MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO 2018 REVIEW OF THE MODEL WHS LAWS DISCUSSION PAPER

APRIL 2018

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1. EXECUTIVE SUMMARY

The Minerals Council of Australia (MCA) welcomes the opportunity to contribute to the *2018 Review of the Model WHS laws*.

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

The MCA continues to advocate for:

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

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

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

The MCA encourages that the review consider mechanisms for industry participants to share post-incident measures and new and revised control measures to eliminate or minimise risks. The MCA considers that evidence of post-incident measures should not be admissible in prosecutions, on the basis that relevant proof of a contravention must pertain to the circumstances arising prior to and at the time of the incident. The MCA is aware of the NSW Department of Planning and Environment Resources Regulator's Causal Investigation Policy which provides a framework pursuant to which the Resources Regulator can quickly but comprehensively investigate the causes of significant safety incidents and high potential mining safety incidents, and promptly share the learnings from those incidents back to the industry to promote awareness and understanding of relevant risks and the controls necessary to prevent recurrences of similar incidents. The MCA considers that there is an opportunity as part of the current review of the Model WHS Act to codify an approach that meets the objective of the NSW Causal Investigation Policy, which is ultimately designed to encourage the sharing of information and facilitate progressively higher WHS standards, within the Model WHS Act.

2. INTRODUCTION

The Minerals Council of Australia (MCA) welcomes the opportunity to contribute to the *2018 Review of the Model WHS laws* discussion paper.

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

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

The minerals industry's number one value and commitment is the safety and health of its workforce, where everyone who goes to work in the industry returns home safe and healthy. Having set itself this ambitious goal, the minerals industry is committed to becoming free of fatalities, injuries and diseases.

MCA member companies maintain that:

- All fatalities, injuries and diseases are preventable
- No task is so important that it cannot be done safely
- All hazards can be identified and their risks managed, and
- Everyone has a personal responsibility for the safety and health of themselves and their work mates.

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

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

The MCA responds to the questions where appropriate in the sections that follow.

3. LEGISLATIVE FRAMEWORK

The model WHS laws

Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

The MCA takes the view that it is preferable for the WHS framework in Australia to be modelled on a two-tiered approach, with primacy given to the Model WHS Act and Model WHS Regulations. Further, MCA considers that the Model WHS Act should be amended to clarify the admissibility of approved Codes of Practice in proceedings.

The 2018 Review Discussion Paper acknowledges that Codes of Practice are outcomes-based, and are intended to be broadly applicable to organisations of all sizes and operating in all industries. By way of example, the Model Code of Practice 'How to manage work health and safety risks' has been developed to provide guidance to all persons who have duties to manage risks to health and safety under the applicable WHS legislation in a particular jurisdiction. This will capture all PCBUs regardless of the nature of their operations and the risks and hazards arising from those operations.

The MCA considers that the approved Codes of Practice do provide useful guidance. Further, it is appropriate that Courts have discretion to have regard to approved Codes of Practice as a part of the existing body of knowledge in relation to a particular hazard or risk and to rely upon a Code in determining what is reasonably practicable in the circumstances in which the Code relates (as per sub-sections 275(3)(a)-(b) of the Model WHS Act). However, the MCA does not consider that the Codes should be automatically admissible as is currently provided for under sub-section 275(2) of the Model WHS Act; this should be a matter for the Court.

We acknowledge that the Model WHS Act provides that a person may introduce evidence of compliance with the Model WHS Act in a manner which is different from an approved Code of Practice, provided that the alternative results in a WHS standard that is equivalent to or higher than that required by the relevant Code of Practice. However the MCA takes the view that this improperly focusses the regulator's (and a Court's) attention on broad-based Codes of Practice which may have limited practical application to the nature of specific hazards and risks arising in the course of a particular PCBU's operations or undertakings. The Model WHS Act should be amended to remove the automatic status of Codes of Practice as evidentiary instruments, and the ordinary rules of evidence should apply in relation to Codes of Practice so that the relevance and authority of a Code to a particular case should be considered in the context of each case.

In this regard, the MCA would draw the reviewer's attention to the approach in section 93(7)(b) of the *Mines Safety and Inspection Act 1994* (WA). The MCA would ask the reviewer to consider whether it is appropriate to amend sub-section 275(4) of the Model WHS Act to expressly confirm that, where it is alleged that a person has contravened a particular provision of the Model WHS Act or Model WHS Regulations for which a relevant Code of Practice was in place at the time of the alleged offence, demonstrating compliance with the relevant provision of the Model WHS Act or Model WHS Regulations otherwise than observing the particular Code of Practice will be a satisfactory defence.

However, in the event that the reviewer disagrees with this approach, the MCA believes that it is important to continue to allow approved Codes of Practice to be equally admissible as evidence of both compliance or non-compliance with a duty under the Model WHS Act (as is currently provided for in section 275(2) of the Model WHS Act).

Any amendment to reflect the position stated above should also flow through to the application of, and prominence given to, Codes of Practice by the regulator in its 'day to day' administration of the legislation. A direction included in an improvement notice may refer to a Code of Practice, and may offer the person to whom it is issued a choice of ways in which to remedy the contravention. In

practice however, the content of Codes of Practice tend to be imposed on duty-holders as though they were legislative requirements, and regardless of the duty-holder submitting that it is able to evidence compliance - albeit in a manner that may be different to that envisaged by the Code of Practice, but that provides an equivalent or higher WHS standard.

The MCA also considers there should be a requirement for Codes of Practice to be updated at regular intervals. The MCA would ask the reviewer to consider the appropriateness of inserting a requirement for Codes of Practice to be updated annually, and/or based on new information becoming available in relation to material WHS risks.

Further to the above, the MCA takes the view that the fundamental concepts of 'hazards' and 'risks' should be defined within the Model WHS Act. Currently, there is no definition for these terms within the Model WHS Act. However, the Model Code of Practice 'How to manage work health and safety risks' provides some helpful guidance on these concepts, as follows:

- **Hazard** means a situation or thing that has the potential to harm a person. Hazards at work may include: noisy machinery, a moving forklift, chemicals, electricity, working at heights, a repetitive job, bullying and violence at the workplace
- **Risk** is the possibility that harm (death, injury or illness) might occur when exposed to a hazard.

In our view, providing clear definitions for both 'hazards' and 'risks' within the Model WHS Act will provide greater clarity around the content of the duty to identify hazards and eliminate or minimise (so far as is reasonably practicable) risks to health and safety.

Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?

The MCA refers to its comments in relation to Question 1 above.

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

The MCA refers to its comments in relation to Question 1, above.

Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?

The MCA refers to its comments in relation to Question 1, above.

Scope and application

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

The MCA takes the view that the reviewer should give due consideration to whether the current approach to identifying hazards and assessing risks is apt to deal with the issue of psychological health. In particular, the 2018 Review should consider whether the Model WHS Act and Model WHS Regulations provide an appropriate structure to support the development and design of safe work practices, having regard to known causes of work-related psychological injuries.

The nature and complexity of psychological health means that a range of contributing factors may be outside the workplace, and outside the ability of duty-holders to both control and assess. Consideration should therefore be given as to whether the conventional wisdom for the management of non-psychological risks in the current WHS legislative scheme is suitable for the management of psychological risks and whether further evidence-based assessment needs to be considered to determine if alternative options are available. The MCA considers any alternative regulation would need to recognise the difficulty in assessing this hazard, the role of risks outside the workplace, and

the limits of a duty-holder's control – and accordingly that any alternative regulation not be unduly prescriptive.

Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?

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

With regard to harmonisation and rationalisation between the Model WHS Act and industry-specific legislation, the MCA strongly believes that where mainstream and industry-specific legislation adopts the same fundamental concepts and terms, these should be aligned to the maximum extent possible. The MCA refers to its comments in relation to Question 1 above, regarding defining 'hazard' and 'risks' within the Model WHS Act. To the extent that industry-specific, activity-based safety legislation also creates positive obligations to identify hazards and assess risks, the MCA submits that legislation should adopt uniform definitions of those terms.

The MCA also strongly believes that there should be a consistent approach between jurisdictions adopting industry-specific legislation for the same industries as to the relationship and interaction between that industry-specific legislation and mainstream WHS laws. To draw on the Australian mining industry as an example, an inconsistency arises in relation to the structure of applicable legislation across the States and Territories. In New South Wales, mines are regulated by the mainstream *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulations 2017* (NSW), as well as the *Work Health and Safety (Mines and Petroleum) Act 2013* (NSW) and associated *Work Health and Safety (Mines and Petroleum) Regulations 2014* (NSW). This specific mining legislation and associated regulations provide additional provisions for WHS issues unique to mines, and were developed based on the national Model WHS Regulations for mining and additional mining provisions agreed by New South Wales, Queensland and Western Australia. However, in Queensland and Western Australia, industry-specific mining legislation and regulations operate independently of the mainstream WHS legislation and regulations.

The MCA also considers that duty-holders would benefit from harmonisation of all duties set out in the Model WHS Act and other industry-specific safety legislation, in relation to the qualifications or defences applicable to those duties. The MCA considers that the concept of 'reasonable practicability' should be applied universally in relation to all duties and obligations applicable to PCBUs under the Model WHS Act. Similarly, a suitable standard based on 'reasonableness' (whether positioned as a qualification or defence) should universally apply to all duties applicable to individual duty holders.

Whilst some of the substantive duties set out in the Model WHS Act incorporate the qualification, 'so far as is reasonably practicable', the use of this qualification across all duties set out in the current Model WHS Act is inconsistent. By way of example, each element of the primary duty of care (at sub-sections 19(1)-(5)) includes the qualification. However each of the further duties of PCBUs set out at sections 22 to 26 of the Model WHS Act contain some qualified and some unqualified elements. Taking the example of the further duties of PCBUs that design plant, substances or structures, the duties to ensure that the plant, substance or structure is designed to be without risks to health and safety (sub-section 22(2)) and to give current relevant information to persons carrying out certain activities (sub-section 22(5)) include the qualification. However, the duties to arrange appropriate

testing etc. (sub-section 22(3)) and to give adequate information to each person to whom the PCBU provides the plant, substance or structure (sub-section 22(4)) are not qualified. There are similar unqualified duties placed on PCBUs that manufacture, import or supply plant, substances or structures (refer to sub-sections 23(3)-(4), 24(3)-(4) and 25(3)-(4) of the Model WHS Act).

The MCA would also draw the reviewer's attention to the duty to notify the regulator of notifiable incidents under section 38 of the Model WHS Act. In particular, the duty under section 38(1) requires the PCBU to ensure that the regulator is notified immediately after the PCBU becomes aware that a notifiable incident has occurred. This duty is not qualified in any way and is a strict liability offence, and carries a maximum penalty of $10,000 in the case of an individual and $50,000 in the case of a body corporate. By comparison, the duty to preserve an incident site under section 39 of the Model WHS Act contains the qualification of 'so far as is reasonably practicable', and also expressly confirms (at sub-section 39(3)), that the duty does not prevent any action to assist an injured person, remove a deceased person, and/or to make the site safe. The MCA would ask the reviewer to consider whether it would be appropriate to adopt a similar qualification in relation to the duty to notify of notifiable incidents, and to clarify that the duty to immediately notify the regulator of notifiable incidents under sub-section 38(1) does not prevent any action to rescue or assist an injured person or to make the site safe.

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

To the extent that the qualifications applicable to duties prescribed pursuant to other industry-specific safety legislation are inconsistent with the Model WHS Act, the MCA would respectfully ask that the reviewer give consideration to harmonisation of those provisions. By way of example, the MCA is aware as a result of feedback from its members operating in multiple jurisdictions that the Queensland *Coal Mining Safety and Health Act 1999* incorporates the concepts of 'an acceptable level of risk' and a level of risk from operations that is 'as low as reasonably achievable'. These concepts are not adopted within the mainstream WHS legislation or harmonised mining safety legislation. Such discrepancies create an additional compliance cost for mine operators operating in multiple jurisdictions. Harmonisation within the Model WHS Act, and between the Model WHS Act and other industry-specific safety legislation, in terms of qualifications and/or defences applicable to statutory duties will assist in ensuring that statutory duties are practically achievable.

A further difficulty arises insofar as a business or undertaking's operations may be regulated by multiple safety regimes. As indicated above, mine operators will typically be subject to various safety regimes including but not limited to legislation and regulations relating to radiation control, explosives, and rail and road transport. With this in mind, the 2018 Review should consider all opportunities to harmonise and rationalise the Model WHS Act and Model WHS Regulations as against industry-specific safety regimes, and between interfacing industry-specific regimes. The MCA considers that development and variation to industry-specific safety regimes should involve robust consultation across industry groups. The MCA strongly advocates for nationally consistent legislative and regulatory frameworks which will allow businesses and undertakings to maximise the resources available to practically improve WHS outcomes.

Question 7: Have you any comments on the extraterritorial operation of the WHS laws?

The MCA does not have any direct concerns with the extra-territorial operation of the Model WHS Act, but adopts the view that the scope of an inspector's powers should be limited so as to facilitate reasonable searches for information, evidence and documents that are relevant to a particular incident. The Model WHS Act should limit the potential for onerous requests for information, evidence and documents that are not directly relevant. Whilst regulators may understandably require certain information from company head offices or management facilities in other jurisdictions in relation to a

particular site-level safety incident, in some instances onerous requests for irrelevant documents and information can redirect time and attention away from safety reviews and incident response measures which would otherwise improve safety outcomes throughout the business or undertaking.

The MCA also refers to its further comments in relation to an inspector's information gathering powers at Question 26, below.

Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

No, the MCA does not seek to make submissions in response to Question 8.

Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?

The MCA agrees that it will be imperative for the Model WHS Act to respond to emerging risks to health and safety arising from disruptive technologies and new business models, flexible work arrangements and the growing body of knowledge relating to psychological health risks. The Australian mining industry will not be immune to disruptive new technologies and business models, which are of course to be encouraged, but must not be allowed to operate with impunity.

Further to the above, the MCA considers that there is scope and opportunity for the Model WHS Act to deal with safety issues arising from the global supply chain. In particular, the Model WHS Act should empower and encourage regulators to hold to account the original designers and manufacturers of plant, substances or structures, who are often in the greatest position to improve safety outcomes in relation to the use of that equipment.

4. DUTIES OF CARE

Duties of PCBUs

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

In the MCA's experience, the use of the phrase 'person conducting a business or undertaking' can cause confusion amongst officers as to whether they, individually or collectively, hold duties in the capacity of a PCBU. Notwithstanding that section 5(4) of the Model WHS Act provides that a person does not conduct a business or undertaking to the extent that they are engaged solely as a worker in, or officer of, a business or undertaking, the MCA takes the view that the phrase should be simplified to 'business or undertaking'.

Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?

No, the MCA does not seek to make submissions in response to Question 11.

Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?

The MCA refers to its comments in relation to Question 6, above.

Duty of officers

Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?

Duty to Exercise Due Diligence

First and foremost, it is the view of the MCA that understanding of and compliance with the officer's duty of care under the Model WHS Act would be enhanced by inserting a note or example to clarify what will constitute 'reasonable steps' for the purposes of section 27(5) of the Model WHS Act. This term is not currently defined under the Model WHS Act. A list of examples is provided for the purposes of sub-section 27(5)(e) only, and the MCA would support the inclusion of further guidance in respect of sub-sections 27(5)(a)-(d) and 27(5)(f).

Secondly, the MCA considers that the scope of each element of the duty for officers to exercise due diligence set out in sub-sections 27(5)(a)-(f) of the Model WHS Act should be limited and clarified, to support compliance. For example, the current drafting of sub-section 27(5) is equally applicable to all hazards and risks, WHS matters, and safety processes, and is not positioned so as to apply, for example, only to those which are assessed by the PCBU as being the most critical within their operations. The MCA acknowledges that each of these elements is qualified to some extent insofar as the duty requires the taking of 'reasonable steps' (and refers to its comments above noting that the meaning of this phrase should be clarified).

Notwithstanding this, it is the view of the MCA that it is not realistic and/or achievable for officers to continuously maintain knowledge of all hazards and risks and WHS matters associated with the conduct or operations of the business or undertaking (sub-sections 27(5)(a)-(b)), or to have knowledge of the availability and use or implementation of all safety processes within the PCBU's operations (sub-sections 27(5)(c)-(f)). The imposition of such broad requirements without any clarification as to the scope of the requirement is unduly onerous and manifestly unfair in circumstances where a failure to comply with the duty to exercise due diligence will expose an officer to severe personal, criminal penalties, including imprisonment.

Application of Industrial Manslaughter offence to 'Senior Officers'

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

First, the industrial manslaughter offences apply to 'senior officers'. This definition is inconsistent with the definition of 'officers' adopted under the Model WHS Act, with the effect that the industrial manslaughter offence may potentially apply to a much wider category of persons than is contemplated in the Model WHS Act. The MCA takes the view that this is inappropriate if the industrial manslaughter offence is to apply to those at the most senior levels of management within an organisation. The MCA considers that the existing officer due diligence duties (and the penalties attached to those duties) contained within the Model WHS Act provide sufficient deterrence.

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

Thirdly, the industrial manslaughter offences potentially overlap with the "traditional" manslaughter offences, which remain available under existing criminal legislation. Further, the industrial manslaughter provisions remove the defences otherwise available to a person under existing criminal legislation for traditional manslaughter offences. If the industrial manslaughter offence is to be adopted more broadly, it should include defences that a person is not criminally responsible for:

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

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

No, the MCA does not seek to make submissions in response to Question 14.

Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?

No, the MCA does not seek to make submissions in response to Question 15.

Duty of other persons at the workplace

Question 16: Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?

No, the MCA does not seek to make submissions in response to Question 16.

Principles applying to duties

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

The MCA refers to its comments in relation to Question 6 above, relating to harmonisation of the qualifications and defences applicable to all duties set out under the Model WHS Act.

5. CONSULTATION, REPRESENTATION AND PARTICIPATION

Consultation with other PCBUs

Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

The MCA considers that understanding of and compliance with the obligation of duty-holders to consult, co-operate and co-ordinate activities with other duty-holders under section 46 of the Model WHS Act could be improved by including legislative guidance on how to comply with those duties. Although the duty to consult, co-operate and co-ordinate is qualified by the phrase 'so far as is reasonably practicable', the MCA considers that the practical application of the duty is potentially unclear (particularly in relation to co-ordinating activities where there are multiple duty holders operating as part of large supply chains). As such, the MCA respectfully calls upon the reviewer to consider whether Division 1 of Part 5 of the Model WHS Act could be amended to provide greater clarity as to how duty-holders may demonstrate compliance with this duty.

Whilst section 48 of the Model WHS Act clarifies the nature of the requirement to consult with workers pursuant to section 47 of the Model WHS Act, there is no equivalent guidance on the nature of the requirement to consult, co-operate and co-ordinate pursuant to section 46 of the Model WHS Act. The SafeWork Australia approved Code of Practice on Work Health and Safety Consultation, Co-operation and Co-ordination acknowledges that a person conducting a business or undertaking may not initially be aware of other duty-holders involved in certain work. That Code of Practice also envisages that consultation, co-operation and co-ordination may occur as part of contractual negotiations, informal discussions when a PCBU is engaged to carry out work, or when a PCBU engages another PCBU to carry out work. Whilst the MCA does not advocate developing prescriptive requirements for how to demonstrate compliance with the Model WHS Act, duty-holders may benefit from further guidance within the body of the Model WHS Act itself as to possible ways of demonstrating compliance with section 46 of the Model WHS Act.

The MCA also notes that section 46 of the Model WHS Act applies in circumstances where more than one person has a duty in relation to the same matter under the Model WHS Act. However, as noted above in relation to Question 6, some PCBUs (including mine operators) are required to comply with various industry-specific safety regimes as a result of the breadth of the PCBU's own operations, or in its dealings with other duty-holders operating as part of a supply chain or network. To the extent that those discrete regimes interact with the Model WHS Act, the MCA would also ask the reviewer to consider whether it is appropriate to include in the Model WHS Act a requirement for duty-holders under interfacing safety regimes to consult, co-operate and co-ordinate activities.

Consultation with workers

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?

The MCA notes that the requirement to consult workers who are, or are likely to be, directly affected by a matter relating to WHS under section 47 of the Model WHS Act does not import a requirement for a PCBU to agree with workers. The MCA acknowledges and agrees with the importance of sharing relevant information in relation to WHS matters, allowing workers a reasonable opportunity to express their views and for these to be taken into account. However, the MCA considers that the Model WHS Act could express with greater clarity that the duty to consult workers can be satisfied notwithstanding that agreement is not reached on a particular issue. This would assist in managing all parties' expectations.

The MCA also notes that the unqualified obligation under section 51 of the Model WHS Act for PCBUs to facilitate the determination of one or more work groups where requested to do so by a

worker under section 50. Although one purpose of the compulsory negotiation between the PCBU and the workers is to determine the number and composition of work groups, there is no upper limit in the legislation on the number of work groups that may be requested, and no minimum number of workers that may be represented by a particular work group. Further, the duty on PCBUs to facilitate the determination of one or more work groups when requested pursuant to sections 50 and 51 of the Model WHS Act is not qualified by reference to existing agreements as to the number and composition of work groups. This represents a significant potential impost to PCBUs, who may be called upon to negotiate and agree to an indefinite number of work groups. The MCA would ask the reviewer to consider providing greater clarity and guidance in relation to the duty under section 51 of the Model WHS Act, and the operation of and reliance on agreements made between PCBUs and workers in relation to the number and composition of work groups.

Question 20: Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?

No, the MCA does not seek to make a submission in relation to Question 20.

Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?

The MCA takes the view that certain powers of health and safety representatives (HSRs) could inhibit the continuing effectiveness of the function of this role, by placing HSRs in a potentially unfair position when seeking to resolve WHS issues with a PCBU where other remedies exist under the Model WHS Act. In particular, the MCA queries whether the power of an HSR to direct that unsafe work cease under section 85 of the Model WHS Act is necessary, given the other avenues for resolution of WHS issues provided to workers in the Model WHS Act.

All workers, officers and PCBUs have a common goal to achieve safe workplaces and have WHS obligations under the Model WHS Act. In addition, the MCA is of the view that the consultation, co-operation and co-ordination requirements between duty holders under the Model WHS Act provide sufficient opportunity for a worker to raise any WHS concerns with a PCBU. The discriminatory, coercive and misleading conduct provisions of the Model WHS Act also serve to protect workers and encourage collaborative reporting of WHS issues to PCBUs as well as others. The Model WHS Act also provides that each worker has the right to cease or refuse to carry out unsafe work in which they are involved under section 84 of the Model WHS Act, and there is no requirement that consultation occur before a worker can exercise that right.

Where WHS issues cannot be resolved, the Model WHS Act provides avenues for those issues to be referred to the regulator for resolution. The MCA considers that the power of the regulator to appoint an inspector to attend the workplace to assist in resolving a WHS issue is indicative that, where consultation has not effectively resolved a WHS issue, it is the regulator (rather than a HSR) that is best placed to make decisions to resolve a WHS impasse and achieve safety outcomes. The MCA takes the view that the regulator is best qualified to make decisions to resolve WHS issues and achieve safety outcomes. Workers have the ability to directly engage with the regulator to seek satisfaction on an unresolved WHS issue through regulators' safety hotlines and other communication methods. An HSR would be able to raise a concern in this regard in his or her capacity as a worker.

In light of the above, the MCA is of the view that the HSR power to direct that unsafe work cease is not necessary as all workers have a duty to take reasonable care for their own safety and to ensure that their acts and omissions do not affect the health and safety of others, and the Model WHS Act provides other effective avenues to resolve WHS issues.

Issues resolution

Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?

No, the MCA does not seek to make submissions in response to Question 22.

Discriminatory, coercive and misleading conduct

Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as a HSR or member of a HSC, or who raise WHS issues in their workplace?

No, the MCA does not seek to make submissions in response to Question 23.

Workplace entry by WHS entry permit holders

Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

Threshold test for right of entry to inquire into contraventions

The MCA takes the view that the Model WHS Act should incorporate a higher standard into the threshold test for WHS entry permit holders to exercise the power to enter a workplace under section 117 of the Model WHS Act, and respectfully asks that the reviewer consider amending section 117 to refer to a 'reasonable belief', rather than a 'reasonable suspicion'. The MCA acknowledges that WHS entry permit holders fulfil a critical function within the Model WHS Act in identifying potential risks to health and safety of workers arising from contraventions of the Model WHS Act, and assisting with monitoring compliance with the Model WHS Act. The value and importance of this function has been recognised in a long line of authorities acknowledging that the power to enter a workplace to inquire into contraventions of applicable WHS legislation is a discrete and critical limitation on the right of property owners to prevent against trespass onto their premises.

Notwithstanding the above, it is the view of the MCA that the current requirement under section 117(2) of the Model WHS Act that the WHS entry permit holder must reasonably suspect a contravention prior to entering a workplace does not sufficiently safeguard against potential misuse of an entry permit. Improper entry to a workplace can cause significant disruption to the operations of a business or undertaking, and is to be strongly discouraged. As such, the MCA considers that it is necessary and appropriate to limit the potential misuse of WHS entry permits whilst preserving the value of this function. The MCA takes the view that this can be achieved by holding WHS entry permit holders to a higher standard in exercising those powers of entry. There is authority for the proposition that a 'reasonable suspicion' is a lower standard than a 'reasonable belief'. Accordingly, the MCA considers it appropriate that WHS entry permit holders be permitted to enter a workplace to inquire into a potential contravention of the Model WHS Act only where a reasonable person in the same circumstances and with the same knowledge and information as the permit holder would reasonably believe that a contravention of the Model WHS Laws has occurred or is occurring.

Alternatively, the MCA submits that permit holders would be assisted in the proper exercise of their powers of entry by further clarification in the Model WHS Act as to what will constitute a factual basis, or material or materials with probative value, sufficient to create in the mind of a reasonable person a suspicion that a person conducting a business or undertaking has contravened, or is contravening, the Model WHS Act, thereby enlivening the power of entry under section 117 of the Model WHS Act.

Notice and notification of exercise of entry rights

The MCA calls upon the reviewer to consider whether it is appropriate for WHS entry permit holders to be required to notify a PCBU and the regulator at the earliest opportunity on forming a suspicion (or belief) as to a contravention of the Model WHS Act, and before affecting entry into the relevant

workplace. In this respect, the MCA draws the reviewer's attention to section 117 of the *Work Health and Safety Act 2012* (SA). That provision incorporates a requirement for a WHS entry permit holder to consider whether it is reasonably practicable to notify the SA regulator of a proposed entry to inquire into a suspected contravention of that Act, and to provide the regulator with an opportunity to attend. Further, where an entry permit holder enters a workplace unaccompanied by an inspector, the permit holder is required to produce a report to the regulator on the outcome of the inquiries. This requirement appears to support the objects of the Model WHS Act as it is an effective and appropriate compliance and enforcement measure which ensures that the regulator is promptly notified of potential WHS incidents or concerns, and facilitates appropriate scrutiny and review of the exercise of powers of entry by entry-permit holders.

The MCA respectfully submits that the reviewer should consider whether the Model WHS Act should incorporate a notice requirement equivalent to that contained within section 117 of the *Work Health and Safety Act 2012* (SA). In this regard, the MCA would ask the reviewer to consider whether it would be preferable for the language of any equivalent provision in the Model WHS Act to require a WHS entry permit holder to give consideration to what is 'reasonable' or 'reasonable in the circumstances', on the basis that the use of the phrase 'reasonably practicable' in section 117(3) of the *Work Health and Safety Act 2012* (SA) may potentially cause some confusion in light of the definition of that phrase set out within section 18 of that legislation.

The MCA strongly believes that a requirement for WHS entry permit holders to notify both the regulator and the PCBU of contraventions will support the overarching objectives of the Model WHS Act in protecting workers and other persons against harm to their health, safety and welfare, by facilitating the prompt elimination or minimisation of risks arising from work, and securing compliance with the Model WHS Act. Further, introducing a duty for WHS entry permit holders to notify regulators of contraventions will supplement the existing duty for PCBUs to notify the regulator immediately after becoming aware of a notifiable incident, and is an appropriate means to drive information sharing by all persons in a position to influence safety outcomes.

As to the current notification requirements of the Model WHS Act, the MCA notes that clause 117(5) requires that a minimum of 24 hours' notice be given prior to entry, except where this would defeat the purpose of the entry, or would unreasonably delay the WHS entry permit holder in an urgent case. The 24 hour notice period has not been adopted in any State or Territory WHS legislation. By way of comparison, under section 119 of both the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Act 2011* (Qld), a WHS entry permit holder is only required to give notice of entry and the suspected contravention as soon as is reasonably practicable after entering a workplace. In Western Australia, section 33(1)(a) of the *Occupational Safety and Health Act 1984* (WA) provides that where a Safety and Health Representative (SHR) seeks to enter a workplace (or part of) it in circumstances where they have not inspected the workplace or relevant part in the preceding 30 days, the SHR may enter at any time and need only provide 'reasonable notice' of the entry to the employer.

Notwithstanding that the notice requirement under section 117(5) of the Model WHS Act is not reflected in relevant State/Territory legislation, the MCA considers that the current drafting of the Model WHS Act does not provide sufficient clarity with regard to the exceptions to the notice requirement. The MCA considers that the legislation should expressly deal with circumstances where these exceptions can arise, including defining an 'urgent case' and incorporating guidance (by way of a note or example) as to when notice will defeat the purpose of an entry.

Clarification that permit requirements cannot be evaded by assisting worker representatives

The MCA invites the reviewer to consider whether the Model WHS Act should be amended to clarify that if an HSR seeks assistance from a person, and that person is a union official, then he or she must hold a right of entry permit under the *Fair Work Act 2009* (Cth) and a WHS entry permit before section 70 of the Model WHS Act will have the effect of requiring that the person conducting a

business or undertaking allow them access to a workplace. There are both policy and practical drivers for such a change. At a level of policy, the regime for the issue of entry permits is an important safeguard to ensure that where WHS laws limit employers' right to determine who enters their premises, union officials exercise their rights responsibly and for proper purposes. The MCA does not consider it appropriate that this protection can potentially be evaded by the mechanism of HSRs requesting assistance from union officials and asserting a right to enter the workplace in that capacity, in circumstances where the an official would otherwise require a WHS entry permit to gain access.

At a practical level, an amendment of the kind described above would allow the Model WHS Act to operate more harmoniously with the law as it stands following *Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470; [2017] FCAFC 89. In that case, from which special leave to appeal to the High Court was refused, the Full Federal Court held that a person who asserts an entitlement to access a workplace as an HSR's assistant is exercising a "State or Territory OHS right" and is therefore required under section 494 of the Fair Work Act 2009 (Cth) to hold a right of entry permit under that Act. This requirement is additional to those which appear on the face of the Model WHS Act, and has potentially significant consequences (including personal liability for substantial pecuniary penalties) for union officials who fail to comply with it. Expressly providing in the Model WHS Act that union officials who assist HSRs must hold a federal permit will therefore assist in ensuring that they can readily know all of the requirements which apply.

6. COMPLIANCE AND ENFORCEMENT

Regulator functions

Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?

The MCA takes the view that, in order to enhance the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator, further clarity should be provided on certain powers delegated to inspectors in relation to the issuing of notices under the Model WHS Act.

In particular, the MCA takes the view that the power to vary or cancel a notice as provided in section 207 of the Model WHS Act should be delegated to an inspector. As an inspector has the ability to issue a notice, and in consideration of the fact that a notice can direct a person to take remedial steps, the inspector should have the equivalent power to vary or cancel that notice. This arrangement would better complement the existing power of the inspector to make minor changes to a notice (pursuant to section 206 of the Model WHS Act), and is appropriate given the availability of the existing provisions relating to review of decisions as set out in Part 12 of the Model WHS Act.

The MCA would also draw the reviewer's attention to the power for inspectors to issue penalty notices under section 243 of the *Work Health and Safety Act 2011* (NSW). The MCA does not support the inclusion of this power in the Model WHS Act. The MCA considers that this power is inappropriate, for example, as the amount payable under a penalty notice issued under this section is fixed as the amount prescribed for the alleged offence by the *Work Health and Safety Regulations 2017* (NSW). Notwithstanding that the *Work Health and Safety Regulations 2017* (NSW) prescribe different penalty amounts for each penalty notice offence, and that there is a mechanism to have a penalty notice reviewed in NSW (whereby the recipient must in the first instance make representations to the State Debt Recovery Office), this framework does not appear to allow sufficient scope for consideration of factors relevant to the appropriate quantum of any penalty on a case by case basis.

In relation to the issuing of notices, the MCA takes the view that further clarity should be provided in the Model WHS Act to prescribe the form and manner in which an inspector confirms that a notice issued under the Model WHS Act has been complied with and is no longer in effect. The MCA is of the view that the form of this confirmation should be prescribed in the Model WHS Act and should reflect a similar process and form to that of the notice issued.

The MCA is of the view that this delegation of power should not negatively impact on the existing regime in relation to reviewable decisions in respect of notices issued under the Model WHS Act. To be clear, the MCA considers that those provisions should remain available in the event that a person wishes to seek a review of a notice.

Inspectors powers' and functions

Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

Overall, the MCA considers that there is a strong need to introduce a prescribed ethical framework to govern how inspectors are to exercise both their specific statutory powers, and more generally, their discretion, in a manner that is consistent with the objects of the Model WHS Act.

The MCA notes that the persons eligible for appointment as an inspector pursuant to the Model WHS Act includes public servants, employees of public authorities and statutory office holders. Appointees to the role of inspector under the Model WHS Act are entrusted by the Government and the community to undertake important work on their behalf, and it is of vital importance to maintain public confidence in the way inspectors fulfil their duties and exercise their statutory authority in furtherance

of progressively higher safety outcomes across all industries. As such, the MCA strongly advocates for the Model WHS Act to establish clear standards of conduct expected of safety inspectors. The MCA considers that there is scope within the 2018 Review to consider the appropriateness of statutory duties to reflect community expectations as to inspectors' standards of behaviour, together with direct exposure to personal penalties for inspectors who fail to meet those standards.

The MCA considers that it is appropriate for expectations as to the standards of behaviour which inspectors are required to meet to be directly addressed within the legislation under which inspectors can be held to account. The legislation provides that inspectors are required to comply with any conditions specified in their instrument of appointment, and with any general or specific directions issued by the regulator (see sections 161 and 162 of the Model WHS Act). Additionally, section 182 of the Model WHS Act requires an inspector to take all reasonable steps to ensure that the inspector (and any assistant) causes as little inconvenience, detriment and damage as is practicable. However, no penalties apply to inspectors in relation to the misuse or improper exercise of their statutory powers pursuant to Parts 9 and 10 of the Model WHS Act. Further, the Model WHS Act does not provide any guidance as to what will constitute 'reasonable steps', or what kinds of inconvenience, detriment and damage are covered, for the purpose of the obligation under section 182. A person may make a claim under section 184 of the Model WHS Act for compensation in respect of any loss or expense arising from the exercise or purported exercise of an inspector's powers. However, this applies only in relation to the exercise of powers relating to entry. Given that any compensation so granted is from the State, with no direct personal exposure for the relevant inspector, this is not an effective measure to ensure appropriate compliance and enforcement action. The MCA considers that the Model WHS Act should establish clearer duties for inspectors which reflect expected standards of behaviour, accompanied by exposure to direct personal penalties for failure to meet those standards.

In particular, the MCA also considers that the Model WHS Act should incorporate clearer and more precise guidelines (including a requirement for mandatory inspector training) in relation to the exercise of coercive information gathering powers. The MCA would ask the reviewer to consider the appropriateness of specific legislation relating to the exercise of coercive information gathering powers taking into account:

- whether information is otherwise available;
- whether information is necessary and relevant to the investigation (the MCA refers to its comments under Question 7 above in this regard);
- whether it is appropriate to require a person to attend an interview in circumstances where it may be possible to provide the relevant questions to that person in writing; and
- time and cost implications to responding to a notice or request.

The MCA considers that the Model WHS Act should be amended to strengthen the requirement for inspectors to give greater consideration to the risk of psychological harm to a PCBU (where this is an individual), representatives of a PCBU, witnesses and other persons seeking to assist throughout the investigation process.

The MCA also considers that there is a strong need to insert greater legislative protection for confidential or sensitive commercial information pertaining to the conduct or operations of a business or undertaking. The Model WHS Act should be amended to incorporate broader safeguards for confidential and commercially sensitive information obtained pursuant to an inspector's powers, and to introduce offences relating to the misuse of such information and/or documents obtained under compulsion.

Further, in relation to the power of inspectors to obtain information and evidence under compulsion, the MCA submits that the Model WHS Act should incorporate an inclusive list of reasons that will constitute a reasonable excuse to refuse or fail to comply with a requirement under section 171 of the

Model WHS Act. In particular, the MCA submits that the Model WHS Act should recognise the following examples (without limitation) as legitimate, reasonable excuses:

- Refusal or failure to comply due to the need to seek legal advice specifically in relation to the requirement
- Where compliance with the requirement gives rise to a risk to psychological health and wellbeing of a person involved in performing the requirements of the notice; and
- Where the requirement under section 171 is manifestly unreasonable, including but not limited to reasons relating to the scope and relevance of information or documents required to be produced and the time for compliance with the requirement.

Members of the MCA would also benefit from legislative complaint mechanisms which would facilitate the escalation and resolution of incidents where inspectors' conduct creates significant adverse health outcomes for individuals assisting them with inquiries, or amounts to an abuse of statutory powers.

Internal and external review of decisions

Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?

The MCA refers to its comments in relation to Question 25 above, noting that any potential amendments to the power to vary or cancel a notice should not alter the existing framework for internal and external reviews.

Exemptions

Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?

No, the MCA does not seek to make submissions in response to Question 28.

Cross-jurisdictional co-operation

Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?

The MCA requests the reviewer to consider ways in which the derivative use immunity provision set out within section 172(2)(c) of the *Work Health and Safety Act 2011* (Cth) could be extended to all workers across all State and Territory jurisdictions. The MCA notes that 172(2)(c) of the *Work Health and Safety Act 2011* (Cth) has the effect that any information, document or thing obtained as a direct or (importantly) an indirect consequence of an individual being compelled to answer a question or produce information is not admissible in evidence in civil or criminal proceedings against the person. This is broader than the protections available under mainstream WHS legislation in other States and Territories, which generally only prohibit the use of answers, information or documents specifically provided under compulsion in proceedings against the individual who provided them. No State or Territory has adopted the protection in respect of information, documents or other things obtained by the regulator as an indirect consequence of the regulator's exercise of their information-gathering powers. The MCA strongly considers that the same level of protection afforded to Commonwealth 'workers' for abrogating their privilege against self-incrimination should be extended to all workers, as this is a direct means of supporting co-operation and assisting the compliance and enforcement objective. Further, it is unfair to allow a protection to be afforded to Commonwealth workers where this is not mirrored in applicable State and Territory legislation.

Incident notification

Question 30: Have you any comments on the incident notification provisions?

The MCA refers to its submissions in relation to Question 24 above, and confirms that it considers it appropriate for the Model WHS Act to incorporate a duty for WHS entry permit holders to notify the regulator and the relevant PCBU of contraventions.

In relation to notifiable incidents, the MCA also considers that PCBUs would benefit from greater clarity and guidance around the materiality thresholds for 'dangerous incidents' (as defined within section 37 of the Model WHS Act) that will trigger the requirement to notify the regulator. For example, a duty to notify the regulator arises in relation to damage to any plant that is required to be authorised for use (pursuant to sections 37(g) and 38), however as 'damage' is not defined, PCBUs may potentially be exposed to a penalty in respect of failure to notify of issues such as scratches or dings to the plant. Similarly in relation to the duty to notify of an uncontrolled escape, spillage or leakage of a substance (section 37(a)), the Model WHS Act or associated regulations should provide guidance on the quantity of the escape, spillage or leakage which will require notification.

The MCA considers that the regulator should provide greater clarity around whether the requirement to notify the regulator of an incident applies in relation to the injury or death of a worker which arises as a result of psychological health issues (including where the death occurs at or away from the workplace). In the ordinary course, a business must notify the regulator of any death of a worker that has occurred 'arising out of the conduct of the business'. Whether or not a death arises out of the conduct of a business is a question of fact and degree, and providing additional clarification on the position where the cause of injury or death relates to psychological health issues would support increased understanding and compliance with the notification requirement.

7. NATIONAL COMPLIANCE AND ENFORCEMENT POLICY

Adoption of the NCEP and the approach to compliance

Question 31: Have you any comments on the effectiveness of the National Compliance and proceedings Policy in supporting the object of the model WHS Act?

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

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

- Continuous improvement, where all parties work together in support of a safety culture based on trust and openness, not an adversarial legal approach based on a blame culture
- Regulatory practice based on consistency, transparency, probity, clarity of role, flexibility and rational pragmatism, and
- An enforcement rationale based primarily on the desire to improve standards at a particular mine and across the mining industry.[1]

The NSW Causal Investigation Policy provides a framework pursuant to which the NSW Resources Regulator can quickly but comprehensively investigate the causes of significant safety incidents and high potential mining safety incidents, and promptly share the learnings from those incidents back to the industry to promote awareness and understanding of relevant risks and the controls necessary to prevent recurrences of similar incidents.

In particular, the MCA respectfully notes that the NSW Causal Investigation Policy expressly provides that "all documents gathered, and information and statements provided to the causal investigation team about the safety incident, will not be used for or made available for any criminal or civil legal proceedings, or for disciplinary action, to the extent allowed by law." This protection is an effective means of encouraging honest and transparent co-operation with the investigation process, which in turn results in a more efficient use of the regulator's resources towards sharing valuable learnings to prevent recurrences across the industry more broadly, and directly supports the objects of the Model WHS Act.

Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

The MCA refers to its comments in relation to Question 31, above.

The MCA has also received extensive feedback from members that in many instances, inspectors undertake investigations on an informal basis and are reluctant to exercise their powers pursuant to the Model WHS Act. This creates uncertainty and inhibits prompt co-operation, particularly as individuals who seek to assist and co-operate with inspectors but lack certainty as to whether information and/or documents produced pursuant to informal requests will receive the protections which would otherwise be afforded in respect of a formal notice.

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

Additionally, the MCA believes that the Model WHS Act should prohibit the use of evidence of measures implemented by a business or undertaking in response to an incident in proceedings for an offence against the Model WHS Act. The MCA considers that evidence of post-incident measures should not be admissible in prosecutions, on the basis that relevant proof of a contravention must pertain to the circumstances arising prior to and at the time of the incident. Reliance on post-incident measures as evidence of whether or not an offence has occurred discourages sharing between industry participants of new and revised control measures to eliminate or minimise risks. There is also a concern that the use of evidence relating to post-incident measures can introduce hindsight bias into judicial consideration of what constituted reasonably practicable steps to prevent a particular kind of incident from occurring.

8. PROSECUTIONS AND LEGAL PROCEEDINGS

Offences and penalties

Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?

In light of research findings that workplace injuries and fatalities are decreasing in Australia, the MCA submits that there is nothing to warrant the imposition of higher penalties in respect of offences under the Model WHS Act.

Legal proceedings

Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?

The MCA notes that the Model WHS Act empowers the Director of Public Prosecutions to commence proceedings in relation to an alleged contravention of the Model WHS Act. The MCA considers that it would improve the objective of increasing sharing of learnings and expediting investigations into incidents if the power of the regulator to commence proceedings for an offence against the Model WHS Act was removed, and this function sat entirely with the Department of Public Prosecution.

Allocating responsibility for safety prosecutions to an independent prosecutor at arm's length from the regulator may increase the willingness of duty-holders to co-operate with the regulator in the aftermath of a safety incident, and increase the scope for robust discussions relating to enforceable undertakings and potentially other initiatives that would represent a more efficient use of regulators' resources and would facilitate more proactive learning and improved safety outcomes for a greater number of workers.

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

Sentencing

Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?

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

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

Enforceable undertakings

Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

No, the MCA does not seek to make submissions in response to Question 36.

Insurance against fines and penalties

Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

No, the MCA does not seek to make submissions in response to Question 37.