# 2018 National Review of the Model Work Health and Safety Laws

Submission from SafeWork SA

July 2018

SOUTH AUSTRALIA

Government of South Australia

# Introduction

South Australia is one of seven jurisdictions that have adopted the model work health and safety (WHS) laws. The Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory and Queensland implemented the model WHS laws on 1 January 2012, while South Australia and Tasmania implemented them on 1 January 2013.

There is a high degree of consistency in the WHS Acts of the seven implementing jurisdictions, however, local variations were required to reflect jurisdictional arrangements and some additional variations to the model WHS Act occurred in South Australia, which remain in place currently (see Attachment 1). South Australia is also one of two jurisdictions (the other being NSW) to vary the model WHS Act to include a statutory review of this State's WHS Act.

Reviews of the South Australian *Work Health and Safety Act 2012*

Section 277 of South Australia's *Work Health and Safety Act 2012* (the WHS Act) requires a review of the Act as soon as practicable after one year; and again after three years of its operation. The initial one year review was undertaken by an independent consultant, Mr Robin Stewart-Crompton, RSC Advising Pty Ltd in 2014. The review *"did not identify any major problems in the legislation itself but considered that more could be done to improve the understanding of rights and obligations and to clarify elements of the law."*[1]

In October 2016, the then Minister for Industrial Relations, the Hon John Rau MP, asked SafeWork SA to undertake the second review of South Australia's WHS laws. This review predominantly examined the operation of the South Australian provisions that differ from the model WHS laws and how effectively those provisions are operating within the national WHS framework. The second review found that the WHS Act was *"operating effectively and that the South Australian variations have not negatively impacted on the operation of the WHS laws in this State, to merit any legislative changes."*[2]

Both reviews highlighted that the laws were operating as intended.

In relation to future national reviews of the model WHS laws, SafeWork SA understands that the original Council of Australian Governments' (COAG) agreement was for five-yearly reviews to be undertaken.

[1] Stewart-Crompton, R (2014) *'Review of the Operation of Work Health and Safety Act 2012 Report November 2014'* Page 6.
[2] SafeWork SA (2017) *'Second review of the operation of the Work Health and Safety Act 2012 (SA) Report November 2017'* Page 4.

Inter-Governmental Agreement

The *Inter-governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (the IGA) was signed by WHS Ministers in 2008 and has not been updated since that time. A revised version was provided to jurisdictions in 2014 but further consideration was postponed due to the review of the *Safe Work Australia Act 2008* (Cth).

SafeWork SA notes that clause 5.5.2 of the IGA states:

> *"any part that proposes to amend its legislation so as to materially affect the operation of the model legislation will submit the proposed amendments to the WRMC for decision and that each party agrees that it will not progress implementation unless the WRMC has endorsed it."*

A number of jurisdictions have made amendments to their WHS laws over time, most recently Queensland. It is likely that jurisdictions would indicate that any amendments made do not 'materially affect the operation of the model legislation' and therefore did not require the endorsement of WHS Ministers. However, the ongoing aim of harmonisation needs to be considered to ensure each jurisdiction's laws do not become increasingly more varied from the model and each other over time. This Review is a timely opportunity to consider the purpose the IGA serves and whether there is a need for a renewed form of high-level commitment required to ensure harmonisation of the laws continue.

Previous amendments

SafeWork SA notes that, as noted in the Discussion Paper, no jurisdictions have yet amended their WHS laws to adopt the changes made to the model WHS laws in 2016. This impacts on the level of harmonisation across the jurisdictions.

SafeWork SA

SafeWork SA is the regulatory authority in South Australia responsible for administering the WHS Act and the *Work Health and Safety Regulations 2012* (SA) (the WHS Regulations).

SafeWork SA administers WHS and industrial relations (IR) education and regulatory services in South Australia. It does this by providing education, compliance and enforcement activities to promote safe, fair, productive working lives and high standards of public safety for all South Australians. SafeWork SA's activities range from the provision of information and practical assistance to business and workers, to fulfilling its statutory obligations of compliance and enforcement.

From 1 July 2016, SafeWork SA commenced operating under a new structure with separate regulatory and education functions. The changes followed consultation undertaken in 2015 to improve the WHS regulatory performance here in South Australia.

In 2017, a legal review of investigation and prosecution arrangements for offences under the WHS Act was conducted by a senior prosecutor from the Office of the Director of Public Prosecutions. This was a broad consideration of how matters handled by SafeWork SA are investigated and, where appropriate, prosecuted, in order to identify opportunities for improvement. While the review acknowledged that prosecutions under the WHS Act are some of the most complex types of prosecutions, it did not consider that legislative amendment was required.

In recognition of South Australia's commitment to nationally harmonised WHS laws, SafeWork SA welcomes the opportunity to provide a submission to the *2018 Review of the Model Work Health and Safety Laws* (the Review) and thanks the Reviewer for allowing SafeWork SA additional time to provide a submission following the South Australian election in March this year.

SafeWork SA has prepared an agency-specific submission due to caretaker conventions preventing wider consultation to targeted stakeholders such as industry associations, unions, and representatives.

# Terms of Reference

***Scope of the review***

*As agreed by WHS ministers, SWA is asked to examine and report on the content and operation of the model WHS laws.*

*The review will be evidence-based and propose actions that may be taken by WHS ministers to improve the model WHS laws, or identify areas of the model WHS laws that require further assessment and analysis following the review.*

*In undertaking the review, SWA will have regard to the object of the model WHS Act (section 3).*

*The review will consider whether:*

a. *the model WHS laws are operating as intended*
b. *any areas of the model WHS laws have resulted in unintended consequences*
c. *the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships*
d. *the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation*
e. *the consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes, and*
f. *the model WHS Regulations, model Codes of Practice and National compliance and enforcement policy adequately support the object of the model WHS Act.*

*The review will be finalised by the end of 2018.*

*SWA will provide a written report for the consideration of WHS ministers.*

# QUESTIONS AND ANSWERS

## The model WHS laws

**Question 1**

*What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes of Practice - to achieve the object of the model WHS laws?*

**Question 2**

*Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?*

**Question 3**

*Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?*

**Question 4**

*Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?*

**Response**

SafeWork SA is of the opinion that the current three-tiered approach provides a sound regulatory structure for health and safety legislation across Australia. The three-tiered approach was a feature of South Australia's preceding occupational health and safety legislation and therefore comes with some familiarity to South Australian stakeholders. The Act outlines the overall duties and structure for consultation, representation and participation and establishment of compliance and enforcement measures. The Regulations outline specific hazard and subject related detail and rules in relation to complying with the duties. The Codes of Practice contain practical information on how to meet the requirements of the legislation, while not being too prescriptive.

SafeWork SA notes that across the jurisdictions, there is a level of variation between the WHS Regulations. An example of this is the Mining Regulations. South Australia adopted the model Mining Regulations as Chapter 10 of the WHS Regulations, but notes that this has not been adopted across other jurisdictions.

In relation to Codes of Practice, SafeWork SA notes that they are essential to provide the necessary detail to support the object of the model WHS Act, as well as provide subject specific information in relation to how the legislative obligations can be met. However, SafeWork SA regularly receives queries from small to medium size businesses to assist them in their interpretation of their obligations and has been advised that some Codes can be long and cumbersome.

In addition, uncertainty can arise in relation to the legal standing of Australian Standards and legacy Codes of Practice. Some provisions of the model WHS laws call up certain Australian Standards which arguably alters their standing in relation to other Standards and jurisdictional specific legacy Codes. Consideration could be given to clarifying the connection to the model laws or alternatively to ensure technical specifications and Standards are located within Codes rather than the primary legislation.

SafeWork SA notes the review of Codes that is currently underway by Safe Work Australia which is limited to the technical accuracy, usability and readability of the documents. Safe Work Australia Members had agreed that model Codes would be reviewed every five years from their publication date. SafeWork SA further notes clause 274 of the model WHS Act which provides that a Code will only be approved or varied if it has been through a consultative process involving the Governments of the Commonwealth and each State and Territory; unions; and employer organisations.

While SafeWork SA is supportive of the legislative provisions in this space, it is conceivable that each jurisdiction would be able to amend its WHS Regulations with far greater ease than the ability to update an error or change in information contained within a Code of Practice. This arguably limits the 'effectiveness' of the model Codes.

Further, it is noted that COAG has decided that Codes will only be developed in the future if there is a need that satisfies the rigorous criteria agreed to by WHS Ministers. For this reason, further reliance on guidance material is likely to occur. This creates a 'fourth tier' in the legislative scheme and can raise queries around the legal standing of such material, which highlights the need for consistency of such material.

## Scope and application

**Question 5**

*Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?*

**Response**

Definition

The current inclusion of psychological health as a part of the definition of 'health' in the legislation fails to identify contributing factors that are potentially non-work related and out of the control of the PCBU.

There are a number of work related issues that can occur at a workplace that could have an impact on the psychological health of a worker, but the root cause of the issue is either not within the WHS jurisdiction and/or the knowledge base or skill set of the Inspector. It is often difficult to address these issues by utilising existing WHS powers and enforcement tools.

SafeWork SA suggests that consideration be given to having clearer descriptions of what constitutes psychological risk or bullying behavior, rather than just the existing definition.

Additional definitions of workplace bullying could also be included to incorporate all forms of serious bullying, including physical, psychological, verbal and cyberbullying.

Powers of Inspectors

Although a WHS obligation is imposed on a duty holder to protect a workers' psychological and physical health, SafeWork SA has encountered difficulties in taking appropriate action in relation to the psychological health of a worker.

It has been the experience of SafeWork SA that the investigative powers are often limited to reviewing the procedures and processes of a workplace. There have been evidentiary difficulties in showing a causal connection between the obligation of a duty holder to protect the psychological health of a worker and the psychological harm that has occurred to a worker. Proving a matter 'beyond reasonable doubt' is also an issue.

In comparison, under the *Fair Work Act 2009* (Cth) (the FW Act), an order to prevent or stop a worker being bullied can be made by the Fair Work Commission. In accordance with section 789FC of the FW Act, a worker who reasonably believes that he or she has been bullied at work may apply to the Fair Work Commission for an order to stop bullying under section 789FF. The Fair Work Commission however, does not have the power to include the payment of compensation or a pecuniary amount in an order. In the event of a contravention of the order, the Federal Court has the power to order compensation and/or impose pecuniary penalties.

Section 789FE of the FW Act states that the Fair Work Commission must start to deal with an application under section 789FC within 14 days after the application is made. As stated in the Fair Work Commission Anti-Bullying Benchbook, 'under the anti-bullying laws proof of actual harm to health and safety is not necessary provided that a risk to health and safety created by bullying behaviour is demonstrated'.[3]

Consideration could be given to whether the legislation should include more information around psychological health including whether specific provisions or a different evidentiary test would be appropriate.

**Question 6**

*Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?*

No comment.

[3] *Re G.C*. [2014] FWC 6988 (Hampton C, 9 December 2014) at para. 50, as cited in the Fair Work Commission Anti-Bullying Benchbook, page 16.

**Question 7**
*Have you any comments on the extraterritorial operation of the WHS laws?*

**Response**

SafeWork SA notes that the model WHS laws when first developed, permitted States and Territories to insert local provisions relating to extraterritoriality. In the explanatory memorandum to the model WHS laws, clause 11 provides that the Bill was intended to apply as broadly as possible while remaining within the legislative power of the relevant jurisdictions.

However due to this flexibility, each jurisdiction differs in the way it has sought to achieve this.

In New South Wales, section 155A was recently inserted into the *Work Health Safety Act 2011* (NSW) to explicitly provide that a notice issued under section 155 of that Act may be served on a person in respect of a matter even though the person is outside the State or the matter occurs, or is located outside the State, so long as the matter relates to the administration of the WHS Act.

The second reading speech for the *Work Health and Safety Amendment Bill 2018* (NSW) noted that the existing alternative to requiring the production of documents from outside of NSW during an investigation was to "subpoena it after court proceedings have commenced which is an inefficient use of court resources as the regulators do not know prior to bringing proceedings whether information that is held interstate will be relevant."

The amendment was also considered necessary as, "due to technological advances, the number of businesses operating in New South Wales that have their head office, data centres, or control rooms located outside the State is growing."[4]

SafeWork SA supports consideration being given to including wider but consistent extraterritorial application to enable WHS Regulators to carry out their functions on cross border issues or incidents.

This would assist WHS Regulators in compelling a witness who has relocated to another State or Territory to provide evidence to an incident that occurred in its own jurisdiction and would be advantageous to dispel challenges of admissibility of evidence that was obtained by SafeWork SA outside of South Australia.

Queries have been raised about the application of the WHS laws in relation to businesses who have engaged workers in South Australia to work overseas in international aid and development programs. The opposite situation has also been asked, where a foreign company has set up an office interstate with contractors in South Australia. The extraterritorial application to foreign businesses engaging Australian workers within Australia is arguably less clear.

[4] *Work Health and Safety Amendment Bill 2018*, Second Reading Speech, Mr MATT KEAN (Hornsby—Minister for Innovation and Better Regulation) (11:38): Legislative Assembly Hansard – 14 March 2018.

**Question 8**

*Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?*

**Response**

SafeWork SA notes the difficulties in ensuring clear boundaries exist between the WHS laws and general public health and safety protections. This can often be linked to the definitions for incident notification, resulting in WHS Regulators being asked to investigate incidents which are not work related (for example, a visitor to a business has an accident which is not relevant to a worker or a workplace system).

In relation to quad bikes, SafeWork SA recognises that safety in this area is broader than just WHS and is a complex area to reform. A number of inquests have been held in Australia which have considered what action could be taken to reduce the fatality rate in relation to quad bike incidents.

The Australian Competition and Consumer Commission (ACCC) recently released a consultation regulatory impact statement addressing proposed major changes to improve the safety of quad bikes, including the introduction of a safety rating system, crush protection devices and mandatory minimum performance standards. This followed an issues paper in 2017 on proposed reforms to improve quad bike safety and prevent further deaths and injuries in the community. There are limitations with consumer safety law in relation to their powers and the scope of jurisdictions. For example, consumer safety laws cannot impose requirements relating to licensing, personal protection equipment or road/use conditions. The structure of consumer law is linked to supply and control responsibilities, and therefore government intervention can only occur in this area. The ability to address users' end activity may be better placed with WHS Regulators.

SafeWork SA notes that this is a complex area where a whole of government response is required in collaboration with relevant parties such as vehicle safety authorities and industry.

**Question 9**

*Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?*

**Response**

<u>Psychological Health</u>

For the reasons outlined in response to question 5, SafeWork SA believes the important issue of bullying in the workplace and the psychological harm that can occur to a worker could be more effectively addressed by the model WHS laws.

<u>Load Shifting Certification</u>

As load shifting certification was rescinded on the harmonisation of the WHS laws, a Notice of Satisfactory Assessment (NSA) issued by an Accredited Assessor is no longer a legislative requirement in South Australia for operators of front-end loaders (LL), front-end loaders/backhoes

(LB), front-end loaders of skid steer type (LS), excavators (LE), dozers (LZ), cableways/flying foxes (LC) or drag lines (LD). The load shifting certification required training in the theoretical knowledge and practical skills to assess the person's competency to operate the plant.

Competent person

Regulation 5(1)(g) of the WHS Regulations states that a competent person means:

> *(g) for any other case—a person who has acquired through training, qualification or experience the knowledge and skills to carry out the task.*

SafeWork SA suggests consideration be given to whether the definition of a competent person 'for any other case' should include 'training, qualification *and* experience'.

## Duty of PCBUs

**Question 10**

*Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?*

**Response**

While SafeWork SA believes that the definition of a PCBU is broad enough to capture most modern working arrangements, confusion can arise in non-standard work arrangements.

ODCO Contracting Systems

Odco contracting systems are designed to provide for the engagement of labour where neither the host employer nor the labour provider enter into an employment contract with the worker.

The term 'Odco contracting system'[5] arises out a Federal Court case in 1991. In that case, a labour hire company owned by Odco supplied workers to the building industry. The Full Court of the Federal Court found that these workers were not employed by the labour hire company because, under the terms of the contract, the labour hire company had little control over their work. Since that time, Courts (including the High Court) have been divided on the status of persons engaged under this type of contracting system.

The Odco contracting system has been supported by businesses as a legitimate form of contracting, a matter which was upheld by the High Court. However, there are circumstances where Odco contracting arrangements have been used to disguise employment arrangements and have been established solely for the purpose of avoiding PCBU/employer obligations. The practice has become known as 'sham contracting'.

In a submission to a House of Representatives Standing Committee Inquiry into independent contractors and labour hire arrangements, Professor Andrew Stewart of the School of Law at Flinders University said:

[5] *BWIU v Odco Pty Ltd* (1991) 29 FCR 104.

*"Odco style arrangements were originally conceived, and continue to be promoted, as a means of avoiding a finding of employment status. There is no legitimate reason for their use and they should accordingly be prohibited."*[6]

GIG Economy

There are also jurisdictional and other legislative challenges arising from the emerging 'GIG' economy. The way in which people work continues to evolve. Accordingly, it is imperative that the duties applied to ensure worker safety continue to be applicable in all circumstances.

The 'GIG economy', freelance task-based work that is organised through online platforms or 'apps' has risen in prominence in Australia over recent years and changes the way people work away from traditional employment models.

While it is arguable that existing WHS duties can be applied in situations that currently arise with existing businesses, this may not be as clear in relation to all tasks workers in the GIG economy undertake as the form of contracting develops in Australia. Further consideration may be needed in relation to whether certain organisations are required to ensure that any employers operating under this model are required to take reasonably practicable steps to ensure that any worker delivering services through the use of their platform performs the work safely and without risk to themselves or others.

**Question 11**

*Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?*

**Response**

SafeWork SA notes that the report of the 2008 National Review into model Occupational Health and Safety Laws recommended that:

> "the model Act place the primary duty of care on those who conduct a business or undertaking to all persons who may be put at risk from the conduct of the business or undertaking. The objective of doing so is to move away from the emphasis on the employment relationship as the determiner of the primary duty, to provide greater health and safety protection for all persons involved in, or affected by, work activity."[7]

SafeWork SA notes that this has been effective in ensuring the primary duty of care is owed by the appropriate party in all cases.

However, despite the operation of section 16 of the model WHS Act, which provides that:

> *If more than one person has a duty for the same matter, each person—*
>
> *(a) retains responsibility for the person's duty in relation to the matter; and*

[6] Professor Andrew Stewart, School of Law, Flinders University, Submission to the Standing Committee on Employment, Workplace Relations and Workforce participation reference: Independent contracting and labour hire arrangements, 2005.

[7] 6.25 National Review into Model Occupational Health and Safety Laws, First Report to the Workplace Relations Ministers' Council October 2008, pg 59.

*(b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity,*

seeking compliance in such situations can be difficult where there are no obvious arrangements put in place to properly take or accept responsibility for sharing the responsibilities between duty holders.

It may also be beneficial to consider linking the duties at section 16 and 46 to clarify the requirements for duty holders to determine shared duties and consult on those, irrespective of whether they are the primary duty holder.

**Question 12**

*Have you any comments on the approach to the meaning of 'reasonably practicable'?*

**Response**

No comment.

## Duty of officers

**Question 13**

*Have you any comments relating to an officer's duty of care under the model WHS Act?*

**Response**

As the duty of an officer was new to WHS legislation in South Australia, there was a level of concern and uncertainty about what it would entail and to whom it would apply. As the legislation has been in operation now for over four years, this seems to be less of an issue. A concern raised often following the introduction of the new duty was whether businesses were appropriately identifying people or roles which were in fact 'officers' within the definition. SafeWork SA is aware that through the development of guidance material and the provision of advice from WHS Regulators, this too has become less of an issue.

## Duty of workers

**Question 14**

*Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?*

**Question 15**

*Have you any comments relating to a worker's duty of care under the model WHS Act?*

**Response**

SafeWork SA believes the definition of 'worker' is sufficiently broad to cover existing work relationships. One issue that has arisen though relates to the status of 'elected members of local authorities'.

In accordance with the model WHS Act:

- "an elected member of a local authority does not in that capacity conduct a business or undertaking;"[8]
- the definition of 'officer' expressly excludes "an elected member of a local authority acting in that capacity;"[9]
- the definition of 'worker' does not make any reference to elected members of local authorities."[10]

As the model WHS Act expressly excludes an elected member of a local authority from the definition of a PCBU or Officer, the intention of whether elected members are to be considered workers or not could be considered in the Review.

In relation to the status of volunteers as workers under the WHS laws, SafeWork SA notes that it has encountered issues relating to PCBUs being unable to appropriately direct volunteers to follow certain WHS instructions (for example, in relation to dress, conduct and the use of personal protective equipment). This can result in difficulties for the PCBU and also for the Regulator seeking to resolve such issues.

## Duty of other persons at the workplace

**Question 16**

*Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?*

**Response**

No comment.

[8] *Work Health and Safety Act 2011* (Cth) s 5(5).
[9] *Work Health and Safety Act 2011* (Cth) s 4.
[10] *Work Health and Safety Act 2011* (Cth) s 7.

## Principles applying to duties

**Question 17**

*Have you any comments relating to the principles that apply to health and safety duties?*

**Response**

No comment.

## Consultation with other PCBUs

**Question 18**

*Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?*

**Response**

SafeWork SA notes that the subcontract culture can limit the effectiveness of consultation mechanisms. Further, in relation to joint ventures and consortiums where there are multiple duty holders, the following queries could be considered by the Review:

- is a consortium a legal entity, and can it apply and hold a licence under the WHS laws?; and
- can a WHS licence be held in the name of multiple proprietary companies?

## Consultation with workers

**Question 19**

*Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?*

**Question 20**

*Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?*

**Question 21**

*Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?*

**Response**

SafeWork SA has found the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work is working well for large workplaces, but can often not be as effective for smaller businesses and subcontractors.

SafeWork SA is aware that for workers in small to medium size businesses, and particularly businesses with only small numbers of workers, there can be little or no opportunity to be involved in WHS consultation, representation and participation.

Similarly, in relation to the establishment and election of HSRs and the formation of health and safety committees, businesses with a small workforce can be limited in their ability to do so.

## Issue resolution

**Question 22**

*Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?*

**Response**

No comment.

## Discriminatory, coercive and misleading conduct

**Question 23**

*Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as a HSR or member of a HSC, or who raise WHS issues in their workplace?*

**Response**

No comment.

## Workplace entry by WHS entry permit holders

**Question 24**

*Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?*

**Response**

The provision of Part 7 has been working with minimal issues. As a new provision in South Australia at the time of the WHS laws' introduction, there was some confusion and concern about the operation of the provisions in certain industries, particularly construction. Ongoing stakeholder engagement and consultation has assisted in a greater understanding of the legislation.

It should be noted that in their submissions to the second review of the operation of the *Work Health and Safety Act 2012* (SA), employer and industry groups were predominantly consistent in their view that the amendments to section 117 of the model WHS Act in relation to the provision

of notice should be implemented in South Australia. Given these amendments have not occurred in any jurisdiction, it may be useful for this Review to consider the rationale and evidence that went into the drafting and successful passage of the amendment to section 117 of the model WHS Act.

## Regulator functions

**Question 25**

*Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?*

**Response**

No comment.

## Inspectors' powers and functions

**Question 26**

*Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?*

**Response**

Section 155 of the model WHS Act is useful in obtaining additional documents or answers to questions, however, as it is a power of the Regulator it relies on appropriate delegations, which can vary across Regulators and prolong the process. SafeWork SA has also found that sometimes only very brief or incomplete answers to the questions are provided which then necessitates a series of notices being issued to obtain the detail that is required. The Regulator can only ask someone to appear to answer questions after all reasonable steps to obtain the information using section 155(2)(a) and (b) have been taken. This means that the questions need to be put to the person in writing first. It is not clear whether the Regulator can expand on the questions asked to a person appearing in accordance with section 155(2)(c).

Section 155 should be amended to make it clear that additional questions can be asked under section 155(2)(c) and ensure discretion is given to the Inspector. Further, section 155(2)(c) could be separated so that Inspectors have powers to compel someone to appear before them to give information orally or in writing, without having to undertake the steps at section 155(2)(a) and (b), which is required as per section 155(4).

Concerns have also been raised with section 171 of the WHS Act that an Inspector only has the power to require production of documents and answering of questions when in attendance at the workplace where the incident occurred. This can present issues where an Inspector must decide whilst at a workplace what questions and documents are relevant and must be required. In this sense the provision is inflexible and can be impractical.

The provision could be amended to allow notices under this section to also be issued by email, post etc., like all other notices. Alternatively, it could be amended along the lines of Queensland's recent amendment:

> *(1) If an inspector enters a workplace under this division, or has within the last 30 days entered a workplace under this division, the inspector or another inspector may—*
>
> *(a) require a person to tell the inspector who has custody of, or access to, a document; or*
>
> *(b) require a person who has custody of, or access to, a document mentioned in paragraph (a) to give the document to the inspector; or*
>
> *(c) require a person at the workplace to attend before the inspector at a stated reasonable time and place to answer questions put by the inspector.*

Alternatively, section 171 and section 155 could be combined to form one section as they are similar in function, yet applied in different ways.

## Internal and external review of decisions

**Question 27**

*Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?*

**Response**

South Australia has received 25 applications for internal review since 1 July 2016. Over 95% of all internal review applications in South Australia have related to the issuing of compliance notices.

Of the 25 applications for internal review, seven decisions of the internal reviewer have been referred to the South Australian Employment Tribunal (SAET) for External Review (note, these five applications relate to two different matters, i.e. one matter in which four improvement notices were issued, reviewed and have subsequently been referred to SAET). In general, there has been a low-medium level of internal review applications in South Australia; and a low level of referral to SAET.

As mentioned above, the vast majority of all internal review applications in South Australia have related to the issuing of compliance notices. The ability to review a compliance notice is not a new feature in South Australia, with similar provisions for the review of notices in the former *Occupational Health, Safety and Welfare Act 1986* (SA) (the OHSW Act). Under the OHSW Act, relevant parties had the ability to seek a review of improvement and prohibition notices, with the review being heard by a specially formed Review Committee under an Industrial Magistrate of the South Australian Industrial Relations Commission.

The introduction of reviewable decisions within the WHS legislation appears to be working as intended. By creating a mechanism where Inspector and Regulator decisions have the ability to be reviewed, the laws ensure accountability and transparency of decision makers.

The introduction of internal review processes in South Australia means that a majority of decisions are able to be reviewed and resolved without the need to involve SAET, which ensures both time and cost efficiencies.

## Exemptions

**Question 28**

*Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?*

**Response**

SafeWork SA receives and processes exemption applications under the WHS legislation from both individuals and for classes of persons. For example, SafeWork SA has granted exemptions from holding high risk work licences to international riggers working in Adelaide for only a few days and exempted companies from having to pay for registrations due to incapacity to pay.

SafeWork SA has found that the provisions work well and customers generally understand the terminology used in these provisions. Accordingly, SafeWork SA considers that the provisions for exemptions are appropriate and working effectively.

An important element is the Regulator's ability to refuse or impose conditions on any exemption granted. This ability to exercise discretionary power is important to allow a case by case assessment to be made, however, the result of this is that there could be a lack of uniformity applied across jurisdictions for similar exemption applications under the model WHS Regulations.

## Cross-jurisdictional co-operation

**Question 29**

*Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?*

**Response**

The WHS Regulations contain a number of occupational licensing or authorisation provisions, in particular High Risk Work (HRW) Licensing, asbestos removal licensing and general construction induction training which require the Commonwealth, State and Territory Regulators to recognise another WHS jurisdictions' licences and licence holders.

Each of the legislative provisions for HRW or asbestos removal licences or cards allows the Regulator to refuse to grant a licence or suspend or cancel a licence. However, consideration could be given to the inclusion of an additional regulation or sub-regulation that provides Regulators with a power or function to not recognise another State or Territory's licence or White Card.

In addition to this general power, consideration could also be given to including a set of considerations on which a refusal could occur, such as the belief that the licence or card holder attained the licence through a training or authorisation process that does not comply with the minimum WHS standards, and/or the Regulator is of the opinion that the holder is not competent and/ or may be a risk to other persons safety.

## Incident notification

**Question 30**

*Have you any comments on the incident notification provisions?*

**Response**

SafeWork SA believes the incident notification provisions are generally poorly understood and interpreted, which results in either over or under reporting of particular incidents. For example, in accordance with section 36(b)(viii) of the model WHS Act, a 'serious laceration' is a serious injury or illness and accordingly is a notifiable incident. SafeWork SA has received numerous notifications in relation to a 'serious laceration' when a child has fallen at a school and cut themselves. More guidance, and the use of greater examples that are easily understood may be a way of addressing existing confusion about when a matter is notifiable.

SafeWork SA also suggests that consideration be given to ways the provisions could be amended to clarify certain current omissions.

Section 37 relates to 'dangerous incident' notification. It requires firstly, that a person must be involved in an incident at a workplace and that they must be exposed to a serious risk to their health or safety. Secondly, the serious risk must emanate from an immediate or imminent exposure to one of the events listed in the subsections. Uncertainty arises, however, when a dangerous incident occurs, but a person is not present at that exact moment, and therefore not exposed to a risk. Leading to the question, would a worker usually be in the vicinity. In these cases, it may be prudent to make a notification, but the requirement to do so is technically unmet.

Similarly, under the existing definitions for notifiable incidents, workplace violence such as harassment, assault and sexual assault rarely fit within the notifiable criteria and therefore are not reported to the Regulator.

Consideration could also be given to whether failure to notify the Regulator of an incident should be an expiable offence.

## The approach to compliance

**Question 31**

*Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?*

**Response**

No comment.

**Question 32**

*Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?*

**Response**

No comment.

## Offences and penalties

**Question 33**

*Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?*

**Response**

Given the relative infancy of the laws and number of prosecutions undertaken, it may still be too early to thoroughly assess the effectiveness of the penalties in the model WHS Act as a deterrent to poor work, health and safety practices.

In South Australia, the introduction of the WHS laws brought a significant increase in the penalties from the previous occupational health and safety laws, which ensured a greater level of awareness and consideration by businesses in relation to their WHS obligations and responsibilities.

There were 9 convictions under the WHS laws in South Australia in 2017 with the monetary penalties imposed ranging from $2 000 to $210 000; 9 convictions in 2016 with penalties ranging from $7 000 to $240 000 and 2 convictions under the WHS laws in 2015 with fines imposed of $39 000 and $45 000.

It is clear from the cases successfully prosecuted in South Australia that the pecuniary penalties have not reached the upper limit available.

However, it is important to note that those limits serve as a deterrent. It is also important to consider that Judges have powers that allow them to discount the penalty applied in a matter due to factors such an early guilty plea.

The ability of Regulators to successfully prosecute breaches of the WHS laws may be a greater barrier in ensuring an effective outcome for an offence relating to a serious accident or death rather than just the penalty imposed once a prosecution has succeeded.

In 2017 a review into the investigation and prosecution arrangements within SafeWork SA for offences under the WHS Act was undertaken by a Senior Prosecutor from the Office of the Director of Public Prosecutions.

This review was a broad consideration of how matters handled by SafeWork SA are investigated and, where appropriate, prosecuted. While the review did not consider the content or operation

of the laws specifically, it found that prosecutions under the WHS Act are amongst the most complex types of prosecutions that can be brought. This is for a number of reasons including the need for an investigation to determine not only what occurred, but also what the exposure to risk was and to prove beyond reasonable doubt what the defendant should have done to remove or mitigate that exposure to risk, and that it was 'reasonably practicable' for them to do so.

## Legal proceedings

**Question 34**

*Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?*

**Response**

SafeWork SA notes the variation from the model section 172. South Australia's provision provides an individual with an excuse of providing information or answering a question on the ground of self-incrimination:

> *172—Protection against self-incrimination*
>
> *An individual is excused from answering a question or providing information or a document under this Part on the ground that the answer to the question, or the information or document, may tend to incriminate that individual or expose that individual to a penalty.*

The South Australian version of section 172 has the potential to produce unintended barriers to Inspectors in securing evidence.

SafeWork SA has investigated matters where workers who have witnessed events have been accompanied to interviews by legal representatives provided by the employer. The lawyers have advised the workers to answer the Inspector's questions by using the words "I refuse to answer the question on the grounds that the answer may tend to incriminate me or expose me to a penalty".

The use of the self-incrimination law in this way, although it may rightfully protect the workers from incriminating themselves, has the potential to significantly inhibit the Inspector from gathering evidence about the PCBU's role in the events, even though the workers are not at fault.

In these circumstances, it could be argued that the workers had failed to answer questions without reasonable excuse, but in practice this is very hard to prove and would take the Inspector away from the primary issues of investigation.

By comparison, section 172 of the model WHS Act states*:*

*Abrogation of privilege against self-incrimination.*

> *(1) A person is not excused from answering a question or providing information or a document under this Part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.*
>
> *(2) However, the answer to a question or information or a document provided by an individual is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information or document.*

SafeWork SA can see the benefits of section 172 of the model Act in removing the unintended barriers that SafeWork SA has experienced. SafeWork SA is supportive of achieving an appropriate balance between the right of a person to be protected under the criminal law, and the importance of the Regulator obtaining essential information.

## Sentencing

**Question 35**

*Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?*

**Response**

No comment.

## Enforceable undertakings

**Question 36**

*Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?*

**Response**

South Australia is still in early stages when it comes to Enforceable Undertakings (EUs). To date, SafeWork SA has accepted 13 EUs.

SafeWork SA notes that an EU provides an opportunity for organisational reform to implement effective workplace health and safety.

Each proposed undertaking is considered on its merit taking into account the seriousness of the alleged contravention. An EU should aim to deliver tangible benefits to workers, industry and the broader community. Feedback received about EUs are that they are beneficial in educating the specific industry; useful in putting money back into making workplaces a safer environment and raising the awareness of unsafe practices; effective in providing practical safety benefits to workers, industry and the community; and beneficial as a long term effective remedy as it can lead to substantial changes in the workplace.

One provision where there may be need to be further consideration in terms of whether it supports the objectives of the model WHS laws, is section 230(3). Under this provision the Regulator must issue, and publish on the Regulator's website, general guidelines in relation to—

*(b) the acceptance of WHS undertakings under this Act.*

There is inconsistency between each jurisdiction’s EU guidelines and schemes. For example, South Australia and New South Wales have mainly the same content in their guidelines. Further to this, both jurisdictions, as well as Victoria provide for the application of EUs to circumstances

involving a Category 2 offence that results in a fatality. It should be noted that the guidelines require a case for exceptional circumstances to be made where a fatality is involved.

By contrast, in Queensland, the *Work Health and Safety Act 2011* (QLD) prohibits EUs being accepted for contraventions, or alleged contraventions, of the WHS Act that involve a fatality.

Additionally, other harmonised jurisdictions do not address the application of EUs to circumstances involving a Category 2 offence that results in a fatality.

In the sense that section 230(3)(b) is silent on each jurisdiction having consistent guidelines, this section arguably does not support the following objective in section 3(h) of the model WHS Act:

- Providing for a balanced and nationally consistent framework to secure the work health and safety of workers and workplaces by:

  *(h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.*

Nationally consistent guidelines should be adopted, however, this will now be a more difficult process, given the recent Queensland amendment.

Another provision which may need to be further considered in terms of whether it supports the objectives of the model WHS laws, is section 232(1)(c) which provides that prosecution of a breach of an EU must be brought within 6 months after—

*(i) the WHS undertaking is contravened; or*

*(ii) it comes to the notice of the regulator that the WHS undertaking has been contravened; or*

*(iii) the regulator has agreed under section 221 to the withdrawal of the WHS undertaking.*

Arguably this is a very tight timeframe and the time pressure related to such a prosecution should be noted, particularly as it may seem to be inconsistent with the objective in section 3(g) of the model WHS Act:

Providing for a balanced and nationally consistent framework to secure the work health and safety of workers and workplaces by:

*(g) providing a framework for continuous improvement and progressively higher standards of work health and safety.*

The Review may wish to consider whether an extended period of time to initiate prosecutions in these instances, aligned with section 232(1)(a) and (b) of the model WHS Act is necessary.

## Insurance against fines and penalties

**Question 37**

*Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?*

**Response**

SafeWork SA does not support the availability of insurance products which indemnify directors of companies against fines and penalties arising from breaches of WHS legislation. For the reasons outlined by His Honour, Industrial Magistrate Lieschke in the decision of *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor*[11], the availability of insurance cover negates the general deterrence for WHS penalties. As outlined in the 2014 South Australian Review, provisions in the *Health and Safety in Employment Act 1992* (NZ)[12] and the *Road Traffic Act 1961* (SA)[13] prohibit insurance and include fines for non-compliance.

Section 272 of the model WHS Act states that a term of any agreement or contract that purports to exclude, limit or modify the operation of this Act or any duty owed under this Act or to transfer to another person any duty owed under this Act is void.

Additionally, the normally accepted position is that under the common law an insurance contract cannot validly indemnify someone against a fine for a wilful criminal act.

However, the effectiveness of section 272 and the common law in preventing businesses from taking out insurance products covering the cost of WHS penalties must be seriously questioned.

In *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22, both Ferro Con and its sole director, Paolo Maione (the defendants) were prosecuted for breaching the OHSW Act.

The defendants argued for a penalty reduction due to their early guilty pleas and contrition and cooperation with SafeWork SA. However, the Court did not provide a discount because Ferro Con had an insurance policy that indemnified Mr Maione for fines imposed for criminal conduct. The Court concluded that Mr Maione's actions in calling upon insurance were "*so contrary to a genuine acceptance of the legal consequences of his criminal offending that they dramatically outweigh the benefits to the justice system of the early guilty plea and statement of remorse*."[14]

Both defendants were convicted and each fined $200 000.

In a 2013 address,[15] Chief Justice of NSW, the Hon JT Bathurst, pointed out that although section 272 provides that any term of a contract that seeks to modify the operation of the Act is void, it does not specifically prohibit insurance for criminal liability.

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[11] *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22.
[12] *Health and Safety in Employment Act 1992* (NZ) s 56I.
[13] *Road Traffic Act 1961* (SA) s 174K.
[14] *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22.
[15] Bathurst JT, *Insurance law – a view from the bench*, Australian Insurance Lawyers Association, National Conference, Keynote Address, 19 September 2013.

In any event, the legal position on insurance contracts covering the cost of WHS penalties does not appear to deter companies and directors from taking up such policies because insurers tend to honour the terms of such policies for commercial reasons.[16]

The prevalence of insurance companies covering the cost of WHS penalties for employers, by honouring their insurance policies was raised in the Best Practice Review of Workplace Health and Safety Queensland (Best Practice Review). The AWU submitted that:

> *"Evidence from legal practitioners who regularly represent employers in WHSQ prosecutions indicates that it is insurance companies rather than employers that are often paying fines following successful prosecutions. The issue of whether a penalty is adequate or should be increased in not particularly relevant if the employer is not in fact paying the fine".*

The Australian Lawyers Alliance also submitted that:

> *"A further consideration in the context of the efficacy of penalties is the commercial reality that many corporations are readily able to, and do, insure against the imposition of a fine for a breach of workplace health and safety legislation".*

In regards to the payment of WHS Penalties by insurance companies, the Best Practice Review recommended that:

> a. the *Work Health and Safety Act 2011* be amended to expressly prohibit insurance contracts being entered into which cover the cost of work health and safety penalties and fines;
>
> b. contravention of the prohibition to enter into an insurance contract which covers the cost of work health and safety penalties and fines should be made an offence;
>
> c. section 29 of the *Health and Safety at Work Act 2015 (NZ)* be considered as a model for the new statutory requirement; and

The Best Practice Review Report explains the New Zealand provision and the benefit of adopting it:

> *"Section 29 of the NZ Act not only declares contracts for insurance against the payment of fines and penalties to be void, but also makes it an offence to enter into such a contract. The benefit of this approach is that it ensures such contracts are void, and also enables parties that enter into such a contract to be prosecuted. This would open the doors for the courts to consider the public policy implications of such contract which is currently hindered by the unlikelihood that either the insurer or the insured would challenge the validity of the contract."*

Using the New Zealand provision as a model for a new provision in the model WHS Act, would act as a strong deterrent to businesses to stop them taking out insurance contracts to cover against WHS penalties. Further to this, it would help preserve the integrity of the objectives of the model WHS legislation.

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[16] See for example N Foster "You can't do that! Directors insuring against criminal WHS penalties (2012) 23 Insurance Law Journal 109, 122-123.

However the following commentary in relation to using the New Zealand provision as a model was provided by the Review of the Operation of the *Work Health and Safety Act 2012* (SA), released in November 2014 and arguably has some merit:

- *"Such a provision would include all offences, including those where there was no intent to contravene the provision or recklessness by the offender.*
- *It may be appropriate to allow insurance for legal costs where a person is found not guilty of contravening the relevant provision."*

# Other issues

**Design of an item of plant**

SafeWork SA has recently experienced issues with the recognition of design registration of an item of plant that has been registered by a corresponding Regulator.

Because the company's design registration is recognised by a corresponding WHS jurisdiction, in accordance with Regulation 247 of the *Work Health and Safety Regulations 2012* (SA), design registration of the item of plant is not required in South Australia. However, SafeWork SA has formed a reasonable belief that the item of plant is unlikely to comply with South Australia's WHS requirements for a number of reasons, including that it does not comply with the relevant Australian Standard.

This situation highlights how the operation of WHS Regulation 245 can be problematic for a WHS Regulator due to automatic mutual recognition of plant design registration by a corresponding WHS Regulator.

The Review may like to consider whether there is merit in amending the WHS Regulations regarding recognition of design registration of an item of plant that has been registered by a corresponding WHS Regulator. Another clause or sub-clause could provide a WHS Regulator with a power of review or veto, if it believes that the design registration should not have been granted by a corresponding Regulator for an item of plant. This power of review or veto could involve, as a matter of process, liaising with the corresponding Regulator.

**Section 271 of the WHS Act**

Section 271 of the WHS Act deals with the confidentiality of information. Section 271(2) restricts the disclosure of information obtained or accessed by the Regulator in exercising powers or functions under the WHS Act. Section 271(3) provides a list of circumstances in which section 271(2) does not apply.

SafeWork SA is committed to assisting persons that are affected by workplace incidents, including the next of kin of workplace fatality victims and seriously injured workers (next of kin). Next of kin often try to seek any information that will help them better understand the circumstances of a workplace incident as such information could potentially help them with the grieving process.

Alternative avenues available to enable next of kin to obtain information from SafeWork SA, such as an application under the *Freedom of Information Act 1991* (Cth) or pre action discovery, do not appear to be viable options.

In respect of SafeWork SA relying on the WHS Act to provide the mentioned information to the next of kin of seriously injured workers, under section 271(3)(a), an exception applies to the disclosure of information about a person if the person's consent is given to: the disclosure of information, the giving of access to a document or the use of information or a document about the person. However, in order for information to be completely disclosed, the consent would need to be sought of all parties whose information is included in the documents sought by the next of kin. Further to this, it should be noted that a body corporate can arguably give consent to the release of information about itself under section 271(3)(a), by virtue of the definition of "person" in section 4(1) of the *Acts Interpretation Act 1915* (SA).

In respect of SafeWork SA relying on the WHS Act to provide the mentioned information to the next of kin of deceased workers, there is no provision in the WHS Act for the deceased worker's personal representative to provide consent to disclosure of such information on their behalf.

As such, the WHS Act provides no direct mechanism for a next of kin to obtain information gathered under the functions and powers of the WHS Act about a deceased worker.

The Review may like to consider whether there is merit in amending the WHS Act to provide for a direct mechanism for a deceased person's representative to provide consent to the release of the mentioned information to the next of kin.

Alternatively, a general amendment to the model WHS Act could be considered to allow release of such information to next of kin of injured/deceased workers. However, consultation would need to occur with affected agencies regarding the potential impact on prosecutions and criminal investigations. Further, the issue of obtaining consent from other parties, where the information concerns them, would also need to be addressed.

**Section 195 of the WHS Act**

Section 195 of the WHS Act provides a power for an Inspector to issue a prohibition notice. It states that:

1. *This section applies if an inspector reasonably believes that—*

    a. *an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; or*

    b. *an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.*

2. *The inspector may give a person who has control over the activity a direction prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.*

3. *The direction may be given orally, but must be confirmed by written notice (a prohibition notice) issued to the person as soon as practicable.*

Section 197 provides an obligation on the person to whom the direction is given or a prohibition notice is issued to comply with the direction or notice.

The Review may like to consider whether there is merit in amending the model WHS Act to clarify whether a prohibition notice can be issued in the absence of a previous direction. It would be beneficial to know if any other jurisdictions have had any prohibition notices contested on this basis previously.

For example, if a prohibition notice is placed on an amusement device under section 195 of the model WHS Act, which prohibits it from being operated with people on it, does the prohibition notice have the capacity to enforce compliance with this notice under section 197 of the WHS Act, if the device was operated interstate? Section 195(2) and (3) when considered together, may be interpreted as meaning that a prohibition notice may only be issued in order to "confirm" a pre-existing direction: that is, that such a notice cannot be issued in the absence of previous direction.

**High Risk Work Licensing**

SafeWork SA administers a HRW accreditation and licensing Scheme as a form of regulatory intervention to HRW activities, to ensure they are undertaken safely by licensed and competent individuals.

While the current licensing Scheme requires the validation of licence holders' qualifications, including evidence of experience, SafeWork SA is aware of concerns being raised by stakeholders regarding the training and assessment processes, and perceived low quality of training being delivered by some Registered Training Organisations (RTOs) in the Vocational Education and Training (VET) sector.

In particular, SafeWork SA is advised there has been a recent decline in industry confidence in HRW licensing with stakeholders, particularly in the construction, manufacturing, transport and logistics industries. Poor quality training outcomes have also been raised by reputable RTOs, who are finding it increasingly difficult to compete with RTOs who are delivering what is considered to be sub-standard training and assessment.

SafeWork SA understands this may also be an issue in other jurisdictions. In 2017, the Australian Skills Quality Authority (ASQA) published a Report, *A review of issues relating to unduly short training*.[17] The Report mentions an inquiry and report into HRW licensing in Western Australia where the following reference was made:

> *"The report on a Western Australian Training and Accreditation Council (WA TAC) strategic audit[18] of units of competency that lead to high-risk licences being issued in that state found that one of the main concerns of the stakeholders was '… the amount of training allocated for training and assessment for each learner was not sufficient to enable them to meet the requirements of the unit of competency.' The WA TAC strategic audit report stressed that safety and the potential for serious consequences are a risk when training and assessment is not compliant. Significantly, this review found 'a direct relationship between delivery of courses in shorter timeframes and high non-compliance with the standards.' This report also found that RTOs claimed they were shortening training because of pressure from industry clients."*

In response to these concerns, SafeWork SA has been undertaking an industry stakeholder project to look at ways to increase confidence in the Scheme, and in particular, avenues that place specific performance conditions on RTOs in terms of the delivery of quality training.

As a result of these actions, SafeWork SA had initially proposed the development and introduction of a conditional agreement scheme between the Regulator and an RTO that would require the RTO to enter into an agreement if it wished to deliver HRW licensing training in South Australia. The proposed RTO scheme was to resemble the current scheme operating in New South Wales.

However, as part of the proposed Scheme's development, SafeWork SA understands from recent advice that issues exist between the jurisdictional and constitutional interaction between the WHS Act and Regulations and the *National Vocational Education and Training Regulator Act 2011* (Cth) (NVETR Act).

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[17] Australian Government; Australian Skills Quality Authority; Report, A review of issues relating to unduly short training; 28 June 2017.

[18] Government of Western Australia 2016, *Training and Accreditation Council: Strategic Industry Audit into Units of Competency that lead to High Risk Work Licences in Western Australia*, p. 8.

The most recent advice indicates a number of insurmountable legal and jurisdictional issues in relation to WHS Regulators' influence over RTOs and VET, including occupational licensing outcomes like HRW licensing training.

The advice makes it reasonably clear that the National VET laws, being Commonwealth law, regulate RTOs and exclude, limit or prohibit SafeWork SA from entering into legally enforceable agreements with RTOs. Therefore, SafeWork SA is currently considering a range of short and long term options, encompassing both regulatory and non-regulatory approaches.

Consideration

SafeWork SA suggests that consideration be given to inclusion of the following amendments to the WHS legislation to:

- provide WHS Regulators with the capacity to consult with industry stakeholders in establishing and setting the minimum standards of HRW licence courses of instruction/training, assessment and the issuance of licences;
- retain Schedule 3 – HRW Licences and classes of HRW and Schedule 4 – HRW licences – competency requirements, of the model Regulations; with provisions that permit the two schedules to be regulated/amended by the Regulators;
- include multi-purpose tool carrier into Schedules 3 and 4;
- allow Regulators to monitor and secure compliance with HRW licence training providers and assessors;
- allow Regulators to enter into compliance agreements with providers of HRW licence training and assessment;
- provide a lawful jurisdiction for Regulators to set the minimum standards and qualifications of training and assessment providers;
- remove VET or ASQA connection with the HRW Licensing provisions (or other WHS training and assessment) from the model WHS laws;
- permit Regulators to have the lawful capacity to set the minimum number of hours and the manner in which the HRW training is delivered, as well as matters such as face-to-face training and assessment and online learning and assessment;
- permit Regulators, after consultation with industry stakeholders, to include onto the HRW licence, a compulsory or non-compulsory refresher date, no less than 4 years after the initial issuance; and
- permit Regulators to cancel, refuse to recognise, replace or direct retraining of a HRW Licence (including those issued in another State or Territory) if the Regulator is of the view that either the training, assessment or general conditions under which the licence was issued were inadequate or unsafe.

**General Construction Induction Training – White Card**

'White Card' in this context means the General Construction Induction Training Card arising from Chapter 6, Part 5 of the WHS Regulations.

SafeWork SA has been made aware of concerns from industry stakeholders about the gradual decline in confidence in the White Card. Much of this relates to the 2014-15 review of the General Construction Induction Training Unit of Competence (UoC) CPCCOHS1001A, which was superseded by CPCCWHS1001, *Prepare to work safely in the construction industry*, which excluded requirements for a 6 hour minimum course of instruction, training and assessment to be conducted face-to-face and not to allow online learning or assessment on the basis that it would not agree to set minimum hours for training courses because it interfered with competency-based learning and progression.

In addition, in 2013 ASQA published a Report following an inquiry into '*Training for the White card for Australia's Construction Industry'* (the ASQA White Card Report) [19]. The Report made a number of observations and recommendations following the survey of 851 White Card holders and the audit of 63 RTOs (who deliver White Card). The ASQA White Card Report found that:

- industry has lost confidence in the value of the White Card as providing an assurance of safety in the workplace for new entrants to the construction industry;
- RTOs delivering the White Card through face–to-face training and assessment have advised they cannot compete with those offering the training and assessment online;
- some delivery of the White Card is taking as little as 30 minutes;
- the majority of White Cards (95 per cent) are being delivered through an online environment;
- no RTOs, audited for the purpose of this review and delivering in the online environment are adequately assuring the identity of students;
- the risk to achievement of the safety objective is compounded by the potential for identity fraud because identity verification in the online White Card programs is not assuring that the person completing the assessment is the person who receives the White Card; and
- the majority of training providers that were audited are compliant with most of the training and assessment standards, but the majority are not compliant with the standard relating to assessment practices, potentially compromising the safety objectives of the White Card.

Furthermore, in response to the audit of Assessment Standard 15.5, ASQA found that:

*"Of the 63 RTOs audited, 15 RTOs assess online. Of these RTOs, 100% were found to be not compliant at the initial audit."*

Unlike HSR training, where the Regulator has the power under section 72 of the WHS Act to approve the course of training for HSRs, in the case of White Card, the Regulator has little power to monitor or secure compliance with RTOs who train and assess competence.

Subject to regulation 325 of the WHS Regulations, a Regulator has the capacity to enter into agreements for the issuance of White Cards, but this may be limited.

From a compliance and enforcement perspective, the current construction of Part 5, Chapter 6 of the WHS Regulations appears to limit both penalties and expiation fees to general construction induction training, whilst there are no corresponding penalties or expiation fees associated with holding a general construction induction training card.

Yet it is the card itself that has become the transferable indicator of competency in the building and construction industry. Feedback from industry stakeholders and Inspectors indicates that, whilst the compliance and enforcement measures should be maintained for attaining and completing training, there should be similar compliance and enforcement provisions for a worker holding ("holding" meaning actually having the card in the workers possession) and presenting a card for inspection, as well as offences for a PCBU who fails to ensure that the worker holds a card.

<u>Consideration</u>

[19] Australian Government; Australian Skills Quality Authority; Report; Training for the White Card for Australia's Construction Industry.
(A national strategic review of registered training organisations offering industry induction training – the White Card)

SafeWork SA suggests that consideration be given to inclusion of the following amendments to the WHS legislation to:

- provide the Regulator with the capacity to consult with industry stakeholders in establishing and setting the course of training, assessment and the issuance of a White Card;
- remove any direct Vocational Education and Training (VET) or ASQA connection with the General Construction Induction Training provisions of the Act and the Regulations;
- allow the Regulator to enter into agreements with the providers of White Card training and assessment;
- that the course of instruction be delivered by face-to-face interaction between the teacher and the candidate and not be less than 6-hours duration;
- permit the Regulator, after consultation with industry stakeholders, to include onto the White Card a compulsory or non-compulsory refresher date, no less than 4 years after the initial issuance;
- to make regulations that provide a lawful jurisdiction for the Regulator to set the minimum standards and qualifications and to monitor and secure compliance of training and assessment providers; and
- permit a Regulator to cancel, refuse to recognise, replace or direct retraining of a White Card (issued in another state or territory) if the Regulator is of the view that either the training assessment or general conditions under which the card was issued were inadequate or unsafe.