TO: MINISTER FOR INDUSTRIAL RELATIONS, HON. JOHN R AU MP

RE: WORK HEALTH AND SAFETY – DRAFT CODES OF PRACTICE

As you are aware in the Parliamentary debate for the Work Health and Safety Bill 2012 an amendment was passed concerning clause 274 of the legislation

(3) In connection with the operation of subsections (1) and (2)—
   (a) the Small Business Commissioner must be consulted before a code of practice is submitted to the Minister under this section so that the Commissioner may assess whether the code of practice would affect small business if implemented and, if so, provide any comments or advice that the Commissioner considers to be appropriate in the circumstances (including that the code be varied); and
   (b) if the Small Business Commissioner recommends that a code of practice be varied, the Minister may make such a variation without the need to adopt the process envisaged by subsection (2) (but may undertake such consultation in relation to the matter as the Minister thinks fit).

Safework SA provided our Office with the twelve (12) Draft codes earlier this year and subsequently we have undertaken to obtain detailed feedback concerning these codes from industry representatives.

These 12 draft codes are as follows:

Tree trimming and removal work – crane access method
Traffic management in workplaces
Working in the vicinity of overhead and underground electric lines
Safe design, manufacture, import and supply of plant
Scaffolds and scaffolding work
Formwork and falsework
Managing cash-in-transit security risks
Managing risks in forestry operations
Managing risks of plant in rural workplaces
Cranes
Industrial lift trucks
Amusement devices

We are now in a position to provide you with a range of comments and recommendations for your consideration.
In general there appears to be a number of recurring issues that various industry groups have brought to our attention. These include:

- Many smaller businesses believe that in practical sense it is almost impossible for them to comply with the WHS regulations and codes of practice already in place. This is due to many businesses being so small that they do not have the capacity to dedicate resources in this area;

- The *Work Health and Safety Act 2012* assume that the same risk is faced by a person conducting a business or undertaking (PCBU) with many staff compared to a business with only one staff;

- The Codes of Practice should be easy to read and understand – our Office has noted that most of the codes are quite lengthy (up to 90 pages for one of the draft codes) and even given that they are ‘support documents’ they have evidentiary status in a court of law;

- Codes must provide practical information on what is reasonably achievable for small businesses on risk controls, and add value by increasing understanding and knowledge of risks and control measures. As outlined above for small businesses without the necessary resources to research new technology or practices, Codes become an even more important tool to help business owners meet their WHS legal duty of care.

- Further to this it would seem appropriate now to further develop information sheets and guidance notes for various industry sectors to understand the basic elements of the Codes. These should not be delayed for a later stage as many small businesses need a simplified form of explanation of responsibilities. Codes should include clear checklists and diagrams to assist with explaining their obligations.

- The biggest impact to small businesses appears to be the additional financial costs to day to day operations to ensure compliance with the Act and regulations. The Codes, although attempting to be helpful will often require specific advice and training requirements that may be costly and may need to be sourced from outside the small business.

- There have also been issues raised from many businesses who have concerns with the powers that have been given to SafeWork SA for prosecutions and investigations. It appears that other States have different approaches to section 172 and there is a clear view by many business organisations that South Australia adopts similar amendments. We understand that there is an amendment Bill that is being considered by the Parliament concerning this issue.

Specific feedback on individual draft codes is now provided for your consideration.
Traffic Management in work places

- Page 8, dot point 2 – suggest change wording and context around supervision
- Page 7, dot point 4 – in regards to reviewing security footage, add “where available” as many small businesses do not have security footage at small building sites.
- Section 3.1 – does not provide practical guidance for smaller building sites with fewer workers. Suggest that a set of guidance material for industry workplaces are developed before the Code is adopted.
- Further to this section, Specific Control Measures appears to be designed for larger fixed workplaces. In particular, the Code does not appear to provide practical guidance for civil construction where often the small size and fluid mobility of the work site occurs, and with a small number of workers in many cases, does not enable many of the suggested control measures to be practically implemented. Reference to and practical examples of small mobile work sites should be included.
- We have been advised that in the initial Issues Paper released by Safe Work Australia it was noted on page 9 of that paper that the Traffic Management Code was designed to be supported by a Guide that covers construction workplaces, as well as other specific industries where other control measures need to be applied. It is recommended that this guidance material be developed and approved before the Code is adopted.
- Page 12, 3.2 – Requires mention of speed suppression devices, such as speed humps.
- Page 13, figure 2 – diagram is seen to be complicated by some groups
- Page 20, 3.10 – Unrealistic to expect all customers of a business to be aware of all traffic management procedures when there are already signs up, for example, about speed limits and lines marked in car parks.
- Page 21, Section 3.1.1, Paragraph 3 – It seems unreasonable to expect a small business to form a traffic management consultative committee. Suggest this section gets deleted.
- Section 3.1.1 – unrealistic for small businesses to put in place traffic management plans for small building sites. Suggests that management plans be required for construction projects of a certain value, for example, $250,000 or greater.
- It is believed that a documented risk management plan is not necessary for residential sites and will be costly for a small business to create one every time.
- Legislation and code is seen as not practical for the majority of residential builders. Many of the processes are seen as ‘overkill’ for example, the requirement for training in the traffic management training program.
- Problems seen with Local authority compliance officers and the use of safety cones around tradesman’s vehicles and trailers.

In addition the housing industry sector has raised a number of issues with us including:

- A major issue for residential builders is the conflict that already exists and has since January 2013 is where a PCBU manages vehicular movements and
unloading/loading of vehicles pursuant to the WHS Act Regulations and Codes of Practice and what they believe is conflicting with the Road Traffic Act 1961.

- The Road Traffic Act 1961 we understand requires a person working on, along or across any road pavement or shoulder, that person must be trained in the Department of Planning, Transport & Infrastructure’s Work Zone Traffic Management Training Program (an 8hr course every 5 years). This is in the housing industries view (where their members who, for example, putting safety cones around a tradesman’s trailer and also having to obtain a permit from Council and pay the appropriate application fees - all after the contractor has prepared the necessary plans) a complete ‘over kill’ compared to say undertaking road works, and slowing traffic. Apparently there is evidence of builders being challenged by Local Authority Compliance Officers for putting safety cones round trailers without the appropriate training.

Cranes

- The Crane Code would be better if separated into two Codes; one covering crane operation and one covering inspection, testing and maintenance for easier referencing.
- Suggested that any amendments that need to be incorporated should involve the Construction OHS Committee hosted by SafeWork SA.
- Page 4, paragraph 5 – Expectation is that duty holders comply with codes of practice and relevant standards. As some standards change regularly and may not have considered OHS, could potentially leave the small business open to legal breaches. Small businesses have limited resources to access standards.
- Licences – it is likely that many small businesses would not be able to meet the licensing requirements for loading and unloading due to significant costs.
- General lifting – suggest that the lifting system should be certified by a licensed rigger.
- Tower ladders – suggests that some information be deleted.
- Some particular groups for example Motor Trade businesses would use registrable vehicle loading cranes, but on an infrequent basis. The concern is the high amount of record keeping that would be required for such infrequent use.
- There should be a basic visual inspection and safety maintenance checklist developed to include in this Code for small businesses in our view.

Scaffolds and Scaffolding Work

- Definition of scaffolding has been defined differently in the regulations and other requirements are not clear enough.
- Code should provide more guidance on competency and assessments.
- An alternative method should be used to identify scaffolding work as a scaffolding plan may not be required for all types of work and may increase further costs and time constraints that a small business does not have.
• The Draft code does not define the differences in housing and other construction.
• A review of figures and pictures in the code should occur with industry stakeholders in order to see how they can be improved.
• Important that language is appropriate and understandable for small businesses.
• Clause 3.2 – High risk construction work at 2 metres should be 3 metres for SA. I have been advised by the HIA that this contradicts with a concession granted by the previous Minister they believe.
• Clause 3.3 – there is no guidance for the use of a structural engineer for minor scaffolding for smaller or residential constructions.

Formwork and Falsework

• Code should include practical advice for the housing sector or potentially exclude residential housing sector from the scope.
• I am advised that South Australian Construction Industry OHS Committee developed a guideline on Formwork in 2010. It would be prudent that the draft code be reviewed against this recent South Australian guideline.
• There appears to be some differences and inaccuracies for points made on page 4 and 7. This includes:
  o 1.1 Page 4 – First paragraph; scaffolding is referred to as plant where in fact it is a temporary structure – there is confusion in industry about this.
  o 1.4 Page 7 – there is a requirement for specific formwork and falsework training to be provided to workers and supervisors. It is suggested that this should only be for workers and supervisors directly involved in formwork and falsework. It would appear to be highly unrealistic to expect a principal contractor site supervisor to have experience and training in this specific field. Therefore this requirement should be removed.
• Technical details from some of the standards should be reflected in the Code so small businesses do not need to pay for extra information to ensure they comply.

Working in the Vicinity of Overhead and Underground Electrical Lines

• The Code outlines “clearance distances” between the wires and work zones, for example for scaffolding, cranes, trucks, and even buildings. The higher voltage load the further clearance is required.
• As non-electricians the difficulty many small businesses face including many builders & trades is the identification of the voltage carried by particular wires.
• Suggested that the previously prepared Advisory Notice from SafeWork SA that identifies size of wires and voltage load be included in this Code of Practice or added as an attachment.
Managing Risks of plant in rural workplaces

- Small business dealers need to provide better training and instruction on the purchase of heavy farm machinery.
- Maintenance and inspection of equipment should be based on reasonable and practical assessment of its use. If the equipment is used or much older there may be difficulty for the small business owner to know how to comply with the current regulations and Code. An information fact sheet would be useful for this area.

There are a number of other issues that have been raised with us in relation to this Draft Code:

Children

- There is reference to children as well as visitors throughout the Code. The concern is that the reference should specifically include children's friends and not be limited to "visitors". We wonder whether the use of "visitors" sometimes overlooks the children's friends including the manager's, employees' or third party children (eg an employee living in a farm house). We believe the draft should make specific reference to include the farmer and the employees' children and/or their friends who reside on the farm.

Quad bikes/All-Terrain Vehicles

- There are concerns that employers will request their employees to wear protective equipment e.g. goggles and helmets. Those employers may have policies in place specifying that their employees must wear protective equipment. The employees may even sign those policies and procedures stating that they have understood and will observe those policies. They may even comply but, because most work is unsupervised, employees know when the employer is not present or, even on the property, they may discard the equipment usually the helmet. The employer might not be aware until an accident occurs and there is a view from the business sector that there is not enough onus on the employee’s responsibilities.

- The Code does not in our view go far enough to cover these circumstances and we suspect mustering cattle in remote areas is probably one very good example where the employees and the employer may at any given time be considerable distances apart. Another example is when the farmer is not even on the property.

- In the section 5.8 Personal Protective equipment it states "A helmet which meets an appropriate standard should always be worn." Is it preferable for that to be amended to "must be worn". The draft places considerable responsibility on the employer and not enough on the employee or the manufacturers. There is no apparent recognition on the actual practice where the employer and the employee are not at the same place when the vehicles are being used. The current situation expects the employer to ensure compliance by placing total trust in the employee complying. The Code also
does not emphasise clearly that the employer is also to comply with these requirements. Unfortunately there can be a view by some that compliance with these laws applies to employees and not employers.

- The Code does not put an onus on the manufacturers of Quad bikes who can also assist by being pro-active and acknowledging that injuries could have been prevented, in some instances, if the quad bike’s safety features were improved. There is an implication in the Draft Code that it is sufficient for an employer, employee or contractor, to comply with the manufacturers’ manual on the basis that the manufacturer has done everything that is reasonable to ensure that the quad bike is safe. We note that the Chair of Safe Work Australia, Mr Hoy, made a challenge to the manufacturers of quad bikes on 26 April 2013, where he “called on the designers and manufacturers of quad bikes to urgently reconsider improving the design of quad bikes so they are not prone to roll over.” We understand that with an average of about 14 fatalities each year since 2001, we believe the Code should reflect the expectation for manufacturers to do all that is reasonable to at least minimise the foreseeable risks.

**Tractors, Farm machinery and Equipment**

- The Code makes reference to the duty of care owed to children, children riding on quad bikes and children using plant and equipment but the section on Tractors makes no mention of children riding or sitting in tractors.

**Drugs and alcohol**

- There is no mention of either of these in the Draft Code and we wonder if there should be given that the employees may use plant, machinery and, equipment.
- It would very difficult for employers particularly in remote and rural areas generally as to what they can do in such circumstances. If for example the employer were to seek a blood test doctors and nurses are not readily available. We are advised that the Farmers OHS Guidebook does offer suggestions but a Code of Practice may also impose penalties for employees who disregard this issue.

**Inductions employees, contractors, suppliers, friends and visitors**

- The Code is silent on this issue with regard to Contractors and the like who may only be on the farm for a short period of time (a few hours)or who is engaged for a "one off". Farmers are expected to induct all contractors and employees. Some contractors only visit the farm for shearing and crutching, silage, seeding and harvesting etc. This is seasonal work and the contractors and the employees may or may not be the same as the previous season. This can be an onerous task but the draft Code is silent on what is seen as a significant issue for short engagements.
Working with animals

- Cattle and pigs in particular are the cause of many workplace injuries and the plant that is used with these animals. Both are often handled in wet and slippery conditions. The Code is silent on handling animals and offering assistance to minimise the risk of injury.

Shearing Sheds, crutching and platform work

- Risks can occur in shearing platforms and the like. The Code could be enhanced with some housekeeping practices for these areas.

Fire control

- There should be ongoing farm maintenance program and be highlighted in the accreditation and re-accreditation courses for handling inflammable, dangerous and chemical materials. The local CFS may not be privy to updated water points' locations unless a map is provided to them by the farmer and updated when water points are relocated. The Code is silent on farms providing maps outlining water points and inflammable and dangerous goods including fertilisers.

Dams

- The Code is silent regarding Dams.

English as a second language

- With the growing incidents of employees particularly, those on 457 Visas and backpackers, many rural industries are faced with engaging seasonal employees whose use of the English language is limited or non-existent. It would appear that is nearly impracticable for employers to have a Code of Practice, Policies and Procedures in place to cater for all languages. This is particularly so in the horticultural industry with fruit picking. It occurs in other commodities as well. Farmers do not wish to discriminate against employees who do not have English as a first language but may be discouraged from engaging these employees because of the risk of not fulfilling their statutory obligations and their duty of care. Farmers may also be faced with the added problem of labour shortages in rural and remote areas and managing employees with English as a second language or not being English conversant at all, can only increase the risk of non-compliance'.

This code in particular could possibly assist by including an overview of Employer and Employee responsibilities.
In summary, we would recommend that:

- You consider varying specific Codes in line with the feedback on a particular that has been presented in this minute.
- Further development of information sheets and guidance notes occur as soon as practicable for various industry sectors so that they may better understand the basic elements of the Codes. In our view these should not be delayed for a later stage as many small businesses need a simplified form of explanation of their responsibilities.
- As part of clearer information all Codes should include clear checklists and diagrams to assist businesses with explaining their obligations.

A number of business groups have indicated that they were more than willing to work with our Office and SafeWork SA in order to improve implementation of this important legislation.

Mike Sinkunas
SMALL BUSINESS COMMISSIONER

Frank Zumbo
DEPUTY SMALL BUSINESS COMMISSIONER

6 June 2013

Cc Hon Tom Kenyon MP, Minister for Small Business
    Bryan Russell, Executive Director SafeWork SA