MODEL WORK HEALTH AND SAFETY MINES REGULATIONS

SUBMISSION TO SAFE WORK AUSTRALIA

MINERALS COUNCIL OF AUSTRALIA with

- Victoria Division of the MCA
- Northern Territory Division of the MCA
- Tasmanian Minerals Council
- SA Chamber of Mines and Energy
- Queensland Resources Council
- NSW Minerals Council

23 SEPTEMBER 2011

About this submission

The Minerals Council of Australia, as the peak national body representing the Australian minerals industry has brought together the views of its members and all State/Territory minerals industry bodies in developing this submission.

This Submission is made by the Minerals Council of Australia (MCA) in conjunction with the:

- Victorian Division of the MCA
- Northern Territory Division of the MCA
- Tasmanian Minerals Council
- South Australian Chamber of Mines and Energy
- Queensland Resources Council
- NSW Minerals Council

This submission makes comment on the exposure draft of the Model Mines Regulations 2011.

Separate comments on the Issues Paper are not made in this submission as the body of this submission and the comments made in the template responding to specific regulations covers all questions asked in the Issues Paper.

A separate submission will be made on the Model Mining Codes of Practice.

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1 GENERAL COMMENTS

Whilst this submission is focused on the minerals specific chapter of the Model WHS Regulations, it is important that the minerals industry's position regarding national reform is restated.

1.1 A uniform regime

The MCA and Representatives strongly supported the establishment of the National Review into OHS Reform on 4 April 2008 by the National Workplace Relations Ministerial Council (Chaired by Deputy Prime Minister Gillard) as providing the framework for a wholesale review of all safety and health legislation across the country, and a platform to achieve uniformity in safety and health regulation across all industry sectors.

Specifically, the MCA recommended that a National OHS regime be implemented through:

- A National OHS Act covering all industries and businesses across all jurisdictions;
- Complemented by National Regulations including, where necessary, clauses for specific hazards and industries; and
- Supported by National guidelines, codes of practice and standards.

The MCA and Representatives see the national effort to develop uniform WHS laws as a significant opportunity to strengthen, not weaken safety and health outcomes, including in the minerals sector. The importance of this effort should not be underestimated. It would represent an important national reform that would inevitably bring significant socio-economic benefits to the Australian economy.

Prior to the establishment of the Review, the minerals industry had been working through the National Mine Safety Framework (NMSF) to attempt to achieve a level of consistency in regulatory regimes for the minerals industry across the nation. This process commenced in 2002 and has proved useful in discussions on ways to align regulatory practice. However this process was fraught, and not having any direct legal authority, could only make recommendations to jurisdictions to inform the way safety and health was managed in the minerals industry. It is further limited in its application to those jurisdictions where safety and health regulation of the minerals industry resides with the Mines/Resources Minister as distinct for the workplace safety Minister.

Therefore when the Review was announced, the opportunity for the mineral industry to achieve truly uniform minerals safety regulation and administration was presented.

The MCA and Representatives consider that the Model WHS Reform process provides the only mechanism to achieve a national safety and health regulatory regime for the minerals industry – the same rules across the country – a truly uniform approach to safety and health.

The MCA and Representatives consider that there is simply no objective justification to isolate some sectors of work. The MCA and Representatives have consistently advocated that there is **no** objective justification for the minerals industry to be regulated outside of the National Model OHS regulatory regime. Furthermore there is **no** objective justification for the minerals industry to have separate legislation, nor can separate jurisdictional regimes be justified - this would fundamentally contradict COAG's objectives for harmonisation.

The MCA and Representatives do not support industry-specific WHS laws. The MCA and Representatives consider that the minerals industry is no different to other hazardous industries like construction, fisheries, forestry, and chemicals, which are to be regulated within the Model OHS Regime, and should accordingly be treated in an equivalent manner. Any industry-specific WHS issues must be managed through the Model WHS regime in regulations, codes and guidelines within the Model Safe Work Act. The objective of harmonisation is that there are the same rules and protections for all workplaces and workers across the country.

The industry experiences a large proportion of the same safety and health challenges that all industries face: from large hazards such as moving equipment and working at heights through to musculoskeletal issues through repetitive tasks. The MCA and Representatives also acknowledge that the minerals industry has a small number of additional WHS challenges that many businesses do not face. These challenges are both shared with other industrial sectors and some specific only to the minerals industry. Accordingly, the MCA and Representatives consider that the management of these specific safety and health issues must be appropriately addressed in subordinate instruments within the Model WHS regime, including national regulation, codes and guidelines.

Accordingly, the MCA and Representatives strongly agree with the expert Review Panel's position that maintaining a separate framework for mining will likely result in legislative inconsistencies between mining and other industries (page 7, Issues Paper – National Review into Model OHS Laws – May 2008).

Recommendation 76

The MCA and Representatives fully support the recommendation of the expert Review Panel and endorsed by Workplace Relations Ministers Council. The recommendation, quoted in the box below clearly states the intent of national OHS laws and that all workers undertaking any type of work across the country should be afforded the same protections and responsibilities.

Part a) clearly states that any other law that includes OHS provisions *should only continue* where they have been objectively justified. While it is unclear who will determine objective justification it would be extremely difficult for one jurisdiction to defend the maintenance of separate laws for a hazard or industry that also exists in other jurisdictions.

Part b) further states that if justification is established (and this may be to allow for transition while awaiting amendment other law), the legal and administrative relationships are to be intertwined, recognising the importance of consistency and long-term compatibility. The remainder of the recommendation clearly states that specific hazards and industries should be regulated within the Model Act as Model Regulations.

National OHS Review - Recommendation 76
We recommend that Ministers agree that:

a) in developing and periodically reviewing the model OHS Act, there should be a presumption that separate and specific OHS laws, (including where they form part of an Act that has other purposes) for particular hazards or high risk industries that are within the responsibility of the Ministers, should only continue where they have been objectively justified;
b) even where that justification is established, there should be an on-going, legislative and administrative interrelationship between the laws and, if there are different regulators, between those regulators;
c) as far as possible, the separate legislation should be consistent with the nationally harmonised OHS laws;
d) where the continuation of the separate legislation is not justified, it should be replaced by the model Act within an agreed timeframe;
e) where specific provisions are necessary, they should normally be provided by regulations under the model Act, with specific provision in the model Act relating to the matters previously regulated by the separate legislation kept to a minimum; and
f) this approach should be recommended to COAG so that, subject to COAG agreement, it is extended within a reasonable timeframe to other legislation that pertains to OHS but which is within the responsibilities of other Ministers.

Uniformity/ harmonisation/ consistency

As discussed in the MCA's submission to the National OHS Review, it remains clear that the terms "national consistency", "national harmonisation" and "national uniformity" are often used interchangeably, creating considerable confusion.

Each term has a different meaning with various interpretations and hence variable outcomes. It is important at the outset to clarify the MCA‟s understanding and clear preference as to intent and outcome. In the MCA‟s view, national consistency and national harmonisation are aspirational and not absolute in their outcomes nor effective. National consistency or harmonisation, in and of itself, is valuable in the absence of a unified national approach to WHS regulation. However, the MCA considers that the benefits of an agreed Model Act will be short-lived if any jurisdiction can make a single amendment to a Model Act, or have additional WHS laws, that render it no longer a national regime. In contrast, uniformity delivers a single legislative tool that is applied universally without jurisdictional amendment and without additional WHS regimes, thus providing the same requirements nationally.

To minimise the prospect of necessarily revisiting reforms in the future, the MCA considers national uniformity is the desired outcome of the Model Act and Regulations.

The InterGovernmental Agreement (IGA)[1] supports this view, and specifically states:

*1.2 The Parties agree that OHS harmonisation means national **uniformity** of the OHS legislative framework (comprised of a model OHS Act, supported by model OHS regulations and model codes of practice) complemented by a nationally consistent approach to compliance policy and enforcement policy.*

1.4 The fundamental objective of the reform covered by this Agreement is to produce the optimal model for a national approach to OHS regulation and operation which will:

*(a) enable the development of **uniform, equitable and effective** safety standards and protections for **all** Australian workers;*

*(b) address the **compliance and regulatory burdens** for employers with operations in more than one jurisdiction;*

*(c) create **efficiencies for governments in the provision of OHS regulatory and support services**; and*

*(d) achieve **significant and continual reductions** in the incidence of death, injury and disease in the workplace.*

1.2 Current regulatory environment for the minerals industry

Not only is the Australian minerals industry regulated through the principal statutes governing OH&S – six State, two Territory, two Commonwealth – and numerous regulations and codes of practice, there are separate mining OHS Statutes in WA, QLD and NSW, with the industry further separated into metalliferous and coal in QLD and NSW. Along with this there are duplicated regulations and codes of practice. In total there is over 3392 pages of OHS legislation companies must comply (Source Productivity Commission). The MCA and Representatives consider that this approach represents an extraordinarily complicated regulatory environment with significant compliance burdens and costs imposed by multiple regimes of regulation, administration and enforcement – compounded by frequent amendments. The effect is that multi-State/Territory employers bear very substantial compliance costs. The Australian minerals sector, whose companies operate in virtually all States and Territories, bears a large proportion of this burden.

This raft of overlapping safety and health laws, standards and requirements within and between jurisdictions can both confuse workers and divert business from the primary goal of improving workplace health and safety. The multi-layered regulatory regime also imposes a significant administrative burden on the minerals sector and adds unnecessary complexity to business operations. The multiplicity of State and Territory OHS legislative regimes applicable to the minerals sector, result in inefficiency, excessive cost, complexity and uncertainty, and, to the extent this detracts from the primary objective, may lead to suboptimal safety and health performance.

Below is how the Australian minerals industry is currently regulated.

Victoria

- *Occupational Health and Safety Act* 2004
- *Occupational Health and Safety Regulations 2007*

NSW

- *Occupational Health and Safety Act* 2000
  Principal OHS Act covering general safety and the mining-specific OHS Acts.
  Occupational Health and Safety Regulations 2001
- *Mine Health and Safety Act* 2004
  Mine Health and Safety Regulation 2007
- *Coal Mine Health and Safety Act* 2002
  Coal Mine Health and Safety Regulation 2006

Queensland

- *Mining and Quarrying Safety and Health 1*999
  Mining and Quarrying Safety and Health Regulations 2001
- *Coal Mining Safety and Health Act* 1999

[1] *http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/OHS_IGA.pdf*

Coal Mine Health and Safety Regulations 2001

The *Workplace Health and Safety Act 1995* is expressly excluded from operating in relation to the minerals industry where the minerals-specific OHS legislation prevails.

Western Australia

- *Mines Safety and Inspection Act 1994*
  Mines Safety and Inspection Regulations

The *Occupational Health, Safety and Welfare Act* 1984 does not apply to any workplace that is, or at which work is carried out on a mine.

South Australia

- *Occupational, Health, Safety and Welfare Act* 1986
  Occupational, Health, Safety and Welfare Regulations

Tasmania

- *Workplace Health and Safety Act* 1995
  Workplace Health and Safety Regulations

Northern Territory

- *Workplace Health and Safety Act* 2007
  Workplace Health and Safety Regulations

Australian Capital Territory

- *Work Safety Act* 2008
  Work Safety Regulations

Commonwealth

- *Safety, Rehabilitation and Compensation Act 1998*
  Safety, Rehabilitation and Compensation Regulations

1.3 Regulating the minerals industry post 1 January 2012

In developing the Model Mines Regulations a range of issues were considered to be inconsistent with the policy intent and the legal framework for the Model Regime. Concerns went to excessive prescription; over reliance on documentation; as well as additional duties, additional regulator enforcement powers, statutory positions, Boards of Examiners and union representatives. It was further considered that there was no 'regulatory gap' that would warrant additional regulation outside of the Model regime. Accordingly Safe Work Australia tripartite groups determined that those issues would not be included into the Model Mines Regulations.

The MCA and Representatives strongly support this position. It is abundantly clear from amendments to the Model WHS Regulations to align all risk management provisions so that there will require a duty holder, in order to manage risk, must identify **all reasonably foreseeable hazards** that could give rise to a risk and that the hierarchy of controls will be expressed to apply to **all risks to health and safety** that must be managed under the WHS Act, not just the risks associated with particular hazards dealt with under the WHS Regulations.

It is further and specifically highlighted in the Mines Regulations:

9.2.1 *Identification of hazards*
The mine operator of a mine must, so far as is reasonably practicable, identify **all reasonably foreseeable hazards associated with mining operations at the mine**.

9.2.2 *Assessment of risks*
The mine operator of a mine must assess risks to health and safety associated **with all hazards** identified under regulation 9.2.1

MCA and Representatives therefore do not support the work of three Governments (WA, NSW and QLD) in developing what is referred to as "non-core" provisions for the minerals industry. It is also apparent that these three Governments intend to expand the provisions detailed in the Model Mines Regulations.

Given the position of these three governments, below is how the Australian minerals industry will be regulated from 1 January 2012.

Victoria; South Australia; Tasmania; Northern Territory; ACT and Commonwealth

- *Model WHS Act 2011*
  Model WHS Regulations 2011

NSW

- *Model WHS Act 2011*
  Model WHS Regulations 2011 minus Model Mines Chapter
- *Mine Work Health and Safety Act 2011*
  Coal Mine WHS Regulations – including Model Mines Chapter plus 'non-core'
  Mine and Quarry WHS Regulations – including Model Mines Chapter plus 'non-core'

Queensland

- *Model WHS Act and Regulations 2011* – will not apply to mining
- *WHS Mine Act*
- *WHS Coal Regulations* – including Model Mines Chapter plus 'non-core'
- *WHS Metalliferous Regulations* – including Model Mines Chapter plus 'non-core'

Western Australia

- *Model WHS Act 2011*– will not apply to mining
- *Mine WHS Act and Regulations* – including Model Mines Chapter plus 'non-core'

For example, on 1 January 2012 a metalliferous mining company with operations in NSW, SA, WA, and QLD will be regulated through:

3 Acts

- Model WHS Act (in SA and NSW);
- *WHS Metalliferous Act* QLD)
- *Mine WHS Act* (WA)

4 Regulations

- *Model WHS Regulations* (SA)
- *Mine WHS Regulations* (NSW)
- *WHS Metalliferous Regulations* (QLD)
- *Mine WHS Regulations* (WA)

From the above list and case study it is clear that reform of safety and health regulation to achieve a uniform regulatory regime has failed for the minerals industry. This failure is not because other national safety and health laws exist as occurs for offshore petroleum, radiation safety, food safety, nor is it because the industry is different in each jurisdiction. Unfortunately historical positions have prevailed and the minerals industry will continue be regulated for the past with no eye for the future or continual improvement in safety and health outcomes.

The Australian minerals industry believes the proposal to regulate mining through separate laws in 3 jurisdictions means the work health and safety regulatory regime comprehensively fails to deliver on the InterGovernmental Agreement:

- will not be uniform – and does not fit within the model Act and regulations;
- will not therefore provide coverage for ALL workers as mining will continue to be excluded;
- will maintain a regulatory burden on the industry; and
- provides no efficiencies for the State Governments in the management of work health and safety.

1.4 Significant risks to safety and health arise from non-uniformity of mines laws

The MCA and Representatives have long articulated their views regarding the increased risk to safety and health. We restate these concerns here. The minerals industry contracts in a vast amount of work, from large and long duration works including contract mining, explosive expertise, earth moving, construction, and maintenance to individual tasks including electrical installation and mechanical work. At anytime there is likely to be numerous PCBUs on a mine site.

These PCBUs can be multinational contracting firms or individual technicians. Each has established safety and health systems and procedures and each invariably works at other industrial sites outside of mining. These contractors are therefore required to jump from one regulatory regime to another in those jurisdictions that continue to insist that mining be regulated differently to all other hazardous or heavy industries. Not only will this require duplicated training and record management but is likely to lead to confusion and uncertainty in managing risks to health and safety. A worker contracted to a mine site will also be required to be fully across two separate regulatory regimes where duties owed to them and by them will differ.

2. THE MODEL MINES REGULATORY REGIME

The MCA and Representatives are pleased with the significant streamlining of the broader Model Work Health and Safety Regulations and acknowledges that this will also be required when finalising the Mines Chapter.

As indicated in the MCA and Representatives submission on the Model Work Health and Safety Regulations and Priority Codes of Practice, while the Model Regulations broadly follow the Council of Australian Government's (COAG) Regulatory Reform Principles, the industry considers that there are numerous situations where there is too much prescription within the Model Regulations.

Specifically in the Mines Chapter there is still a level of prescription that is excessive and is considered to be inconsistent with the intent and framework of the Model Work Health and Safety regime.

This detail should be included in Codes of Practice or industry guidance material. We again note that the rationale prepared by SWA on what should be included in the Model Act, Regulations and Codes has not been strictly followed. This is most obvious where provisions detail non-mandatory requirements which would be better dealt with in the relevant Code.

Excessive detail in the Model Mines Regulations limits the flexibility required to achieve the intent of the regime – specifically the provision of risk based regulatory framework specifically tailored to the nature of a workplace and the roles and responsibilities of its employees.

In addition, the Model Regulations fail to incorporate repeal provisions. Accordingly, it is critical that all jurisdictions be required to indicate how they will apply the repeal process.

Further to the MCA and Representatives submission on the Model Work Health and Safety Regulations and Priority Codes of Practice, we provide the following specific remarks regarding key provisions of the regime:

2.1 Overarching comments

Format

The MCA and Representatives acknowledge that the format of the Mines Regulations will change to align with the other Regulations. We applaud Safe Work Australia and the tripartite groups for agreeing to introductory provisions being inserted into each Chapter or Part (as appropriate). This will enhance the usability of the Regulations and identify who the duty holders are and the relationship between the duties in the Model WHS Act and other duties in the Regulations.

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Application
The Mines Regulations would be enhanced by the inclusion of a statement of application to expressly identify those industries that the provisions relate to.

Delineation of Mining Operations
The MCA and Representatives have concern the definition of 'mining operations' is unnecessarily broad and arguably extends to activities and operations that do not give rise to mining hazards.

For example, the definition of 'mining operations' includes exploration for 'minerals by mechanical means that disturb the ground'. This description is very broad and encompasses activities such as minor ground testing/sampling that do not give rise to mining hazards.

Further the use of the term 'in connection with' gives the concept of mining operations a 'wide connotation' incorporating any activity related to the extraction of or exploration for minerals- again, even if mining hazards do not exist in relation to such activities.

This means there are also circumstances where construction work, agricultural work and/or rail work may take place at mine but given the timing/location/nature of the work, there is no exposure to mining hazards. This work also is routinely undertaken by companies that are not mining operations.

As such MCA and Representatives submit that the Mines Chapter should allow mine operators to delineate areas where ancillary activities are taking place as areas where the Mines Chapter obligations will not apply, for example civil infrastructure such as workshops and treatment plants etc. This should be based on a risk assessment process where delineation/exclusion of ancillary activities is only permitted where a risk assessment has determined that mining hazards will not arise.

Administrative burden
There are numerous duties to document numerous processes that do not directly link to safety outcomes. This represents a substantial risk as resources are diverted towards paper compliance and away from frontline safety and health management.

There are a number of Schedules that contain an extraordinary amount of technical detail that is best placed in Codes and guidance material.

Health and Safety Representatives (HSRs)
MCA and Representatives again object to the inclusion of a power for HSRs to request a review of health and safety measures, if they form the view that the PCBU has not adequately reviewed the control measures as required. This represents a power that is beyond the scope of the power of HSRs recommended by Workplace Relations Ministers Council (WRMC) (Recommendation 106). Duties specified in the Model Act can not apply differently in the Model Regulations. We again submit that the HSRs power to request review goes beyond the intention of the Model Act and needs to be amended.

In the Mines Regulations, HSRs have specific review powers on what are extremely technical and complex documents that systemised the management of health and safety across a mining operation. With the broader decision by governments that HSRs are not required to be competency trained this is a power that HSRs will not be equipped to make and the concept of "reasonable belief" is simply not an appropriate way to request a review.

Worker duties
Further to the MCA and Representatives submission, a reciprocal responsibility for workers to assist the Mine Operator comply with the Model Mines Regulations is required. Simply having a broad duty in the Model Act is not sufficient. Such a requirement is something which should be reasonably expected of workers in specifically *regulated* industries and ought to be reflected in the Model Mines Regulations.

There should be additional duties on workers to comply with the specific risk assessment measures within the Model Mines Regulations.

For example clause 9.3.3 of the Regulations includes specific obligations of workers in relation drug and alcohol, which is appropriate. However, there is no duty on a worker under Part 9.3 not to not present or stay at work while fatigued, nor is there a duty on a worker to not bring or use prohibited items at mining operation detailed in Schedule 9.3.

Reasonably practicable
The MCA and Representatives acknowledge that Safe Work Australia has undertaken a review of the duties in the Model regulations and where it is appropriate that 'reasonably practicable' should apply. MCA and Representatives would expect that this review is applied to the Model Mines Regulations also.

MCA and Representatives support the approach adopted by SWA in determining general parameters that govern whether a regulation should be qualified or prohibited. Including:

- An unqualified requirement or a prohibition should only be used where it is reasonably able to be complied with or met, in all circumstances. An unqualified requirement is breached if the relevant person fails, for whatever reason, to do or refrain from doing a specific thing or achieve a specific outcome.
- Mandating a specific requirement where there is more than one means of compliance is not appropriate and is inconsistent with the qualifier of reasonably practicable under the Model WHS Act.
- Where the duty holder does not have sufficient ability to direct or influence or control the relevant matter, the requirement should be qualified. Otherwise the person may be in contravention of the regulation where they are not in a position to comply with it.

In the Mines Regulations there remain numerous provisions where an absolute duty is not qualified by so far as is reasonably practicable even when there may be outside influences that can prevent the Mine Operator form actually achieving the outcome required by the duty. These will be raised in the various sections below where relevant.

The concepts of 'reasonable steps', 'reasonable concern' and 'reasonable grounds' are repeatedly used within the Mines Chapter. The use of the term 'reasonable' in the Model Act and Regulations and the Mines Chapter imports an objective element into the relevant provisions. A statutory requirement to act reasonably or on reasonable grounds is satisfied if the decision meets an objective standard of reasonableness. It requires a consideration of what a 'reasonable person' would do in the circumstances.

There is a large body of case law dedicated to interpretations of the term 'reasonable' and the various concepts that use the term. This case law will inevitably aid in the interpretation of the Model Act and Regulations once they are enacted and applied. However, consideration should be given as to whether reliance on judicial interpretations of other legislation provide sufficient certainty for the application of the Model Act and Regulations or whether specific guidance on the meaning of 'reasonable steps', 'reasonable concern' and 'reasonable grounds' is required for this context. We recommend further statutory clarification on the rights and obligations involving 'reasonable concern', 'reasonable grounds' and 'reasonable steps' is provided.

Mutual recognition
Given the illogical retention of mining specific legislation and regulations in three States (WA, NSW and QLD), the concept of mutual recognition that has now been included in the Model regulatory regime may not translate across the minerals industry. This is particularly concerning where these States (in some form or other) are introducing a raft of addition duty holders into mining laws with attached certificates and licences. How will a worker be able to move freely around the industry across the nation?

Risk Management and Control
The MCA and Representatives applaud Safe Work Australia and the tripartite forums for significantly restructuring the risk management provisions across the Model regulations. This is a significant improvement and one suggested by the minerals industry in its submission on the Model regime. Incorporation of general risk management principals including the hierarchy of controls into the Regulations is essential to ensure duty holders know how to comply with the general duties under the Act and prevent uncertainty/disputation about what risk management principles should be applied.

Whilst we understand the reasoning behind releasing the Model Mines Regulations for comment with risk management provisions drafted in the old format and style, we seek assurance that all industries will be regulated through a uniform risk management framework.

In submissions on both the Model Act and Model Regulations, we expressed concerns regarding the how risk management is defined in the Model regime compared with ISO 31000. Even with the changes to the Model regulations there are still differences between the Model regime and the AS/NZS4360 / ISO31000 Risk Management Principles and Guidelines. The minerals industry has long used risk management principles to manage safety and health, environmental and financial risks through Australian and International Standards.

Many companies are also internationally accredited. These differences in approach place an increased regulatory burned on the minerals industry.

2.2 Regulators Harmonisation projects

Administration of legislation is fundamental to its successful and effective implementation. A significant element in achieving a consistent approach to Model Mines Regulations is the manner in which the legislation is interpreted and applied.

Further to MCA and Representatives submission on the broader Model regulatory regime, it is critical that a project for Mining be established (akin to that for Construction and Major Hazard Facilities) to ensure Regulators across the nation also adopt a uniform approach to administering specific provisions in Chapter 9 relating to managing safety and health in mining operations. There is scope for coordination of regulator training and for secondment/exchanges of regulatory personnel between jurisdictions to not only broaden the experience of Regulators, but to facilitate consistent interpretation of regulation.

In addition, MCA remains concerned that Regulators continue to find it increasingly hard to attract and retain staff with technical expertise in mining. The Model Mines Regulations has the added benefit of safety and health regulatory staff being able to work in any jurisdiction – this is a further area where harmonisation is significantly compromised by three jurisdictions having separate laws. Recognising that smaller States/Territories do not necessarily have access to the full complement of specialised skills, sharing of specialised resources should be encouraged, particularly in relation to incident investigation.

2.3 Interface with safety and health regulations outside of Model regime

It was a deliberate decision not to include certain safety and health regulatory regimes in the harmonisation. This however causes significant impacts for the minerals industry with regards to its supply chain.

Given the level of infrastructure needed to transport material extracted from mining, it is not uncommon that mining operations will intersect with other infrastructure, such as rail, road and port infrastructure. This, in turn, means that some aspects of mining operations will fall within the scope of other industry specific health and safety regulatory regimes.

For example in NSW the Rail Safety Act 2008 (NSW) (**RS Act**) imposes a series of general duties to ensure the safety of railway operations. These duties extend to rail transport operators, rail safety workers, directors and managers of rail transport operators and others. The Independent Transport Safety and Regulator (**ITSR**) has jurisdiction as a regulator under the RS Act.

Under the RS Act, a rail transport operator (being a person who has effective management and control of rail infrastructure or a person who operates rolling stock) will have obligations under the RS Act to ensure, so far as is reasonably practicable, the safety of the railway operations. There will be (and currently are) circumstances, where mining operators have effective management and control of rail infrastructure (such as private sidings) and/or rolling stock. In these circumstances, the obligations under the RS Act apply (however there are exemptions for railways in connection with underground mines).

Again, the interaction of these regimes means mining operators are covered by a range of health and safety legislation and this can make the process of ensuring compliance onerous and complex.

2.4 Interface with industrial law

The proposed Model Act and Regulations contain a number of provisions that draw on principles typically applied in an industrial relations context. Principles relating to:

- Consultation and representation;
- Discrimination and workplace rights;
- Negotiation and issues resolution;

have largely been the domain of industrial relations legislation and have not been as prevalent in a WHS context.

While workers and their representatives have an important role to play in improving WHS outcomes, care must be exercised to ensure WHS issues do not become so intertwined with industrial issues that the objective of ensuring WHS is frustrated. The following case examples demonstrate this point.

Union rights of entry
Cases dealing with union rights of entry for WHS purposes demonstrate how the objective of ensuring WHS can be obscured when unions have gained entry to premises for WHS purposes but refused to disclose their WHS concerns.

In one case union officials sought and gained access to a construction site for WHS purposes. The union's involvement with the operator at the site was initially prompted by a dispute over the payment of subcontractors. While at the site the union officials proceeded to engage in a range of conduct that was contrary to the *Workplace Relations Act 1996* (Cth) (including hindering and obstructing the operator and refusing to comply with reasonable requests to undergo site inductions).

On the basis of this conduct, proceedings were brought against the union officials for contraventions of the *Workplace Relations Act 1996* (Cth). One of the allegations was that the union officials had exercised their right of entry for WHS purposes for an **improper purpose** (being the dispute about payment of subcontractors). Central to this allegation was the failure of union to disclose their WHS concerns to the operator at the site.

However the Court found that while it would have been preferable for the union to be more cooperative about conveying its WHS concerns, failure to do so did not amount to a breach of the *Workplace Relations Act 1996* (Cth) (thought other conduct of the union did amount a breach). This case (and others) has meant that, unless expressly required by legislation, unions do not necessarily need to identify a 'specific safety concern' in order for the right of entry for WHS purposes to be legitimately exercised.

The MCA and Representatives recognise (and supports) the provisions under the proposed Model Act and Regulations, requiring a WHS Permit Holder exercising a right of entry to investigate a suspected contravention to, as soon as reasonably practicable after entry, give notice of the entry and the suspected contravention (including, as far as practicable, the particulars of the contravention)[2].

However, MCA and Representatives still have concern that there is potential under the Model Act and Regulations for the rights of entry provisions to be misused for industrial, rather than WHS purposes.

Drug and alcohol policies
Drug and alcohol policies/procedures have frequently been the subject of industrial disputation and litigation. Disputes about testing procedures and enforcement of policies/procedures are a clear example of how industrial issues can influence WHS.

In another case a worker resigned after producing a positive drug test and a second employee refused to take a drug test (and was stood down). Although the employees' contracts of employment expressly required them to participate in random drug testing, the union argued the employer did not have grounds to test because the drug assessment regime had to be established in agreement with the majority of workers and was not established in accordance with the relevant mine safety legislation. The employer conceded the drug and alcohol testing policy was not established in accordance with the mine safety legislation. However, the employer pursued the argument on the basis of its common law right to test under the employment contract.

At first instance the court reinstated the employee who had been stood down and gave the other employee 4 days to withdraw his resignation. The court also ordered that all records relating to the testing be destroyed. The decision was later quashed on appeal with the court finding that the legislative scheme (mine safety legislation) did not invalidate the terms of the employment contracts which required random testing.

Again this case demonstrates how the development of drug and alcohol polices/procedures and even their implementation can overshadow the primary WHS objective for which such policies/procedures are implemented. In relation to Chapter 9 specifically, MCA and Representatives have concern the express obligation to consult with workers on '*developing and implementing strategies to protect persons at the mine from any risk to health and safety arising from… consumption of alcohol or drugs by any person'* may create avenues for further disputation about drug and alcohol policies and procedures.

[2] Section 119 of the Act and clause 2.4.4 of the Regulations

Consultation
Disputation about consultation itself is also not uncommon in the context of employers attempting to develop and implement WHS systems.

In one case, the union commenced dispute proceedings against a mine in relation to fatigue management. The dispute stemmed from an incident where a truck operator fell asleep at the wheel and drove into a fixed structure, causing significant damage to the truck. Following the incident, the union attempted to meet with mine management to discuss the issue of fatigue management. When no meeting was forthcoming the union notified the relevant industrial tribunal of a dispute.

The union claimed the mine failed to meet with it to discuss fatigue and fatigue management. The mine claimed it had undertaken considerable consultation with employees on the implementation of a fatigue management plan and that it proposed to consult with employees further, including providing education about the plan and seeking employee feedback. The mine also argued there was no dispute and if there was, questioned why the dispute resolution procedure in the applicable agreements hadn't been followed.

At first instance the tribunal found in favour of the mine. However the union were successful on appeal with the tribunal finding that despite the mine's direct consultation with employees it's refusal to meet and consult with the union constituted a dispute.

While this case turned on whether the union raised a legitimate dispute, the decision indicates how periphery matters (such as process and representation) can end up becoming the core focus of industrial disputation, and override pertinent WHS issues. Again, this case demonstrates how the interaction between industrial and WHS can obscure the ultimate objective of improving (and ensuring, as far as is reasonably practicable) WHS.

3. MODEL REGULATIONS AND CODES OF PRACTICE FOR MINING

Public Comment Response Forms

Section A: Model Mines Regulations

Model Work Health and Safety Regulations for Mining - Public Comment Response Form

Individual/Organisational name: MINERALS COUNCIL OF AUSTRALIA and REPRESENTATIVES	
Regulations Chapter 9: Mines	
Part 9.1 PRELIMINARY	
Regulation	**Comment**
Application	Given the use of the term 'in connection' with it must be made clear in a section headed Application in this chapter that clearly shows that desktop analysis, feasibility studies, etc do not constitute mining operations. In most cases following the granting of a licence to explore or extract minerals there is a significant period of time before activity on the ground will comment. It is also unlikely that the mine holder will appoint a mine operator (if they so determine) well in advance of a mining operation being established.
9.1.1(1)(b)	This provision includes in the definition of a mine 'plant' and 'structures' – these terms are defined in the Model Regulations. Given that the definitions and provisions relating to plant and structure in the Model Regulations have been amended it is necessary to ensure that the definition of mine remains appropriate and relevant.
Recommended new provision 9.1.1(3)	A mine is not: (a) a major hazard facility; or (b) a construction site
9.1.2(1)(a)	To avoid unintended capture of farming activity it is recommended that "for commercial use" be inserted after 'ground'. The concept of ground disturbance varies according to tenement, heritage and environmental law across the nation. What is intended by this term? It is recommended that Safe Work Australia (SWA) assess the various interpretations of 'ground disturbance' in these laws and prepare an explanation of these terms for the purpose of this chapter and a threshold test regarding disturbance for the consideration of stakeholders. 'mechanical means' also has various interpretations in tenement, heritage and environmental law across the nation. It is also recommended that SWA assess the various interpretations of 'mechanical means' in these laws and prepare an explanation of these terms for the purpose of this chapter for the consideration of stakeholders.

9.1.2(2)(a)	The word “materials” has been introduced in this definition, it is recommended that this be replaced by “minerals” for accuracy. The term, ‘in connection with’ appears to extend the definition of ‘mining operations’ to activities associated with the extraction of and exploration for minerals (in addition to the actual activity of extraction and exploration itself). Judicial interpretations of the phrase ‘in connection with’ have found the term has a ‘wide connotation’ and merely requires a relation between one thing and another. The phrase does not necessarily require a causal relationship between the two things and can be used to describe a relationship with a contemplated future event. Courts have accepted the phrase ‘in connection with’ is akin to the phrase ‘having to do with’ and includes matters occurring prior to as well as subsequent or consequent so long as they are related to the principal thing. Taking this judicial interpretation of the phrase into account, it is likely that <u>any activity</u> related to the extraction of or exploration for minerals could fall within the scope of the definition of mining operations. The definition would not necessarily require a ‘causal’ connection between the extraction/exploration of minerals and the related activity and would encompass future activities as well. Consideration should be given as to whether the concept of ‘in connection with’ unreasonably extends the definition of mining operations. We recommend that given the broad definition of ‘mining operations’ that a provision be incorporated that excludes activities that take place outside a ‘mine’.
9.1.2(2)(b)	The word “materials” be also replaced by “minerals” for accuracy. It is unclear whether minerals sent away to a laboratory for assay would constitute a mining operation. It is also unclear if minerals sent offsite for ‘processing’ is still deemed “in connection with” the mining operation. Core sample processing in on-site laboratories, should be regulated under these Regulations. Off site laboratories should be regulated under the WHS Regulations. It is industry’s view that these offsite activities not be categorised as ‘in connection with’ as it unreasonably imposes the mining regulations on non-mining operations.
9.1.2(2)(c)	In the MCA and Representatives submission on the Model Regulations, it was recommended that mining operations be regulated through the Mining regulations and not the construction chapter. Therefore this provision regarding constructing and decommissioning as a part of a mining operation would not be regulated through the construction chapter.
9.1.2(4)	The minerals industry continues to question why tourist mines are considered mining operations when they do not meet the primary definition.
9.1.4	There is confusion between hazard and risk in this section.
9.1.4(1)(a)	We acknowledge that this provision establishes the documentation process regarding principle mining hazard plans, however the provision defines principle mining hazard as things that are not actually hazards i.e. “any activity”. This mixing of hazards and activities

	can lead to confusion as it is inconsistent with its natural meaning. At the commencement of 9.1.4 it is recommended that an explanation of why this list exists to provide context and references provision 9.2.10. The words can be easily changed into hazards, by rewording, the meaning still exists i.e. roads and vehicle operation can be reworded to vehicle interaction and vehicular infrastructure
9.1.4(1)(a)(i-viii)	Whilst we acknowledge the intent, this list is not a list of hazards rather it represents a series of headlines that covers hazards, areas on a mine site, consequences and activities. With the inclusion of an explanatory comment as recommended above this could be alleviated.
9.1.4(1)(b)	This provision is too broad as it relates to "a risk" rather than meeting a threshold. Clearly there be a level of risk to any activity, whether this risk is materially significant should be the determinant. The section is not intended to capture all risk to health and safety, as this is the context of the WHSMS.
Note	As per recommended new provision at 9.1.1(3), this note should be deleted.
9.1.6(2)	It is unclear why "with control over a right or entitlement to carry out mining operations" is in bold and italics – is this phrase to be defined? If so we request draft wording be provided for stakeholder comment.
9.1.7(1)	Only (a) and (b) are required in regulations, the remainder is expected to be what is "the manner and form required by the regulator".
9.1.7(4)	The concepts of 'reasonable steps', 'reasonable concern' and 'reasonable grounds' are repeatedly used within the Mines Chapter. For example: Regulation 9.7.1(4), 3.5.1(2)), sections 84 and 85 of the Model Act.. These terms are used commonly across Australian law. Case law dealing with these terms is extensive. However, consideration should be given as to whether reliance on judicial interpretations of other legislation provide sufficient certainty for the application of the Model Act and Regulations or whether specific guidance on the meaning of 'reasonable steps', 'reasonable concern' and 'reasonable grounds' is required for this context. We recommend further statutory clarification on the rights and obligations involving 'reasonable concern', 'reasonable grounds' and 'reasonable steps' is provided.
9.1.7(6)	Be reworded to "the mine operator of a mine who intends to cease **or ceases**". In some circumstances the mine operator has no intention to cease but rather is terminated.
9.1.8	This provision is considered redundant as if the regulator is not notified of the appointment of a mine operator it is clear that the mine holder is the mine operator.
9.1.9	This provision includes a definition of 'adversely affected by alcohol or drugs'. It provides that a person will be adversely affected by alcohol or drugs if the '*alcohol or drugs have caused the person's judgment or capacity to be impaired to the extent that the person may expose the person's or another person's health or safety to a risk*'.

	Regulation 9.2.3 uses this concept of 'adversely affected by alcohol or drugs' to impose an obligation on a mine operator to ensure that a person whom the mine operator reasonably believes is adversely affected by alcohol or drugs does not enter or remain at the mine. An impairment based model is inadequate to protect the health and safety of all workers. It is also inconsistent with current practice in the minerals industry- i.e. to adopt a detection based approach to drug and alcohol management- and other health and safety legislation for high risk industries. Reliance on an impairment based approach is not the most effective means of eliminating or controlling the risks associated with the impact of drugs and alcohol at a mine. The most effective means of eliminating/controlling this risk is to use a detection based model. It is therefore consistent with the hierarchy of controls, that the detection model should be preferred over the impairment model. It is also inconsistent with the aim of the WHS Act that the highest level or protection is applied. This section must be detection based i.e. absence or presence of drugs (encompassing illicit, synthetic, prescription and non-prescription) or alcohol (determined above exposure standards). Road safety is a detection based model; why should there be a lesser requirement on mining operations? Without a detection based system, the Mine Operator is prevented from discharging its duty effectively. The *Rail Safety Act 2008* (NSW) (RS Act), for example, imposes a positive obligation on rail transport operators to ensure, so far as is reasonably practicable, that rail safety workers do not carry out rail safety work while the *prescribed concentration of alcohol* is present in their blood or while under the influence of a drug[1]. The RS Act also requires the implementation of a safety management system which includes a drug and alcohol management program in compliance with the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* (NSW)[2] (RS Regulation). Importantly, clause 15 of the RS Regulations provides that a rail safety worker may be: – breath tested or required to undergo breath analysis whether or not there is any suspicion that the worker has recently consumed alcohol, or – required to provide a urine sample whether or not there is any suspicion that the worker has recently taken drugs[3]. The RS Regulation also: – specifies matters that must be included in a drug and alcohol management program; – provides for the authorisation of testing officers; – allows random, targeted and post-incident testing of rail safety workers; – requires mandatory post-incident testing after a prescribed incident; – sets out requirements for conducting alcohol and drug tests, including requirements for taking and analysing urine and blood

[1] Section 8(2)(c) of RS Act
[2] Section 12 of RS Act, section 19 of the RS Act, Schedule 1 of *Rail Safety (General) Regulation 2008* (NSW) (clause 24)
[3] Clause 15 of the RS Regulation

	samples; – prescribes offences relating to alcohol and other drugs and offences relating to testing for alcohol or other drugs; – provides for notification of positive tests and prescribes penalties for refusal or failure to be tested, and interfering with test results or blood or urine samples.
Part 9.2 MANAGING RISKS	
Regulation	**Comment**
DIVISION 1	
Overarching	Whilst the Representatives acknowledge that this Part will be substantially rewritten consistent with the amended Model regulations with only specific mining risk management to be retained, the below comments relate to the public comment draft Mines Regulations.
9.2.3(2)	(b) The use of the terms risk and hazard are inconsistent. This provision is related to 'risk' not hazard.
9.2.3(3)	If 9.2.3(2) is not corrected, this provision is inconsistent.
9.2.3(4)	The use of adjectives and adverbs in regulations is not appropriate. It is recommended that 'suitable' be deleted from the provision. Division 5 of the final Regulations details how personal protective equipment must be provided as well as provision around use.
9.2.4(1)(f) and (3)	As explained in the first part of the submission, it is inappropriate for a HSR to request a review of risk control measures when they may not required to be competent to do so.
9.2.4(3)(b)	There is an adjective used here. We recommend the removal of an adjective in 9.2.3(4) but there must be some trigger here. What is appropriate?
9.2.4(4)	Recommend the wording be changed from "any workings" to "any mining methods"
9.2.4(4)(b)	This provision is circular as a mine operator would need to undertake the review to determine whether a 'significant change' has occurred and could thus create or increase a risk.
9.2.4(b)	There needs to be a threshold to the term 'increase'. It is recommended that 'material' or 'significant' be inserted. It is not reasonable that a review be triggered if the risk increases by 0.01%

9.2.5	It is important to acknowledge that the WHSMS is managing safety and health risks but that it is one part of a bigger operational management system and will also interface with other specific management systems (environment, community, financial etc). It is also important to recognise that many PCBUs that enter a mining operation will have safety and health managements system that their workers are trained in. It should be incumbent on the mine operator to undertake a gap analysis between the site WHSMS and the contract PCBUs system and identify what is required to meet the requirements on site. It is unreasonable to expect a PCBU entering a mining operation for a specific and defined purpose and time to adopt the site WHSMS when their own system is equivalent and can be cross mapped into the site WHSMS. It is inappropriate for contractors who carry out jobs such as road works or building works on mine sites to be required to follow the same safety and health management system as mine workers on site rather that the specific risk management system appropriate to the contractors task.
9.2.5(2)(a)	Insert 'reasonably practicable' as this absolute duty is a higher duty that that in the WHS Act and is not able to be complied with.
9.2.5(2)(b)	Insert 'reasonably practicable' as this absolute duty is a higher duty that that in the WHS Act and is not able to be complied with.
9.2.5(2)(b)	This provisions extends the duty to 'other persons', this must be qualified by so far as is reasonably practicable.
9.2.6(1)(b)	Replace "risks to health and safety" with "risks to workers". Like the concept of 'in connection with' the concept of 'associated with' is interpreted broadly but the meaning of 'associated with' is subject to the context where the term is used. The industry submits that the use of the term requires more clarity in the drafting. The entire provision is prescriptive.
9.2.6(1)(g)	Delete this provision. Subclause (b) requires systems, procedures and risk control measures; there is no need to identify what is but 1 of these; in fact it serves to minimise the other control measures that (b) requires.
9.2.6(1)(j)	What does 'readily accessible' mean. Systems are electronically housed; a worker off site will not be able to access the system.
9.2.8(1)	Components of a WHSMS will be reviewed and revised as required; however a full review of the entire system would typically be undertaken in industry every 5 years. A move to 3 years will impose a significant burden with no indication that management of safety and health will improve.
9.2.9(1)	There needs to be value derived from these provisions instead of simply being a reporting requirement. Industry has long been frustrated when providing data to regulators and receiving no analysis to enable performance tracking and benchmarking.

	Add “for the purpose of performance tracking and industry benchmarking”. Are confidentiality provisions required? i.e. that only aggregate data that does not identify operators be publicly reported.
9.2.9(2)	Quarterly submission is onerous. Half-yearly submission (divided into quarters to enable calendar and financial year reporting) is adequate.
New provision 9.2.9(3)	“health and safety information provided under this Regulation will not be used in proceedings against the mine operator.”
<u>DIVISION 2</u>	
9.2.10	Suggested rewording to avoid the need to prepare a PMHP when the principal mining hazard does not exist i.e. a surface mine will not have mine shafts and winding operations. Replace (1) with “The mine operator of a mine must prepare a principal mining hazard management plan that addresses each principal mining hazard identified at the mining operation under regulation 9.2.1.”
9.2.10(2)(b)	What is meant by “readily accessible and comprehensive”?
9.2.11	The MCA and Representatives note that Managing Risks Code of Practice is more closely aligned with the Australian Standard for Risk Management. MCA’s comments regarding risk management are located in the general section of this submission.
9.2.11(1)	Insert ‘as far as reasonably practicable’ after must.
9.2.11(1)(b)	There is further confusion between risk and hazard. Insert the word ‘risks’ to replace ‘hazards’
9.2.11(2)(a)	Likelihood is a mathematical concept. The use of likelihood as numerical risk matrices have not proven useful for workers. A ‘high probability tends to override all other ‘likelihoods’ and can lead to a reduced focus on the latter. Ranking risks are more appropriate – often using a traffic light ranking system which is more meaningful for workers. The term ‘severity’ should be deleted and replaced with ‘degree’ for consistency with the Model Act.
9.2.11(2)(b) and (c)	These provisions attempt to prescribe the how rather than what the intent of the provision is. This is best located in the WHSMS Code of Practice.
9.2.11(2)(d)	Is not required as once a control(s) has been decided on the focus is on implementation. The duty to provide the hierarchy of controls makes this provision redundant.

DIVISION 3	
Overarching comment	This Division has a significant amount of detail that best resides in the relevant Codes of Practice and guidance material.
9.2.13	Insert ‘as far as reasonably practicable’ after must ensure. There is a reliance on other persons.
9.2.14(1)(a)	Insert ‘as far as reasonably practicable’ after must ensure. It not possible to ensure whether a person is aware. Recommend the wording also change to “has been made aware” from “is aware”.
9.2.14(1)(b)	Insert ‘as far as reasonably practicable’ after must ensure. It not possible to ensure that exploratory bore-holes will indicate the presence and location of the hazard.
9.2.14(1)(c)	The term ‘safe zone’ is not in common use in the minerals industry; we recommend that ‘separation distance’ be the term used.
9.2.14(2)	Insert ‘as far as reasonably practicable’ after must. The intent of this provision is supported however it is not possible to place the absolute duty on the mine operator when there is a reliance on other persons.
9.2.14(3)	Insert ‘as far as reasonably practicable’ after ensure. The intent of this provision is supported however it is not possible to place the absolute duty on the mine operator when there is a reliance on other persons.
9.2.15(1)	This provision should relate to shafts that are operational and have winding systems. Insert ‘as far as reasonably practicable’ after must ensure. There are numerous disused and non-operational shafts from time to time at a mining operation. Reword to “The mine operator of a mine must ensure, as far as reasonably practicable, that every winding system for any operational shaft at the mine....”
9.2.15(f)	Insert after entry to every “operational shaft”
9.2.15(5)	Insert ‘as far as reasonably practicable’ after ensure. There is a reliance on other persons. Insert ‘operation’ prior to shaft.
9.2.15(6)	Insert ‘as far as reasonably practicable’ after must ensure. There is a reliance on other persons.
9.2.15(7)	Insert ‘as far as reasonably practicable’ after must ensure. There is a reliance on other persons.

9.2.16(2)	Replace “have regard to” with “consider”. Plain English is preferred.
9.2.16(2)(a-e)	This detail is provided for in the Code of Practice for Roads and Other Vehicle Operating Areas.
9.2.18	As explained in 9.2.6(1)(g) above this provision should be deleted. Subclause (b) of 9.2.6(1) requires systems, procedures and risk control measures; there is no need to identify what is but 1 of these; in fact it serves to minimise the other control measures that (b) requires.
9.2.19	Insert ‘as far as reasonably practicable’ after must ensure.
9.2.19(b)	The safe level is variable according to specific circumstances. What is a safe level with respect to moisture? This needs to be further defined or clarified and relate to the actual risk.
9.2.20	It is unclear why this section is located here as it relates to air quality which is in the following provisions.
9.2.20(2)	This provision prescribes how to comply rather than what the intent is – move to Code of Practice.
9.2.21(1)(a) and (b)	Start provision with ‘minimise’ and then delete (b).
9.2.21(2)(a)	Insert “beyond exposure standards” after contaminant.
9.2.21(2)(b)	Move to Code of Practice as these are only two of the contaminants that may be present.
9.2.21(3)	Personal protective equipment is in the hierarchy of control; recommend the provision be reworded to “The mine operator must, so far as is reasonably practicable, comply with this recommendation by managing the risk. This can include personal protective equipment.”
9.2.21(4)	Insert ‘as far as reasonably practicable’ after must ensure as (c) relies on another person.
9.2.21(4)(a) and (b)	It is again recommended that ‘suitable’ be deleted from the provision. Division 5 of the final Regulations details how personal protective equipment must be provided as well as provision around use.
9.2.22(1)	Replace “having regard to” with “consider”. Plain English is preferred.
9.2.22(2)	Insert ‘as far as reasonably practicable’ after must ensure as (c) relies on persons with design duties.
9.2.22(a)	This provision should use “safe oxygen level” rather than the lower limit. This should state the lower and upper safe oxygen level limits. 19.5% - 23%.

9.2.22(b)	Should be determined by exposure standards.
9.2.23 (2-5)	Insert ‘as far as reasonably practicable’ after must ensure. “general body concentration” is not a universally used term.
9.2.23(6)	The requirement to “install” implies the air monitoring devices must be fixed. The regulation must allow for the use of mobile air monitoring devices.
9.2.24	The provision is about workers and other persons, the heading should reflect this.
9.2.25	Signs are only one way of disseminating information along with information and training. It is recommended that this section be titled “Information available”. Unless a sign is in the line of site at all times it is not suitable. It is unclear how compliance could be demonstrated under this section.
9.2.26(2)	Delete the adjective ‘suitable’ and replace with “accredited”. (a) should read, “the devices used are suitable and are calibrated for”: Replace “having regard to” with “consider”. Plain English is preferred.
9.2.27	This regulation requires a mine operator to keep records of the results of air quality monitoring, the details of the location and frequency of monitoring and the sampling method used. These records must be retained for 7 years and available for inspection. This requirement has the potential to impose an excessive administrative burden on mine operations, without any direct safety benefits.
9.2.28(1)	Insert ‘as far as reasonably practicable’ after must ensure. This section needs to be refocused on the exposure to risk. (d) is unworkable as there are situations where air will be contaminated but it doesn’t represent a risk.
9.2.28(2)	“the purest source available” should be replaced with plain English “uncontaminated respirable air.”
9.2.28(3)	Replace air current” with air flow”. It is not clear what is meant by ‘regularly’.
9.2.29	This relates to an actual schematic of the ventilation system. This is an integral part of the principle mining hazard plans regarding air quality and dust and airborne contaminants as well as fire or explosion or gas outbursts; therefore this section is not required.

9.2.30	This section should be rewritten to provide for the mine operator having a duty to identify items through 9.2.11 that should not be brought onto site or used on site. The draft Schedule 9.3 can then be placed in guidance as a reference point.
DIVISION 4	
Overarching comment	This Division has a significant amount of detail that is in the Emergency Management Code of Practice. We recommend that the Division be streamlined. It is recommended that Safe Work Australia consult widely with emergency service providers to gain a better understanding of the operability of the provisions.
9.2.32(3)(iii)	What does 'adequate' refer to how will 'respond effectively' be determined? It should be based on the site's risk assessment.
	This regulation is impracticable - the term "accounted for" is more appropriate than "located".
9.2.32(4)(b)	Consult means taking into account a person's views therefore (b) is not required.
9.2.32(5)	This is redundant.
9.2.35	Insert 'as far as reasonably practicable' after must. At remote and rural locations it may not be possible to conduct joint annual testing.
9.2.37	This Regulation sets out specific requirements for exits for underground mines. According to the Issues Paper, the requirements reflect the International Labour Organisation (ILO) Safety and Health in Mines Convention 1995 (ILO C176) which provides, at Article 7, that employers *'wherever practicable, provide from every underground workplace, two exits, each of which is connected to a separate means of egress to the surface'*. Regulation 9.2.37, as drafted, reads as though an underground mine is required to have at least 3 means of exiting the mine workings. That is, the hoisting shaft, any normal means of exit and an additional means of exit. A further exit (totalling 4 exits) is required for coal and metalliferous mines. This requirement does not reflect the Article 7 of the ILO convention (ILO C176), but goes beyond the provisions of Article 7, in the following respects: 1. Article 7 requires an employer, **wherever practicable**, to provide 2 exits from an underground workplace- each of which is connected to a separate means of egress to the surface. This obligation is qualified by what is practicable. There is no such qualification in regulation 9.2.37; 2. Article 7 requires **2 exits, each connected to separate means of egress to the surface**. This means the underground workplace must have 2 exits that cannot be connected to the same egress i.e. the exits must be separate. There is no requirement to have more

	than 2 exits. 3. Article 7 requires **2 exits from an underground workplace**. Regulation 9.2.37 requires 3 or 4 exits from underground workings. There may be underground workings at a mine that are not workplaces. I.e. work has ceased in that area of the mine. The requirements in regulation 9.2.37 are not practicable.
9.2.37(1)(a-b)	These sub clauses are not required as they are integral to an underground mine.
9.2.37(2)	Emergency exists should be about means of escape not number of exits. Further to comments made at 9.2.37, in many mines there is no provision for a 3rd exit beyond the normal exit and the hoisting shaft. It is not possible to put in another decline. This also assumes that hoisting shafts are inappropriate when they are clearly appropriate.
9.2.37(3)	This provision brings the number of exits to 4. This is not workable.
9.2.39	Who determines what is 'prominent'.
9.2.41(1)	This section focuses on first aid and rescue but it must extend to recovery of equipment and remediation of the site. Insert "and remediation" after 'rescue' in (1).
9.2.41(3)	The inclusion of inrush here is not necessary.
9.2.41(4)	Insert 'as far as reasonably practicable' after must ensure as the provision relies on another person. Division 5 of the final Regulations details how personal protective equipment must be provided as well as provision around use.
<u>DIVISION 5</u>	
9.2.42(1)	Provision prior to a worker commences work cannot be complied with for existing workers. Transitional provisions are required to allow the mine operator sufficient time to prepare documentation.
9.2.42(1)(a)	The worker should receive a written summary only of the element(s) of the WHSMS that applies to them. This would also be part of the site induction.
9.2.42(3)(b)	Not supported, as explained in 9.2.6(1)(g) above this provision should be deleted. Subclause (b) of 9.2.6(1) requires systems, procedures and risk control measures; there is no need to identify what is but 1 of these; in fact it serves to minimise the other control measures that (b) requires.

9.2.43(a)	There is again confusion between risk and hazard. Replace 'hazards' with 'risks'
9.2.44	This duty can only apply with regards to authorised visitors, not unauthorised visitors or trespassers.
9.2.46	The record of training should be kept for 2 years. Records should be kept consistent with Australian Quality Training Framework requirements for training records
Part 9.3 FITNESS FOR WORK AND HEALTH MONITORING	
Regulation	**Comment**
9.3.1(2)	To be consistent with worker duties related to drugs and alcohol, we suggest the regulation require a worker to: • Disclose to a mine operator if they are impacted by fatigue; and/or • Disclose to a mine operator if the worker believes, on reasonable grounds, the worker would be impacted by fatigue if the worker commenced work at the mine. • Disclose to a mine operator if they are impacted by fatigue ***during*** work.
9.3.2(1)	In order to align the obligations imposed by sub-regulation 9.3.2 with current mining industry best practice and other industry specific health and safety legislation (e.g. the RS Act), as discussed above at 9.1.9, the industry submits that 9.3.2 be amended to: 1 Require the mine operator to ensure, so far as is reasonably practicable, that persons do not enter or remain at a mine while a nominated concentration of a drug and/or a nominated concentration of alcohol is present in the person's breath, blood or urine. 2 Require mine operator to, as far as is reasonably practicable, develop and implement strategies for ensuring compliance with point (1). 3 Without limiting the requirement in point (2), the provision should also require a mine operator to ensure the strategies include provisions for persons at a mining operation, or proposing to enter a mine, to undergo testing to detect the presence of drugs and/or alcohol, whether or not there is any suspicion the person is or may be adversely affected by drugs and/or alcohol. For the purposes of point (1), the nominated concentration of alcohol and/or drugs should be the concentration nominated by the mine operator.
9.3.2(2)	For operations that are fly-in fly-out it may not be possible to remove the worker from the site, so it is recommended that 'where reasonably practicable' is inserted.

9.3.3	This regulation should include additional obligations on persons (not only workers). It is recommended that Regulation 9.3.3 provide that a person must not enter or remain at a mine if: a. A nominated concentration of alcohol and/or a prescribed concentration of a drug is present in the person's breath, blood or urine; or b. A person refuses or fails to undergo testing to detect the presence of alcohol and/or drugs; or c. A person has consumed alcohol and/or drugs within a nominated period prior to entering or proposing to enter the mine. For the purposes of this requirement, the nominated period should be the period nominated by the mine operator. We also recommend that sub regulation 9.3.3 include an additional obligation on a person (not only workers) proposing to enter a mine, to disclose to the mine operator whether he or she has consumed alcohol and/or drugs within the nominated period. For operations that are fly-in fly-out it may not be possible for the worker to leave the site, so it is recommended that 'where reasonably practicable' is inserted.
9.3.4(1)	As 'worker' is taken to include all contractors that work on site it is not possible to comply with this duty to carry out health monitoring. Insert 'as far as reasonably practicable' after must ensure. Recommend inserting "**have potential** to have an adverse effect".
9.3.4(2)(a)	This provision cannot be complied with for existing workers. Insert 'as far as reasonably practicable' after must. Transitional provisions are required to allow the mine operator sufficient time to comply.
9.3.4(2)(b)	It is not always possible to undertake health monitoring before a worker ceases work.
9.3.4(4)	Delete provision. It is inappropriate for a worker to be consulted on the selection of a registered medical practitioner.
9.3.4(6)	This should read "the direct employer of the worker must pay all expenses in relation to health monitoring".
9.3.5	This section must allow for a Mine Operator to be made aware of any health issues that a worker has that may place them at an increased risk to health at the mining operation. There must be a duty on the registered medical practitioner to report any issue that presents a risk to a worker. It is important that the mine operator does not inadvertently place the work at an increased risk. We recommend that the provision be expanded to include a positive obligation on registered medical practitioners, to report to the mine operator, if: 1 they become aware of a worker's medical condition, in the course of health monitoring; and

	2 that medical condition (although potentially unrelated to the affects of working at a mine) may, in the reasonable opinion of the medical practitioner, present a risk to a worker while working at the mine.
9.3.5(2)(b)	This provision should also include the need for the medical practitioner to determine whether or not the applicant is unsuitable for the duties proposed.
9.3.6(4)	Recommend this be redrafted to "where requested, the operator of a mine must ensure that a workers' health monitoring results are given to the worker if mining operations cease at the mine". Workers may not always wish to receive this information.
Part 9.4 CONSULTATION AND WORKERS' SAFETY ROLE	
Regulation	**Comment**
Recommended new sub provision 9.4.1(c)	A worker at a mining operation should have a duty broader than principle mining hazards this should extend to other hazards at the mine. We recommend a new (c) "the identification of other hazards at the mine."
9.4.2(a)	This provision could impose an unreasonable burden on mine operators. This is because the WHS management system would, theoretically, be implemented continuously (every minute of every day) at a mine operation. An obligation to continuously consult on every facet of the implementation would be unreasonable. We therefore seek clarification on what is intended by sub regulation 9.4.2(a) and deletion of the word 'implementing' from this provision.
9.4.2(e)	*Transitional Principles* for the Act (Transitional Principle I), released by Safe Work Australia provide that the model WHS regime will recognise policies and procedures agreed under pre-harmonisation legislation, where those policies and procedures comply with the requirements of the model WHS laws. The industry seeks confirmation that 'Transitional Principle I' will apply to policies and procedures drug and alcohol and fatigue management policies under the Mines Chapter.
Part 9.5 MINE SURVEY PLANS	
Regulation	**Comment**
9.5.1(1)(a)	It is not always the case that a 'registered mine surveyor' will prepare the mine survey plans. There is no such thing as a registered mine surveyor in Victoria. No training provision exists. Surveyors within Victoria can be licensed as Cadastral surveyors. There are other competent persons that do this. It is inappropriate to restrict certain persons in this provision. It is recommended that "competent person" be used.

9.5.3(1)	There will come a point in time where a previous version of a mine survey plan offers no value and its retention is no longer reasonable nor relevant to the operation.
Part 9.6 NOTIFICATION OF HIGH POTENTIAL INCIDENTS	
Regulation	**Comment**
9.6.1(2)	The concept of a 'high potential incident' appears to extend the notion of 'dangerous incident', (which requires exposure to a serious risk to health or safety emanating from an immediate/ imminent exposure to the events listed) to persons within the vicinity of the event (whether or not they have been exposed to serious risk to health and safety). It is not clear why only the minerals industry has this requirement.
Part 9.7 MINE RECORDS	
Regulation	**Comment**
9.7.1(2)(b)	It is inappropriate that details of a mine operator's investigation be placed on the Mine Record and therefore be available for view by all workers. Investigation reports will include commercially confidential material and also identify individual workers related to the incident thereby impact on privacy. The requirements to keep incident investigations part of the mine record and make that record available for inspection would undermine the ability for a mine operator to carry out a privileged and confidential investigation for the purposes of obtaining legal advice. Legal professional privilege is specifically safe guarded under section 269 of the Act and these requirements appear, on the face of it, to be an attempt to circumvent that provision. These requirements also further erode the right to silence and protections from self incrimination. While there is no right to silence under the Model Act, the Model Act does not require an individual or mine operator to investigate an incident, record and retain investigation information (which may be incriminating) and then make the record available for inspection. We therefore recommend that Regulation 9.7 prescribes an express exclusion from the mine records for: any information covered by legal professional privilege; any information that may be commercially sensitive; and personal information. In addition, information about incident investigations should be excluded from the content requirements of the mine record. We also recommend that Regulation 9.7.1 contain a provision preventing the public disclosure of information contained in the mine record (unless disclosed by the mine operator).

9.7.1(3)(b)	Each record in the mine record is required to be kept for 7 years. What, if any, safety and health value is there in keeping shift communication record for 7 years?
SCHEDULES	
Schedule 9.1	
General	Quarterly reporting is onerous as detailed above at 9.2.9(2). There will need to be clear interpretative guidance regarding the intent of this Schedule.
3.	This can only be an estimated. Without a swipe card system of entry and exit the accuracy of hours provided will be an estimate at a point in time.
4.	The obligation under Schedule 9.1 to record the number of 'high potential incidents' requiring notification under Regulation 9.6.1 (and include this in the quarterly report to the regulator under regulation 9.2.9) is not necessary. If the mine operator has an obligation to notify 'high potential incidents' to the regulator, the regulator will already be aware of the number of 'high potential incidents' that have occurred at a mine.
8.	This requires substantial guidance. Restricted work can be interpreted in numerous ways.
9.	Whilst understanding then intent of the final paragraph, the use of the terms preventable and therapeutic is in conflict. Therapy implies after an event, whereas prevention is obviously intended to preclude an event from occurring. Preventative activities can also include wellness program, observations – clearly not related to a work incident. This needs to be rewritten. Also to clarify that vaccinations and immunisations are not classified here. A clear demarcation between what are considered first aid events is required. i.e. medical treatment does not include first aid cases, for example: non-prescription medicines; general wound management of a topical nature i.e. flushing, bandage, butterfly enclosures; eye irrigation.
Schedule 9.2	
General	This detail duplicates what is in each PMH Code of Practice. There is also significant overlap with Division 3.

	It really only provided a checklist and we recommend that this schedule be deleted.
Schedule 9.3	
	As detailed above at 9.2.30, the Schedule should be placed in guidance as a reference point.
Schedule 9.4	
1.2	What does ‘up-to-date’ mean? We recommend that “detailed and accurate” be used consistent with the language in 9.5.1.
4.4	This can be seen as a duplicate of 3.1(a)
Other Comments	

Section B: Model Mines Codes of Practice

Note: MCA and Representatives will make a separate submission to Safe Work Australia on the Model Mines Codes of Practice by 7 October 2011.

4. FURTHER REGULATORY COMMENTS

4.1 Transitional provisions

All minerals companies will face new regulatory regimes on 1 January 2012. The Model regime, being an exercise largely of consolidation, does not exist in its entirety any jurisdiction. Some provisions will be familiar, others not. The Model Mines Regulations introduce specific risk assessment procedures and a raft of records management duties. Further, some operators in the minerals industry have not previously been required to systematically assess risks to health and safety and document through a work health and safety management system. Some less complex and specific mine types have not been required undertake this level of detail. The Model Mines Regulations will represent a significant initial burden to these operators.

Compounding this is the extensive delay in releasing the Model Mines Regulations for public comment and it is expected that the Regulations will not be finalised before November 2011. This leaves companies (and Regulators) insufficient time to establish processes and systems that will be in compliance with the new Model Mines Regulations.

Therefore a significant period of time is required to allow companies to identify any gaps in their existing systems and processes as well as meeting documentation requirements under the new regime. A period of no less than 12 months from commencement of the Model Act and Regulations is required.

Whilst it is acknowledged that the design and duration of transitional provisions is the responsibility of each jurisdiction and may depend on some extend to the variation between the existing regime and the new regime, it is critical that transitional provisions for the minerals industry are uniform across the nation. Many minerals companies have operations across a number of jurisdictions and would be confusing and inequitable if transitional provisions varied.

4.2 Exemptions

As expressed in MCA and Representatives submission on the Model Regulations and Priority Codes of Practice, mineral companies manage all risks to safety and health at a mining operation in a holistic and systematic way. As the Mines Regulations state:

9.2.5 (2) - The WHS management system must be designed to be used by the mine operator **as the primary means** of:

(a) ensuring the health and safety of workers at the mine; and
(b) ensuring that the health and safety of other persons is not put at risk from work carried out as part of mining operations.

The MCA and Representatives remain concerned that there are three specifically regulated industries – MHFs, mining and construction which have potential for overlap and duplication of regulatory requirements.

The MCA and Representatives consider it critical these three industries each be supported by the regulatory framework to establish the most effective and efficient system for controlling risks, in a way that is appropriate to the particular industry and its own operating procedures. Mining operations should therefore, under the Regulations, be exempt from the obligations under Chapter 6 and Chapter 8 of the Model Regulations on the basis that a safety outcome may be better achieved through the specific obligations in Chapter 9. This enables a holistic approach to managing risks in a way that best reflects the operations of an industry and the type of work being undertaken.

As such, the MCA and Representatives again recommend that sites classified “mining operations” as defined in Chapter 9, be excluded from the definition of construction work and classification as a major hazard facility as indicated below.

6.1.1(3)(d) *construction work* is currently drafted as not including “mining or the exploration for or extraction of minerals”. Recommend that this be reworded as “mining operations as defined by Chapter 9.”

Specific exemptions be provided for mining operations regulated under Chapter 9 for the MHF requirements on the basis that equivalent safety outcomes will be achieved in a more effective and efficient manner.

It is recommended that a new **8.1.1(3)** is inserted and move the current (3) to (4). The new (3) is to read "This Chapter does not apply in relation to a "mining operation" that is regulated by Chapter 9 of these Regulations."

4.3 Relationship with other Chapters of the Model Regulations

At the time of writing, the revised Model Regulations (updated following the public comment period) had not yet been released. As such the issues raised here may be addressed in the revised version of the Model Regulations. Unless express exemptions apply, the whole Model Regulations and the Mines Chapter are intended to apply to mining operations. If this approach is ultimately adopted, it is important:

- There is no duplication between the Mines Chapter and other provisions of the Model Regulations;
- There is no inconsistency between the Mines Chapter and other provisions of the Model Regulations (e.g. provisions applicable to mining operations in the Mines Chapter should not be inconsistent with other provisions of the Model Regulations also applicable to mining operations);
- Mining operations are appropriately exempted from aspects of the Model Regulations that pose additional regulatory burdens on mine operators without direct health and safety benefits.

There are a number of provisions in the Model Regulations that exempt or exclude 'mines' or the 'working of a mine' but it is unclear whether these exemptions/exclusions apply to 'mining operations' more broadly. For example:

Confined Space
Chapter 4 contains detailed provisions prescribing specific risk control measures for hazardous work. Part 4.3 in particular deals with 'confined space'. Importantly, the definition of 'confined space' excludes a mine and the workings of a mine[3]. Initial interpretations of this provision (prior to the release of the Mines Chapter which included a definition of 'mine') could have read this exclusion to apply to the workings of an actual mine, but not to broader 'mining operations' (which includes activities associated with actual extraction/exploration such as the storage, preparation or handling of extracted minerals).

Based on the definition of 'mine' now released as part of the Mines Chapter, any 'workplace at which mining operations are carried out' (i.e. a mine) would be excluded from the definition of 'confined space'. This means that Part 4.3 would not apply to any workplace where 'mining operations' occur and this includes workplaces where activities of handling/storing and preparing/processing extracted materials in connection with the extraction of minerals, take place. Further a workplace where the constructing or decommissioning an extraction site or exploration site would also be exempt from Part 4.3.

Construction
Chapter 6 deals with construction work. It contains provisions relating to principal contractor duties, risk control requirements for construction work, high risk construction work and excavation work (including the ability for a HSR to request a review of those risk control measures for construction work) and induction obligations.
At this stage, 'mining or the exploration for or extraction of minerals' is excluded from the definition of 'construction work'. There are also exclusions from provisions relating to 'excavation work' if the excavation work is a mine. As indicated above, the initial draft Model Regulations did not include a definition of mine and as such, the scope of this exclusion was uncertain. If these provisions are now read in conjunction with the definitions in Chapter 9, it appears as though the exclusions are arguably broader than initial interpretations would suggest. That is, activities associated with handling/storing and preparing/processing extracted materials and the constructing or decommissioning of an extraction site or exploration site would be excluded from Chapter 6.

This broader interpretation of the Chapter 6 exemptions may well benefit members as it removes another layer of regulation from mining operations. However, as with the provisions relating to 'confined space' the scope of Chapter 6 needs to be clarified in view of the language and definitions used in Chapter 9.

[3] See clause 4.3.2 of the Regulations

Major Hazard Facilities
Under Chapter 8, a major hazard facility is a facility where hazardous chemicals (as identified in Schedule 15) are present or likely to be present in quantities above the threshold amounts **or** a facility determined by the regulator to be a hazardous facility. Regulation 8.1.1(2) will list exclusions for Chapter 8 and refers to a Jurisdictional Note allowing jurisdictions to identify facilities where Chapter 8 will not apply.

While the Jurisdictional Note suggests mining operations will be exempt from Chapter 8, it relies on each jurisdiction to implement the exemption. This fails to provide certainty for mine operators. As such, we once again recommend that Chapter 8 specifically exclude mining operations regulated by the Mines Chapter (as the reliance on the Jurisdictional Note creates uncertainty and allows jurisdictional inconsistency).

In addition to the above, there are also examples of provisions where obligations under the Mines Chapter will need to be read in conjunction with obligations prescribed elsewhere in the Model Regulations and Act.

Self Rescuers/Respiratory Equipment
Regulation 9.2.40 of the Mines Chapter provides that persons who go underground must be provided with self-rescuers.

There are other provisions in Chapter 3 of the Model Regulations (i.e. those not relating to mining specifically) which relate to air supplied respiratory equipment (see Regulation 3.2.3). These provisions include specific detail regarding matters such as nominated air pressures and temperatures regarding the supply of air. Regulation 3.2.3(5) also specifies that air supplied respiratory equipment is not to be used in circumstances where inadequate air supply might represent a risk to the health and safety of the user of the equipment unless the equipment is fitted with an automatic warning device and an auxiliary air supply is provided. It is arguable that self rescuers are used in circumstances which represent a risk to the health and safety of the user of the equipment (i.e. an irrespirable atmosphere). In these circumstances mine operators will need to ensure self rescuers are fitted with an automatic warning device and an auxiliary air supply is provided.

This drafting means that in order to comply with the Model Regulations, mine operators may need to defer to Regulations 9.2.40 and Regulation 3.2.3. Consideration should be given as to whether the provisions relating to self rescuers and respiratory equipment should be located together or, alternatively, whether Regulation 3.2.3 should not apply to mine operators on the basis that self rescuers provided in the context of mining are more specialised items of PPE and should not be regulated under the general provisions relating to respiratory equipment under Chapter 3.

Consultation and Workers' Safety Role
Regulation 9.4.1 requires a mine operator to implement a safety role for workers at the mine that enables them to contribute to:

- the identification of principal mining hazards under Regulation 9.2.1; and
- the consideration of risk control measures for risks associated with principal mining hazards at the mine.

Regulation 9.4.2 then goes on to list further triggers for worker consultation under section 49 of the Model Act. Namely, consultation is required in relation to:

- implementing the WHS management system for the mine;
- conducting risk assessments for principal mining hazard management plans;
- preparing and reviewing the emergency plan for the mine;
- the safety role under regulation 9.4.1;
- developing and implementing strategies to protect persons at the mine from any risk to health and safety arising from the following:
    - the consumption of alcohol or drugs by any person;
    - worker fatigue.

While it is clear these triggers relate specifically to obligations under the Mines Chapter section 49 of the Model Act arguably provides sufficient scope for worker consultation to be triggered (albeit without specific reference to the Mines Chapter). Consideration should be given to whether Regulations 9.4.1 and 9.4.2 are necessary of whether the consultation provisions under the Model Act are sufficient.

4.4 Use of the term *mining operations* throughout the Model Regulations

A number of places in the Model Regulations (draft released for public comment) make reference to 'mining' and 'mine'. It is acknowledged that some of the below provisions have been amended, however they are included here to illustrate the need for uniformity in language across the Model Regulations.

6.1.1 Meaning of *construction work*
(3) In this Part, ***construction work*** does not include:
(d) mining or the exploration for or extraction of minerals.

7.3.1 Work involving asbestos or ACM—prohibitions and exceptions
(3) Subregulation (1) does not apply if the work involving asbestos is any of the following:
(h) non-asbestos mining or extraction of stone if asbestos is met;

4.3.2 Meaning of *confined space*
(2) A ***confined space*** does not include a mine or the workings of a mine.

8.1.5 Tailing dams
(1) Schedule 15 chemicals present in the tailing dam of a mine are not to be considered in determining whether a mine is a facility or a major hazard facility.
(2) In this regulation:
mine means [.....].
tailing dam means [.....].

Mining is not defined in the Mines Regulations, nor is exploration or extraction of minerals, non-asbestos mining or tailing dam.

Given that the Model Regulations excluding Chapter 9 are to be finalised by Workplace Relations Ministers prior to the comment period for the Moines Regulations closing, it is critical that following finalisation of the Mines Regulations that a consistency check is undertaken. Furthermore, the decision to place all definitions in Chapter 1 of the Model Regulations will necessitate that the definitions in the Mines Regulations are replicated in Chapter 1.

4.5 Jurisdictional notes

As indicated earlier the MCA and Representatives continue to be concerned over the use of jurisdictional notes, particularly where they will result in lack of uniformity. Jurisdictional notes should be utilised only where they are appropriate, for example, to align the Model Act or Regulations with local court structures. Jurisdictional Notes are not appropriate in circumstances that will result in an inconsistency in provisions that are key to the interpretation of the Model Act or Regulations such as definitions or that will result in inconsistent provisions generally, such as penalty provisions and reporting requirements. It is further concerning that jurisdictional notes are drafted based on who the regulator is rather than what the policy intent is.

The intent of Jurisdictional Notes was clearly defined in the Issues Paper accompanying the Model Work Health and Safety Regulations. With regards to the Mines Regulations, our concerns remain that some jurisdictional notes:

- adversely affect harmonisation, and are not simply about transition.
- compromise uniformity through retaining ability to interact with work health and safety laws of other jurisdictions.
- go to policy e.g. State based exemptions and definitions.

For example the inclusion of a Jurisdictional Note at 9.1.2 compromises uniformity, where the scope of coverage of the Mines Regulations can be expanded.

4.6 Penalties

Further to the MCA and Representatives submission on the Model Regulations we restate concern that a lack of criteria is likely to result in inconsistent application of penalties.

Proportionality is essential and there should also be no imprisonment for offences under the Model Regulations.

Whilst there are no penalties ascribed to specific provisions in the Model Mines Regulation we recommend that compliance must be measurable against defined criteria.

Application of penalties

- the point of non-compliance must be where the PCBU has not reasonably controlled a risk
- Specific regulations duplicate for specific hazards the obligations under the Act. Penalties must only apply to one instrument – the Act or the Regulations.
- Penalties must be consistent with the degree of exposure to risk.
- The penalty levels must justify the safety benefit. If the scale collapses to three levels then it would be required to apply higher penalties for minor issues. The current 5/4 levels give a better focus on the right message.
- The control hierarchy is an established concept. Using controls as the point of non-compliance is building on an existing framework – not new and not arbitrary.

It is also vital that there must be a separation of administrative issues that are not based on safety.

4.7 Infringement Notices

Infringement notices are not supported. Their application in jurisdictions which currently have these tools, in the experience of industry, is subjective and varied. Any compliance tool needs to be measurable. The MCA and Representatives submit that focusing the Regulations on effective risk management rather than infringements, is more appropriate. Further, it is essential that this is provided in a proportional manner. For operators that manage major risks, it is essential that their focus remain on these risks, and they are not continually diverted by issues that are considered to represent a minor risk.

If Infringement Notices are retained there must be a clear and meaningful approach to their application:

- There must be a justifiable safety outcome
- Must be consistent with the degree of exposure to risk.
- Must not be used where “reasonably practicable” is the qualifier.
- Infringement Notices must be excluded where there is potential for any subjectivity/discretion by inspectors.

END