



**Small Business
Development Corporation**

Our Ref: D15/191

Submission on the Work Health and Safety Bill 2014
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SUBMISSION ON THE WORK HEALTH AND SAFETY BILL 2014

The Small Business Development Corporation ('SBDC') welcomes the opportunity to provide comments on the Work Health and Safety Bill 2014 ('WHS Bill') which was tabled in Parliament by the Minister for Commerce, the Hon Michael Misichin MLC, in October 2014 for public comment.

The SBDC is an independent statutory authority of the Western Australian Government and was established to facilitate the development and growth of small businesses in this State. The SBDC has been providing assistance to small business owners for over 30 years and in that time has acquired extensive knowledge regarding the issues facing the sector in Western Australia. One of the SBDC's key strategic objectives is to advocate for a fair, conducive and productive environment for small businesses in Western Australia. The SBDC strives to achieve this by taking a leading role in influencing the policy and regulatory environment for small business in order to reduce unnecessary red tape and administrative burdens.

WHS Reform

The SBDC acknowledges the Western Australian Government's pursuit of national WHS reforms, with a focus on minimising business compliance costs. It is noted that the WHS Bill has been developed in response to the Government's decision to not fully implement the national *Model Work Health and Safety Act 2011* ('Model WHS Act') due to the identification of unreasonable financial imposts on small businesses, as reported in the regulatory impact statement ('WHS RIS') undertaken in 2012 by consultants Marsden Jacob Associates. Instead, the WHS Bill proposes to adopt some of the provisions contained within the Model WHS Act in order to modernise and harmonise (to a large degree) existing occupational safety and health ('OSH') legislation in Western Australia.

From a small business perspective, the SBDC supports the introduction of the WHS Bill, pursuant to some minor revisions which are outlined in more detail further in this submission.

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The SBDC also acknowledges that at this stage the full impact of the proposed WHS reforms on the State's small business sector cannot be properly assessed without knowing the final make up of the regulations (and associated Codes of Practice) that will support the principle Act.

It is noted that WorkSafe WA has indicated that it is currently reviewing existing regulations in respect of the WHS Bill to remove unnecessary red tape and improve safety outcomes, and that if the proposed legislation is adopted there would be further opportunity for public consultation on these regulations before their implementation.¹ The SBDC strongly encourages WorkSafe WA to ensure that comprehensive stakeholder consultation – especially with small business representatives – is undertaken with regards to the development of the regulations as these were identified in the WHS RIS to be a particular area of contention that potentially could add significant costs to small and regional businesses if not implemented well.

The SBDC also recognises that there is generally a low level of awareness of OSH/WHS matters amongst Western Australian small business operators presently and that the renewed focus on reforms in this area will likely improve this understanding and lead to safer workplaces overall, which is a positive outcome.

In order to minimise unnecessary administrative burden and costs on small businesses associated with implementing the reforms, the SBDC would welcome the opportunity to work with WorkSafe WA to review the regulations and Codes of Practice, engage with the small business sector and develop guidance material to ensure a smooth transition into the new regulatory framework.

WHS Bill

The following points on aspects of the WHS Bill are offered from a small business perspective.

Exclusions

The SBDC notes that the proposed WHS Bill predominantly follows the Model WHS Act with the exclusion of the following:

- union right of entry – right of entry for the purposes of OSH is already provided for under the *Industrial Relations Act 1979 (WA)* and its inclusion in the WHS Bill would create duplication and inconsistencies;
- health and safety representatives' capacity to direct the cessation of work – this provision is already available to individual workers and the government is of the view that this should be retained at an individual level; and
- reverse onus of proof in discrimination matters.

The SBDC supports these exclusions on the basis that they are sufficiently catered for in other existing legislation or are unreasonable (in the context of reverse onus of proof) and do not directly impact on safety outcomes in the workplace. The SBDC believes these exclusions would be largely welcomed by the small business sector.

Broadened definitions of employer and employee

¹ Development in OHS in WA – the Green Bill Podcast, Worksafe WA, November 2014. Available from < <http://www.commerce.wa.gov.au/publications/developments-osh-wa-green-bill>>

Consistent with the Model WHS Act, the WHS Bill broadens the definitions associated with the terms 'employer' and 'employee' and respectively replaces these with 'person conducting a business or undertaking' and 'worker'.

It is noted that alternative working relationships such as work undertaken by contractors or under labour hire arrangements are captured in the existing *Occupational Safety and Health Act 1984 (WA)* ('OSH Act'), and ensure that general duties applied to employers and employees also apply to this cohort.

The SBDC considers that the broader definitions contained in the WHS Bill more accurately reflect modern workplace arrangements and hence do not object to their inclusion. The SBDC also agrees to the exclusion of volunteers and prisoners from the definition of 'worker'.

Duty of officers

The WHS Bill explicitly outlines the due diligence requirements of duty holders, and places an onus on them to proactively ensure safety in the workplace. Duty holders will specifically be required to exercise due diligence by: keeping up-to-date on WHS matters; understanding the hazards and risks associated with their business operations; ensuring appropriate resources and processes are in place to eliminate or minimise risks; responding to reports of hazards and risks in a timely manner; and implementing and verifying internal business processes to ensure compliance.

The SBDC notes that in the recent report on the economic impact of WHS harmonisation commissioned by Safe Work Australia, business operators indicated that the additional focus by management on WHS issues due to the new duty of care requirements was beneficial overall to improving WHS standards in the workplace.²

It is the opinion of the SBDC that these due diligence requirements on duty holders will drive better compliance with WHS and lead to improved safety outcomes at minimal cost to small businesses. Their inclusion in the WHS Bill is therefore supported by the SBDC.

Health and safety committees

The WHS Bill outlines a provision for the establishment of a health and safety committee in a workplace, if requested by a health and safety representative of workers at the workplace or by five or more workers at the workplace.

The SBDC notes that there is a provision in the current OSH Act (refer to s.39A) that allows an employer to make an application to the WorkSafe WA Commissioner to decide whether they may be exempted from establishing such a committee. The SBDC recommends that a similar provision be retained in the WHS Bill as the requirement to establish health and safety committees in very small businesses (i.e. those employing five or so workers) would be overly burdensome and not necessarily improve workplace safety outcomes. Other forms of communication and internal consultation processes would better suit these size workplaces.

Terminology

The SBDC notes that one of the key objectives of introducing the WHS Bill is to improve its level of understanding by businesses through the simplification of language and

² *The economic impact of WHS harmonisation*, Safe Work Australia, November 2014, p.4

adoption of plain English drafting, which is welcomed. However, the SBDC has received feedback from a few small business operators that some of the terms and definitions used in the WHS Bill may be unclear or confusing for the layperson unfamiliar with interpreting Acts of Parliament.

For example, the use of the term 'Constitution of committee' (s.76) had been mistaken by a small business operator to infer a requirement for a formal constitution to be entered into between the employer and the health and safety committee. This clause is actually about the membership/make-up of the committee, which in the current OSH Act is referred to as 'safety and health committee, agreement as to members, etc' (s.39C).

The SBDC recommends ensuring that the language used within the WHS Bill is, to the extent possible, free of ambiguity and easy to comprehend.

Time limitations

The SBDC acknowledges the approach taken with regards to time limitations for seeking a review or extension of a notice under the WHS Bill. This approach reflects current legislation and provides flexibility for businesses to have up until the compliance date to seek a review or extension. This approach ensures that small businesses have the appropriate mechanisms in place to comply with the requirements set by the regulator.

Enforcement measures

It is noted that the penalties included in the WHS Bill are consistent with the Model WHS Act and that these are significantly higher than the existing penalties contained within the OSH Act. The SBDC acknowledges that the courts will take into consideration the severity of the offence as well as the capacity of the business to pay, which is welcomed from a small business perspective.

Other changes to enforcement options include the removal of enforceable undertakings, which provide an alternative to prosecution in certain circumstances. It is noted that enforceable undertakings are used in other jurisdictions (such as Queensland) and provide an opportunity for a defendant to agree to undertake certain WHS requirements in lieu of paying a fine. The associated costs of enforceable undertakings are generally consistent with the cost of a fine, but have the benefit of directly improving WHS standards in the workplace.

The SBDC recommends that this option be retained in the WHS Bill, as it provides an alternative from prosecution. This is particularly relevant for small businesses that would not necessarily have the financial capacity to concurrently pay a fine as well as introduce improved standards in the workplace.

Transitional arrangements

The SBDC welcomes the inclusion of transitional arrangements in the WHS Bill and recommends that these take into consideration suitable timeframes to enable small businesses to understand their obligations, update their policies and procedures, and put in place any additional compliance requirements.

Concluding statement

The SBDC supports the introduction of the WHS Bill, with some minor revisions. Further consultation with relevant small business stakeholders (including the SBDC) on the proposed regulations and Codes of Practice is urged to limit unintended consequences and unnecessary costs from being introduced as a result of harmonisation. The SBDC is willing to work with WorkSafe WA to engage with industry bodies and small business operators on the subsidiary legislation and in the development of appropriate guidance tools to assist small business operators to understand and comply with their obligations under the WHS Bill.

If you would like to discuss this submission in more detail, please contact Ms Lisa Legena, Senior Policy and Advocacy Officer, on 6552 3378 or at lisa.legena@smallbusiness.wa.gov.au.

Yours sincerely



David Eaton
SMALL BUSINESS COMMISSIONER

30 January 2015