STATUTORY REVIEW OF THE WORK HEALTH AND SAFETY (MINES AND PETROLEUM SITES) ACT 2013 AND REGULATION

1 May 2020

NSW MINERALS COUNCIL

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Executive Summary

NSW Minerals Council (NSWMC) welcomes the opportunity to contribute to the statutory review of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (WHS (MPS) Act) and *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* (WHS (MPS) Regulation) (the Review).

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.

While the WHS (MPS) Act and WHS (MPS) Regulation are generally operating effectively, there remain a number of areas that could be amended to improve fairness, practicality and overall effectiveness of the laws.

The NSW mining industry operates under a tripartite WHS model in partnership with Government and unions. From an industry perspective, this has worked well and created a respectful, open relationship among the stakeholders to deliver strong WHS outcomes. This model is driven through the Mine Safety Advisory Council (MSAC) which reports to the Minister for Resources and industry sees it as essential to maintain this body.

NSWMC supports an outcomes based, collaborative regulatory approach that is not litigiously focussed. It is important that the NSW regulatory framework establishes this environment and it is enforced commensurately.

To this end, NSWMC believes that, recklessness remains the appropriate test for a Category 1 offence as Category 2 and Category 3 offences already allow for prosecution where it is not necessary to prove that the defendant had knowledge of a risk to health and safety. Similarly, an industrial manslaughter provision should not be supported as the existing offences under the WHS laws and criminal manslaughter laws already allow for prosecution. Industrial manslaughter provisions are unnecessary, would not improve safety outcomes and would overlap with the "traditional" manslaughter offences.

For lesser offences, penalty notices for offences under the WHS (MPS) laws may be an efficient way of allowing less serious breaches of the WHS (MPS) laws to be resolved.

To ensure that regulations are not applied unjustly, where individuals or organisations could be prosecuted for not implementing unreasonable controls, NSWMC believes that it is only fair that all duties applicable to duty-holders should be qualified by a test of reasonableness or reasonable practicability.

The Review provides an opportunity to simplify the structure of the laws, increase efficiency, and remove duplication. Clarity should be provided on which is to prevail to the extent of any inconsistency between the WHS (MPS) Act and *Work Health and Safety Act 2011* (NSW). Simplified laws would assist in making it easier for duty holders to understand their obligations. For example, there is an opportunity to simplify and bring together the matters which require notification or reporting to the Regulator.

There is also an opportunity to improve the process and efficiency through which workers are consulted by allowing coal mines to have only safety and health representatives without health and safety representatives for individual work groups. This presents real health and safety challenges and risks to industry and workers through the current complex and inefficient process.

Industry has experienced challenges in consulting with emergency services, particularly where a concentration of mining exists. The current process is inefficient and resource intensive for both

emergency services and industry. Improvements to this process could be facilitated by the Resources Regulator or through amendments to the WHS (MPS) Laws.

Changes should not be implemented unless there is a compelling reason to do so. In this respect, the current framework of statutory functions is effectively managing health and safety risks at mines. NSWMC has not observed a need for additional statutory functions.

NSWMC is aware that there is interest in aligning the coal and non-coal provisions. It is important to note that these industries are very different and present different risk profiles. A thorough analysis of the effectiveness of current provisions is required before any changes are considered in the non-coal industry.

This submission sets out NSWMC's responses to the Review Discussion Paper. The submission has been framed around the themes and questions posed in the Discussion Paper. NSWMC welcomes ongoing engagement in the Review.

National Context -Discussion Paper Questions 1 to 4

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

The National Mine Safety Framework **(**NMSF**)** was an initiative of the COAG Energy Council. It aimed to improve the safety of mining workers through consistent and efficient occupational health and safety regulations.

The NMSF's seven strategies focused on key areas where consistency across each state or territory would most benefit the industry. These were:

a) nationally consistent legislation;

b) competency support;

c) compliance support;

d) a nationally coordinated protocol on enforcement;

e) consistent and reliable data collection and analysis;

f) effective consultation mechanisms; and

g) a collaborative approach to research.

The success of these strategies depends on developing nationally consistent mine safety legislation.[1]

The objective of achieving nationally consistent mine safety legislation has not been achieved.

Within the key mining jurisdictions of New South Wales, Queensland and Western Australia the legislation has continued to be inconsistent. Currently, Queensland proposes reforms under the Mineral and Energy Resources and Other Legislation Amendment Bill 2020 (Qld) to (among other things) introduce the offence of industrial manslaughter. These changes would require careful consideration if proposed in NSW so that a debate can be held on whether they would improve safety outcomes.

Western Australia is progressing the introduction of the Work Health and Safety Bill 2019 (WA). The details of the regulations to be made under that Act (when passed) which will relate to mining and petroleum remain unclear.

The key objective of achieving nationally consistent mine safety legislation has therefore not been met. This continues to impose additional compliance costs on business operating in more than one jurisdiction. It creates a barrier to the ease at which workers can work across states because it requires specific information, instruction or training specific to each jurisdiction.

Further, the approach of data collection and analysis and the communication of learning remains state based.

Recent examples include the Brady Review of fatalities in the Queensland mining industry from 2000 to 2019; the annual accident and injury statistic reporting regarding the safety performance in the Western Australian mineral industry; and the NSW Resources Regulator's statistical publications and reports.

There remains opportunity to enhance the level of collaboration between the state regulators on data collection and analysis and research.

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[1] Department of Industry, Science, Energy and Resources, National Mine Safety Framework Implementation Report, June 2009, https://www.industry.gov.au/data-and-publications/national-mine-safety-framework-implementation-report

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

National consistency remains a valid objective.

Benefits arise from efficiencies that can be achieved for cross-jurisdictional operations including facilitating the mobility of workers between jurisdictions, the development of corporate health and safety policies and standards that require less amendment to meet jurisdictional specific requirements and consistent information, instruction and training that could be provided to workers.

Alignment of coal and non-coal industries

It is understood that the Resources Regulator intends to apply some coal-specific elements of the WHS (MPS) Act and WHS (MPS) Regulation to the non-coal sector. These sectors operate under different historical contexts, risk profiles and operational conditions and hence different control measures are appropriate. The impacts and relevance of particular provisions are disparate between the different industries.

It is important that prior to any changes being considered in the non-coal industry there is a thorough analysis of the effectiveness of current provisions.

Question 3: Has the WHS (MPS) framework facilitated effective interstate regulatory cooperation?

There remains room to enhance interstate regulatory cooperation. In particular in relation to the sharing of data and learnings across the jurisdictions.

Further, each of the relevant regulators continues to have different compliance and enforcement approaches and prosecution guidelines.

The regulators also take state-based approaches to other regulatory activities such as the conduct of causal investigations and the publication of industry alerts. To assist the industry there is opportunity to enhance the sharing of information and lessons between the regulators and the consistent communication of learnings to industry.

Question 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?

Industrial manslaughter unnecessary

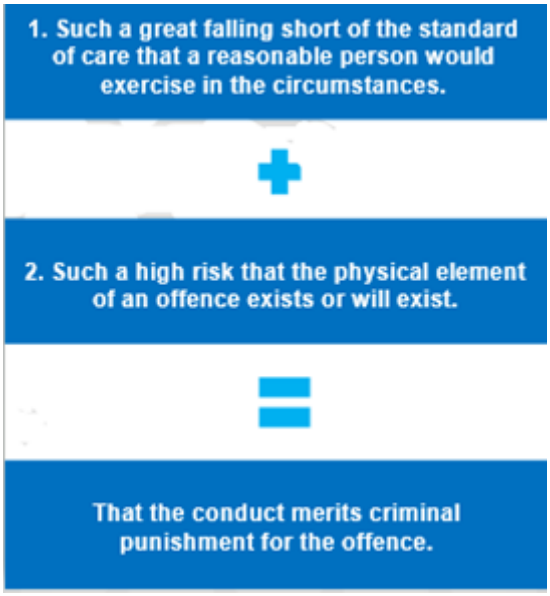
A number of jurisdictions have introduced an offence of industrial manslaughter with a proposal pending that it is introduced into the Queensland resources legislation.

At the current time, such an offence is not proposed under the *Work Health and Safety Act 2011* (NSW) (WHS Act). However, it is proposed under the Work Health and Safety Amendment (Review) Bill 2019 (NSW) (WHS Amendment Review Bill) that section 31 of the WHS Act be amended to include an alternative fault element of gross negligence. This appears to suggest a lowering of the threshold of offending when compared to the existing requirements of section 31 of the WHS Act.

The proposed amendment to section 31 of the WHS Act and any proposals to include an industrial manslaughter offence which would apply to the NSW resources industry, should be subject to detailed debate on whether the inclusion of the offence assists in meeting the underlying policy intentions of improving standards in work health and safety.

Recklessness remains the appropriate test for a Category 1 offence. Whilst not consistent between the jurisdictions, the offences of gross negligence and recklessness may, at a high level, be summarised as:

Threshold for criminal negligence



Factors dictating liability in recklessness

The Workplace Relations Ministers' Council did not accept the recommendation made by the 2008 review into model occupational health and safety laws that cases of very high culpability should involve gross negligence.

The reason for not accepting this recommendation was that: *"'gross negligence' offences should be dealt with outside the model Act as they would otherwise cut across local criminal laws and manslaughter offences."*

Beyond the contravention of accepted legal principles, the impact of the introduction of a gross negligence fault element would have on industry includes:

- The prevention of sharing of safety learnings. Lowering the threshold for a Category 1 offence to gross negligence will be counterproductive as it will encourage the adoption of defensive legal strategies and hinder the sharing of learnings.

- Increasing the difficulty of attracting appropriately qualified people to industry. The lowering of the bar for culpability of offences would exacerbate this.

The 2018 Review of the Model Work Health and Safety Laws considered there is a risk that the threshold to prove the fault element of recklessness is too high, and there are limitations to dealing with work-related deaths through general manslaughter offences in the criminal law. However, a prosecution (*Stephen James Orr v Cudal Lime Products Pty Ltd*) under the Category 1 offence occurred in NSW in 2018.

The introduction of an alternate criminal test has the effect of lowering the criminal standard that is necessary to be proven by the prosecution in order for a person to be found guilty of an offence.

The justification for this is limited. Such a change is out of step and inconsistent with the national laws. It fails to respond adequately to the fact that Category 1 offences are intended to be the most serious offences.

Category 2 and Category 3 offences already allow for prosecution where it is not necessary to prove that the defendant had knowledge of a risk to health and safety.

Similarly, an industrial manslaughter provision would not be supported by NSWMC. Industrial manslaughter offences are opposed by bodies such as the Law Council of Australia and Bar Association of Queensland.

The December 2018 Australian Government response to the Senate Education and Employment References Committee report, *They never came home - the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, did not support the introduction of an industrial manslaughter offence:

> *"A separate industrial manslaughter offence in the model WHS laws is unlikely to achieve justice for families who have lost a loved one in the workplace."*
>
> *"The Government believes that a more effective approach, that would be more likely to achieve better outcomes, is to focus on addressing the critical issues that have been identified in relation to the enforcement of existing laws, in particular, the way in which investigations into workplace deaths are conducted."*
>
> *"The Government's view is that the current offences in the model WHS laws, together with current criminal manslaughter laws, are able to address workplace deaths provided they are applied appropriately. Where there has been a workplace death, all of those responsible can be prosecuted under the existing offences regime and the general criminal manslaughter provisions."*

The Australian Government also noted that based on the ACT experience, which has had an industrial manslaughter offence since 2014 but no prosecutions under the offence to date, it is questionable whether an industrial manslaughter offence will be used.

There have, however, been prosecutions under the ACT's general manslaughter provisions. There is also no evidence that the ACT's industrial manslaughter laws have resulted in fewer workplace deaths. The number of workplace deaths in the ACT has remained constant since 2003 when industrial manslaughter offences were introduced.

Additionally, including industrial manslaughter provisions into the Bill would change the focus of the legislation from one that is about the level of risk to one where the outcome becomes the determinant.

Industrial manslaughter provisions are unnecessary, would not improve safety outcomes and would overlap with the "traditional" manslaughter offences.

Protection of record of certain reviews of control measures against being admissible in evidence

Section 201 of the *Coal Mining Safety and Health Act 1999 (*Qld) requires, in certain circumstances, an investigation to be conducted into an incident. Section 201(4) provides that a report prepared in response to section 201 is not admissible in evidence against the site senior executive, or any other coal mine worker mentioned in the report, in any criminal proceeding other than proceedings about the falsity or misleading nature of the report. This provision enhances safety outcomes by facilitating an open disclosure during investigation into an incident, unhindered by fears of possible prosecution. This allows for the root causes of an incident to be understood, which can be disseminated more broadly as safety learnings across industry. There is an opportunity to include such a protection in clause 11 (Record of certain reviews of control measures- mine operator) of the WHS (MPS) Regulations for any report that is prepared in response to clause 11.

Work Health and Safety (Mines and Petroleum Sites) Act 2013 - Discussion Paper Questions 5 to 13

Question 5: Are the objects of the WHS (MPS) Act still valid, appropriate and working as intended?

The objects of the WHS (MPS) Act are:

(a) to assist in securing the objects of the WHS Act at mines and petroleum sites, including the object of securing and promoting the health and safety of persons at work at mines, petroleum sites or related places;

(b) to protect workers at mines and petroleum sites and other persons against harm to their health and safety through the elimination or minimisation of risks arising from work or from specific types of substances or plant;

(c) to ensure that effective provisions for emergencies are developed and maintained at mines and petroleum sites;

(d) to establish a scheme for ensuring that persons exercising certain functions at mines and petroleum sites are competent to do so;

(e) to establish the Mine Safety Advisory Council;

(f) to provide for worker safety and health representatives in coal mines;

(g) to facilitate interstate regulatory co-operation;

(h) to establish Boards of Inquiry; and

(i) to provide for enforcement powers that are in addition to those in the Work Health and Safety Act 2011.

The WHS (MPS) Act is to be read together with the WHS Act and therefore the objects and principle of the WHS Act are also relevant.

The objects of the WHS (MPS) Act remain valid and are working as intended.

Question 6: Are there any areas arising from application of the WHS (MPS) laws that have had unintended outcomes?

Clarification to avoid WHS (MPS) Act being applied to non-mining activities

There has been circumstances in which NSW Resources Regulator Inspectors have sought to apply the WHS (MPS) Act to the "whole" of sites in a way which is not consistent with the intended application of the WHS (MPS) Act.

As an example where there is a quarry, workshops and batching plant and the Resources Regulator has sought to apply the WHS (MPS) Act to the workshops and batching plant which are physically separate and distinct from the quarry and at which activities are performed which are not integral to the operation of the quarry. Such application appears to be inconsistent with the guidance provided by the Resources Regulator on "understanding the term 'mining operations.'"

There is an opportunity to clarify further the application of the WHS (MPS) laws to avoid unintended outcomes of the WHS (MPS) Act being applied to non-mining activities which are more appropriately addressed by the WHS Act.

Clarity on prevailing WHS legislation

In New South Wales, mines are regulated by the mainstream *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulation 2017* (NSW), as well as the *Work Health and Safety (Mines*

and Petroleum Sites) Act 2013 (NSW) and associated *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* (NSW).

The specific mining legislation and associated regulations provide additional provisions for WHS issues unique to mines and were developed based on the national Model WHS Regulations for mining and additional mining provisions agreed by New South Wales, Queensland and Western Australia. However, in Queensland and Western Australia, industry-specific mining legislation and regulations operate independently of the mainstream WHS legislation and regulations.

In New South Wales, the *Work Health and Safety (Mines & Petroleum Sites) Act 2013* (NSW) is to be construed with and as if it formed a part of the *Work Health and Safety Act 2011* (NSW). However, neither statute specifies which legislation will prevail to the extent of any inconsistency between them.

Clarifying the position in this regard will create clearer expectations and improve the ability of PCBUs to understand and give effect to industry-specific legislative requirements. For example, there is an opportunity to streamline the overlap between mine safety and health representatives under Part 5, Division 3 of the WHS (MPS) Act and health and safety representatives under Part 5, Division 3 of the WHS Act. This is discussed further at Question 9 below.

Question 7: Are the provisions under the WHS (MPS) laws for incident notification still valid, appropriate and working as intended?

Simplification and clarity of notification requirements

There is an opportunity to simplify and bring together in the WHS MPS laws the matters which require notification or reporting to the Regulator.

As currently drafted, in order to identify if an incident is notifiable, it is necessary for an operator to have regard to:

(a) Section 14 of the WHS (MPS) Act;

(b) Clause 128 of the WHS (MPS) Regulations;

(c) Clause 178 of the WHS (MPS) Regulations;

(d) Clause 179 of the WHS (MPS) Regulations;

(e) Clause 699 of the Work Health and Safety Regulation 2017 (NSW); and

(f) Clause 13 of Schedule 9 of the WHS (MPS) Regulations.

The analysis is therefore time consuming and complex. There is opportunity to consolidate the information to simplify the process of identifying whether a particular incident is notifiable.

Further, industry would be assisted by the development by the Resources Regulator of a checklist, flowchart or other similar stepped process and guidance on matters which require notification. If the guidance had the status of a Code of Practice then this would provide definitive guidance and it would have the status of being able to be used in proceedings to demonstrate what was known about the notification duty in accordance with section 275 of the WHS Act.

As an example of the complexity of the notification requirements, many companies have had to develop templates and procedures to methodically work through the various requirements as they are relevant to different types of operations. Such tools developed by industry have been useful in explaining the rationale behind decisions on what is reported as these are often the subject of conjecture between mine site operators and inspectors such is the complexity of the notification regime. By way of example of such a tool or procedure, the Glencore *Notification of Incident and Injury Assessment Tool* – the underground version of this tool can be found at Attachment 1.

High potential incidents

The *Work Health and Safety (Mines and Petroleum Sites) Amendment Regulation 2019* (NSW) introduced three new high potential incidents:

- an uncontrolled fire on mobile plant that is in operation (whether operated directly, remotely or autonomously).
- a loss of control of heavy earthmoving machinery that is operated remotely or autonomously, including any failure of braking or steering.
- spontaneous combustion occurring at the surface of a coal mine (including an underground coal mine).

It is not uncommon for spontaneous combustion to occur on the surface of coal mines (both open cut and on the surface of an underground coal mine) particularly when mining coal with a high propensity for spontaneous combustion. These events are effectively managed by the coal mine as part of day to day operations and typically involve no risk to health and safety of persons.

It is sufficient that "spontaneous combustion at a coal mine," is included as a dangerous incident at clause 179(a)(xix) of the WHS (MPS) Regulation and there is no need to include spontaneous combustion as a separate high potential incident. It is noted that clause 128(5)(a) will already include as a high potential incident an event referred to in clause 179(a) that would have been a dangerous incident if a person were reasonably in the vicinity at the time when the incident or event occurred and in usual circumstances a person could have been in that vicinity at that time.

If spontaneous combustion remains as a high potential incident a qualifier should be included so as not to result in the constant need to notify for day to day operations. For example, that the incident exposes a worker or any other person to a serious risk to a person's health or safety. Similarly, this qualifier should be included to the uncontrolled fire on mobile plant and the loss of control of heavy earthmoving machinery so that there is a threshold level set and that minor easily managed incidents are not being captured as a high potential incident.

Question 8: Are the provisions functions of government officials still valid, appropriate and working as intended?

Given the specific and technical nature of the mining industry, there is an opportunity to include in the WHS (MPS) laws that "government officials" under section 18 of the WHS (MPS) Act have experience of mining/petroleum operations (as relevant). While in practice, the Resources Regulator does require mining industry experience for some inspector roles, this would be best confirmed in legislation to ensure that this policy is both maintained and required for all relevant roles.

It is often report by NSWMC members, particularly in the metalliferous sector, that Resources Regulator inspectors request inappropriate information or consider requiring inappropriate controls which, beyond being an unnecessary administrative and financial burden, may actually present safety risks.

Requiring industry experience would assist to develop and retain an experienced inspectorate with appropriate industry experience. Currently the only qualification requirement in section 18 of the WHS (MPS) Act and clause 174 of the WHS (MPS) Regulations is that a "government official" holds qualifications in any of the following, but not to have specific experience in mining/petroleum operations.

(a) engineering;

(b) occupational health and safety;

(c) law;

(d) policing; or

(e) regulatory studies.

Question 9: Are the provisions for worker representation in coal mines still valid, appropriate and working as intended?

Streamline mine safety and health representatives and health and safety representatives

The WHS (MPS) Act sets out the role and functions of mine safety and health representatives (SHRs). The SHRs have a concurrent function to any health and safety representatives (HSRs) for work groups elected in accordance with the requirements of the WHS Act.

SHRs are representatives of workers' health and safety interests in the coal industry. They were formerly known as check inspectors. SHR arrangements only apply to coal mines, and do not apply where the only mining operation is exploring for coal.

A SHR fulfils all the functions of HSR but for all workers at the mine, and in addition may observe any formal investigation conducted by or on behalf of the mine operator of an event or other occurrence at the coal mine that must be notified to the regulator.

The adoption of the former check inspector functions for SHR in the WHS (MPS) Laws together with the HSRs under the WHS Act has led to a situation where, for coal mines, there is significant overlap between SHR and HSR functions. This can lead to duplication, confusion and inefficiencies as a result of:

- The process involved in determining the various groups and the number of HSR's required to adequately represent the workforce.
- The potential for three separate groups for the purposes of consultation with the workforce:
    - Safety and Health Representatives under the WHS (M&P) Laws; and
    - Health and Safety Representatives under the WHS Act; and
    - Work Health and Safety Committee Representatives.
- The risk that one crew could have a HSR, a SHR and a WHS Committee member representing them.
- The inefficiencies and confusion arising out of the consultative requirements on the employer having so many representatives to consult with. This is especially the case where the SHRs and HSRs are not Work Health and Safety Committee Representatives.

The 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. There is opportunity to streamline the duplication of HSRs with the SHR without reducing safety outcomes by allowing coal mines to have only an SHR without HSRs for individual work groups. This is consistent with the approach in Queensland which sufficiently manages worker representation in that jurisdiction.

Appropriate use of powers

NSWMC acknowledges the important role and functions of Industry Safety and Health Representatives (ISHRs) under the work health and safety laws. However it is important that ISHRs exercise the powers they have been provided with in a proper manner and purpose. Recent events have raised concerns around the use of an ISHR's powers for industrial rather than safety outcomes.

At a coal mine in NSW, an ISHR has raised purported safety concerns (details of which were not 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.

At times, the ISHR has arrived at site with a PIN already drafted, displaying the PIN at meetings and stating that if certain action was not undertaken the PIN would be issued. Numerous times the issue of the PIN has been erroneous and hence cancelled by the Resources Regulator.

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.

While these examples have been de-identified for the purpose of this submission, the cases have been reported to the Resources Regulator by numerous NSWMC member companies.

A person is only eligible to be an ISHRs if they are a WHS entry permit holder (section 28 of the WHS (MPS) Act). The WHS Act sets out a duty that a WHS entry permit holder must not intentionally and unreasonably delay, hinder or obstruct any person or disrupt any work at a workplace, or otherwise act in an improper manner. However, this duty is limited to when a WHS entry permit holder is exercising or seeking to exercise rights in accordance with Part 7 of the WHS Act (Workplace entry by WHS entry permit holders).

There is an opportunity to enhance the WHS (MPS) Laws by introducing a similar requirement into the WHS (MPS) Act so that when an ISHR is exercising their functions under Part 5 of the WHS (MPS) Act (Safety and health representatives for coal mines) or a SHR is acting in accordance with functions delegated under section 32 of the WHS (MPS) Act (Delegation of functions to site safety and health representative), that the ISHR or SHR must not unreasonably delay, hinder or obstruct any person or disrupt any work at a mine, or otherwise act in an improper manner.

Further, section 148 of the WHS Act contains restrictions on the unauthorised use or disclosure of documents or information obtained by a WHS entry permit holder in the course of exercising a right of entry under the WHS Act. There is an opportunity to enhance the WHS (MPS) Act to include a similar provision to section 148 of the WHS Act so that any documents or information obtained by a ISHR in the course of exercising their functions under section 28 of the WHS (MPS) Act must not be used or disclosed for a purpose unrelated to the function exercised under section 28.

Work health and safety training

The importance of worker involvement in health and safety is recognised by NSWMC. This includes trained safety and health representatives and the industry safety and health representatives. NSWMC supported the inclusion of coal-specific worker representation at the time of the development of the WHS (MPS) Act. It remains in support of the provisions.

NSWMC continues to consider it is important that safety and health representatives are required to undertake a course of training relating to work health and safety that is accredited by the Resources Regulator (section 45 of the WHS (MPS) Act).

The review of the Model WHS Act by Marie Boland recommended (recommendation 10) that the Model WHS Act be amended to allow health and safety representatives to choose their own training course. This recommendation is proposed to be implemented in the WHS Act if the WHS Amendment Review Bill passes. NSWMC considers that any change to allow a safety and health representative for a coal mine to choose their own training course should not be supported because it is important that training of safety and health representatives continues to cover content that is necessary to appropriately equip safety and health representatives with the necessary information to allow them to fulfil their role.

Question 10: Are the provisions for enforcement measures still valid, appropriate and working as intended?

There is an opportunity to expand the list of offences that are eligible for remedy through a penalty notice issued under section 243 of the WHS Act. Currently, the list of offences set out in Schedule 18A of the *Work Health and Safety Regulation 2017* (NSW) (WHS Regulation) does not include any offences under the WHS (MPS) laws and the WHS (MPS) laws do not allow for penalty notices.

Penalty notices for offences under the WHS (MPS) laws may be an efficient way of allowing less serious breaches of the WHS (MPS) laws to be resolved.

Examples of offences that may be appropriately dealt with through penalty notices include:

- Section 15 of the WHS (MPS) Act (Duty to notify of notifiable incidents).
- Clause 7A of the WHS (MPS) Regulations (Mine operator to notify regulator of change of contact details).
- Clause 18 of the WHS (MPS) Regulations (Duty to provide information to operator of adjoining mine or petroleum site).
- Clause 42 of the WHS (MPS) Regulations (Air monitoring - signage).

Consideration should also be given to a review mechanism for a decision to issue a penalty notice without having the matter determined by the Court. Section 243 of the WHS Act applies to penalty notices. This provides that the *Fines Act 1996* (NSW) applies to a penalty notice.

If a person issued with a penalty notice does not wish to have the matter determined by a Court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence. However, this does not provide a review mechanism without resort to the Court.

Question 11: Are the provisions for a Board of Inquiry still valid, appropriate and working as intended?

Fortunately, it has not been necessary for Board of Inquiry to be established under the WHS (MPS) Act since its introduction. NSWMC is in support of the provisions establishing Boards of Inquiry.

The important protections which prohibit evidence obtained by a Board of Inquiry being used against an individual in any proceedings should be retained.

Question 12: Are the provisions for statutory bodies still valid, appropriate and working as intended?

It is critically important that the established tripartite arrangements continue to allow input from all stakeholders into mine safety and competence arrangements.

NSWMC values the opportunity to work through the existing statutory bodies of the Mine Safety Advisory Council and the Mining and Petroleum Competency Board and is of the view that they should be retained.

Question 13: Do the provisions for statutory bodies ensure adequate representation in the provision of advice in relation to health and safety and competence?

The membership of the Mine Safety Advisory Council and the Mining and Petroleum Competency Board are set out in clauses 160 and 164 of the WHS (MPS) Regulations. The membership, which includes NSWMC, Cement, Concrete and Aggregates Australia, CFMMEU or AWU and, in the case of the Mine Safety Advisory Council, persons that can provide expertise that is of assistance to the Council continue to provide adequate representation in the provision of advice in relation to health and safety competence.

Work Health and Safety (Mines and Petroleum Sites) Regulation 2014 – Discussion Paper Questions 14 to 25

Question 14: Are the provisions for nomination and appointment of operators still valid, appropriate and working as intended?

No specific issues with these requirements.

Question 15: Are the provisions for managing risk in addition to the WHS Regulation still valid, appropriate and working as intended?

Duties qualified by a test of reasonableness or reasonable practicability

The concept of 'reasonable practicability' should be applied universally in relation to all duties and obligations applicable to mine and petroleum site operators under the WHS (MPS) laws. Similarly, a suitable standard based on 'reasonableness' (whether positioned as a qualification or defence) should universally apply to all duties applicable to individual duty holders.

Whilst some of the substantive duties incorporate the qualification, 'so far as is reasonably practicable', the use of this qualification across all duties is inconsistent. For example, the duty to notify the regulator of notifiable incidents under section 15 of the WHS (MPS) Act is not qualified in any way and carries a maximum penalty of $10,000 in the case of an individual and $50,000 in the case of a body corporate.

By comparison, the duty to preserve an incident site under section 17 of the WHS (MPS) Act contains the qualification of 'so far as is reasonably practicable', and also expressly confirms (at sub-section 17(3)), that the duty does not prevent any action to assist an injured person, remove a deceased person, and/or to make the site safe.

Consideration should be given to whether it would be appropriate to adopt a similar qualification in relation to the duty to notify of notifiable incidents, and to clarify that the duty to immediately notify the regulator of notifiable incidents does not prevent any action to rescue or assist an injured person or to make the site safe.

Question 16: Are the provisions for SMS, including PHMP & PCP, still valid, appropriate and working as intended?

No specific issues with these requirements.

Question 17: Are the provisions specific control measures still valid, appropriate and working as intended?

Reduce the level of prescription set out in the specific control measures

There is opportunity to simplify and reduce the level of prescription set out in the specific control measures in Part 2 (Managing risks), Divisions 4 (Specific control measures—all mines and petroleum sites) and 5 (Specific control measures—underground mines). Examples of where the level of prescription could be reduced to allow greater flexibility and to encourage innovation in how duty holders manage risks include the following:

- Clause 32 (Electrical safety) to reduce the number of specific requirements and the cross referencing to the Wiring Rules.
- Clause 42 (Air monitoring - signage) to allow flexibility in the way information is communicated.

- Clause 44A (Operation of belt conveyors) to allow a risk-based approach to the inspection of conveyors.

The risk-based approach required by the duty to identify hazards and manage risks and to develop a safety management system imposes the obligation on the PCBU to manage risks to health and safety. The specific control measures are therefore unnecessarily prescriptive and reduce flexibility and the potential for innovative approaches to the control of risks.

Facilitate the use of innovative technology through legislation

Further, there is opportunity to encourage the use of technology to improve health and safety outcomes. In 2019 the Resources Regulator released an Innovation Policy which intends to provide a clear pathway for the consideration of innovations prevented by legislation or technical standards. The Innovation Policy explains the Resources Regulator's 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.

Question 18: Are the provisions for emergency management still valid, appropriate and working as intended?

Consultation with emergency services

Clause 89 of the WHS (MPS) Regulations imposes an obligation on the mine operator of a coal mine or an underground mine to, so far as is reasonably practicable, consult with (among others) the primary emergency services with responsibility for the area in which the mine is located.

The practical experience of operators is that this consultation requirement is 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.

Without wishing to create further burden on emergency services, industry would be assisted by improvements and clarity around these consultation requirements and processes. This may be through a process facilitated by the Resources Regulator in mining regions across NSW or through amendments to the WHS (MPS) Laws which might include:

- Include a positive obligation on emergency services to consult with mine operators. Section 46 of the WHS Act (duty to consult with other duty holders) could be used as a framework for such a clause, but with amendments to require the emergency services and mine operators to consult, cooperate and coordinate activities with one another.
- Either together with, or as an alternate to the suggestion above, including a requirement in the WHS (MPS) Laws (or in guidance material) a requirement for emergency services to nominate a single point of contact for mine operators to contact in relation to consultation or provide an alternative of allowing for consultation to occur on an industry basis.

Question 19: Are the provisions for information, instruction and training still valid, appropriate and working as intended?

Refer to question 9 above.

Question 20: Are the provisions for health monitoring still valid, appropriate and working as intended?

The provisions for health monitoring remain valid, appropriate and working as intended.

There has been contemplation of the application of the health monitoring framework in the coal sector to the non-coal sector. This 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.

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.

Question 21: Are the provisions for consultation and worker safety role still valid, appropriate and working as intended?

No specific issues with these requirements.

Question 22: Are the provisions for survey plans and mine plans still valid, appropriate and working as intended?

No specific issues with these requirements.

Question 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?

The same issues as discussed in relation to question 7 apply to this question.

Question 24: Are provisions for statutory functions still valid, appropriate and working as intended?

The current framework of statutory functions in NSW provides an effective mechanism for allocating responsibility and managing risks. Changes made without considering the framework as a whole may jeopardise the aim of providing better safety outcomes.

The Site Senior Executive role is inappropriate for the NSW legislative framework

The *Coal Mining Safety and Health Act 1999* (QLD) (CMSH Act) requires that a mine has a site senior executive (SSE). The SSE is the most senior officer employed or otherwise engaged by the coal mine operator for the coal mine who is located at or near the coal mine and has responsibility for the coal mine.

The SSE has extensive obligations under the CMSH Act including an obligation to ensure the risk to persons from coal mining operations is at an acceptable level.

In contrast, under the WHS (MPS) Laws there are a range of statutory functions for mines including the mining engineering manager, electrical engineering manager, mechanical engineering manager and ventilation officer. The statutory functions under the WHS (MPS) Laws support the safe operation of mines without unduly imposing onerous obligations on individuals that are subject to potential criminal penalties.

In NSW, persons that are appointed to a statutory function owe the same duty as other workers to (among other things) take reasonable care for their own health and safety and to take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons.

The objective standard to which holders of statutory roles may be held in NSW is appropriate. The sharing of safety responsibilities between a number of statutory functions is likely to drive better health and safety outcomes than a concentration of responsibility in a single senior role.

Health and safety outcomes would not be improved by the implementation of a role similar to an SSE in NSW. The implementation of such a role would complicate and duplicate elements of the existing structure and by attaching significant criminal penalties, like in QLD, would encourage a highly defensive legal approach and discourage sharing of information.

Additional Statutory Functions unnecessary

In 2019 a Discussion Paper was released entitled *Proposed New Statutory Function: Geotechnical Engineer - Underground Coal Mines* (Discussion Paper). The industry acknowledges the importance of those holding statutory function certificates of competence having the right knowledge, experience and qualifications in order to fulfill their roles effectively.

Activities undertaken in the area of geotechnical engineering already fall under the responsibility of the mining engineering manager. There is no logical basis to infer that the presence of a geotechnical engineer statutory function would result in any change or improvement to safety outcomes. Nor is there any basis for inferring that there are inadequacies in the present framework that prevent the adequate management of geotechnical risks.

The Resources Regulator concluded that the addition of a Geotechnical Engineer - Underground Coal Mines statutory function was not warranted. NSWMC supports this view.

NSWMC holds the view that the addition of further Statutory Functions is unnecessary as the management of risks is appropriately managed by the existing framework. In the absence of a compelling reason to impose it, further regulatory burden should not be introduced.

Question 25: Are provisions for licensed activities and registration of plant still valid, appropriate and working as intended?

There is an opportunity to simplify the requirements in relation to the registration of plant. In particular, there is an opportunity to simplify the requirement to register an altered design of plant if the alteration to components continue to meet the same fit, form or function as the parts they are replacing.

Clause 177 of the WHS (MPS) Regulation sets out plant designs and items of plant that must be registered. Clause 244 of the WHS Regulation sets out when the design of plant must be registered and this includes when the design of plant is altered. Plant that requires design registration includes (among others) diesel engine systems, booster fans, braking systems, conveyor belting and winder systems at underground mines.

It follows that if a winding system is being upgraded that parts may be replaced. This may trigger a requirement to re-register the design of the plant, even though it is intended to operate in the same way as the original design.

The guidance from the NSW Resources Regulator provides that “when a component is replaced with a new component that functions equivalently to the original” this does not constitute a change to the design that requires re-registration. There is an opportunity to include this requirement in the WHS MPS laws to provide clarity on this issue. Further, there is an opportunity to extend the requirement so that as long as the component being replaced has the same, fit, form or function as the part being replaced this does not require re-registration.