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President: Peter Jordan

Secretary: Shane Thompson

1 May 2020

Mr Kym Bills
Independent Reviewer
Statutory Review of WHS (MPS) laws 2020,
Resources Regulator –
Regulation Development,
PO Box 344,
HUNTER REGION MAIL CENTRE NSW 2310

Delivered by email: rr.feedback@planning.nsw.gov.au

Dear Mr Bills

RE: CFMMEU COMBINED NORTHERN DISTRICT / SOUTH WESTERN DISTRICT REVIEW FEEDBACK RESPONSE

Introduction

The Construction, Forestry, Maritime, Mining and Energy Union Northern Mining & NSW Energy District and the South Western District (*“the CFMMEU”*) welcome the opportunity to provide feedback relevant to the terms of reference of the statutory review of the Work Health and Safety (Mines and Petroleum) Sites Act 2013 (*“WHS (MPS) Act”*) and Regulations (*“WHS (MPS) Regulations”*).

The CFMMEU is a registered industrial organisation of employees under the Fair Work Act 2009. The CFMMEU has been representing mining & energy workers throughout NSW for over 150 years, representing workers in underground and open cut coal mines and metalliferous mines. It has also been involved in the representation of members in the distribution of electricity, predominantly from coal fired power stations.

The components of the Union that make this submission is the principle Union representing persons employed in the coal mining industry in NSW. The South Western District represents coal mineworkers in the NSW South Coast / Wollongong region, the Burragorang Valley near Camden, the Blue Mountains and in addition represents metalliferous the far west of NSW, including Broken Hill. The Northern District covers coal mining from the North of Sydney to the Queensland border.

The CFMMEU as the principle Union representing coal miners and metalliferous workers, the Industry Safety & Health Representatives (“ISHR’s”) appointed under s.28 Appointment of Industry Safety and Health Representatives of the WHS (MPS) Act, with their close work health and safety (“WHS”) relationship with both the Mine Safety Health Representatives (“MSHR’s”) provided for by Division 3 Mine Health and Safety Representatives of Part 5 of the WHS (MPS) Act and the Health Safety Representatives (“HSR’s”) provided for in the structure of the WHS (MPS) Act are in an unique position.

Before providing commentary relevant to the terms of reference and the summary of 25 identified specific enquiries in the Discussion Paper of the review, we take the opportunity to indicate the manner we intend to set out our responses.

The CFMMEU is of the general view that the objectives of the WHS (MPS) laws are and remain valid and the terms of the Act and associated Regulations are appropriate for securing those objectives. The CFMMEU is of the view that a small number of matters are open to improvement and will identify those matters when responding to the relevant specific enquiry as detailed in the Statutory Review Discussion Paper.

In the context of this general view, it is not our intention to respond to each of the enquiries. Where there is silence, we ask that the silence be read as general support for the validity and appropriateness of the current terms as detailed in the WHS (MPS) laws. We make no submissions with respect to enquiries relevant to the petroleum industry. The CFMMEU does not represent workers in that industry.

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Organisation

These submissions are made on behalf of an organisation, being the registered industrial organisation of employees identified within this submission.

Privacy

The CFMMEU consents to the submissions being published, including its identity. The CFMMEU notes it has redacted the name of two (2) mines from this submission and identified them only as Mine A and Mine B. Therefore, the name of those mines will be provided in a separate correspondence, so the companies remain unidentified in the event of submissions being published.

Review response

The CFMMEU submits in response to the reviews and enquiries as follows:-

National Context

1. Do the WHS (MPS) laws remain consistent with the National Mine Safety Framework principles?

The CFMMEU submits the WHS (MPS) laws remain consistent with the National Mine Safety framework principles.

2. Is the objective of seeking national consistency relating to WHS in relation to mines and petroleum sites still valid?

The objective of seeking national consistency to WHS in relation to mines remains valid. The activities of coal mining and other mining is not restricted to a single state jurisdiction. It remains appropriate

that there be national consistency and that consistency is to the highest standards, and the pursuing and collective utilisation of resources, information, research and approach.

4. Are there any developments in mine and petroleum safety laws in the major mining states that could improve safety regulation and outcomes in NSW? 1 <https://www.nsw.gov.au/improving-nsw/have-your-say/> REVIEW OF WHS (MPS) LAWS Discussion paper 10 WHS (MPS) Act

The CFMMEU submits there are no relevant developments they can identify, in the mining industry in the major states, that could improve safety regulation outcomes in NSW. The CFMMEU does, however, identify that there have been improvements in enforcement and penalty mechanisms in other jurisdictions, being namely the introduction of industrial manslaughter laws. The mining industry is an inherently dangerous industry. Not being specifically related to coal but the Queensland government commissioned a best practice review for WHS Queensland. That review recommended the introduction of industrial manslaughter offences. These offences equally apply to the mining industry as we understand and represents best practice in a major coal mining industry jurisdiction.

WHS (MPS) ACT

5. Are the objects of the WHS (MPS) Act still valid, appropriate and working as intended? (Part 1 of Act)

The CFMMEU submits that the objects are still valid, appropriate and working as intended.

7. Are the provisions under the WHS (MPS) laws for incident notification still valid, appropriate and working as intended? (Part 3 of the Act);

And

23. Are the provisions for notifications and information to be provided to the regulator and information to be kept by the operator still valid, appropriate and working as intended (Part 6 and Part 7 of the Regulation)

We ask it to be noted we have dealt with enquiry 7 and 23 collectively.

Part 3 of the WHS (MPS) Act includes the requirements for the notifications to the Regulator and the ISHR of certain types of incidents. That part also relevantly deals with other steps that are required to be taken when such an incident occurs. In the main, the CFMMEU submits that the provisions under the WHS (MPS) laws of incident notification are appropriate and other than the circumstances identified below, are working as intended. The CFMMEU holds a concern that those upon whom it is incumbent to give notification are not doing so on each occasion it is required. This, in the main, is not a failing or an inappropriateness in the terms and structure of the legislation but is related to lacklustre compliance.

A notification requirement for certain types of incidents can be found at clause 128 Duty to Notify Regulator of Certain Incidents. Section 128(5) of the Regulation defines a meaning of a high potential incident. Sub section(a) of sub clause (5) of section 128 reads relevantly for this submission...*“that would have been a dangerous incident if a person were reasonably in the vicinity at the time the incident or event occurred and in usual circumstances a person could have been in that vicinity at the time...”*- For completeness we note that this sub section is related to events referred to in clause 179(a)(i)(xviii). The imprecision of this clause has had the unintended consequence where incidents that-would be notified and should be notified are not.

If certain events occur at a location that is within a place of work, and workers can be required to be near or are required to work near that place, it should be a notifiable.

9. Are the provisions for worker representation in coal mines still valid, appropriate and working as intended? (Part 5 of the Act)

The provisions for worker representation in coal mines is still valid, appropriate and working in the main as intended. There are improvements that could be made that we detail below. Prior to doing so, we do stress with strength, the validity and the appropriateness of the two (2) types of worker representative HSR's, identified and relevant to the coal mining industry. They are MSHR's which are elected by the workers at a particular mine and the ISHR's which appointment by the Minister with respect to coal mines in NSW.

The representative structure of ISHR's, MSHR's and HSR's working in conjunction provide for superior worker representation and safety in the industry. As identified in the discussion papers, a feature of the industry is that HSR's are unable to issue section 90 Provisional Improvement Notices (“PIN”) but

they can be issued by ISHR's and MHSR's. The exact number is not known but we submit we do not believe in the coal mining industry that any person, other than an ISHR, has issued a PIN.

It is usual practice that where a MSHR is unable to resolve a safety concern that has arisen, they seek the assistance and intervention of the ISHR's. The ISHR's, where necessary and in compliance with the tests required before issuing a PIN and forming the requisite belief, issue the PIN.

There are four (4) permanent ISHR's. A cursory review for the preparation of this submission of the activities of one (1), Mr Tranter, an ISHR in the Northern District, reveals that for a 12 month period Mr Tranter attended 128 inspections, 25 incident investigations and issued eight (8) suspension of operation notices under section 30 of the WHS (MPS) Act and issued 26 PIN's under section 90 of the WHS (MPS) Act. Issuing section 30 suspend notices are vitally important to the immediate protection of coal miners from harm, and the issuing of section 90 PIN's are important to improve the health and safety outcome for mine workers and the industry. The formal issuing of PIN's or suspension of operation notices are the tip of the iceberg when it comes to achieving WHS outcomes in the industry, as the vast majority of interventions are resolved by consultation and discussion between the stakeholders at a mining operation that are appropriate to ensuring WHS outcomes.

We do submit there can be slight modifications in the terms of the legislation in this regard. A function of an ISHR under the WHS (MPS) Act is to "*participate in the investigation*" of events, occurrences and notifiables. This reference to participation results in confusion as the role of an ISHR includes the investigation. This arises in the course of performing their normal functions. The ISHR's have the functions of a HSR and those functions include, under the WHS legislation, the function to investigate a complaint. Also by its nature, prior to forming a view to issue a PIN or a suspension notice, an ISHR is required to investigate the circumstances as it is the process of investigation that results in a component of forming the requisite view to issue the PIN or suspension notice respectively.

A further anomaly arises due to the wording of section 29 Function of Industry Safety and Health Representative of the WHS (MPS) Act. It specifies that an ISHR has the same functions of an HSR under the WHS (MPS) Act. Section 29 relevantly reads:-

Functions of industry safety and health representatives

(1) An industry safety and health representative has the functions of a health and safety representative under the WHS Act for a work group, as if the work group comprised all workers at all coal mines.

There is some difference in terminology between the WHS (MPS) Act and the WHS Act, when referring to the functions of the HSR. This can be found at sub division 5 of Part 5 where it makes reference to the conjunctive of both powers and functions. This is not only evidenced in the title but in the terms of section 68 and 69. It may be appropriate for consistency to amend the words in the WHS Act to include both powers and functions.

Similarly for MSHR's the WHS (MPS) Act at section 42 Functions of Mine Safety and Health Representatives, at sub-section (3) reads that it is a "*function to observe any formal investigation conducted by or on behalf of the mine operator of an event or an occurrence at a coal mine...*" is required to be notified to the Regulator.

The legislative structure would be aided by an appropriate modification to the function from that of "*observe*" to a more proactive role that would aid the investigation. It is suggested that the role of the MSHR in that process could be modified to mere observation to participation. We submit the functions of the MSHR and the contribution they can make to WHS in the circumstances of a notifiable incident would be aided by this type of amendment.

The WHS (MPS) Regulations at regulation 130 Quarterly Reports places an obligation on the mine operator to give a quarterly WHS report. It must be provided in the manner required by the Regulator and must contain the information specified in Schedule 9 Information to be Included in Mine Quarterly Report. We do not detail the information in this submission; however, we do note that each of those items are important for achieving an understanding as to how an operation is performing with respect to its WHS. The WHS (MPS) legislation provides for a number of important areas of notification to the ISHR's. Under the current structure ISHR's do not receive that report from the mine operator and would be aided in the performance of their role if they were provided with that form of report also. We ask for a modification be made to the WHS (MPS) Regulations requiring that the Quarterly Report required by Regulation 130 be provided to ISHR's in addition to the Regulator.

10. Are the provisions for enforcement measures still valid, appropriate and working as intended?
(Part 6 of the Act)

Subject to our earlier submission concerning the consideration of industrial manslaughter laws, the provision of enforcement measures is still valid, appropriate and working as intended.

WHS (MPS) Regulation

14. Are the provisions for nomination and appointment of operators still valid, appropriate and working as intended? (Part 1A of the Regulation)

The provision for the nomination and appointment of operators is still valid. It provides a unique set of skills to be able to operate effectively in the mining industry. There has been the evolution where an Operations Manager who may not be statutory qualified is taking on a broader role with respect to the operations than intended and may not, with respect to a coal mine, have the appropriate knowledge and skills in relation to mining operations. A suggested modification is the mine's Operator or other PCBU should be able to demonstrate knowledge and skills in relation to the mine and its operations. This requirement would be appropriate to ensure the statutory framework meets the objectives of the WHS (MPS) Act.

15. Are the provisions for managing risk in addition to the WHS Regulation still valid, appropriate and working as intended? (Part 2, Div 1, Subdivision 1 of the Regulation)

The CFMMEU submits the provisions for managing risks, in addition to the WHS Act and Regulations are valid, appropriate and working as intended. We do, however, note that clause 9 identifies that *"there is to be an assurance...that a risk assessment is conducted...by a person who is competent to conduct a risk assessment having regard to the nature of the hazard"*. Risk assessments are often conducted by a team or a group and there may be utility in expanding the requirement to include a reference that where a risk assessment is conducted by a risk assessment team or group, that the members of the team or the group are appropriate for the nature of the hazard. As a minor additional note, the Regulatory note that appears below sub clause 4 of clause 9 could be expanded to include reference to section 48 or 49 of the WHS Act.

16. Are the provisions for SMS, including PHMP & PCP, still valid, appropriate and working as intended? (Part 2, Div 1, Subdiv 2-4 and Div 2 and 3 of the Regulation)

The provisions with respect to the SMS, including the PHMP and PCP, are found within Part 2 of Division 1 Sub Division 2-4 and Division 2 & 3 of the Regulations. Other than an additional principle hazard, it is submitted that those provisions are still valid, appropriate and working as intended.

The CFMMEU submits that an additional principle mining hazard should be identified, that being rock / coal bursts. This could form a component of the ground or strata instability considerations, which are found at clause 1 Ground and Strata Failures of Schedule 1 Principle Mining Hazard Plans – additional matters to be considered or provided for as its own clause within that schedule. The coal mining industry is not absent of the hazard of the rock / coal bursts. There have been the repeated incidents at the Austar Underground Colliery and the related fatalities as well ongoing and continued issues arising at Appin and others. These additional requirements in this regard must be considered in developing the control measures to manage the risk of rock / coal bursts:-

- *The potential for stored energy in the mines strata;*
- *The potential of strata material being released into the mine's workings;*
- *The type/nature/amount of material that could be released into the mine's workings; and*
- *The potential geological structures pose.*

17. Are the provisions specific control measures still valid, appropriate and working as intended? (Part 2, Div 4-5 of the Regulation)

The CFMMEU submits the provisions specific control measures are still valid. They are appropriate and working as intended. The only clarification on this position is the above comment with respect to rock / coal bursts.

18. Are the provisions for emergency management still valid, appropriate and working as intended? (Part 2, Div 6 of the Regulation)

The requirements for emergency management are still valid and are appropriate. The CFMMEU has identified that the emergency management plans are not working fully as intended. The emergency management arrangements identify *"the emergency management plan...must address all aspects of*

emergency response including by ensuring ...the provision of adequate rescue equipment and that an adequate number of persons trained are available to respond effectively to the emergency ...”.

The CFMMEU has observed that the plans of a number of mines do not provide sufficient detail that enables the determination of the exact quantum of resources that are adequate or the number of trained personnel. There could be a modification to require that the plan exactly specifies the quantum of material and the number of trained personnel. The current structures led to some plans just indicating there will be adequate numbers of trained personnel and there will be adequate levels of rescue equipment. The detail in the plan should be more specific than that.

Additionally, clause 96 Emergency Exits of Sub Division 2 of Underground Mines operationally provide at s.96(5)(c) that the mine operator of an underground mine must ensure “...workers who may need to use exits are provided with sufficient training and instructions so as to be made familiar with those exits” in an underground coal mining environment in circumstances in the event of an emergency a worker may have to travel distances in the dark on uneven surfaces. The simple provision of training and instruction so as to be familiar is not sufficient. This has led to the unintended consequence of workers simply being shown the egress on a mine plan and a discussion occurring as to the steps that should be taken on exit, which is simply insufficient. Familiarity for the exit needs to be in the form of an employee having no limit on the opportunity for the worker to make themselves familiar with those exits through walking the egress.

Additionally, Division 6 of Sub Division 1 should be amended to display the escape and rescue plan at all times. The current arrangements appear to operate to the affect that it will be provided only upon request.

21. Are the provisions for consultation and worker safety role still valid, appropriate and working as intended? (Part 4 of the Regulation)

The CFMMEU submits the provision for consultation and worker safety role is still valid and appropriate, however we also submit it is not working as intended. The coal mining industry is dominated by a number of major mining corporations. We have observed there has been the evolution of the development of global corporate procedures and plans that may be implemented at a particular mining operation without the appropriate consultation in the manner envisaged under Part 4 Consultation Workers Safety Role of the WHS (MPS) Regulations.

We submit that to assist in the provisions working to the full extent intended, the regulation will be aided by the identification of a class of worker that must be included in the consultation, this being the HSR and the relevant MSHR. The regulation would also be aided by a regulatory notation appearing below regulation 120, which identifies that there also exists the requirement to comply with consultation requirements set out in Division 2 Consultation with Workers of Part 5 of the WHS Act concerning Worker Consultation, Representation and Participation.

24. Are provisions for statutory functions still valid, appropriate and working as intended? (Part 8 of the Regulation)

The CFMMEU submits the provisions for statutory functions are still valid and strongly so. We submit that without modification, they are not appropriate and are not working as intended. Our submission in this regard falls into two (2) parts, one dealing with the geographical / operational scope of responsibility given to statutory officials, specifically the Open Cut Examiner. With respect to the open cut, this concerns the statutory responsibility of an Open Cut Examiner. With respect to the types of statutory official, we submit there is a need in the underground for an additional statutory official in the class of Geo-Technical Engineer.

A statutory function, which is not a key statutory function for the purposes of the definition of key statutory functions contained in the WHS Regulation, forms a function that is key to WHS of the persons working at the mine. That is the statutory role of Open Cut Examiner found at clause 18 Open Cut Examiner of Part 3 of Schedule 10 Statutory Functions of the WHS Regulation. The relevant section of the Schedule is set out below:-

18 Open cut examiner (only required if extraction occurs at the mine)

- (1) The statutory function of open cut examiner is to supervise workers and inspect work areas in a part of the mine.*
- (2) The requirement for nomination to exercise the statutory function is that the individual nominated must hold a current practising certificate that authorises the exercise of the statutory function.*
- (3) This clause does not apply to a coal mine at which no extraction occurs.*

An Open Cut Examiner's role is to supervise and inspect areas of work. To perform this supervisory role under nomination, they must hold a current practicing certificate that authorises them to be able to perform the role.

The CFMMEU has identified at mining operations that there is insufficient nomination of Open Cut Examiners for the size of the operations. There exists in NSW a number of, what the CFMMEU colloquially refers to as “*superpits*”, which initially arose as a consequence of a number of smaller mining operations being joined to form supersized mining operations. A historical example was the amalgamation of Hunter Valley No 1, Howick and the Lemington mines, which now form the Hunter Valley Operations. The amalgamation of Mount Thorley and the Warkworth Mines forming the Mount Thorley / Warkworth Operation. In addition to this, there has been some operations that are what, we in this submission will colloquially refer to as “*superpits*” in their own right. Two (2) mines come to mind, Mt Arthur Open Cut Coal Mine and Maules Creek Open Cut Coal Mine but there are others.

There are two (2) mines that we rely upon as specific examples where the supervisory (Open Cut Examiners) role has been less than adequate. These two (2) mines, for the purposes of these submissions, we identify as Mine A and Mine B. The identify of these mines will be provided in separate correspondence. The deficiencies we identify have not been a reflection of the statutory qualification and assessment process but a reflection that there have been insufficient statutory supervisory numbers for the magnitude of the operations. We submit that the regulation can be improved by the specification of both the size of the geographical location to be provided to an Open Cut Examiner for their supervisory functions and/or coal movements, and the number and amount of equipment they are to supervise. At the time of making these submissions, the numbers of interventions by the Regulator is not known, however we understand they have, for these two (2) operations, been excessive. This may also be the case for other large mining operations. These operations have formed, we say, the highest number of interventions. If we take for example Mine B, there appears to be a consistent stream of the requirement of the ISHR to issue section 90 Notices under the WHS Act and section 30 Notices under the WHS (MPS) Act, and the Regulator having to resort to issuing Improvement Notices under section 191 of the WHS (MPS) Act, Section 23 Notification to the Mine Operator of a Concern under the WHS (MPS) Act and Section 195 Prohibition Notices of the WHS (MPS) Act.

With respect to the type of Notices that are issued and the incidents that gave rise to the investigation, appropriate statutory supervision levels are a common theme.

Secondly, the CFMMEU submits there is a necessity for a new statutory role, being that of Geo-Technical Engineer. The CFMMEU submits the underground coal mining industry in NSW is not sufficiently sourced with sufficiently competent personnel with respect to geological issues and we

believe that a significant contributing factor to this is the absence of a statutory function with the responsibility for Geo-Technical engineering in underground mining engineering.

The NSW Resources Regulator in its Discussion Paper, Proposed New Statutory Function: Geotechnical Engineer- Underground Coal Mines describes what a Geo-technical Engineer is in the following terms

“A geotechnical engineer uses principles of soil mechanics and rock mechanics to:

- *investigate subsurface conditions and materials*
- *determine the relevant physical/mechanical and chemical properties of these materials*
- *evaluate stability of natural slopes and man-made soil deposits*
- *assess risks posed by site conditions”*

(2020). Retrieved 29 April 2020, from

https://www.resourcesregulator.nsw.gov.au/__data/assets/pdf_file/0003/1157961/Public-consultation-discussion-paper-geotechnical-engineer.pdf

Appendix A of that Discussion Paper provides a more detailed analysis of a Geo-Technical Engineer and at B further provides how that Geo Technical Engineer fits into the operational structure of the mine, which we adopt for these submissions without repeating. Principally the responsibilities with respect to the functions that would be appropriate to a Geo Technical Engineer fall to the Mining Engineering Manger’s statutory functions, however we submit there is a need for a more specialised qualified and experienced statutory personnel to perform the roles that would be principally related to the geo-technical issues associated with the principle hazards of ground and strata failure, inundation, inrush and gas out bursts.

As identified in the Discussion Paper, Proposed New Statutory Function: Geotechnical Engineer- Underground Coal Mines there has been a series of high potential and dangerous issues - 29 high potential issues and 10 dangerous incidents were identified by the Regulator between March 2018 and March 2019. There have been eight (8) fatalities identified by the Regulator since 1998 and there has been nine (9) major investigations relating to ground strata management in the same period, see Appendix C of that Discussion Paper.

Ground strata issues remain in existence at all mines, with some mines having particularly complex strata management issues. Earlier in this paper with respect to coal rock bursts, we identified two (2) such mines as Austar Underground Colliery and Appin Underground Colliery. -The CFMMEU submits there is a need for the additional statutory function of a Geo-Technical Engineer.

Conclusion

The CFMMEU concludes by thanking you for the opportunity to respond to the Discussion Paper. Should you, during the review, require any additional information or clarification of any issue raised in this submission, please do not hesitate to contact the CFMMEU Northern District or South Western District Offices utilising the relevant contact details as set out earlier in this submission.

Yours sincerely



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