

Australian Government Safe Work Australia

2018 Review of the model WHS laws



SOUTH AUSTRALIAN WINE INDUSTRY
ASSOCIATION INCORPORATED

SUBMISSION OF: SOUTH AUSTRALIAN WINE INDUSTRY
ASSOCIATION INCORPORATED

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THE SOUTH AUSTRALIAN WINE INDUSTRY ASSOCIATION INCORPORATED

1. The South Australian Wine Industry Association (SAWIA) is an industry association representing the interests of wine grape growers and wine producers throughout the state of South Australia. SAWIA (as it is known today) was established in 1840 as the *Society for the Introduction of Vines*.
2. SAWIA is a not for profit incorporated association, funded by voluntary member subscriptions, grants and fee for service activities, whose mission is to provide leadership to South Australian grape and wine businesses so they achieve great things that they couldn't by themselves.
3. SAWIA membership represents approximately 96% of the grapes crushed in South Australia and about 36% of the land under viticulture. Each major wine region within South Australia is represented on the board governing our activities.
4. SAWIA has a strong track record as an industry leader and innovator in many areas. SAWIA pro-actively represents members and the greater wine industry with government and related agencies in all aspects of business in the wine sector.
5. What SAWIA does for members is covered in four key areas:
 - Representation and Leadership;
 - Advice and Information;
 - Products and Services; and
 - Promotion and Opportunities.
6. SAWIA is also registered association of employers under the South Australian *Fair Work Act 1994* and is also recognised as a Recognised State-Registered Association under the *Fair Work (Registered Organisations) Act 2009*.

SUMMARY OF SUBMISSION

1. Since the introduction of the model laws in 2011, there has been increasing fragmentation amongst the states that have adopted the laws, and state based variations have begun to appear which may have an effect of diluting the intent of the harmonised laws.
2. There is scope for further simplifying and rationalising the Codes of Practice with an emphasis on specific, practical guidance on managing particular issues.
3. There is minimal guidance offered by State regulators in relation to mental health, including workplace stress. Safe Work Australia and State regulators should consider utilising and linking to resources developed by specialist bodies to better assist PCBUs in managing workplace mental health.
4. The definition of "officer" and their duty, including the extent of "due diligence" is not well understood, particularly by small business and those who potentially are in the role.
5. There is some confusion and uncertainty when it comes to managing contractors and the level of validation, supervision and direction that is required to ensure the safety of contractors whilst on site.
6. Whilst health and safety committee or a HSR may be appropriate for some businesses, other businesses may want to be able to consider alternative arrangements. SAWIA submits that the review considers the possibility of recognising other alternative arrangements of consultation.

7. It is submitted that the review panel formalise through legislation the practice where a business is able to contact the inspector who has issued an enforcement notice, to seek an extension on implementing the requirements of that enforcement notice. This would occur before the internal review is sought.
8. In relation to national compliance and enforcement policy reinforcing the key obligations of inspectors when conducting investigations.
9. On the matter of Sentencing Guidelines, SAWIA does not support the implementation of sentencing guidelines for work health and safety offenders across all jurisdictions.
10. In relation to insurance products indemnifying directors against fines and penalties for breaches of work health and safety legislation, SAWIA does not support any legislation to prohibit such insurance.
11. An Enforceable undertaking (EU) is a good alternative to prosecution and can be used more effectively and quickly to address contraventions. However, it should be noted that EUs may be burdensome from an administrative and reporting perspective, particularly for a small business.



SOUTH AUSTRALIAN WINE INDUSTRY

The wine industry is both unique and complex in nature. It takes raw produce, wine grapes, and turns them into a value added product, wine, that is sold throughout the world. Unlike other manufacturing sectors, the wine industry's viticultural foundations require long lead times to produce a crop and based on the vagaries of nature each vintage make the balance of supply and demand a constant challenge.

The industry is 'vertically integrated', spanning agriculture (wine grapes), manufacturing (winemaking) and sales into a global marketplace. Sales growth is driven by exports through the main channels of off-premise (supermarkets and wine retail) and on premise (restaurants, clubs, pubs) venues, often through company owned distribution channels.

Some businesses in the wine industry are extremely diverse, and employ persons in any number of the following occupations:

- agriculture (grape growing);
- manufacturing (winemaking);
- science (laboratory);
- retail (cellar door sales);
- horticulture (nursery);
- food and beverage (cellar door / café & restaurant);
- administration (clerks);
- cleaning (cleaners);
- security (security officers);
- barrel manufacturing (coopers);
- warehousing and packaging (store persons);
- transport of grapes & bottled wine (drivers);
- maintenance (mechanics & welders);
- planning & technical production / tasks (engineers); and
- other professionals (accountants, sales persons, marketers, export persons, quality assurance, micro-biologists, winemakers, viticulturists & management).

The Australian wine Industry consists of 65 wine regions across the six states and one territory (ACT), see Figure 1. While wine grape growing and wine production occurs in the six States and the ACT, the crush data demonstrates that South Australia is the single largest State in terms of crush.

Figure 1: Crush by State and region¹

State/Regions	2017 Raw Crush Data Tonnes	% of total crush
South Australia	984,000	51%
New South Wales	398,000	21%
Victoria	87,000	4%
Western Australia	40,000	2%
Queensland	2,168	<0.05%
Tasmania	11,000	1%
Australian Capital Territory	-	<0.05%
Murray Darling-Swan Hill ²	410,000	21%
TOTAL	1,807,207	100%

In addition, South Australia has about 56% of Australia's vineyard area.

¹ Wine Australia 2018, Australian wine sector 2017 at a glance

² This region crosses the State borders of Victoria and New South Wales



South Australia exports wine worth \$1.4 billion that is about two-thirds of Australia's total exports. China is our most valuable export market at about \$392 million and is the dominant destination for South Australia's wineries

Our industry is worth \$2.12 billion annually and directly employs 8,700 people.

The national wine industry organisations, including marketing, education and research & development institutions have their headquarters in South Australia, providing collaboration, leadership, innovation and expertise in winemaking and viticulture

BACKGROUND

In 2010-2011, Safe Work Australia developed a single set of Work Health and Safety (WHS) laws to be implemented across Australia. Referred to as 'model' laws, for the model WHS laws to become legally binding, the Commonwealth, states and territories were required to separately implement them as their own laws.

At that time, State Ministers responsible for WHS agreed to a review of the model WHS laws which was to occur in 2018. Consequently, a discussion paper was released by Safe Work Australia in February 2018 that contained the terms of reference for the review and guiding questions that gave attention to particular terms of reference. These terms, based on the aims of the review, consider whether:

- A. the model WHS laws are operating as intended;
- B. any areas of the model WHS laws have resulted in unintended consequences;
- C. the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships;
- D. the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation;
- E. the consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes; and
- F. the model WHS Regulations, model Codes of Practice and National compliance and enforcement policy adequately support the object of the model WHS Act.

SAWIA welcomes the opportunity to make a submission to the review of the model WHS laws, responding to the review's terms of reference and guiding questions.

SAWIA'S SUBMISSION

Whether the model WHS laws are operating as intended.

SAWIA acknowledges that there have been benefits from having harmonised legislation, particularly for businesses that operate across a number of states, however, we note that there has been increasing fragmentation of the harmonised legislation across the states, which is invariably diluting the intent of the model harmonised laws. An example of this has been the introduction of the Industrial Manslaughter provisions in the Queensland legislation.

The Codes of Practice have the potential to provide clear, practical guidance on ways to ensure that duties are met. However, there is still scope for further simplifying and rationalising the Codes, given that many of them include standard sections which are uniform across multiple codes, for example the risk management process.

SAWIA submits that the Codes should focus on specific, practical guidance on managing particular issues with generic material and information being kept to a minimum in the code, alternatively remove and include in separate guidance materials.

The use of Australian Standards is common in the workplace. As part of the review, consideration could be given to the creation of something similar to the NSW Code of Practice for Technical Guidance that existed alongside the repealed NSW OHS Act 2000. It would be useful for industry to have a glossary of Australian Standards for health and safety issues that exist in the workplace. However, this document should not have the same legal standing as a code of practice in that it could be called up in court as an example of best practice.

SAWIA acknowledges that the scope of the legislation is broad in nature and that work health and safety relates to both physical and psychological health. However, apart from guidance materials from Safe Work Australia in relation to workplace bullying there is minimal guidance offered by State regulators in relation to mental health, including workplace stress.

Safe Work Australia and State regulators should consider utilising and better disseminating the resources developed by specialist bodies, for example beyondblue, Heads Up and Black Dog Institute to better assist PCBUs in managing workplace mental health.

Whether the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships.

The duties that apply to workers and others at the workplace are appropriate and suitable for health and safety legislation.

However, the definition of “officer” and their duty, including the extent of “due diligence” is not well understood, particularly by small business and those who potentially are in the role. The matter can also be complicated within a business when management are not aware as to who would be considered, making or participating in decisions affecting the whole or a substantial part of the business, or has capacity to affect significantly the corporation’s financial standing.

This should be contrasted with the definition of “responsible officer” under section 61 of the repealed South Australian *Occupational Health, Safety and Welfare Act 1986* which required the appointment of a single person to fulfil this obligation. This provided more certainty and clarity to business.

The definition of officer in the WHS Act refers to the meaning of officer in the *Corporations Act 2001*. While it may be appropriate to adopt the definition from the *Corporations Act 2001*, many businesses, particularly small businesses would not feel confident trying to locate and navigate the *Corporations Act 2001* to determine whether one or more staff members comes within this definition. In addition, while there is an Interpretive Guideline available from Safe Work Australia on the definition, it is not easily located.

SAWIA submits that consideration should be given to inserting the wording of officer from the *Corporations Act 2001* into the WHS Act and then provide further guidance on this definition by for example legislative notes to the relevant section.

Whether the consultation, representation and issue resolution provisions are effective and used by duty holders and workers are protected where they participate in these processes.

On the matter of the definition as to who is a worker and the consultation required with other PCBUs when managing contractors, there is some confusion and uncertainty when it comes to managing contractors and the level of validation, supervision and direction that is required to ensure the safety of contractors whilst on site. Whilst it is understood that a PCBU is

required to have in place contractor management systems more practical guidance on the level of validation, supervision and direction of contractors would be beneficial.

SAWIA acknowledges that there is a Code of Practice on Work Health and Safety Consultation, Co-Operation and Co-Ordination which provides guidance on activities with other PCBU's. However, more guidance is required regarding consultation, co-operation and co-ordination to improve safety outcomes in the supply chain.

The WHS Act mandates consultation with workers, but does not mandate the mechanism for such consultation. Despite this apparent flexibility, the WHS Act only provides for two mechanisms for consultation within the workplace – a health and safety committee or a health and safety representative (HSR).

Whilst health and safety committee or a HSR may be appropriate for some businesses, other businesses may want to be able to consider alternative arrangements. Yet, other arrangements are not recognised under the WHS Act and would not be accepted as an appropriate alternative. SAWIA submits that the review considers the possibility of recognising other alternative arrangements of consultation. For example, this could include mechanisms similar to “other agreed arrangements” which was part of the repealed New South Wales *Occupational Health and Safety Act 2000*.

On the question of health and safety representatives, SAWIA considers that there is value in retaining the role and responsibilities of the HSR as outlined in the WHS Act. It is acknowledged that such roles can be a valuable conduit for sharing information between workers and management and to also assist in resolution of health and safety issues.

Whether the compliance and enforcement provisions are effective and sufficient to deter non-compliance with the WHS legislation.

For the performance of their duties, the inspector's powers are considered to be appropriate.

Where a PCBU is issued with an enforcement notice there may situations where the PCBU needs an extension on implementing the requirements of for example an improvement notice. Rather than seeking an internal review, SAWIA submits that consideration should be given to inserting a provision to allow a PBCU to seek an extension.

The national compliance and enforcement policy adequately supports the object of the model WHS Act.

SAWIA submits that there is scope for improving the national compliance and enforcement policy by reinforcing the key obligations of inspectors when conducting investigations.

Section 271 of the *Work Health and Safety Act 2012 (SA)* provides for the confidentiality of information and of contents of documents obtained. While, the national compliance policy outlines a number of key principles, SAWIA notes that confidentiality is not one of them.

SAWIA submits that for a PCBU being requested to provide information to an inspector as part of an investigation, being able to trust the inspector's impartiality, balance and integrity is as important as being able to trust documents and information to be kept confidential and not shared with other persons where not necessary for the exercise of power.

Whether the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation.

SAWIA supports the three (3) categories of offences and the distinction between reckless conduct which imposes a higher penalty than a breach of a health and safety duty.

On the matter of Sentencing Guidelines, SAWIA does not support the implementation of sentencing guidelines for work health and safety offenders across all jurisdictions. The WHS Act is merely a model Act and not a Federal Act. It is a number State Acts, whilst harmonised, applied in the State and Territory jurisdictions.

Differences in sentencing are due to the interaction of the WHS Act with State and Territory criminal law frameworks, including sentencing law and criminal procedure legislation. It would be inappropriate for national Sentencing Guidelines to be imposed on the jurisdictions with little or no regard to their criminal law frameworks. W

An Enforceable undertaking (EU) is a good alternative to prosecution and can be used more effectively and quickly to address contraventions. However, it should be noted that EUs may be burdensome from an administrative and reporting perspective, particularly for a small business.

In relation to insurance products indemnifying directors against fines and penalties for breaches of work health and safety legislation, SAWIA does not support any legislation to prohibit such insurance.

The Discussion Paper states that the 20015 Review of the South Australian Act recommended that the Act be amended to expressly prohibit such insurance products. That is not correct. The report by Mr Robin Stewart-Crompton on the Review of the Operation of Work Health and Safety Act 2012 in November 2014, did no such thing but merely posed the following question and potential options³.

Option 17 for addressing the question of insurance against fines under the WHS legislation

Option 17: If it is considered that the current position should be changed separately from a general policy decision in relation to insurance against criminal penalties under any South Australian laws, the following four options might be considered:

- A. refer the matter to Safe Work Australia for further consideration (probably in the context of the 2016 national review of the WHS laws); or
- B. include a complete prohibition in the WHS Act along the lines of the prohibitions under the Road Traffic Act and the New Zealand OHSE Act; or
- C. apply such a prohibition to category 1 and (possibly) category 2 offences in which there has been wilful or negligent conduct endangering other persons and allow the court to decide whether any order prohibiting indemnification should be made in other cases; or
- D. apply the prohibition to any criminal offences under the WHS Act that involve wilful, reckless or negligent acts.

SAWIA is unaware that it is the position of the current South Australian Government for the law to change.

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The issue was raised in the context of a decision by an Industrial Magistrate under the repealed South Australian *Occupational Health, Safety and Welfare Act 1986*. SAWIA submits that legislative change should not be driven by commentary, questions and philosophical arguments by a single Industrial Magistrate in a lower court.

Whether or not such insurance should continue to be offered is a matter for the insurance industry and their clients. If there is any appetite to consider legislative change this should be considered by an expert body, for example the Australian Law Reform Commission.

Conclusion

SAWIA considers the model laws have had an overall positive effect on health and safety at the workplace. With harmonisation, there has been a simplification of safety systems for businesses that operate across Australia. However, there are opportunities to consider further improvements to the Act and Codes of Practice as outline above.

