appea the voice of australia's oil and gas industry

Submission
January 2015

# Comments on WA Work Health and Safety Bill 2014

## CONTENTS

## KEY POINTS

- The proposed changes are aligned with the stated intent to modernise WHS legislation, with opportunities for further improvement as identified in this submission. APPEA recognises that this is not a straightforward task, as there are many features of the Model WHS Act that seek to affirm positive rights and which may unintentionally lead to issues of industrial conflict.

- It is imperative that the legislation is supported by complementary Regulations and Codes of Practice that have been thoroughly reviewed by industry to avoid unintended consequences of prescription by stealth

- In preparing its submission, APPEA has worked closely with CME and is fully supportive of their detailed comments. This submission will emphasise the key areas of interest to the WA oil and gas industry.

- APPEA commends the WA government's efforts to work with industry to reform all of the health and safety legislation and to reduce regulatory overlap and looks forward to continuing to support these reforms.

## GENERAL

APPEA supports the general principle of objectives based health and safety legislation, which has supported a positive and improving performance in health and safety both in Australia and overseas.

There are a number of relevant legislative health and safety activities that relate to this bill, including development Of WHS regulations, the review of Mining, Petroleum and Major Hazard Facilities and the COAG review of the Model WHS Act and Regulations.

APPEA notes the importance of maintaining consistency between these activities to support modernisation and continuous improvement in health and safety performance. The Green Bill review should also consider data generated by these complementary activities.

Establishing clear boundaries for the applicability of Work Health and Safety legislation, as opposed to that applied to industries that manage higher hazards, will help to avoid duplication arising because of disputed jurisdiction. This exists at some sites in Western Australia and creates some difficulties for both industry and government agencies.

The bill specifically lists a number of legislative instruments outside the scope of this legislation. APPEA recommends that this list be reviewed to ensure that sites with a higher level of hazard (such as sites defined as major hazards facilities under the Dangerous Goods Act) are solely addressed by more relevant legislation and not subjected to duplicative regulatory oversight.

The green bill is consistent with the WA government's stated intent to remove industrial relations aspects that are addressed elsewhere, including clauses associated with union right of entry, stop work rights for health and safety representatives (as opposed to the duty to stop unsafe acts captured in general duties) and the reverse onus of proof in discrimination matters.

The green bill falls short of improving post-incident response, by increasing the time limit for prosecution, removing the option of enforceable undertakings and proposing a punitive level of penalties, which appear contradictory to the intent to modernise the legislation.

APPEA is aligned with and supports the comments provided by CME in their submission. In addition, there are two areas where APPEA has additional comments:

- The specific clauses that address accommodation in support of industrial activity are unnecessary and should be removed. How accommodation issues are to be addressed should be a subject for guidance notes supporting regulations and/or in agreed codes of practice.
- The proposed use of the regulator to arbitrate disputes between the workforce and businesses is an unconstructive and inefficient use of regulators time. The onus should be on the parties to take reasonable steps to reach a settlement. The regulator can address issues where settlement is not achieved by considering whether steps taken have been reasonable and initiate enforcement actions as appropriate.

## REMOVAL OF UNNECESSARY CLAUSES

APPEA notes that the bill proposes not to adopt unnecessary clauses associated with:

- Union right of entry
- Power of health and safety representatives to cease work
- The reverse onus of proof in discrimination cases

These deletions are supported. APPEA notes that they are addressed in other legislation and could lead to unintended consequences of supporting spurious industrial actions. The clause associated with the power of health and safety representatives to cease work is at odds with the obligation for individuals and companies to act to remedy unsafe conditions under the general duties and is potentially divisive to a positive safety culture in the workplace.

## POTENTIAL AREAS FOR IMPROVEMENT

Reference is made to accommodation in section 19 Primary Duty of Care. This appears unnecessary given the general concept of Person in Control of a Business or Undertaking and may lead to unnecessary confusion because of the broad variety of accommodation used to support business activities. Further elaboration of the applicability of accommodation would be better provisioned through the use of guidance notes.

Hence APPEA recommends that references to accommodation be removed in order to avoid unnecessary confusion and debate.

In Part 6, Div 1, the treatment of discriminatory conduct, there are attempts to prohibit such conduct being taken against workers, which is a concept the APPEA wholeheartedly supports. The provisions could be further enhanced by ensuring that these protections cannot be used maliciously.

Further, there are further steps that can be taken to balance intervention provisions:

- Use of civil rather than criminal sanctions
- Removal of prospective workers from clause 105 (addressed under the Fair Work Act)
- Reducing penalties associated with Clause 107 vs 104, reflecting the lesser significance of this conduct
- Reducing time limitation for claims of discriminatory conduct to 21 days as per the Fair Work Act

References to Australian Standards in the Bill are not consistent with the principles of objectives based legislation, being prescriptive in nature. These should be removed from the bill, whilst retaining the option to include relevant standards in Codes of Practice, which should be developed in consultation with industry.

## POST INCIDENT PROVISIONS

There are a number of post incident provisions that serve to detract from the modernisation of the legislation:

- The exclusion of enforceable undertakings – the proposed removal of this option severely reduces the flexibility available to avoid prosecution and penalties. Retention of this provision would enable new solutions to be identified to a given problem and would support the utilisation of emerging technology or novel approaches. APPEA recommends that this provision is retained.
- Excessively punitive penalty levels – The level of penalties is inconsistent with a fair basis for assigning costs as described by provisions of The Sentencing Act relating to equivalent imprisonment terms. Using this method would imply a maximum proposed equivalent sentence of 50 years, which is excessive by any standard. APPEA recommends that the penalty amounts be reduced to a level that discourages non-compliance without acting as a deterrent to business activity in the state.
- Time limitation period – the proposed extension of time limits for prosecution from 2 to 3 years serves only to encourage indecision and unnecessarily extend the uncertainties for industry. APPEA recommends that the model WHS Act 2 year limitation is retained in support of the intended modernisation approach.