AMMA
AUSTRALIAN
RESOURCES &
ENERGY GROUP

Submission to Safe Work Australia

Consultation Regulation Impact Statement – Recommendations of the 2018 Review of the model WHS laws

August 2019

Commercial in confidence

About AMMA

AMMA is Australia's resources and energy industry 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.

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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Executive Summary

Australian Resources and Energy Group AMMA provides the following submission to Safe Work Australia's (SWA) Consultation Regulation Impact Statement (CRIS) in relation to the Recommendations of the 2018 Review of the model Work Health Safety (WHS) laws (**the 2018 Review**).

AMMA focuses its feedback on the following recommendations of significant concern to members in the resources and energy industry, summarised below.

1. **Workplace entry by HSR assistants**

   AMMA and its members hold concerns regarding the recommendation that union officials should be free to enter workplaces to assist a Health and Safety Representative (HSR) without being required to hold a valid entry permit under workplace laws. The recommendation would create inconsistencies with industrial relations laws and detract from entry seeking to make genuine safety improvements.

   The *Fair Work Act 2009's* (**FW Act**) right of entry regime already creates significant industrial problems for employers, having significantly relaxed the union right of entry provisions that were appropriately balanced and applied responsibly under prior industrial relations systems. Under the current regime there is clear evidence of recurring instances where unions have abused privileges associated with safety to circumvent what little checks remain on the right of entry, to instead further their industrial interests and cause disruption to workplaces.

   AMMA submits that SWA maintain the current model policy that requires union officials to hold a valid entry permit when entering a workplace, regardless of the reason for entry, and further clarified to avoid any confusion.

2. **WHS entry permit holders – prior notice of entry**

   AMMA does not support changes to the current WHS right of entry regime that would allow unions' access to workplaces without any prior notice of entry. AMMA submits the model WHS laws maintain the provisions of the 2016 amendments, meaning permit holders should operate in accordance with the right of entry provisions, including provision of 24 hours' notice, under the FW Act.

   There is clear evidence that union officials continue to abuse their workplace entry rights for the purpose of advancing the political, industrial and representational agendas of their organisation and often at the expense of genuine health and safety concerns.

   Removing the requirement for 24 hours' notice will only further undermine the genuine health and safety interests of employees and promote conflict and disputation between parties. Conflict and disagreement in the workplace has a negative impact on workplace culture which in turn increases exposure to health and safety risks.

   AMMA supports maintaining the requirement for 24 hours' notice prior to entry as a sensible approach to dealing with health and safety matters in the workplace. There needs to be further clarification that the requirement for 24 hours' notice prior to entry is the most appropriate and sensible approach to addressing safety concerns in the workplace.

3. The Category 1 offence and industrial manslaughter

AMMA and its members strongly oppose the new fault element for Category 1 offence and the introduction of an offence of industrial manslaughter in workplace health and safety laws. The punitive nature of the recommendation of the 2018 Review has been a controversial concept and is largely rejected as unnecessary and divisive by the business community.

The 2018 Review findings highlight the limitations of the model WHS laws in deterring breaches of the general duties provisions. The most obvious and evident limitation is the lack of harmonisation of WHS laws across jurisdictions. This has been a source of frustration and confusion for all stakeholders in understanding how the WHS system applies to their business or operations.

There are existing, appropriate avenues within Australian criminal law for individuals to be prosecuted for gross negligence that has led to a workplace death. A framework that focuses on punitive measures to health and safety compliance diminishes an organisations' safety culture. AMMA maintains that continuous improvement in safety outcomes in the workplace, is best driven by cooperative, proactive initiatives to enhance safety culture, not an adversarial legal approach seeking to attribute blame and liability after an accident occurs.

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

1. Introduction

1. Australian Resources and Energy Group AMMA welcomes the opportunity to make this submission on Safe Work Australia's (SWA) Consultation Regulation Impact Statement (CRIS) in relation to the Recommendations of the 2018 Review of the model Work Health Safety (WHS) laws (**the 2018 Review**).

2. The CRIS released by SWA on 24 June 2019 covers all 34 recommendations of the 2018 Review but focuses on 12 recommendations that are likely to have significant impacts or involve complex or sensitive policy issues. Of those 12 recommendations, AMMA has responded to the following recommendations of significant concern to members in the resources and energy industry:

    a. Recommendation 8: Workplace entry of union officials providing assistance to a HSR

    b. Recommendation 15: Remove 24 hour notice period for entry permit holders

    c. Recommendation 23a: Enhance Category 1 offence

    d. Recommendation 23b: Create an industrial manslaughter offence

3. 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 shared members and the broader business community. In terms of this consultation process, AMMA has, in particular, reviewed the submissions of the Australian Chamber of Commerce and Industry (ACCI) and Chamber of Minerals and Energy of Western Australia (CME) and endorses the positions and recommendations of both employer organisations.

4. AMMA's submission focuses on the particular areas where WHS laws, regulations and processes intersect with industrial relations matters and may be exposed to misuse and abuse by third parties. This includes union access to workplaces, the powers of elected health and safety representatives (HSRs), and reviews and prosecutions relating to WHS matters.

5. The Recommendations from the 2018 Review final report have largely ignored the submissions of industry representatives. The Recommendations have a strong focus on compliance and enforcement measures rather than preventative measures that seek to improve health and safety practices. They also seek to insert greater third party interference despite there being no clear evidence this would lead to improved safety outcomes.

6. It has always been AMMA's position that health and safety at the workplace is a shared responsibility. However given the statutory responsibility is ultimately on the employer, it is critical employers are able to manage the unique safety circumstances within their specific operations as only they best know how.

7. Resources and energy sector employers strive to address any safety concerns and innovate within their own workforces and are consistently challenging themselves and their employees to improve. To promote collaboration and innovation for improved safety outcomes in the workplace, future reviews of WHS frameworks must remove unnecessary prescriptive measures and administrative burdens to engage all workers and Persons Conducting a Business or Undertaking (PCBU).

2. Workplace entry by HSR assistants

Option 1	Status quo	Support
Option 2	Work to clarify union officials may assist an HSR without a Fair Work permit (Recommendation 8) Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the *Fair Work Act 2009 (Cth)* or another industrial law.	Oppose

8. The 2018 Review Consultation Regulation Impact Statement (CRIS) poses the following questions in relation to Recommendation 8:

    a. *How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?*

    b. *What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders?*

    c. *Do you have suggestions for other options to address the problems identified in the 2018 Review findings?*

    d. *What is your preferred option and why will it be best for you, your organisation and your stakeholders?*

How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

9. The 2018 Review Report found there is a potential for limitations on a HSR's ability to request assistance of any person under the model WHS laws following the decision in *Australian Building and Construction Commission v Powell* (*Powell*). The 2018 Review also found such limitations are not consistent with the original intent of the HSR assistant provisions in the model WHS Act.

10. Whilst AMMA recognises the contribution unions have to health and safety in the workplace, it has long advocated for workplace entry rights that are appropriate and balanced and which do not impede productivity, freedom of association and safety in the workplace. Under federal industrial laws, right of entry privileges have been abused and misused as a means to achieve industrial objectives, undermining both the intention of industrial relations legislation and genuine safety issues at the workplace. Union officials abusing their entry rights under WHS laws for industrial purposes is an ongoing concern, often daily, for resources and energy employers.

11. The notion that an "invitation" to enter a workplace can circumvent the workplace law requirements has long been relied on by union officials as a tactic to advance the industrial interests of their organisations. However, the decision in *Powell* found a union official entering a workplace to assist a HSR is required to hold a valid entry permit under the *Fair Work Act 2009* (FW Act) and must comply with certain requirements under the FW Act.

12. Holding a right of entry permit is a privilege and comes with certain responsibilities on the test of character of the permit holder. In determining a person is fit and proper to hold an

entry permit under workplace laws the Fair Work Commission must take into account any breaches of industrial laws, uncivil behaviour in workplaces and appropriate training undertaken.

13. The 2018 Review Report considers the rights of a HSR to request assistance from any person with appropriate knowledge and experience, including union officials, should not be restricted. Where the genuine intention of a HSR is to seek assistance to investigate a suspected safety breach, it could be reasonably assumed that person would be a union official or a person whose knowledge and experience would warrant them holding a valid entry permit under the relevant legislation.

14. Recently, the Australian Government has sought to address the longstanding issues of excessive union workplace entries and abuse of entry permits under the FW Act. On 1 July 2019, new form of entry permits were introduced that require entry permits issued by the Fair Work Commission to include a photo and signature of the permit holder, pursuant to the Fair Work Amendment (Modernising Right of Entry) Regulations 2019.

15. In addition to the photo and signature requirements, a significant change to the right of entry permit is the inclusion of a "QR Code," which when scanned using an application on a smart phone will direct users to the current list of permit holders on the Fair Work Commission website. This allows employers to confirm the status of the entry permit and verify whether it is still current and thus confirms the identity of the person who is accessing the workplace.

16. Another update to the right of entry regime under the FW Act is the notice of entry forms which must be given to employers. The notice of entry forms are required to clearly set out the rules that both union officials and employers must follow when rights of entry are being exercised. The Australian Government said in a media release that "changes to the notice of entry forms will ensure all parties are aware of their statutory rights and responsibilities, and provide contact details for the appropriate regulator in the event of any queries, which will assist in reducing disputes over right of entry." These new reforms are designed to better enforce lawful and responsible use of entry permits that will prevent the burden of excessive and disruptive union visits to Australian workplaces. These changes are sensible and make the right of entry framework clearer and less vulnerable to misuse.

17. With enhancements to the requirements for an entry permit under the FW Act, it is anomalous that the requirements for an entry permit in relation to safety matters be more lenient. The test for determining a persons' suitability to hold an entry permit under the FW Act, and thus holds privileges as a fit and proper person, should be consistently applied where a person is seeking access to a workplace under safety laws.

18. For these reasons AMMA strongly opposes the recommendation that union officials are not required to hold a right of entry permit for the purpose of assisting a HSR in the workplace. Any recommendations that allow the influence of third parties such as trade unions unfettered access to workplaces to deal with safety matters should not come at the expense of business operations and nor should it undermine the function of independent WHS inspectors.

What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders?

19. The recommendation of the 2018 Review to clarify that union officials may assist a HSR without an entry permit under the FW Act would create further disruptions in workplaces and exacerbate the misappropriation of HSR assistant privileges by union officials to instead pursue their industrial or representational interests.

20. The 2018 Review considered the impacts of maintaining the status quo in relation to union officials requiring an entry permit to assist a HSR. It found the present requirements would see an increase in the costs in seeking legal and other professional advice to understand the implications of case law on their business. Other costs to business identified in the 2018 Review include loss of productivity due to a HSR needing to identify an alternative person to assist and delays that may impact safety in the workplace. Respectfully, AMMA finds these propositions utterly absurd. The experiences of AMMA members as well as years of industrial case law demonstrate that the less regulation there is on workplace entry privileges, the greater the productivity impacts and costs of disruption to business.

21. The current right of entry rules under the FW Act already create significant industrial problems for employers, with overly lenient union entry provisions compared to prior industrial relations systems. Employers are now routinely hit with greater costs and more frequent disruptions to their businesses, with less control and fewer consequences applied to inappropriate behaviour by permit holders.

22. There is also clear evidence of recurring instances where unions have abused privileges associated with safety, circumventing what little checks remain on right of entry, to instead further their industrial interests and cause disruption to workplaces. Examples of this include the following:

    a. Where unions have used spurious safety issues to pursue industrial relations objectives and abused WHS regimes:

        i. In the case of ***Chevron Australia v MUA***, 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".

        ii. In the ***ABCC v CFMEU (The Kane Constructions Case)***, 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.

        iii. ***Laing O'Rourke Australia Pty Ltd v CFMEU***, 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."

        iv. In ***ABCC v AMWU, AWU, CFMEU & Ors***, 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 consistently with safety and/or refused to comply with proper process:

   i. In the case of ***CFMMEU v ABCC (The Broadway on Ann Case)*** 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.

   ii. The case of ***ABCC v CFMMEU (The Bendigo Theatre Case)*** 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.

   iii. In the case of ***ABCC v CFMEU (The Bruce Highway Caloundra to Sunshine Upgrade Case)*** 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 on nine occasions from March 8 to April 17 under Queensland OHS laws, but refused to show their entry permits.

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

23. In addition to the above decisions, the inappropriate use of safety as a pretext for industrial purposes has been clearly identified in both the Cole Royal Commission into the Building and Construction Industry, and the Heydon Royal Commission into Trade Union Governance and Corruption.

24. It is clear that there is great potential for unions to utilise any amendments to the current right of entry regime for purposes related to their political, industrial and membership agendas that are unrelated to improving safety outcomes. This type of behaviour does not just impact employers, but as outlined above, employees are also affected, through undermining the legitimacy of genuine WHS concerns. Unlawful union behaviour and industrial disputation may also discourage productivity, business confidence and investment and employment opportunities, thereby impacting the Australian community, economy, and living standards.

Do you have suggestions for other options to address the problems identified in the 2018 Review findings?

25. Recommendation 8 of the 2018 Review would require SWA to work with relevant agencies to consider how to ensure that a union official entering a workplace to provide assistance to a HSR is not required to hold an entry permit under the FW Act. AMMA and its members recognise that the right of entry regime ensures union officials are not hindered in exercising their lawful rights, however in exercising those rights should not be provided unfettered access to workplaces which disrupts business and undermines genuine safety concerns.

26. The processes and requirements under the FW Act that sees the Fair Work Commission (FWC) issue right of entry permits demonstrate that entry permit holders are held to higher standards and the right to enter a workplace is a privilege that carries significant

responsibilities. These safeguards ensure that a person entering a workplace is a fit and proper person to exercise a right of entry for the purpose of which the permit has been granted.

27. There is a need to ensure that union officials entering a workplace to deal with safety matters haven't breached safety protocols in the past or demonstrated uncivil or unlawful behaviours. It also requires that union officials undertake the appropriate training to deal with health and safety matters to achieve improved safety outcomes in the workplace. The requirements for any individual seeking to enter a workplace for the purpose of assisting a HSR in the workplace should not be anything less.

28. It is reasonable to expect a HSR should seek assistance from a person with relevant experience in workplace health and safety matters. Such a person would be assumed to hold or have previously held a right of entry permit under WHS or workplace laws.

29. Where a person assisting a HSR does not hold a current right of entry permit, an alternative to Recommendation 8 could include a requirement for a modified 'fit and proper person' test and a declaration on the notice of entry. The 'fit and proper person' test would ensure the proposed HSR assistant has not demonstrated uncivil behaviour or breached workplace laws in the past. The declaration on the notice of entry would also provide some assurance that the proposed person assisting a HSR has never had any equivalent permit revoked, suspended or been disqualified.

30. Following on the requirement for a declaration in the notice of an entry, the proposed recommendation should include penalties where a union official abuses the assistance provisions under model WHS laws to gain access to workplace for industrial purposes. The penalties may include disqualification from holding an entry permit under FW Act and WHS laws. This requirement may address any impact to business arising from the misuse of the HSR assistant provisions without the need for an entry permit under the FW Act.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

31. AMMA and its members hold concerns regarding the recommendation that union officials should be free to enter workplaces to assist a HSR without being required to hold a valid entry permit under workplace laws. The recommendation would create inconsistencies with industrial relations laws and detract from entry seeking to make genuine safety improvements.

32. Adopting this recommendation would bring an unacceptable risk for safety laws to be misused by trade unions as a ruse to access workplaces to advance industrial and political interests. The requirement for union officials to hold a valid permit under the FW Act was designed to mitigate the misuse of entry privileges under the guise of safety and there is no justification for amending this longstanding implemented principle.

33. AMMA submits that SWA maintain the current practice that requires union officials to hold a valid right of entry permit when entering a workplace, regardless of the reason for entry, and further clarified to avoid any confusion.

3. WHS entry permit holders – prior notice of entry

Option 1	Status quo	Support
Option 2	Remove the 24-hour notice period for entry permit holders (Recommendation 15) Amend the model WHS Act to retain previous wording in s 117 of the model WHS Act	Oppose

34. The CRIS poses the following questions in relation to Recommendation 15:

    a. *How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?*

    b. *What practical impact, including the costs and benefits, would requiring or not requiring a WHS entry permit holder to provide prior notice of entry have on you, your organisation or your stakeholders?*

    c. *Do you have suggestions for other options to address the problems identified in the 2018 Review?*

    d. *What is your preferred option and why will it be best for you, your organisation and your stakeholders?*

How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

35. The 2018 Review found there is confusion and ongoing disagreement over whether WHS entry permit holders are required to provide prior notice of entry to make inquiries into suspected breaches of WHS laws. This follows the 2016 amendments to the model WHS laws requiring entry permit holders to provide written notice at least 24 hours, but no more than 14 days, before entering a workplace under WHS laws. To date, no jurisdiction has implemented this amendment.

36. AMMA submits the model WHS laws should maintain the provisions of the 2016 amendments and should operate subject to the regulation of permit holders in accordance with the right of entry provisions under the FW Act. Importantly, the sensible requirement to provide 24 hours' notice of entry should be the minimum allowable standard consistent with right of entry provisions in WHS laws and the FW Act that enables the PCBU to appropriately respond to an inquiry or entry requests.

37. The requirement for a WHS entry permit holder to provide at least 24 hours' notice of entry to the employer is particularly relevant to the resources and energy industry. Major sites and facilities typically have important safety and security requirements for visitors to these operations that involve administrative process prior to arrival. Further, many sites are large and often remote, involving particular logistical requirements such as transport, accommodation and availability of facilities.

38. 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 when entering these workplaces. Any recommendation that allows union officials to enter a workplace without prior notice only exacerbates safety issues and causes

delays and frustrations for both the employer and entry permit holder in order to arrange necessary access to the workplace.

39. It is AMMA's position that any WHS right of entry provisions 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.

What practical impact, including the costs and benefits, would requiring or not requiring a WHS entry permit holder to provide prior notice of entry have on you, your organisation or your stakeholders?

40. Resources and energy employers continue to be unfairly exposed to the absurd costs, delays, productivity impacts and safety issues associated with the thousands of site entry requests they receive each year.

41. A 2018 survey of resources and energy employers revealed more than 50 per cent had their workplace adversely affected by the frequency and impact of union access under both industrial and safety laws. This is a significant impact on an industry that is a major pillar of the national economy including contributing three of the top five export products.

42. In 2016, KPMG research estimated the cost of union visits to 100 major projects to be more than $5 million annually. This research found the number of union visits in the resources and energy industry range from approximately five per annum per 500 employees to 150 per annum per 500 employees. The average time taken to manage and facilitate visits is between three and 15 hours per visit. This represents a labour cost of between $1,000 and $150,000 per annum on average for every 500 workers.

43. The research conducted by KPMG found that free access to Australian worksites has a broad range of detrimental impacts to organisations, including:

    a. Costs to facilitate entry

    b. Compliance costs for work health and safety requirements

    c. Costs of obtaining additional security

    d. Time spent providing a safety induction for union officials

    e. Time spent escorting union officials through workplaces

    f. Costs of arranging transport and/or accommodation for remote site visits

44. Some specific examples of the number and frequency of union visits to resources and energy sector operations under the industrial relations regime which requires 24 hours' notice of entry include:

    a. **Woodside's Pluto LNG Project** which during the first two years of construction, from 2007 to 2009, there were no union visits to the site. Following the implementation of the FW Act right of entry rules, there were 217 entry requests within four months. Over the following six months, the number of requests had increased to 450.

    b. **BHP Billiton's Worsley Alumina Plant** was subject to an extreme number of entry requests where the number of requests jumped from 82 in the years 2007-2008 to over 1500 in 2010-2011.

45. It can only be expected that this already excessive number of union visits to resources and energy operations will continue to increase where unions have unfettered access to workplace. 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 does not need to be supported by a right of entry scheme that involves surprise raids by union officials.

Do you have suggestions for other options to address the problems identified in the 2018 Review?

46. The 2018 Review identified confusion and disagreement regarding the requirements of a WHS entry permit holder to provide notice prior to entering a workplace to inquire into a suspected safety-related contravention. This confusion can be attributed to the fact that no jurisdiction has implemented the 2016 amendment requiring written notice of entry to be provided at least 24 hours before entry. This confusion is furthered by the removal of national guidance material from the SWA website that is not consistent with the jurisdictional laws.

47. The fact that no jurisdiction has implemented the entry notice provision is not a reason to remove it. The Review provides an opportunity to evaluate the current framework and allow jurisdictions to reconsider implementation of the provision.

48. A significant issue with the right of entry regime is the abuse of the privileges demonstrated by the conduct of union officials once they have access to a workplace. There needs to be enhanced measures that clearly define the purpose of the entry and clarify the rights and responsibilities of officials holding a permit.

49. Providing clarity on permit holders' role and responsibilities sets the standard of behaviour and conduct expected of a union official when making an inquiry into a suspected contravention. Where a union official's conduct is adverse to the standard expected, having a clearly defined set of roles and responsibilities will allow a PCBU to establish that there has been an abuse of workplace entry privileges.

50. There are often few or no negative consequences for union officials who misuse their entry privileges and still fewer consequences for the union that encourage them to do so. Where serious safety breaches are concerned, just as employees are disciplined, union officials should forego their right to be on site and have their permit revoked or suspended.

51. The penalties for abusing right of entry are minimal, highlighted in the increased number and frequency of union visits to resources and energy sector operations. An alternative to removing the requirement for notice of entry should be enhanced penalties for the abuse of right of entry privileges. An alternative to Recommendation 15 should be stricter enforcement of penalties against permit holders who misuse their right of entry privileges. The prosecution of abusing right of entry provisions is necessary to ensure genuine safety concerns are addressed.

52. The requirement for 24 hours' notice must remain and SWA should encourage jurisdictions to adopt this sensible approach to right of entry to provide consistency with the provisions in both the FW Act and WHS laws. The provision of notice also ensures a PCBU can appropriately respond and address safety concerns in the workplace.

53. As noted in the 2014 COAG Review: "It is not the role of entry permit holders to 'catch' non-compliant duty holders or otherwise enforce WHS at the workplace. This is the role of the

Regulator." Safety is a shared responsibility and the surprise element of right of entry does not support a productive and collaborative approach to safety.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

54. There is clear evidence that union officials continue to abuse their workplace entry rights for the purpose of advancing the political and industrial agendas of their organisation and at the expense of genuine health and safety concerns.

55. New provisions that allow union's free entry and access to workplaces will only further undermine the health and safety of employees and promote conflict and disputation between parties. Conflict and disagreement in the workplace has a negative impact on workplace culture which in turn increases exposure to health and safety risks.

56. Whilst AMMA acknowledges the contribution unions have to health and safety in workplaces, it supports workplace entry rights that are appropriate and balanced, including when applying to WHS laws. AMMA supports maintaining the requirement for 24 hours' notice prior to entry as a sensible approach to dealing with health and safety matters in the workplace. There needs to be further clarification that the requirement for 24 hours' notice prior to entry is the most appropriate and sensible approach to addressing safety concerns in the workplace.

4. Category 1 Offence and Industrial Manslaughter

Option 1	Status quo	Support
Option 2	Include gross negligence as a fault element in the Category 1 offence (Recommendation 23a only) Recommendation 23a: Enhance Category 1 offence *Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is **grossly negligent** in exposing an individual to a **risk of serious harm** or death.*	Oppose
Option 3	Introduce an offence of industrial manslaughter in the model WHS Act (Recommendation 23b only) Recommendation 23b: Industrial manslaughter Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following: • The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act. • The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate. • A body corporate's conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers. • The offence covers the death of an individual to whom a duty is owed. *Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels (Recommendation 22) and develop sentencing guidelines (Recommendation 25).*	Oppose
Option 4	Implement both Recommendations 23a and 23b	Oppose

57. The CRIS poses the following questions in relation to Recommendation 23a and 23b:

a. *How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?*

b. *What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders?*

c. *Do you have suggestions for other options to address the problems identified in the 2018 Review?*

d. *What is your preferred option and why will it be best for you, your organisation and your stakeholders?*

e. *What do you see as the main limitations of the model WHS laws in deterring breaches of the health and safety duties?*

f. *What benefits and costs are associated with Category 1 offence including two alternative fault elements?*

g. *What do you consider the practical impacts of industrial manslaughter to be for you, your business and your stakeholders? What need, if any, would they address?*

How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?

58. AMMA's view, consistent with other business representative groups, is that there are existing, appropriate avenues within Australian criminal law for individuals to be prosecuted for gross negligence that has led to a workplace death. A framework that focuses on punitive measures to health and safety compliance diminishes an organisations' safety culture.

59. The 2018 Review identified increasing community concerns that there should be an outcome-based offence in circumstances where a PCBU has breached their duty of care under WHS laws that leads to a workplace death. This finding, along with the introduction of industrial manslaughter offences in state jurisdictions, has heavily influenced the recommendations in the 2018 Review with little evidence that enhanced offence provisions would improve safety outcomes.

60. The current model WHS laws for the most serious offences provide penalties based on exposure to a risk of serious injury, illness or death and not based on the consequences of the exposure to a risk. This follows the 2008 National Review of model WHS laws that noted 'the natural abhorrence felt towards work-related deaths should not lead to an inappropriate response. The seriousness of offences and sanctions should relate to the culpability of the offender and not solely to the outcome of the non-compliance. Otherwise, egregious, systemic failures to eliminate or control hazards and risks might not be adequately addressed.'[1]

61. There does not have to be an outcome of that exposure to the risk for the offence provisions to apply to the PCBU. These offence provisions ensure that the PCBU is liable for breaching general duty provisions even when an injury, illness or death has not occurred. The application of the current offence provisions covers breaches much broader range of breaches than the proposed outcome-based offences. The current penalties regime provides an appropriate proactive and risk-based preventative approach to workplace health and safety compliance.

62. It is important to note that a PCBU does not go unpunished where culpability is found for a serious injury or death in the workplace. Overall, whilst liability, reputational damage, compensation and sanctions are all important and interact to form a web of incentives for either compliance or non-compliance, there is no mechanical effect of "severe sanctions leading to higher compliance", in either criminal justice, or in the enforcement of business regulations.[2]

63. The introduction of more punitive measures to compliance will be detrimental to workplace safety culture as the focus shifts from a proactive risk-based approach aimed at preventing contraventions of WHS laws towards seeking to attribute blame for an outcome that in most instances is permanent.

[1] Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008, p 135.
[2] Blanc, F., "Reforming Inspections: Why, How and to What Effect?", (2012), OECD, Paris.

What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders?

64. AMMA supports maintaining the status quo in relation to Recommendation 23a and 23b of the 2018 Review. The 2018 Review findings do not provide sufficient evidence to suggest the proposed changes to offence provisions under the model WHS Act would facilitate improved safety outcomes in the workplace and prevent further industrial fatalities.

65. The findings of the 2018 Review are concerned with prosecuting breaches of general duty provisions under the model WHS Act. The aim of which appears to address increasing community expectations that seek to attribute blame to an individual whose conduct leads to a workplace death rather than prosecute an entity which, in some instances, is unable to be adequately sentenced.

66. The practical impacts of the options relating to Category 1 offence and industrial manslaughter include but are not limited to:

    a. Potential for an increase in the number of matters being prosecuted, adding to the judicial system and deviating resources away from the workplace to defend these matters rather than focusing on prevention of future incidents. The cost of this outcome is additional pressure on the WHS Regulator that is already stretched due to a lack of resourcing.

    b. Difficulties in attracting appropriately qualified people for roles in the resources and energy industry where the type of work involves a higher inherent risk. There are fundamental roles in the industry where workers hold liability under statutory authorities. Any changes to the culpability of offences would be detrimental to the prospective employment in the resources and energy industry.

    c. Reduced safety and hazard identification and reporting in the workplace that could lead to adverse consequences. The recommendation for enhanced penalties in model WHS laws provokes a culture of fear in the workplace. Workers could become less inclined to raise safety concerns for fear of retribution that could result in reduced safety and hazard reporting and thus increase the likelihood of further injuries of fatalities.

    d. Cultivation of a ‘blame’ culture in workplaces where employers and employees are more focused on defending themselves and seeking to attribute blame and liability than working cooperatively for continued improvements in safety practices and cultures.

67. The options for change in Recommendation 23a and 23b are unnecessary and provide no further benefit overall for stakeholders given offence provisions already exist in the model WHS Act. The current penalties allow for significant fines and terms of imprisonment for those who recklessly cause death or serious injury at a workplace.

Do you have suggestions for other options to address the problems identified in the 2018 Review?

68. To address the problems identified by the 2018 Review there is scope to balance the current system to provide equal weight to prevention and enforcement measures in the model WHS laws. The recommendation to introduce offence provisions based on outcomes undermines the objective of WHS laws to deter non-compliance by focusing on prevention.

69. An alternative to Recommendation 23a and 23b is stricter enforcement of the current offence provisions in model WHS laws for breaches that do not result in injury, illness or death. The current penalties apply based on the level of exposure to risk and the culpability of the offender. Further prosecution for breaches under the current offence provisions would seek to address community concerns relating to liability where there is a serious injury or death in the workplace.

70. Recommendation 25 of the 2018 Review to develop and issue sentencing guidelines is a more sensible approach to deterring non-compliance of WHS laws. This would increase consistency in sentencing and improve public confidence that there are penalties for contraventions of WHS laws. This option is more appropriate than legislating increased penalties that involves an adversarial legal approach seeking to attribute blame and liability.

71. Further in addressing the findings of the 2018 Review, the Regulator requires greater resourcing to support WHS education, training and compliance monitoring. The more effective approach to deterring non-compliance is a stronger focus on prevention through education by open sharing of safety lessons and proactive health and safety improvements.

72. AMMA's position is that the concerns identified in the 2018 Review could be addressed through the evaluation of the administration and enforcement of existing laws, including the stricter application of offence provisions under the model WHS laws.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

73. AMMA and its members strongly oppose the new fault element for Category 1 offence and the introduction of an offence of industrial manslaughter in workplace health and safety laws. The punitive nature of Recommendations 23a and 23b of the 2018 Review has been a controversial concept and is largely rejected as unnecessary and divisive by the business community.

74. There is no evidence that the current legislative framework is ineffective in dealing with serious offences, nor is there any evidence that imposing greater criminal liability on individuals for workplace accidents would have a positive impact on safety outcomes. The limited data provided by the 2018 Review suggests there has been an overall improvement in safety outcomes since the model WHS laws were developed with the national workplace fatality rate almost halving in the decade to 2017.[3]

75. The overemphasis of punitive compliance measures focuses on safety outcomes rather than continued improving of health and safety practices and cultures. This approach undermines the key objective of the model WHS Act to "provide a framework for continuous improvement and progressively higher standards of work health and safety" (Division 2, s 3(1)(g)). The result does not create safer workplaces and does not support a safety culture of broader workforce buy in.

76. Further, AMMA supports the Australian Government's response to the Senate Inquiry into industrial deaths in Australia that "the central concern arising from the inquiry is that poor investigations lead to poor outcomes" and further that "current offences in the model WHS laws, together with current criminal manslaughter laws, are able to address workplace deaths provided they are applied appropriately."

[3] SWA 2018 Final Report, page 183.

77. AMMA maintains that continuous improvement in safety outcomes in the resources and energy industry, is best driven by cooperative, proactive initiatives to improve safety culture, not an adversarial legal approach seeking to attribute blame and liability after an accident occurs.

What do you see as the main limitations of the model WHS laws in deterring breaches of the health and safety duties?

78. The findings identified by the 2018 Review highlight the limitations of the model WHS laws in deterring breaches of the general duties provisions. The most obvious and evident limitation is the lack of harmonisation of WHS laws across jurisdictions. This has been a source of frustration and confusion for all stakeholders in understanding how the WHS system applies to their business or operations.

79. There has been increasing duplication and complexity in WHS regulation following the introduction of the model WHS Act. The main cause is the overlap between the model WHS Act, state and territory WHS regulation and industry specific and hazard specific safety legislation. There needs to be further clarification and simplification on the application of WHS regulation across multiple jurisdictions.

80. Another limitation of the model WHS laws in deterring non-compliance relates to the administration and enforcement of existing laws. The model WHS Act contains appropriate penalties for breaches of WHS laws, however it appears they are not being adequately administered and enforced given the concerns identified in the 2018 Review.

81. The Regulator must reinforce its inspectorate responsibilities to further enforce penalties and prosecute those who expose workers to a risk of serious injury or death in the workplace. This would seek to address the community concerns that there needs to be an outcome-based offence where circumstances have led to workplace injury or fatality.

What benefits and costs are associated with Category 1 offence including two alternative fault elements?

82. Recommendation 23a of the 2018 Review provides for the amendment of s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is 'grossly negligent' in exposing an individual to a risk of serious harm of death. The recommendation is focused on the prosecution of a Category 1 offence rather than prevention of breaches of WHS laws that result in death.

83. AMMA recognises that the inclusion of a 'gross negligence' fault element will lower the threshold for convictions of Category 1 offences by removing the need to prove subjective awareness of the risk that is required by recklessness. The 2018 Review found this is likely to increase the number of Category 1 offences however there was no evidence that including gross negligence as a fault element will result in improved safety outcomes.

84. AMMA submits that it is not appropriate to include an additional fault element for Category 1 offence for reasons included at part 66 of this submission in addition to the following:

    a. Offences for 'gross negligence' already exist under local criminal laws and manslaughter offences, which only provides further unnecessary prescription and complexity in the prosecution of the Category 1 offence.

b. The inconsistency of state and territory laws for offences of 'gross negligence' and 'recklessness' makes it difficult to understand how the proposed offence would interact with the jurisdictions.

85. The objective of any offence provision is to ensure compliance with general duty provisions through deterrence which takes risk-based preventative approach. Under the current model WHS laws, proof of harm is not required and the Category 1 offence applies where there is exposure to the risk of death or serious injury.

86. AMMA opposes the inclusion of an additional fault element in the offence provisions of the model WHS Act as there is little evidence that punitive measures to compliance are effective in deterring safety breaches nor improving health and safety outcomes.

What do you consider the practical impacts of industrial manslaughter to be for you, your business and your stakeholders? What need, if any, would they address?

87. AMMA and its members strongly oppose the introduction of an industrial manslaughter provision within the model WHS Act.

88. AMMA submits that it is not appropriate for an industrial manslaughter offence to be included in the WHS laws for reasons included at part 66 of this submission in addition to the following:

    a. There are already appropriate avenues to prosecute workplace-related manslaughter offences under existing criminal laws. It is unclear whether this has the potential to create dual liability for an individual under two separate regimes.

    b. The model WHS Act already provides penalties for offences that include significant fines and terms of imprisonment for a PCBU found to have recklessly caused serious injury or death in a workplace.

    c. There is the potential for indirect culpability given the complex corporate structure of organisations. The individual who is the duty holder may be totally removed from direct criminal and culpable involvement that results in a workplace death, however could be prosecuted under this recommendation.

89. There is currently inconsistency across jurisdictions where industrial manslaughter provisions have been introduced. AMMA recognises the introduction of industrial manslaughter offences in the state jurisdictions will vastly influence the inclusion of an industrial manslaughter offence in the model WHS laws.

90. Where it is considered appropriate to introduce an industrial manslaughter offence in the model WHS Act, there must be further specific consultation provided to ensure stakeholders understand the practical and legal implications of its introduction.

6. Conclusion

91. For the reasons provided in this submission, AMMA's position is to:

    a. Oppose Recommendation 8 that provides workplace entry for union officials to assist a HSR without holding a right of entry permit.

    b. Oppose Recommendation 15 removing the 24 hour notice period for entry permit holders to access workplaces.

    c. Oppose Recommendation 23a that enhances Category 1 offence through the inclusion of an additional fault element.

    d. Oppose Recommendation 23b that introduces an industrial manslaughter offence in model WHS laws.

92. AMMA has long supported sensible controls over union access to workplaces. The Recommendations of the 2018 Review aim to significantly enhance union access and gifts it increased and unfettered powers in relation to safety matters in the workplace. These enhancements restrict a PCBU's control and management of safety matters in its workplace which, under WHS laws, it holds the ultimate statutory responsibility.

93. The proposed amendments to WHS laws also appear to be heavily influenced by community expectations seeking to attribute blame and liability to an individual where there has been a breach of WHS laws. In addressing community concerns the 2018 Review has sought to impose excessive legalism in WHS laws that only serves to create further adversary and disputation in the workplace.

94. AMMA's position is that the concerns and findings of the 2018 Review could be addressed through evaluation of the administration and enforcement of existing laws, rather than seeking to add unnecessary prescription and regulation into an already complex system.

95. **AMMA submits that Safe Work Australia maintain the status quo in relation to its recommendations regarding union access to workplaces and the enhancement of penalties under the model WHS laws.**