



**Submission to Safe Work Australia on the
Draft Model Work Health & Safety Regulations and
Codes of Practice**

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1. ABOUT AMMA

- 1.1 AMMA is the national employer association for the mining, oil and gas and associated processing industries and has been serving the resource industry for over 90 years. It is the only national employer association representing the interests of Australia's onshore and offshore resource industry.
- 1.2 The majority of resource industry employers operating in Australia are AMMA members – including companies directly and indirectly employing over 500,000 working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to those industries.

2. INTRODUCTION

- 2.1 AMMA welcomes this opportunity to make a submission to Safe Work Australia in the current public comment period on aspects of the proposed nationally harmonised work health and safety system, which will take effect from 1 January 2012.
- 2.2 AMMA has been actively involved in the OHS harmonisation process from the beginning, having made detailed submissions to the *National review into model OHS laws* in July 2008¹ and on the *Exposure draft for the Model OHS Act and Stage 1 Model Regulations* in November 2009², as well as being heavily engaged in the harmonisation process on behalf of its members ever since.
- 2.3 The resource industry is committed to improving health and safety at the workplace, with many employers in the industry having committed to achieving a target of zero harm to their employees. Mining operations exist across Australia and many employers operate in more than one jurisdiction. As a result, employees, particularly those working for contractors, can be required to work across multiple mine sites and jurisdictions.
- 2.4 Multi-jurisdictional employers, including many in the resource industry, spend significant time and resources understanding their obligations and implementing systems under more than one OHS and mine safety regime, as well as educating their employees who work across state and territory borders. Under a single national OHS regime, it is hoped that greater time and resources can be dedicated to improving health and safety in the workplace rather than ensuring compliance with a plethora of legislative schemes.
- 2.5 AMMA would like to commend the Federal Government on its significant progress to date in harmonising Australia's work health and safety laws. In AMMA's submissions to the OHS harmonisation process, AMMA has voiced its

¹ *Submission on the National Review into Model OHS Laws*, AMMA, 11 July 2008

² *Public comment response to the exposure draft for the Model OHS Act and Stage 1 Model Regulations*, AMMA, 9 November 2009

- support for a model national OHS system that provides coverage to all industries and achieves best practice regulation for the resource industry in particular.
- 2.6 AMMA very much supports the Federal Government's stated objectives of national harmonisation – improved safety, less red tape, greater certainty and more efficiency³ – the intended outcome being that red tape and compliance burdens will be reduced for resource industry employers that operate across state borders.
- 2.7 AMMA would also like to commend Safe Work Australia on its progress towards harmonising the specific provisions of Australia's work health and safety legislation and regulations across multiple jurisdictions, which is no easy task.
- 2.8 AMMA welcomes the opportunity to contribute to ensuring the benefits of the proposed new system are maximised for employers. In seeking to influence Australia's work health and safety system, AMMA has historically been (and remains) focused on the intersection of workplace relations and work health and safety. This submission therefore concentrates on areas where those two jurisdictions meet and where there is the potential for safety issues to become 'industrialised'. Key areas of regulation in this regard are:
- Right of entry;
 - The functions and powers of elected health and safety representatives (HSRs); and
 - Union access to records.
- 2.9 While this submission raises problems with the Work Health & Safety Regulations (the General Regulations), AMMA also takes this opportunity to renew its concerns with the model national Work Health & Safety Bill itself (the Model Bill), from which the General Regulations flow. While the Federal Government appears to consider the Model Bill a *fait accompli*, other than

³ Australian Government, *National Review into Model OHS Laws, Terms of Reference*, Commonwealth of Australia, Canberra

allowing for the possibility of minor technical changes, AMMA maintains that the Model Bill itself requires significant amendments which would then be required to flow down to the General Regulations. AMMA notes that the latest version of the Model Bill has yet to be tabled or debated in federal parliament and could well be subject to change once there.

- 2.10 While the National Mining Regulations were not released with the latest suite of documents for public comment, contrary to industry expectations, AMMA would also like to take this opportunity to flag some issues that might arise in the industry-specific regulations, particularly with regard to drug and alcohol testing policies that will impact on mining industry employers and employees.

3. THE WORK HEALTH & SAFETY REGULATIONS

General comments

- 3.1 AMMA maintains there is a lack of justification for many of the provisions included in the General Regulations and feels that Safe Work Australia has not adequately addressed the need for all the provisions in its *Regulatory Impact Statement*⁴. There must be a proven need for each provision in the General Regulations, and where a particular provision cannot be justified, it should be removed. No additional regulatory burden should be imposed on employers where there exists another effective mechanism by which to ensure compliance, such as via a code of practice or subordinate guidance material.
- 3.2 In addition, provisions in the General Regulations that simply repeat the general duties in the Model Bill should be removed. It is unclear from the drafting of the suite of legislative and regulatory documents to date the reasons for provisions being included in the General Regulations rather than a code of practice or guidance material. Consistent criteria should be applied across the entire harmonisation package to ensure that each provision is not only justified but is also housed in the most logical and workable instrument in order to meet the aim of reducing the compliance burden for business.
- 3.3 Where offences specified in the General Regulations do not link back to specific provisions in the Model Bill, such provisions need to be qualified by '*so far as is reasonably practicable*' in the same way that provisions that do source back to the Model Bill are.
- 3.4 As currently drafted, it appears that employers or 'persons conducting a business or undertaking' (PCBUs) could be accused of alleged breaches of the same duty under both the General Regulations and the Model Bill, thereby raising issues of 'double jeopardy' for employers. Examples of where this has the potential to occur are included at the end of this chapter. Suffice to say, it is extremely

⁴ *Consultation Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice*, Access Economics, 10 January 2011

important that the penalty provisions under the Model Bill and the General Regulations are made consistent with each other to ensure there is no possibility of employers being charged with dual offences over the same course of conduct.

Right of entry

- 3.5 **Part 2.4** of the General Regulations covers workplace entry by permit holders and is in need of significant amendment.
- 3.6 **Clause 2.4.6** should be amended to limit right of entry for consultation purposes under s.121 of the Model Bill to meal times rather than just to 'usual working hours'. As currently drafted, the General Regulations place no restriction on the duration of a union visit for the purpose of consulting with members or eligible members other than a provision in the Model Bill that prohibits permit holders from disrupting the performance of work (*see reference to s.146 of the Model Bill below*). It has been suggested in some quarters that parties at the workplace could, for example, enact a memorandum of understanding (MoU) to ensure union permit holders behaved reasonably and did not abuse the privilege of being able to stay on sites for unlimited periods. In AMMA members' experience, a MoU is not a practical alternative to clear legislative requirements. Union representatives are unlikely to agree to have their entry rights curtailed when they are enshrined in the legislation and the regulations. The right of entry provisions in the General Regulations must therefore be amended to stipulate that entry for consultation purposes is allowed only during meal breaks, and entry is restricted to employer-designated locations. This would have the added benefit of making those provisions consistent with their counterpart provisions in the *Fair Work Act 2009*.
- 3.7 With respect to entry to investigate alleged safety matters, there are even fewer provisions specifying how this should occur on a mine site.
- 3.8 There does exist under s.146 of the Model Bill a provision that states:

A WHS entry permit holder exercising, or seeking to exercise, rights in accordance with this Part, must not intentionally and

unreasonably delay, hinder or obstruct any person or disrupt any work at a workplace, or otherwise act in an improper manner.

- 3.9 A breach of the above provision could attract a maximum civil penalty of \$10,000 for the permit holder. However, in AMMA's view, this will not provide a sufficient incentive for some union officials to act within the law. The provision only prevents a permit holder from unreasonably hindering work and does not place any natural limits on the duration of visits for consultation purposes. This will cause significant issues for resource industry employers, particularly on remote sites where union officials have considerable idle time when either waiting for transport off the site or travelling to another part of the site.
- 3.10 AMMA members remain skeptical about the workability of provisions that leave the operational aspects of right of entry to agreement between union officials and the employer. Minimum boundaries need to be set in order to inject some rigour into this area of the General Regulations. As mentioned, such boundaries would be most appropriately based on those contained in the *Fair Work Act*, which includes a requirement for union representatives to only meet during meal breaks and at a location specified by the employer.
- 3.11 **Clause 2.4.1** of the General Regulations covering training requirements for workplace health and safety permits should also be amended. As currently drafted, the provision allows for entry permit training that is '*provided or approved by*' the regulator. AMMA maintains that the phrase '*or approved*' should be deleted in order to make it explicit that training for permit holders should only be provided by the regulator given the regulator's role in enforcing right of entry requirements. This would enable the regulator to strictly control right of entry training rather than giving other parties such as unions the power to train their own officers.
- 3.12 **Under clause 2.4.2** covering the form of entry permits, AMMA maintains that an extra provision should be inserted at 2.4.2(i) requiring permits to contain photo identification (ID) as a minimum requirement, along with the already stated

- requirements for permits to include the person's name and the name of their union, etc.
- 3.13 **Under clause 2.4.3**, AMMA maintains a new provision should be added at 2.4.3(f) to require notices of entry to state the reason for visits, in addition to the stated requirement of having to cite the section of the Model Bill the permit holder is relying on for entry as well as the date of their visit. This would ensure that employers can make arrangements for union representatives to meet only with those workers with whom they are entitled to meet. This would make entry notices much more workable for employers from a logistical perspective given that on many large resource projects there are different groups of workers with whom the permit holder could potentially meet at any given time.
- 3.14 **Clause 2.4.4(a)** qualifies the requirement for right of entry for the purposes of investigating an alleged breach by stating that '*as far as practicable*' the entry notice should include the particulars of the suspected breach. This qualifier should be removed given the fact that the permit holder should always have the particulars of any suspected breach on hand if their concerns are genuinely held.
- 3.15 **Under clause 2.4.7**, photo ID should be required in the proposed online register of permit holders to ensure it matches the permit holder's photo and/or appearance. This will help to ensure permits cannot be used by anyone other than the authorised permit holder. An additional provision should therefore be inserted at 2.4.7(c) that would require the authorising authority to publish on its online register a photo of all registered permit holders.

Determination of work groups

- 3.16 **Clause 2.1.1** of the General Regulations relating to negotiations for and the determination of onsite 'work groups' needs amending to clarify that work groups must only be determined by negotiation and agreement between the PCBU and the workers themselves. As the Model Bill is currently drafted, it allows workers '*or their representatives*' to negotiate with the PCBU to determine work groups. The inclusion of the phrase '*or their representatives*' under s.52(1)(b) of the

Model Bill should be clarified in this clause of the General Regulations to ensure that such representatives are employee representatives only and exclude union officials, lawyers or others that do not work in the work group. This would remove the obvious potential for safety issues to become industrialised via the involvement of union officials and other third parties in the determination of work groups, which AMMA maintains should be left up to the workers themselves. Alternatively, as discussed later in this submission, the Model Bill itself should be amended to make it clear that the reference to workers '*or their representatives*' excludes union officials and other third parties.

- 3.17 The stated purpose of work groups under the legislation is to facilitate the representation of workers in the group by one or more health and safety representatives. AMMA is not opposed to work groups being enabled under the legislation or regulations but maintains that consultation over determining work groups should be simple and uncomplicated and confined to the PCBU and workers themselves, with no external third parties involved.

Representation and participation

- 3.18 As a general comment, the duties and obligations included in Chapter 2 of the General Regulations covering *Representation and participation* need to be cross-referenced back to the Model Bill to ensure they are applied consistently and correctly as this is not the case at present.
- 3.19 **Under clause 2.1.7**, issues around training and competency levels for work health and safety permit holders need further comprehensive review and should be determined in consultation with all stakeholders as to what level of competency is required by permit holders given the powers they will have under the harmonised scheme.
- 3.20 **Clause 2.1.3** which sets out procedures for conducting elections for health and safety representatives would more appropriately be included in guidance material in recognition of the fact there is not a single correct way of conducting elections.

The election process should be left up to negotiations between the parties and should not be prescriptively set out in the General Regulations.

Hazardous chemicals

- 3.21 As a general comment on Chapter 7 covering *Hazardous chemicals*, the duties and obligations of workers as opposed to PCBUs need further clarification, and manufacturers' and importers' duties should be covered in separate guidance material.
- 3.22 **Clause 7.1.65** of the General Regulations should be amended, which requires a statement of exposure to hazardous chemicals to be provided to workers in particular circumstances. A new condition should be inserted at clause 7.1.65(c), in the same form as appears in 7.1.53(1)(a), that the Regulation only applies if there is a significant risk to the worker's health because of exposure to a hazardous chemical. That chemical should then be referenced in Schedule 14 of the General Regulations in order to trigger the duty to provide workers with a statement of exposure. Without those qualifiers being inserted, an employer or PCBU could not be expected to know every substance a person had been exposed to and be able to document it unless the substance was known to pose a significant health risk and appeared in the hazardous chemicals schedule at Schedule 14(1)(c) of the General Regulations.

Personal protective equipment

- 3.23 **Clause 3.2.3** of the General Regulations relating to *Air supplied respiratory equipment* would be more appropriately included in guidance material than the General Regulations. This is an extremely prescriptive provision and this level of specification is more suited to inclusion in guidance material.

'Double jeopardy' concerns

- 3.24 As mentioned in the *General comments* at the start of this chapter, AMMA is extremely concerned that the way the General Regulations and Model Bill are currently drafted could give rise to 'double jeopardy' concerns for employers who

- could arguably face prosecution under the Model Bill and the General Regulations for the same course of conduct.
- 3.25 One example of this is at clause 5.1.28(1) of the General Regulations dealing with *Information, training, instruction and supervision*. That clause requires a person with management or control of plant at a workplace to ensure that any worker or other person at the workplace who may be exposed to a risk arising from the use or presence of plant (as well as any supervisor of that worker), is provided with relevant information, training and instruction in relation to the nature of the hazards involved.
- 3.26 A substantially similar provision exists under s.19 of the Model Bill under the *Primary duty of care*. Under s.19(3)(f), a PCBU is required to ensure as far as is reasonably practicable that any information, training, instruction or supervision is provided which is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.
- 3.27 Obviously, any potential for this to happen to employers needs to be rectified immediately.
- 3.28 Another example where double jeopardy issues arise is via the duty under s.19(3)(b) of the Model Bill for PCBUs to provide and maintain 'safe plant and structures'.
- 3.29 A failure in this regard could also arguably lead to an alleged breach of clause 5.1.29 of the General Regulations, which requires PCBUs to ensure adequate guarding of all areas of plant.
- 3.30 These and all other anomalies that expose employers to double jeopardy issues should be rectified between the Model Bill and the General Regulations.

4. THE WORK HEALTH & SAFETY BILL

General comments

- 4.1 The current public comment period is focused on Safe Work Australia seeking feedback on the General Regulations and codes of practice that will form part of the nationally harmonised OHS system from 1 January 2012.
- 4.2 However, AMMA contends that serious issues remain with the core legislation – the Work Health & Safety Bill (the Model Bill) – which will form the bedrock of the new system. These issues should not be ignored in the current public comment exercise.
- 4.3 An important issue for the Federal Government and Safe Work Australia to address is how to discourage unions' use of harmonised OHS laws to pursue industrial agendas that would be more difficult to pursue under the *Fair Work Act*. The first step in this process would be to make the Model Bill and the *Fair Work Act* consistent with each other in areas where IR and OHS overlap. This would include ensuring consistency of provisions in areas like right of entry, union access to records and the powers of elected health and safety representatives.
- 4.4 As it currently stands, differences between the *Fair Work Act* and the Model Bill would give unions an alternative back-door entry under OHS laws where they lack entry rights under the *Fair Work Act*. This is in spite of the fact that union entry rights have already been massively expanded under the *Fair Work Act*. For instance, in order to enter a site to investigate a breach of the Model Bill, union permit holders will not be required to have any members on-site, just eligible members. In contrast, under the *Fair Work Act*, union permit holders must have members on-site to enter to investigate an alleged breach and that breach must relate to one of their members. This divergence between the two pieces of legislation will encourage unions to use the more lenient OHS laws to gain access to worksites in order to pursue industrial agendas such as recruitment campaigns for upcoming enterprise bargaining rounds, all under the guise of safety issues. Further, it could raise potential disputes over who is or is not

eligible to join a particular union, which is something the various state safety regulators in enforcing the harmonised legislation would not necessarily be qualified to resolve.

- 4.5 Union permit holders will also have greater access to documents and employee records under the Model Bill than under IR laws, with the Model Bill as currently drafted encouraging unions to bypass the stricter controls of the *Fair Work Act* and again use safety as an access point. The potential for this to happen is discussed later in this chapter.

Right of entry

- 4.6 **Section 117** of the Model Bill should be amended to remove the right of permit holders to enter worksites to investigate suspected safety breaches unless those alleged breaches relate to a member of the permit holder's union. This would make the Model Bill consistent with the *Fair Work Act*, which requires a suspected breach of IR laws to relate to a union member before a permit holder can enter to investigate. Under the Model Bill, a permit holder can enter to enquire into a suspected safety breach that affects any 'relevant worker', which is defined as either a union member or someone eligible to become one.
- 4.7 **Section 119** of the Model Bill should be amended to require between 24 hours and 14 days' notice of entry to investigate a suspected safety breach, consistent with s.487 of the *Fair Work Act* which requires notice before permit holders can enter to investigate an alleged breach. As the Model Bill currently stands, permit holders are only required to give notice of entry to investigate a suspected breach 'as soon as is reasonably practicable' after entering a site. Even then, they can bypass any notice requirements whatsoever in 'urgent' situations.
- 4.8 **Section 130** of the Model Bill should be amended to require permit holders to disclose the names of workers who have requested their presence on a site before entering (AMMA also maintains that those workers should have to be members of that union). At present, the Model Bill does not require permit

holders to disclose the names of workers on the site and, in fact, says unions can only do so with workers' express consent.

- 4.9 **Section 123** of the Model Bill should be amended to allow civil penalties to be imposed against union permit holders who fail to comply with the requirements of their permits. Under the Model Bill as currently drafted, a \$10,000 civil penalty provision applies under s.123 but only where a permit holder breaches conditions that the 'authorising authority' has specifically imposed on the permit under s.135. While PCBUs and other relevant parties can apply under s.138 of the Model Bill to have an entry permit revoked for reasons including that the permit holder has acted in an '*improper*' manner while exercising their rights under the legislation, there are no other civil penalties available to deter union permit holders from doing the wrong thing.

Powers of elected health and safety representatives (HSRs)

- 4.10 **Section 68(2)(g)** of the Model Bill should be amended to remove the right of an elected HSR to request the assistance of '*any person*' in relation to a safety matter. As the Model Bill currently stands, that other person could be a union official (or anyone else) and this would again give back-door entry to unions who would not otherwise have the right to enter a workplace because they would not be eligible to represent the interests of workers. If a HSR needs assistance from any person, AMMA maintains it should be restricted to the regulator or an authorised inspector. PCBUs should not be required to facilitate access to their worksites by union officials or others who have no other right to be there and who may well have no specific safety training with which to assist a HSR in any case.
- 4.11 **Section 85** of the Model Bill should be deleted in its entirety to remove the power of HSRs to direct workers to cease work where they have a reasonable concern that workers will be exposed to an '*immediate*' or '*imminent*' risk to their health or safety. Workers already have an individual statutory right to cease unsafe work, which AMMA supports, and the only other person who should be authorised to direct work to cease is an authorised inspector or the regulator.

- 4.12 **Section 90** of the Model Bill should be amended to remove the right of HSRs to issue provisional improvement notices (PINs) to rectify what they reasonably believe is a breach of the legislation. Again, the only person who should be empowered to issue PINs is the regulator or an authorised inspector.

Access to information and records

- 4.13 **Section 118(1)(d)** of the Model Bill should be amended to remove union permit holders' right to require PCBUs to allow them to inspect and make copies of any 'directly relevant' documents when investigating an alleged safety breach. This represents a significant expansion of powers that currently exist in state jurisdictions, in particular Victoria. Permit holders' access to documents should specifically exclude confidential or commercially sensitive information as well as the employment records of non-union members. In this regard, s.118(1)(d) of the Model Bill should be made consistent with s.482(1)(c) of the *Fair Work Act*, which prohibits permit holders from accessing non-member records while exercising right of entry without the express consent of the workers concerned. Under s.483AA of the *Fair Work Act*, permit holders can also apply to access non-member records with the approval of the federal industrial tribunal Fair Work Australia. Permission from a higher authority should also be required under the harmonised national OHS system before unions can access non-member records that may assist unions in their industrial aims under the guise of investigating safety issues.
- 4.14 **Section 118(4)** of the Model Bill places a reverse onus of proof on employers (PCBUs) to show they have a reasonable excuse for not allowing permit holders to inspect any work system or to have access to directly relevant records. Employers face maximum penalties of \$10,000 for individuals and \$50,000 for bodies corporate if they fail to comply. AMMA maintains it is unclear how those provisions will be applied and seeks examples of typical scenarios in the guidance material to aid employers so that they know exactly what records they will be required to produce and when.

- 4.15 **Section 48(1)(a)** of the Model Bill should be amended in relation to the duty on PCBUs to share 'relevant information' about safety matters with workers when consulting with them over safety issues that directly affect them. This provision should specifically exclude employers having to share confidential or commercially sensitive information with workers and should be drafted so as to leave the type of information to be shared with workers up to the PCBU's discretion.

Discriminatory conduct

- 4.16 **Section 110** of the Model Bill should be amended to remove the prospect of criminal proceedings being brought against PCBUs that are alleged to have discriminated against workers because of their rights and powers under the legislation. Only civil proceedings should be available under this section of the legislation. This provision should also be changed to remove the reverse onus of proof on employers that as currently drafted requires them to prove that the alleged prohibited reason for the discrimination was not the sole or dominant reason.
- 4.17 **Section 104(1)** of the Model Bill should be amended to bring maximum fines against PCBUs for discriminatory conduct into line with maximum penalties for other breaches of the legislation. Maximum fines under this section are currently set at \$500,000 per breach for corporations and \$100,000 for individuals, compared to \$50,000 for corporations and \$10,000 for individuals for many other breaches of the legislation. The proposed penalties for discriminatory conduct are excessive and should be reduced to \$50,000 and \$10,000 respectively.

Determination of work groups

- 4.18 **Section 52(1)(b)** of the Model Bill covering negotiations for work groups should be amended. As currently drafted, this section says that a work group is to be determined by negotiation and agreement between the PCBU and the workers who will form the work group '*or their representatives*'. AMMA maintains that this phrase should be deleted as it opens up the possibility of the appointment of

union officials, lawyers or anyone else, and has the potential to industrialise safety issues. AMMA is not opposed to work groups being allowed under the legislation, but maintains that negotiations for determining work groups should be simple and uncomplicated and left up to the PCBU and workers, with no external third-party involvement.

Consultation with other duty holders

- 4.19 **Section 46** of the Model Bill, which requires PCBUs to consult with all other duty holders that have a duty in relation to the same safety matter, namely other PCBUs, includes an entirely new statutory obligation that states:

If more than one person has a duty in respect of the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

- 4.20 Safe Work Australia needs to acknowledge that this is a significant additional regulatory burden being placed on employers, the need for which has not been fully justified in terms of how it is supposed to improve health and safety outcomes. If this requirement to consult with other duty holders in relation to a safety matter remains, there should be an amnesty on prosecutions for a transitional period of up to three years to give employers time to adjust to this significant change and to fully come to grips with what is required. This transitional period will be especially important given that breaches of s.46 can attract criminal charges and maximum penalties of \$20,000 for individuals and \$100,000 for corporations.

5. CODES OF PRACTICE

General comments

- 5.1 As a general rule, codes of practice should only be used where statutory evidence is required of mandatory requirements under the Model Bill or the General Regulations. Codes should not be about statements of possibilities but should focus on implementation of and compliance with the provisions in the Model Bill and the Regulations. All discretionary items should be contained in guidance material rather than codes. AMMA maintains that Safe Work Australia has so far not established or adhered to clear criteria for determining when a code is the appropriate vehicle as opposed to guidance material or Regulations.
- 5.2 The codes that have been released for public comment to date are not easy for stakeholders to understand and need to be set out more simply and concisely. Codes should be short and simple and provide immediate advice on mandatory requirements under the legislation and Regulations, with guidance material used for dealing with specifics.

6. STATE-SPECIFIC DIFFERENCES

- 6.1 AMMA maintains that the Model Work Health & Safety Bill, the General Regulations and industry-specific regulations should replace all state-level OHS and mine safety legislation that currently exists. In order to achieve a fully harmonised work health and safety system that meets the stated aims of reducing red tape and compliance burdens for employers, inconsistencies between state jurisdictions must be minimised if not totally removed.
- 6.2 At present, there are concerns over whether reforms in this area will lead to a 'uniform' national system (a system of regulation that cannot be altered jurisdictionally) or merely a 'consistent' system, which would leave room for each state or territory to alter their own workplace safety laws to some extent.
- 6.3 Current inconsistencies between state jurisdictions impose unnecessary compliance costs on resource industry employers that operate across state and territory borders. This is further compounded by the frequency of reviews of OHS and mine safety laws by respective governments and the consequent need for businesses to keep track of legislative amendments and implement changes to their safety practices in order to remain compliant. The duplication of resources by state and territory governments of maintaining existing regimes is unnecessary and costly.
- 6.4 AMMA maintains that the benefits of the national harmonisation of work health and safety laws will be seriously undermined if states and territories insist on retaining state-specific variations.
- 6.5 AMMA notes that the Western Australian Government has committed to implementing the Model Bill in all but four areas, and will adopt numbering that is consistent with the Model Bill to maximise ease of reference and minimise confusion for duty holders. The four areas in which Western Australia will abstain from adopting the Model Bill's provisions are:
- The power of elected HSRs to direct work to cease;

- Maximum penalties increased to \$3 million compared to the current maximum in WA of \$625,000;
 - Right of entry; and
 - The reverse onus of proof on employers in defending discrimination claims.
- 6.6 The stance of the WA Government aside, harmonisation that allows state and territory governments to retain control over the level of consistency they choose to achieve defeats the purpose of the exercise. Harmonisation will not be achieved where a state or territory government amends, either now or in the future, its 'mirror' OHS laws and this will merely create a snowball effect for further changes by the states and territories. This is particularly concerning where governments may be strongly influenced by stakeholder demands, such as the former Keneally Labor Government in NSW⁵ which was replaced with the O'Farrell Liberal Government on March 26, 2011.
- 6.7 While incoming NSW Premier Barry O'Farrell previously committed to implementing the Model Bill in its entirety as currently drafted⁶ (contrary to former Premier Kristina Keneally's desire to take into the national system the ability for unions to prosecute as well as a reverse onus of proof on employers under the general duty of care), it remains to be seen what will happen to the Model Bill once it hits state parliaments and their Upper Houses.
- 6.8 AMMA also notes that the Australian Greens Party, which will have the balance of power in the Federal Senate from 1 July 2011, earlier signaled its support for the former NSW Government's proposals to insert a reverse onus of proof on employers under the general duty of care and the ability for unions to prosecute and collect a portion of the fines. While the newly elected NSW Premier has previously committed to adopting the *Work Health & Safety Act* as it is, it remains

⁵ *OHS harmonisation "dead", as NSW opts out*, OHS Alert, published by Specialist News, 14 October 2010

⁶ *NSW Opposition confirms support for harmonisation*, OHS Alert, published by Specialist News, 10 February 2011

to be seen what will happen to the model legislation when it hits federal parliament given the way it is currently constituted and given the Greens will soon have the balance of power in the Senate.

- 6.9 It is AMMA's view that in order to achieve the outcomes sought by the Federal Government – to 'cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties'⁷ – uniformity, not consistency, must be the goal. This would entail a *Work Health & Safety Act* and supporting Regulations that applied nationally and were drafted to withstand amendments by individual states and territories.
- 6.10 It also cannot be overstated that the nationally harmonised laws will not achieve the desired results of improved safety, less red tape, greater certainty and more efficiency unless significant efforts are made to ensure that all state and territory regulators are unified in their approach to their ongoing enforcement and compliance roles under the nationally harmonised system.
- 6.11 A nationally harmonised OHS system should also not retain the status quo in each jurisdiction with regard to mining-industry specific safety laws as currently exist in Queensland⁸, Western Australia⁹, New South Wales¹⁰ and, most recently, via amendments to the *Workplace Health & Safety Act* in Tasmania. The continuation of separate mine safety laws will inevitably result in inconsistencies between the states given that the reform of mine safety laws can often lag behind the reform of principal OHS laws or vice versa. AMMA understands all state governments with mining-industry specific legislation intend to retain it in the move to a nationally harmonised system. This will add an extra compliance burden onto resource industry employers and will, to a significant extent, undermine the benefits for employers of OHS harmonisation. If those states go ahead with their plans, employers will be required to comply with state-specific mine safety laws as well as the model national OHS legislation, the General

⁷ Australian Government, *National Review into Model OHS Laws, Terms of Reference*, Commonwealth of Australia, Canberra

⁸ *Qld Mining & Quarrying Safety & Health Act 1999*

⁹ *WA Mines Safety & Inspection Act 1994*

¹⁰ *NSW Mine Health & Safety Act 2004*

- Regulations and industry-specific Regulations such as the National Mining Regulations.
- 6.12 The implementation of any new laws is costly and time-consuming for businesses in the resource industry. Any additional layers of legislation/regulation in the form of state-specific mine safety laws are therefore not desirable in any way. Ideally, the harmonisation process would completely remove duplication and have the new national requirements apply consistently across the states, with no extra industry-specific regulation.
- 6.13 The states that currently have mine safety laws in place are the resource-driven states where the bulk of AMMA members operate. Of course, it remains to be seen whether NSW mine safety laws will be retained along with the national Model Bill and Regulations in the wake of the recent Liberal Party election win in that state.
- 6.14 It is also unclear how having state and national mining industry regulation will work from an enforcement perspective. For instance, will one incident carry multiple consequences under this model? AMMA maintains that this possibility should not arise for employers as a result of any sensible harmonisation exercise.
- 6.15 Mining industry-specific guidance should be dealt with under the yet-to-be-publicly-released National Mining Regulations and relevant codes of practice. Employers should not be required to comply with an extra tier of state mine safety regulation after 1 January 2012 by having to adopt the new National Mining Regulations as well as continue to observe mine safety legislation in the states that plan to retain it.

7. THE NATIONAL MINING REGULATIONS

- 7.1 AMMA notes that the National Mining Regulations, which will comprise an important part of industry-specific regulation for resource industry employers from 1 January 2012, were not publicly released with the General Regulations and codes of practice. At the time of writing this submission, the National Mining Regulations were yet to be publicly released.
- 7.2 AMMA will make specific comments on the Mining Regulations when they are released for public comment but would like to raise some preliminary issues of concern. In particular, these relate to the fact that the Mining Regulations will be the only Regulations containing provisions specifically relating to drug and alcohol testing policies.

Drug and alcohol testing policies

- 7.3 Given that the National Mining Regulations will be the only part of the OHS harmonisation package to deal specifically with drug and alcohol testing policies, it will be important to get those provisions right for the industry, to ensure they are workable and to guard against onerous prescription.
- 7.4 AMMA would like to place on the record its opposition to any future proposals that might require consensus to be reached between a mine operator (PCBU) and their workforce prior to introducing a drug and alcohol testing policy from 1 January 2012 onwards. AMMA members report that consensus is almost impossible to achieve in such situations given the natural disinclination of employees and their unions to support the implementation of drug and alcohol testing policies.
- 7.5 A requirement to consult over such policies is acceptable as long as employers are able to introduce the drug and alcohol testing policy they see fit if agreement cannot be reached with the workforce or its representatives.
- 7.6 AMMA members would also be extremely concerned if their current drug and alcohol testing policies were discarded under the new system for not being

introduced following consultation or consensus with the workforce. Most employers in the resource industry have devoted considerable resources to consulting with their employees in order to implement responsible policies in this area. This often represents years of work that should not be usurped by any subsequent proposals for greater consultation or consensus.

- 7.7 Similarly, AMMA members would strongly oppose any proposals to require employers and employees or their representatives to participate in mandatory issue resolution procedures in the event a drug and alcohol testing policy could not be agreed upon. Any such proposals would be extremely onerous for resource industry employers who should be free to implement the policy that best suits their business without the spectre of an arbitrated outcome hanging over their head. Any such proposals would be particularly onerous for new businesses and greenfield or start-up projects.
- 7.8 Safe Work Australia should approach all these issues with a view to minimising the compliance costs for business in introducing new drug and alcohol testing regimes and must allow the status quo of existing policies to continue in order to minimise transitional compliance costs for resource industry employers.
- 7.9 AMMA calls for a sufficient public comment period to ensue following the release of the draft Mining Regulations to allow stakeholders, including AMMA, adequate time to address issues of importance.

8. CONCLUSION

8.1 AMMA reaffirms its support for the stated objectives of OHS harmonisation which include reduced red tape and reduced compliance burdens for businesses. While it is an achievement for the Federal Government to have come so far in implementing a nationally harmonised OHS system, many of the current proposals and their implementation and adoption by the states will see the harmonised scheme fall short of the seamless system employers were anticipating.

8.2 Shortfalls of the currently proposed nationally harmonised scheme include that:

- Western Australia is abstaining from adopting all of the provisions of the Model Bill;
- State parliaments could still seek to amend the Model Bill in each jurisdiction;
- State regulators and authorities will be tasked with enforcing compliance with the nationally harmonised system and may apply the laws inconsistently or in a way that reflects state-specific biases;
- Relevant states plan to retain their mining industry-specific legislation which will add a further compliance burden for resource industry employers;
- There are serious issues with the Model Bill and the General Regulations as outlined in this submission, in particular in the areas of right of entry, union access to records and the powers of health and safety representatives; and
- Questions remain about how the National Mining Regulations will be applied, particularly with regard to the future implementation of drug and alcohol testing policies.

- 8.3 AMMA urges all stakeholders in the OHS harmonisation process to ensure that inconsistencies across jurisdictions are minimised wherever possible and that the debate remains open and ongoing with regard to reasonable changes to aspects of the proposed nationally harmonised scheme.