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

This submission is made on behalf of The Australian Industry Group (Ai Group)

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than 1 million employees.

It is an organisation committed to helping Australian industry with a focus on building competitive and sustainable industries through global integration, skills development, productive and flexible workplace relations, infrastructure development and innovation.

The organisation provides practical information, advice and assistance to help members run their businesses more effectively. It ensures through policy leadership that members have a voice at all levels of government, by representing and promoting their interests on current and emerging issues.

Ai Group members operate small, medium and large businesses across a range of industries.

We are represented in ongoing tripartite consultative forums with state governments and occupational health and safety regulators in Queensland, New South Wales, Victoria and South Australia.

Ai Group is a member of Safe Work Australia. As the laws have been developed, we have participated in the tripartite debates undertaken at Safe Work Australia member meetings and through our involvement on the Strategic Issues Group – OHS (SIG-OHS) which has been charged with overseeing the development of the laws on behalf of Safe Work Australia.

Introduction

Ai Group's information, advisory, consulting, legal and training services brings our staff into contact with a broad range of businesses across Australia who share with us the opportunities and challenges that arise when running a business in the current regulatory environment. Every day our specialist Work Health and Safety (WHS) staff interact with employers who need advice or assistance to meet their current health and safety obligations. Ai Group has also established mechanisms to engage with industry in relation to key issues of concern/interest in the development and implementation of the WHS laws.

This practical exposure to WHS issues within businesses, combined with the expert knowledge of our experienced advisers, informs our considerations and ensure that the legal, technical and day to day practical implication of those laws in the workplace are all taken into account.

As a member of Safe Work Australia, and its SIG-OHS, Ai Group has had the opportunity to utilise this knowledge and expertise to express the views of "persons conducting a business or undertaking" during the development of the Model WHS Act and the draft WHS Regulations and Codes of Practice. In relation to the mining specific Regulations and Codes of Practice, we have specificaaly worked closely with the Minerals Council of Australia.

It is crucial to our members who operate in the mining sector, and especially those who also operate in other sectors, that the legislation covering mining operations are aligned with the WHS laws wherever possible.

A harmonised regime

It is our understanding, that Victoria, South Australia, Tasmania, Northern Territory, ACT and the Commonwealth will adopt the Model WHS Mining Regulations and Codes as part of the full package of Model WHS Laws. However, it is disappointing that three jurisdictions (Queensland, Western Australia and New South Wales) have indicated that they will continue to legislate mining safety under a separate set of laws, and particularly that these laws will incorporate "non-core" provisions that will not be consistent with the Model WHS Mining Regulations.

This approach will continue to create confusion for businesses that operate in both mining and non-mining workplaces. It will also continue the create barriers for businesses who operate within, or provide services to, the mining sector in other states, to undertake work in Queensland, New South Wales or Western Australia. It is currently unclear whether the "non-core" provisions will ultimately be the same in these three jurisdictions, or whether each of the three jurisdictions will adopt differing non-core provisions. If the latter occurs, confusion and difficulties will be exacerbated.

It is recognised that there may be some hazards/risks in specific types of mining operations that require specific attention. However, we believe that this level of detail could be provided in Codes of Practice or guidance material. They do not warrant separate legislative regimes and/or the adoption of "non-core" provisions.

Consultation Regulation Impact Statement (RIS)

We note that, according to the Safe Work Australia website, the status of the RIS continues to be that "the RIS will be posted when OBPR has considered it. This is anticipated to occur soon". It is extremely disappointing that the public comment period for the Regulations and Codes of Practice will be closing before the consultation RIS has been made available, particularly as this only a consultation RIS and further work can be done to refine it following public comment.

It is crucial that the consultation RIS is provided for public comment as soon as possible.

The Regulations

It is recognised that much work has been undertaken in relation to the WHS Regulations generally, since they were issued for public comment, and that these enhancements have not flowed through to the current version of the Mining Regulations. We are treating it as a "given" that these enhancements will be incorporated into the Mining Regulations and we will not provide detailed comment on the Regulations which will be reworked as part of this process.

Individual/Organisational name: THE Australian Industry Group	
Regulations Chapter 9: Mines	
Part 9.1 – Preliminary	
Regulation	**Comment**
Application	The Major Hazard Facilities Regulations contain an "application" section. This would be appropriate for the Mines Regulations as well. In this provision it would be appropriate to define the scope of the term "in connection with". The Minerals Council of Australia provide more detailed information regarding concerns with this terminology and their issues should be explored by Safe Work Australia.
Recommended new provision	It is essential that the Regulations clearly establish that the operations of a mine are not covered by the regulations for Major Hazard Facilities or Construction. This provision could be contained within the body of the regulations, or in the application section proposed above.
9.1.2(1)(a)	It is our understanding that the terms "ground disturbance" and "mechanical means" have different interpretations according to tenement, heritage and environmental laws across Australia. To avoid confusion and inconsistent applications of the law, it is important that the terminology is defined for the purposes of WHS laws. This could be achieved through guidance material or an interpretative guideline.
9.1.2	In various locations, the word "materials" has been utilised. For consistency, this should be replaced with "minerals".
9.1.2(2)(c)	It is recommended that "constructing and decommissioning" are covered by the construction regulations, rather than the mining regulations.
9.1.2(4)	It is unclear why tourist mines are covered by these regulations when they do not meet the primary definition of mining operations. If this coverage remains, guidance material should be developed to clearly indicate to tourist mines what is required to meet their obligations under the Regulations. Such guidance material should delineate between a "mine" that was specifically established for the purposes of tourism and one that was previously operated as a mine.
9.1.4	It would be helpful to establish a context for the "meaning of principal mining hazards". This could be achieved by making a reference to

	regulations 9.2.10 or Division 2 and/or having preliminary words that state “for the purpose of developing principal mining hazard management plans …”
9.1.4	It is not appropriate to utilise the words “create a risk” without some qualifying statement, as there will always be some level of risk. An appropriate qualifier may be “materially significant risk”
9.1.4 (Note)	As outlined earlier, it is not appropriate for a mine to be regulated as both a Major Hazard Facility and a Mine. Only the Mines regulations should apply. If this occurs, then this note would need to be removed.
9.1.6(2)	The words at the end of the paragraph are in bold and italics, indicating that they are to be defined in the regulations. We have not been provided with a definition, so we are unable to comment on this. Further clarification is required.
9.1.7(6)	Reference is made to a mine operator who intends to cease being a mine operator. It should also include a mine operator who ceases to operate. This will ensure that mine operators who may not be planning to cease operation, but rather the arrangement is terminated, retain this obligation.
9.1.9	This regulation establishes that a person is adversely affected by drugs or alcohol if they 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 at risk. This approach is not consistent with current practices in the minerals industry which applies a detection based approach to dealing with drugs and alcohol. This is a major concern to the industry. The Minerals Council of Australia has addressed this issue in detail within their submission and we encourage Safe Work Australia to incorporate detection based methods into the regulations.
Part 9.2 – Managing Risks	
Regulation	**Comment**
9.2.1 to 9.2.4	We have not provided comment on these regulations as they will be significantly amended (in line with the introduction of a general risk management part at the commencement of the regulations) when incorporated into the WHS Regulations.
9.2.5	This regulation establishes the requirements for a WHS management system. It needs to be recognised that many PCBUs who enter a mining operation will have their own WHS management system and it would not be appropriate to require them to adopt the specific WHS management system of the mine site if their own system provides an equivalent level of safety and is appropriate for the risks they are dealing with. It is not clear whether this regulations allows the flexibility for this to occur.

9.2.5(2)	In both (a) and (b) the words “so far as is reasonably practicable” should be inserted. Alternatively, the new terminology in the Regulations could be adopted stating that “the WHS management system must be designed to be used as the primary means of “managing the risks” associated with the mine; hence referring the reader back to the general risk management approach in part 3.1 of the regulations, which incorporates the qualifier of “so far as is reasonably practicable”.
9.2.6(1)(g)	It is recommended to delete this provision as it implies that the ventilation control plan has a higher status than the other principal mining hazard management plans.
9.2.8(1)	Specifying a requirement to review the WHS management plan every 3 years will create an additional burden on industry, without any clear benefits to health and safety. It is noted also, that there are no similar provisions in the Major Hazard Facilities regulations. It is recommended that this requirement be removed and that the provisions should be compared to the MHF requirements to identify whether further adjustments should be made to create greater consistencies across the regulations.
9.2.9 and Schedule 9	This regulation and the associated schedule require the miner operator to provide detailed information (number of incident, number of LTIs, number of MTIs etc) to the regulator on a quarterly basis. There are no similar provisions elsewhere in the regulations and there has not been any safety justification for providing this data. Ai Group strongly objects to this provision which is totally inconsistent with the Act and Regulations, and requires the mine operator to provide information to the regulator which is not required in any other industry. If this provision remains, there needs to be a further provision which ensures that the information will not be utilised in any proceedings against the mine operator.
9.2.10	It is not appropriate to include details in the regulations about what is to be included in the risk assessment and how it is documented. This level of detail is more appropriate for a Code of Practice or guidance material. However, if the detail is retained, consideration should be given to aligning the terminology and approach with that included in the “safety assessment” section of the MHF regulations, for the benefit of consistency.
Division 3 - General	The detail contained in this division is far too prescriptive and would be better addressed in Codes of Practice or guidance material. If these regulations remain, there needs to be a total review of the “qualifiers” to ensure that they are appropriate; for example in 9.2.14(1)(a) it may be more appropriate to say “take reasonable steps to ensure that the person is at all times aware…” The Minerals Council of Australia has provided some recommendations for technical amendments that should be incorporated into the regulations if they remain.

Division 4 – General	This division contains a lot of detail which is better dealt with in the relevant Code of Practice. Further concern is raised, as it was in relation to MHFs, that the emergency services organisations, and others required to be consulted with in these regulations may not be willing or able to participate as indicated by the regulations. Such lack of involvement may leave the mine operator unintentionally in breach of the regulations, e.g. 9.2.35 requires that the emergency plan be tested in conjunction with the emergency response service provided at least once each year. Modifications similar to those made to the MHF regulations should be made to these provisions. The Minerals Council of Australia has provided some recommendations for technical amendments that should be incorporated into the regulations if they remain.
9.2.42(1)	This regulation requires the mine operator to provide each worker with a summary of the WHS management plant before they commence work at the mine. Transitional Requirements will be required for this regulations to apply appropriately. It should only be necessary, and appropriate, to provide a summary of part(s) of the WHS Management plan that are relevant to the work to be undertaken by the worker. This is particularly the case if a contractor is coming on site to do a specific task for a short duration.
Part 9.3 – Fitness for Work and Health Monitoring	
Regulation	**Comment**
General	The Minerals Council of Australia has provided detailed feedback on this part of the regulations. Ai Group supports the views expressed by the MCA and encourages Safe Work Australia to adopt their recommendations.
Part 9.4 – Consultation and Workers' Safety Role	
Regulation	**Comment**
General	These provisions are similar to those for workers at a MHF (regulation 574), but there is no corresponding "duties of workers" (regulation 576). The Mines regulations should be modified to include duties of workers similar to those for MHFs. Without such duties it will be implied that the duties of workers in a Mine are less than those in a similarly regulated industry.

Part 9.5 – Mine Survey Plans	
Regulation	**Comment**
9.5.1	It is recommended that reference to a “registered mine surveyor” be removed and reference only be made to a competent person.

Part 9.6 – Notification of High Potential Incidents	
Regulation	**Comment**
9.6.1	This provision appears to be attempting to expand the scope of the notifiable incidents that applies under the Act. It is not appropriate to do so for one particular industry. This regulation should be removed

Part 9.6 – Mine Records	
Regulation	**Comment**
9.7.1	Again, this regulation seems to be attempting to establish a set of rules that are different to every other industry, but in relation to the same issues. It is not clear why particular records need to be kept for 7 years in relation to a mine, but a lesser period of time in relation to other industries (i.e. notices issued under Part 10 of the Act; records of notifiable incidents; and records of high potential incidents). It is also unclear what safety benefit can be obtained by keeping, for 7 years, a copy of every report made by a shift supervisor. We are also concerned about the requirement to have available for inspection any details of any investigation undertaken in relation to a notifiable incident. These provisions should be removed from the regulations.

Codes of Practice
As the Codes of Practice are predominantly technical in nature we are obtaining technical input from the Minerals Council of Australia to support the development of our position on these documents. For this reason we are not making any comments on the Codes as part of public comment and will consider the views expressed by the MCA in subsequent deliberations at SIG-OHS.