

**AMENDMENTS TO THE
WORK HEALTH AND
SAFETY (MINES AND
PETROLEUM SITES) ACT
2013 AND REGULATION
DISCUSSION PAPER**

17 May 2021

NSW MINERALS COUNCIL



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1 Executive Summary

NSW Minerals Council (NSWMC) appreciates the opportunity to provide feedback on the Discussion Paper: Amendments to the *Work Health and Safety (Mines and Petroleum Sites) Act 2013 and Regulation*.

NSWMC represents the State's mining industry. Work health and safety (WHS) is the number one priority of the minerals industry in NSW. A risk based, aligned and consistent legislative framework is important to delivering practical WHS outcomes. NSWMC supports an outcomes based, collaborative regulatory approach that is not litigiously focussed.

NSWMC acknowledges the consultation that has been conducted throughout the legislative review process and the fair hearing that has been afforded to all stakeholders by both the independent reviewer, Kym Bills, and the Resources Regulator.

The independent review provided an opportunity to simplify the structure of the laws, improve their operational efficiency and remove duplication. The Discussion Paper considers a number of proposals that would go towards these outcomes, and other, that arguably move away from them and could lead to perverse health and safety outcomes.

In particular, the paper proposes a number of amendments where the rationale and reason to consider a change has not been clearly established. NSWMC has identified these in the submission. Should these amendments be pursued, NSWMC would encourage the Resources Regulator to release a detailed discussion paper, providing a compelling reason to consider the change, before progressing these further.

This submission sets out NSWMC's responses to the Discussion Paper.

NSWMC would welcome the opportunity to meet to discuss this submission with the Resources Regulator.

2 NSWMC Response to Discussion Paper Questions

Please find below NSWMC’s responses to the questions in the Discussion Paper.

| Question | Resources Regulator’s Position | NSWMC Comment |
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| <p>i Should there be two types of investigations contained in the WHS (MPS) Act?</p> | <p>The Resources Regulator’s position is that the policy has been effective in achieving its intended aim and it’s not necessary to prescribe the approach legislatively. The causal investigation policy approach was developed to ensure learnings, once known, were quickly disseminated but so as not to fetter the enforcement mechanisms within the broader <i>Work Health and Safety Act 2011</i> legislative scheme. The Resources Regulator is of the view that this balance has been achieved under the current policy approach.</p> <p>The Resources Regulator believes any such amendments would be required to be made to the WHS Act and would need to be considered by SafeWork NSW in the context of NSW’s commitment to the model Work Health and Safety laws.</p> | <p>NSWMC supports that there be two types of investigations contained in the WHS (MPS) Act – causal and enforcement. This can be facilitated by way of the introduction of the Resources Regulator’s ‘causal investigation policy’ within legislation.</p> <p>While the Recommendation from the independent review suggests the adoption of the Queensland model in the <i>Coal Mine Safety and Health Act 1999</i>, NSWMC is of the view that the NSW Resources Regulator’s causal investigation policy is better constructed and more appropriate to be adopted in NSW.</p> <p>The Resources Regulator’s causal investigation policy describes the framework for carrying out a causal investigation, for a quick and full understanding of the causes of safety incidents, and publication of corresponding lessons to reduce the likelihood of recurrence. Solidifying this approach within legislation would provide greater certainty about the validity of the approach.</p> <p>It has been working effectively and achieving the desired outcomes, hence NSWMC supports legislative formalisation of the Resource Regulator’s causal investigation policy.</p> <p>It would further strengthen the ability of industry to meet the objectives of the WHS legislation with regards to the protection of health and safety of persons by providing information about potential hazards that may exist.</p> <p>Including causal investigation provisions within the WHS (MPS) Act will also ease the facilitation of other States adopting similar approaches in their jurisdictions.</p> |

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| ii | Should persons named in causal investigation reports provided to the Resources Regulator be protected from having that information used as evidence against them in the event that enforcement action is taken? | | <p>Yes. This will most effectively facilitate open communication and facilitate the more rapid dissemination of information about the causes of incidents out to industry so that lessons can be quickly learnt and applied and similar incidents avoided in the future. The principal rationale for such an approach is to avoid repetition of incidents that could harm workers on a mine site.</p> <p>It is also consistent with the privilege against self-incrimination. This is 'a basic and substantive common law right, and not just a rule of evidence'. It reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'. The privilege is that a person is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime.</p> |
| iii | Should the function of mine SHRs be expanded beyond the HSR functions under the WHS Act and previous mine safety legislation to enable them to participate in investigations? If so, are there any limitations that may be warranted on its exercise? | The Resources Regulator's position is that any amendment to the role of mine SHR should be considered in the context of the functions of HSRs under the WHS Act and would need to be considered by SafeWork NSW in the context of NSW's commitment to the model Work Health and Safety laws. | <p>The function of mine SHRs should not be expanded beyond the HSR functions under the WHS Act and previous mine safety legislation to enable them to participate in investigations. This would potentially lead to duplication, confusion and inefficiencies, adding unnecessary red tape.</p> <p>The justification for this recommendation is that, at times, SHRs may not be able to attend multiple investigations. The frequency and scale of this concern needs to be quantified and consideration should be given to alternative, less complex resolutions to the purported issue, like for example, scheduling the investigations so they do not conflict.</p> <p>Effective mechanisms are already in place which allow for workers to provide input into the work health and safety management systems in place at a workplace. The mine SHR has the function of representing all the workers at the coal mine in work health and safety matters. This therefore provides a mechanism for consultation with workers. Work Health and Safety Committees also exist at mine sites.</p> <p>Mine sites have also experienced issues in the way in which industry SHRs have exercised their powers and expanding the powers of mine SHRs would likely exacerbate these issues. Industry SHRs have been known to raise purported safety concerns (details of which were not</p> |

particularised) which caused significant delay to the roll out of training. This has arisen particularly in the context of enterprise bargaining between the operator and CFMMEU and where contractors are involved.

Cases have arisen where an ISHR sought involvement over specific disciplinary and employment matters, unrelated (or at most, tenuously related) to safety issues. In one case the ISHR sought involvement into a non-safety related performance review of a worker. The ISHR demanded oversight of the performance investigation and that information relating to it be provided to him.

The robust involvement in employment and industrial issues has contrasted starkly to the level of attendance to genuine safety issues and concerns in some cases.

Expanding the investigative powers of mine SHRs would worsen these issues.

It should also be noted that each incident investigation team is compiled based on their expertise and knowledge relative to the incident that has occurred. They should be comprised of the people best qualified in relation to the incident at hand.

Just by virtue of being appointed an SHR does not necessarily provide an investigation team with the right breadth of knowledge. This would therefore inhibit valuable input into the process as an SHR may be taking the position of somebody who may be able to provide valuable input to the investigation process.

iv Do you have any concerns regarding the adoption of the amendments for appointment of industry SHRs by the Minister?

The first principle in the NSW Government's seven Better Regulation principles is that "the need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs." The need for the Minister to be able to appoint additional industry health and safety representatives has not been established.

Mine inspectors have a role in overseeing operations. The mine SHR has the function of representing all the workers at the coal mine in work health and safety matters. This therefore provides a mechanism for consultation with workers. Work Health and Safety Committees also exist at many mine sites.

Further, there does not appear to be any demonstrated need for additional industry SHRs. Total industry employment has not grown dramatically, and the total number of mines has actually reduced over the last five years. Industry reports that SHRs are readily contactable when required.

v Do you agree with extending industry SHRs to mines other than coal mines?

The statutory review concluded that there was insufficient information available at this time to determine whether extending the industry SHR provisions to this mining sector is reasonable and warranted.

The first principle in the NSW Government's seven Better Regulation principles is that "the need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs."

This sector has existing and sufficient arrangements in place for WHS consultation. Mechanisms are in place through which workers are engaged on health and safety issues and able to provide input on any issues of concern.

NSWMC does not support the extension of SHR's to mines other than coal mines.

vi Should the WHS (MPS) Act be amended to include provisions equivalent to sections 146 and 148 of the WHS Act?

NSWMC agrees that the arrangements for safety and health representatives for coal mines in Part 5 of the WHS (MPS) Act should include similar provisions to sections 146 and 148 of the WHS Act when industry safety and health representatives and mine safety and health representatives are exercising WHS (MPS) Act powers, namely to not unreasonably and intentionally delay, hinder, obstruct or disrupt work, and to not use or disclose documents for a non-WHS related purpose.

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| | | | This would enhance the WHS (MPS) Laws and help to ensure that safety and health representatives exercise their powers for proper purposes. |
| vii | Should the WHS (MPS) Act be amended to amend the purpose statement for Boards of Inquiry to include 'contributing factors', and to explicitly allow for high potential emerging and systemic issues and the making of potential findings and recommendations to reduce the likelihood of future accidents and incidents? | | NSWMC does not oppose this recommendation. |
| viii | Should the WHS (MPS) Regulation be amended to clarify that the MPCB can appoint a person as an assessor? | To remove doubt as to the role of assessors, the Resources Regulator intends to amend the WHS (MPS) Regulation to reflect that assessors are appointed by the MPCB as 'assessors'. | NSWMC does not oppose this recommendation. |
| ix | Is clarification required in relation to rock and coal bursts and related pressure bursts being a principal mining hazard? | | NSWMC members hold the view that rock and coal bursts and related pressure bursts are already effectively managed through the risk management of ground and strata failure. However, if they were to be introduced as a principal mining hazard, there is a need for clear definition with regard to what would be classified as rock and coal bursts and related pressure bursts. There is particular concern regarding the term "pressure burst" being included due to the lack of a clear definition. Clear drafting is required on what "pressure burst" is intended to cover as it is important that situations where there is a large rib spall or rib slump are not incorrectly and inaccurately misconstrued as a "pressure burst". |

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| x | Are there any elements of the Global Industry Standards on Tailings Management that should be prescribed in the WHS (MPS) Regulation? | NSWMC is of the view that it is unnecessary to prescribe elements of the Global Industry Standards on Tailings Management (GISTM) in the WHS (MPS) Regulation. Reference to these Standards are already included on the Resources Regulator’s website dedicated to Tailings Storage Facilities. |
| | | The NSW mining industry has a strong track record in managing dams. This is due to the industry’s rigorous management practices, low tolerance for risk, robust regulatory framework and geological and climatic settings. |
| | | A comprehensive framework is also in place with Dams Safety NSW having been established under the Dams Safety Act 2015 to be an independent, transparent and effective regulator with responsibility for the safety of declared dams in the state. |
| | | Dam Safety NSW has published guidelines on Mining near declared dams, Emergency Plans, Operations and maintenance plans, and Dam Safety Management Systems. It is understood that Dams Safety NSW is actively considering any gaps between the GISTM and NSW practices and standards. |
| xi | Should Schedule 6 of the WHS (MPS) Regulation be amended to include sampling over 80% of a shift, require all respirable dust samples tested for silica, and include more detail on sampling of the drill and blast area, as well as areas involving mobile equipment and maintenance, coal handling preparation and mobile crushing plant? | NSWMC does not oppose the proposal to including sampling over 80% of a shift and requiring all respirable dust samples be tested for silica. |
| | | However further prescription and requirements are unnecessary in respect of sampling of the drill and blast area, as well as areas involving mobile equipment and maintenance, coal handling preparation and mobile crushing plant. These amendments are not supported as such sampling should be risk based. |
| | | The NSW mining industry has a strong and effective focus on complying with the workplace exposure standards (WES) as required under clause 49 of the WHS Regulations. General requirements for managing risks from airborne contaminants and hazardous atmospheres are set out in Divisions 7 and 8 of Part 3.2 of the WHS Regulations and further control measures for air quality and monitoring set out in Part 2 (Managing risks), Divisions 4 (Specific control measures—all mines and petroleum |

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| | | <p>sites) and 5 (Specific control measures —underground mines) of the WHS (MPS) Regulation.</p> <p>Further, section 17 of the WHS Act requires risks to be minimised so far as is reasonably practicable. This means that mining operations are already required to reduce their exposures to the lowest level that is reasonably practicable. It is also common practice in the NSW mining industry to set action triggers at 50% of WESs.</p> |
| xii | <p>Should the WHS (MPS) Regulation be amended to require sampling and analysis of respirable quartz at non-coal mines, similar to the requirements in clause 86 and Schedule 6?</p> | <p>Amending the WHS (MPS) Regulation to require sampling and analysis of respirable quartz at non-coal mines is unnecessary as a rigorous framework already exists. The NSW mining industry has a strong and effective focus on complying with the workplace exposure standards (WES) as required under clause 49 of the WHS Regulations. General requirements for managing risks from airborne contaminants and hazardous atmospheres are set out in Divisions 7 and 8 of Part 3.2 of the WHS Regulations and further control measures for air quality and monitoring set out in Part 2 (Managing risks), Divisions 4 (Specific control measures—all mines and petroleum sites) and 5 (Specific control measures —underground mines) of the WHS (MPS) Regulation.</p> <p>Further, section 17 of the WHS Act requires risks to be minimised so far as is reasonably practicable. This means that mining operations are already required to reduce their exposures to the lowest level that is reasonably practicable. It is also common practice in the NSW mining industry to set action triggers at 50% of WESs.</p> <p>Additionally, the coal and non-coal industries have significant differences and risk profiles which mean it is not appropriate to simply transpose coal requirements onto the non-coal industry.</p> |
| xiii | <p>Should the WHS (MPS) Regulation be amended to provide certain exemptions for small quarries?</p> | <p>No comment.</p> |

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| xiv | The Resources Regulator is currently addressing this issue of clarification of safety devices like oxygen candles in refuge chambers through guidance. Should the Resources Regulator's position be made explicit in the WHS (MPS) Regulation? | NSWMC supports amendments linked to clause 34 of the WHS (MPS) Regulation that clarify that safety devices like oxygen candles can be used in refuge chambers during an emergency under clause 3(1)(d) of Schedule 4 to the WHS (MPS) Regulation. |
| xv | Should the WHS (MPS) Regulation be amended to include a 'note' under clauses 5(2) and 5(3) of Schedule 4 to refer the reader to the defined terms of 'underground coal mine' and 'underground mine' in clause 3 of the WHS (MPS) Regulation? | NSWMC have no concerns with this recommendation. |
| xvi | Should emergency sealing in clause 68 of the WHS (MPS) Regulation make provision for re-entry and, if so, include an airlock? | NSWMC does not support legislative change to make provision for re-entry and an airlock as this is a commercial or business continuity issue rather than a safety one. It is not relevant to the objectives of the legislation. |
| xvii | Should the emergency plan include more detail in relation to testing of, and training in, the emergency plan and mine rescue? What | Due to the fact that Mines Rescue is currently undergoing a review and it is uncertain what its function will be going forward, it would be premature to legislate for the recommended outcomes since these may change in the near future. The WHS (MPS) Regulation already contains sufficient details in relation to the emergency plan and mine rescue. |

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| | additional detail should be included? | | |
| xviii | Should the WHS (MPS) Regulation be amended to include a requirement for mine operators to display aspects of the escape and rescue plan, including exits, refuges, firefighting equipment, communications and oxygen stations and to ensure mine workers have a reasonable opportunity to utilise the exits during periodic training? | | See response to question xvii. |
| xix | Should the WHS (MPS) Regulation be amended so that an automatic update provision (similar to that under clause 78) is applied to all references to standards in the Regulation? | Note: Clause 78 of the WHS (MPS) Regulation already contains an 'automatic update' provision which applies to standards referenced within that clause - this covers 13 of the 25 references to standards in the Reg. | NSWMC is supportive of the update of references to standards subject to there having been a review by the Resources Regulator in consultation with industry to analyse the suitability and applicability of the updated standard. It is important that consideration be given to industry's capacity to comply. There are situations where standards (particularly international standards) are amended without any input from the Resources Regulator or industry. This can result in discrepancies and feasibility issues. |
| xx | Is it appropriate to continue to refer to standards or should the relevant parts be prescribed within the WHS (MPS) Regulation? | Our position is that references to Australian Standards remain appropriate and it's not necessary to codify relevant elements in the WHS (MPS) Regulation or codes of practice made under the regulation. | NSWMC does not support the prescription of relevant parts of standards and agrees with the position of the Resources Regulator. |

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| xxi | Should the WHS (MPS) Regulation be amended to enable a professional engineering demonstration of an alternate means of compliance that entails a level of risk equivalent to, or better than, complying with a prescribed standard? | NSWMC supports this amendment as it would provide legislative support to the Resources Regulator’s innovation policy providing support for the development and use of new technologies, systems and products to continuously improve hazard control, risk management, and health and safety outcomes at mines. The Regulator aims to ensure that the use of better and safer technology is not prevented by the legislation. Legislative support for this approach can be integrated into the WHS (MPS) Regulation by allowing for the use of alternate control measures where safety outcomes are expected to be equal to or better than the control measures specified in the WHS (MPS) Regulation. |
| xxii | Is the Resources Regulator’s <i>Innovation policy</i> sufficient for enabling consideration of innovations prevented by legislation or technical standards? | See response to question xxi. NSWMC supports legislative enactment to provide a clearer framework for enabling consideration of innovations prevented by legislation or technical standards. |
| xxiii | Do you support the proposed amendments to the explosion-protection provisions in clauses 78(2) and 78(3) of the WHS (MPS) Regulation to make it explicit that electrical plant used in an underground coal mine must comply with the requirements of the certificate of conformity or Departmental approval? | It is not necessary to modify clause 78(2) and 78(3) of the WHS (MPS) Regulation. It is inherent in the existing clause that electrical explosion protected equipment installed having a valid certificate of conformity should comply with the requirements of this certificate. |
| xxiv | Do you support the proposal to amend clause 80 of the WHS | NSWMC supports this proposal. |

(MPS) Regulation to incorporate the provisions outlined in the class exemption titled *Work Health and Safety (Mines and Petroleum Sites) Exemption (Use of Cables in Hazardous Zones) 2020* as published in the NSW Government Gazette No 171 of 7 August 2020?

xxv Should the wording in clause 93 of the WHS (MPS) Regulation be amended to be consistent with clause 89 to ensure that consultation with emergency services is included when the emergency plans are tested?

The wording in clause 93 of the WHS (MPS) Regulation should not be amended to be consistent with clause 89 Clause 93 of the WHS (MPS) Regulation.

Clause 93 relates to testing of emergency plans at mine or petroleum sites and provides that any such test is to have regard to the recommendations made by any emergency service organisation consulted under clause 89 in preparing the plan.

This obligation is sufficient and there is no need to change the obligation to “must ensure”.

The practical experience of operators is that consultation requirements are onerous on the emergency services and industry alike.

Further, in areas with a concentration of mining operations, over-consultation with multiple emergency services can be a considerable burden, have limited value and be difficult to complete.

This is due to a number of factors including the voluntary nature of some relevant emergency services, the availability of relevant emergency service personnel or changing personnel within the relevant emergency service.

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| <p>xxvi Do you agree with amending 128(5) of the WHS (MPS) Regulation to make exceedances of diesel particulate matter and substances and mixtures specified in clause 50 of the WHS Regulation a high potential incident?</p> | | <p>NSWMC does not oppose the proposal to include exceedances of diesel particulate matter as a high potential incident, however, seeks appropriate transitional arrangements to support industry with this change.</p> <p>If diesel particulate matter is to be specified as a high potential incident a 12-18 month transitional period should be provided to allow industry to build maturity in monitoring and work collaboratively with the Resources Regulator to develop systems to facilitate this reporting.</p> <p>The broadening to substances and mixtures specified in clause 50 of the WHS Regulation is not considered necessary unless the exposure to a specific airborne contaminant or substance is identified by risk assessment to require monitoring. Any amendment should be quantified. Specific analysis should be undertaken and cogent reasons found before a substance or mixture is included as a high potential incident. Otherwise, it is more effective if the substances are managed on a case by case basis as part of each site's risk assessment process.</p> |
| <p>xxvii Should Schedule 3 of the WHS (MPS) Regulation be amended to include raised bore activity as a high risk activity?</p> | <p>We intend to amend Schedule 3 to the WHS (MPS) Regulation to include large diameter and long underground raised bore activity as a high-risk activity in underground mines in instances where:</p> <ul style="list-style-type: none"> • raised boring activity in an underground mine is greater than 3.0 meters in diameter and more than 100 meters long; or • the waiting period is proposed to be 3 months. | <p>NSWMC does not support the inclusion of raised bore activity as a high risk activity.</p> <p>The mining industry undertakes raised bore activity regularly and has done so over a long period of time. Proper risk based management is undertaken which is already captured within current legislative requirements.</p> <p>However, it is noted that if the Resources Regulator does adopt provisions to include raised bore activity as a high risk activity there should be a waiver of the waiting period in emergency cases.</p> |
| | <p>The information and document to be provided in relation to the activity is proposed to be as follows:</p> <ul style="list-style-type: none"> • details of the safety systems and method of working | |

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- details of the plant and equipment to be used.
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xxviii Should the WHS (MPS) Regulation be amended to include a requirement that at least one person who has undertaken safety training as specified by the regulator be present at an opal mine when mining activity is taking place?

No comment.