



WHS Act Review
SafeWork SA
Policy and Governance Team
GPO Box 465
ADELAIDE SA 5001

By email: webmaster.safework@sa.gov.au

To whom it may concern

WORK HEALTH AND SAFETY ACT 2012 REVIEW

SafeWork SA has requested comment on the operation of the Work Health and Safety Act 2012 (the Act) insofar as it relates variations between the model legislation put forward by Safe Work Australia and the Act.

The Motor Trade Association of South Australia (MTA) therefore provides the attached recommendations in relation to only those elements which differ from the model legislation. The MTA notes that a comprehensive review of the model legislation and harmonisation arrangements will be undertaken in 2018.

The MTA further notes that the current Act has only been in operation for a relatively short period of time, with several charges laid under Category 1 yet to commence. There is considerable merit in allowing for current provisions to continue operating for at least the period up to the review in 2018. This would allow for determinations to be made in these matters, and provide evidence as to the efficacy of the South Australian Act.

Of the eight provisions that are at variance with the model legislation, the MTA considers that seven of these serve to enhance the function of the Act, and provide procedural fairness in any hearing.

The one provision where the MTA considers there to be merit in a change is in relation to WHS entry permit notification periods.

The MTA considers that the model legislation provides a more consistent and fairer system for notification periods relating to WHS entry permits than the South Australian Act.

The MTA also wishes to comment on the model legislation's provision for Health and Safety Representatives (HSR) to access advice from 'any' person in discharging the HSR's rights and responsibilities under the Act.

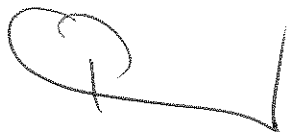
While the South Australian Act also contains a provision for 'any' person, this is more tightly defined as being a person involved in the workplace either in a staff or management capacity or a recognised consultant pursuant to the Act.

The South Australian provisions ensure informed or qualified assistance is provided to the HSR in exercising their powers and responsibilities. A weakening of this provision would allow for inexperienced advice to be rendered which has the potential to compromise WHS in the workplace.

The MTA has attached a summary document detailing its position in relation to each of the eight elements and is happy to provide additional information if required.

If you require further assistance in this matter please contact the MTA's General Manager for Member Services, Anna Moeller, on 08 8291 2000.

Yours sincerely

A handwritten signature in black ink, appearing to be 'P. Unerkov', written over a horizontal line.

Paul Unerkov
Chief Executive Officer

22 December 2016

Attachment One – Summary of MTA WHS Review Recommendations

Model WHS Act	SA Regulations WHS Act	Recommendation
Provides that in managing risks, a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable (section 17 (1), model WHS Act).	Provides that a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable, but only to the extent to which they have the capacity to influence and control the matter (section 17(2), WHS Act).	Maintain South Australian provisions
Provides for prosecution exceptions for: - volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace; and (section 34 (1), model WHS Act). - unincorporated associations (although unincorporated associations may be PCBUs for the purposes of the model WHS Act, their failure to comply with a duty or obligation under the WHS Act does not constitute an offence and cannot attract a civil penalty)(section 34(2), model WHS Act).	The WHS Act (SA) includes an additional provision to clarify that volunteer officers in mixed residential/commercial strata/community titles corporations will not be liable for a breach of officer duties under the WHS Act (section 34, WHS Act).	Maintain South Australian provisions
Provides that a health and safety representative (HSR) can seek assistance from any person whenever necessary in exercising a power or carrying out a function under the legislation. There are no limitations in the model WHS laws on the types or categories of people from whom assistance can be sought (section 68 (2)(g), model WHS Act).	As per the model WHS laws a HSR can seek assistance from any 'person'. However, the WHS Act (SA) provides that 'any person' is limited to:- a person who works at the workplace; a person who is involved in the management of the relevant business or undertaking; or a consultant who has been approved as required by the legislation ² (section 68(3) and (6)), WHS Act).	Maintain South Australian provisions - note these provisions provide for suitability qualified person to provide assistance and delivers most efficient and effective outcomes.
Provides that an HSR is entitled to five training days in the first year, one in the second and one in third (regulation 21, model WHS Regulations).	The WHS Act (SA) provides for an increase in the number of training days for HSRs to five in the first year, three in the second and two in the third (section 72(9), WHS Act).	Maintain South Australian provisions

<p>Allows for a WHS entry permit holder (EPH) to enter a workplace to inquire into a suspected WHS contravention, where the contravention is in relation to a 'relevant worker'. The EPH must reasonably suspect a contravention is occurring or has occurred when entering for this purpose. (section 117, model WHS Act). Prior to recent changes, the model WHS laws provided that an EPH was not required to give notice before entering a workplace. However, amendments to the model WHS Act now require an EPH to provide a minimum of 24 hours' and a maximum of 14 days' notice to the relevant PCBU and the person with management or control of the workplace before entry takes place.(section 68 (3B), model WHS Act).</p>	<p>The WHS Act (SA) includes certain policies and procedures relevant to when a EPH seeks to exercise a right of entry to require into suspected contraventions of the WHS Act (section 117, WHS Act).</p> <p>This includes providing that EPHs must give consideration as to whether it is reasonably practicable to notify the regulator prior to entry in order to provide an opportunity for an inspector to attend at the workplace at the time of entry (section 117(3)). However, if the EPH is not accompanied by an inspector, they must furnish a report on the outcome of his or her inquiries at the workplace to the regulator, in accordance with the WHS Regulations, after the entry has occurred (section 117(6)), WHS Act).</p>	<p>Agree to Model legislation requirements for notification periods for entry.</p>
<p>Provides that for the purposes of an inquiry into a suspected contravention, an EPH may enter any workplace for the purpose of inspecting, or making copies of: - employee records that are directly relevant to a suspected contravention; or - other documents that are directly relevant to a suspected contravention and that are not held by the relevant PCBU. Before doing so, the EPH must give notice of the proposed entry to the person from whom the documents are requested and the relevant PCBU. This notice must be given during usual working hours at least 24 hours, but not more than 14 days, before the entry (section 120, model WHS Act).</p>	<p>As per the model WHS laws, an EPH can enter a workplace for the purpose of inspecting or making copies of employee records and other documents directly relevant to a suspected contravention. However, The WHS Act (SA) provides that the right of an EPH to require copies of a document is subject to any direction that may be given by an inspector. This may include a direction that copies of a document not be required to be made and provided to the EPH (section 120(6), WHS Act).</p>	<p>Maintain South Australian provisions</p>

<p>The model WHS Act does not provide protection against self-incrimination (section 172, model WHS Act) but instead provides for use immunity.</p>	<p>The WHS Act (SA) provides for a protection against self-incrimination (section 172, WHS Act). The provision states that a person must answer questions or produce information or documents unless to do so would tend to incriminate or expose them to an offence.</p>	<p>Maintain South Australian provisions - the rights are enshrined as common law rights.</p>
<p>Provides that the Minister may approve a Code of Practice (COP) for the purposes of the Act and may vary or revoke an approved COP (section 274(1), model WHS Act). However, the Minister may only approve, vary or revoke a COP if it was developed by a process that involves consultation between the Governments of the Commonwealth and each State and Territory, unions, and employer organisations (section 274(2), model WHS Act). An approval of a COP, or a variation or revocation of an approved COP, takes effect when notice of it is published in the Government Gazette, or on date specified in the approval, variation or revocation (section 274(4), model WHS Act).</p>	<p>As per the model WHS laws, the Minister may approve a COP for the purposes of the Act and may vary or revoke an approved COP. However, the WHS Act (SA) includes additional requirements in relation to approved COPs. These include: - a requirement for the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister (section 274(3)), WHS Act); - a requirement that the Industrial Relations Consultative Council recommend to the Minister approval of a COP made under the WHS Act (section 274(2), WHS Act); and - a requirement that COPs be subject to disallowance by Parliament (section 274(8), WHS Act).</p>	<p>Maintain South Australian provisions</p>