

South Australia

Occupational Health, Safety and Welfare (Miscellaneous) Amendment Bill 2009

A BILL FOR

An Act to amend the *Occupational Health, Safety and Welfare Act 1986*; and to make a consequential amendment to the *Criminal Law (Sentencing) Act 1988*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Occupational Health, Safety and Welfare (Miscellaneous) Amendment Act 2009*.

5 **2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

10 **Part 2—Amendment of *Occupational Health, Safety and Welfare Act 1986***

4—Amendment of section 4—Interpretation

Section 4(1), definition of *inspector*—delete the definition and substitute:

inspector means—

- 15 (a) an inspector of mines under the *Mines and Works Inspection Act 1920*;
- (b) an authorised officer under the *Petroleum Act 2000*;
- (c) an inspector under the *Petroleum (Submerged Lands) Act 1982*;
- (d) an inspector under the *Offshore Minerals Act 2000*;
- 20 (e) a public service employee authorised by the Minister to exercise the powers of an inspector under this Act;

5—Amendment of section 6—Non-derogation

Section 6—after subsection (2) insert:

- 25 (3) To avoid doubt, the functions and powers of an inspector under this Act may be performed or exercised in relation to a workplace even if another Act also provides for the performance or exercise of functions or powers in relation to the same place by other persons appointed or authorised by or under that or any other Act.

6—Amendment of section 31A—Training of health and safety representatives, deputies and committee members

Section 31A(2)(a)(i)—delete "20" and substitute:

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5 **7—Insertion of Part 5A**

After Part 5 insert:

Part 5A—Right of entry

Division 1—Preliminary

38A—Preliminary

10 (1) In this Part—

authorised representative means a representative of a registered association (including a person who is concerned in, or takes part in, the management of the association) who holds a permit issued under section 38D;

15 *Industrial Registrar* means the person holding or acting in the office of Industrial Registrar under the *Fair Work Act 1994*;

prescribed document means a document—

- 20 (a) required to be kept by an employer under this Act; or
(b) relating to the health, safety and welfare of employees of an employer.

(2) For the purposes of paragraph (b) of the definition of a *prescribed document*, where a document contains information regarding the health of an employee, that information must not be disclosed under this Part without the consent of the employee.

25 (3) For the purposes of this Part, consultation involves the sharing of information (including prescribed documents), the exchange of views between employers and the persons or bodies that must be consulted and the genuine opportunity for them to contribute effectively to any decision-making process to eliminate or control risks to health or
30 safety.

Division 2—Right of entry

38B—Right of entry

35 (1) An authorised representative may enter a workplace for the purposes of viewing the workplace and engaging in consultation, if an employee at the workplace is a member, or is eligible to become a member, of the registered association that the authorised representative represents.

- 5
- (2) An authorised representative may engage in consultation under subsection (1) with—
- (a) an employer or occupier at the workplace; or
 - (b) any employee at the workplace who—
 - (i) is willing to take part in consultation; and
 - (ii) —
 - (A) is a member, or is eligible to become a member, of the registered association that the authorised representative represents; or
 - 10 (B) has been assigned duties in the workplace relevant to occupational health, safety and welfare (including a health and safety representative and occupational health, safety and welfare officers); or
 - 15 (C) performs duties relevant to the health and safety of an employee who is a member, or is eligible to become a member, of the registered association that the authorised representative represents.
- 20
- (3) The authorised representative may only enter a workplace during working hours and, insofar as is reasonably practicable, should consult with an employee during his or her mealtime or other break.
- (4) Entry to a workplace is not authorised unless an authorised representative has given reasonable notice to the employer.
- 25
- (5) For the purposes of subsection (4)—
- (a) the notice must be given in writing; and
 - (b) a period of 24 hours notice will be taken to be reasonable unless some other period is reasonable in the circumstances of the particular case.
- 30
- (6) While at a workplace, an authorised representative may inspect, and make copies of, any prescribed document that—
- (a) is kept at the workplace; or
 - (b) is accessible from a computer that is kept at the workplace.
- 35
- (7) An authorised representative must not exercise the right under subsection (6) unless—
- (a) the representative has given the employer a written notice setting out the representative's intention to exercise the right, and reasons for doing so; and
 - (b) the notice is given at least 24 hours before exercising the right.
- 40

(8) The authorised representative may, by written notice, require an employer to produce, or provide access to, prescribed documents that are kept elsewhere than at the workplace.

(9) A person to whom a notice under subsection (8) has been given must produce the documents to the authorised representative no later than 48 hours after the time at which the notice under subsection (7) was given.

Penalty: Division 6 fine.

(10) An employer is not required to provide under this section—

- (a) information that is privileged on the ground of legal professional privilege; or
- (b) information that is relevant to proceedings that have been commenced under this Act.

(11) If—

(a) an employer must, in order to comply with the requirements of this section, disclose information which—

- (i) relates to a trade secret; or
- (ii) is held by the employer on a confidential basis; and

(b) the employer, at the time that he or she discloses the information, declares that the information is confidential,

a person to whom the information is disclosed (either by the employer or by another person) must not (if he or she is aware of the confidential nature of the information) communicate the information to a third person unless—

(c) —

- (i) that third person is directly involved in the consultation process; or
- (ii) the disclosure of the information is necessary to protect the health, safety or welfare of another person; or
- (iii) the disclosure is—
 - (A) necessary for the proper performance of an official duty; or
 - (B) made with the consent of the employer; or
 - (C) required by a court or tribunal constituted by law; and

(d) the person—

- (i) informs the third person that the information is confidential information supplied for the purposes of these provisions; and

- (ii) takes such other steps as are reasonable in the circumstances of the particular case to protect the confidentiality.
- 5 (12) An authorised representative must, as soon as reasonably practicable after entering a workplace, make reasonable efforts to inform the occupier and any employer at the workplace of the entry and the intention to exercise powers under this Part.
- 10 (13) Where the occupier or any employer at the workplace becomes aware of the attendance of an authorised representative at the workplace, the occupier or employer must notify any relevant health and safety representative present at the workplace.
- 15 (14) An authorised representative must not enter any part of a workplace that is used for residential purposes without the consent of the occupier or employer at the workplace.
- (15) An authorised representative must not enter, or remain at, a workplace if to do so would be contrary to the provisions of another Act that restrict or prohibit access to that place.
- 20 (16) An authorised representative must not enter, or remain at, a workplace, unless the representative produces his or her permit for inspection when requested to do so by the occupier or employer at the workplace.
- (17) An authorised representative must not enter, or remain at, a workplace if—
- 25 (a) the employer or occupier at the workplace requests the representative to comply with an occupational health and safety requirement that applies to the workplace; and
- (b) the request is a reasonable request; and
- (c) the representative fails to comply with the request.
- Penalty: Division 6 fine.
- 30 (18) If, while the authorised representative is at the workplace, an issue relating to occupational health, safety or welfare arises between the authorised representative and the occupier or employer at the workplace, either of those persons may request the attendance at the workplace of an inspector to inquire into the issue.
- 35 (19) The inspector—
- (a) must inquire into the issue; and
- (b) may perform any of his or her functions or exercise any of his or her powers under this Act that the inspector considers reasonably necessary in the circumstances.
- 40 (20) The Director must ensure that an inspector attends the workplace as soon as possible after the request is made and in any event—
- (a) where the workplace is within the metropolitan area—within 1 business day;

- (b) where the workplace is outside the metropolitan area—
within 2 business days.

Division 3—Permits

38C—Entitlement to hold permit

5 A person may only hold a permit as an authorised representative of a registered association if he or she—

- (a) is an employee or officer of the association; and
- (b) has satisfactorily completed a course of training approved
(in writing) by the Director for the purposes of this
10 paragraph; and
- (c) is not disqualified from holding a permit by an order of the Industrial Registrar.

38D—Issue of permit

- 15 (1) A registered association may apply to the Industrial Registrar for the issue of a permit to a person entitled to hold a permit under section 38C.
- (2) An application for a permit must specify the person who is to hold the permit and any other information prescribed by the regulations.
- 20 (3) The Industrial Registrar may issue a permit to a person if satisfied that the person is entitled to hold a permit under section 38C.
- (4) The Industrial Registrar may impose conditions on a permit.
- (5) The form of a permit will be determined by the Industrial Registrar and must contain the following information:
 - 25 (a) a recent photograph of the permit holder;
 - (b) the signature of the permit holder;
 - (c) a statement that the permit holder is an authorised representative for the purposes of this Part;
 - (d) a statement relating to the conditions (if any) that apply in relation to the permit;
 - 30 (e) the date on which the permit will expire;
 - (f) any other information prescribed by the regulations.

38E—Expiry of permit

- 35 (1) A permit issued to a person as an authorised representative of a registered association expires at the earlier of—
 - (a) 3 years after it is issued; or
 - (b) when the person ceases to be an employee or officer of the association; or
 - (c) when the association ceases to be a registered association.

- (2) An application may be made for the issue of a subsequent permit before the permit has expired.

38F—Revocation and disqualification

- (1) The Director or an employer may apply to the Industrial Registrar for an order to be made in relation to a permit held by a person because the person has—

- (a) intentionally hindered or obstructed any employer or employee; or
(b) acted otherwise than for the purposes of exercising a power under this Part; or
(c) misused a document obtained under this Part.

- (2) The applicant must give written notice of the application, setting out the grounds for it, to the person who holds the permit and the registered association concerned.

- (3) The person and the association required to be given written notice under subsection (2) are parties to the application.

- (4) If the Industrial Registrar is satisfied about any of the matters in subsection (1)(a), (b) or (c), the Registrar may by order, do 1 or more of the following:

- (a) revoke the permit;
(b) if the Registrar considers it appropriate to do so, disqualify the person from holding a permit for a specified period (of no more than 5 years);
(c) impose conditions or further conditions on the permit.

38G—Return of permit

Within 21 days after a permit expires or is revoked, the person to whom it was issued must return it to the Industrial Registrar.

38H—Dispute as to authority of authorised representative to enter workplace

- (1) If an employer or occupier at a workplace disputes the authority under this Part of an authorised representative to enter the workplace, the authorised representative may apply to the Industrial Registrar for an order authorising entry to the workplace for the purposes of this Part.

- (2) The Industrial Registrar may make an order authorising entry to a workplace under this section if satisfied that the proposed entry is authorised under this Part.

- (3) The Industrial Registrar may stipulate that an order under this section takes effect for a specified period or until further order.

- (4) The Industrial Registrar must proceed to determine a dispute under this section as a matter of urgency.

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- (5) The parties to an application under this section are the authorised representative and the employer or occupier (as the case requires).
- (6) The Industrial Registrar must not disclose information received under this section relating to the identity or personal affairs of an employee.
- (7) An employer or occupier must permit an authorised representative to enter a workplace and exercise powers under this Part in accordance with an order of the Industrial Registrar.
- Penalty: Division 6 fine.

10 **38I—Review**

Any of the following persons:

- 15
- (a) the Director;
- (b) a registered association aggrieved by a decision of the Industrial Registrar under this Division;
- (c) an employer or occupier aggrieved by a decision of the Industrial Registrar under this Division,

may apply to the President of the Industrial Court to have a decision of the Industrial Registrar reviewed by a review committee.

Division 4—Offences

20 **38J—Offences**

- (1) An authorised representative exercising, or seeking to exercise, rights under this Part must not intentionally hinder or obstruct a person, or otherwise act in an improper manner.

Penalty: Division 6 fine.

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- (2) A person must not—
- (a) refuse or unduly delay entry to premises by an authorised representative who is entitled to enter the premises; or
- (b) otherwise intentionally hinder, obstruct, intimidate or threaten an authorised representative exercising rights under this Part, or induce or attempt to induce any other person to do so.
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Penalty: Division 6 fine.

- (3) A person who is not an authorised representative holding a permit under this Part must not, in any way, hold himself or herself out as—

- 35
- (a) a person who holds a permit under this Part; or
- (b) an authorised representative of a registered association.

Penalty: Division 6 fine.

8—Amendment of section 39—Improvement notices and prohibition notices

Section 39(6)—delete subsection (6)

Schedule 1—Consequential amendment to *Criminal Law (Sentencing) Act 1988*

1—Amendment of section 19—Limitations on sentencing powers of Magistrates Court

- 5 (1) Section 19(3)—delete "The Magistrates Court" and substitute:
Subject to subsection (6), the Magistrates Court
- (2) Section 19—after subsection (5) insert:
- 10 (6) Despite subsection (3), where proceedings for an offence against the *Occupational Health, Safety and Welfare Act 1986* are brought before an Industrial Magistrate, the Court may impose a fine of up to \$300 000.
- (7) To avoid doubt, subsection (5) does not apply to proceedings to which subsection (6) applies.
- 15 (8) Subsection (6) applies to proceedings even if the offence to which the proceedings relate was committed before the commencement of the *Occupational Health, Safety and Welfare (Miscellaneous) Amendment Act 2009*.