



**NSW  
Resources  
Regulator**

**DISCUSSION PAPER**

**AMENDMENTS TO THE  
WORK HEALTH AND SAFETY (MINES AND  
PETROLEUM SITES) ACT 2013 AND REGULATION**

Call for submissions by 17 May 2021

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## ABBREVIATIONS

Abbreviation	Description
CFMMEU	Construction, Forestry, Maritime, Mining and Energy Union
COAG	Council of Australian Governments
HSR	A health and safety representative provided for under Part 5 of the WHS Act.
ICMM	International Council on Mining and Metals
MPCB	Mining and Petroleum Competence Board
MSAC	Mine Safety Advisory Council
Model Act	Model WHS Act as developed and published by Safe Work Australia.
Model Regulations	Model WHS Regulations as developed and published by Safe Work Australia.
NCDI	non-core drafting instructions
NMSF	National Mine Safety Framework
NSW WHS laws	<p>When used in relation to mines and petroleum sites in NSW, it is a reference to the WHS (MPS) Act, the WHS (MPS) Regulation, the WHS Act and the WHS Regulation.</p> <p><b>Note:</b> This is defined in the WHS (MPS) Act. This definition contrasts with references to the model WHS laws that may be referred to in relation to NSW workplaces other than mines and petroleum sites, which is a reference to the WHS Act, WHS Regulation and Codes of Practice.</p>
Operator	A general term used to mean both a mine operator and a petroleum operator who may be the mine or petroleum site holder themselves or another person

	conducting a business or undertaking appointed by the mine or petroleum site holder to operate the mine or petroleum site.
PCBU	A person conducting a business or undertaking with primary duties under the WHS Act.
PRI	Principles for Responsible Investment
SHR	Safety and health representative for a coal mine
SSE	Senior Site Executive
SMS	Safety Management System
UNEP	United Nations Environment Programme
WHS	work health and safety
WHS Act	<a href="#"><u>Work Health and Safety Act 2011</u></a>
WHS Regulation	<a href="#"><u>Work Health and Safety Regulation 2017</u></a>
WHS (MPS) Act	<a href="#"><u>Work Health and Safety (Mines and Petroleum Sites) Act 2013</u></a>
WHS (MPS) laws	WHS (MPS) Act and WHS (MPS) Regulation
WHS (MPS) Regulation	<a href="#"><u>Work Health and Safety (Mines and Petroleum Sites) Regulation 2014</u></a>

# 1. Introduction

## 1.1. Purpose of this discussion paper

During 2020, Mr Kym Bills led an independent statutory review of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (WHS (MPS) Act) and the *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* (WHS (MPS) Regulation) (collectively referred to in this paper as the WHS (MPS) laws).

A public consultation period ran from 1 March to 1 May 2020. The lead reviewer prepared a discussion paper and conducted nine public forums, with six face-to-face sessions, across NSW and three online forums due to COVID-19 restrictions. He examined all submissions and considered the issues raised in them, as well as the outcomes of an online survey and input from the public forums.

The lead reviewer completed the report on the statutory review, which was tabled in Parliament by the Deputy Premier on 10 November 2020.

The statutory review [report](#) makes 40 recommendations for the WHS (MPS) laws. Of the 40 recommendations made in the statutory review, the NSW Government support 25 recommendations (recommendations 1-5, 11-14, 16, 18, 19, 21, 22, 28, 31-40). We have immediately commenced implementation on these 25 recommendations, which include reviewing legislation in, and collaboration with other jurisdictions, reviewing existing guidance material and developing new guidance material.

We have identified that 15 of the recommendations (recommendations 6, 7, 8, 9, 10, 15, 17, 20, 23, 24, 25, 26, 27, 29 and 30) are complex, and may require legislative reform. It has been identified that further consultation with key industry stakeholders in relation to these 15 recommendations is necessary.

The purpose of this discussion paper is to provide further information and consideration for implementation of the recommendations made by Kym Bills in his report of the statutory review of WHS (MPS) laws and other relevant matters.

This paper explains and discusses the recommendations from the review that we consider to be complex, or that require legislative amendments.

We are undertaking further consultation on the amendments to the WHS (MPS) laws that have been proposed following both the statutory review and identification of other relevant matters.

For further information visit our [Have your say](#) web page.

## 1.2. Scope

The NSW Resources Regulator is responsible for administering the *Work Health and Safety Act 2011* (WHS Act) and the WHS (MPS) Act for ensuring compliance with work health and safety legislation in relation to mines and petroleum sites. SafeWork NSW is the regulator and administers the WHS Act in all workplaces. The Deputy Premier and Minister for Regional New South Wales, Industry and Trade, the Hon. John Barilaro MP is the Minister responsible for mine and petroleum safety.

This discussion paper considers the recommendations made by Kym Bills in his Statutory Review of the WHS (MPS) Laws, in particular the 15 recommendations (6, 7, 8, 9, 10, 15, 17, 20, 23, 24, 25, 26, 27, 29 and 30) that we have identified as complex and requiring further consultation from stakeholders prior to implementation. This discussion paper also considers other matters identified by us.

## 1.3. Statutory Review Report

The statutory review comprised 40 recommendations, with four relating to consistency with the National Mine Safety Framework (NMSF) and improving collaboration among major mining jurisdictions, 34 relating to the WHS (MPS) Act and WHS (MPS) Regulation and associated guidance, and two recommendations relating to a possible major on-shore petroleum project or carbon capture and storage projects. Twenty-five of the recommendations require a review of existing legislation and/or a review of existing guidance material and are already being implemented.

We have identified the following recommendations from the report we consider require further consultation:

### Recommendation 6

Provisions in relation to 'causal' investigation should be reviewed and broadened beyond the current section 18(2)(c) of the WHS (MPS) Act and clause 14(1)(n) and (o) of the WHS (MPS) Regulation and include contributing factors and a systemic approach. This should also include formalising the Resources Regulator's 'causal investigation policy' within legislation with associated protections. Part 3 of the WHS (MPS) Act should be renamed 'Incident notification and investigation' with a new head of power provided for investigation of incidents for the purpose of establishing 'causality' and future safety improvements. Industry investigations should be more professional and consistent. Industry investigation reports should be provided to the Resources Regulator within 30 days under clauses 11 and 12 of the WHS (MPS) Regulation with appropriate protections. These protections should be considered by a tripartite forum such as Mine Safety Advisory Council (MSAC). Causal investigation should be separate from any investigation for the purpose of enforcement (e.g. via the current section



70(1)(b) of the WHS (MPS) Act) with details concerning the different types of investigation included in the WHS (MPS) Regulation.

### Recommendation 7

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

### Recommendation 8

Section 28 of the WHS (MPS) Act should be amended to include a new subsection 1(c) stating that an eligible person must satisfy probity checks, and a new subsection (2B) stating that the Minister may appoint additional persons as industry health and safety representatives if they meet the eligibility requirements in section 28(1) and there are no fewer than four persons appointed under section 28(2) and (2A). The Minister should seek additional evidence of costs and benefits and obtain the Mine Safety Advisory Council's advice before proposing amendments to extend industry safety and health representative roles beyond coal in Part 5, Division 2 of the WHS (MPS) Act.

### Recommendation 9

The arrangements for safety and health representatives for coal mines in Part 5 of the WHS (MPS) Act should include similar provisions to sections 146 and 148 of the WHS Act when industry safety and health representatives and mine safety and health representatives are exercising WHS (MPS) Act powers, namely to not unreasonably and intentionally delay, hinder, obstruct or disrupt work, and to not use or disclose documents for a non-WHS related purpose.

### Recommendation 10

The WHS (MPS) Act section 56(1) Board of Inquiry purpose statement should be expanded to include 'contributing factors' and to explicitly allow for high potential emerging and systemic issues and the making of potential findings and recommendations to reduce the likelihood of future accidents and incidents.

### Recommendation 11

The Chairperson of the Mining and Petroleum Competence Board should be required to be an independent person similarly to the Chairperson of the Mine Safety Advisory Council and Part 8 Division 2 of the WHS (MPS) Act and Part 11 of the WHS (MPS) Regulation should be amended accordingly.

### Recommendation 14

Consistent with changes made to the WHS Act and the *Work Health and Safety Regulation 2017* (WHS Regulation), penalty amounts under the WHS (MPS) Act and WHS (MPS) Regulation should be amended to specify penalty units and, desirably, should be automatically indexed with the Consumer Price Index.

### Recommendation 16

References to all standards in the WHS (MPS) Regulation should be reviewed. Some, such as AS/NZS 1972 in clause 80(3)(b), should be updated with Resources Regulator consideration given to automatically updating to the latest version or whether enduring mining and petroleum related elements in some standards are better specified in the Regulation or in a code of practice. The Resources Regulator, in consultation with the Mining and Petroleum Competence Board (MPCB), should consider a formal provision to enable a professional engineering demonstration of an alternate means of compliance that entails a level of risk equivalent to, or better than, following a standard.

### Recommendation 18

The Resources Regulator should consider broadening the exemptions in Clause 184 for small gemstone, opal and tourist mines to include low risk 'tier 3' mine sites such as small surface gravel pits used by regional and remote councils for roadworks and small exploration sites.

### Recommendation 20

Notwithstanding the provisions of WHS (MPS) Regulation clauses 179(j), 23(1) and Schedule 1, consideration should be given by the Resources Regulator to clarifying that rock and coal bursts and related pressure bursts are a principal mining hazard (or an important element of an existing principal mining hazard).

### Recommendation 23

The Resources Regulator should reference the August 2020 Global Industry Standard on Tailings Management in its guidance material and consider potential legislative amendments to incorporate aspects of the standard.

### Recommendation 24

The Resources Regulator should seek amendments linked to clause 34 of the WHS (MPS) Regulation that clarify: that safety devices like oxygen candles can be used in refuge chambers during an emergency under clause 3(1)(d) of Schedule 4 to the WHS (MPS) Regulation; and that the prohibitions in relation to explosives testing and exploders storage and battery changing at clause 5(2) and 5(3) of Schedule 4 should refer to while 'underground at an underground coal mine' rather than anywhere on site.

## Recommendation 26

The Resources Regulator should review whether emergency sealing in clause 68 of the WHS (MPS) Regulation should make provision for re-entry and if so, include an airlock.

## Recommendation 27

The Resources Regulator should consider whether: sampling of airborne dust at coal mines in Schedule 6 Part 1 clause 2 of the WHS (MPS) Regulation should be amended to change the minimum sampling period from at least five hours to a minimum of 80% of a shift; Part 1 clause 2(8) should be strengthened to require analysis of the level of respirable silica for each respirable dust sample; and for surface coal mines, Part 3 clause 7 should include more detail on sampling of the drill and blast area, and areas involving mobile equipment and maintenance, coal handling preparation and mobile crushing plant.

## Recommendation 29

The Resources Regulator, with input from MSAC, should review whether in clauses 93 and 95 and Schedule 7 clause 4(3) of the WHS (MPS) Regulation there should be additional prescription in relation to testing of, and training in relation to the emergency plan, with a minimum workforce to be trained in mine rescue for underground coal mines and possibly other underground mines.

## Recommendation 30

The emergency plan and associated provisions in the WHS (MPS) Regulation 2014 should require specific details of the underground coal mine escape and rescue plan to be displayed at all times with key features such as exits, refuges, firefighting equipment, communications and oxygen stations clearly indicated. Mine workers should have a reasonable opportunity to utilise the exits during periodic training.

## **1.4. Other matters**

Following the independent Statutory Review, we identified the following matters that require further consultation from industry stakeholders:

### Issue 1

We propose to amend the explosion-protection provisions in subclauses 78(2) and 78(3) of the WHS (MPS) Regulation to make it explicit that, in addition to the requirement for electrical plant to **have** a valid certificate of conformity or be Departmental approved plant, the electrical plant must also **comply** with the requirements of the certificate of conformity or Departmental approval.

## Issue 2

We propose to amend clause 80 of the WHS (MPS) Regulation (Use of cables in the hazardous zone) to incorporate the provisions contained in a class exemption granted by the Regulator and published in the [NSW Government Gazette No 171 of 7 August 2020](#).

## Issue 3

The wording in clause 93 of the WHS (MPS) Regulation will be amended to be consistent with clause 89 of the WHS (MPS) Regulation in relation to ensuring emergency plans address recommendations made by emergency services.

## Issue 4

Following the implementation of the new exposure standard for diesel particulate matter in clause 39(1) of the WHS (MPS) Regulation, it is intended to make exceedances a high potential incident under clause 128(5) of the WHS (MPS) Regulation.

It is also proposed that exceedances of all substances or mixtures that are specified in the workplace exposure standards for airborne contaminants monitoring undertaken under clause 50 of the WHS Regulation are included as notifiable high potential incidents under clause 128(5) of the WHS (MPS) Regulation.

## Issue 5

It is intended to amend Schedule 3 of the WHS (MPS) Regulation to include large diameter and long underground raised bore activity as a high risk activity in underground mines.

## Issue 6

Clause 7B of the WHS (MPS) Regulation should be amended to include a requirement that opal mine operators ensure that at least one person who has undertaken safety training, as defined in clause 7B(8), is present at the mine when mining activity is taking place.

## Issue 7

It is intended to amend clause 138 of the WHS (MPS) Regulation to put an obligation on any person exercising a statutory function, that requires a practising certificate, to comply with the maintenance of competence requirements for that statutory function.

## Issue 8

It is intended to amend clause 161 of the WHS (MPS) regulation to enable MSAC to provide advice to the Regulator.

## 2. Responding to this discussion paper

### Have your say

We are seeking written submissions in relation to this discussion paper from stakeholders and other interested parties. You can make an individual submission or contribute to a joint submission through your employer, union, professional association, work health and safety group or committee or another forum.

You are invited to respond to some, or all the questions asked in this paper. Please outline the reasons supporting your view, particularly where you identify issues and problems. You can use the downloadable fillable form or make your own submission.

The NSW Government's seven Better Regulation principles aim to guide the development of regulation to that which is required, reasonable and responsive to the economic, social and environmental needs of NSW. When providing your submission, you should be mindful to take the Better Regulation principles into account:

1. The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.
2. The objective of government action should be clear.
3. The impact of government action should be properly understood, by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.
4. Government action should be effective and proportional.
5. Consultation with business, and the community, should inform regulatory development.
6. The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered.
7. Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness.

Please provide your submission to [rr.feedback@planning.nsw.gov.au](mailto:rr.feedback@planning.nsw.gov.au) by 5pm on 17 May 2021.

Submissions on this discussion paper will be considered by the Resources Regulator before making final recommendations to the Deputy Premier. Submissions or summaries will be published on our website in accordance with our [Engagement and public consultation policy](#). Please advise us if you believe there is a reason why your name should not be published with your submission.

For further information visit our [Have your say](#)<sup>1</sup> web page.

A summary of all questions for your consideration and feedback are as follows:

- (i) Should there be two types of investigations contained in the WHS (MPS) Act?
- (ii) Should persons named in causal investigation reports provided to the Resources Regulator be protected from having that information used as evidence against them in the event that enforcement action is taken?
- (iii) Should the function of mine SHRs be expanded beyond the HSR functions under the WHS Act and previous mine safety legislation to enable them to participate in investigations? If so, are there any limitations that may be warranted on its exercise?
- (iv) Do you have any concerns regarding the adoption of the amendments for appointment of industry SHRs by the Minister?
- (v) Do you agree with extending industry SHRs to mines other than coal mines?
- (vi) Should the WHS (MPS) Act be amended to include provisions equivalent to sections 146 and 148 of the WHS Act?
- (vii) Should the WHS (MPS) Act be amended to amend the purpose statement for Boards of Inquiry to include 'contributing factors', and to explicitly allow for high potential emerging and systemic issues and the making of potential findings and recommendations to reduce the likelihood of future accidents and incidents?
- (viii) Should the WHS (MPS) Regulation be amended to clarify that the MPCB can appoint a person as an assessor?
- (ix) Is clarification required in relation to rock and coal bursts and related pressure bursts being a principal mining hazard?
- (x) Are there any elements of the Global Industry Standards on Tailings Management that should be prescribed in the WHS (MPS) Regulation?
- (xi) Should Schedule 6 of the WHS (MPS) Regulation be amended to include sampling over 80% of a shift, require all respirable dust samples tested for silica, and include more detail on sampling of

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<sup>1</sup> <https://www.resourcesregulator.nsw.gov.au/about-us/have-your-say>

the drill and blast area, as well as areas involving mobile equipment and maintenance, coal handling preparation and mobile crushing plant?

- (xii) Should the WHS (MPS) Regulation be amended to require sampling and analysis of respirable quartz at non-coal mines, similar to the requirements in clause 86 and Schedule 6?
- (xiii) Should the WHS (MPS) Regulation be amended to provide certain exemptions for small quarries?
- (xiv) The Resources Regulator is currently addressing this issue of clarification of safety devices like oxygen candles in refuge chambers through guidance. Should the Resources Regulator's position be made explicit in the WHS (MPS) Regulation?
- (xv) Should the WHS (MPS) Regulation be amended to include a 'note' under clauses 5(2) and 5(3) of Schedule 4 to refer the reader to the defined terms of 'underground coal mine' and 'underground mine' in clause 3 of the WHS (MPS) Regulation?
- (xvi) Should emergency sealing in clause 68 of the WHS (MPS) Regulation make provision for re-entry and, if so, include an airlock?
- (xvii) Should the emergency plan include more detail in relation to testing of, and training in, the emergency plan and mine rescue? What additional detail should be included?
- (xviii) Should the WHS (MPS) Regulation be amended to include a requirement for mine operators to display aspects of the escape and rescue plan, including exits, refuges, firefighting equipment, communications and oxygen stations and to ensure mine workers have a reasonable opportunity to utilise the exits during periodic training?
- (xix) Should the WHS (MPS) Regulation be amended so that an automatic update provision (similar to that under clause 78) is applied to all references to standards in the Regulation?
- (xx) Is it appropriate to continue to refer to standards or should the relevant parts be prescribed within the WHS (MPS) Regulation?
- (xxi) Should the WHS (MPS) Regulation be amended to enable a professional engineering demonstration of an alternate means of compliance that entails a level of risk equivalent to, or better than, complying with a prescribed standard?

- (xxii) Is the Resources Regulator's *Innovation policy* sufficient for enabling consideration of innovations prevented by legislation or technical standards?
- (xxiii) Do you support the proposed amendments to the explosion-protection provisions in clauses 78(2) and 78(3) of the WHS (MPS) Regulation to make it explicit that electrical plant used in an underground coal mine must **comply** with the requirements of the certificate of conformity or Departmental approval?
- (xxiv) Do you support the proposal to amend clause 80 of the WHS (MPS) Regulation to incorporate the provisions outlined in the class exemption titled *Work Health and Safety (Mines and Petroleum Sites) Exemption (Use of Cables in Hazardous Zones) 2020* as published in the [NSW Government Gazette No 171 of 7 August 2020](#)?
- (xxv) Should the wording in clause 93 of the WHS (MPS) Regulation be amended to be consistent with clause 89 to ensure that consultation with emergency services is included when the emergency plans are tested?
- (xxvi) Do you agree with amending 128(5) of the WHS (MPS) Regulation to make exceedances of diesel particulate matter and substances and mixtures specified in clause 50 of the WHS Regulation a high potential incident?
- (xxvii) Should Schedule 3 of the WHS (MPS) Regulation be amended to include raised bore activity as a high risk activity?
- (xxviii) Should the WHS (MPS) Regulation be amended to include a requirement that at least one person who has undertaken safety training as specified by the regulator be present at an opal mine when mining activity is taking place?



## 3. Discussion of selected review recommendations

The following is a discussion on proposed amendments for each of the recommendations that we have identified as requiring further consultation prior to implementation.

### 3.1. Causal investigations

#### Review recommendation 6

Provisions in relation to 'causal' investigation should be reviewed and broadened beyond the current section 18(2)(c) of the WHS (MPS) Act and clause 14(1)(n) and (o) of the WHS (MPS) Regulation and include contributing factors and a systemic approach. This should also include formalising the Resources Regulator's 'causal investigation policy' within legislation with associated protections. Part 3 of the WHS (MPS) Act should be renamed 'incident notification and investigation' with a new head of power provided for investigation of incidents for the purpose of establishing 'causality' and future safety improvements. Industry investigations should be more professional and consistent. Industry investigation reports should be provided to the Resources Regulator within 30 days under clauses 11 and 12 of the WHS (MPS) Regulation with appropriate protections. These protections should be considered by a tripartite forum such as MSAC. Causal investigation should be separate from any investigation for the purpose of enforcement (e.g. via the current section 70(1)(b) of the WHS (MPS) Act with details concerning the different types of investigation included in the WHS (MPS) Regulation.

Recommendation 6 is intended to improve the outcomes of investigations undertaken by industry in response to a serious incident, while ensuring that contributory factors are reported and included in a systematic investigation process. This recommendation also seeks to ensure investigations of serious incidents are provided to us in a timely manner while providing protection from enforcement action, based on information in that report.

Further, the reviewer recommended that Part 3 of the WHS (MPS) Act be renamed 'Incident notification and Investigation' to include the word 'investigation' in the heading, and amended to include a head of power that provides for investigations for the purposes of establishing causality for safety improvement.<sup>2</sup> This amendment could give effect to the Causal Investigation Policy.<sup>3</sup>

<sup>2</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2013-054#pt.3>

<sup>3</sup> [https://www.resourcesregulator.nsw.gov.au/data/assets/pdf\\_file/0005/713597/Causal-investigation-policy.pdf](https://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0005/713597/Causal-investigation-policy.pdf)

This recommendation proposes that we apply the Queensland model in the *Coal Mine Safety and Health Act 1999* (Qld) where the Senior Site Executive (SSE) must provide an investigation report to the regulator within 30 days for a serious injury or High Potential Incident.<sup>4</sup> Under this model, the investigation report cannot be used as evidence against the SSE or persons named in the report.

In NSW, the WHS (MPS) Act does not require the appointment of an SSE, with the mine or petroleum site operator having many of the obligations that an SSE has in Queensland. As per clauses 11 and 12 of the WHS (MPS) Regulation, it is the mine or petroleum site operator's obligation to record and review control measures, and must have procedures in their Safety Management System (SMS) on how to investigate incidents.<sup>5</sup> The reviewer has recommended that an SMS should include contributing factors and a systemic approach to investigations by the mine or petroleum site operator beyond the current requirements in subclauses 14(n) and (o) of the WHS (MPS) Regulation.<sup>6</sup> Further, the reviewer considers it appropriate for serious incident notification reports to be provided to the Regulator in a timely manner with similar protections as provided in the Queensland model.

The reviewer indicated that MSAC should consider the protections appropriate for industry investigation of incidents.

The causal investigation policy was implemented to complement existing investigation provisions under the WHS laws and the requirement for operators to undertake reviews of control measures following incidents. The policy provides that for certain incidents, the causal factors can be quickly identified and communicated to industry.

The Resources Regulator's position is that the policy has been effective in achieving its intended aim and it's not necessary to prescribe the approach legislatively. The causal investigation policy approach was developed to ensure learnings, once known, were quickly disseminated but so as not to fetter the enforcement mechanisms within the broader *Work Health and Safety Act 2011* legislative scheme. The Resources Regulator is of the view that this balance has been achieved under the current policy approach.

The Resources Regulator believes any such amendments would be required to be made to the WHS Act and would need to be considered by SafeWork NSW in the context of NSW's commitment to the model Work Health and Safety laws.

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<sup>4</sup> <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1999-039>

<sup>5</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.11>

<sup>6</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.14>

**Questions**

- (i) Should there be two types of investigations contained in the WHS (MPS) Act?
- (ii) Should persons named in causal investigation reports provided to the Resources Regulator be protected from having that information used as evidence against them in the event that enforcement action is taken?

**Note:** Responses to these questions will be provided to MSAC for its consideration.

## 3.2. Safety and health representatives

Part 5 of the WHS (MPS) Act sets out provisions for safety and health representatives (SHRs) with specified functions for industry SHR that apply across coal mines in NSW or, in the case mine SHRs, are limited to the coal mine where they work.<sup>7</sup>

Provisions for SHRs – formerly known as check inspectors – existed in various forms in separate mine safety legislation in NSW for either coal mines or metalliferous and extractive mines prior to the introduction of general occupational health and safety legislation and requirements for consultation with workers and worker representatives.

Consistent with the national agreements, these provisions essentially preserved the functions of these worker representatives to ensure there was no reduction in standards but in relation to coal mines only. As the WHS (MPS) Act forms part of the WHS Act, changes were made where appropriate to interface with the WHS Act provisions for health and safety representatives which continue to apply at coal mines as modified by the WHS (MPS) Act. The Statutory Review Report made several recommendations to improve or clarify the operation of the legislative scheme and the ensuing outcomes.

### 3.2.1. Mine SHR participation in investigations

**Recommendation 7**

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).

<sup>7</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2013-054#pt.5>

The statutory review recommends that the functions of mine SHRs be amended to enable them to 'participate' in investigations, as provided for industry SHRs under the WHS (MPS) Act. This would mean that a mine SHR would be able to perform this function as well as an industry SHR.

Under section 42(3) of the WHS (MPS) Act, a mine SHR may observe any formal investigation conducted by or on behalf of the mine operator of an event or other occurrence at the coal mine that must be notified to the regulator.<sup>8</sup> The proposed change may involve a more active role for mine SHRs in the decision making process and would be a departure from their role under the previous mine safety legislative scheme which provided for mine SHRs to 'observe' only.

Under the current provisions, a mine SHR may escalate to an industry SHR any concerns to enable more active participation of a worker representative in an investigation. However, this may not address instances where an industry SHR is not available to participate in several investigations at a time.

The role of mine SHRs in investigations is one of several functions that are in addition to those of a health and safety representative (HSR) under the WHS Act. This change would apply to the mine SHR elected for a mine under the WHS (MPS) Act and would not affect the functions of any HSRs elected under the WHS Act to represent particular work groups in relation to a mine.

A mine SHR for a coal mine has all the functions of a health and safety representative under the WHS Act for a work group at the mine, as if the work group comprised all the workers at the mine.

The Resources Regulator's position is that any amendment to the role of mine SHR should be considered in the context of the functions of HSRs under the WHS Act and would need to be considered by SafeWork NSW in the context of NSW's commitment to the model Work Health and Safety laws.

### Question

- (iii) Should the function of mine SHRs be expanded beyond the HSR functions under the WHS Act and previous mine safety legislation to enable them to participate in investigations? If so, are there any limitations that may be warranted on its exercise?

<sup>8</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2013-054#sec.42>

### 3.2.2. Number and coverage of industry safety and health representatives

**Recommendation 8**

Section 28 of the WHS (MPS) Act should be amended to include a new subsection 1(c) stating that an eligible person must satisfy probity checks, and a new subsection (2B) stating that the Minister may appoint additional persons as industry health and safety representatives if they meet the eligibility requirements in section 28(1) and there are no fewer than four persons appointed under section 28(2) and (2A). The Minister should seek additional evidence of costs and benefits and obtain MSAC advice before proposing amendments to extend industry safety and health representative roles beyond coal in Part 5, Division 2 of the WHS (MPS) Act.

It is recommended that to be eligible to be appointed as an industry SHR, a person must satisfy probity checks carried out on behalf of the Minister. This would formalise in legislation the current practice for any Ministerial appointments (including where nominated by industry) and extends Government policy regarding any appointment for integrity screening.

In addition, it is recommended that a new provision be inserted to enable the Minister to appoint additional industry SHRs even if there are already four industry SHRs so long as they meet the eligibility requirements and there are no fewer than four persons appointed which have been nominated by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU). Currently, the Minister must appoint a person as an industry SHR if they are nominated by the CFMMEU and there are less than four industry SHRs.

While the current legislation does not limit the number of CFMMEU nominated eligible persons who may be appointed as industry SHRs, past and current practice is to have four persons exercising the functions of industry SHRs at a given time. The proposed new provision, however, would enable eligible persons who may not be nominated by the CFMMEU to be appointed by the Minister. The Minister could have discretion to determine when additional industry SHRs may be appointed if additional resources are considered warranted (for example, to participate in investigations).

**Question**

(iv) Do you have any concerns regarding the adoption of the amendments for appointment of industry SHRs by the Minister?

In response to public consultation, the statutory review also considered the issue of extending the provisions for industry SHRs to apply in respect of metalliferous and extractive mines. This would represent a significant change to the legislative scheme that has applied to this mining sector.

The equivalent of mine SHRs employed at a mine have previously been available in this sector but, following industry consultation, they were not continued under the WHS (MPS) Act. The HSR provisions in the WHS Act operate in lieu of any specific mining-related worker representative.

The statutory review concluded that there was insufficient information available at this time to determine whether extending the industry SHR provisions to this mining sector is reasonable and warranted.

### Question

(v) Do you agree with extending industry SHRs to mines other than coal mines?

**Note:** Responses to this question will be provided to MSAC for its consideration.

## 3.2.3. Not to cause unreasonable delay

### Recommendation 9

The arrangements for safety and health representatives for coal mines in Part 5 of the WHS (MPS) Act should include similar provisions to sections 146 and 148 of the WHS Act when industry safety and health representatives and mine safety and health representatives are exercising WHS (MPS) Act powers, namely to not unreasonably and intentionally delay, hinder, obstruct or disrupt work, and to not use or disclose documents for a non-WHS related purpose.

The WHS (MPS) Act forms part of the WHS Act. To be eligible to be appointed as an industry SHR under the WHS (MPS) Act, a person must be a WHS entry permit holder the WHS Act.

For consistency, it is proposed that it is appropriate that provisions similar to sections 146 and 148 of the WHS Act – for example, not to intentionally and unreasonably delay, hinder or obstruct any person or disrupt any work at a workplace, or otherwise act in an improper manner - should also apply to persons exercising the functions of an industry SHR under the WHS (MPS) Act.

### Question

(vi) Should the WHS (MPS) Act be amended to include provisions equivalent to sections 146 and 148 of the WHS Act?

### 3.3. Boards of Inquiry

#### Recommendation 10

The WHS (MPS) Act section 56(1) Board of Inquiry purpose statement should be expanded to include ‘contributing factors’ and to explicitly allow for high potential and emerging and systemic issues and the making of potential findings and recommendations to reduce the likelihood of future accidents and incidents.

Section 56(1) of the WHS (MPS) Act provides that the purpose of a Board of Inquiry is to inquire into the nature, circumstances and causes or potential causes of the incident or safety matter and provide findings and recommendations in order to avoid accidents or incidents in the future.<sup>9</sup>

It is recommended that section 56(1) of the WHS (MPS) Act be amended to include ‘inquiry into contributing factors’ as one of the purposes of a board of inquiry.

Section 56(2) of the WHS (MPS) Act states that the Minister provides terms of reference for the inquiry when constituting the Board of Inquiry.<sup>10</sup> At that time, the Minister can include additional detail, such as details relating to the purpose, and emerging and systemic issues.

#### Question

- (vii) Should the WHS (MPS) Act be amended to revise the purpose statement for Boards of Inquiry to include ‘contributing factors’, and to explicitly allow for high potential emerging and systemic issues and the making of potential findings and recommendations to reduce the likelihood of future accidents and incidents?

### 3.4. Mining and Petroleum Competence Board

#### 3.4.1. Independent Chair

#### Recommendation 11

The Chairperson of the Mining and Petroleum Competence Board should be required to be an independent person similarly to the Chairperson of the Mine Safety Advisory Council and Part 8 Division 2 of the WHS (MPS) Act and Part 11 of the WHS (MPS) Regulation 2014 should be amended accordingly.

<sup>9</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2013-054#sec.56>

<sup>10</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2013-054#sec.56>

Part 8 of the WHS (MPS) Act provides for the establishment of two statutory bodies, being MSAC and the Mining and Petroleum Competence Board (MPCB).<sup>11</sup> This part sets out the functions, membership, procedures and other matters relating to these boards with additional provisions set out in the WHS (MPS) Act and Regulation.

Subclause 160(1)(d) of the WHS (MPS) Regulation requires that the chairperson of MSAC, who is appointed by the Minister, to be independent of the employer and union nominating bodies.<sup>12</sup> Whilst the chairperson of the MPCB is also appointed by the Minister, there is currently no regulatory requirement that the chairperson is independent of the nominating bodies. In practice, the Minister does appoint a chairperson that is independent.

For consistency with the broader NSW Government principles on conflicts of interest and probity, and to codify the current practice, the Resources Regulator intends to amend the Regulation so that the chairperson of the MPCB is to be independent of the nominating bodies.

**The NSW Government has agreed to adopt this recommendation.**

## 3.4.2. Functions of the board

Section 67(3)(c) of the WHS (MPS) Act allows for the MPCB to engage consultants, develop competence standards or cause competence standards to be developed, and assess a person's competence, cause a person's competence to be assessed or accept an assessment of a person's competence.<sup>13</sup>

In the administration of these functions, the MPCB appoints assessors (i.e. examination panel members) based on their experience and qualifications held. Assessors are not appointed on the basis of their role in industry or their position title.

To remove doubt as to the role of assessors, the Resources Regulator intends to amend the WHS (MPS) Regulation to reflect that assessors are appointed by the MPCB as 'assessors'.

### Question

(viii) Should the WHS (MPS) Regulation be amended to clarify that the MPCB can appoint a person as an assessor?

<sup>11</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2013-054#pt.8>

<sup>12</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.160>

<sup>13</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2013-054#sec.67>



### 3.5. Rock and coal burst

**Recommendation 20:**

Notwithstanding the provisions of Work Health and Safety (Mines and Petroleum Sites) Regulation 2014 clauses 179(j), 23(1) and Schedule 1, consideration should be given by the Resources Regulator to clarifying that rock and coal bursts and related pressure bursts are a principal mining hazard (or an important element of an existing principal mining hazard).

Rock burst and coal burst events are associated with mining induced seismic activity; that is, an event that has been triggered by some form of mining process or activity. The statutory review recommended further consideration be given to clarifying that rock bursts, coal bursts and related pressure bursts are a principal hazard (or an important element of an existing principal hazards).

The WHS (MPS) Regulation defines a principal hazard as any activity, process, procedure, plant, structure, substance, situation or other circumstance relating to the carrying out of mining operations that has a reasonable potential to result in multiple deaths in a single incident or a series of recurring incidents.<sup>14</sup>

A principal hazard is either prescribed as a principal hazard in the WHS (MPS) Regulation or is otherwise identified as meeting these conditions. If a principal hazard is prescribed, the additional matters in Schedule 1 must be considered in a principal hazard management plan.

The occurrence of a rock burst, coal burst and related pressure bursts can lead to ground or strata failure, which is specified as a principal hazard. Clause 44B of the WHS (MPS) Regulation addresses the requirement to manage risks to health and safety associated with mining induced seismic activity and this must be considered in developing the control measures to manage the risks of ground or strata failure.<sup>15</sup>

Rock bursts and coal bursts at underground coal mines were specifically included as dangerous incidents that must be notified to the Resources Regulator, even if no one was in the vicinity at the time of the incident. Clauses 10 to 12 in the WHS (MPS) Regulation require relevant control measures to be reviewed in response to such a notifiable incident, and a record kept in response to these notifiable incidents.

A factsheet, *Dangerous incident – coal burst or rock burst* was published in August 2018 providing guidance to mine operators on coal burst and rock burst and related events at underground mines.<sup>16</sup>

<sup>14</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.5>

<sup>15</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.44B>

<sup>16</sup> [https://www.resourcesregulator.nsw.gov.au/\\_data/assets/pdf\\_file/0008/828476/PUB18-146-DOI-NEW-FACTSHEET-New-dangerous-incidents-coal-burst-and-rockburst.pdf](https://www.resourcesregulator.nsw.gov.au/_data/assets/pdf_file/0008/828476/PUB18-146-DOI-NEW-FACTSHEET-New-dangerous-incidents-coal-burst-and-rockburst.pdf)

This includes events which may be an indicator of increasing rock burst or coal burst potential but are not notifiable that should be investigated further.

**Question**

- (ix) Is clarification required in relation to rock and coal bursts and related pressure bursts being a principal mining hazard?

### 3.6. Incorporation of Global Industry Standard on Tailings Management

**Recommendation 23**

The Resources Regulator should reference the August 2020 Global Industry Standard on Tailings Management in its guidance material and consider potential legislative amendments to incorporate aspects of the standard.

The Resources Regulator has recently amended Schedule 3 to the WHS (MPS) Regulation on High Risk Activities (HRAs) to extend requirements for an emplacement area at coal mines into tailings storage facilities for all mines.<sup>17</sup> Clause 27 of the WHS (MPS) Regulation sets out the information and documents that must be provided in relation to the activity.<sup>18</sup>

The Resources Regulator has a web page dedicated to Tailings Storage Facilities and refers to a number of standards from Dam Safety NSW; The Australian National Committee on Large Dams (ANCOLD) guidelines and the Global Industry Standards on Tailings Management.<sup>19</sup>

The International Council on Mining and Metals (ICMM), the United Nations Environment Programme (UNEP) and the Principles for Responsible Investment (PRI) co-convened the Global Tailings Review to establish an international standard for the safer management of tailings storage facilities.<sup>20</sup>

The Global Industry Standards on Tailings Management provides six topic areas, 15 principles and 77 associated requirements. The six topics and 15 principles are:

<sup>17</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sch.3>

<sup>18</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sch.3-sec.27>

<sup>19</sup> <https://www.resourcesregulator.nsw.gov.au/environment/tailings-storage-facilities>

<sup>20</sup> <https://globaltailingsreview.org/>

## ■ **Topic I: Affected Communities**

- 1. Respect the rights of *project-affected people* and *meaningfully engage* them at all phases of the *tailings facility lifecycle*, including closure.

## ■ **Topic II: Integrated Knowledge Base**

- 2. Develop and maintain an interdisciplinary *knowledge base* to support safe *tailings* management throughout the *tailings facility lifecycle*, including closure.
- 3. Use all elements of the *knowledge base* – social, environmental, local economic and technical – to inform decisions throughout the *tailings facility lifecycle*, including closure.

## ■ **Topic III: Design, Construction, Operation and Monitoring of the Tailings Facility**

- 4. Develop plans and design criteria for the *tailings facility* to minimise risk for all phases of its *lifecycle*, including closure and post closure.
- 5. Develop a *robust design* that integrates the *knowledge base* and minimises the risk of failure to people and the environment for all phases of the *tailings facility lifecycle*, including closure and post-closure.
- 6. Plan, build and operate the *tailings facility* to manage risk at all phases of the *tailings facility lifecycle*, including closure and post-closure.
- 7. Design, implement and operate monitoring systems to manage risks at all phases of the facility lifecycle, including closure.

## ■ **Topic IV: Management and Governance**

- 8. Establish policies, systems and accountabilities to support the safety and integrity of the *tailings facility*.
- 9. Appoint and empower an *Engineer of Record*.
- 10. Establish and implement levels of review as part of a strong quality and risk management system for all phases of the *tailings facility lifecycle*, including closure.
- 11. Develop an organisational culture that promotes learning, communication and early problem recognition.

- 12. Establish a process for reporting and addressing concerns and implement whistle blower protections.
- **Topic V: Emergency Response and Long-term Recovery**
  - 13. Prepare for emergency response to *tailings facility* failures.
  - 14. Prepare for long term recovery in the event of a *catastrophic failure*.
- **Topic VI: Public Disclosure and Access to Information**
  - 15. Publicly disclose and provide access to information about the *tailings facility* to support public accountability.

There is considerable overlap between the principles in Topics III and IV, the requirements to be provided to the Resources Regulator as part of the HRA requirements, and the requirements as part of an inundation or inrush principal hazard management plan as set out in Schedule 1 to the WHS (MPS) Regulation.<sup>21</sup> Preparation for an emergency in Topic V is also a requirement in Division 6 of the WHS (MPS) Regulation.<sup>22</sup>

Areas where the Global Standard goes further than the current WHS (MPS) Laws are that an executive is to be identified as being responsible for the tailing's management. Further, an Engineer of Record is to be identified as part of the management structure. The Resources Regulator may consider amending clause 129(5) of the WHS (MPS) Regulation to include the persons nominated to be the executive responsible and the Engineer of Record.<sup>23</sup>

#### Question

- (x) Are there any elements of the Global Industry Standards on Tailings Management that should be prescribed in the WHS(MPS) Regulation?

### 3.7. Review of schedule 6 (sampling airborne dust at coal mines) of the regulation

<sup>21</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sch.1>

<sup>22</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#pt.2-div.6-sdiv.1>

<sup>23</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.129>

**Statutory Review Recommendation 27:**

The Resources Regulator should consider whether: sampling of airborne dust at coal mines in Schedule 6 of the WHS(MPS) Regulation:

- Part 1 clause 2 of the Work Health and Safety (Mines and Petroleum Sites) Regulation 2014 should be amended to change the minimum sampling period from at least five hours to a minimum of 80% of a shift
- Part 1 clause 2(8) should be strengthened to require analysis of the level of respirable silica for each respirable dust sample, and for surface coal mines
- Part 3 clause 7 should include more detail on sampling of the drill and blast area, and areas involving mobile equipment and maintenance, coal handling preparation and mobile crushing plant.

Schedule 6 of the WHS(MPS) Regulation is the mandatory minimum worker exposure sampling required in coal mines. The Resources Regulator published *A Guide to the Development of an Airborne Contaminants Principal Hazard Management Plan*<sup>24</sup> that is required as part of the mine operator's safety Management System. The guide includes a section on how to assess worker exposure to air contaminants and the development of sampling strategies by a competent person and statistical analysis of the results. This guide is applicable to all types of mining operations.

The statutory review provided detailed stakeholder views on specific control measures in clause 86<sup>25</sup> and Schedule 6 of the WHS (MPS) Regulation<sup>26</sup> applying to **all coal mines** in relation to the **sampling and analysis of the airborne dust**.

Coal Services submitted that the minimum standard required for sampling of airborne dust, as specified in Schedule 6 to the WHS (MPS) Regulation should be amended to reflect changes in working arrangements in NSW coal operations, differences between surface operations and underground operations, and identify gaps in what is required to be sampled and analysed that affect the ability to fully appreciate the control strategies required. They suggested an analysis of the level of respirable quartz, samples of respirable dust (where cement products are applied), and sampling at other (surface) coal mines should be undertaken for completeness, and to reflect the differences with underground operations. Coal Services provided the following detailed amendment suggestions for the WHS (MPS) Regulation:

<sup>24</sup> [https://www.resourcesregulator.nsw.gov.au/data/assets/pdf\\_file/0003/823422/Airborne-Contaminants-PHMP-Guide.pdf](https://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0003/823422/Airborne-Contaminants-PHMP-Guide.pdf)

<sup>25</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.86>

<sup>26</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sch.6>

- Amend Part 1 clause 2(2) of Schedule 6 from ‘over a period of at least 5 hours’ to ‘a minimum of 80% of a shift’ in duration, to reflect the changing nature of shift work in NSW.
- Amend Part 1 clause 2(8) of Schedule 6 to include an analysis of the level of respirable quartz to be required for each respirable dust sample.
- Amend clause 5(3) of Schedule 6 to replace the current statement with ‘samples of respirable dust are required to be taken at least once every six months.’
- Amend the heading of Part 3 of Schedule 6 from ‘Other coal mines—sampling’ to ‘Surface coal mines—sampling’.
- Amend Part 3 of Schedule 6 to state the following:

## **7 Surface Drill and Blast Area**

- (1) Samples are to be taken in each part of a coal mine where drilling and blasting activities are carried out, including from the breathing zone of at least five persons including, so far as is reasonably practicable:
  - a) two persons completing shotfirer tasks
  - b) two persons operating drills
  - c) a person exposed to airborne dust.
- (2) Samples of respirable dust are to be taken at least once every six months.
- (3) Samples of inhalable dust are to be taken at least once every 12 months.
- (4) In the case of a mine at which there is more than one crew or shift, samples must be taken at the frequency specified in subclauses (2) and (3) in respect of each crew or shift.

## **8 Surface Mobile Equipment and Maintenance**

- (1) Samples are to be taken in each part of a coal mine where mobile equipment and maintenance activities are carried out, including from the breathing zone of at least five persons including, so far as is reasonably practicable:
  - d) three persons operating mobile equipment
  - e) two persons completing maintenance activities
- (2) Samples of respirable dust are to be taken at least once every 12 months.
- (3) Samples of inhalable dust are to be taken at least once every 12 months.
- (4) In the case of a mine at which there is more than one crew or shift, samples must be taken at the frequency specified in subclause (2) in respect of each crew or shift.

## **9 Coal Handling Preparation and Mobile Crushing Plant**

- (1) Samples are to be taken in each part of a coal mine where coal handling preparation and mobile crushing plant activities are carried out, including from the breathing zone of at least five persons including, so far as is reasonably practicable:

- (a) five persons working in or around coal handling facilities or mobile crushing plant.
- (2) Samples of respirable dust and samples of inhalable dust are to be taken at least once every 12 months.

The AWU suggested that the requirements in clause 86 and Schedule 6 of the WHS (MPS) Regulation should apply to all mines and submitted that although all mining operators (including quarry operators) are required to regularly monitor and test for the presence of such hazards and undertake actions to reduce exposure to relevant workers, broad non-compliance with these requirements has been reported.

#### Question

- (xi) Should Schedule 6 of the WHS (MPS) Regulation be amended to include sampling over 80% of a shift, require all respirable dust samples tested for silica and include more detail on sampling of the drill and blast area, and areas involving mobile equipment and maintenance, coal handling preparation and mobile crushing plant?
- (xii) Should the WHS (MPS) Regulation be amended to require sampling and analysis of respirable quartz at non-coal mines, similar to the requirements in clause 86 and Schedule 6?

### 3.8. Certain exemptions for small quarries

#### Recommendation 18

The Resources Regulator should consider broadening the exemptions in Clause 184 for gravel gemstone, opal and tourist mines to include low risk 'tier 3' mine sites such as small surface gravel pits used by regional and remote councils for roadworks and small exploration sites.

Feedback from stakeholders during the review process suggested that the levels of regulation applying to lower risk mining, such as small quarries, gravel pits used periodically by local councils for road works, and extraction operations, were excessive.

In response, we intend to amend the WHS (MPS) Regulation to apply similar exemptions to small quarries that are currently available to certain gemstone mines and tourist mines in Clause 184 of the WHS (MPS) Regulations.<sup>27</sup> Clause 184 provides exemptions to those sites from some provisions of the WHS (MPS) Regulation relating to control of risk and contents of the safety management system regarding principal hazard management plans and principal control plans.

Mine operators must, however, set out the systems, procedures, plans and other control measures that are used to control any risks to health and safety at the mine associated with the mine's major hazards.

<sup>27</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.184>

We have already introduced a three-tier classification system for quarrying operations with the aim of better targeting regulatory resources and managing competency requirements based on risk. Tier-3 quarries in the scheme have been exempted from certain requirements in relation to the quarry manager statutory function.<sup>28</sup> The mine operator of a tier-3 quarry may now nominate a competent person who does not hold a practising certificate as quarry manager, with this competent person being exempt from holding a practising certificate to be a quarry manager at a tier-3 quarry.

We intend to amend the WHS (MPS) Regulation so that a small quarry is defined to reflect the definition in the three-tiered classification system, which states:

‘Tier-3 quarry means a mine, other than an underground mine or a coal mine, where the mining operations meet all the following criteria:

- (a) 5 or less workers (FTE), including the quarry manager and contractors
- (b) does not carry out dredging or blasting (explosives) activities
- (c) does not extract more than 30,000 cubic meters of extractive material for sale or reuse per year.’

We will also publish additional guidance for small quarries as recommended by the Reviewer in recommendation 19.

#### Question

- (xiii) Should the WHS (MPS) Regulation be amended to provide certain exemptions for small quarries?

### 3.9. Schedule 4 (prohibited items) of the WHS (MPS) Regulation

#### Statutory review recommendation 24

The Resources Regulator should seek amendments linked to clause 34 of the WHS (MPS) Regulation that clarify: that safety devices like oxygen candles can be used in refuge chambers during an emergency under clause 3(1)(d) of Schedule 4 to the WHS (MPS) Regulation; and that the prohibitions in relation to explosives testing and exploders storage and battery changing at clause 5(2) and 5(3) of Schedule 4 should refer to while ‘underground at an underground coal mine’ rather than anywhere on site.

<sup>28</sup> [https://www.resourcesregulator.nsw.gov.au/data/assets/pdf\\_file/0007/1207915/Tier-3-quarry-managers-class-exemption-March-2020.pdf](https://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0007/1207915/Tier-3-quarry-managers-class-exemption-March-2020.pdf)



## Use of safety devices like oxygen candles in refuge chambers

Feedback provided during the Statutory Review provided that the prohibition on ignition sources in clause 3(1)(d) of the WHS (MPS) Regulation should not include safety devices such as oxygen candles or the like in a refuge chamber if these are specifically included in the equipment schedule of the refuge chamber by the manufacturer or following an appropriate risk assessment.

The Resources Regulator published a fact sheet on this issue in August 2019 titled ‘*Use of oxygen candles in refuge chambers at underground mines*’.<sup>29</sup> Our position on this issue is that an oxygen candle is not a prohibited item for use in a refuge chamber in underground metalliferous mines as it does not have a naked flame.

### Question:

- (xiv) The Resources Regulator is currently addressing this issue of clarification of safety devices like oxygen candles in refuge chambers through guidance. Should the Resource Regulator’s position be made explicit in the WHS (MPS) Regulation?

## Prohibitions in relation to explosives testing and exploders storage and battery changing

Feedback provided during the Statutory Review demonstrated that the wording of clauses 5(2)( and 5(3) of Schedule 4 to the WHS (MPS) Regulation should be amended to clarify the intention of the clauses, and the circumstances in which the clauses apply.<sup>30</sup>

The definition of ‘underground coal mine’ and ‘underground mine’ from clause 3 of the WHS (MPS) Regulation are as follows:

- **Underground coal mine** means an underground mine that is a coal mine.
- **Underground mine** means that part of a mine that is beneath the surface of the earth and includes plant and structures that extend continuously from the surface into that part of the mine but does not include a part of a mine in which highwall mining is being carried out.

<sup>29</sup> Fact sheet ‘Use of oxygen candles in refuge chambers at underground mines’ available at [www.resourcesregulator.nsw.gov.au/data/assets/pdf\\_file/0008/1153097/Fact-Sheet-Use-of-oxygen-candles-in-refuge-chambers-in-underground-metalliferous-mines.pdf](http://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0008/1153097/Fact-Sheet-Use-of-oxygen-candles-in-refuge-chambers-in-underground-metalliferous-mines.pdf)

<sup>30</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sch.4-sec.5>

Based on these definitions, it is clear that the prohibitions in clauses 5(2) and 5(3) of Schedule 4 do not apply to anywhere on site, but rather, only to those parts of a mine as described in the definition of 'underground mine'. Therefore, our position is that the language in these clauses does not require correction. However, one option could be to include a 'note' under clauses 5(2) and 5(3) of Schedule 4 to remind the reader of the meaning of 'underground coal mine' and 'underground mine' in clause 3 of the Regulation.

#### Question

- (xv) Should the WHS (MPS) Regulation be amended to include a 'note' under clauses 5(2) and 5(3) of Schedule 4 to refer the reader to the defined terms of 'underground coal mine' and 'underground mine' in clause 3 of the WHS (MPS) Regulation?

### 3.10. Emergency sealing

#### Recommendation 26

The Resources Regulator should review whether emergency sealing in clause 68 of the WHS (MPS) Regulation should make provision for re-entry and if so, include an airlock.

Feedback provided during the statutory review recommended that clause 68 of the WHS (MPS) Regulation should be amended to include a reference that an airlock is included in emergency sealing arrangements to allow for re-entry to be carried out without damaging the integrity of an emergency seal.<sup>31</sup>

The emergency sealing requirements for underground coal mines in clause 68 of the WHS (MPS) Regulation do not include re-entry provisions. However, there are re-entry provisions related to sealing underground coal mines in Queensland and New Zealand, as follows:

- In Queensland, the site senior executive must ensure the underground coal mine, when sealed, has facilities allowing:
  - persons to re-enter the mine through the entrance
  - large mobile equipment to enter or exit the mine through an airlock.<sup>32</sup>

<sup>31</sup> The NSW Mines Rescue submission is available at [www.resourcesregulator.nsw.gov.au/about-us/have-your-say/work-health-safety-mines-and-petroleum-sites-act-and-regulation-review](http://www.resourcesregulator.nsw.gov.au/about-us/have-your-say/work-health-safety-mines-and-petroleum-sites-act-and-regulation-review)

<sup>32</sup> Refer clause 156(3)(c)-(d) of the Coal Mining Safety and Health Regulation 2017 (QLD)

- In New Zealand, the mine operator of an underground coal mine must ensure that when sealed, the mining operation has facilities allowing re-entry by people to the underground parts of the mining operation.<sup>33</sup>

**Question**

- (xvi) Should emergency sealing in clause 68 of the WHS (MPS) Regulation make provision for re-entry and if so, include an airlock?

### 3.11. Training, testing and display of the emergency plan in underground coal mines

**Recommendation 29:**

The Resources Regulator, with input from the Mine Safety Advisory Council, should review whether in clauses 93 and 95 and Schedule 7 clause 4(3) to the WHS (MPS) Regulation there should be additional prescription in relation to testing of, and training in relation to, the emergency plan, with a minimum workforce to be trained in mine rescue for underground coal mines and possible other underground mines.

Under clause 88 of the WHS (MPS) Regulation, the operator of a mine or petroleum site has a duty to prepare an emergency plan.<sup>34</sup> Clause 93 relates to the testing of the emergency plan and provides that the operator of a mine or petroleum site must test the emergency plan at least every twelve months and following a significant revision of the plan.<sup>35</sup> Clause 95 relates to the training of workers and provides that the operator of a mine or petroleum site must ensure workers are trained in the emergency plan.<sup>36</sup> Clause 4(3) to Schedule 7 relates to the arrangements for mines rescue required that the arrangements state the minimum mines rescue training, arrangements for mine operators in the vicinity to assist in an emergency, how inertisation equipment is to be used and the procedures for mines rescue.<sup>37</sup>

Feedback from stakeholders during the review process suggested that additional detail could be included in the emergency plan, such as how the plan is tested and the type of training, the level of

<sup>33</sup> Refer clause 184(1)(d)(iii) of the Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2016 (NZ)

<sup>34</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.88>

<sup>35</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.93>

<sup>36</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.95>

<sup>37</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sch.7-sec.4>

testing and the percentage of the workforce involved in testing the plan and the percentage trained in mines rescue.

The reviewer recommended seeking further technical, employer and workforce perspectives and consider whether there should be additional prescription relating to testing of and training in the emergency plan including a minimum number of staff trained in mine rescue for underground coal mines and other underground mines.

### **Question**

(xvii) Should the emergency plan include more detail in relation to testing of, and training in, the emergency plan and mine rescue? What additional detail should be included?

### **Recommendation 30**

The emergency plan and associated provisions in the Work Health and Safety (Mines and Petroleum Sites) Regulation 2014 should require specific details of the underground coal mine escape and rescue plan to be displayed at all times with key features such as exits, refuges, firefighting equipment, communications and oxygen stations clearly indicated. Mine workers should have a reasonable opportunity to utilise the exits during periodic training.

Stakeholder feedback further suggested that the escape and rescue plan should be displayed at all times. While there is a requirement to keep a copy of the emergency plan on site and available request, the Reviewer recommends that specific details of the escape and rescue plan, including exits, refuges, firefighting equipment, communications and oxygen stations, should be displayed at all times.

### **Question**

(xviii) Should the WHS (MPS) Regulation be amended to include a requirement for mine operators to display aspects of the escape and rescue plan, including exits, refuges, firefighting equipment, communications and oxygen stations and to ensure mine workers have a reasonable opportunity to utilise the exits during periodic training?

### 3.12. Penalty amounts linked to Consumer Price Index

**Recommendation 14:**

Consistent with changes made to the WHS Act and the WHS Regulation, penalty amounts under the WHS (MPS) Act and WHS (MPS) Regulation should be amended to specify penalty units and desirably should be automatically indexed with the Consumer Price Index.

The penalties for offences under the WHS (MPS) Act and WHS (MPS) Regulation are currently set as monetary amounts that do not reflect the seriousness of the offences. By comparison, the penalties for offences under the NSW WHS Act are expressed in penalty units that maintain their value in terms of the Consumer Price Index, calculated as set out in Part 13 Division 2A of the WHS Act.<sup>38</sup>

Part 13 Division 2A of WHS Act provides that penalties are expressed as a number of penalty units, with the monetary value of the penalty being the number of dollars obtained by multiplying the value of a penalty unit by the number of penalty units. The value of a penalty unit under Part 13 Division 2A was set as \$100 for the 2019-20 financial year and is subject to CPI for each subsequent financial year, with the method of calculation for CPI set out in Division 2A.

This recommendation could be implemented by inserting a Division analogous to Part 13 Division 2A of the WHS Act into the WHS (MPS) Act and amending all sections of the WHS (MPS) Act that currently state a penalty of a monetary figure to a number of penalty units that reflect the seriousness of the offence.

**The NSW Government has agreed to adopt this recommendation.**

### 3.13. References to all standards in the regulation to be reviewed

**Statutory review recommendation 16**

References to all standards in the Work Health and Safety (Mines and Petroleum Sites) Regulation 2014 should be reviewed. Some such as AS/NZS 1972 in clause 80(3)(b) should be updated with Resources Regulator consideration given to automatically updating to the latest version or whether enduring mining and petroleum related elements in some standards are better specified in the

<sup>38</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2011-010#pt.13-div.2A>

Regulation or in a code of practice. The Resources Regulator, in consultation with the Mining and Petroleum Competence Board should consider a formal provision to enable a professional engineering demonstration of an alternate means of compliance that entails a level of risk equivalent to, or better than, following a standard.

There are currently 25 separate references to standards in the Regulation. The majority of these references (20 of the 25) apply to underground coal mines, three apply to all coal mines and two apply to all mines and petroleum sites. The Reviewer's recommendation that AS/NZS 1972 in clause 80(3)(b) should be updated is addressed in section 4.3 of this discussion paper 'Use of cables in the hazardous zone'.

Consideration should be given to automatically updating the WHS (MPS) Regulation to reference the latest version of standards. Nine of the 25 references in the WHS (MPS) Regulation are to standards which have been superseded by a more recently published edition. However, as pointed out by Ampcontrol in their submission *"Standards are revised independently either by adoption of International Standards or locally by Standards Australia. The Resources Regulator does not have control of this process or the content of the revised Standard. A revision to the Standard has the immediate effect of altering Regulatory requirements."*

Clause 78 of the WHS (MPS) Regulation already contains an 'automatic update' provision which applies to standards referenced within that clause.<sup>39</sup> This enables compliance with any updated edition of the standard or any equivalent International Electrotechnical Commission Standard. Thirteen of the 25 references to standards in the Regulation are contained within clause 78. Consideration should be given to whether this 'automatic update' provision should be applied to the other 12 references to standards in the Regulation.

Notwithstanding the proposed automatic update provision in clause 78, the Regulator proposes to amend the note in clause 78(3)(b)(i) of the WHS (MPS) Regulation as this reference is not correct in the latest edition of the Standard. The note currently reads:

See table 2.1 of Australian and New Zealand Standard AS/NZS 60079.14:2009 *Explosive atmospheres—Part 14: Electrical installations design, selection and erection for the explosion protection techniques that achieve equipment protection level "Mb"*.

We intend to amend the note to state:

See Appendix ZZ table 2 of Australian and New Zealand Standard AS/NZS 60079.14:2017 *Explosive atmospheres—Part 14: Design selection, erection and initial inspection for the explosion protection techniques that achieve equipment protection level "Mb"*.

<sup>39</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.78>

**Question**

- (xix) Should the WHS (MPS) Regulation be amended so that an automatic update provision (similar to that under clause 78) is applied to all references to standards in the Regulation?

## Include the elements of the Standard in the regulation

The Reviewer recommended consideration be given to whether enduring mining and petroleum related elements in some standards are better specified in the WHS (MPS) Regulation or in a code of practice (as opposed to referring directly to the Standard in the WHS (MPS) Regulation). This approach aligns with recommendation 31a from the Final report of the Review of the model Work Health and Safety laws<sup>40</sup> (December 2018) which is to: *“Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.”*

Our position is that references to Australian Standards remain appropriate and it’s not necessary to codify relevant elements in the WHS (MPS) Regulation or codes of practice made under the regulation. Standard references are used judiciously and allow advances in technical knowledge to be incorporated as part of the risk-based approach legislative framework. It should be noted that codes of practice are not mandatory, rather they identify ways in which duty holders can meet their legal obligations.

**Question**

- (xx) Is it appropriate to continue to refer to standards or should the relevant parts be prescribed within the WHS (MPS) Regulation?

## Formal provision for alternative means of compliance

The Reviewer recommended consideration of a formal provision to enable a professional engineering demonstration of an alternate means of compliance that entails a level of risk equivalent to, or better than, complying with a standard.

The Resources Regulator has adopted, and continues to adopt this approach to assist with compliance, including the following examples:

- Recent plant design registration orders issued by the Resources Regulator and published in the NSW Government Gazette include a provision for instances where a design does not comply with the requirements of the design order. In this instance, the designer must specify

<sup>40</sup> Available at [www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws](http://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws)

the published technical standards, or the engineering principles used to identify controls, incorporated in the design to achieve at least an equivalent level of safety as the requirements of the design order.

- Under a recent class exemption<sup>41</sup> issued by the Resources Regulator regarding the use of cables in hazardous zones, mine operators of underground coal mines are exempt from requirements concerning conformance to specific standards identified in the WHS (MPS) Regulation. As one of the conditions of the exemption, the individual nominated to exercise the statutory function of electrical engineering manager at the mine must determine that the use of an exempted cable will result in a standard of safety that is at least equivalent to the standard that would be achieved by compliance with the relevant clause of the WHS (MPS) Regulation.

We propose to amend the WHS (MPS) Regulation to include the provisions of this class exemption.

An example of a regulatory provision which enables an alternate means of compliance in another jurisdiction can be found in section 37(3)(b) of Queensland's *Coal Mining Safety and Health Act 1999* regarding Recognised Standards.<sup>42</sup> This provision enables operators to manage the risk in a different way, but they must be able to show that the method used is at least equivalent to the method in the recognised standard.

In NSW, in relation to codes of practice, section 275(4) of the WHS Act enables a duty holder to provide evidence of compliance with the WHS Act in a manner that is different from the code but provides a standard of work health and safety that is equivalent to or higher than the standard required in the code.

## What does a 'professional engineering demonstration' look like?

In considering a formal provision to enable an alternate means of compliance, consideration needs to be given to what a 'professional engineering demonstration' looks like. Some options include:

- Adopting a similar approach to that used in the class exemption for cables used in the hazardous zone. This requires the statutory function holder of the relevant engineering discipline to determine that the alternate means of compliance achieves an equivalent level

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<sup>41</sup> The *Work Health and Safety (Mines and Petroleum Sites) Exemption (Use of Cables in Hazardous Zones) 2020* published in the NSW Government Gazette No 171 of 7 August 2020 and also available at [www.resourcesregulator.nsw.gov.au/safety-and-health/legislation/gazettals/whs-mines-legislation-gazettals](http://www.resourcesregulator.nsw.gov.au/safety-and-health/legislation/gazettals/whs-mines-legislation-gazettals) .

<sup>42</sup> <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-1999-039>



of safety as to what would be achieved through compliance with the relevant standard referenced in the Regulation.

- Adopting a similar model to that used for plant design registration where a design must be verified by a design verifier who must provide a statement stating the design has been produced in accordance with published technical standards or engineering principles specified by the designer. A design can only be verified by a person who is a competent person who was not involved in the production of the design.
- Adopting the process used for plant item registration where the item of plant must be inspected and a statement provided by a competent person stating the plant is safe to operate. A person is competent to inspect an item of plant if the person has educational or vocational qualifications in an engineering discipline relevant to the plant, or knowledge of the technical standards relevant to the plant to be inspected.

## Our current approach

When it comes to regulating compliance with standards, we use a combination of strategies which are implemented on a case-by-case basis. As outlined earlier, in some instances a reference to a standard in the WHS (MPS) Regulation includes a reference to later editions of that standard or an equivalent international standard. Whereas, in other instances there is no 'automatic update' provision applied, and compliance must be achieved with the specified edition of the standard.

Where appropriate, we enable an alternate means of compliance through the demonstration of an equivalent level of safety. As set out in our *Innovation Policy*<sup>43</sup>, we will provide a clear pathway for the consideration of innovations prevented by legislation or technical standards. This includes using the tools available in the WHS legislative framework such as the exemption provisions in Part 11.2 of the WHS Regulation to:

- support trials and the evaluation of potential new systems of work, products and plant in an operating work environment (mine)
- permit alternative systems of work, products and plant to be used if the proponent can demonstrate effective risk control and that at least an equivalent level of health and safety will be achieved.

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<sup>43</sup> Available at [www.resourcesregulator.nsw.gov.au/data/assets/pdf\\_file/0006/850461/Innovation-Policy.pdf](http://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0006/850461/Innovation-Policy.pdf)

**Questions:**

- (xxi) Should the WHS (MPS) Regulation be amended to enable a professional engineering demonstration of an alternate means of compliance that entails a level of risk equivalent to, or better than, complying with a prescribed standard?
- (xxii) Is the Resources Regulator's *Innovation policy* sufficient for enabling consideration of innovations prevented by legislation or technical standards?

## 4. Other matters

The following proposed amendments arose from internal feedback provided by Resources Regulator staff following the statutory review.

### 4.1. Certificates of conformity for explosion-protected electrical equipment

As part of the explosion-protection requirements in clauses 78(2) and 78(3) of the WHS (MPS) Regulation, all electrical plant used in a hazardous zone at an underground coal mine must have a valid certificate of conformity or be Departmental approved plant.<sup>44</sup> Clause 78(9) of the WHS (MPS) Regulation contains the definitions for both *certificate of conformity* and *Departmental approved* plant.

We propose to amend the explosion-protection provisions in clauses 78(2) and 78(3) of the WHS (MPS) Regulation to make it explicit that in addition to the requirement for electrical plant to **have** a valid certificate of conformity or be Departmental approved plant, the electrical plant must also **comply** with the requirements of the certificate of conformity or Departmental approval.

The rationale for this proposed amendment is that some mines are using electrical plant that has a certificate of conformity or Departmental approval, but does not conform to the requirements of the certificate of conformity or Departmental approval. For example, some mines are choosing to apply maintenance tolerances to explosion-protected thread tolerances which are outside the manufacturing tolerances that were performance tested during the explosion-protected certification process.

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<sup>44</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.78>

**Question**

(xxiii) Do you support the proposed amendments to the explosion-protection provisions in clauses 78(2) and 78(3) of the WHS (MPS) Regulation to make it explicit that electrical plant used in an underground coal mine must **comply** with the requirements of the certificate of conformity or Departmental approval?

## 4.2. Use of cables in the hazardous zone

We propose to amend clause 80 of the WHS (MPS) Regulation to incorporate the provisions contained in a class exemption granted by the Resources Regulator and published in the NSW Government Gazette No 171 of 7 August 2020.<sup>45</sup>

The exemption titled the *Work Health and Safety (Mines and Petroleum Sites) Exemption (Use of Cables in Hazardous Zones) 2020* applies to the use of cables in a hazardous zone in an underground coal mine, where the concentration of methane in the general body of air is less than 1.25% by volume.

The class exemption permits the use of cables that do not conform to the requirements of clauses 80(3)(b) and (c) of the WHS (MPS) Regulation, subject to certain conditions.<sup>46</sup> The class exemption was issued after considering alternative designs which demonstrated that an equivalent level of health and safety may be achieved by cables that do not conform with these clauses.

This exemption does not apply where the design of the engineered system specified the use of compliant cables and the installed cables are identified as non-compliant with clause 80(3)(b) or (c) of the WHS (MPS) Regulation after the engineered system has entered service.

The class exemption is consistent with our Innovation Policy for continuous improvement of health and safety through design, technology, product and system innovation and development.<sup>47</sup>

**Question**

(xxiv) Do you support the Resources Regulator's proposal to amend clause 80 of the WHS (MPS) Regulation to incorporate the provisions outlined in the class exemption titled *Work Health and Safety (Mines and Petroleum Sites) Exemption (Use of Cables in Hazardous Zones) 2020* as published in the NSW Government Gazette No 171 of 7 August 2020?

<sup>45</sup> A copy of the exemption is available at: [www.resourcesregulator.nsw.gov.au/data/assets/pdf\\_file/0012/885486/NSW-Govt-Gazette-Exemption-WHS-MPS-Use-of-Cables-in-Hazardous-Zones-3-August-2020.pdf](http://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0012/885486/NSW-Govt-Gazette-Exemption-WHS-MPS-Use-of-Cables-in-Hazardous-Zones-3-August-2020.pdf)

<sup>46</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.80>

<sup>47</sup> The Regulator's Innovation Policy is available at: [www.resourcesregulator.nsw.gov.au/data/assets/pdf\\_file/0006/850461/Innovation-Policy.pdf](http://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0006/850461/Innovation-Policy.pdf)

### 4.3. Consultation with emergency services

The wording in clause 93 of the WHS (MPS) Regulation will be amended to be consistent with clause 89 of the WHS (MPS) Regulation in relation to ensuring emergency plans address recommendations made by emergency services.

Clause 93 of the WHS (MPS) Regulation relates to testing of emergency plans at mine or petroleum sites and provides that any such test is to **have regard to** the recommendations made by any emergency service organisation consulted under clause 89 in preparing the plan.<sup>48</sup>

In contrast, clause 89(2) provides that the mine operator **must ensure** that the emergency plan addresses any recommendation made by the emergency service organisations consulted.<sup>49</sup>

#### Question

(xxv) Should the wording in clause 93 of the WHS (MPS) Regulation be amended to be consistent with clause 89 to ensure that consultation with emergency services is included when the emergency plans are tested?

### 4.4. Notifications of exceedances to workplace exposure standards for airborne contaminants

Following the implementation of the new exposure standard for diesel particulates matter in clause 39(1)<sup>50</sup>, it is intended to make exceedances a High Potential Incident under clause 128(5) of the Regulation.<sup>51</sup>

It is also intended to include exceedances of all substances or mixtures that are specified in workplace exposure standards for airborne contaminants monitoring undertaken under clause 50 of the WHS Regulation as notifiable High Potential Incidents under clause 128(5) of the WHS (MPS) Regulation.

<sup>48</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.93>

<sup>49</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.89>

<sup>50</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.39>

<sup>51</sup> <https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2014-0799#sec.128>

**Question**

(xxvi) Do you agree with amending 128(5) of the WHS (MPS) Regulation to make exceedances of diesel particulate matter and substances and mixtures specified in clause 50 of the WHS Regulation a High Potential Incident?

## 4.5. Schedule 3 High Risk Activities

Recently there have been a number of incidents involving raised bore activity in underground mines. We consider that raised bore activity, that is of a large diameter and over a long distance and is conducted solely underground, should be a high-risk activity. Including long and large diameter underground raised bore activity as a high-risk activity will enable the Resources Regulator to review the proposed safety systems, including and equipment and plant to be used, and allow feedback to be provided to the mine operator if required.

*MDG 1030 Guideline for raised boring operations* outlined risk to be considered when planning raised boring operations that includes planning, site establishment and mobilisation, pilot hole drilling, reaming and cuttings removal and demobilisation.<sup>52</sup>

We intend to amend Schedule 3 to the WHS (MPS) Regulation to include large diameter and long underground raised bore activity as a high-risk activity in underground mines in instances where:

- raised boring activity in an underground mine is greater than 3.0 meters in diameter and more than 100 meters long; or
- the waiting period is proposed to be 3 months.

The information and document to be provided in relation to the activity is proposed to be as follows:

- details of the safety systems and method of working
- details of the plant and equipment to be used.

**Question**

(xxvii) Should Schedule 3 of the WHS (MPS) Regulation be amended to include raised bore activity as a high risk activity?

<sup>52</sup> [https://www.resourcesregulator.nsw.gov.au/data/assets/pdf\\_file/0017/420074/MDG-1030.pdf](https://www.resourcesregulator.nsw.gov.au/data/assets/pdf_file/0017/420074/MDG-1030.pdf)

## 4.6. A competent person at an opal mine

Opal mining requires the management of a number of principal hazards. Currently, opal mine license holders are required to ensure the mine operator has undertaken safety training. Safety training is defined in clause 7(B)(8) of the WHS (MPS) Regulation as ‘a course of training relating to health and safety at opal mines specified by the regulator.’<sup>53</sup>

It is intended to amend the Regulation to require the opal mine operator to ensure that at least one person, who has undertaken the safety training as specified by the Resources Regulator, is present at the mine when mining activity is taking place. This requirement is to ensure there is a competent person on site, at all times, when mining activity is occurring.

### Question

(xxviii) Should the WHS (MPS) Regulation be amended to include a requirement that at least one person, who has undertaken safety training as specified by the Regulator, is present at an opal mine when mining activity is taking place?

## 4.7. Automatic mutual recognition

The Commonwealth and the State Government have agreed to progress reforms to mutual recognition to provide for automatic mutual recognition. The [Mutual Recognition \(New South Wales\) Amendment Bill 2021](#) was introduced in NSW Parliament on 16 March 2021.

The reforms will remove the requirement by persons with registration for an occupation in one jurisdiction to notify the registration authority in a second jurisdiction, when they intend to practise an equivalent occupation in the second jurisdiction.

The mutual recognition principle applies to statutory functions in schedule 10 of the WHS (MPS) Regulation. In NSW, holders of practising certificates for schedule 10 statutory functions are required to comply with maintenance of competence requirements as a condition of their certificate.

Under the automatic mutual recognition reforms, holders of interstate registration will not be granted a practising certificate.

We intend to amend clause 138 of the WHS (MPS) Regulation to put an obligation on any person exercising a statutory function, that requires a practising certificate, to comply with the maintenance of

<sup>53</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sec.7B>

competence requirements for that statutory function specified by the regulator in the NSW Government Gazette.

This will ensure that maintenance of competence requirements apply equally to all people exercising the statutory functions in NSW, irrespective of whether they gain registration locally or through automatic mutual recognition.

## 4.8. Mine Safety Advisory Council

The role of the Council is to provide advice to the Minister on health and safety matters, and any matters identified by the Minister.

We intend to amend clause 161 of the WHS (MPS) Regulation to enable MSAC to provide advice to the Regulator.

## 4.9. Review of Schedule 12 Savings and Transitional provisions

As part of the amendment of the WHS (MPS) Regulation, the savings and transitional provisions in Schedule 12 will be reviewed to determine which of these provisions are still in effect and therefore are required to be included in the new Regulation.<sup>54</sup>

As part of the transition to the WHS (MPS) Regulation, which commenced on 1 February 2015, certain provisions were included in Schedule 12 to enable duty holders to achieve an alternative means of compliance to the provisions in the WHS (MPS) Regulation. The transitional period for a number of these provisions has ended. However, there are still some provisions in Schedule 12 which are in effect and may need to be included in the remake of the Regulation.

**The NSW Government has agreed to adopt this recommendation.**

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<sup>54</sup> <https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0799#sch.12>

## Attachment A

### Standards referenced in the WHS (MPS) Regulation

#	CLAUSE	CLAUSE HEADING	STANDARD	MOST RECENT EDITION?	CLAUSE APPLIES TO WHICH MINES?
1	3	Definitions ( <i>intrinsically safe circuit</i> )	AS/NZS 60079.11:2011 <i>Explosive atmospheres—Equipment protection by intrinsic safety ‘i’.</i>	Yes	Underground coal mines
2	3	Definitions ( <i>Wiring rules</i> )	AS/NZS 3000:2018 <i>Electrical installations</i>	Yes	All mines and petroleum sites
3	31(2)(b)	Explosives and explosive precursors	AS 2187 <i>Explosives—Storage, transport and use</i>	N/A – this refers to the AS 2187 series of Standards which covers five individual standards AS 2187.0 – AS 2187.4	All mines and petroleum sites
4	78(2)(b)(i)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 60079.11:2011 <i>Explosive atmospheres—Part 11: Equipment protection by intrinsic safety ‘i’</i>	Yes	Underground coal mines



# AMENDMENTS TO WHS (MPS) LAWS

Discussion paper

#	CLAUSE	CLAUSE HEADING	STANDARD	MOST RECENT EDITION?	CLAUSE APPLIES TO WHICH MINES?
5	78(2)(b)(ii)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 60079.18:2011 <i>Explosive atmospheres—Part 18: Equipment protection by encapsulation ‘m’</i>	No. Superseded by AS/NZS 60079.18:2016	Underground coal mines
6	78(2)(b)(iii)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 1826(Int):2006 <i>Electrical equipment for explosive gas atmospheres—Special protection—Type of protection ‘s’</i>	No. Superseded by AS/NZS 1826:2008	Underground coal mines
7	78(2)(b)(iv)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 60079.33:2012 <i>Explosive atmospheres—Part 33: Equipment protection by special protection ‘s’</i>	Yes	Underground coal mines
8	78(2)(b)(v)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 60079.1:2015 <i>Explosive atmospheres—Part 1: Equipment protection by flameproof enclosures ‘d’</i>	Yes	Underground coal mines
9	78(2)(b)(vi)(A)	Use of plant in hazardous zone (explosion-	AS/NZS 60079.35.1:2011 <i>Explosive atmospheres—Part 35.1: Caplights for use in mines susceptible to firedamp—</i>	Yes	Underground coal mines

# AMENDMENTS TO WHS (MPS) LAWS

Discussion paper

#	CLAUSE	CLAUSE HEADING	STANDARD	MOST RECENT EDITION?	CLAUSE APPLIES TO WHICH MINES?
		protection required)	<i>General requirements—Construction and testing in relation to the risk of explosion</i>		
10	78(2)(b)(vi)(B)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 62013.1:2001 <i>Caplights for use in mines susceptible to firedamp—Part 1: General requirements—Construction and testing in relation to the risk of explosion</i>	Yes	Underground coal mines
11	78(3)(b)(i)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 60079.0:2012 <i>Explosive atmospheres—Part 0: Equipment—General requirements</i>	No. Superseded by AS/NZS 60079.0:2019	Underground coal mines
12	The note within clause 78(3)(b)(i)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 60079.14:2009 <i>Explosive atmospheres—Part 14: Electrical installations design, selection and erection for the explosion protection techniques that achieve equipment protection level “Mb”</i>	No. Superseded by AS/NZS 60079.14:2017	Underground coal mines
13	78(3)(b)(ii)	Use of plant in hazardous zone (explosion-	AS/NZS 60079.0:2012 <i>Explosive atmospheres—Part 0: Equipment—General requirements</i>	No. Superseded by AS/NZS 60079.0:2019	Underground coal mines

# AMENDMENTS TO WHS (MPS) LAWS

Discussion paper

#	CLAUSE	CLAUSE HEADING	STANDARD	MOST RECENT EDITION?	CLAUSE APPLIES TO WHICH MINES?
		protection required)			
14	78(4)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 2290.1:2014 <i>Electrical equipment for coal mines— Introduction, inspection and maintenance—Part 1: For hazardous areas</i>	Yes	Underground coal mines
15	78(6)(a)	Use of plant in hazardous zone (explosion-protection required)	AS/NZS 1299:2009 <i>Electrical equipment for mines and quarries— Explosion-protected three-phase restrained plugs and receptacles for working voltages up to and including 3.3 kV</i>	Yes	Underground coal mines
16	78(6)(b)	Use of plant in hazardous zone (explosion-protection required)	AS 1299—1993 <i>Electrical equipment for coal mines—Flameproof restrained plugs and receptacles</i>	No. Superseded by AS/NZS 1299:2009	Underground coal mines
17	80(2)(a)	Use of cables in hazardous zone	AS/NZS 60079.11:2011 <i>Explosive atmospheres—Equipment protection by intrinsic safety ‘i’</i>	Yes	Underground coal mines

## AMENDMENTS TO WHS (MPS) LAWS

Discussion paper

#	CLAUSE	CLAUSE HEADING	STANDARD	MOST RECENT EDITION?	CLAUSE APPLIES TO WHICH MINES?
18	80(3)(b)	Use of cables in hazardous zone	AS/NZS 1972:2006 <i>Electric cables—Underground coal mines—Other than reeling and trailing</i>	Yes	Underground coal mines
19	80(3)(c)	Use of cables in hazardous zone	AS/NZS 1802:2003 <i>Electric cables—Reeling and trailing—For underground coal mining purposes</i>	No. Superseded by AS/NZS 1802:2018	Underground coal mines
20	Schedule 1, 3A (f)	Principal hazard management plans-additional matters to be considered, Gas outbursts	AS 3980–1999, <i>Guide to the determination of gas content of coal—Direct desorption method</i>	No. Superseded by AS 3980:2016	All coal mines
21	Schedule 2, 2, (4)(c)	Principal control plans-matters to be addressed, Mechanical engineering control plan	AS 4606-2012, <i>Grade S fire resistant and antistatic requirements for conveyor belting and conveyor accessories</i>	Yes	Underground coal mines

# AMENDMENTS TO WHS (MPS) LAWS

Discussion paper

#	CLAUSE	CLAUSE HEADING	STANDARD	MOST RECENT EDITION?	CLAUSE APPLIES TO WHICH MINES?
22	Schedule 3 18(1)(a)	High risk activities, Mining in outburst control zones	AS 3980–1999, <i>Guide to the determination of gas content of coal—Direct desorption method</i>	No. Superseded by AS 3980:2016	Underground coal mines
23	Schedule 5(3)(1)	Water barriers in underground coal mines	EN 14591-2:2007, <i>Explosion prevention and protection in underground mines—Protective systems—Part 2: Passive water trough barriers</i>	Yes	Underground coal mines
24	Schedule 6(2)(6)	Sampling airborne dust at coal mines	AS 2985–2009 <i>Workplace atmospheres—Method for sampling and gravimetric determination of respirable dust</i>	Yes	All coal mines
25	Schedule 6(2)(7)	Sampling airborne dust at coal mines	AS 3640–2009 <i>Workplace atmospheres—Method for sampling and gravimetric determination of inhalable dust</i>	Yes	All coal mines