Submission

South Australian Occupational Health, Safety and Welfare Miscellaneous Amendment Bill 2009

Submitter:	Christopher Platt
Organisation:	AMMA
Address:	Level 10, 607 Bourke Street Melbourne 3000
Phone:	03 9614 4777
Fax:	03 9614 3970
Email:	christopher.platt@amma.org.au
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1. Summary

1.1. The South Australian Occupational Health, Safety and Welfare (Miscellaneous) Amendment Bill 2009 (Consultation Bill) proposes to insert a new Part 5A into the *Occupational Health, Safety and Welfare Act 1986* that will allow union representatives to enter South Australian workplaces and engage in consultation.

1.2. This is a new right – the Act does not currently afford unions a right to enter the workplace for OHS purposes. Significantly, in the absence of union access to workplaces, the safety standards of employers in South Australia have been improving under the current state OHS system. This is evidenced by strong moves towards achieving the government's strategic goal of a 40 percent injury reduction by 2012, a drop a significant drop in fatalities from 18-20 per annum to just 5-8 per annum.

1.3. The evidentiary basis for affording union representatives a right to enter the workplace to engage in consultation, particularly when trade union membership in South Australia has halved since 1990,[1] is lacking. AMMA has therefore recommended, as its primary position, to remove Part 5A from the Consultation Bill.

1.4. AMMA's key concerns in respect to Part 5A of the Consultation Bill are as follows:

1.4.1. The definition of 'consultation' is vague and ambiguous. It could enable the sharing of information or exchange of views about extraneous matters, whilst actions taken by unions in viewing the workplace and accessing records has the potential to be characterised as undertaking an investigation – a right specifically excluded by the Minister.

[1] Australian Bureau of Statistics, *Employee earnings, benefits and trade union membership*, 'Trade Union Membership', Table 1, Cat No 6310.0, ABS, Canberra, viewed 13 March 2009, http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6310.0Aug%202007?OpenDocument

1.4.2. It allows unions to enter workplaces where they have no members, where the employees are members of a different union or where there are employees which the relevant union is not eligible to represent.

1.4.3. It provides scope for entry to occur without 24 hours notice and scope to engage in consultation outside of meal or other breaks.

1.4.4. It allows an authorised official to enter and wander the workplace without a requirement to immediately notify the employer or occupier, putting at risk the safety of him or herself and others in the workplace;

1.4.5. It allows union access to, and subsequent disclosure of, a broad range of records, including trade secrets and information held in confidence, where the authorised representative is merely engaging in consultation and not an investigation (in which case it could be argued that such records are relevant to the investigation of a suspected breach).

1.4.6. It does not adequately regulate the issuing or revocation of permits, to ensure union officials entering the workplace are 'fit and proper persons' with an understanding of, and training in, occupational health and safety.

1.4.7. It does not make adequate provision for the resolution of disputes regarding entry to the workplace.

1.5. When government proposes to allow a union to enter the workplace, an appropriate balance must be struck between the right of the union to represent its members with the right of the employer to operate its business without undue interference or interruption.

1.6. This balance is not achieved in Part 5A of the Consultation Bill. While Part 5A follows a national trend of allowing unions to enter workplaces for OHS purposes, the provisions are drafted so broadly that it represents a significant expansion of powers where there is no evidentiary basis, lacks clarity and blurs the lines between health and safety and industrial relations issues.

KEY RECOMMENDATIONS

Recommendation 1: AMMA does not support union right of entry for the purposes of engaging in consultation and contends that Part 5A of the Consultation Bill should be removed.

Recommendation 2: Amend the definition of 'consultation' to ensure that such entry cannot be used to pursue industrial agendas or to undertake investigations of suspected breaches.

Recommendation 3: Restrict union right of entry to workplaces where the employee is a member that the union is entitled to represent as prescribed in the union's eligibility rules.

Recommendation 4: Require a minimum 24 hours of notice of entry and immediate notification upon entering the workplace.

Recommendation 5: Remove union access to records or alternatively, limit access to those documents that are directly relevant to the health and safety matters under discussion.

Recommendation 7: Protect trade secrets and information held in confidence from mandatory disclosure, unless by order of the Commission.

Recommendation 8: Impose penalties for unauthorised disclosure of employer records, with additional consequences in respect to the ability of the authorised representative to hold a permit.

Recommendation 9: Require a union official seeking to hold a permit to be a 'fit and proper person', as per the requirements in section 742 of the *Workplace Relations Act 1996.*

Recommendation 10: Require revoked or expired permits to be returned to the Industrial Registrar within 7 days.

2. AMMA Profile

2.1. AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries, including significant numbers of construction and maintenance companies in the resources sector.

2.2. AMMA is the sole national employer association representing the employee relations, human resource management, occupational health and safety, education, employment and training interests of Australia's onshore and offshore resources sector and associated industries.

2.3. As at the date of this submission all of AMMA's members fall within the definition of a trading corporation.

3. Right of Entry of Trade Union Representatives

Background

3.1. The South Australian Government is proposing to introduce provisions giving union officials (and other persons) right of entry powers for occupational health and safety purposes. The new powers of entry are contained in the South Australian Occupational Health, Safety and Welfare (Miscellaneous) Amendment Bill 2009 (Consultation Bill) which has been released for public comment.

3.2. As a result of right of entry provisions in the *Workplace Relations Act 1996*[2] (which will be replicated (to some extent) in the soon to be enacted Fair Work Act 2009) the South Australian occupational health and safety legislation applies to unincorporated and incorporated employers in South Australia, despite incorporated employers falling within the federal workplace relations jurisdiction.

3.3. Presently most Australian states and territories (except South Australia and Tasmania), provide for some form of union right of entry under occupational health and safety legislation, with differing rights and obligations in respect to the entry. Significant differences arise with respect to the purpose for which a union can enter the workplace, with the Northern Territory and Queensland specifically allowing unions to enter the workplace to hold discussions on health and safety matters.

3.4. However, a union seeking entry to workplaces of incorporated employers must also adhere to the requirements set out in Part 15, Division 5 of the *Workplace Relations Act 1996*. The requirements operate to the extent of any inconsistency with the state or territory OHS law and include the following[3]:

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[3] *Workplace Relations Act 1996* ss 755 – 758.

3.4.1. the official must hold a permit under the *Workplace Relations Act 1996*;

3.4.2. right of entry must be exercised during working hours;

3.4.3. the official must not exercise any right to inspect or otherwise access employment records unless 24 hours notice is given to the occupier of the premises prior to entry stating the intention to do so and reasons;

3.4.4. the official must produce his or her permit when requested by the occupier of the premises; and

3.4.5. the official must comply with any reasonable occupational health and safety requirement of the occupier of the premises.

3.5. The federal OHS entry rights and obligations have been largely reproduced in the Fair Work Bill 2008, however employee records notice obligations (see 3.3.3 above) and requirement to produce a permit (see 3.3.4 above) refer to both the occupier of the premises *and* an 'affected employer'.[4]

3.6. Unions will not be able to exercise a right of entry to workplaces of incorporated employers under South Australian OHS law unless such law is prescribed by the *Workplace Relations Regulations 1996* or its successor. However, for the purposes of this submission it is assumed the South Australian OHS law, upon amendment, will be listed as a prescribed OHS law in regulations under the Fair Work Act. The Consultation Bill is therefore of relevance to incorporated South Australian employers.

Entry for Investigation

3.7. Clause 7 of the Consultation Bill proposes to insert Part 5A, which provides unions with a right to enter the workplace for the purposes of 'viewing the workplace and engaging in consultation'.

[4] A person is an 'affected employer' if one or more of the person's employees performs work on the premises: Fair Work Bill 2008 clause 495(2).

3.8. Significantly, as identified in the Minister's letter of 23 December 2008 seeking comments on the Consultation Bill, the Bill does not empower a union to enter the workplace for investigation or intervention in response to suspected occupational health, safety and welfare breaches.

3.9. Such investigation or intervention is undertaken by qualified and independent inspectors with the responsibility for administering and enforcing the *Occupational Health, Safety and Welfare Act 1986*.

3.10. **AMMA contends that it remains appropriate that breaches of health and safety laws are investigated by health and safety inspectors who are suitably qualified and independent.**

3.11. **AMMA supports the Consultation Bill's approach of not granting unions right of entry for the purposes of investigating suspected breaches of occupational health, safety and welfare laws.**

Entry to Engage in Consultation

3.12. The Consultation Bill empowers a union to enter the workplace for the purposes of 'viewing the workplace and engaging in consultation'.

3.13. Section 38A(3) states that 'consultation' involves

> the sharing of information (including prescribed documents), the exchange of views between employers and the persons or bodies that must be consulted and the genuine opportunity for them to contribute effectively to any decision-making process to eliminate or control risks to health or safety.

3.14. The phrase 'viewing the workplace and engaging in consultation' is vague and ambiguous, making it difficult for the exercise of powers of entry to be effectively monitored by employers and the Industrial Registrar. For example, a union that has entered the workplace, views machinery and then seeks information about risks to safety and measures the employer is taking in

respect of those risks, could also be characterised as undertaking an investigation of a suspected breach – a right not afforded under the Consultation Bill and highlighted as being excluded in the Minister's letter of 23 December 2008.

3.15. Furthermore, the present definition of 'consultation' does not make it clear that the 'sharing of information' and 'exchange of views' is limited solely to matters of health and safety. Arguably, the present definition of 'consultation' may allow for the sharing of information and exchange of views on matters that do not relate to workplace health and safety and which encroach on industrial relations issues. In fact, the nature of union representation of employees on industrial relations matters can invariably result in the blurring of the lines between industrial relations issues and health and safety issues. Entry for the purposes of engaging in consultation with employees under OHS law does not adequately draw a distinction between industrial issues and health and safety issues, giving opportunity for entry under OHS law to be abused by unions seeking to pursue industrial agendas. Industrial issues are often subject to negotiation; safety issues are not.

3.16. A right of entry under an OHS law that requires no reasonable suspicion of a breach or other tangible reason for entry, but merely allows entry where the union wishes to discuss health and safety, offers easy access to workplaces for reasons not necessarily related to safety. The potential for the blurring of the line between OHS and industrial issues is more likely to occur under the proposed right of entry laws in the Consultation Bill due to the broadly described 'consultation' right and considerable union powers to access records. In comparison, the right of entry under section 90J of the Queensland *Workplace Health and Safety Act 1995* is more tightly controlled. Section 90J is worded as follows:

> 90J Powers for discussing workplace health and safety
>
> (1) An authorised representative for an employee organisation may enter a place for the purposes of *discussing matters relating to workplace health and safety* (emphasis added).

Despite the more clearly defined provision in the Queensland legislation, AMMA members with operations in Queensland have experienced the misuse of entry for consultation purposes, particularly in the construction sector. This abuse is considered to be driven by unwillingness on the part of unions to abide by the requirements for entry under the federal workplace relations law, and is testimony to the extent to which right of entry provisions are exploited for purposes that do not further the safety and health of workers.

3.17. There is no evidentiary basis to support the need to provide unions with such a broad power of consultation as is expressed in the Consultation Bill. The present occupational health and safety system is working, evidenced by the progress of the state towards achievement of its injury reduction target of 40 percent by 2012, such that it is considered within reach.[5]

3.18. **AMMA does not support union right of entry for the purposes of engaging in consultation and contends that Part 5A of the Consultation Bill should be removed.**

3.19. **In the alternative, AMMA submits that the definition of 'consultation' in section 38A(3) of the Consultation Bill should be amended to ensure that**

3.19.1. **the sharing of information and exchange of views is limited to matters relating to workplace health and safety; and**

3.19.2. **that the definition of 'consultation' expressly exclude the capacity for unions to undertake investigations into suspected breaches of OHS law.**

3.20. In the event that the contention in paragraph 3.18 is not accepted, AMMA makes the following comments in respect to particular provisions of the Consultation Bill:

[5] South Australia's Strategic Plan Audit Committee, *South Australia's Strategic Plan Progress Report 2008*, South Australian Government, July 2008, viewed 6 March 2008, http://www.saplan.org.au/images/ProgressReport2008/prog%20rep%2008%20intro%20and%20summary.pdf

Access to the workplace - eligible members

3.21. The Consultation Bill provides authorised representatives with a right to enter workplaces where the employee is a member or an *eligible* member.

3.22. This means that a union could enter a workplace regardless whether each and every employee has chosen not to become a member of the union or indeed, where the employee has chosen to become a member of *another* union but is still eligible to be a member of the union seeking entry due to a crossover in the unions' eligibility rules. In addition, some employees are members of a union but the union may not actually be entitled to represent their interests as prescribed in the union's rules. This is a significant and empowering position for authorised representatives, who will be able to access non-unionised workplaces and,

3.22.1. inspect and make copies of prescribed documents (section 38B(6));
3.22.2. require the employer or occupier at the workplace to engage in consultation (section 38B(2));
3.22.3. view the workplace (section 38(B(1)); and
3.22.4. engage in a process of recruitment whilst on site.

3.23. **AMMA contends that section 38B(1) should be amended to restrict union right of entry to workplaces where the employee is a member that the union is entitled to represent as prescribed in the union's eligibility rules.**

When to consult

3.24. Section 38B(3) provides that entry to the workplace must be during working hours and that the union should, '*insofar as reasonably practicable*', consult during mealtime or other breaks.

3.25. Laws providing unions with a right to enter the workplace must balance the rights of the union to represent their members with the right of the employer to

operate their business without undue interference. The inclusion of the words 'insofar as reasonably practicable' may operate to enable the continuation of consultation that commenced during mealtime or other breaks to extend into an employee's working time, unduly interfering with the employer's business.

3.26. This provision is also broader than equivalent rights in Queensland and the Northern Territory, both of which limit discussions strictly to meal or other breaks.[6]

3.27. **AMMA submits that the words 'insofar as reasonably practicable' in section 28B(3) of the Consultation Bill be removed.**

Notice of entry – prior to entry

3.28. Section 38B(4) and (5) provide for 24 hours notice in writing to be provided to the employer, '*unless some other period is reasonable in the circumstances of the particular case*'.

3.29. AMMA contends that it is unnecessary to allow a union to access a workplace without 24 hours notice, where entry is for consultation purposes. Immediate access to the workplace is only relevant in respect to suspected breaches of OHS law, where there is an imminent risk to health and safety. This distinction is acknowledged in Queensland's *Health and Safety Act 1995*, which requires 24 hours written notice for entry to hold discussions but not in respect to entry for investigation purposes.[7]

3.30. In addition, a reduced notice requirement based on a standard of reasonableness begs the question as to who will determine what other period would be reasonable and will give rise to disputes between the parties.

[6] *Workplace Health and Safety Act 2007* (NT) s 53(3)(a); *Workplace Health and Safety Act 1995* (Qld) s 90J(3).
[7] *Workplace Health and Safety Act 1995* (Qld) s 90K(2)(a)(b).

3.31. **AMMA contends that the words 'unless some other period is reasonable in the circumstances of the particular case' be removed from section 38B(5) to require a minimum of 24 hours written notice to be provided.**

Notice of entry – after entering the workplace

3.32. Section 38B(12) requires an authorised representative to make 'reasonable efforts' to inform the occupier and any employer at the workplace of the entry 'as soon as reasonably practicable'.

3.33. It is AMMA's view that the requirement to inform the occupier or employer of the entry 'as soon as reasonably practicable' is not appropriate. It is unreasonable and contrary to standards of workplace health and safety to effectively sanction the entry to a workplace and ability to wander the premises for any length of time without the knowledge of the employer or occupier. To that end, section 38B(12) does not give proper attention to the operation of section 38B(17), which requires the authorised representative to comply with the employer or occupier's occupational health and safety requirements.

3.34. Mine sites have strict occupational health and safety procedures that extend to visitors who are required to sign in, complete a site safety induction and participate in safety processes such as drug and alcohol testing, prior to entering the workplace. This standard occupational health and safety practice applies to all site visitors and will be undermined if an authorised official is able to enter a workplace without notifying the employer that they have done so, and will put at risk the health and safety of others. It is therefore essential that upon entry to the workplace, the authorised representative immediately notify the occupier and any employer and comply with all reasonable health and safety requirements.

3.35. **AMMA submits that section 38B(12) should be amended to require an authorised representative to notify the occupier and employer *immediately* upon entering the workplace.**

3.36. **AMMA further submits that the requirement to comply with an employer or occupier's occupational health and safety requirements under section 38B(17) should be linked to the immediate notification requirements in section 38B(12).**

Access to records - general

3.37. Part 5A provides authorised officials with a right to inspect and copy 'prescribed documents'. While Queensland and Northern Territory OHS laws enable union officials to enter the workplace to discuss workplace health and safety matters, each jurisdiction recognises that access to documents is not necessary to facilitate that discussion and consequently does not allow access to documents where entry is for this reason. Access to records is strictly limited to union officials that have entered the workplace to investigate a suspected breach, where it might be reasonable to suggest that the employer's records may assist in the investigation.

3.38. The South Australian Consultation Bill takes the remarkable step of allowing a union access to the employer's records where the authorised representative is merely engaging in consultation and not any process of investigation where such records may be relevant to a suspected breach.

3.39. AMMA considers that access to documents should be limited to documents voluntarily disclosed by the employer and should not be a mandatory requirement as part of a consultation process.

3.40. Furthermore, the definition of a 'prescribed document' as 'a document required to be kept under the Act' or as including a document 'relating to the health, safety and welfare of employees of an employer' under section 38A(1) is unreasonably broad. It would enable unions to:

3.40.1. engage in 'fishing expeditions';

3.40.2. access records that are not relevant to the particular health and safety matters under discussion; and

3.40.3. access employee records, including non-member records, such as contracts of employment (except for records relating to the employee's health).

3.41. A loosely defined definition of 'prescribed documents' may also give rise to disputes as to whether a document does or does not relate to the health and safety of an employee and is a costly imposition on employers.

3.42. **AMMA contends that access to documents be wholly removed from Part 5A of the Consultation Bill.**

3.43. **In the alternative, AMMA contends that access to documents should be limited to those documents that are directly relevant to the health and safety matters under discussion. A description of the types of documents that may be considered to relate to the health and safety of employees should be provided in Part 5A in order to provide guidance to the parties and limit the potential for dispute.**

Access to records – confidential and trade secret information

3.44. Section 38B(11) provides limited protection to employers' trade secret information or information held on a confidential basis.

3.45. Firstly, section 38B(11) contemplates that the operation of the right of entry provisions may result in the disclosure of trade secret information, or information held on a confidential basis. It does not allow an employer to refuse to disclose such information on the grounds that it will reveal trade secrets or information held on a confidential basis.

3.46. Following the disclosure of such information, section 38B(11) specifies a range of circumstances and employees to which the authorised official can communicate the information. This includes persons involved in the

consultation process (section 38B(11)(c)). Under the Consultation Bill, those persons an authorised official can potentially engage in consultation with is very broad: an employee who is a member or eligible to become a member; an employee assigned duties relevant to workplace health and safety (but who does not have to be a member or eligible member); and an employee who perform duties relevant to health and safety and who is a member or eligible member (section 38B(2)(b)).

3.47. The ability for the authorised official to control the use of trade secret information or information held on a confidential basis, where the scope of persons to whom disclosure can be made is so broad, is very limited. Section 38(B)(11)(d)(e) merely requires the authorised official to inform the person that the information is confidential and take other reasonable steps to protect the confidentiality.

3.48. Furthermore, inappropriate disclosure by an authorised official does not appear to attract a penalty under Part 5A of the Consultation Bill, providing little deterrent for inappropriate use of the records.

3.49. **AMMA submits that prima facie, an employer must not be required to disclose information relating to trade secrets or information held on a confidential basis. Disclosure of such information should only be required by order of the Commission after consideration of the risk from disclosure to the employer's business and the relevance of the information to the matters being discussed.**

3.50. **AMMA further contends that section 38B(11)(c) and (d) be amended to include a penalty provision for unauthorised disclosure, with additional consequences in respect to the ability of the authorised representative to hold a permit.**

Permits

3.51. Union officials seeking entry to workplaces under OHS law must be appropriately trained in order to hold a permit. This is recognised under section 38C(b) of the Consultation Bill, which requires satisfactory completion of an approved course of training.

3.52. It is essential that an approved course of training remains relevant and up-to-date. Likewise, a union official must have knowledge of current OHS issues and any regulatory changes.

3.53. Entry to the workplace is a privilege afforded to unions and should be extended only to those officials who are a 'fit and proper person'. Under the *Workplace Relations Act 1996* a union official seeking to hold a right of entry permit must be a 'fit and proper person'. This requirement is also adopted in the Fair Work Bill 2008. When determining whether a person is 'fit and proper' in order to hold a federal right of entry permit, the Industrial Registrar must have regard to[8]:

- Whether the official has received appropriate training about rights and responsibilities of a permit holder;
- Whether the official has been convicted of any offence against an industrial law or other law that involves entry onto premises, fraud or dishonesty, or intentional use of violence, or damage or destruction to property;
- Whether the official's permit under industrial or OHS law has been cancelled, suspended or has had conditions imposed on it, or whether the official has been disqualified fro exercising or applying for a right under industrial or OHS law; and
- Any other matters the Industrial Registrar considers relevant.

[8] *Workplace Relations Act 1996* s 742.

3.54. When an authorised representative seeks to enter the workplace of an incorporated employer under a state or territory OHS law, the representative must also hold a permit under the *Workplace Relations Act 1996* (and the Fair Work Bill 2008, from date of commencement). This should be reflected in the definition of 'authorised representative' under section 38A(1).

3.55. **AMMA contends that a course of training approved by the Director under section 38C(b) must be duly accredited and its approval subject to periodic review. AMMA further contends that a union official seeking his or her permit to be reissued following its expiry under section 38E be required to undertake refresher training.**

3.56. **AMMA further contends that Part 5A require a union official seeking to hold a permit to enter the workplace to be a 'fit and proper person', as per the requirements in section 742 of the *Workplace Relations Act 1996.***

3.57. **AMMA also contends that the definition of an 'authorised representative' in section 38A(1), as being 'a representative…who holds a permit issued under section 38D' should be amended to include 'any other permit that may be required'.**

Return of permits

3.58. Section 38G specifies that a permit that has expired or which is revoked must be returned within 21 days of the expiry or revocation.

3.59. AMMA considers that a more reasonable period of 7 days would be appropriate, and remove opportunity for any inappropriate use of a permit after its expiry or revocation.

3.60. **AMMA contends that Section 38G be amended to reduce the period in which a permit must be returned to the Industrial Registrar from 21 days to 7 days.**

Dealing with disputes

3.61. While section 38H provides for the resolution of disputes in respect to the authority of an authorised representative to enter the workplace, Part 5A fails to provide a mechanism to deal with disputes regarding access to documents under sections 38B(6), 38B(10) and 38B(11), or the reasonableness of an occupational health and safety request under section 38B(17).

3.62. **AMMA submits that Part 5A include an ability for disputes relating to access to records or the reasonableness of an occupational health and safety request to be resolved by the Industrial Registrar.**

4. Concluding comments

Part 5A of the Consultation Bill provides unions in South Australia with a significant level of access and intervention to workplaces. It does so without the necessary clarity or evidentiary basis to ensure safety is not undermined in the workplace and will potentially blur the lines of distinction between safety and industrial issues, consultation and investigation. It does this by:

- Defining 'consultation' loosely such that it may provide scope for unions to engage in consultation on other matters;
- Providing unions with scope to enter workplaces on less than 24 hours written notice;
- Providing unions with access to documents where entry is only for consultation purposes, defining 'prescribed documents' in such a manner that it will allow access to a broad range and number of documents, and allowing access to trade secret information and information held in confidence;
- Providing unions with the ability to consult with other persons, not just members or eligible members; and
- Giving scope for unions to engage in consultation at times other than meal or other breaks;

There is no evidentiary basis to afford unions in South Australia with such broad rights under OHS law, given that the state is already strongly moving towards its 40 percent injury reduction target for 2012, identified in the South Australian Strategic Plan. At the end of 2008, the state has already achieved a 21 percent reduction and achievement of the set target is 'within reach'.[9] There is also a drop in fatalities from a high of 18-20 per annum to just 6-8 per annum, a declining trend.[10] This increase in workplace safety has been achieved without broad union consultation rights.

Part 5A fails to adequately balance the rights of unions to represent their members and the right of employers to operate their business without undue interference.

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[9] South Australia's Strategic Plan Audit Committee, *South Australia's Strategic Plan Progress Report 2008*, South Australian Government, July 2008, viewed 6 March 2008, http://www.saplan.org.au/images/ProgressReport2008/prog%20rep%2008%20intro%20and%20summary.pdf

[10] Government of South Australia, Target Fact Sheets: Greater Safety at Work, 'South Australia's Strategic Plan, viewed 6 March 2008, http://www.saplan.org.au/images/TargetFactsSheets2008/t2.11%20target%20fact%20sheet.pdf