

Report
Full investigation - *Ombudsman Act 1972*

Complainant	Mr Michael Debenham
Government Agency	SafeWork SA
Ombudsman reference	2018/10472
Date complaint received	2 October 2018

Issues	<ol style="list-style-type: none">1. Whether the agency was wrong in failing to act appropriately on the Livestock & Rural Transporters Association of Victoria's (LRTAV) report alleging unsafe loading/unloading infrastructure at the Mount Gambier & District Saleyard in February 20182. Whether the agency was wrong in failing to conduct a thorough investigation of the formal complaint made to the agency on 8 August 2018 after a worker received an injury at the Mount Gambier & District Saleyard3. Whether the agency should have provided reasons and acted in a manner that was contrary to law or wrong in failing to do so in relation to its decision to uphold the actions taken by SWSA as an outcome of its investigation
---------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

SafeWork SA (**SWSA; the agency; the regulator**) is a business unit within the Department of Treasury and Finance (**DTF**).

SWSA is responsible for providing work health and safety, public safety and state-based industrial relations services across South Australia.

As a regulator, SWSA manages the state's work health and safety functions as well as administering state industrial relations laws.

As a result of the Machinery of Government changes that took effect on 1 July 2018, SWSA was transferred from the Attorney General's Department (**AGD**) to DTF. The transfer has had some consequence as the complaint handling policies of the two departments differ across the relevant period for this matter.

Prima facie, I have jurisdiction to investigate the conduct of the District Council of Grant (**the council**), noting that the Mount Gambier & District Saleyards (**the Saleyard**) is a business entity of the council. I have carefully considered whether investigation of the council is warranted but have determined that, in these circumstances, it is not necessary. In reaching that view, I have had regard to the fact that it is the role of SWSA as the regulator to oversee the safety requirements of the Saleyard, particularly in circumstances where there have been direct reports made to the SWSA about hazards in that workplace from several sources. I have also had regard to the fact that the complaint is about SWSA. I consider that the key issues in these circumstances will be appropriately addressed by focussing on SWSA rather than the council.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the agency
- seeking more particulars from the agency
- seeking information from the council
- considering the *Work Health and Safety Act 2012 (the WHS Act)*
- considering DPC Circulars PC 039 and AS/WZS 10002: 2014
- considering the agency's Improvement Notices issued under the WHS Act
- considering the council's work health and safety and hazard management policies
- considering communications between SWSA and the council
- interviewing the following persons:
 - the complainant
 - Mr Adrian Smith, Senior Inspector, SWSA
 - Mr Peter Mitchell, Business Manager, Mount Gambier & District Saleyards
- preparing a provisional report and providing it to the parties for comment
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

Responses to my provisional report

In response to my provisional report, SWSA made submissions on specific matters (including my foreshadowed recommendations) which I have addressed in the body of this report as necessary.

The complainant provided a response indicating that the LRTAV was pleased with my investigation and foreshadowed recommendations, and otherwise commenting on my report. I address that response as necessary in the body of this report.

The complainant's response included:

One other point that is clear in your investigation, and an unfortunately regular problem for our industry - is that regulators for safety in the workplace, right across Australia, have no real understanding of handling and particularly loading and unloading of livestock and the hazards and associated risks of this complex task, despite the publication of our guide in 2015 (Guide for Safe Design of Livestock Loading Ramps and Forcing Yards) specifically aimed at helping to address this issue.

We would encourage you to recommend that not only SWSA but all other Australian workplace safety authorities have some staff trained specifically in this area as we feel this would have enabled SWSA to better understand our concerns and the seriousness of them.

I do not consider that my jurisdiction in this investigation extends to making recommendations to other Australian workplace safety authorities. While I do not consider it necessary to make a formal recommendation to SWSA as suggested by the complainant, I include the complainant's submission in this report for SafeWork SA's consideration.

Mr Peter Mitchell of the council contacted my Office to clarify one factual issue, and an amendment has been made in this report accordingly.

Having considered the parties' responses, apart from some minor amendments, my views substantially remain as set out in my provisional report.

Background and evidence obtained in my investigation

Complaint by the Livestock & Rural Transporters Association of Victoria (LRTAV)

1. Mr Michael Debenham (**the complainant**) is the Secretary of the LRTAV. He complained to my Office that SWSA mishandled the LRTAV's concerns about unsafe loading/unloading infrastructure reported at the Saleyard in February 2018 and its response to a formal complaint made to SWSA on 8 August 2018 after a worker received an injury related to the earlier notification.
2. The Saleyard is a business entity of the council and is managed by Mr Peter Mitchell. Mr Mitchell reports to the Chief Executive Officer of the council. Mr Mitchell has a peer relationship with the council's Manager of Organisational Development, Human Resources, Risk and Safety, Ms Marianne Tucker who also reports to the Chief Executive Officer of the council. Both officers sit on the council's management team.
3. The complainant provided my investigation with copies of letters from SWSA to LRTAV dated 14 August 2018 and 17 September 2018 both signed by SWSA's Feedback Manager, Ms Ashe Bucco.
4. The 14 August 2018 letter acknowledged the LRTAV's complaint and included:

SafeWork SA takes great care to ensure that complaints such as this are properly addressed. I can assure you that SafeWork SA will conduct a thorough investigation into

the concerns raised in your email and will be in contact within 28 days (this is the maximum timeframe) to advise of the outcome.

5. The 17 September 2018 letter was sent 34 days later and included:

I apologise for the delay in replying to you on this matter.

I am advised that Inspector Chris Spinks made further contact with you to discuss your concerns and outlined with you the actions taken by SafeWork SA in February 2018 in relation to an agreed action plan between the relevant parties, and subsequent compliance action taken by SafeWork SA in August 2018.

It has been determined that the actions taken in both instances are considered to be appropriate. Please note that this complaint has now been closed by SWSA.

Should you be dissatisfied with this outcome, you may choose to raise your concerns with the South Australian Ombudsman. The Ombudsman has the power to investigate the legality and reasonableness of the administrative actions of State Government agencies and the Local Government sector.

6. At that point the complainant made a complaint to my Office.

7. My investigation has identified the following sequence of events relevant to the complaint:

- in January 2018 a number of safety hazards were identified and reported to the management of the Saleyard by the LRTAV
- on 19 January 2018 the complainant contacted SWSA Inspector, Mr Adrian Smith, and requested a meeting with the council in Mt Gambier to discuss the identified hazards
- the meeting was held at the Saleyard on 2 February 2018 and was convened by the council's then Chief Executive Officer, Mr Trevor Smart; the meeting involved representatives of the council, the Livestock & Rural Transporters Association of South Australia (LRTASA) LRTAV, and SWSA
- the outcome of the meeting was an agreement by the Saleyard management to make necessary modifications to mitigate hazards on three loading ramps and forcing yards
- an incident was reported to SWSA on 9 February 2018, in part recorded by SWSA as follows:

[Incident at Mt Gambier Cattle yards] There is a loading ramp that the cows go up to go into the pen. There is a flap that needs to be pulled across because there is a gap between the truck and the ramp. The flap needs to be pulled across then the truck get shut. There is no safety gate to stop the cattle coming back toward you. This morning a cow turned around and came back at him as he was trying to shut the gate. The cow jumped at him and then another three followed the cow out. The cow did brush past him, but didn't hurt him. However, the cow could have knocked him down. The only way for him to get off the ramp was to scale the nearby fence, due to there being no gate. It is believed that similar incidents have happened to other workers that attend this stock yards [sic].

- a meeting was held at the Saleyard on 13 February 2018 involving SWSA, LRTAV, LRTASA, the council and a representative of an engineering company; this was noted by SWSA as 'a worksite visit'.
- On 20 February 2018 the council, under the signature of Mr Mitchell, wrote to the complainant in his capacity as Chairman of the Safety Committee of the LRTAV. The letter stated that the council was committed to:

...resolving the safety issues that are involved with the existing adjustable cattle ramps[...]. Our plan is to have the safety modifications completed before the end of June 2018.

- On 7 March 2018, as a consequence of the incident report and the meeting held on 13 February 2018 at the Saleyard, SWSA issued four Improvement Notices to the council. The Improvement Notices relevantly included the following requirements:
 - WHSIN 139911 required the council to take the following action by 16 March 2018:
Conduct a review of the plant and associated tasks to ensure that engineering controls are able to be implemented to reduce the risk of injury. Evidence may be in the form of an action plan that demonstrates engineering controls and time frames to achieve.
 - WHSIN 139912 required the council to take the following action by 6 April 2018:
Develop and implement a process for the receiving of information from other persons at the worksite regarding hazards, incidents and risks. This process needs to be suitable, adequate and readily understandable to other persons at the worksite.
 - WHSIN 139913 required the council to take the following action by 23 March 2018:
Develop, implement, and communicate suitable Emergency Plans that are readily accessible to other persons at the worksite. Recommend that these could be displayed in the loading ramp area.
 - WHSIN 139914 required the council to take the following action by 6 April 2018:
Develop and implement the provision of information, training and instruction that communicates to other persons the necessary information that is needed to reduce the risk of injury, this may be in the form of an induction or manual either online or hardcopy.
- the Improvement Notices were issued to Ms Tucker, as liaison contact at the council
- the LRTAV was not notified of the Improvement Notices; they were confidential between SWSA and council staff, including the Saleyard management
- on 28 June 2018 Mr Smith (acting with his colleague Mr Stephen Kain) signed off on Inspection Report Number 145553 declaring that:
 - The reason for the visit was from complaints and incidents regarding safety of persons at the saleyards, in particular the unloading/loading process and associated plant/structure.
 - Inspectors made several visits to the workplace.
 - The initial visit was part of the consultation process initiated by District Council of Grant.
 - Follow up visits were made by inspectors to review engineering controls and other risk control improvements.
 - Four WHS Improvement Notices were issued which have all been complied with [my emphasis].
- on 1 August 2018 an LRTAV member was injured while unloading cattle using Ramp C at the Saleyard; according to SWSA's Case File Report:
 - the driver was unloading cattle at Ramp C and as he opened the truck door, a cow 'hit him'
 - first aid was provided and an ambulance was called
 - the driver's ribs and chest were sore
- the driver was subsequently admitted to hospital
- on 2 August 2018 SWSA issued a Prohibition Notice in relation to Ramp C 'for the provision and maintenance of safe plant/structures'.
- on 8 August 2018 the LRTAV made a complaint to SWSA
- on 25 September 2018 SWSA lifted the Prohibition Notice on use of Ramp C.

8. In response to my provisional report, SWSA stated:

When the complainant contacted SafeWork SA in February 2018, the main concern raised was the lack of consultation from the Council regarding solutions. This became the focus of the four improvement notices issued in March 2018; to ensure consultation occurred between the Council and the [LRTA] to develop engineering controls. The improvement notices were not issued to ensure that specific engineering controls were used.

Further, the action taken by SafeWork SA and the Council in consultation with the LRTA was at all times consultative, in that the Council kept in frequent contact with the LRTA regarding the action plan of engineering controls they had developed in consultation.

9. In terms of the incident on 1 August 2018, the LRTAV stated in its complaint to SWSA on 8 August 2018:

...[O]n the 1st August 2018, one of our members was injured while unloading cattle at one of the ramps at Mount Gambier saleyard - which had still not had the required modifications completed. He had to be taken to hospital due to those injuries. Not only had this ramp not had the safety gate installed by the agreed time, but all the force yards on the 3 ramps have still not yet had infill sheeting installed on them.

The LRTAV believe that SafeWork SA failed in their duty to prevent this incident from happening by not taking appropriate action in February when first made aware of the hazards at Mount Gambier.

The reason that the LRTAV feel this way is based on common principles to prevent injury in work places and using the Australian Livestock & Rural Transporters Association (ALRTA) "Guide for safe design of livestock loading ramps & forcing yards". The first step is to identify the hazard, this had been done prior to and at the meeting Safe Work SA had at Mount Gambier with the saleyard management and our representatives. The main hazard is also identified on page 9 of the ALRTA guide and relates to "no exit/entry gate at the top of the ramp" and "no sliding gate at top of ramp". The main risk is "being struck by stock coming back out of the vehicle while retrieving fold-over flap and/or closing crate door". The next step would be to assess the likely [sic] hood of this occurring and the level of harm possible. In this case the likelihood is that every time the ramp is used this could occur, so a 100% chance. The level of harm ranges from what happened on August 1 to potential death from being trampled by one or more cattle.

Taking the above into account we feel that Safe Work SA should have made Mount Gambier saleyard lock-out the 3 ramps concerned until such time as they could be made safe to use and that this would have prevented the injury to our member and the hazard exposure all other users were subjected to whilst waiting for the modifications to be completed.

10. SWSA responded to my provisional report addressing the complaint that SWSA 'failed in [its] duty to prevent this incident from happening':

SafeWork SA is the regulator for Work Health and Safety in this State and seeks to enforce compliance with the legislation by assisting duty holders and the public in ensuring safe workplaces for all. Without doubt, the agency has an important role to play in achieving workplace safety. However, it is important to distinguish that duty holders under the legislation include persons conducting a business or undertaking (PCBUs), workers, officers and others (see sections 19-29 of the WHS Act). While SafeWork SA seeks to assist duty holders to comply, the primary duty to ensure, so far as is reasonably practicable, the health and safety of workers, lies with PCBUs. In this instance, there were a number of parties involved including the District Council [of] Grant, the LRTA Victoria, the LRTA SA, Whitty Engineering and individual trucking companies. Each of these parties owed a duty to its own workers and others in business or undertaking they were conducting.

In managing risks to health and safety, the WHSA Act and the *Work Health and Safety Regulations 2012* (SA) (WHS Regulations) outline that this requires the person to eliminate risks to health and safety, so far as is reasonably practicable; and, if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable (section 17 of the WHS Act and Regulation 35).

The extension of the LRTA Victoria's comments [...] that the likelihood of harm every time is 100% does not appear to follow the hazard identification and risk management process as outlined above. From this understanding, LRTA members would refuse to use any cattle ramp that does not meet the association's requirements. This is not the intention of a risk management approach to dealing with hazards and risk. Further, it is clear that within the industry, there is a significant number of cattle trucks unloaded without incident. It is flawed to determine that the likelihood of harm every time is 100%.

The Action Plan

11. As a result of the stakeholder discussions in February 2018, and the issuing of the Improvement Notices, Mr Mitchell prepared an Action Plan to comply with all four of 'the measures to be taken to remedy or prevent the contravention or likely contravention' [of the Act and the associated Regulations].
12. It is significant that Improvement Notice WHSIN 139911 required the council 'to conduct a review of the plant and associated tasks to ensure that engineering controls are able to be implemented to reduce the risk of injury'.
13. The Action Plan was a detailed document with eight categories of benchmarks for recording progress, as follows:
 - Action Descriptions
 - Responsible Officer
 - Date to Begin
 - Due Date
 - Resources Required
 - Potential Risks
 - Desired Outcome
 - Completed.
14. The Goal cited for WHSIN 139911 was:

To reduce the safety risks associated with loading/unloading cattle at the cattle adjustable ramps A, B & C, Mount Gambier saleyards
15. The Benchmarks for Success for that Notice were:
 1. A safe system is provided for Transport Operators to load/unload Cattle safely via the Cattle adjustable ramps A, B & C
 2. SafeWork SA to sign off on Improvement Notice *WHSIN 139911*.
16. The parties to the Action Plan were cited as council staff, Saleyard staff, Whitty Engineering staff, Transport Operators, the LRTAV and SWSA.
17. The Action Description entry recorded for 28 May 2018 was to: 'Modify Ramp C with modifications to flap, slam shut gate, personal access gate and walkway'. Mr Mitchell was identified as the Responsible Officer and the due date for completion was recorded as 15 June 2018. The Action Plan shows that the quote for modifications was received and the work was to proceed.

18. In his report dated 28 June 2018, and titled 'Investigation Summary', Mr Smith recorded that:³

Four WHS improvement Notices were issued which have all been complied with. The District Council of Grant have[sic] made engineering improvements to the truck flap at the end of ramp, modified walkways adjacent to ramp, installed exit gates.

DCG provided copies and examples of administrative controls such as emergency plans, inductions, work procedures as well as photos of engineering improvements....

Recommendation

No further action on this file and close.

My Office's interviews

19. A number of persons have been interviewed for the purposes of my investigation. I summarise the relevant evidence below.

Mr Adrian Smith

20. Mr Smith is the SWSA Senior Work Health and Safety Inspector. He was present at the Saleyard meetings with the LRTAV and other stakeholders in February 2018 and early March 2018 and issued the four Improvement Notices to the council on 7 March 2018. Mr Smith gave the following evidence to my investigation:

- Mr Smith has worked in his current role for a period of eight years, commencing in January 2011
- Mr Smith responds to complaints and concerns and visits worksites both proactively and reactively
- if complaints are deemed to have substance Mr Smith issues either an improvement notice or a prohibition notice
- the first complaint about the Saleyard came in February 2018 from a subcontractor truck driver named 'Kerry' who was concerned about the safety of the ramps
- subsequent complaints were received shortly afterwards about safety at the Saleyard from another driver and then by the complainant
- Mr Smith understood the complainant's complaint to be about a lack of consultation between the Livestock Associations (in South Australia and Victoria) and the council and this was the complaint that led to and determined the issuing of the Improvement Notices
- during the worksite visits Mr Smith was looking to the council to consult with the Livestock Associations to 'come to us with recommendations for improvement - [however] it seemed there wasn't much consultation between them'
- the hazards reported were mainly about access gates to the ramp and the risks associated with contact between cattle and workers loading or unloading the holding pens
- the council came up with action plans before the Improvement Notices were issued on 7 March 2018
- Mr Smith kept in touch with Ms Tucker from the council by email to monitor what was completed [from the agreed Action Plan] and what was not completed
- because there is 'no legislative guidance for ramps' and there was limited communication between the council and the Livestock Associations, SWSA wanted the council to 'show us that yes, we have consulted and yes, the associations are happy'

³ Document 60: 28/06/2018 - Adrian Smith, SWSA Investigation Summary for case file 2018-868.

- compliance [with the Improvement Notices] ‘meant that they met the intent of the notice...the evidence we wanted was the action plan - short term control, consultation and starting’
- prior to the incident on 1 August 2018 [which resulted in injury and led immediately to the issue of a Prohibition Notice], he believed ‘that SWSA had done enough to ensure compliance with the Improvement Notices...progress had been made’
- [but] ‘when we inspected Ramp C on 1 August the engineering controls when inspected were not adequate and the injury was almost a result of that’
- the Action Plan was the responsibility of the council. ‘We haven’t got the resources [to ensure every modification is up to standard]’
- before the Prohibition Notice was lifted on 21 September 2018 and while Mr Smith was on leave, four other SWSA inspectors went to the Saleyard to inspect Ramp C for compliance; those inspectors noted: ‘all seems to work ok’.

21. Mr Smith also provided a Case File Report (**the first Report**) covering the period 9 February 2018 to 1 August 2018 and a second Report (**the second Report**) covering the period 1 August 2018 to 22 November 2018 when the SWSA file on this matter was closed. The first report relevantly noted:

05/03/2018 - A Worksite Visit

Meeting onsite to review progress re improvements to loading ramps, and general safety. Insp Kain, Beer, Smart, Mitchell, Aston and Tucker in attendance. Peter Mitchell will email action plan.

07/03/2018 WHSIN - Improvement Notice 139911

Engineering Controls to be implemented? Compliance by DCG undertaking consultative approach with users of loading ramps, engaged 3rd party engineering company to assist and have undertaken engineering modifications and improvements.

Mr Peter Mitchell

22. Mr Mitchell is the Business Manager, Mount Gambier Saleyards. He oversees the Saleyard operations, which is owned by the council. Mr Mitchell has overall responsibility to, where reasonably practicable, have processes in place to ensure the health safety and wellbeing of those who work onsite. Mr Mitchell gave the following evidence to my investigation:
- the Saleyard operates under the council’s safe work policy framework (identified as the *Drafting and Livestock Handling Policy*; the *Incident & Reporting Procedure*; the *Workplace Inspection Procedure* and the *Hazard Management Procedure*)
 - third parties (i.e. agents and operators) have their own safe work procedures; the Saleyard safe work employee procedures are not the same as those of the third parties - but the differences have never been a problem
 - Mr Mitchell did not see the complaint made by ‘Kerry’ to SWSA in early February 2018 but he had discussions with LRTAV representatives on 2 February 2018 to discuss what they would like to see in terms of (ramp) modifications, but, he said: ‘this meeting was not prompted by any injury’
 - On 2 and 13 February 2018 Mr Mitchell had meetings with the Livestock Associations and SWSA representatives and on 26 and 27 of February 2018 he met with the engineering company. On 5 March 2018 Mr Mitchell met with SWSA and LRTAV and was told then that SWSA would issue Improvement Notices. Mr Mitchell said: ‘I never had an issue with this because I knew there were concerns (and) we had to put things in place to get them resolved’

- According to Mr Mitchell, the loading ramps in question (A,B & C) were over 40 years old and never had any safety gate and 'the Associations asked (us) to look at putting some on and getting a gate from the walkway into the ramps to close the truck door installed. They also suggested infill on the side of the ramps - not safety but improvements. There were also proposals to modify the forcing yard system to make loading and unloading easier'⁴
 - Mr Mitchell did not receive any specific complaints about the ramps aside from the few 'who will grizzle about maintenance' from time to time
 - Mr Mitchell found the action plan outline on-line and showed Ms Tucker. Mr Mitchell told my investigation: 'we both agreed to use it. I prepared it and we were working with the engineer.' He takes responsibility for working with the engineer and what they had designed and the safety modifications...but, he said: 'we had problems with the weather and with their schedule. We learned we weren't a priority and it was very frustrating'. The other complication was that all the ramps were individually made, not custom made by professional ramp builders. They were made by local engineers and were all slightly different.
 - Mr Mitchell kept the Livestock Associations 'in the loop' with updates on the ramp modifications but at the end of July 2018 Ramp C was still not completed
 - Ramp C was started on 31 July 2018. According to Mr Mitchell, it was late and he held a safety meeting on that day with LRTAV in attendance before he went away for a week. He was away when the Ramp C incident happened on 1 August 2018. He had thought the modification work was under control. He said he was 'gutted' when he heard about the injury
 - After the incident SWSA came back on a regular basis. Mr Mitchell stated: 'we thought we had them satisfied but other improvements were needed'
 - Mr Mitchell noted that it is 'hard to get these modifications done...We need a bigger stick to make sure that things happen faster'.
23. Mr Mitchell confirmed that he was not interviewed for the SWSA investigation conducted by Mr Chris Spinks in August 2018.
24. In response to my provisional report, SWSA noted the summary of Mr Mitchell's evidence and stated:

[...] [P]rior to the incident on Ramp C, the belief was that it was not being used until modifications were completed. The modifications had been completed to Ramps A and B, with consultation and approval from the LRTA. On 31 July 2018, the Council held a safety meeting with the LRTA regarding Ramp C, the day before Mr Mitchell went on leave. The incident occurred the next day, after the engineering company had completed the works, but no one had inspected those works before putting the ramp back into service, including any of the PCBUs.

Relevant law/policies

25. Part 8 of the WHS Act defines the functions and powers of the regulator.
26. Section 152(b) of the WHS Act provides that it is a function of the regulator to 'monitor and enforce compliance with this Act'.

⁴ In response to my provisional report, the complainant stated:

'Infill to forcing yards does indeed improve the flow of stock but more importantly it prevents the operator from being struck by an animal through the fence and prevents the operator from placing any part of their body through the fence. This is references in the ALRTA guide on page 11.

As of 31st May, ramp C had only just had the infill fitted to the Eastern side of the force yard, this is not the side where the operator works from. Over 12 months after the agreed completion date of the requested works ("the action plan") operators are still exposed to the above risks due to lack of infill.'

27. Part 10 of the WHS Act outlines the procedures and conditions under which Improvement Notices and Prohibition Notices may be issued.

28. Section 191 of the WHS Act provides:

191—Issue of improvement notices

- (1) This section applies if an inspector reasonably believes that a person—
 - (a) is contravening a provision of this Act; or
 - (b) has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated.
- (2) The inspector may issue an improvement notice requiring the person to—
 - (a) remedy the contravention; or
 - (b) prevent a likely contravention from occurring; or
 - (c) remedy the things or operations causing the contravention or likely contravention.

29. Section 193 of the WHS Act provides:

193—Compliance with improvement notice

The person to whom an improvement notice is issued must comply with the notice within the period specified in the notice.

Maximum penalty:

- (a) in the case of an individual—\$50 000;
- (b) in the case of a body corporate—\$250 000.

30. Section 194 of the WHS Act provides:

194—Extension of time for compliance with improvement notices

- (1) This section applies if a person has been issued with an improvement notice.
- (2) An inspector may, by written notice given to the person, extend the compliance period for the improvement notice.
- (3) However, the inspector may extend the compliance period only if the period has not ended.
- (4) In this section—

"compliance period" means the period stated in the improvement notice under section 192, and includes that period as extended under this section.

31. Section 195 of the WHS Act provides:

195—Power to issue prohibition notice

- (1) This section applies if an inspector reasonably believes that—
 - (a) 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; or
 - (b) an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.
- (2) The inspector may give a person who has control over the activity a direction prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.
- (3) The direction may be given orally, but must be confirmed by written notice (a "prohibition notice") issued to the person as soon as practicable.

32. Section 197 of the WHS Act provides:

197—Compliance with prohibition notice

The person to whom a direction is given under section 195(2) or a prohibition notice is issued must comply with the direction or notice.

Maximum penalty:

- (a) in the case of an individual—\$100 000;
- (b) in the case of a body corporate—\$500 000.

33. Part 12 of the WHS Acts sets out the internal review process.

34. Section 227 of the WHS Act provides:

227—Decision on internal review

As soon as practicable after reviewing the decision, the internal reviewer must give the applicant in writing—

- (a) the decision on the internal review; and
- (b) the reasons for the decision.

35. Section 271 of the WHS Act provides:

271—Confidentiality of information

- (1) This section applies if a person obtains information or gains access to a document in exercising any power or function under this Act (other than under Part 7).
- (2) The person must not do any of the following:

- (a) disclose to anyone else—
 - (i) the information; or
 - (ii) the contents of or information contained in the document;
- (b) give access to the document to anyone else;
- (c) use the information or document for any purpose.

Maximum penalty:

- (a) in the case of an individual—\$10 000;
 - (b) in the case of a body corporate—\$50 000.
- (3) Subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document—
- (a) about a person, with the person's consent; or
 - (b) that is necessary for the exercise of a power or function under this Act; or
 - (c) that is made or given by the regulator or a person authorised by the regulator if the regulator reasonably believes the disclosure, access or use—
 - (i) is necessary for administering, or monitoring or enforcing compliance with, this Act; or
 - (ii) is necessary for the administration or enforcement of another Act prescribed by the regulations; or
 - (iii) is necessary for the administration or enforcement of another Act or law, if the disclosure, access or use is necessary to lessen or prevent a serious risk to public health or safety; or
 - (iv) is necessary for the recognition of authorisations under a corresponding WHS law; or
 - (v) is required for the exercise of a power or function under a corresponding WHS law; or
 - (d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or
 - (e) that is required or authorised under a law; or
 - (f) to a Minister.
- (4) A person must not intentionally disclose to another person the name of an individual who has made a complaint in relation to that other person unless—
- (a) the disclosure is made with the consent of the complainant; or
 - (b) the disclosure is required under a law.

Maximum penalty:

- (a) in the case of an individual—\$10 000;
- (b) in the case of a body corporate—\$50 000.

36. The WH&S and other relevant policies of the council include the *Hazard Management Procedure* whereby:

- the council recognises its obligation to identify reasonably foreseeable hazards that could give rise to risks to health and safety; and
- eliminate or minimise those risks as far as reasonably practicable [1]
- hazard management should occur for all activities where there is potential for harm [2.1]
- risk assessments must be undertaken for all identified hazards [2.4]

37. DPC Circular PC 039 relevantly provides:

All South Australian public sector agencies are required to establish and maintain an effective and responsive CMS, including an overarching complaints management policy that conforms to the principles of *AS/NZS 10002:2014*.

Whether the agency was wrong in failing to act appropriately on the LRTAV's report alleging unsafe loading/unloading infrastructure at the Mount Gambier & District Saleyard in February 2018

38. The complainant first contacted the agency on 19 January 2018 to request a meeting to discuss safety hazards identified by members of the LRTAV and as reported to the management of the Saleyard by some of those members.⁵

39. The safety hazards related to access and egress to the cattle forcing yards and loading ramps.

40. The meeting was held at the Saleyard on 2 February 2018 with the outcomes as noted earlier in this report. In addition, a list of 'safety issues' discussed in the meeting was sent to the agency on 3 February 2018 by the complainant as follows:

The association thanked the saleyard management team for convening the meeting and then raised the main safety issues in order of importance.

1. No Safety Gate at the end of ramps A, B & C.
2. No exit gate at the top of ramps A, B & C
3. The forcing yards for ramps A, B & C have no slam shut gates no or insufficient infill and are not of suitable size on ramps B & C.....
4. There is no livestock carrier representation on the Mount Gambier & District Saleyards Advisory Committee. The Association then said that they were seeking a commitment from the Saleyard management that works would be carried out to address the above issues. The party then viewed the ramps and agreed on the following:

Ramp A

As a matter of urgency engage suitable persons to modify the end of the ramp to fit a sliding safety gate and an exit gate to enable access from the walkway.

Then after carrying out the work mentioned below for ramps B&C, modify the walkway to run the full length of the ramp and force yard 1 meter down from the top of the fence.

⁵ There is a discrepancy in the evidence given by Mr Smith who remembered that the first complaint about the Saleyard came in February 2018 from a subcontractor truck driver named 'Kerry' who was concerned about the safety of the ramps. The recollections about who actually complained first and when are not directly relevant to my investigation.

Reposition the gates in the force yard to hinge from the walkway side and fit slam shut latches that also enable them to be opened from the walkway.

Fill in the sides of the force yard and ramp.

These changes will enable the safe long term use of ramp A and correspond with the recommendations of the ALRTA [sic]ramp guide.⁶

Ramps B & C

As a matter of urgency install hinged safety gates at the very end of the ramps as discussed to

enable the safe removal of the fold over flap and closing of the truck back doors by the operator in the short term.

Long term either modify these ramps and forcing yards so that they also meet the recommendation of the ALTR [sic] ramp guide or replace them with new ramps in either the same location or a suitable alternative location.

The livestock transport associations (LRTAV and LRTASA) would provide support for the saleyards application for HSVPP funding to install 2 new ramps and forcing yards as thanks for the above commitment.

41. In response to my provisional report, the complainant stated:

The LRTAV had clearly listed the lack of a “safety gate” in correspondence to Peter Mitchell [...] on the 3rd of February 2018 and as noted in your report [...]”1. No Safety gate at the end of ramps A, B & C.” listed as item number 1 highlighting its importance. Almost all correspondence between SafeWork SA [...] and [the council] post this correspondence makes no mention of a “[S]afety Gate”. The lack of a “Safety Gate” on ramp C on the 1st of August 2018 is the undisputable cause of the injury to our member on that day.

42. Improvement Notice WHSIN 139911 issued on 7 March 2018 stipulated that the contravention of the Act ‘must be remedied before 16 March 2018’.
43. WHSIN 139911 gave the council nine days to remedy the breach by conducting an inspection and developing an action plan to demonstrate engineering controls (to reduce the risk of injury).
44. Given the high risks presented by the loading zones, the short timeframe seems reasonable in all the circumstances. However, it is clear from the evidence that the nine day timeline imposed related to the development of an Action Plan to demonstrate engineering controls, but not to the completion of modifications required to deliver those controls.
45. The Action Plan was the responsibility of the Saleyard manager Mr Mitchell and was developed in collaboration with his council colleague, Ms Tucker.
46. While the Action Plan is a detailed document covering a range of communication issues between the parties and safety modifications to loading ramps designated as Ramp A, Ramp B and Ramp C, it is only the latter that is of particular concern in my investigation.
47. The Action Plan relevantly noted that the engineering control required was:

Modify Ramp C with modifications to flap, slam shut gate, personal access gate and walkway.
48. The Responsible Officer (for executing the Plan) was Mr Mitchell; the commencement date was recorded as 28 May 2018 and the due date for completion was recorded as 15 June 2018.

⁶ Guide For Safe Design of Livestock Loading Ramps and Forcing Yards; Australian Livestock and Rural Transporters Association (ALRTA), June 2015.

49. A second Action Description for Ramp C was recorded as follows:

Review Ramp C modifications with SafeWorkSA and Transport Association.

50. Again, Mr Mitchell was designated as the Responsible Officer; the commencement date was 22 June 2018 and the completion date recorded as 25 June 2018. Importantly, the 'Desired Outcome' was noted as:

All parties are happy with safety changes to Ramp C.

51. In response to my provisional report, the complainant stated:

SWSA mentioned that they were happy with the "action plan" considering that the LRTAV were happy with the commitment from [the council]. It should be noted that as the LRTAV have [sic] no regulatory power over [the council] we were indeed happy that a commitment had been given to address the concerns raised by us, however the LRTAV opinion was then, as it is now, that the ramps in question should have been subject to a prohibition of use until made safe. Had SWSA contacted us for our opinion on this we would have made this known to them.

Whether SWSA should have considered issuing Prohibition Notices

52. I have considered the question of whether SWSA should have considered issuing Prohibition Notices, as well as any required Improvement Notices, when first made aware of the incidents and hazards.

53. Section 195 (1) of the WHS Act applies if an inspector reasonably believes that—

- (a) 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; or
- (b) an activity may occur at a workplace that, if it occurs, will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

54. Assuming section 195(1) of the WHS Act is satisfied, section 195(2) of the WHS Act provides:

- (2) The inspector may give a person who has control over the activity a direction prohibiting the carrying on of the activity, or the carrying on of the activity in a specified way, until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.

55. Improvement Notice *WHSIN 139911* states that 'the belief is that the existing plant and associated tasks have reasonably foreseeable hazards that have not been controlled or minimised so far as reasonably practicable to reduce the risk of injury to persons'.

56. I note that, as with Improvement Notices, the WHS Act does not require that a Prohibition Notice be issued whenever an inspector holds such a reasonable belief; only that a Prohibition Notice may be given under those circumstances [my emphasis].

57. Based on SWSA's observation of the nature of the contravention and the risks it presented, in my view, SWSA should have, at the very least, considered issuing a Prohibition Notice. This is because it appears that the incident reports were pointing to potential activity that may involve a serious risk to health or safety.

58. Mr Smith has stated that before the injury incident on 1 August 2018, he believed that SWSA had done enough to ensure compliance with the Improvement Notices and noted that:

The Action Plan had been discussed and communicated with the [SA and Victorian] Associations, [and] progress had been made.

To issue a Prohibition Notice there must be an imminent and immediate risk of injury. Considering how much cattle goes through the Saleyard daily without injury or incident, the Action Plan was in place and communicated. We issue Prohibition Notices when we feel we just can't leave the site because someone will get hurt. When we inspected Ramp C on 1 August the engineering controls when inspected were not adequate, and the injury was almost a result of that...

Ramp C had been modified, but not to the level of Ramps A and B...We didn't get to see the modifications to Ramp C after they were done with Ramp B. ⁷

59. I consider that Mr Smith's comments demonstrate a misunderstanding of the relevant test under the WHS Act. The test is not whether there is an 'imminent and immediate risk of injury.' In my view, the WHS Act does not envisage that Prohibition Notices should only be issued in circumstances where an inspector considers that they cannot leave a site for risk of someone getting hurt.
60. Rather, the test in section 195(1) of the WHS Act is whether there is a serious risk to health or safety arising from immediate or imminent exposure to the hazard. In my view, it is clear there was a serious risk to health or safety every time that Ramp C was used. In light of that, I consider that SWSA should have given serious consideration to prohibiting the use of Ramp C unless and until that serious risk was addressed.
61. In response to my provisional report, SWSA stated:

The terms immediate or imminent are not defined in the WHS Act and accordingly are given their ordinary dictionary meanings. To recommend in this case that a prohibition notice should have been issued could infer that, unless the LRTA approve all cattle ramps in South Australia, they should be prohibited from use because of the inherent risk to health and safety. Referring again to the duties of the WHS Act, it is the duty of the PCBU to ensure, so far as is reasonably practicable, the health and safety of workers and others at the worksite. By virtue of their role, inspectors are given a number of functions and powers under the WHS Act to enable them to assist duty holders to achieve compliance, including the ability to issue improvement and prohibition notices. An inspector makes an informed decision in each individual case. With respect, I disagree with your finding, in hindsight, that a prohibition notice should have been issued.

62. I have carefully considered that response in forming my final view. I accept SWSA's submission that it is the duty of a person conducting a business or undertaking (PCBU) to ensure a safe worksite. That does not change my view that SWSA should have, at the very least, given proper consideration to issuing prohibition notices. I am somewhat concerned at SWSA's submission that it necessarily follows from my view that 'unless the LRTA approve all cattle ramps in South Australia, they should be prohibited from use because of the inherent risk to health and safety.' I do not accept that submission. Ultimately, it is up to the agency to make its own assessment of the individual hazard and take action accordingly.

Should SWSA have taken further steps to ensure compliance with the Improvement Notices

63. Mr Mitchell stated that he 'felt frustrated' during the implementation of the Action Plan:

⁷ Interview with Ombudsman SA Investigator, 21 January 2019.

[...]because it was taking longer than I would have liked because of wet weather, and we were limited because we couldn't do it ourselves. We have five people here on staff all together. I've got a guy that can do [engineering] when we have time to do it, but we were relying on outsiders to do it and they had their own schedule. I learned we weren't a priority and it was very frustrating that we set time limits and they weren't met. We had a lot of rain. The weather didn't help.⁸

64. The evidence shows that SWSA was concerned to follow-up on the agreements made in the Action Plan to make appropriate engineering modifications to Ramps A, B and C. I have sighted the Case File Report opened by Mr Adrian Smith on 9 February 2018 and closed on 2 July 2018, after 143 days. The Report shows that there were six 'Worksite Visits' (to the Saleyard) during that 143 day period and numerous 'Evidence Collection' 'Phone Calls' and 'Emails' logged as part of the SWSA monitoring process.
65. I am satisfied that the SWSA officers concerned made reasonable efforts to monitor the progress of the engineering control modifications after the issue of the Improvement Notices in March 2018. I accept the evidence of Mr Smith to my investigation wherein he maintains that 'the emails from District Council of Grant we believed at the time demonstrated the maintenance and review of controls as well as general risk and workplace management'.⁹
66. However, I note that the file was closed and marked 'no further action' by SWSA Team Leader Mr Phillip Miles on 2 July 2018. This was just one day after SWSA officers Mr Smith and Mr Kain received the following email from Ms Tucker at the council reporting on the incomplete modification works to the loading ramps:

Hi Adrian
An update on where we are at with the Loading Ramps.

RAMP A - ready for use

The further modifications that were identified at the last meeting with operators, SafeWork, Council and Stock Agent representatives attending, have been finalised. The bump stop at the front of the ramp is completed, flap corrected, gate easier to open, infill placed, and modifications to the forcing yard have also been undertaken to allow further separation from cattle to occur.

Attached:

- Letters to LRTASA & LRTAV
- Notice to Users at Ramp A
- Plant Risk Assessment Ramp A
- Images of modifications and improvements

The Business Manager has advised that he is satisfied that the Ramp is ready for use. He and the Team Leader will monitor closely, particularly in the first weeks to ensure no additional hazards are identified because of the modifications.

RAMP B

Final plans are being drawn up. Gate, walkway etc will be engineered in Whitty's workshop and brought onto site for modifications to the ramp to occur. The walkway on this particular ramp is being engineered to be 600mm in width as there is not the additional hazard of the steps as at Ramp A.

Envisaged to be completed within the next 3 weeks.

RAMP C

⁸ Interview with Ombudsman SA Investigator, 22 January 2019.

⁹ Email to Ombudsman SA, 7 February 2019.

Envisaged to be complete by end of July 2018, if not earlier.

If you have any questions or clarifications, please contact me on [xxxx] or [xxxx].

With thanks
Marianne

67. As noted, SWSA Inspectors believed that the commitment to an Action Plan (including the engineering controls identified between the parties and uncontested in their details) and the regular reports on progress from the council, including the email on 2 July 2018, gave sufficient cause to 'sign-off' on the work as complete. Apparently no further action was required.
68. The incident of 1 August 2018 is noted in the second Case File Report opened that day by SWSA. It reads as follows:
- A cow has hit a truck driver
- The driver was unloading cattle using ramp C at the Mount Gambier Saleyards as he has opened the truck door the cow has hit him.
- First Aid was provided and an ambulance was called - notifier was not sure if he will be admitted.
- Injured Party: [named]
ribs & chest is sore.
Not known, Unknown,
Notifier: Marianne Tucker
69. The Prohibition Notice was issued on 2 August 2018. Before that Notice was lifted on 25 September 2018, the SWSA Report relevantly documents the following:
- DC Grant 30/08/2018 Phone Call
SMITHAO1
- From Marianne, went through action plan, explained that to have notices complied with, need to ensure engineering controls are implemented and agreed by stakeholders, the longer term bigger picture action plan is a separate process...
- AND:
- DC Grant 20/09/2018 Email
KAINS01
- From Marianne Tucker including photos of ramp [C] improvements
- DC Grant 20/09/2018 Phone Call
KAINS01
- call from Marianne and [P]eter advising that they had completed mods to ramp c. Feedback from users was that the self closing gate was okay. I advised that it was not and perhaps council should review the gate to ensure it is safe. Advised I would come and have another look in the morning.
70. There is no dispute that there were serious delays in implementing the modifications to all three ramps and that Ramp C was nowhere near completion when the file on Improvement Notice *WHSIN 139911* was closed on 2 July 2018. In fact, the record shows that the regulator had marked the Notice on engineering controls as 'complied with' as early as 4 June 2018.

-
71. Instead of ensuring compliance with the engineering modifications required to make all three ramps safe, the evidence shows that SWSA was prepared to close the file on the intended action [my emphasis] outlined in the Action Plan. This left at least one of the working ramps in the Saleyard, Ramp C, as a serious safety hazard. As things transpired, this was an accident waiting to happen.
72. In my view, the file should not have been closed unless and until SWSA was satisfied that the modifications to Ramp C were completed. Instead, SWSA should have continued to monitor the progress of the modifications to ensure that those modifications occurred as a matter of priority and given consideration to escalating the matter as necessary. The approach taken has the potential to undermine the power of an Improvement Notice to effect meaningful change, and undermine confidence in the rigor of SWSA's regulation.
73. In response to my provisional report, SWSA noted that the directions in WHSIN 139911 included:
- Conduct a review of the plant and associated tasks to ensure that engineering controls are able to be implemented to reduce the risk of injury. Evidence may be in the form of an action plan that demonstrates engineering controls and time frames to achieve.
74. SWSA also noted that Ramp C was not in use at the time the file was closed. According to SWSA:
- The Council held a meeting with LRTA regarding Ramp C on 31 July 2018 and a decision was made to use the ramp without anyone, including Mr Mitchell, knowing what modifications had taken place.
75. While I have no reason to doubt that submission, I consider that little turns on it in the circumstances.
76. SWSA stated:
- The focus of the notice was on the process of implementing improvements, not on specific engineering controls for individual ramps. Therefore, compliance with the notice was deemed as receipt of the plan indicating the improvements to be made, in line with the improvements already made and inspected on Ramps A and B. On that basis, I do not believe it is correct to state "[t]he approach taken has the potential to undermine the power of an Improvement Notice to effect meaningful change, and undermine confidence in the rigour of SafeWork SA's regulation." While I acknowledge that a follow up visit to ensure the intended action was undertaken by the Council could have been scheduled, the contents of the notice and the basis on which it was deemed as complied with were appropriate in a regulatory sense and I do not believe undermine the confidence in the rigour of the agency, or undermine the power of an improvement notice to effect meaningful change.
77. While I understand this submission, I have difficulty reconciling it with Mr Smith's record of his conversation with the council:
- From Marianne, went through action plan, explained that **to have notices complied with, need to ensure engineering controls are implemented** and agreed by stakeholders, the longer term bigger picture action plan is a separate process...[my emphasis].
78. Regardless, having carefully considered SWSA's submission, my view remains that, in all of the circumstances, it was the wrong decision to close the file at that point. I consider that SWSA had discretion to keep the file open and continue to monitor the situation until all modifications to Ramp C were completed. Ms Tucker's email indicates that the remaining works were intended to be completed in a matter of weeks. In those

circumstances, I have difficulty understanding why the file was not left open until a follow up inspection had confirmed that those works were complete. Once the file was closed, SWSA would arguably have less leverage in ensuring that the planned modifications to Ramp C were implemented. Ultimately, I am mindful of the fact that a serious incident occurred while those modifications were not yet in place and SWSA no longer had an open file. I consider that in all the circumstances I can reasonably express the view that such a process has the potential to undermine confidence in the rigour of the agency's regulation.

79. It concerns me that SWSA appears reluctant to acknowledge any error in its process. In that regard, I comment that, while I acknowledge that it is easy to be critical in hindsight, it is important that I continue to hold SWSA to a high standard of administrative practice.

Opinion

In light of the above, my view is that the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act by:

- failing to properly consider the issuing of a Prohibition Notice
- closing the file before modifications to Ramp C were completed.

To remedy the error, I recommend under section 25(2) of the Ombudsman Act, that the agency:

1. Review and implement existing policies to ensure that they provide guidance and clarity to SWSA inspectors as to when to issue Improvement Notices and when to issue Prohibition Notices, including a requirement for inspectors to make a record giving reasons for the adequacy of compliance directions.
2. Stipulate in relevant policies that, where an improvement notice requires an Action Plan, the full implementation, rather than the creation of an Action Plan (or similar requirement), is considered as complying with an Improvement Notice.
3. Provide training on the policy to relevant staff.

SWSA provided comments on my recommendations as foreshadowed in my provisional report, including:

- the agency has recently reviewed, consolidated and released a comprehensive Compliance and Investigation manual for internal use which addresses recommendation 1
- in regard to recommendation 2, directions given by inspectors need to factor in individual circumstances; creation of an Action Plan can be a valid tool whereas in other instances a discrete and clear direction may be given
- in regard to recommendation 3, the new manual will be discussed across teams as part of ongoing development.

Having considered SWSA's comments on my recommendations, I have made some minor amendments to those recommendations for the purposes of clarification. While I note the steps taken by SWSA to date, my view remains that it is necessary to make the recommendations outlined above and monitor their implementation accordingly. In reporting to me on implementation of my recommendations, I expect that the agency will provide me with copies of the relevant policies (including the training manual) that address my recommendations.

Whether the agency was wrong in failing to conduct a thorough investigation of the formal complaint made to SWSA on 8 August 2018 after a worker received an injury at the Mt Gambier and District Saleyard

80. On 8 August 2018 Mr Graham Howell, the President of the LRTAV, wrote to Mr Christopher Spinks, Team Leader SWSA. The letter was a formal complaint to SWSA 'about the way in which SafeWork SA handled a report made to them about the hazards that the association had identified at the Mount Gambier and District Saleyard'.

81. The letter of complaint noted the injury to 'one of our members' on 1 August 2018 and said:

Not only had this ramp not had the safety gate installed by the agreed time, but all the force yards on the 3 ramps have still not yet had infill sheeting installed on them. The LRTAV believe that SafeWork SA failed in their duty to prevent the incident from happening by not taking appropriate action in February when first made aware of the hazards at Mount Gambier.

The reason that the LRTAV feel this way is based on common principles to prevent injury in the workplace and using the Australian Livestock & Rural Transporters Association (ALRTA) "Guide for safe design of livestock loading ramps & forcing yards".

82. SWSA responded to the LRTAV letter of complaint on 14 August 2018. In her acknowledgement correspondence, Ms Bucco noted that the matter had been referred to her, and that:

SafeWork SA takes great care to ensure complaints such as this are properly addressed. I can assure you that SafeWork SA will conduct a thorough investigation into the concerns raised in your email and we will be in contact within 28 days (this is the maximum timeframe) to advise on the outcome.

83. At the time of the lodging of the complaint SWSA had recently been part of a machinery of government change. This meant that the agency had been transferred out of the AGD and into the DTF. The change meant that SWSA operated in a different complaint handling environment from the past. Instead of being subject to the overarching AGD *Feedback, complaints and compliments management Policy*, SWSA operated only under its own agency policy known as *SafeWork SA Feedback*. This is because the DTF had no whole-of-agency policy to cover all its operations and those of its business units, including SWSA.¹⁰

84. I have considered the content of the *SafeWork SA Feedback* policy and noted the relevant commitments it makes to complainants. Step 5 in the designated complaint handling process states:

How we progress your complaint will depend on what it's about and who else it involves.

All complaints will be carefully considered and we will respond as soon as possible to let you know if we can resolve it quickly, or whether we need more time to assess it.

We will use procedures that are without prejudice and are fair to all concerned. Once complete, we will inform you of the outcome, reasons for the decision and the action taken.

¹⁰ In 2015, as a result of the Ombudsman SA *Audit of state government agencies' complaint handling* (November 2014), the Premier issued a new directive through the Department of Premier and Cabinet known as *DPC Circular 039 - Complaint Management in the South Australian Public Sector*. The Circular mandated complaint handling policy for all agencies that has to be consistent with the Australian Standard, AS/NZS 10002:2014. It appears that DTF were in breach of the Circular when this particular SafeWork SA investigation was conducted.

-
85. I have referred to the AGD *Feedback, complaints and compliments management Policy* because, just six weeks earlier than this complaint was lodged with SWSA, the AGD policy requirements would have taken precedence over the *SafeWork SA Feedback* policy. This is relevant because the AGD policy contains provisions that are not included in the SWSA policy document. Amongst these are:
- a commitment to clarity about the complaint process being followed
 - a commitment to objectivity and fairness, including access to an internal review
 - a commitment to transparency where the agency resolves to be clear about how a complaint has been resolved and about how the agency's handling of a complaint can be reviewed or appealed
 - a commitment to ensuring that all documentation regarding a complaint will be retained in accordance with the *State Records Act 1997*.
86. While I consider that there is evidence of good faith from SWSA to commit the agency to a thorough investigation of the LRTAV complaint, it appears that the complaint handling policy framework that the agency uses is outdated, inadequate and non-compliant with State Government policy. I make further comment on this below.
87. I note that SWSA concluded the handling of the LRTAV's complaint in a short letter from Ms Bucco addressed to their President, Mr Graham Howell on 17 September 2018. The relevant passages from the letter are as follows:
- I apologise for the delay in replying to you on this matter.
- I am advised that Inspector Chris Spinks made further contact with you to discuss your concerns and outlined with you the actions taken by SafeWork SA in February 2018 in relation to an agreed action plan between the relevant parties, and subsequent compliance action taken by SafeWork SA in August 2018.
- It has been determined that the actions taken in both instances are considered to be appropriate. Please note that the complaint has now been closed by SafeWork SA.
88. The letter concluded with advice to the LRTAV that it was entitled to raise its concerns with my Office should it remain dissatisfied. The letter provides little detail about the complaint handling process undertaken by SWSA, the nature of the evidence considered and the opportunity for the complainant to comment on the unexplained view that all actions taken by SWSA were appropriate.
89. In response to a request from my Office for a copy of the SWSA investigation report and 'any briefing notes prepared for SWSA senior officers on the complaint...and any notes or records [or] any other documentation you consider relevant to the matter', I received a considerable number of documents, including copies of the Improvement Notices issued in March 2018 and a one page document marked 'CONFIDENTIAL', which I later confirmed was the entire documentation relating to the SWSA investigation of the LRTAV complaint. It was signed by Mr Spinks and dated 23 August 2018.
90. I note that the complaint was received by SWSA on, or shortly after, 8 August 2018 and the investigation was apparently completed and signed off by Mr Spinks two weeks later, on 23 August 2018. However, the record shows that it took SWSA more than three weeks, until 17 September 2018, to reply to the LRTAV about their complaint. In the process, SWSA failed to comply with the 28 day timeframe. No explanation was given to the complainant.
91. I note also that the documents provided to my Office by SWSA did not include the Senior Inspector's Case File Report (**the first Report**) covering the period 9 February

2018 to 1 August 2018 or the report (**the second Report**) covering the period 1 August 2018 to 22 November 2018 (when the SWSA file on this matter was closed). These reports contain important documentation directly relevant to SWSA's handling of the hazard reports and Improvement Notice follow up from the beginning of the matter in February 2018. They should have been included in the documentation requested from SWSA when my Office made initial enquiries. Instead, Mr Smith volunteered access to them when my Investigating Officer interviewed him.

92. This omission is important because it sheds some light on the approach taken to complaint handling in SWSA. In his letter to my Investigating Officer, dated 9 October 2018, SWSA Executive Director, Mr Martyn Campbell stated that:

As you can appreciate we take great care to ensure that complaints are properly addressed and investigated thoroughly...

I confirm that the documents I will supply are all the records within the possession of custody and control of SafeWork SA and consent that these documents be destroyed when your investigation is concluded.

93. When my Investigating Officer saw the one page investigation report signed by Mr Spinks, my Officer again requested 'the complaint investigation report and process documentation' - believing it to be incomplete and possibly an oversight. In an email reply to my Officer responding to the further request for information, dated 19 October 2019, Ms Bucco said the following about the SWSA investigation process:

I confirm that there is no additional documentation to provide in relation to the investigation that was undertaken following receipt of the complaint by the LRTAV.

The officer responsible for the investigation has indicated that in investigating the complaint, he conducted a review of the files relevant to the matter and completed the action sheet based on that review. He also spoke directly with the Inspector that had been involved in both incidents in relation to his actions and why they were taken. This process included referencing meeting records, emails and notices, where issued, to understand the actions that had been taken.

Each complaint that is received by SafeWork SA that is referred for further investigation uses the action sheet as a consistent method for complaints to be investigated across the agency. As the nature of complaints can vary greatly, there is not an additional checklist or process that must be followed each time, other than ensuring the action sheet is completed. As occurred in this case, investigators will usually telephone or email the complainant and speak to any inspectors involved and consider all information provided by a complainant, and available on an inspector's file where necessary.

Following receipt of the complaint action sheet, an officer, myself in this case, will assess the information presented and prepare a letter of outcome. Due to the operation of privacy principles and section 271 of the *Work Health and Safety Act 2012* (SA), that letter will usually inform a complainant that consideration has been given to the matter and outline an outcome. In this case that outcome was that the actions taken were considered to be appropriate and that the matter was now closed.

94. Given that SWSA had an obligation to conduct, in its own words, 'a thorough investigation' that investigation has to meet basic standards of competent, considered and fair process and to have its findings understood by the complainant. The investigation should also be fair and demonstrate a complete accounting of the events and actions under question. In my view, the SWSA investigation fails to meet these basic standards and cannot be considered to be either thorough or fair.
95. While the investigation report notes the incident in August 2018, it does not demonstrate that the evidence relevant to the Ramp C failure was properly reviewed and assessed. The investigation report states:

Following an incident in August 2018 an incident occurred at the Mt Gambier Saleyard on ramp c where a contractor received an injury when struck by a Cow that attempted to exit a truck onto the ramp, Inspector Smith again attended the saleyard and as the engineering controls for the ramp had not been modified [my emphasis] issued a Prohibition notice on ramp c for the provision and maintenance of safe plant/structures.

The complainant has alleged that this action should have been taken during the first interaction with the site in February 2018 and that this would have prevented the injury of August 2018.

As the actions of the Inspector in February 2018 was initiated by a complaint with no injury and the PCBU and representative Association was in agreement on the action taken at that time it is determined that appropriate actions were undertaken at that time.

Although the potential for injury was present and an action plan developed by the PCBU to address the hazards associated with the use of loading ramps at that site incorporating the design guidelines developed by the Australian Livestock and Rural Transporters Association had been agreed by all parties it is considered that appropriate actions were taken at that time to address matters raised.

It is recommended that a response to the Livestock and Rural Transporters Association of Victoria be sent explaining that the actions taken are considered to be appropriate at that time and subsequent action following the incident on the 1st August 2018 has escalated compliance[sic] actions at the Mt [G]ambier Saleyards.

96. In my view, the investigation report fails to document the detailed evidence available about the Improvement Notices and follow-up monitoring of the engineering control work undertaken by council contractors. More importantly, it provides no insight whatsoever into the question about why SWSA officers signed off that the Action Plan had been complied with while Ramp C had not been modified. There is no evidence of consideration as to whether a Prohibition Notice should have been issued at an earlier stage. There appears to have been little reflection as to whether any further steps could or should have been taken. I note too that the check box indicating that the report has been provided to the [SWSA] Complaint Manager is marked as 'No'.
97. In summary, the evidence before me suggests that the investigation process itself was relatively superficial with little meaningful reflection.
98. Further, as discussed below, the complainant was not given adequate reasons for the decision.
99. In response to my provisional report, SWSA stated:

It is indeed unfortunate that the relevant inspector, Mr Adrian Smith, was not consulted during the Agency's complaint investigation in August 2018. This oversight will be addressed in the updated complaints procedure to ensure this does not occur in future complaints. It is also for this reason that, [...], certain documents were not made available to your office in its preliminary inquiries. I accept this was a failing in this particular instance and will be rectified in updated processes for the investigation of complaints.
100. It is to the agency's credit that it has acknowledged that there is room for improvement in its investigation procedures and response to my investigation.

Opinion

In light of the above, my view is that the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act in failing to conduct a thorough investigation of the complainant's complaint.

To remedy the error, I recommend under section 25(2) of the Ombudsman Act, that the agency:

4. Provide the complainant with a written apology forthwith for SWSA's failures in the conduct of the investigation into their complaint dated 8 August 2018 and advise on steps taken to improve future complaint investigations
5. In collaboration with the Department of Treasury and Finance senior staff, create a new SWSA agency complaint handling policy that fully complies with the Australian Standard, AS/NZS 10002:2014 and with *DPC Circular 039 - Complaint Management in the South Australian Public Sector*.

I am pleased to note that, in its response to my provisional report, SWSA has indicated a willingness to write a letter of apology to the complainant and that it is currently reviewing its complaints process to ensure consistency with the Australian Standard and DPC Circular 039.

Whether the agency should have provided reasons and acted in a manner that was contrary to law or wrong in failing to do so in relation to its decision to uphold the actions taken by SWSA as an outcome of its investigation

101. SWSA's letter to the LRTAV dated 17 September 2018 advised the outcome of its internal investigation as follows:

I am advised that Inspector Chris Spinks made further contact with you to discuss your concerns and outlined with you the actions taken by SafeWork SA in February 2018 in relation to an agreed action plan between the relevant parties, and subsequent compliance action taken by SafeWork SA in August 2018.

It is has been determined that the actions taken in both instances are considered to be appropriate. Please note that this complaint has now been closed by SafeWork SA.

102. It is clear from the above that SWSA did not provide reasons for its determination that actions taken were appropriate.
103. In response to my investigation, Ms Bucco explained SWSA's usual process in relation to complaint handling including:

Following receipt of the complaint action sheet, an officer, myself in this case, will assess the information presented and prepare a letter of outcome. Due to the operation of the privacy principles and section 271 of the *Work Health and Safety Act 2012* (SA), that letter will usually inform a complainant that consideration has been given to the matter and outline an outcome. In this case that outcome was that the actions taken were considered appropriate and that the matter was now closed.

104. When asked about the application of the Information Privacy Principles (IPPS) and section 271 of the WHS Act, Mr Campbell stated that:

The confidentiality provision of the *Work Health and Safety Act 2012* (SA) is very clear in that the disclosure of information or the contents of information obtained through the exercise of powers under the act is prohibited.

While there are exceptions provided at section 271 at subsection (2) these typically do not apply to enabling SafeWork SA to disclose information obtained through investigating a complaint to the complainant.¹¹

¹¹ Letter to Ombudsman SA, dated 20 December 2018

105. As an issue of release of personal information for the purposes of the IPPS does not appear to arise in this case, and I note that Mr Campbell did not purport to rely on the application of the IPPS in his response, I have focussed on SWSA's reliance on section 271 of the WHS Act to explain its failure to give detailed reasons to the LRTAV.

106. I turn now to section 271 of the WHS Act. The Act provides:

271—Confidentiality of information

- (1) This section applies if a person obtains information or gains access to a document in exercising any power or function under this Act (other than under Part 7). (IPP)
- (2) The person must not do any of the following:
 - (a) disclose to anyone else—
 - (i) the information; or
 - (ii) the contents of or information contained in the document;
 - (b) give access to the document to anyone else;
 - (c) use the information or document for any purpose.

Maximum penalty:

- (a) in the case of an individual—\$10 000;
 - (b) in the case of a body corporate—\$50 000.
- (3) Subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document—
 - (a) about a person, with the person's consent; or
 - (b) that is necessary for the exercise of a power or function under this Act; or
 - (c) that is made or given by the regulator or a person authorised by the regulator if the regulator reasonably believes the disclosure, access or use—
 - (i) is necessary for administering, or monitoring or enforcing compliance with this Act; or
 - (ii) is necessary for the administration or enforcement of another Act prescribed by the regulations; or
 - (iii) is necessary for the administration or enforcement of another Act or law, if the disclosure, access or use is necessary to lessen or prevent a serious risk to public health or safety; or
 - (iv) is necessary for the recognition of authorisations under a corresponding WHS law; or
 - (v) is required for the exercise of a power or function under a corresponding WHS law; or
 - (d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or
 - (e) that is required or authorised under a law; or
 - (f) to a Minister.
 - (4) A person must not intentionally disclose to another person the name of an individual who has made a complaint in relation to that other person unless—
 - (a) the disclosure is made with the consent of the complainant; or
 - (b) the disclosure is required under a law.

Maximum penalty:

- (a) in the case of an individual—\$10 000;
- (b) in the case of a body corporate—\$50 000.

The second reading speech for the legislation clarified that section 271 is designed to ensure that inspectors are accountable and credible when they perform their functions and exercise powers.¹² I do not consider that section 271 would have prevented the giving of reasons in this situation.

107. I have also considered section 227 of the WHS Act which provides as follows:

227 - Requirements of an internal review decision

227—Decision on internal review

As soon as practicable after reviewing the decision, the internal reviewer must give the applicant in writing—

- (a) the decision on the internal review; and
- (b) the reasons for the decision.

108. I expressed a view in my provisional report that I considered that SWSA failed to comply with the requirement in section 227 to give reasons for its decision in relation to an internal review.

109. In response to my provisional report, SWSA stated:

It is important to note that the process for internal review is separate to the agency's complaints process. The WHS Act is based on the model Work Health and Safety Bill developed by Safe Work Australia and introduced as mirror legislation in 6 of the 8 Australian jurisdictions. This Bill introduced an internal merits review process with a right to external review. An application for internal review can be received for a number of reviewable decisions as outlined in section 223 of the WHS Act and Regulation 676 of the WHS Regulations. The issuance of an improvement notice is a reviewable decision, however the complaint received by the LVTAR on 8 August 2018 was not an application for Internal Review. It was a complaint to the agency, and was dealt with through the agency's complaints process, accordingly.

Information about internal review is provided with any compliance notice issued, and the form for an internal review application is available on the SafeWork SA website.

The process for internal review, as noted in [my provisional report] is mandatory in its timeframes and requirements, including that an application must be made within 14 days of the decision to which it is seeking review. Further any decisions made on internal review can be referred for external review to the South Australian Employment Tribunal.

110. Having considered that response, and reviewed the file, I accept that the complaint was not an application for internal review as prescribed by the WHS Act. In light of that, I do not consider that SWSA failed to comply with the requirement in section 227 to provide reasons or, on that basis, acted contrary to law.

111. My view remains, however, that it was wrong for SWSA to fail to give reasons in these circumstances. In particular, I consider that SWSA should have provided an explanation as to why it considered that the actions taken were appropriate. As stated above, I do not consider that SWSA was prevented from giving an outline of its reasoning by section 271 of the WHS Act. In the absence of any reasoning, I do not see

¹² Work Health and Safety Bill, Second reading speech, 7 April 2011, The Hon. B.V. Finnigan, Legislative Council; Parliament of South Australia.

how it is possible for a complainant to be satisfied that their complaint has been properly and transparently investigated.

Opinion

In light of the above, my view is that the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act by failing to give reasons for its decision to uphold the actions of SWSA as an outcome of its investigation.

To remedy the error, I recommend under section 25(2) of the Ombudsman Act, that the agency:

6. Pursuant to recommendation 5, incorporate into the new SWSA agency complaint handling policy a clear requirement that reasons must be given in writing for a decision made at the conclusion of an investigation of a complaint, or of an agency initiated investigation of a matter.

Summary and Recommendations

In light of the above, my final view is that:

- the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act by:
 - failing to properly consider the issuing of a Prohibition Notice
 - closing the file before modifications to Ramp C were completed.

To remedy the error, I recommend under section 25(2) of the Ombudsman Act, that the agency:

1. Review and implement existing policies to ensure that they provide guidance and clarity to SWSA inspectors as to when to issue Improvement Notices and when to issue Prohibition Notices, including a requirement for inspectors to make a record giving reasons for the adequacy of compliance directions.
 2. Stipulate in relevant policies that, where an improvement notice requires an Action Plan, the full implementation, rather than the creation of an Action Plan (or similar requirement), is considered as complying with an Improvement Notice.
 3. Provide training on the policy to relevant staff.
- the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act in failing to conduct a thorough investigation of the complainant's complaint.

To remedy the error, I recommend under section 25(2) of the Ombudsman Act, that the agency:

4. Provide the complainant with a written apology forthwith for SWSA's failures in the conduct of the investigation into their complaint dated 8 August 2018 and advise on steps taken to improve future complaint investigations
5. In collaboration with the Department of Treasury and Finance senior staff, create a new SWSA agency complaint handling policy that fully complies with the Australian Standard, AS/NZS 10002:2014 and with *DPC Circular 039 - Complaint Management in the South Australian Public Sector*.

- the agency acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act by failing to give reasons for its decision to uphold the actions of SWSA as an outcome of its investigation.

To remedy the error, I recommend under section 25(2) of the Ombudsman Act, that the agency:

6. Pursuant to recommendation 5, incorporate into the new SWSA agency complaint handling policy a clear requirement that reasons must be given in writing for a decision made at the conclusion of an investigation of a complaint, or of an agency initiated investigation of a matter.

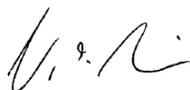
Final comment

In accordance with section 25(4) of the Ombudsman Act the agency should report to the Ombudsman by **8 November 2019** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Treasurer as relevant Minister for the purposes of section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

7 August 2019