Modernising Work Health and Safety Laws in Western Australia

Submission by the Association of Mining and Exploration Companies

Confidentiality

This document has been modified to remove personal information not specifically authorised for publication or that is not in the public domain. This includes some contact and personal details, and metadata. Electronic signatures have also been removed.

This process may have resulted in minor changes to the appearance of the submission but has not modified the substantive content. If you believe there have been changes to content of the document please email WHSreform@dmirs.wa.gov.au or call the WorkSafe Contact Centre on 1300 307 877.

Accessibility

This is a third party document and DMIRS has conducted a basic review to ensure the majority of the substantive content is accessible. There may be elements of this submission that are not fully accessible (for example, scanned or hand-written elements). If you are having difficulties accessing the document please email WHSreform@dmirs.wa.gov.au or call the WorkSafe Contact Centre on 1300 307 877.

31 August 2018

David Smith
Director General
Department of Mines, Industry Regulation and Safety
100 Plain Street
EAST PERTH WA 6000

By email: WHSreform@dmirs.wa.gov.au

Dear David
Modernising Work Health and Safety laws in WA

Thank you for the opportunity to provide input on the proposals to modernise Western Australia`s work health and safety laws.

The Association of Mining and Exploration Companies (AMEC) has hundreds of members which will be affected by any proposal to reform the current laws surrounding work health and safety in the workplace. We therefore have a direct interest in the proposed reforms.

We note that the Minister for Mines and Petroleum has been advised by a Ministerial Advisory Panel (MAP) on the development of a single harmonised and amalgamated Work Health and Safety Act (WHS Act), comprising a small group of industry, union and Government representatives. Despite offering to contribute, it was disappointing that AMEC was not invited to participate in the confidential MAP deliberations, or consulted in any way during that process.

Nevertheless, the following specific comments are now provided.

General
In principle, AMEC is supportive of a single harmonised and amalgamated WHS Act, subject to the following observations:

- We note that some recommendations in the MAP report are at variance to the *Model Work Health and Safety Bill 2016* version, and in some cases inconsistent with current practices in other Australian jurisdictions.
- It is fundamentally important that the proposed Western Australian legislation is workable, practical and not overly prescriptive in the context of the mining and mineral exploration sector.
- It is imperative that the legislation does not result in unintended consequences, such as increased costs, reduced productivity or is disruptive to the workplace / mining operations.

- AMEC members are concerned that some recommendations have the potential to involve industrial relations issues and could be duplicative and destabilising.
- There should be a clear separation between safety and industrial issues.
- It is unclear from the Report which recommendations were unanimously supported by the MAP, and which ones were supported through simple majority.
- The details contained in the Regulations and Codes of Practice underpinning the legislation will be critical in the operational functionality of the legislation. AMEC looks forward to providing input to those future consultation processes involving the mining industry.
- Noting that the Safe Work Australia 2018 Review of the model Work Health and Safety laws is still to be finalised, it may be prudent to await the outcome of that Review and its findings to avoid the need for any subsequent amendments to the WA legislation.

In the absence of any further advice or explanation, members are not supportive of the following recommendations:

Recommendation 8 – Duty of care on the providers of workplace health and safety advice, services and products

- This recommendation proposes to introduce a new duty of care on the providers of workplace health and safety advice, services or products (defined as 'relevant service' or 'relevant service provider'). This duty of care does not exist within the current OHS or MSI Acts. In some other Australian jurisdictions specific obligations are placed on persons and organisations other than the PCBU, however no jurisdiction imposes a broad general duty of care on all 'relevant service providers', as the recommendation suggests. As such, the practical effect of implementing the recommendation is unknown.
- By placing a further, specific duty on service providers, it is possible that it will create confusion within some organisations about their own duty of care obligations, given that there are already a number of duty of care obligations noted in the legislation.
- The scope of the duty of care for relevant service providers is unclear. Clear definitions of relevant service and service provider would be needed to ensure the scope of the duty does not extend beyond the nature of the services provided.
- The recommendation is also silent as to the practical impact breaching this duty of care will have on relevant service providers. This may create uncertainty regarding the liability of relevant service providers. In jurisdictions that impose a duty of care on persons or organisations other than the PCBU, maximum penalties for breaching the duty of care are listed in the legislation. The recommendation does not currently address penalties for breaching this duty of care.
- Further, the effect of implementing this recommendation could be to shift the duty of care from the PCBU to the relevant service provider. In instances where there is a breach of duty, this could mean action must be taken against the relevant service provider, instead of the PCBU. The wording of the legislation should clearly state whether a duty of care remains on the PCBU after acting on advice or receiving services from a relevant service provider.

- Many of the professions listed as examples of relevant service providers already owe a duty of care when providing their services under other legislation. This is true in the case of lawyers, who already owe a duty of care to provide sound advice under the Legal Professional Conduct Rules. The new duty suggested by the recommendation may be unnecessary given these pre-existing duties.
- More thought needs to be given to this recommendation as a practical reality may be an unintended consequence is that there may be fewer service providers.

Recommendation 16 – Right to cease unsafe work to include hazards posed to other persons

- Great care will need to be taken in relation to this recommendation to ensure that appropriate controls exist to prevent any potential misuse.
- An onus should be placed on the person ceasing work to establish reasonable grounds for doing so.

Recommendations 19 to 22– Right of entry

- Members are particularly concerned with these recommendations, which appear to intersect with industrial relations matters. In our view, these matters should be appropriately dealt with through relevant industrial relations legislation as they do not appear to have any direct benefit for health and safety outcomes.
- Members consider that effective consultation between employers and employees is essential to deliver best practice workplace health and safety outcomes. The involvement of a third party has the potential to turn this into an adversarial process.
- Members are concerned with the potential administrative, safety risk, due diligence and logistical burden in responding to third party right of entry requests and ensuring that those requests are appropriately addressed in a timely, efficient and effective manner. This includes preparing for the visit, security access to the mine site, induction training, general safety of the third party person whilst on site, and ensuring that the right company personnel are available on site at the time of the visit by the Entry Permit Holder (EPH). It is unworkable or impractical not to require advance notice of entry by a third party, particularly noting that most sites are located in very remote areas.
- Members consider that the requirement for an EPH to only attend a one-day face to face training session in occupational health and safety in order to gain a permit, is inadequate. In the main, company Health and Safety Representatives undertake at least 5 days training.
- Recommendation 19 further references a notice requirement to the Person Conducting Business or Undertaking (PCBU) AFTER entering the workplace. This is an unacceptable arrangement for the reasons stated above, and in any event impractical as the third party person is unlikely to gain access to the site through normal security protocols.
- Members considered that for any third party visit to be effective that at least 24 hours` notice should be provided, including an explanation of the reason for the visit. This is understood to be consistent with the default provisions under the *Industrial Relations Act 1979* and the *Fair Work Act 2009.* We also consider that

any third party entering a mine site using these provisions should be required to provide a report detailing the outcomes of the visit to the regulator and a copy given to the mining company. As the visits are safety focused, the sharing of this information should not be contentious, and would be beneficial for all parties.

- The recommendations relating to the issuing, managing and withdrawing of entry permits by three different agencies (Regulator, Registrar and Work Health and Safety Tribunal) appears to be duplicative and will create an unnecessary administrative burden for all parties.

Recommendation 30 – Enforceable undertakings not permitted for Category 2 offences involving a fatality

- Members consider that there should be a hierarchy of enforcement tools available to the regulator to address non-compliance, such as penalties, enforceable undertakings (including Category 1 and Category 2 offences), improvement notices, prohibition notices and education support initiatives.
- The opportunity to enter enforceable undertakings avoids the potential of adversarial prosecution, which has wider implications in relation to investor confidence levels.

Recommendation 31 – Include unions as an eligible person who may request certain decisions to be reviewed

- Although members understand the intent of the recommendation to reduce the administrative burden on employers and employees, there is concern about its practical application and any unintended consequences.
- In order to address any such concerns, a representative action could be brought by one worker on behalf of others, particularly where any decision by the regulator related to a group of workers. We understand that such a provision currently exists within the *Federal Court of Australia Act 1976 (Cth)*.

Recommendation 32 – Permit any person to be appointed by the Regulator to initiate a prosecution

- Members consider that this recommendation will add another unnecessary layer of complexity in the enforcement of the WA WHS Act, and has the potential to create conflicts of interest or misuse.
- It is critical that any third party appointments are appropriately resourced, skilled and experienced to prosecute any breaches of the WA WHS Act.

Recommendation 33 – Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision

- Members consider that penalty proceedings are matters for the regulator, and not third parties.

Recommendation 37 – Establish Mining and Critical Risk Advisory Committee (MACRAC)

- Members are concerned with the proposed structure of MACRAC to also include a representative from each of the Australian Petroleum Production and Exploration Association, and the Australian Pipelines and Gas Association.

- It is acknowledged that there will be some work health and safety matters that are common across the mining, petroleum and pipeline sectors. However, there are specialised safety issues which require separate attention and consideration. This notes that the petroleum industry operates through a 'safety case' regime, where the ongoing management of safety is the responsibility of the operator and not the regulator. The mining sector operates under a 'risk based' approach in close consultation with the regulator.
- It is therefore apparent that there will be matters on the MACRAC Agenda and Work Plan concerning mines safety that will be irrelevant to the petroleum and pipeline sectors. Conversely, many matters relating to petroleum and the pipeline sectors will be irrelevant to the mining industry representatives.
- AMEC considers that the current Mining Industry Advisory Committee (MIAC) structure should be retained in order to efficiently deal with specific safety issues affecting, or likely to affect the mining and mineral exploration / prospecting sectors.

Impact on mines safety cost recovery levy

It is unclear from the MAP Report what impact the proposed reforms will have on government agency resources, and the current cost recovery arrangements raised through the Mines Safety and Inspection Act and Regulations. We would expect that there will no increase in agency expenditures or the mines safety levy.

Impact of automation and digital transformation

The legislation and underpinning Regulations and Codes of Practice must be designed to recognise that automation and digital transformation is occurring in the mining industry at a rapid rate. It is crucial that the work health and safety regulatory environment does not inhibit innovation which could lead to positive outcomes, such as improved safety in the workplace.

We look forward to ongoing consultation in relation to this critical reform process.

Yours sincerely

Warren Pearce
Chief Executive Officer