

File No: I7358 FD; 06055



22 June 2018

The Honourable Bruce Lander QC  
Independent Commissioner Against Corruption

By Email Only: [evaluation@icac.sa.gov.au](mailto:evaluation@icac.sa.gov.au)

Dear Commissioner

## Evaluation of SafeWork SA

As you know, we act for Ms Pam Gurner-Hall (widow of Mr Jorge Castillo-Riffo), the Construction, Forestry, Mining, Maritime and Energy Union and the Australian Workers Union.

We are instructed to make the following submission to your evaluation of SafeWork SA.

### Introduction

1. Our clients each have long-standing grave concerns (particularly long-standing in relation to the CFMEU and the AWU) about the efficacy of SafeWork SA in relation to the enforcement of workplace safety law.
2. Essentially, our clients consider that contraventions of workplace safety laws are, in the main, not the subject of enforcement action by SafeWork SA. There is a desperate need for more and stronger enforcement of workplace safety laws.
3. The frequent lack of enforcement has led to widespread disregard of workplace safety obligations, leading to more injuries and deaths.
4. Our clients believe that the reduction in the raw figures concerning workplace injuries relates more to the shift in the South Australian economy away from industries which have historically and still cause injury, to more sedentary work, rather than adequate improvement in workplace safety practices. An additional factor is the tightening of the definition of workplace injuries for workers compensation purposes over time, thus excluding injuries which would previously have been recognised as work caused.
5. As we have explained, a coronial inquest into the death of Mr Jorge Castillo-Riffo is part heard (**the inquest**). Evidence received in the inquest provides examples which corroborate the concerns held by our clients, and material speaking to substantial opportunity to improve the enforcement of workplace health and safety laws.
6. Including because SafeWork SA is a party participating in that inquest, our clients assume your evaluation has access to the exhibits and transcript of the inquest.

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**Ms Gurner-Hall's evidence in the Coronial Inquest**

■ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

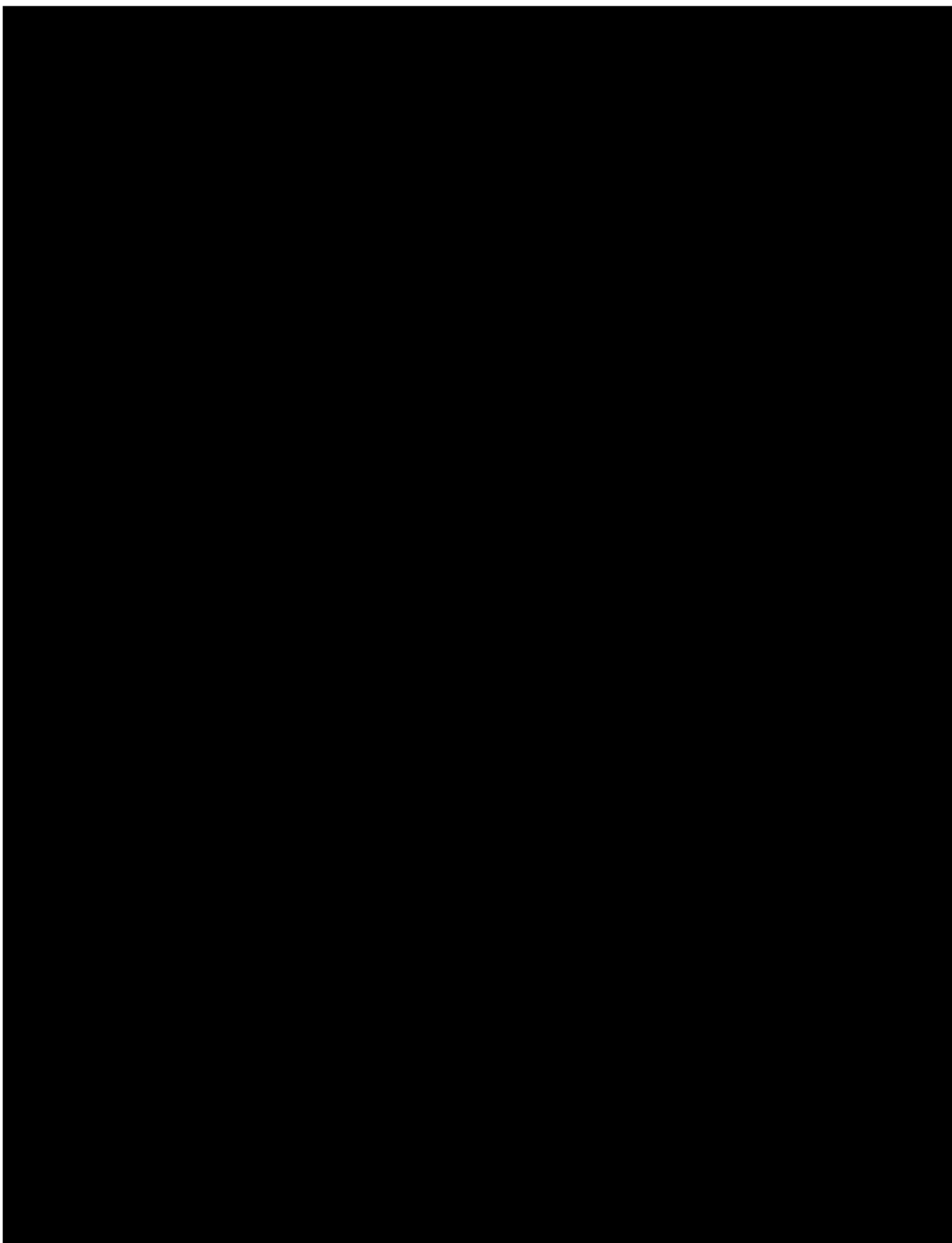
[REDACTED]

[REDACTED]

[REDACTED]

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■ [REDACTED]



- [Redacted]
- [Redacted]
- [Redacted]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13. In that regard, our clients submit that enforcement of workplace safety laws would be greatly enhanced by adopting the regime of civil remedy enforcement proceedings presently found in the Commonwealth *Fair Work Act 2009*.
14. As you would be aware, that regime allows the workers concerned (which may extend to their estates) and relevant unions to commence proceedings for the imposition of civil penalties when employment laws are contravened.
15. Injured workers, the families of deceased injured workers and relevant unions should have the capacity to commence civil penalty proceedings when workplace safety laws are contravened.
16. That would assist SafeWork SA by sharing the burden of regulatory enforcement with persons more directly concerned in the events and more motivated to improve workplace safety, much as the role of bringing enforcement proceedings for award entitlements, minimum wages and the like under the Commonwealth *Fair Work Act 2009* is shared between regulatory authorities, the workers concerned and relevant Unions.
17. In that regard, our clients' note that the *Work Health and Safety Act 2012* includes a civil penalty regime as an alternative to criminal prosecution. However, only SafeWork SA and its officials may commence such proceedings.
18. Our clients emphasise that they consider criminal prosecution proceedings an extremely important aspect of enforcement. However, that aspect of enforcement should be supplemented by allowing injured workers, the families of injured workers killed at work, and relevant unions to commence civil penalty proceedings when workplace health and safety laws are broken.

[REDACTED]

20. Enhanced enforcement is also likely to lead to enhanced compliance.

**SafeWork SA focusing on theory not practice**

21. The CFMEU is extremely concerned that SafeWork SA, in attending worksites, often focuses on whether paperwork about safety is in order, as opposed to what is actually happening. In its experience, there is often a huge difference between what the paperwork says is supposed to happen, and what actually happens.

**Evidence of poor investigation practices**

22. A SafeWork SA Senior Work Health and Safety Inspector, has given evidence in the inquest. [REDACTED]

23. The evidence concerning the investigation of Mr Castillo's death, leading as it did to the withdrawal of the prosecution shortly before trial, is incomplete. That very substantially impedes our clients' ability to make submissions on this important example of the serious deficiencies present in SafeWork SA. Notwithstanding that, this submission attempts to assist this evaluation by reference to the evidence that has been given.

24. [REDACTED]

25. There were police on the scene when the inspector and other SafeWork SA officials attended on the day of the accident. [REDACTED]

26. It appears that measuring aspects of the work environment in which the accident occurred was extremely important to the proper investigation of the accident. [REDACTED]

[REDACTED] It was particularly important to take those measurements on the day as the worksite concerned (being the new Royal Adelaide Hospital) was a building site which was evolving significantly and rapidly.

27. [REDACTED]

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[REDACTED]



36. [REDACTED]

37. [REDACTED]

38. [REDACTED]

39. [REDACTED]

40. [REDACTED]

**Failure to prosecute breaches of workplace safety law per se**

41. Some regulators commence enforcement proceedings for breach of regulatory requirements, irrespective of whether harm has been suffered as a result of that breach.<sup>20</sup>

42. So far as our clients are aware, [REDACTED], SafeWork SA has never commenced a prosecution or civil penalty proceedings for breaches of workplace safety laws where there has not been an injury (e.g. cases of “near misses” or identified failures to provide a safe system of work).<sup>21</sup>

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>20</sup> For example, see *Fair Work Ombudsman v Musicians Union of Australia* [2016] FCA 302

[REDACTED]

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- 43. Enforcement of workplace health and safety law, irrespective of good luck preventing an injury, is likely to significantly enhance compliance with the law.
  - 44. Workplace safety laws should be enforced when they are significantly broken, whether by criminal prosecution or civil penalty proceeding, even if no injury or death results.

**SafeWork SA's legal resources**

- 45. [REDACTED]
- 46. Those views expressed by SafeWork SA may make an assessment of SafeWorkSA's use of legal resources in investigating and prosecuting matters relevant to this evaluation.

**CFMEU experience**

- 47. Based on its experience of seeking assistance from SafeWork SA to address safety issues, the CFMEU makes the following observations in particular.
- 48. Frequently, inspectors appear very reluctant to make decisions to take any enforcement action (e.g. issuing formal notices) on the basis of their own assessment, without a team of other inspectors becoming involved and agreeing. This can have the consequence that appropriate enforcement action is simply not taken or is inappropriately delayed.
- 49. That reluctance may relate to oversensitivity by SafeWork SA management to complaints by building industry employer representatives, leading to inspectors being criticised by management because of such complaints when low level enforcement action is taken (e.g. by issuing a formal notice).
- 50. It may be that remuneration levels of inspectors are inadequate compromising SafeWork SA's capacity to attract and retain the best possible inspectors.
- 51. Difficulties in workplace safety law enforcement also arise when regulation appears to be inadequately adapted to changes in technology, sometimes leading to an inappropriate focus on fine technical detail rather than broad safety principles.
- 52. For example:

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Timing of events in this evaluation**

- 53. Our clients are respectful of the views you have expressed in response to their request for amendments to the timing of events in this evaluation.
- 54. Our clients continue to submit that amendments to the timeframes are appropriate to allow submissions at least after further evidence about the investigation of Mr Jorge Castillo-Riffo's death is adduced from SafeWork SA officials in August this year, and ideally after the inquest has reported
- 55. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

56. In our clients' respectful submission, having regard to the above, there is a very significant and plain likelihood of overlap between this evaluation and the coronial inquest.
57. In our clients' submission, this evaluation would best proceed with the benefit of the evidence scheduled to be adduced in the inquest and knowledge of such findings and recommendations as may be made by the Coroner, given his above indications.
58. Our clients are unaware of a factor in favour of maintaining the present schedule which appears more significant than taking proper account of developments in the inquest.

### **Conclusion**

59. Our clients anticipate seeking the opportunity to further participate in the evaluation should the opportunity arise.
60. So far as our clients are aware, the materials requested from SafeWork SA by the evaluation are yet to be posted online and accordingly our clients have been unable to assess or comment on them.
61. Workers cannot rely on SafeWork SA to protect them from unsafe work practices.
62. The capacity of union officials to enter workplaces to assist in protecting members from unsafe work practices is critical.
63. In terms of reform, our clients' core contention is that whatever improvements may be able to be made to SafeWork SA's enforcement of work health and safety law, the regulator alone will never be adequately resourced to adequately enforce work health and safety laws by itself.
64. The model adopted by the Commonwealth *Fair Work Act 2009* which allows properly interested parties to apply to Courts to enforce employment laws should be embraced in respect of South Australian Work Health and Safety Law.

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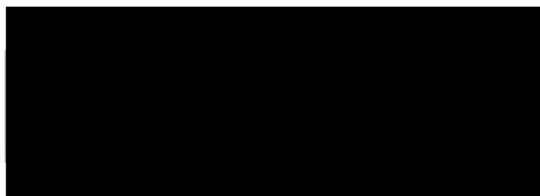
[REDACTED]

Our clients thank you for receiving their submission.

Yours faithfully

LIESCHKE & WEATHERILL

Per:



MICHAEL ATS  
**Principal**