

Ref: 08MIR/1995

December 2008

Title FirstName Surname
Position
Organisation
Address1
SUBURB STATE PC

Dear Title Surname

I am writing to invite your comments on the attached *Occupational Health, Safety and Welfare (Miscellaneous) Amendment Bill 2009* (the Consultation Bill).

The Consultation Bill addresses proposed measures to provide for:

- more effective occupational health, safety and welfare (OHSW) enforcement and prosecution in South Australia; and
- enhanced rights for employee representatives when consulting on OHSW matters in the workplace (including right of entry for union representatives).

The Consultation Bill consists of four important proposals to amend the *Occupational Health, Safety and Welfare Act 1986* (the OHSW Act) and one consequential amendment to the *Criminal Law (Sentencing) Act 1988*. The South Australian Government is currently considering the introduction of a finalised Bill on these matters early in 2009.

The Consultation Bill includes the following proposals (in the order they are addressed by the Bill):

1. Inspector Authority in Mining and Petroleum Related Workplaces

Clause 4 – Amendment of section 4 – Interpretation (page 2)

Clause 5 – Amendment of section 6 – Non-derogation (page 2)

Clauses 4 and 5 of the Consultation Bill gives authority to OHSW inspectors to enter and use their powers under the OHSW Act in workplaces covered under the *Mines and Works Inspection Act 1920*, the *Offshore Minerals Act 2000*, the *Petroleum Act 2000* and the *Petroleum (Submerged Lands) Act 1982*, without the requirement for additional gazettal of inspectors under those Acts.

This measure will facilitate effective coordination between SafeWork SA and the agencies that regulate mining and petroleum workplaces, and will provide the flexible use of the resources of the OHSW inspectorate, particularly in regional areas of South Australia. No additional costs to business have been identified as arising from this proposal.

It should be noted that the authority confirmed by this provision only relates to the administration of the OHSW Act, which already applies in these workplaces.

The proposal to confirm the authority of OHSW inspectors is given effect in the Consultation Bill by amendment of the existing definition of *inspector* under section 4(1) of the OHSW Act.

2. Training of Health and Safety Representatives

Clause 6 – Amendment of section 31A – Training of health and safety representatives, deputies and committee members (page 3)

Clause 6 of the Consultation Bill would amend the OHSW Act to reduce the health and safety representative (HSR) training threshold for businesses from 20 employees to 10 employees. This proposal reinstates the training threshold that applied in the OHSW Act until 2005. At this time, a Legislative Council amendment to the *Occupational Health, Safety and Welfare (SafeWork SA) Amendment Bill 2005* changed the threshold from 10 to 20 employees.

It is the Government's view that consultation is a crucial feature of OHSW legislation and is necessary to achieve appropriate practices to control hazards at the workplace. The role of effective and well trained HSRs is pivotal in this process and the previous threshold of 10 employees was appropriate in our view given the circumstances of industry in this State.

The proposal to reduce the threshold for HSR training to businesses with 10 employees will improve the training and operation of HSR's in their important role in those small businesses where they are elected.

The proposal to amend the training requirement for HSRs is given effect in the Consultation Bill by amending section 31A(2)(a)(i) by deleting "20" and replacing it with "10" employees.

3. Right of Entry of Trade Union Representatives

Clause 7 – Insertion of Part 5A (page 3)

In recent years there has been a national trend to allow employee representatives right of entry for OHSW purposes. All States and Territories with the exception of South Australia and Tasmania have provisions allowing right of entry for OHSW purposes.

As with the earlier proposal to encourage HSR training this proposal seeks to strengthen effective OHSW consultation in South Australian workplaces. In workplaces without OHSW committees and HSRs, this proposal will create a positive new opportunity for health and safety issues to be identified and addressed effectively. The measure aims to reduce workplace injury and illness in our workplaces by facilitating cooperative consultation between employees, employers and accredited union representatives.

The South Australian Government has consulted with the SafeWork SA Advisory Committee (the Advisory Committee) on a suitable model of right of entry for South Australia. Although an agreed model was not established, the Bill takes into account the elements discussed by the Advisory Committee.

The Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation in its 2007 report titled: *Inquiry into the Law and Processes Relating to Workplace Injuries and Death In South Australia* recommended amendment of the OHSW Act to include right of entry for union representatives for OHS purposes.

The model for right of entry contained in the Consultation Bill is characterised by the following main features:

- potential application to all workplaces where a relevant union has a member or a person eligible to be a member;
- empowerment of entry for workplace consultation but not investigation or intervention in response to suspected OHSW breaches. The Bill does not provide any power to an authorised representative to stop work or require that a specified action should be taken by an employer;
- a strong administrative system operated by the Industrial Registrar to manage the issue of entry permits and to regulate the conduct of authorised representatives;
- a timely procedure managed by the Industrial Registrar to address occasions when the right to enter is disputed in the workplace;
- provisions consistent with Federal industrial relations law;
- appropriate entry notice provisions based on the circumstances in the workplace and whether access to OHSW documents is being sought;
- employer notification requirements upon entry by the authorised representative, including the production of an entry authority upon request;
- offences that address inappropriate conduct by an authorised representative or inappropriate conduct designed to hinder or prevent an authorised representative exercising their powers; and
- appeals rights against decisions made by the Industrial Registrar.

One issue that you might like to make comment on is the process for addressing disputes that arise about the entitlement of authorised representatives to consult within a workplace.

The Consultation Bill refers resolution of entry disputes to the Industrial Registrar. It is also proposed that the Industrial Registrar should be responsible for regulating the entry permit system. I invite comment as to whether disputes regarding entry into a particular workplace by an authorised representative should be referred to the members of the Industrial Relations Commission of South Australia, rather than to the Registrar.

The proposal to implement right of entry for OHSW purposes is given effect in clause 7 of the Consultation Bill by the proposal to add a new Part 5A to the OHSW Act.

4. Expiation Notices

Clause 8 – Amendment of section 39 – Improvement notices and prohibition notices (page 9)

The SafeWork SA Amendment Bill of 2005 introduced an expiation fee for an offence under section 39(5) of the OHSW Act. Section 39(5) requires that once an improvement notice issued by an inspector has been complied with, a statement of compliance should be returned to SafeWork SA within five days.

However, during the passage of the SafeWork SA Amendment Bill an additional amendment, section 39(6) was passed which implemented a three year sunset on the use of expiation fees for section 39(5) offences. The three year sunset period expired on 15 August 2008.

The experience during the last three years is that expiation notices are a useful tool that has been subject to only occasional (but effective) use by the OHSW inspectorate. It is therefore proposed to facilitate the continued use of expiation notices under the OHSW Act by removing section 39(6) of the Act.

Non-compliance with section 39(5) attracts a Division 7 fine if an expiation fee is not used. The current Division 7 maximum fine is \$5,000 for individuals and \$15,000 for corporations and public sector agencies. Use of expiation fees also avoids additional court costs associated with a prosecution.

The amendment to provide for the ongoing use of expiation notices is given effect to in the Consultation Bill by deleting section 39(6) of the OHSW Act.

5. Industrial Magistrates – Maximum Penalties

Schedule 1 – Consequential amendments to *Criminal Law (Sentencing) Act 1988* (page 10)

The sentencing capacity of Industrial Magistrates hearing OHSW cases is currently restricted by section 19(3) of the *Criminal Law (Sentencing) Act 1988* (the Sentencing Act) to a maximum fine of \$150,000.

With the passage last year of the *Occupational Health, Safety and Welfare (Penalties) Amendment Act 2007*, which tripled fines for corporations and public sector agencies, Industrial Magistrates will be unable to sentence in many cases where the new levels of penalties are relevant.

Penalties under the OHSW Act (from 1 January 2008)

DIVISION	INDIVIDUALS	CORPORATIONS OR PUBLIC SECTOR AGENCIES
Division 1 fine	\$200 000	\$600 000
Division 2 fine	\$100 000	\$300 000
Division 3 fine	\$40 000	\$120 000
Division 4 fine	\$30 000	\$90 000
Division 5 fine	\$20 000	\$60 000
Division 6 fine	\$10 000	\$30 000
Division 7 fine	\$5 000	\$15 000

It is proposed to amend section 19(3) of the Sentencing Act so that the maximum penalty that an Industrial Magistrate may award is raised to \$300,000.

The proposed increase will permit Industrial Magistrates to sentence in all prosecutions of individuals and corporations (including public sector agencies), except the most serious cases where the full extent of a Division 1 fine (for a corporation/public sector agency) or the higher penalties under section 59 of the OHSW Act are considered.

Any matter where a penalty beyond \$300,000 was to be considered, would be referred to a Judge, rather than an Industrial Magistrate.

The Government's view is that it is in the best interests of the South Australian community that Industrial Magistrates should continue to operate effectively as the main judicial resource responsible for both hearing and sentencing in the great majority of OHSW cases at first instance. South Australia's Industrial Magistrates are highly respected and have developed a strong knowledge in a specialised area of the law over many years of hearing OHSW cases.

The proposed change in sentencing powers is given effect to by the Consultation Bill by amending section 19 of the Sentencing Act.

Making a comment

The Consultation Bill is being released in a very dynamic period of national OHSW policy development. The State Government along with the Commonwealth and the other States and Territories supports the national harmonisation of OHS laws in Australia. The current objective is that a national model Act, regulations and standards should be adopted by all jurisdictions by December 2011.

The second report of the National Review into Model Occupational Health and Safety Laws (the National Review), which will make recommendations regarding several of the matters addressed by the Bill (including potentially right of entry, health and safety representative training, and expiation notices) is expected to be publicly released in mid February 2009.

The Government will be taking the recommendations of the National Review into account, as well as the submissions it receives from the public and key stakeholders, when it comes to framing a final Bill for introduction into the Parliament. Your submissions on the issues addressed by the Bill will also be of great assistance to the Government in representing the interests of South Australian businesses and workers as the final stages of the national OHS harmonisation process unfold.

Comments on the Consultation Bill are encouraged and should be made to SafeWork SA by **5pm Friday 13 March 2009**. Please find attached the 'Guidelines for Submitting Comments', which includes contact details and cover sheet information. If you have any queries please contact Mr Alex Campbell, Acting Senior Policy Officer, SafeWork SA on telephone 8303 0266.

Yours sincerely

PAUL CAICA
MINISTER FOR INDUSTRIAL RELATIONS