



**COMMENTS ON THE**

**on the**

**OCCUPATIONAL HEALTH AND SAFETY ACT REVIEW  
REPORT PREPARED BY MR C M MAXWELL, QC  
DATED MARCH 2004**

**Prepared by:**

**Victorian Minerals & Energy Council Inc.**

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## Comments on the Maxwell Report

### EXECUTIVE SUMMARY

The Victorian minerals industry is a substantial employer of labour and an industry that takes the health and safety of its workforce very seriously; in fact it is the industry's number one priority. As the industry falls within the jurisdiction of the Occupational Health and Safety Act, VMEC is directly interested in the current review of that Act.

Following the release of the Maxwell report on the review of the OHS Act the minerals industry continues to be concerned with the long-term uncertainty of maintaining experienced mining personnel in the Department of Primary Industries as the group responsible for regulating the safety of Victoria's mines. It is strongly recommended that any revision of the OHS Act cement the administrative arrangement for the regulation of mines in legislation or regulation.

Some of the other issues that we are critical of and would recommend an alternative to that of Maxwell include the following:

- clarification of the use of privileged information gained by inspectors in interviews;
- the need for inspectors to be accountable for any lawful instruction they may make due to ignorance;
- the requirement for the "elimination" of all risks;
- the lack of a requirement for employees to be responsible for their actions related to psychosocial behaviours;
- the failure to require HSRs to consult;
- the proposed introduction of roving HSRs; and
- the proposed right of entry of union appointed health and safety officials.

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### 1 INTRODUCTION

Victoria has a very important minerals and energy industry that is not only significant nationally but also critical to many other industries in Victoria that depend upon low cost, reliable energy. It also provides significant employment in regional Victoria.

The minerals and energy industry of Victoria:

- Produces more than 65 million tonnes of coal per year;
- Produces about 4 tonnes of gold per year;
- Produces 85% of Victoria's electricity;
- Has an annual turnover in Victoria of more than \$600M; and
- The mining industry alone directly employs more than 5,000 Victorians (and more than 10,000 indirectly), the majority of these being located in regional Victoria.

The minerals industry is a substantial employer of labour that takes the health and safety of its workforce very seriously; in fact it is the industry's number one priority. The industry in Victoria falls within the jurisdiction of the Occupational Health and Safety Act (OHS Act). We are therefore directly interested in the review of the Victorian OHS Act.

The Victorian Minerals & Energy Council Inc (VMEC) is an industry association that represents the corporate minerals and energy industry of Victoria. The members of the Council are engaged in mineral processing, mining, exploration, or the provision of services to the industry.

This submission is made for and on behalf of the Victorian minerals industry.

### 2 VICTORIAN MINERALS INDUSTRY

#### 2.1 Safety Vision

The safety and health vision of the Australian minerals industry and as adopted by VMEC is of an Australian minerals industry **free** of fatalities, injuries and diseases. The leaders of Victoria's minerals industry have endorsed this vision. The complete safety and health statement is included as Appendix A.

This aspirational vision has become the most important driver that the industry has and is integral in all of our pre-competitive industry activities.

#### 2.2 Safety Performance

The industry has worked hard at improving its safety performance over recent years. We have been very successful in reducing LTI's but sadly fatalities still remain a major concern. We have clearly addressed the high frequency, low consequence injuries but the incidence of low frequency; high impact events that cause fatalities remain. Our current attention is focussed on reducing the number of these incidents that cause fatalities.

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The graphs of LTIFR and Fatalities both nationally and for Victoria are included as Appendix B. These graphs demonstrate the points made above.

### **3 GENERAL OBSERVATIONS**

In reviewing the recommendations of Maxwell there is a high level of concurrence with the approach taken by the minerals industry to occupational health and safety (OHS). In fact there are only a few matters which would cause concern to the industry if implemented by Government. These matters of agreement and concern are discussed in the following sections. However, the following general observations of the Maxwell report are made to highlight a fundamental difference in approach to OHS.

Generally Maxwell's recommendations are made in the light of "community expectations" and precedents set by other Australian states, Commonwealth and international legislation. No attempt has been made to evaluate or demonstrate that harsher penalties for breaches of safety laws in fact result in improved OHS performance. There is no evidence to demonstrate that States or Territories which already have harsher penalties have a greater rate of compliance than Victoria.

It is important that any amendments to the OHS Act strike a balance between penalties for breaches and continual improvement in safety outcomes.

The Maxwell report is very much focussed on the responsibilities of the employer and very little if any attention is paid to the corresponding responsibilities of employees. This makes the review very one dimension and it accordingly suffers in credibility.

Maxwell states that there are two sides in workplace health and safety - "management" and "labour" and that it is important that they are not polarised when it comes to OHS. There are in fact three sides, as the Authority's requirements must also be satisfied. It is an unfortunate fact that some of the current provisions of OHS Act serve to reinforce polarisation and indeed there is particular reference in the review to the divide between employers and the inspectorate. Some of Maxwell's recommendations will reinforce such polarisation such as the notion of Health and Safety Representatives being the Workplace Inspectors' "eyes and ears".

### **4 MATTERS OF AGREEMENT**

#### **4.1 Enforcement and Penalties**

We are pleased to note that the Review does not make any recommendations specifically related to an offence of "industrial manslaughter". We would expect the Government to hold to its previous undertakings not to proceed with amendments to the Crimes Act to introduce such a penalty.

We note the recommendation regarding the introduction of custodial sentences for first time offenders where breaches of the Act involve a "high-level culpability" for

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example, where a duty holder repeatedly fails to comply with duties under the Act. In such circumstances we would expect there to be a blatant disregard of lawful instructions and a listing of warnings.

We agree with the introduction of a statutory time limit for the commencement of prosecutions under the Act.

It is acknowledged that the provision for enforceable undertakings and alternative sentencing orders is appropriate, as monetary penalties are not appropriate (or effective) in all circumstances. We agree with the recommendation that the Authority should have the power to accept enforceable undertakings as an alternative to prosecution for criminal offences.

We agree with the Review recommendation that the Act clearly prescribe the functions and powers of inspectors, and establish a process for internal and external review of inspectors' decisions. It is also important that the Act specify which powers are exercisable by inspectors only upon entry to premises, and which powers are exercisable in other circumstances.

Regarding the enforcement recommendations of the Review we agree with the following significant recommendations:

- inspectors have the power to issue “investigation notices” which require a person to stop the use or movement of, or interference with, any plant, substance or thing, or to “prevent the disturbance” of any plant, substance or thing specified in a notice;
- the provisions in the Act relating to improvement notices be amended to allow inspectors to give directions to duty holders, including directions prohibiting particular conduct, or directions governing any activity to which a notice relates;
- the provisions relating to prohibition notices be amended to allow inspectors to prohibit the carrying on of any activity in a particular way and to allow inspectors to prohibit the “commencement of an activity” which inspectors suspect may occur (and which may involve a risk to the health and safety of any person); and
- inspectors be given the power to issue “infringement notices” specifying penalties for breaches of the Act and/or regulations made pursuant to the Act (“on-the-spot” penalty notices).

### 4.2 General Duties under the Act

#### *“Worker” and “Proprietor”*

We agree with the Review recommendation that the term “worker” be introduced into the Act to make it clear that the general duties in section 21 apply to all “workers” (ie. all persons who perform work activities) at a workplace. We also agree with the recommendation that the term “proprietor” be included in sections 21 and 22 to ensure

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that persons who have control and management of workplaces and business “undertakings”, but who are not “employers”, are subject to general safety duties.

These changes would ensure that all persons who perform work activities in a workplace or “working environment” are covered by the Act (ie. they are “protected” by the general duties), and that all persons who manage and control work activities (including contractors who do not have any employees) are subject to general safety duties.

These proposed changes are consistent with the principles which underpin the Act. The changes would clarify the range of participants in the minerals industry who are subject to general duties.

### *“Reasonably Practicable”*

The general duties in the Act are subject to the test of practicability. “Practicable” is defined by reference to matters to which a duty holder must have regard in determining what is practicable. These include the severity of a risk or hazard, available methods of eliminating or controlling the risk or hazard, and the cost of doing so.

We agree with the Review recommendation that the general duties in the Act be qualified by the phrase “reasonably practicable”, rather than the phrase, “so far as is practicable”. The Review recognises that a number of duty holders may owe different duties to different persons at the same workplace. Each of these duties is subject to the “practicability” qualification, but the Act does not currently offer any guidance in respect of the “allocation” of responsibility amongst multiple duty holders in one workplace.

Further, we agree that “control” of a workplace risk or hazard be specified as a factor to be considered in determining what is reasonably practicable. “Control” would include a duty holder’s capacity to control a workplace risk or hazard, the ability to influence decisions in relation to control of a workplace risk or hazard, and the level of control *actually exercised or capable of being exercised* by persons for whom the duty holder is responsible.

This change would have the practical effect that persons would not be liable for failing to eliminate or minimise a hazard or risk which is beyond their control.

### *Risk v Cost Relationship*

We agree with the proposal in the Review that recommends that the Act be amended to make it clear that risk control measures must be determined on an objective basis, not by reference to the particular circumstances of the duty holder (ie. financial circumstances or business strategies).

## 4.3 Duties and Liabilities of Officers

The Act currently provides that where a body corporate commits an offence, an officer is guilty of an offence if it is proved that the offence was committed with the

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officer's consent or connivance, or the offence can be attributed to the officer's wilful neglect, that is, gross negligence.

We agree with the proposal that the Act be amended to provide that each officer must take reasonable steps to ensure that the relevant body corporate complies with its duties under the Act.

We also agree with the Review recommendation that this amendment should apply to officers of entities other than companies (ie. partnerships and unincorporated associations and businesses) but not to volunteer officers.

This recommendation is consistent with the principles that underpin the Act. If implemented, the recommendation would have the effect that officers of corporations and other entities which are involved in mining activities would be subject to a broader general duty than under the Act as it currently stands.

All officers (including persons involved in the "management" of corporations) would have to show that they have exercised reasonable diligence to ensure that the entities for which they are responsible, comply with duties under the Act.

We support the Review conclusion that a "reverse onus of proof" is not warranted for offences applying to officers.

### 4.4 Consultation, Participation and Representation

#### *General Duty to Consult*

We agree with the Review recommendations that impose on employers a general duty to consult with persons who work in, or in connection with an employer's undertaking and that there be increased flexibility for employers and workers to implement consultation and representation arrangements that suit the needs of particular workplaces.

Further we support the amendment of the Act to specify the "essential elements" of consultation, but not to prescribe how consultation is to be undertaken.

We note that the duty to consult would require employers to:

- share with employees relevant information about occupational health, safety and welfare;
- give employees the opportunity to express their views and to contribute to the resolution of occupational health and safety issues; and
- take into account the views of employees in determining changes to policies, systems and procedures.

The duty to consult would not, however, necessarily restrict employers in implementing occupational health and safety policies or procedures, or giving directions to workers in respect of occupational health and safety matters (following consultation).

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### *Designated Working Groups*

We support the Review recommendation regarding the abolition of “Designated Work Groups”, and amendment of the Act to provide for election of health and safety representatives (“HSRs”) by “all persons who work in the undertaking of an employer”. This change would have the practiced effect that any HSRs elected at a workplace on site could exercise their powers in respect of any occupational health and safety issues at the workplace or site.

### **4.5 Information and Assistance**

We support amendments that empower inspectors to give advice about OHS compliance although there is a need to avoid conflicts between the regulatory and advisory roles. The “mines inspector model” of regulator and advisor has worked very effectively in mines for many years. Inspectors should be allowed to give advice under the conditions suggested in the Review.

It is important that the Authority supports and assists both HSRs and employers. However, the Authority should not routinely provide HSRs with information that is not also provided to the employer. Obviously information requested by HSRs is a different situation.

We support the recommendation that the Authority develop much more detailed practical guidelines for inspectors about what is regarded as constituting compliance-

- (a) in different types of workplaces;
- (b) in relation to different types of hazards.

The recommendation that the Authority issue “Safety Rulings” is supported.

## **5 MATTERS OF CONCERN**

Generally the minerals industry is critical of approaches that have a primary aim to seek retribution for accidents and incidents rather than a primary aim to improve safety and health outcomes.

### **5.1 Enforcement and Penalties**

Regarding the enforcement recommendations of the Review we make the following comments as clarification is required to two of the significant recommendations:

Firstly, the recommendation that inspectors be given the power to require persons present at a workplace or premises (which has been legally entered) to answer questions that may assist inspectors could lead to behaviours that mean that a lawyer is called immediately after an ambulance is called. Such outcomes would be counter productive. It is important that it is clearly appreciated by all, including inspectors, employers and employees that any information provided can only be used against that person after an official warning that the proceedings of the interview are being

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conducted under the Crimes Act. Information given prior to such a warning is privileged information. It should not be necessary for persons being interviewed to declare “privilege” at the commencement of normal interviews with inspectors, it should be automatic.

Secondly, the proposal that inspectors be given the power to issue directions to any person for the purpose of dealing with an emergency situation in which the health and safety of any person is endangered has merit but it is essential that such instructions are given by inspectors that are sufficiently qualified in the matter at hand to make such judgements. It would be totally unacceptable for an inspector with no formal mining engineering training to issue lawful instructions regarding an underground mine that could place other parts of the operation in jeopardy. If inspectors are to be given this authority it is important that the Authority take full and total accountability for any adverse outcomes that result from the instruction.

### 5.2 General Duties under the Act

#### *Risk v Cost Relationship*

The Review recommends that the Act be amended to make it clear that duty holders must take steps to “eliminate” any risk unless the cost of doing so is grossly disproportionate to the risk.

We have grave concerns with the requirement to “eliminate” all risks. The use of the word eliminate could lead to the absurd outcome of needing to close down all mines because we are unable to eliminate all of risk. Surely the word to be used in any amendments to the Act should be to “minimise” or “eliminate as reasonably practicable”.

#### *Psychosocial Health Risks – Stress, Fatigue, Bullying etc*

The Review recommends that the objects of the Act be amended and that the term “working environment” be defined to make it clear that the general duties in the Act require the provision and maintenance of a safe and healthy physical and psychosocial working environment.

As a general principal we have no serious concerns with this recommendation. However, by expressly including psychosocial risks which include risks relating to fatigue, stress, bullying and occupational violence there must be a corresponding responsibility placed on workers to ensure that they also recognise their accountability in this duty. To require the employer to be wholly responsible for the psychosocial risks is inappropriate and impractical and any amendments to the Act must include a corresponding accountability on employees.

### 5.3 Consultation, Participation and Representation

#### *General Duty to Consult*

An employer has a statutory duty to consult with their work force. There is no corresponding binding requirement on the workforce to not unreasonably object to any proposal. While the intent of consultation is not to require consensus or agreement, the fact is that failure to achieve consensus or agreement can create

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grounds for a dispute and potentially a PIN at some work places. The review fails to recognise that in some circumstances and in some work environments employees may positively resist efforts to improve their OHS and take steps to frustrate initiatives of management.

Currently HSRs are required under the Act to consult with an employer before he or she does anything covered under Sections 31(1)(b),(c) and (d). It is totally inappropriate that the Review recommend that HSRs not be required to consult with an employer on their actions whilst an employer is required to consult with employees. Surely, a balance is required and a clear requirement is required in the Act for consultation to be a two way process with both employers and employees equally responsible.

### *Roving Health and Safety Representatives*

The Review also recommends the introduction of a mechanism for election or appointment of “roving HSRs” who would be empowered to visit workplaces and address urgent occupational health and safety issues. The Review further recommends that roving HSRs should have the power to enter workplaces and represent workers in workplaces where “the conditions of work make this appropriate” (ie. remote workplaces where there are no elected HSRs).

We have concerns with such an approach in the minerals industry as it could readily be abused to further industrial campaigns. It also introduces an external third party to the consultation which would have the effect of breaking down the most effective consultation model of direct engagement between an employer and employee.

Where sites have elected HSRs and effective consultative mechanisms there should be no need for Roving HSRs. This recommendation should be rejected and focus placed on the preferred option of mine sites electing their own HSRs.

### *Right of Entry for Union Officials*

The Review recommends the establishment of a limited right for certain union officials, who have occupational health and safety qualifications, to enter workplaces and investigate suspected breaches of the Act. A union occupational health and safety official would need a permit issued by the Magistrate’s Court in order to enter a workplace.

We totally object to this provision. We see no valid role for such union officials and see it as vehicle for unions to promote membership and further industrial campaigns. Further, it is arguable that a right of entry is unnecessary given the broad powers which may be exercised by inspectors and HSRs under the Act (particularly if elected HSRs ultimately cover most or all mining workplaces in Victoria).

## **6 MATTERS OMITTED**

It should be noted that the Review does not specifically comment on, or make recommendations in respect of, the *Occupational Health and Safety (Mines) Regulations 2002*.

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The minerals industry of Victoria has particular concerns related to the recent changes in the safety regulation of mines in Victoria and the long-term certainty of jurisdictional responsibilities. These concerns were not addressed by Maxwell but remain the critical concerns of the industry as below.

On 29 November 2001 the Minerals Resources Development Act (MRD Act) was amended (through the Accident Compensation (Amendment) Act 2001) to remove the exemption of mines from the OHS Act. The OHS Act was amended in the same legislation to enable the Victorian WorkCover Authority (VWA) to appoint staff of the Department of Natural Resources and Environment (DNRE) as health and safety inspectors in mines and quarries. The Government introduced these amendments with the concurrence of VMEC and its members on the basis of an understanding that mines would continue to be regulated by the specialist staff of the Minerals and Petroleum Regulation Branch of the Department of Primary Industries (DPI or the DNRE at that time). Consequently, an agreement was reached between the Minister for WorkCover and the Minister for Energy and Resources and an MOU signed between the VWA and the DPI. The DPI inspectors were subsequently trained and accredited as WorkCover inspectors.

On 28 October 2002 new Occupational Health and Safety (Mines) Regulations were introduced and replaced the old mine safety regulations prepared under the MRD Act. This completed the jurisdictional transition.

This transition has for the most part been successful. The Victorian mines continue to be regulated by experienced mining people but under the same laws that apply to all other Victorian businesses.

However, the arrangement is only as good as the good will between the relevant Ministers and the two Government agencies involved.

Members of VMEC are most concerned at the long-term uncertainty related to the regulation of Victoria's mines. Consequently, we strongly recommend that when the OHS Act is amended that it includes, either in the legislation or accompanying regulations, a specific reference to the regulation of mines by the specialist staff of the Minerals and Petroleum Regulation Branch of the Department of Primary Industries.

## APPENDIX A – SAFETY & HEALTH STATEMENT

### 1 MINERALS COUNCIL OF AUSTRALIA

#### 1.1 SAFETY & HEALTH STATEMENT

*Endorsed by the Safety & Health Policy Committee of the Victorian Chamber of Mines at its first meeting 10<sup>th</sup> March 1999*

##### **Safety and Health Vision**

An Australian minerals industry **free** of fatalities, injuries and diseases.

##### **Safety Awareness**

The state of mind where we are constantly aware of the possibility of injury and act accordingly at all times.

(Adapted from Dr Neil George, circa 1939)

##### **Safety and Health Beliefs**

All fatalities, injuries and diseases are preventable.

No task is so important that it cannot be done safely.

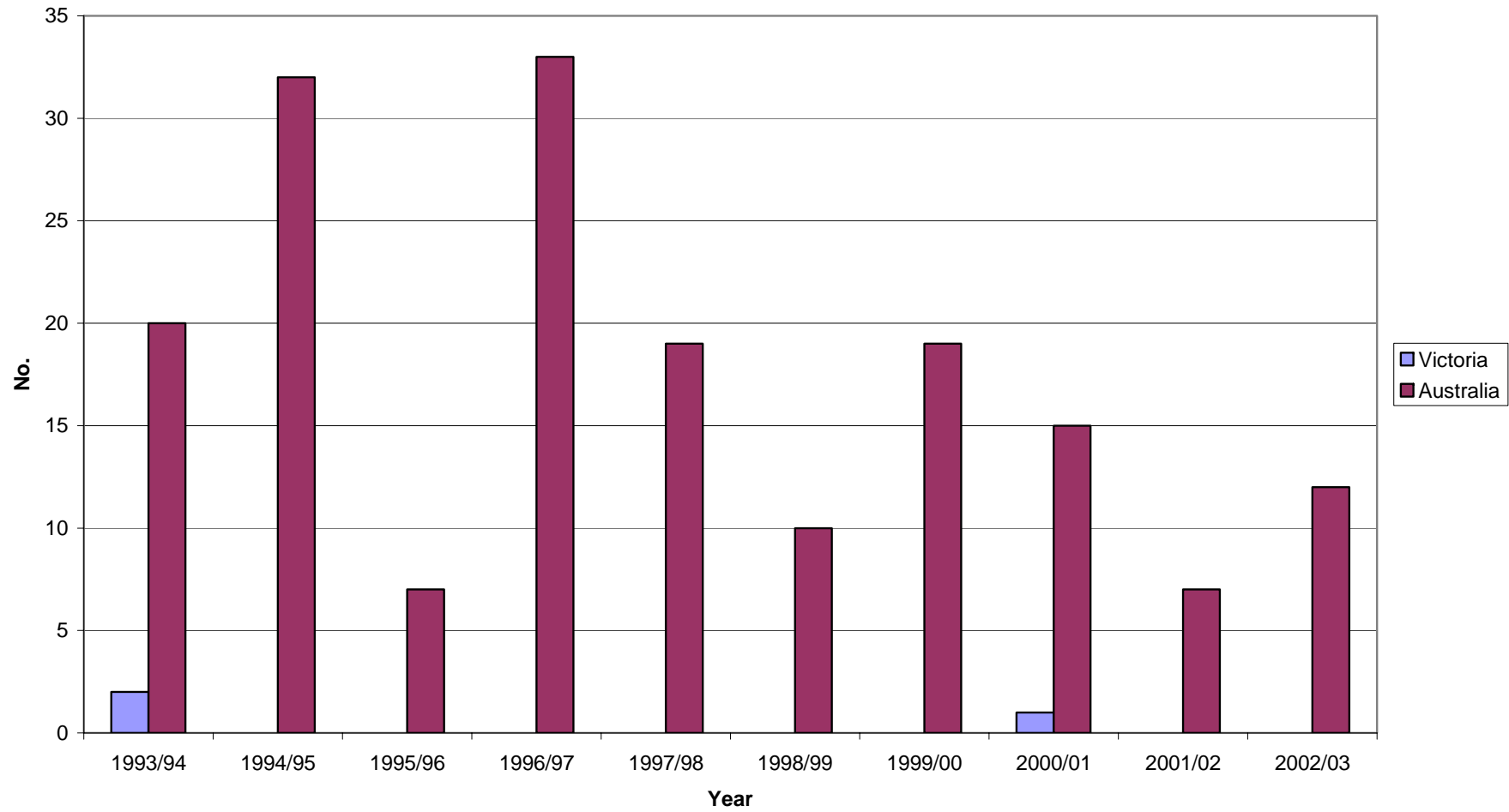
All hazards can be identified and their risks managed.

Everyone has a personal responsibility for the safety and health of themselves and others.

Safety and health performance can always improve.

## APPENDIX B – SAFETY PERFORMANCE

### Minerals Industry Fatalities



# APPENDIX B – SAFETY PERFORMANCE

## Minerals Industry Lost Time Injuries

