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2018 Review of the model work health and safety laws

Safe Work 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 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.

Recommendations

CME appreciates the opportunity to comment on the 2018 Review of the model Workplace Health and Safety (WHS) laws (the review). CME supports the holistic objectives of the review to examine the laws and consider how they are operating in practice, whether they are achieving the objects stated in the model WHS Act and whether they have resulted in untended consequences.

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

General

- CME recommends SWA share preliminary findings of the review with WA's Ministerial Advisory Panel (MAP) to ensure important learnings are considered prior to legislative reforms being finalised in the WA parliament.

Legislative framework

- CME supports the principle of harmonisation at the level of the WHS Act, provided there is flexibility for state and industry based approaches through Regulation and provided the WHS Act is amended to remove unnecessary prescription.
- CME recommends a move to a two-tiered framework consisting of the model WHS Act and model WHS Regulations with supporting non-mandatory model Codes of Practice.
- CME supports ongoing flexibility for jurisdictions to determine the scope and application of WHS legislation.

Right of Entry

- CME opposes right of entry provisions in the WHS Act recommends that Part 7 be removed.
- If Part 7 is retained, CME recommends the 2016 amendments to sections 117(3) to (8) the model WHS Act be adopted in all States and Territories. This required WHS permit holders to provide notice of at least 24 hours prior to entry.
- If Part 7 is retained, CME recommends the model WHS Act be amended to 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.

- If Part 7 is retained, CME recommends inspection of employee records upon entry should be limited to records directly relevant to the purpose of entry.
- If Part 7 is retained, CME recommends there should be consequences for WHS permit holders who contravene entry permit conditions, comparable to those in the *Fair Work Act 2009 (Cth).*

Compliance, enforcement and prosecutions

- CME strongly supports Part 11 of the 2016 WHS Act being maintained with no amendments to facilitate the use of enforceable undertakings as an alternative to prosecution.
- CME recommends an enforcement policy be developed by regulators to clearly articulate appropriate and transparent criteria for considering, entering into and managing enforceable undertakings.
- CME generally opposes punitive approaches to enforcement, however we accept the role of penalties enshrined in the Act provided they form part of a hierarchy of enforcement mechanisms including enforceable undertakings.
- 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.
- CME does not support the inclusion of industrial manslaughter offences in the WHS Act.

Consultation, representation and participation

- CME recommends a move to less prescriptive and more risk based, outcomes focussed consultation provisions in the WHS Act.
- CME recommends Part 5 be reviewed 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.
- In the absence of large scale reform to Part 5, CME considers at a minimum, the following amendments to the WHS Act should be made to remove unnecessary prescription from this section.
    - 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.
- CME opposes the current requirements relating to HSRs and recommends the WHS Act be amended to facilitate collaboration and cooperation on WHS issues.
- CME considers that the WHS Act should be amended to 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.
- CME recommends that the WHS Act 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.
- CME recommends clarifying who "any person" is in relation to section 68(2)(g) to ensure this is someone with relevant knowledge or expertise.
- CME recommends that the WHS Act be amended to remove HSRs' ability to stop work on safety grounds, or to limit its scope and introduce penalties for using this power vexatiously.

Health and safety duties

- CME recommends that the definition of 'officer' be amended to clarify that it does not cover statutory appointees.
- CME recommends it should be clarified in the WHS Act that companies have flexibility to apportion principal responsibility where there are multiple PCBU's.

Definition of hazard and risk

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

Treatment of psychological hazards

- CME recommends amending the WHS Act to include a reporting requirement to capture significant psychological trauma of absences of more than 10 days.

Extraterritorial arrangements

- CME would oppose broad extraterritorial application of the model WHS laws and recommends if the regulator and inspectors' powers are to have any extraterritorial application, this should be in limited circumstances which are clearly prescribed by the model WHS Act, and only where there is a clear, close nexus to WHS issues in the relevant jurisdiction.

Context

Although Western Australia (WA) has not implemented the model WHS laws in their current form, CME remains an active participant in the harmonisation process.

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

In July 2017, the state Government confirmed reform of safety and health legislation in WA would be progressed in line with the national model WHS laws. Under the approach general and resources WHS legislation will be consolidated within a single Act. The single Act will be supported by regulations including sector specific regulations for the mining and oil and gas industries.

CME is a member of the WA Ministerial Advisory Panel (MAP) currently working to develop recommendations for the Minister on the content of the single Act. These reforms are progressing quickly, with public consultation on MAP's recommendations expected to commence in approximately mid-2018.

Therefore, while WA is not currently operating under the model laws, the current review is clearly of direct relevance to the WA resources sector.

In addition, a number of CME member companies have experience operating in jurisdictions where the model WHS laws apply and are hence well placed to comment on their application in practice and in the context of WA. This submission incorporates these examples where available as supportive evidence.

CME consider the findings of this review extremely relevant to WA given the direction of legislative reforms and understands timeframes from this review may accommodate preliminary findings being drafted at the time MAP is considering a draft WHS Bill.

CME recommends SWA share preliminary findings of the review with WA's MAP to ensure important learnings are considered prior to legislative reforms being finalised in WA.

The below submission outlines CME's response to the review. The submission initially provides comment on the model WHS framework before moving into issues of key priority to the WA resources sector, largely in relation to the model WHS Act. These primarily relate to:

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

CME notes the review's discussion paper raises 37 questions which may be addressed in submissions. CME's responses (where given) to these questions are set out in **Appendix 1**.

Legislative framework

CME notes the reviews discussions paper provides commentary on the model WHS framework. The below section of the submission provides a response to the following areas in relation to this:

- Harmonisation
- The three-tiered approach to the model framework consisting of the model WHS Act, model WHS Regulations and model Codes of practice.

- Scope and application of model laws

Harmonisation

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 Act 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 harmonisation process that, in particular for the resources sector, adoption of the laws in WA would require amendment to ensure the legislation is either an improvement on or meets current best practice.

Further, CME's support for the adoption for the WHS Act in WA, is contingent on industry specific regulations being maintained to support ongoing flexibility for the application of risk management approaches best suited to particular industries and to facilitate innovation across the WA resources sector.

CME submits such an approach is critical to allow hazards and risks specific to different industries to be efficiently and effectively addressed.

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 the WHS Act, provided there is flexibility for state and sector based approaches through Regulation and Codes of Practice. However, CME considers there is an unnecessary level of prescription in the WHS Act which is impeding the harmonisation process by disincentivising states from adopting it without amendments. 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 WHS Act to "provide a framework for continuous improvement and progressively higher standards of work health and safety" (Division 2, s.3(1)(g)).

CME supports the principle of harmonisation at the level of the WHS Act, provided there is flexibility for state and industry based approaches through Regulation and provided the WHS Act is amended to remove unnecessary prescription.

A two-tiered approach

CME considers the current three-tiered approach to the model framework consisting of the model WHS Act, model WHS Regulations and model Codes of Practice could be simplified.

CME members have expressed concern with the level of prescription in the model Codes of Practice, considering them to be overly detailed and challenging to apply in the context of the WA resource sector.

To support state and industry based approaches to WHS Regulation, supporting Codes of Practice should similarly be state and sector specific.

CME considers the model Codes are a useful resource that should continue to be available to jurisdictions to refer to when developing their own guidance.

Currently the WHS Act requires consultation at all levels when adopting model Codes of practice. While this may occur and should be encouraged, CME considers it important this is not mandated to allow for efficient and timely development of sector and state specific guidance material.

Given the level of prescription and differences across states and industries, CME opposes the mandatory nature of Codes and considers it is unrealistic to continue to include them as part of the three-tiered approach to the model framework.

CME recommends a move to a two-tiered framework consisting of the model WHS Act and model WHS Regulations with supporting non-mandatory model Codes of Practice.

Scope and application

Jurisdictional notes and Schedule 1 of the WHS Act provide the opportunity for jurisdictions to include or exclude relevant legislation such as dangerous goods within the model WHS Act.

Under the direction of WA's current safety legislation reforms, the follow legislation is planned to be consolidated under the WHS Act:

- Occupational Health and Safety Act 1984
- Mines Safety Inspection Act 1994
- Petroleum and Geothermal Energy Resources Act 1967
- Petroleum (Submerged Lands) Act 1982
- Pipelines Act 1969
- Dangerous Goods Safety Act 2004 (not yet decided)

CME notes that other jurisdictions have taken varying approaches in determining the scope and coverage of the legislation and considers it important the WHS Act allows for ongoing flexibility in this regard.

There are challenges applying WA dangerous goods legislation under the WHS Act. This relates 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 such as dangerous good blurs the boundary between general public health and safety and workplace health and safety. The focus on 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.

CME supports ongoing flexibility for jurisdictions to determine the scope and application of WHS legislation.

Right of entry

CME acknowledges that right of entry is provided for under state and federal industrial relations legislation and that the intent of the model WHS Act Part 7 is to bring workplace entry for specific purposes within the purview of WHS legislation and the WHS regulator.

CME continues to express strong opposition to inclusion of union right of entry provisions under WHS legislation.

Third party right of entry

CME opposes the model WHS laws containing right of entry entitlements for unions or other parties and considers that the WHS Act should only provide for entry to workplaces by WHS inspectors appointed under the Act. Union right of entry is more appropriately dealt with in

general industrial relations legislation, namely the *Fair Work Act 2009* (Cth) and any 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. Managing and responding to union right of entry requests creates a logistical, administrative and supervisory burden, which can detract from productivity and in many cases may present WHS risks. It can also be disruptive to the workplace where the right of entry is exercised.

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 a significant increase in frequency in right of entry requests at one particular site. Such a frequent exercise of right of entry has a significant impact on business for example to accommodate entry at short notice (in terms of site access requirements) and removing leaders form their job front to escort unions.

For industry, involving a third party through union right of entry is viewed as a further impediment to effective consultation and productive safety outcomes and impacts upon the trust between management and the workforce on site. CME considers direct consultation between employers and employees is an essential component of workplace health and safety, while the involvement of third parties could turn this into an adversarial process.

There is a concern that including a WHS entry pathway in WHS Act may further increase the number of attempted right of entries. There is also a concern that the provisions as presently drafted fail to effectively deter frivolous and vexatious use of these provisions.

As assessment of the number of disputes resulting from right of entry demonstrates only a handful reached the level of the tribunal. Although this demonstrates mechanisms of the Act are effect to prevent against misuse to the extent of the tribunal, from industry's perspective the damage is already done through impost to site in facilitating entry.

Further supporting this, 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".

CME members do not consider that the inclusion of entry for WHS purposes within the WHS Act will reduce the likelihood of these provisions being used vexatiously or improve the ability of employers to seek a timely resolution when these rights are abused.

CME opposes right of entry provisions in the WHS Act recommends that Part 7 be removed.

Notice requirements

If the provisions of the WHS Act allowing right of entry by WHS permit holders are retained, CME strongly supports retaining the 2016 amendments to sections 117(3) to (8) of the model WHS Act. 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.

CME notes the 2016 amendments have not yet been adopted in any jurisdiction. 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. CME considers that SWA has a role to play in encouraging other jurisdictions to update their laws consistent with the 2016 amendments to the model WHS Act.

Where the model WHS laws contain right of entry entitlements for unions or other parties these should be consistent with general workplace and industrial relations legislation.

In WA it is unworkable and impractical not to require advance notice of entry, particularly in resources sector where many operations are remotely located. For example on an offshore oil and gas platform there are already such limited availability of helicopters to transport workers to and from site. Accommodating entry without advanced notice is unworkable and notice of at least 24 hours before entry is required to enable the site to coordinate its arrangements for the entry. Aside from transportation requirements, these include ensuring inductions can be completed and other site access requirements are satisfied to ensure company WHS protocols are met.

If Part 7 is retained, CME recommends the 2016 amendments to sections 117(3) to (8) of the model WHS Act be adopted in all States and Territories.

Requirement to notify the regulator and report on outcomes

Further, if right of entry provisions remain, CME considers that any person exercising right of entry under the WHS Act should be required to notify the regulator of such entry and subsequently to produce a report in relation to that entry.

CME supports the approach taken in SA, where the *Work Health and Safety Act 2012* (SA) requires that 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.

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. This would

not only assist in justifying the purpose of that entry but importantly it should communicate relevant findings to assist in improving safety and health 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 that the entry has delivered a meaningful benefit to worker health and safety. Therefore a report should be provided to 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 furnished with a 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. Additionally, documentation relating to workplace entry could be useful for all parties should any dispute arise in relation to that entry.

If Part 7 is retained, CME recommends the model WHS Act be amended to 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.

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. Currently, the ability for inspection of employee records in section 120 of the WHS Act 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 is unclear given the ability to inspect relevant records is already provided for under section 118 of the WHS Act.

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.

If Part 7 is retained, 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.

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

Compliance, enforcement and prosecutions

The reviews discussion paper seeks feedback from stakeholders on the effectiveness of compliance and enforcement measures.

CME opposes a punitive approach to enforcement of the WHS Act and Regulations. CME 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 relation to the model WHS laws.

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 laws 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. Resorting 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 Act 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 Act;
- 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 WHS Act, 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 the *Best Practice Review of Workplace Health and Safety Queensland*[1] (Queensland Report) has 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 that 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.

For example, in South Australia, an enforceable undertaking was entered into with SRG Building (Southern) Pty Ltd (SRG) following a fatal workplace incident.[2] SRG undertook to implement a variety of detailed strategies to benefit workers, industry and community including by developing preventative devices, providing training, providing licenses for high risk employees, developing a controlled document management system, and introducing an annual safety award. CME submits that the net WHS impact of this regulatory response was positive. CME considers its use in exceptional circumstances such as this 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.

Currently in WA, undertakings are only available further to a prosecutorial process being underway and not as an alternative to prosecution. Prosecutorial processes frustrates the sharing of information which negatively impacts an organisations ability to implement timely health and safety improvements. CME members therefore view the provisions relating to enforceable undertakings within the WHS Act as a key area of benefit in adopting the model WHS laws

CME strongly supports Part 11 of the 2016 WHS Act 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. CME however 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*

[1] 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

[2] 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

they have frustrated the objectives of OHS regulation" and "*the available evidence suggests their use has also been successful in other regulatory fields*"[3]

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 regulators to clearly articulate appropriate and transparent criteria for considering, entering into and managing enforceable undertakings.

Third party prosecutions

There are provisions in New South Wales (NSW) legislation that provide for the ability of third parties to bring prosecutions. CME would be concerned if these provisions were to be proposed for adoption more broadly as part of the model and as a result, CME wishes to comment on this ability as part of the current review.

CME opposes provision for third party prosecutions of offences under the WHS Act and Regulations. CME considers that WHS regulators, with statutory powers, functions, and responsibilities, are the appropriate bodies to prosecute breaches of the model WHS Act and Regulations. Third parties may not be appropriately resourced, structured, or skilled to prosecute breaches of the model WHS Act, and should not be empowered to do so.

CME considers that third party prosecutions:

- would add a layer of unnecessary complexity in the enforcement of the model; WHS laws;
- may create a risk of conflicts of interest for employee organisations which initiate prosecutions;
- could be misused to advance political or industrial agendas, which could impact on the integrity of the prosecutor, and public confidence in its function;
- 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 resourced 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 (NSW). 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[4] 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

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

[4] 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

prosecuted. This recommendation was considered in the Queensland Report[5]**.** 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*."[6]

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 the employee organisations who initiate prosecutions in a position of conflict of interest. . Furthermore, it is noted the union movement is estimated to represent approximately 15per cent of the public sector workforce and 10 per cent of the private sector workforce. CME can't 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 health and safety.

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.

Industrial Manslaughter

WHS law should facilitate the creation of a collaborative workplace culture that puts an emphasis on the reporting and dissemination of information, allowing people to freely report incidents and in doing so learn from these incidents. Offences like industrial manslaughter are likely to discourage the free flow of communication due to a fear of prosecution, resulting in less reporting and therefore, potentially more injuries and fatalities.

The industrial manslaughter offences are focused on outcomes rather than on managing risks. CME considers that an increased focus on communication, education and prevention is more likely to reduce workplace fatalities.

In WA, like most jurisdictions, manslaughter offences are already available under existing criminal legislation. The inclusion of a specific provision in the model WHS laws dealing with

[5] At pages 69 – 70, 73.

industrial manslaughter would appear to overlap with, and potentially duplicate, these offences. In addition, the industrial manslaughter provisions currently applicable in the Australian Capital Territory and Queensland are inconsistent with accepted principles of criminal law and remove defences that are otherwise available to a person for traditional manslaughter offences. CME support the comments outlined in the Minerals Council of Australia submission in this regard.

Further CME notes that the Australian Capital Territory and Queensland industrial manslaughter offences currently apply to 'senior officers'. This definition is inconsistent with the definition of 'officers' adopted under the WHS Act. This means that the industrial manslaughter offence may potentially apply to a much wider category of persons than that contemplated in the WHS Act. CME also supports the comments submitted by the Minerals Council of Australia in their submission relating to this.

CME believes that the WHS Act is not an appropriate place for the industrial manslaughter provisions.

CME does not support the inclusion of industrial manslaughter offences in the WHS Act.

Consultation, representation and participation

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

Part 5 of the WHS Act sets out a range of prescriptive requirements in relation to consultation, the election of health and safety representatives (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 WHS Act to provide for "fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety".

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 move to less prescriptive and more risk based, outcomes focussed consultation provisions in the WHS Act.

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, they are ineffective in promoting meaningful consultation and issue resolution for workers.

CME considers that the WHS Act 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 Act in regards to consultation, the level of prescription in *the Mines Safety Inspection Act 1994* (WA) is a cause for frustration for members. Currently, CME members take varied approaches to HSR engagement and committees to facilitate effective consultation. For example, one CME member company has a workforce spread across ten separate geographical locations throughout WA, posing obvious challenges for overcoming communication silos. This company 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. 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, the member notes this would be ineffective without other equally important aspects of their approach such as the engagement of management, professional development of HSRs and strategies to empower HSR's to take ownership of the committee process. Members are concerned a move to an even more prescriptive framework will hinder organisations abilities to implement flexible strategies to address their particular workforce.

Furthermore, 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. Given the role of safety leadership in effective consultation and communication, one company 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 5 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.

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 enshrined in the WHS Act. 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 be reviewed 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 WHS Act where prescription particularly undermines the 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, 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 would be a backwards step for the WA resources sector who has long evolved past a process driven approach.

In the absence of large scale reform to Part 5, CME considers at a minimum, the following amendments to the WHS Act should be made to remove unnecessary prescription from this section.

- **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.**

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 through established channels in relation to any such issues. 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 WHS Act 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.

CME opposes the current requirements relating to HSRs and recommends the WHS Act be amended to facilitate collaboration and cooperation on WHS issues.

CME considers that the WHS Act should be amended to 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.**

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 laws 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 appropriate regulator. A 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 this. 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 recommends that the WHS Act be amended to remove HSRs' ability 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 the right to request that they have a person assisting them have the right to access a workplace 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).

CME proposes the following underlined amendment to the WHS Act section 70(1)(g) 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 49 G, 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[7] in considering whether a right of entry permit is required in such circumstances, and would help to resolve confusion on this issue[8].

Unless this amendment is made, the WHS Act 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 that the WHS Act 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 WHS Act 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*

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

[8] 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.

(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 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) to ensure this is someone with relevant knowledge or expertise.

Health and safety duties

CME has concerns about the scope of the positive due diligence obligations which apply to 'officers' under section 27 of the WHS Act, specifically in relation to the term 'officer' which is defined in section 4 of the WHS Act. The positive duties imposed on officers under the Act 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.

CME acknowledges the South Australian review[9] 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 MSIA legislation. 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 between role ambiguity and employee mental health, for example related to elevated levels of anxiety[10].

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 understands the definition of 'officer' under the WHS Act is not intended to include statutory appointees. While some consideration to this is given in SWA's interpretive guideline on officers[11], CME members have expressed concern the available guidance has not sufficiently resolved uncertainty regarding the application of the definition of officer to statutory positions.

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

[10] 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

[11] 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

Therefore, CME maintains this requires clarification within the WHS Act. 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 **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**.

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.

Clarifying the position in this way would no doubt be welcomed nationally. 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. A number of CME member companies operate across a multiple jurisdictions nationally and have expressed concern with the implications of the ambiguity in this section.

CME recommends that the definition of 'officer' be amended to clarify that it does not cover statutory appointees.

The model WHS legislation prescribes a range of detailed duties in respect of WHS matters. It also prescribes what duty holders have what duties. 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 'person conducting a business or undertaking' (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.

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 WHS Act.

CME recommends it should be clarified in the WHS Act that companies have flexibility to apportion principal responsibility where there are multiple PCBU's.

Definition of hazard and risk

The terms 'hazard' and 'risk' are used throughout the model WHS Act 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 WHS Act 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 WHS laws. CME submits that defining these terms might assist industry to understand how regulatory authorities will expect these concepts to be understood.

The MSIA and OSHA define 'hazard' and 'risk', as follows (in substantially the same terms):[12]

> ***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' are defined in the WHS laws by reference to the definitions set out in the current MSIA and OSHA.

Treatment of psychological hazards

CME notes the definition of 'health' in the WHS Act 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 workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors – code of practice'[13], 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.*[14]

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 laws, CME considers there is a lack of certainty in whether mental injuries are notifiable incidents under the WHS Act and around what steps must be taken to protect an individual's personal information when such notifications are made.

Amending the WHS Act to capture significant psychological trauma would go a long way to addressing this. This amendment would assist in capturing work related psychosocial injuries in a national database and addressing current issues with quantifying work related psychosocial injuries.

CME recommends amending the WHS Act to include a reporting requirement to capture significant psychological trauma of absences of more than 10 days.

Extraterritorial arrangements

CME accepts extraterritorial application of the model WHS laws may be useful in some specific circumstances. In particular CME acknowledges prosecutions could be unnecessarily impeded where the laws do not provide for a mechanism to access relevant information held outside the relevant jurisdiction.

However, just as duties under model WHS laws do not extend beyond the relevant jurisdiction, nor should inspectors' powers under the model WHS laws. For example, inspectors should not be entitled to undertake inspection or compliance activities such as issuing improvement or prohibition notices in respect of matters outside the relevant jurisdiction.

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

[13] 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

[14] Ibid. p. 23

If inspectors' powers to interview persons or compel the production of documents are to be exercised outside the relevant jurisdiction, this should be in limited circumstances, clearly prescribed by the model WHS Act, and should be limited to matters which have a clear, close nexus to WHS issues in the relevant jurisdiction. Such limitations are required in order to minimise a potentially burdensome process of collating and providing documents that are not directly relevant, and where effort is otherwise redirected to those processes rather than responsive measures that might otherwise be required to improve health and safety outcomes.

CME would oppose broad extraterritorial application of the model WHS laws and recommends if the regulator and inspectors' powers are to have any extraterritorial application, this should be in limited circumstances which are clearly prescribed by the model WHS Act, and only where there is a clear, close nexus to WHS issues in the relevant jurisdiction.

Conclusion

CME welcomes the review, considering its findings important to ensuring the model WHS laws are operating in practice in line with the objects stated in the model WHS Act.

CME looks forward to ongoing engagement throughout the review process.

Please see CME's responses (where given) to questions raised in the reviews discussion paper.

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
Reg Howard-Smith	Chief Executive	13/04/2018	[redacted]
Document reference	K:\Occupational Safety & Health\Projects & Issues\Legislation\National Harmonisation\National Review of OHS Laws\2018 COAG review\2018 SWA Review of model WHS Laws		

Appendices

Appendix 1 – responses to specific questions raised in the Discussion Paper

1. **Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?**

   CME considers the current three-tiered approach to the model framework consisting of the model WHS Act, model WHS Regulations and model Codes of Practice could be simplified. Given the level of prescription and differences across states and industries, CME opposes the mandatory nature of Codes and considers it is unrealistic to continue to include them as part of the three-tiered approach to the model framework. CME repeats its comments in the submission above.

2. **Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?**

   CME does not seek to make submissions in response to question 2.

3. **Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?**

   CME supports a risk based approach to WHS management and opposes unnecessary and unworkable prescription. CME considers that prescriptive, detailed Codes may be unhelpful in that they are fixed at a particular point in time, and may not account for variations in workplaces and work tasks, particularly across varying industries. CME considers that compliance with Codes should not be mandatory, and prescriptive Codes should be avoided. Any Codes which are introduced should demonstrate a risk based approach to WHS management. Where states choose to adopt model Codes with amendments, CME considers it imperative these do not require formal review and approval by all jurisdictions prior to becoming active.

4. **Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?**

   CME considers that the interaction between the WHS Act, WHS Regulations, WHS Codes, and other WHS related legislation, and the overlapping duties and duty holders under each item of legislation, remains a source of confusion for many of its members.

   CME repeats its response to question 3 above.

5. **Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?**

   CME supports the treatment of psychological health in the workplace in the same manner as physical health. CME repeats its comments in the submission above concerning psychological hazards.

6. **Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?**

   As outlined in the above submission, CME considers it should be up to jurisdictions to define the scope of laws and subsequently assist stakeholders in understanding where the laws apply and don't apply. CME repeats its comment in the above submission.

7. **Question 7: Have you any comments on the extraterritorial operation of the WHS laws?**

   CME repeats its comments in the submission above concerning extraterritorial arrangements.

8. **Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?**

   The model WHS where drafted to apply to workplaces, not to public health and safety or the environment. Therefore CME considers incorporating legislation not relating to workplaces in the WHS Act such as dangerous good blurs the boundary between general public health and safety and workplace health and safety. The focus on 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. CME repeats its comments in the above submission relating to the scope of the legislation.

9. **Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?**

   CME supports a risk based approach to WHS management. In CME's view, WHS laws should address how WHS risks must be dealt with, not what WHS risks exist and what specific steps must be taken to manage each. In light of this, CME does not recommend that any particular hazards or risks be included in the scope of the WHS laws. This would see an unnecessary level of prescription in the WHS legal framework.

   CME notes that the terms 'risk' and hazard' are not defined in the WHS laws, and submits that defining these terms might assist industry to understand how regulatory authorities will expect these concepts to be understood.

10. **Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?**

    CME considers the Act should be amended to provide greater clarity that companies have the flexibility to apportion principal responsibility in instances where the primary duty of care can applies to multiple organisations. CME repeats its comments in the submission above.

11. **Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?**

    CME does not seek to make submissions in response to question 11.

12. **Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?**

    CME considers that the concept of 'reasonable practicability' should be applied universally in relation to all duties applicable to PCBUs under the model WHS Act. Similarly, a suitable standard based on 'reasonableness' (whether positioned as a qualification or defence) should universally apply to all duties applicable to individual duty holders.

13. **Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?**

    CME recommends that the definition of 'officer' be amended to clarify that it does not cover statutory appointees under the WHS Act by virtue of their statutory appointment. 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 repeats its comments in the submission above.

14. **Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?**

    CME does not seek to make submissions in response to question 14.

15. **Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?**

    CME does not have any direct concerns with the operation of the worker's duty of care under the model WHS Act.

    However, CME recommends that the model WHS Act clarify that workers have a duty to report any act or incident that gives rise to concerns for health and safety to the PCBU before those issues are reported by the worker to third parties. This would enable the PCBU to take measures in a timely manner, and ensuring consultation occurs directly between employees and the employer in the first instance.

16. **Question 16: Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?**

CME does not seek to make submissions in response to question 16.

17. **Question 17: Have you any comments relating to the principles that apply to health and safety duties?**

    CME does not seek to make submissions in response to question 17.

18. **Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?**

    CME refers to comments in relation to Question 10.

19. **Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?**

    As noted in the submission above, the prescriptive consultation requirements in Part 5 of the WHS Act 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.

    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.

20. **Question 20: Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?**

    Companies take a holistic approach to workforce consultation that involves both formal and informal consultation such as 'tool box talks'. Flexible approaches to consultation are required to take advantage of all opportunities to reach the broadest range of employees. CME considers large scale reform to Part 5 of the WHS Act is needed to help facilitate this.

21. **Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?**

    CME repeats its submission in respect of HSRs above.

22. **Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?**

    CME does not seek to make submissions in response to question 22.

23. **Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as an HSR or member of a HSC, or who raise WHS issues in their workplace?**

    CME is not convinced there is a need for specific discrimination provisions in the WHS Act given the general protections and mechanisms already provided for under state and federal anti-discrimination and the *Fair Work Act 2009* (Cth). While is it noted that other jurisdictions have adopted Part 6, there appears to have been quite limited use of it as evidenced by the case law.

24. **Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?**

    CME considers that the WHS Act should only provide for entry to workplaces by WHS inspectors appointed under the Act. Union right of entry is more appropriately dealt with in general workplace and industrial relations legislation.

    CME considers direct consultation between employers and employees is an essential component of workplace health and safety, while the involvement of third parties through union right of entry could turn this into an adversarial process and act as an impediment to effective consultation and productive safety outcomes.

CME repeats its comments and recommendations in the submission above concerning right of entry.

25. **Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?**

    CME does not seek to make submissions in response to question 25.

26. **Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?**

    CME does not seek to make submissions in response to question 26.

27. **Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?**

    CME does not seek to make submissions in response to question 27.

28. **Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?**

    CME supports a move away from prescription, towards a best practice, risk-based approach to WHS management.

    In CME's view, the fact that an industry participant might be required to seek an exemption is an indicator that the legislation is too prescriptive. A risk-based approach to WHS management should obviate the need for exemptions, and avoid associated inefficiencies.

29. **Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?**

    CME does not seek to make submissions in response to question 29.

30. **Question 30: Have you any comments on the incident notification provisions?**

    There is a lack of certainty in whether mental injuries are notifiable incidents under the WHS Act and around what steps must be taken to protect an individual's personal information when such notifications are made. CME notes that the requirement to report on the cause of a mental injury overlooks the potential complexity of such injuries, and difficulties associated with reporting on such injuries, where the nature and cause of such injury may not be readily identifiable, particularly on remote work sites where there may be a time delay in accessing specialist medical opinions.

    CME repeats its comments in the submissions concerning psychological hazards, and question 5 above.

31. **Question 31: Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?**

    CME is aware of positive feedback from industry in relation to the New South Wales (NSW) Department of Planning and Environment Resources Regulator's Causal Investigation Policy. The NSW Causal Investigation Policy supports the timely dissemination and sharing of information, and to facilitate progressively higher standards of work health and safety. CME considers there is an opportunity to codify an approach consistent with the NSW Causal Investigation Policy.

    CME notes that the NSW Causal Investigation Policy contains an express protection that all documents and information gathered in the investigation will not, to the extent allowed by law, be used for any criminal or civil legal proceedings, or for disciplinary action. This is an effective means of encouraging honest and transparent cooperation with the investigation process. In turn, it is also likely to result in a more efficient use of the regulator's resources and, more broadly, supports the objects of the WHS Act.

    CME support the comment submitted by the Minerals Council of Australia in this regard.

32. **Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?**

    CME does not seek to make submissions in response to question 32.

33. **Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?**

    CME repeats its comments in the submission above concerning penalties.

34. **Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?**

    CME has consistently advocated for a hierarchy of enforcement responses to deal with non-compliance in safety to enable 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 enforcement framework needs to strike a balance between deterrence and risk management flexibility.

    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. Resorting to a punitive and high penalty environment is not conducive with this approach. There is no evidence to clearly link higher penalties to improved safety outcomes. CME advocates that prosecutions should be avoided, and enforceable undertakings used as an alternative to prosecution.

    Where prosecutions are brought, these should be instituted in a timely manner. CME notes that the WHS Act permits a person, which may include a member of the public, to make a written request to the regulator to bring a prosecution, if none has been brought by the regulator. This process extends the overall time that it may take to resolve proceedings. CME considers there is a need to ensure the objective of increasing the sharing of WHS learnings and expediting investigations into incidents is not negatively impacted by any extension to third parties including unions.

35. **Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?**

    CME does not seek to make submissions in response to question 35.

36. **Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?**

    CME supports the use of enforceable undertakings as an alternative to prosecution.

    CME considers enforceable WHS undertakings have the potential to lead to improved safety outcomes, for example, by encouraging innovation by duty holders to find new and innovative ways of complying with their duties, and by seeing immediate steps to improve WHS outcomes following WHS incidents. CME considers this is consistent with the objectives of the model WHS Act.

    CME repeats its comments in the submission above concerning enforceable undertakings.

37. **Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?**

    CME opposes any prohibition on insurance in respect of offences under the WHS Act and Regulations.

    Insurance protecting companies and officers in respect of costs associated with breaches of legislation are a commercial necessity. Without insurance, the cost and risk of doing business in Australia might be such as to drive some businesses to lower cost and risk jurisdictions. This would have a net adverse impact on business and productivity in Australia.

    Similarly, insuring directors and officers in respect of liability associated with breaches of legislation is an important step in attracting and retaining quality leadership and management. If such insurance were not available, many potential leaders and managers may decline to be involved leadership and management positions.

    A breach of WHS legislation may involve death, serious injury, lost productivity, loss of workforce morale, a reduction or shut down in operations. These matters provide a considerable incentive for corporations and their leadership to work towards strong WHS outcomes. There is no evidence that

the fact that insurance may be available in respect of breaches of the WHS Act and Regulations encourages an inferior WHS performance