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Business SA submission:

Review of the National Model WHS Laws

13 April 2018

Business SA
Chamber of Commerce
and Industry South Australia

Executive Summary

1. Business SA, South Australia's Chamber of Commerce and Industry, was formed in 1839 and has approximately 4,000 members across every industry sector, from micro businesses right through to listed companies. Our members employ some 140,000 South Australians. Business SA is a not-for-profit business membership organisation which advocates on behalf of members and the broader business community for sustainable economic growth in South Australia and the nation.

2. Business SA supported the national harmonisation of the Work Health Safety laws in 2012, and worked with State Government, industry and unions to achieve effective harmonisation in South Australia. Given this history of involvement with the *Work Health and Safety Act 2012*, and our diverse member base, Business SA is pleased to provide these comments to the review of the *Work Health and Safety Act 2012 (the WHS Act)*.

3. Members of Business SA have not raised major concerns regarding the WHS Act and the implementation of the harmonised system in SA. However, there are still a few areas of concern for our members, which will be address in this submission. Business SA believes safety should be balanced with business costs and administrational burdens as this will lead to safer outcomes. If businesses are overly burdened, they will focus on meeting the legal expectations and not the reason behind it or will consider implementation too difficult or costly to implement.

4. Business SA is a member of the Australian Chamber of Commerce and Industry (the Australian Chamber). The Australian Chamber has made a substantial submission to the review of the model *Work Health and Safety Act 2012*. Business SA has worked closely with and supports the submission of the Australian Chamber. This submission complements the detailed submission of the Australian Chamber.

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Codes of Practice and Australian Standards

The basis of the model WHS laws framework is the model WHS Act, the model WHS Regulations and 24 model Codes. This framework covers all businesses in South Australia, regardless of size, by way of the *Work Health and Safety Act 2012*.

While the three-tiered approach of the WHS Act, Regulations, and Codes provides flexibility in responding to changing circumstances and technology, it can at times lead to confusion given the sheer volume of documents. This is compounded by regulators who may also publish guidelines on issues of individual jurisdictional concern.

Codes of Practice provide guidance on how to comply with legal obligations and are required to be followed unless a workplace has introduced another solution with the same or a better health and safety standards. Although the codes of practice provide guidance, if an organisation has not followed a code, this can be used as evidence in a prosecution.

Business SA members have raised concerns that *Codes of Practice* are unnecessarily long and are not always industry specific. Therefore, the Codes provide general information that is not always helpful in actually reducing risks in workplaces. For example, the management of lifting safely in a healthcare environment is significantly different to a construction site or retail store. The *How to Manage Work Health and Safety Risks Code of Practice 2011*, is 30 pages long and does not provide industry specific guidance to employers and the *Managing of Risks of Falls at Workplaces Code of Practice* is 56 pages long.

It is Business SA's view that long and complex codes of practice do not improve work health and safety in workplaces. Instead they cause confusion and run the risk of employers not implementing the codes as they do not believe them to be relevant to their workplaces. To be effective, codes of practice should be simple, easy to understand, easy to implement, industry specific and created with industry consultation.

Another concern raised by Business SA members is the requirement to purchase Australian Standards that are referred to by the Codes of Practice. While on their own, standards are voluntary, if referred to by State or Commonwealth government in legislation, these standards can become mandatory. Industry standards are administered by Standards Australia and are required to be purchased. This leads to additional costs for businesses and a reluctance to purchase the Standards. Business SA submits that access to legal requirements, such as standards, should be without a cost to businesses. Ultimately, the codes of practice should not refer to external documents as this provides complexity and inconsistency that businesses should not be required to navigate.

Industrial manslaughter

Safety at work is one of the most important assurances an employer can provide. Appropriate prevention and enforcement mechanisms should encourage all employers to minimise or eliminate risks in the work environment. However, Business SA does not support the introduction of industrial manslaughter legislation as an appropriate mechanism for improving safety.

In South Australia, as with other Australian jurisdictions, nationally based industrial manslaughter legislation will cause an unnecessary overlap with the state's criminal laws.[1]

Business SA submits that the general criminal law and work health safety law perform related, but strictly distinct, functions. The *Criminal Law Consolidation Act 1936* (CLCA) and *WHS SA Act* are both criminal statutes which effectively complement each other. The *WHS SA Act* applies in instances where workers are recklessly exposed to a serious risk[2] and the CLCA applies when a worker is killed due to that reckless exposure; usually under a gross negligence manslaughter charge.

This appropriately separates the crime of reckless exposure to a serious risk and the crime of gross negligence leading to a worker's death. The implementation of industrial manslaughter legislation will blur this distinction, relegating workplace deaths to the work health and safety regime, rather than the more appropriate general criminal law. This may mislead people into believing that workplace fatalities, and industrial manslaughter, is somehow less serious than common law manslaughter.

The Peter Colbert case demonstrates such laws in action. Mr Colbert was charged with manslaughter in 2014 following the death of his employee, Robert Brimson. Brimson was killed on March 7 2014 when the brakes of the truck he was driving failed. Brimson took evasive action to avoid crashing into other motorists and hit a traffic pole, unfortunately dying in the crash. Prior to the crash it was alleged that Colbert had been warned about the condition of the truck's brakes on a number of occasions – a fact denied by Colbert throughout the trial. Given Colbert was Brimson's employer, a duty of care existed.

At trial the jury had to determine whether Colbert had been negligent in not fixing the defective brakes. Colbert was unanimously found guilty of manslaughter by gross negligence in 2015. Although there was a re-trial, after the Court of Criminal Appeal ruled the trial judge's summing up to the jury was biased towards prosecution witnesses, Mr Colbert was convicted at the re-trial.

Business SA submits that current range of penalties applicable to workplace fatalities are appropriate. Currently the law distinguishes between the crimes of reckless exposure to a serious risk, and the crime of manslaughter by gross negligence. Manslaughter through gross negligence is the most likely charge to be brought against employers following a workplace fatality. The current maximum potential penalty for manslaughter is imprisonment for life, a fine or both. Business SA submits that such a penalty would in fact be erode, should industrial manslaughter legislation be introduced.

Business SA also has concerns that a model national industrial manslaughter provision will contradict criminal law in some states as each state has different criminal law provisions that the model industrial manslaughter provision will need to complement. South Australian criminal law is based on common law. However, a number of Australian states have moved to codified criminal law systems. The current ACT industrial manslaughter offence operates within a code jurisdiction, and cannot easily be compared and contrasted, or imported, into South Australian law for that reason, and neither would a national model.

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[1] *Criminal Law Consolidation Act 1935* (SA).

[2] *WHS SA Act s 31(1)(b).*

Dangerous substances

It is Business SA's view that SafeWork Australia should encourage the South Australian government to repeal the *Dangerous Substances Act 1979* (SA). By South Australia continuing to administer our dangerous substances via this Act, the system remains inconsistent with other jurisdictions and results in poorer safety outcomes and imposes higher costs on business.

The intent of developing model WHS laws in Australia was to work towards consistent workplace safety standards across all states. As part of that process there was a decision nationally to remove the need for licensing requirements for dangerous goods, consistent with the previously agreed approach of the National Standard for the Storage and Handling of Workplace Dangerous Goods. In November 2015, SafeWork SA notified South Australian businesses that the state-based dangerous substances licencing scheme would be maintained; a step away from the nationally harmonised system.

South Australia is no safer for maintaining the burdensome, costly and, arguably, riskier licence system. Part of the nationally harmonised approach is a broad definition of 'hazardous chemicals' which are subject to notification requirements. Within this system, 'dangerous substances' are a subset of 'hazardous substances'. This approach encompasses a wider range of chemicals than South Australia's 'dangerous substances' definition in the Dangerous Substances Act, which only covers Class 2 LPD, Class 3 Flammable Liquids, Class 6 Toxic and Class 8 Corrosive substances.[3] It is difficult to see a dangerous substances safety system which applies to fewer substances than nationally harmonised 'hazardous substances', resulting in safer workplaces.

The experience in New South Wales and Victoria of moving from a licensing system to a notification regime suggests such a change would not have adverse effects on work health and safety.[4]

By South Australia moving towards a notification model based on the broader definition of hazardous chemicals, of which dangerous substances are a subset, there will be more consistent definitions throughout Australia and a consistent national approach will provide safer workplaces. Most simply, the need to obtain a dangerous substance licence is a revenue stream for the South Australian government at the expense of South Australian businesses. Businesses in South Australia should not be subject to licensing costs for a less effective substance safety system.

A second consequence of SafeWork SA's 2015 decision is the unnecessary administrative complexity created by jurisdictional inconsistency in substance safety approaches. The South Australian business community does not operate in isolation from other states and the transport of dangerous substances and hazardous chemicals across jurisdictional boundaries occurs daily. Forcing businesses to operate in both the nationally harmonised notification framework, and South Australia's less effective licencing regime should not occur. Although it has been noted at the beginning of this submission that most South Australian businesses support the current WHS laws, businesses have also provided feedback that there are significant WHS compliance and administrational requirements that should be reduces where possible, of which dangerous substances licencing is one.

[3] *Dangerous Substances (General) Regulations 2017* (SA) s 3.
[4] Consultation Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice, 10 January 2011.

Psychological Health

Business SA members have raised concerns about the management of psychological health in the workplace. Mental health, both in personal lives and workplaces has received a significant increase in exposure over the last decade. Mental health issues are very important and affect all aspects of life and many Business SA members take a proactive approach to managing workplace health as well as providing assistance to employees who require assistance for issues outside of the workplace.

Psychological health is an individual and complex issue that requires continued research to ensure workplaces are providing best practice prevention and mitigation strategies. In South Australia, there are currently three key pieces of legislation that guide employers to provide a safe and healthy workplace, including managing psychosocial stressors.

Firstly, the *WHS Act 2012* defines health to mean physical and psychological, and therefore extends the duty of care provisions to the mental health of employees. Employers are responsible for ensuring that the workplace is a safe working environment, and this includes protecting employees from a poorly designed or managed workplace, a traumatic event, workplace violence, fatigue, bullying or harassment and excessive or prolonged work pressures. The *WHS Act 2012* places responsibility with the person conducting a business or an undertaking (PCBU) to manage the risks associated with an employee's exposure to hazards as far as is reasonably practicable. Employees also have a responsibility for taking reasonable care of their own health and safety, and of others around them in the workplace. That includes cooperating with reasonable policies, procedures and complying with instructions.

The *Disability Discrimination Act 1992* requires employers to prevent discrimination and harassment of an individual experiencing a mental health condition, including physical and verbal abuse, and to make reasonable adjustments to allow an employee to productively perform the functions of a job. This means an employer must offer equal employment opportunities to someone with a mental health condition. An employer must be able to determine the inherent requirements of the job, including the ability to perform core tasks, work effectively with the team and work safely. These laws also apply to contractors and parties to a partnership agreement. Employers are obligated to protect the human rights of people with a mental health issue, without discrimination.

The *Privacy Act 1988* establishes a clear framework for employers when implementing a structured mental health prevention program in the workplace. The act prevents employers from disclosing a mental health issue of an employee without their permission and requires all information to be kept confidential and used for the purpose of the disclosure. This could be in adjusting the role or working environment to make allowances for the mental health condition. Employers should only collect information that is necessary and relevant to the role, ensuring the employee is informed and the use, access and storage of the information is explained to them. An employer is only able to breach confidentiality in the case of a legitimate reason to believe that there is a serious and imminent threat to the health, safety or property of any person in the workplace or community. This is when a reasonable person would say there is no other option available.

As mental health is complex and a developing field of study, further prescriptive regulation should not be considered. It is Business SA's view that a flexible approach that allows for advancements in the field will ensure the best outcomes. Practical, education-based approaches should be encouraged.

Structure of SafeWorkSA

The ability for a government organisation to implement safe workplaces can be hampered by the trust businesses have in the department. In the past, Business SA members indicated low levels of trust and confidence in SafeWorkSA (SWSA). Businesses were unlikely to seek out advice from SWSA out fear an inspector would attend their workplace to seek out non-compliance.

However, recently SWSA restructured to separate its enforcement and educational departments. This created clear lines between the two departments. Educational officers cannot go in, see an issue and then call in the inspector. This has reduced the fear and distrust employers had for SWSA.

The feedback from our members indicates the change increased employer's willingness to seek out advice and therefore provides safer workplaces. It has fostered a more collaborative environment between employers and the regulator and SWSA is no longer feared by businesses.

Although this is not legislated, Business SA would recommend SafeWork Australia working with its state-based counterparts to implement similar structures as South Australia provides an excellent example of changes within the regulator that provides enhanced outcomes and safer workplaces.

Conclusion

Should you require any further information or have questions, please contact Estha van der Linden, Policy Adviser, on [redacted] or [redacted]