



SOUTH AUSTRALIAN WINE INDUSTRY
ASSOCIATION INCORPORATED

20 December 2016

WHS Act Review
SafeWork SA
Policy and Governance Team
GPO Box 465
ADELAIDE SA 5001

By email: webmaster.safework@sa.gov.au

Re: Review of the Work Health and Safety Act 2012 (SA)

The South Australian Wine Industry Association Inc. (SAWIA) welcomes the opportunity to contribute to the review of the *Work Health and Safety Act 2012 (SA)* (WHS Act).

The South Australian Wine Industry Association (SAWIA) is an employer and industry association representing the interests of wine grape growers and wine producers throughout the state of South Australia. SAWIA is the oldest wine industry organisation in Australia and has existed, albeit with various name changes, since 1840. SAWIA recognised its 175 years of service to the South Australian wine industry in 2015.

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. Our membership range from some of Australia's largest wine producers to small, boutique wine producers and independent wine grape growers.

The association's as an active Work Health and Safety Committee which has been consulted on this matter and makes the following comments.

General Comments

SAWIA submits that it is still too early to make fully informed comment on the operation of the WHS Act.

The WHS Act has been in operation for less than four years and has seen only a handful of prosecutions under it. It is our view the review is premature, especially as, according to the discussion paper, "*It is expected that the Commonwealth Government, with the support of state and territory ministers, will soon confirm a deferral of the first significant national review of the model WHS laws until 2018.*"

The rationale given in the discussion paper for the proposed deferral is that "*As the model laws have not been in place for the full five years in all jurisdictions, it is foreseen that there will be insufficient data and evidence available to fully examine the implementation of the model laws.*"

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SAWIA notes that Mr Robin Stewart-Crompton, RSC Advising Pty Ltd, conducted the first statutory review of the Act in 2014, (one year after the commencement of the Act), and found that overall, the legislation is working as it was intended. While the first review did make a number of recommendations SAWIA submits that the majority of recommendations related to the operational structure of SafeWork SA, rather than specific changes to the Act.

SAWIA notes that Section 277(3) of the WHS Act provides that a second review of the operation of the Act (the SA Review) be conducted as soon as practicable after the expiry of three years from the commencement of the Act.

As the national review of the model WHS laws is now likely to occur in 2018, SAWIA supports the (second) review focusing only on the operation of the South Australian provisions that differ from the model WHS laws.

SAWIA provides feedback on the variations to the WHS Act as compared to the federal model WHS laws as outlined in the discussion paper at attachment A.

Thank you for the opportunity to comment on the review of the WHS Act 2012 and should you require any further information please contact me.

Yours faithfully,



Egon Schwidder
Business and Workplace Adviser

	Model WHS Act Regulations	WHS Act (SA)	SAWIA Comment
1	Provides that in managing risks, a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable (section 17 (1), model WHS Act).	Provides that a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable, but only to the extent to which they have the capacity to influence and control the matter (section 17(2), WHS Act).	SAWIA supports the retention of Section 17(2). Our members have again confirmed that a control test definition within the Act is fundamental to ensure that the duties of a Person Conducting a Business or Undertaking (PCBU) is clearly articulated.
2	Provides for prosecution exceptions for: - volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace; and (section 34 (1), model WHS Act). - unincorporated associations (although unincorporated associations may be PCBUs for the purposes of the model WHS Act, their failure to comply with a duty or obligation under the WHS Act does not constitute an offence and cannot attract a civil penalty)(section 34(2), model WHS Act).	The WHS Act (SA) includes an additional provision to clarify that volunteer officers in mixed residential/commercial strata/community titles corporations will not be liable for a breach of officer duties under the WHS Act (section 34, WHS Act).	SAWIA has no objection to the retention of this clarifying statement related to Section 34, WHS Act.

	Model WHS Act Regulations	WHS Act (SA)	SAWIA Comment
3	Provides that a health and safety representative (HSR) can seek assistance from any person whenever necessary in exercising a power or carrying out a function under the legislation. There are no limitations in the model WHS laws on the types or categories of people from whom assistance can be sought (section 68 (2)(g), model WHS Act).	As per the model WHS laws a HSR can seek assistance from any 'person'. However, the WHS Act (SA) provides that 'any person' is limited to: <ul style="list-style-type: none"> - a person who works at the workplace; - a person who is involved in the management of the relevant business or undertaking; or - a consultant who has been approved as required by the legislation (Section 68(3) and (6)), WHS Act). 	SAWIA supports the retention of the Section 68(3) and (6), WHS Act. The "consultant" should be suitably experience or qualified in work health and safety and have some connection with the industry in which he or she is providing assistance to an HSR.
4	Provides that an HSR is entitled to five training days in the first year, one in the second and one in third (regulation 21, model WHS Regulations).	The WHS Act (SA) provides for an increase in the number of training days for HSRs to five in the first year, three in the second and two in the third (section 72(9), WHS Act).	SAWIA does not believe that the increase in training days is warranted, however to date the additional training days in years 2 and 3 do not appear to have created an issue for some members.
5	Allows for a WHS entry permit holder (EPH) to enter a workplace to inquire into a suspected WHS contravention, where the contravention is in relation to a 'relevant worker'. The EPH must reasonably suspect a contravention is occurring or has occurred when entering	The WHS Act (SA) includes certain policies and procedures relevant to when a EPH seeks to exercise a right of entry to require into suspected contraventions of the WHS Act (section 117, WHS Act). This includes providing that EPHs must give consideration as to whether it is	SAWIA's initial position was that the right of entry (ROE) provisions in the WHS Act should reflect the provisions of entry under the <i>Fair Work Act 2009</i> , particularly in terms of reasonable prior notice to the employer to enter the business premises.

	Model WHS Act Regulations	WHS Act (SA)	SAWIA Comment
	<p>for this purpose. (section 117, model WHS Act).</p> <p>Prior to recent changes, the model WHS laws provided that an EPH was not required to give notice before entering a workplace. However, amendments to the model WHS Act now require an EPH to provide a minimum of 24 hours' and a maximum of 14 days' notice to the relevant PCBU and the person with management or control of the workplace before entry takes place: (Section 68 (3B), model WHS Act).</p>	<p>reasonably practicable to notify the regulator prior to entry in order to provide an opportunity for an inspector to attend at the workplace at the time of entry (section 117(3)). However, if the EPH is not accompanied by an inspector, they must furnish a report on the outcome of his or her inquiries at the workplace to the regulator, in accordance with the WHS Regulations, after the entry has occurred (section 117(6)), WHS Act).</p>	<p>SAWIA notes that amendments to the model laws in March 2016 now provide a minimum of 24 hours' and a maximum of 14 days' notice to the relevant PCBU and the person with management or control of the workplace before entry takes place.</p> <p>SAWIA submits that the ROE provisions in the model laws (as amended) be adopted.</p> <p>Should the ROE provisions in the model laws (as amended) be adopted then Section 117(6) WHS Act can be deleted. However, if the requirement for an EPH to provide a report on the outcome of his or her inquiries at the workplace to the regulator is retained, SAWIA submits that the report should only be made available to the regulator and not be a matter of public record due to being a report that contains information that is not subject to any verification, that is the content of the report is not tested or proven as accurate.</p>
6	<p>Provides that for the purposes of an inquiry into a suspected contravention, an EPH</p>	<p>As per the model WHS laws, an EPH can enter a workplace for the purpose of inspecting or making copies of employee</p>	<p>SAWIA supports the retention of section 120(6), WHS Act.</p>

	Model WHS Act Regulations	WHS Act (SA)	SAWIA Comment
	<p>may enter any workplace for the purpose of inspecting, or making copies of:</p> <ul style="list-style-type: none"> - employee records that are directly relevant to a suspected contravention; or - other documents that are directly relevant to a suspected contravention and that are not held by the relevant PCBU. <p>Before doing so, the EPH must give notice of the proposed entry to the person from whom the documents are requested and the relevant PCBU. This notice must be given during usual working hours at least 24 hours, but not more than 14 days, before the entry (section 120, model WHS Act).</p>	<p>records and other documents directly relevant to a suspected contravention. However, The WHS Act (SA) provides that the right of an EPH to require copies of a document is subject to any direction that may be given by an inspector. This may include a direction that copies of a document not be required to be made and provided to the EPH (section 120(6), WHS Act).</p>	<p>The variation is designed to protect the privacy of persons whose records might otherwise be accessed for purposes unrelated to the suspected contravention.</p>
7	<p>The model WHS Act does not provide protection against self-incrimination (section 172, model WHS Act) but instead provides for use immunity.</p>	<p>The WHS Act (SA) provides for a protection against self-incrimination (section 172, WHS Act). The provision states that a person must answer questions or produce information or documents unless to do so would tend to incriminate or expose them to an offence.</p>	<p>SAWIA supports the retention of section 172, WHS Act (SA). The use of immunity in the model Act does not in our view provide individuals with adequate protections against self-incrimination.</p>

	Model WHS Act Regulations	WHS Act (SA)	SAWIA Comment
8	<p>Provides that the Minister may approve a Code of Practice (COP) for the purposes of the Act and may vary or revoke an approved COP (section 274(1), model WHS Act).</p> <p>However, the Minister may only approve, vary or revoke a COP if it was developed by a process that involves consultation between the Governments of the Commonwealth and each State and Territory, unions, and employer organisations (section 274(2), model WHS Act).</p> <p>An approval of a COP, or a variation or revocation of an approved COP, takes effect when notice of it is published in the Government Gazette, or on date specified in the approval, variation or revocation (section 274(4), model WHS Act).</p>	<p>As per the model WHS laws, the Minister may approve a COP for the purposes of the Act and may vary or revoke an approved COP.</p> <p>However, the WHS Act (SA) includes additional requirements in relation to approved COPs. These include:</p> <ul style="list-style-type: none"> - a requirement for the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister (section 274(3)), WHS Act); - a requirement that the Industrial Relations Consultative Council recommend to the Minister approval of a COP made under the WHS Act (section 274(2), WHS Act); and - a requirement that COPs be subject to disallowance by Parliament (section 274(8), WHS Act). 	<p>SAWIA supports the retention of the additional requirements in relation to approve COPs.</p> <p>The requirement for the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister (section 274(3)), WHS Act); ensures that the needs of small business in SA is appropriately considered.</p>

