

Modernising Work Health and Safety Laws in Western Australia

Submission by the Australian Mines and Metals Association

Confidentiality

This document has been modified to remove personal information not specifically authorised for publication or that is not in the public domain. This includes some contact and personal details, and metadata. Electronic signatures have also been removed.

This process may have resulted in minor changes to the appearance of the submission but has not modified the substantive content. If you believe there have been changes to content of the document please email WHSreform@dmirs.wa.gov.au or call the WorkSafe Contact Centre on 1300 307 877.

Accessibility

This is a third party document and DMIRS has conducted a basic review to ensure the majority of the substantive content is accessible. There may be elements of this submission that are not fully accessible (for example, scanned or hand-written elements). If you are having difficulties accessing the document please email WHSreform@dmirs.wa.gov.au or call the WorkSafe Contact Centre on 1300 307 877.



Submission to the Western Australian Department of Mines, Industry Regulation and Safety

**Proposals for amendments to the model
Work Health and Safety Bill for adoption
in Western Australia**

August 2018

About AMMA

AMMA is the Australian Resources and Energy Group and has provided a unified voice for employers on workforce and other industry matters for 100 years.

AMMA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

The resources industry is, and will remain, a major pillar of the national economy. Its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resources industry directly generates more than 8% of Australia's GDP, with around 50% of the value of all Australian exports coming from the resources industry. In 2015-16, the value of Australian resource exports was \$157.1 billion. This is projected to increase to \$232 billion in 2020-21¹.

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment. The resources extraction and services industry directly employs 222,300 people. Adding resource-related construction and manufacturing, the industry directly accounts for 4% of total employment in Australia. Considering the significant flow-on benefits of the sector, an estimated 10% of our national workforce, or 1.1 million Australians, are employed as a result of the resources industry.

First published in 2018 by

AMMA, Australian Mines and Metals Association

Email:

████████████████████

Phone:

(03) 9614 4777

Website:

www.amma.org.au

ABN:

32 004 078 237

© AMMA 2018

This publication is copyright. Apart from any use permitted under the Copyright Act 1968 (Cth), no part may be reproduced by any process, nor may any other exclusive right be exercised, without the permission of the Chief Executive, AMMA, GPO Box 2933, BRISBANE QLD 4001

¹ Office of the Chief Economist – Resources and Energy quarterly publication.

Executive Summary

Australian Resources and Energy Group AMMA provides the following submission to the Department of Mines, Industry Regulation and Safety regarding the Ministerial Advisory Panel's (MAP) proposals for amendments to the model Work Health and Safety Bill for adoption in Western Australia. AMMA focuses its feedback to those recommendations that relate to industrial relations issues, summarised below.

1. **Right of entry**

In AMMA's view, a separate union right of entry regime under the proposed WA WHS Act is entirely unnecessary. There is no national consensus regarding union right of entry that would justify Western Australia's adoption of the provisions in the 2011 Model WHS Bill.

The right of entry regime recommended by the MAP would create conflict and confusion given the extensive right of entry provisions that already exist under both state and federal industrial law. Further, adopting this regime would bring with it an unacceptable risk – a risk that has been realised in jurisdictions where safety laws allow for union right of entry – of trade unions abusing right of entry privileges, and union officials using safety laws as a ruse to access workplaces in support of their industrial or political interests.

If this clear advice is rejected, at the very least, the proposed WA WHS Act should adopt the provisions of the 2016 amendments to the Model WHS Bill and should operate subject to the regulation of permit holders in accordance with the right of entry provisions under the FW Act. Importantly, the 2016 Amendments include the sensible requirement for at least 24 hours' notice of entry. In addition to the obvious safety, security and logistical issues associated with allowing individuals to access major resources and energy facilities without prior notice, the safety regime in WA does not need to be supported by a right of entry scheme that involves surprise raids by union officials.

2. **Health and safety representatives (HSRs)**

AMMA does not support an extension of the powers of HSRs in WA. AMMA does not support HSR's having a new legal power to direct that work cease, or any extension of the role of HSR's to matters that concern other work groups. The proposed WA WHS Act, with the MAP recommendations, would prescribe powers that go well beyond the historic responsibilities of HSR's in WA in supporting collaborative safe work cultures in their employer's workplace.

If the proposed WA WHS Act will include provisions allowing all workers the statutory right to cease unsafe work, with appropriate safeguards, there is no need to redefine and bolster the legal role of HSRs in the workplace. The Regulator should be the only authority with power under the proposed WA WHS Act to unilaterally direct work to be ceased, and this should not be undermined. HSR's should not be expected to form part of a kind of 'vigilante force' in that regard, exercising powers which better reside with the expert Regulator.

3. **Investigations, reviews and prosecutions**

AMMA has significant concerns about the MAP recommendations that might permit the distinction between safety matters and industrial matters to become blurred.

If there is any necessity for safety matters arising under the WA WHS Act to be resolved by a tribunal, this should be undertaken by a body that is independent of industrial relations structures, and not by a division of the Western Australian Industrial Relations Commission. This would properly ensure WHS matters and industrial relations matters are appropriately dealt with as separate issues. Further, AMMA does not support extending any such jurisdiction

to a wider range of matters that may cross-over with industrial relations matters, nor enabling HSRs to undermine the Regulator by taking issues directly to any such tribunal for review.

AMMA also does not support the inclusion of trade unions as “eligible persons” for the purposes of instigating reviews of WHS decisions, or the MAP recommendation concerning trade unions commencing prosecutions. Apart from the obvious potential for abuse of such a role and the pursuit of ulterior purposes, serious questions arise as to whether the safety regime in WA should be in anyway be reliant on partisan third parties that may operate as ‘bounty hunters’. AMMA strongly opposes any measures seeking to bolster the influence of third parties, including trade unions, over safety matters, at the expense of the independent specialist WHS Regulator.

Additionally, AMMA recommends that the development and implementation of the proposed WA WHS Act, based on Model WHS laws, be deferred until Safe Work Australia releases its report into the performance of the nationally harmonised WHS system in 2019.

These positions alongside feedback on specific MAP recommendations are detailed within the following submission. AMMA would be pleased to provide additional advice to the Department on any issues it requires.

Contents

About AMMA	1
Executive Summary.....	2
1. Introduction.....	5
The Western Australian approach.....	5
WHS and industrial relations.....	6
2. Right of Entry	7
A separate right of entry regime is unnecessary and open to abuse	7
There is no consensus or consistency on right of entry	8
The 2016 amendments are important and appropriate.....	9
The abuse of right of entry is well documented	9
Summary of AMMA positions on right of entry	11
3. Health and safety representatives.....	13
Extension of HSR power	13
Rights to stop work	13
Summary of AMMA positions on health and safety representatives	14
4. Process for investigations, reviews and prosecutions	15
Industrial relations and WHS matters must be clearly separated.....	15
HSRs should not be able to undermine the Regulator.....	15
Extending union powers is not in the interests of WHS	16
AMMA positions on the process for investigations, reviews and prosecutions.....	16
5. Timing of WHS harmonisation.....	18

1. Introduction

1. Australian Resources and Energy Group AMMA welcomes the opportunity to make this submission on the proposed Work Health & Safety Act for Western Australia (**WA WHS Act**), which represents an important part of Western Australia's participation in the nationally harmonised work health and safety (**WHS**) system.
2. For clarity, throughout this submission the term "**Model WHS Bill**" refers to the 2011 model Work Health and Safety Bill established by Safe Work Australia and largely preferred by the WA Ministerial Advisory Panel (**MAP**) as the model laws for adoption in the state. The 2016 amended WHS Model Bill is referred to as "**the 2016 Amendments**". References throughout to "**the Regulator**" refer to the Worksafe Western Australia Commissioner which is the current regulator for WHS matters in WA and, it appears, would remain the regulator under the WA WHS Act.
3. This submission deals with and outlines AMMA's positions on the MAP's recommendations for amendments to the Model WHS Bill before adoption into the WA WHS Act.
4. The resources and energy industry is committed to continuously improving WHS outcomes. Many AMMA members operate across multiple states and territories, with half being based in or having operations in WA, and spend significant time and resources understanding their obligations and implementing systems under various WHS and mine safety regimes.
5. As such, AMMA has an interest in ensuring the harmonisation of Australia's WHS laws and regulations yields maximum benefits in terms of standardisation, with the greatest possible consistency between jurisdictions. AMMA has been actively involved in the WHS harmonisation process from the outset, having made detailed submissions to the *National review into model OHS laws* in July 2008 and the *Exposure draft for the Model OHS Act and Stage 1 Model Regulations* in November 2009, as well as state-based implementation processes and performance-based reviews in the meantime.

The Western Australian approach

6. AMMA has closely tracked announcements and proposals as they specifically pertain to WA's participation in the nationally harmonised scheme. AMMA has previously provided a comprehensive submission during the public comment period for a previous proposal regarding the WA WHS Act.
7. Notwithstanding AMMA's broad position that consistency across WHS jurisdictions is desirable, AMMA has been generally supportive of the Western Australian Government's decision to delay harmonisation with the Model WHS Bill until considerations arising from the state's unique economy and business environment are appropriately dealt with. This largely includes WA's high reliance on its mining and energy sector which has historically operated under a bespoke set of WHS regulations, including allowing operators to take an individualised risk-based approach to ensuring safety in their workplaces, and overseen by truly independent regulators with minimal third party interference.
8. While resources employers are always seeking continuous improvement and there is no call for complacency, this bespoke focus on the unique operating environment of WA's mining and energy employers has seen positive indicators of improvements in WHS outcomes in the state.
9. Therefore, while AMMA supports standardisation so that businesses can navigate their obligations across multiple jurisdictions seamlessly, there is room for alternative provisions that best suit the state's unique needs and maintain its record on safety. The MAP makes a number of key recommendations in relation to WA deviating from the Model WHS Bill and/or not

adopting important changes in the 2016 Amendments. AMMA has sought to respond to such proposals on their merits.

WHS and industrial relations

10. AMMA is the national employer group for the resources and energy industry, and has a particular expertise in industrial relations matters. For this reason, AMMA often works closely with other peak industry bodies to provide this specific expertise, and to ensure consistency of approach across members. In terms of this consultation process, AMMA has, in particular, provided input to and reviewed the submission of the Chamber of Minerals and Energy of Western Australia (**CME**) and endorses its positions and recommendations.
11. AMMA's submission therefore seeks to add additional insight and weight to the Department's considerations of the MAP's recommendations where they relate to industrial relations matters. Unfortunately it is not uncommon for safety laws and processes to be abused by trade unions and other third parties seeking influence in a workplace for industrial relations purposes. This is well documented historically and remains a prevalent issue in all states and territories today.
12. Therefore this submission focuses on the particular areas where WHS laws, regulations and processes may intersect with industrial relations matters and may be exposed to misuse and abuse by third parties. This includes areas such as union access to workplaces, the powers of elected health and safety representatives (**HSRs**), and reviews and prosecutions relating to WHS matters.
13. Only by specifically addressing these issues can WA implement a nationally harmonised WA WHS Act that is best suited to maintaining the state's safety performance while fostering competitive and productive WA workplaces including in the state's unique mining and energy operations.

2. Right of Entry

14. One of the key areas of contention is the MAP recommendation that the WA WHS Act adopt union right of entry provisions in the Model WHS Bill. These provisions would establish a new right of entry regime under the state's WHS laws, separate to those provided under the federal system, the *Fair Work Act 2009* (Cth) (**FW Act**), and the state's existing *Industrial Relations Act 1979* (WA) (**IR Act**). AMMA strongly opposes this recommendation and maintains the position that:
- Right of entry provisions should be omitted entirely from the proposed WA WHS Act.
 - Alternatively, if it is decided against strong industry advice that the WA WHS Act should include right of entry provisions, the provisions should be consistent with the well-considered 2016 Amendments and operate subject to the regulation of permit holders – including in relation to their conduct – in accordance with the right of entry provisions under the FW Act.
15. AMMA's reasons for this position are outlined below.

A separate right of entry regime is unnecessary and open to abuse

16. AMMA has long supported sensible controls over union access to workplaces. For instance the federal system for at least two decades prior to the FW Act's introduction in 2009 outlined clear rules that were uncontentious, well understood and accepted by all parties. This former system was well balanced and generally acknowledged that access to workplaces by trade unions is overwhelmingly for industrial relations purposes, whilst third party access to workplaces for WHS reasons should be undertaken by the specialist WHS regulators appointed by state governments (and in some sectors federal regulators) to administer WHS laws.
17. The Model WHS Bill provisions, if adopted as recommended by MAP, would expand union access to worksites, remove sensible and proportionate conditions for entry, undermine the role of the independent WHS Regulator, and create clear avenues for the new WA WHS Act to be misused and abused by third parties including trade unions seeking to pursue their industrial interests.
18. The rationale provided by the MAP for its recommendation to adopt the Model WHS Bill's right of entry provisions does not justify the change, particularly given the high potential for overlap with and confusion regarding the existing federal system and, unless also amended or repealed, state system, which is unique to WA.²
19. In terms of the federal right of entry system, AMMA notes that there is the potential for inconsistency between the right of entry provisions under the Model WHS Bill and the FW Act.³ There has been controversy about the interplay between the two regimes in other states, including the tendency for unions to seek to bypass the requirements under the FW Act in favour of a more lenient WHS right of entry. The MAP's recommended approach to right of entry in the WA WHS Act would risk bringing similar problems to WA, creating conflict and

² AMMA notes that there is considerable room for the IR Act provisions on right of entry to be better aligned with the federal FW Act regime, particularly in relation to the regulation of permit holders, including their conduct.

³ AMMA notes the litigation that occurred regarding whether a union official seeking to enter premises for the purpose of carrying out WHS activities must also go through the procedure for exercising right of entry as set out in the FW Act. This was ultimately required to be determined by a Full Court of the Federal Court of Australia in the matter of the *Australian Building and Construction Commissioner ("ABCC") v. Powell* [2017] FCAFC 89 (2 June 2017). It was found that union officials are required to have a valid Federal Right of Entry permit in order to enter a site pursuant to a State or Territory WHS law, including where a WHSR invites a union official onto the workplace under the provisions of WHS legislation.

confusion for occupiers, employers and employees about right of entry processes under multiple legislative regimes.

20. A state WHS right of entry regime is unnecessary, and AMMA opposes such a regime being introduced as part of the proposed WA WHS Act. Safety matters should be raised directly and immediately with the employer, or where perceived necessary, with the Regulator. If an employee wishes to also raise a safety issue with their union, the absence of right of entry provisions does not prevent a union official from communicating with the employer about the issue and constructively seeking to have the issue addressed. A union official also has the option of raising any unaddressed safety issue directly with the Regulator if direct communication with the employer does not lead to a satisfactory resolution of the issue. Similarly, union officials can raise any health and safety issue they consider requires immediate attention with an inspector. Providing union officials with rights of entry under the WA WHS Act is not required in order to address safety issues – whether on an urgent basis or otherwise - and presents a real risk of creating confusion and conflict.

There is no consensus or consistency on right of entry

21. One justification provided by the MAP for recommending that WA adopt the right of entry provisions within the Model WHS Bill (and rejecting the 2016 Amendments) is said to be to ensure consistent treatment of right of entry for WHS purposes within the states and territories. AMMA argues respectfully that this position is erroneous – both in relation to the regimes that apply in other jurisdictions and in relation to the unique regime recommended by the MAP for WA.
22. There is no consistency in the application of the right of entry provisions across jurisdictions that should weigh heavily in favour of WA adopting the Model WHS Bill (2011) provisions.
23. Victoria, for instance, has not adopted the Model WHS Bill at all. Laws in Queensland, New South Wales, the Northern Territory and the ACT do not include the 2016 Amendments, but their respective WHS laws were originally adopted and implemented prior to the amendments being made. Reviews into best practice safety laws have taken and are taking place in some of these jurisdictions. South Australia has in fact adopted a key element of the 2016 Amendments, increasing the penalty for contravention of conditions of a WHS entry permit holder in line with the 2016 Amendments.
24. Notably, the South Australian WHS Act has also added additional provisions that introduce additional controls and restrictions when compared with the Model WHS Bill, including requiring permit holders to contact the respective regulator prior to exercising right of entry. The MAP recommendations include adopting similar but watered down provisions in WA. That the MAP recommends incorporating additional right of entry provisions which are not replicated in other states and territories – including in South Australia - is directly inconsistent with the argument that there is consistency across the states/territories that needs to be upheld in WA.
25. As noted above, as a broad proposition, AMMA supports the intent behind the proposed WA WHS Act, as recommended by the MAP, to create harmonisation with other jurisdictions as well as ensure laws are tailored to WA's unique conditions. However, in relation to right of entry, in the absence of consistent treatment of right of entry across the states and territories, AMMA sees no justification in implementing a WHS-based right of entry regime that does not factor in the needs and legitimate expectations of WA's business community. AMMA notes that, whilst the MAP takes a different direction, it appears to be accepted by the MAP that there is a need for a unique approach to WHS right of entry in WA.
26. WA should pursue an approach that is best for the state. In AMMA's view, an additional right of entry regime within the WA WHS Act is unnecessary.

The 2016 amendments are important and appropriate

27. If the WA Government decides to go against the clear, consistent and strong advice of the business community not to adopt the right of entry provisions within the Model WHS Bill, the alternative must be to set appropriate boundaries to ensure that this right is not abused. In particular, measures should be in place to ensure that the right of entry is used solely for workplace health and safety purposes as opposed to pursuing industrial agendas.
28. A key part in delivering some of the necessary boundaries would be to adopt the 2016 Amendments to the Model WHS Bill's right of entry provisions.
29. The 2016 Amendments contain important corrections. For example, one of the changes stipulated that before entering a workplace to inquire into a suspected contravention, a WHS entry permit holder must give at least 24 hours' notice to the employer. Another change involved increased penalties for contravening WHS entry permit conditions.
30. AMMA notes that if any right of entry provisions were to be adopted in the WA WHS Act, the provisions in the 2016 Amendments are far more suited to WA's unique safety, business and industrial environment than the original Model WHS Bill. In a recent review, the 2016 Amendments were found to, enhance clarity, consistency, and ensure all details of the suspected contravention are clear and well advised prior to entry⁴.
31. The 2016 Amendments are particularly relevant to the resources and energy industry in WA. Major sites and facilities typically have important safety and security requirements. Further, many sites are large and some are remote, involving particular logistical issues. These are characteristics that are entirely inconsistent with a regime that allows individuals to access facilities without prior notice, or which does not properly regulate the conduct of union officials. The safety regime in WA does not need to be supported by a right of entry scheme that involves surprise raids by union officials. Further, any WHS right of entry provisions should operate subject to the regulation of permit holders – including in relation to their conduct – in accordance with the right of entry provisions under the FW Act.

The abuse of right of entry is well documented

32. A significant concern is that, if the provisions in the Model WHS Bill are adopted, there is a real risk that the WA WHS Act will be manipulated and used for industrial purposes. Too often, rights under WHS laws have been abused and used as a means to achieve industrial relations objectives, undermining industrial relations legislation and genuine safety issues at the workplace. This view is consistent and common across jurisdictions, as recently highlighted in a public consultation on the review of WHS legislation⁵.
33. AMMA's position that a new right of entry regime within the proposed WA WHS Act would be likely to create industrial problems is based on clear evidence of recurring instances where unions have abused privileges associated with safety, to instead further their industrial interests and/or cause disruption to workplaces.
34. Examples of this include the following.

⁴ The 2014 Council of Australian Governments (COAG) review, Department of the Prime Minister and Cabinet, *Improving the model work health and safety laws* (2017) noted that Ministers have been asked to consider the powers of union officials and whether they should be subject to further limitations, following allegations of misuse of union powers under the WHS Act in some jurisdictions.

⁵ Independent reviewer Marie Boland expressed that “*The importance of right of entry for WHS purposes was emphasised by unions. Many business representatives considered these provisions worked well where they were used for genuine safety purposes, however, significant concerns about misuse were raised, mainly in the construction sector.*”

- a) Where unions have used spurious safety issues to pursue industrial relations objectives, and have abused WHS regimes:
- In the case of **Chevron Australia v MUA**⁶, Justice Gilmour found that “the conduct of the MUA was deliberate and that the safety issues, said at the material time by the MUA to justify industrial action on each day, were just a pretext”.
 - In the **ABCC v CFMEU (The Kane Constructions Case)**⁷, Justice Jessup stated the “transparently groundless invocation of occupational health and safety as a pretext for entering the site reflected badly”. His Honour commented that the type of action taken by CFMEU could be of detriment to the workers, by undermining the legitimacy of genuine WHS concerns.
 - **Laing O’Rourke Australia Pty Ltd v CFMEU**⁸, concerned alleged unlawful withdrawal of labour by site workers for 48 hours following three unions baselessly asserting safety issues. Justice Collier noted “there is a serious question to be tried as to whether, on the facts of this case and particularly taking into account the recent history of industrial dispute between the parties, there is an element of abuse in the exercise of rights of entry by officials of the three respondent unions on 15 February 2013 purportedly pursuant to the WHS Act.”
 - In **ABCC v AMWU, AWU, CFMEU & Ors**⁹, while the officials contended the stoppages related to safety and therefore did not constitute unlawful industrial action, the Court found “[t]hat view was a mistaken one”. The Court found instead that by involving themselves in the action, the officials “took advantage of the employees’ unlawful conduct to strengthen their hands in their negotiations with the companies”.
- b) Where unions have blatantly disregarded workplace health and safety procedures and protocols, acted inconsistently with safety and/or refused to comply with proper process:
- In the case of **CFMMEU v ABCC (The Broadway on Ann Case)**¹⁰ an official entered a Brisbane construction site without an entry notice, before: ignoring requests to leave; raising his middle finger at a supervisor; squirting water on and threatening a manager who attempted to film him; and using one worker's swipe card to swipe a number of workers through the turnstiles and out of the premises.
 - The case of **ABCC v CFMMEU (The Bendigo Theatre Case)**¹¹ included union officials being aggressive and abusive towards authorised representatives of the site occupier when asked to explain their presence or produce their entry permits.
 - In the case of **ABCC v CFMEU (The Bruce Highway Caloundra to Sunshine Upgrade Case)**¹² the Federal Court issued an interlocutory injunction to stop officials entering a project on safety grounds without showing entry permits. The joint venturers of the project gave evidence that officials had entered the project

⁶ Chevron Australia Pty Ltd v The Maritime Union of Australia (No. 2) [2016] FCA 768

⁷ ABCC v CFMEU (The Kane Constructions Case) (No 2) [2017] FCA 368.

⁸ Laing O’Rourke Australia Pty Ltd v CFMEU [2013] FCA 133

⁹ Australian Building and Construction Commissioner v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors (The Australian Paper Case) (No 2) [2017] FCA 367 (11 April 2017).

¹⁰ Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Broadway on Ann Case) [2018] FCAFC 126 (14 August 2018)

¹¹ Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bendigo Theatre Case) (No 2) [2018] FCA 1211 (14 August 2018)

¹² Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case) [2018] FCA 553 (20 April 2018)

on nine occasions from March 8 to April 17 under Queensland OHS laws, but refused to show their entry permits.

- In the case of **ABCC v CFMEU (The Footscray Station Case)**¹³ officials entered areas marked as unsafe, ignored warnings to move away, obstructed trucks and stopped work by holding a meeting for about 10 minutes.

Summary of AMMA positions on right of entry

#	MAP Recommendation	Clauses	AMMA Position
19	Implement the approach to right of entry provided in the WHS Bill 2011 consistent with all other harmonised jurisdictions.	117,119, 120,123.	<p>AMMA does not support the adoption of the Model WHS Bill's provisions. For the reasons stated above AMMA strongly believes:</p> <ul style="list-style-type: none"> • Any state WHS-based right of entry regime is unnecessary, confusing and open to abuse. • Inspections and investigations are best left to the WHS Regulator. • Union right of entry relating to IR matters is best left to federal and state IR laws. <p>If, against the clear advice of industry, a state WHS-based entry regime is to be established, it must adopt the 2016 Model WHS Amendments and operate subject to the regulation of permit holders – including in relation to their conduct – in accordance with entry provisions under the <i>Fair Work Act 2009</i> (Cth).</p>
20	Adopt the intent of South Australian provisions for right of entry, permitting a workplace entry permit holder (EPH) to inform the Regulator of the intended entry, and associated changes.	New clauses inserted in section 117.	<p>AMMA opposes this recommendation. If a new entry regime is established which draws on similar provisions under the South Australian legislation:</p> <ul style="list-style-type: none"> • A permit holder should be <u>required</u> to inform the Regulator (and the employer) prior to entry; • A permit holder should be <u>required</u> to provide a report to the Regulator (and the employer) following entry.
21	Insert the Registrar of the Western Australian Industrial Relations Commission as the authorising authority for the WHS entry permit system.	4, 116, 131, 132, 134, 135, 149, 150 and 151.	<p>See comments under recommendation 19 - AMMA opposes any state WHS-based right of entry regime, in relation to permits or otherwise. If a state regime is created within the WA WHS Act, right of entry permit matters should be aligned with the provisions within the FW Act.</p>

¹³ Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Footscray Station Case) [2017] FCA 1555 (21 December 2017)

22	Insert the <i>WHS Tribunal</i> as the authorising authority for revocation of WHS entry permits and resolution of disputes about right of entry.	138, 139, 140 and 142.	See comments above.
24	The <i>Registrar</i> to be included as an eligible party to apply to the <i>WHS Tribunal</i> to revoke a WHS permit, or deal with a dispute about a WHS entry permit.	138(1), 142(4).	AMMA does not support this recommendation as it stands. If a state WHS-based entry regime is to be established, an affected employer or PCBU must also be permitted to make applications (to revoke or place conditions on an entry permit).

3. Health and safety representatives

35. AMMA recognises the role of all workers in creating and ensuring a safe work environment, and notes the significant efforts of members to promote an empowered safety culture, where all workers recognise and raise safety concerns. Health and safety representatives (**HSRs**) play an important role in WA workplaces which should be recognised and retained under the WA WHS Act.
36. However, the proposed WA WHS Act, with amendments recommended by MAP, would prescribe additional power to HSRs that go well beyond their historic responsibilities in WA and that risk creating more confusion, disruption and potentially disputation across different designated working groups, while adding little to no value to safety outcomes.
37. AMMA considers it far more appropriate for the WA WHS Act to contain a minimum level prescription for HSR responsibilities that is consistent with their current role and responsibilities in the workplace, which has proven effective and largely uncontroversial.

Extension of HSR power

38. AMMA opposes the recommendation of MAP seeking to clarify, and thereby, it appears, extend, the power for HSRs to assist other work groups at the workplace. A significant concern is the potential for an HSR to seek to become involved in matters that should be properly dealt with by another workgroup (and another HSR), and which may have little or no direct relevance to the first work group. Further, AMMA notes that:
 - a) in maintaining and facilitating positive health and safety outcomes, a less adversarial approach to the role of HSRs should be adopted, consistent with current practice, whereby it is the duty for HSRs to engage and cooperate with PCBUs towards the resolution of WHS issues and where HSRs are to be held to a prescribed standard of conduct in performing their role.
 - b) HSRs may be inclined to adversarial behaviour in dealing with other employers on sites where multiple employers and contractors operate, and this may be disruptive and counterproductive to overall WHS outcomes and the intent of establishing HSRs. This may further lead to issues when determining liability and contractual obligations.
 - c) in order to facilitate collaboration and cooperation on WHS issues, there should be clarity surrounding the scope of an HSR's responsibilities in respect of their workgroup where a project is made up of multiple employers and contractors. Further, AMMA notes the potential for a lack of clarity to lead to a crossover of issues more appropriately the focus of workplace health and safety committees.
39. Providing HSRs with increased formal powers would create a risk of abuse in a variety of circumstances, and may promote an industrial relations approach or mindset on safety issues inconsistent with the role of all workers in ensuring a safe work environment. Organisations want all workers to perform the duties of HSRs – allocating special powers to particular individuals would risk creating an adversarial approach.
40. The additional HSR powers recommended for the proposed WA WHS Act may undermine and detract from the current efforts of employers and employees to build a safety culture where everyone is encouraged to speak up on potential safety issues or concerns. AMMA's position is that the WA WHS Act should not extend or amplify the current rights of HSRs.

Rights to stop work

41. AMMA does not support the WA WHS Act including a right for an HSR to direct that work cease where they believe there is a safety risk. Providing a new legal right in WA for an HSR to order that work cease risks creating confusion with, and undermining the appropriate controls and processes of, the existing individual statutory right for a worker to cease work if they believe they are at risk of imminent and serious injury or harm.
42. Workers currently have an individual statutory right to cease unsafe work, which AMMA supports. No worker should ever feel compelled to continue work if they genuinely believe that there is a real risk to their safety. The proposed continuation of this statutory right should continue to be subject however to appropriate controls, including the person ceasing work needing to have reasonable grounds for a genuine belief about a risk of imminent injury or harm. This allows organisations to manage safe working cultures and “stop work” procedures through workplace policies and procedures, where management expects, relies upon and supports individual workers to stop work if there is an imminent risk.
43. The only person legally authorised under the WA WHS Act to direct work of others to cease should be an authorised inspector or the Regulator. Limiting this right to an independent specialist inspector or regulator facilitates the principle that upholding a safe working culture should be a consultative effort among all groups in the workplace including management, supervisors, HSRs and employees alike. It would ensure all individuals in a workplace feel empowered to stop work if there is a serious risk to their safety, and are not undermined or confused by additional and unnecessary legal powers provided to HSRs.
44. HSRs should continue in their effective role as safety liaisons who can immediately report a safety concern to management, resulting in a collaborative, non-adversarial process for determining whether work should cease. Where necessary, the assistance of the Regulator can be called upon, including on an urgent basis and, where the Regulator considers necessary, requiring work to cease. HSR’s should not be expected to form part of a kind of ‘vigilante force’ in that regard, exercising powers which better reside with the expert Regulator.

Summary of AMMA positions on health and safety representatives

#	MAP Recommendation	Clauses	AMMA Position
12	Clarify the power of HSRs to provide assistance in specified circumstances to all work groups at the workplace.	69(3).	AMMA opposes this recommendation. This would create the potential for an HSR of one workgroup to have a right to become involved in matters that should properly be dealt with by other workgroups and other HSRs, and which may have little or no direct relevance to the first work group.
16	Include the common law right for a worker to cease unsafe work where there is a risk posed to another person by the work.	84	AMMA may support this <u>if</u> this is balanced with appropriate controls on the potential for abuse, including the person ceasing work being required to have a genuine belief based on reasonable grounds.

4. Process for investigations, reviews and prosecutions

45. AMMA has concerns about a number of MAP recommendations relating to the structure and processes of the regulatory and review bodies that would be involved in administering the proposed WA WHS Act, including new powers provided to particular parties to initiate reviews, proceedings and prosecutions into safety matters. In particular, some of the MAP recommendations might lead to a blurring of the distinction between safety matters and industrial matters.

Industrial relations and WHS matters must be clearly separated

46. AMMA notes that the MAP recommends establishing a new body to administer WA's WHS review system, the Work Health and Safety Tribunal (**WHST**). AMMA members in-principle do not take issue with the stated reason for establishing a body insofar as it is deemed necessary for safety matters arising under the WA WHS Act to be resolved. Further, AMMA is supportive of the MAP recommendation to specify within the IR Act that WHS matters are not industrial matters.
47. However, in order to truly ensure that any such body - the WHST or otherwise - is focused solely on WHS matters, and that industrial relations matters are separately dealt with by the Western Australian Industrial Relations Commission (**WAIRC**), AMMA's view is that the body should be independent of industrial relations structures, with a specified jurisdiction over a clearly defined set of safety-only issues. This would keep the work and purpose of the body focused solely on WHS matters, while industrial matters are administered by the WAIRC and, federally, the Fair Work Commission.
48. Concern also exists with some MAP recommendations regarding the jurisdiction of the proposed WHST, including extending beyond the jurisdiction of the current Occupational Safety and Health Tribunal (**OSHT**) and into dealing with industrial relations or pseudo-industrial relations matters. Specifically, there appears to be too wide a range of matters that may be considered for conciliation under the WA WHS Act by the WHST. Matters that appear to be more related to industrial relations outcomes than safety outcomes and thus more appropriately dealt with in accordance with existing laws in an appropriate tribunal or potentially a court with relevant jurisdiction. Most notably, such matters include settling disputes around "discriminatory or coercive conduct", right of entry disputes, "failure to commence negotiations", and issues arising to pay and entitlements after the cessation of work.
49. Where it is deemed such issues are properly safety matters falling within the WA WHS Act, the Department should deal with them through the Regulator at first instance. If there is a need for further review such processes should be independent of industrial matters and the WAIRC.

HSRs should not be able to undermine the Regulator

50. AMMA notes that under the Model WHS Bill, HSRs and individual workers can cease work for safety reasons in specified circumstances. The Model WHS Bill also includes the right for HSRs to seek review of an issue arising out of the cessation of unsafe work. The MAP recommends the WHST deal with such matters.
51. AMMA maintains that it is important for issues to remain with the specialist Regulator and, where reviews and conciliation is deemed necessary, only then referred to a separate body independent of the WAIRC. Referral should be confined to an employee involved in or employer directly affected by the cessation of work. Given the individual nature of the belief relevant to a worker's cessation of work, there should be no assumption that such matters will always involve common issues, or should progress on a representative basis.

52. Further, issues relating to payment, and the definition of industrial action, are dealt with by federal workplace law under the FW Act. MAP's current recommend structure creates the potential for inconsistent processes and determinations given the duplication with the current provisions in the FW Act, and may create issues regarding who has jurisdiction over particular matters.

Extending union powers is not in the interests of WHS

53. The Model WHS Bill provides a structured process that permits an "eligible person" to request a review of a decision made by a regulator, and if the person is not satisfied may apply to the WHST for further review. An eligible person is someone whose interests are affected by the decision, including the worker, PCBU, or an HSR. Alarming, it is recommended by the MAP that unions be included under this definition. MAP seeks to justify this change as being necessary to address procedural issues with the current WHS regime.
54. Putting aside questions as to the likely extent of the procedural issues referred to by the MAP, AMMA recognises two immediate problems with MAPs approach in addressing any such procedural issues. Firstly, unions represent approximately 15% of the total workforce and only 10% of the private sector workforce. The model recommended by the MAP would provide unions with increased powers to intervene on safety issues best left to the Regulator, including providing unions with standing before the WHST despite potentially having few members affected. Relevant to AMMA members, any relevant procedural issues would remain in respect of the, on average, 90% of employees who choose not to be union members. Secondly, there are multiple unions that represent different workers across different sectors. Allowing multiple unions with competing interests for union membership and industry coverage to have standing in relation to safety issues in the workplace would not address efficiency in procedural process.
55. In any event, there is also no comprehensible reason as to why unions – relatively small and unrepresentative groups compared with the workforce as a whole - should be given a special authority to initiate prosecutions in relation to PCBUs. Extending the rights of unions is not in the best interests of workplace health and safety. It would create unnecessary complexity in the enforcement of WHS laws, create conflict of interest for employee organisations and allow the potential for misuse of the WA WHS Act to advance political or industrial agendas.
56. AMMA notes that the Regulator is the appropriate body to prosecute breaches. The Regulator has a range of strategies and compliance tools enabling it to improve workplace safety. These include: provision of advice or guidance, issuance of improvement and/or prohibition orders, the ability to seek injunctive relief, the ability to issue infringement notices, the ability to accept enforceable undertakings, the ability to institute prosecutions and the ability to publically identify companies and PCBUs. The Regulator has a graduated range of tools that permits it to apply a remedy based on factors including the nature of the infringement/incident, the record of the PCBU, the gravity of the infringement/incident and the cooperation/contribution shown by the PCBU. Providing unions with an ability to commence prosecutions would have the potential to undermine the role of the Regulator. Serious questions arise as to whether the safety regime in WA should be in anyway reliant on partisan third parties that may operate as 'bounty hunters'.

AMMA positions on the process for investigations, reviews and prosecutions

#	MAP Recommendation	Clauses	AMMA Position
39	Establish the Work Health and Safety Tribunal		<p>AMMA is not opposed in principle, however:</p> <ul style="list-style-type: none"> The role should not reside within the WAIRC, to ensure separation of industrial and safety issues;

			<ul style="list-style-type: none"> • AMMA does not support any extension of the jurisdiction of the current OSHT; and • The range of potential conciliation matters is too broad and crosses over into industrial matters.
17	Include the right of an HSR to seek review of an issue arising out of the cessation of unsafe work by the Work Health and Safety Tribunal	89, 229.	AMMA opposes this recommendation. As outlined above, it is appropriate for issues to remain with the WHS Regulator.
41	Provide the Work Health and Safety Tribunal with power to direct the Registrar to investigate and report on matters.	51G(1) of the OSH Act to be incorporated.	AMMA's position is that authorised inspectors of the WHS Regulator should conduct all investigations into safety matters, not the Registrar of the WAIRC.
43	Extend conciliation powers of the Work Health and Safety Tribunal	51J of the OSH Act to be incorporated.	AMMA does not support the jurisdiction of the current OSHT being expanded. The range of matters for conciliation is too broad with too great a risk of crossing-over into industrial disputes. Regulation of safety matters should be left with the Regulator, conciliation of IR matters should be left with the FWC or the WAIRC in accordance with existing legislation.
31	Include a worker's union as an eligible person who is able to apply for certain decisions to be reviewed.	223.	AMMA does not support this recommendation. The review process should not allow for third parties, potentially with minimal involvement in the workplace, to circumvent the role of the Regulator and bring matters directly before the WHST.
32	Permit the Regulator to appoint any person to initiate a prosecution.	230(b) and 260(b).	AMMA's position is that alternative persons be restricted to relevant public legal and regulatory officers.
33	Include a union as a party that can bring proceedings for breach of a WHS civil penalty provision.	New paragraph to be added to 260.	<p>AMMA does not support this recommendation. Giving Unions the right to bring proceedings for breach of WHS civil penalty provision will:</p> <ul style="list-style-type: none"> • Introduce unnecessary complexity in the enforcement. • Create conflict of interests for unions. • Allow misuse to advance industrial/political agendas.

			<p>The Regulator is the appropriate body to prosecute breaches. Unions are not impartial regulators.</p> <p>Extending the ability to bring prosecutions to unions presents risk and is not in the best interest of health and safety.</p>
--	--	--	---

5. Timing of WHS harmonisation

57. AMMA notes that the Model WHS Bill is currently in the process of public consultation, and that Safe Work Australia will subsequently produce a written report on the current operation and content of the adoption of WHS laws, in all jurisdiction, in 2019.
58. In the interest of harmonisation, and the potential for the Model WHS Bill and jurisdictional WHS laws to undergo amendments, AMMA suggests that it would be appropriate to allow for an opportunity to consider the report prior to the implementation of WHS laws for WA.
59. Given Western Australia has delayed adopting the nationally harmonised WHS laws since 2008/9, there seems little need to rush the development and implementation of any harmonised laws in the short term when a comprehensive review by the national safety authority is due to hand-down recommendations in 2019.
60. **AMMA recommends that the development and implementation of the WA WHS Act, based on Model WHS laws, be deferred until Safe Work Australia releases its report into the performance of the nationally harmonised WHS system in 2019.**