

Review of the *Work Health and Safety Act* 2012 (SA)



SA UNIONS

SUBMISSION BY:

**SA UNIONS
SECRETARY JOE SZAKACS
DECEMBER 2016**



Summary Position

SA Unions made comprehensive submissions regarding the operation of the *Work Health and Safety Act 2012 (SA)* to the 2014 Review conducted by Mister Robin Stewart-Crompton. We maintain the views we expressed at that time.

By and large we support the subsequent steps taken by the South Australian Government to implement suggested improvements to operations and legislation that were included in the *Report of the 2014 Review*.

Our comments on this occasion (Appendix 1) are directed towards the differences between the *WHS Act (SA)* and the *model WHS Act*.

We argue that one particular departure from the *model WHS Act* (entitlement to training days for HSRs) makes sense because it retained an existing provision of State legislation and that provision was directly related to the Object of the Act and improving safety performance. To have adopted the *model WHS Act* would have resulted in a reduction of training days for HSRs and less safe workplaces in South Australia.

In other areas where the *WHS Act (SA)* departs from the *model WHS Act* there is no pre-existing arrangement that justifies the variance.

Some of these differences are benign. It's not clear that they address an actual legislative or safety problem but they appear to do limited harm.

Other differences appear pointedly directed at constraining the Regulator frustrating the capacity of unions to assist their members in matters related to their safety at work.

SA Unions

SA Unions is the peak trade union council for South Australia. Through its affiliated organisations, it represents approximately 160,000 union members in all industries and sectors.

Ensuring the health and safety of people at work is a major focus for the union movement, of equal importance to industrial relations and workers' compensation. Our vision is that nobody should go to work and be hurt or be killed and our aim is that work injuries are reduced and that deaths should be rare.

SA Unions promotes work, health and safety education and training and plays a formal role in advising government on work, health, safety and welfare matters through its nominees on the Industrial Relations Consultative Council.¹

SA Unions has a focus on ensuring that:

- Injuries are prevented through strong clear laws, regulations, codes and guidance materials
- Employers understand and act in a way that reflects their responsibility under the law to ensure work is safe and healthy
- Workers have the right to seek assistance and advice from their have their issues raised and dealt with by well-trained health and safety representatives and their representative unions
- There is a well-resourced, effective and strong regulator with an active inspectorate to police the laws and ensure those who break them are brought to justice
- That should workers be injured, they are treated with dignity and assisted in getting better and back to work through adequate payments and an effective rehabilitation process including training if required.

As an accredited training provider with SafeWork SA, SA Unions is a major provider of training to Health and Safety Representatives in South Australia.

Submission

SA Unions welcomes the opportunity to make a brief contribution to the Review of South Australia's *Work Health and Safety Act 2012* (WHS Act).

We have previously made comprehensive submissions regarding the operation of the *Work Health and Safety Act 2012 (SA)* to the 2014 Review conducted by Mister Robin Stewart-Crompton. We maintain the views we put in those submissions.

We reiterate our view that there is sense in having nationally consistent work health and safety legislation but only if the consistent legislation actually improves worker safety.

Unfortunately a number of States and the Commonwealth have used the argument of consistency to promote a regulatory regime that reduces or hampers the traditional role of trade unions in promoting safety at work and acting to defend workers against unsafe work practices.

An obsession with attacking the industrial conditions and protections of building workers and their unions has spilled across into the work health and safety area.

As a consequence we have seen a range of departures from the Model Act that deny or frustrate health and safety representatives who seek advice or support from unions.

¹ Schedule 2 – *Work Health and Safety Act 2012*

Bureaucratic measures and approvals operate to keep Entry Permit Holders from responding to reported breaches of legislation quickly.

The time of inspectors is wasted having to babysit site visits by Entry Permit Holders. Inspectors are put in the invidious position of having to second-guess entry permit holders requests for information.

Employers are given a right silence and can refuse to produce information or documents to avoid self-incrimination. These rights are denied to building workers.

The regulator is hamstrung in introducing new codes of practice by a series of unnecessary bureaucratic hurdles.

Attached as Appendix A is a more detailed response to each of our concerns in relation to those areas where there is a difference between the Model Act and the WHS Act (SA).

We are available to discuss the views contained in this submission and to respond to the views of other parties.

Yours faithfully,

Joe Szakacs

Secretary SA Unions

21 December 2016



SA Unions Comments on the Differences between the Model WHS Act and the WHS Act 2012 (SA)

| | Model WHS Act/Regulations | WHS Act 2012 (SA) | SA Unions Comment |
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| 1 | Provides that in managing risks, a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable (S 17 (1), model WHS Act). | Provides that a person must eliminate risks to health and safety, so far as is practicable but only to the extent to which they have the capacity to influence and control the matter (s. 17 (2) WHS Act) | The subsection potentially creates some confusion about the duty to eliminate risks to health and safety. The meaning is unclear. To date there has been no negative impact as far as we can tell. |
| 2 | 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 (S 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 offices 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). | The additional exemption is obscure and appears unnecessary. To date there is been no negative impact as far as we can tell. |
| 3 | Provides that a health and safety representative (HSR) can seek assistance from any person whenever necessary in exercising a power or carrying out of | As per the model WHS laws a HSR can seek assistance from any other “person”. However, the WHS Act (SA) provides that “any person” is limited to: | This section limits the people and organisations from whom an HSR can request assistance. It is deliberately intended to frustrate the capacity of an HSR to receive advice from a union, a lawyer or |



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| | 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). | <ul style="list-style-type: none"> – a person who works at the workplace; – the 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 (section 68 (4) and (6)), WHS Act). | <p>a wide range of specialists who would need to:</p> <ul style="list-style-type: none"> • satisfy the definition of a consultant and; • have obtained approval from the employer(conflict), the consultative Council or a health and safety committee(if they exist) before they could provide advice. <p>This provision is unnecessary, counter-productive and at odds with the objects of the WHS Act specifically objects 3(1) (b) (c) (d) (f).</p> |
| 4 | Provides that an HSR is entitled to 5 training days in the first year, one in the second and one in the third (regulation 21, model WHS regulations). | The WHS Act (SA) provides for an increase in the number of training days for HSR are to 5 in the first year, three in the second and two in the third (section 72 (9), WHS Act). | This is not an <u>increase</u> in training days for South Australian HSR's but a maintenance of the entitlement that existed prior to the model WHS Act. In fact 10 days represents a reduction in the 15 days that was provided for under previous legislation. |
| 5 | Allows for a WHS entry permit holder (EPH) to enter a workplace to inquire into the 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 the workplace. However, amendments to the model WHS Act now | <p>The WHS Act (SA) includes certain policies and procedures relevant to when and EPH seeks to exercise a right of entry to inquire into suspected contraventions of the WHS Act (section 117, WHS Act (SA)).</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</p> | <p>Both the Model Act and the WHS Act (SA) hamper the capacity of an EPH to act expeditiously when enquiring into suspected contraventions of the Act.</p> <p>Improving compliance with the Act by allowing easier workplace entry by WHS entry permit holders is integral to meeting Objects 3 (1) (a) (c) (e) and (f) of the WHS Act (SA).</p> <p>We are concerned that changes in the policy "that relates to the circumstances when inspectors will attend at workplaces when notified of the</p> |



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| | 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 any entry takes place. (Section 68 (3B), model WHS Act). | enquiries at the workplace to the regulator, in accordance with the WHS regulations, after the entry has occurred (section 117 (6)), WHS Act). | proposed entry of WHS entry permit holders” may be changed in ways that further frustrate entry. |
| 6 | <p>Provides that for the purposes of an inquiry into a suspected contravention, and EPH may enter any workplace for the purpose of inspecting, or making copies of:</p> <ul style="list-style-type: none"> – 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. <p>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> | 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 may be given by an inspector. This may include a direction that copies of the document not be required to be made and provided to the EPH (section 120 (6), WHS Act). | <p>This section is a total waste of valuable Inspectorial time. Inspectors are effectively having to second-guess EPH’s and police their requests for documents.</p> <p>This is an unnecessary level of bureaucracy and means that inspectors are robbed of the time they need to fulfil their own tasks.</p> <p>Section 120 (6) should be repealed.</p> |
| 7 | The model WHS Act does not provide protection against self-incrimination (section 172, model WHS Act) but instead provides for the use of immunity. | The WHS Act (SA) provides for a protection against self-incrimination (section 172, WHS Act). The provision states that a person must answer | This Section neatly illustrates the double standard in industrial relations and WHS legislation in the treatment of employers and workers. If a worker is killed or seriously injured Employers |



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| | | <p>questions or produce information or documents unless to do so would tend to incriminate or expose them to an offence.</p> | <p>may be offered either immunity (model Act) or can refuse to answer questions or produce information if it would tend to incriminate or expose them to an offence (WHS Act (SA)). If a worker stops work over a perceived safety issue that may save a life they may be exposed to penalties and will be denied a right of silence.</p> |
| 8 | <p>Provides that the Minister may approve a Code of Practice (COP) for the purposes of the Act, and may give 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 the 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 a 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:</p> <ul style="list-style-type: none"> – 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>These provisions effectively frustrate the making of codes of practice that are nationally consistent. It seems wrong in principle that the Consultative Council (an advisory body to the Minister) can veto the making of a code of practice by the Minister. No other State or Territory or the Commonwealth sees the need to consult with a Commissioner for Small Business on the approval of codes of practice. Nor do we. We also question why Parliament, having passed legislation and approved regulations, would then need to micro manage codes of practice.</p> <p>These provision should be repealed</p> |

