

INTRODUCTION

As a result of “in-principle” agreement between the Commonwealth, State and Territory governments to cooperate on harmonizing OHS laws by having uniformity of the OHS legislative framework a national review was instigated earlier this year. The National Review into Model Occupational Health and Safety Laws is an opportunity to review Australia’s legislative regime, which all aim to prevent workplace death, injury and disease, but are different between jurisdictions in detail and application of these laws. The review will achieve an outcome that will deliver a national and consistent approach to the management of safety in Australia.

The South Australian Wine Industry Association (SAWIA) supports the review to harmonise Occupational Health and Safety Laws so that legislation is made simpler and easier, not only to understand, but to apply, so that we achieve a reduction in the incidence of incidents, near-misses, accidents and fatalities and provide consistency for business conducted across Australia (including ‘red tape’ reduction).

OVERVIEW OF THE SOUTH AUSTRALIAN WINE INDUSTRY ASSOCIATION

SAWIA is the peak body representing wine grape growers and winemakers within the state of South Australia. SAWIA’s membership directly comprises approximately 96% of the state’s wine grape crush and approximately 36% of the viticulture area.

SAWIA’s members comprise a variety of differing sized companies ranging from global companies with interests in Australia and overseas, Australian based companies with assets and facilities in multi wine regions throughout Australia and smaller to medium companies domiciled in one regional area.

SAWIA’s membership constitutes employers who would have duties and obligations under the South Australian *Occupational Health, Safety and Welfare Act 1986* (the Act) and *Occupational Health, Safety and Welfare Regulations 1995*.

This submission is made by SAWIA on behalf of its employer members in response to the Issues Paper published on 31 May 2008 (the Issues Paper). SAWIA has a standing industry Occupational Health, Safety and Welfare Committee that meets bi-monthly to discuss OHSW matters of importance to the industry. Reporting to SAWIA’s governing body, this committee has been consulted regarding the review of the Issues Paper, and has had direct input into the substance of this submission.

SAWIA and its member consider OHS an important issue and are interested in achieving improved outcomes for all stakeholders.

1. Legislative Approach:

The current SA legislative regime has similar underlying principles of the prevention of workplace death, injury and disease, and is a complex web of Acts, Regulations, Approved Codes of Practice, Australian Standards, guidelines and other information / publications¹ that make compliance challenging and in a lot of cases confusing and

¹ For example in SA, WorkCover Corporation Information Sheets and other publications

potentially 'overly technical' in its presentation. It must be made simpler and easy, not only to understand, but to apply, if we are to reduce the incidence of incidents, near-misses, accidents and fatalities.

It would assist duty holders if there was a hierarchy of compliance, with explanation and / or a diagram of that hierarchy system. As a suggestion or example:

- Act
- Regulations
- Code of Practice
- Standards
- Guidance material, Margin Notes

Within the wine industry the large companies employ specialist OHSW personnel but the small and medium sized companies combine the role with other functions and the feeling of being overwhelmed is well reported. This may well be the case in other States / Territories and industries – so harmonisation should allow for improved operation and understanding of OHS duties, compliance and obligations.

The South Australian OHSW Act and *Regulations* reflect the Robens style of legislation – setting out the broad duties of the parties with the general duties fleshed out through the use of standards in regulations and codes of practice. This is to be contrasted with the prescriptive style of legislation reflecting a mass of detailed and technical rules.

SAWIA submits that the model OHS Act should specify its objectives. In determining what 'themes' the objectives should represent SAWIA reviewed the objects of the SA², Victorian³ and WA⁴ Acts because in our view they best describe what OHS law intend. On that basis we submit the following matters be covered in the list of objectives for the model OHS laws:-

- To securing the health, safety and welfare of employees and other persons at work.
- To elimination, at the source, of risks to the health of employees and other persons at work.
- To protect the public.
- To involve employees, employers and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards.
- To encourage the promotion, education and community awareness on matters relating to occupational health safety and welfare.

As a general principle contents of the Act should not be repeated in the Regulations. The regulations should be drafted with a view to:

- achieving national consistency of approach, this is particularly important in aligning obligations and compliance across State borders;

² Occupational Health, Safety and Welfare Act – section 3

³ Occupational Health and Safety Act 2004 – section 2

⁴ Occupations Safety and Health Act 1984 – section 5

- improving regulations and consolidating as appropriate to reflect modern terms, use and practical application within a workplace;
- using the regulations as a framework with sufficient guidance material to reflect the practical realities of achieving compliance;
- ensuring that the means by which employers and employees achieve compliance is cost effective, easy to understand and reflects safe work best practice;
- reduce red tape, costs of compliance and be clear in intent;
- recognising that the interaction of the responsible government agency with duty holders to educate, advise and provide information that assists everyone take responsibility for their own safety and that of others and minimise the likelihood of injury.

The regulations should then be supported by specific codes of practice, standards and guidance material.

An issue that is regularly raised by SAWIA members is that the “Standards” are often overly technical in nature for OHS personnel to comprehend and that means they are unclear about what is required in order to comply. The Review Panel may consider whether it is preferable to support the concept of the development of ‘Industry Codes of Practice’ or ‘Industry Guidance Material’ rather than the continued support of the Standards.

As part of a review of SA OHSW Regulations 1995 the SA Government is considering the issues related to the use of standards within the legislation. SAWIA submits that the Review Panel may consider recommending that “Standards” should be reviewed to ensure that they are written in “plain english”, so that the people that rely on the standards can understand exactly what it is that they are required to comply with.

2. Scope, Application & Definitions:

The model OHS Act should be applicable to all industries with the objects of the Act being broad enough to cover all occupational activities and be flexible enough to accommodate new and evolving types of work arrangements. Any industry specific activities that require accommodating outside of this ‘flexibility’ should be encapsulated within the regulations and / or codes of practice. SAWIA submits that the OHSW legislation in SA (Section 3), WA (Section 5) and Victoria (Section 2) adequately address broad and flexible objectives.

Duties of care should be tied to the conduct of work where the work is carried out (as opposed to where work has been carried out). The duty of care owed by a person carrying out work must ensure the safety of all other people who are, or may be, impacted by that work. When considering the duty of care “where the work is carried out” the model OHS Act should also consider the concept of “where work has been carried out”.

For example, a sign may be installed correctly and function adequately and safely for the first year or two. Then, for some reason the sign falls down and an employee is injured. Who has the duty of care to ensure that the sign was, and continues to be secure and safe? The original contractor, the business owner or a third party who may have completed some other maintenance work, not directly related to the business' sign but the third party's activities may have contributed to the incident?

It is critical that definitions are included in the model OHS Act. Definitions are fundamental to national consistency and express the intent of the Parliament. All definitions should be simple and purpose oriented.

3. Duties of Care – Who owes them and to whom?:

Many different people in the workplace have a role to play in ensuring health and safety. These people include employers and employees, and also building designers, owners and occupiers and providers of plant, equipment or substances used at work (not an exhaustive list). Self employed people must also take steps to protect their own health and safety and avoid adversely affecting the health and safety of others. In some cases the responsibility may be shared.

Part 3, Section 19 – 25 of the South Australian OHS Act defines duties of care of the following categories of duty holders:-

- Employers
- Workers
- Self-employed persons (including Contractors)
- Occupiers
- Designers and owners of buildings
- Manufacturers
- Owners of plant
- All persons (not being an employer, employee or occupier of a workplace)

Within each category the SA Act specifies what must be done by each duty holder, so far as is reasonably practicable, and where control and management of an employee exists, for example, in *section 19 – Duties of employers*,

- (1) *An employer must, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular—*
- (a) *must provide and maintain so far as is reasonably practicable—*
- (i) *a safe working environment;*
 - (ii) *safe systems of work;*
 - (iii) *plant and substances in a safe condition; and*
- (b) *must provide adequate facilities of a prescribed kind for the welfare of employees at any workplace that is under the control and management of the employer; and*

- (c) *must provide such information, instruction, training and supervision as are reasonably necessary to ensure that each employee is safe from injury and risks to health.*

If the model OHS Act was to clearly define who has control the definition would need to be very specific in so far as determining “overall control” say by the “the company” and the more specific “control” over a process or activity and of how “control” relates to contractors and labour hire arrangements.

The SA OHS Act in SAWIA’s view provides a good outline of who duty holders are, what they must do and to whom they owe a duty of care.

4. ‘Reasonably Practicable’ & Risk Management:

The Issues Paper refers to “Article 4 of the International Labour Organisation’s Occupational Safety and Health Convention No.155 states that national policies should focus on the prevention of ‘accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

The OHS Acts in Victoria and Western Australia provide that, in determining what is reasonably practicable, regard must be had to:

- *the likelihood of the hazard or risk occurring;*
- *the degree of harm that would result if the hazard or risk occurred;*
- *the state of knowledge that exists about the hazard or risk and any ways of eliminating or reducing the hazard or risk;*
- *the availability and suitability of ways to eliminate or reduce the hazard or risk; and*
- *the cost of eliminating or reducing the hazard or risk.”*

SAWIA believes that the concept of “reasonably practicable” is a fundamental principle and must be enshrined in the model OHS Act. SAWIA also supports all of the points above raised in the Issues Paper. In addition to reasonably practicable the model OHS Act should also define “reasonably foreseeable” so that stakeholders focus on being pro active with regard to safety, i.e. what can be done to avoid accidents and incidents, in stead of being reactive and finding solutions to prevent an incident from re-occurring.

The concept of Risk Management is fundamental to managing occupational health and safety. Risk management principle of;

- Hazard identification
- Risk assessment
- Risk control
- Reviewing risk controls

should be defined and included in the model OHS Act. Specific detail as to how risk management is to be undertaken should be contained in the Regulations and be described in a manner that allows it to be flexibly adapted to the workplace.

5. Consultation, Participation and Representation:

SAWIA agrees that consultation between employers and employees is essential for effective OHS management and for enabling participation of employees in health and safety. Consultation as a concept is fundamental to achieving better outcomes for OHS in the workplace.

While the model OHS Act must require parties to consult, the requirement must also be broad enough to allow variation and flexibility to accommodate differences in the size of businesses and specific workplaces. How consultation occurs should be left to the parties to determine based on their particular requirements on a workplace by workplace basis. The number of safety representatives and the composition of safety committees should be mandated but should be based on requirement of employers and employees and have regard to the size of the organisation, number and locations of workplaces, and numbers of employees, as is the case in SA, WA and Victoria. The method and system of consultation, if prescribed, should be included in the model OHS Regulations.

Many SAWIA members are small to medium companies with less than 20 employees. In many of these workplaces employees often feel that there is not a need to have a formal OH&S representative or safety committee given that they have a good relationship with their employer (and vice versa) and matters are ordinarily raised and addressed as they become known or via regular tool box meetings. SAWIA submits that the requirement under the model OHS Act to have OHS representatives and safety committees should be left to the workplace to decide with regard to the number of representatives, if any, and the composition and makeup of a committee, if the workplace wants to have a committee. The broad requirement with regard to representatives and committees should be included in the model OHS Act so that we can achieve national consistency rather than having each state / territory create different requirements through Acts and regulations. In SA the requirement currently rests with the workplace to decide if they want to have an OHS representative, and if there are greater than 20 employees a safety committee can be facilitated if requested by employees.

Currently OHS Representative training in SA is 5 days annually. Five days out of the workplace is a significant cost to employers and SAWIA submits that the training requirements could be reviewed with a view to recognizing prior learning where an employee has previously completed the necessary training in a previous year, or with a previous employer, provided the training was within a set time frame of say the past 5 to 6 years. Perhaps then refresher training can be attended.

SAWIA submits that the types of functions to be undertaken by HSR and HSC are adequately described in the SA Act. In summary the model OHS Act should provide broad functions as follows:-

The functions of a health and safety representative should include:-

- inspect the whole or any part of any relevant workplace

- take reasonable steps to consult with the employer in relation to carrying out an investigation of any workplace and the outcome of any such investigation
- investigate complaints relating to occupational health, safety or welfare made by employees in the work group
- accompany an inspector during an inspection of any relevant workplace
- at the request of the employee, be present at any interview concerning occupational health, safety or welfare between:-
 - an inspector and an employee
 - the employer (or a representative of the employer) and an employee;
- make representations to the employer on any matter that relates to occupational health, safety or welfare at any relevant workplace.
- issue a default notice where a health and safety representative is of the opinion that a person is contravening a provision of the Act; or has contravened a provision of the Act in circumstances that make it likely that the contravention will be repeated.
- direct that work cease until adequate measures are taken to protect the health and safety of an employee where a health and safety representative is of the opinion that there is an immediate threat to the health or safety of an employee, given the nature of the threat and degree of risk identified.

The powers and functions of a health and safety representative under this Act are limited to acting in relation to the work group that the health and safety representative represents.

Section 36 (1), (2), (3), of the SA OHSW Act provides for consultation with the employer before the health and safety representative can act in so far as ordering a cessation of work or requesting an inspector to potentially issue a default notice or a prohibition notice. However, if the HSR is of the opinion that given the nature of the threat and degree of risk work should immediately cease, the HSR may direct that work cease, until adequate measures are taken to protect the health and safety of an employee.

SAWIA submits this aspect must be retained in the model OHS Act so that we achieve national consistency and drive the requirement for consultation, where possible, before taking action to shut down or severely inconvenience a workplace, whilst at all times ensuring the health and safety of all parties.

The functions of health and safety committees should include:-

- facilitate co-operation between an employer and the employees of the employer in initiating, developing, carrying out and monitoring measures designed to ensure the health, safety and welfare at work of the employees;
- assist in the resolution of issues relating to occupational health, safety or welfare that arise at any relevant workplace;
- to assist in the formulation, review and dissemination (in such languages as are appropriate) to employees of the occupational health, safety and welfare practices, procedures and policies that are to be followed at any relevant workplace;

- to consult with the employer on any proposed changes to occupational health, safety or welfare practices, procedures or policies;
- to keep under review developments in the field of rehabilitation of employees who suffer work-related injuries; and the employment of employees who suffer from any form of disability;
- to assist in the return to work of employees who have suffered work-related injuries; and in the employment of employees who suffer from any form of disability;
- such other functions as are prescribed or agreed upon by the employer and the health and safety committee.

Right of Entry

Power of entry and inspection should be included in the model OHS Act. The power to enter a workplace should be available to an inspector, on the same grounds as is the case under the SA OHSW Act⁵. The regulator / inspectorate may be asked to attend a workplace by a HSR or any other person who believes that there is a real threat to safety at the worksite. Powers of entry must however be confined to occupational health and safety matters and not be used as a veiled attempt to deal with industrial relations say by employees and employee organisations. Restricting entry powers to Inspectors, who must be independent of the workplace, will ensure that the emphasis will appropriately be placed on reducing hazards in the workplace, and not on dealing with other “industrial matters”.

Protection from Discrimination and Victimisation

The model OHS Act should include provisions to ensure that persons are adequately protected from potential adverse effects to their person and/or employment where they are;

- raising a health and safety issue; or
- carrying out health and safety functions; or
- refusing to undertake work they consider to be unhealthy or unsafe.

Employees and their representatives should not be reluctant to raise health and safety issues for fear of consequences, particularly in relation to their engagement.

Presently there is a significant amount of legislation that already deals with discrimination, protection of whistle blowers, and Equal Employment Opportunity (EEO). When drafting the model OHS Act the challenge for the review panel will be to get the balance right between what protections to include in the model OHS Act and what protections are based on other existing legislation.

The focus of the model OHS Act must be to protecting the rights of employees to be safe at work and also to be “safe” in raising safety related issues. The model OHS Act should not be able to be used as a vehicle for an employee/s to claim discrimination or victimisation simply to put pressure on an employer to accede to some non related safety matter.

For example, if an employee’s employment is terminated for performance reasons,

⁵ Occupational Health, Safety and Welfare Act 1986 – section 38

the employee has an opportunity to refer the issue of his/her termination to the Australian Industrial Relations Commission (AIRC) by alleging either unfair or unlawful dismissal. If, after the employment is terminated, the employee raises discrimination and / or victimisation issues related to "safety" issues as a strategy to assist in the alleged unfair dismissal claim, then that matter should be dealt with by the AIRC or EEO legislation and not under the model OHS Act.

6. Regulator Functions, Powers & Accountability:

The model OHS Act should include provision for the establishment, functions, powers and accountability of regulators, and also require regulators to publish enforcement and prosecution policies.

Interpretive documents are required must be relevant and in plain English.

The powers and functions of the regulators outlined in the Issues Paper appear adequate and are supported by SAWIA

- administering and enforcing the Act;
- making recommendations and providing advice on the Act and other supporting laws to the responsible Minister;
- monitoring standards of OHS;
- advising employers, employees and others on their rights and obligations under the Act;
- formulating and disseminating standards, guidance and other information to assist persons to comply with their duties and obligations under the Act;
- fostering cooperative and consultative relationships between employers, employees and others on OHS;
- promoting education and training in OHS by facilitating the development and provision of OHS training courses;
- promoting public awareness of OHS;
- initiating and encouraging research into OHS improvements; and
- collecting and publishing OHS statistics and data.

It is important to also clearly articulate that education and OHS awareness must be facilitated in consultation with all stakeholders in the community.

Inspectors are central to achieving good OHS outcomes. The model OHS Act must set out the process of appointment, powers and functions. Inspectors should be experienced in one or more industries and have, or be working towards obtaining, relevant qualifications in occupation health and safety at Certificate IV level.

7. Compliance & Enforcement:

SAWIA supports the approach of a graduated approach to enforcement, ranging from advice and persuasion through to prosecution. SAWIA submits that the 'enforcement pyramid' outlined in the Issues Paper could be modified to a graduated approach that includes:-

- Advice and persuasion (followed up in writing)
- Warnings and negotiated outcomes
- Default or Improvement notices
- Prohibition notices
- Prosecution

Where an Inspector provides "verbal advice" to another person, e.g. HSR or an employer, the advice should be followed up in writing to ensure a consistent understanding by both parties. On occasions such verbal advice has been relied upon by an employer only to be questioned by a second Inspector at a later time. If the employer had received a written advice then that advice could be used to explain why a particular practice was implemented or continues to apply.

SAWIA does not support the notion of "infringement notices". Are they an expiation notice or on the spot fine? Concerns have been raised that "infringement notices" issued may become a KPI for inspectors and potentially a revenue raising activity which would not necessarily be seen as advancing the objects of the Act or produce the outcomes to prevent injury, disease or death in the workplace. Warnings and improvement notices should provide the same outcomes. However, if "infringement notices" were to be introduced then it should be made clear that the number of infringement notices issued must not in any way be aligned to any form of KPI for an Inspector and/or the regulator.

When considering compliance and enforcement it is important to establish what primary outcome is desired; punitive or exemplary? SAWIA submits that non punitive penalties should be implemented in all but the most serious safety incidents where one or more parties acted negligently or in direct defiance of the legislation.

Applying large monetary penalties is not always equitable. A large multi national company may far more easily deal with paying a fine while preferring to keep a low profile with regard to the prosecution. Exposure as an employer who does not adequately comply with safety requirements is often a greater penalty. Senior employees may also feel the strain of such exposure with regard to their on-going or future employment prospects. Whilst a smaller company would also not welcome public exposure, a significant fine could potentially be catastrophic to the company. Smarter penalties could include requiring companies to provide on-going training, and be subject to regular reviews. Good safety is a cultural developed within an organisation. It is good business and promotes prevention.

8. Prosecutions:

Prosecution should only be considered after other compliance and enforcement options have been unsuccessful or are considered to be inappropriate.

Most serious contraventions of OHS legislation could lead to criminal proceedings, for example workplace deaths (however we are not suggesting the introduction of industrial manslaughter).

With regard prosecutions SAWIA submits that only the regulator (Inspectors) or the Minister must be able to commence prosecutions. Inspectors are seen as unbiased in considering cases for prosecution. They are trained and experienced and able to follow a process to evaluate each case on its merits before proceeding with prosecution. SAWIA is strongly opposed to third parties being able to commence prosecutions, as is the case in NSW where a union may commence a prosecution. Allowing third parties, such as unions, to commence prosecutions raises the questions of objectivity and potential bias.

9. Other Issues:

The model OHS Act must have an enabling clause to create regulations; codes of practice; and other guidance material to assist duty holders understand their obligations under the model OHS Act.

Notification of incidents and reporting requirements enable OHS authorities to target their compliance and enforcement efforts and to collect, interpret, analyse and report information and statistics relating to health and safety. Broad safety statistics by industry and injury type are essential for stakeholders to have a broader awareness of matters that could impact safety at their worksite. The model OHS Act should provide for detailed reporting of all notifiable incidents. The requirement to report should be in the model OHS Act and the details relating to what constitutes a 'notifiable' incident to report and timeframe etc. should be detailed in the regulations.

10. General Comments

The model OHS Act should be written to enforce a minimum common standard across all jurisdictions of federal, state and territory OHS laws. SAWIA submits that the SA, WA and Victorian OHSW legislation when taken together provide a good foundation on which to create the model OHS Act. We have concern with the NSW legislation and would oppose importation of many of their terms such as reverse onus of proof and union rights to prosecute.

End of submission