

PUBLIC COMMENT FORM

OCCUPATIONAL HEALTH AND SAFETY ACT 2000

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INTRODUCTION

1. AMMA is a national employer association for the mining, hydrocarbons and associated processing and service industries. It is the sole national employer association representing the employee relations and human resource management interests of Australia's onshore and offshore resources sector and associated industries.
2. AMMA member companies operate in the following industry categories:
 - Exploration for minerals and hydrocarbons
 - Metalliferous mining, refining and smelting
 - Non-metallic mining and processing
 - Coal mining
 - Hydrocarbons production (liquid and gaseous)
 - Associated services such as:
 - Construction and maintenance
 - Diving
 - Transport
 - Support and seismic vessels
 - General aviation (helicopters)
 - Catering
 - Bulk handling of shipping cargo

3. AMMA represents all major minerals and hydrocarbons producers as well as significant numbers of coal, construction and maintenance companies in the resources sector. AMMA is in a unique position in that it is able to articulate a view on the workplace relations legislative reform needs of the resources sector.
4. The Australian resources sector makes a significant contribution to Australia's wealth and prosperity, underpinning critical supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors.
5. The resources sector will contribute minerals and energy exports in the order of \$93 billion in 2006-2007. This represents approximately two thirds of Australia's total commodity export earnings.
6. The mining industry directly employs 115,000 employees.¹ Many more employees are indirectly employed as a result of activity in the mining sector.
7. The average annual rate of growth since the mid 1980s as measured by the gross product per hour worked for the mining industry has been 3.3 per cent compared to an all industries average of 1.6 per cent – double the national average
8. These statistics highlight the significance of the resources sector.

Workplace Arrangements

9. The presence of international competition has resulted in the resources sector being 'early adopters' of workplace reform including a focus determining workplace arrangements at the enterprise level.
10. In line with its focus on industrial relations and human resource interests, AMMA has restricted its submission to the workplace relations matters that are directly relevant to the interface between occupational health and safety and workplace relations
11. The AMMA submission can be summarised as follows;
 - the right of entry of authorised representatives under sections 77 and 85B should be strictly limited to occupational health and safety matters;
 - the proposed amendment to section 23A will result employers facing double jeopardy in respect to a claim of termination of employment;
 - the introduction of guidelines in the manner proposed in sections 46B and 46D has the potential to result in employers being prosecuted for complying with a guideline;
 - the proposed Part 6A has the potential to encourage the issuance of protection notices as a revenue stream for union litigants and is contrary

¹ ABS, Labour Force, Australia, Detailed - Electronic Delivery, (cat. no. 6291.0.55.001).

to the intentions of the Act; and

- the proposed section 62(2)(a) will have the effect of removing the fundamental right to silence and undermines the foundation of the Australian judicial system.

12. One matter which requires comment is Part 2A of the Occupational Health and Safety Act 2000. AMMA has previously contended that the criminal law has long had the capacity to address the criminal responsibility of corporation officers for the death of another due to recklessness. The Australian criminal law is accompanied by a range of protections for an accused that underpins our judicial system and ensures respect for the rule of law. The introduction of sections 32A and 32B of the Occupational Health and Safety Act 2000 has resulted in the the imposition of legal duties beyond reasonable limits in a manner which is aimed to punish rather than prevent workplace fatalities. AMMA maintains its opposition to the differential treatment of corporations and their officers and encourages the New South Wales Government to reconsider its position on this issue.

13. Our comments with regard to specific sections of the draft bill follow.

SPECIFIC COMMENTS

SECTION NO. OR QUESTION NO. (eg 8(1)(d))	ISSUE, SUPPORTING REASONS AND COMMENTS
<p>Section 77 – Powers of entry of places of work</p> <p>Section 85B – Powers of entry of places of work for discussing occupational health and safety</p>	<p>The proposed amendment is drafted in a manner which would allow unions to raise disputes in relation to rights of entry that are not directly related to occupational health and safety and then heard in the New South Wales Industrial Relations Commission. The proposed amendment has the potential to undermine the operation of the right of entry provisions contained in the Commonwealth Workplace Relations Act.</p> <p>In particular, when the above proposed amendment is read in conjunction with that proposed by section 85B, a union which does not have members at a workplace is afforded the ability to hold discussions with non-members or members of other unions in regard to occupational health and safety issues.</p> <p>The proposed amendments would allow a union to enter into a workplace over which they have not traditionally had coverage or coverage has been determined to be held by another union under the Workplace Relations Act.</p> <p>A number of AMMA members have direct arrangements with their employees which do not involve unions. Other AMMA members have arrangements with Unions who have constitutional coverage. These arrangements have resulted in a stable relationship evidenced by decreased rates of industrial disputation and improved safety performance.</p> <p>To the extent that the amendments allow for a union to hold discussions with eligible non-members, the proposed amendment has the potential to be exploited as a means to expand its involvement into workplaces that have made a choice not to involve a union.</p> <p>To the extent that the amendments allow for a union to hold discussions with employees who are not eligible for membership, this arrangement has the potential to be exploited as a means to expand union coverage and result in ‘turf wars’ that will adversely impact on the operation of the enterprise and do nothing to improve safety.</p> <p>To the extent that the New South Wales Industrial Relations Commission has the jurisdiction to deal with the right of entry of authorised representatives, this should be strictly limited to occupational health and safety matters. AMMA contends this</p>

	<p>could be achieved by restricting the definition of disputes by the inclusion of words to the effect that <i>'the dispute does not involve matters which are capable of, or are, or have been, the subject of proceedings under another State or Commonwealth Act'</i>.</p> <p>The proposed amendment should limit union discussions to 'members of the that organisation' and delete 'eligible members' as the inclusion of this phrase raises issues beyond those confined to matters of occupational health and safety, such as union membership.</p> <p>AMMA considers that the additional amendment to this Division should be made requiring an employee representative to notify an occupier immediately upon entry into the workplace and provide details of the matter they wish to discuss in order to ensure that the any urgent matter is dealt with expediently. The employee representative should also be required to complete any entry requirement related to safety.</p>
<p>Section 23A Application for reinstatement of employee unlawfully dismissed under section 23</p>	<p>The proposed amendment provides that an employee who is not satisfied with any finding under section 23 of the Act has the ability to make an application to the New South Wales Industrial Relations Commission for redress for termination of employment. This procedure will result in a duplication of processes in respect of termination of employment. And this place an employer in a position of double jeopardy</p> <p>The unlawful termination provisions of the Workplace Relations Act (Cth) provide a mechanism for redress in the case where an employee is dismissed for acting as an employee representative (including an occupational health and safety representative) or for filing a complaint as a representative. This mechanism places a reverse onus of proof on the employer and is accompanied by considerable penalties.</p> <p>The insertion of the proposed amendment would appear to result in an inconsistency between the State and Commonwealth legislative schemes, adds to the complexity and cost of the unlawful termination jurisdiction and does not add any further protection for employee representatives. AMMA submits that the incidence of complaints of this nature are the exception and do not support the creation of an additional jurisdiction.</p>

<p>Guidelines – Section 46B(1) (a) and (b)</p> <p>Section 46D</p>	<p>The proposed amendment will allow WorkCover to produce guidelines in relation to;</p> <ul style="list-style-type: none">• the application of the Act; or• regulations to a class of employees; or• how it intends to exercise its discretionary powers. <p>AMMA submits that this amendment is superfluous where compliance with a guideline is inadmissible as evidence in any prosecution proceedings.</p> <p>Adherence to a guideline by an employer should be admissible as evidence in any proceedings. It would appear that a consequence of the amendment may be that an employer is able to be prosecuted by a union for following a guideline.</p>
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<p>Part 6A - Safety Recommendation Notices</p>	<p>The inclusion of the ability for an employee safety representative to issue safety recommendation notices will add a further level of compliance for employers.</p> <p>AMMA is not opposed to the inclusion of the amendment per se but submits that if the intention of the Parliament is to focus on occupational health and safety issues in the workplace, then the Act should on the whole reflect this purpose.</p> <p>The capacity for a union to prosecute an employer and to receive a penalty for a successful prosecution encourages the use of the Act as a revenue stream rather than a mechanism to improve occupational health and safety.</p> <p>If the provision of a penalty is to encourage legislative compliance any penalty should be paid into consolidated revenue and applied by the Government towards achieving the objects of the Act. The moiety system is outdated in modern Australia.</p> <p>AMMA submits that it is the responsibility of the State to advise and educate employers and employees about the matters covered by the legislation and, if deemed necessary, prosecute where a breach of the Act or regulations has occurred. This would also include where a matter has arisen from an employee safety recommendation.</p> <p>AMMA contends that the Act be amended to remove the enforcement capacity of unions in relation to any safety recommendation issued by an employee safety representative.</p>
<p>Section 62(2)(a)</p>	<p>AMMA strongly opposes the inclusion of an amendment to the Act which provides that an inspector may record oral evidence without the consent of the person being recorded.</p> <p>It is a fundamental right of an individual to the privacy of communication and the right to silence. The proposed amendment would permit the use of secret listening devices and remove the right to of an accused to refuse to give evidence which may incriminate them. The proposed amendment removes a key element of procedural fairness.</p> <p>A failure to protect these rights will undermine the integrity of any investigative process and jeopardise the ability of the person being interviewed to provide information in an informed and considered manner. AMMA is strongly opposed to the recording</p>

of any interview conducted by an investigator where the person being interviewed does not consent to the recording.

Further, before such investigative interviews are conducted the person being interviewed should be informed of the nature of the incident or alleged offence (if any) that has been committed, given access to relevant information and provided with the questions or facts about which they will be questioned.

Where there is a reasonable belief that the interviewee has committed an offence the interviewer should warn the interviewee that they believe that an offence has been committed, the details of that offence and advise the interviewee that they are not obliged to answer any further questions and that any evidence that give may be recorded and used in evidence against them. In addition the interviewee should be provided with a copy of the transcript of the interview.

From an evidentiary perspective, taped interviews made without the consent of the interviewee or in the absence of a 'caution' should not be admissible in any proceedings.