MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE SAFE WORK AUSTRALIA CONSULTATION REGULATION IMPACT STATEMENT: RECOMMENDATIONS OF THE 2018 REVIEW OF THE MODEL WORK HEALTH SAFETY LAWS

---

5 AUGUST 2019

TABLE OF CONTENTS

1 INTRODUCTION

The Minerals Council of Australia (MCA) appreciates the opportunity to comment on the Safe Work Australia Consultation Regulation Impact Statement: Recommendations of the 2018 Review of the Model Work Health Safety Laws.

The MCA represents Australia's exploration, mining and minerals processing industry. MCA member companies account for more than 75 per cent of Australia's annual mineral production and 80 per cent of mineral export earnings. Resources companies employ more than 240,000 people directly in highly paid, highly skilled jobs, mostly in remote and regional Australia.

The Australian minerals industry is committed to continuous improvement in all areas of health and safety and follows a best practice risk-based approach to managing risks of exposure to the workplace. The number one value and commitment of the Australian minerals industry is the safety and health of its workforce, where everyone goes to work and returns home safely.

The MCA supports a firm but fair legislative framework that achieves healthy and safe workplaces and provides for appropriate responses if serious offences are proven. Those objectives must encourage prompt learning and sharing of important lessons that can contribute to general and specific deterrence and improve health and safety outcomes at Australian workplaces

The MCA continues to advocate for:

- Continuous improvement, where all parties work together in support of a safety culture based on trust and openness
- Regulatory practice based on consistency, transparency, probity, clarity of role, flexibility and rational pragmatism
- Enforcement rationale based primarily on the desire to improve Work Health and Safety (WHS) standards at Australian workplaces and prevent further incidents by fostering prompt sharing of safety lessons across industry.

This submission contains industry feedback, examples and preferred position on the following recommendations:

- Recommendation 2: Psychosocial risks
- Recommendation 7A: work groups and HSRs in small business
- Recommendation 8: Workplace entry by HSR assistants
- Recommendation 9:Cancelling a provisional improvement notice
- Recommendation 10: Choice of HSR training course
- Recommendation 13: Referral of disputes
- Recommendation 15: WHS entry permit holders: prior notice of entry
- Recommendation 17: Inspectors' powers
- Recommendation 23A and 23B: Category 1 offence and industrial manslaughter
- Recommendation 26: Prohibit insurance for WHS fines
- Recommendation 27: Risk management process
- Recommendation 29A and 29B: Safe Work Method Statements
- Recommendations contained in Appendix A: recommendation 6, 18, 19, 20, 21 and 25.

2 PSYCHOSOCIAL RISKS – RECOMMENDATION 2

The affect of problems identified in relation to psychosocial risks

Mental health is a key element of health and safety and is therefore a vital part of the overall industry's commitment to the workforce.

Mental health problems are common in the Australian community. It is estimated that approximately 20 per cent of the population experience mental ill-health in any 12 month period.[1]

The minerals industry is a significant employer in diverse regions across Australia and the mental health needs of those working in the sector are likely to reflect those of the general community.

The key issue identified by the 2018 Review of the WHS laws in relation to psychological health was that business owners are uncertain about how to address psychological health, with criticism of the absence of specific requirements for managing psychological risks in the model WHS Regulations.

Member organisations of the MCA aim to manage psychological risks through established risk-based processes. These actions are usually integrated within overall health and safety policy and practices. Members may draw on guidance materials such as the MCA Blueprint for Mental Health and Wellbeing and the Safe Work Australia guidance identified in the Consultation Regulation Impact Statement.[2]

Risk-based processes consider factors such as operational design and organisational cultural as well as the importance of raising mental health awareness and promoting good health and wellbeing.

As part of this, the minerals industry works to deliver a range of programs, including mental health first aid, access to employee assistance programs and other support.[3] The industry also supports and participates in existing campaigns and initiatives that raise awareness and promote mental health and wellbeing, for example RU OK? Day.

Practical impact of options set out in relation to psychosocial risks

The MCA is of the strong view that the way psychological risks are treated within the WHS laws should be consistent with the treatment of other risks. That is, the risk-based approach that is set out in section 17 of the WHS Act, by reference to what is reasonably practicable in section 18 of the WHS Act, provides an appropriate framework for the identification and management of psychological risks. This is particularly the case with the publication of guidance by Safe Work Australia and regulators.

The MCA therefore supports maintaining the status quo so that psychological risks continue to be regulated by the existing framework of the Model WHS Act.

It is important to retain flexibility in the way in which PCBUs may manage psychological risks and to ensure that innovation and increasingly effective control measures are identified as the state of knowledge on managing psychological risks improves. Such an approach is consistent with the object in section 3(1)(g) of the Model WHS Act of providing a framework for continuous improvement and progressively higher standards of work health and safety.

Innovation and increasingly effective controls are achieved through a flexible, non-prescriptive regulatory approach.

Introducing prescriptive regulations on managing psychological risks would impose a regulatory burden that may not be necessary. Without knowing the detail of the proposed regulations it is difficult to assess the value and necessity of that regulatory burden.

Recommendation 2 makes reference to psychological 'injury' – this conveys the impression of an acute or one-off occurrence rather than a word such as 'illness' which is typically associated with

[1] Australian Institute of Health and Welfare, *Mental health services – in brief 2018*, Cat. no. HSE 211. AIHW, Canberra 2018.
[2] The Minerals Council of Australia, *Blueprint for mental health and wellbeing*, 2015, Canberra.
[3] Minerals Council of Australia, *Mental Health*, Safety and Health page, Canberra 2019.

psychological issues and conveys conditions which may develop over a longer-term period. It is unclear whether this was the intention – with psychological injuries intended to be dealt with and control measures implemented in a similar way to other acute injuries addressed by the Model WHS Act. If this is the intention this would appear to narrow the scope of the issues which would be addressed under the WHS Regulations. The lack of clarity provides further support for dealing with psychological risks in guidance rather than the WHS Regulations.

Other options to address problems identified in relation to psychosocial risks

It is recognised in the Consultation RIS that Safe Work Australia has published guidance on managing psychological risks since the time of the consultation for the 2018 Review.

It is important that WHS regulators and Safe Work Australia promote the provision of advice, information, education and training in relation psychological risks (consistent with the objects of the Model WHS Act). Resources deployed in promoting the existing guidance would provide a better solution to the issues identified than amending the WHS Regulations to include prescriptive regulations on psychological risks.

Given the dynamic nature of the area of psychological health, it is more appropriate that information on how the risks may be eliminated or controlled is included in guidance so that improvements can readily and swiftly be implemented. As noted in the Consultation RIS, in the last year alone, there has been a significant increase in the information available to assist duty holders to comply with their obligations and to create mentally safe workplaces.

It is important to recognise that the management of psychological health is a complex area. Many psychological hazards are not work-based and the interaction between work-based hazards and non-work hazards must be recognised. Conducting further research to identify alternate options to the management of psychological hazards that go beyond existing frameworks may be appropriate. A flexible regulatory approach (as currently exists) would support this further work. It would allow PCBUs to respond to any further learnings communicated through new or updated guidance material.

Preferred option to address problems identified in relation to psychosocial risks

For the reasons discussed above, the MCA supports maintaining the status quo.

State of knowledge on psychosocial hazards, risks and control measures

The prevalence of mental health problems across the Australian community is widely accepted and supported by research. The mental health needs of those working in the minerals industry are likely, at the very least, to reflect those of the general community.

Groups including MATES in Mining, Lifeline, Beyond Blue, the Mentally Healthy Workplace Alliance and Black Dog Institute have done significant work to raise awareness of, and provide practical control measures to manage, mental health issues. The MCA has drawn on the work of these groups in developing the Blueprint for Mental Health and Wellbeing.[4]

As with all risks, knowledge of the hazards and risks, and related control measures improves over time. Maintaining a flexible regulatory regime is important to allow an appropriate response to improved knowledge of hazards, risks and control measures.

Detail of prescriptive psychosocial regulations

The detail of any proposed regulations will need to be understood in order to assess the impact that they may have. In particular, an assessment will be required of whether any proposed regulations are unduly prescriptive and potentially restrict innovation and flexibility in the way in which psychological risks are eliminated or minimised by duty holders.

[4] The Minerals Council of Australia, *Blueprint for mental health and wellbeing*, 2015, Canberra.

The multifaceted nature of psychological risks must also be considered. Any regulations for the management of psychological risks must recognise that matters which relate to the workplace may only be a part of the complex cause of any psychological ill health.

If a decision is taken to implement prescriptive regulations (an approach which the MCA does not support) the opportunity to comment further on the nature of such regulations would be welcome.

3 WORK GROUPS AND HSRS IN SMALL BUSINESS – RECOMMENTATION 7A

The affect of problems identified in relation to work groups and HSRs in small business

Recommendation 7A is directed to small businesses and undertakings where the operations involve 15 workers or fewer and a HSR is required. No changes to existing arrangements are proposed for larger businesses and undertakings; the impact on the minerals industry is therefore limited.

Preferred option to address the problems identified in relation to work groups and HSRs in small business

The MCA supports the recommendation to amend the Model WHS Act so that – for small businesses – a PCBU is only required to form one work group represented by one HSR and deputy HSR (unless otherwise agreed) to ensure that worker representation is not unduly complex or burdensome.

4 WORKPLACE ENTRY BY HSR ASSISTANTS – RECOMMENDATION 8

The affect of problems identified in relation to workplace entry by HSR assistants

The MCA supports balanced union right of entry rules. Members of the MCA are subject to many right of entry requests. For example, a minerals company had more than 550 right-of-entry visits between 2011 and 2013. Another MCA member was subject to 257 visits between January 2015 and June 2016.

Maintaining a balanced right of entry system depends on unions exercising rights in an appropriate way and in accordance with the requirements in the WHS Act and *Fair Work Act 2009* (Cth).

An unbalanced right of entry system causes business interruption with significant cost impacts for businesses and, ultimately, the Australian economy.

The MCA is concerned that if a union official is not required to hold an entry permit under the Act or another industrial law, this may lead to situations in which persons who have previously been prohibited from holding a permit (or who have had restrictions imposed on their permit) use the HSR assistant process to access workplaces. This may lead to business interruption risks and costs associated with enforcing legal rights through the Courts.

Practical impact of the options set out in relation to workplace entry by HSR assistants

If Recommendation 8 is adopted there is potential that HSRs may take advice from people who are not appropriately qualified or experienced to give it. The impact of this may include:

- Potential creation of, or failure to address, safety issues
- Disruption and disturbance to business operations
- Costs associated with productivity loss
- Diversion of resources away from real safety issues.

It is important that appropriate safeguards are in place to verify that persons providing assistance to HSRs are appropriately qualified and experienced to provide assistance to HSRs in the discharge of their functions and that a framework exists to ensure this is the case.

Option 2 of the Consultation RIS is for Safe Work Australia to work with relevant agencies to consider how to ensure that a union official accessing a workplace to provide assistance to a HSR is not required to hold an entry permit under the FW Act.

If this option is progressed, MCA would welcome the opportunity to provide additional feedback on any safeguards under consideration to address the potential for inappropriate use of the 'right of entry to assist an HSR assistant' entry provisions.

Other options to address the problems identified in relation to workplace entry by HSR assistants

The recommendation in the 2018 Review appears to respond to the interpretation of provisions on the entry of a person assisting a HSR by the Full Court of the Federal Court of Australia in *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89.

Any proposed amendments to the WHS Act to respond to *Powell* will require careful assessment as to why the interpretation of the Full Court should be varied by legislative change. In particular the justification for varying the finding that:

> There is no reason of policy or common sense why one would distinguish between differently worded conditions that by their operation provided a right to enter premises for occupational health and safety reasons, to require a permit if the official has a reasonable suspicion of a contravention of a State or Territory or Commonwealth law about occupational health and safety, but not to require a permit if the

> official is asked to assist an [HSR] deal with an issue about occupational health and safety, which may or may not have a connection with such a contravention.[5]

If amendments to the Model WHS Act are proposed it will be necessary to consider the safeguards put in place in order to verify that:

- Persons providing assistance to HSR are appropriately qualified and experienced to provide assistance
- There is a mechanism to raise concerns regarding inappropriate behaviour by persons assisting HSRs.

In this context it is also important to note that HSRs can be disqualified from holding their position as HSR if the rights of an HSR are exercised for an improper use.

Safeguards will also need to be considered to allow a PCBU to deny entry in circumstances where the person assisting the HSR does not have sufficient knowledge of WHS matters to assist the HSR.[6]

Careful review of safeguards to prevent potential for misuse of the provisions will be required. In particular safeguards against misuse to facilitate entry of persons that have previously been disqualified from holding a permit or whom have had a permit suspended or revoked. These protections are currently provided in section 71(4) of the Model WHS Act and the notice requirements in clause 20A(2) of the Model WHS Regulations. Any proposed amendments must be considered so that there is not a circumvention of these exceptions from the obligation to permit access to a person assisting a HSR.

An alternative option is amending the Model WHS Act to clarify that *if* an HSR seeks assistance from a person, *and* that person is a union official, then the union official must hold a right of entry permit under the FW Act and a WHS entry permit before clause 70 of the Model WHS Act will have the effect of requiring that the PCBU allow them access to a workplace. There are both policy and practical drivers for such a change.

From the policy perspective, the regime for the issue of entry permits is an important safeguard to ensure that, where WHS laws limit employers' right to determine who enters their premises, union officials exercise their rights responsibly and for proper purposes. It is not appropriate that this protection can potentially be evaded by the mechanism of HSRs requesting assistance from union officials and asserting a right to enter the workplace in that capacity, in circumstances where an official would otherwise require a WHS entry permit to gain access.

At a practical level, an amendment of the kind described above would allow the Model WHS Act to operate more harmoniously with the law as it stands following the decision in *Powell*. Expressly providing in the Model WHS Act that union officials who assist HSRs must hold a federal permit will assist in ensuring that they can readily know all of the requirements which apply.

Lastly, HSRs have qualifications obtained through training and additionally, as a worker, also have the option of seeking the assistance of the regulator. Inspectors are appropriately qualified and can provide technical assistance. The powers inspectors have been granted under the Model WHS Laws and their sole focus on health and safety matters make them more appropriate to assist with the resolution of WHS issues and achieve safety outcomes.

Preferred option to address problems identified in relation to workplace entry by HSR assistants

For the reasons discussed above, the preferred option is to maintain the status quo.

[5] *Powell* per Allsop CJ, White and O'Callaghan JJ at [57].

[6] See for example section 70(1) of the *Occupational Health and Safety Act 2004* (Vic) which provides that a person assisting a HSR must be permitted to access the workplace 'unless the employer considers that the person is not a suitable person to assist the representative because of insufficient knowledge of occupational health and safety.'

5 CANCELLING A PROVISIONAL IMPROVEMENT NOTICE – RECOMMENDATION 9

Practical impact of the options set out in relation to cancelling a provisional improvement notice

The MCA is concerned that Recommendation 9 may not have considered information or evidence on the frequency of PIN cancellations by an inspector for technical reasons (i.e., not those errors that could cause 'substantial injustice'), or why an inspector would do this rather than confirm the PIN with changes.

The MCA does not consider it necessary to mandate that where a PIN is cancelled the issue must be resolved in accordance with section 82 of the Model WHS Act, particularly given that:

- The power of an inspector to confirm the PIN with changes (section 102(1)(b) of the Model WHS Act) provides a mechanism to resolve technical errors in a PIN
- Where there are grounds to issue a PIN (i.e., because the PCBU is contravening or has contravened the Model WHS Act) the inspector has sufficient expertise and discretion to confirm the PIN, issue an improvement notice or issue a prohibition notice.

It is reasonable to conclude the belief (in relation to the contravention) of the person who issued the PIN is unfounded when an inspector takes no action following the cancellation of a PIN. Otherwise, the inspector would have taken some action to seek to remedy the contravention.

Other options to address the problems identified in relation to cancelling a provisional improvement notice

Section 82 of the WHS Act allows an inspector to exercise any of the inspector's compliance powers under the WHS Act in relation to the workplace once they have attended the workplace.

To the extent that the Model WHS Act is amended to require issues to be dealt with under section 82 when a PIN is cancelled, consideration will need to be given to the extent to which any proposed provisions will interact with the decisions which are 'reviewable decisions' under section 223 of the Model WHS Act to allow for an appropriate review mechanism of an inspector dealing with an issue referred to them under section 82 of the WHS Act.

Preferred option to address the problems identified in relation to cancelling a provisional improvement notice

For the reasons discussed above, the preferred option is to maintain the status quo.

6 CHOICE OF HSR TRAINING COURSE – RECOMMENDATION 10

The affect of problems identified in relation to choice of HSR course and the cause and extent of disagreement over HSR training

An element of the general duty of a PCBU under section 19(3)(f) of the Model WHS Act is:

> the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.

There is no logical justification for allowing HSRs to choose training under section 72 in circumstances where the general duty is on the PCBU to provide training in all other areas (where a worker does not have a right to select the training course).

Further, there is a risk that a course chosen by HSRs may not be appropriately scheduled to meet operational requirements or not cover content that the PCBU has identified as necessary to enable the PCBU to meet its duties.

Preferred option to address problems identified in relation to choice of HSR training course

The preferred option is to maintain the status quo.

7 REFERRAL OF DISPUTES – RECOMMENDATION 13

The affect of problems identified in the 2018 Review findings

The objects of the Model WHS Act include 'providing for fair and effective workplace…issue resolution in relation to work health and safety' (section 3(1)(b) of the Model WHS Act) . Steps which seek to refer a dispute to a court or tribunal may be inconsistent with the objective of effective (being quick and uncostly) resolution of disputes.

Other options to address the problems identified in the 2018 Review finding

To the extent that dispute referral is included (a position that MCA does not support), it will be important to include a mechanism so that any stop work decision can be 'stayed' in a similar way to 'stay' of a reviewable decision where internal review is sought under section 228 of the WHS Act. Such a mechanism could minimise the risk that stop work may be used inappropriately and that businesses will be exposed to cost as a result of the work stoppage until the final resolution of the dispute.

Preferred option to address the problems identified in the 2018 Review findings

The preferred option is to maintain the status quo.

Referral of issues that are not resolved under s 82 or 89 of the model WHS Act to a court or tribunal if Option 2 is adopted

The referral of matters to a court or tribunal is typically an option of last resort due to the cost, time and effort involved in legal proceedings. Whilst legal proceedings may be appropriate in some circumstances, dealing with the majority of disputes outside of a court or tribunal will facilitate the efficient resolution of disputes in accordance with the objects of the Model WHS Act.

8 WHS ENTRY PERMIT HOLDERS: PRIOR NOTICE OF ENTRY – RECOMMENDATION 15

The affect of problems identified in relation to WHS entry permit holders: prior notice of entry

The requirement in section 117(5) of the Model WHS Act for 'at least 24 hours' notice to be provided when exercising an entry to inquire into suspected contraventions' has not been adopted in any jurisdiction.

However the justification for the inclusion of this requirement set out in the 2014 review of the Model WHS Act are matters which remain valid. In particular, any amendment to the notice period should seek to address:

- The scope for abuse by union officials to use the lack of notice as potential means of inappropriate access to workplaces
- Unexpected disruption to business operations and associated loss of productivity and increased production costs from union officials entering workplaces for alleged WHS purposes and interrupting scheduled work
- Confusion among employers associated with inconsistency in notice periods across different types of entry by permit holders (i.e., the difference between entry to consult and advise workers and entry to inquire into suspected contraventions)
- The inability of employers and workers to take full advantage of the range of provisions in the Model WHS Act to resolve safety concerns without third party intervention, including through consultation, issue resolution and HSRs – which may otherwise not be exhausted prior to a WHS entry permit holder entering a workplace for the purpose of inquiring into a suspected contravention of the Model WHS Act.

A number of reasons support retaining the requirement for 24 hours' notice, including:

- The Model WHS Act provides that workers themselves have the right to cease unsafe work under section 84
- Inspectors are typically widely available
- The powers afforded to regulators under the Model WHS Act indicate that the regulator is better placed to assist with the resolution of WHS issues and achieve safety outcomes
- Workers have the ability to directly engage with the regulator to seek satisfaction on an unresolved WHS issue through regulators' safety hotlines and other communication methods.

Preferred option to address the problems identified in the 2018 Review findings

The preferred position is to maintain the status quo.

9 INSPECTORS' POWERS – RECOMMENDATION 17

The affect of problems identified in the 2018 Review findings

It is the practical experience of the MCA members that regulators use notices issued under section 155 to obtain information and documents. It is the MCA's view that section 155 of the Model WHS Act is an appropriate mechanism to enable regulators to obtain information and documents.

The requirement for the regulator to have reasonable grounds that the person is capable of giving information is an appropriate qualification to limit notices being inappropriately issued. However, it is the practical experience of the members that this is not an unduly onerous obligation on the regulator. For example, it allows for notices to be issued to any PCBU associated with the relevant works and to individuals employed or engaged by those PCBUs.

On occasions, the time by which a notice must be responded to is very short given the volume of information that is sought; placing significant demands on business that may detract from operational requirements.

It is the experience of members that often multiple notices are issued to a party that seek documents which have previously been provided or which seek response to questions which have previously been asked in an earlier notice. This imposes an unnecessary cost and time burden on parties required to respond to the notice.

Practical impact of the options set out in this Consultation RIS

MCA is concerned that any extension to the powers of an inspector may compound these issues.

Other options to address the problems identified in the 2018 Review finding

Consideration should be given to the inclusion in the Model WHS Act of a requirement that any notice be issued in writing in the prescribed form and that appropriate protections apply during the period which any notice may be issued following attendance at site:

- To allow for reasonable time to comply with the requirements in the notices
- Against multiple and duplicative requests for information from multiple inspector; as a general rule, a single inspector should handle all requests
- Against incrimination
- So that requests under the exercise of the power within the 30 days clearly be identified as connected to the initial entry.

Preferred option to address the problems identified in the 2018 Review findings

Subject to the protections discussed above, MCA does not oppose the proposed amendment.

Limitations on exercise of the power within 30-days after entry by an inspector if Option 2 is adopted

If Option 2 is adopted, exercise of the power within 30-days after entry by an inspector should be limited to only obtaining information that is related to the reason that inspector first entered the workplace.

Limiting the information that an inspector may obtain to the reasons that the inspector first entered the workplace provides clarity of scope and safeguards against this power becoming too broad. There is no obvious justification to allow an inspector to obtain information that is unrelated to the reason that the inspector first entered the workplace.

The MCA also supports consideration of a condition for inspectors to be trained on the requirements for issuing requests for information/documents so that they understand the powers and relevant protections afforded under the WHS Act. It is the experience of MCA members that the knowledge of

inspectors can vary and leads to requests for information/documents being made informally. Consequently, it is not always clear that the request is afforded the relevant protections, for example – against self-incrimination for an individual. It is important that requests are made consistently and that all requests are afforded relevant protections.

The MCA is of the view that seven days should be sufficient time in which to require the production of documents and answers however it is acknowledged that some cases are complex and may require more time. Therefore the MCA proposes that the expected standard is set at seven days with a maximum of 21 days allowable. The MCA also strongly recommends that guidance is given to inspector's to ensure that information is obtained in an efficient and timely manner to minimise disruption

Section 155 of the WHS Act is available to the regulator to obtain information where they have reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the WHS Act or, that will assist the regulator to monitor or enforce compliance with the WHS Act. Providing seven days will allow sufficient time for the regulator to develop reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence and hence if further documents or answers are required, they can be obtained using section 155.

9 CATEGORY 1 OFFENCE AND INDUSTRIAL MANSLAUGHTER – RECOMMENDATION 23A AND 23B

The affect of problems identified in relation to category 1 offence and industrial manslaughter

Recommendation 23A

The inclusion of a gross negligence offence appears to propose that the criminal standard at which a Category 1 offence may be committed be lowered; the MCA does not consider this to be appropriate. It has the potential to increase the difficulty of attracting and retaining appropriately qualified people to the industry. The lowering of the bar for culpability of offences would exacerbate this.

Whilst not consistent between the jurisdictions, the offences of gross negligence and recklessness may, at a high level, be summarised as:

- Gross negligence: a departure from the standard of care a reasonable person would exercise as to merit criminal punishment (e.g. Criminal Code (Cth) s 5.5). It is an assessment of the defendant's conduct, rather than their thinking. It is an objective test.
- Recklessness: has a subjective element to it which directs attention to the defendant's knowledge. In the Criminal Code (Cth), a person is reckless as to a result if they are aware of a substantial risk that the result will occur, and that having regard to the circumstances known to the person, it is unjustifiable to take the risk.

The area is complex because criminal laws are not consistent across the jurisdictions. For the purposes of the general criminal law the jurisdictions can be grouped into:

- The common law jurisdictions: Victoria; New South Wales; and South Australia
- The "traditional code jurisdictions": Queensland; Western Australia; and Tasmania
- The "modern code jurisdictions": the Commonwealth; Australian Capital Territory and the Northern Territory.

The review acknowledges the Workplace Relations Ministers' Council did not accept the recommendation made by the 2008 review into model occupational health and safety laws that cases of very high culpability should involve gross negligence.

This recommendation was not accepted as 'gross negligence offences should be dealt with outside the model Act as they would otherwise cut across local criminal laws and manslaughter offences.'

If the Model WHS Act is to include an offence of gross negligence this must consider how the proposed offence will interact with state and territory laws. In particular because offences of 'gross negligence' and 'recklessness' are not consistent across all jurisdictions, clarity must be provided as to how jurisdictional variations will be managed.

Consideration should also be given to whether other options may be preferable, for example – expressing the nature of an offence in the WHS Act as opposed to relying on concepts of criminal law that are complex, vary between jurisdictions and are potentially not well understood by duty holders.

An example of how the requirements of the offence may be expressed within the drafting of the provisions is provided by s. 318 of the Crimes Act 1958 (Vic), which relates to culpable driving causing death:

> (2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle—
>
> (a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or

(b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case.

The 2018 Review considered there is a risk that the threshold to prove the fault element of recklessness is too high, and therefore difficult to establish, and there are limitations to dealing with work-related deaths through general manslaughter offences in the criminal law. However recent prosecutions under the Category 1 offence include the decision of the District Court in *Stephen James Orr v Cudal Lime Products Pty Ltd*; *Stephen James Orr v Simon Shannon* [2018] NSWDC 27.

In the decision of the District Court in *Stephen James Orr v Cudal Lime Products Pty Ltd*; *Stephen James Orr v Simon Shannon* [2018] NSWDC 27, Cudal Lime Products Pty Ltd was fined $900,000 after pleading guilty following the death of a worker's de facto partner who was electrocuted when she came into contact with a metallic flexible shower hose in the cottage they lived in 200m from the mine. Electricity was supplied to the mine and the nearby cottage through the same system. The metallic fixtures of the cottage were dangerously electrified as a result of a fault in the low voltage system of the mine which transferred to the cottage via the cable supply between the mine and the electrical sub-board of the cottage. This incident occurred after a series of electrical faults at the mine over the course of many years.

In South Australian Employment Court in *Martyn Campbell v Jeffrey Rowe* [2019] SAET 104, a site supervisor plead guilty to a category 1 offence where he failed to stop, and joined, dangerous horseplay.

The guilty pleas demonstrate that regulators are successfully obtaining convictions for the most serious of offences in circumstances which warrant prosecutions being brought. It does not demonstrate that the bar is set unreasonably high. Rather, it demonstrates that Category 1 offences are reserved, rightly, for the most serious offences – of which it would arguably be expected that there would be relatively few examples because of the very serious nature of the offending.

The intention of the categorisation of offences was set out in the First Report of the National Review of OHS Laws.[7] The report identified that Category 1 offences would be for the most serious breaches. The categorisation of offences was to allow for 'a differentiation that takes account of culpability and risk.' It was also intended to:

> allow the potential legal consequences of a breach to be clearly and simply explained to duty holders when advice and information is being given. It might also facilitate warning a duty holder, if that is required, about the implications of particular conduct.

The MCA believes that these intentions remain valid and is concerned that changes to the offences will make it more difficult for duty holders to understand the implications of the various offences.

Recommendation 23B

It remains unclear how the 2018 Review came to a conclusion to recommend the adoption of an industrial manslaughter offence in light of clearly articulated views by bodies such as the Law Council of Australia, a continuous advocate against the introduction of a specific industrial manslaughter offence into the Model WHS Laws. In advocating this position the Law Council of Australia points to the existing criminal law and WHS offences (which already include offences that can give rise to jail sentences for those who recklessly cause death at a workplace). Similarly, the Bar Association of Queensland expressed strong concerns when industrial manslaughter offences were proposed in Queensland.

The industrial manslaughter recommendation is arguably inconsistent with accepted principles of criminal law. It is a generally accepted principle of criminal law that recklessness is arguably a higher standard than negligence.

[7] Workplace Relations Ministers' Council, *National review into model occupational health and safety laws: first report*, Australian Government, October 2008.

Introducing an industrial manslaughter offence into the Model WHS Act would be unnecessary and inappropriate as there are already existing manslaughter offences in each jurisdiction under the general criminal law. For example, under the *Crimes Act 1900* (NSW), a charge of manslaughter has a maximum penalty of 25 years imprisonment.

Successful prosecutions for workplace deaths in recent years, under the general crime of manslaughter include:

- In April 2017 a 12-year jail sentence was imposed on the company director of a transport company by the South Australian Supreme Court after he was found guilty of manslaughter in relation to the death of a truck driver
- In March 2018, a company director was sentenced to seven years' jail for manslaughter by the Queensland Supreme Court, following the electrocution of a 20-year-old worker.

The MCA supports the views expressed in the Australian Government response to the Senate Education and Employment References Committee report: *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia (Senate Inquiry into Industrial Deaths).*[8]

The Australian Government's response to the Senate Inquiry into Industrial Deaths (which made a similar recommendation for the inclusion of an industrial manslaughter offence albeit not on identical terms because it argued the Queensland provisions should be used as a starting point) included the following points:

> A separate industrial manslaughter offence in the model WHS laws is unlikely to achieve justice for families who have lost a loved one in the workplace.
>
> The Government believes that a more effective approach, that would be more likely to achieve better outcomes, is to focus on addressing the critical issues that have been identified in relation to the enforcement of existing laws, in particular, the way in which investigations into workplace deaths are conducted.
>
> The Government's view is that the current offences in the model WHS laws, together with current criminal manslaughter laws, are able to address workplace deaths provided they are applied appropriately. Where there has been a workplace death, all of those responsible can be prosecuted under the existing offences regime and the general criminal manslaughter provisions.

The Australian Government also noted that based on the ACT experience, which has had an industrial manslaughter offence since 2014 but no prosecutions under the offence to date, it is questionable whether an industrial manslaughter offence will be used.

There have, however, been prosecutions under the ACT's general manslaughter provisions. There is also no evidence that the ACT's industrial manslaughter laws have resulted in fewer workplace deaths. The number of workplace deaths in the ACT has remained constant since 2003 when industrial manslaughter offences were introduced.

Additionally, including industrial manslaughter provisions into the Model WHS laws would change the focus of the legislation from one that is about the level of risk to one where the outcome becomes the determining factor in the offence.

The MCA recommends detailed debate on whether the inclusion of the offence assists in meeting the underlying policy intentions of improving standards in work health and safety.

In the event that an industrial manslaughter offence is introduced in the Model WHS Act, it is important that the following issues are considered:

[8] Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia,* Australian Government, October 2018,

- The criminal standard to which duty holders are held should reflect the seriousness of the offence. The highest criminal standard, which is generally accepted to be recklessness, should apply to the offence. If a lower standard is to apply the drafting of the offence must make it clear that the standard of criminal negligence applies. This is that there is an unjustifiable failure to meet the standard that a reasonable person would have exercised in the circumstances and that the relevant conduct involved a high risk of death.
- Making all available defences under existing criminal laws available to the offence. For example, existing manslaughter offences do not occur when the act or omission is not malicious or where the person had a lawful excuse. Such defences should apply to industrial manslaughter offences.
- Aligning the rights and privileges for other criminal offences with the industrial manslaughter offence so that duty holders and, in particular, individuals are afforded a right to silence and a privilege against self-incrimination. Consideration should also be given to a broad derivative use immunity so that information obtained under a compelled power for one purpose cannot be used against individuals in industrial manslaughter proceedings.
- Providing courts with discretion to impose either financial penalties or a term of imprisonment as opposed to allowing only for imprisonment of individuals.
- Industrial manslaughter offences being prosecuted by the relevant public prosecutions department as opposed to health and safety regulators.
- Aligning the limitation period for any industrial manslaughter offence to the existing limitation period in section 232 of the Model WHS Act.

Such protections will go some way to addressing the concerns of industry with the inclusion of an industrial manslaughter offence, notwithstanding the absence of any deterrent benefit from the introduction of the offence in the ACT or Queensland to date. These include the potential for the offence to have an adverse impact on the ability for industry to attract and retain suitable candidates to leadership roles.

Preferred option to address the problems identified in the 2018 Review finding

The preferred option is to maintain the status quo. The MCA strongly opposes the introduction of an industrial manslaughter offence.

10 PROHIBIT INSURANCE FOR WHS FINES – RECOMMENDATION 26

Other options to address the problems identified in the 2018 Review finding

If the prohibition is introduced clarity should be provided on what, if anything, an insurance policy can respond to. Additionally, any prohibition on insurance should make it clear that there is no infringement on an individual's right to defend themselves.

If any amendments were proposed it should be made clear that the prohibition of insurance is limited to indemnification of monetary penalties under the Model WHS Act but does not affect legal or court costs involved in an accused's defence. To restrict a defendant's right to avail themselves of an appropriate defence in circumstances of a criminal prosecution would risk offending the principles of justice.

11 RISK MANAGEMENT PROCESS – RECOMMENDATION 27

Preferred option to address the problems identified in relation to risk management process

It is important that the risk based approach of the Model WHS Law is maintained. The MCA supports Recommendation 27 so long as the qualification of 'so far as is reasonably practicable' is applied. Such an approach is consistent with the objects of the Model WHS Act to provide a 'framework for continuous improvement and progressively higher standards of work health and safety' and the principles set out in section 17 of the Model WHS Act. Such an approach provides businesses with flexibility in how they identify, manage and control WHS risks and hazards.

The review acknowledges that in implementing the recommendation, 'there may be necessary consequential amendments to the definition of "reasonably practicable" in s 18 of the WHS Act with the effect that the definition would apply to a risk management process.'

The drafting of such amendments will require detailed consideration. It will be necessary to consider safeguards to avoid unintended consequences of:

- Imposing an unqualified requirement to eliminate or minimise all risks with the application of the hierarchy of controls
- Not recognising the need to prioritise the elimination or minimisation of risks to health and safety.

While some of the substantive duties set out in the Model WHS Act incorporate the qualification, 'so far as is reasonably practicable,' the use of this qualification across all duties set out in the current Model WHS Act is inconsistent. The concept of 'reasonable practicability' should be applied universally in relation to all duties and obligations applicable to PCBUs under the Model WHS Act. Similarly, a suitable standard based on 'reasonableness' (whether positioned as a qualification or defence) should universally apply to all duties applicable to individual duty holders.

12 SAFE WORK METHOD STATEMENTS – RECOMMENDATION 29A AND 29B

Practical impact of the options set out in relation to safe Work Method Statements

Were a prescribed template to be developed it is likely it would require customisation for every industry in order to be effective. There is a risk that any such template would be overly prescriptive and hinder the ability of PCBUs to determine whether a SWMS is needed (other than when mandatory for high risk construction work) and what should be in it.

The detail of any proposed template will need to be understood in order to assess the impact that it may have. In particular, an assessment will be required of whether any proposed template is unduly prescriptive and potentially restrictive of innovation and flexibility in the way in which SWMS are completed.

Preferred option to address the problems identified in the 2018 Review finding

Should SWA proceed with the introduction of a SWMS template, MCA supports the suggestion in the Consultation RIS that businesses that have their own template or pro-forma SWMS in place be permitted to use their own SWMS documents, as long as they incorporate the requirements of the prescribed template.

13 RECOMMENDATIONS CONTAINED IN APPENDIX A LIKELY TO HAVE MORE THAN A MINOR IMPACT

MCA considers that the following recommendations from the 2018 Review are likely to have more than a minor impact:

- Recommendation 6: provide practical examples of how to consult with workers
- Recommendation 18: clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the Model WHS laws outside of their jurisdiction
- Recommendation 19: enable cross-border information sharing between regulators
- Recommendation 20: review incident notification provisions
- Recommendation 21: review national compliance and enforcement policy
- Recommendation 25: consistent approach to sentencing.

Recommendation 6

The 2018 Review identifies workplaces that may be included as examples in the proposed Code. This includes workplaces with fly-in-fly-out workers and workers with English as their second language.

The detail of the proposed Code will need to be understood and assessed. There is a risk that the inclusion of examples in a Code may reduce flexibility in the way in which consultation can and will occur. This is because the Code may be used in evidence as to what a duty holder knows or ought reasonably to have known about eliminating or minimising a risk to health and safety.

A reduction in flexibility may have operational impacts that require careful assessment. The removal of flexibility in the consultation arrangements is a particular concern for MCA's members. The risk of prescription is that innovation and development may be hindered.

In the event that examples are included in the Code there is the risk that these become mandatory (especially where compliance with the Code or an alternate process which provides an equal or higher standard of safety is mandatory as in Queensland).

The MCA is concerned that this may result in investigations and/or prosecutions for a failure to comply with the Code. Alternatively, it may result in debates on whether different consultation processes result in an equivalent or higher standard that provided for in the Code.

Recommendations 18 and 19

The proposed amendments will require careful consideration to identify if any amendments may inadvertently seek to circumvent protections that exist in other jurisdictions. The specific interaction between the different protections in the jurisdictions will require detail consideration, for example:

- The protection against self-incrimination of an individual under section 172 of the *Work Health and Safety 2012* (SA) (which differs from the Model WHS Act) in providing that a person is excused from providing information or documents on the ground that the information or document, may tend to incriminate that individual or expose that individual to a penalty
- The protection afforded a natural person under section 9(3) of the *Occupational Health and Safety Act 2004* (Vic) to refuse or fail to give any information if giving the information would tend to incriminate him or her.

Recommendation 20

The 2018 Review identified that the inclusion of a notification trigger for psychological injuries 'will require some further assessment and analysis to ensure that everyone is clear about what should and should be notified in this context.'

Any proposals to include a trigger for the notification of psychological injuries will require detailed consideration to assess the operational impact of any proposed notification. In particular, expert opinion might be required on whether it is appropriate to include circumstances that expose a person to a risk of psychological injury (as opposed to injury occurring) and, if so, how duty holders will be equipped to make this assessment to facilitate notification.

Recommendation 21

The detail of any proposed decision-making framework will require careful assessment. This assessment should seek to verify that any framework is balanced and allows for an appropriate consideration of a range of enforcement options (where these are appropriate in the circumstances). Appropriate guidance on the consideration of offers to enter into WHS undertakings should also be included.

Recommendation 25

The content of any proposed guidelines will require careful consideration.

The 2018 Review refers to the UK Sentencing Council Guidelines for Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences. These guidelines direct the Court to 'focus on the organisation's annual turnover or equivalent to reach a starting point for a fine.'

Consideration of similar proposals will require careful consideration as to whether such an approach is appropriate in the context of the Australian criminal legal system.

Determining how the guidelines interact with the discretion of judges who are best placed to assess the appropriateness of a penalty in the specific circumstances of a case will also be required.