

## Attachment A

### NSWMC Comments on Discussion Paper

#### OVERVIEW

NSWMC and its members place worker health and safety as the highest priority when conducting mining operations. As such, NSWMC supports the introduction of the draft Work Health and Safety (Mines) Regulation (the Regulation) in principle. In particular, NSWMC supports regulatory reform that aligns mine safety laws with the model *Work Health and Safety Act 2011 (NSW)* (**WHS Act**) and *Work Health and Safety Regulation 2011 (NSW)* (**WHS Regulation**).

NSWMC notes mine safety laws, as they are at present, lack consistency across mining sectors and do not reflect key WHS Act and WHS Regulation principles. NSWMC acknowledges the mining industry is subject to extensive regulation due to the nature and impact of its operations. However, NSWMC also emphasises the importance of striking the right balance between a legislative approach that clearly articulates obligations/responsibilities and a legislative approach that is overly prescriptive and burdensome. The latter approach can detract from safety and stifle industry innovation.

NSWMC believes that the balance has not been appropriately addressed in the Draft Regulations - and these are noted in specific areas in Attachment B.

NSWMC acknowledges the introduction of the Regulation is not seen by Government as regulatory reform. However, it should be noted that for members, there are some proposed provisions that will result in substantial/notable changes to their previous regulatory regime, particularly for members in the exploration, metalliferous and extractive (non-coal) sectors.

#### 1.2 Additional tri-state WHS (Mines) provisions

NSWMC supports the tri-state process and the objective of achieving regulatory consistency across NSW, Western Australia and Queensland in relation to mine health and safety.

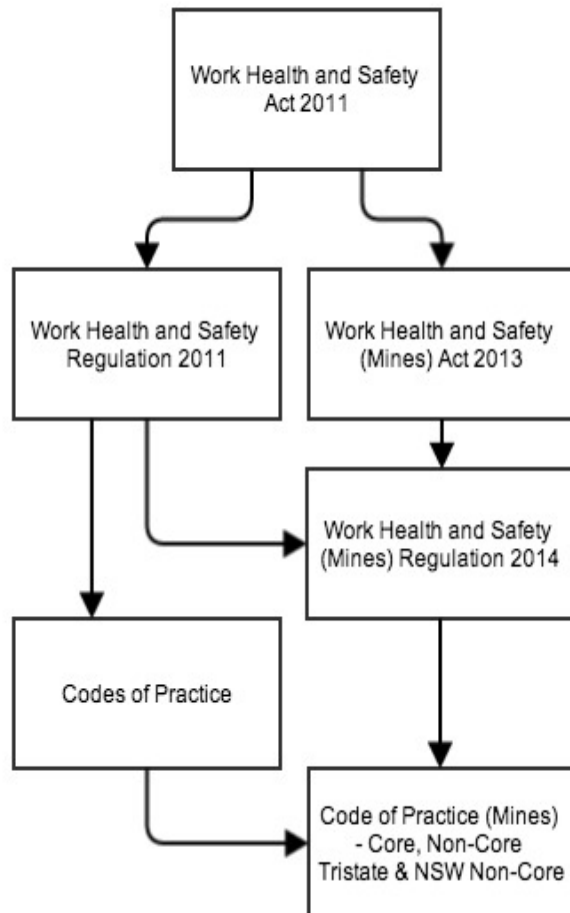
However, NSWMC is gravely concerned that not all members of the tri-state process are working towards the same objectives anymore. Consequently, key areas where consensus was reached, to enable the process to move forward, should be revisited to ensure NSW mines have world leading legislation.

NSWMC does not see any value in adopting legislation from other states, which will add administrative and economic burden to sites for little or no value - especially if those states are no longer willing to work towards a uniform or even consistent legislative approach.

#### 2.3 Legislative Framework

NSWMC supports the proposed legislative framework consisting of the WHS Act, WHS Regulation Work Health and Safety (Mines) Act 2013 (the Act) and the proposed Regulation. However, concern has been noted at the diagram presented in the discussion paper does not truly represent the way

the Act and Regulations actually work, and is in fact misleading. NSWMC believes a better representation would be:



There is also significant concern by members that combining coal specific and non-coal specific safety legislation and regulations has the potential to cause confusion. Such members are used to referring to legislation and regulations that are specific to the coal mining sector and the remaining mining sectors. Members are not used to reviewing legislation/regulation where they need to carefully determine which parts are applicable to them and which parts are not.

In addition, there are examples throughout the Regulation where obligations pertaining to particular hazards, such as diesel exhaust emissions, are dealt with across numerous provisions and are not consolidated in one part of the Regulation.

Consideration has been given to whether members would prefer:

1. to retain separate regulatory regimes (e.g. coal and non-coal specific legislation/regulation);  
or
2. to have the proposed Regulations reordered so provisions for each sector are kept together and separate from each other.

On balance, members indicated the proposed legislative structure and Regulations were acceptable though strong support was voiced for clear and comprehensive guidance material that would assist members to navigate the Regulations and understand their obligations.

In particular, guidance for small miners and explorers is essential.

However it is noted that any guidance material generated to aid compliance should simply consolidate and state the law regarding a particular matter and should avoid interpretation of the legislative obligations- which should stand alone.

In addition, NSWMC believes the Regulation could be reordered around topic and risk areas with sub-headings/clauses under these for each mine type.

It is also noted, that in order to avoid duplication, the proposed Regulation frequently refers to Part 3.1 of the WHS Regulation. Concern has been raised that frequent cross reference of legislation and other regulations can make it difficult for the Regulations to be read and understood. As such, NSWMC supports the inclusion of appropriate legislative notes that give some information and context for cross referencing.

It is also noted however, that NSWMC does not support the inclusion of provisions in the Regulation that simply duplicate or reflect WHS Act/WHS Regulation obligations.

#### **2.4.2 Exploration**

There was considerable concern among exploration members on the scope and scale of the Draft regulations and the significant impact they will face in adequately interpreting the new Regulation.

In particular:

- clear definitions for some key exploration terminology - e.g. disturbing the means by mechanical means
- unclear on the value of the exemption offered for opting in or out of management system requirements
- no clear link to current licencing provisions and obligations under that seperate regulatory instrument - in addition environmental triggers and surface disturbance requirements
- concern that insufficient guidance exists to allow efficient compliance with the Regulation - and hence economically viable operations to continue/commence
- practicalities of a small explorer meeting the SSE obligations
- is geophysical exploration considered
- significant transitional arrangements will be needed for explorers - e.g. 18 months
- understanding of application to the complete cycle of exploration (including rehab)

NSWMC recommends a specific exploration group be established to work with the Department to ensure adequate and appropriate risk based regulation is developed, rather than cumbersome and overburdening regulation.

#### **3.2 Managing Risks**

NSWMC and its members support the risk management approach adopted in the Regulation and the application of Part 3.1 of the WHS Regulation.

However, the risk management approach in the Regulation does not allow duty holders to determine and apply the most reasonably practicable control measure in accordance with the hierarchy of controls. Rather, when addressing particular hazards, the Regulation invariably refers mine operators to clause 9 of the Regulation (which in turn refers to Part 3.1 of the WHS Regulation) but then prescribes a series of risk controls that must be adopted. The provisions in *Part 2, Division 5 Specific control measures- underground mines, Subdivision 3- Underground coal mines*, provide examples of this approach but there are many other examples.

In most cases the risk controls prescribed for each hazard are not qualified by 'as far as is reasonably practicable' but are expressed in absolute terms. Further, some obligations expressed as risk controls are more directed towards record keeping than ensuring safe outcomes. See for example clause 66(3)(d), 66(3)(e) and 66(5)) regarding coal dust explosion controls.

This is inconsistent with the approach adopted in the WHS Act.

Further, some mining operations use the concept of As Low As Reasonably Practicable (ALARP) to manage work health and safety risks. It is not clear whether and how an ALARP approach to risk management can be aligned with the proposed risk management requirements of the Regulation. This has the potential to create confusion.

NSWMC suggests the approach to risk management be reviewed in the Regulation with a view to reducing the number of absolute obligations where compliance outcomes cannot be ensured.

Further, record keeping obligations associated with the management of certain mining related hazards should be removed. NSWMC does not suggest mine operators should not monitor working conditions and hazards as a means of managing work health and safety risks, but it is a matter for the mine operator to maintain sufficient records of monitoring and to demonstrate compliance with its work health and safety obligations.

### **3.6 Contractor Management**

NSWMC accepts there is a need to manage contractor health and safety at a mine operation. However NSWMC considers the requirements prescribed by the Regulation are not necessary or appropriate for all types of contractor work at a mining operation. The manner in which mine operators manage contractors working at a mining operation should be determined by the mine operator and contractor and based on a range of factors including the nature of the relationship and engagement, the contractor's expertise, the nature of work, the complexity and size of the project and its proximity to mining hazards.

The requirements for contractor health and safety management plans are potentially appropriate for substantial and complex projects where mine operators rely on contractor's expertise and resources with the particular work. However the same requirements are potentially excessive for minor, short-term, low risk work where contractors will not come into contact with mining related hazards or labour hire arrangements where contractors are used to supplement the mine operator's workforce.

The contractor management provisions should include flexibility for mine operators and contractors to develop and implement appropriate plans and systems based on the nature of the project and risks associated with the contractors work.

### **3.7 Specific Risk Control Measures**

NSWMC has made specific comment on particular risk control measures and provisions in its submissions on the proposed Regulations (Attachment B).

As a general principle, NSWMC does not support the prescription of particular risk control measures in the Regulation. This is particularly so where the risk control measure is expressed as an absolute duty rather than being qualified by 'so far as is reasonably practicable'.

Notwithstanding this, NSWMC acknowledges the policy intent behind including some risk control measures in the Regulation.

In relation to the approach to risk control measures adopted in the Regulation, NSWMC notes:

1. In general the prescription of risk control measures has the potential to discourage creative thinking and innovation. NSWMC has a strong history of supporting safety innovation in the mining industry and does not support the over prescription of risk control measures when the same information can be included in a Code of Practice and guidance material.
2. If risk control measures are prescribed, they should only be included if the prescribed control is the only means of controlling a risk, in particular the high consequence, low probability risks - lessons from the past. Where there are multiple ways to control a risk, such content should be included in Codes of Practice or guidance material.
3. Absolute risk controls should only be included if implementation of the risk control would be reasonably practicable in all circumstances. Where it is not possible to definitively conclude that a risk control is reasonably practicable, then the risk control should not be prescribed in the Regulation or in the alternative, prescribed with the appropriate qualification of 'as far as is reasonably practicable'.
4. Some risk control measures purportedly applicable to all mines or all underground mines in the Regulation, have their roots in coal mining operations. These risk control measures do not always align with risk control practices in the non-coal sector. There may be some risk control measures that are reasonably practicable within the coal sector due to the likelihood and seriousness of the risk manifesting but that same risk profile does not apply to the non-coal sector therefore, the consideration of what is reasonably practicable in the non-coal sector could lead to an entirely different control being adopted. NSWMC suggests careful consideration be given to those provisions that require the application of coal based risk controls to the non-coal sector.

#### **3.9.2 Reasonable Steps**

NSWMC supports the use of the term 'reasonable steps' in relation to provisions identified in the Discussion Paper. NSWMC does not support the inclusion of the word 'all' in conjunction with 'reasonable steps' ('all reasonable steps'). The inclusion of the word 'all' arguably imposes a more onerous obligation on the duty holder (to take steps that may not even be known or

contemplated by the duty holder) when the taking of reasonable steps should be sufficient to discharge the obligation.

The Regulation does not include a definition of 'reasonable steps' and NSWMC submits the inclusion of an appropriate definition would aid with compliance. The question of whether a duty holder has taken reasonable steps in relation to a duty will potentially be determinative of criminal

liability and, as with the concept of 'as far as is reasonably practicable', a definition and further guidance around this concept is appropriate.

It is noted, under the WHS Act, the term 'reasonable steps' is applied in relation to the officers' due diligence under section 127 which is an individual obligation. While there are legislative notes and guidance material available on what the taking of 'reasonable steps' involves from an individual responsibility perspective under the WHS Act, there is nothing in the Regulation that would provide clarity or guidance to aid with corporate compliance. Any definition or guidance on meaning of 'reasonable steps' in the context of the Regulation will need to address what 'reasonable steps' actually means in terms of corporate compliance.

### **3.11 Emergency Management**

The transitional period of 12 months proposed for the introduction of the self-contained self-rescuers is inadequate. A transition period of at least 3 years should be provided for mine operators to achieve compliance given the substantial cost and investment involved.

### **3.14 Health Monitoring (and Fitness for Work)**

#### **Health monitoring**

General concern has been raised by the coal mining sector that Part 3 duplicates the requirements for assessments under Order 41 of the Coal Industry Act 2001 (NSW). It is understood that the policy intent behind Part 3 is about capturing adverse health effects associated with mining operations (and controlling those effects) and this is different from Order 41 (which is about fitness for work and may take into account medical conditions not necessarily associated with work at mining operations). However there is still duplication in relation to the periodic health surveillance medical assessments also required under Order 41. Despite the different intent, compliance with Part 3 and Order 41 will still require workers to undergo periodic medical assessments and for mine operators to facilitate this process.

It is also noted that clause 108(3) requires health monitoring at intervals determined by the registered health practitioner. This requirement, combined with 3 yearly assessments under Order 41 and 2 yearly audiometric testing under the WHS Regulations makes it very difficult for a mine operator to coordinate and comply with the multiple requirements.

NSWMC submits that coal mining operations should be exempt from Part 3 Health monitoring.

In the alternative, if coal mining operations are required to comply with Part 3 and Order 41, arrangements should be made that would allow a single medical assessment and report to address the matters required under the Regulations and Order 41 and any other assessment/monitoring required under the WHS Regulation. It is understood Coal Services will be looking at providing a report template that complies with clause 113 of the Regulation. The template of this report should be available to industry for use by all medical practitioners who conduct medical assessments under Order 41 and health monitoring under Part 3.

Although outside the scope of this submission, NSWMC submits that in the event Part 3 of the Regulation is adopted, consideration should be given to removing the requirement for periodic health surveillance medical assessments under Order 41 as a further reform.

### **Fitness for Work**

Effective management of risks associated with fatigue and drug/alcohol consumption requires cooperation and compliance from workers. Clause 44 and 45 do not contain any positive obligations on workers in respect of these matters. It is suggested such obligations be included in clauses 44 and 45.

In relation to procedures and systems for the management of risks associated with fatigue and drug/alcohol consumption, NSWMC considers the development and implementation of these procedures/systems should ultimately be determined by mine operators and should not be prescribed by the Regulation or require agreement with workers/worker representatives. As such, NSWMC does not support the inclusion of Non Core Drafting Instructions (NCDIs) 26.20 to 22.22. It is the mine operator who bears the overarching responsibilities in terms of work health and safety at a mine and the mine operator should be able to determine how this is done. It is noted that the consultation obligations under the Regulation will already allow for worker input into the management of work health and safety risks and these provisions provide adequate scope for worker involvement in fatigue and drug/alcohol related procedures and systems.

It is also noted Subdivision 3 does not include any provisions for mine operators to assess or address physical unfitness or psychological impairment of workers (that may not be work related). Mine operators frequently need to manage risks associated with physical unfitness and psychological impairment of workers that pose additional risks to the worker and others at the mine operation. NSWMC members have suggested that provisions dealing with this type of work health and safety risk would assist in managing the impact of such matters in the workplace. Such provisions may include, for example, requiring workers to provide relevant information to mine operators (where there is a potential risk to health and safety of the workers and others at work) and co-operate with any requirements of the mine operator to manage risks associated with the physical unfitness and psychological impairment of the worker.

### **3.18 Mine Record**

NSWMC accepts it is necessary for mine operators to keep records of certain matters relating to the mining operations. However, in addition to clause 131 and 132, there are numerous provisions in the Regulation directed towards documenting and recording risk management systems, changes to systems, risk assessments and high potential incidents. These are extensive recordkeeping obligations that extend beyond those prescribed in the 'core' Regulations and WHS Regulation. Excessive focus on documenting and record keeping of risk management processes can detract from the genuine risk management thinking and behaviours and place unnecessary administrative burden on business with no direct safety benefit.

NSWMC does not support record keeping obligations that are primarily focused on aiding regulatory activity rather than facilitating safety outcomes. Further, such provisions have the potential to impose criminal sanctions for actions or omissions that are largely

administrative in nature.

Detailed prescription regarding documentation and record keeping is not appropriate content for criminal legislation and should be included in guidance material.

NSWMC does not support the requirements to keep records for 7 years and proposes 2 years is sufficient to achieve the objectives of the WHS Act.

### **3.21 Statutory Functions**

While preferring not to have statutory positions/functions at all, NSWMC accepts the appointment of individuals to statutory positions is a characteristic of existing coal mine health and safety legislation in NSW and is proposed for the Regulation.

NSWMC does not support the introduction of new statutory positions such as the site senior executive - in its current form and without adequate understanding of the full implications, obligations and legal responsibilities of the role.

NSWMC also opposes the requirement to appoint individuals to statutory positions where those individuals will also be imbued with specific, additional, individual liability under the Regulation. Workers already have individual obligations under section 28 of the WHS Act and those obligations are sufficient to encompass the expectations of a statutory position holder.

Specifically, NSWMC opposes the deeming of the site senior executive as an 'officer' under the Regulation and submits this provision is unnecessarily burdensome for the individual concerned.

Concern has been raised that the inclusion of numerous statutory positions/functions will have very real industrial implications for mine operators where workers and representatives rely on the status of a position as a statutory position to claim additional entitlements and remuneration. For example, the inclusion of an electrical tradesperson as a statutory position may be used by an individual to distinguish their role from other electrical trades positions at the mine.

If the proposed statutory functions/position provisions are retained, for new statutory positions, such as the site senior executive, a transitional period of at least 5 years should be adopted for mine operators to comply. It is highly likely people capable and willing to fulfil site senior executive roles will be sought after across the industry and recruitment of people into these roles will be difficult and costly.

Concern has also been raised about the need to have individuals in relief and acting positions (or with necessary competencies and certificates to step up) given the requirement for key statutory positions not to be vacant for more than 7 days.

### **Schedule 10**

In general, concern has been raised that the description of some statutory positions/functions and their relationship to other statutory position/functions in Schedule 10 unnecessarily dictates the organisational and management structures of mine operations. For example *the undermanager must control and manage mining engineering activities at the mine during a shift and under the direction of a mining engineering manager* and this has the potential to mean the undermanager must work under the direct management of the mining engineering manager and report directly to that position. It is understood this is not the intent of the language in Schedule 10 and mine operators are still at liberty to develop and implement their own organisational structures provided there is alignment with the statutory functions described in Schedule 10. That is, the undermanager may not need to report directly to the mining engineering manager but the mining engineering



manager should oversee and manage (though not necessarily directly manage) the undermanager in his work.

It is suggested this intent is not clear from the language of Schedule 10 which should be reviewed and any descriptors dictating the internal organisational structure and relationship between statutory positions should be removed. The Regulations should not dictate organisational structures and internal supervision/management arrangements within a mining operation.

There is also concern among non-coal operations that several key statutory functions are absent e.g. Ventilation Officer. In addition the qualifications for several positions, including Ventilation Officer need clarification including approved providers and appropriate experience.

### **3.21.3 Directions to statutory function holders**

NSWMC does not support the inclusion of NCDI 9.37 which states:

*9.37 A person must not give a direction on health and safety overriding a direction or action taken by a person in a statutory position unless the person is identified in the management hierarchy as being in a more senior position and has an equivalent or higher qualification than that person in the statutory position.*

Such provision is unnecessary and has no direct safety benefit. Further, such provision has the potential to result in unsafe outcomes. For example, a contractor, with expertise in a particular matter such as explosives, should be able to give a direction or instruction to a worker (regardless of their statutory status) in the interests of safety. NCDI 9.37 should not be included as it not possible to anticipate the types of health and safety directions that may be given at a mining operation and by whom.

### **Part 3.22 Savings and Transitional Arrangements**

Concern has been raised by members that the transitional periods proposed for the Regulation are inadequate. There is considerable prescription contained in the Regulation and mine operators will need to carefully consider the detail of these provisions to update systems and processes and achieve compliance.

Further, the issue of readability and usability of the Regulation has already been raised in discussion with members. As such, the transitional arrangements will need to allow members sufficient time to consider the Regulation, obtain advice (if necessary), plan and implement necessary changes. This time will also need to take account of worker consultation obligations and the workers' safety role.

It should also be noted the Regulations propose some significant changes for the operation of non-coal mining operations which may require detailed consideration of obligations and major systems changes to implement the control measures prescribed.

In general, it is suggested that all of the transitional periods proposed by the Department for the Regulation be extended by at least a further 18 months (24 months total) to provide a reasonable timeframe for compliance noting that mine operators still need to comply with their overarching WHS obligations in the meantime. Further to this - consistency in the time period applied will also be useful as Schedule 12 currently includes a large range of times.

Consideration should also be given to allowing non-coal operations additional ( min 6 month) transitional periods for those duties that are not included in current mine health and safety legislation/regulations.

In relation to some obligations, such as those imposed under clause 99 (self-rescuers) and 135(4) (appointment of key statutory positions), sealing, seismic activity, ventilation control plan and post incident monitoring may require additional transitional periods given the extent of change that will need to be implemented, market constraints (high demand for certain products and personnel) and financial investment required by the mine operators.

#### **4 Codes of Practice**

Whilst some guidance as to the overarching structure and intended general application of codes has been provided. Significant uncertainty still exists on their practical application in the workforce, their interpretation and subsequent enforcement by inspectors and union officials, and the overlapping nature of WHS Codes, Core Codes, Non-Core Codes and NSW Codes - not to mention guidance - and MDGs.

There also concern within the industry that other regulatory instruments, such as the Coal Industry Act continue to apply contradictory orders that provide limited value to the industry improving health and safety.

NSWMC suggests that a significant piece of work needs to be undertaken with stakeholders to firmly map out appropriate guidance - applicable to NSW mining operations - of all scales and sizes - and ensure limited overlap, no duplication - and a robust and tripartite process for developing and communicating their intended purpose and outcomes.

#### **Other Overarching Comments**

##### **Enforcement**

NSWMC recognises the adoption of “drafting conventions” in the creation of the draft regulations - but are very concerned that the inclusion of penalties against each clause - has the unintended consequence of shifting the culture to a focus on these penalties rather than managing the risk.