



# Submission on the draft Work Health and Safety Bill 2014

WorkSafe WA

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## Contents

About CME .....	3
Recommendations .....	3
Context .....	5
Improving safety and health outcomes .....	5
Alignment to, and consistency with, resource safety legislation .....	6
Adoption of best practice elements of COAG review and continued focus on removal of unnecessary prescription.....	7
The Green Bill.....	7
Punitive approach and increase in maximum penalty levels .....	8
Exclusion of enforceable undertakings .....	9
Time limitation period .....	11
Treatment of accommodation .....	12
Treatment of discriminatory conduct.....	13
Treatment of volunteers.....	13
Additional types of inspectors .....	14
Instruments of declaration .....	14
Regulations and codes of practice.....	14
Conclusion .....	16

## About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia funded by its member companies, which generate 95 per cent of the value of all mineral and energy production and employ 80 per cent of the resources sector workforce in the state.

The Western Australian resources sector is diverse and complex, covering exploration, processing, downstream value adding and refining of over 50 different types of mineral and energy resources.

In 2013-14, the value of Western Australia's mineral and petroleum production was \$121.6 billion, accounting for 91 per cent of the state's total merchandise exports. Furthermore, the value of royalties received by the Western Australian government from the resources sector increased by 33 per cent from the 2012-13 financial year to reach a record \$6.98 billion in 2013-14.

## Recommendations

### **CME supports the broad principles of modernising work health and safety laws in Western Australia to formalise best practice risk based outcomes focused principles for safety legislation.**

CME recommends key concepts of the national model work health and safety (WHS) legislation be adopted in Western Australia, recognising the potential benefits to organisations operating in a harmonised environment across jurisdictions.

However, in supporting modernised legislation in Western Australia, CME recommends the review of current legislation should focus on retaining only best practice elements of the Model WHS Act and Regulations and remove unnecessary complexity and regulatory and administrative burdens.

CME recommends consideration of the following issues is critical in any move to adopt new safety legislation in Western Australia:

- clear objective – a clear objective to improve safety and health outcomes through adopting a risk based approach and removing unnecessary regulator and administrative burden;
- alignment – maintain separate but aligned general industry and resources safety legislation;
- best practice - adoption of best practice elements from existing and Model WHS legislation including consideration of the COAG review and continued focus on removal of unnecessary prescription; and
- timing - timing of introduction to ensure minimal regulatory burden.

CME is broadly supportive of the proposed WHS Bill (the Green Bill), however, has a number of concerns regarding specific provisions. To address these CME recommends:

- the Regulations accompanying the Green Bill remain focused on a best practice risk based approach to safety and health management and this goal is not thwarted by high levels of prescription;
- Codes of Practice under the Green Bill are only adopted where these are appropriate to the environment in Western Australia, where they have been reviewed in consultation with industry and where prescriptive requirements are not couched in language which is mandatory or which imposes an unnecessary burden on organisations;

- a critical review of the remainder of the package of Model WHS legislation be undertaken with industry input to ensure it reflects best practice and achieves the objective of improving safety and health outcomes;
- on an ongoing basis, there is resources sector representation on the Commission for Occupational Safety and Health as a mechanism to ensure ongoing alignment between general and resources safety legislation throughout the current reform process;
- the Green Bill and resources safety legislation and, in particular, the WHS (Mines) Bill continue to progress through Parliament together following appropriate consultation with industry;
- a thorough review of the Green Bill and WHS (Mines) Bill be undertaken against the outcomes of the COAG review in consultation with industry;
- the penalties in the Green Bill be reviewed to provide for enforcement mechanisms which improve safety outcomes by encouraging innovation in achieving compliance with the Act;
- the Green Bill include enforceable undertakings as an alternative enforcement mechanism in the terms included in the Model WHS Act;
- if enforceable undertakings are a feature of the Green Bill, an enforcement policy be developed by WorkSafe WA which clearly articulates appropriate transparent criteria for considering and entering into enforceable undertakings;
- the time limitation period for the commencement of prosecution for offences be aligned with the Model WHS Act to ensure any prosecution typically commences within two years of the date of the alleged contravention;
- the full range of accommodation arrangements and potential complexities arising in determining jurisdiction be considered before finalising any accommodation provisions of the Green Bill and WHS (Mines) Act;
- industry be provided with an opportunity to comment on the suitability of provisions relating to accommodation once it is clear how the provisions addressing this area in the Green Bill and the WHS resources legislation will interact;
- provision be included in the Green Bill to ensure protections from discriminatory conduct cannot be used maliciously by workers.
- if additional persons are to be appointed as inspectors a mechanism be included in the Green Bill to require these persons to have adequate training in WHS matters.

These issues are discussed in more detail below.

## Context

The Western Australian resource industry welcomes the opportunity to express its views on the Green Bill.

CME has consistently supported the broad principle of national harmonisation of WHS laws and has also consistently supported the Western Australian Government's opposition to key areas of the Model WHS Act. These were: the level of penalties; union right of entry; the power of health and safety representatives to order stop work; and the reversal of the onus of proof in discrimination matters.

CME is pleased the modernisation of WHS legislation in Western Australia has been progressed and is also heartened by recent statements made publically by WorkSafe WA the Model WHS Regulations will also be reviewed to reduce 'red tape'. Further consultation on how this will occur will be welcomed.

As has been expressed previously, CME considers the predominant driver of the harmonisation process had been to achieve consensus, rather than to deliver best practice safety legislation. Going forward, a detailed review of the WHS Regulations is required to ensure these achieve best practice, and unnecessarily prescriptive and contradictory elements are removed.

CME notes the COAG review of the Model WHS Act and Regulations is due to report in the first quarter of this year and considers this review should inform the further development of Western Australia legislation.

**CME supports the broad principle of modernising the Occupational Safety and Health Act 1984 by adopting the Green Bill, subject to the key issues identified in the submission below and a thorough review of the Green Bill against the outcomes of the COAG review.**

### Improving safety and health outcomes

CME's view is the primary driver for the adoption of revised safety legislation in Western Australia must be to improve safety outcomes. The resources sector has previously expressed concern with elements of the Model WHS legislation falling short of best practice. Specifically, in some areas, the West Australian legislative package has been more advanced.

CME considers it imperative the entire suite of Model WHS legislation (the Act, Regulations and Codes of Practice) be reviewed prior to any adoption in Western Australia to ensure the objective of improving safety and health outcomes is met. The challenge in reviewing only the Act, in the absence of the Regulations is determining to what degree this outcome will be met.

**CME supports in principle the adoption of the modernised WHS Legislation in Western Australia. However, considers it is imperative:**

- **the Regulations accompanying the Green Bill remain focused on a best practice risk based approach to safety and health management and this goal is not thwarted by high levels of prescription; and**
- **Codes of Practice under the Green Bill are only adopted where these are appropriate to the environment in Western Australia, where they have been reviewed in consultation with industry and where prescriptive requirements are not couched in language which is mandatory or which imposes an unnecessary burden on organisations.**

**CME recommends a critical review of the remainder of the package of Model WHS legislation be undertaken with industry input to ensure it reflects best practice and achieves the objective of improving safety and health outcomes.**

## **Alignment to, and consistency with, resource safety legislation**

CME supports the modernisation of two separate, yet strongly aligned, safety legislative instruments in Western Australia. It has long been the resource sectors' view separate safety legislation for mining and petroleum/major hazard facilities (MHF) is required to address sector specific hazards and risk management processes as well as provide adequate support from a dedicated regulator.

Industry supports an outcome focused, risk based approach to WHS legislation formalised across legislative instruments. Risk based legislation need not be prescriptive but rather allow the appropriate person with control over a matter to identify the risk control measures best suited to eliminating or minimising risks.

Areas of the legislation such as the hierarchy of controls should be consistent across legislative instruments so areas of a business covered by the general industry legislation and those covered by the resources specific legislation can speak a common 'language'. If inconsistency develops between the pieces of legislation there is an increased risk safety outcomes will be diminished as inconsistencies in the way in which a business understands risks in its different parts is likely to develop.

CME acknowledges the Green Bill and replacement legislation to the Mines Safety and Inspection Act 1994 (WA) (MSIA) are being progressed as separate instruments. As these Bills continue to be developed, alignment must be kept under constant review to ensure the separate pieces of legislation do not become misaligned as changes occur over time.

**CME supports, on an ongoing basis, resources sector representation on the Commission for Occupational Safety and Health as a mechanism to ensure ongoing alignment between general and resources safety legislation throughout the current reform process.**

In addition, CME has previously suggested it would be beneficial to extend the membership of the Safety Legislation Reform Ministerial Advisory Panel to include representation from WorkSafe WA.

### ***Ongoing reform agenda***

There are a number of separate reform programs for WHS legislation in Western Australia progressing. These include:

- this consultation on the Green Bill (which will presumably be followed by consultation on the accompanying Regulations);
- the review being undertaken of the structure of mining, petroleum and MHF safety legislation;
- the ongoing development of legislation to modernise the MSIA; and
- the review of the Dangerous Good Safety Act.

CME has consistently advocated for the Green Bill and for resources safety legislation to be developed together and ideally to be considered by Parliament in parallel.

CME supports the current consultation process underway for the Green Bill, however, is concerned consultation on the proposed WHS (Mines) Bill has not yet occurred. While it is understood Green Bill provisions will be mirrored in the WHS (Mines) Bill with the mining specific provisions inserted, industry has not yet had the opportunity to review these provisions.

It is critical the two pieces of legislation can be reviewed together prior to their implementation to ensure industry has an opportunity to comment on the complete package

of proposed legislation. At this stage it is not yet possible to ascertain a clear understanding of how these legislative instruments will inter-relate and impact on the resources sector.

For example, section 12(2) of the Green Bill excludes a number of specific industries from being covered by this Act given they have other safety legislative instruments in place. Given the proposal by DMP to integrate safety regulation of Major Hazard Facilities (MHFs) into an alternative piece of safety legislation potential exists for duplication if this is also not dealt with in section 12(2).

While Green Bill provisions may be supported in principle, it is not possible to provide full support until it is clear to what extent provisions will be mirrored in the WHS (Mines) Bill or otherwise apply to the broader resources industry.

**CME recommends the Green Bill and resources safety legislation and, in particular, the WHS (Mines) Bill continue to progress through Parliament together following appropriate consultation with industry.**

### **Adoption of best practice elements of COAG review and continued focus on removal of unnecessary prescription**

CME understands, in reviewing the Green Bill, Worksafe WA will take into account the recommendations of the COAG review of the Model WHS Act. Recommendations of the COAG review which improve safety outcomes and remove unnecessary prescription should be considered in the context of the Green Bill and inform the development of supporting regulations.

CME supports this approach, however, considers feedback should be provided to industry where further amendments are proposed and, if needed, afford the opportunity to respond. This is imperative to ensure there is a continual focus on removing unnecessary prescription and legislation adopted in Western Australia is best practice and suits the specific operating environment here.

**CME recommends a thorough review of the Green Bill and WHS (Mines) Bill be undertaken against the outcomes of the COAG review in consultation with industry.**

## **The Green Bill**

From the outset, CME has been engaged in the policy process to harmonise safety legislation across Australia. During this process, CME and the Western Australian Government, expressed concern regarding the implementation of the Model WHS legislation in Western Australia relating to four specific issues:

- union right of entry;
- power of health and safety representatives to cease work;
- the reversal of the onus of proof in discrimination cases; and
- the proposed level of penalties.

CME recognises the Green Bill has removed three areas of concern for CME. Namely, the removal of provision pertaining to union right of entry; the power of the health and safety representative to order cessation of work; and the reversal of the onus of proof in discrimination cases is supported by industry. However, CME continues to oppose the introduction of Model WHS Act penalty levels in Western Australia as will be discussed further below.

CME understands the Green Bill will form the basis for future resource safety legislation and as such, this submission is focused on those provisions with the potential to impact the resources sector.



The resources industry support the vast majority of proposed provisions in Green Bill, however, a number of these present concerns and are discussed in more detail in the sections below:

- adoption of overly punitive penalty scheme currently enshrined in the Model WHS Act;
- exclusion of enforceable undertakings;
- review of time limitation period; and
- appropriate process to review the accompanying Regulations and Codes of Practice.

### **Punitive approach and increase in maximum penalty levels**

CME notes the Government of Western Australia had previously indicated it would not adopt the penalties which are provided for in the Model WHS Act. CME supported that view.

The proposed level of penalties in the Model WHS Act for companies and individuals, which the Green Bill proposes to adopt, are inappropriately high. Logic which argues higher penalties incentivise ongoing innovation and continuous improvement in safety is fundamentally flawed.

CME appreciates the Model WHS scheme includes 'maximum' penalties and a number of considerations influence the amount ultimately imposed by the Courts for a breach of the legislation. However, the courts are highly unlikely to continue applying penalties consistent with those currently being applied for the same offenses should the Model WHS penalties be adopted. This is because the Court will start from a higher maximum and will apply any 'discounting' considerations (eg early plea, contrition, objective seriousness of the offence etc) to that maximum to reach a penalty it considers, in all the circumstances, appropriate.

Industry is concerned the penalty amounts are disproportionately excessive compared to a number of other serious offences in Western Australia.

More importantly, there is no evidence to support assertions higher penalty rates lead to better safety outcomes. Western Australia has consistent or better fatality and lost time injury frequency rates when compared to Australian jurisdictions where the model WHS penalties were adopted in 2012. This is supported by:

- the latest figures for notifiable fatalities (1 January – 31 October 2014) which show New South Wales, Queensland and Victoria each experienced more fatalities than Western Australia<sup>1</sup>; and
- the latest figures for serious workers' compensation claims which show Tasmania, Queensland, New South Wales and the Australian Capital Territory (each of which has enacted laws based on the model WHS Act) have higher rates of claims than Western Australia<sup>2</sup>.

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<sup>1</sup> Safe Work Australia, Notifiable Fatalities October 2014 Monthly Reports  
<http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/555/notifiable-fatalities-october-2014.pdf>

<sup>2</sup> 2014, Safe Work Australia, Key Work Health and Safety Statistics, Australia  
<http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/841/Key-WHS-Statistics-2014.pdf>



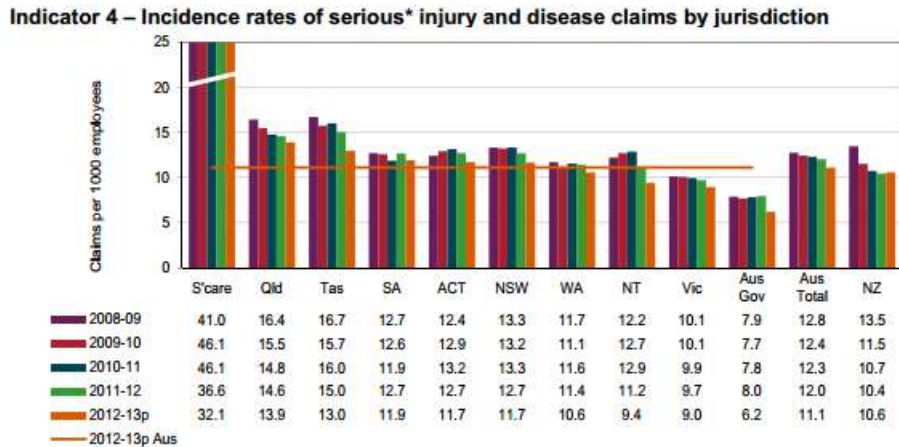


Figure 1<sup>3</sup>

CME considers the penalties in the Green Bill should be reviewed with an aim of establishing a compliance and enforcement regime which will best achieve safety outcomes and continuous improvement. That is, a graduated mechanism which encourages innovation in safety and compliance through a range of enforcement mechanisms, reserving prosecution and imposition of penalties for the most serious of offences.

Further, CME is concerned the inappropriately high penalties which may be imposed on individuals (including custodial sentences) may run the risk of dis-incentivising persons to act in senior management positions and may impact on safety outcomes by driving paralysis of decision making as people are afraid to take steps necessary for ensuring health and safety for fear of inadvertently breaching the legislation.

**CME recommends the penalties in the Green Bill be reviewed to provide for enforcement mechanisms which improve safety outcomes by encouraging innovation in achieving compliance with the Act.**

As discussed further below, CME also considers it is important a range of enforcement options are maintained in the Green Bill.

### Exclusion of enforceable undertakings

Industry does not support the proposed deletion Part 11 of the Model WHS Act which makes provision for the regulator to accept WHS enforceable undertakings.

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 removal is also inconsistent with the position the Department of Consumer and Employment Protection took in 2008 in its submission to the national review of OHS laws<sup>4</sup>. Specifically, in their submission, DOCEP submitted ‘the model OHS Act should provide the power to accept an enforceable undertaking from an alleged offender as an alternative to prosecution’ (emphasis in original).

<sup>3</sup> Safe Work Australia, Comparative Performance Monitoring Report, Sixteenth Edition, October 2014. <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/884/CPM16-Web.pdf>

<sup>4</sup> Department of Consumer and Employment Protection, National review into model occupational safety and health laws, Submission of the Department of Consumer and Employment Protection, p 39 available from <https://submissions.deewr.gov.au/sites/Submissions/OHSReview/Documents/112WADOCEP.pdf>

The position proposed in the Green Bill is enforceable undertakings would not be available as an alternative to prosecution and would only be available to the Courts as an alternative penalty mechanism where conviction has been recorded.

CME considers safety outcomes can be improved by enforceable undertakings as outlined below. This view is consistent with the findings of the national review into OHS laws<sup>5</sup>.

CME understands the reasons why consideration has been given to remove the ability for PCBUs and the regulator to enter into enforceable undertakings include:

- the perceived administrative burden and impact on resourcing of the regulator; and
- the perceived impact enforceable undertakings may have on safety outcomes by only requiring a PCBU to meet duties which it already has (and which it is alleged it has failed to meet).

However, it is CME's view:

- monitoring compliance against an enforceable undertaking is unlikely to be a significant administrative burden for the regulator. This is because, a PCBU is required to comply with general duties by identifying hazards and risks to health and safety, taking steps to address these and to continuously monitor its compliance with the legislation. The regulator has a limited role to play and is not required to constantly review compliance of a duty holder. This principle is consistent with the 'Robens-esq' nature of the legislation. CME considers the approach to compliance with an enforceable undertaking would be similar, with the duty holder required to monitor its compliance with the regulator stepping in only if there were failings in this regard;
- safety outcomes are likely to be improved by the opportunity to enter into enforceable undertakings by encouraging innovation. That is, duty holders would find new and innovative ways of complying with the duties and would therefore 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 Green Bill, specifically objective 3(g) which relates to continuous improvement and aiming for progressively higher WHS standards;
- if an enforceable undertaking was entered into, it would provide finality and certainty and foster a collaborative approach to safety. That is, it avoids the potential of adversarial prosecution, in which the outcome is inherently uncertain, the process can be time consuming and a Court is 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 can be far more detrimental than any resultant penalties. In a high risk and competitive industry such as the Western Australian resources sector, enforceable undertakings provide an alternative to prosecution where the benefits of agreed remedial action may best suit the alleged breach and lead to better safety and health outcomes for the workforce; 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 against their employer years after the incident leading to the prosecution. This is perhaps especially the case where the employee remains employed by the PCBU.

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<sup>5</sup> Stewart-Crompton, R, Mayman, S and Sherriff, B, National Review into Model Occupational Health and Safety Laws, Second Report, January 2009, Chapter 36, available from [http://docs.employment.gov.au/system/files/doc/pdf/national\\_review\\_into\\_model\\_ohs\\_laws\\_secondreport.pdf](http://docs.employment.gov.au/system/files/doc/pdf/national_review_into_model_ohs_laws_secondreport.pdf)

Consistent with the approach taken in the Model WHS Act, CME considers it is appropriate an enforceable undertaking would only be available where this was agreed by the PCBU and the regulator, ensuring the measures in the undertaking are appropriate and drive improvement in safety outcomes, as opposed to the Regulator accepting an undertaking to implement measures which should have already been in place.

Lastly, the Model WHS Act anticipates an enforceable undertaking would not be available for category 1 offences. CME considers this is appropriate so a balance is achieved between the benefits which may be derived from enforceable undertakings and for the public and any injured parties to ensure appropriate punitive action is taken to prosecute organisations alleged to have committed the most serious offences.

**CME recommends the Green Bill include enforceable undertakings as an alternative enforcement mechanism in the terms included in the Model WHS Act.**

**Further, CME recommends if enforceable undertakings are a feature of the Green Bill an enforcement policy be developed by WorkSafe WA which clearly articulates appropriate transparent criteria for considering and entering into enforceable undertakings.**

### **Time limitation period**

The Green Bill proposes to retain the 'status quo' position currently enshrined in the Western Australian OSH Act for the time limitation for the regulator to commence a prosecution in Western Australia.

CME considers the investigation process and the decision to commence any prosecution should be aligned with the position in the Model WHS Act. That is, the time limitation period should be reduced in Western Australia to two years. This would provide greater certainty to industry following an incident and allow lessons learnt from incidents which are often not shared until the completion of the Court process to be shared more quickly, improving safety outcomes. Further, it would afford any injured party the 'closure' provided by the Court process sooner.

CME welcomes indications from both Worksafe WA and DMP there is a commitment to progress these matters and share learnings from safety incidents as quickly as possible. However, in the absence of a clear policy position or regulatory onus to do so, barriers to access this potential critical information, including protracted prosecutions, are likely to persist.

Prosecutions are often not commenced until shortly before the expiry of the time limitation period, but a considerable time after an alleged offence. Extending this time period, adds to the uncertainty facing the business. CME considers, where possible, particularly for less serious offences, WorkSafe WA should indicate if it will not prosecute sooner so the matter can be resolved and appropriate lessons shared sooner.

The time periods provided for in the Model WHS Act are already long when compared internationally. For example, summary offences to be heard by a Magistrate under the *Health and Safety at Work etc Act 1974* (UK) must generally be commenced within 6 months of the regulator having sufficient evidence to commence the prosecution and within 3 months of the publication of any report by a Coroner.

**CME recommends the time limitation period for the commencement of prosecution for offences be aligned with the Model WHS Act to ensure any prosecution typically commences within 2 years of the date of the alleged contravention.**

## Treatment of accommodation

The following comments relate to the inclusion of clause 19(5A) in the Green Bill.

CME considers the current arrangements under the OSH Act and the MSIA ensure there is a duty holder who owes a duty to workers residing in accommodation under its management and control. However, CME supports the simplification of the current provisions to provide greater clarity in respect of which Act applies (OSH Act or MSIA) and which regulator is responsible for administering legislation at worker accommodation.

Where practicable, CME considers an accommodation facility should be regulated by one regulator (to the exclusion of the other) to provide simplicity and clarity. However, it is important the regulator who administers WHS legislation at accommodation has the necessary expertise and skill set to adequately discharge this role.

CME understands accommodation is also likely to be addressed in the WHS legislation for the resources sector. CME notes the specific exclusion in the Green Bill in section 19 (5A)(b) for 'a person who works at a workplace referred to in section 12(2)'. CME is concerned that the application of this provision may have practical difficulties by tying the exclusion to the person (as opposed to the workplace). As an example, it is unclear how the provision will treat accommodation for a worker who normally works at a mine site (and would therefore fall in the exclusion provided by section 12(2), when this person is on a work related trip to Perth to visit the corporate office and resides in employer provided accommodation such a company apartment.

Further, expanding the definition of 'workplace' to include accommodation in section 19(5) of the Green Bill may have practical and legal implications beyond the Green Bill.

CME welcomes the opportunity to review the proposed interaction of the full package of legislation to understand how accommodation may be regulated.

CME notes there are several different types of accommodation arrangements and facilities which must be considered if any changes are to be made to the provisions addressing duties at accommodation provided to workers by a PCBU. For example:

- company owned accommodation on a mining or exploration lease, which is operated by a third party for the company's employees and contractors;
- company owned accommodation which may straddle a mining tenement such that it is neither exclusively on or off the mining or exploration lease;
- company owned accommodation within town boundaries, which is operated by a third party for the company's employees and contractors;
- third party owned and operated accommodation within town boundaries, which is used by only one mining company client, for that company's employees and contractors;
- third party owned and operated accommodation within town boundaries occupied by a combination of persons working at mining operations and other workplaces covered by the Green Bill, but is not a motel/hotel;
- accommodation may be provided in hotels or serviced apartments; and
- accommodation may be provided in a range of styles ranging from camping through to purpose built villages.

**CME recommends the full range of accommodation arrangements and potential complexities arising in determining jurisdiction be considered before finalising any accommodation provisions of the Green Bill and WHS (Mines) Act.**

**Further, CME recommends industry be provided with an opportunity to comment on the suitability of provisions relating to accommodation once it is clear how the**

**provisions addressing this area in the Green Bill and the WHS resources legislation will interact.**

**Treatment of discriminatory conduct**

CME supports the broad principle of including provisions to protect workers and prospective workers from discrimination on certain prohibited grounds. However, industry is concerned the provisions within Part 6, Division 1 of the Green Bill may be used to provide protection to persons who would use safety matters as a means to cause disruption to businesses with malicious intent.

For example, it may be appropriate for certain disciplinary action to be taken against a worker in circumstances where they have maliciously caused disruption to the business. These situations should not be protected by the provisions of the Green Bill so the employer's prerogative to take necessary disciplinary action is not curtailed.

**CME recommends protections be included in the Green Bill to ensure protections from discriminatory conduct cannot be used maliciously by workers.**

Further, to enhance the workability of the provisions and to ensure they are not unnecessarily punitive to employers, industry considers certain amendments should be made to address concerns with the current provisions in Part 6, Division 1 of the Green Bill. Specifically:

- It is inappropriate for criminal sanctions to apply to this form of conduct. In other areas of the law where employees are provided with protection from discrimination (for example, in the *Fair Work Act 2009* (Cth)), the sanctions are civil in nature. CME considers civil penalties are an appropriate enforcement mechanism in this area.
- In practice, the conduct which gives rise to the prohibited reasons in clause 106 of the Green Bill are unlikely to apply to prospective workers. In addition, prospective workers are provided with protections from discriminatory conduct under the Fair Work Act. For these reasons, CME considers prospective workers be removed from clause 105 (with subsequent deletions to the other reference to prospective workers in clauses 106, 111(b)(ii) and 112(3)(c)(ii)).
- The penalties for the conduct set out in clauses 104 and 107 are the same. CME considers the penalty associated with direct discriminatory conduct should reflect the seriousness of this conduct and the more remote conduct set out in clause 107 should be subject to a lesser penalty to reflect the lower objective seriousness of this conduct.
- The time limitation for commencing proceedings alleging discriminatory conduct under clause 113 of the Green Bill is 12 months. CME considers this time limitation period is excessive when compared to similar provisions in other areas of legislation. For example, under the Fair Work Act in situations involving termination of employment, a person alleging 'adverse action' has been taken against them has 21 days to commence proceedings. CME therefore recommends the time limitation period be reduced.

**Treatment of volunteers**

CME understands the way in which the Green Bill proposes to treat volunteers is to treat them as 'other persons' at the workplace (ie they would not be included in the definition of workers).

There are perhaps two types of volunteer organisations:

- The first is a 'voluntary association' (as defined in clause 5(8) of the Green Bill). This definition is quite narrow and only covers organisations which don't employ any



person to carry out work for the association. These organisations are not a PCBU under the Green Bill.

- The other type would be an organisation which has a combination of volunteers and paid workers. These are a PCBU under the Green Bill.

The exclusion of volunteers from the definition of 'worker' means a PCBU which uses volunteers would not owe those volunteers the general duty of care (including the requirement to provide training etc). The effect of this is volunteers might be treated differently to any paid employees of the voluntary association.

To ensure, so far as reasonably practicable, the health and safety of volunteers as other persons it may be, in practice, the organisation provides training or supervision to volunteers, but this would not be required under the Green Bill.

CME considers volunteers should be provided with adequate training and supervision as part of their employment. Specifically, CME notes there are many situations where volunteers may interact with the resources industry. This is particularly the case in emergency response situations where volunteers within (among others) the State Emergency Services and the Department of Fire and Emergency Services may support organisations in the resources industry respond to emergencies.

### **Additional types of inspectors**

CME notes the proposed appointment of officers of the Commissioner of Main Roads to be inspectors under the Green Bill. Whilst this may be appropriate in certain circumstances, CME considers any person appointed as an inspector must be knowledgeable in WHS matters relating to all workplaces.

**CME recommends if additional persons are to be appointed as inspectors a mechanism be included in the Green Bill to require these persons to have adequate training in WHS matters.**

### **Instruments of declaration**

CME supports the proposed inclusion of the provisions in section 11(4)-(7) of the Green Bill. Instruments of declaration remain an important tool for duty holders to seek certainty over which piece of legislation applies. In an area where technology is developing rapidly, there may be a number of situations where the distinction between mining operations on the mining tenement and remote corporate offices blur, requiring certainty through declarations.

Further, there are likely to continue to be certain situations during the life of the legislation when it is appropriate for a particular regime to apply to the exclusion of the other – power stations which would otherwise be covered by the WHS (Mines) Act might be one example.

### **Regulations and codes of practice**

#### ***Regulations***

CME notes the comments made by WorkSafe WA the process of reviewing the Model WHS Regulations is ongoing and is supportive in principle of the 'guiding principles' WorkSafe WA is adopting to review the Regulations<sup>6</sup>.

CME considers the overarching focus of reviewing the Model WHS Regulations for any adoption in Western Australia must be:

- to remove unnecessary prescription; and

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<sup>6</sup> Department of Commerce, WorkSafe WA, Developments in OSH in WA – The Green Bill, 21 November 2014, available from <http://www.commerce.wa.gov.au/publications/developments-osh-wa-green-bill>

- to remove features which are unworkable in remote and regional parts of Western Australia.

CME welcomes the opportunity to make further comment on the Regulations when these are released for public comment.

In order to achieve the best safety outcomes, the Regulations should adopt a risk based outcomes focused approach. Recommendations from the COAG review of the Model WHS legislation aimed at better achieving these aims should be taken into account in reviewing the Regulations to accompany the Green Bill.

**CME recommends Regulations to accompany the Green Bill be outcome based and take a risk based approach, removing unnecessary levels of prescription.**

### ***Incorporation of Australian Standards***

CME notes the Model WHS Regulations contain some references to Australian Standards (AS). CME supports the position relevant mandatory requirements should be stipulated in Western Australian legislation rather than AS being specifically referenced. This is because there is a limited opportunity to input into the development of Standards and there are often long time frames associated with the review and updating of Standards. CME therefore considers AS should not, where possible, be incorporated into the Regulations.

However, where any AS is incorporated, for example, as an interim requirement for new technologies whilst relevant regulation or codes are developed, these should be made freely available by the Regulator so a PCBU does not have to pay to access mandatory requirements.

### ***Codes of Practice***

Codes of Practice and other guidance material form an important part of the guidance available to industry. CME welcomes the proposed amendments to the Green Bill to allow Codes of Practice to be adopted in Western Australia without requiring national consensus.

CME recognises there are potential benefits in adopting national consistent guidance material. However, these benefits can be quickly eroded with the introduction of unnecessary prescription or irrelevant Codes. For this reason, CME welcomes the inclusion in the Green Bill of a formal process for the review and implementation of Codes of Practice to ensure:

- industry is provided with an opportunity to comment on these;
- consideration of existing national and state-based guidance material; and
- there is Governmental oversight of Codes of Practice, through an approval process.

This comment is particularly relevant because CME, together with other industry associations in the resources sector, identified significant issues associated with certain of the Codes of Practice developed for the Model WHS legislation in its submission to Safe Work Australia on the Model WHS Regulations and Codes of Practice<sup>7</sup>. Many of these issues could have been avoided if an appropriate consultative process with industry was followed in the development of these Codes.

**CME supports the inclusion in the Green Bill of a consultative process to ensure any Codes of Practice are developed with industry input and they are not unnecessarily prescriptive or better issued as guidance notes.**

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<sup>7</sup> Joint Submission, Model Work Health and Safety Regulations and Codes of Practice, Submission to Safe Work Australia, April 2011, [http://www.minerals.org.au/file\\_upload/files/submissions/MCA%20and%20Representatives%20Submission%20-%202011.pdf](http://www.minerals.org.au/file_upload/files/submissions/MCA%20and%20Representatives%20Submission%20-%202011.pdf)




## Conclusion

In conclusion, CME supports in principle the adoption of laws which are more closely aligned to the Model WHS Act. However, any reform should be based on best practice and should have the aim of improving safety outcomes. Among other things, alignment and consistency with resources safety legislation (where possible) is paramount, as is maintaining a range of enforcement options.

CME looks forward to continuing to work closely with Worksafe WA and other stakeholders to progress these important reforms.

If you have any further queries regarding the above matters, please contact Adrienne LaBombard, Manager – Workplace Health and Safety on (08) 9220 8250 or at [a.labombard@cmewa.com](mailto:a.labombard@cmewa.com)

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