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

Discussion Paper - Published April 2020

SUBMISSION BY THE ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS AUSTRALIA

1. This submission is made by the Association of Professional Engineers, Scientists and Managers Australia in relation to the Discussion Paper published by the NSW Resources Regulator in April 2020 and titled *"Amendments to the Work Health and Safety (Mines and Petroleum Sites) Act 2013 And Regulation"*.

2. The Collieries Staff Division is a Division of the Association of Professional Engineers, Scientists and Managers Australia, which trades as the Collieries' Staff and Officials Association ("**the Association**").

3. The Association represents and is entitled to represent "staff employees" working in the coal mining industry. This coverage includes employees occupying statutory positions, such as Deputies, Undermanagers, Surveyors, Electrical and Mechanical Engineers, Mining, Mechanical and Electrical Engineering Managers, Ventilation Officers, Open Cut Examiners and others the classifications covered by Schedule B of the *Black Coal Mining Industry Award 2010* ("**the BCMIA**").

4. The Association relies on its submission dated 1 May 2021 and makes the further following submissions. Following consultation with our members, the Association makes the below submissions with respect to the matters which impact our membership most, being the proposed amendments regarding causal investigations and Mine Safety and Health representatives. Any matter to which the Association has not made a submission should not be taken to be agreed or opposed, and we look forward to providing feedback when more detailed proposals are drafted.

CAUSAL INVESTIGATIONS

5. The Association opposes the proposed legislative entrenchment of any investigation regime. This is particularly the case insofar as the recommendation proposes the adoption of the Queensland model located in the *Coal Mine Safety and Health Act 1999 (QLD) ("the Queensland Act").*

6. We would submit that the current system, under which investigations are carried out pursuant to the Policy strikes a desirable balance between a holistic and certain process without the rigidities attached to a legislatively enshrined approach.

7. In circumstances where a venerable policy mechanism exists, the Reviewer should only propose a departure from the current model where they can be satisfied that significant

evidence exists to warrant amendment. The Association suggests that this is not currently the case.

8. This is particularly so given the lack of detail included in the discussion paper as to the specific form and language of any proposed legislative insertion. The proposed Recommendation is largely conceptual at this stage, which presents difficulties in constructively responding. However, the position of the Association is that a compelling case for amendment has not been demonstrated.

9. Within the detail presented, the Association has identified several areas of specific concern.

10. The proposed entrenchment of the Causal Investigation Policy would present issues with regards to the protections afforded to participants and the information they provide during the course of the investigation. The Policy states:

> *"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 (emphasis added)****.*

11. As can be seen, the Policy creates an important caveat that the protections only exist to the extent that they can be overridden by any other relevant law. Such protection should be considered in the context of section 90 of the *Evidence Act 1995 (NSW):*

> *"In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if--*
>
> > *(a) the evidence is adduced by the prosecution, and*
> > *(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence."*

12. Section 90 makes it clear that the decision as to the admissibility of evidence in criminal proceedings is ultimately a matter of discretion for the court. To that end, a trial judge may consider that the probative value of admissions made during the course of a causal investigation would outweigh the prejudice caused by the circumvention of the ostensible protections of the Policy.

13. Such a system creates legal uncertainty and potential liability for the individuals involved. This is also undesirable from a public policy angle as it will act as a deterrence against individuals providing fulsome and holistic evidence for fear of the potential of it being used as evidence against them.

14. It is inappropriate for such a system to be entrenched in legislation where individuals may be compelled to provide evidence. Such consideration reinforces the Association's position that the status quo should be maintained wherein the system is contained in policy and participation is voluntary.

15. A further concern is created by the suggestion that the proposal would adopt the model contained under the Queensland Act. The experience of the Association and its members under the Queensland laws has been largely negative and we strongly oppose the adoption of this system in New South Wales.

16. Section 201 of the Queensland Act creates the obligation on the Site Senior Executive ("SSE") to carry out a causal investigation and provide a report to the Inspector within one month of the incident. The protections against self-incrimination for this process are contained in sub-section (4):

> *"(4) A report prepared or forwarded by the site senior executive under subsection (1) 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."*

17. The Association submits that this Queensland protection is flawed and insufficient to fundamentally protect the rights of workers:

    a. The protection afforded is limited solely to criminal proceedings. No protection is provided to individuals in respect of any civil liability.

    b. The language of section 201 appears to limit the protection to the report itself and appears not to extend to the materials collected through the course of the investigation. Accordingly, as the language in section 201 is unclear, statements or documents provided through the course of the investigation could potentially be used against individuals without breach of section 201(4).

    c. This dynamic also causes concerns with regards to the role of legal professional privilege. Specifically, where statements and materials are provided with legal assistance through the course of an investigation, the rights to privilege ordinarily sit with the Company and not the individual worker.

    d. This is a particular concern in the black coal mining industry where employers regularly enter and exit worksites through the purchase and sale of mine sites. Such exchanges create concerns as to the transmission of privilege and the treatment of the materials in question by a new employer.

18. We also note that should the recommendation be implemented as proposed, that the Reviewer indicated that the Mine Safety Advisory Committee (MSAC) should consider the appropriate protections for industry investigations.

19. The Association is concerned by this suggestion as it does not currently sit on the MSAC. The Association is primarily concerned with the representation of staff employees in the black coal mining sector. As the holders of statutory positions, supervisors and managers, our members are often the focus of the investigations in question. Accordingly, it is appropriate that if, despite our submissions above, it is decided to progress any amendments to the Act and Regulations, that the Association should be able to engage in any further considerations and submissions regarding appropriate protections.

MINE SHR PARTICIPATION IN INVESTIGATIONS

20. Recommendation 7 of the Discussion Paper issued by NSW Resources Regulator dated April 2021 states the following:

> *"Section 42(3) of the WHS (MPS) Act should be amended to enable mine safety and health representatives to 'participate' in investigations similarly to industry safety and health representatives under section 29(2)(b)."*

21. Section 29(1) then states that the Industry SHR will have the functions of a health and safety representative under the WHS Act plus the ability to:
22. Section 28(2) of the WHS (MPS) Act permits the appointment of an industry safety and health representative ('SHR') so long as the person is an 'eligible person' and they are nominated by the Construction, Forestry, Maritime, Mining and Energy Union.

23. Section 29(1) then states that the Industry SHR will have the functions of a health and safety representative under the WHS Act plus the ability to:

    a. review the content and implementation of any safety management system required by the Regulations in respect of a coal mine;

    b. participate in investigations of events, occurrences or notifiable incidents at a coal mine;

    c. assist in the training of the site SHR and electrical SHR.

24. Regulation 168 of the WHS (MPS) Regulations requires the Industry SHR to hold the qualifications to exercise the statutory function of deputy or open cut examiner and has completed a course and training that is accredited by the Regulator in relation to being a Mine SHR.

25. A Mine SHR is elected pursuant to the procedures set out on s 39 of the WHS (MPS) Act and holds the position for a period of 3 years.

26. The proposal is to mirror the Industry SHR provisions for the purposes of a Mine SHR. The Association opposes the amendments and Recommendation 7 on the following grounds:

    a. the current system in relation to investigations of safety incidents is functioning well and does not requirement amendment;

    b. empowering Mine SHR's with the ability to participate in investigations creates potential for conflicts of interest to arise;

    c. there is a risk that the investigation process will be tainted;

d. there is no requirement for the Mine SHR's to undertake the appropriate training in conducting investigations to ensure that any investigations are done so on an objective and fair basis;

e. the protection of any evidence obtained by a Mine SHR.

GROUND OF OPPOSITION 1

27. The Association says that the current investigative scheme is operating efficiently and effectively. The current scheme strikes a very good balance between the requirement to investigate, understand and prevent WHS risks but at the same time providing protection to the individuals involved in any safety incidents in relation to the evidence they provide.

28. The Association says that no amendments are required nor should be considered and Recommendation 7 should be rejected.

GROUND OF OPPOSITION 2

29. The appointment of a Mine SHR with the ability to 'participate' in investigations creates the potential for conflicts of interest to arise. A Mine SHR has a duty to *'represent the workers in the work group in relation to work health and safety'*[1]. The purpose of any investigation is to ensure that there is an independent review of the circumstances so that objective recommendations can be made. This is the entire rationale behind the investigative functions of the Regulator as set out in the Part 9 of the WHS Act.

30. If an investigator has a legislative obligation to represent the interests of one particular party involved in the investigation then it could not be said that the investigation process will be conducted in a fair and balanced manner. The Mine SHR has a legislative obligation to not be impartial and to advocate for a particular outcome. For example, if the Mine SHR forms the view that a particular work process should be implemented following an incident then he/she is legislatively required to advocate for that position irrespective of whether this may be the best solution. This approach is simply not consistent with the entire ethos of the legislative scheme including the stated Objects in the WHS Act which includes the provision of information in relation to work health and safety[2].

31. Empowering a Mine SHR to 'participate' in an investigation creates a conflict of interest for that person and it would be unfair on the Mine SHR.

GROUND OF OPPOSITION 3

32. In addition to conflicts of interest, taking into account the legislative obligations of the Mine SHR then the ultimate findings of an investigation will also be tainted. The Mine SHR is *required* to advocate on behalf his/her colleagues otherwise there is a failure to discharge

[1] Section 42 of WHS (MPS) Act and s 68 of WHS Act.
[2] Section 3 of WHS Act.

their statutory duty. If an investigator has an agenda or is advocating for a particular position then the entire investigation process and the findings are subject to doubt as to their independence.

33. The *Causal Investigation Policy* states that the purpose of such an investigation is to *'identify the causal factors of safety incidents, the effectiveness of the controls being used and what factors may have contributed to the failure of the controls'*. If an investigator is advocating a position, it could not be said that the investigation would achieve the stated aims.

GROUND OF OPPOSITION 4

34. Although Mine SHR's are required to undergo the compulsory training as mandated by s 45 of the WHS (MPS) Act, there is no specific training required with respect to conducting investigations. Any amendment to the powers of the Mine SHR should also require the person to undergo detailed training as to investigations (whether this be a Certificate III or Certificate IV course at TAFE, Graduate Diploma in Accident Investigations or Graduate Certificate in Transport Safety Investigations). This would require amendments to, inter alia, reg 168 of the WHS (MPS) Regulations. This would also result in a further cost which is not necessary when taking into account the other grounds of opposition outlined above.

GROUND OF OPPOSITION 5

35. The final ground of opposition to Recommendation 7 is what protections will apply to any note, document or information and associated material created by the Mine SHR. The first issue is the property in the notes of the Mine SHR. The second issue is the admissibility of that evidence and associated material.

36. If it is accepted that the Mine SHR owns the documents, evidence and associated material they create during the investigation due to their legislative role then an issue arises as to what protections are placed upon the dissemination and use of that evidence. The WHS (MPS) Act would have to be amended so that confidentiality provisions applied restricting the use and disclosure of that material.

37. The second issue, which is consistent with the objections to Recommendation 6, is the legislative restrictions on the use of that evidence in other proceedings or for other purposes. The Queensland scheme does not provide sufficient protections and robust protections would have to be included in any legislative change.

CONCLUDING REMARKS

38. The Association maintains its opposition to Recommendation 7. The legislative scheme is functioning well and does not require another complicated layer of investigations and investigative powers.

Collieries' Staff and Officials Association

24 May 2020