Government of South Australia

SafeWork SA

Civil dispute resolution for breaches of WHS duties

Consultation Paper

Foreword by the Minister

Every South Australian deserves the right to come home safe to their families and loved ones at the end of every working day.

Sadly, far too many workers lose their lives to work-related injuries and illnesses each year. Many workers who survive their injuries continue to suffer lifelong trauma afterwards. This a tragedy which has devastating personal consequences for workers and their families, and significant economic consequences for businesses and the community.

The task of enforcing health and safety at work has historically been the responsibility of South Australia's statutory health and safety regulator, SafeWork SA. Over the past 10 years SafeWork SA has been the subject of numerous reviews and inquiries, which have resulted in significant reforms to its culture and practices. That reform agenda continues to this day.

SafeWork SA's team of investigators and inspectors are talented, professional, and passionate about improving safety for the community. They do important and valuable work and their commitment cannot be doubted.

However, reviews into SafeWork SA have made clear that the regulator cannot do the essential work of keeping South Australians safe on its own. In the last financial year there were nearly 140,000 businesses in South Australia employing nearly 840,000 workers. No regulator, no matter how well resourced, can be in every workplace at once.

That role falls to the workers, businesses, unions, employer organisations, and health and safety professionals who work at the frontline of health and safety every day. They have a significant part to play in helping keep South Australians safe.

The independent review of SafeWork SA conducted by Mr John Merritt, and completed in December 2022, recommended changes to the *Work Health and Safety Act* to give a greater role to those stakeholders, including by allowing workers and their representatives to take enforcement action for health and safety breaches without solely relying on SafeWork SA.

This means that workers and their representatives would be able to apply for a court to impose a relatively low civil fine for breaches of health and safety duties, without recording a criminal conviction. This would act as an alternative remedy to serious criminal prosecutions, and an important deterrent against contravening behaviour.

Civil penalty regimes of this kind already exist in many areas of the law and have been proven effective. For example, civil penalties have been in place for breaches of workplace rights and entitlements for over 20 years, and have allowed both workers and businesses to take an active role in ensuring a fair industrial playing field.

Of course, it is essential that our health and safety laws provide a fair framework which balances the different rights and interests of both workers and businesses.

Any civil penalty system for health and safety breaches needs to be accompanied by a robust alternative dispute settlement pathway, to ensure every opportunity is taken to resolve health and safety issues without the need for legal proceedings.

Additionally, just as employers owe health and safety duties to their workers, entry permit holders must comply with right of entry obligations. With an expanded dispute resolution system for health and safety disputes, it is appropriate to consider a more robust mechanism for employers and their representatives to enforce the settlement of right of entry disputes.

The independent review conducted by Mr Merritt presents an important opportunity to make a real and lasting improvement to health and safety in South Australia, and I am pleased to present this consultation paper outlining a potential model for the implementation of one of the review's key recommendations.

The proposals in this paper do not alter the duties which are already owed under the WHS Act by employers, workers, and their representatives. Instead, this proposal is aimed at building a culture of accountability by involving more people in the task of monitoring and enforcing health and safety laws.

The reforms outlined in this consultation paper are directed at creating a fair and balanced health and safety framework which achieves the one goal everyone agrees is most important: eliminating workplace deaths and injuries, so all South Australians can come home safe every day.

Hon Kyam Maher MLC
Minister for Industrial Relations and Public Sector

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1. Introduction

At the 2022 State Election, the Government committed to undertake an independent review of the practices and processes of SafeWork SA to improve workplace safety, deliver prompt action on safety concerns, support improved physical and mental wellbeing in workplaces, and ensure a genuine voice for workers in complaint and resolution processes.

This independent review was conducted by Mr John Merritt, former executive director of WorkSafe Victoria, and commenced in September 2022. The review received feedback from a wide range of work health and safety stakeholders including employer organisations, trade unions, safety professionals, government agencies, and the families of victims of workplace incidents. The review was concluded in December 2022.

Recommendation 39 of the review was that the *Work Health and Safety Act 2012* (WHS Act) should be amended to extend the existing civil penalty provisions to cover the primary duty of care and related offences, and that standing to bring civil penalty applications should be conferred on workers, families of injured workers, and employee associations.

This recommendation was informed by Mr Merritt's findings that:

- Stakeholders who contributed to the review expressed concern about the visibility of SafeWork SA within the community;
- The current volume of worksite visits, level of enforcement notices, and number of criminal prosecutions by SafeWork SA is not adequate to create a realistic perception that breaches of work health and safety will be held to account;[1]
- Generally, only the most extreme breaches of work health and safety (such as serious injuries and workplace deaths) are the subject of criminal prosecutions;
- SafeWork SA has committed significant efforts to improving its capacity and internal processes, however it will take time before this translates into a stronger regulatory presence in the community; and
- Employee organisations have the expertise and capability to undertake civil penalty applications, and this presents a clear remedy to build a culture of compliance amongst work health and safety duty holders.

In its preliminary response to the independent review, the Government committed to further consultation with stakeholders before determining a final position on this recommendation.

This paper outlines a potential model for the implementation of Mr Merritt's recommendation to expand civil penalties to breaches of health and safety duties, but in a manner which gives primacy to alternative dispute processes which encourage the resolution of health and

[1] The review found that SafeWork SA's investigation and prosecution capacity is significantly lower than interstate regulators; Queensland, New South Wales, and Victoria each complete around 100 prosecutions each year, while SafeWork SA completed eight criminal prosecutions in 2022.

safety disputes at an early stage. This represents a practical, effective, and timely remedy for breaches of health and safety duties as an alternative to serious criminal prosecutions.

In recognition of the need to maintain a balanced work health and safety framework, this paper also outlines potential changes to the existing dispute resolution pathway for right of entry disputes to give employers greater capacity to deal with breaches of dispute settlement orders, including the capacity to seek a civil penalty from a court.

Together the measures proposed in this paper would encourage the resolution of disputes at an early stage and ensure that all participants in the work health and safety system can hold each other accountable for meeting their duties and obligations under the WHS Act.

2. Civil penalties

What is a civil penalty order?

A civil penalty is a monetary fine imposed by a court on a person (either an individual or body corporate) to deter breaches of the law.

If a civil penalty is imposed on a person this does not result in a criminal conviction, and cannot lead to a term of imprisonment. A civil penalty is a monetary penalty only.

An application to a court for a civil penalty is a civil proceeding rather than a criminal proceeding. This means the legal burden of proof is the civil standard of the balance of probabilities, not the criminal standard of guilt beyond reasonable doubt.

Because civil penalty applications are conducted with this lower burden of proof, the maximum civil penalty is typically much lower than maximum criminal penalties.

If a court finds a person has breached their legal obligations and is liable to receive a civil penalty, it has a broad discretion to determine an appropriate penalty having regard to all the circumstances of the case. It is not required to impose the maximum penalty.

For example, the court will consider factors such as the extent of the breaches, whether there were similar breaches previously, the size and financial resources of the party, whether management were involved, whether the party has exhibited contrition or taken corrective action, and the need for specific and general deterrence against future breaches.

Current civil penalties under the WHS Act

The WHS Act already contains civil penalty provisions, however these penalties only apply to breaches of right of entry obligations[2] and do not apply to breaches of health and safety.

The only party who can currently apply for a court to impose a civil penalty under the WHS Act is the regulator, SafeWork SA.[3] This means other parties who are directly affected by a contravention, such as workers and employer organisations, do not have standing under the WHS Act to seek penalties for those breaches.

The maximum civil penalties under the WHS Act range between $10,000 for individuals to $50,000 for body corporates. This paper proposes to increase the maximum penalty for a body corporate to $100,000, however this is still substantially lower the maximum penalties for criminal offences which can range up to $3 million.[4]

Civil penalties under the Fair Work Act 2009 (Cth)

The Commonwealth *Fair Work Act 2009* governs the rights and duties of employers and workers under the national industrial relations system, including in relation to matters such as wages and conditions, leave entitlements, and enterprise bargaining, and provides a model for the use of civil penalties to enforce compliance with industrial laws.

The *Fair Work Act* and its predecessors have used civil penalty provisions as the primary means of enforcing compliance with rights and obligations under the legislation, rather than a criminal enforcement model.

For example, civil penalties can currently be imposed by a court for matters such as:[5]

- contravening a term of an award or enterprise agreement;
- failing to pay correct leave entitlements;
- failing to provide pay slips;
- discriminating against employees; and
- breaching Commonwealth right of entry duties.

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[2] For example, a penalty may be imposed on a WHS permit holder if they contravene the conditions on their permit, or unreasonably obstruct the performance of work at a worksite: *Work Health and Safety Act 2012* (**WHS Act**) ss 123 and 146. Similarly, a penalty may be imposed on the occupier of a premises for hindering or obstructing a WHS permit holder who is lawfully exercising their entry rights: WHS Act s 145.

[3] WHS Act s 260.

[4] A maximum penalty of $18 million is proposed for an industrial manslaughter offence, however this legislation has not yet passed Parliament.

[5] *Fair Work Act 2009* (Cth) (**FW Act**) s 539.

Unlike the WHS Act, which only allows SafeWork SA or an authorised inspector to commence a civil penalty application, the *Fair Work Act* allows parties to take enforcement action themselves if they are affected by a breach of the law. For example:

- an employee or employee organisation may commence a civil penalty application against an employer in relation to an underpayment of wages;
- an employer or employer organisation may commence a civil penalty application against an employee organisation for breaches of right of entry requirements, including under state and territory health and safety laws such as the WHS Act.

By empowering parties to enforce their industrial rights directly through civil penalties, the *Fair Work Act* involves more people in monitoring and enforcing compliance with the law and reduces the need to rely solely on a statutory regulator.

In this context courts have recognised that both employer and employee organisations play a legitimate and important role and serve the public interest by supporting a culture of compliance with industrial laws.

3. Dispute settlement pathways

Disagreements can arise about a range of different issues under the WHS Act, including whether a person conducting a business or undertaking (**PCBU**) is complying with its health and safety duties, or whether a WHS entry permit holder is complying with their obligations in relation to the exercise of right of entry powers.

The primary object of dispute resolution in the WHS Act should be to promote the settlement of disputes at an early stage and at a low cost, by encouraging discussions at a worksite level or through the assistance of the independent umpire. Litigation should be an option of last resort which is open to the parties only once those processes have been exhausted.

The WHS Act currently only provides a civil dispute pathway in relation to right of entry disputes. There is no civil dispute pathway to resolve disputes over health and safety duties, which are almost exclusively enforced through criminal prosecutions by SafeWork SA.

Under the existing right of entry pathway, any party to a right of entry the dispute may ask an inspector to attend the workplace to assist in resolving the dispute.[6] If the dispute cannot be resolved, a party may apply for the South Australian Employment Tribunal (**SAET**) to assist in resolving the dispute through conciliation, mediation, arbitration, or making an order such

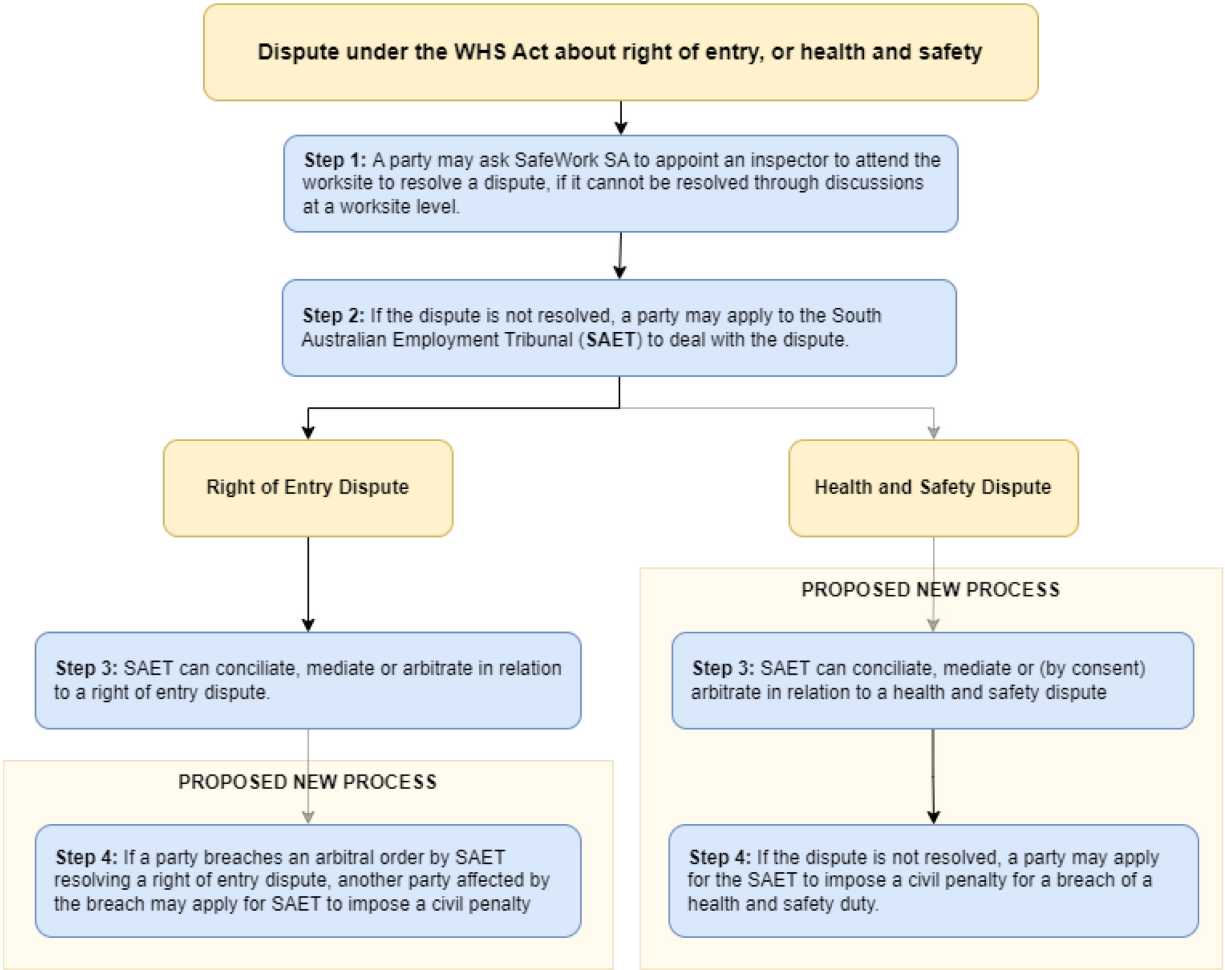
[6] WHS Act s 141.

as to revoke or impose conditions on a WHS entry permit.[7] If a party breaches an order made by the SAET then a civil penalty may be imposed by the court.[8]

Rather than providing general standing to pursue civil penalty applications, this paper proposes incorporating the civil penalty framework within an alternative dispute resolution pathway based on the existing right of entry disputes process. This would maintain a similar focus on alternative dispute resolution as the primary means of dispute settlement.

Under this model parties would be able to seek the assistance of an inspector to resolve a health and safety dispute at a worksite. If the dispute cannot be resolved, then parties may apply to the SAET for assistance through conciliation, mediation, or consent arbitration. Only where that process is exhausted could a party seek a civil penalty order.

This model does not diminish the existing capability of parties under the Commonwealth *Fair Work Act* to seek civil penalties for right of entry breaches under state and territory laws such as the WHS Act.[9] Instead, this represents an alternative dispute resolution pathway to the remedies available under Commonwealth legislation.



[7] WHS Act s 142.

[8] WHS Act s 143.

[9] FW Act, Part 3-4, Division 3.

4. Summary of proposed model

This paper proposes a model implementing Mr Merritt's recommendation that civil penalty orders be available for breaches of health and safety duties, within a dispute settlement framework based on the existing dispute resolution process for right of entry disputes.

This paper also proposes amendments to the existing right of entry dispute pathway to provide stronger powers to deal with breaches of orders settling a right of entry dispute, particularly where a party is involved in repeated right of entry contraventions.

The model this paper would give standing to businesses and employer organisations, and workers and employee organisations, to seek civil penalty orders from a court if a dispute about health and safety, or right of entry, cannot be resolved through the mandatory dispute resolution pathway.

This would have the benefit of:

- Encouraging the resolution of health and safety disputes, and right of entry disputes, at a worksite level through discussions between employers, workers, their representatives, and the regulator.
- Providing a practical and low-cost alternative dispute resolution process before the independent industrial umpire as a mandatory step before any civil penalty proceeding can occur.
- Allowing disputes about work health and safety to be resolved faster and at a lower cost to the parties than criminal proceedings, including significantly lower maximum penalties than for criminal convictions.
- Providing a deterrent to contraventions of the existing work health and safety duties and right of entry requirements under the WHS Act.
- Involving more people in monitoring and enforcing compliance with the WHS Act. This would include workers and their representatives monitoring compliance with health and safety duties, and employers and their representatives monitoring compliance with right of entry requirements.
- Giving employers and employer organisations the ability to seek penalties for breaches of orders resolving a right of entry dispute, and give new powers to the SAET to deal with repeated right of entry breaches.
- Ensuring employee organisations can only commence civil penalty proceedings where they are meeting their own obligations under the WHS Act.
- Allowing SafeWork SA to better focus its investigation and prosecution resources on serious criminal offences.

The key elements of the proposed model are as follows. These are explained in more detail in Section 5 of this paper, together with further issues for consideration.

Dispute resolution process

1. The existing right of entry disputes procedure under the WHS Act will be expanded to deal with health and safety disputes so that:

    a. A party to a health and safety dispute may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute;

    b. If the dispute is not resolved, a party may apply for the SAET to deal with the dispute by conciliation, mediation, or (by consent) arbitration;

    c. If the dispute is still not resolved, a party may apply to the SAET for a civil penalty order in relation to a breach of a health and safety duty owed under Part 2 of the WHS Act (other than sections 27 to 29).

Scope of dispute proceedings

2. A party may apply for the SAET to deal with a health and safety dispute where they reasonably believe that a person is contravening, or has contravened, a provision of the WHS Act and this contravention involves a serious risk to the health and safety of a person.

3. The SAET may dismiss a health and safety dispute where:

    a. the dispute relates to bullying in the workplace and would more appropriately be dealt with through an application for an order to stop bullying under the *Fair Work Act 2009* (Cth);

    b. the dispute relates to discrimination and would more appropriately be dealt with through an application under the *Equal Opportunity Act 1984* (SA), the *Age Discrimination Act 2004* (Cth); the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth); or the *Sex Discrimination Act 1984* (Cth).

Maximum penalties

4. The maximum civil penalty will be as follows:

Individual	Body corporate
up to $10,000	up to $100,000

Standing

5. Standing to apply for the SAET to deal with a health and safety dispute, right of entry dispute, and to seek a civil penalty order, will be conferred on:
    a. SafeWork SA;
    b. Employers directly affected by a contravention;
    c. Employees directly affected by a contravention;
    d. Registered employer organisations entitled to represent the industrial interests of an employer directly affected by a contravention; and
    e. Registered employee organisations entitled to represent the industrial interests of an employee directly affected by a contravention.

Time limitations

6. A civil penalty application must be bought within 2 years of the date on which the alleged contravention of the WHS Act occurred.

Costs

7. Dispute proceedings and civil penalty applications will be a 'no costs' jurisdiction, other than in cases where a party has acted unreasonably or vexatiously.
8. The SAET will have the power to dismiss a dispute proceeding or civil penalty application where it is frivolous, vexatious, or an abuse of process.

Double jeopardy

9. Proceedings for a civil penalty order will be stayed if criminal proceedings are commenced against a person for an offence constituted by conduct that is substantially the same as the conduct constituting the civil penalty contravention.
10. A court cannot make a civil penalty order against a person if the person has been convicted of a criminal offence constituted by conduct that is substantially the same as the conduct constituting the civil penalty contravention.

SafeWork SA's involvement in civil proceedings

11. SafeWork SA may intervene as a party in any civil penalty application.

Right of entry disputes

12. The existing right of entry dispute procedure under the WHS Act will be expanded so a party can apply for SAET to impose a civil penalty for a breach of an arbitral order dealing with a right of entry dispute.

13. When arbitrating a right of entry dispute, the powers of the SAET will be expanded so that it may make a declaration that an organisation has a "significant history" of contravening the WHS Act.

14. If such a declaration is made by the SAET:

    a. the organisation will be prohibited from commencing a civil penalty application under the WHS Act;

    b. the organisation will be required to report all intended exercises of a right of entry power to SafeWork SA before entering a premises;

    c. the organisation will be required to provide a written report to SafeWork SA detailing the exercise of its right of entry within 28 days of the entry;

    d. there will be a rebuttable presumption that any future contraventions by WHS entry permit holders employed by the organisation will result in their permit being revoked, unless there is a reasonable excuse for the contravention.

15. A declaration by the SAET may be revoked after a period of 2 years if the organisation can demonstrate a history of compliance with the WHS Act, and that appropriate measures have been taken to prevent future contraventions.

5. Key elements

Dispute resolution process

What compulsory dispute resolution process should apply for disputes about health and safety duties?

As outlined above in Part 2 of this paper, the WHS Act already contains an alternative dispute resolution pathway for right of entry disputes.

It is proposed to create a complementary pathway for disputes about breaches of health and safety duties, with a similar focus on structured alternative dispute resolution prior to a party being able to seek a civil penalty from a court.

Under this model a health and safety dispute would follow the same initial process where a party may ask an inspector to attend the workplace to assist in resolving the dispute. If the dispute cannot be resolved then a party may apply for the SAET to deal with the dispute.

It is proposed that the SAET's powers in dealing with a health and safety dispute will predominantly be conciliation and mediation, with the option for a dispute to be arbitrated with the consent of all parties. Only in circumstances where a dispute is not resolved through

this process will a party be able to seek that the SAET impose a civil penalty order for breaching a health and safety duty.

This is analogous to the existing process for general protections applications under the *Fair Work Act*. In those cases, a party must first undergo conciliation, mediation, or (by consent) arbitration in the Fair Work Commission. If that process does not resolve the dispute, then the Commission will issue a certificate which allows a party to make a separate civil penalty application to the Federal Court.

It is not proposed to confer a compulsory arbitration power on the SAET when dealing with a health and safety dispute. This would likely result in complex dispute proceedings which unreasonably involve the SAET in the task of determining how a business structures its affairs, including matters on which discretion may reasonably be exercised in different ways.

It is appropriate that any compulsory power of the SAET is limited to determining the more narrow legal question of whether there has been a contravention of a health and safety duty under the WHS Act and whether a civil penalty should be imposed. This provides a meaningful deterrent against contraventions of existing health and safety duties without unnecessarily interfering in businesses' managerial prerogative.

Proposal:

The existing right of entry disputes procedure under the WHS Act will be expanded to deal with health and safety disputes so that:

a. A party to a health and safety dispute may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the dispute;

b. If the dispute is not resolved, a party may apply for the SAET to deal with the dispute by conciliation, mediation, or (by consent) arbitration;

Which parts of the WHS Act should a civil penalty be available for?

If the mandatory conciliation and mediation process outlined above does not resolve a health and safety dispute, it is necessary to determine when a civil penalty may be imposed by the SAET in a subsequent application.

Mr Merritt recommended in the independent review that civil penalties should be introduced for breaches of section 19 (the primary duty of care), and each of the existing Category 1 (recklessly exposing a person to a risk of death or serious injury or illness), Category 2 (exposing a person to a risk of death or serious injury or illness), and Category 3 (failing to comply with a health and safety duty) criminal offences.[10]

[10] WHS Act ss 31 – 33.

Allowing Category 1, 2 and 3 offences to be pursued on a civil basis may create significant legal and conceptual difficulties, as these offences import notions of criminal recklessness which are difficult to apply in a civil law context.

Inserting civil penalties as a direct counterpart to each of the existing criminal offences would also create significant complexity for a court in determining an appropriate penalty. This would result in up to 9 different maximum penalties depending on the nature of the contravention and whether the contravener was an individual or a body corporate.

Instead of creating a direct counterpart to each of the existing criminal offences on a civil basis, an alternative and simpler option would be to make civil penalties available for breaches of the health and safety duties already owed under Part 2 of the WHS Act. Since breaches of these duties already form the legal basis for the existing criminal offences in the WHS Act, this would be consistent with the principle behind Mr Merritt's recommendation but result in significantly less complexity in implementation.

It is proposed that, in a civil penalty application following a health and safety dispute, a penalty may be imposed by a court for a contravention of the existing health and safety duties under Part 2 of the WHS Act.

It is proposed to specifically exclude civil penalties for the duties owed under sections 27, 28 and 29 of the WHS Act. These duties impose health and safety obligations on officers and employees of companies, workers, and other persons present at a worksite.

It is appropriate that contraventions by these duty-holders are excluded from the civil penalty system as a PCBU will typically be vicariously liable for the actions of its officers and employees, and will have disciplinary and control measures available to deal with any health and safety contravention arising from their behaviour.

Additionally, this exclusion would help to ensure that civil penalty applications focus on systematic health and safety issues rather than what, in substance, are interpersonal disputes between individual employees and officers within a worksite.

Proposal:

If a health and safety dispute is still not resolved with the assistance of the SAET, a party may apply to the SAET for a civil penalty order in relation to a breach of a health and safety duty under Part 2 of the WHS Act (other than sections 27 to 29).

Scope of dispute proceedings

Should there be a risk threshold for a health and safety dispute?

It is necessary to consider whether an alleged breach of a health and safety duty alone should give rise to the ability to commence a health and safety dispute before the SAET and to seek a civil penalty order, or whether some additional test is appropriate.

The intention of any threshold for disputes would be to ensure that dispute proceedings and civil penalty applications are used to deal with substantive health and safety risks only, rather than minor or technical contraventions.

By way of comparison, currently under the WHS Act:

- A Category 3 criminal offence only requires that a person who has a health and safety duty has breached the duty;[11]
- A Category 2 offence imposes an additional requirement that the breach of that duty must "[expose] an individual to a risk of death or serious injury or illness";[12]
- A provisional improvement notice may be issued where it is reasonably believed that a person is contravening a provision of the Act, or has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated;[13]
- A prohibition notice may be issued where it is reasonably believed that an activity is occurring at a workplace that involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.[14]

On balance it is proposed that, consistent with the threshold for a prohibition notice, a party may apply for the SAET to deal with a health and safety dispute where they reasonably believe that a person is contravening, or has contravened, a provision of the WHS Act and this contravention involves a "serious risk" to the health and safety of a person.

Provided that threshold is met, it is not necessary for either a provisional improvement notice or prohibition notice to be put in place before a dispute is referred to the SAET.

Feedback is sought from stakeholders on whether this is an appropriate threshold or whether there is an alternative test which is more suitable, while still achieving the objective of avoiding a multiplicity of disputes over minor or technical contraventions.

Proposal:

A party may apply for the SAET to deal with a health and safety dispute where they reasonably believe that a person is contravening, or has contravened, a provision of the WHS Act and this contravention involves a serious risk to the health and safety of a person.

[11] WHS Act s 33.

[12] WHS Act s 32.

[13] WHS Act s 90.

[14] WHS Act s 195.

Should some disputes be excluded because there is a more appropriate dispute settlement jurisdiction?

There is an overlap between health and safety duties owed under the WHS Act and obligations imposed by other laws in relation to employment relationships, particularly dealing with psychosocial risks such as workplace bullying and discrimination.

The *Equal Opportunity Act 1987* prohibits discrimination against employees on the basis of characteristics such as age, sex and disability, and provides for the resolution of disputes by the Equal Opportunity Commissioner. In many cases conduct which would amounts to discrimination under the *Equal Opportunity Act* would also contravene the WHS Act.

Similarly, the *Fair Work Act* provides a process for an employee to apply to the Fair Work Commission for an order to stop bullying at work (where "bullying" is defined as repeated unreasonable behaviour which creates a risk to health and safety). This again represents an overlap with the health and safety duties also owed under the WHS Act.

Health and safety disputes under the WHS Act are not intended to displace existing specialised dispute resolution processes under other legislation, and there may be some categories of cases that are appropriate to exclude from the civil penalty system on the basis that there is a more appropriate alternative jurisdiction to hear those disputes.

This will also avoid a situation where health and safety disputes are used to deal with what, in substance, are interpersonal disputes between individual employees which can be dealt with in other forums, rather than systematic health and safety issues within a workplace.

It is proposed to give SAET the power to dismiss a health and safety dispute or civil penalty application where there is a more appropriate forum for that dispute to be dealt with.

Proposal:

The SAET may dismiss a civil penalty application where:

- the contravention relates to bullying in the workplace and would more appropriately be dealt with through an application for an order to stop bullying under the *Fair Work Act*;
- the contravention relates to discrimination and would more appropriately be dealt with through an application under the *Equal Opportunity Act 1984* (SA), the *Age Discrimination Act 2004* (Cth); the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth); or the *Sex Discrimination Act 1984* (Cth).

Maximum penalties

What should the maximum civil penalty be?

As outlined above, civil penalty applications are conducted using civil processes and with a lower burden of proof than criminal proceedings. It is appropriate that the maximum civil penalty is substantially less than comparable criminal penalties for the same conduct.

The existing civil penalties in the WHS Act for right of entry breaches are generally $10,000 for an individual and $50,000 for a body corporate.

It is proposed that the maximum penalty for contravening a health and safety duty, as well as for breaching an order dealing with a right of entry dispute, will be increased to up to $10,000 for an individual and $100,000 for a body corporate.

The proposed maximum penalties are significantly lower than maximum penalties for criminal offences under the WHS Act. For example, the maximum penalty for a Category 1 offence by a body corporate is up to $3 million, while the proposed penalty for industrial manslaughter is up to $18 million, or up to 20 years imprisonment.

This penalty structure reflects an intention that civil penalties should be relatively low compared to criminal penalties, but still sufficient to deter more serious contraventions of obligations under the WHS Act.

Proposal:

The maximum civil penalty will be as follows:

Individual	Body corporate
up to $10,000	up to $100,000

Standing

Which persons should have standing to bring a civil penalty application?

In the independent review Mr Merritt recommended that standing to bring a civil penalty application for breaches of health and safety duties should extend to workers, families of deceased workers, and employee associations.

Subject to complying with the compulsory dispute resolution process outlined above, that recommendation is reflected in this paper. However, it is intended that, while family members of a deceased worker will not have personal standing, they will effectively be able to commence proceedings through the estate of the deceased worker.

Additionally, it is proposed that standing to bring civil penalty applications for breaches of an order dealing with a right of entry dispute will be extended to employers and employer organisations. This is consistent with the framework under the *Fair Work Act.*

This will promote the overall objective of building a culture of compliance by allowing all parties in the work health and safety framework to hold each other accountable for meeting obligations under the WHS Act.

It is proposed that a party will only have standing if they are "directly affected" by a relevant breach of the WHS Act. This will ensure that disputes are confined only to those parties with a real and immediate interest in the relevant contraventions.

Proposal:

Standing to apply for the SAET to deal with a health and safety dispute, right of entry dispute, and to seek a civil penalty order, will be conferred on:

a. SafeWork SA;

b. Employers directly affected by a contravention;

c. Employees directly affected by a contravention;

d. Registered employer organisations entitled to represent the industrial interests of an employer directly affected by a contravention; and

e. Registered employee organisations entitled to represent the industrial interests of an employee directly affected by a contravention.

Time Limitations

What should the statute of limitations be?

Any limitation period for disputes and civil penalty applications under the WHS Act should ensure that respondents are not subject to an indefinite period of potential litigation, that the integrity of evidence and the availability of witnesses is maintained, and that disputes are progressed and resolved as quickly as practicable.

The existing statute of limitations for civil penalty applications under the WHS Act is 2 years after the contravention first comes to the notice of the regulator.[15] This is consistent with the 2-year limitation for existing criminal offences.

[15] WHS Act s 261.

On balance, it is proposed that the statute of limitations will be maintained at 2 years consistent with current legislation.

Proposal:

A civil penalty application must be bought within 2 years of the date on which the alleged contravention of the WHS Act occurred.

Costs

What should the costs regime be?

Ordinarily, industrial matters are a 'no costs jurisdiction, where both parties bear their own legal costs of proceedings unless a party has acted unreasonably or vexatiously.

A regime where 'costs follow the event'[16] may act as a disincentive to bringing unmeritorious proceedings. However, given the relatively low maximum civil penalties proposed in this paper, there is a risk that any legal costs which are ordered will exceed the penalty imposed for a contravention.

This would undermine the fairness of the dispute resolution system and be a significant barrier to access to justice for both workers and employers.

An alternative hybrid model would have 'no costs' proceedings during conciliation and mediation, but costs follow the event if a party subsequently applies for a civil penalty order. This would allow for conciliation and mediation to occur at low cost, but still create a disincentive against progressing unmeritorious applications to hearing.

On balance it is proposed that civil penalties under the WHS Act will maintain the usual 'no costs' jurisdiction for industrial matters.

However, it is proposed that a civil penalty application may be dismissed of the application is frivolous, vexatious or an abuse of process. This is consistent will serve as an impediment to the pursuit of unmeritorious proceedings.

Proposal:

Dispute proceedings and civil penalty applications will be a 'no costs' jurisdiction, other than in cases where a party has acted unreasonably or vexatiously.

The SAET will have the power to dismiss a dispute proceeding or civil penalty application where it is frivolous, vexatious, or an abuse of process.

[16] That is, where the unsuccessful party is required to pay the successful party's legal costs of the proceedings.

Double jeopardy

What should be the interaction between criminal prosecutions and civil penalty proceedings?

According to the 'double jeopardy' principle, a person ordinarily cannot be punished twice for the same conduct. It is appropriate that this principle is reflected in any civil penalty model to ensure a person cannot face a civil penalty following a criminal conviction.

It is proposed that criminal prosecutions will take priority over civil penalty applications, so that if SafeWork SA commences a prosecution then any civil penalty application concerning the same matter will be stayed until the outcome of the case.

It is also proposed that if SafeWork SA is successful in a criminal prosecution, a court will be prohibited from subsequently imposing a civil penalty in relation to the same matter. This assures parties of finality if a criminal conviction is imposed.

Proposal:

Proceedings for a civil penalty order will be stayed if criminal proceedings are commenced against a person for an offence constituted by conduct that is substantially the same as the conduct constituting the civil penalty contravention.

A court cannot make a civil penalty order against a person if the person has been convicted of a criminal offence constituted by conduct that is substantially the same as the conduct constituting the civil penalty contravention.

SafeWork SA's involvement in civil proceedings

What role should SafeWork SA have in civil penalty proceedings?

It is proposed that SafeWork SA will have standing to intervene in any civil penalty application commenced by other parties, such as workers or employer organisations. This is appropriate given SafeWork SA's role as the statutory work health and safety regulator and its institutional expertise in work health and safety mattes.

In particular it is expected that SafeWork SA may seek to intervene when proceedings raise issues of interpretation concerning the WHS Act, regulations, and codes of practice, or raise an issue of general importance concerning work health and safety.

If SafeWork SA intervenes in a proceeding then it will have the same capacity as other parties to apply for the case to be dismissed if it is frivolous, vexatious, or an abuse of process. This ensures that SafeWork is capable of taking an active role in preventing any misuse of the civil penalty regime.

It is intended that SafeWork SA would be automatically informed of any civil penalty proceedings filed by parties in the SAET, so that it has the opportunity to consider the proceedings and determine whether to intervene or not.

Proposal:

SafeWork SA may intervene as a party in any civil penalty application.

Right of entry disputes

What measures should be taken to strengthen existing dispute resolution process for right of entry disputes?

WHS entry permit holders have an essential role under the WHS Act in educating workers about health and safety risks, investigating potential contraventions of health and safety duties, and resolving issues at a worksite level before injuries occur.

However, this role also comes with special privileges and responsibilities. The WHS Act recognises the need for checks and balances to ensure entry powers are exercised appropriately, particularly when entering the private premises of a PCBU where there is the potential to disrupt work being undertaken.

As outlined above, the WHS Act already contains a dispute resolution process where the SAET can mediate, conciliate, and arbitrate disputes over right of entry matters, including by making orders revoking or placing conditions on a WHS entry permit.

The proposed expansion of this system to deal with health and safety disputes, and the conferral of standing on workers and employee organisation to seek a civil penalty order for health and safety breaches, would give greater responsibility to those stakeholders in monitoring and upholding compliance with the WHS Act.

In recognition of this additional responsibility, it is appropriate to consider what further measures are needed to ensure responsible behaviour, and that employee organisations cannot seek to uphold the WHS Act if they are simultaneously breaching their own obligations under the Act in relation to right of entry.

Under the Commonwealth *Fair Work Act,* private sector employers and their representatives can already seek civil penalty orders against an employee organisation or permit holder for right of entry breaches, including for contraventions of state and territory health and safety laws such as the WHS Act.[17] It is not proposed to duplicate these existing processes which are already available under other legislation.

[17] FW Act, Part 3-4, Division 3.

Instead, to complement the remedies already under Commonwealth legislation, it is proposed to confer standing on parties to seek a civil penalty order if a party breaches an order made to resolve a right of entry dispute under the WHS Act. This will allow those parties to take an active role in enforcing the settlement of right of entry disputes, without undermining existing dispute resolution processes.

If a WHS entry permit holder breaches an order settling a right of entry dispute, it is also proposed to allow a court to impose a civil penalty on the employee organisation that employs the permit holder.[18] This will encourage employee organisations to take responsibility for management of their officers and employees when exercising entry rights, and is consistent with the right of entry regime under the *Fair Work Act.*

Finally, it is proposed to expand the powers of the SAET when dealing with right of entry disputes to make a declaration that an employee organisation has a "significant history" of breaching its right of entry obligations under the WHS Act.[19]

The effect of such a declaration would be to prohibit the organisation from commencing civil penalty applications under the WHS Act, and to impose stronger reporting requirements to SafeWork SA about the exercise of its right of entry powers.

For example, the relevant employee organisation may be required to report intended exercises of right of entry powers to SafeWork SA before entering a worksite, and to deliver a written report on the outcome of that entry within 28 days after the entry.[20]

This would recognise that an organisation which does not comply with the law should not be empowered to exercise new powers to uphold the law, and allow SafeWork SA to more closely supervise employee organisations if they have a significant history of misbehaviour.

It is also proposed that such a declaration would lower the threshold for revoking a WHS entry permit where a permit holder is involved in future right of entry breaches, by imposing a rebuttable presumption that future contraventions will result in a permit being revoked unless there is a reasonable excuse for the contravention.[21]

This would recognise that the SAET should be able to take into account any history of misconduct across an organisation when evaluating the appropriate orders to make in settlement of a right of entry dispute, and when determining whether it is appropriate for a person to retain a WHS entry permit.

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[18] Currently the WHS Act only allows civil penalties to be imposed on an individual WHS permit holder, but not the employee organisation for whom the permit holder is an officer or employee.

[19] It is intended SAET could take into account findings of contraventions of the WHS Act which have been made in the context of civil penalty proceedings under the FW Act, as well as dispute proceedings under the WHS Act.

[20] In some circumstances a WHS permit holder may already be required to report an intended entry to investigate suspected contraventions, and to provide a written report on the outcome of the entry to the regulator, under sections 117(3) and 117(6) of the WHS Act. This proposal would expand the existing requirements.

[21] For example, it may be found there is a "reasonable excuse" if the contravention arises from a reasonable and good-faith interpretation of the law which is ultimately found by a court to be incorrect. The revocation of a permit is intended to occur only where there are substantive right of entry breaches, not technical errors.

Proposal:

The existing right of entry dispute procedure under the WHS Act will be expanded so a party can apply for SAET to impose a civil penalty for a breach of an arbitral order dealing with a right of entry dispute.

When arbitrating a right of entry dispute, the powers of the SAET will be expanded so that it may make a declaration that an organisation has a "significant history" of contravening the WHS Act.

If such a declaration is made by the SAET:

(a) the organisation will be prohibited from commencing a civil penalty application under the WHS Act;

(b) the organisation will be required to report all intended exercises of a right of entry power to SafeWork SA before entering a premises;

(c) the organisation will be required to provide a written report to SafeWork SA detailing the exercise of its right of entry within 28 days of the entry;

(d) there will be a rebuttable presumption that any future contraventions by WHS entry permit holders employed by the organisation will result in their permit being revoked, unless there is a reasonable excuse for the contravention.

A declaration by the SAET may be revoked after a period of 2 years if the organisation can demonstrate a history of compliance with the WHS Act, and that appropriate measures have been taken to prevent future contraventions.

6. Examples

The following examples illustrate the application of the model proposed in this paper.

Example #1 – Health and safety dispute

A manufacturing firm removes the safety guard on several pieces of machinery to make them faster for workers to access and operate.

Workers raise concerns with the firm about the safety risk posed by the removed guard, including that this is inconsistent with the employer's duty to ensure, as far as reasonably practicable, that plant at its worksite is without a risk to health and safety.[22]

Discussions at a worksite level are unsuccessful in resolving the dispute.

The workers' union applies for the SAET to assist in resolving the dispute. The SAET arranges a telephone conciliation conference between the parties where both sides express their views on the safety issues, and the SAET member explains to the employer the need to ensure that plant at the worksite is safe.

As a result of this process the employer and the union agree that the safety guards will be re-installed on the machinery in the workplace and the dispute is resolved.

Example #2 – Health and safety dispute – civil penalties

An overseas visa worker in the horticultural industry is required by their employer to operate a forklift without holding a license, with no relevant training, and with no safety systems in place at the workplace. Other workers are required to do the same.

The worker raises concerns with their employer about this practice, and the worker's union writes to the employer identifying the issue and asking that it urgently be fixed.

The employer refuses to take any action to correct the issue and, several weeks later, a co-worker is hospitalised when they are hit by a forklift driven by an unlicensed worker.

The worker's union applies for the SAET to assist in resolving the health and safety dispute. During the conciliation and mediation process the employer expresses no contrition and refuses to take any corrective action.

Following the unsuccessful dispute settlement process, the worker's union applies to the SAET to impose a civil penalty on the employer for breaching its primary duty of care to ensure, as far as reasonably practicable, the health and safety of its workers.[23]

After hearing the evidence presented by both parties, the court finds that the employer contravened its health and safety duties and imposes a civil penalty of $80,000 on the employer to deter future contraventions of the WHS Act.

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[22] WHS Act s 21.

[23] WHS Act s 19.

Example #3 – Right of entry dispute – civil penalties

A group of union WHS entry permit holders entering a worksite refuse to have their permits available for inspection,[24] refuse to comply with occupational health and safety requirements that apply at the workplace,[25] and unreasonably obstruct the performance of work at the workplace.[26]

The employer seeks the assistance of SAET to resolve the dispute.

After hearing from both parties, the SAET arbitrates the dispute by making orders that the WHS entry permit holders ensure their permits are available for inspection, comply with occupational health and safety requirements, and cease obstructing work.[27]

Despite these orders, the union's WHS entry permit holders continued these actions during multiple future entries to the worksite.

The employer applies to the SAET for civil penalties to be imposed for the breaches of its arbitral orders dealing with the right of entry dispute.

After hearing the evidence presented by both parties, the SAET finds that the union and the WHS entry permit holders have repeatedly and intentionally contravened orders settling the right of entry dispute.

The court imposes civil penalties of $90,000 on the union, and penalties of $8,000 on each of the WHS entry permit holders to deter future contraventions.

The court also takes into account a similar prior history of breaching right of entry obligations by the union, and makes a declaration that the union has a significant history of breaching right of entry obligations under the WHS Act.

This declaration prevents the union from commencing civil penalty applications, allows SafeWork SA to supervise its use of entry rights more closely, and makes it easier to revoke officials' WHS entry permits if they are involved in future breaches.

[24] Contrary to WHS Act s 125.

[25] Contrary to WHS Act s 128.

[26] Contrary to WHS Act s 146.

[27] These orders are made under the existing powers in WHS Act s 142.

7. How to provide your feedback

Your views will help the Government determine its final response to the recommendation of the independent review of SafeWork SA regarding the introduction of civil penalties for breaches of WHS duties.

Please provide your written submissions as follows:

Via email to: AttorneyGeneral@sa.gov.au

Closing date: Friday, 10 November 2023

Please be aware that any documents provided are subject to the *Freedom of Information Act 1991.* While efforts will be made to keep material confidential where this is requested, in some circumstances submissions be required to be disclosed under that Act. Where disclosure of information may identify you, attempts will be made to consult with you before any documents are disclosed.