Modernising Work Health and Safety Laws in Western Australia

Submission by the Chamber of Minerals and Energy

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Submission
August 2018

Proposals for amendments to the model Work Health and Safety Bill for adoption in Western Australia

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About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia (WA). CME is funded by its member companies who are responsible for most of the State's mineral and energy production and are major employers of the resources sector workforce in the State.

In 2016-17, the value of WA's mineral and petroleum industry was $105 billion. Iron ore is currently the State's most valuable commodity, and saw an increase in iron ore sales by almost 31 per cent on the previous financial year to value almost $64 billion. Petroleum products (including LNG, crude oil and condensate) followed at $19 billion, with gold third at $11 billion, both commodities saw an increase in sales of 5 per cent and 7 per cent respectively from the previous financial year.

The resources sector is a major contributor to the state and the Australian economy. The estimated value of royalties to the state of WA received from the resources sector composed of $5.78 billion which accounted for around 19 per cent of the state government's revenue in 2016-17.

CME's recommendations

CME appreciates the opportunity to provide comment as part of the Department of Mines, Industry, Regulation and Safety's (DMIRS) public consultation on proposed content on WA's single Work Health and Safety Act (WHS Act(WA)).

Key CME recommendations are outlined below with further detail in the subsequent sections of this submission and in the detailed Appendix.

In regards to the approach to reform in WA, CME:

- Supports the principle of harmonisation at the level of the WHS Act, provided there is flexibility for industry based approaches through regulation and provided the WHS Act (WA) does not include the unnecessary prescription that is present in areas of the Model WHS Law. Full support of the single Act approach is contingent on CME reviewing the detail of the accompanying regulations.
- Recommends opportunity be provided for further consultation on the WHS Act (WA) together with its regulations once they have been drafted by Parliamentary Counsel's Office.
- Recommends the Government consider the preliminary findings of the 2018 SWA review of the Model WHS Laws to ensure important learnings are considered prior to legislative reforms being finalised in WA.
- Considers the MAP process did not provide for sufficient consultation with industry on proposed content of the single Act. CME's in principle support for the Government's approach to WHS reforms is contingent on industry concerns with the proposed content of the WHS Act (WA), as outlined in the below submission, being adequately addressed.
- Does not support adopting Schedule 1 of the WHS Act (WA) as drafted, on the basis that dangerous goods and high risk plant (related to dangerous goods) should be regulated separately to work and health safety laws for workplaces.

CME opposes right of entry provisions in the WHS Act (WA) and recommends Part 7 be removed. If Part 7 is included in the WHS Act (WA), CME recommends:

- The 2016 amendments to sections 117(3) to (8) of the Model WHS Law be adopted.

- There be competency restrictions on the permit holders who can exercise right of entry to investigate a suspected contravention of the WHS Act (WA).
- The right to consult with workers in s121 be confined to "working hours" and "mealtimes and other breaks".
- The WHS Act (WA) also incorporate notification and reporting requirements to the regulator equivalent to that contained in the SA WHS legislation and to also require reporting to the PCBU in all instances where entry occurs for WHS purposes, and to report total right of entries on an annual basis.
- The regulator be the authorising authority for entry permits.
- Inspection of employee records upon entry should be limited to records directly relevant to the purpose of entry.
- There should be consequences for WHS permit holders who use Part 7 to advance an industrial agenda, and contravene entry permit conditions, comparable to those in the Fair Work Act 2009 (Cth), in the WHS Act (WA).

Regarding compliance, enforcement and prosecutions, CME:

- Generally opposes punitive approaches to enforcement, however accepts the role of penalties enshrined in the Model WHS Law provided they form part of a hierarchy of enforcement mechanisms including enforceable undertakings.
- Strongly supports Part 11 of the Model WHS Law being maintained with no amendments to facilitate the use of enforceable undertakings as an alternative to prosecution.
- Recommends an enforcement policy be developed by the regulator to clearly articulate appropriate and transparent criteria for considering, entering into and managing enforceable undertakings.
- Recommends that no provision is adopted to enable or introduce the opportunity for third parties, including unions, to bring prosecutions under the WHS Act (WA).
- Recommends a union not be an eligible person who is able to apply for review of a decision under s 223 of the WHS Act (WA). However, CME recognises the concerns behind MAP recommendation 31, and is supportive of amendments to allow eligible persons to be represented by paid agents in review proceedings, and for the introduction for a procedure for representative claims by one eligible person on behalf of a group of eligible persons affected by a decision.

For Part 5 relating to consultation, representation and participation, CME:

- Recommends Part 5 of the Model WHS Law be reviewed and amended for the WHS Act (WA) to ensure consultation provisions enshrined in legislation reflect modern workplaces, such as the resource sector, and enable companies to take a risk-based, outcomes focused approach to workforce consultation.
- Considers at a minimum, the following amendments to the Model WHS Law should be made for the WHS Act (WA) to remove unnecessary prescription from Part 5:
  - In section 47(1) limit the matters on which the employer is required to consult to those within the PCBU's management and control;
  - In section 48(1) limit consultation requirements with the words 'so far as reasonably practicable';
  - In section 48(2) limit the requirement to consult with HSRs with the words 'so far as reasonably practicable'; and

  - limit consultation requirements to require consultation only with workers who are likely to be directly affected by the subject matter of the consultation.
- Considers the term “sufficient seniority” in relation to MAP recommendation 15 needs to be clarifying to ensure the practical application of this does not create unintended consequences.
- Opposes the requirements relating to HSRs in the Model WHS Law and recommends the WHS Act (WA) facilitate collaboration and cooperation on WHS issues. CME considers that the WHS Act (WA) should provide for:
  - a more restrictive process for triggering HSR elections;
  - secret ballots in HSR election processes;
  - clarity in the scope of work groups;
  - a limit to the number of potential work groups electing HSRs in one workplace (to avoid confusion);
  - limits on the number of successive appointments available to HSRs;
  - a less adversarial approach to the HSR role, and a positive duty for HSRs to engage and cooperate with PCBUs in the resolution of WHS issues; and
  - HSRs to be held to a prescribed standard of conduct in the performance of their roles.
- Opposes extending HSR powers to provide assistance to all work groups at the workplace.
- Recommends the WHS Act (WA) exclude the ability for HSRs to stop work on safety grounds, or to limit its scope and introduce penalties for using this power vexatiously.
- Recommends the WHS Act (WA) be amended to allow entry to workplaces on the invitation of a HSR only if the entrant is ordinarily entitled to be at the workplace, or is an entry permit holder under State or Federal workplace legislation.
- Recommends clarifying who “any person” is in relation to section 68(2)(g) of the Model WHS Law to ensure this is someone with relevant knowledge or expertise.

To address issues relating to health and safety duties, CME recommends:

- Any duty of care imposed on service providers expressly exclude employees of a PCBU, lawyers and medical providers.
- The definition of ‘officer’ be amended for the WHS Act (WA) to clarify that it does not cover statutory appointees.
- It be clarified in the WHS Act (WA) that companies have flexibility to apportion principal responsibility where there are multiple PCBUs.

Other:

- CME recommends the terms ‘hazard’ and ‘risk’ are defined in the WHS Act (WA) by reference to the definitions set out in the current Mines Safety Inspection Act 1994 (WA) and Occupational Safety and Health Act 1984 (WA).
- CME recommends including a reporting requirement in the WHS Act (WA) to capture significant psychological trauma of absences of more than 10 days.

Context and Introduction

Currently in WA, mines safety and health legislation, the *Mines Safety and Inspection Act 1994* (WA), is separated from but aligned to general WHS legislation, the *Occupational Safety and Health Act 1984* (WA).

Safety and health legislation in WA has been undergoing reform for a number of years. In July 2017, the McGowan Government announced these legislative reforms would be progressed in line with the national model WHS laws administered by Safe Work Australia (the Model WHS Law).[1] All states and territories have now adopted the Model WHS Law, with some jurisdiction specific variations, other than WA and Victoria.

The Government's proposed approach is for general, petroleum and resources WHS legislation to be consolidated within a single Act. This means that the following laws will be replaced and consolidated:

- *Occupational Safety and Health Act 1984*
- *Mines Safety and Inspection Act 1994*
- *Petroleum and Geothermal Energy Resources Act 1967*
- *Petroleum (Submerged Lands) Act 1982*
- *Pipelines Act 1969*
- *Petroleum and Geothermal Energy Safety Levies Act 2011*

The single WHS Act (WA) will be supported by industry specific regulations to suit the State's unique conditions, enabling the resources sector to continue a risk-based approach and continue to support the safety-case approach for petroleum and major hazard facilities.

The approach departs from the previous Government's reform agenda to adopt the Model WHS Law, but to retain separate legislation for the resources industry.

Cabinet established the Ministerial Advisory Panel on Work Health and Safety Reform (MAP) to advise the Minister for Mines and Petroleum, Commerce and Industrial Relations the Hon. Bill Johnston MLA (the Minister) on the development of the WHS Act (WA). CME was selected to represent the resources sector on MAP. CME welcomed this opportunity, considering it a reflection of our strong engagement in WHS legislative reforms since the harmonisation process commenced in 2008.

MAP's approach was to discuss the Model WHS Law and seek to agree recommendations on it by consensus. However, due to the variety of diverging interests on MAP, on many occasions a consensus could not be reached. In the instance of this, the ultimate recommendation was determined by a vote of MAP members. The MAP process has now concluded and a public consultation document outlining MAP's recommendations has been released; *Modernising work health and safety laws in Western Australia – Proposals for amendments to the model Work Health and Safety Bill* (public consultation document).

Given the process for determining recommendations, CME's position in many instances does not align with MAP's recommendation and hence is not reflected in the public consultation document. For this reason, CME has prepared the below detailed submission to outline industry's position on each aspect of the proposed WHS Act (WA).

The submission initially outlines CME's position on the approach to WHS legislative reforms in WA before moving into issues of key priority to the WA resources sector. These primarily relate to:

[1] For avoidance of doubt, a reference in this submission to the "Model WHS Law" is to the March 2016 version published by Safe Work Australia, rather than the March 2011 version, unless this is otherwise stated.

- Right of entry
- Compliance, enforcement and prosecutions
- Consultation, representation and participation
- Health and safety duties

CME's more specific responses to the MAP recommendations are set out in Table 1 in **Appendix 1**. Table 2 in **Appendix** 1 outlines CME's position on aspects of the Model WHS Law that were not addressed in MAP's recommendations.

CME appreciates the opportunity to provide comment on proposed content of the WHS Act (WA) as part of the current public consultation period and looks forward to continued engagement on these important reform.

Approach to reform in Western Australia

CME has been an active member in the WHS legislative reform process over the past decade. The below section outlines CME's position on the current approach to the reforms in WA, specifically in relation to:

- Harmonisation and the Model WHS Laws
- The Ministerial Advisory Panel on Work Health and Safety Reform
- Scope and application of the WHS Act (WA)

Harmonisation and the Model WHS Laws

The WA resources sector is committed to ensuring the safety and health of its workforce. On behalf of its members, CME helps facilitate a collaborative and innovative approach to safety and health, to assist industry in driving best practice safety outcomes.

CME notes the main object of the Model WHS Law is "to provide for a balanced and nationally consistent framework to secure the health and safety of workers". From the outset CME has expressed broad support for the principle of national harmonisation of WHS laws.

However, CME raised concerns throughout the process that, in particular for the resources sector, adoption of the Model WHS Law in WA would require amendment to ensure the legislation is either an improvement on or meets current best practice.

In regards to harmonisation, CME recognises the benefits for business who operate across jurisdictions in having a common understanding of the legislation and acknowledges inconsistent adoption and application of model laws in other states impacts our members and also impacts their perception of the benefits of harmonisation.

CME sees particular benefit in harmonisation at the level of a WHS Act (WA), provided there is flexibility for sector based approaches through regulation. However, CME considers there is an unnecessary level of prescription in the Model WHS Law (and proposed for adoption in WA). These areas are addressed where relevant in the following submission.

CME supports WHS legislation that promotes best-practice WHS management and is risk-based and non-prescriptive, with a focus on continuous improvement and prevention of incidents. Unnecessary prescription promotes a culture of regulatory compliance as opposed to facilitating continuous improvement, directly undermining a key objective of the Model WHS Law to "provide a framework for continuous improvement and progressively higher standards of work health and safety" (Division 2, s.3(1)(g)).

Further, CME's full support for the adoption of the single WHS Act (WA) approach, is contingent on a review of the detail of the industry specific regulations planned to be developed

under the Government's reform agenda. This approach is critical to allow hazards and risks specific to different industries to be efficiently and effectively addressed.

CME supports the principle of harmonisation at the level of the WHS Act, provided there is flexibility for industry based approaches through regulation and provided the WHS Act (WA) does not include the unnecessary prescription that is present in areas of the Model WHS Law. Full support of the single Act approach is contingent on CME reviewing the detail of the accompanying regulations.

Given the detail of regulation content is currently unclear, CME considers it important the package (Act and Regulations) is able to be considered by the public prior to being tabled in Parliament. Detailed review of and consultation on this package will assist to achieve a best practice, workable suite of WHS legislation, and avoid any unintended consequences. CME is not aware of any legal restriction which would prohibit the release of the draft Regulations prior to the WHS Act (WA) being tabled in Parliament. Indeed, CME is aware of other recent consultation processes that have involved the release of a draft Bill and draft regulations together, allowing appropriate consideration of the legislative package as a whole.[2]

CME recommends opportunity be provided for further consultation on the WHS Act (WA) together with its regulations once they have been drafted by Parliamentary Counsel's Office.

Safe Work Australia (SWA) is currently undertaking a review (2018 SWA review) of the content and operation of the model WHS laws to examine how they are operating in practice, whether they are achieving the objectives stated in the model WHS Act or if they have resulted in any unintended consequences. The review involved extensive consultation across jurisdictions.

Findings of this review have obvious relevance to the WHS Act (WA), providing a timely opportunity for WA to learn about gaps and practical challenges in implementing the Model WHS Law in other jurisdictions. Consideration of findings from the review should occur with a view to achieving a version of the Model WHS Law for WA that reflects best practice and addresses known shortcomings from experience in other jurisdictions.

CME recommends the Government consider the preliminary findings of the 2018 SWA review of the Model WHS Laws to ensure important learnings are considered prior to legislative reforms being finalised in WA.

Ministerial Advisory Panel on Work Health and Safety Reform

As previously noted, the Ministerial Advisory Panel on Work Health and Safety Reform (MAP) was formed by Cabinet to provide advice to the Minister on the content of the single WHS Act (WA).

MAP was established as a mechanism to consult with relevant stakeholders to ensure the content of the single Act would deliver the best possible outcomes to WHS in WA. To achieve this, MAP comprised five voting members:

- one representative from CME;
- one representative from the Chamber of Commerce and Industry of WA;
- one representative from UnionsWA;
- Simon Millman (MLA) Member for Mount Lawley; and
- Penny Bond, Senior Policy Adviser to the Minister.

[2] See for example: the release by the Federal Government in January 2018 of a package of reforms to review the Australian Consumer Law. The Regulations have been released together with the Bill so that stakeholders understand how the new legislative framework will operate: https://treasury.gov.au/consultation/t257313/.

Stephanie Mayman filled the position of Chair. This position was non-voting. In addition, non-voting representatives from DMIRS participated in meetings to provide specialist and technical expertise.

CME appreciated the opportunity to participate in MAP however considers the process was inadequate as a consultation mechanism and did not provide industry sufficient opportunity to input into the content of the WHS Act (WA).

The operational procedures of MAP contained strict confidentiality provisions, limiting members ability to discuss MAP's workings or distribute minutes and agendas. Given CME's role on the panel was to represent the views of the resources sector this limited our ability to most effectively consult with industry throughout the process.

To develop recommendations, MAP worked section by section through the 2016 Model WHS Act. Decisions and recommendations were aimed to be achieved by consensus of MAP members however, where any proposed amendment to the 2016 Model Bill was not agreed unanimously, the proposal was subject to a vote by MAP members. The majority vote determined the progression of the proposed amendment.

As outlined in the below submission, industry has significant concerns with a number of areas of the Model WHS Law and amendments proposed for adoption in WA. Throughout the MAP process CME raised these concerns and proposed amendments to address them. However, given the voting composition, these were almost always voted down.

CME regularly tabled detailed position papers at MAP outlining industry concerns to ensure views of the resources sector were captured in the MAP record.

CME also iterated the importance of ensuring information on dissenting views on contentious issues and voting outcomes at MAP were captured in the public facing document outlining MAP's recommendations. It was communicated to CME this would occur.

On 30 June 2018 DMIRS released the public consultation document titled *'Modernising Work Health and safety Laws in Western Australia – Proposals for amendments to the Model Work Health and Safety Bill for Adoption in Western Australia'* outlining MAP's recommendations. The public consultation document notes on page 1:

> *"The recommendations provided to you reflect the MAP's decisions in consideration of Western Australian harmonisation with the Model Bill. The majority of these recommendations were agreed by consensus. On the few occasions where consensus was not possible the decision to recommend change was made by majority vote, and the Panel members' views are reflected in the recommendations".*

Further, on page 2 it states:

> *"I have pleasure in enclosing those members' responses received following the MAP's review of their recommendations".*

Unfortunately, CME notes the public consultation document does not contain information on dissenting views or voting outcomes. Further, the public consultation document only outlines MAP recommendations where an amendment to the Model WHS Law is proposed. Therefore, it fails to capture the broad range of concerns raised by industry members (i.e. where an amendment to the Model WHS Law was proposed but voted against).

Given this structure, the public consultation document communicates proposals as 'MAPs recommendations'. This inaccurately implies consensus views on all recommendations and areas of the Model WHS Law proposed for adoption. As outlined in Appendix 1 and in the following submission, industry supports a large amount of MAP recommendations however has significant issues with a number of key recommendations and areas of the Model WHS Law.

MAP recommendations do not reflect a consensus view and the public consultation document does not reflect industry concerns with the proposals. CME therefore wishes to outline these issues and record our concerns with the MAP process through this submission.

CME considers the MAP process did not provide for sufficient consultation with industry on proposed content of the single Act. CME's in principle support for the Government's approach to WHS reforms is contingent on industry concerns with the proposed content of the WHS Act (WA), as outlined in the below submission, being adequately addressed.

Scope and application

The jurisdictional notes and Schedule 1 of the Model WHS Act provide the opportunity for jurisdictions to include or exclude relevant legislation such as dangerous goods from their iteration of the Model WHS Law. Appendix 1 to this submission contains detail on CME's position on MAP recommendations on the jurisdictional notes (Appendix B of the public consultation document). In summary, CME is for the most part supportive of MAP's recommendations in this area.

One area of departure is that in MAP recommendation 35, and Appendix B of the public consultation document, MAP recommends Schedule 1 of the Model WHS Law be adopted as drafted. Schedule 1 provides that a jurisdiction may choose to regulate high risk plant or dangerous substances or both.

There are challenges applying WA dangerous goods legislation under the WHS Act (WA). These relate to duties in the legislation given areas of it apply to public health and safety and the environment for example storage and handling. CME considers incorporating legislation not relating to workplaces in the WHS Act (WA) such as dangerous goods blurs the boundary between general public health and safety and workplace health and safety. The focus of the WHS laws should remain on protecting worker safety and health as part of work conducted for a PCBU and not seek to extend its scope. As a result, CME's position is Schedule 1 should be amended to exclude dangerous goods, and that consequently the scope of the legislation as stated in section 12 of the WHS Act (WA) should be amended to exclude dangerous goods and, insofar as it is already regulated by dangerous goods legislation, high risk plant.

Further, as noted in MAP recommendation 35, there is a separate legislative reform process underway to consolidate dangerous goods regulations, which will likely run parallel to the development of the WHS Act (WA), and will provide an opportunity to ensure dangerous goods legislation aligns with the new WHS Act (WA). It is anticipated this consolidation process will take 18 months to two years. In these circumstances, it is premature to include provisions on dangerous goods in the WHS Act (WA), as it may inhibit the efforts of legislators to separately perform a holistic review of the legislative and regulatory regime for dangerous goods, particularly as it applies to non-workplaces. There is potential for uncertainty if dangerous goods is addressed in the WHS Act (WA) and in the existing WA dangerous goods legislation. CME supports an approach where, once the existing dangerous goods legislation is revised, Parliament considers whether it is appropriate to incorporate it in the WHS Act (WA). This will avoid a situation where dangerous goods is addressed in two areas of legislation, in potentially inconsistent terms.

To avoid confusion and appropriately carve out dangerous goods, CME requests a further amendment to Schedule 1, for insertion at the beginning of the Schedule, to clarify its interaction with the *Dangerous Goods Safety Act 2004* (WA):

> *"(1) This section applies if*
>
> *(a) this Act, in the absence of this section, would have application in particular circumstances; and*
>
> *(b) the Dangerous Goods Safety Act 2004 also has application in the circumstances.*
>
> *(2) This Act does not have application in the circumstances to the extent that the Dangerous Goods Safety Act 2004 has application.*"

Similar wording can be found in can be found in the *Work Health and Safety Act 2011* (Qld), which in Schedule 1, Part 2 deals with the relationship of that Act to other safety Acts, such as electrical safety legislation.

If the above approach suggested by CME is adopted, a further amendment to the scope of the legislation in section 12 of the WHS Act (WA) should be made:

> "*Schedule 1 provides for the application of this Act to*
>
> *(a) the storage and handling of dangerous goods; and*
>
> *(b) the operation or use of high risk plant affecting public safety,*
>
> *but only to the extent that the Dangerous Goods Safety Act 2004 and regulations made under that Act do not apply*."

The likely practical effect of the above qualifications are that most dangerous goods and high risk plant would continue to be regulated by specialist legislation.

CME does not support adopting Schedule 1 of the WHS Act (WA) as drafted, on the basis that dangerous goods and high risk plant (related to dangerous goods) should be regulated separately to work and health safety laws for workplaces.

Right of entry

Workplace entry by WHS entry permit holders is addressed in Part 7 of the Model WHS Law. As outlined in the public consultation document, MAP has recommended Part 7, sections 117–123 be adopted from the 2011 version of the Model WHS Bill.

Right of entry is provided for under State and Federal industrial relations legislation and CME acknowledges the intent of Part 7 is to bring workplace entry for specific purposes within the purview of WHS legislation and the WHS regulator.

Presently in WA, a union official must hold an entry permit under section 494(1) of the *Fair Work Act 2009* (Cth) and an entry permit under section 49J(2) of the *Industrial Relations Act 1979* (WA) before they can exercise right of entry to investigate a contravention of the *Occupational Safety and Health Act 1984* (WA) or the *Mines Safety and Inspection Act 1994* (WA) pursuant to section 49I of the *Industrial Relations Act 1979* (WA).

The current framework differs from the way that right of entry is addressed under the Model WHS Law. Section 124 of the Model WHS Law allows an entry permit holder to enter a workplace to exercise a right conferred by Part 7:

(a) Relying on their federal permit, without having a permit under state legislation; or

(b) Under a permit conferred by a state law, but because of section 494(1) of the *Fair Work Act 2009* (Cth) the person would also need to hold a federal permit.

The Model WHS Law differs to the current WA position because it is possible to enter on a federal permit alone, whereas the *Industrial Relations Act 1979* (WA) presently requires a person to be authorised under that Act. The consequence is that it is easier to meet the eligibility requirements for entry under the Model WHS Law, than under the current regime.

Position on third party right of entry

CME opposes the right of entry entitlements for unions or other parties in the Model WHS Law, and considers the WHS Act (WA) should only provide for entry to workplaces by WHS inspectors appointed under the WHS Act (WA). Union right of entry is more appropriately dealt with in general industrial relations legislation, namely the *Fair Work Act 2009* (Cth) and state based legislation (e.g. the *Industrial Relations Act 1979* (WA)).

For industry, involving a third party through union right of entry can interrupt effective WHS consultation and WHS management at workplaces. The WHS Act (WA) should seek to provide robust mechanisms for participation, consultation and resolution of WHS issues by PCBUs and workers that are appropriate to the structure of the business and the nature of its workforce. Ensuring workplace participants are engaged and encouraged to raise WHS matters within the workplace should be the focus of the WHS regulatory framework for WA in the interests of having a positive impact on WHS outcomes.

Direct consultation between employers and employees is an essential component of workplace health and safety. Effective consultation is discussed at length in below sections of the submission. In summary, companies take holistic approaches to facilitate effective consultation. These often consist of a range of initiatives, aiming to directly engage employees on WHS. An example of such an approach is illustrated through the below case study.

Case study 1 – Company A
Company A has introduced numerous initiatives aimed at directly engaging their broader workforce on WHS matters and support company efforts to foster a positive safety culture. These include:

- Behavioural Based Safety initiative: actively engages employees to improve their ability to identify risks and implement safe methods of work.
- 'Stop for Safety' initiative: all employees are empowered to stop work if they are concerned about safety. There are no repercussions for stopping work.
- Safety Database initiative: management regularly review work practices and work areas to identify safety risks and good practices and reinforce the 'safety first/stop for safety' requirements
- Rotation of HSR's into safety department: HSR's are rotated through the safety department to increase their experience with safety management systems and processes. This process generates new safety leaders.
- Safety Integration Projects: employees lead the development and implementation of a number of projects aimed at solving specific safety issues.

Further, the legislative intent of the Model WHS Law is clearly to encourage consultation and sharing of safety concerns. Promoting the involvement of a third party through inclusion of union right of entry provisions in WHS legislation can impede industry efforts to foster effective consultation by making the process unnecessarily adversarial. This impacts safety outcomes.

Members in other jurisdictions have expressed frustrations in this regard. One CME member has provided a relevant example relating to their workplace consultation process with Health and Safety Representatives (HSRs) in Queensland. In this instance, HSRs engaged with unions on safety issues and failed to follow the employer's procedures in respect to reporting and escalating safety matters. This approach completely bypassed internal processes specifically designed to resolve WHS issues, created significant disruption to the workplace and most importantly negatively impacted the organisations ability to effectively address WHS issues in a timely manner. Multiple members have approached CME with similar comments.

Managing and responding to union right of entry requests creates a logistical, administrative and supervisory burden, detracting from productivity, presenting WHS risks and creating disruption to the workplace. To respond to right of entry requests from a third party union, company resources are naturally redirected accordingly when the focus should be on updating the regulator, if appropriate, and dealing directly with employees to resolve safety concerns.

By way of illustration, the following table shows the numbers of statutory right of entries exercised by union officials between 2007 and 2011 at a CME member site in WA in both operations and construction arenas:

Table 1: Right of entries at the CME member site between 2007 and 2011

	Operations	Construction
	Total	Total
2007	0	0
2008	0	82
2009	23	355
2010	116	676
2011	175	553

Table 1 demonstrates there has been a significant increase in the frequency in right of entry requests at this particular site. Such a frequent exercise of right of entry has a significant impact on the business for example to accommodate entry at short notice (in terms of site access requirements), removing personnel from their job front to escort unions and appropriately responding to any misuse of right of entry or failure to comply with entry permit conditions.

There is significant concern that including a WHS entry pathway in the WHS Act (WA) may further increase the number of attempted right of entries, creating disruption to workplaces without material benefits to WHS.

Further, there is concern the provisions as presently drafted in the Model WHS Law fail to effectively deter frivolous and vexatious use of these provisions, for example to advance an industrial agenda or to pursue membership opportunities. The below examples are anecdotes provided from recent experiences of CME member companies.

Case study 2 – Company B

A union official who received and investigated a complaint from a worker, required Company B to produce certain documents and evidence, alleging it was relevant to the complaint. The request included information on an unrelated safety case. The worker was involved in an industrial workplace dispute unrelated to safety prior to exercise of powers, and it was unlikely that information requested would be used for the collateral purpose of the dispute.

Case study 3 – Company 2

A HSR employed at Company C issued a notice for the cessation of unsafe work, and requested their union have site access to assist with the concern. The notice related to the activity of loading motor vehicles which was being undertaken by non-unionised workers during industrial action.

Case study 4 – Company D

At this particular operation, union officials attended and raised three suspected safety contraventions relating to a water cart, barricading and an incident report.

Prior to advising anyone at Company D of their presence, the officials had directed the water cart operator on site to pull over and park up because they alleged two of the water cart tyres were bald and not fit for purpose.

Company D's HSE Principal asked to view the officials' notice of the entry and the suspected contravention, to which an official replied that he was not required to provide this prior to the entry and could provide it after. The HSE Principal requested the notice of entry paperwork again, to which an official replied he did not need to provide it and the officials could add additional items to the notice if they wanted to.

As one official was only wearing a short sleeve shirt and the site WHS requirements required long sleeve shirts to be worn, the HSE Principal asked the union official to change into a long sleeve shirt, to which the official refused.

The officials proceeded to inspect plant and other things relevant to the suspected contravention(s). In the process of inspecting plant and equipment relating to the three suspected contraventions, the officials looked at the pre-start book and raised two other items that had been brought up during the day's pre-start inspection, and which were not directly relevant to the suspected contraventions. The officials also engaged in discussions with workers during their lunch breaks in the crib facilities about a separate concern.

The union officials were not co-operative during their site visit and appeared to be looking for additional WHS contraventions.

Case study 5 – Company E

Company E had a project based in Darwin. A number of contractors on this particular project reported similar cases where substantial disruption was caused from vague claims by union representatives of unsafe conditions. Union representatives would claim an anonymous tip on an imminent unsafe situation in a particular work area. Upon entry, representatives would point out many trivial issues that were at best only marginally unsafe. These occurrences appeared to coincide with times of industrial activity.

The project operated with multiple contractors, many subcontractors, and up to 4,000 workers at peak times and these occurrences caused significant disruption without demonstrated benefits to WHS.

Case study 6 – Company F

In the experience of Company F, union representatives would enter site for reasons that posed no real risk to the WHS of workers for example, plant flashing lights not working. Very frequently when investigated by the union and company after entry there was found to be no WHS issue.

Once onsite the company has numerous examples where union representatives would use the opportunity to broaden what they wanted to look at and pursue another agenda than investigating the alleged breach. For example to visit the workers huts and encourage membership.

Case study 7 – Company G

In 2017, union officials entered Company G's site without a valid entry permit and requested to go to the crib rooms to discuss with workers during crib break as the officials were in the area. Company G refused entry. Instantly union officials exercised their entry under the WHS Act citing they had had seen a truck exit the site without traffic control or a flashing light on. Company G said that was not a valid reason to exercise entry under the WHS Act. However union officials raised concerns that no traffic controllers operated on the exit and suspected that the site operated without any plan management procedures and issued a WHS notice.

Union officials then went to the intersection, escorted by Company G officials, and requested Company G put a traffic controller at the intersection. Company G refused on the basis the intersection was not an exit to the site and was in fact a public road which had been designed by an engineer to operate without traffic control (as signed). The road configuration was as planned and approved.

Union officials then wanted to talk to operators on their break about the safe operation of the plant. The workers were consulted and responded that they did their prestart in accordance with company procedures.

Union officials then proceeded to inspect equipment around the site. No breaches were found. All equipment working had prestarts that were in compliance, had fire extinguishers and some had maintenance records missing that were in the office. Project Manager offered to inspect those in the office.

Further supporting this anecdotal evidence, unions have a track record of using spurious WHS issues to pursue industrial relations objectives as outlined in the below samples from findings of Federal Court Judges:

- Chevron Australia Pty Ltd v The Maritime Union of Australia (No. 2) [2016] FCA 768

Gilmour J noted at paragraph 113 "I have inferred from the evidence generally, but in particular the evidence constituted by the chain of emails passing between the MUA and the employees of Patricks, that the MUA, as part of its campaign against Chevron in relation to foreign crewed vessels, organised the … respondents to engage in unprotected industrial action on 28 and 29 June 2012 on the basis of asserted safety issues which were, in fact, a pretext."

- Australian Building and Construction Commissioner v the Construction, Forestry, Mining and Energy Union [2018] FCA 42

Flick J noted at paragraph 272 "Taken in context, it is concluded that the events as from 5 June 2014 all formed part of a campaign being pursued by the CFMEU to secure the reintroduction of site allowances by putting pressure on BKH to sign the enterprise agreement it was proposing…"

Later at paragraph 273 Flick J noted further "A number of the facts when drawn together expose the campaign being pursued for what it was and expose the fact that any concern as to safety was not driving the conduct being engaged in by the CFMEU and its members".

- Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case) [2018] FCA 553

Justice Collier noted at paragraph [21], "as is apparent from the available evidence of the ABCC's witnesses, consequences of the respondents entering the sites without entry permits have included: the unauthorised entries are causing safety issues on the Site; when the respondents attend without being authorised to do so, work ceases in that vicinity; shifts have been cancelled by Project managers in anticipation of unauthorised visits by the respondents; stand down of shifts has caused further delay to the delivery of the Project; delays are having financial consequences in respect of the Project; and the working time of managers and other employees on the Project is taken up dealing with the individual respondents when they are on site."

In addition, a summary of feedback received during consultation as part of the 2018 SWA review of Model WHS Laws, indicates significant concerns about misuse of safety right of entry exist across jurisdictions.[3]

CME remains generally supportive of employees exercising their right to be represented by their union when appropriate. Employees can continue to exercise their right to be represented by their union, and the union can raise any health or safety issue with the employer or an inspector without any need to enter the workplace.

CME members consider the inclusion of entry for WHS purposes within the WHS Act (WA) will increase the likelihood of these provisions being used vexatiously and negatively impact the ability of employers to seek a timely resolution when these rights are abused. While the Model WHS Law includes penalties for breaching entry provisions, much of the impost would have already occurred through disruption to sites to facilitate entry for example for repeated entry attempts or where legitimate entry is used for anterior purposes (i.e. seeking new members) or is frivolous in nature.

CME opposes right of entry provisions in the WHS Act (WA) and recommends Part 7 be removed.

Notice requirements

There are more onerous notice requirements in the 2016 version of the Model WHS Act than under the *Industrial Relations Act 1979* (WA) (**IR Act**), and 2011 version of the Model WHS Act.

Under the 2016 Model WHS Act, at least 24 hours but less than 14 days' notice of entry is required, unless the permit holder applies to an authorising authority for an exemption, and the authorising authority reasonably believes there is a serious risk to health or safety emanating from an imminent or immediate exposure to a hazard at the workplace.

Under the IR Act, permit holders can enter without notice to inspect a suspected breach of the *Occupational Safety and Health Act 1984* (WA) or the *Mines Safety and Inspection Act 1994* (WA), except when the permit holder requires production of employment records or other documents during entry, in which case 24 hours are needed.

Under the 2011 Model WHS Act (section 119), a permit holder must as soon as reasonably practicable after entering a workplace, give notice of the entry and the suspected contravention. There is no requirement to give notice if doing so would unreasonably delay the permit holder in an urgent case or defeat the purpose of entry.

If the provisions allowing right of entry by WHS permit holders are retained in the WHS Act (WA), CME strongly supports implementing the 2016 amendments to sections 117(3) to (8) of the Model WHS Law. These amendments require the WHS permit holder to provide notice at least 24 hours before, but not more than 14 days before, the proposed entry.

MAP recommendation 19 notes that the 2016 amendments have not yet been adopted in any other jurisdiction, and on that basis, advocates for the 2011 version of the Model WHS Law to be adopted for the WHS Act (WA). For example, under section 119 of both the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Act 2011* (Qld), a WHS entry permit holder is only required to give notice of entry and the suspected contravention as soon as is reasonably practicable after entering a workplace.

Providing notice helps address issues discussed above relating to unnecessary disruption to workplaces.

[3] See: https://www.safeworkaustralia.gov.au/system/files/documents/1808/2018-review-public-consultation-summary_1.pdf

The below case study from a CME member demonstrates how providing notice supports better WHS outcomes than if no notice requirement existed.

Case study 7 – Company G

Company G runs a large infrastructure project in Sydney. There have been several instances where right of entry visits have been requested at Company G's sites.

Typically the union provides 24 hours' notice of entry. Receiving 24 hours' notice of a right of entry means that the most significant practical difficulties (i.e. ensuring the appropriate personnel are on site, identifying the potentially affected area, collecting relevant information etc.) can be managed.

The company had a number of issues in the early stage of the project with local residents complaining about environmental dust levels from the construction process. One of the residents had raised the issue with a union, who requested a site visit. As the permit holder had to provide 24 hours' notice, we were able to ensure the right people were on site to assist with the visit (i.e. Project Manager, WHS Manager and Superintendent). Company G also collated the information from their site boundary monitoring to show the dust levels that were being produced from their construction process.

The preparation time meant the visit was managed well and after seeing how Company G was managing the dust issue, the permit holder left site with an increased appreciation of the issue and an understanding of their control processes. There was no further outcome from this visit.

Should entry without notice be exercised during a critical time, for example during a safety incident or during its investigation, the lack of notice is likely to impact the progress of both incident recovery and incident investigation. Site resources would immediately need to be redirected towards supervision of the third party, naturally impacting the resources available to focus on the safety matter.

In addition to the demonstrated advantages of receiving notice, it is important to note WA is in a different position to other harmonised jurisdictions given the sheer volume of remote resources sector projects operating in our state. It is unworkable and impractical not to require advance notice of entry in these situations. In such cases, notice of at least 24 hours before entry is required to enable the site to coordinate its arrangements for the entry.

For example many operations charter flights directly to remote operations with extremely limited seating availability to transport workers to and from site. Expecting a seat on these flights with no notice is unrealistic and often simply not possible to coordinate. Aside issues relating to transportation, these include ensuring inductions can be completed and other site access requirements, such as those required to ensure safety and control over those who enter a high risk work environment (for example appropriate PPE, as demonstrated in case study 4 above), are satisfied to ensure persons entering site are safe to do so.

If Part 7 is included in the WHS Act (WA), CME recommends the 2016 amendments to sections 117(3) to (8) of the Model WHS Law be adopted.

Qualifications

If right of entry provisions are included in the WHS Act (WA), CME considers there needs to be a system of ensuring permit holders that exercise right of entry for safety purposes are competent to assist with a safety grievance, and competence to articulate findings and make observations on a safety event in a constructive manner.

If Part 7 is included in the WHS Act (WA), CME recommends there be competency restrictions on the permit holders who can exercise right of entry to investigate a suspected contravention of the WHS Act (WA).

Rights exercised on entry

The Model WHS Law provides for permit holders to enter a workplace to consult on work health and safety matters with, and provide advice on those matters to one or more relevant workers who wish to participate in the discussions (section 121). CME considers these discussions with workers should only take place during "working hours" and "mealtimes and other breaks", consistent with limits that apply to entry to hold discussions under section 490 of the *Fair Work Act 2009* (Cth). This amendment would ensure that entry to consult and advise on WHS matters causes minimum disruption, and occurs at a time when workers are on break and can properly engage in the discussion if desired.

For avoidance of doubt, CME does not propose that permit holders should be confined in this way where the entitlement to consult arises under s 118 in connection with a safety contravention.

If Part 7 is included in the WHS Act (WA), CME recommends the right to consult with workers in s121 be confined to "working hours" and "mealtimes and other breaks".

Requirement to notify the regulator and report on outcomes

If right of entry provisions are included in the WHS Act (WA), CME considers that any person exercising right of entry under the WHS Act (WA) should be required to notify the regulator of such entry and subsequently to produce a report to the regulator in relation to that entry, with a copy to be provided to the PCBU. MAP recommendation 20 proposes to provide permit holders with an option to notify the regulator, and report on right of entry. This recommendation does not go far enough to mitigate against vexatious use of Part 7, and enhance the interaction between the regulator and the PCBU on safety issues.

CME supports the approach taken in SA, where the *Work Health and Safety Act 2012* (SA) requires the WHS regulator be notified of any proposed exercise of right of entry, and given an opportunity to attend the workplace during the right of entry. A mandatory requirement to notify the regulator better advances the object of the WHS Act (WA) to "secure the health and safety of workers and workplaces". It may also assist to guard against the potential for vexatious use of right of entry powers for ancillary purposes as it would make entry more meaningful and places accountability on the permit holder to demonstrate how WHS outcomes have been improved as a result.

Further, under the SA approach, if entry is exercised and no inspector attends, the permit holder must report the outcome of their inquiries to the regulator in a form prescribed by the regulations, who then must give consideration to what action should be taken.

As a general principle, where entry for WHS purposes occurs there ought to be clear and documented observations and outcomes with a report provided on each occasion. Such a report should declare any potential conflicts that the permit holder has. This would not only assist in justifying the purpose of that entry but importantly it should communicate relevant findings to assist in improving WHS outcomes.

While the SA amendments are a positive step, CME does not consider a requirement to report to the regulator only if an inspector does not attend would not go far enough to meet this objective. CME also considers the onus should be on the person entering the workplace to demonstrate the entry has delivered a meaningful benefit to worker health and safety. Therefore, a report should be provided to the regulator and the PCBU regardless of whether an inspector has attended.

Given the significant impost of facilitating entry and the requirements imposed on the PCBU in this regard, CME considers it is reasonable in all instances for the PCBU to be provided with a copy of the report following that entry. It is noted this communication could have the added benefit of improving consultation and cooperation between union officials and PCBUs and assist the PCBU in identifying opportunities for making safety and health improvements

based on the findings and observations of the permit holder. Additionally, documentation relating to workplace entry could be useful for all parties should any dispute arise in relation to that entry and it would deter frivolous entry.

CME would also like to see a requirement on unions to report their right of entry activity in totality to the regulator on an annual basis, so that the regulator can monitor right of entry patterns.

If Part 7 is adopted, CME recommends the WHS Act (WA) also incorporate notification and reporting requirements to the regulator equivalent to that contained in the SA WHS legislation and to also require reporting to the PCBU in all instances where entry occurs for WHS purposes, and to report total right of entries on an annual basis.

Authorising authority

MAP recommendation 21 proposes that the Registrar administer the entry permit system for the WHS Act (WA). Registrar is to be the:

> "*Chief Executive Officer of the Department of the Registrar – Western Australia Industrial Relations Commission, or any other person designated as Registrar under the Industrial Relations Act 1979.*"

CME considers that the designated Regulator, DMIRS, is better placed than the Registrar to administer the entry permit system. Reasons for this include:

- it is currently proposed that the Regulator will be involved in administering and monitoring entry by WHS permit holders, so there may be some efficiencies in this;
- the Regulator should have the most developed knowledge of WHS matters, and an understanding of whether and how WHS entry is needed to investigate such matters; and
- the Registrar, and other alternatives, such as the Fair Work Commission, are industrial tribunals with a less developed knowledge of WHS matters.

If CME's approach is adopted, there would also be no need for the amendment proposed as MAP recommendation 24, to give the Registrar standing to apply to the WHS Tribunal to revoke a right of entry permit.

If it is proposed to keep the authorising authority as the Registrar, CME proposes there should be an obligation for the Registrar to report developments on WHS entry permits to the Regulator, and would like clarification provided on whether the Registrar will liaise with the Regulator in determining whether to issue an entry permit.

If Part 7 is adopted, CME recommends the Regulator be the authorising authority for entry permits.

Inspection of employee records

CME considers that inspection of employee records upon entry should be limited to records directly relevant to the purpose of entry. The ability for permit holders to inspect of employee records in section 120 of the Model WHS Law is not consistent with the equivalent provision in the *Fair Work Act 2009* (Cth), which relates to access to a record or document after an earlier entry. In addition, the purpose of section 120 of the Model WHS Law is unclear, given the ability to inspect relevant records is already provided for under section 118 of the Model WHS Law.

CME is concerned this provision could be misused by unions to obtain information unrelated to their purpose of entry. For example records containing contact details for employees that could be then approached in relation to union membership. This concerns are supported by evidence referenced in above industry case studies.

If Part 7 is adopted in the WHS Act (WA), CME recommends inspection of employee records upon entry should be limited to records directly relevant to the purpose of entry.

Consequences of contravening WHS entry permit conditions

CME considers there should be adverse consequences for WHS permit holders who contravene the conditions on their entry permit. This could be achieved by inserting a provision mirroring section 486 of the *Fair Work Act 2009* (Cth) in the WHS Act (WA).

CME urges the Government to consider amendments to expressly prohibit a permit holder from exercising right of entry under Part 7 of the WHS Act (WA) where the primary reason for the right of entry is to advance an industrial agenda.

If Part 7 is retained, CME recommends there should be consequences for WHS permit holders who use Part 7 to advance an industrial agenda, and contravene entry permit conditions, comparable to those in the Fair Work Act 2009 (Cth), in the WHS Act (WA).

Compliance, enforcement and prosecutions

CME opposes a punitive approach to enforcement and has consistently advocated for a hierarchy of enforcement responses to deal with non-compliance in safety. This enables the regulator to accommodate particular circumstances, including the nature of the breach, the actual or possible consequences of the breach and the relative immediacy of any danger. An effective penalty framework needs to strike a balance between deterrence and risk management flexibility.

The following section further outlines CME's position on this in the context of the current proposals.

Penalties

CME's opposition to punitive approaches to compliance and enforcement on the grounds they do not improve health and safety outcomes is supported by a lack of evidence on their effectiveness.

CME acknowledges there needs to be consequences for offenses and that penalties have a role in this regard but emphasises the need for these to form part of a range of enforcement mechanisms to deal with non-compliance, including enforceable undertakings, improvement and prohibition notices.

A hierarchy of enforcement mechanisms enables the regulator to accommodate particular circumstances, including the nature of the breach, the actual or possible consequences of the breach and the relative immediacy of any danger. It also appropriately supports the role of the regulator in balancing a focus on compliance with support and education to assist in raising health and safety standards.

CME notes the level of penalties included in the Model WHS Law are significant and an overemphasis on penalties may disincentivise companies to strive for zero harm through ongoing innovation and continuous improvement WHS practices. High penalties may encourage industry participants to vigorously defend prosecutions of safety breaches and to take a less collaborative approach to regulatory engagement.

CME notes that WA has equal or lesser fatality and lost time injury frequency rates relative to those in other Australian jurisdictions with harmonised WHS legislation, supporting the notion that more punitive approaches do not lead to improved WHS outcomes.

The industry is moving towards a risk-based approach and is receptive to a legislative environment with risk-based safety management systems at its core. Reverting to a punitive and high penalty environment does not support this approach.

CME generally opposes punitive approaches to enforcement, however we accept the role of penalties enshrined in the Model WHS Law provided they form part of a hierarchy of enforcement mechanisms including enforceable undertakings.

Enforceable undertakings

CME strongly supports the role of enforceable undertakings as part of the hierarchy of enforcement mechanisms available under WHS legislation.

Enforceable WHS undertakings are beneficial as they move beyond punitive compliance to drive positive cultural change and actually lift health and safety standards. Additional benefits are outlined below:

- WHS undertakings have the potential to encourage innovation by duty holders finding new and innovative ways of complying with their duties. Duty holders would then be doing more than they would otherwise have been doing without the agreement of an undertaking, thereby improving overall safety outcomes. CME considers this is consistent with the objectives of the Model WHS Law;
- if a WHS undertaking is entered into, it could provide finality and certainty and foster a collaborative approach to safety. Such an approach avoids the potential of an adversarial prosecution, which is necessarily time consuming and the outcome is inherently uncertain with a Court ultimately limited in what outcomes it can deliver;
- whether or not an offence is found to have been committed by an organisation, the bringing of a prosecution can have a significant impact through loss of investor and shareholder confidence and may ultimately be far more detrimental than any resultant penalties; and
- allowing for other enforcement options potentially alleviates some of the stress and anxiety which may be caused by witnesses being called to provide evidence on a matter, possibly against their employer, a number of years after the incident which led to the prosecution.

Under the Model WHS Law, a WHS undertaking is not be available for Category 1 offences. This is appropriate to balance the benefits which may be derived from WHS undertakings while ensuring appropriate punitive action is taken to prosecute organisations alleged to have committed the most serious offences.

CME notes that MAP recommendation 30 proposes to amend the Model WHS Law to make enforceable undertakings unavailable for Category 2 offences involving a fatality. This recommendation is consistent with the *Best Practice Review of Workplace Health and Safety Queensland*[4] (Queensland Report) which also recommended amending the *Work Health and Safety Act 2011* (Qld) to prohibit the use of enforceable undertakings in respect of Category 2 offences where there has been a fatality. CME is concerned that a blanket prohibition on the use of enforceable undertakings in such circumstances may preclude best practice WHS, and observes there is scope for significant improvements to WHS outcomes where enforceable undertakings are made. Excluding enforceable undertakings from the range of available measures to deal with alleged Category 2 offences could be a missed opportunity to see benefits to WHS.

[4] Tim Lyons, *Best Practice Review of Workplace Health and Safety Queensland: Final Report*, 2017, pp. 69 – 70, p. 73, https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0016/143521/best-practice-review-of-whsq-final-report.pdf

For example, in South Australia, an enforceable undertaking was entered into with SRG Building (Southern) Pty Ltd (SRG) following a fatal workplace incident.[5] SRG undertook to implement a variety of detailed strategies to benefit workers, industry and the community. CME submits that the net WHS impact of this regulatory response was positive. Under the proposed approach in WA this enforceable undertaking would not have been able to be entered into. CME considers its use in exceptional circumstances such as the example just noted where it was mutually agreed by all parties to be entered into, resulted in positive outcomes for the deceased workers family, the workforce, the company and the regulator.

CME strongly supports Part 11 of the Model WHS Law being maintained with no amendments to facilitate the use of enforceable undertakings as an alternative to prosecution.

It is acknowledged there may be additional resources required on the part of the regulator to manage undertakings when they are entered into. However, CME considers any potential impost on the regulator is outweighed by the potential benefits in improved health and safety outcomes. Further, the second report on the National Review into Model Occupational Health and Safety Laws in relation to enforceable undertakings found that "*there is no evidence that they have frustrated the objectives of OHS regulation" and "the available evidence suggests their use has also been successful in other regulatory fields".*[6]

CME considers regulations and guidance material play a role in providing useful assistance in managing the potential impost to the regulator. For example including requirements around reporting on outcomes against the undertaking rather than the regulator having the sole responsibility. This would help alleviate some of the administrative burden on the regulator.

CME recommends an enforcement policy be developed by the regulator to clearly articulate appropriate and transparent criteria for considering, entering into and managing enforceable undertakings.

Third party prosecutions

MAP recommendation 32 proposes an amendment to the Model WHS Act to allow a union to bring proceedings for breach of a WHS civil penalty provision. CME understands part of the rationale for this recommendation may be to address insufficient resources of regulator (particularly WorkSafe).

CME opposes provision for third party prosecutions of offences under the WHS Act (WA) and regulations. CME considers that the WHS regulator, with statutory powers, functions, and responsibilities, is the appropriate body to prosecute breaches of the WHS Act (WA) and regulations. Third parties may not be appropriately resourced, structured or skilled to prosecute breaches of the WHS Act (WA), and should not be empowered to do so. Consequently, they are not an appropriate solution to regulatory resourcing issues. The emphasis must be on ensuring the regulator is appropriately resourced with skilled inspectors to perform a quality role in a transparent manner.

CME considers third party prosecutions:

- would add a layer of unnecessary complexity in the enforcement of the WHS Act (WA);
- may create a risk of conflicts of interest for employee organisations which initiate prosecutions, as unions are active participants in some workplaces and have their own agendas;

[5] SRG Building (Southern) Pty Ltd, *Undertaking to the Executive Director, SafeWork SA given for the purposes of part 11 of the Work Health and Safety Act, 2017,* https://www.safework.sa.gov.au/uploaded_files/srg-enforceable-undertaking.pdf

[6] Stewart-Crompton, R, Mayman, S and Sherriff, B, National Review into Model Occupational Health and Safety Laws, Second Report, January 2009.

- may undermine the integrity of the regulator, and public confidence in its assessment of appropriate action to be taken;
- could be misused to advance political or industrial agendas, which could impact on the integrity of the prosecutor, and public confidence in its function; and
- are unlikely to be able to determine the most effective approach to be taken in a response to an infringement or incident, which may impact on the quality of analysis in prosecutorial decision making, depending on the skills and experience of third party prosecutors.

CME considers that the emphasis in the regulatory scheme should be on ensuring the regulator is appropriately skilled to perform a quality role in a transparent manner. Relying on third parties to fill the gap may create mistrust and undermine the role of the regulator.

CME notes only one other harmonised jurisdiction has experience with similar provisions; New South Wales. The *Work Health and Safety Act 2011* (NSW) enables the secretary of an industrial organisation of employees to initiate prosecutions for Category 1 or 2 offences, if the Director of Public Prosecutions recommended prosecution and the WorkCover declined to prosecute. This provision reflects a similar role for unions in the predecessor *Occupational Health and Safety Act 2000* (NSW). The June 2017 Report on the First Statutory Review of the Work Health and Safety Act in New South Wales[7] observed that this section had not yet been utilised.

A mechanism for engaging third parties in prosecutorial decision making was also recently considered in Queensland. A PWC report, dated 28 March 2017, commissioned by the Queensland Government recommended introducing a "Prosecutions board" consisting of key stakeholders (including the Senior Director of Prosecution Services) that would consider legal advice and other relevant considerations when determining whether an incident should be prosecuted. This recommendation was considered in the Queensland Report[8]**.** The Queensland Report concluded that a Prosecutions Board would not be appropriate for Queensland, and noted:

> "*In responding to the issue of whether a Prosecutions Board should be established stakeholders were almost unanimously opposed to its introduction. The dominant reason related to this was that a prosecutions board could be viewed as a partisan body and* ***would add an unnecessary layer of complexity to the current prosecutions framework****. MBQ also suggested that a prosecutions board is likely to have an adverse impact on the integrity and independence of the regulator, specifically noting:*
>
> *"If members of the prosecutions board are chosen by the government of the day, there is a* ***real risk of perceived political bias****, which of course will undermine the integrity and independence of the regulator."*
>
> *The Civil Contractors Federation (CCF) also highlighted that a decision to commence a prosecution requires careful consideration of the law and relevant evidence and should be decided by those with appropriate legal skills in interpreting legislation.76 While the HIA had concerns about the qualifications of candidates who might be appointed to a possible prosecutions board.*
>
> *…It is the view of the Review that the establishment of a prosecutions board is inappropriate due to conflicts of interest with potential members of such a board noting it is likely they would need to be legal practitioners.*
>
> *Additionally, a prosecutions board is considered to be an* ***overly complex response*** *to issues surrounding prosecutorial decision making and that there are other alternatives approaches to ensuring the efficacy and independence of the decision making process*."

The observations made in the Queensland Report further support CME's opposition to third party prosecutions.

Unions are not impartial regulators. They are active participants in some workplaces and have their own agendas. There is therefore a legitimate risk that the proposed ability could place

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[7] http://www.safework.nsw.gov.au/media/publications/law-and-policy/whs-act-statutory-review-2017/work-health-and-safety-act-2011-statutory-review-report-june-2017

[8] At pages 69 – 70, 73.

the employee organisations who initiate prosecutions in a position of conflict of interest. Further, 11 of the 14 civil penalty provisions relate to offences committed by an entry permit holder or union. Providing a right to a union to initiate proceedings is inappropriate when a majority of offences relate to conduct by union officials.

It is also noted the union movement is estimated to represent approximately 15 per cent of the public sector workforce and 10 per cent of the private sector workforce. CME cannot see any justification as to why third party groups such as unions would be given the authority to initiate prosecutions in relation to companies and PCBU's where they may have no members or involvement.

As noted above in relation to right of entry, unions have a track record of using spurious WHS issues to pursue industrial relations objectives. In this context, extending the ability to bring prosecutions to unions present an unacceptable risk to employers and is unlikely to be in the best interest of WHS.

There are existing, more appropriate, mechanisms for citizens to place public pressure on departments and regulators to encourage punitive action. For example, workers and other members of the public (including unions) can write a 'ministerial', or lobby inspectors and department heads, whom have duties to respond and consider objectively whether it is appropriate to commence an action in Court or initiate an independent commission. The public pressure in Queensland for the Government to respond to the Dreamworld incident, resulting in an inquest and legislative changes, is an example of such citizen activity.

CME recommends that no provision is adopted to enable or introduce the opportunity for third parties, including unions, to bring prosecutions under the WHS Act (WA).

Review of decisions

The Model WHS Law contains a hierarchy for an "eligible person" to seek review of decisions made by the regulator. For most decisions, there is a further avenue of review to an authorised authority (which is proposed by MAP to be the WHS Tribunal for WA).

Under the Model WHS Law, an employee organisation is able to provide assistance to their member, but they do not have standing to seek review of a decision of the regulator as of right. Eligible persons are those who are effected by a decision and include the PCBU, a HSR or the worker.

MAP recommendation 31 proposes to provide a "worker's union" with standing as an "eligible person" to apply for certain decisions to be reviewed. The MAP recommendation identifies the reason for this amendment as addressing a procedural issue with the current work health and safety regime, whereby when a decision affects multiple workers, each worker must separately request review of the decision in issue. This results in separate matters with a similar factual matrix before the Tribunal, creating inefficiencies.

A further matter discussed by MAP in support of its recommendation was that workers may feel intimidated to approach a Tribunal for relief, as there is no mechanism for a union to represent them in review proceedings.

CME has the following concerns with providing a "worker's union" with standing to seek review of a regulator's decision in the WHS Act (WA):

- the standing may be used vexatiously to advance an industrial agenda. Vexatious use of WHS rights has already been seen in the case law on safety right of entry, as set out above;
- review may be sought by a union in circumstances where the affected worker does not wish to seek review of a decision affecting them;

- this approach represents a departure from the position in each other harmonised jurisdiction, and hence undermines efforts to introduce a consistent WHS framework across Australia;
- there is no evidence base that suggests this change addresses an issue with the current Model WHS Law, and therefore warrants a departure from harmonisation;
- excluding these words would not stop unions from assisting workers and HSRs to prepare applications for review, or from providing advice on their application; and
- MAP's recommendation does not clarify how "union" would be defined, and in particular whether it would encompass both registered and unregistered unions under the *Fair Work (Registered Organisations) Act 2009* (Cth).

A better way to address the identified procedural concern would be to allow a representative action to be brought by one worker on behalf of others, where the regulator's decision relates to a group of workers. A mechanism of this nature is presently available under Part IVA of the *Federal Court of Australia Act 1976* (Cth) for the Federal Court, and Part 10 of the *Civil Procedure Act 2005* (NSW), which could form a precedent for developing a procedure in the WHS Act (WA). Such a regime would likely be on an "opt in" basis, so workers have an opportunity to decide whether they would like review of the decision insofar as it affects them.

Given the feedback that an "eligible person" may be intimidated to appear before a Tribunal, there could be a mechanism in the WHS Act (WA) to address this that does not involve providing a union with standing. For example, the WHS Act (WA) could include a mechanism for an "eligible person" to be represented by "paid agent", as is possible under s 12 of the *Fair Work Commission Rules 2013* (Cth).

CME recommends a union not be an eligible person who is able to apply for review of a decision under s 223 of the WHS Act (WA). However, CME recognises the concerns behind MAP recommendation 31, and is supportive of amendments to allow eligible persons to be represented by paid agents in review proceedings, and for the introduction for a procedure for representative claims by one eligible person on behalf of a group of eligible persons affected by a decision.

Consultation, representation and participation

Safety is a joint responsibility of all who interact with a workplace including the PCBU, workers, designers, importers, design verifiers, manufacturers and other persons. Given this complex web of relationships, safe work places can only be achieved with cooperation and consultation directly between all duty holders working together to achieve improved safety outcomes.

CME considers Part 5 of the Model WHS Law will not achieve best practice WHS consultation in modern workplaces such as the WA resources sector.

Part 5 of the Model WHS Law sets out a range of prescriptive requirements in relation to consultation, the election of HSRs, health and safety committees, issue resolution, stop work rights and provisional improvement notices. These requirements are detailed and inflexible and will likely see businesses focus on compliance, instead of on WHS outcomes.

Furthermore, they undermine objective s.3(1)(b) of the Model WHS Law to provide for "fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety". This concern is reflected in the Consultation Summary for the 2018 SWA review, which comments:

> "There were consistent messages that neither the duty of PCBUs to consult with other PCBUs holding a concurrent duty, nor the duty to consult with workers were operating as intended, were clearly understood or were being enforced."

In the experience of CME members, best practice WHS consultation typically features a risk based, outcomes driven, collaborative approach to WHS management, where all employees are actively engaged in identifying and managing WHS issues, and communicate regularly and openly on WHS matters. This is explained further in the below section of the submission.

CME recommends a less prescriptive and more risk based, outcomes focussed consultation provisions in the WHS Act (WA).

Consultation, co-operation and co-ordination between duty holders, consultation with workers

As noted above, the prescriptive consultation requirements in these divisions encourage a focus on compliance and an adversarial approach to managing WHS matters, instead of a focus on WHS outcomes and an open, collaborative approach to managing WHS matters. These requirements create an administrative burden for business, without evidence that they improve WHS outcomes. Further, CME considers they are ineffective in promoting meaningful consultation and issue resolution for workers.

CME considers the WHS Act (WA) should contain a minimum level of prescription concerning consultative structures to leave workplaces with sufficient flexibility to determine the arrangements which are most effective for their particular workplace. If specific processes related to consultation need to be prescribed, these should be implemented through regulations and should be focused on ensuring consultation occurs directly between employees and the employer in the first instance. CME members support a risk based, outcomes driven approach to WHS management to provide flexibility to companies to implement practices most relevant to facilitating meaningful WHS consultation in their circumstance.

The WA resources sector is complex with organisations operating under vastly different circumstances across a number of different geographical locations with differing workforces (size and nature) of varying operational maturities. Consultation requirements prescribed in legislation should support effective consultation on WHS matters across all of these, from remote exploration sites with small workforces to large dynamic companies with multiple operations and workgroups. Approaches to effective consultation with workers is unique to each of these operational contexts.

A variety of dynamic WHS consultation systems are adopted by CME members to suit the particular nature of their workforce. These systems take a holistic approach, including both informal and formal consultation practices. Strategies are not simply process driven but focus on outcomes and working to maintain engagement of all employees, not just HSRs, in WHS matters.

Company management system frameworks are designed to facilitate effective consultation and communication between workers and the PCBU. These are complex and differ across companies and sites to ensure systems are directly relevant to the context in which they are applied. HSR's and committee structures (and compliance with the legislation) represent an element of these systems, however, effective consultation is broader than this. Companies focus significant effort on engaging with the broader workforce, including effectively engaging contractors.

While not as prescriptive as the Model WHS Law in regards to consultation, the *Mines Safety Inspection Act 1994* (WA) similarly focuses on a process driven approach.

Currently, CME members take varied approaches to HSR engagement and committees to facilitate effective consultation. CME has prepared the below case studies, which describe systems in place at two member companies, to demonstrate diverging approaches to consultation.

Case study 8 – Company H

Company H has a workforce spread across ten separate geographical locations throughout WA, posing obvious challenges for overcoming communication silos. Company H designed and implemented a committee structure and HSR engagement strategy to effectively facilitate communication on WHS across all levels of the business and across all geographical locations. This structure is underpinned by consultation and charter management controls to ensure it is implemented in an effective and responsive manner.

The committee structure consists of two layers whereby four HSE groups report to a central HSE Steering Committee. While the committee framework provides the structure to facilitate effective communication, Company H notes this would be ineffective without other equally important aspects of their approach such as the engagement of management, professional development of HSRs and specific strategies used to empower HSR's to take ownership of the committee process.

Case study 9 – Company I

Company I has established two HSE Consultative Forums, both chaired by its CEO, with both management and employee participants (including HSRs). Each Forum is a multi-organisational level representative body from each major work location. Each meets every second month to identify and discuss elements of its operations that are having a positive or negative impact on Company I's health and safety culture. The level of engagement, interaction and input from employee participants and HSRs has been very high and the Forums have identified a number of issues that required attention and/or improvement. The issues have included communication flows, training standards, field-time, equipment availability.

CME is concerned that a move to a more prescriptive framework will hinder organisations' abilities to implement flexible strategies to address their particular workforce by disincentivising innovative initiates and driving a compliance based culture.

CME's members acknowledge effective consultation is far more complex than a prescribed process of elected HSRs and a series of committees. For example, companies recognise their efforts to create a positive safety culture are closely related to effective consultation and communication. The below two case studies illustrate creative initiatives to promote safety.

Case study 10 – Company J

Given the role of safety leadership in effective consultation and communication, Company J introduced a new training program focussed on safety leadership. The program provides supervisors with a range of leadership skills including safety values, conversation toolkit (including information on safety shares, shift start meetings, interactions and interventions, toolbox talks and safety interaction meetings). Over five years, 260 employees have received this training and the site has seen a profound impact on safety culture and the engagement of employees and contractors in WHS matters.

Case study 11 – Company K

A role was created at Company K to enable HSRs to do a six month rotation in the Safety Department. This is a partnership arrangement with HSR providing crew and task knowledge and the Safety Specialist providing safety knowledge. The partnership approach fosters a direct relationship with crews, improves safety training outcomes and WHS outcomes. The partnership between the Safety Specialist and Safety Resource has improved the productivity of crew training days and created a trusting environment where employees can participate in proactive safety improvements and resolution of issues.

These examples demonstrate while it is important to have an element of structure around HSR's and committee processes this does not in itself translate to improved performance, communication, consultation or motivation of HSR's. There is no one size fits all model and a holistic, multifaceted approach is essential.

As a result, CME members are extremely concerned with the consultation provisions proposed to be enshrined in the WHS Act (WA). Legislating in this way promotes a minimum compliance approach and only hinders an organisation's ability to meaningfully engage with workers by promoting a culture of regulatory compliance. As such, it is imperative the legislation provides for flexibility to support meaningful, outcomes driven consultation and communication with employees on WHS matters.

CME recommends Part 5 of the Model WHS Law be reviewed and amended for the WHS Act (WA) to ensure consultation provisions enshrined in legislation reflect modern workplaces, such as the resource sector, and enable companies to take a risk-based, outcomes focused approach to workforce consultation.

There are a number of areas of Part 5 of the Model WHS Law where prescription particularly undermines the Act's objective to facilitate fair and effective consultation, co-operation and issue resolution. Examples of this are listed below.

- Section 47's requirement for the PCBU to consult with workers in relation to health and safety is overly broad and therefore unclear as to when this is a requirement.
- The interaction of section 48(2) and 49(a) suggests that a HSR (if workers are represented by one) must be present at all meetings where hazards are identified. This would require the presence of an HSR at every job hazard analysis (JHA). This is overly onerous and practically not achievable.
- The requirement to capture records of training will require significant amendments to companies management systems. Both formal and informal consultation such as 'tool box talks' should be incentivised by the WHS Act (WA), however, requiring all such consultation to be formally recorded seems like an excessive, administratively costly and unnecessary requirement.

To update company practices to comply with prescriptive consultation provisions in the WHS Act (WA) would be a backwards step for the WA resources sector who has long evolved past a process driven approach.

CME considers at a minimum, the following amendments to the Model WHS Law should be made for the WHS Act (WA) to remove unnecessary prescription from Part 5:

- **In section 47(1) limit the matters on which the employer is required to consult to those within the PCBU's management and control;**
- **In section 48(1) limit consultation requirements with the words 'so far as reasonably practicable';**

- **In section 48(2) limit the requirement to consult with HSRs with the words 'so far as reasonably practicable'; and**
- **limit consultation requirements to require consultation only with workers who are likely to be directly affected by the subject matter of the consultation.**

Constitution of Health and Safety Committee

MAP recommendation 15 proposes an amendment to the Model WHS Law to include a requirement for the Health and Safety Committee to include a representative from management with sufficient seniority to authorise the decisions and recommendations of the Committee.

CME generally supports this recommendation however considers it needs to be clearly defined to avoid unintended consequences either through regulation or an appropriate Code of Practice. Consideration must be given to:

- what "sufficient seniority" means. In the context of a complex, large enterprise where there are multiple layers of management it is not practical to have Directors participate in this kind of Committee as it would draw them away from demanding management duties. It is more likely a crew supervisor would be allocated the role;
- whether an appointment to this role concedes that the person meets the statutory definition of "officer" given there needs to be an acknowledgement of seniority and decision making authority for selection for the role. If there is ambiguity in the duties and consequence of holding the role this will have consequences for finding a suitably qualified person for the role; and
- what it means to "authorise decisions and recommendations". In most complex organisations, proposals go through a variety of Departments for analysis and costings, and are ultimately signed off after deliberation at a senior level, by a person who is unlikely to be involved in a Committee of this nature. A decision can also be of small consequence, such as a request for a different approach to a pre-start, right through to a request for an upgrade of equipment that costs $5 million dollars. It can also relate to a range of subject matter, and it is unlikely that one person would have authority to consider all kinds of decisions, even if they were very senior. It would be more practical to refer to an "authority to escalate", than a decision making authority in light of these uncertainties.

Given the uncertainties and potential for unintentional consequences, CME proposes that the legislative prescription be kept high level, such as:

> "A health and safety committee must include a representative that is at supervisor or management level that has authority to escalate the proposals and recommendations of the Committee within the PCBU."

Guidance around the appropriate level of seniority and decision making powers can then be included in a Code of Practice, that can more comprehensively deal with varying company sizes and industry circumstances.

CME considers the term "sufficient seniority" in relation to MAP recommendation 15 needs to be clarifying to ensure the practical application of this does not create unintended consequences.

Health and Safety Representatives

Industry considers the role of HSRs are important in maintaining workforce engagement in safety. CME members have however questioned whether the primacy of the role is declining in circumstances where all workers are expected and encouraged, as outlined above, to raise and manage WHS issues as required in their day to day work, and to report WHS concerns through established channels. CME notes that there are protections for persons who raise

safety issues in workplaces under the *Fair Work Act 2009* (Cth) and increasingly in whistleblowing related laws.

CME has concerns about the provisions of the Model WHS Law in respect of the election and activities of HSRs and considers the provisions create an adversarial rather than collaborative environment between workers, HSRs and the PCBU. As discussed, above CME members invest significant resources in creating and maintaining collaborative cultures that empower all workers to speak up on WHS matters. Industry considers these provisions will detract from these efforts and create a culture that ultimately undermines cooperation between the PCBU and workers.

In particular, CME considers the WHS Act contains an unnecessary level of prescription in relation the election processes for HSRs. For example, the ability for elections to be held at the request of only one worker and potential for an unlimited number of work groups to be established is an unnecessary impost that could create issues for example where a single short term contractor is able to trigger an election process. The process for election of deputies and administration of committees is another example of an overly prescriptive process in this section, creating significant impost to companies without any benefits to workforce consultation.

The below case study evidences that a flexible approach to HSR elections, work groups and WHS Committee processes are a preferred way to manage safety risks and achieve safety outcomes.

Case study 12 – Company L

Company L's business is a single mine operation, covering a large operating area and so, there are practical difficulties in getting people to attend meetings in person. Despite this, to encourage cross area learning and sharing of experiences, it has combined the separate operational area WHS Committees into a single Committee that is held using video-conferencing. The acceptance of the use of technology by both Committees allows an increased level of interaction across the HSRs and assists the business to implement solutions to issues that are consistent in their content/approach.

CME opposes the requirements relating to HSRs in the Model WHS Law and recommends the WHS Act (WA) facilitate collaboration and cooperation on WHS issues. CME considers that the WHS Act (WA) should provide for:

- **a more restrictive process for triggering HSR elections;**
- **secret ballots in HSR election processes;**
- **clarity in the scope of work groups;**
- **a limit to the number of potential work groups electing HSRs in one workplace (to avoid confusion);**
- **limits on the number of successive appointments available to HSRs;**
- **a less adversarial approach to the HSR role, and a positive duty for HSRs to engage and cooperate with PCBUs in the resolution of WHS issues; and**
- **HSRs to be held to a prescribed standard of conduct in the performance of their roles.**

HSR power to assist other work groups

MAP recommendation 12 proposes to amend section 69(3) of the Model WHS Law to include a power for HSRs to assist all work groups in the workplace in any circumstance.

CME opposes this recommendation on the following basis:

- it is appropriate for a HSR, elected by members of a work group, to represent that work group. They do not have a mandate to assist other workgroups, who elected different HSRs;
- section 69(2) of the Model WHS Law provides for HSRs to exercise any functions or powers beyond the work group where there is an immediate and imminent exposure to a hazard that affects, or may affect another work group, or a member of another work group has requested the HSR's assistance. In both circumstances the HSR is only involved when the HSR of the other work group is unavailable. It is appropriate to continue to confine the role of a HSR consistent with this subsection;
- Recommendation 12 would effectively empower a HSR to exercise the functions and powers under the WHS Act (WA) across any work group within a PCBU and across all PCBUs at the workplace, which would be difficult for a PBCU to manage;
- this extension of power would likely cause significant issues in a project environment where numerous contractors and different work groups are working side by side, with potential for unnecessary disruption to work;
- there are practical difficulties with a HSR identifying when there is unsafe work occurring in another work group, and for their supervisor to determine what directions are lawful and appropriate in those circumstances; and
- this additional power has not been adopted in any other harmonised jurisdiction, meaning it would represent a departure from the objective to have nationally consistent safety legislation. Further, it is not a power that other jurisdictions have considered introducing following their reviews of their enactments of the Model WHS Law.

CME opposes extending HSR powers to provide assistance to all work groups at the workplace.

Right to cease or direct cessation of unsafe work

While CME considers HSR's play a key role in WHS, CME continues to oppose the powers conferred on HSRs in the Model WHS Law to cease work.

CME notes that all workers have an ability to stop work if they consider work to be unsafe. CME further notes that HSRs have an ability to report safety matters to site management, to regulators, and to union representatives, and that if a HSR considers that work should stop for safety reasons, it may (and should) report this to the appropriate member(s) of management and action should then be taken as appropriate. As can any worker, if a HSR considers it warranted, they can report the matter to the regulator. The regulator can issue an improvement notice or a prohibition notice in extreme circumstances. A HSR can issue a provisional improvement notice, a useful tool for HSR's to address safety issues. A union representative (if permitted) can enter site to investigate the safety issue.

Given these circumstances, CME considers that there is no clear need for HSRs to have rights to stop work on safety grounds. These powers are duplicative and unnecessary.

Management expects and relies upon workers ability to stop work and want to foster a safe work environment. As a result, these provisions are seen by industry as a retrograde step that detracts from all workers exercising this responsibility, because they may consider it to be the responsibility specifically of HSRs and become uncertain regarding their roles and responsibilities as a result. Similarly it would be a backwards step that would likely result in HSRs feeling put in an adversarial position and subsequently discourage them from taking on the position.

CME is supportive of MAP recommendation 16, which proposes to extend a worker's right to cease unsafe work where there is a risk posed to "any other person" by the work. It is important

that all workers feel empowered to take responsibility where they observe unsafe work that will impact themselves, other workers and the general public.

CME recommends the WHS Act (WA) exclude the ability for HSRs to stop work on safety grounds, or to limit its scope and introduce penalties for using this power vexatiously.

Qualification and Experience for persons assisting HSRs

CME has concerns with the overly broad nature of provisions dealing with HSRs power to request assistance from other persons. Section 68(2)(g) when read in conjunction with section 70(1)(g) appears to give a HSR a right to request third party access to a workplace, for the purpose of assisting the HSR, if that is necessary.

CME is concerned that these provisions could be used by unions or other third parties to seek entry to workplaces under the auspices of WHS, without complying with the requirements of the right of entry regime established in the *Fair Work Act 2009* (Cth) and state right of entry provisions.

CME proposes the following amendment to section 70(1)(g) of the Model WHS Law for the WHS Act (WA) to allow entry to workplaces on the invitation of a HSR only if the entrant is ordinarily entitled to be at the workplace, or is an entry permit holder under State or Federal workplace legislation.

> *"allow a person assisting a health and safety representative for the work group to have access to the workplace if that is necessary to enable the assistance to be provided, but only if the person is:*
>
> *(i)ordinarily entitled to be at the workplace ; or*
> *(ii)an authorised representative, as defined in the Industrial Relations Act 1979 section 49G, of an organisation of which at least 1 of the workers is a members; or*
> *(iii) an official or an organisation to whom a current entry permit has been issued under the Fair Work Act if the organisation is entitled to represent the industry interest under the Act of at least 1 of the workers;"*

This amendment reflects the approach of a Full Court of the Federal Court of Australia[9] in considering whether a right of entry permit is required in such circumstances, and would help to resolve confusion on this issue[10].

If this amendment is not made to the Model WHS Law for the WHS Act (WA), the WHS Act (WA) leaves scope for third parties to access workplaces in a wide range of circumstances (provided that the HSR invites them). This could be used by union representatives in order to access workplaces, without complying with the more stringent requirements of right of entry provisions under other laws.

CME recommends the WHS Act (WA) be amended to allow entry to workplaces on the invitation of a HSR only if the entrant is ordinarily entitled to be at the workplace, or is an entry permit holder under State or Federal workplace legislation.

Further, CME considers there is benefit in insertion of the below addition to section 68(2)(g) of the Model WHS Law to ensure that "any person" requested by the HSR to provide assistance has the relevant knowledge or experience.

> *"(a) a person who works at the workplace; or*
> *(b) a person who is involved in the management of the relevant business or undertaking; or*
> *(c) a consultant who has been approved by—*
> *(i) the Consultative Council; or*
> *(ii) a health and safety committee that has responsibilities in relation to the work group that the health and safety representative represents; or*
> *(iii) the person conducting the business or undertaking at the workplace or the person's representative.*

[9] *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89

[10] Which is clear from the circumstances in *Australian Building and Construction Commissioner v Hanna* [2017] FCCA 2519, and *Australian Building and Construction Commissioner v CFMEU* [2017] FCAFC 53.

And "consultant" is defined as "a person who is, by reason of his or her experience and qualifications, is suitably qualified to advise on issues relating to work health, safety or welfare".

Without this there is no reasonable opportunity for a PCBU to question the experience of a person called in by a HSR, when that person arrives at the employer's premises or site and seeks entry for the purposes of assisting a HSR.

CME recommends clarifying who "any person" is in relation to section 68(2)(g) of the Model WHS Law to ensure this is someone with relevant knowledge or expertise.

Health and safety duties

Duty of care for providers of WHS advice

MAP recommendation 8 proposes to include a new duty of care for providers of workplace health and safety advice, services or products.

CME considers that this new duty should expressly exclude providers who are employees of a PCBU as the PCBU has a duty of care and this would duplicate the duty of care for those employees. The new duty should also exclude lawyers and medical providers, on the basis these professions have fiduciary duties to their clients/patients, and are supervised by distinct professional regulatory bodies. Including a duty in the WHS legislation would unnecessarily duplicate existing professional obligations and is therefore not an appropriate application of the Department's finite regulatory resources.

CME recommends that any duty of care imposed on service providers expressly exclude employees of a PCBU, lawyers and medical providers.

Officer

CME has concerns about the scope of the positive due diligence obligations which apply to 'officers' under section 27 of the Model WHS Law, specifically in relation to the term 'officer' which is defined in section 4 of the Model WHS Law. The positive duties imposed on officers under the Model WHS Law are serious and have subsequently onerous requirements on companies to ensure they are met. It is not clear whether this definition extends the term 'officer' to include statutory appointees under the legislation, for example, to site senior executives and registered mine managers.

CME acknowledges the South Australian review[11] ultimately found this issue was not significant enough to warrant any material amendments to its WHS laws. However, in the context of the WA resources sector, implications of this ambiguity are significant due to a number of persons being 'appointed' to roles under the *Mines Safety Inspection Act 1994* (WA). Just a few examples of these include registered manager, underground mine manager, underground ventilation officer and surface ventilation officer.

Clarity on which individuals have these obligations is critical to avoid confusion and ensure that they are met. If this is not clarified, individuals may be discouraged from applying for roles that may be considered to be 'officers' due to the potential to face significant penalties which apply to officers. It is important WHS legislation does not discourage skilled workers from taking on important statutory roles. Furthermore, literature has long identified a negative link

[11] Robin Stewart-Crompton, *Review of the Operation of Work Health and Safety Act 2012: Report November 2014*, 2014.

between role ambiguity and employee mental health, for example related to elevated levels of anxiety[12].

From an organisational perspective, this has possible financial and resourcing implications in that training efforts may be duplicated where companies are unsure of who has due diligence obligations. A clear definition of officer is required to address these issues.

CME considers this is an unintended consequence of the laws and understand the definition of 'officer' under the Model WHS Law is not intended to include statutory appointees. While some consideration to this is given in Safe Work Australia's interpretive guideline on officers[13], CME members have expressed concern the available guidance has not sufficiently resolved uncertainty regarding the application of the definition of officer to statutory positions.

Therefore, CME maintains this requires clarification within the WHS Act (WA). This could be achieved by amending section 4(c) to read:

> *"(c) an officer of a public authority within the meaning of section 252,*
>
> *other than an elected member of a local authority acting in that capacity <u>but does not include an appointee to a position under this Act or any associated regulations who is acting in their capacity as such an appointee</u>."*

Such an amendment would provide clarity, but would not unreasonably refine the scope of the definition of 'officer'. If a statutory position holder was a director or secretary of the relevant corporation, they would still be an officer, given the scope of the provision.

CME understands that this issue has led to uncertainty in other harmonised jurisdictions, and although it is generally assumed that statutory position holders are not 'officers' by virtue of their statutory position, this is ultimately not clear.

CME recommends the definition of 'officer' be amended for the WHS Act (WA) to clarify that it does not cover statutory appointees.

Person conducting a business or undertaking

MAP recommendation 7 proposes to amend the definition of 'person conducting a business or undertaking' (PCBU) to ensure that only workers and officers who are 'natural persons' are excluded from the definition. CME supports the retention of the wording in section 5(4) of the Model WHS Law without amendment for the WHS Act (WA). CME's wishes to ensure that it is clear that a worker, particularly a supervisor or statutory position, cannot be taken to be the PCBU. To the extent that this is unclear from the wording in section 5(4) of the Model WHS Law, CME considers this can be dealt with in guidance material on officers and PCBUs published by the DMIRS.

Instead, CME considers there is merit in clarifying who has the principal PCBU responsibility for a site. This is often a source of confusion where there are multiple duty holders, particularly for complex operations.

The Model WHS Law prescribes a range of detailed duties in respect of WHS matters. It also prescribes the duties that particular duty holders have. A person can have more than one duty by virtue of them being in more than one class of duty holder. More than one person can concurrently hold the same duty. A key duty holder is a PCBU. There can be more than one PCBU at a workplace. This framework of overlapping duties and duty holders remains a source of confusion for many CME members.

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[12] E. S Jackson & R. S. Schuler, A Meta-analysis and conceptual critique of research on role ambiguity and role conflict in work settings. Organizational behavior and human decision processes, 36, 16-78, 1985

[13] Safe Work Australia, 2011, Interpretive Guideline – Model Work Health and Safety Act, The health and safety duty of an Officer under section 27 https://www.safeworkaustralia.gov.au/system/files/documents/1702/interpretive_guideline_-_officer.pdf

The overlapping duties of PCBUs create significant confusion for industry. While the duty to consult, co-operate and co-ordinate is qualified by the phrase 'so far as is reasonably practicable', the practical application of the duty is potentially unclear where there are multiple duty holders.

This creates significant confusion for complex operations in the resources sector. For example large oil and gas operations made up of a series of multilayered contracting companies, many of whom would be considered to have 'the management and control' of certain areas within that site. In these instances it is unclear who holds the principal PCBU responsibility. In such contexts, typical contracting arrangements involve a requirement that the contractor implement and comply with a safety management system, and compliance with this requirement is typically audited by the principal. It is recognised that while this will assist the principal to comply with their WHS duties, it is not clear whether this would be sufficient under the Model WHS Law.

CME recommends it should be clarified in the WHS Act (WA) that companies have flexibility to apportion principal responsibility where there are multiple PCBUs.

Definition of hazard and risk

The terms 'hazard' and 'risk' are used throughout the Model WHS Law and are important concepts. For example, they operate to clarify what is "reasonably practicable" for a PCBU to do to ensure health and safety. This is critically important, as the "primary duty" under the Model WHS Law is for PCBU's to ensure the health and safety of persons engaged in their business or undertaking, "so far as is *reasonably practicable*".

CME notes that the terms 'hazard' and 'risk' are not defined in the Model WHS Law. CME submits that defining these terms in the WHS Act (WA) might assist industry to understand how regulatory authorities will expect these concepts to be understood.

The *Mines Safety Inspection Act 1994* (WA) and *Occupational Safety and Health Act 1984* (WA) define 'hazard' and 'risk', as follows (in substantially the same terms):[14]

> **"*hazard*** *in relation to a person, means anything that may result in injury to the person or harm to the health of the person;*
>
> ***risk*** *in relation to any injury or harm, means the probability of that injury or harm occurring;"*

CME recommends the terms 'hazard' and 'risk' be defined in the WHS Act (WA) by reference to the definitions set out in the current *Mines Safety Inspection Act 1994* (WA) and *Occupational Safety and Health Act 1984* (WA).

Treatment of psychological hazards

CME notes the definition of 'health' in the Model WHS Law is explicit in its inclusion of psychological health.

CME supports the treatment of psychological health in the same manner as physical health. This is in accordance with industry practice, as evidenced by the WA draft 'Mentally healthy

[14] *Mines Safety and Inspection Act 1994* (WA), s.4; *Occupational Safety and Health Act 1984* (WA), s.3

workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors – code of practice'[15], which states:

> "*The current mining, petroleum and general industry legislation does not include a definition of 'health' and does not explicitly cover mental health. However, the Department of Mines, Industry Regulation and Safety considers the intent of the legislation, and interprets 'health' to mean physical and psychological (mental) health.*"[16]

In the management of risks to psychological health in the workplace, as with all risk management, CME supports a risk based, outcomes focussed approach, with minimum prescription.

In regards to treatment of psychological injuries under the Model WHS Law, CME considers there is a lack of certainty in whether mental injuries are notifiable incidents and around what steps must be taken to protect an individual's personal information when such notifications are made. CME is supportive of MAP recommendation 10, which proposes to include an incapacity to work for 10 days or more as a category of "serious injury or illness", to capture serious mental health conditions such as post-traumatic stress disorder.

Amending the Model WHS Law for the WHS Act (WA) in a way that captures significant psychological trauma would assist in capturing work related psychosocial injuries in a state database and address current issues with quantifying work related psychosocial injuries.

CME recommends including a reporting requirement in the WHS Act (WA) to capture significant psychological trauma of absences of more than 10 days.

Conclusion

The WA resources sector is a critical part of the economy and has a unique occupational health and safety context. CME welcomes the opportunity to comment on the proposed content of the WHS Act (WA) as part of the public consultation.

Please see CME's responses to each of the MAP recommendations in the public consultation document in Appendix 1. Appendix 1 also outlines CME's position on a number of areas of the Model WHS Law proposed for adoption in WA, but not addressed in the public consultation document.

CME looks forward to continued engagement throughout the ongoing WHS legislation reform process.

If you have any further queries regarding the above matters, please contact Elysha Millard, Policy Adviser People and Communities, on [redacted] or [redacted].

Authorised by	**Position**	**Date**	**Signed**
Paul Everingham	Chief Executive	29/8/2018	
Document reference	K:\Occupational Safety & Health\Projects & Issues\Legislation\Labor Harmonisation\WHS WA Bill\Public Consultation\CME submission		

[15] Government of Western Australia, Department of Mines, Industry Regulation and Safety, *DRAFT: Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors – code of practice*, 2018, http://www.dmp.wa.gov.au/Consultation-16497.aspx

[16] Ibid. p. 23

Submission template (including all recommendations)

The below tables utilise the Department of Mines, Industry, Regulation and Safety's submission template to outline the CME's position on all aspects of the proposals. Table 1 responds to MAP's recommendations outlined in the public consultation document. Table 2 outlines CME's position on matters that were not addressed in MAP's recommendations but are related to the Model WHS Law.

Table 1 - Response to MAP recommendations

			Summary of CME's position	CME's proposed drafting change
1	Amend the Objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	3(1)(c).	CME supports the proposal to amend the objects of the WHS Act (WA) to foster cooperation and consultation in the development of health and safety standards.	(d) to foster and facilitate cooperation and consultation between employers and employees, and associations representing employers and employees;
2	Amend the Objects of the WHS Act (WA) to make specific reference to Western Australia.	3(1)(h).	CME has no objection to this recommendation.	N/A
3	Include the formulation of policies and the coordination of the administration of laws relating to work health and safety in the Objects of the WHS Act.	3(1).	CME has no objection to this recommendation.	N/A

			Summary of CME's position	CME's proposed drafting change
4	Establish roles of 'Chief Inspector of Mines' and 'Chief Inspector of Critical Risks' to enable duties under the Act and Regulations.	4.	CME supports the inclusion of definitions for statutory office holders including Chief Inspector of Mines and Chief Inspector of Critical Risks. Support is pending a review of the draft wording for these definitions.	N/A
5	Amend the definition of import to include importation from another state or territory into Western Australia.	4.	CME does not object to this recommendation.	N/A
6	Amend the meaning of supply to include the loan of an item.	6(1).	CME does not object to inclusion of 'loan' within the list of this paragraph.	N/A
7	Amend the meaning of person conducting business or undertaking to ensure only workers and officers who are 'natural persons' are excluded.	5(4).	CME supports the maintenance of the original wording in s 5(4) of the Model WHS Act.	Retain original s 5(4), being: "A person does not conduct a business or undertaking to the extent

			Summary of CME's position	CME's proposed drafting change
			The main concern of CME is ensuring it is clear a worker (especially a supervisor or Registered Manager) cannot be taken to be the PCBU. CME also hopes to see this dealt with in guidance material on Officer and PCBU published by DMIRS.	that the person is engaged solely as a worker in, or as an officer of, that business or undertaking."
8	Include a new duty of care on the providers of workplace health and safety advice, services or products.	New clause to be added to Division 3, Part 2 and new and new definitions to be added to section 4	CME does not support the inclusion of the National Review Recommendation for specific duties for OHS Service Providers, given limits on their ability to control the implementation of their advice. CME is supportive of a more limited extension of the duty of care to those that verify plant design.	Exclude the proposed amendment to Division 3, Part 2 on providers of workplace health and safety advice

			Summary of CME's position	CME's proposed drafting change
9	Amend the meaning of serious injury or illness to include immediate treatment as an in-patient without reference to a hospital.	36(a).	CME does not object to the recommendation to remove the words "in a hospital" from the WHS Law (WA). However, CME would like to raise a concern that hospitals may have a commercial incentive to treat as in-patient rather than out-patient where an injury is work related.	N/A
10	Include incapacity to work for 10 or more days as a category of serious injury or illness.	36.	CME supports the MAP recommendation to insert a reporting requirement where an illness or injury requires 10 or more days off work on the basis that this amendment is consistent with the "catch all" in an equivalent definition in the *Occupational Health and Safety Act 1984* (WA) (**OSH Act**)	N/A

			Summary of CME's position	CME's proposed drafting change
11	Amend the heading 'Negotiations for agreement for work group' to 'Negotiations for determination for work group'.	52 (heading only).	CME does not object to this amendment	N/A
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	CME opposes this recommendation as outlined in the above submission.	Adoption of the 2016 version of the Model WHS Law for this provision.
13	Change the approving authority for courses to be attended by a health and safety representative (HSR) from the regulator to the Work Health and Safety Commission.	72(1)(a).	CME does not object to this amendment	N/A
14	Ensure the PCBU's obligation to ensure a health and safety representative (HSR) attends approved training is a 'requirement' rather than an 'entitlement'.	72(1)(b).	CME is supportive of the amendment that HSRs should be "required" rather than entitled to attend training. However, further clarification is required (likely appropriate for regulations) on how the "required" courses will be determined and approved, and whether there will be other,	N/A

			Summary of CME's position	CME's proposed drafting change
			optional courses, that HSRs may elect to attend.	
15	Require that a health and safety committee must include a representative from management with sufficient seniority to authorise the decisions and recommendations of the committee.	New clause to be added to section 76.	CME generally supports this recommendation however considers clarification in a number of areas, as outlined in the above submission, to prevent against unintended consequences and impracticalities.	Clause amended to require that a health and safety committee must include a representative that is at supervisor or management level that has authority to escalate the proposals and recommendations of the Committee within the PCBU.

			Summary of CME's position	CME's proposed drafting change
16	Include the common law right for a worker to cease unsafe work where there is a risk poses to any other person by the work	84	CME supports this recommendation. Further comment on the benefits are outlined in the above submission.	Nil.
17	Include the right to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal (WHST).	89, 229.	CME does not object to MAP's recommendation to add a new s 89(2) and amend s 229 to provide a right to seek review in the OSH Tribunal where an inspector cannot resolve a matter arising out of cessation of unsafe work. However, consideration should also be given to providing an ability for the dispute to be referred to the Magistrates Court where it is more properly categorised as a pay dispute, acknowledging the overlap between industrial relations and	N/A

			Summary of CME's position	CME's proposed drafting change
			safety issues in the workplace.	
18	Add a requirement that a HSR is notified where a request to review a provisional improvement notice by an inspector is sought by a PCBU or person.	New clause to be added to section 100.	CME does not object to the addition of a clause allowing HSRs to be notified on PINs. CME further proposes a change in line with the previously proposed WHS Resources Bill that removes the time limit on a request for review of provisional improvement notice (s100). This amendment was proposed, but rejected, during the MAP consultation process.	(1) ~~Within 7 days~~ after a provisional improvement notice is issued to a person: (a) the person to whom it was issued; or (b) if the person is a worker, the person conducting the business or undertaking at the workplace at which the worker carries out work, may ask the regulator to appoint an inspector to review the notice.
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117,119,120, 123.	CME does not support inclusion of right of entry provisions under WHS legislation and considers this is more appropriate under IR legislation. If	If part 7 is adopted, this should be from the 2016 version of the Model WHS Law, which relevantly adds:

	Summary of CME's position	CME's proposed drafting change
	part 7 remains, CME does not support the adoption of the 2011 version of the Model WHS Act for right of entry, in place of the updated, 2016 version published by Safe Work Australia. This would be a retrograde step. Please refer to the body of our submission for further detail.	117 (3) Furthermore, a WHS entry permit holder must: (a) give consideration as to whether it is reasonably practicable to give notice to the Regulator about the proposed entry before exercising a power under subsection (1) in order to provide an opportunity for an inspector to attend at the workplace at the time of entry; and (b) if it is reasonably practicable to give notice to the Regulator about the proposed entry, comply with any requirement prescribed by the regulations in relation to giving such a notice under this section.

			Summary of CME's position	CME's proposed drafting change
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.	New clauses inserted in section 117.	CME supports this MAP recommendation, which is consistent with the South Australian version of the harmonised legislation however considers further amendments are needed to ensure material WHS benefits. Further detail is outlined in the above submission.	If a WHS entry permit holder exercises a power of entry under this section (117) — (a) the WHS entry permit holder ~~may~~ must furnish a report on the outcome of his or her inquiries at the workplace to the PCBU and Executive Director in accordance with the regulations; and (b) on the receipt of a report under paragraph (a), the Executive Director must give consideration to what action (if any) should be taken on account of any suspected contravention of this Act outlined in the report and report back to the entry permit holder and the relevant PCBU.

			Summary of CME's position	CME's proposed drafting change
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.	CME does not support this MAP recommendation. It would prefer for the authorising authority to be the regulator, DMIRS. Please refer to the body of the submission for further detail.	Replace "authorising authority" with "Regulator" in cl 138, 139, 140 and 142
22	Insert the WHS Tribunal as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.	See comments above on MAP recommendation 21.	N/A
23	Replace references to the defined phrase relevant state or territory industrial law with the Industrial Relations Act 1979	4, 116,124, 131(2)(c)(ii), 133(c)(ii), 137(1)(b)(ii), 137(1)(d)(ii), 138(2), 150(b), 150(c)(ii)	CME does not object to this MAP recommendation.	N/A
24	The Registrar to be included as an eligible party to apply to the WHS Tribunal to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4).	Please refer to comments above on MAP recommendation 21.	N/A

			Summary of CME's position	CME's proposed drafting change
25	Modify the power of inspectors to require production of documents and answers to questions without the prerequisite of physical entry to the workplace.	171, Division 3 of Part 9 (heading) and Subdivision 4 of Division 3 of Part 9 (heading).	CME does not support the extension of the inspector's powers in the manner proposed in the MAP recommendations, which adopt Recommendation 8 from the Queensland Government's Best Practice Review. In particular: • it is an undue interference with individual rights to allow an inspector to require a person to answer questions at any time or place; and • it is not practicable to include a power for an inspector to request that a person produce a document located "at any place" and produce a	N/A

			Summary of CME's position	CME's proposed drafting change
			document "made at any place". Such an amendment departs from other harmonised jurisdiction, other than Queensland, where the amendment is has not yet been implemented and is therefore untested. Further, it would extend the ambit of inspector powers beyond what is required to discharge that function.	
26	Clarify that the power of inspectors to conduct interviews includes the power to record the interview.	171.	CME does not object to this MAP recommendation	N/A
27	Include a requirement for the person issued an improvement notice to notify the Regulator of their compliance.	193.	CME supports this recommendation	N/A

			Summary of CME's position	CME's proposed drafting change
28	Include the power for the Regulator to request an independent evaluation consistent with current practice.	New clause to be added to Division 2, Part 8.	CME does not oppose this MAP recommendation, and notes that this is consistent with the current approach that DMIRS takes.	N/A
29	For consistency with the Coroner's Act 1996, remove the power of an inspector to attend any inquest into the cause of death of a worker and examine witnesses.	160(f) and 187.	CME supports deletion to avoid confusion and ensure against unintended impacts on coronial legislation.	N/A
30	Ensure that enforceable undertakings are not available for Category 2 offences involving a fatality.	New sub-clause to be added to section 216.	CME does not support this MAP recommendation. Enforceable undertakings are an important regulatory tool to address safety issues and	N/A

			Summary of CME's position	CME's proposed drafting change
			improve safety outcomes. Please refer to the body of this submission for further detail.	
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	CME opposes this MAP recommendation to provide standing for a person "or his or her union" to seek review of a decision on a number of grounds. These are detailed in the body of this submission.	Retain Model WHS Bill language, which does not include standing for "or his or her union".
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	CME does not object to this MAP recommendation. However, CME understands this is designed to provide flexibility on who runs prosecutions within Government. To prevent again vexatious and unintended	To prevent against unintended consequences refine amendment to, "Permit the Regulator to appoint any person in the public service to initiate a prosecution."

			Summary of CME's position	CME's proposed drafting change
			consequences CME recommends amendments.	
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260.	CME does not support this MAP recommendation, for reasons outlined in detail in the body of the submission. Such a power would likely undermine confidence in the regulator, may be used vexatiously to advance an industrial agenda, and there is no evidence base that suggests this change addresses an issue with the current Model WHS Bill, and therefore warrants a departure from harmonisation. This recommendation assumes that unions are independent, when they are the subject of many	If the MAP recommendation is adopted, CME would propose the following revised version of it: Proceedings for a contravention of a WHS civil penalty provision may only be brought by: (a) the regulator; or (b) an ~~inspector~~ person with the written authorisation of the regulator (either generally or in a particular case); or (c) ~~A union.~~ a person with standing.

			Summary of CME's position	CME's proposed drafting change
			offences, such as those that relate to entry permit holders and right of entry. A further concern with the manner in which the amendment is drafted is that it does not require a union to wait for regulator to decided not to prosecute. If this MAP recommendation is adopted, CME's position is that "union" should be replaced with "person with standing" so it's a third party ability not limited to unions.	
34	Remove the requirement that codes of practice cannot be approved, varied or revoked by the Minister without prior consultation with the Governments of the Commonwealth and each state and territory.	274(2)(b).	CME supports the MAP recommendation to remove s 274(2)(b), and also MAP's decision to retain the requirement to consult unions and	N/A

			Summary of CME's position	CME's proposed drafting change
			employer groups on codes of practice.	
35	Streamline and modernise dangerous goods safety laws, and adopt Schedule 1 of the model WHS Bill.	Section 3 references to 'dangerous goods' and Schedule 1.	CME opposes this MAP recommendation to adopt Schedule 1 as drafted, for reasons set out in detail in the body of the submission. In essence, dangerous goods is a specialist area that regulates goods both inside and outside of workplaces. It is better suited to a separate regime. Introducing regulation for it in WHS law may create regulatory overlap and consequent confusion.	If Schedule 1 is adopted, CME proposes wording to avoid overlap in obligations: "(1) This section applies if (a) this Act, in the absence of this section, would have application in particular circumstances; and (b) the Dangerous Goods Safety Act 2004 also has application in the circumstances. (2) This Act does not have application in the circumstances to the extent that the Dangerous Goods Safety Act 2004 has application."

			Summary of CME's position	CME's proposed drafting change
36	Establish the Work Health and Safety Commission tripartite consultative body for Western Australia.	Schedule 2 to include clauses establishing the WHSC.	CME supports this MAP recommendation, contingent on a mining specific advisory committee being retained that includes industry representatives.	N/A
37	Replace the Mining Industry Advisory Committee with Critical Risk Advisory Committee.	Include a section establishing the MACRAC in Schedule 2.	CME supports this MAP recommendation.	N/A
38	Review approach to remuneration for appointed members of the WHSC in consultation with Parliamentary Counsel.	Remuneration clause for inclusion in Schedule 2.	CME supports this MAP recommendation.	N/A
39	Establish the Work Health and Safety Tribunal as the external review body for work health and safety matters.	Include new Part/Schedule.	CME does not object to this MAP recommendation. However, CME does not support extension of the jurisdiction of the OSH Tribunal beyond that currently in Part VIB of	N/A

			Summary of CME's position	CME's proposed drafting change
			the OSH Act to workplace investigations on behalf of the Tribunal (which are more appropriately managed by the regulator) or to industrial relations matters (which should be dealt with by the Fair Work Commission, Federal Court or WAIRC, as appropriate).	
40	Add clauses specifying administrative and procedural matters for reviews conducted by the Work Health and Safety Tribunal	New clauses to be added to section 229.	CME does not object to this MAP recommendation.	N/A
41	Provide the Work Health and Safety Tribunal (WHST) with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated into the WHS Bill.	CME does not support this MAP recommendation, as investigations are more appropriately managed by the regulator.	N/A

			Summary of CME's position	CME's proposed drafting change
42	Include a clause that mirrors the exclusion of work health and safety matters from the definition of industrial matters in the Industrial Relations Act 1979.	Equivalent of 51G(3) of the OSH Act.	CME does not object to this MAP recommendation.	N/A
43	Extend the current conciliation powers of the Work Health and Safety Tribunal (WHST) to include all matters that may be referred, other than Regulator enforcement activities.	51J of the OSH Act to be incorporated into the WHS Bill.	CME does not object to this MAP recommendation in light of the presently proposed jurisdiction of Tribunal, being similar to that of the current OSH Tribunal. However, it reserves further comment on whether conciliation is appropriate for any additional jurisdiction included in the draft legislation.	N/A
44	Insert the WHS Tribunal as the designated court or tribunal for specific matters.	65, 112, 114, 215 and 229.	CME does not object to this MAP recommendation.	N/A

Table 2 – No MAP recommendations made

Table 2 outlines CME's position on matters that were not addressed in MAP's recommendations but are related to areas of the Model WHS Law proposed for adoption in Western Australia.

				Summary of CMEs position	CMEs proposed drafting change
S 3	Provides aims of the Act. 3(1)(a) – provides for protection of workers and other persons through eliminating or minimising risks. 3(1)(h) – facilitates consistent national approach to work health and safety. 3(2) – requires highest level of protection as is reasonably practicable.	No recommendation made.	Subsections (1)(a), (1)(h) and (2)	CME objects to the use of the term 'welfare' in the general obligation to protect workers from hazards to their 'welfare', as it is ambiguous and uncertain. It is not clear how hazards to worker welfare would be identified and managed in a practical sense. The ordinary Oxford Dictionary meaning of "welfare" is "happiness and fortunate", which is not appropriately the subject of WHS regulation. The definition of "health" already covers physiological hazards. CME also proposes the deletion of s 3(1)(h) which provides, "*maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction."*	"s3(1)(a) protecting workers and other persons against harm to their health~~,~~ and safety ~~and welfare~~ through the elimination or minimisation of risks arising from work..." Deletion of s 3(1)(h) "s 3(2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health~~,~~ and safety ~~and welfare~~ from hazards and risks arising from work..."

				Summary of CMEs position	CMEs proposed drafting change
S 4	Provides definitions for the Act, including 'officer'.	No recommendation made.	Definition of 'officer'.	This has created significant concern in jurisdictions where the model was adopted as to whether statutory position holders fall within the definition of officer, such as the Site Senior Executive. Amendments to the Model WHS Law should be made to clarify that statutory positions are not also considered to be an Officer on the basis it would create a significant disincentive for employees to take up these critical safety responsibilities. We address this further in the body of this submission.	Insertion of: "*but does not include an appointee (statutory position holder) appointed under the legislation unless they are a member of the board of directors*."
S 7	Defines a worker as someone who carries out work. Includes: 7(1)(h) – volunteer; and	No recommendation made.	Subsection (1)(h) and (i).	Guidance material is required on the application of the primary duty to volunteers. The reference to "persons of a prescribed class" as being subject to the primary duty is unclear.	N/A

				Summary of CMEs position	CMEs proposed drafting change
	7(1)(i) – person of prescribed class.			There should be a definition of "prescribed class" or a cross reference to a schedule or regulation making power.	
S 9	Provides that examples or notes form part of the Act.	No recommendation made.	S 9.	CME opposes the inclusion of examples and notes to the legislation, as they tend to be utilised to create an additional provision, rather than provide a factual example. Inclusion of examples and notes will inevitably lead to legal disputation regarding their legal status. Such commentary is better suited to regulator guidance material or an explanatory memorandum.	Deletion of s 9, and associated examples and notes in the legislation.
Part 2 Subdivisio n 1	Contains the principles that apply to health and safety duties.	No recommendation made.	Part 2 Subdivision 1.	Further guidance is required to clarify what is required to comply with the health and safety duties where there are multiple duties holders – such as principal and	N/A

				Summary of CMEs position	CMEs proposed drafting change
				contractor, sub-contractor arrangements.	
S 16	Provides that more than 1 person can have a duty at the same time. 16(3) – requirements where more than 1 person has a duty for the same matter.	No recommendation made.	Subsection (3).	Regulator guidance, or additional drafting, is required to clarify how s 16(3) on concurrent duty holders will affect deputy and alternate appointment holders who may not be on site at the time of an incident.	N/A
S 18	Provides what is reasonably practicable in ensuring health and safety. 18(c) – what is reasonably practicable depends on what a person concerned knows or ought reasonably to know.	No recommendation made.	Subsection (c).	CME supports the definition of "reasonably practicable", subject to the inclusion of definitions of "hazard" and "risk". Please refer to the body of the submission for further detail.	N/A

				Summary of CMEs position	CMEs proposed drafting change
S 19	Provides that person conducting business or undertaking has primary duty of care. 19(3)(e) – person conducting business or undertaking must provide adequate facilities for worker welfare.	No recommendation made.	Subsection (3)(e).	CME does not support the inclusion of the word welfare, for reasons identified in the comments on s 3 above.	Remove the reference to “welfare”, or provide a more specific definition of “welfare” and “welfare facilities” in the Act or regulations (e.g the OSH Act and MISA list relevant facilities for workers as including toilets, crib rooms, showers etc).
S 24	Provides specific duties for person conducting business or undertaking that involves importing plant, substances or structures. 24(3)(a) – requirements for importer carrying out calculations, analysis, testing or examination.	No recommendation made.	Subsection (3)(a).	Consideration should be given to whether an importer must, “carry out, or arrange the carrying out of, any calculations, analysis, testing or examination that may be necessary for the performance of the duty” where the material is obtained by the manufacturer from a reputable source.	N/A

				Summary of CMEs position	CMEs proposed drafting change
S 31	Provides definition of what a Category 1 offence is (reckless conduct). 31(1)(b) – it is an offence if person exposes someone to whom duty owed to risk of death or serious injury or illness without reasonable cause.	No recommendation made.	Subsection (1)(b),	CME would like clarity on what constitutes “a reasonable excuse” in the context of reckless conduct.	Insertion of a definition for “reasonable excuse”
S 38	Establishes duty on person who conducts business or undertaking to notify regulator when there is notifiable incident. 38(1) – person who conducts business or undertaking must ensure regulator notified once aware that notifiable incident occurred.	No recommendation made.	Subsection (1).	CME would like this sub-section clarified. The use of term “ensure” has implications that a PCBU must ensure immediate communication with the regulator. Given the high penalties in the Model WHS Law, it is critical these provisions are practically achievable by PCBUs and do not disincentive the reporting of incidents including those were are not “reportable”. Immediate	“(1) A person who conducts a business or undertaking must notify the regulator as soon as reasonably possible ~~ensure that the regulator is notified immediately~~ after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred.” “insert as far as practicable” or “as soon as reasonably practicable”

				Summary of CMEs position	CMEs proposed drafting change
				notification is not always possible, especially in remote areas. CME's proposed amendment encourages a good relationship with the regulator**.**	
S 39	Establishes duty on person with management or control of workplace where notifiable incident occurs to preserve incident site. 39(1) – person with management or control of workplace must ensure site where incident occurred not disturbed until inspector arrives.	No recommendation made.	Subsection (1).	CME is concerned that the obligation to not disturb an incident site will not work in the resources context where sites are remote and inaccessible. In such areas, it may not be practical to wait until an inspector physically arrives or for direction from an inspector. For example, if a jumbo drill rig that is located underground sprays oil that causes turbo fire (being a notifiable incident), the jumbo will typically be brought to the surface for maintenance and then notification to the inspector will occur. It is impractical to freeze the scene underground. If an amendment is not made to the Model WHS Law for this, CME would like regulatory guidance material published on what is	N/A

				Summary of CMEs position	CMEs proposed drafting change
				"reasonably practicable" preservation of a site within the meaning of s 39(1).	
Part 5	Provisions relating to consultation, representation and participation.	No recommendation made.	Part 5.	As detailed in the body of the submission, the level of prescription in Part 5 is concerning to CME. This will require compliance focused changes to management systems to ensure records of consultation, and does not provide flexibility for best practice consultation approaches used by industry including informal and formal consultation mechanisms.	N/A
S 47	Establishes duty on person conducting business or undertaking to consult with workers likely to be affected by work health or safety matters.	No recommendation made.	Subsection (1).	CME is supportive of worker consultation on WHS issues. However, the way that s 47(1) is drafted in the Model WHS Law is too broad and unclear in its potential application. The WA WHS Act provisions on worker consultation should align with the object to promote communication	"(1) The person conducting a business or undertaking must, so far as is reasonably practicable, consult, in accordance with this Division and the regulations, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter under the person's

				Summary of CMEs position	CMEs proposed drafting change
	47(1) – person conducting business or undertaking must consult with workers.			and cooperation in improvement safety and health outcomes.	management and control relating to work health or safety."
S 48	Provides what is required regarding consultation. Consultation requires: 48(1)(a) – information to be shared with workers; 48(1)(b) – workers be given reasonable opportunity to express views and contribute; 48(1)(c) – workers' views taken into account; and 48(1)(d) – workers advised of outcome. 48(2) – consultation must involve health	No recommendation made.	Subsections (1)-(2).	Section 48 is overly prescriptive and will cause an unnecessary burden for companies. CME would like section 48 the Model WHS Law amended to clarify that consultation is only required "so far as reasonably practicable". An example of the difficulties with the Model WHS Law, as drafted, are that section 48(2) and section 49(a) suggests that a HSR (if workers are represented by one) must be present at all meetings where hazards are identified. Requiring the presence of a HSR at all JHA meetings is likely not achievable and will not necessarily lead to better WHS outcomes.	"(1) This section only applies in respect to workers who are likely to be directly affected by the matters that are the subject of the consultation. ~~(1)~~ (2) Consultation under this Division requires, so far as is reasonably practicable:.... ~~(2)~~ (3) If the workers are represented by a health and safety representative, the consultation must involve that representative so far as is reasonably practicable. ~~(3)~~ (4) For the purposes of this section, 'workers' means the workers who are, or are likely to be, directly affected by the matter relating to work health or safety in relation to which consultation is required."

				Summary of CMEs position	CMEs proposed drafting change
	and safety representative.				
S 49	Provides when consultation required. 49(c) – consultation required in relation to decisions made about adequacy of facilities for worker welfare.	No recommendation made.	Subsection (c).	As noted above, CME is not supportive of the inclusion of the term “welfare” in the WA WHS Act, as it is uncertain and ambiguous.	Delete the term ‘welfare’, unless this is defined in the WA WHS Act.
Division 3	Establishes provisions relating to health and safety representatives.	No recommendation made.	Division 3	The following provisions under the Model WHS Law are of concern to the CME, due to their potential to disrupt workplace productivity in exchange for limited if any enhancements to WHS outcomes and increased bureaucracy: • Ability for elections can be held at the request of only one worker; • Potential for an unlimited number of work groups to be established;	N/A

	Summary of CMEs position	CMEs proposed drafting change
	• Lack of requirement to conduct a secret ballot for HSR elections; • the possibility of an industrial organisation to be called to conduct the ballot for HSR elections, who is unlikely to be impartial; and • Limited consequences for HSRs who abuse their power. CME's position to minimise bureaucracy and ensure there is an opportunity for a clear communication channel between a HSR and management is for the WA WHS Act to: • provide that HSRs be representative of a substantial percentage of the workforce. • limit the number of work groups that can be established. • provide that ballots for the election of HSRs must be secret	

				Summary of CMEs position	CMEs proposed drafting change
				• hold HSRs to appropriate standards and penalise them accordingly if a misuse of their power occurs.	
S 50	Provides that worker may ask person conducting business or undertaking to facilitate election of health and safety representative(s).	No recommendation made.	S 50.	As noted above, CME does not support the Model WHS Law position to allow one worker to request an election. This should be a collective work crew decision. HSRs should represent a substantial percentage of the workforce and that there should be a limit to the number of work groups established.	N/A
S 61	Provides procedure for election of health and safety representatives. 61(3) – worker majority may get union, other person or	No recommendation made.	Subsection (3).	CME opposes the inclusion of an ability for an election to be co-ordinated with the assistance of a union in s 61(3). There will likely be an actual or perceived conflict where the majority of workers in a work group are union members and request a union representative to run the elections, but not all the	N/A

				Summary of CMEs position	CMEs proposed drafting change
	organisation to conduct election.			candidates for elections are union members.	
S 65	Provides procedure for disqualification of health and safety representatives.	No recommendation made.	New subsection (1)(c).	CME supports inclusion of an amendment as per current MSIA requirements.	"(c) has failed adequately to perform the functions of a safety and health representative under this Act"
S 67	Provides requirement for election of deputy health and safety representative.	No recommendation made.	S 67.	CME members do not support the inclusion of Deputy HSRs. Given they have the same training requirements as HSR, this role doubles the cost to PCBUs. CME requests removal of provision for election of deputy health and safety representatives as it results in unnecessary duplication of processes and training effort.	N/A
S 68	Provides powers and functions of health	No recommendation made.	Subsections (2)(d), (2)(g) and (3A).	CME supports amending the rules around access to the PCBU's site (in s68(3A) and s71(5)). In particular, if specific entry to a	**(2)(g):** "Any person" is limited to:

		Summary of CMEs position	CMEs proposed drafting change
	and safety representatives. 68(2)(d) – health and safety representative may be present at interview concerning work health and safety. 68(2)(g) – health and safety representative may request assistance of any person wherever necessary. 68(3A) – requirements if person assisting health and safety representative requires access to workplace to provide the assistance.	workplace requirements apply, limitations should be placed on: • who can assist with the election of health and safety representatives; • from whom assistance can be requested by the health and safety representative (s68(2)(g)); and • who must be allowed on site to provide assistance (s70(g)) CME members request removal of the power of a HSR to be present at a meeting concerning health and safety with the consent of a worker or group of workers. (s68(2)(d)) & (s70(e)); The HSR is not an advocate, that is the role of a union representative or some other person. We should not be putting HSR's in this position, the relationship cannot be adversarial, that is totally unfair to the HSR.	(a) a person who works at the workplace; or (b) a person who is involved in the management of the relevant business or undertaking; or (c) a consultant who has been approved by— (i) the Consultative Council; or (ii) a health and safety committee that has responsibilities in relation to the work group that the health and safety representative represents; or (iii) the person conducting the business or undertaking at the workplace or the person's representative. And "consultant" is defined as "a person who is, by reason of his or her experience or qualifications, suitably qualified to advise on issues relating to work health, safety or welfare". **(3A):**

				Summary of CMEs position	CMEs proposed drafting change
				CME would like to see an amendment to clarify that the ability for a HSR to request assistance from “any person” cannot be used by unions to gain access without valid entry. CME does not support inclusion of a power for CME’s to stop work. CME supports the removal of s 3A of the Model WHS Law, as it makes the role adversarial and does not achieve the level of consultation required.	~~If a person assisting a health and safety representative under subsection (2)(g) requires access to the workplace to provide the assistance, the health and safety representative must give notice of the assistant's proposed entry to:~~ ~~(a) the person conducting the business or undertaking for whom the representative's workgroup carries out the work at the workplace; and~~ ~~(b) the person with management or control of the workplace.~~
S 70	Provides general obligations of person conducting business or undertaking. Person conducting business or undertaking must: 70(1)(d), (e) – allow health and safety representative to be	No recommendation made.	Subsections (1)(d), (1)(e), (1)(f), (1)(g)	Rules for HSR’s should fit the rules for a PCBU, otherwise it is an adversarial relationship that will not help workplace safety. (d) - HSRs should only be able to attend an interview with a worker if they are selected by the worker as an independent person but provided that they cannot advocate. As drafted, this sub-	“(g): allow a person assisting a health and safety representative for the work group to have access to the workplace if that is reasonable and necessary to enable the assistance to be provided; and (i)the person is ordinarily entitled to be at the workplace and who the

				Summary of CMEs position	CMEs proposed drafting change
	present at interview concerning work health and safety; 70(1)(f) – provide necessary resources, facilities and assistance to health and safety representative; 70(1)(g) – allow person assisting access to workplace if necessary.			section is unfair on the HSR and makes the relationship adversarial. (e) - CME requests removal of the power of a HSR to be present at a meeting concerning health and safety with the consent of a worker or group of workers. (s68(2)(d)) & (s70(e)). (f) - CME would prefer that this sub-section be cast as requiring a HSR to "perform their role", rather than to "exercise his or her powers", as the latter has an adversarial tone. (g) - This section should be recast to clarify its interaction with right of entry in Part 7 of the Model WHS Law.	workers authorise to assist them; or (ii)is an authorised representative, as defined in the Industrial Relations Act 1979 section 49 G, of an organisation of which at least 1 of the workers is a members; or (iii) is an official or an organisation to whom a current entry permit has been issued under the Fair Work Act if the organisation is entitled to represent the industry interest under the Act of at least 1 of the workers;
S 71	Provides exceptions to s 70. 71(4) – where person conducting business or undertaking not required to allow	No recommendation made.	Subsections (4) and (5).	(4): CME do not consider it is adequate to enable those with revoked permits to be refused entry. The entry must meet all the conditions under the *Fair Work Act 2009* (Cth)/and or Part 7 of the	N/A

				Summary of CMEs position	CMEs proposed drafting change
	person assisting health and safety representative to have access to workplace. 71(5) – person conducting business or undertaking may refuse on reasonable grounds to grant access.			Model WHS Law as per requested amendment to section 70 (g). (5): Reasonable grounds should to include a person's relevant knowledge and experience.	
S 72	Provides obligation on person conducting business or undertaking to train health and safety representatives.	No recommendation made.	Subsection (2).	Three months may not be practicable given time off site, rosters and leave. Attendance needs to be negotiated and planned and agreed to between the two parties. Six months is a more preferable timeframe.	(2): The person conducting the business or undertaking must: (a) as soon as practicable within the period of ~~3 months~~ 6 months after the request is made, allow the health and safety representative time off work to attend the course of training; and (b) pay the course fees and any other reasonable costs associated with the health and safety representative's attendance at the course of training capped at a maximum of 5 days.

				Summary of CMEs position	CMEs proposed drafting change
S 74	Provides that person conducting business or undertaking must ensure that there is list of health and safety representatives.	No recommendation made.	S 74.	CME members request that this section includes a requirement that a PCBU notify the regulator each time a person is elected as a health and safety representative (s74(2)).	N/A
S 81	Provides process for resolution of health and safety issues. 81(3) – representative of party to an issue may enter workplace for purpose of attending discussions.	No recommendation made.	Subsection (3).	**(3):** CME requests it be clear this entry is solely for the purpose of these discussion and does not entitle the entrant any other access.	**(3):** A representative of a party to an issue may enter the workplace for the sole purpose of attending discussions with a view to resolving the issue. Alternatively, it could be inserted as at 71: "The person conducting a business or undertaking is not required to allow a person representative to have access to the workplace: (a) if the assistant has had his or her WHS entry permit revoked; or (b) during any period that the assistant's WHS entry permit is suspended or the assistant is

				Summary of CMEs position	CMEs proposed drafting change
					disqualified from holding a WHS entry permit. (d) on reasonable grounds.”
S 82	Requires that issue be referred to regulator for resolution by inspector. 82(1) – applies if issue not resolved after reasonable efforts made. 82(3)(b) – request to regulator does not prevent worker exercising rights under Div 6 or health and safety represented from issuing notice or direction to cease work.	No recommendation made.	Subsections (1) and (3)(b).	The OSH Act uses the language of “seriousness” in the equivalent provision – section 25. CME supports adoption of similar language for the WA WHS Act. It is critical to ensure that s 82 is not used vexatiously. CMR does not support HSRs having the power to order work to cease under this section.	“82(1): This section applies if an issue has not been resolved after reasonable efforts have been made to achieve an effective resolution of the issue and where there is a risk of imminent and serious injury to, or imminent and serious harm to the health of any person.”

				Summary of CMEs position	CMEs proposed drafting change
S 85	Allows health and safety representative to direct unsafe work to cease. 85(1) – health and safety representative may direct worker in work group to cease work if concerned carrying out work would be serious risk. 85(3) – if risk so serious and immediate or imminent that it is not reasonable to consult, health and safety representative can direct worker to cease work without consultation. 85(5) – health and safety representative must inform the person conducting the business or	No recommendation made.	Subsections (1), (3), (5) and (6)(c).	CME opposes to the power of a HSR to order that work cease under this section. As regards, subsection (6)(c): The HSR training must be current and relevant. It needs to be clear a course 5 years prior is not sufficient. If training is completed under another harmonised jurisdiction's WHS law the PCBU needs to be able to verify relevance.	"(1): A health and safety representative may direct a worker who is in a work group represented by the representative to cease work if the representative has a genuine and reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate ~~or imminent~~ exposure to a hazard. (3): The health and safety representative may direct the worker to cease work without carrying out that consultation or attempting to resolve the matter as an issue under Division 5 of this Part if the risk is so serious and immediate ~~or imminent~~ that it is not reasonable to consult before giving the direction. (5): ~~Prior to giving any direction under this section, of if that is not possible as soon as practicable after giving any direction under this section.~~ t~~T~~he health and safety representative must inform the person conducting the business or

				Summary of CMEs position	CMEs proposed drafting change
	undertaking of any direction given. 85(6)(c) – health and safety representative cannot give direction unless representative has completed relevant training.				undertaking of any direction given by the health and safety representative to workers under this section. (6)(c): completed training equivalent to that training under a corresponding WHS law and has provided evidence of such training to the PCBU."
S 88	Requirements relating to continuity of engagement of worker who has ceased work.	No recommendation made.	S 88	CME would like wording to be inserted to clarify what the term 'purposes' entails.	N/A
S 95	Permits issuing of provisional improvement notice.	No recommendation made.	S 95	Notice should be notified to the PCBU and/or person with management or control as well as the individual.	N/A
Part 6	Provides prohibition for discriminatory,	No recommendation made.	Part 6.	There is no need to incorporate specific discrimination provisions in the WA WHS Act given general	N/A

				Summary of CMEs position	CMEs proposed drafting change
	coercive and misleading conduct.			protections in the *Fair Work Act 2009* (Cth) already provide for this. An automatic assumption that someone has not been employed because of a previous role as a HSR is not necessary.	
S 105	Defines discriminatory conduct.	No recommendation made.	New subsection (3).	CME recommends introduction of an opportunity for defence to include reasonable management action and seek to minimise unmeritorious claims.	"(3) To avoid doubt, discriminatory conduct for the purpose of subsection (1) does not include reasonable management action carried out in a reasonable manner."
S 106	Defines 'prohibited person'.	No recommendation made.	S 106.	The CME strongly advises that to avoid malicious use of this provision for industrial relations purposes, there must be an express prohibition for a worker to coerce, intimidate or discriminate another worker or PCBU as a result of the same issues in the prohibited reason provisions and criminal penalties, if a worker is	N/A

				Summary of CMEs position	CMEs proposed drafting change
				shown to have used this clause for inappropriate purposes.	
S 108	Prohibits coercion or inducement.	No recommendation made.	New subsection (4).	To avoid malicious use of this provision for industrial relations purposes, there must be an express prohibition for a worker to coerce, intimidate or discriminate another worker or PCBU as a result of the same issues in the prohibited reason provisions and criminal penalties, if a worker is shown to have used this clause for inappropriate purposes. This requires amendment also to section 105. Such amendment partially uses the language from s 789FD of the *Fair Work Act 2009* (Cth), and partially adopts the style of the carve out for emergency service workers in s 108(3).	(4) "To avoid doubt, reasonable management action carried out in a reasonable manner is not an action with intent to coerce or induce a person."
S 110	Requirements regarding proof of	No recommendation made.	S 110.	The 'reasonably practicable' is a necessary and sufficient	N/A

				Summary of CMEs position	CMEs proposed drafting change
	discriminatory conduct.			qualification on the duties to be established in the Model WHS Law. The onus of proof in establishing this standard must always rest with the prosecution regardless of the type of offence or the person being prosecuted. Reverse onus is also difficult to defend in a large organisation where there is more than one decision maker.	
Part 7	Requirements regarding workplace entry by WHS entry permit holders.	No recommendation made.	Part 7.	WHS legislation should not confuse industrial relations and safety. CME does not support the WA WHS Act containing right of entry entitlements for unions or other parties. Right of entry should be limited to inspectors. Direct consultation between employers and employees is an essential component of workplace health and safety. The involvement	N/A

				Summary of CMEs position	CMEs proposed drafting change
				of third parties can turn this into an adversarial process.	
S 117	Provides requirements for entry to inquire into suspected contraventions. 117(3) – WHS entry permit holder must give notice before entering workplace. 117(4)(a) – notice must comply with regulations.	No recommendation made.	Subsections (3) and (4)(a)	Adoption of the 2011 version of the 2011 Act would be a retrograde step as the 2016 version has been endorsed. The request to provide notice is reasonable.	N/A
S 118	Provides rights that may be exercised while at workplace. 118(1)(d) – WHS entry permit holder may require person to allow entry permit holder to inspect, and	No recommendation made.	Subsection (1)(d), and (2).	Subsection (1)(d) should be amended to clarify that it is subject to section 148, to avoid ambiguity. Subsection 118(2) should be amended to reflect the position taken in South Australia. This is a reasonable addition, and necessary if inspectors are to attend premises when a WHS	"(d) require the relevant person conducting a business or undertaking to allow the WHS entry permit holder to inspect, and make copies of, any document that is directly relevant to the suspected contravention and that: (i) is kept at the workplace; or

				Summary of CMEs position	CMEs proposed drafting change
	make copies of, any relevant document. 118(2) – person not required to allow WHS entry permit holder to inspect or make copies of a document if it would contravene law.			entry permit holder exercises right of entry.	(ii) is accessible from a computer that is kept at the workplace; and (iii) subject to the restrictions set out in section 148. (e) warn any person whom the WHS entry permit holder reasonably believes to be exposed to a serious risk to his or her health or safety emanating from an immediate or imminent exposure to a hazard, of that risk. (2) The right of a WHS entry permit holder to require copies of a document under subsection (1)(d) is subject to any direction that may be given by an inspector (which may include a direction that copies of a document not be required to be made and provided to the WHS entry permit holder)."
S 119	Notice of right of entry must be given as soon as practicable after entry	No recommendation made.	Subsections (1) and (2)(a).	Notice is reasonable in all circumstances and advance notice should be enabled in this provision to recognised instances where this would be necessary – i.e remote	(1) A WHS entry permit holder must, as soon as is reasonably ~~practicable after entering a workplace~~ under this Division, give notice of the entry and the

	Summary of CMEs position	CMEs proposed drafting change
	sites and oil and gas platforms. Advance notice is necessary to enable sites to facilitate safety induction and escort for the official. It is unrealistic to expect to get on charter flights where safety critical staff need to be the priority to get to site.	suspected contravention, in accordance with the regulations, to: (a) the relevant person conducting a business or undertaking; and (b) the person with management or control of the workplace. (2) Subsection (1) does not apply if to give the notice would: ~~(a) defeat the purpose of the entry to the workplace; or~~ (b) unreasonably delay the WHS entry permit holder in an urgent case. (3) Subsection (1) does not apply to an entry to a workplace under this Division to inspect or make copies of documents referred to in section 120. Note See the jurisdictional note in the Appendix.

				Summary of CMEs position	CMEs proposed drafting change
S 120	Provides requirements for entry to inspect employee records or information held by another person. 120(2) – WHS entry permit holder may enter workplace for purpose of inspecting, or making copies of particular documents.	No recommendation made.	Subsection (2).	Protection of the privacy and the unwanted release of employee details to union officials is needed if this is adopted in the WA WHS Act. It needs to be clear in these section employees are to be protected from unwanted approaches by union officials including right of PCBU not to provide access to documents which may identify names and contact details of employees unless expressly by their consent, or at a minimum to enable PCBU to first de-identify these documents. CME would also like it clarified that records inspected are not to be removed from site including copies or electronic records.	N/A
S 122	Provides requirements for notice of entry. 122(1) – WHS entry permit holder must	No recommendation made.	Subsection (1).	CME proposes an addition to this section to ensure the appropriate notification occurs in all instances. For example , at a large site with smaller contractors. This addition	"(1) Before entering a workplace under this Division, a WHS entry permit holder must give notice of the proposed entry to the relevant person conducting a business or undertaking and the person with

				Summary of CMEs position	CMEs proposed drafting change
	give notice of the proposed entry to relevant person.			would require small contractor and overarching site to be notified.	management or control of the workplace."
S 124	Provides requirements for WHS entry permit holder must to hold permit under other law.	No recommendation made.	S 124	An amendment to the Model WHS Law is required to make it expressly clear a WHS right of entry cannot be exercised while a person's permit under the *Fair Work Act 2009* (Cth) is suspended, revoked or expired. This is currently ambiguous in the legislation and is likely to be considered by the courts as a result of recent questions in New South Wales where unions officials hold both a *Fair Work Act 2009* (Cth) and WHS entry permit have had their FW Act entry permit suspended. Section 138(2) sets out grounds for an application to revoke once of which is that "a union official no longer holds or will hold" a federal permit. However an official with a suspended permit "will hold" the	"A WHS entry permit holder must not enter a workplace unless he or she also holds an entry permit under the Fair Work Act ~~[~~or the ~~relevant State or Territory industrial law~~ Industrial Relations Act 1979~~]~~ and that entry permit is not suspended, revoked or expired."

				Summary of CMEs position	CMEs proposed drafting change
				permit in the future and potentially without any limitations.	
S 138	Provides requirements where person may apply to revoke WHS entry permit. 138(2)(a) – provides grounds for application for revocation of WHS entry permit.	No recommendation made.	New subsection (2)(aa).	As above, s 138 should be amended to deal with permits that have been suspended, revoked or have expired.	"(2) The grounds for an application for revocation of a WHS entry permit are (a) that the permit holder no longer satisfies the eligibility criteria for a WHS entry permit or an entry permit under a corresponding WHS law, or the Fair Work Act or the Workplace Relations Act 1996 of the Commonwealth or the Industrial Relations Act 1979 (WA)~~[relevant State or Territory industrial law]~~; or (aa) that the permit holder has been issued an entry permit under the Fair Work Act or Industrial Relations Act 1979 (WA), but that that permit has since been suspended, revoked or expired."
S 146	Provides requirements that	No recommendation made.	Penalty clause.	This section only includes one penalty of $10,000 (i.e penalty for	A WHS entry permit holder exercising, or seeking to exercise,

				Summary of CMEs position	CMEs proposed drafting change
	WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace.			an individual and body corporate are not distinguished). CME considers that it is important both penalties are provided here, as is done in the NSW WHS law.	rights in accordance with this Part must not intentionally and unreasonably delay, hinder or obstruct any person or disrupt any work at a workplace, or otherwise act in an improper manner. WHS civil penalty provision. ~~Maximum penalty: $10 000.~~ In the case of an individual—$10 000. In the case of a body corporate—$50 000.
S 148	Provides requirement that information or documents must not be used or disclosed in an unauthorised way.	No recommendation made.	Subsections (a)-(e)	CME proposes the deletion of subsections a-e.	~~(a) the person reasonably believes that the use or disclosure is necessary to lessen or prevent:~~ ~~(i) a serious risk to a person's health or safety; or~~ ~~(ii) a serious threat to public health or safety; or~~ ~~(b) the person has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the~~

	Summary of CMEs position	CMEs proposed drafting change
		~~information or document as a necessary part of an investigation of the matter or in reporting concerns to relevant persons or authorities; or~~ ~~(c) the use or disclosure is required or authorised by or under law; or~~ ~~(d) the person reasonably believes that the use or disclosure is reasonably necessary for 1 or more of the following by, or on behalf of, an enforcement body (within the meaning of the Privacy Act 1988 of the Commonwealth):~~ ~~(i) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law imposing a penalty or sanction or breaches of a prescribed law;~~ ~~(ii) the enforcement of laws relating to the confiscation of the proceeds of crime;~~ ~~(iii) the protection of the public revenue;~~

				Summary of CMEs position	CMEs proposed drafting change
					~~(iv) the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct;~~ ~~(v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or~~ ~~(e) if the information is, or the document contains, personal information—the use or disclosure is made with the consent of the individual to whom the information relates.~~
s 209	Provides requirements on issuing and giving of notice. 209(1) – sets out method of delivery of notice. 209(2) – establishes what regulations may prescribe.	No recommendation made	Subsection (1) – (2)	Section 209 is unclear and should be amended in line with Division 4 of the MISA.	N/A

				Summary of CMEs position	CMEs proposed drafting change
S 225	Provision relating to internal reviewer. 225(2) – person who made decision cannot be internal reviewer in relation to that decision.	No recommendation made.	Subsection (2).	CME would like further clarify in this section on who may be involved in an internal review decision.	"(2) The person who made the decision cannot be an internal reviewer in relation to that decision, and cannot be involved in any internal reviewer's review of that decision."
Schedule 3	Sets out regulation-making powers.	No recommendation made.	Division 4.	As per comments above, CME would like the term "Welfare" removed on the ground that it is ambiguous.	Delete or redefine the term 'welfare'.