Submission on the Work Health and Safety (Resources) Bill
Department of Mines and Petroleum
Contents
About CME ....................................................................................................................... 4
Recommendations ........................................................................................................... 4
  Alignment to, and consistency with, general industry work health and safety legislation... 4
Consolidation of Mining and Petroleum ........................................................................ 5
Objects ............................................................................................................................ 5
Incident reporting and notification ............................................................................. 5
Accommodation .............................................................................................................. 5
Site senior executive .................................................................................................... 6
Resource facility operator ............................................................................................. 7
Remote facilities ............................................................................................................ 7
Major hazard facilities ................................................................................................. 7
Information publication provisions ............................................................................ 7
Boards of inquiry ......................................................................................................... 7
Costs associated with introduction ............................................................................ 8
Context ............................................................................................................................ 9
Review of the Detail ....................................................................................................... 9
WHS Green Bill ............................................................................................................ 10
  Alignment to, and consistency with, general industry work health and safety legislation.. 10
Consolidation of Mining and Petroleum ...................................................................... 12
Objects of the WHSR Bill ............................................................................................. 13
Incident notification and reporting ............................................................................ 14
  Notification requirements ........................................................................................ 14
  Reporting by workers .............................................................................................. 14
  Safety Regulations System ..................................................................................... 14
Accommodation ............................................................................................................ 15
  Potential unintended consequences of the definition of ‘accommodation’ .............. 15
  Appropriate duty holder ......................................................................................... 16
  Duty in respect of accommodation ....................................................................... 17
Definition of ‘site senior executive’ ........................................................................... 17
Definition of ‘resources facility operator’ .................................................................. 18
Duty of a person conducting a business or undertaking from remote operations .... 18
Major hazard facilities ................................................................................................. 19
  Classification of major hazard facilities ................................................................. 19
  Information on the location of major hazard facilities .......................................... 19
Incident investigation and Publication of information by the DMP ............................ 20
Boards of Inquiry ....................................................................................................... 21
Costs associated with WHSR legislation .................................................................. 21
Conclusion ..................................................................................................................... 22
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 2014, the value of Western Australia’s mineral and petroleum production was $114.1 billion. Iron ore accounted for approximately $65.1 billion of production value to be the state’s most valuable commodity. Petroleum products (including LNG, crude oil and condensate) followed at $25.1 billion, with gold third at $8.7 billion.¹

Notwithstanding the recent decline in the price of several export commodities, the estimated value of royalty receipts the state received from the resources sector still composed over 16 per cent of estimated total state revenue in 2015-16, or around $4.4 billion.²

As at March 2015, there was approximately $179 billion in resources sector projects committed or under construction in Western Australia and a further $118 billion in proposed or possible projects.³

Recommendations

- CME supports modernisation of work health and safety legislation for the resources industry and recommends reform remain focused on achieving best practice, maximising potential benefits and minimising costs wherever possible.
- Industry’s ongoing support of the WHSR Bill is contingent on reviewing the detail of the accompanying Regulations. CME recommends draft supporting Regulations be released through MAP as soon as possible to ensure members have adequate time to consider and provide input. Following this process, CME recommends the final draft WHSR Bill and accompanying regulations should be released for final review and comment prior to being introduced in Parliament.

Alignment to, and consistency with, general industry work health and safety legislation

- CME’s strong preference continues to be for the Work Health and Safety Bill 2014 for general industry (the Green Bill) and the WHSR Bill to progress through parliament together. However, in the event this does not occur CME recommends the WHSR Bill be progressed as a priority incorporating the amendments outlined below.
- While CME provided in principal support for the Green Bill, this was contingent on a number of requested amendments. CME’s submission to the Green Bill, included at Appendix 1, is to be read in conjunction with this submission as all requested amendments to the Green Bill equally apply to the WHSR Bill.

³ DMP, 2015, loc. cit.
CME recommends the WHSR Bill be amended to incorporate best practice elements from the Green Bill, including the consultative provisions regarding Ministerial delegation of jurisdictions and inclusion of the ‘control test’ for persons conduction a business or undertaking (PCBUs) to ensure control remains an important element of determining what is reasonably practicable.

If the Green Bill does progress in the short term, CME recommends it be aligned to be maximum extent possible with the WHSR Bill. If the Green Bill does not progress, consequential amendments to the Western Australian Occupational Health and Safety Act 1984 (OHS Act) will be required to minimise inconsistency with the WHSR Bill.

CME recommends DMP and WorkSafe WA work together in consultation with MAP, Council of Occupational Safety and Health (COSH) and the Mining Industry Advisory Committee (MIAC) to address any potential inconsistency regardless of the approach taken to these reforms.

Consolidation of Mining and Petroleum

Given ongoing concerns raised by industry sectors, and in particular the oil and gas sector, regarding full consolidation within the WHSR Bill, CME recommends Option 2 continue to be carried as a contingency and requests further information be provided on the potential implementation of this option.

CME recommends in reviewing the WHSR regulations MAP be provided with additional information regarding options for the future structure of resources safety legislation and the opportunity to consider whether mining and petroleum regulation is best placed in a single consolidated set of regulations or whether it is preferable to develop separate sets of regulation specific to industry sectors.

Objects

CME recommends the objects of the WHSR Bill be amended to make the different approach to risk management in the oil and gas and mining sectors explicitly clear. Specifically, CME recommends clause 3(ab) of the WHSR Bill be amended to:

- separate out the references to safety cases and safety management systems (SMS); and
- recognise petroleum operations and MHFs will be subject to a safety case and mining operations will be subject to a SMS.

Incident reporting and notification

CME recommends the definitions of ‘serious injury or illness’ and ‘dangerous incident’ be amended to remove ambiguity and additional guidance be provided on matters the DMP considers would require notification as serious injuries or illnesses and as dangerous incidents (and therefore trigger a full investigation).

CME recommends the WHSR Bill be amended to include a specific obligation on workers and others at the resources facility to notify the resources facility operator of dangerous occurrences of which the worker or other person becomes aware.

CME recommends the implementation of the SRS system for petroleum and MHF operators be progressed by the DMP as a matter of priority to streamline the provision of information to the DMP. Additionally, CME recommends DMP prepare information material or training sessions to assist petroleum, pipeline and MHF companies in the transition to the new reporting system.

Accommodation
CME strongly recommends a mechanism to ensure there is no unintended extension of right of entry entitlements to residential premises be included in the WHSR Bill, or though consequential amendments to the Industrial Relations Act 1979 (WA). For example, this might be achieved by:

- including sections 129 and 170 of the Model WHS Act in the WHSR Bill; or
- including a provision similar to the restriction on entering premises used mainly for residential premises contained in section 493 of the Fair Work Act 2009 (Cth).

CME recommends the following amendments to ensure clarity regarding the duty to maintain accommodation:

- A new clause (which, using the existing numbering would become clause 5H) be included to define the ‘Person with management or control of accommodation’ to mean:
  - The person conducting a business or undertaking who has overall management or control of the accommodation.
- Clause 19(4) of the WHSR Bill be amended to read:
  - ‘A person with management or control of accommodation must ensure, so far as is reasonably practicable, that accommodation is maintained so that the worker occupying the accommodation is not exposed to risks to their health and safety’
- The definition of accommodation be amended to read:
  - ‘accommodation means any accommodation in which a worker of a resources facility operator resides; and
  - (a) the occupancy is necessary for the purposes of the workers’ engagement because other accommodation is not reasonably available; and
  - (b) is not:
    - (i) within a townsite within the meaning in section 26(1) of the Land Administration Act 1997; or
    - (ii) within the metropolitan region as defined in the Planning and Development Act 2005; or
    - (iii) pursuant to a written agreement containing terms that might reasonably be expected to apply to a letting of the accommodation to a tenant.’
- The definition of ‘mining operations’ be amended to read at paragraph (l):
  - ‘accommodation as defined on a mining tenement and used solely in connection with the mining operations’; and
- Similar changes be made to the definition of ‘petroleum operation’ so the definition is appropriately limited.

Subject to the above amendments, CME recommends the duty to maintain accommodation as proposed by clause 19(4) of the WHSR Bill remain qualified as a ‘maintenance’ duty. CME would not support the extension of this duty beyond what is reasonable practicable and does not support the alternate wording of the same provision used in the Model WHS Act.

Site senior executive
CME recommends the drafting of the definition of ‘site senior executive’ (SSE) be amended so:
- the SSE be appointed as having responsibility for the resource facility by the resources facility operator rather than the most senior natural person representing the resources facility operator automatically being the SSE; and
- the word ‘at the site’ is replaced by the words ‘of the resources facility’.

CME recommends the transition period to the obligations being imposed on an SSE be sufficiently lengthy to allow individual the time to obtain appropriate training on their duties.

Resource facility operator
CME recommends the definition of ‘resources facility operator’ be amended to remove the provisions in subclause 5G(3) which deal with a situation where no selection of an operator has been made.

Remote facilities
CME recommends clause 26A(2) of the WHSR Bill be amended to remove ambiguity and clarify the facilities to which to provision applies. This could be achieved by:
- inserting the word ‘remote’ prior to the first instance of the word ‘facility’ in clause 26A(2) of the WHSR Bill; and
- inserting the word ‘resources’ before the second instance of the word ‘facility’ in clause

CME further recommends consideration be given to whether the duty in clause 26A of the WHSR Bill is appropriate for situations in which an unmanned offshore petroleum facility is remotely operated from another manned offshore petroleum facility.

Major hazard facilities
CME Recommends DMP develop an Explanatory Memorandum in consultation with industry and MHF operators to ensure there is appropriate flexibility, clarity and certainty regarding the process of classification of MHFs.

CME recommends the criteria the DMP will use to assess whether a facility should be determined to be a MHF be published.

CME recommends the DMP develop a system to allow certain parties registered with the DMP to obtain information on whether a facility is a MHF.

Information publication provisions
CME recommends further clarity be provided on the intent of the provisions providing DMP with the power to release information relating to safety incidents. While CME supports the role of the regulator in promoting the sharing of safety lessons learned, it is important there is clarity on how these provisions will be used.

CME recommends the WHSR Bill be amended to remove the specific reference to the publication of radiation management plans.

CME recommends a nuanced approach to the publication of information is required based on an assessment of the information being in the public interest and appropriately managing commercially sensitive information.

Boards of inquiry
In the interests of streamlining the WHSR Bill, CME recommends the provisions relating to boards of inquiry be deleted.

**Costs associated with introduction**

- CME recommends further detailed analysis of the anticipated cost and benefits of these reforms be undertaken including incorporating findings and outcomes of the Council of Australian Government (COAG) review of national model WHS legislation.

- To minimise the cost burden from the introduction of the WHSR Bill, CME recommends the DMP take a pragmatic approach to policies and procedures of resources facility operators including permitting resource facility operators to continue to use existing policies and procedures which refer to current legislation but otherwise meet the substantive requirements of the WHSR Bill.

These issues are discussed below in more detail.
Context

CME appreciates the opportunity to comment on the ‘mock-up’ draft Work Health and Safety (Resources) Bill (WHSR Bill) Consultation Regulatory Impact Statement (CRIS).

The CME have consistently supported the reform of work health and safety legislation in Western Australia to move away from prescription and incorporate best practice risk based outcomes focused approaches.

While industry supports the broad principles of national harmonisation, CME appreciates the intent of the Western Australian Government’s reform program is to modernise and streamline existing work health and safety legislation while building national consistency where possible.

CME is pleased the modernisation of WHS legislation for the resources industry in Western Australia has been progressed and considers it is critical this reform continue to focus on achieving the best outcomes for Western Australia. Going forward, a detailed review of the regulations accompanying the WHSR Bill is required to ensure these achieve the intended benefits to safety outcomes as well as streamline and reduce regulatory and administrative burden.

CME supports modernisation of the work health and safety legislation for the resources industry and recommends reform remain focused on achieving best practice, maximising potential benefits and minimising costs wherever possible.

Review of the Detail

Based on the level of detail provided in the CRIS it is not possible to fully assess the benefits of the proposed reforms, nor it is possible to accurately estimate potential costs as is discussed later in this submission.

CME understands much of this detail will be included in the supporting regulations. While industry strongly supports the removal of unnecessary prescription from the Act, CME maintains a review of the detail which sits in the regulations is critical to enable a full assessment of the benefits and costs and to make a determination as the whether the reforms are likely to achieve the intended outcomes.

CME understands ‘mock-up’ chapters of the regulations will be made available to the Safety Legislation Reform Ministerial Advisory Panel (MAP) for review and comment ahead of the planned CRIS on the regulations in 2016 and strongly supports this approach.

MAP was established to provide tri-partite advice to the Minister for Mines and Petroleum regarding the resources safety legislation reform program and input into the development of the WHSR legislation. Given the proposed timeframe, with implementation of the new laws scheduled for early 2017, it is critical MAP is provided with the opportunity to review and input into these as early as possible. MAP’s support for the detail which will sit in the supporting regulations is critical to the ongoing momentum of these reforms.

Further, CME is not aware of any legal restriction which would prohibit the release of the draft regulations prior to the WHSR being tabled in Parliament. Indeed, CME is aware of
other recent consultation processes that have been conducted by the release of a draft Bill and draft Regulations together.

While CME appreciates the reform process is under considerable time pressure, in light of the substantial changes which may be introduced through these reforms, it is critical industry has the opportunity to review and comment on the full legislative package before a final commitment is made to enact the WHSR Bill.

For this reason, CME would support the release through MAP of the final package to legislation for review and comment prior to it being put before Parliament.

Industry’s ongoing support of the WHSR Bill is contingent on reviewing the detail of the accompanying Regulations. CME recommends draft supporting Regulations be released through MAP as soon as possible to ensure members have adequate time to consider and provide input. Following this process, CME recommends the final draft WHSR Bill and accompanying regulations should be released for final review and comment prior to being introduced in Parliament.

**WHS Green Bill**

The opportunity to review and provide comment on the Work Health and Safety Bill 2014 (Green Bill) for general industry released in September last year was welcomed by CME. As noted in our submission, industry is supportive of the Green Bill in principal.

While full support continues to rest on resolution of the specific amendments sought in our submission and a review of the detail which will sit in the supporting regulations, CME wishes to reiterate support for progression of these reforms. In industry’s view, the implementation of the Green Bill, with the suggested amendments, has the potential to result in improved safety outcomes as well as reduce regulatory and administrative burden.

CME is strongly of the view reform of the work health and safety legislation as it relates to the resources sector is required to reduce the current level of prescription and bring existing legislation in line with best practice. Further, CME considers implementing outcomes focused legislation that is less prescriptive and maximises flexibility and promotes proactive compliance will enable continuous improvement and facilitate the development implementation of innovative approaches. This should result in cost savings for industry as well as improved safety outcomes.

CME’s strong preference continues to be for the Work Health and Safety Bill 2014 for general industry (the Green Bill) and the WHSR Bill to progress through parliament together. However, in the event this does not occur CME recommends the WHSR Bill be progressed as a priority incorporating the amendments outlined below.

**Alignment to, and consistency with, general industry work health and safety legislation**

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4 See for example: the release by the Federal Government of a package of reforms to strengthen the foreign investment framework to be given effect through (among other things) the Foreign Acquisitions and Takeovers Regulations 2015. The Regulations have been released together with the Bill so that stakeholders understand how the new legislative framework will operate. In this respect, the Regulations contain key provisions such as the definition of agribusiness, definitions and rules around foreign government investors and the specific rules for free trade agreement partner countries; and the release for public comment by the Federal Government of changes to the unclaimed moneys provisions which will be given effect by (among other things) the Banking Amendment (Unclaimed Money) Regulation 2015.
CME welcomes the large degree of alignment between the Green Bill and the WHSR Bill with many of the core provisions shared across the legislative instruments. Industry supported and encouraged this approach.

However, CME notes the provisions in the WHSR Bill which are common to the Green Bill do not yet reflect any changes resulting from the Green Bill consultation process which was completed earlier this year.

A report on the results of this consultation has also not been released making it difficult to anticipate whether any of industry’s recommended amendments will be incorporated.

For example, as outlined in CME’s submission to the Green Bill, industry has raised concerns in relation to a number of areas common to the WHSR Bill and the Green Bill. These include compliance and enforcement mechanisms including the lack of the availability to enter into enforceable undertakings in lieu of prosecution and provisions to ensure protections from discriminatory conduct cannot be used maliciously by workers.

While CME provided in principal support for the Green Bill, this was contingent on a number of requested amendments. CME’s submission to the Green Bill, included at Appendix 1, is to be read in conjunction with this submission as all requested amendments to the Green Bill equally apply to the WHSR Bill.

Additionally, CME notes in some areas the common provisions differ, which in some cases creates material differences in meaning and potential outcomes. For example, the provisions providing the Minister with the power to make determinations regarding jurisdiction under the Green Bill provide for consultation between the two relevant Ministers whereas under the WHSR Bill the Minister for Mines and Petroleum appears to have the power to make this determination without consultation.

There also appears to be a difference in the application of the ‘control test’ for determining what is reasonably practicable for a person conducting a business or undertaking (PCBU) in discharging their duty of care obligations. This could result in diverging liability tests and create uncertainty for proponents regarding their responsibilities under the WHSR Bill.

Further, CME notes the approach taken in the Green Bill is consistent with that taken in South Australia and CME supports the incorporation of the this ‘control test’ in Western Australia.

CME recommends the WHSR Bill be amended to incorporate best practice elements from the Green Bill, including the consultative provisions regarding Ministerial delegation of jurisdictions and inclusion of the ‘control test’ for PCBUs to ensure control remains an important element of determining what is reasonably practicable.

It is important to note the resource industry strongly supports the maintenance of separate work health and safety legislation to address sector specific hazards and risk management processes as well as provide adequate support from a dedicated regulator. Industry would strongly oppose any effort to create a single piece of legislation for all industries.

Industry considers the current reform processes underway must as far as possible maintain this separation while staying focused on consistency across the two legislative instruments.

If the Green Bill does not progress, consequential amendments will be required to ensure the current Occupational Safety and Health Act 1984 (WA) (OSH Act) aligns to the WHSR Bill in areas where there would otherwise be inconsistent provisions such as the mechanism for seeking an instrument of declaration under the OSH Act.

Regardless of the timing and approach to reform and work health and safety legislation for general industry it is critical the two pieces of legislation are drafted to ensure a high level of alignment to minimise duplication and inconsistency.

If the Green Bill does progress in the short term, CME recommends it be aligned to be maximum extent possible with the WHSR Bill. If the Green Bill does not progress,
consequential amendments to the existing OSH Act will be required to minimise inconsistency and duplication with the WHSR Bill.

Alignment must continue to be a longer term priority even in the event a high level of consistency is not achievable in the near term through the current reform process.

For example, the introduction of the WHSR Bill in the absence of the Green Bill would create uncertainty regarding definitions, requirements and regulatory jurisdiction and potential duplication of issues covered in the existing OSH Act.

Alignment in the following areas is particularly important:

- Definitions of key terms such as employer (person conducting a business of undertaking) and employee (worker);
- Duty of care responsibilities;
- Accountabilities;
- The treatment of accommodation;
- The mechanism to establish the jurisdiction of one Act over the other; and
- Compliance enforcement activities including penalties.

CME recommends DMP and WorkSafe WA work together in consultation with MAP, Council of Occupational Safety and Health (COSH) and the Mining Industry Advisory Committee (MIAC) to address any potential inconsistency regardless of the approach taken to these reforms.

Consolidation of Mining and Petroleum

CME acknowledges there are potential benefits to be derived from a consolidated WHSR Bill which establishes a framework for a streamlined and consistent regime governing safety and health across mining, MHF and petroleum operations in Western Australia.

However, industry has previously raised concern with the full consolidation of petroleum and mines safety legislation (referred to as Option 1 in the previous Decision RIS on the structure of the legislation) noting the different risk management approaches and significant operational differences across these unique sectors.

These concerns have been addressed to some extent through the Decisions RIS and in the high level drafting of WHSR Bill. Additionally, CME was pleased to note the Decisions RIS, recommended an alternative structure which would maintain the separation of mining and petroleum (referred to as Option 2) be carried forward as a contingency.

However, the present Consultation RIS has provided very little detail around specific anticipated benefits to safety or through reduction in regulatory burden associated with including petroleum within the WHSR legislation. Likewise no further detail has been provided around Option 2 to enable a comparison of assessment of benefits and costs against Option 1 or to outline how or when this ‘contingency’ might apply.

The assessment in the Consultation RIS of potential costs is also limited as discussed further below.

As a result, industry remains unconvinced the potential benefits of full consolidation of the legislation outweigh the anticipated risks, as outlined in our previous submission (available [here](http://www.cmewa.com/policy-and-publications/policy-areas/people-and-communities/preview?path=Draft-submission-resources-safety-consolidation-options.pdf)). It is noted for example while the current reform consolidates the safety elements of
petroleum legislation, the three existing state based Acts covering petroleum will continue to apply.

**Given ongoing concerns raised by industry sectors regarding full consolidation within the WHSR Bill, CME recommends Option 2 continue to be carried as a contingency and requests further information on the potential implementation of this option in light of Option 1 not being achievable.**

Specifically, CME questions whether the proposed decoupling of well integrity and environmental regulations from safety regulations for the petroleum industry is desirable from a practical or safety perspective.

While there is clearly an opportunity to streamline existing petroleum and pipeline legislation, CME notes extricating the safety elements of this legislation and incorporating them into consolidated resources work health and safety legislation, particularly at the level of the regulations, will be a complex exercise and industry is not convinced this will deliver a net benefit or be achievable in the identified timeframes.

**CME recommends in reviewing the WHSR regulations MAP be provided with additional information regarding options for the future structure of resources safety legislation and the opportunity to consider whether mining and petroleum regulation is best placed in a single consolidated set of regulations or whether it is preferable to develop separate sets of regulation specific to industry sectors.**

**Objects of the WHSR Bill**

As noted above, CME considers it important the unique risk management approaches and operational realities of the mining, petroleum, pipelines and MHF sectors of the resources industry are appropriately recognised in the legislation. The differences in the risk management approaches are outlined in detail on pages 9-10 of our submission to the CRIS on the proposed structure of the legislation (available here).

While the high level drafting of the WHSR Bill is largely supported, CME considers the Objects of the WHSR Bill should be clarified to specifically recognise and provide certainty to industry regarding the ongoing acceptability of these different risk management approaches.

CME understands the detail underpinning the risk management approach and required outcomes will be outlined in the regulations and supports this approach. However, as currently drafted, it is unclear in what instances the implementation of a safety case or safety management system will be required.

**CME recommends the objects of the WHSR Bill be amended to make the different approach to risk management in the petroleum and mining sectors explicitly clear. Specifically, CME considers clause 3(ab) of the WHSR Bill be amended to:**

- separate out the references to safety cases and safety management systems; and
- recognise petroleum operations and MHFs will be subject to a safety case and mining operations will be subject to a safety management system.

This might be achieved by:

- amending clause 3(ab) to read:
  
  ‘to ensure that a petroleum operator, geothermal energy operator, greenhouse gas storage operator and operator of a major hazard facility develop, implement and maintain effective safety cases’; and

- inserting a new clause (ac) to read:
  
  ‘to ensure that a mine operator develop, implement and maintain effective safety management systems’.
Incident notification and reporting

Notification requirements

The WHSR Bill proposes to make amendments to the definitions of ‘serious injury or illness’ and ‘dangerous incident’, which differ to those in existing Western Australian legislation and are also not consistent with the definitions included in the Model WHS Act.

Industry is concerned the amendments to these definitions may create uncertainty on the matters that must be reported. In particular, CME notes:

- the inclusion of the words ‘includes but is not limited to’ in the definition of ‘serious injury or illness’; and
- the inclusion of the words ‘or had the potential to expose’ in the definition of ‘dangerous incident’.

CME considers the additional matters required to be notified to the DMP are not currently clear from the definitions included in the WHSR Bill. Before supporting these changes, it is important to understand what additional matters the DMP will require to be notified.

Additionally, the broadening of the definitions discussed above coupled with the requirement to investigate these incidents in accordance with clause 39A of the WHSR Bill, may have the unintended impact of driving a conservative or restrictive interpretation of the matters requiring notification.

This is because resource facility operators may be reluctant to notify an incident they consider to be of a minor nature (which can be managed appropriately through internal reporting) if the statutory requirements of clause 39A of the WHSR Bill (to conduct a full investigation) will be triggered by notification of these incidents. This may have the unintended consequence of decreasing reporting.

**CME recommends the definitions of ‘serious injury or illness’ and ‘dangerous incident’ be amended to be consistent with the model WHS Act and to remove ambiguity. Additionally, guidance should be provided on matters the DMP considers would require notification as serious injuries or illnesses and as dangerous incidents which would therefore trigger a full investigation.**

Reporting by workers

CME notes the current Mines Safety and Inspection Act 1994 (WA) (MSIA) imposes a specific obligation on persons working in a mine to report some occurrences and situations in accordance with section 11. In contrast, the duties imposed on workers and other persons under clauses 28 and 29 of the WHSR Bill do not include a specific requirement for workers to notify incidents to the PCBU. CME is of the view the WHSR Bill would benefit from the inclusion of provisions similar to those in section 11 of the MSIA.

**CME recommends the WHSR Bill be amended to include a specific obligation on workers and others at the resources facility to notify the resources facility operator of dangerous occurrences of which the worker or other person becomes aware.**

Safety Regulations System

CME notes for the mining sector of the resources industry, the DMP’s Safety Regulations System (SRS) for online reporting has been developed and implemented. CME welcomes the progression of the roll out of the SRS system for petroleum facility operators and operators of MHFs to facilitate the provision of information to the DMP through this system.
However, CME notes the implementation of new IT systems take considerable time and additionally, transition periods may be required to ensure those with responsibility to report have access to and understand how to use the new system.

**CME recommends the implementation of the SRS system for petroleum and MHF operators be progressed by the DMP as a matter of priority to streamline the provision of information to the DMP. Additionally, CME recommends DMP prepare information material or training sessions to assist petroleum, pipeline and MHF companies in the transition to the new reporting system.**

### Accommodation

CME notes the current reform process is an opportunity to clarify requirements and regulatory jurisdiction of the regime applicable to accommodation provided to resource sector workers. However, industry considers the approach to accommodation:

- Must remain consistent with the underlying principles of the work health and safety legislation in that it:
  - includes provisions which are risk based and avoid unnecessary prescription;
  - places responsibility with the duty holder most appropriate to owe a duty; and
  - recognises the duty owed is couched by a consideration of what is reasonably practicable for the appropriate duty holder to take; and
- Must not result in unintended consequences that potentially expand union rights of entry to accommodation premises used by resources workers.

Further, CME understands it is not the intention of DMP for accommodation to be treated as a workplace under the WHSR Bill and strongly supports this objective. The following sections address this issue in more detail.

### Potential unintended consequences of the definition of ‘accommodation’

CME is concerned the inclusion of ‘accommodation’ (as defined in clause 4 of the WHSR Bill) in the definitions of ‘mining operations’ and ‘petroleum operations’ may have the unintended consequence of accommodation being considered to be a ‘workplace’. This is because clause 8 of the WHSR Bill defines a ‘workplace’ as ‘a place where resources operations are carried out for a business or undertaking’ and the definition of ‘resource operations’ in turn includes mining and petroleum operations. Simply put, the embedding of these definitions can be read to include ‘accommodation’ within the definition of ‘workplace’.

This ambiguity regarding the definition of ‘accommodation’ in the WHSR Bill needs to be clarified to avoid confusion and ensure associated duties and duty holders in these instances are clearly understood.

Further, industry is concerned defining ‘accommodation’ as a ‘workplace’ for resource sector operators could have unintended consequences for right of entry by entry permit holders.

In this regard, it is noted the Fair Work Act specifically excludes the right of entry to any residential premises (including accommodation camp facilities), however, expressly does not cover State based occupational health safety matters. CME considers similar exclusion of the Fair Work Act rights of entry provisions should be replicated in Western Australia resources safety or industry relations legislation to ensure consistency of application between the State and Commonwealth jurisdictions.

**CME strongly recommends a mechanism to ensure there is no unintended extension of right of entry entitlements to residential premises be included in the WHSR Bill, or though consequential amendments to the *Industrial Relations Act 1979* (WA) (IR Act). For example, this might be achieved by:**
o including sections 129 and 170 of the Model WHS Act in the WHSR Bill; or

o including a provision in the IR Act similar to the restriction on entering premises used mainly for residential premises contained in section 493 of the Fair Work Act 2009 (Cth).

**Appropriate duty holder**

CME considers the way in which accommodation is defined in the WHSR Bill may not recognise the diverse range of accommodation which is provided for resource sector workers. Specifically, there may be situations where the resources facility operator is not the owner or the person with management or control over the accommodation. CME considers the duty to maintain accommodation should rest with the person that has the closest nexus of control over the accommodation. In CME’s view, this is consistent with the underlying concepts of work health and safety legislation.

Further, CME considers the exception currently contained in the MSI Act for premises which are the subject of a written agreement (ie the letting of the residential premises to a tenant) should continue to apply to the duty to maintain accommodation in the WHSR Bill. This is because in a lease arrangement, the landlord will have duties to maintain the property and it is therefore not appropriate for additional duties to be imposed through the WHSR Bill.

For these reason, CME recommends:

o A new clause (which, using the existing numbering would become cluse 5H) be included to define the ‘Person with management or control of accommodation’ to mean:

  The person conducting a business or undertaking who has overall management or control of the accommodation.

o Clause 19(4) of the WHSR Bill be amended to read:

  ‘A person with management or control of accommodation must ensure, so far as is reasonably practicable, that accommodation is maintained so the worker occupying the accommodation is not exposed to risks to their health and safety’

o The definition of accommodation be amended to read:

  ‘accommodation means any accommodation in which a worker of a resources facility operator resides; and
  
  (a) the occupancy is necessary for the purposes of the workers’ engagement because other accommodation is not reasonably available; and
  
  (b) is not:
  
  (i) within a townsite within the meaning in section 26(1) of the Land Administration Act 1997; or

  (ii) within the metropolitan region as defined in the Planning and Development Act 2005; or

  (iii) pursuant to a written agreement containing terms that might reasonably be expected to apply to a letting of the accommodation to a tenant.’

o The definition of ‘mining operations’ be amended to read at paragraph (l):

  ‘accommodation as defined on a mining tenement and used solely in connection with the mining operations’
Similar changes be made to the definition of ‘petroleum operation’ so the definition is appropriately limited.

Duty in respect of accommodation

Subject to the inclusion of the changes discussed above, CME considers the duty to maintain accommodation as proposed by clause 19(4) of the WHSR Bill is appropriate and supports its inclusion in the Bill. This is because CME considers the duty to maintain accommodation to a standard which, so far as is reasonably practicable, does not expose occupants of the accommodation to a risk to their health and safety is appropriate.

It is also noted duties pertaining to the maintenance of accommodation are consistent with international health and safety legislation dealing with worker accommodation. For example, a similar approach is taken in applicable legislation in the United Kingdom and certain Canadian provinces6.

Subject to the above amendments, CME recommends the duty to maintain accommodation as proposed by clause 19(4) of the WHSR Bill remain qualified as a ‘maintenance’ duty. CME would not support the extension of this duty beyond what is reasonable practicable and does not support the alternate wording of the same provision used in the Model WHS Act.

Definition of ‘site senior executive’

CME acknowledges the use of the term ‘site senior executive’ within the WHSR Bill and welcomes the DMP’s intent to impose less prescription in the appointment of a SSE when compared to a ‘registered manager’ under the MSI Act.

However, industry is concerned the drafting of the definition of ‘site senior executive’ may lead to unintended consequences because:

- there may be situations where the most senior person at the resources facility (such as the ‘General Manager’) may not be the appropriate SSE. Resource facility operators should be free to appoint the most suitable person as the SSE, this may not always be the most senior person on site;
- there is a potential risk the definition as drafted may have the unintended consequence of a senior person visiting a resources facility becoming the SSE during the period they are at the resources facility by dint of being ‘the most senior person on site’;
- industry understands the role of Exploration Manager under the MISA will not be specified in the WHSR legislation, however, clarity is required regarding the role of the SSE with regards to Greenfields exploration sites;
- it would better reflect the integrated nature of petroleum operations and the fact that these operations are not limited to a single ‘site’ to replace the words ‘site’ with ‘resources facility’; and
- the words ‘at the site’ do not deal with situations where a resource operation might be unmanned (ie an unmanned platform) and therefore the words ‘of the resources facility’ allow for these situations.

CME therefore recommends the drafting of the definition of ‘site senior executive’ be amended so:

6 See, for example, clause 66 of the Offshore Installations and Wells (design and Construction etc) Regulations 1996 (UK); clause 16 of the Industrial Camps Regulation (British Columbia)
o the SSE be appointed as having responsibility for the resource facility by the resources facility operator rather than the most senior natural person representing the resources facility operator automatically being the SSE; and

o the word ‘at the site’ is replaced by the words ‘of the resources facility’.

CME understands the duties owed by the SSE will be set out in the Regulations and as discussed above, it is important these are released for public comment as a matter of priority so a full assessment can be made of support for the inclusion of the role of a SSE in the WHSR Bill.

It is noted the role of the SSE will be filled by individuals. For mining operations, the SSE role may be filled by the person whom is currently the ‘Registered Manager’. For petroleum and MHF operations, the requirement for an individual to hold this role will be new. CME therefore considers it is important there are appropriate transition periods to allow individuals to receive the appropriate training on their duties and for the costs to the PCBU in providing training to be spread out over an appropriate period so the cost burden is reduced.

Further, in the absence of the release of the Regulations accompanying the WHSR Bill it is not possible to identify if the WHSR legislation will set out qualifications that an SSE is expected to hold (if any).

CME recommends the transition period to the obligations being imposed on an SSE be of sufficient duration to allow an individual the time to obtain appropriate training on their duties.

Definition of ‘resources facility operator’

CME notes subclause 5G(3) of the WHSR Bill includes a provision which addresses a situation in which a resources facility operator has not been selected. CME considers:

o it is difficult to envisage circumstances in which a selection of an operator would not be made. This is particularly the case where clause 5E of the WHSR Bill requires a ‘petroleum operator’ is ‘registered by the regulator as the operator of that petroleum operation’;

o clause 5G(2) makes it mandatory to select and operator; and

o it appears inconsistent with the nature of the WHSR Bill which imposes the primary duties on a PCBU, to impose duties on individuals through clause 5G(3)(b) in circumstances where a selection of an operator is not made.

CME recommends the definition of ‘resources facility operator’ be amended to remove the provisions in subclause 5G(3) which deal with a situation where no selection of an operator has been made.

Duty of a person conducting a business or undertaking from remote operations

CME welcomes the inclusion of clause 26A in the WHSR Bill to clarify the treatment of remote operations centres so the jurisdiction of DMP and WorkSafe is made clear.

However, as currently drafted, CME considers there is the potential for confusion between the facilities (the remote facility or the resource facility) being described in the clause.

CME recommends clause 26A(2) of the WHSR Bill be amended to remove ambiguity and clarify the facilities to which to provision applies. This could be achieved by:
• inserting the word ‘remote’ prior to the first instance of the word ‘facility’ in clause 26A(2) of the WHSR Bill; and

• inserting the word ‘resources’ before the second instance of the word ‘facility’ in clause

Further, CME is concerned, as drafted, the clause dealing with remote operations may not be appropriate for unmanned facilities operated from a manned facility, such as in offshore operations, where each would be a resources facility.

CME further recommends consideration be given to whether the duty in clause 26A of the WHSR Bill is appropriate for situations in which an unmanned offshore petroleum facility is remotely operated from another manned offshore petroleum facility.

Major hazard facilities

Classification of major hazard facilities

CME supports the definition of a MHF included in the WHSR Bill. Specifically, CME supports the position that in order for a facility to be considered a MHF it must have chemicals above the prescribed level and following an assessment of factors such as location and usage be determined by the regulator to be a MHF.

The proposed definition appears to recognise locations where chemicals are in the prescribed quantity but are present only for a limited period of time (eg a distribution centre) should not automatically be a MHF. However, CME would welcome the intention of this drafting being made expressly clear in the Explanatory Memorandum to accompany the WHSR Bill. This would ensure clarity for companies provided by the existing pragmatic and consultative approach to MHF classification between the regulatory and facility operators.

Further, CME understands it is the intention of the DMP to adopt a risk based approach in determining whether a facility should be determined to be a MHF. CME supports this approach. However, considers it important the criteria for assessment are made clear.

CME Recommends DMP develop an Explanatory Memorandum in consultation with industry and MHF operators to ensure there is appropriate flexibility, clarity and certainty regarding the process of classification of MHFs.

CME welcomes additional information being provided on the critical levels of chemicals to be prescribed in the regulations. If the levels are to be drawn from the Model WHS legislation, it would be appropriate for the terminology to be updated to ensure consistency between any schedule setting out the thresholds and the Globally Harmonised System of Classification and Labelling of Chemicals.

CME recommends the criteria the DMP will use to assess whether a facility should be determined to be a MHF be published.

Information on the location of major hazard facilities

In certain situations it may be necessary for a third party to know if the facility they are supplying a good or service to is a MHF. CME understands, due to security considerations, the DMP no longer publishes a list of MHFs in the State. CME considers the security concerns need to be balanced against the need for third parties to know if a facility is a MHF.

CME recommends the DMP develop a system to allow certain parties registered with the DMP to obtain information on whether a facility is a MHF.
Incident investigation and Publication of information by the DMP

CME supports the sharing of safety and health information across the resource industry where this will lead to improved safety and health outcomes.

It is understood proposed WHSR Bill requirements relating to the provision of incident reports to the DMP (clause 39) and the ability for the DMP to publish information have been included to facilitate the sharing of lessons learned to facilitate continuous improvement efforts.

CME supports in-principle amendments to improve transparency. However, it is important DMP finds a balance between access to relevant information and protection of commercially sensitive material. Greater clarity is also required on the matters that might be prescribed by the regulations.

**CME recommends further clarity be provided on the intent of the provisions providing DMP with the power to release information relating to safety incidents. While CME supports the role of the regulator in promoting the sharing of safety lessons learned, it is important there is clarity on how these provisions will be used.**

Additionally, CME cautions against a simplistic approach being taken to the publication of information. Industry would not support an approach which required complex documents completed internally by an operator for a specific purpose to be released without appropriate consultation with the company and background information being provided by the DMP.

A practical approach to the publication of information is required which recognises the release of highly technical documents, for example those prepared for a regulatory approval process, may not be the best approach to facilitate public understanding of relevant issues.

For example, industry does not consider the release of radiation management plans (RMPs) would necessarily be in the public interest given the highly technical nature of these documents which are drafted to meet regulatory requirements administered by DMP.

CME also questions the intent behind including the release of RMPs as a prescriptive requirement in the WHSR Bill and considers this is contrary to the objective of formalising a best practice risk based approach which removes unnecessary prescription.

**CME recommends the WHSR Bill be amended to remove the specific reference to the publication of radiation management plans. The requirement appears to be inconsistent with a risk based approach,**

Further, CME considers the publication of information should focus on making the regulatory decision making process transparent as opposed to simply releasing documents prepared by a resource facility operator. A careful assessment is required by the DMP before making any information publically available. This should include consideration of:

- the intent of the publication or release – ie that it is in the public interest;
- whether the material includes the appropriate context and level of details to be generally understood; and
- whether commercially sensitive information can be appropriately protected.

Further, CME considers it is important for organisations to have the ability to protect commercially sensitive information. Prior to publication of any information, organisations should be given the opportunity to redact commercially sensitive information from any documents to be published by the DMP.

**CME recommends a risk based approach to the publication of information is required based on an assessment of the whether the information is in the public interest,**
includes appropriate context and commercially sensitive information can be appropriately protected.

Boards of Inquiry

CME supports in principle provisions providing for an inquiry to be undertaken in the circumstances set out in clause 277 of the WHSR Bill. However, where possible, the WHSR Bill should be simplified and should not be duplicative of other legal processes.

CME considers the provision on Boards of Inquiry may be unnecessary in light of the existing ability for an inquiry to be held which has been used previously in WA.

In the interests of streamlining the WHSR Bill, CME recommends the provisions relating to boards of inquiry be deleted.

Costs associated with WHSR legislation

The consultation RIS provides an estimate of the ‘set up’ costs of training workers on the WHSR Bill. The RIS uses figures from the National RIS on the Model WHS Act to estimate the cost of training workers would be $25 per worker. CME considers this figure is not accurate and the costs associated with the introduction of the new legislation for the resources sector are likely to be significantly more than this.

CME considers, as a minimum, resource facility operators will be required to:

- conduct a gap analysis of current procedures against the requirements of the new legislation to identify if any amendments are required;
- update legislative references in documents;
- update training materials; and
- conduct training for workers.

Taking training as an example, the development of training materials and the cost associated in having an employee away from their substantive task whilst they are receiving training would clearly be more than $25 per person.

However, the costs associated with ‘set up’ for the WHSR Bill need to be balanced against the potential longer term savings from legislation that is less prescriptive (through reduction in regulatory and administrative burden) and which reflects best practice (through improvement in safety outcomes).

In order for the introduction of the WHSR Bill to impose the least cost burden, CME considers it is important for the DMP to take a pragmatic approach and not to require ‘change for changes sake’. For example, if a policy or procedure of an operator refers to the old legislation, this should be accepted and operators should be given an appropriate transition period in which to ‘roll out’ new documentation.

To minimise the cost burden from the introduction of the WHSR Bill, CME recommends the DMP take a pragmatic approach to policies and procedures of resources facility operators including permitting resource facility operators to continue to use existing policies and procedures which refer to current legislation but otherwise meet the substantive requirements of the WHSR Bill.
Conclusion

CME appreciates the opportunity to make a submission on the Consultation RIS for the mock-up draft WHSR Bill.

As outlined above, CME remains supportive of the objectives of progressing reform of safety and health legislation in Western Australia. However our full support for these reforms continues to rest on a review of the detail including the opportunity to review and comment on the full package of legislation.

Pending the specific recommended amendments outlined above, CME is generally supportive of the WHSR Bill. However CME note there is considerable work still to be done to address a number of the identified issues including clearly articulating the rational for full consolidation as opposed to a phased approach under Option 2.

CME urges DMP to continue to closely consult with industry to work through these issues and ensure the legislation is designed to maximise potential benefits and minimise costs wherever possible.

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