



Consultation regulation impact statement: Recommendations of the 2018 Review of the Model WHS Laws

Submission to Safe Work Australia

Contact
Adrienne LaBombard
Manager
People and Communities

a.labombard@cmewa.com

Contents

| | |
|---|----|
| About CME | 1 |
| Summary and Recommendations | 1 |
| Context – WHS Harmonisation and Reform in WA | 3 |
| Recommendation 1 - Review the model WHS Regulations and Codes of Practice | 3 |
| Recommendation 2 - psychological health regulations | 4 |
| Recommendation 8 - Workplace entry of union officials when providing assistance to an HSR | 6 |
| Recommendation 15 – Retain previous wording in s 117 of the model WHS Act | 8 |
| Recommendation 23 - Category 1 Offence and Industrial Manslaughter | 9 |
| Recommendation 23a | 9 |
| Recommendation 23(b) | 10 |
| Conclusion | 11 |
| Appendix 1 - Response to Review Recommendations | 13 |

About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia. CME is funded by member companies responsible for over 90 per cent of the State's mineral and energy production and workforce employment.

In 2017-18, the value of Western Australia's mineral and petroleum industry was \$115 billion. Iron ore is currently the State's most valuable commodity at \$61 billion. Petroleum products (including crude oil, condensate, liquefied natural gas, liquefied petroleum gas and natural gas) followed at \$26 billion, with gold third at \$11 billion. Both commodities saw an increase in value of 39 and 5 per cent respectively from the previous financial year.

Contributing to a third of the State's total industry Gross Value Added,¹ the resources sector is a major contributor to both the State and Australian economy. The value of royalties received from the sector in 2018-19 totalled \$6.2 billion, accounting for 20 per cent of State Government revenue.^{2,3}

Submission Summary

CME appreciates the opportunity to comment on Safe Work Australia's (SWA) Consultation Regulation Impact Statement (CRIS) on the 2018 Review of the model Workplace Health and Safety (WHS) laws (the 2018 review).

CME made a submission to the 2018 review and participated in a consultation session with the independent reviewer, Ms Marie Boland. CME welcomed this opportunity to engage in the national review process at a time when the Western Australian (WA) Government is also consulting on the adoption of model WHS laws in WA.

However, it is disappointing many of the recommendations put forward by industry were not adopted in the 2018 review recommendations. Further, the flavour of the 2018 review report and recommendations appear heavily focused on enhancing the compliance and enforcement framework and does not, in our view, go far enough towards proposing the type of improvements required to support progressively better safety and health outcomes.

It is noted a thorough, quantitative assessment of whether the laws are effective in reducing the number of serious incidents and fatalities was also lacking. The Australia-wide compensation claim and worker fatality trends included in Appendix G of the 2018 review report provide a limited snapshot, and CME considers the review would have benefited from further analysis - including at a jurisdiction level. An evidence-based approach is critical to ensure any impost imposed by proposed changes to the legislation is offset by improvements in the outcomes for workers.

CME considers there has been a reluctance over successive reviews to modernise the national model WHS laws in line with leading practice, and considers this will continue to be a key factor limiting their consistent national uptake and their effectiveness in driving continuous improvement.

CME contends further reviews must focus on removing unnecessary prescription and administrative burden. Amendments must be prioritised to enable risk-based, outcomes-focused approaches, which in turn will stimulate innovation for progressively better outcomes and the engagement of all workers and Persons Conducting a Business or Undertaking (PCBU) in effective health and safety management systems.

While CME appreciates the initial assessment of the 2018 review recommendations provided in the CRIS, in the absence of specific amendments being proposed along with their detailed drafting, it is not possible to make an informed assessment of the impact these changes will make to industry safety and health performance. The views in CME's submission represent the collective experience of the world-leading practice in safety and health management of the WA resource sector. CME also endorses the comments made by the Minerals Council of Australia in their submission on the same matter.

Key issues for the WA resources sector are outlined in detail in the following submission.

¹ Duncan, A., Kiely, D. and Salazar, S., *Quarterly Economic Commentary: March 2019*, Bankwest Curtin Economics Centre, Curtin University, April 2019, p. 4.

² Excludes monetary contributions via North West Shelf grants, State taxes and fund levies.

³ Government of Western Australia, *Budget Paper No. 3: 2019-20 Economic and Fiscal Outlook*, Western Australian State Budget 2019-20, Department of Treasury, May 2019, p. 68.

These comments should be read in conjunction with CME recommendations and responses against each of the 2018 review recommendations provided at Appendix 1.

Summary of Recommendations

- CME supports the proposed review of WHS regulations and CoPs. However, CME considers this review must focus on removing unnecessary prescription to enable risk-based, outcomes-focused approaches consistent with emerging best practice.
- CME does not support the introduction of regulations covering the management of psychosocial health within the model WHS laws. CME recommends maintaining the status quo so that psychological risks continue to be regulated by the existing WHS framework supported by national and state specific guidance material to promote best practice.
- While CME supports the conduct of a broad review into notification provisions (Recommendation 20), any proposals to include a specific trigger for the notification of psychological injuries will require further consideration and consultation. WA Ministerial Advisory Panel Report Recommendation 10 should be considered as an alternative.
- CME strongly opposes CRIS Option 2 (implementation of Recommendation 8) and instead recommends the WHS Act be amended to allow entry to workplaces on the invitation of an 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 continues to prefer the complete removal of the WHS entry pathway under model WHS laws (Part 7) consistent with the current proposal of the WA State Government.
- Where Part 7 is retained, CME does not support a reversal of the 2016 amendments to sections 117(3) to (8) of the model WHS Act. SWA should instead work to promote the adoption of the 2016 provisions as recommended by the 2014 review of WHS laws.
- CME strongly opposes Recommendation 23a and recommends the status quo be maintained. Further justification is required to support consideration of the proposed lower of the Category 1 threshold given the lack of evidence it would lead to better safety or health outcomes.
- CME does not support the inclusion of an industrial manslaughter offence in the WHS Act and recommends the status quo be maintained.
- Should SWA determine to introduce an industrial manslaughter offence in the model WHS Act, it should be guided by the six principles outlined in the below submission and subject to further robust consultation.
- CME recommends membership of the SWA Committee be expanded to include direct representation of the Australian resources sector.

Context – WHS Harmonisation and Reform in WA

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 leading practice outcomes in safety and health.

Although WA has not implemented the model WHS laws in their current form, CME remains a broad supporter and 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)*. Separate legislation covers on and offshore petroleum and geothermal industries and dangerous goods.

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.

Consultation on proposed content for a WA WHS Bill closed in August, 2018 and the sector continues to await the full detail on the final content of the Bill to be announced. However, the State Government has written to CME to advise that the WA WHS Bill will not include the WHS entry provisions enshrined in Part 7 of the WHS Act. CME considers this is a positive step and importantly recognises that WA and Federal industrial relations legislation already provide for a pathway for WHS entry.

Additionally, in the short term, WA Dangerous Goods legislation is proposed to remain separate and be streamlined as part of a parallel process prior to being considered for inclusion in the WHS framework subsequent to the proclamation of the new laws.

The WA WHS Bill is proposed to be supported by three sets regulations including sector specific regulations for the mining, petroleum and geothermal industries. Consultation on the proposed structure and content for these regulations is expected to commence in August 2019.

Therefore, while WA is not currently operating under the model laws, the 2018 review recommendations and the initial assessment of their impact by SWA are of material importance to the processes underway here.

In addition, a number of CME member companies have experience operating in jurisdictions where the model WHS laws apply and therefore are well placed to comment on the potential impact of the 2018 review recommendations as well as the application of the WHS laws in general.

The following submission provides a response to the 2018 review recommendations including our preferred option as presented by SWA in the CRIS and an assessment of likely impacts wherever possible.

The body of the submission focuses on the review recommendations of key concern to the WA resources sector with additional commentary and preferred options listed against review recommendations at **Appendix 1**.

Recommendation 1 - Review the model WHS Regulations and Codes of Practice

From the outset, CME has expressed broad support for the principle of national harmonisation of WHS laws. The benefits for businesses who operate across jurisdictions in having a common understanding of WHS legislation is recognised.

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.

A non-prescriptive, risk-based, and outcomes-focused approach is critical to ensure hazards and risks specific to different industries to be efficiently and effectively addressed. In this regard, there is an unnecessary level of prescription in the current model WHS framework, particularly at the level of the regulations and codes of practices (CoPs), which is impeding the harmonisation process by disincentivising states from adopting it without amendments.

CME has long noted the complexity and administrative processes of the current model WHS regulations, leading to burden on employers to manage additional internal processes to maintain compliance. For example, the number of notification requirements and authorisations with which employers are required to comply is significant, and often duplicative. This creates an impact where valuable resources may be diverted to unnecessary administrative compliance work rather than utilising resources to improve safety outcomes.

Flexibility is required to ensure the context of operations is taken into account. For example, in relation to major hazard facilities (MHFs), the model Regulations should outline required standards of operating MHFs rather than stipulate specific threshold quantities for certain chemicals. The current thresholds would lead to a significant over-classification of MHFs in WA that would already be adequately regulated through existing Dangerous Goods regulations.

Additionally, the location of most resource sector operations in remote and regional parts of Australia presents an additional logistical challenge for employers seeking to comply with the model WHS regulations. Some provisions are unrealistic for employers operating in these areas and add unnecessary complexity and cost burden.

The elevation of detailed guidance material to CoPs as the mandatory third tier of the WHS framework, also creates an additional level of prescription, complexity and potential confusion.

CME acknowledges the important role of national guidance material and considers this should continue to be available to jurisdictions to refer to. However, CoPs should not be mandated (particularly in their current form) and the development of this material should be guided by clear criteria whereby:

- CoPs are non-prescriptive, evidence-based and outline a risk-based approach to meeting WHS duties; and
- Guidance material provides more detailed practical guidance and/or templates targeted at an industry or hazard specific level to support compliance and continuous improvement.

CME would support a detailed review which gives consideration to significant amendments with a view to:

- Adopting a best practice, risk-based, outcomes-focused approach;
- Ensuring the regulations allow flexibility for industry specific approaches and risk profiles and facilitate innovation for progressively better outcomes;
- Removing unnecessary prescription and significantly streamlining the regulations and suite of CoPs (and moving additional detail to guidance material where necessary); and
- Establishing clear criteria for the purpose, scope and content of CoPs and guidance material.

CME supports the proposed review of WHS regulations and CoPs. However, CME considers this review must focus on stripping back unnecessary prescription to enable risk-based, outcomes-focused approaches consistent with emerging best practice.

Recommendation 2 - psychological health regulations

CME notes the definition of 'health' in the model WHS Act is explicit in its inclusion of psychological health. Further, the risk-based approach that it is set out in section 17 of the WHS Act, by reference to what is reasonably practicable in section 18 of the WHS Act, already provides an appropriate framework for the identification and management of psychosocial risks.

Further, since the time of the release of the 2018 review report, SWA released a national Guide: *Work-related psychological health and safety: A systematic approach to meeting your duties*⁴. In WA, the recently released CoP: *Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors*⁵ provides guidance on creating and maintaining a mentally healthy workplace through:

- Providing an environment that promotes good health and wellbeing;

⁴ Safe Work Australia, *Work-related psychological health and safety: A systematic approach to meeting your duties*, 2019, available at: <https://www.safeworkaustralia.gov.au/doc/work-related-psychological-health-and-safety-systematic-approach-meeting-your-duties>

⁵ Department of Mines Industry Regulation and Safety, *Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors*, 2019, available at: https://www.commerce.wa.gov.au/sites/default/files/atoms/files/fifocode_of_practice.pdf

- The application of a risk management process to avoid or minimise the harm from psychosocial hazards and risk factors and develop a mentally healthy workplace;
- Developing response strategies (intervention) for workers when there are concerns regarding work-related stress or exposure to psychosocial hazards and risk factors; and
- Providing an environment that supports recovery.

The WA CoP applies to workplaces that utilise fly-in fly-out (FIFO) work arrangements in the resources (mining petroleum, geothermal) and construction sectors, however, is available and relevant for all work places to refer to.

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

It important that flexibility is maintained in the way in which PCBU's may manage psychological risks and that innovation and increasingly effective control measures are identified as the state of knowledge on managing psychological risks improves. Scenarios will also differ greatly between individual cases and will require a flexible approach to management. Such an approach is consistent with the objective in section 3(1)(g) of the Model WHS Act of providing a framework for continuous improvement and progressively higher standards of work health and safety.

In the absence of certainty on best practice, imposing prescriptive regulations on managing psychological risks would impose an unnecessary regulatory burden.

Further, it is important to recognise that the management of psychological health is a complex area. Many psychological hazards are not work based and the interaction between work-based hazards and non-work hazards must be recognised.

A further benefit of guidance (as opposed to regulations), is these documents can be readily updated as new research or data emerges. Given the vast bodies of work underway across industry and academia, to better understand issues around mental health in the workplace and how best to manage the risks and support employees, it would be premature to enshrine prescriptive requirements in the regulations.

Rather than amend the WHS regulations, CME considers it is important that state and territory regulators and SWA continue to promote the provision of guidance, advice, information, education and training in relation psychological risks (consistent with the objects of the Model WHS Act).

This is particularly the case given the complexity of mental health within the workplace and across the community, the current state of knowledge on workplace psychosocial hazards and the dearth of evidence-based approaches for effectively managing psychosocial risks.

CME does not support the introduction of regulations covering the management of psychosocial health within the model WHS laws. CME recommends maintaining the status quo so that psychological risks continue to be regulated by the existing WHS framework supported by national and state specific guidance material to promote best practice.

CME also wishes to express concern in relation to the proposed consideration of incident notification provisions relating to psychosocial injuries as part of the broader review into notification provisions (See comments on Recommendation 20 at Appendix 1).

It is acknowledged there is a lack of certainty around whether psychosocial injuries are currently notifiable and in relation to what steps must be taken to protect an individual's personal information when such notifications are made. However, the introduction of a 'psychological trigger' in the model WHS Act could have significant unintended impacts.

Psychological injuries are distinct and subjective in nature and do not, for the most part, translate well to the concept of a specific 'event' or 'incident'. Additionally these injuries and the relative severity of them does not translate well into the definition of "serious injury" as defined in Section 35 of the model WHS Act. For example, treatment as an "in-patient", where required, may not be immediately follow an "event" or "incident".

A further unintended consequences of immediate notification to regulators could create a deterrent to workers self-reporting these cases to PCBU's and seeking the support they need.

The proposed review into notification provisions should also consider the US OSHA injury and illness reporting requirements which specifically exclude reporting of mental illness unless certain criteria are met. This reduces the decision-making burden on employers as to whether a condition is or is not a work-related

mental illness and also overcomes uncertainty with regards to interaction of privacy laws (see OSHA 1904.5(b)(2)).

The WA Ministerial Advisory Panel (MAP) recommended the inclusion of a duty to report incapacity of ten or more days (consistent with current WA legislation requirements) in their final report on proposed amendments to the model WHS Bill for adoption in WA (see Recommendation 10)⁶. The approach would broadly capture longer latency injuries including psychosocial injuries and could be considered as a far simpler and effective way of capturing this type of injury data.

While CME supports the conduct of a broad review into notification provisions (Recommendation 20), any proposals to include a specific trigger for the notification of psychological injuries will require further consideration and consultation. WA Ministerial Advisory Panel Report Recommendation 10 should be considered as an alternative.

Recommendation 8 - Workplace entry of union officials when providing assistance to an HSR

CME and our member companies have significant concerns with the overly broad nature of provisions dealing with HSRs power to request assistance from other persons.

This has consistently been identified as a concern for industry given the potential for unions or other third parties to use these provisions as a 'back door' 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 strongly opposes implementation of Recommendation 8 in any form, and considers it would effectively enshrine in the laws a mechanism for union officials (including those who have previously been disqualified from holding a permit or whom have had a permit suspended or revoked) to flout entry requirements and cause unwanted and unproductive disruptions in workplaces under the guise of providing assistance to HSRs.

Furthermore, CME considers implementing this amendment would 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".

Maintaining a balanced right of entry system depends on unions exercising rights in an appropriate way and in accordance with the requirements in the WHS Act and *Fair Work Act 2009* (Cth) (FW Act). An unbalanced right of entry system causes business interruption which can result in significant productivity and cost impacts. It also risks creating an adversarial workplace environment which impacts on effective consultation and cooperation.

The proposed implementation of Recommendation 8 would remove an important safeguard currently available to PCBUs under sections 68(3A) and (3B) of the model Act, whereby a union official entering site to assist an HSR is required to hold a valid entry permit.

The CRIS disappointingly dismisses valid concerns raised by industry, noting available protections under the model WHS Act for PCBUs.

However, it is noted these so-called protections are only available to a PCBU after a request has been made by an HSR. For a PCBU to then seek to scrutinise such requests (ie to determine whether the person is a union official and also holds a valid permit) risks damaging the relationship between PCBU and HSR and would neither be efficient or effective practice. From the perspective of supporting cooperative and consultative work environments, CME considers it is far better to clarify in the Act, who is and who is not an eligible person to provide such assistance.

Further, the opportunity presented by the proposed amendment is expected to significantly increase requests for entry for to assist an HSR. The removal of the above protection means the onus will solely rest with the PCBU to provide "reasonable grounds" to refuse such as request and this in itself will create an additional impost on the PCBU.

⁶ Mayman, Stephanie, *Modernising Work Health and Safety Laws in Western Australia*, Ministerial Advisory Panel Report, July 2018, available at: https://www.commerce.wa.gov.au/sites/default/files/atoms/files/whs_act_consultation.pdf

It is noted Recommendation 8 appears to respond to the interpretation of these provisions and those governing workplace entry by union officials by the Full Court of the Federal Court of Australia in *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89. However, CME does not consider sufficient justification has been provided as to why the interpretation of the Full Court should be varied by legislative change.

The regime for the issue of entry permits is an important protection to ensure that where WHS laws limit employers' right to determine who enters their premises, union officials exercise their rights responsibly and for proper purposes. It is not appropriate that this protection can potentially be evaded by the mechanism of HSRs requesting assistance from union officials and asserting a right to enter the workplace in that capacity, in circumstances where an official would otherwise require a WHS entry permit to gain access.

Consistent with the above, CME has previously proposed an alternate amendment to WHS Act section 70(1)(g) to address these concerns:

“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 decision of the Full Court in *Powel*⁷ in considering whether a right of entry permit is required in such circumstances, and would help to resolve confusion on this issue⁸.

CME strongly opposes CRIS Option 2 (implementation of Recommendation 8) and instead recommends 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.

Additionally, CME does not consider the model laws provide a PCBU sufficient opportunity to ensure a person assisting the HSR has sufficient knowledge of WHS matters to assist the HSR.⁹

The CRIS refers the 2018 Review finding that “the rights of an HSR to request assistance from any person *with appropriate knowledge and expertise* [emphasis added], including union officials, should not be restricted”. However, CME notes there is currently no such qualification on “any person” in the model WHS Bill.

Further to the above amendment, CME considers there would be benefit in inserting at section 68(2)(g) of the model WHS Act the following list to ensure that “any person” requested by an HSR to provide assistance has the relevant knowledge or experience:

(a) a person who works at the workplace; or

(b) a person who is involved in the management of the relevant business or undertaking; or

(c) a consultant who has been approved by—

(i) the Consultative Council; or

(ii) a health and safety committee that has responsibilities in relation to the work group that the health and safety representative represents; or

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.

⁹ See for example section 70(1) of the *Occupational Health and Safety Act 2004* (Vic) which provides that a person assisting a HSR must be permitted to access the workplace “unless the employer considers that the person is not a suitable person to assist the representative because of insufficient knowledge of occupational health and safety”.

(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 effectively 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. As noted above, this situation also risks damaging the relationship between PCBU and 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.

Recommendation 15 – Retain previous wording in s 117 of the model WHS Act

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 industrial relations 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.

It is noted 2016 amendments to sections 117(3) to (8) of the model WHS Act require the WHS permit holder to provide notice at least 24 hours before proposed entry have not yet been adopted in any jurisdiction. However, CME considers the justification for the inclusion of this requirement as set out in the 2014 review of the model WHS remain and noted in the SWA CRIS remain valid¹⁰.

Further, CME does not consider the 2018 review report provides sound rationale for reversing this amendment. The argument in the 2018 review rests primarily on the lack of uptake of the amendment in those in the jurisdictions operating under the model WHS laws. This ignores the reality there will always be 'lag time' between amendments made to the model legislation and implementation by states and territories. It makes no sense to reverse a sound review decision when there has been insufficient time allowed for it to be adequately considered and cascade through the system.

It is widely known unions officials have and continue to enter or seek to enter sites under the guise of workplace health and safety to pursue other agendas.

Facilitating entry (even where it is valid) and responding to repeated entry requests creates impost through disruption to business operations (ie to provide transport and safety inductions for officials) with associated loss of productivity and increased costs due to interruption of scheduled work.

Inadequate safeguards from misuse of WHS entry also impacts the inability of PCBUs and workers to take full advantage of the range of provisions in the model WHS Act to resolve safety concerns without third party intervention, including through cooperation, consultation, issue resolution and HSRs.

In addition to the points raised above, CME considers it is unjustified to reverse the 2016 amendments to Section 117 of the model WHS Act to remove the requirement for 24 hours' notice because:

- The powers afforded to regulators under the model WHS Act mean the regulator is best placed to assist with the resolution of WHS issues and achieve safety outcomes. Workers have the ability to directly engage with the regulator to seek satisfaction on an unresolved WHS issues;
- Inspectors are typically available on a 24 hour basis through a roster system;

¹⁰ Decision Regulation Impact Statement: Improving the model work health and safety laws, Safe Work Australia, December 2014

- There are mechanisms within the model WHS Act to seek exemption from a notice period where a matter is truly urgent; and
- The model WHS Act provides that workers themselves have the right to cease unsafe work under section 84.

In Western Australia 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.

Should the model WHS laws contain right of entry entitlements for unions or other parties, CME consider these must be consistent with general workplace and industrial relations legislation.

As an alternative to that proposed amendment, CME considers SWA has a role to play in encouraging other jurisdictions to update their laws consistent with the 2016 amendments to the model WHS Act.

CME continues to prefer the complete removal of the WHS entry pathway under model WHS laws (Part 7) consistent with the current proposal of the WA State Government.

Where Part 7 is retained, CME does not support a reversal of the 2016 amendments to sections 117(3) to (8) of the model WHS Act. SWA should instead work to promote the adoption of the 2016 provisions as recommended by the 2014 review of WHS laws.

Recommendation 23 - Category 1 Offence and Industrial Manslaughter

CME has significant concerns with Recommendations 23a and 23b, as well as the general overemphasis on punitive approaches to compliance and deterrence as a key theme of this review.

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)). Unnecessary prescription, and an overemphasis on punitive compliance mechanisms promotes a culture of regulatory ‘tick the box’ compliance, impedes information sharing and the development of “no blame” cultures, which directly undermines this objective. This notion is supported in a number of submissions to the current review such as comments that from the South Australian Coroners Court.¹¹

While limited, CME notes the data presented in the 2018 review report suggests an overall improvement in safety outcomes since the time of the development of the model WHS laws. However, it is not possible to infer on the information presented whether the laws themselves have substantively influenced this trend and, if so, what aspects of the laws have been most influential.

While the most significant amendments proposed by the review appear to be aimed at more punitive approaches to compliance and facilitating the prosecution of higher order offences, CME does not consider sufficient justification has been provided to support these changes to the model WHS Act.

Recommendation 23a

CME understands the impact of the proposed inclusion of gross negligence will be a lowering of the threshold for the Category 1 offense under the model WHS Act. CME does not consider this is appropriate or necessary for the following reasons:

- As noted by the Workplace Relations Ministers’ Council in response to the 2008 review into model laws: “‘gross negligence’ offences should be dealt with outside the model Act as they would otherwise cut across local criminal laws and manslaughter offences.”¹²;

¹¹ South Australian Coroners Court, *Inquest into the death of Mr Jorge Castillo-Riffo*, 9/2018 (2071/2014),

¹² WRMC Response To Recommendations of the National Review into Model OHS Laws, May 2009, available at: <https://www.safeworkaustralia.gov.au/doc/wrmc-response-recommendations-national-review-model-ohs-laws>

- The resource sector is committed to implementing a best practice 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;
- It has the potential to increase the difficulty of attracting appropriately qualified people, particularly to those industries with higher inherent risks, and workers who hold liability through statutory positions, such as the resource sector. The lowering of the bar for culpability of offences would exacerbate this; and
- There has been inadequately consideration as to how the proposed offence would interact with state and territory laws where offences of “gross negligence” and “recklessness” are not consistent.

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 strongly opposes Recommendation 23a and recommends the status quo be maintained. Further justification is required to support consideration of the proposed lower of the Category 1 threshold given the lack of evidence it would lead to better safety or health outcomes.

Recommendation 23(b)

The WA resources industry does not support the introduction of an industrial manslaughter provision within the model WHS framework.

Industrial manslaughter offences are focused on outcomes rather than on managing risks. A more effective approach to achieve better health and safety outcomes is for WHS legislation to remain focused on the prevention of incidents supported by a hierarchy of compliance mechanisms with a balanced emphasis on education, communication, and enforcement activities.

CME notes the above position is consistent with the views expressed by the Australian Government in their response to the Senate Inquiry into industrial deaths¹³.

The proposal to introduce a harmonised industrial manslaughter provisions in the model WHS laws is particularly concerning given:

- There is no evidence the introduction of industrial manslaughter offences in other jurisdictions have improved safety outcomes or resulted in fewer workplace deaths in those jurisdictions which already have the offence. However overly punitive approaches to enforcement have been identified as detrimental to fostering early and open sharing of safety lessons and proactive safety and health improvements¹⁴;
- The change is unnecessary given manslaughter offences are already available under general criminal law (for example under the WA criminal code);
- The change is unnecessary, given proposed WHS offences under the Model WHS Act already include offences that can give rise to significant fines and jail sentences for those who recklessly cause death or even serious injury at a workplace, thus providing the required level of specific and general deterrence; and

Industrial manslaughter is a serious offence, with significant potential implications, and as such, its potential introduction and application must be fully and properly considered.

Poorly considered or rushed introduction of an industrial manslaughter offence could have unintended consequences which impair, rather than enhance, health and safety outcomes and/or introduce inequities

¹³ Australian Government, Australian Government response to the Senate Education and Employment References Committee report: They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, December 2018, available at: <https://docs.jobs.gov.au/documents/australian-government-response-they-never-came-home>

¹⁴ See for example: Gunningham, Neil, Prosecution for OHS Offences: Deterrent or Disincentive?, Sydney Law Review 359, 2007, accessed from: <http://www.austlii.edu.au/au/journals/SydLawRw/2007/15.html>; and Johns, Mark, comments on inquest into the 2014 death of a construction worker at the Royal Adelaide Hospital development project: see paragraphs [36.1]-[36.2] : <http://www.courts.sa.gov.au/CoronersFindings/Lists/Coroners%20Findings/Attachments/776/CASTILLORIFFO%20Jorge%20Alberto.pdf>

(e.g. creation of dual liability on individuals under two separate regimes, inequity in availability and type of defences and burden of proof) impacting on individual fundamental rights¹⁵.

For example, the Queensland industrial manslaughter offences (which is proposed to form the basis for the model WHS offence) currently applies to 'senior officers'. This definition is inconsistent with the definition of 'officers' adopted under the WHS Act. Concerningly, this means the industrial manslaughter offence may potentially apply to a much wider category of persons than that contemplated in the model WHS Act.

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.

Should SWA determine that such an offence is to be included in the model WHS Act, further robust consultation should be undertaken to ensure stakeholders can consider the nature of the proposed offence and the practical and legal implications of its introduction. This must include the release of detailed drafting instructions and explanatory statement covering the proposed application of the offence.

Additionally, to mitigate potential perverse outcomes as outlined above, CME submits the following principles should underpin the drafting of any proposed offence:

1. **Standard:** The standard for individuals should be recklessness, not gross negligence. Failing that, the standard that should be applied should be 'gross negligence' for both companies and individuals. At the very least, it should be made clear that a legal standard of criminal negligence applies.
2. **Defences:** All available defences under existing criminal laws should be incorporated or expressly reserved.
3. **Immunities and rights:** Individuals being investigated for possible breach of the industrial manslaughter offence should be entitled to the same rights and protections as under general criminal laws (eg right to silence and privilege against self-incrimination). If protections are abrogated, broad derivative use immunities should expressly apply.
4. **Penalties:** Courts should have the discretion to impose either financial penalties or imprisonment.
5. **Proper prosecution:** The offence should only be able to be prosecuted by the Director of Public Prosecutions (DPP).
6. **Limitation periods:** The same limitation periods which apply to existing offences under WHS Laws would also apply to the offence.

CME does not support the inclusion of an industrial manslaughter offence in the WHS Act and recommends the status quo be maintained.

Should SWA determine to introduce an industrial manslaughter offence in the model WHS Act, it should be guided by the six principles outlined above and subject to further robust consultation.

Conclusion

CME welcomes the opportunity to comment on the SWA CRIS on the 2018 review report recommendations and looks forward to participating in the subsequent decision regulation impact statement (DRIS) process.

The above submission discusses the key recommendations of interest and concern to the WA Resource Sector and should be read in conjunction with our position on the full list of 2018 review report recommendations as outlined in the SWA CRIS.

As noted above, there is limited detail available in the CRIS to be able to meaningfully assess and provide evidence of specific impacts on the WA resource sector arising from the proposed changes. CME believes,

¹⁵ Law Council of Australia submission: The framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, 30 May 2018

however, that the positions we have outlined here are well established and reflect the views and expertise of the WA resources sector on best practice safety and health management.

Further robust consultation is required on many of the proposed changes and any changes proposed to be carried forward by SWA should be supported in the DRIS by:


- Detailed proposed drafting and explanatory statements;
- Further evidence to justify the need for the changes; and
- Evidence to support the expected safety and or health benefits of the proposed change.

CME notes the resources industry does not currently have direct representation on the SWA Committee, however, there continue to be a large number of matters before the Committee of direct relevance to the resource industry and with the potential to most significantly impact our sector.

Beyond the public consultation processes, the resource sector has limited ability to directly input into these important matters. It is also evident from the lack of uptake of industry recommendations that significant information unique to the resources industry was not adequately considered as part of 2018 review and subsequent SWA CRIS. This again highlights the importance of representation for our sector at a national policy level.

CME recommends membership of the SWA Committee be expanded to include direct representation of the Australian resources sector.

If you have any further queries regarding the above matters, please contact Ms Adrienne LaBombard, Manager People and Communities on (08) 9220 8520 or a.labombard@cmewa.com.

| Authorised by | Position | Date | Signed |
|--------------------|---|------------|---|
| Rob Carruthers | Director – Policy and Advocacy | 05/08/2019 |  |
| Document reference | K:\Occupational Safety & Health\Projects & Issues\Legislation\National Harmonisation\National Review of OHS Laws\2018 Boland review | | |

Appendix 1 - Response to Review Recommendations

CME's response to each of the review recommendations is outlined below. Further detail on key issues is provided in the above submission.

| # | Review Recommendation | CME Recommendation (Preferred Option) | CME Position / Analysis of Impact |
|---|---|--|---|
| 1 | <p>Review the model WHS Regulations and model Codes of Practice:</p> <p><i>Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven priority industries in the Australian Work Health and Safety Strategy 2012-2022.</i></p> | <p><i>See above discussion.</i></p> <p>CME supports the proposed review of WHS regulations and CoPs.</p> <p>However, CME considers this review must focus on stripping back unnecessary prescription to enable risk-based, outcomes-focused approaches consistent with emerging best practice.</p> | <p><i>See above discussion.</i></p> |
| 2 | <p>Make regulations dealing with psychological health:</p> <p><i>Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.</i></p> | <p><i>See above discussion.</i></p> <p>CME recommends Option 1: maintain the status quo.</p> <p>Option 2 is strongly opposed by the WA Resources Industry.</p> | <p><i>See above discussion.</i></p> <p>There is insufficient state of knowledge on what constitutes good practice for the management of psychosocial risks. Regulators should remain focused on education and assisting companies to navigate this complex area.</p> <p>Outcomes-based regulation in this space is welcomed, and prescriptive regulation would be cumbersome and not data-driven.</p> |
| 3 | <p>Continuously assess new industries, hazards and working arrangements:</p> <p><i>Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.</i></p> | <p>CME supports this recommendation as well as SWA's proposal that criteria be developed by SWA Members, in consultation with other stakeholders.</p> | <p>CME notes the WA resource industry does not have direct representation on SWA but should be included in any further consultation on this and other matters covered in this review.</p> |
| 4 | <p>Clarify that a person can be both a worker and a PCBU:</p> <p><i>Amend s 5(4) of the model WHS Act to make clear that a person can be both a worker and a PCBU, depending on the circumstances.</i></p> | <p>CME supports this recommendation.</p> | <p>An amendment to clarify this issue in the WHS Act was also recommended in the 2018 Ministerial Advisory Panel Report, Modernising work health and safety laws in WA (Recommendation 7) available here.</p> |

| | | | |
|------------------|---|--|---|
| <p>5</p> | <p>Develop a new model Code on the principles that apply to duties:</p> <p><i>Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 (the Principles), including examples of:</i></p> <ul style="list-style-type: none"> <i>the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and</i> <i>processes for PCBUs to work co-operatively and cohesively to discharge their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—s 46 of the model WHS Act).</i> | <p>CME support the intent of the recommendation, however, considers the need for a new CoP on this matter should be assessed against clear criteria.</p> <p>A Guide may be more appropriate for providing practice guidance and including examples covering specific types of work arrangements as referenced in the recommendation.</p> | <p><i>See comments on guidance development criteria at Recommendation 1 discussion above.</i></p> |
| <p>6</p> | <p>Provide practical examples of how to consult with workers:</p> <p><i>Update the model Code of Practice: Work health and safety consultation, co-operation and co-ordination to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.</i></p> | <p>CME supports the intent of this recommendation, however, consideration should be given to the development of guidance material which could provide industry specific examples and practical guidance.</p> | <p><i>See also comments on recommendation 7a below.</i></p> <p>The 2018 Review identifies examples of the workplaces that may be included as examples in the proposed Code.</p> <p>There is a risk that the inclusion of examples in a Code may reduce flexibility in the way in which consultation can occur. This is because the Code may be used in evidence as to what a duty holder knows or ought reasonably to have known about eliminating or minimising a risk to health and safety.</p> <p>A reduction in flexibility may have operational impacts that require careful assessment.</p> |
| <p>7a</p> | <p>New arrangements for HSRs and work groups in small businesses</p> | <p>CME supports the intent of the Option 2- to amend the Model WHS Act so that for small businesses a PCBU is only required to form one work group represented by one HSR and deputy HSR (unless otherwise</p> | <p>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:</p> |

| | | | |
|----|--|---|---|
| | | <p>agreed) to ensure that worker representation is not unduly complex or burdensome.</p> <p>However, CME notes the issues relating to complexity and prescription in Part 5 of the model WHS Act are not limited to small business as concluded by the 2018 review.</p> <p>CME recommends Part 5 be reviewed and streamlined further 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.</p> | <ul style="list-style-type: none"> • 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 |
| 7b | <p>Work group is negotiated with proposed workers:</p> <p>Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.</p> | CME supports this recommendation. | |
| 8 | <p>Workplace entry of union officials when providing assistance to an HSR:</p> <p><i>Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act 2009 (Cth) or another industrial law.</i></p> | <p>CME recommends Option 1 – maintain the Status quo.</p> <p>CME strongly opposes Option 2 and would have significant concerns should this recommendation be implemented in any form.</p> <p>Further CME recommends the WHS Act is amended to qualify HSR assistance from “any person” must be someone with relevant experience/qualification.</p> | <p><i>See above discussion.</i></p> <p>There is a significant risk unions officials will use this as a way to avoid meeting entry requirements and enter sites for purposes other than WHS.</p> |
| 9 | Inspectors to deal with safety issue when cancelling a PIN | <p>CME supports Option 1 – maintain the status quo.</p> <p>An amendment to mandate where a PIN is cancelled the issue must be resolved in accordance with section 82 of the Model WHS Act +(Option 2) is unnecessary given:</p> <p>The power of an inspector to confirm the PIN with changes (section 102(1)(b) of the Model WHS Act)</p> | <p>This recommendation appears to have been made in the absence evidence about how often an inspector cancels a PIN for technical reasons, or why an inspector would do this rather than confirm the PIN with changes.</p> <p>Where no action is taken by an inspector following the cancellation of a PIN it seems</p> |

| | | | |
|----|---|---|--|
| | | <p>provides a mechanism to resolve technical errors in a PIN.</p> <p>Where there are grounds to issue a PIN (i.e. because the PCBU is contravening or has contravened the Model WHS Act) the inspector has sufficient expertise and discretion to confirm the PIN, issue an improvement notice or issue a prohibition notice.</p> | <p>reasonable to conclude the inspector considered the issue(s) raised in the PIN to be unfounded - otherwise the inspector would have taken some action which would seek to remedy the alleged contravention.</p> |
| 10 | <p>HSR choice of training provider</p> | <p>CME recommends Option 1 – maintain the status quo.</p> <p>Option 2 – implementation of the recommendation is not supported and could create significant impost for PCBUs particularly those who operate in remote or regional locations.</p> <p>In WA the Commission for Occupational Health and Safety has a statutory function of approving HSR training courses. This is an important safeguard and should be maintained.</p> | <p>There is a risk that a course chosen by HSRs may not be appropriately scheduled to meet operational requirements or not cover content that the PCBU has identified as necessary to enable the PCBU to meet its duties.</p> <p>The recommendation could create administrative burden by introducing additional work for audit, contract and procurement teams (due to possible increase in total training provider numbers).</p> <p>It could also create significant impost on employers in regional or remote areas where the HSR's preference is not available at a location in proximity to the operation and the PCBU is liable for all associated costs of attending.</p> |
| 11 | <p>Provide examples of Health and Safety Committee constitutions, agendas and minutes:</p> <p><i>Update the model Codes and guidance with examples of Health and Safety Committee (HSC) constitutions, agendas and minutes.</i></p> | <p>CME supports the intent of this recommendation, however, would not support the inclusion of this level of detail in a CoP.</p> <p>CME considers guidance material could effectively provide examples and practical guidance to assist with good governance and the effective running of Committees without creating unnecessary impost for those who already have effect systems/processes in place.</p> | |
| 12 | <p>Update guidance on issue resolution process and participants:</p> <p><i>Update the Worker representation and participation guide to include:</i></p> | <p>This recommendation is supported.</p> | |

| | | | |
|----|---|---|---|
| | <ul style="list-style-type: none"> <i>practical examples of how the issue resolution process works, and</i> <i>a list of the various representatives entitled to be parties in relation to the issues under s 80 of the model WHS Act as well as ways of selecting a representative and informing the other parties of their involvement.</i> | | |
| 13 | Resolving outstanding disputes after 48 hours | <p>CME recommends Option 1 – maintain the status quo.</p> <p>Option 2 – allowing referral to a court or tribunal of outstanding disputes on a WHS or cease work issues after 48 hours is not supported. As noted in the CRIS there is no evidence this will lead to the more efficient resolution of issues.</p> <p>Should this option be implement, CME considers it will be important to include a mechanism so that any stop work decision can be “stayed” in a similar way to the the “stay” of a reviewable decision where internal review is sought under section 228 of the WHS Act.</p> | <p>The referral of matters to a court or tribunal is typically an option of last resort due to the cost, time and effort involved in legal proceedings. Whilst legal proceedings may be appropriate in some circumstances, CME considers the majority of disputes ought to be dealt with outside of a court or tribunal to facilitate the efficient resolution of disputes in accordance with the objects of the Model WHS Act.</p> <p>Without such a mechanism, there is a risk that stop work may be used inappropriately and that businesses will be exposed to cost as a result of the work stoppage until the final resolution of the dispute.</p> |
| 14 | <p>Clarify court powers for cases of discriminatory or coercive conduct:</p> <p><i>Amend the model WHS Act to make it clear that courts have the power to issue declaratory orders in proceedings for discriminatory or coercive conduct.</i></p> | CME does not wish to comment on this recommendation. | |
| 15 | Amend the model WHS Act to retain previous wording in s 117 of the model WHS Act | <p><i>See above discussion.</i></p> <p>CME recommends Option 1 – maintenance of the Status quo and consistency with the entry permit scheme under the Fair Work Act 2009 (Cth).</p> <p>Further, CME recommends the complete removal of Section 7 as proposed by the WA State Government.</p> | <i>See above discussion.</i> |

| | | | |
|----|--|---|--|
| | | CME would have significant concerns should Option 2 be implemented. | |
| 16 | <p>Align the process for the issuing and service of notices under the model WHS Act to provide clarity and consistency:</p> <p><i>Amend the model WHS Act to align the service of notices under s 155 and s 171 with those in s 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.</i></p> | CME supports the recommendation. | |
| 17 | <p>Provide the ability for inspectors to require production of documents and answers to questions for 30 days after they or another inspector enters a workplace</p> | <p>CME would support the implementation of the recommendation (Option 2) provided consideration is also given to amending the WHS Act:</p> <ul style="list-style-type: none"> • to allow for reasonable time to comply with the requirements in the notices; • protect against multiple and duplicative requests for information from multiple inspectors. As a general rule, a single inspector should handle all request; • protect against incrimination extending to cover the 30 days period; and • to specifically require that the notice be issued in writing if the power is exercised away from the workplace, and that this applies to the exercise of all powers under section 171. <p>Further if Option 2 is implemented, CME does not consider there is justification to allow an inspector to obtain information unrelated to the reason the inspector first entered the workplace. Without this limitation the power becomes unfettered and overly broad.</p> <p>An alternative option would be for SWA to develop guidance or training for inspectors that is focussed on the scope of their powers to require the production of documents. Inspectors can have variable understanding of their powers, including the form in which those powers should be exercised (e.g.</p> | <p>Section 155 of the Model WHS Act is considered to be an appropriate mechanism to enable regulators to obtain information and documents.</p> <p>However, CME understands often multiple notices are issued to a company which seek documents which have previously been provided or which seek responses to questions which have previously been asked in an earlier notice. This imposes an unnecessary cost and time burden on parties required to respond to the notice.</p> <p>In some instances the time by which a notice must be responded is too short given the volume of information sought. This places significant demands on business and can detract from operational requirements.</p> <p>The proposed extension to the powers of an inspector may compound the above issues.</p> |

| | | | |
|----|--|--|--|
| | | requests for documents are often made informally in emails) and why the form is important (i.e. the protection against self-incrimination). | |
| 18 | <p>Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction</p> <p>Amend the model WHS Act to clarify that the regulator's power to obtain information under s 155 has extraterritorial application.</p> | <p>CME supports the intent of the recommendations. However, consider further consultation will be required on the specific proposed amendment.</p> <p>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.</p> | <p>The proposed amendments will require careful consideration to identify if any amendments may inadvertently circumvent protections that exist in other jurisdictions. The specific interaction between the different protections in the jurisdictions will require detail consideration.</p> |
| 19 | <p>Enable cross-border information sharing between regulators:</p> <p><i>Amend the model WHS Act to include a specific power enabling regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.</i></p> | <p><i>See comments at Recommendation 18 above.</i></p> | |
| 20 | <p>Review incident notification provisions:</p> <p><i>Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.</i></p> | <p>CME support SWA's recommended approach to undertake a further review of incident notification provisions provided the focus of this review be on clarifying and streamlining requirements and enhancing the ability to maintain a national data set to support the prevention of significant incidents.</p> <p>Any proposals to include a trigger for the notification of psychological injuries will require detailed consideration to assess the operational impact of any proposed notification.</p> <p>The approach recommended in the MAP Report Recommendation 10 (Duty to report Incapacity of ten</p> | <p>CME is concerned about potential unintended consequences should a psychological trigger be proposed for inclusion in the model WHS Act.</p> <p>Psychological injuries are distinct and subjective in nature and do not, for the most part, translate well to the concept of a specific 'event' or 'incident'.</p> |

| | | | |
|-----|---|---|---|
| | | or more days) should be considered as a far simpler and effective way of capturing this type of injury data. | |
| 21 | <p>Review the National Compliance and Enforcement Policy (NCEP):</p> <p><i>Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.</i></p> | <p>CME supports the conduct of the review by SWA provided the review includes an assessment of the effectiveness of the different elements within the hierarchy of enforcement mechanisms enshrined in the Act including enforceable undertakings.</p> | <p>The detail of any proposed decision-making framework will require careful assessment. This assessment should seek to verify that any framework is balanced and allows for an appropriate consideration of a range of enforcement options (where these are appropriate in the circumstances). This would include appropriate guidance on the consideration of offers to enter into WHS undertakings.</p> |
| 22 | <p>Increase penalty levels:</p> <p><i>Amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and</i></p> <p><i>Review the increased penalty levels as part of future reviews of the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate.</i></p> | <p>CME disagree with the SWA assessment of no regulatory impact associated with this recommendation.</p> <p>The policy intent of increasing penalties could be achieved through the creation and adoption of new national sentencing guidelines.</p> | <p>CME note WA only recently passed amendments increasing penalties in line with the model WHS laws. A further increase in penalties without justification is not considered to be in line with the principles of good regulation.</p> |
| 23a | <p>Enhance Category 1 offence:</p> <p><i>Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.</i></p> | <p><i>See above discussion.</i></p> <p>CME recommends Option 1 – maintain the status quo.</p> <p>Option 2 – include gross negligence as a fault element in the Category 1 offence (Recommendation 23a only) - is strongly opposed.</p> <p>Option 4 – implement both Recommendations 23a and 23b – is also strongly opposed.</p> | <p><i>See above discussion.</i></p> <p>CME oppose any amendment to the Category 1 as currently enshrined in the model WHS Act. Significant further justification for and consideration of impacts is required before any such change is considered.</p> <p>We note again the recommendation in relation to sentencing guidelines. The policy intent behind the proposed inclusion of ‘gross negligence’ would also be achieved through clear sentencing guidelines.</p> |

| | | | |
|-------------------|---|---|---|
| <p>23b</p> | <p>Industrial manslaughter:</p> <p><i>Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:</i></p> <ul style="list-style-type: none"> <i>The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act.</i> <i>The conduct engaged is on behalf of a body corporate is taken to be conduct engaged in by the body corporate.</i> <i>A body corporate's conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers.</i> <i>The offence covers the death of an individual to whom a duty is owed.</i> | <p><i>See above discussion.</i></p> <p>CME recommend Option 1 – maintain the status quo.</p> <p>Option 3 – introduce an offence of industrial manslaughter in the model WHS Act (Recommendation 23b only) – is strongly opposed.</p> <p>Option 4 – implement both Recommendations 23a and 23b – is also strongly opposed.</p> | <p><i>See above discussion.</i></p> <p>CME notes the comment made by SWA is the CRIS: “there is currently limited evidence to measure the impact of maintaining the status quo, including whether an industrial manslaughter offence would improve safety outcomes”.</p> |
| <p>24</p> | <p>Improve WHS regulator accountability for investigation progress:</p> <p><i>Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.</i></p> | <p>CME does not wish to comment on this recommendation.</p> | |
| <p>25</p> | <p>Consistent approach to sentencing:</p> <p><i>Safe Work Australia work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered.</i></p> | <p>CME supports the conduct of the review into the feasibility of developing national WHS sentencing guidelines by SWA, working with relevant experts.</p> | <p>This work should be undertaken as a priority and no action taken on recommendations 23a and 23b until it is completed.</p> <p>The content of any proposed guidelines will require careful consideration. For example consideration will be required of how the guidelines interact with the discretion of judges who are best placed to assess the</p> |

| | | | |
|----|--|---|--|
| | | | appropriateness of a penalty in the specific circumstances of a case. |
| 26 | <p>Prohibit insurance for WHS fines:</p> <p><i>Amend the model WHS Act to make it an offence to:</i></p> <ul style="list-style-type: none"> • <i>enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act;</i> • <i>provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and</i> • <i>take the benefit of such insurance or such an indemnity.</i> | <p>CME recommends Option 1 – maintain the status quo</p> <p>Should Option 2 be proposed by SWA, it is our view, subject to further consultation on the detail of the proposed change, it should be implemented as a prohibition on making a claim against an insurance policy to cover the cost of fines and only once convicted of an offence.</p> | <p>CME considers the recommendation is inconsistent with existing and wide-spread insurance models for business risk. Further assessment and analysis of the problem is needed and consultation with relevant stakeholders as to the most appropriate solution.</p> <p>While CME members do not report seeking out or utilising this type of coverage, CME is concerned that insurance policies held by multi-national organisations and sourced from international companies may include such coverage as a matter of course, either by way of insurance (e.g.directors and officers insurance) or indemnity from contractors or joint venture participants.</p> |
| 27 | <p>Clarify the risk management process in the model WHS Act:</p> <p><i>Amend the model WHS Act to clarify the risk management process by including a hierarchy of controls (consistent with reg 36) and making any corresponding amendments necessary to the model WHS Regulations.</i></p> | <p>CME supports the intent of the recommendation, however, has some concerns with potential implementation of Option 2.</p> <p>It will be critical the qualification of ‘so far as is reasonably practicable’ is applied. Such an approach provides businesses with flexibility in how they identify, manage and control WHS risks and hazards.</p> <p>Further, the concept of ‘reasonable practicability’ should be applied universally in relation to all duties and obligations 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.</p> | <p>CME agrees with the sentiment of SWA as noted in the CRIS: “benefit is expected to be minimal because the duty to ensure health and safety under the model WHS Act already requires a PCBU to do all that is reasonable to eliminate or minimise risk...”</p> <p>However, whilst some of the substantive duties set out in the Model WHS Act incorporate the qualification, ‘so far as is reasonably practicable’, its use across all Model WHS Act duties is inconsistent.</p> <p>Prescription on hierarchy of controls has the potential to conflict with companies’ risk management processes and safety management systems, causing unnecessary conflict/duplication and confusion.</p> |

| | | | |
|-----|--|---|---|
| 28 | Improved recording of amusement device infringements and operator training | CME does not wish to comment on this recommendation. | |
| 29 | <p>29a: Add a SWMS template to the WHS Regulations</p> <p>29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS</p> | <p>CME recommend Option 3 - develop a tool to support the completion of fit-for-purpose SWMS (Recommendation 29b only).</p> <p>CME does not support the prescription of templates in the WHS regulations. Flexibility for risk-based approaches must be provided for supported by high quality guidance material.</p> <p>Should Option 2 be implemented, CME supports the suggestion in the CRIS that companies who have their own template or pro-forma SWMS in place (which meet the requirements of the regulations), be permitted to continue to use these.</p> | <p>The detail of any proposed template will need to be understood in order to assess the impact that it may have. In particular, an assessment will be required of whether any proposed template is unduly prescriptive and potentially restrictive of innovation and flexibility in the way in which SWMS are completed.</p> |
| 30 | <p>Photographic ID on White Cards:</p> <p>Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.</p> | CME supports this recommendation. | |
| 31a | <p>Consider removing references to Standards in model WHS Regulations:</p> <p><i>Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.</i></p> | CME supports the recommendation and proposed conduct of the review to cover concerns with the use of standards in the model WHS laws, primarily the currency of standards referenced, the cost of accessing standards and whether compliance with a standard is mandatory. | |
| 31b | <p>Compliance with Standards not mandatory unless specified:</p> <p><i>Amend regulation 15 of the model WHS Regulations ('Reference to Standards') to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated.</i></p> | CME supports this recommendation. | |

| | | | |
|------------|---|--|--|
| | | | |
| 32 | <p>Review MHF Regulations:</p> <p><i>Review the model WHS Regulations dealing with MHFs, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.</i></p> | <p>CME supports the proposed review of the MHF chapter in the model WHS Regulations. However, considers this review should not be limited to administrative or technical amendments but should include consideration of thresholds and MHF classification processes.</p> | |
| 33 | <p>Review crane licence classes:</p> <p><i>Review the high-risk work licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.</i></p> | <p>CME is in principle supportive of recommendation 33. However, it is noted SWA has only recently finished a review of the Units of Competence and National Assessment Instruments. Prior to any formal review process SWA should undertake appropriate stakeholder engagement to demonstrate a need from broader Industry for this to occur.</p> | |
| 34a | <p>Improving the quality of asbestos registers:</p> <p><i>Amend the model WHS Regulations to require that asbestos registers are created by a competent person and update the model Codes to provide more information on the development of asbestos registers.</i></p> | <p>CME does not wish to comment on this recommendation.</p> | |
| 34b | <p>Competent persons in relation to asbestos:</p> <p><i>Review existing requirements for competent persons, including consideration of amendments to the model WHS Regulations to provide specific competencies for asbestos-related tasks or requirements for further guidance on the skills and experience required for all asbestos-related tasks.</i></p> | <p>CME does not wish to comment on this recommendation.</p> | |