Government of South Australia
SafeWork SA

Second review of the operation of the *Work Health and Safety Act 2012* (SA)

REPORT

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CONTENTS

ACRONYMS AND ABBREVIATIONS

AHA	Australian Hotels Association (SA)
Ai Group	Australian Industry Group
AWU	Australian Workers' Union
COP	Code of Practice
EPH	Entry Permit Holder
HIA	Housing Industry Association
HSC	Health and Safety Committee
HSR	Health and Safety Representative
IGA	Inter-Governmental Agreement
MBSA	Master Builders South Australia
Model WHS Act	Model Work Health and Safety Act
Model WHS Regulations	Model Work Health and Safety Regulations
MTA	Motor Trade Association
OPS	Office for the Public Sector
OSBC	Office for Small Business Commissioner
PCBU	Person conducting a business or undertaking
PIN	Provisional improvement notice
PWMC	Person with management and control
OHSW Act	*Occupational Health, Safety and Welfare Act 1986* (SA)
ROE	Right of entry
SAWIA	South Australian Wine Industry Association
SISA	Self Insurers of South Australia
SWMS	Safe Work Method Statement
WHS	Work Health and Safety
WHS Act (SA)	*Work Health and Safety Act 2012* (SA)
WHS Regulations (SA)	*Work Health and Safety Regulations 2012* (SA)

EXECUTIVE SUMMARY

In October 2016, the Hon John Rau MP, Minister for Industrial Relations, asked SafeWork SA to undertake a second review of the operation of the WHS Act (SA) as required by section 277(3) of the Act (the section 277 Review). The section 277 Review focussed on the eight provisions of the WHS Act (SA) that significantly differ from the Model WHS Act, and to what extent, if any, these South Australian variations have impacted on the operation of WHS laws in this state.

In late 2016, SafeWork SA circulated a Discussion Paper to targeted stakeholders such as unions, industry associations and representative groups for comment. Fifteen submissions were received.

A number of submissions noted that given that the WHS Act (SA) has only been in operation for a relatively short period of time, it is still too early to make fully informed comments on the operation of the WHS legislation. Despite this, most submissions provided responses to the eight provisions in focus with some providing further comments regarding other aspects of the WHS Act (SA) and the WHS Regulations (SA).

Opinions regarding the merit of these provisions were generally divided down industry association and union lines, with little or no consensus.

Feedback was also received on the recent separation of SafeWork SA's regulator and educator functions and roles. In particular, some parties expressed that the operational changes have had a positive impact, giving businesses and workers the confidence to access educator services to assist and support them to understand their WHS obligations and address specific WHS issues, thereby helping to reduce workplace injuries.

In March 2017, a separate review commenced into the investigation and prosecution arrangements for offences under the WHS Act (SA) (Investigation and Prosecution Capability Review). The Investigation and Prosecution Capability Review was conducted by a senior prosecutor from the Office of the Director of Public Prosecutions, and was finalised in June 2017.

The recommendations of that review were considered by the section 277 Review. Significantly, none of the recommendations of the Investigation and Prosecution Capability Review sought to amend the WHS Act (SA).

The section 277 Review found that the WHS Act (SA) is 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. This aligns with recent statistics on South Australia's WHS performance. Since the introduction of the WHS Act, South Australia's WHS performance has continued to improve, with consistent reductions in work-related death, injury and illness. In 2014/2015, ReturnToWorkSA workers' compensation claim data demonstrates an overall 8.4 per cent reduction in the rate of work-related deaths, injuries and illnesses.[1]

[1] It is noted that this measure lags by 12 months, meaning that the figure measure at 30 June 2015 was the true injury rate at 30 June 2014.

With little consensus of opinion on any necessary changes to the South Australian variations in the WHS Act (SA), and in advance of the 2018 National Review (including any recommendations that may arise from that review), amending the WHS Act (SA) could further complicate the WHS legislative landscape in South Australia and be detrimental to the achievement of healthy and safe working environments for PCBUs and workers. It is also acknowledged that the WHS Act (SA) only commenced in South Australia in 2013, thus providing a limited time in which to adequately evaluate its full effectiveness.

Additionally, the section 277 Review noted that no submissions were able to provide, clear, empirical evidence to support any immediate change.

Whilst the section 277 Review does not recommend any changes to the WHS Act, the Industrial Relations Consultative Council does provide a forum to discuss and further investigate any identified issues with the Act, including the South Australian specific variations.

As mentioned, aside from the commentary received on the South Australian specific variations, the section 277 Review also received further comments regarding other aspects of the WHS Act (SA) and WHS Regulations (SA). In the opinion of this review these comments can be addressed and without legislative change. This Report provides specific recommendations to effect this.

INTRODUCTION

In May 2009, in response to the *National Review into Occupational Health and Safety Laws*, the former Workplace Relations Ministers' Council (WRMC) agreed in-principle to a review of the content and operation of the Model Work Health and Safety (WHS) laws at least once every five years.

South Australia is one of seven jurisdictions that have adopted the Model 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 including uniformity in most key areas such as duties, offences, penalties and sentencing options. Local variations were required to reflect jurisdictional arrangements, but some additional variations to the Model WHS Act occurred in four jurisdictions, including South Australia.

South Australia and New South Wales were the only two jurisdictions that varied the Model WHS Act to include a statutory review or, in South Australia's case, reviews of their WHS Act.

In October 2016, the Hon John Rau MP, Minister for Industrial Relations, asked SafeWork SA to undertake the section 277 Review.

In determining the parameters for this review, SafeWork SA noted that an examination of the model WHS laws was conducted by Safe Work Australia in 2014/2015, and amendments arising from that work are still in progress. The Australian Government will also be undertaking a comprehensive review of the Model WHS laws in 2018, which is expected to provide a better overall picture of stakeholders' experience with the WHS laws.

Within this context, and in recognition of South Australia's commitment to nationally harmonised WHS laws, the section 277 Review has focussed on the eight South Australian specific provisions of the WHS Act (SA), and to what extent, if any, have these South Australian specific variations impacted on the overall operation of the WHS laws in this state. While this was a focus, SafeWork SA also invited feedback on the overall operation of the WHS Act (SA) in its entirety.

This is consistent with the New South Wales statutory review that was undertaken in 2016/17, which also just considered the state-specific provisions of its WHS legislation.

It should also be noted that in the five years of operation of the model WHS Act, a number of proposals have been agreed to at a national level to amend the model WHS Act. Where these proposals are implemented, it can result in regulatory burden for persons conducting a business or undertaking, health and safety representatives and workers required to understand and alter systems to comply with new regimes.

Consultation and Findings

On 1 November 2016, SafeWork SA provided a Discussion Paper to targeted stakeholders such as unions, industry associations and representative groups. In response, SafeWork SA received 15 submissions.

The submissions were posted on the SafeWork SA website at the completion of the consultation period, except where confidentiality was requested. The organisations that made submissions to the section 277 review were:

- Australian Hotels Association (SA)
- Australian Industry Group
- Australian Workers Union
- Business SA
- Cement Concrete & Aggregates Australia
- Department of Employment, Australian Government
- Housing Industry Association
- Masters Builders South Australia
- Motor Trade Association of South Australia
- Office for the Public Sector, Government of South Australia
- SA Unions
- Self Insurers of South Australia
- Small Business Commissioner, South Australia
- South Australian Wine Industry Association
- Urban Development Institute of Australia

Stakeholders' views and comments as well as SafeWork SA's findings regarding the eight South Australian specific provisions of the WHS Act (SA) are explored separately and in greater detail in Chapters 1 to 6 of this report. Other issues raised in submissions are considered in Chapter 7.

CHAPTER 1 – MANAGING RISKS

	Model WHS Act	WHS Act (SA)
1	Provides that in managing risks, a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable (s17).	Also provides that a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable, but only to the extent to which they have the capacity to influence and control the matter (s17(2)).

Section 17(2) of the WHS Act (SA) further qualifies the general WHS duty of a duty holder to eliminate or minimise risks to health and safety, so far is reasonably practicable, with a 'control test' that is intended to strengthen the protection from a person being held criminally liable for something they cannot control.

'Reasonably practicable' is defined at section 18 of the WHS Act (SA) without variation from the Model WHS Act. The inclusion of section 17(2) to the WHS Act (SA) effectively extends the definition of 'reasonably practicable' in relation to a duty holder's responsibility to manage risks.

The *Report of the 2014 Review of the South Australian Work Health and Safety Act 2012* (2014 Review) noted that section 17(2) was added during the passage of the WHS Bill (SA) and that it has no counterpart under other versions of the model WHS laws implemented in other jurisdictions.

Submissions from employer groups/industry associations strongly support the retention of section 17(2) with some seeking further amendments to the definition of control.

The HIA said that the term 'control' is not defined and could be interpreted as 'control to any extent'. In its view, the appropriate duty structure that provides for individual responsibility to the extent that the person is in 'actual control' of a certain activity, and that the subsequent liability is apportioned based on the level of control. The HIA submitted this is particularly important in the context of residential construction as a PCBU cannot rely on the knowledge and skill of contractors engaged to undertake a specialist task and for whom the PCBU exercises little or no control over.[2]

MBSA submitted that section 17(2) could be further clarified to recognise a person's ability to 'command, direct and compel'.[3]

SA Unions considers that section 17(2) potentially creates some confusion about the duty to eliminate risks to health and safety, but is not aware of any negative impact with this provision to date.

[2] HIA submission, p.1
[3] MBSA submission, p.4

Safe Work Australia provides guidance material[4] on the issue of control in relation to the meaning of reasonably practicable. This states that control is not explicitly stated in the Model WHS Act's definition of what is reasonably practicable but that the capacity to exercise influence and control over a relevant matter is, however, something which is taken into account when determining what is reasonably practicable.

Overall, there doesn't appear to be any detrimental evidence relating to the operation of section 17(2) of the WHS Act (SA). The 2014 Review stated that the ongoing need for section 17(2) may become clearer as cases are decided in the implementing jurisdictions. SafeWork SA is not aware of any relevant case law to date and no submission to this review cited any relevant cases. Further, no submissions provided any negative empirical evidence regarding the effectiveness of section 17(2).

As such, it is recommended that this provision is retained in its current form.

[4] Safe Work Australia Guide – *How to determine what is reasonably practicable to meet a health and safety duty*, May 2013

CHAPTER 2 – VOLUNTEERS

	Model WHS Act	WHS Act (SA)
2	Section 34 provides prosecution exceptions for: - volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace; (s34(1)) and - unincorporated associations (although unincorporated associations may be PCBUs for the purposes of the Model WHS Act, their failure to comply with a duty or obligation under the WHS Act does not constitute an offence and cannot attract a civil penalty) (s34(2)).	The WHS Act (SA) includes an additional provision to clarify that volunteer officers in mixed residential/commercial strata/community titles corporations will not be liable for a breach of officer duties under the WHS Act (s34 (1)).

The intention of section 34 of the Model WHS Act is to ensure that voluntary participation at an officer level is not discouraged.

The addition of section 34(1) to the WHS Act (SA), with accompanying definition at section 34(5), in relation to volunteer officers in prescribed strata/community titles corporations has been included to avoid any doubt in relation to prosecution exceptions for this type of volunteer.

Submissions from employer groups/industry associations confirm that this provision is merely a clarification but should be retained because any provision that provides further clarity to complex legislation is welcomed.

SA Unions submitted that the additional exemption is obscure and unnecessary and is only clarifying what the Model WHS Act achieves with or without its inclusion.[5]

The existing provisions at section 34 of the Model WHS Act provide certain protections to volunteer officers. Volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace. This means that volunteers are exempt from prosecution as 'officers', including in the situation of mixed residential/commercial strata/community titles.

It should also be noted that strata title bodies corporate of wholly residential strata schemes are exempt from the Model WHS Act and WHS Act (SA) unless they directly employ a worker. Strata title bodies corporate of mixed residential/commercial strata schemes are similarly exempt in relation to common areas of the strata scheme that are used for residential purposes only.

The Safe Work Australia website provides a significant amount of guidance material relating to strata title bodies corporate and their committees, and highlights that volunteer committee members cannot be prosecuted under the WHS laws as officers.[6]

[5] SA Unions submission, Appendix 1, p.1
[6] Safe Work Australia website: *http://www.safeworkaustralia.gov.au/sites/swa/news/pages/tn02082012*

While the additional provision for volunteer officers in prescribed strata/community titles corporations is purely a South Australian variation, it does not fundamentally change the intent of volunteer officer protections. Rather, it provides clarification for one example of a volunteer officer.

In light of this, it is recommended that this provision is retained in its current form.

CHAPTER 3 – HEALTH AND SAFETY REPRESENTATIVES

	Model WHS Act	WHS Act (SA)
3	Provides that a health and safety representative (HSR) can seek assistance from any person whenever necessary in exercising a power or carrying out a function under the legislation. There are no limitations in the Model WHS Act on the types or categories of people from whom assistance can be sought (s68(2)(g)). However, the Model WHS Act now requires that an HSR must give at least 24 hours, but not more than 14 days' notice of an assistant's proposed entry to the PCBU and/or PWMC of the workplace (ss68(3A) and 68(3B)).	As per the Model WHS Act an HSR can seek assistance from any 'person'. However, the WHS Act (SA) provides that 'any person' is limited to: - a person who works at the workplace; - a person who is involved in the management of the relevant business or undertaking; or - a consultant who has been approved as required by the legislation (s68(4) and s68(6)).

The effect of this variation is that the WHS Act (SA) limits who a HSR can request assistance from. Section 68(6) of the WHS Act (SA) defines 'consultant' to be a person who is, by reason of his or her experience or qualifications, suitably qualified to advise on issues relating to work health, safety or welfare.

It should be noted that the Model WHS Act has since been amended so that a person assisting an HSR under section 68(2)(g), that requires access to the workplace to provide the assistance, cannot enter the workplace without the HSR providing the PWMC of the workplace at least 24 hours' notice.

The former SafeWork SA Advisory Council[7] established criterion for the approval of a WHS Consultant for the purposes of section 68(4)(c)(i) of the WHS Act (SA). There are currently 21 approved consultants that are listed on the SafeWork SA website and HSRs are made aware of this.

All submissions from employer groups strongly support the retention of this provision because it ensures that the person from whom the HSR is seeking assistance has a connection with the workplace being entered.

Business SA stated that it is common sense that a person providing assistance is either connected to the workplace or suitably qualified and approved by legislation in order to properly assist.[8]

[7] The SafeWork SA Advisory Council was abolished in 2015. The Industrial Relations Consultative Council was then established as the Minister's primary WHS and industrial relations consultative committee, and is now responsible for the approval of WHS Consultants.
[8] Business SA submission, p.3

The Ai Group noted this is a valuable amendment and is finding in other jurisdictions that the model provisions are being utilised for union organisers to enter a workplace without being bound by the provisions that are placed on union right of entry within WHS laws and the *Fair Work Act 2009* (Cth). Further, the Ai Group indicated that section 68(2)(g) of the model WHS Act will likely be a focus for the 2018 National Review**.**[9]

MBSA submitted that removing this provision would allow union officials to enter sites with no requirement for Commonwealth Fair Work Permits or State-based WHS Entry Permits. MBSA also cited the recent amendments to the Model WHS Act regarding the 24 hour notice requirements and claims this is clear evidence of concerns about areas of overreach or abuse of health and safety laws for union entry on sites. Removing this difference would therefore allow for a divergent approach within South Australia that ignores all available evidence.[10]

SA Unions submitted that the South Australian amendment limits the people and organisations from whom an HSR can request assistance and that it is deliberately intended to frustrate the capacity of an HSR to receive advice from a union, a lawyer or a wide range of specialists. SA Unions suggested it is counter-productive and at odds with the objects of the WHS Act (SA).[11]

On 31 October 2017, the *Work Health and Safety (Representative Assistance) Amendment Bill 2017* was passed in South Australian parliament. It is noted that following the passing of this Bill, section 68(4) and section 68(6) of the WHS Act will be amended to allow for 'any person' to be able to provide assistance to a HSR. This will remove the requirement for the IRCC to approve WHS consultants under the WHS Act. The legislative change will come into operation 3 months after the date on which it is assented to by the Governor.

[9] Ai Group submission, p.3
[10] MBSA submission, p.5
[11] SA Unions submission, Appendix 1, p.1

	Model WHS Act	WHS Act (SA)
4	Provides that an HSR is entitled to five training days in the first year, one in the second and one in the third (Regulation 21).	Provides for an increase in the number of training days for HSRs to five in the first year, three in the second year and two in the third year (s72(9)).

Section 72(9) of the WHS Act (SA) provides additional training days for HSRs (a total of 10 days over three years) compared to the Model WHS Act (7 days over three years). This variation is a compromise between the HSR training day entitlements under the Model WHS Act and the former OHSW Act of 15 days over three years. It should be noted that the 15 HSR training days under the former Act applied to employers who employed more than 20 employees. For employers with less than 20 employees, an HSR could only take such time off work to take part in a course of training as the employer reasonably allowed.

Most submissions from employer groups/industry associations, whilst not in total support of the additional HSR training days provided by section 72(9) of the WHS Act (SA), provided feedback that this provision is not creating any significant issues within their respective industries and is not considered a priority matter for amendment.

However, the MBSA stated that the current South Australian provisions place business owners at a relative cost disadvantage to their national competitors and, as a matter of productivity and competitive equality, recommends the immediate adoption of the national model.[12] Similarly, the HIA submitted that the South Australian provisions created an unreasonable cost impost on PCBUs and should be deleted in their entirety.[13]

SA Unions reinforced that the WHS Act (SA) provisions are still a reduction on the previous entitlement and should be maintained[14], whilst the AWU would like a return to five training days per year given that today's subject matter extends beyond the traditional Level 1, 2 and 3 training.[15]

The OPS stated that agencies had not reported any issues with HSR training entitlements but the necessity for a re-elected HSR to receive the same training entitlement as a newly elected HSR (particularly in the first year of their re-election) was questioned, and that consideration should be given to streamlining this entitlement.[16]

This issue of training entitlements for re-elected HSRs was raised in the 2014 Review with an option for the possible reduction in HSR training days for a person who is re-elected as a HSR in relation to the same work group without a break in holding the position and if no material change in the work or working environment.

[12] MBSA submission, p.6
[13] HIA submission p.3
[14] SA Unions submission, Appendix 1, p.2
[15] AWU submission
[16] OPS submission

In February 2016, SafeWork SA undertook a communication survey to measure the effectiveness and reach of the agency's existing customer service and outreach. Among others, the survey was distributed to 3492 HSRs and included questions relating to HSR training. A total of 606 HSRs participated in the survey (approximately 17%) and 248 (41%) had undertaken their full first year HSR training entitlement of five days, 169 (28%) had undertaken their three day entitlement in the second year, and 154 (25%) had undertaken their two day entitlement in the third year. If re-elected at the completion of their current three-year term, 77% said that they would intend using their full 10 day entitlement in the next term. Importantly, 85% of respondents stated that their PCBU supports their entitlement to HSR training

This data shows that many HSRs are not utilising their full training entitlement, however there is still a reasonable proportion that do and a large proportion that at least intend to use their full entitlement if re-elected. With most stating they receive PCBU support with HSR training, this would indicate that many HSRs are either selective or satisfied with their training needs without using their full 10 day entitlement over three years. Therefore many employers are not necessarily being subjected to an additional cost impost compared to jurisdictions with a 7 day training entitlement over three years.

It is generally accepted that the training of HSRs is critical to their ability to perform their functions as representatives of the health and safety interests of their fellow workers. In the short term, there does not appear to be any basis to implement any further departure from South Australia's previous HSR training entitlement. It is therefore recommended that this provision is retained in its current form.

CHAPTER 4 – ENTRY PERMIT HOLDERS

	Model WHS Act	WHS Act (SA)
5	Allows for a WHS EPH to enter a workplace to inquire into a suspected WHS contravention, where the contravention is in relation to a 'relevant worker'. The EPH must reasonably suspect a contravention is occurring or has occurred when entering for this purpose. (s117). Prior to recent changes, the Model WHS Act provided that an EPH was not required to give notice before entering a workplace. However, amendments to the Model WHS Act now require an EPH to provide a minimum of 24 hours' and a maximum of 14 days' notice to the relevant PCBU and the PWMC of the workplace before entry takes place (s117(5)).	The WHS Act (SA) includes certain policies and procedures relevant to when an EPH seeks to exercise a right of entry to inquire into suspected contraventions of the WHS Act (s117). This includes providing that EPHs must give consideration as to whether it is reasonably practicable to notify the regulator prior to entry in order to provide an opportunity for an inspector to attend at the workplace at the time of entry (s117(3)). However, if the EPH is not accompanied by an inspector, they must furnish a report on the outcome of his or her inquiries at the workplace to the regulator, in accordance with the WHS Regulations, after the entry has occurred (s117(6)).

Section 117 of the WHS Act (SA) contains certain policies and procedures relevant to when an EPH seeks to exercise a right of entry to inquire into suspected contraventions of the Act.

Section 119 of the WHS Act (SA) and Regulation 27 of the WHS Regulations (SA) also has an important connection to section 117. Section 119 requires an EPH, as soon as reasonably practicable after entering a workplace to inquire into a suspected contravention of the Act, to give notice to the PCBU, including of any suspected contravention. Additionally, Regulation 27(b)(iii) of the WHS Regulations (SA) requires the notice to specify the section of the Act under which the WHS entry permit holder is entering or proposing to enter the workplace.

As noted in the above table, section 117 of the Model WHS Act, now includes a minimum 24 hours' notification requirement in relation to EPHs. Further, even in the case where a union believes that there is a serious risk to health and safety arising from an immediate or imminent exposure to a hazard at the workplace, an EPH can only enter the workplace once the union has been issued with an exemption certificate by the regulator. The EPH must also give a copy of this certificate to the PCBU and the PWMC of the workplace within specified time frames.

To date, no jurisdiction has adopted the amendments to section 117 of the Model WHS Act.[17] This could suggest further divergence from the Model Act is growing. However, employer and industry groups were predominantly consistent in their view that the model amendments should be implemented in South Australia.

[17] *http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/pages/jurisdictional-progress-whs-laws*

MBSA submitted that it is a clear failing of policy where the WHS Act (SA) does not require the permit holder to notify the workplace at first instance under section 117. It reasoned that such notice allows those responsible in the workplace to prioritise resources to ensure those with the power to make change are fully focussed on the issue being raised.[18]

Business SA and MBSA were particularly concerned that in light of the lack of requirement to give prior notice to PCBUs about a proposed entry, EPHs are manipulating the power to enter a workplace under section 117, so that they can also conduct a site visit under Division 3 of the Act. MBSA suggests an immediate amendment to section 117 to specifically exclude the use of powers conferred under sections 121 and section 122 under any entry empowered by section 117. Further, MBSA submits that entries by permit holders should require the attendance of a PCBU and there should be greater transparency to protect against abuse of the permit system. As such, MBSA suggested that details of all entries should be published by the regulator in a timely manner together with the outcome of those entries.[19]

MBSA also highlighted that the Model WHS Act was amended in March 2016 to increase penalties for contravention of entry permits. Given the importance of the rights and responsibilities attached to these permits, MBSA recommends the immediate adoption of increased penalties for any abuse of permit conditions.[20]

The HIA chose to comment on the operation of section 119 of the WHS Act (SA). It recommended that the EPH be required to give written notice of the suspected contravention upon entering a workplace and prior to exercising any other powers. As such, it recommended removing the as soon as reasonably practicable notice qualification in section 119.[21]

The MBSA[22] and the HIA[23] also submitted that regarding Regulation 28 of the WHS Regulations (SA) - which clarifies the contents of the notice provided by the EPH to SafeWork SA under section 117 of the WHS Act (SA) - it is always reasonably practicable for the EPH to provide particulars of the contravention to which the notice relates to SafeWork SA. As such, they recommend removing the words 'reasonably practicable' in Regulation 28(1)(b)(v).

SAWIA suggested that if the model provisions are adopted (which they believe should be the case) then section 117(6) of the WHS Act (SA) can be deleted. In the alternative, it argued, if the requirement for an EPH to provide a report of the outcome of his or her inquiries at the workplace to the regulator is retained, the report should only be made available to the regulator and not be a matter of public record.[24]

[18] MBSA submission, p.7
[19] MBSA submission, p.10
[20] MBSA submission, p. 13
[21] HIA submission, p.3
[22] MBSA submission, p.8
[23] HIA submission, p.3
[24] SAWIA submission, Attachment A, p.3

The Ai Group emphasised the need for SafeWork SA to undertake an analysis and evaluation of entry activity, covering when entries are undertaken and for what reasons. Consistent with its views on this matter, the Ai Group noted that in respect of the Model WHS Act provision the jurisdictions have not adopted this approach within their legislation.[25] Additionally, the Ai Group noted that there is less disputation about union right of entry under SA laws than in other jurisdictions.[26] This appears to be supported by information provided by the Industrial Relations Court of South Australia that, to date, no WHS entry permit disputes have been lodged with it.

SA Unions said that the Model WHS Act and the WHS Act (SA) hamper the capacity of an EPH to act expeditiously when enquiring into suspected contraventions of the Act. It added that improving compliance with the Act by allowing easier workplace entry by WHS entry permit holders is integral to meeting objects 3 (1) (a) (c) (e) and (f) of the WHS Act (SA).[27]

As previously mentioned section 119 of the WHS Act requires an EPH to give notice upon entry to the PCBU, as soon as reasonably practicable, including of the suspected contravention. Additionally, regulation 27(b)(iii) requires the notice to specify the section of the Act under which the WHS entry permit holder is entering or proposing to enter the workplace.

In SafeWork SA's experience, the EPHs have notified the PCBUs at the time of entry onto the premises.

Regarding MBSA's suggestion to adopt the Model WHS Act amendment to increase penalties for contraventions of entry permits, it should be noted that no jurisdiction has yet implemented this approach. Again, this is a divergence from the Model WHS Act.

Given the differing opinions on the effectiveness of section 117 of the WHS Act (SA), the lack of empirical evidence to support these opinions, it is recommended that section 117 of the WHS Act (SA) is retained in its current form.

[25] Ai Group submission, p.4
[26] Ibid
[27] SA Unions submission, Appendix 1, p.2

	Model WHS Act	WHS Act (SA)
6	Provides that for the purposes of an inquiry into a suspected contravention, an EPH may enter any workplace for the purpose of inspecting, or making copies of: - employee records that are directly relevant to a suspected contravention; or - other documents that are directly relevant to a suspected contravention and that are not held by the relevant PCBU. Before doing so, the EPH must give notice of the proposed entry to the person from whom the documents are requested and the relevant PCBU. This notice must be given during usual working hours at least 24 hours, but not more than 14 days, before the entry (s120).	As per the Model WHS Act, an EPH can enter a workplace for the purpose of inspecting or making copies of employee records and other documents directly relevant to a suspected contravention. However, the WHS Act (SA) provides that the right of an EPH to require copies of a document is subject to any direction that may be given by an inspector. This may include a direction that copies of a document not be required to be made and provided to the EPH (s120(6)).

Both the WHS Act (SA) and the Model WHS Act essentially allows an EPH, who is entering a workplace to inquire into a suspected contravention, to inspect or make copies of employee records or other documents, which are held or accessible at the workplace and are related to the contravention. However, the WHS Act (SA) and the Model WHS Act differ in relation to the safeguards that they provide in relation to the copying of relevant documents. Specifically, the WHS Act (SA) provides a protection against improper use of section 120 of the WHS Act (SA) by providing that an inspector may give a direction that a document is not required to be provided to an EPH.

Employers and industry group submissions were consistently supportive of section 120 of the WHS Act (SA), including retaining section 120 (6). Section 120(6) was seen as a necessary amendment that prevented misuse of employee information by EPHs and ensures privacy is not breached.

SAWIA noted that the variation is designed to protect the privacy of persons whose records might otherwise be accessed for purposes unrelated to the suspected contravention.[28]

Business SA submitted that it is an essential variation that protects the privacy of workers and workplaces. It added that any access to personal information should be closely monitored by SafeWork SA to ensure that privacy breaches do not occur.[29]

SISA argued that this is a common-sense variation designed to protect the privacy of persons whose records might otherwise be accessed for purposes unrelated to the suspected contravention. An example of this might be the collection of personal details of workers for the purposes of identifying non-union workers. [30]

However, some submissions suggested that despite section 120(6), EPHs were still misusing section 120 to collect information for purposes other than as outlined in this section. For example, the HIA

[28] SAWIA submission, Attachment A, p.4
[29] Business SA submission, p.4
[30] SISA submission, Attachment 1, p.4

submitted that its members have reported that EPHs are misusing this provision to collect information for industrial purposes.[31] MBSA similarly commented that this power is being abused to provide a means of collecting documents for use in industrial matters. Further, the MBSA suggested that consideration be given to introducing a caveat to section 120 that limits the use of such documents copied or obtained to matters concerning the specific breach - in short, they should not be used in bargaining ploys.[32]

Conversely, both the AWU[33] and SA Unions prefer the model WHS Act provision as they argue that it does not appear to restrict relevant information from being released. SA Unions argued that section 120(6) of the WHS Act (SA) is a waste of inspectorial time.[34]

SafeWork SA inspectors have not reported any issues with the operation of section 120(6).

Regarding the issue raised by some employers groups about EPHs still misusing section 120 to collect information for purposes other than outlined in section 120, it should be noted that under Section 141, if a dispute arises about the exercise or purported exercise by a WHS entry permit holder of right of entry under this Act, any party to the dispute may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute.

As SafeWork SA has not reported any issues and no submissions have included empirical evidence to support changing this provision, it is recommended that section 120 is retained in its current form.

[31] HIA submission, p.3
[32] MBSA submission, p.11
[33] AWU submission
[34] SA Unions submission, Appendix 1, p.3

CHAPTER 5 – SELF-INCRIMINATION

	Model WHS Act	WHS Act (SA)
7	The Model WHS Act does not provide protection against self-incrimination (s172) but instead provides for use immunity.	The WHS Act (SA) provides for a protection against self-incrimination (section 172, WHS Act). The provision states that a person must answer questions or produce information or documents unless to do so would tend to incriminate or expose them to an offence.

Part 9 of the WHS Act (SA) provides for the appointment of inspectors and gives them powers of entry to workplaces and powers of entry to any place under a search warrant issued under the Act.

However, section 172 of the WHS Act (SA) excuses an individual from answering a question or providing information or a document under Part 9 on the ground that the answer or the information or document may tend to incriminate the individual or expose the individual to a penalty – the protection against self-incrimination.

Section 172 modified the Model WHS Act's power of inspectors to compel a person to answer questions and produce documents with no privilege against self-incrimination. The Model WHS Act gives an individual 'use immunity' - that is, an 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.

Every WHS jurisdiction apart from South Australia has adopted the Model WHS Act provision.

Employers and industry group submissions were largely supportive of maintaining the privilege against self-incrimination, on the basis that it's been an important, long entrenched principle of the criminal law system.

The MBSA argued that the provision should only be amended if there can be a compelling case that a more significant negative outcome can be avoided, citing that 'any change to the right against self-incrimination – otherwise known as the right to silence – should be made only where such a change is proven as absolutely necessary to prevent a greater evil'.[35]

The HIA views the provision as an important safeguard against what it believes are broad powers under the WHS Act (SA) to investigate and compel the answering of questions of the PCBU and other parties, and importantly the significant penalties that can attach to individuals. The HIA said that it is important to maintain protection for all natural persons including Directors, particularly PCBUs. [36]

The Department of Employment submitted that the protection against self-incrimination is capable of limiting the information that may be available to inspectors or regulators, which may undermine

[35] MBSA submission, p.11
[36] HIA submission, p.3

the ability of an inspector to respond to an immediate threat to health and safety in a timely manner and the ability of a regulator to investigate health and safety incidents.[37] It also noted that the National Review into the Model OHS laws considered this matter at length and that it agrees with the Review's recommendation that the importance of securing health and safety justifies requiring a person to answer questions and that a person should not be entitled to rely on a privilege against self-incrimination. Further, the Department considers that the use immunity on information provided gives adequate protection to the rights of individuals.[38]

SA Unions submitted that the operation of section 172 highlights the double standard in industrial relations and WHS legislation in the treatment of employers and workers. It argued that if a worker is killed or seriously injured employers may be offered either immunity (under the Model WHS Act) or can refuse to answer questions or produce information if it would tend to incriminate or expose them to an offence (WHS Act (SA)). Additionally SA Unions submitted that conversely, if a worker stops work over a perceived safety issue that may save a life they may be exposed to penalties and will be denied a right of silence.[39]

There are clearly divergent views about the merits of section 172, and whether it achieves an appropriate balance between the regulator obtaining necessary information and the rights of persons being protected under criminal law.

It is therefore recommended that section 172 of the WHS Act (SA) is retained in its current form. However, given that every other jurisdiction has adopted the use immunity provision, it should be monitored in these jurisdictions, with particular reference to how it has contributed to the success of WHS prosecutions.

[37] Australian Government - Department of Employment submission, para. 24
[38] Ibid at para. 25
[39] SA Unions submission, Appendix 1, p.3-4

CHAPTER 6 – CODES OF PRACTICE

	Model WHS Act	WHS Act (SA)
8	Provides that the Minister may approve a COP for the purposes of the Act and may vary or revoke an approved COP (s274(1)). However, the Minister may only approve, vary or revoke a COP if it was developed by a process that involves consultation between the Governments of the Commonwealth and each State and Territory, unions, and employer organisations (s274(2)). An approval of a COP, or a variation or revocation of an approved COP, takes effect when notice of it is published in the Government Gazette, or on date specified in the approval, variation or revocation (s274(4)).	As per the Model WHS Act, the Minister may approve a COP for the purposes of the Act and may vary or revoke an approved COP. However, the WHS Act (SA) includes additional requirements in relation to approved COPs. These include: - a requirement that the Industrial Relations Consultative Council recommend to the Minister approval of a COP made under the WHS Act (s274(2)); and - a requirement for the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister (s274(3)); - a requirement that COPs be subject to disallowance by Parliament (s274(8)).

Under section 274 (1) of the WHS Act (SA) and the Model WHS Act, the Minister may approve a COP for the purposes of the Act and may vary or revoke an approved COP.

However, the WHS Act (sections 274(2) and (3)) and the Model WHS Act (section 274(2)) each have their own mandated consultation processes. Additionally, unlike COPs under the Model WHS Act, COPs under the WHS Act (SA) are subject to final vetting by State Parliament (sections 274(8-11)).

Section 274 of the Model WHS Act has been adopted by every jurisdiction apart from South Australia.

Currently twenty one nationally developed COPs are in place in South Australia under the WHS Act (SA). They are listed on the "Codes of Practice" section of the SafeWork SA website.

Another three nationally developed COPs have been disallowed in South Australia, namely:

- Construction work
- Prevention of falls in the housing construction
- Safe design of structures

Employers and industry group submissions were consistent in their support of the extensive review process for the approval, varying and revoking of approved COPs under the WHS Act (SA).

The AHA, in supporting the process, noted that the process was considered important at the commencement of the legislation due to the significant variation of the nature of businesses and

employees, who would be covered by the codes, i.e. small businesses, less than 15 employees to large national businesses. [40]

Further to this theme, employer groups supported the role of the OSBC, in scrutinising COPs from a small business perspective, for issues such as ease of compliance. The over-riding message from these submissions was that without checks and balances like those provided by the OSBC, COPs run the risk of being complex, technical documents that aren't easy to distill for small businesses. HIA observed that it is important to maintain the OSBC as an "independent review" of all COPs and their impact on the ability (practically and financially) of small business to be compliant.[41]

More broadly, SISA sees the South Australian stage of the review process as filters on the making of COPs, ensuring that when COPs are published, they are fit for purpose and of real value.[42]

Business SA also noted that as COPs are admissible as evidence, it is essential that a vigorous approval process is undertaken.[43]

The Ai Group observed that when COPs have been referred to the Small Business Commissioner, a consultation process has been initiated to seek input from small business. They noted that whilst this is not a requirement of the Act, it has allowed for consultation to occur on the issues that are of particular importance to small business.[44]

The MBSA whilst being in favour of the additional consultative elements of section 274 of the WHS Act recommends that the scope of the consultation should be expanded even further. The MBSA suggests that section 274(2) of the WHS Act (SA) should also specifically refer to South Australian representatives to ensure consultation considers the impact on State-based businesses. The MBSA also submitted in regards to section 274(2), the Minister for Industrial Relations should consider broadening membership of the Industrial Relations Consultative Council given its current lack of building and construction experience. Additionally, the MBSA recommends that, given the Small Business Commissioner has no duty to consult individually, section 274(3) of the Act be amended to specifically empower that person to publicly consult on changes to ensure the impact on small businesses is adequately considered and to publish its findings.[45]

Whilst there was strong support for section 274 from employer groups, SA Unions opposed this provision. SA Unions argued that these provisions frustrate the making of COPs that are nationally consistent. It also suggested that it seems wrong in principle that the Industrial Relations Consultative Council (an advisory body to the Minister) can veto the making of a COP by the Minister. Further SA Unions noted that no other state or territory, or the Commonwealth, sees the need to consult with a Commissioner for Small Business on the approval of COPs. [46]

[40] AHA submission, Attachment, p.7
[41] HIA submission, p.4
[42] SISA submission, Attachment 1, p.5
[43] Business SA submission, p.5
[44] Ai Group submission, p.6
[45] MBSA submission, p.12
[46] SA Unions submission, Appendix 1, p.4

The OSBC indicated that from his perspective, the WHS Act (SA) seems to be operating smoothly – albeit the degree of regulation associated with the Act continues to be too cumbersome and too complex for small business to readily cope with.[47]

It is recommended that section 274 of the WHS Act (SA) is retained in its current form. This is in light of the likelihood that section 274 of the Model WHS Act will be reviewed as part of the National Review, including the obtaining of valuable feedback from other jurisdictions regarding the effectiveness of this section.

[47] HIA submission, p.2

CHAPTER 7 – OTHER ISSUES

CONSTRUCTION PROJECT THRESHOLD

Regulation 292 of the WHS Regulations (SA) defines a 'construction project' as a project that involves construction work where the cost of construction work is $450,000 or more.

The significance of defining construction work as a 'construction project' is that additional WHS requirements become mandatory. This includes requirements for a principal contractor to be appointed to manage and control the work site, including providing specific facilities; a WHS management plan, which sets out the arrangements to manage WHS on a construction project; and installing relevant signage. The objective of the principal contractor requirement is to ensure coordination of activities on larger construction sites where there are a number of PCBUs working at the same time carrying out different tasks with an increasing level of risk.

The threshold amount was raised in South Australia from $250,000 (the threshold contained in the Model WHS Regulations, and which has been adopted in all other harmonised jurisdictions, except for the Northern Territory) to $450,000 following an amendment to the WHS Regulations (SA) in July 2015. The practical effect of this amendment was to exclude the majority of low-risk residential housing projects from the additional WHS obligations imposed on a construction project.

Some submissions to the Review made observations in relation to South Australia's construction project threshold. The MBSA commented that it received conflicting feedback from its members around the monetary definition of a 'construction project' and made no immediate recommendations regarding this matter, instead citing that MBSA would seek further detailed feedback before providing advice to SafeWork SA.[48]

The HIA submission noted that given that it will be some time before the WHS Act (SA) and the WHS Regulations (SA) are reviewed again, the threshold dollar value of a construction project should be raised from $450,000 to $500,000 and indexed according to CPI. In particular, the HIA noted that '*this dollar value would be consistent with the value set in the Northern Territory and it also recognises the escalating compliance costs, materials and specialist labour as well as the increased costs of purchasing house and land packages.*'[49] The HIA's submission was supported by the UDIA.

However, while the Northern Territory's construction project threshold is greater, in relative terms, South Australia has the highest construction threshold as compared to those jurisdictions that have adopted the Model WHS laws, given that construction costs in the Northern Territory are at least 15% higher than South Australia.[50]

[48] MBSA submission, p.14
[49] HIA submission, p.5
[50] See for example: Australian Bureau of Statistics, Australian Government, 2012, *Building Activity: Australia, June 2012*; BMT Quantity Surveyors Regional Variations Table: www.bmtqs.com.au/construction-cost-table.

In light of the submissions received and the ambiguity surrounding an appropriate threshold amount, it is recommended that that the current 'construction project' definition is retained; but that SafeWork SA, continue to regularly monitor, through engagement with industry, whether the requirements it triggers are proportionate to the risks that the regulation is seeking to address.

SAFE WORK METHOD STATEMENTS

A Safe Work Method Statement (SWMS) is a document that sets out the high risk construction work activities to be carried out at a workplace, the hazards arising from these activities and the measures to be put in place to control the risks.

The primary purpose of a SWMS is to help supervisors, workers and any other persons at the workplace to understand the requirements that have been established to carry out high risk construction work in a safe and healthy manner. Regulation 291 of the WHS Regulations (SA) outlines the types of work that are classified as high risk construction work. This is consistent with the Model WHS Regulations.

The HIA submission raised a number of issues in relation to SWMS noting that in HIA's experience many jurisdictions have identified difficulties for principal contractors to ensure that SWMS are completed, followed and understood by subcontractors.[51]

To address this issue, the HIA submits that the focus of responsibility for a SWMS should be on the relevant PCBU performing the work, given that these are the persons with actual control over the method of work, rather than on the principal contractor.[52]

To clarify, the WHS Regulations (SA) currently provide for the following requirements in relation to SWMS:[53]

- a PCBU carrying out high risk construction work must ensure that a SWMS for the proposed work is prepared (or has already been prepared by another person) before any such work starts[54], and provide a copy of the SWMS to the principal contractor[55];
- a PCBU carrying out high risk construction work must put in place arrangements for ensuring that the high risk construction work is carried out in accordance with the SWMS[56]; and
- the principal contractor for a construction project must take all reasonable steps to obtain a copy of the SWMS relating to high risk construction work before the work starts[57].

[51] HIA submission, p.4
[52] Ibid
[53] The South Australian provisions are consistent with the Model WHS Regulations.
[54] Regulation 299, WHS Regulations (SA)
[55] Regulation 301, WHS Regulations (SA)
[56] Regulation 300, WHS Regulations (SA)
[57] Regulation 312, WHS Regulations (SA)

This arrangement essentially places the primary responsibility to prepare a SWMS and ensure that it is implemented on the PCBU performing the high risk construction work. The principal contractor's duty only requires that the principal contractor takes all reasonable steps to obtain a copy of the SWMS prior to the high risk construction work commencing. This aligns with the HIA's position that the focus of the responsibility should be on the relevant PCBU.

However, it is noted that the nature of construction work does mean that there are often multiple PCBUs, all of whom may owe one or more WHS duties. Duties are non-transferable, which means that more than one PCBU can have the same duty. Where duties overlap, each PCBU must discharge the duty to the extent that the person has the capacity to influence and control the matter. Determining which person or persons have the capacity to influence and control the work depends on the circumstances at the time.

It is recommended that current arrangements relating to Safe Work Method Statements are retained.

INCIDENT NOTIFICATION

Section 38 of the WHS Act (SA) requires a PCBU to notify the regulator of fatalities, serious injuries and illnesses, as well as dangerous incidents that arise, as soon as they become aware of the incident. The incident notification provisions also trigger an obligation to preserve the incident site and aim to capture events that are of a nature and significance to require the attention of the regulator[58].

Part 3 of the WHS Act (SA) defines the terms 'notifiable incident'[59], 'serious injury or illness'[60] and 'dangerous incident'[61] to clarify when incident notification is required.

The OPS submission, which provided a consolidated response on behalf of public sector agencies, noted that in relation to incident notification there could be increased clarity around what is notifiable to the Regulator. Examples were provided concerning the definition of 'serious injuries'; what would be considered a 'spinal injury' and the boundary between 'controlled' and 'uncontrolled' dangerous incident exposures.[62]

SafeWork SA acknowledges that injury thresholds, when applying the incident notification requirements, can at times be difficult to interpret. This issue has been raised at the national level, and in response Safe Work Australia (SWA) updated its incident notification fact sheet to provide greater assistance to PCBUs in deciding whether the regulator needs to be notified of a work-related injury, illness or dangerous incident. A key aim was to ensure that incident notification requirements are sufficiently clear to avoid under or over reporting of incidents. This guidance material is available on the SWA website (www.safeworkaustralia.gov.au).

[58] Section 39, WHS Act (SA)
[59] Section 35, WHS Act (SA)
[60] Section 36, WHS Act (SA)
[61] Section 37, WHS Act (SA)
[62] OPS submission

OPS also submitted that there should be stipulation of who, other than SafeWork SA, are 'regulators' for notification of incidents[63]. For example, relevant notification requirements, in addition to those required under WHS laws, can include notification to the Australian Children's Education and Care Quality Authority, where incidents involve approved providers of education and care services, and the Office for the Technical Regulator, if the incident is related to an electric shock, gas infrastructure, or gas fitting. While this information is provided on the Notifiable Incident Report Form (available on the SafeWork SA website) it may also be beneficial to list it in the general website guidance material for notifiable incidents.

In light of the feedback from the OPS, that identifies a clear need for further clarity around incident notification requirements, it is recommended that SafeWork SA review the guidance material on its website and update it to further explain when a PCBU is required to notify the regulator of an incident. Additionally, it is recommended that SafeWork SA review and updates its website to provide information/links to other regulators that may need to be notified in particular circumstances.

PROVISIONAL IMPROVEMENT NOTICES AND HEALTH AND SAFETY REPRESENTATIVES

A PIN is a written notice issued by an HSR that requires a WHS contravention, or likely contravention, to be remedied within a certain period. An HSR can issue a PIN if they reasonably believe a person is contravening a WHS law[64]. A PIN must state which provision is considered to have been contravened, how it has been contravened, and the date by which the contravention must be remedied. In South Australia, under section 93 of the WHS Act (SA), a PIN can include directions on how to remedy a contravention, including through reference to a Code of Practice and offering the person a choice of remedial options.

The affected person or PCBU issued with a PIN can ask the regulator to have the notice reviewed by an inspector[65]. If a request is made to review the PIN it ceases to have effect until the inspector makes a decision on the review[66]. The inspector must either confirm the PIN, with or without changes, or cancel it[67]. A confirmed PIN becomes an improvement notice issued by the inspector under the WHS Act (SA) and must be complied with.

While the model WHS laws also provide that an HSR can issue a PIN, in March 2016, in response to the recommendations contained in the Australian Government's *Decision Regulation Impact Statement – Improving the model Work Health and Safety Laws,* section 93 of the Model WHS Act was amended to provide that where an HSR issues a PIN it may now include 'recommendations' rather than 'directions' to remedy a contravention. The model provision now also provides that it is not an offence to fail to comply with recommendations in a notice.

[63] Ibid
[64] Section 90, WHS Act (SA)
[65] Section 100, WHS Act (SA)
[66] Section 100(2), WHS Act (SA)
[67] Section 102, WHS Act (SA)

The MBSA submitted that South Australia should immediately adopt the model WHS laws that allow HSRs to issue 'recommendations', rather than 'directions'.[68] In particular, the MBSA raised concerns about the lack of safety qualifications among HSRs, and that 'South Australian representatives issue 'directions' which may result in penalties for an offence, whereas model counterparts issue 'recommendations' without the power of criminal and civil sanctions'.[69]

At this stage, none of the jurisdictions that have adopted the model WHS laws have implemented this change. PINs are an important tool in promoting safety and ensuring compliance in the workplace. In particular, the ability for HSRs to issue PINs allows workplaces to address safety issues without third party intervention. It is noted that HSRs are required to have completed training before they are able to issue PINs and may be disqualified from office for misuse of power, which provides a safeguard against improper use of PINs. In addition, before issuing a PIN an HSR must first consult with the person who is to receive the proposed notice, with a PIN only being able to be issued if the consultation does not result in the contravention being addressed.

Consequently, South Australia has chosen not to adopt this approach on the grounds that it would diminish both the powers that HSRs have in issuing PINs and the safety mechanism that PINs provide in the workplace.

FIRST AID REQUIREMENTS

Regulation 42 of the WHS Regulations (SA) places specific obligations on a PCBU in relation to first aid, including requirements to:

- provide first aid equipment and ensure each worker at the workplace has access to the equipment ensure access to facilities for the administration of first aid; and
- ensure that an adequate number of workers are trained to administer first aid at the workplace or that workers have access to an adequate number of other people who have been trained to administer first aid.

The MBSA submission sought clarification with regards to the provisions under the WHS Regulations (SA) relating to first aid training and supplies. In particular, the MBSA raised concerns about circumstances where a person undertaking work alone on site would need to be both first-aid trained and require a current certificate to comply with the WHS requirements[70]. The submission noted that this would impact on all sectors where employees or contractors may work alone.

To address the issue, the MBSA suggested that regulation 42 be amended to include the term 'where reasonably practicable', highlighting that this reinforces the approach taken by the Approved Code of Practice for First Aid which requires that a risk assessment be carried out.[71]

[68] MBSA submission, p.13
[69] Ibid
[70] MBSA submission, p.14
[71] Ibid

In response to the MBSA's suggestions, SafeWork SA has updated the guidance material on the SafeWork SA website to provide examples and clarify first aid responsibilities for duty holders. In particular, it has been highlighted that in circumstances where a PCBU shares a workplace or building with other businesses, a PCBU can consult with other business operators to coordinate and provide shared access to training, first aiders, and first aid equipment and facilities for their workers. This will satisfy the first aid requirements.

It is recommended that SafeWork SA should continue to engage with stakeholders to ensure that educational material provides clear and practical guidance on WHS issues of interest.

MINING INDUSTRY

CCAA raised a number of issues in its submission about how the requirements under Chapter 10 of the WHS Regulations (SA) apply to the extractive industry. In particular, the CCAA submission highlighted issues surrounding the need to apply the principle of proportionality to Principal Mining Hazards; reporting and Emergency Plan requirements; Health Monitoring Reports; the National Mine Safety Database. [72]

SafeWork SA acknowledges the comments made by CCAA and will seek to engage directly with CCAA and other stakeholders, to review how effectively Chapter 10 of the WHS Regulations is operating for the extractive industry.

As such, it is recommended SafeWork SA should engage directly with CCAA, and other stakeholders, to review how effectively Chapter 10 of the WHS Regulations is operating for the extractive industry.

[72] CCAA submission