AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

Submission to the exposure draft

Work Health & Safety Bill 2014 (WA)

February 2015

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 96 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to those industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

The resource industry currently employs more than 1.1 million people either directly or indirectly and accounts for 18% of economy activity in Australia[1] (double its share of a decade ago). Australia's earnings from resources and energy commodities is projected to increase at an average rate of 7% a year from 2013-14 to total $274 billion in 2018-19[2].

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[1] Reserve Bank of Australia research discussion paper, *Industry dimensions of the resources boom, February 2013*

[2] Bureau of Resources and Energy Economics, *Resources and Energy Quarterly – September Quarter 2014*

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Executive summary

- AMMA welcomes the opportunity to provide input into the "green" draft of the WA Work Health & Safety Bill 2014 (the draft Bill), which will determine how WA participates in Australia's nationally harmonised, state-regulated work health and safety system.

- AMMA has consulted with its membership over the draft Bill and has identified in this submission key areas of concern for AMMA members.

- This includes issues raised by the Bill's departures from the Model Work Health & Safety Act (the Model Act) and features of the Model Act proposed to be adopted in the draft Bill that could have unique implications for WA businesses and therefore warrant special consideration and attention.

- AMMA notes the draft Bill is one for general industry rather than the resource industry specifically but urges the government to take into account the appropriateness of this Bill for the resource industry as a key objective.

- AMMA members that have had input into this submission include those operating in sectors such as metalliferous mining, oil and gas, and mining construction.

- AMMA notes that the stated aims in drafting the draft Bill include reducing red tape; keeping down compliance costs; keeping modifications to the Model Act to a minimum to maximise the benefits of harmonisation; and adopting the most appropriate and suitable laws, regulations and codes of practice for WA. These aims have helped to guide AMMA's submission.

Exclusions from the draft Bill

- AMMA notes there are three (formerly four) key areas where WA will depart from the Model Act by declining to adopt:

    - The reverse onus of proof on employers / persons conducting a business or undertaking (PCBU) in cases where workers allege they have been discriminated against for exercising a right under health and safety laws (Part 6 of the draft Bill; s110 of the NSW Work Health & Safety Act).

    - The ability for elected health and safety representatives (HSRs) to direct a worker to cease work in the event there is a reasonable concern of a serious risk to health and safety (s85 of the NSW Act) noting this right exists for individual workers to stop unsafe work at common law.

- The right of entry laws from the Model Act, with WA having referred instead to its existing Industrial Relations Act 1979 (s49G and s49I to s49O).

- While AMMA and its members see great benefits from consistency across jurisdictions in appropriate areas, noting that nearly every jurisdiction has departed in some way from the Model Act in implementing it.

- In NSW, for instance, unions retain a very limited right to bring prosecutions which does not exist in any other jurisdiction.

- With this in mind, AMMA considers the above exclusions are sensible departures from the Model Act and that the benefits of harmonisation will not be lost despite these and other appropriate differences that recognise the unique needs of WA businesses.

- As one AMMA member succinctly put it:

> *"WA mining organisational culture has some great strengths and I do not see why these strengths should be diluted to 'tidy things up'. Picking up on good concepts from other jurisdictions is another matter..."*

Brand new provisions in WA

- AMMA notes the draft Bill contains some provisions that do not currently exist under the WA Occupational Safety & Health Act (OSH Act) which will have significant consequences for employers.

- In areas such as the introduction of new and more stringent officers' duties, and the requirement for health monitoring, AMMA does not necessarily oppose the draft Bill's provisions. However, much greater clarity, sufficient educational and promotional support, and sensible transitional periods will be essential, particularly and that no WA employers will be grappling with these duties for the very first time.

- **Transitional periods:** AMMA notes the government proposes transitional periods of around 12 months where a staggered approach is deemed necessary. AMMA supports transitional periods being applied but believes that in relation to some brand new duties such as health monitoring and officers' duties, an even longer transitional period could be warranted.

- It is also appropriate that the government, in partnership with industry, use these transitional periods to actively inform the employer community of the changes that are coming. This will allow employers to inform themselves, train managers and supervisors, and review procedures and processes.

- **Maximum penalties:** AMMA notes that contrary to previous WA Government indications, the draft Bill adopts the maximum penalties that apply under the Model Act, rather than retaining the current maximum in WA. This change would increase maximum penalties for a Category 1 offence from $625,000 under the WA OSH Act to $3 million under the Model Act.

- This is a massive increase about which employers were not previously warned.

- There should be some basis or evidence for such an increase, and in the absence of a sound basis, such a massive quantum rise should not occur. Alternatively, if the government was determined to increase penalties to these levels, there should be a phased increase supported by a proper process of information and promotion.

Union access to workplaces – Part 7

1. The WA Government has held to its previous commitment that it would not adopt the Model Act's provisions in relation to union access to workplaces (right of entry).

2. Part 7 of the draft Bill therefore entirely omits the right of entry provisions contained in s116 to s151 of the Model Act taken up by other jurisdictions.

3. According to the draft Bill, union access to workplaces for WA employers will continue to be governed by the WA Industrial Relations Act instead of having specific provisions included in the WA Work Health & Safety Act.

4. The provisions that continue to apply in relation to right of entry are those contained in the Industrial Relations Act 1979 (s49G and s49I to s49O).

5. AMMA maintains that the existing IR Act provisions have worked well for industry in WA and we can see no reason to depart from them as part of the harmonisation process. AMMA and its members can see good reasons for continuing to keep right of entry as an IR rather than safety matter going forward.

6. A sample of AMMA member comments in this regard are included below:

> *"Right of entry is predominantly an industrial issue, not a safety issue."*
>
> *"This will prevent 'safety' being hijacked by other issues."*
>
> *"I do support right of entry if there is a genuine health and safety issue that poses a significant threat to a person's wellbeing. Unfortunately, I believe this may also see health and safety used as a pawn."*
>
> *"Unions have a very good grasp on manipulating safety to their benefit; keeping this separate would be good."*

Reverse onus of proof – Part 6

7. The WA Government has kept its promise not to adopt the Model Act's provisions that put a reverse onus of proof on employers responding to discrimination claims (eg claims from workers alleging they have been discriminated against for raising health and safety issues).

8. The relevant provisions appear under Part 6 of the draft Bill, with the contrasting Model Act provisions appearing under s110 of the NSW Work Health & Safety Act. The provisions adopted in NSW and other jurisdictions would have the effect of presuming the dominant reason for a course of conduct (such as terminating a worker's employment) was a "prohibited" one (such as because the worker was elected a health and safety representative if such a factual circumstance exists) unless the employer could prove otherwise.

9. AMMA supports the draft Bill excluding these specific provisions of the Model Act that have been adopted in other jurisdictions.

10. AMMA and its members firmly believe that the onus should always rest on the one making the allegations rather than the party forced to defend them. Imposing on employers a reverse onus of proof is unacceptable, inequitable and an abuse of due process in this and other areas of workplace legislation but unfortunately it is increasingly common in Australia's workplace regulation.

11. As one AMMA member remarked:

> *"All claims should be based on merit and investigated accordingly."*

12. And another:

> *"It should be up to the individual to provide the evidence of discrimination."*

13. And another:

> *"[Adopting the reverse onus of proof would be] likely to lead to very considerable 'internal red tape' in organisations … and somewhat of a fear-based approach. It would cost the industry hundreds of millions of dollars in extra costs and opportunity costs … It also seems to turn a generally accepted legal principle on its head, for what end I'm not sure."*

Powers of HSRs – Part 5

14. The WA Government has followed through in the draft Bill on its commitment not to adopt the Model Act's powers for elected health and safety representatives (HSRs) to direct unsafe work to cease.

15. Under s85 of the NSW Act, which is based on the Model Act, a health and safety representative may direct a worker in their work group to cease work if they have a reasonable concern that carrying out the work would expose the worker to a serious risk to health or safety emanating from an immediate or imminent exposure to a hazard.

16. While that power has, appropriately in AMMA's view, not been picked up in the draft Bill, individual workers do retain the right at common law to cease unsafe work.

17. Implementing the Model Act's provisions in this area would in AMMA's view be unnecessary and no evidence has been provided to warrant a departure from the current satisfactory WA arrangements.

18. In the view of one AMMA member company:

> *"I believe that the power to stop work should be a consultative effort among health and safety professionals, supervisors and employees."*

19. The reality is that providing HSRs with this formal power would create the risk of abuse in a variety of circumstances, and would continue to promote an industrial relations approach or mindset on safety issues. As one AMMA member pointed out:

> *"Giving HSRs this power would be counter-productive. It is actually quite difficult to get workers to become HSRs in some organisations. Most workers don't want the stress of such a role – they just want to do their job in the main in a straightforward way – and contribute to the larger goal of the organisation. Giving HSRs this type of management power will turn people who would otherwise want to be a HSR off it and possibly attract a minority type of person who would enjoy an adversarial type of approach. It also seems to be a de facto way of introducing a 'union rep' type mentality into the workforce."*

20. AMMA notes the draft Bill also removes the role of the "deputy HSR" contained in the Model Act which, if retained, would have imposed extra compliance and training costs on employers. AMMA supports this modification to the Bill.

Maximum penalties – s31

21. The WA Government, for at least four years leading up to the draft Bill's release, was extremely vocal about not taking on the Model Act's higher maximum penalties ($3 million for a Category 1 offence compared with $625,000 in WA).

22. However, s31 of the draft Bill does adopt the same penalties as the Model Act in relation to a Category 1 offence for "reckless conduct".

23. While some would argue that penalties should be the same for the same offence no matter where in Australia it occurs, and these penalties apply only to the absolute worst and most flagrant offences, there is strong evidence to suggest that monetary penalties alone do not create safer outcomes.

24. As one AMMA member described it:

> *"The size of the penalty is not a large driver of any organisation I have ever worked for."*

Health and safety duties – Part 2

25. Sections 17, 18 and 19 (and to a lesser extent s16) of the draft Bill relate to employers' duty to manage risks so far as is "reasonably practicable".

26. According to the supporting information provided by WorkSafe WA to inform stakeholder submissions to this review, the intention is clear in the Model Act's provisions that this duty only applies to aspects of the workplace over which the PCBU has "control".

27. However, in the current South Australian version of the Model Act, specific provisions were inserted to clarify that duty holders were only required to eliminate / minimise risks to the extent they had control over them.

28. For the sake of extra clarity, the WA Bill adopts the SA provisions in this regard. While AMMA believes this was already clear, we support increased certainty via the modified SA provisions being inserted into the WA Bill.

Officers' duties – Part 2

29. A key difference between the existing WA OSH Act and the draft Bill is in the area of officers' duties.

30. Under s27 of the draft Bill, WA officers would for the first time be required to take proactive steps and exercise "due diligence" when it comes to health and safety arrangements in an organisation. Under the existing WA OSH Act, no proactive measures are required of company officers.

31. AMMA notes the draft Bill picks up the Corporations Act 2001 definition of "officer" and this means, in simple terms, their decision-making can have a substantial impact on financial viability of the company. It is not generally meant to capture middle management and below.

32. Given that this is a substantial change for WA duty holders, a sensible transitional period of one to two years and other support measures should be implemented in order to give WA companies time to ensure their officers are sufficiently trained in the new obligations.

33. Many AMMA members considered that while it would take some time to implement, the new proactive duties would continue to drive a high degree of health and safety focus of companies at management level.

34. AMMA member comments in that regard include:

> *"It is simply strengthening the chain of command."*
>
> *"Proactive requirements will put officers into forward planning across the board."*
>
> *"It will drive greater accountability for resource and funding requirements."*
>
> *"This will encourage and require officers to become more involved in the management of OHS."*
>
> *"This is a fundamentally important part of the Act. Everyone who has a responsibility to other people and ability to control risks should be required to do so."*
>
> *"As long as the message and definition is clear."*

35. AMMA does not, however, support increased personal and professional liability for company officers in areas over which they have no control. In some cases, for instance, officers are removed from production and can have little impact on safety. As one AMMA member observed:

"Being proactive in general is a good approach. What is actually regarded as probative is another matter. If this is not overly prescriptive then this could result in value-add to safety outcomes. If it results in a lot of administrative burden or loss-of-management-focus by management and workers, then it won't add value, it will detract."

Definition of 'worker' – Part 1

36. AMMA notes the draft Bill excludes volunteers from the definition of "worker" under s7. However, PCBUs and others still owe a duty of care to volunteers which are included under the reference to "other persons" at the workplace to whom a range of duty holders owe a duty (and vice versa).

37. Prisoners have also been removed from the draft Bill's definition of "worker" unless they are on day "work release" in which case they fall under the definition.

38. AMMA sees both the above exclusions from this part of the draft Bill as sensible and practical.

Enforceable undertakings – Part 11

39. A key difference between the draft Bill and the Model Act adopted in other jurisdictions relates to enforceable undertakings.

40. Under the Model Act, enforceable undertakings can be entered into as an alternative to the prosecution of PCBUs.

41. The draft Bill does not include enforceable undertakings as an alternative to prosecution but does allow them as an option once a matter has gone to court. In this regard, AMMA understands the draft Bill retains the current provisions of the WA OSH Act.

42. AMMA notes that to date the WA courts have not taken up the option of entering into enforceable undertakings which could include, for instance, a commitment by the PCBU to train staff in order to prevent future incidents.

43. The information provided by WorkSafe WA as to the reasons for the draft Bill excluding the Model Act's ability for enforceable undertakings to be a pre-litigation option (ie to be used as an alternative to legal action) is that if it was included WorkSafe would have to monitor the enforceable undertakings that are entered into. This would, according to WorkSafe, divert its resources away from investigations and compliance towards monitoring compliance with those undertakings.

44. AMMA does not see this as a valid basis on which to deny WA employers the same alternatives to prosecution as exist in other jurisdictions:

    - The concern expressed by WorkSafe WA would be equally valid for any of the other jurisdictions that have successfully allowed undertakings as a pre-litigation option. If this has been overcome elsewhere, it can be overcome in WA.

    - All systems should avoid litigation and encourage amicable, negotiated resolution of matters to the extent possible. WA employers, employees, unions, inspectors and others should surely have the same avenues and capacities to settle matters by undertakings as those in other states.

45. AMMA urges the WA government to include enforceable undertakings as a pre-litigation option in a revised WA Bill.

46. WorkSafe WA should seek to work with its counterpart state agencies to ensure it can play its role in supporting such a system, as effectively and cost-efficiently as possible. If this requires an increase in staff and / or extra resources to

provide employers with this important right and avenue to future safe and productive relations, extra funding should be allocated accordingly.

47. If WorkSafe was itself equipped to enter into such undertakings at the regulatory level, this would provide a very valuable alternative for employers, and a useful demonstration of a transformative and partnership-based approach to remediation and future compliance.

48. AMMA's view is that enforceable undertakings have worked well in a number of jurisdictions, and companies entering into them often do more than a financial penalty might require. They could be a pathway towards cultural and attitudinal change at workplaces and can be a foundation for very positive and safe workplace outcomes.

49. Availing employers of this option would therefore have the potential to improve safety outcomes more than monetary penalties would. It would have the added benefit of making the system less adversarial and unnecessarily punitive. It would be of concern if all other jurisdictions availed themselves of this opportunity and WA could not.

50. However, caution must also be exercised so that this option, if taken up, does not lead in practice to what one AMMA member described as "*regulatory staff trying to manage a business, which might be counter-productive*".

Prosecution timeframes

51. Under the Model Act adopted in other jurisdictions, a prosecution must be commenced within two years of a regulator becoming aware of an alleged offence.

52. Instead of retaining that two-year limit, the draft Bill has instead proposed a three-year limit although, according to WorkSafe WA, the aim will be to bring prosecutions on within 12 months.

53. AMMA believes that consistency in this area will have greater benefits than in many other areas, even if prosecutions are commenced within a year as planned. AMMA would urge the government to make the WA Bill consistent with other jurisdictions in this regard as there is no business case for state-based differences in this area.

54. As one AMMA member commented:

> *"Two years is more than sufficient. Dragging out the process is unfair to employees who have been the victim of an employer's failure to comply with legislative requirements."*

And another said:

> *"This is one area where 'harmonisation' seems a reasonable idea. I can't think of any reasons to make this three rather than two years – it would seem to be driven by 'making things easier for the regulator', giving such bodies 'more time to get things right'. I don't think this 'more time' would in fact be a benefit to the regulators and would in fact just increase their workload – nothing like a deadline to sharpen a focus."*

55. Furthermore, there would be a complication if WA provided for a longer timeframe for bringing matters than the other states. Where matters of concern arise nationally or across state boundaries, employers are going to work to resolve them as soon as possible according to the timelines operating in other jurisdictions, following or in parallel to any determination.

56. With the proposed different timeframe in WA, there is a risk the employer will have taken action, or a court will have signalled priorities for remediation, prior to WA even commencing matters under the model being canvassed.

57. Longer prosecution periods also make it more probable that key persons relevant to an investigation may have changed employers, moved outside the jurisdiction, their memory may have dimmed, or they may have passed away. A delay may well make the proper resolution of matters harder in such cases.

58. There is also a concern based on the adage of "justice delayed is justice denied". AMMA maintains that WorkSafe WA should be resourced to properly investigate matters and take action within a reasonable timeframe, which in this case would be two rather than three years to align with the other jurisdictions. If the inspectorate is under-resourced, this should be raised within government.

59. Not to mention the consequences for an injured worker's workmates, families and communities of prosecutions over such matters being unduly protracted and left unsettled.

60. This may also be in contrast to the WA Public Sector Commission's code of ethics which commits to making decisions that are "honest, fair, impartial, and timely …"

61. Consistency of timeframes for prosecution appears quite fundamental to the operation of harmonised legislation and in AMMA's view is one of the areas in which departure from the model should not be considered.

Access to accommodation – Part 10

62. There has been a great deal of discussion recently in relation to the issue of proposing that unions be given access to work camps and accommodation villages in terms of specific right of entry powers. AMMA notes this has also come up in relation to the recent inquiry into FIFO operations and potential mental health impacts.

63. AMMA urges caution in the strongest possible terms in this regard and remains opposed to any opening up of employer-provided personal accommodations to union officials conducting union business.

64. This is both unwarranted and unnecessary and in AMMA's view will not, contrary to some commentators on the issue, improve mental health outcomes for workers on remote sites.

65. **Employee privacy:** There are issues of employee privacy and the rights of non-union members not to be disturbed in their private lodgings. These are places that should be free of industrial relations ideology and confrontation.

66. AMMA maintains that the only parties that should have access to accommodation villages, aside from the workers themselves, is an authorised government inspectors or representatives of the employer. AMMA maintains that unions are not sufficiently qualified to inspect the safety or quality of accommodation.

67. Under no circumstances should this Bill adopt measures that could be used to put further industrial pressure on employers in relation to agreement making and which will simply be used in many cases by unions to recruit new members.

68. This is a Bill, and will be an Act, about safety. Unions' capacity to organise and sell participation in their organisations and how this is and is not supported in legislation should be completely separate from the protection of employee health and safety.

69. As one AMMA member put it:

> *"Unions are a third party organisation that should have no automatic right to enter accommodation, similar to any salesman peddling the membership benefits of any organisation."*

70. AMMA notes that according to information provided by WorkSafe WA to inform stakeholders to this review, employer-provided accommodation is not currently considered a workplace and WorkSafe WA inspectors are not

currently able to issue improvement and prohibition notices in that environment.

71. The draft Bill, however, inserts a new provision under s195(5) allowing inspectors to issue notices in an accommodation environment as appropriate.

72. AMMA does not support this new provision being included in the WA Bill and believes the status quo should be retained.

Welfare of workers

73. Under the current WA OSH Act, there is no reference to ensuring the "welfare" of workers, only their "health and safety".

74. In contrast, the draft Bill and the Model Act adopted in other states includes the concept of "health, safety and welfare" throughout, which represents a new statutory duty of care for WA employers in recent times.

75. This extra dimension will require increased clarity in the Bill itself and targeted education for WA employers as to exactly what is required.

76. For instance, under s19(3)(e) of the draft Bill under the "primary duty of care", PCBUs are required to provide "adequate facilities for the welfare at work of workers in carrying out work for the business …"

77. AMMA members are very concerned that it is not entirely clear from the Bill what is meant by this duty. Greater clarity and specificity is required and, if possible, further consultation with industry over the appropriateness of the inclusion of this new aspect of worker safety.

78. While many AMMA member companies already work in a "values-based" culture where the welfare of employees is taken into account, greater clarity around exactly what is required from a legal and regulatory point of view is warranted.

79. Otherwise, companies could face immense costs from trying to provide "welfare" solutions to employees of all races, religions, sporting backgrounds, etc but still come under fire for falling short.

80. Providing for the welfare of employees appears an open-ended consideration and to create a duty which is very difficult to define and discharge. There is also a question of whether this is a duty which should in whole or in part lie with the employer, and where such a duty starts and stops.

Health monitoring

81. For the first time in WA, the draft Bill proposes a requirement for monitoring the health of workers.

82. Unfortunately, the Bill lacks sufficient detail in relation to these brand new duties for employers in WA.

83. Exactly what sort of monitoring will be required? How much will this cost? Who will keep the records? This is not entirely clear.

84. As one AMMA member observed:

> *"Our industry is by nature serviced by a transient workforce, so where does health duty of care start for the new PCBU? Further resources will be required to support due diligence and duty of care systems to provide evidence of controls beyond those that currently exist."*

85. These are critical issues that could have huge consequences for employers, which is why urgent clarification is needed. If Regulations are to be made specifying what is required in terms of "health monitoring" for general industry, employers and their representatives should be consulted on the development of Regulations before they are finalised.

86. Again, if this is imposed, WorkSafe WA has a duty to work with employers to inform them of what this will mean in practice and how they could best try to comply with this obligation.