MINERALS COUNCIL OF AUSTRALIA

SUBMISSION ON THE FRAMEWORK SURROUNDING THE PREVENTION, INVESTIGATION AND PROSECUTION OF INDUSTRIAL DEATHS IN AUSTRALIA

JUNE 2018

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1. EXECUTIVE SUMMARY

The Minerals Council of Australia (MCA) welcomes the opportunity to contribute to the *inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*. This follows the submission the MCA made to the Safe Work Australia 2018 review of the model work health and safety laws.

The minerals industry is firmly committed to the principle that every individual, regardless of where they work, whether as a direct employee or contractor, and whatever tasks they undertake, should have the same high standard of workplace safety. A nationally-consistent, risk-based preventative Work Health and Safety (WHS) regulatory system, supported by industry-specific regulation, would deliver benefits based on greater certainty, consistency and efficiency. It would also help to ensure that compliance challenges do not detract from the practical tasks of identifying, managing and minimising risk and the continuous improvement of safety and health outcomes by companies.

The MCA continues to advocate for:

- continuous improvement, where all parties work together in support of a safety culture based on trust and openness, not an adversarial legal approach based on a blame culture;
- regulatory practice based on consistency, transparency, probity, clarity of role, flexibility and rational pragmatism; and
- an enforcement rationale based primarily on the desire to improve WHS standards at a particular mine and prevent further incidents by sharing learnings across the mining industry.

The MCA believes that the industrial manslaughter offences applicable in the Australian Capital Territory and Queensland (excluding the Queensland mining industry) are inconsistent with accepted principles of criminal law and should not be supported.

In this submission the MCA offers suggestions to areas where the Model WHS laws and their application can be strengthened and in some cases altered to ensure consistency in delivering better health and safety outcomes.

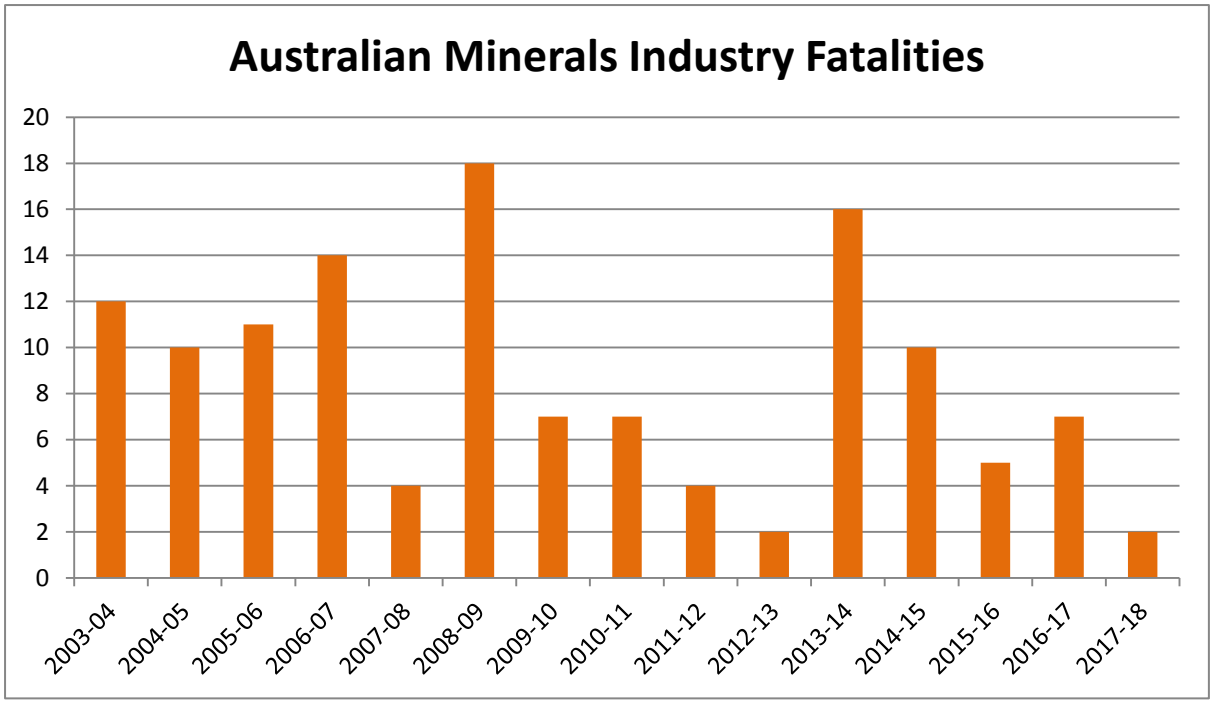
The MCA encourages the Inquiry to consider further mechanisms for industry participants to more effectively share lessons learned and post-incident measures and new and revised control measures to eliminate or minimise risks. The MCA is aware of the NSW Department of Planning and Environment Resources Regulator's Causal Investigation Policy which provides a framework pursuant to which the Resources Regulator can quickly but comprehensively investigate the causes of significant safety incidents and high potential mining safety incidents, and promptly share the learnings from those incidents back to the industry to promote awareness and understanding of relevant risks and the controls necessary to prevent recurrences of similar incidents. The MCA considers that there is an opportunity as part of the Inquiry to recommend an approach that meets the objective of the NSW Causal Investigation Policy, which is ultimately designed to encourage the sharing of learnings to prevent future incidents and facilitate progressively higher WHS standards, within the Model WHS Act.

2. INTRODUCTION

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, environmentally and socially responsible and attuned to its communities' needs and expectations.

The minerals industry is a fundamental source of Australia's comparative advantage in the global economy and a major contributor to the nation's innovation effort. Mining is Australia's second largest industry and Australia's largest export earner by a very wide margin.

The minerals industry's number one value and commitment is the safety and health of its workforce, where everyone who goes to work in the industry returns home safe and healthy. In seeking to achieve this objective, the minerals industry is committed to becoming free of fatalities, injuries and diseases. It has not yet met this goal, and the fatality data which the industry collects from publicly available resources is set out below.



MCA member companies maintain that:

- all fatalities, injuries and diseases are preventable;
- no task is so important that it cannot be done safely;
- all hazards can be identified and their risks eliminated or minimised as far as reasonably practicable; and
- everyone has a personal responsibility for the safety and health of themselves and their work mates.

The industry recognises that even greater effort is needed based on leadership, systems, people, culture and behaviour working in unison – backed by robust regulation. It is firmly committed to the principle that every individual, regardless of where they work and what tasks they undertake, should have the same high standard of workplace safety. Just as the industry has integrated safety and health issues across varied operations, it seeks an integrated approach from governments to support a growing, diverse and increasingly mobile labour force.

The MCA continues to advocate uniform national occupational health and safety legislation, supported by industry-specific regulation, to bring greater certainty, efficiency and clarity to industry participants. It is also critical that compliance challenges do not detract from the practical task of identifying, managing and minimising risk and the continuous improvement of safety and health outcomes.

This submission reflects the views of our MCA member organisations who were closely consulted with on the matter. Through this process the Chamber of Minerals and Energy of Western Australia (CME), on behalf of its member organisations, wished to offer formal support for the content of this submission. CME is the peak resources sector representative body in Western Australia (WA), funded by its member companies who are responsible for most of WA's mineral and energy production and are major employers of the resources sector workforce in WA.

The MCA also draws the inquiry's attention to the MCA submission made to the Safe Work Australia 2018 Review of the model WHS laws.[1]

[1] Minerals Council of Australia, *2018 Review of the model WHS laws*, 13 April 2018.

3. PREVENTION OF INDUSTRIAL DEATHS

Harmonisation of the WHS Laws

It is the view of the MCA that there should be greater opportunity for harmonisation and rationalisation between the Model WHS Act and industry-specific legislation that adopts the same fundamental WHS concepts and terms. Additionally, the MCA strongly supports the development of nationally consistent industry-specific WHS regimes for industries spanning multiple jurisdictions. Improving the alignment between mainstream and industry-specific safety legislation, and increasing uniformity between industry-specific legislation across jurisdictions, will assist in minimising administrative duplication, and allow greater time and resources to be re-directed from compliance-related activities to improving practical workplace safety outcomes.

MCA supports WHS legislation that promotes best practice WHS management and is risk-based and non-prescriptive, with a focus on continuous improvement and prevention of incidents. Unnecessary prescription promotes a culture of regulatory compliance as opposed to facilitating continuous improvement, directly undermining a key objective to secure the promotion of the WHS Act.

With regard to harmonisation and rationalisation between the Model WHS Act and industry-specific legislation, the MCA strongly believes that where mainstream and industry-specific legislation adopts the same fundamental concepts and terms, these should be aligned to the maximum extent possible. To the extent that industry-specific, activity-based safety legislation also creates positive obligations to identify hazards and assess risks, the MCA submits that legislation should adopt uniform definitions of those terms.

The MCA also strongly believes that there should be a consistent approach between jurisdictions adopting industry-specific legislation for the same industries as to the relationship and interaction between that industry-specific legislation and mainstream WHS laws. To draw on the Australian mining industry as an example, an inconsistency arises in relation to the structure of applicable legislation across the States and Territories. In New South Wales, mines are regulated by the mainstream *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulations 2017* (NSW), as well as the *Work Health and Safety (Mines and Petroleum) Act 2013* (NSW) and associated *Work Health and Safety (Mines and Petroleum) Regulations 2014* (NSW). This 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, industry-specific mining legislation and regulations operate independently of the mainstream WHS legislation and regulations. Western Australia and Victoria have not yet adopted model WHS legislation, however, the Western Australia Government has recently indicated a commitment to reform WHS laws in line with harmonisation. Another example of inconsistency in WHS laws is the inclusion by some states of dangerous goods legislation within their WHS laws while other states maintain separate dangerous goods legislation.

The MCA also considers that duty-holders would benefit from harmonisation of all duties set out in the Model WHS Act and other industry-specific safety legislation, in relation to the qualifications or defences applicable to those duties. The MCA considers that the concept of 'reasonable practicability' should be applied universally in relation to all duties and obligations applicable to persons conducting a business or undertaking (PCBUs) under the Model WHS Act. 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.

Standardising incident notification requirements would also allow organisations which span multiple jurisdictions and operations (for example, mining companies which also have port, rail, airports and other aspects of their operations subject to different WHS legislative requirements) to better streamline this process.

A further difficulty currently arises insofar as a business or undertaking's operations may be regulated by multiple safety regimes. As indicated above, mine operators will typically be subject to various safety regimes including but not limited to legislation and regulations relating to radiation control, explosives, and rail and road transport. With this in mind, the Inquiry should consider all opportunities to harmonise and rationalise the Model WHS Act and Model WHS Regulations as against industry-specific safety regimes, and between interfacing industry-specific regimes. The MCA considers that development and variation to industry-specific safety regimes should involve robust consultation across industry groups. The MCA strongly advocates for nationally consistent legislative and regulatory frameworks which will allow businesses and undertakings to maximise the resources available to practically improve WHS outcomes.

Industrial manslaughter laws

The MCA strongly believes that the industrial manslaughter offences applicable in the Australian Capital Territory and Queensland are inconsistent with accepted principles of criminal law. The MCA considers that the industrial manslaughter offence should not be introduced more broadly, for the reasons outlined below.

First, the industrial manslaughter offences in Queensland apply to 'senior officers'. This definition is inconsistent with the definition of 'officers' adopted under the Model WHS Act, with the effect that the industrial manslaughter offence may potentially apply to a much wider category of persons than is contemplated in the Model WHS Act. The MCA takes the view that this is inappropriate if the industrial manslaughter offence is to apply to those at the most senior levels of management within an organisation. The MCA considers that the existing officer due diligence duties (and the penalties attached to those duties) contained within the Model WHS Act and other related legislation provide positive obligations that are designed to establish a positive health and safety culture at all levels of an organisation. Obligations which are designed for the prevention of health and safety incidents are to be preferred to punitive measures that only take effect after an incident has occurred.

Secondly, it is a generally accepted principle of criminal law that recklessness is a higher standard than negligence. As such, offences involving recklessness require the prosecution to prove some element of intent, and are subject to more serious penalties than offences involving negligence. For example, a Category 1 offence under the Model WHS Act requires that the person is reckless as to the risk to an individual of death or serious harm, and carries a maximum penalty for an individual of five years' imprisonment. In contrast, the industrial manslaughter offence requires the prosecution to prove that the person was negligent about causing death, however this carries a maximum penalty for an individual of 20 years' imprisonment.

Thirdly, the industrial manslaughter offences potentially overlap with the "traditional" manslaughter offences, which remain available under existing criminal legislation. Further, the industrial manslaughter provisions in Queensland for example, remove the defences otherwise available to a person under existing criminal legislation for traditional manslaughter offences.

If the industrial manslaughter offence is to be adopted more broadly, it should include defences that a person is not criminally responsible for:

- an act or omission that occurs independently of the exercise of the person's will, or
- an event that the person does not intend and that is not reasonably foreseeable as a possible consequence.

4. INVESTIGATION OF INDUSTRIAL DEATHS

Encourage the sharing of information and facilitate progressively higher WHS standards

An increase in fatalities in 2013-14 resulted in the minerals industry embarking on initiatives to arrest this rise, including sharing and learning lessons from significant incidents and working with the International Council of Mining and Metals (ICMM) to publish practical guidance on preventing the most serious types of health and safety incidents. This work is known as "Critical Control Management".

The Critical Control Management process is a practical method of improving managerial control over rare but potentially catastrophic events by focusing on the critical controls. These sorts of events are called material unwanted events. Mining industry examples of material unwanted events include underground fires, coal dust explosions and overexposure to diesel particulate matter. The MCA considers the WHS laws should allow for the sharing of post incident measures and new and revised control measures to eliminate or minimise risks with appropriate safeguards to ensure such information is not inappropriately used against duty holders in an enforcement context.

The MCA is aware that the New South Wales Minerals Council has received significant positive feedback from its members in relation to the NSW Department of Planning and Environment Resources Regulator's Causal Investigation Policy. Whilst the Causal Investigation Policy only applies to certain types of incidents, the MCA considers that there is an opportunity as part of the Inquiry to consider an approach that meets the objective of the NSW Causal Investigation Policy, which is ultimately designed to encourage the sharing of information and facilitate progressively higher WHS standards, within the Model WHS Act.

As previously set out in the MCA's Submission to the National Review into Model Occupational Health and Safety Laws dated July 2008, the MCA strongly advocates:

- continuous improvement, where all parties work together in support of a safety culture based on trust and openness, not an adversarial legal approach based on a blame culture;
- regulatory practice based on consistency, transparency, probity, clarity of role, flexibility and rational pragmatism; and
- an enforcement rationale based primarily on the desire to improve standards at a particular mine and across the mining industry.[2]

The NSW Causal Investigation Policy provides a framework pursuant to which the NSW Resources Regulator can quickly but comprehensively investigate the causes of significant safety incidents and high potential mining safety incidents, and promptly share the learnings from those incidents back to the industry to promote awareness and understanding of relevant risks and the controls necessary to prevent recurrences of similar incidents. The Causal Investigation Policy is not available in incidents involving deaths or reckless conduct etc.

In particular, the MCA respectfully notes that the NSW Causal Investigation Policy expressly provides that "all documents gathered, and information and statements provided to the causal investigation team about the safety incident, will not be used for or made available for any criminal or civil legal proceedings, or for disciplinary action, to the extent allowed by law." This protection attempts to provide a means of encouraging greater co-operation with the investigation process as duty holders are able to participate in the investigation process knowing that there is not going to be enforcement action taken against them, unless they are found to have acted recklessly. This could result in a more efficient use of the regulator's resources towards sharing valuable learnings to prevent recurrences across the industry more broadly, and directly supports the objects of the Model WHS Act, rather than directing resources towards legal proofs of evidence for enforcement action.

[2] Minerals Council of Australia, *National Review into Model Occupational Health and Safety Laws*, July 2008.

It is noted extraterritorial application of the model WHS laws is possible through jurisdictional notes and may be useful in some specific circumstances. In particular it is acknowledged prosecutions could be unnecessarily impeded where the Model WHS Act does not provide for a mechanism to access relevant information held outside the relevant jurisdiction.

However, just as duties under model WHS laws do not extend beyond the relevant jurisdiction (except in the Commonwealth which does have extra-territorial jurisdiction), nor should inspectors' powers under the model WHS laws.[3] For example, inspectors should not be entitled to undertake inspection or compliance activities such as issuing improvement or prohibition notices in respect of matters outside the relevant jurisdiction.

If inspectors' powers to interview persons or compel the production of documents are to be exercised outside the relevant jurisdiction, this should be in limited circumstances, clearly prescribed by the Model WHS Act, and should be limited to matters which have a clear, close nexus to WHS issues in the relevant jurisdiction. Such limitations are required in order to minimise a potentially burdensome process of collating and providing documents that are not directly relevant, and where effort is otherwise redirected to those processes, rather than responsive measures that might otherwise be required to improve health and safety outcomes.

[3] Section 12F of the *Work Health and Safety Act 2011* (NSW) (Cth) and section 15.1 of the *Criminal Code Act 1995* (Cth).

5. PROSECUTION OF INDUSTRIAL DEATHS

In light of research findings that workplace injuries and fatalities are decreasing in Australia, the MCA submits that there is nothing to warrant the imposition of higher penalties in respect of offences under the Model WHS Act.[4] Further there is a lack of evidence that such punitive approaches to compliance and enforcement lead to improvements in health and safety outcomes.

While industry acknowledges a need for consequences for offences and that penalties have a role in this regard, to be effective in driving progressively better safety and health outcomes these must form part of a range of enforcement and compliance mechanisms, including enforceable undertakings and improvement and prohibition notices.

A hierarchy of enforcement mechanisms enables the regulator to accommodate particular circumstances, including the nature of the breach, the actual or possible consequences of the breach and the relative immediacy of any danger. It also appropriately supports the role of the regulator in balancing a focus on compliance, with support and education to assist in raising health and safety standards.

The penalties included in the model WHS laws are significant. An effective enforcement framework needs to strike a balance between deterrence and risk management flexibility.

The industry is moving towards a risk based approach and is receptive to a legislative environment with risk-based safety management systems at its core. Resorting to a punitive and high penalty environment is not conducive with this approach.

Where prosecutions are brought, these should be instituted in a timely manner. The Model WHS Act permits a person, which may include a member of the public, to make a written request to the regulator to bring a prosecution, if none has been brought by the regulator.

The MCA notes that the Model WHS Act empowers the Director of Public Prosecutions to commence proceedings in relation to an alleged contravention of the Model WHS Act. The MCA considers that it may improve the dialogue between the regulator and industry if the regulator's role was solely to regulate and the power of the regulator to commence proceedings for an offence against the Model WHS Act was removed, and this function sat entirely with the Department of Public Prosecution, or other state prosecuting function.

Allocating responsibility for health and safety prosecutions to an independent prosecutor at arm's length from the regulator should ensure that only those prosecutions that indicate a prima facie case and are regarded as being in the public interest are pursued. Furthermore, separation of the prosecution function from the regulatory function may increase the scope for robust discussions relating to the range of enforcement mechanisms available to achieve the object of the Model WHS Act, including enforceable undertakings and potentially other initiatives that would represent a more efficient use of regulators' resources. Using an existing independent prosecutor may also present further efficient use of government resources by potentially removing some duplication associated with have multiple prosecuting bodies.

The MCA also advocates for the adoption of a prescribed form of disclosure certificate which would confirm that the Prosecutor's duty of disclosure has been satisfied prior to filing a prosecution. The MCA would draw the Inquiry's attention to similar requirements included in Schedule 1 of the *Director of Public Prosecutions Regulation 2015* (NSW). The MCA considers that it is of the utmost importance to ensure that persons facing criminal prosecution for breach of the Model WHS Act are able to completely know and understand the allegations against them, and further, to avoid improper use of limited Court time and resources in circumstances where a failure to satisfy the duty of disclosure would result in delay.

[4] Safe Work Australia, viewed on 5 June 2018

The MCA does not consider the introduction of sentencing guidelines to be necessary. The MCA takes this view on the basis that the judiciary is well-equipped to determine the appropriate quantum of penalties on a case-by-case basis.

The Courts also have adequate scope under the existing regime to consider alternative orders including adverse publicity orders, WHS orders and training orders, and the MCA does not support the introduction of sentencing guidelines which may limit the flexibility of the Courts to consider the appropriate orders and sentencing on its merits.

The Model WHS Act enables the secretary of an industrial organisation of employees to initiate prosecutions for Category 1 or 2 offences, if the Director of Public Prosecutions recommended prosecution and the regulator declined to prosecute. This provision reflects a similar role for unions in the predecessor *Occupational Health and Safety Act 2000* (NSW). The June 2017 Report on the First Statutory Review of the Work Health and Safety Act in New South Wales observed that this section had not yet been utilised.[5] This in combination with the declining representation of the workforce that industrial organisation have, suggest that there is no justification as to why third party groups such as unions would be given the authority to initiate prosecutions in relation to companies and PCBUs where they may have no members or involvement. The union movement is estimated to represent approximately 15 per cent of the public sector workforce and 10 per cent of the private sector workforce.[6]

The provision for third party prosecutions of offences under the Model WHS Act and Regulations are strongly opposed by industry. In addition to the potential impacts on the timely sharing of learnings, third parties may not be appropriately resourced, structured, or skilled to prosecute breaches of the Model WHS Act, and should not be empowered to do so.

Third party prosecutions:

- would add a layer of unnecessary complexity in the enforcement of the Model WHS laws;
- may create a risk of conflicts of interest for employee organisations which initiate prosecutions;
- could be misused to advance political or industrial agendas, which could impact on the integrity of the prosecutor, and public confidence in its function;
- may impact on the quality of analysis in prosecutorial decision making, depending on the skills and experience of third party prosecutors.

The emphasis in the regulatory scheme should be on the prosecutor being appropriately resourced to perform a quality role in a transparent manner. Relying on third parties to undertake prosecutions would undermine the role of the regulator.

Industrial organisations are not impartial regulators and can be active participants in some workplaces. An ability for any organisation that has an active role in a workplace to commence prosecutions could create a conflict of interest.

[5] SafeWork New South Wales, *Work Health and Safety Act 2011 Statutory Review Report*, June 2017, viewed on 5 June 2018.
[6] The Australian, *Union membership hits record low*, 4 May 2017, viewed on 5 June 2018.

6. CONCLUSION

MCA reiterates that its member companies maintain that:

- all fatalities, injuries and diseases are preventable;
- no task is so important that it cannot be done safely;
- all hazards can be identified and their risks eliminated or minimised as far as reasonably practicable; and
- everyone has a personal responsibility for the safety and health of themselves and their work mates.

For the reasons outlined in this submission, MCA considers that it is unnecessary, and inconsistent with Model WHS laws, for industrial manslaughter offences being more broadly introduced in Australia.