

**Independent Commission Against Corruption Evaluation of the Practices, Policies and Procedures
of the Regulatory Arm of SafeWork SA**

Submission of SA Unions

Introduction

1. SA Unions is the peak trade union council for South Australia. Through our affiliated organisations, we represent approximately 160,000 union members in all industries and sectors.
2. Ensuring the health and safety of people at work is a major focus for the union movement. The pursuit of safer workplaces for working people is of equal importance to industrial relations and workers' compensation. Our vision is that nobody should go to work and be hurt or be killed and our aim is that work injuries are reduced and that deaths should be rare.
3. SA Unions promotes work, health and safety education and training and plays a formal role in advising government on work, health, safety and welfare matters through its nominees on various advisory bodies, including the Industrial Relations Consultative Council.
4. During the past eight years SA Unions has made submissions to five separate inquiries into Work Health and Safety legislation and/or the structures and functions of SafeWork SA.
5. In the short timeframe available to provide this preliminary submission we restate some key observations we have made in the past. These observations relate to the subject matter of the Independent Commission against Corruption (ICAC) evaluation and suggest a context in which this evaluation should take place.
6. We anticipate that we are one of a number of "representative parties" who will be asked to make a submission, at public hearings in first two weeks of July¹ and will supplement and expand on our views at that time.
7. This submission seeks to address the preliminary matters raised by the Commission and assist the evaluation in a timely manner, within the tight timeframes set.
8. We are advised that a number of our member unions will be making submissions and representation to this evaluation. To the extent that those submissions provide additional information for consideration, SA Unions endorse those submissions.

¹ Transcript of ICAC public hearing 1 June 2018 page 6 para 15

Submission

9. The Independent Commissioner against Corruption has described the reason for embarking on an evaluation as a:

“...consequence of a number of complaints and reports that have been made to the Office for Public Integrity about Safework SA, since the inception of my office. Each of the complaints and reports have of course been dealt with on their merits but the totality of the complaints and reports led me to think that it has become necessary to consider the wider context in which Safework SA conducts its business, and in particular how it guards against the risks of corruption, misconduct and maladministration.”²

10. Counsel assisting has suggested the evaluation:

“...provides an opportunity to identify both good practices and opportunities to improve. The ultimate aim is to minimise risks of corruption, misconduct and maladministration within Safework SA, best ensuring that it continues to fulfil its vital duty to ensure the health and safety of those working in South Australia, efficiently and effectively”.³

11. While recognising that an ICAC evaluation will necessarily look at “corruption, misconduct and maladministration” we agree with the Commissioner that “*the wider context in which Safework SA conducts its business*” is the important starting point of any evaluation.
12. This broader context is that SafeWork SA is one of nine National, State and Territory regulators enforcing Work Health and Safety legislation. Over the past decade the national legislative framework has moved towards a “Model Act” and this development is in the national interest.
13. Nationally the powers of inspectors and investigators are similar and are widely understood to be necessary and appropriate. The strong enforcement of workplace safety is highly desirable and entirely necessary. SA Unions submits it is not in the public interest that the discretionary powers of inspectors or investigators are curtailed.
14. We agree with Counsel assisting that this evaluation “*provides an opportunity to identify both good practices and opportunities to improve*” and in the light of an ICAC evaluation it is not surprising that Counsel assisting would suggest the “*ultimate aim is to minimise risks of corruption misconduct and maladministration*”.
15. However, in the numerous submissions SA Unions has made over the years about what is necessary and vital to ensure the safety of those working in South Australia, minimising risks of corruption misconduct and maladministration has not featured.

² Transcript of ICAC public hearing 1 June 2018 page 2 para 30

³ Transcript of ICAC public hearing 1 June 2018 page 6 para 35

16. To the best of our knowledge the major enquiries into workplace safety have not suggested these matters are a high priority or a concern, nor has there been identified conduct or processes that have led to further public examination.
17. We suggest that the context in which this evaluation should begin with the first Object of the *Work Health and Safety Act 2012*:

3 – Object

- (1) *The main object of this act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by –*
- (a) *protecting workers and other persons against harm to their health safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant.*
- (2) *in furthering subsection (1) (a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health safety and welfare from hazards and risks arising from work, or from specified types of substances or plants, as is reasonably practicable”⁴*

18. We submit that there are fundamentals that are important to ensure “*the principle that workers and other persons should be given the highest levels of protection against harm to their health safety and welfare*”. For example:

- Engagement of industry, employers and unions in improvement across an industry.
- Strong and meaningful workplace consultation structures (Work, Health and Safety Representatives and Committees).
- Good prevention programs, including industry engagement and campaigns to make safety a public and community issue.
- An active SafeWork SA inspectorate that undertakes random visits, audits, the effective use of improvement notices and the enforcement of codes and workplace consultation processes.
- A seamless approach from the prevention of injury to treatment, return to work and compensation for people based on principles of the dignity and respect for the worker and the obligation of employers to ensure worker safety.
- High quality data collection and measurement based on outcomes rather than reporting alone.
- Strong enforcement and proactive and timely prosecutions of those who do not comply with laws, regulations and codes.

⁴ *Work Health and Safety Act 2012 (SA) Division 2, Para 3 – Object*

19. We submit that the Commission should ensure that the evaluation it conducts does not become narrowly focused on “risks” but takes a broader view of the context in which SafeWork SA operates, and the objects of the Act⁵.
20. That broader view should recognise that vested interests often wish to ignore safety in the face of financial considerations.
21. We submit that employers in the building and construction industry are often hostile to the presence of unions in workplaces when they act to have the safety concerns of workers addressed and protected pursuant to the Act⁶. We would seek to lead further evidence in respect to this in the conduct of the evaluation by the Commission.

Areas Identified by the Commission for Evaluation

Legislative and regulatory functions and responsibilities discharged by public officers within the regulatory arm of SafeWork SA

22. Over the last decade there has been steady progress towards a common national legislative frameworks and functions to regulate occupational work health and safety across Australia.
23. The legislation in South Australia is almost a mirror of the “model Act” to which most states and territories are committed. The provisions of the State *Work Health and Safety Act 2012* and the Commonwealth *Work Health and Safety Act 2011* which also operates in South Australia are virtually identical.
24. It is not in the public or national interest for states and territories to adopt different legislative or regulatory approaches. This has been a consistent policy approach that recognises the importance of harmonisation for the operation of business.
25. We submit that it would be highly undesirable to curtail regulatory powers in South Australia.
26. SA Unions has previously observed the discharge of legislative and regulatory function by SafeWork SA in review of function of the Act⁷. This included feedback from our member unions and their operational experience. Some observations included:
 - Health and Safety Representatives need more support from SafeWork SA and better consistency of approach from inspectors.
 - Inspectors should have, where possible, industry experience in the areas they are working in.
 - The rate of attrition of inspectors was of concern.

⁵ *Work Health and Safety Act 2012 (SA)*

⁶ Ibid

⁷ Ibid

- Examples of failures by inspectors to contact Health and Safety Representatives while undertaking the duties, and failures to inspect work and operations rather than just documentation while undertaking these duties.

The discretionary powers given to inspectors and investigators employed within SafeWork SA and the practices, policies and procedures that are in place to safeguard against abuse of those discretionary powers

27. There is nothing exceptional about the powers given to inspectors or investigators in South Australia and nothing novel about the discretionary powers they are asked to exercise.
28. These discretionary powers are consistent with those of other jurisdictions.
29. To the best of our knowledge there is no widespread or systemic abuse of discretionary power.
30. SA Unions submits that complaints in regard to safety and the use of right of entry appear restricted to one industry, the building and construction industry.
31. SA Unions submits employers are encouraged to complain at every opportunity about unions and the prosecution of workplace rights.

Practices policies and procedures in respect of the availability and use of resources by public offices employed within the regulatory arm of SafeWork SA and whether those Practices, policies and procedures provide a sufficient safeguard to minimise the misuse of those resources; and

32. The highest priority for the regulator should be increasing and expanding activities that deter parties from breaching the Act⁸. Practices, policies and procedures should be directed towards increasing the number of successful prosecutions and reducing instances of injury.
33. SA Unions submits that focusing on minimising the misuse of resources is likely to result in risk averse bureaucratic culture that is distracted from addressing the higher order priorities.
34. SA Unions submits that and effective enforcement and prosecutorial regime plays an important role in preventing and deterring serious workplace injuries and deaths.
35. More generally, evidence from the research literature is clear. Effective enforcement is essential if the objects of WHS legislation are to be achieved.⁹¹⁰¹¹¹²

⁸ *Work Health and Safety Act 2012 (SA)*

⁹ Safe Work Australia April (2013) *The Effectiveness of Work Health and Safety Interventions by Regulators: a Literature Review*

¹⁰ D I Levine et al (2012) Randomised Government Safety Inspections Reduce Work Injuries with No Detectable Job Loss, *Science*, Vol. 336, 907–911.

¹¹ K Purse and J Dorrian (2011) Deterrence and Enforcement of Occupational Health and Safety Law, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 27:1, 23–39.

36. SA Unions submits that there is at present a deficiency in the prioritisation and number of prosecutions for breaches of the Act¹³, and that any new focus on resourcing as described by Evaluation would have a further perverse impact on this deficiency.
37. The number of convictions arising from prosecutions arising from breaches of the Act¹⁴ has fallen by 50%, from 46 in 2009/10 to 23 in 2013/14¹⁵. We are advised that this downward trend has continued, and that member unions of SA Unions will submit further on this.
38. This is an unacceptable trend, given the continuing high level of serious injury in South Australia. It should also be noted that this decline does not appear to be due to any significant change in the number of prosecution cases forwarded to the DPP that are not proceeded with, or a reduction in the number of cases in which defendants are found guilty of WHS offences.

Practices policies and procedures in respect of the deployment of human resources within the regulatory arm of SafeWork SA and whether those practices policies and procedures provide adequate measures to manage those human resources so as to ensure the proper and efficient discharge of core functions.

39. SA Unions is still evaluating this matter within the very limited time available to prepare this submission. We note that documents from SafeWork SA, that the Commission indicated would be publicly available, were not on the Commission website at the time this submission was submitted.
40. SA Unions seeks to reserve our right to make further submissions in respect to this matter when further documents become available.
41. As a principle, as the regulator of workplace safety in South Australia, SafeWork SA should be properly resourced to enforce the law. This involves adequate resources to ensure the proper exercise of enforcement and prosecutorial functions.
42. SA Unions submits that any undue focus on curtailing the powers of inspectors will only serve to weaken the safety regime intended to reduce the risk of workers being injured or killed at work.

¹² S Jamieson et al (2010) OHS prosecutions: Do They Deter Other Companies from Offending? *Journal of Health, Safety and Environment*, Vol. 26:3, 213 –231.

¹³ Ibid

¹⁴ Ibid

¹⁵ Safe Work Australia (2013) *The Effectiveness of Work Health And Safety Interventions by Regulators; a Literature Review*.