

Report on the Statutory Review of the *Coal Mine Health and Safety Act 2002*

July 2009



**NSW DEPARTMENT OF
PRIMARY INDUSTRIES**

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CHAPTER 1 – EXECUTIVE SUMMARY

The *Coal Mine Health and Safety Act 2002* (CMHS Act) received assent on 16 December 2002. Included in the CMHS Act is a requirement to review, as soon as possible after the period of five years from the date of assent, the ongoing validity of the Act's policy objectives and whether the provisions of the Act are appropriate for those objectives to be met.

The statutory review of the CMHS Act (the review) was conducted by the NSW Department of Primary Industries (DPI) at the direction of the Minister for Mineral Resources. The terms of reference of the review were to evaluate the effectiveness of the Act, including consideration of whether:

1. The Act is effectively meeting its objectives;
2. The provisions of the Act meet the NSW Government's Better Regulation Principles. In particular:
 - a) Whether the provisions of the Act are easy to understand;
 - b) Whether there are opportunities to improve compliance and administrative processes, and to reduce compliance costs; and
 - c) To identify any unintended consequences from the operation of the Act; and
3. The Act includes unnecessary regulatory duplication and/or inconsistencies.

A discussion paper calling for public comment was released on 16 December 2008, with submissions closing on 27 January 2009. The discussion paper sought comment on the following issues:

1. The scope and application of the CMHS Act;
2. The process for nomination of coal mine operators by colliery holders;
3. The content of Health and Safety Management Systems (HSMS);
4. The content of Emergency Management Systems (EMS);
5. Requirements for the review of HSMS and EMS;
6. The submission of HSMS and EMS documentation to DPI;
7. Tourist and educational activities at disused coal mines.

DPI received seven submissions as well as two letters in support for the submission by the NSW Minerals Council. The submissions are summarised in section 2.3 of this report and discussed in more detail in Chapter 5.

There was some support in the submissions for retaining the current system for defining application of the CMHS Act, which is partly based on the geographical concept of a colliery holding. However, a submission from an Inspector of Coal Mines with DPI highlighted that using the concept of colliery holdings to define application of the CMHS Act may result in uncertainty about application of the Act to some coal mining-related workplaces.

With regard to many of the other issues raised in the discussion paper, there were differences in the nature and extent of suggested changes to the CMHS Act and *Coal Mine*

Health and Safety Regulation 2006 (CMHS Regulation) between submissions from industry-based groups such as the NSW Minerals Council, and employee-based groups such as the Construction, Forestry, Mining and Energy Union - Mining and Energy Division (CFMEU). Generally, industry-based submissions called for a less prescriptive and more 'risk-based' approach in the CMHS Act, while employee-based submissions advocated retaining or increasing the level of prescription.

Industry-based submissions on the process for nomination of operator for coal operations proposed that the power for the Chief Inspector to reject a nomination of operator should be removed. The CFMEU submitted that the provisions for nomination of operators should remain unchanged.

The submission from DPI Inspectors of Coal Mines indicated that, while the process itself was not an issue, the administrative documents supporting the nomination process are unnecessarily complex and need to be streamlined. DPI Inspectors of Coal Mines also raised issues with the management structures at coal operations.

In relation to development, submission and review of HSMS and EMS, one of the main concerns raised in the industry-based submissions was the interaction and extent of overlap between the *Occupational Health and Safety Act 2000* (OHS Act) and the CMHS legislation. In general, the submissions commented that the overlap and interaction between the OHS Act and the CMHS Act is confusing and sought amendments to the CMHS Act to make it more 'risk-based' in line with the OHS Act. The submission by Mines Rescue also commented on the potential for confusion in interpreting and applying the OHS Act and CMHS Act at coal-related workplaces.

In contrast, the submission from the CFMEU generally advocated retaining or increasing the content, submission and review requirements for HSMS and EMS. A submission by DPI Inspectors of Coal Mines also generally did not support any lessening of the current level of prescription in the CMHS Act in relation to EMS and HSMS and suggested that further prescription was required in some areas, such as recognition of emergency services in development and testing of EMS. Further recognition of the role of emergency services was supported by Mines Rescue.

Most submissions declined to comment on the system of tourist mine permits in the CMHS Act, but DPI Inspectors of Coal Mines advocated that oversight of tourist mines be retained by DPI.

Despite the difference in views expressed in the submissions, a common theme was the importance of securing and supporting OHS in the mining industry and acknowledgment that there are mining-industry specific hazards that need to be addressed. This supports the conclusion that the CMHS Act policy objectives remain valid.

The submissions indicated, however, that there are areas where ease of understanding and administrative processes could be improved. The recommendations made in the report are aimed at achieving this without compromising discussion and development of national OHS legislation through the *National Review into Model Occupational Health and Safety Laws* and the National Mine Safety Framework. The recommendations include legislative amendment as well as non-legislative actions such as updating guidance notes. The recommendations are summarised below and are discussed in more detail in Chapter 5.

RECOMMENDATIONS ARISING FROM THE REVIEW

1 Application of the CMHS Act

1. Amend the CMHS Act to provide a clearer definition of 'mine' by tying the definition more closely to the activities described for the purposes of application of the Act.
2. Amend the CMHS Act to make clear that it does not apply to a place declared as a derelict mine under the new section 242A of the *Mining Act 1992*.
3. Amend the CMHS Act to clarify that it applies to coal mines abandoned prior to introduction of the Act.
4. Insert clauses 51 to 53 of the *Coal Mine Health and Safety Regulation 2006* (the CMHS Regulation) into the CMHS Act to ensure greater transparency in the powers of enforcement available under the CMHS legislation.
5. Review interaction of the CMHS and OHS legislation in relation to construction work on infrastructure intended to be part of a coal operation, and identify areas needing legislative clarification or further non-legislative guidance.

2. Nomination of operator

6. Adopt a similar approach to that of the Queensland legislation to appointment of an operator. That is, the 28-day time period for rejection of nomination of an operator by the Chief Inspector is removed from section 17 of the CMHS Act and the meaning of operator is more clearly defined in the legislation.
7. Amend the CMHS Act to include a requirement for regular on-site attendance at a coal operation of those in management positions.

3. Content of HSMS

8. Provide guidance in the guidance note GNC-003: *Preparing a Health and Safety Management System* on the relationship between the requirements for HSMS content under the CMHS legislation and AS4804:2001.
9. Provide guidance in the guidance note GNC-003: *Preparing a Health and Safety Management System* on the relationship between the requirements for HSMS content under the CMHS legislation and Order 34 under the *Coal Industry Act 2001*.
10. Amend the CMHS Act to provide in sections 26 and 27 that objection to a HSMS includes objection to a major hazard management plan.
11. Amend the CMHS Regulation to incorporate the safety requirements contained in clause 88 of the CMHS Regulation into the CMHS Act.

12. It is recommended to monitor outcomes of HSMS audits and OHS management systems education initiatives to identify areas where further clarification or guidance on HSMS is needed.
- 4. Content of EMS**
13. Include a requirement in the CMHS Regulation to adequately address consultation with the external emergency services identified in section 47(2)(f) of the CMHS Act when developing, reviewing and testing EMS.
 14. Include fire fighting plans and escape and rescue plans as part of an EMS.
 15. EMS requirements to be more clearly grouped into elements that must be addressed in EMS.
- 5. HSMS and EMS review requirements**
16. Review guidance material on preparation of a HSMS (GNC-003: *Preparing a Health and Safety Management System*) and include information about the relationship between the OHS and CMHS legislation for HSMS reviews.
- 6. Submission of HSMS and EMS documentation**
17. Retain the 21-day timeframe for objection to a HSMS by the Chief Inspector.
 18. Include information in the guidance note on HSMS (GNC-003: *Preparing a Health and Safety Management System*), published by DPI, on the following:
 - the content of an 'outline' of information in the HSMS to be provided to the Chief Inspector and Industry Check Inspector under section 25 of the CMHS Act and clause 22 of the CMHS Regulation;
 - the level of detail required to be submitted to the Chief Inspector and Industry Check Inspector about amendments to HSMS under section 29 of the CMHS Act and clause 24 of the CMHS Regulation.
- 7. Tourist and education permits**
19. It is recommended that no changes be made to the current provisions.

CHAPTER 2 – INTRODUCTION

The coal mining industry has achieved significant long-term improvements in health and safety, with the rate of work-related injuries and fatalities in the NSW coal mining industry declining steadily in the last decade. This is a result of a deeper understanding by government, industry and mine workers of contemporary systematic approaches to assessing and managing risk. However, the tragic deaths of three mine workers since September 2008 has highlighted that continued innovation and vigilance is needed to ensure that the best outcomes are achieved.

The NSW Government has committed to working towards a target of zero fatalities and serious injury in the mining industry through continued engagement with stakeholders and development of legislation that reflects and assists best practice in health and safety.

The CMHS Act and the CMHS Regulation were part of an overall reform of occupational health and safety (OHS) laws in NSW. The aim of these reforms was to develop a modern systematic approach to workplace occupational health and safety with an emphasis on assessment and management of risks. The CMHS Act works with the OHS Act to provide a comprehensive framework for health and safety in the coal mining industry.

The OHS outcomes of the coal industry have improved significantly in the past decade. Analysis of accident notification data for the coal mining industry to 2007/08 (as collated by DPI) reveal that the frequency of fatal injury has continued to trend downwards (see Appendix B, Figure 1: *NSW Fatal Injury Frequency Rate (FIFR) – Coal*). No fatalities were recorded in 2007/08. The frequency rates for serious bodily injuries and lost time injuries are also continuing to trend downward, as reflected in the tables below (see Appendix B, Figures 2 and 3 respectively: *NSW Lost Time injury Frequency Rate (LTIFR) - Coal*) and *NSW Serious Bodily Injury and Serious Injury Frequency Rate (SBI/SIFR) – Coal*).

It is too soon after commencement of the CMHS Act to fully judge the extent to which that legislation has contributed to improved OHS performance on the coal industry. However, the data are consistent with the CMHS Act focus on developing effective health and safety management systems and emergency management plans, which suggest that the objectives of the CMHS Act be maintained.

Administration and enforcement of OHS legislation in NSW is shared between DPI and WorkCover NSW. DPI administers OHS legislation as it applies to the NSW mining industry on behalf of the Minister for Mineral Resources. OHS legislation applying to general industry is administered by the Minister for Finance through WorkCover NSW. WorkCover NSW also performs certain licensing and administrative functions in relation to coal and mining workplaces such as registering general industry plant. DPI and WorkCover have entered into a memorandum of understanding to ensure the coordinated, effective, efficient and seamless administration of OHS legislation in NSW.

CHAPTER 3 – BACKGROUND

3.1 LEGISLATIVE ENVIRONMENT

3.1.1 Development of a coal mine OHS legislative framework

The *Coal Mines Regulation Act 1901*, *Coal Mines Regulation Act 1912* and the *Coal Mines Regulation Act 1982* (the CMR Act) were among a range of industry-specific laws for regulating hazardous industries. The CMR Act required a range of management, engineering and supervisory appointments and placed detailed prescriptive duties on these persons for the control of hazards and oversight of mining operations.

The CMHS Act was developed in response to recommendations made by the Mine Safety Review in 1997 and the Gretley Inquiry Report in 1998, which investigated the death of four men after an inrush of water from abandoned workings at Gretley colliery in 1996. One of the main recommendations made by these reports was replacement of the prescriptive regulations made under the CMR Act with a systematic risk management approach. After consulting widely about issues relevant to the development of regulations to support the CMHS Act, the 2004 Wran Mine Safety Review recommended the CMHS Regulations be introduced without delay. The CMHS Act and CMHS Regulation commenced on 23 December 2006.

3.1.2 OHS Act 2000 and OHS Regulation 2001

While these developments in mine safety law proceeded, the *Occupational Health and Safety Act 1983* and associated Regulation were also subject to consultative review processes and reforms.

The OHS Act enhanced existing workplace consultation provisions to include a general duty on employers to consult with workers on OHS matters, and OHS representatives and other agreed consultation arrangements in addition to workplace OHS committees.

The *Occupational Health and Safety Regulation 2001* (OHS Regulation) replaced more than 40 existing hazard and industry-specific regulations with a single consolidated regulation which promoted a systematic approach to the identification, assessment and control of risk to health and safety arising from work. It also promoted performance-based duties for specific workplace hazards and issues, and nationally consistent plant design and registration standards and occupational licensing and certification systems.

The OHS Regulation has been progressively extended to apply to coal mines to establish consistent standards for general hazards across all industries and to comply with International Labour Organisation workplace and mine safety conventions (ILO Convention 155 and ILO Convention 176, respectively). The OHS Regulation was extended to fully apply (with some exceptions) to the coal mining industry on 1 September 2008.

3.1.3 Explosives Act 2003 and Explosives Regulation 2005

The OHS legislative framework includes regulation of explosives at mining related workplaces. The *Explosives Act 2003* and *Explosives Regulation 2005* (the explosives legislation) commenced in 2005 to ensure the occupational health and safety of persons

where explosives are handled as well as the security of the community in the wake of the terrorist attacks in the United States of America in September 2001. The Director-General of DPI is the regulatory authority for the explosives legislation at coal workplaces and mining workplaces. Coal workplace is defined as a place of work to which the CMHS Act applies. However, all persons handling explosives, including those in the mining industry, must be authorised by a licence issued by WorkCover NSW. The statutory review of the *Explosives Act 2003* is currently being undertaken by WorkCover NSW.

3.2 RELATED LEGISLATIVE REFORM INITIATIVES

3.2.1 Review of the OHS Act

A statutory review of the OHS Act commenced in 2005, and led to identification of a number of areas of possible reform and a draft OHS Amendment Bill. Subsequently, the NSW Government sought stakeholder comment on the draft OHS Amendment Bill and appointed Paul Stein QC to further investigate stakeholder concerns about legal issues associated with the nature and limits of the duties of care in the OHS Act. The OHS Amendment Bill has been held over pending the outcomes of the national review of occupational health and safety laws.

3.2.2 Development of national model OHS laws

In 2007, the Council of Australian Governments (COAG) agreed to a timetable for achieving national OHS standards and harmonising elements in principal OHS Acts, subject to there being no reduction or compromise in standards for legitimate safety concerns in current OHS standards. The national review will identify model OHS Act provisions, which it is proposed all States and Territories will adopt. The first and second reports to the Workplace Relations Ministerial Council (WRMC) to the *National Review into Model Occupational Health and Safety Laws* have been released and will inform decision by WRMC about the structure and content of a model OHS Act. Safe Work Australia will develop the model OHS Act and supporting regulations.

3.2.3 The National Mine Safety Framework

In addition to the national review of OHS laws, the Commonwealth Government is consulting with the States and Territories to develop a consistent mine health and safety legislative regime across Australia through a National Mine Safety Framework (NMSF). The NMSF was set up under the Ministerial Council on Mineral and Petroleum Resources. Drafting instructions for a draft national model are being prepared.

3.2.4 NSW Government 'Better Regulation' principles

The NSW Government Better Regulation Office (BRO) seeks to ensure that government action is needed, is effective in achieving its objectives and does not impose unnecessary burdens on business and the community, that is, regulation is required, reasonable and responsive. It has established seven principles for agencies to follow to meet government's aims. The Better Regulation principles are intended to inform the development and review of all regulation in NSW.

3.3 POLICY ENVIRONMENT

3.3.1 NSW Health and Safety Strategy

The CMHS Act supports the *NSW Workplace Health and Safety Strategy 2005–2008*, to reduce the human and economic cost of work-related injury and disease through effective and efficient action.

New South Wales is committed to two targets:

- to reduce workplace fatalities by at least 20 per cent by 30 June 2012 (with a reduction of 10 per cent by 30 June 2007); and
- to reduce the incidence of workplace injuries by at least 40 per cent by 30 June 2012 (with a reduction of 20 per cent by 30 June 2007).

These targets give effect to the *National Occupational Health and Safety Strategy 2002–2012*. The NSW coal industry met the targets set for 30 June 2007.

3.3.2 Injury prevention initiatives

The Mine Safety Advisory Council (MSAC) has overseen the ‘Digging Deeper Project’ to give effect to the State OHS strategy and the recommendations of the Wran Mine Safety Review. The project has identified issues that require attention within the industry, including the need to improve the effectiveness of consultation and the operation of OHS management systems.

In response, MSAC has been developing the strategy of working towards world-leading health and safety. It has identified that the drivers for further improvement are OHS culture change and development of non-technical skills at all levels. The CEO OHS Culture Change Summit in November 2008 brought opinion leaders from the NSW mining and extractives industry, unions and the public service to set an agenda for culture change to improve OHS performance. The summit issued a Communiqué that outlines an agreement on a set of guiding principles to address key health and safety issues. The Communiqué calls for the development and implementation of joint strategies to:

- Foster non-technical skills through education programs to improve OHS culture;
- Educate communities about good OHS principles at and beyond the workplace; and to
- Promote the value of non-technical skills of consultation, communication, situational awareness, teamwork, decision making and leadership.

CHAPTER 4 - OVERVIEW OF THE CMHS ACT REVIEW

4.1 PURPOSE OF THE REVIEW

Section 226 of the CMHS Act requires that a statutory review be undertaken as soon as possible after the period of five years from the date of assent by the NSW Governor. The review must consider whether the objectives of the Act are still valid and if the provisions

of the Act are appropriate for those objectives to be met. The CMHS Act received assent on 16 December 2002.

The objects of the CMHS Act are set out in section 10 as follows:

- to assist in securing the objects of the *Occupational Health and Safety Act 2000* in relation to coal operations (including the object of securing and promoting the health, safety and welfare of people at work at coal operations or related places), and
- to put in place special provisions necessary for the control of particular risks arising from the mining of or exploration for coal, and
- to ensure that effective provisions for emergencies are developed and maintained at coal operations and related places.

The overall purpose of conducting a statutory review five years after the date of assent is to consider whether the objectives of CMHS Act are still valid and if the provisions of the Act are appropriate to meet those objectives. Although assent was given to the CMHS Act on 16 December 2002, the Act did not commence operation until December 2006. This means that CMHS Act is being reviewed after it has been in operation for just under two years. In addition, the NSW Government is mindful of the evaluation of OHS and mine safety legislation occurring at a national level at the same time as this review of the CMHS Act is taking place.

Given the context in which the statutory review is taking place, the evaluation of whether the terms of the CMHS Act are appropriate for meeting its objectives focused on considering the effectiveness, relevance and clarity of the Act, and on opportunities for improving compliance and administrative processes. This approach is in keeping with the principles recently introduced by the NSW Better Regulation Office. The goal of these principles is to ensure that legislation is efficient, effective and responsive.

4.2 TERMS OF REFERENCE

The terms of reference for this review did not seek to duplicate the comprehensive public comment processes being undertaken through the national initiatives already described, but rather, focused on an evaluation of the effectiveness, relevance and clarity of the Act, and opportunities for compliance and administrative processes. Accordingly, the Minister determined that the terms of reference were:

To evaluate the effectiveness of the Act, including consideration of whether:

1. The Act is effectively meeting its objectives;
2. The provisions of the Act meet the NSW Government's Better Regulation Principles.
In particular:
 - a) Whether the provisions of the Act are easy to understand;
 - b) Whether there are opportunities to improve compliance and administrative processes, and to reduce compliance costs; and
 - c) To identify any unintended consequences from the operation of the Act; and
3. The Act includes unnecessary regulatory duplication and/or inconsistencies.

4.3 ISSUES FOR STAKEHOLDER CONSIDERATION

Within the context of the Terms of Reference, the Discussion Paper sought stakeholder comment on the following issues:

1. The scope and application of the CMHS Act
2. The process for nomination of coal mine operators by colliery holders
3. The content of HSMS
4. The content of EMS
5. Requirements for the review of HSMS and EMS
6. The submission of HSMS and EMS documentation to DPI
7. Tourist and educational activities at disused coal mines.

4.4 THE REVIEW PROCESS

The review involved:

- conducting information briefings with key stakeholders;
- media advertisements and letters to stakeholders notifying of the review;
- release of the *Discussion Paper on the Review of the Coal Mine Health and Safety Act 2002* which called for public comment on a range of issues;
- preparation of a report, including recommendations for consideration of the Minister.

The *Report of the Review of the Coal Mine Health and Safety Act 2002* (the Report) consolidates the issues outlined in the discussion paper and public submissions, analyses them and, where appropriate, makes recommendations addressing those issues.

4.5 SUMMARY OF SUBMISSIONS

A list of the submissions and letters is attached to the Report at Appendix A.

APPLICATION OF ACT

Many of the submissions gave examples of inconsistencies and areas of uncertainty in relation to application of the Act but were nevertheless broadly supportive of the current regime for determining jurisdiction. However, one submission in particular raised concerns about application of the Act to coal workplaces that are outside colliery holdings.

NOMINATION OF OPERATORS

The comments provided various views on the process of nominating operators. Submissions from the NSW Minerals Council and Illawarra Coal suggested that an approach like that of Queensland should be adopted while the CFMEU and the DPI Inspectors of Coal Mines submitted that the provisions for nomination of operators should remain unchanged. DPI Inspectors of Coal Mines suggested that, while the process itself was not an issue, the administrative documents supporting the nomination process are unnecessarily complex and need to be streamlined. This submission also raised broader issues concerning the management structure which is nominated by the operator.

CONTENT OF HEALTH AND SAFETY MANAGEMENT SYSTEMS (HSMS)

A variety of views about the content of HSMS were expressed in submissions. Three submissions were of the view that simplification of the content requirements is not needed and that further elements could be added to the HSMS requirements in order to be proactive in addressing risks associated with coal mining. In contrast, another two submissions were of the view that the content requirements found in different pieces of legislation were confusing and the CMHS Act should take a more risk management-based approach, similar to the OHS legislation. Comment was also made on the need for guidance notes relevant to HSMS requirements to be regularly reviewed and updated. The submission from the Mines Rescue Service suggested that exclusion of emergency management from the HSMS resulted in inconsistency with AS4804:2001 and system elements being overlooked.

CONTENT OF EMERGENCY MANAGEMENT SYSTEMS (EMS)

A range of views was expressed in discussion of this issue. Some submissions sought less prescriptive legislation while others thought that further elements should be required in the EMS. The submission by Illawarra Coal suggested that the legislative requirements be simplified and further guidance about content be provided through codes of practice and policy guidance. A DPI Inspector of Coal Mines, Mr Macpherson, suggested that requirements could be better addressed by organising them into four separate topic areas. Concern was expressed in submissions by DPI Inspectors of Coal Mines and the Mines Rescue Service that the current content requirements for EMS do not fully reflect the involvement of external emergency services.

REVIEW OF HSMS

Comment was again mixed in relation to the current system of reviewing the HSMS and EMS. Three submissions were generally supportive of retaining the current regulatory requirements for review by the operator. However, the submissions made some suggestions for improvement, including making the language used in the CMHS Act more consistent with that in AS4804:2001 and the OHS legislation, as well as requiring that HSMS reviews take into account new technologies and practices. The NSW Minerals Council and Illawarra Coal expressed the view that it was difficult and time consuming to correlate the requirements set out in the various legislation, instruments, standards and guidance material. It was suggested that the CMHS legislation should be simplified and reflect a more risk management-based approach.

SUBMISSION OF HSMS AND EMS

Several submissions raised the issue of operational and safety implications because of the 21-day objection period after submission of HSMS to DPI. They suggested amending the Act to remove it.

There were different views expressed about the role of Industry Check Inspectors, with the NSW Minerals Council identifying duplication in the role of Industry Check Inspector and Chief Inspector in the submission of and objection to HSMS.

There was also some confusion about what level of detail an 'outline' of a HSMS needs to include. Some stakeholders wanted guidance as to what an outline should incorporate,

while the CFMEU submission suggested that the entire HSMS and EMS could be submitted.

TOURIST AND EDUCATION PERMITS

Most stakeholders did not comment on this issue. However, the submission by DPI Inspectors of Coal Mines put forward a strong view that DPI retains involvement in supervision of tourist mines in the interests of public safety.

OTHER ISSUES

Most submissions raised issues outside the discussion points provided in the review paper. Some of these issues were more directly concerned with the operation of the CMHS Regulation rather than the Act. These issues have been noted and will be discussed with stakeholders separate to this review. In summary, the main issues raised in submissions on topics outside the discussion points include:

- The requirements for notification of low-severity incidents in clauses 55 and 56 of the CMHS Regulation should be limited to trend data to be submitted quarterly to DPI.
- Amendment of competence provisions in Part 9 of the CMHS Act and related regulations in relation to maintenance of competence.
- Change the experience requirement of a candidate for site check inspector elections under section 159(2)(b) of the CMHS Act to be in line with the Coal Competence Board requirements for open cut examiner and mine deputy.
- Increasing the powers of enforcement and responsibilities of authorised officers, Industry Check Inspectors, site check inspectors and OHS Committee members under OHS legislation.

CHAPTER 5 - KEY ISSUES AND STAKEHOLDER COMMENT

5.1 APPLICATION OF ACT

Issue 1: Application of the Act

The Government seeks industry comment on any practical difficulties in understanding if and when the Act is meant to apply to a business.

Section 8 of the CMHS Act deals with application of the Act. Section 8(1)(a) provides that the Act applies to places of work that are within a 'colliery holding'. This is a geographical based criteria intended to provide a jurisdictional boundary capable of being drawn on a map.

Schedule 1 of the CMHS Regulation further defines the application of the Act within a colliery holding using activity based criteria. Clause 1 of Schedule 1 essentially provides that the Act does not apply to places of work that are within a colliery holding but are unrelated to coal mining. The effect of Schedule 1 is that the application of the Act is

effectively reliant on an activity-based definition but these activities must be located within the geographical confines of a colliery holding.

The CMHS Act also applies to places of work that are a coal exploration site, or the subject of a licence to mine coal under the *Offshore Minerals Act 1999* (sections 8(1)(b) and (c)), and to abandoned coal operations and emplacement areas (section 8(2)). The definitions of exploration site, emplacement area and abandoned coal operation are all activity based and are independent of the concept of colliery holdings.

Public Comment

In general, the submissions indicated that there were circumstances in which it is difficult to clearly determine application of the Act or where application of the Act appears to be inconsistent.

Colliery holdings

An important issue raised by Mr Macpherson, an Inspector of Coal Mines with DPI, is related to application of the CMHS Act to places of work at which mining-related activities take place but which are not part of a coal operation as defined in the Act. The submission highlighted that defining application of the Act through the concept of colliery holding can result in uncertainty as to whether the CMHS Act applies to some places of work at which mining-related activities are carried out, and can also result in different OHS requirements at different coal-related workplaces.

The NSW Minerals Council stated that it was critical to retain the geographic and activity-based tests for application of the Act to ensure that only activities on a colliery holding are subject to obligations under the Act. However, the submission also identified areas where application of the Act could be clarified. For example, it was submitted that it is difficult to determine application of the Act when it involves consulting and interpreting multiple pieces of legislation.

Non-mining activities

A further area of concern raised in this submission is application of the Act to construction of infrastructure carried out in relation to coal operations, such as new coal operations that are not yet operational. The following comments were made in the submission:

- the OHS legislation applies to the exclusion of the CMHS Act where a colliery holding is unregistered;
- once a colliery holding is registered, and there is construction work for infrastructure intended to be part of a coal operation, the CMHS Act will apply.
- the prescriptive provisions in the OHS Act and OHS Regulation also apply to construction work undertaken as part of a coal operation at a registered colliery holding, for example, excavation work.
- where a colliery holding is registered, this may result in those performing non-mining activities being required to comply with parts of the CMHS Act that apply to mining activities, for example, ventilation requirements.
- in addition, DPI is responsible for supervising construction work, which has traditionally been regulated by WorkCover.

The submission expressed the intent that duties under the CMHS Act are not placed on those performing non-mining activities within a colliery holding (such as farming and

fishing). Submissions suggested that this intent should be extended to other non-mining activities, such as construction work.

These comments are supported in part in the submission by Mr Macpherson, who suggests that the construction provisions need to be clarified. The submission cites section 4 of the CMHS Act as including construction of certain things which are intended to be part of a coal operation as being taken as part of a coal operation, but there is no requirement to appoint an operator for a coal operation unless mining is undertaken.

Drilling activities

The NSW Minerals Council submission also commented on the need for clarification about application of the Act to drilling activities. The submission makes the following points about the issue, with the suggestion that the apparent inconsistencies be addressed:

- The CMHS Act provides that it applies to a ‘coal exploration site’, which is defined in section 3 to include drilling from the surface to discover or prove the existence of coal.
- Schedule 1 of the CMHS Regulation provides that the CMHSA Act applies to ‘mining’ undertaken inside a colliery holding but outside a coal operation. The definition of mine (as a verb) in section 3 of the CMHS Act excludes exploration for coal by drilling from the surface.
- Schedule 1 also provides that the Act applies to ‘drilling from the surface for a mining purpose in connection with the mining of coal or for the purpose of discovering or proving the existence of coal’.

Abandoned mines

Application of the Act to abandoned mines was also raised. The definition of coal operation in sections 3 and 4 of the CMHS Act defines any building, structure, pit, shaft, drive, level, drift excavation of work within colliery holding that is part of coal operation that is in the course of being abandoned as part of a coal operation. The submission by Mr Macpherson raises a question about application of the CMHS Act to mines abandoned prior to the introduction of the concept of ‘coal operations’.

The submission by the Inspectors of Coal Mines suggested that the definition in section 3 of ‘mine’ when used as a noun, and ‘mine’ when used as a verb is inconsistent. For example, the activity of constructing a shaft or draft at a coal operation meets the definition of mine as a verb, but the same shaft or draft does not meet the definition of mine as a noun.

Safe design

This submission also sought clarity on application of the CMHS Act and the OHS Act in relation to expert mine design consultants. The concern raised in the submission is that the level of advice provided by a mine design expert is based on assumptions and research that is not readily available to industry, which makes it difficult for the mine operator and others to effectively interrogate the proposed design. This leads to transferral of risk from the consultant to the mine operator where the mine operator has not been able to adequately question or challenge the design. Related to this is the potential reluctance of mine designers to confront mine operators seeking high-risk mine designs. The report into the disaster at Crandall Canyon Mine in the USA was provided as evidence of plans provided by technical consultants that used significant safety risks that were ignored or undetected during the planning process.

It was suggested that it be a requirement that all expert mine design consultants provide advice on the following issues in relation to any design they provide to a mine:

- the assumptions adopted in the design process that may limit or control elements of the design;
- the safe operational limits of the design advice; and
- a statement of certification that their design meets the outcomes sought by the mine.

Enforcement

This submission also suggests that the CMHS Act needs to be amended to enable enforcement options to be targeted at those providing advice, services and products to the coal mining industry.

Nearly all submissions raised the language used in Schedule 1 as a source of confusion in determining application of the Act and suggested amending it to remove the double negative.

Discussion

Jurisdiction – colliery holdings

The submissions demonstrate that there is scope for clarifying the places of work to which the CMHS Act applies.

The concept of ‘colliery holding’ has been a key feature for determining the application of the CMHS Act since it commenced. It was intended that the colliery holding register would provide a means of clearly identifying jurisdictional boundaries of the CMHS Act in geographical terms capable of being marked on a map. In practice, it appears that the concept of colliery holding has made the application of the CMHS Act less clear, particularly in relation to some places of work at which mining-related work takes place but which are outside a colliery holding. Application of the CMHS Act to these places of work, and in relation to other activities such as surface drilling, could be made clearer by using activity-based criteria only.

Unlike the *Mine Health and Safety Act 2004*, the CMHS Act does not provide an opportunity for the Minister to make a determination about jurisdiction in the unusual circumstance where application of the Act to a particular place is unclear. To provide for the unusual circumstance where application of the CMHS Act is unclear, the Minister should be given a power to make a binding determination (except in court proceedings) as to whether the Act applies to a place of work.

DPI had identified potential difficulties with defining application of the CMHS Act by reference to “colliery holdings” prior to the statutory review of the CMHS Act. Amendments to the CMHS Act to make application of the Act clearer are currently being considered.

Abandoned mines

Application of the CMHS Act to abandoned mines and derelict mines is also unclear in some circumstances. The CMHS Act applies to “abandoned coal operations” (section 8(2) of the CMHS Act). It should be made clear that this includes mines abandoned prior to commencement of the CMHS Act and introduction of the concept of “coal operations”.

Declaration of derelict mine sites under the new section 242A of the *Mining Act 1992*, which will commence later this year, is primarily aimed at facilitating rehabilitation activities which are managed by DPI. There is a potential for conflict of interest if DPI is both manager of the rehabilitation activities and regulator of OHS on those sites.

Enforcement

Powers of enforcement under the CMHS legislation could be made more transparent. Clauses 51 to 53 of the CMHS Regulation provide the Chief Inspector with considerable powers of enforcement. Under clause 51, the Chief Inspector may, in certain circumstances, issue a notice that imposes prohibitions and restrictions on an operator, and requires the operator to carry out certain works, or direct that operator to cause the coal operation to be evacuated immediately and/or to be closed, either indefinitely or for a specified period. This power would be better placed in the Act to provide greater transparency in the enforcement powers available under the CMHS legislation

Safe design

Duties in relation to safe design under OHS legislation are currently being examined under the *National Review into Model Occupational Health and Safety Laws*. WorkCover NSW has also previously discussed coverage of general duties as they relate to safe design in the *Report of the Review of the OHS Act 2000* released in May 2006 (see page 46 of that report). While the *Report of the Review of the OHS Act 2000* did not support amending the OHS Act to address the issues of design safety, the First Report to the Council of Workplace Relations Ministers for the National Review recommends that the model Act place duties of care on designers of structures in addition to designers of plant and substances. The first report for National Review recommends (Recommendation 34, page 75) that the duty incorporate broad requirements for:

- a) hazard identification, risk assessment and risk control;
- b) appropriate testing and examination to identify any hazards and risks;
- c) the provision of information to the person for whom the plant, structure or substance is provided about the hazards, risks and risk control measures; and
- d) the ongoing provision of any additional information as it becomes available.

The definition of key terms relevant to this duty is discussed in the second report for the National Review, which was released on 13 February 2009. Further discussion about this issue will occur at a national level, so no further comment about including duties in relation to safe design in the CMHS Act has been made in this Report.

Non-mining activities

There is some confusion evident in the submissions about application of the CMHS Act and its relationship to the OHS legislation in relation to construction work carried out on infrastructure intended to be part of a coal operation. For example, the submission by the NSW Minerals Council states that where there construction work on infrastructure intended to form part of a coal operation, the prescriptive provisions of the OHS Regulation regarding construction work apply including, for example, excavation work. However, the definition of 'construction work' in clause 3 of the OHS Regulation specifically excludes excavation work at a coal workplace or mining workplace for the purposes of extracting minerals or quarry product.

The NSW Minerals Council submission also comments that those performing non-mining activities may have to comply with parts of the CMHS Act that apply to mining activities, for example, ventilation arrangements. Ventilation arrangements under the CMHS Act are part of the HSMS content for underground mines (see clauses 13 and 21 of the CMHS Regulation). While employees and contractors undertaking construction work at a coal operation must comply with the HSMS in place at that coal operation (sections 59 and 72 of the CMHS Act respectively), it is the duty of the operator to develop the ventilation arrangements for the HSMS.

Amendment of the jurisdiction provisions in the CMHS Act to make application of the Act activity-based may assist in making application of the CMHS legislation to construction work clearer, but further review of the interaction between the OHS Act and CMHS Act in relation to construction work is required to identify where clarification is needed. It may be that further non-legislative guidance through guidance note GN-005 *Construction Work at Coal Workplaces and Mining Workplaces* will assist stakeholders in clarifying and meeting their obligations for construction work.

Recommendations

1. Amend the CMHS Act to provide a clearer definition of ‘mine’ by tying the definition more closely to the activities described for the purposes of application of the Act.
2. Amend the CMHS Act to make clear that it does not apply to a place declared as a derelict mine under the new section 242A of the *Mining Act 1992*.
3. Amend the CMHS Act to clarify that it applies to coal mines abandoned prior to introduction of the Act.
4. Insert clauses 51 to 53 of the CMHS Regulation into the CMHS Act to ensure greater transparency in the powers enforcement available under the CMHS legislation.
5. Review interaction of the CMHS and OHS legislation in relation to construction work on infrastructure intended to be part of a coal operation, and identify areas needing legislative clarification or further non-legislative guidance.

5.2 NOMINATION OF OPERATOR

Issue 2: Nomination of Operators

Comments are sought on the appropriateness of the provisions in the CMHS Act and Regulation for the nomination of operators and their “de facto” approval by DPI.

In particular, comments are sought on whether the current provisions could be simplified to require colliery holders to appoint operators and notify the DPI of the appointment, and for DPI to rely on its general enforcement powers to address non-compliance by colliery holders.

The designation of who is in control of the workplace is an essential element in ensuring the effective implementation of health and safety management systems and emergency arrangements. Under section 17 of the CMHS Act, a colliery holder must not allow any mining to be undertaken unless the colliery holder has nominated a person as an operator who is the employer with the day-to-day control of the coal operation. The nomination of an operator must be provided to DPI, who may reject the nomination. This part of the review looks at whether the appointment of the operator can occur with a reduced administrative burden for industry.

Public Comment

Nominated operator

The submissions by the NSW Minerals Council and Illawarra Coal were strongly supportive of adopting a process similar to that set out in the Queensland legislation, whereby the colliery holder notifies the relevant inspector of the appointment of a coal mine operator and any changes to that appointment. Under the Queensland legislation an inspector has no power to reject the appointment.

The NSW Minerals Council outlined the following difficulties with the current process for nominating an operator under the CMHS Act:

- Where there is a change of operator during mining activities, the current nomination and ‘approvals’ process can mean mining activities stop until the approval has been ‘granted’. Delays by DPI in completing the administrative procedures at DPI can have significant commercial and employment implications;
- The ground for rejecting a nomination of operator may not be properly assessed by DPI. For example, one of the prescribed grounds for rejecting the nomination of operator is that the nominated operator does not have day-to-day control. The question of who is an ‘employer’ and what constitutes ‘control’ requires consideration of factual and legal tests.
- Another ground for rejection is where multiple operators are nominated for separate operations within a colliery holding, which is to argue that multiple operators are detrimental to health and safety. However, multiple operators are not unusual and it is possible to eliminate or control any detriment to health and safety by applying appropriate health and safety management systems and principles.

Submissions by the CFMEU and Mr Macpherson indicate that the current process for nominating an operator is not problematic. The CFMEU suggested that the process is important to make the current operator with day-to-day control of the coal operation readily identifiable. However, these submissions did make suggestions for improvement including that the definition of operator should be clarified. The submission by the Inspectors of Coal Mines was critical of the unnecessarily complex and confusing documents that support the process and suggests that the documents could be simplified to contain more concise and relevant information.

Management structure

The submission by the Inspectors of Coal Mines also raised issues about the management structure of a coal operation. Under section 37 of the CMHS Act, the operator must prepare a management structure, which includes a manager of mining engineering. The submission identifies three main issues with the process of appointing a manager of mining engineering, as follows:

- A tendency for companies to appoint the same manager of mining engineering to multiple operations, which makes effective supervision difficult at any of those operations. An example is provided of the same manager of mining engineering being appointed to three different coal operations, each hundreds of kilometres apart. This view was supported by comments in another submission.
- The possibility that one person may hold multiple positions in the management structure, which can have the effect of neutralising supervision. An example is provided where the management structure at a mine had three levels, with the highest and lowest level being filled by the same person.
- The operator's representative at a coal operation is not necessarily the manager of mining engineering. It is suggested that this may result in the appointment of persons as a site representative who may not be experienced or qualified enough to adequately assess the advice they receive. An example is provided where a manager of mining engineering provides advice to a person without whole-of-mine management experience. In support, the submission also cites the recommendation from the inquiry into the Mt Kembla disaster in 1902, that positions of statutory authority at a mine be established and persons could not hold these positions unless they were qualified and deemed competent by government.

Discussion

Nominated operator

The current provisions for nominating an operator could be streamlined to reduce the administrative burden for both industry and government. The Queensland coal mine health and safety legislation (the *Coal Mining Safety and Health Act 1999 (Qld)*) provides an example of how this might be achieved.

Under the Queensland legislation, there is no provision for the Chief Inspector to reject the appointment of a coal mine operator, but the requirements for appointment of a coal mine operator are clearly set out. Many of these requirements for appointment of operator under the Queensland legislation are similar to the circumstances under which the Chief Inspector may reject nomination of operator under the CMHS Act. For example:

- section 53(2) of the *Coal Mining Safety and Health Act 1999 (Qld)* provides, in summary, that an appointment of a coal mine operator for a part of a coal mine that is not a separate part of a surface mine is ineffective. Under section 17 of the CMHS Act, an operator may be nominated for each separate and distinct coal operation within a colliery holding, and the Chief Inspector may reject that nomination if the different parts of the colliery holding are not sufficiently distinct to warrant separate operators.
- Section 24 of the Queensland legislation defines when an operator is not in control of a coal operation for part of a surface mine. Under section 17 of the CMHS Act, the Chief Inspector may reject a nomination of an operator if the Chief Inspector believes that the nominated operator is not the employer with the day-to-day control of the coal operation.

The process for nomination for operator could therefore be streamlined by removing the provision for rejection by the Chief Inspector and instead more clearly defining the meaning of operator. This places consideration of these matters on the colliery holder as part of the process for nomination of operator, rather than on the Chief Inspector after a nomination has been made.

Management structure

In relation to issues about management structure raised in submissions, both the Queensland and Western Australian mine safety legislation contain provision concerning on-site supervision by persons in senior management roles. Under the Queensland legislation, the site senior executive, who is appointed by the operator, must develop and ensure compliance with the health and safety management plan (see section 41 of the *Coal Mine Safety and Health Act 1999*(Qld)). A person may not be appointed a site senior executive at more than one mine except in certain circumstances and must also be located at or near the mine (see sections 54 and 25 of the *Coal Mine Safety and Health Act 1999* (Qld) respectively).

In Western Australia, a principal employer must appoint a registered mine manager who is responsible on a daily basis for the control and supervision of the mine and mining operations and, except for absences on a regular scheduled basis (referred to as a commute schedule), must reside at a location in relation to the mine which will allow the registered manager to control and supervise the mine effectively (see section 33 of the *Mines Safety and Inspection Act 1994* (WA)).

Division 4 of Part 5 in the CMHS Act sets out the ‘duties’ of those in management positions, but does not specifically deal with the on-site attendance by persons in those management positions. The CMR Act, which was in place prior to the CMHS Act, was prescriptive in its requirements for attendance by managers and other officials, and had a notice provision specifically to deal with irregular attendance by mine managers (see sections 48 and 48A of the CMR Act). There appears to be a need to find a balance between these two approaches.

Recommendations

6. Adopt a similar approach to that of the Queensland legislation to appointment of an operator. That is, the provision for rejection of nomination of an operator by the Chief Inspector is removed from section 17 of the CMHS Act and the meaning of operator is more clearly defined in the legislation.
7. Amend the CMHS Act to include a requirement for regular on-site attendance at a coal operation of those in management positions.

5.3 CONTENTS OF HSMS

Issue 3: Content of HSMS

Comments are sought on examples of where the volume and complexity of HSMS requirements may result in practical problems in understanding the totality of legal requirements for HSMS, the ease of their implementation, and unintended risks.

Comments are sought on possible options for:

- ***simplifying and clarifying CMHS Act requirements for HSMS, and their relationship to relevant OHS Regulation and AS4804:2001 provisions; and***
- ***the extent to which regulatory requirements for HSMS may be supported or partly replaced by an approved codes of practice and DPI guidelines.***

The CMHS Act places duties on persons to ensure that comprehensive and robust health and safety management systems are developed and implemented at coal operations. This part of the review examines whether these requirements meet better regulation principles, and whether there are opportunities to improve ease-of-understanding and compliance for industry.

Public Comment

Submissions by the NSW Minerals Council and Illawarra Coal expressed a view that the HSMS requirements in the CMHS legislation are too prescriptive and should be more risk based in line with the OHS legislation. Other issues and suggested improvements identified by these submissions were as follows:

- where guidelines are developed they should be subject to appropriate review, for example, *MDG-1004 Outburst* is dated 1995 and *MDG 1006 Spontaneous Combustion* is dated 1996;
- the training as part of the HSMS should be risk based similar to the OHS Regulation, with specific mining-related risks addressed in the CMHS Regulation. Training prescribed by Coal Services Order 34 adds complexity in application and administration;
- the requirements placed on operations under the OHS legislation, CMHS legislation and AS 4804:2001 *Occupational health and safety management systems—General guidelines on principles, systems and supporting techniques* are overlapping and confusing. HSMS content should be identified in the CMHS Regulation to remove duplication with OHS Regulation;
- inspection and supervisions arrangements should be risk based similar to the OHS legislation requirements, rather than the prescriptive CMHS legislation. For example, with belt inspections, a competent person can inspect a belt but if they clean any spillage it is ‘performing work’ and needs inspection by supervisor.

The submission by Mines Rescue set out examples of dealing with the HSMS requirements related to experience as a Registered Training Organisation presenting legislation to deputy classes. It was submitted that it is difficult to obtain a clear and consistent understanding of all subject matter because of the layout of the legislation and multiple sources of

information. The various sources of information include the OHS legislation, CMHS legislation, guidelines, Australian Standards and codes of practice, as well as gazettal notices and safety alerts which must be complied with pursuant to clause 211 of the CMHS Regulation. Searching these sources is time consuming and difficult, and there is a chance some important information may not be discovered. For example:

- Procedures for testing undiluted exhaust emissions from diesel are contained in MDG 29, parts of which have been included in a gazettal notice setting out the requirements for limits on content of diesel exhaust and procedure for analysis and sampling.
- Testing undiluted exhaust emissions is a routine task performed by mine deputies but procedure cannot be found by reference to CMHS legislation alone. To discover the atmospheric conditions for coal mines and exposure to various gases, the following need to be referenced:
 - oxygen limits under the OHS Regulation;
 - carbon dioxide/monoxide limits in mines under the CMHS Regulation;
 - carbon dioxide/monoxide limits for exposure and the oxygen limit hazardous to persons under NOHSC 1003.
- Gas level limits from the various sources are sometimes different and difficult to interpret. For example, the short-term exposure limit (STEL) for carbon monoxide is not stated in NOHSC 1003. Time-weighted average (TWA) needs to be adjusted for different shift lengths.

It was suggested in the submission that the consideration be given to how information in the legislation can be simplified and more easily referenced by practitioners.

Separation of emergencies from HSMS is also identified as an issue by Mines Rescue. It was submitted that this separation may result in inconsistency with AS4804:2001 and the potential for some system elements to be overlooked. A suggestion was made to include emergencies in the HSMS.

The submission by the CFMEU, the Inspectors of Coal Mines and Mr Macpherson indicated it would be difficult to cut down on the existing requirements for HSMS without compromising safety outcomes. In general, they suggest that the complexity of the requirements is overstated and the requirements set out in the Australian Standards, OHS legislation and CMHS legislation are consistent and should not pose difficulties for industry.

The submission by the CFMEU was strongly opposed to regulatory requirements being replaced by codes of practice and guidelines because they are often seen as irrelevant and there are questions about their enforceability. Where an issue is important enough to require some regulation it should be in the form of legislation. These submissions suggested that, if anything, the HSMS requirements should be expanded to include other hazards associated with coal mining.

The Inspectors of Coal Mines strongly argued that support and sequencing plans should be provided as part of the HSMS due to the catastrophic consequences of strata failure. It was submitted that the reactive nature of enforcement cannot adequately address the risks associated with failure of support systems.

This submission also argued strongly for DPI retaining oversight of matters listed in clause 88 of the CMHS Regulation, which sets out some technical requirements for the bord and pillar system of mining approval from the Minister is required on the recommendation of the Chief Inspector for use of a method of mining other than the bord and pillar system. Clause 88 is due to expire on 1 September 2009. Only some of the things dealt with in clause 88 in the CMHS Act will be covered by the high-risk notifications system under sections 53 and 54 of the CMHS Act and clause 49 of the CMHS Regulation. It was submitted that an adequate system of oversight is not being maintained in relation to secondary workings, including stable pillar design and the sequence of pillar extraction.

Discussion

The Australian Standard AS 4804:2001 *Occupational health and safety management systems—General guidelines on principles, systems and supporting techniques*, sets out general guidance on developing and implementing OHS management systems. The OHS Act imposes general requirements for assessing and controlling risks at a workplace, with additional performance requirements for specific hazards and activities. The CMHS Act requires the development of a documented system to assess and manage risk at a coal operation, including additional prescriptive components relevant to hazards associated with coal mining. Section 23(4) of the CMHS Act and clause 14 of the CMHS Regulation provide that a HSMS must be consistent with AS 4804:2001.

The submissions indicate that the interrelationship between the HSMS requirements in the CMHS and OHS Act and AS 4804:2001 are causing confusion for some stakeholders. This may be, in part, because the CMHS legislation has been in operation a relatively short period of time. In addition, AS 4804:2001, the OHS legislation and the CMHS legislation tend to adopt different regulatory styles and terms, with the CMHS legislation being narrower in focus and using language more specific to coal mining than the general OHS legislation and AS4804:2001.

The HSMS content requirement in the CMHS Act (section 23) is reasonably clear. The additional components of HSMS required under the CMHS Regulation (clauses 13-21) appear to be the source of much of the confusion. These additional components include out programs, arrangements and plans to be included in a HSMS.

A suggestion put forward in the discussion paper was to incorporate all elements relevant to the content requirements of HSMS in the CMHS Act and Regulation. However, this may result in unnecessary duplication of legislation. Also, the development of national OHS and mine safety legislation will go some way to addressing the balance between the requirements in the general OHS laws and legislation specific to the mining industry.

Another suggestion put forward in the discussion paper was to use AS 4804:2001 as a guide only. However, the requirement for consistency with AS 4804:2001 is intended to provide some standardisation of HSMS across industry, which is an important goal in the context of the national processes aimed at achieving consistent OHS legislation across Australia. The reference to AS 4804:2001 should therefore stay in the legislation, but ease of understanding could be improved by providing guidance on the relationship between the CMHS legislation and the requirements under AS 4804:2001.

Some clarification is also needed about how Order 34 of the *Coal Industry Act 2001* fits into the HSMS requirements under the CMHS legislation. Section 10(1)(i) of the *Coal*

Industry Act 2001 provides that a function of Coal Services (an ‘approved company’) is approval of training schemes required for a HSMS under the CMHS Act. Order 34, *Coal Services Approval of Training Schemes for NSW Coal Mine Operator Health and Safety Management Systems*, was made to exercise this function.

Under Order 34, the operator of each coal operation in NSW must submit a training scheme for the HSMS for that coal operation to Coal Services for approval. It is noted that Coal Services has published a guide to assist coal operations to implement the Order 34 (see *Coal Services Guidelines for: 1. The Training and Competence Management Scheme component of a Coal Operation’s OHSMS. 2. Meeting the requirements of Coal Services Order 34 “Coal Services Approval of Training Schemes for NSW Coal Mine Operator Health and Safety Management Systems”*). The relationship between Order 34 and the HSMS also needs to be referred to in the guidance provided by DPI. The guidance note GNC-003: *Preparing a Health and Safety Management System* published by DPI should be updated to include this information.

In relation to the submission comments on support rules and plans, clause 32 of the CMHS Regulation sets out the contents of a strata failure management plan, which include the preparation and distribution of support plans. The prescribed contents of the strata failure management plan closely mirror the ‘support rules’ provisions under the preceding legislation (see clause 48 of the *Coal Mines (Underground) Regulation 1999*).

The strata failure management plan is a ‘major hazard management plan’, which must be included in any HSMS (section 23(6) of the CMHS Act). Section 26 of the CMHS Act provides the grounds for the Chief Inspector to object to a HSMS. Where the Chief Inspector objects, the HSMS must not be implemented until the objection has been resolved and the operator has revised the HSMS, taking into account any matters raised in the objection, and resubmitted it to the Chief Inspector within the prescribed time (sections 26(2) and 26(3) of the CMHS Act and clause 23 of the CMHS Regulation). There is therefore some scope for the Chief Inspector to object to major hazard management plans, including a strata management plan, as part of the provisions that allow objection to a HSMS, but the legislation could be made clearer on this point.

Clause 88 of the CMHS Regulation mirrors section 138 of the repealed CMR Act. The requirement of Ministerial approval was used to control potential impacts related to surface subsidence, including mine safety, resource utility, and environmental and land use factors. A revised approval process was developed, in consultation with industry, where potential impacts other than mine safety would be dealt with under the *Mining Act 1992* (the Mining Act), and issues related to mine safety would be incorporated into the CMHS legislation.

Clause 88 was included in the CMHS Regulation as a transitional provision to cover the subsidence management process until relevant amendments were made to the Mining Act and associated regulation. The Mining Act amendments have passed through Parliament and new regulations are currently being drafted (the Mining Regulation). The repeal of clause 88 of the CMHS Regulation was extended to 1 September 2009 to allow for implementation of the new Mining Regulation.

Understanding of HSMS requirements may also be helped by several non-legislative initiatives currently underway. For example, desktop and field audits of HSMS undertaken by DPI may identify areas for further clarification of content requirements. A copy of the audit assessment tool is available from the DPI website. In addition, DPI is developing

OHS management system education and improvement strategies dealing with issues relevant to HSMS such as consultation, fitness for work and the implementation of OHS management systems.

Recommendations

8. Provide guidance in the guidance note GNC-003: *Preparing a Health and Safety Management System* on the relationship between the requirements for HSMS content under the CMHS legislation and AS 4804:2001.
9. Provide guidance in the guidance note GNC-003: *Preparing a Health and Safety Management System* on the relationship between the requirements for HSMS content under the CMHS legislation and Order 34 under the *Coal Industry Act 2001*.
10. Amend the CMHS Act to provide in sections 26 and 27 that objection to a HSMS includes objection to a major hazard management plan.
11. Amend the CMHS Regulation and Act to incorporate the safety requirements contained in clause 88 of the CMHS Regulation into the CMHS Act.
12. It is recommended to monitor outcomes of HSMS audits and OHS management systems education initiatives to identify areas where further clarification or guidance is needed.

5.4 CONTENT OF EMERGENCY MANAGEMENT SYSTEMS

Issue 4: Content of an EMS

Comments are sought on practical problems in understanding the CMHS Act and Regulation requirements for EMSs and their practical implementation, while maintaining current high standards for emergency response arrangements.

In particular, comments are sought on options for simplifying and clarifying CMHS Act and Regulation requirements for the EMS, including:

- consistency with OHS Regulation emergency and first aid provisions; and***
- the extent to which regulatory requirements may be supported or partly replaced by an approved code of practice.***

Coal mining health and safety laws have traditionally contained extensive and detailed provisions for emergency response and evacuation arrangements because of the potentially catastrophic consequences of underground mining risks. These provisions also recognise the need for specialised emergency response training and equipment, and for close cooperation with external emergency services. This part of the review considers whether the CMHS Act should be clarified to improve implementation of EMS by industry.

Public Comment

The submissions from the NSW Minerals Council and Illawarra Coal commented that the overlapping CMHS legislation and OHS legislation and codes of practice create confusion. It was suggested that the EMS requirements under the CMHS legislation could be simplified and made more consistent with the OHS Regulation. If necessary, mining-specific legislation dealing with matters such as underground risks and escape systems could be covered in supporting guidelines and codes of practice. It was submitted this would bring the EMS requirements more into line with the objects of the CMHS Act as set out in sections 10(b) and 10 (c).

Submissions by the CFMEU and the Inspectors of Coal Mines did not support any simplification of EMS content. It was submitted that the EMS requirements in the CMHS legislation are more detailed than the general OHS legislation to cover risks specific to mining. Replacement of EMS requirements in the legislation by codes of practice was opposed. It was submitted that a general OHS response with individual risk assessment fails to recognise that the response to serious and extended emergencies is not only provided by the mine itself but also by external agencies.

The submission by the Inspectors of Coal Mines further commented that emergency plans need to ensure a coordinated response by relevant agencies. The criticisms made about a lack of coordinated response during the Gretley disaster in 1996 were provided to illustrate this point, and since Gretley, much effort has been made to formulate interagency protocols and operational procedures which were updated for commencement of the CMHS Act. It was submitted that, as the EMS requirements are integrated through these operational procedures, to simplify them would be ill considered from an interagency committee perspective. This submission also suggests there should be provision to allow DPI inspectors to initiate emergency exercises to ensure they are conducted on a sufficiently regular basis.

The Mines Rescue submission also raised the issue of involvement of external emergency services in the development or testing of EMS and commented that all relevant agencies should be involved in a coordinated response. It was suggested that a provision could be included in clause 45(a) of the CMHS Regulation to the effect that the availability and operating parameters of emergency services should be adequately addressed in EMS.

Other submissions also made suggestions for change to the legislation, as follows:

- better documentation and outcomes could be achieved by more clearly separating the different elements of the EMS. Lumping together many elements (fire control, first aid, emergency escape, and other emergencies) in one document is often reflected in the way plans are developed and set out;
- the first aid provisions should include a requirement that adequately trained persons must be distributed through all work groups.

Discussion

One of the reasons that EMS is separate from HSMS is to allow different management structures in emergencies where appropriate. However, the submissions indicate that ease of understanding and compliance could be improved in relation to the EMS content. As suggested in one of the submissions, the different elements that need to be addressed in the

EMS are not readily identifiable, and could be improved by more clearly grouping the different elements of the EMS. The relationship between the EMS and the escape and rescue plans (clause 47 of the CMHS Regulation) and fire fighting plans (clause 48 of the CMHS Regulation) also need clarification.

Section 47(2)(f) of the CMHS Act provides that the EMS must identify key personnel and resources (both internal and external) available to be called on in the case of an emergency. Clause 45 of the CMHS Regulation also deals with EMS content, but does not include further detail about the requirements in relation to external emergency services. Given that the involvement of external emergency services in dealing with emergencies at mines is essential, a requirement in EMS for consultation with emergency services in the development and testing of EMS is needed.

Recommendation

13. Include a requirement in the CMHS Regulation to adequately address consultation with the external emergency services identified in section 47(2)(f) of the CMHS Act when developing, reviewing and testing EMS.
14. Include fire fighting plans and escape and rescue plans as part of an EMS.
15. EMS requirements to be more clearly grouped into elements that must be addressed in an EMS

5.5 HSMS AND EMS REVIEW REQUIREMENTS

Issue 5: HSMS and EMS Review

Comments are sought on whether the CMHS Act provisions for the review of the HSMS and EMS should be simplified and clarified, taking into account relevant AS4804:2001 and OHS Regulation provisions.

Review of HSMS and EMS is an essential element in ensuring they remain appropriate for controlling risk in the workplace. Section 28 of the CMHS Act provides that the operator must review the HSMS at least once every three years, and relevant parts of the HSMS must be reviewed immediately after certain events occur.

Public Comment

The submissions from the NSW Minerals Council and Illawarra Coal suggested that the review requirements set out in the CMHS Act and the OHS Act are conflicting and confusing. For example, the CMHS Act prescribes requirements for the review of all relevant parts of HSMS and EMS, the OHS Regulation requires review of relevant risk assessment and risk control measures, and AS 4804:2001 requires the periodic review of HSMS and EMS system effectiveness. Adding to the complexity are DPI Safety Alerts and Safety Bulletins which contain further prescription beyond the legislation. It was suggested the review provisions under the CMHS Act must be simplified to reflect a risk-based approach, consistent with the OHS Regulation.

The Mines Rescue Service submitted that the different trigger points for review under the CMHS legislation, the OHS legislation and AS 4804:2001 are largely consistent but are worded differently and can therefore be confusing. It was suggested that review triggers in OHS legislation and AS 4804:2001 be retained but there is no need for additional reviews in the CMHS Act. It was noted that DPI has power to direct reviews at any time necessary.

The CFMEU and the Inspectors of Coal Mines commented that it is difficult to see what could be reduced or simplified in the review requirements. This is because the purpose of review under AS 4804:2001 or the OHS legislation is to determine statutory compliance and /or risk control effectiveness, which are different from true safety reviews. The submission by Inspectors of Coal Mines cites a circular by the UK Health and Safety Executive (HSE) to support the suggestion that the risk should be periodically reviewed to challenge existing measures and take into account changes such as new knowledge, techniques and technologies for reducing or eliminating risks. It was suggested that the CMHS Act be amended to require systems review to take into account new technologies and new practices to drive risk lower.

Discussion

Although there is some comment in the submissions about the potential for confusion and duplication between requirements the OHS and CMHS legislation, the different pieces of legislation cover different aspects of OHS management. The CMHS Act requires review of the system of managing health and safety at a coal operation (the HSMS), whereas the OHS Regulation requires review of the risk assessments and control measures undertaken as part of an employer's general duties under the OHS legislation.

The circumstances for review of risk assessments and control required under clause 12 the OHS Regulation are similar to the HSMS review requirements in section 28 of the CMHS Act. However, variations include when there is evidence that the risk assessment is no longer valid (cl 12(a) OHS Regulation); when there is a 'significant change in operations ...' as opposed to 'a significant change is proposed in the place of work or in work practices ...' (s 28 2(d) CMHS Act and cl 12(a) OHS Regulation); and the need for a review 'if there is a fatality ...' and 'if there is a dangerous incident ... that could reasonably have been expected to result in a fatality' (s 28(2)(b)-(c) CMHS Act) as opposed to requiring review 'whenever ... injury or illness results from exposure to a hazard to which the risk assessment relates ...' (cl 12(b) OHS Regulation).

Part of the confusion about the interrelationship between the HSMS review requirements in the CMHS Act and the OHS Regulation seems to be related to the different regulatory styles and language used, with the CMHS Act using more mine-specific language than the general OHS legislation. Some confusion may also be a result of stakeholders still becoming familiar with the CMHS legislation and how it interacts with OHS Regulation, which was only extended to apply to the mining industry in September 2008. Including some explanation of the relationship between the OHS and CMHS legislation in relation to HSMS in the guidance note published by DPI about preparing HSMS (GNC-003: *Preparing a Health and Safety Management Plan*) may assist stakeholders in understanding their obligations under the OHS and CMHS legislation.

Recommendations

16. Review guidance material on preparation of a HSMS (GNC-003: *Preparing a Health and Safety Management System*) and include information about the relationship between the OHS and CMHS legislation for HSMS reviews.

5.6 SUBMISSION OF HSMS AND EMS DOCUMENTATION

Issue 6: Submission of HSMS and EMS documentation

Comments are sought on any practical difficulties that stakeholders have experienced in relation to the CMHS Act and CMHS Regulation provisions for the submission of HSMS and EMS outlines to DPI.

Documented health and safety management systems and emergency arrangements are essential for ensuring that people understand the coal operation's risk management arrangements. This part of the discussion paper considers the requirements for such documentation and whether there are any practical difficulties for the operator in meeting these.

Public Comment

An issue was raised in the submissions by the NSW Minerals Council and Illawarra Coal about the 21-day time period for notification of an objection to a HSMS by the Chief Inspector during which time the HSMS may not be implemented. It was submitted that this delay has operational and safety implications. The operator should be able to notify DPI of changes and DPI use enforcement powers to address non-compliance with HSMS requirements. It was submitted that changes to HSMS or EMS are usually made to improve safety, and that the waiting period for the Chief Inspector to object adds unnecessary delay.

Several submissions also raised the issue of what level of detail should be included in the 'outline' of a HSMS required to be submitted to the Chief Inspector and the Industry Check Inspector under section 25 of the CMHS Act. The CFMEU commented that compliance difficulties arise because the CMHS legislation fails to identify the appropriate scope of information that must be provided. The CFMEU suggested that the entire HSMS should be submitted, as reducing the HSMS to an outline is an administrative burden, especially when technology allows electronic versions of the complete HSMS to be provided easily.

Related to this were questions in the submission by the NSW Minerals Council about the level of detail about amendments to a HSMS that must be sent to the Chief Inspector and Industry Check Inspector under section 29 of the CMHS Act.

There was a difference of opinion between submissions from industry and the CFMEU submissions on the role of industry check inspectors in the submission of and objection to HSMS under the CMHS Act. The NSW Minerals Council argued that there is unnecessary duplication in the role of the Chief Inspector and Industry Check Inspector in relation to HSMS and the requirement for providing information to the Industry Check Inspector should be removed. Differently, the CFMEU called for an amendment in relation to the power under section 27 for the Industry Check Inspector to object to a HSMS. This submission suggested that the Chief Inspector be required to investigate an objection by

the Industry Check Inspector and justify any finding that the HSMS does not need amendment.

Discussion

The 21-day time period for notification of objection to a HSMS in section 26(4) of the CMHS Act is primarily aimed at ensuring that new operations have an adequate HSMS in place prior to commencing mining. An operator does not have to prepare a mine safety management plan for a mine if a previous operator of the mine prepared a plan that complies with this Act and the regulations, and the plan is adopted by the subsequent operator (section 20(4) of the CMHS Act).

Once a HSMS is in place, an amended HSMS may be implemented immediately after informing the Chief Inspector of the amendment, unless the regulations provide the amendment is of a kind that cannot be implemented during 28 days after informing the Chief Inspector of the amendment (see section 29(5) of the CMHS Act and clauses 25 and 26 of the CMHS Regulation). This means that delays or disruption to operations due to the 21-day time frame for notification of objection to a HSMS should be minimal.

To avoid pre-empting possible discussion at the national level, no comment is made in this Report in relation to the role of Industry Check Inspectors.

The submissions indicate some guidance is needed as to what ‘outline’ means in relation to information to be supplied to the Chief Inspector and Industry Check Inspector under clause 22 of the CMHS Regulation. Related to this is clarification of the level of detail required to be submitted about amendments to HSMS. These matters could be addressed through non-legislative action.

Recommendations

17. Retain the 21-day timeframe for objection to a HSMS by the Chief Inspector.
18. Include information in the guidance note on HSMS (GNC-003: *Preparing a Health and Safety Management System*), published by DPI, on the following:
 - the content of an ‘outline’ of information in the HSMS to be provided to the Chief Inspector and Industry Check Inspector under section 25 of the CMHS Act and clause 22 of the CMHS Regulation;
 - the level of detail required to be submitted to the Chief Inspector and Industry Check Inspector about amendments to HSMS under section 29 of the CMHS Act and clause 24 of the CMHS Regulation.

5.7 TOURIST AND EDUCATION PERMITS

Issue 7: Provision for tourist and education permits

Comments are sought on the whether CMHS Act provisions for the issue of permits for tourist and educational activities at coal operations should be retained.

Tourist and educational permits have historically been provided for in mining-related legislation. The CMHS Act (sections 105-109) sets out a permit system for DPI to authorise tourist and educational activities at mines. This part of the review explores whether it is appropriate for government to continue to provide such permits.

Public Comment

Most submissions made no comment on this issue. One submission stated that there should be no reduction in oversight by DPI of tourist mines, given the level and type of risks associated with tourist mines.

Discussion

Stakeholders have not identified any problems with the system of issuing permits for tourist mines under the CMHS Act. No permits for tourist mines have yet been issued under the CMHS Act.

Recommendations

19. It is recommended that no changes be made to these provisions.

5.8 OTHER ISSUES

Most submissions raised issues outside the topics provided in the discussion paper. Some of these issues were more directly concerned with the operation of the CMHS Regulation than the Act. These issues have been noted and will be discussed with stakeholders separate to this review. They included:

- Requirements for notification of low-severity incidents in clauses 55 and 56 of the CMHS Regulation. The submission from Illawarra Coal comments that these clauses are open to interpretation and create a high volume of notifications for no additional safety outcomes. It is suggested that reporting of these incidents could be limited to trend data required to be submitted quarterly to DPI. The forms on which these incidents are notified limit the amount of information and time is required to complete follow-up reports frequently requested by inspectors. This issue is not directly related to the provisions of the CMHS Act, but has been noted for further stakeholder consultation and consideration.
- Competence standards under Part 9 of the CMHS Act. The following suggestions and comments were made in a submission by the DPI Mining Industry Competencies Unit:
 - the operator and contractor be obliged to ensure that persons maintain their competency;
 - enable conditions for maintaining competency to be imposed on holders of certificates of competence issued under the *Coal Mines Regulation Act 1982*;
 - the functions of the Board to be clarified and to include setting up systems of maintaining competence and endorsement of Registered Training

Organisations (RTOs) as suitable for the mining industry (section 134 of the CMHS Act and 173 of the CMHS Regulation);

- clarification on the capacity of the Minister to delegate functions under the section 212 of the Act;
- amend clause 162 of the CMHS Regulation in relation to function and competence requirements for managers of electrical and mechanical engineering at open cut mines to make them the same as for underground mines;
- clarify that the certificate of competence would be the only specified evidence for each specified function;
- provisions relating to service of documents (section 215) should allow for service of documents by email;
- enable the operator or employer to be notified or inquire about the suspension or cancellation of a certificate of competence (clause 174, 175 and 178 of the CMHS Regulation).

These issues and related possible changes to the CMHS legislation will be discussed more broadly with stakeholders separate to this review process.

- Mr Macpherson submitted that the experience requirements for a candidate for Site Check Inspector elections under section 159(2)(b) of the CMHS Act are more rigid than the Coal Competence Board requirements for open cut examiner and mine deputy. Coal Competence Board requirements should be used in section 152(2)(b). Further discussion of this issue is required with stakeholders before any recommendation can be made.
- Powers of enforcement, functions and responsibilities of authorised officers, Industry Check Inspectors, Site Check Inspectors and OHS Committee members under OHS legislation were discussed in the submission by the CFMEU. These are matters that will be considered at the national level.

CHAPTER 6 – CONCLUSIONS

The CMHS Act review has confirmed that the Act is meeting the objectives set out in section 10 of the Act, although the submissions indicated there is some capacity to improve ease of understanding and compliance. However, the differences in approach between the industry and employee-based submissions meant there was no clear consensus as to how improvements could best be achieved. In deciding on its recommendations, DPI therefore sought to achieve a balance between protecting the health and safety of those working in the mining industry and, where possible, reducing unnecessary administrative burdens on both industry and Government.

While the Report identifies areas where ease of understanding and compliance with the CMHS Act could be improved, care has been taken to avoid pre-empting discussion or recommendations that may be made through the *National Review into Model Occupational Health and Safety Laws* and the National Mine Safety Framework processes. Examination

of the broader issues around the types of duties, requirements and powers contained in the general OHS legislation and mining-related health and safety laws are all being addressed at a national level.

The relationship between general OHS legislation and regulation of mining-specific health and safety hazards will also be addressed through the national processes. This has been taken into account in considering issues raised in the submissions about the relationship between the OHS and CMHS legislation, which was one of the main themes to emerge from the discussion on HSMS and EMS.

The recommendations made in this report have therefore focused on improving practical understanding of requirements relevant to HSMS and EMS in the OHS legislation and CMHS legislation. Identifying areas of overlap or duplication will be an ongoing process, given that the CMHS Act has only been in operation for a relatively short period of time and stakeholders may need more time to fully assess the requirements under the legislation. Ongoing consultation with stakeholders will be required to ensure that matters can be addressed as they arise.

REFERENCES

OHS and CMHS Acts and Regulations

For full copies, refer to www.legislation.nsw.gov.au

Guidance material

DPI guidelines and guidance material on the CMHS Act and Regulations are available at www.dpi.nsw.gov.au/minerals/safety

WorkCover approved codes of practice are available on www.workcover.nsw.gov.au

Digging Deeper Report

For further information and full copies of the Report and implementation plan refer to www.dpi.nsw.gov.au/minerals/safety

National OHS Review

The Issues Paper seeking comments on national model OHS laws is available at www.nationalohsreview.gov.au

National Mine Safety Framework

The NSMF is available at <http://www.ret.gov.au/>

NSW Government “Better Regulation” principles

For further information, refer to www.betterregulation.nsw.gov.au

APPENDIX A - LIST OF PUBLIC SUBMISSIONS

The following organisations and individuals provided a submission to the CMHS Act Review as part of the call for public comment in the *Coal Mine Health and Safety Act 2002 Discussion Paper*.

Copies of submissions are available on the DPI website (www.dpi.nsw.gov.au/minerals/safety) except where confidentiality was requested.

- Construction, Forestry, Mining and Energy Union (CFMEU) - Mining and Energy Division
- BHP - Illawarra Coal
- DPI - Inspectors of Coal Mines
- DPI – Mining Industry Competency Unit
- NSW Mineral Council
- Macpherson, David – Inspector of Coal Mines, DPI
- Mines Rescue Service

Two letters expressing support for the submission by the NSW Minerals Council were received from:

- Centennial Coal
- Rio Tinto Coal Australia

APPENDIX B - ANALYSIS OF ACCIDENT NOTIFICATION DATA FOR THE COAL MINING INDUSTRY TO 2007/08

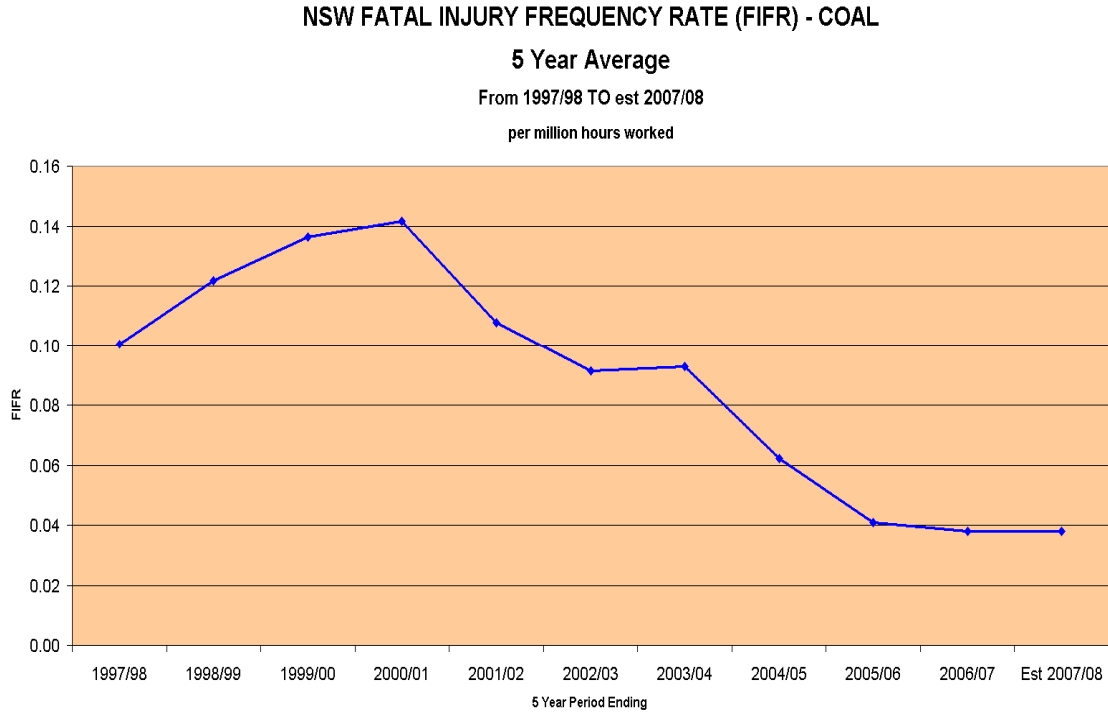


Figure 1

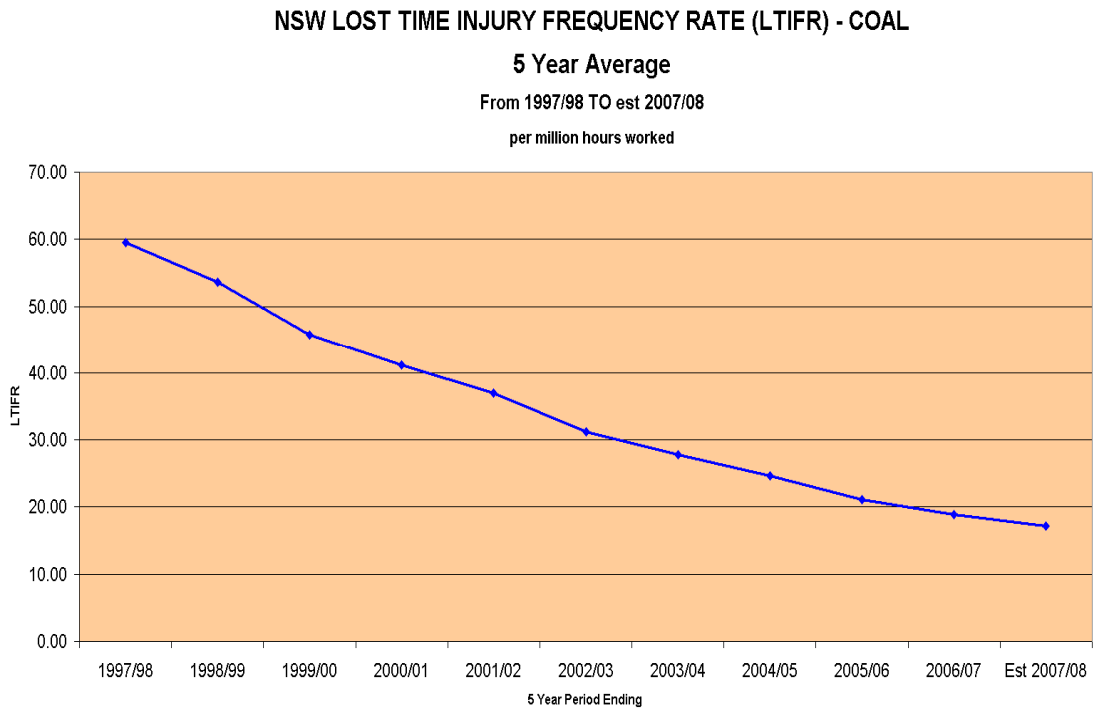


Figure 2

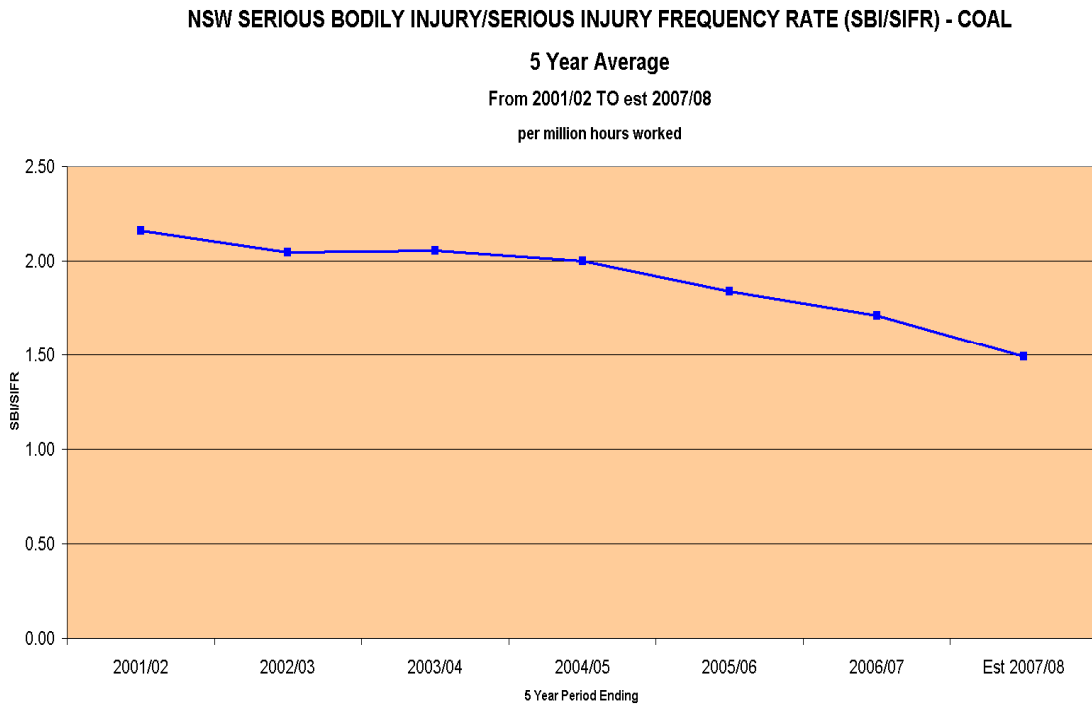


Figure 3