

Independent Review of the
Mine and Petroleum Site Safety Levy

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1. Purpose

This independent review of the Mine and Petroleum Safety Levy has been undertaken to investigate the determination and administration of the levy and make recommendations, as appropriate, on improvements to the administration and management of these funds.

2. Background

The *Mine and Petroleum Site Safety (Cost Recovery) Act 2005* established the Mine and Petroleum Safety Fund, commonly referred to as the Mine Safety Levy, in December 2005. The Levy is charged by the NSW Government to fund the regulation of health and safety at the state's mining and petroleum workplaces.

It was introduced following the NSW Mine Safety Review (the Wran Review) provided to the NSW Government in February 2005.

The levy applies to employers in the mining industry who have obligations under mine safety legislation for the health and safety of workers. The Levy is collected through insurance premiums, and is paid by Coal Mines Insurance (coal sector), icare (non-coal sector) and mining industry 'self-insurers' for the non-coal sector.

The Secretary of NSW Department of Planning and Environment (DPE) determines the proportion that the nominal insurers (icare and Coal Mines Insurance) shall contribute based on a proportion of total wage estimates. Mining Industry self-insurers estimate their own wages and are invoiced separately. The Secretary determines the proportion payable based on wages provided by the self-insurer.

Determinations of the proportions paid by all the insurers are approved by the Minister for Resources.

Prior to May 2017 the Levy was administered by the Division of Resources and Geoscience, Governance Branch. Since this time all mine safety functions have been consolidated into the NSW Resources Regulator, which has taken responsibility for the Levy moving forward.

On 1 April 2017 the NSW Resources Regulator was transferred from the NSW Department of Industry to DPE as part of Machinery of Government changes.

In 2017/18 financial year, the levy will generate approximately \$34.3 million in revenue. Any difference in expenditure has been made up by the budget reserve (discussed further on page 10).

This review follows concerns from key stakeholders, in particular the NSW Minerals Council and Coal Services Pty Limited, that transparency, accountability and reporting of the Levy have not met stakeholder expectations.

3. Scope

The scope of this review has been determined by the terms of reference. Considerations include:

1. Is the Levy being expended in an efficient and effective manner in accordance with the legislation?
2. Is the current process for apportioning the levy amongst industry employers appropriate?
3. How can the determination of annual levy estimates better reflect the cyclic nature of the mining industry?
4. What improvements can be made to the management and administration of the Levy?
5. What enhancements could be made to reporting on the expenditure of the Levy?

4. Findings

4.1 Is the Levy being expended in an efficient and effective manner in accordance with the legislation?

Regulatory role

As outlined in the objects of the *Work Health and Safety Act 2011*, it is the role of the Secretary and the NSW Resources Regulator, as the WHS regulator for mines and petroleum sites, to provide for a balanced and nationally consistent framework to secure the health and safety of workers and mining workplaces by:

- protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant;
- providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety;
- encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment;
- promoting the provision of advice, information, education and training in relation to work health and safety;
- securing compliance with work health and safety legislation through effective and appropriate compliance and enforcement measures;
- ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under work health and safety legislation;
- providing a framework for continuous improvement and progressively higher standards of work health and safety, and;

- maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.

The NSW Resources Regulator, within the DPE, is responsible for all regulatory activities funded by the Levy that are connected with mine safety legislation in NSW. This includes:

- assessments, investigations and verification of safety systems, processes and standards
- investigations of incidents to provide information on lessons learnt and to increase awareness and contribute to a better understanding and management of safety hazards and risks in mining operations
- the collection, reporting and dissemination of safety data and information
- providing specialised technical and engineering services
- education campaigns
- authorisations and licensing.

During the past 12 months the Regulator has undertaken an ambitious reform program for mine safety under the *Incident Prevention Strategy*. The aim has been the development of a transparent, robust and consistent approach to regulatory activities. Focus areas include:

- implementation of centralised incident reporting
- delivery of a proactive approach through the targeted assessment program and planned inspections
- publishing of monthly reports on compliance activities, as well as outcomes of each targeted assessment program
- investing in improved data capture and analysis, including online reporting tools, and
- embedding a risk-based, outcomes-focused approach.

Efficiency and effectiveness of the Regulator

DPE's Cost Recovery Framework defines efficiency and effectiveness as 'making the proper use of available resources to achieve policy outcomes'.

The NSW Resources Regulator is recognised as a high-hazard industries regulator, and as such has adopted a proactive regulatory model that involves deployment of a skilled workforce across the state. The new deployment model is a significant shift from a largely reactive model in place prior to 2016.

The Regulator's current strategic approach focuses on proactive assessment of duty holders' compliance with their obligations to implement systems to manage risk, and more specifically, catastrophic risk. Further, it includes greater attention on gathering and analysing data from industry performance to shape future regulatory actions and interventions.

As a high-hazard industry, mining will always present the possibility that serious injuries and fatalities, including multiple fatalities, may occur at any time regardless of the regulatory oversight. However, the regulatory approach adopted by the NSW Resources Regulator now enables clearer vision of how the resources funded by the Levy are allocated to fulfilling the work health and safety objectives of the regulator.

It is important that the the Regulator is recognised as a key control measure in preventing serious harm through its proactive approach. For example, during the same period in 2017 the Regulator

took significant and swift regulatory action to prohibit production activities and restrict workers from entering the underground workings at three separate coal mines due to inadequate responses from each mine in relation to managing methane gas incidents. The actions of the regulator created strong specific and general deterrence within the industry and resulted in significant improvements in the way each mine manages risks associated with hazardous atmospheres at their workplaces.

Furthermore, since consolidation of all mine safety functions in May 2017, which has resulted in the Levy now falling under the responsibility of a single Senior Executive, further efficiencies are anticipated moving forward. It is expected that this reform will bring increased accountability and a reduction of unnecessary expenditure.

Expenditure of funds

The *Mine and Petroleum Site Safety (Cost Recovery) Act 2005* specifies that funds collected under the Levy can only be used for:

- Regulatory activities connected with mine safety legislation
- Expenses incurred in the administration or execution of mine safety legislation, and
- Administrative expenses related to the fund.

For the 2015-16 financial year a total of \$35,878,000 payments were made from the fund. These payments included:

Employee related costs	\$23,799,000
Operating expenses	\$12,079,000
<i>including internal department service charges</i>	\$6,061,000

Internal department charges

Industry concerns have been raised that internal department service charges are charged against the fund without enough transparency around calculation methods or actual costs incurred.

These charges include items such as accommodation, payroll, legal services, computer hardware and software, motor vehicles, other corporate business services, management and governance.

It should be noted that on 1 April 2017 the NSW Resources Regulator was transferred from the NSW Department of Industry to DP&E as part of Machinery of Government changes. This means that internal department services will be delivered and charged by the DP&E moving forward.

To assist in the calculation of charges to better reflect the cost of services provided, DP&E Cluster Corporate Services has recently developed a Corporate Cost Recovery Framework. The Framework utilises a Daily Rate Recovery Model (DRRM) for cost recovery activities. This includes the sum of both direct and indirect cost incurred and is calculated on employee costs.

The following applies to NSW Resources Regulator:

Description	% of employee costs
Payroll tax	5.45%
Workers compensation insurance	1.74%
Labour related oncosts	7.19%
Property / Accommodation	7.37%
Information Technology	6.68%
Human Resources	1.48%

Other Corporate Services not included above (such as finance and governance)	3.16%
Overhead related oncosts	18.69%
Total oncost rate	25.888%

Note: Corporate legal costs (totalling approximately \$823k) are not included in this calculation. Motor vehicle costs are also billed separately. It should be noted that recent reforms have included a shift from inspectors being issued their own vehicle to the implementation of a centralised deployment model. This means that fleet cars are no longer home garaged and will result in a reduction of the available fleet as vehicles fulfil their lease terms.

These figures are consistent with comparable on cost rates elsewhere in the Department.

Supplementation of other areas and commercial revenue

Assurance that the Levy is not supplementing other areas (such as non-safety related matters) has also been raised as a potential issue.

This is currently addressed internally by the use of specific project codes and cost centres. In the few instances where the work of a business unit is split, the appropriate percentage of funding is allocated. The review has found that while this is occurring, it isn't being communicated effectively.

The review has also found that any commercial revenue generated that is funded by the Levy offsets the budget the following year. However, at present this is only communicated by a single line item in the Annual Report listed as miscellaneous revenue. This could be communicated better and more transparency provided on this revenue.

Prosecutions

Concerns have been raised by industry regarding the funding of prosecutions from the Levy. This includes a concern that the Department will incur no liability if it commences a prosecution and fails, as the industry pays to both prosecute and compensate itself.

Funding of mine safety prosecutions from the Mine Safety Levy is essential to ensure breaches of the Work Health and Safety laws are enforced to the highest possible standards and that the Regulator can act where necessary to commence proceedings.

The use of external law firms and counsel are essential to ensure that all prosecutions are conducted with the highest level of professionalism, exercised in the public interest and comply with the model litigant guidelines.

The Regulator is entitled to receive the same level of legal services as defendants and should not be constrained in the pursuit of justice. Any alternative could unfairly position the Regulator and undermine the regulatory regime.

It is also noted that WHS prosecutions are presently excluded from the protections of section 257D of the Criminal Procedures Act 1986. Ordinarily any proceedings initiated in good faith and in the proper manner, and where the investigation was conducted in a proper manner, cannot have professional costs awarded against the prosecutor.

An Assessment and Review Committee (ARC) is well established to ensure that all decisions to prosecute are properly considered. ARC provides independent and objective advice to the Secretary

about the consistent application of the Compliance and Enforcement Policy. It considers investigation reports and legal advice and makes recommendations about whether or not a prosecution, or any other action, should be initiated. ARC includes an independent chair appointed by the Secretary, a representative of SafeWork NSW, the Chief Compliance Officer, the Manager Major Investigations and Emergency Response and the Director Mine Safety Performance.

The regulator for all non-mining workplace health and safety in NSW, SafeWork NSW, has disclosed that all activities are 100% cost recovered with no funding received from consolidated revenue. Funding sources include a levy, licence fees, grants, moieties and legal costs. SafeWork NSW is also responsible for funding prosecution costs in the event a prosecution fails through existing funding sources.

Recommending any changes to the existing arrangement in NSW Resources Regulator, which mirrors the position of SafeWork NSW, may have a number of unintended consequences.

One of these unintended consequences may result in a reluctance to pursue a prosecution when there is an overriding public interest to do so, despite a slightly higher risk of a loss. There are, on occasion, prosecutions that require strong decisive action to achieve better safety outcomes regardless. It is not the intent of this review to hinder this process.

Finding:

1. Internal department charges and calculations accord with the department's established policy and are within generally recognised government and industry parameters.
2. The expenditure of the fund is in line with the purpose for which the Levy is collected. There is no evidence that expenditure was used for other purposes that it should not be funding.
3. Following reforms implemented in 2016, the expenditure of the fund is considered broadly efficient and effective. Further improvement could be made in relation to greater transparency, which will lead to greater confidence by stakeholders.
4. The funding of prosecutions is not inconsistent with the general work health and safety regulator (SafeWork NSW), who is also levy funded. Changes to this model may lead to unintended consequences so further consideration is required.

4.2 Is the current process for apportioning the levy amongst industry employers appropriate?

The current process for apportioning the levy amongst industry employers involves calculating the percentage of each sector's contribution to total industry wages.

Wage estimates are provided by iCare for the non-coal sector (within the Work Industry Classification (WIC) of Division B- Mining), Coal Mines Insurance for the coal industry and the State Insurance Regulatory Authority for the small percentage of industry self-insurers.

For the 2015-16 financial year this meant that the actual apportionment of the Levy was:

- 74.88% for Coal Mines Insurance insured employers (coal sector)
- 24.15% for icare insured employers (non-coal sector)
- 0.95% for self-insured employers

The coal sector accounted for the following regulatory effort in the 2016/17 period

- 80% of the safety incident notifications received over this period (1549 of 1927).
- 66% of Targeted Assessment Programs (TAPs) undertaken (37 of 56)

- 54% of planned inspections (135 of 250)*
- 89% of High Risk Activity notifications (202 of 228)
- 99.64% of design registration and licensing activities

*Dec 2016 to June 2017 only

From this analysis it can be determined that the current apportionment broadly reflects the regulatory effort expended on each industry segment.

A detailed examination of the methodology for calculation was beyond the scope of this review.

Concerns were also raised by stakeholders that some entities who should be contributing to the Levy were not. The Regulator should investigate what steps could be taken to ensure that all relevant entities are contributing, which helps protect the integrity of the scheme.

Finding:

5. While a detailed examination of the methodology was out of scope, the current apportionment broadly reflects the regulatory effort expended on each industry segment.

4.3 How can the determination of annual Levy estimates better reflect the cyclic nature of the mining industry?

Industry stakeholders have raised concerns that while the number of coal mines and related employees have dropped by approximately one third over the past few years, the Levy budget has continued to increase. While it has been noted that the Levy has not increased over the past two years, roll over funds have been utilised to make up any shortfall.

It should also be noted that a core level of capability and resourcing is required to ensure that the Regulator is well equipped to adequately regulate and reduce risk of catastrophic failure, and respond in a timely manner if any such event may occur. This is required regardless of the size of the industry.

The cyclic nature of the industry also requires a different regulatory approach depending if there is a downturn or mining boom. Regardless of the approach, however, a similar level of resourcing is required.

It is not possible to consider a hypothetical and based on the current expectation that the industry will not experience a significant downturn, there is no warrant in a reduction to the Regulator's resourcing.

It is generally agreed that it is the responsibility of the Minister and Department to determine what funding is required in order for statutory and supporting functions to be adequately performed.

Additionally, during consultation there were no stakeholders who supported the view that numbers within the Regulator should rise or fall with industry.

Finding:

6. A core level of capability and resourcing is required to ensure that the Regulator is well equipped to adequately regulate and reduce risk of catastrophic failure regardless of the size of the industry.

4.4 What improvements can be made to the management and administration of the Levy?

It is clear from the review that there are a number of improvements that can be made regarding the management and administration of the Levy. The need for improvement has been identified around timeliness and consultation in particular.

A key criticism of the annual determination process for the levy is a lack genuine consultation.

While it is apparent that a business planning process and budget model underpin the determination of the annual mine safety budget, the opportunity for input to the levy determination is usually limited. Timing and level of stakeholder engagement is not defined or consistent.

When determining the Mine Safety Levy estimate, considerations include the planned mine safety program and related budget for the relevant period, any funds to be carried forward from the current financial year and the residual balance of the Mine Safety Fund.

Historically the budget for the following year was based on historical expenditure, which was reflective of the previous re-active model of the regulator. This has been overhauled following the reforms implemented in 2016 that has seen the Regulator move to a risk-based outcomes-focused approach. This means that budgets can now be forecast based on regulatory priorities and proactive action plans.

Approval of the Levy estimate has also been delayed on a number of occasions. This has a flow on effect, impacting the ability of the insurers (Coal Services and icare) to determine the percentage for premiums. This also causes difficulty for industry in regards to budgeting.

The introduction of a budget process that includes two-year forward estimates would enable more considered strategic planning and provide greater certainty for both stakeholders and the Resources Regulator.

Budget reserve

There has been some criticism from stakeholders around lack of transparency relating to the budget reserve.

While it is generally accepted that a modest reserve is required as a contingency and to sustain operations during the period pending the receipt of Levy funds from the insurers, better clarity around what it can be used for is required.

This reserve needs to be reported in a transparent and open manner, with any adjustments clearly accounted for in reporting.

Finding:

7. A number of improvements can be made to the management and administration of the Levy, in particular around timeliness and consultation.
8. Reforms implemented in 2016 have resulted in a more reliable budget process that is based on regulatory priorities and pro-active action plans.
9. There is a lack of transparency around the budget reserve, including a lack of guidance of how it should be used.

4.5 What enhancements could be made to reporting on the expenditure of the Levy?

Concerns have been raised by industry that there is a lack of transparency regarding how the Levy is spent and what safety initiatives, personnel and outcomes it specifically funds.

While it is noted that there has been an improvement in the reporting of expenditure in the last two years, the standard of reporting still fails to meet stakeholder expectations.

A better breakdown of costs, including detailed reporting against expenditure, and assurance funds are spent on activities related to health and safety is required.

The recent commencement of a six-month forward activity statement outlining compliance priorities is a welcome start.

Cost centres have been set up internally to ensure that Levy funds are expended in accordance with the legislation. There is clear separation within Resources Regulator between activities that are related to mine safety and those related to compliance with the Mining Act (which is another function of Resources Regulator funded from a separate Levy).

There are currently limitations within the Department's finance system, SAP ByDesign, relating to the generation of reports and separating Levy expenditure from other expenditure for reporting purposes. Currently Resources Regulator is operating out of the Department of Industry systems, with an expected transition to Department of Planning and Environment systems later this year (following the Machinery of Government transfer that occurred on 1 April 2017).

Finding:

10. While improvements in reporting have been recognised, further improvements relating to transparency are required.

5. Recommendations

Recommendation 1:

Provide greater transparency relating to expenditure of funds from the Levy. In particular, more detail should be provided relating to financial reporting, including itemised expenditure for items over \$150,000 in value. The regularity of the reporting should also be reviewed, with quarterly reporting considered, in addition to the Annual Report.

Recommendation 2:

Provide greater transparency relating to commercial revenue generated from the funds. In particular, commercial revenue should be included within the financial reporting with commentary provided detailing the nature of this revenue.

Recommendation 3:

Consider conducting a detailed review on current contributors to the levy. This review should identify if there are any segments of the mining industry who are not currently paying the Levy but should be. Consideration should then be made to prepare a strategy to resolve this issue.

Recommendation 4:

Consider conducting a detailed examination of the methodology for calculating the Levy to determine if a more suitable alternative exists.

Recommendation 5:

Include information within the reporting of regulatory activities, that is released to industry on a regular basis, that clearly articulates the breakdown of regulatory effort for each sector. In particular a breakdown of incident notifications, pro-active inspections and other regulatory activities should be disclosed per sector.

Recommendation 6:

Introduce a budget planning process that includes two year forward estimates.

In the development of this budget:

- any new projects and/or initiatives should be clearly identified.
- the budget process should include consultation with stakeholders, particularly those who represent industry who pay the Levy
- timing of consultation should be scheduled for January/February each year

Recommendation 7:

Determinations should be issued no later than March of each year, with processes put in place to ensure this occurs. These processes should be clearly communicated to insurers and industry.

Recommendation 8:

A reserve of 10% of the levy determination should be kept within the fund but should not exceed this level. Adjustments should be made to the levy determination to ensure that the reserve is maintained at this level and not above. This information should be clearly disclosed in the Annual Report.

Recommendation 9:

A protocol should be established for accessing the budget reserve and adequately reporting this. This protocol should state what the reserve funds can and cannot be used for. A copy of the protocol should be published on the Department's website.

Recommendation 10:

Consideration should be given to the development of a regular audit program. This audit program should include the completion of an audit of the Mine Safety Levy Funds every three years.

(Note: it is recognised that a number of internal audits have already taken place)

Appendix 1: Consultation and documentation

The following organisations were consulted as part of this review:

Insurers

- Coal Services
- icare

Mining representative organisations

- NSW Minerals Council
- Cement Concretes and Aggregates Australia

Unions

- CFMEU Mining & Energy Division
- Australian Workers Union

Mining companies

- Glencore Australia
- Evolution Mining
- Centennial Coal
- Bloomfield Group
- Yancoal Australia

Government

- NSW Resources Regulator

The following documents were reviewed as part of this review:

#	Document	Description
1	Mine and Petroleum Site Safety (Cost Recovery) Act 2005	Legislation
2	Mine Safety (Cost Recovery) Regulation 2013	Legislation
3	Mine and Petroleum Site Safety (Cost recovery) policy	Policy document
4	Mine safety levy factsheet	Publicly available factsheet published October 2014
5	Mine Safety Levy Annual Report 2013-14	Annual report required under regulation
6	Mine Safety Levy Annual Report 2014-15	Annual report required under regulation
7	Mine Safety Levy Annual Report 2015-16	Annual report required under regulation
8	Mine safety levy internal audit report	Internal audit report