REVIEW OF THE
MINES SAFETY AND INSPECTION
ACT 1994

by

COMMISSIONER S J KENNER

A Member of the Western Australian
Industrial Relations Commission
and
Chairman of the
Coal Industry Tribunal of Western Australia

March 2009
27 March 2009

The Hon Norman Moore B.A. DipEd JP MLC
Minister for Mines and Petroleum
4th Floor, London House
216 St Georges Terrace
PERTH WA 6000

Dear Minister

Review of the Mines Safety and Inspection Act 1994 (WA)

I am pleased to submit to you my Final Report for the above Review containing my recommendations.

In accordance with s 110(2) of the Act the Report is to be laid before each House of Parliament as soon as practicable after it is prepared.

Yours faithfully

[Signature]

COMMISSIONER S J KENNER
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Summary of Recommendations

INDUSTRY AND NATIONAL DEVELOPMENTS

Recommendation 1
That there be continued progress in relation to the implementation of harmonised standards in occupational health and safety in the mining industry through the principles and Strategies of the NMSF.

GENERAL DUTIES FRAMEWORK

Recommendation 2
That the general duties provisions in the MSI Act remain in their current form and that the alignment with the OSH Act general duties provisions is maintained.

Recommendation 3
That the General Duty of Care Guideline be reviewed and updated under the auspices of the MIAC, to incorporate commentary in relation the scope and application of the principles relevant to control exercised by duty holders in terms similar to the corresponding WorkSafe Guideline and having regard to recent Western Australian case law.

Recommendation 4
That s 102A of the MSI Act be repealed and re-enacted in Division 4 of Part 2 as a new s 15G entitled “Duty of visitors to comply with directions”.

Recommendation 5
That the MSI Act be amended to insert a new s 29A at the commencement of Part 3 Division 3 to the same effect as s 20A, but only as to s 15A, as modified to incorporate Recommendation 6.

Recommendation 6
That the existing ss 20A, 104(1a) and the proposed s 29A of the MSI Act make it clear that the reference to ss 15A, 15B and 15C, as the case may be, is only to the extent that the reference to “employer” and “employee” is for the limited purpose of those provisions.
Recommendation 7
That the MSI Act be amended in s 15C to incorporate the intent of ss15A(5) and 15B(4).

A RISK MANAGEMENT APPROACH FOR THE WESTERN AUSTRALIAN MINING INDUSTRY

Recommendation 8
That a risk management model of safety and health regulation be implemented in the Western Australian mining and minerals processing industry.

Recommendation 9
That implementation of a risk management model to safety and health regulation be implemented by a combination of amendments to the MSI Act and the enactment of new regulations. The form and content of those amendments and regulations should be consistent with Recommendations 10-13.

Recommendation 10
That a differential approach to safety regulation be adopted in the mining and minerals processing industry in Western Australia as set out in Recommendations 11-13.

Recommendation 11
That a safety case approach to regulation be available on an “opt-in” basis for those mining operations that wish to select this option voluntarily by new regulations or an amendment to the Regulations. On “opting in” and acceptance/approval by the Regulator the mine should be exempted from compliance with the Regulations by way of a general exemption and with the requirements specified in Recommendation 12.

Recommendation 12
That for all other mining operations, subject to Recommendation 13 below, the MSI Act be amended to incorporate a safety management system and principal/major hazard management plan approach using as a guide the CMSH Act (Qld) and Regulations and the CMHS Act (NSW) and Regulations consistent with Principle 16 of the NMSF Legislative Framework, incorporating a Trigger Action Response Plan (TARP). The focus should be on implementation and demonstration of adequacy.
Recommendation 13

That small open cut mines and quarries employing 10 employees or less be exempt from the requirement to prepare a safety management system/principal hazard management plan.

INTERACTION WITH OTHER LEGISLATION

Recommendation 14

That the provisions of the MSI Act presently in common with the OSH Act be repealed and the application of the OSH Act should extend to mines with such modifications as are necessary. The MSI Act should continue to apply as complimentary legislation, in addition to the OSH Act, containing mining specific provisions as is the case in the New South Wales mining industry.

Recommendation 15

That subject to Recommendation 14 s 6A of the MSI Act be amended to enable the MSI Act to operate in a workplace covered by the OSH Act to compliment the terms of the OSH Act.

Recommendation 16

That subject to Recommendation 17 below, par (b) of the definition of “mining operations” in s 4 of the MSI Act be repealed and there be inserted in lieu thereof words along the following lines:

“the constructing, erecting, maintaining, or demolishing of any excavation, dam, building, structure, plant, machinery, equipment or work that is on a mining tenement and is intended to be part of a mine.”

Recommendation 17

That the definition of “mining operations” in s 4 of the MSI Act be amended by deleting the current exclusions and inserting in lieu thereof words along the following lines:

“but does not include –
(p) the operation of steel making plants; or
(q) the operation of rolling mills; or
(r) the operation of facilities for the manufacture of goods from mining products; or
(s) the operation of residential facilities or recreational facilities and the ground used for the purpose where such facilities are not located on a mining tenement and directly associated with mining operations; or
(t) the operation of sand, gravel, limestone, or rock excavation carried on by or for any State agency or instrumentality or any local government for the use or disposition by any such agency, instrumentality or local government; or
(u) the operation of excavation activities on private land by and for the use of the owner of the land; or
(v) the construction and installation of surface railways; or
(w) air transport to and from a mine.”

Recommendation 18
That subject to the establishment of satisfactory occupational health and safety standards for rail operations:

(a) the MSI Act be amended to remove from its coverage the operation of privately owned railways by the repeal of par (e) in the definition of mining operations in s 4; and

(b) as a consequence, Part 15 of the Regulations be repealed.

ADMINISTRATION OF THE ACT

Recommendation 19
That there be an analysis of the Queensland Annual Report Review to consider the issues and recommendations that may be relevant to the reporting of information to the RSD and the use of that information in RSD publications and data systems for the benefit of the mining industry.

Recommendation 20
That in particular the RSD consider:

(a) the means by which trends, case studies and incidents may be reported to improve safety and health performance in the mining industry;

(b) the means by which individual mines may electronically access reported information as to their individual and aggregated industry data for their use in improving their safety and health performance; and

(c) the means by which information contained in safety reports and bulletins may be improved in terms of their frequency of publication and content.
Recommendation 21

That the MSI Act and Regulations be amended where relevant to specify time limits within which reporting obligations are to be met.

Recommendation 22

That the mining engineering discipline remain a core competency for the most senior level in the Inspectorate. That mining engineering Inspectorate expertise be supported by other specialist and generalist disciplines, more broadly based, as may be required.

Recommendation 23

That the Mines Inspectorate adopts the Public Sector Training Package for workplace inspection as part of its core competency for Inspector positions.

Recommendation 24

That the key and independent positions of State Mining Engineer and State Coal Mining Engineer be retained.

Recommendation 25

That the positions of State Mining Engineer and State Coal Mining Engineer be re-titled “Chief Mining Officer” or like title.

Recommendation 26

That the position of District Inspector be retained.

Recommendation 27

That the title of the position be changed to “District Mining Officer” or like title.

Recommendation 28

That the required qualifications and experience for a District Inspector be retained as being the holder of a FCCC.

Recommendation 29

That the qualifications for appointment of Special Inspectors in s 18(3) of the MSI Act be broadened to enable the State Mining Engineer to appoint a Special Inspector “for such purposes as may be directed by the State Mining Engineer in the instrument of appointment”.
Recommendation 30

That the position of Special Inspector be re-titled “Special Mining Officer” or “Mining Officer” or like title, consistent with Recommendations 25 and 27 above.

Recommendation 31

That the Mines Inspectorate develop a dedicated investigations capacity comprising appropriately skilled and experienced personnel to lead investigative activity and to provide an internal resource to the Inspectorate generally.

Recommendation 32

That the position of Special Inspector (or retitled position) should include, but not be limited to, the following existing and additional expertise:

(a) Geotechnical engineering;
(b) Mechanical engineering;
(c) Electrical engineering;
(d) Structural engineering;
(e) Chemical and Process engineering and metallurgy;
(f) Noise and vibration specialists;
(g) Chemistry;
(h) Radiation;
(i) Occupational health and safety generalists;
(j) Occupational hygienists;
(k) Ergonomists;
(l) Organisational/human behaviourists; and
(m) Investigators with investigative and forensic skills and experience including but not limited to:
   (i) leading investigations and investigation teams;
   (ii) securing accident/incident sites;
   (iii) interviewing skills and witness statement preparation; and
   (iv) the preparation, in conjunction with other Inspectorate staff, of reports for coronial inquests and prosecution briefs to the State Solicitor’s Office.

Recommendation 33

That the position of Employee’s Inspector be retained.

Recommendation 34

The position of Employee’s Inspector be an appointed position and the district election provisions of the MSI Act and the Regulations should be repealed. The qualifications for appointment should remain the same.
Recommendation 35

That the responsibilities of an Employee’s Inspector be re-focussed to provide in particular, further support and assistance to health and safety representatives and committees in the performance of their role in the workplace. In particular emphasis should be placed on assistance in relation to the development of risk management principles and procedures.

Recommendation 36

That the powers of an Employee’s Inspector under the MSI Act be the same as those exercisable by all Inspectors and that subject to Recommendations 33-35, s 21(2) of the MSI Act be repealed.

Recommendation 37

That the position of Employee’s Inspector be re-titled consistent with Recommendations 25, 27 and 30, to “Employee’s Mining Officer” or like title.

Recommendation 38

That the position of Assistant Inspector be abolished and that s 20 of the MSI Act be repealed with any necessary consequential amendments.

Recommendation 39

That the Mines Inspectorate maintain an internal legal capacity to provide general legal advice and assistance to the State Mining Engineer and other Mines Inspectorate staff. This capacity should be expanded to provide advice and assistance in relation to investigations into accidents and incidents and in the provision of any necessary assistance in relation to prosecution action by the State Solicitor’s Office.

Recommendation 40

That there is a substantial increase in the resourcing of the RSD to ensure that the Mines Inspectorate is able to meet the demands placed upon it by the mining industry.

Recommendation 41

That the ratios of Mines Inspectorate staff to those persons employed in the mining industry, is placed on a more sustainable footing in comparison to other mining jurisdictions and that this is kept under review.
Recommendation 42

That in conjunction with Recommendations 40 and 41, there is a review of remuneration levels and conditions of appointment within the Mines Inspectorate to ensure that as far as possible, there is a closer correlation between salaries and conditions of appointment offered, to those prevailing in the mining industry.

Recommendation 43

That the Public Sector Management Act 1994 (WA) be amended to enable the appointment of persons on fixed term contracts of employment in similar terms to s 122 of the Public Service Act 2008 (Qld).

Recommendation 44

That the MSI Act be amended by inserting a new s 22 prescribing the functions of the Mines Inspectorate in similar terms to that contained in s 125 of the MQSH Act (Qld).

Recommendation 45

That the Mines Inspectorate continue to use the Risk Management Index along with other indicators, such as prior safety performance history, responsiveness to inspectorial activity and other relevant considerations, in its inspectorial approach.

Recommendation 46

That the Mines Inspectorate, subject to appropriate resourcing, adopt a team based approach to inspection and focus on broad compliance reviews in conjunction with the suggested reorientation set out above.

Recommendation 47

That the Mines Inspectorate personnel undergo training and development in relation to:

(a) risk management;
(b) workplace inspection methodology with a focus on “whole of mine” reviews and OHS system audits and reviews;
(c) the Mines Inspectorate Enforcement Policy and the DPP guidelines on prosecution (as may be amended); and
(d) communications and leadership skills, report writing and other administrative skills.
Recommendation 48
That there be developed key performance indicators and individual training and development plans for personnel in the Mines Inspectorate.

TRIPARTITE POLICY DEVELOPMENT

Recommendation 49
That the MIAC:
(a) prepare a strategic plan as to its vision for safety and health in the mining industry in Western Australia;
(b) the plan should have a five year timeframe and be kept under review on an annual basis; and
(c) reporting against achievements should be incorporated into the COSH Annual Report.

MANAGEMENT OF MINES

Recommendation 50
That the current constitution of the Board for the various certificates of competency be confirmed as appropriate.

Recommendation 51
That in the short to medium term the Board mechanism be retained for the purposes of the grant of the existing certificates of competency, with a view to the ultimate adoption of a competency based system, administered by a professional mining industry body or tertiary institution.

Recommendation 52
That such a transition as in Recommendation 51 should be progressed in accordance with the NMSF. In particular that relating to the development of nationwide, industry-based assessments of competency, consistent with the objectives of Strategy 2: Competency Support.

Recommendation 53
That in the event of the ultimate outsourcing of the functions of the Board the State retain a role in competency assessment, including the setting of standards and the issuance of certificates if retained.
<table>
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<th>Recommendation 54</th>
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<tr>
<td>That examinations set by and meetings of the Board be more frequent than at present. The revised frequency of examinations and meetings of the Board should be as determined by the Board in light of this Recommendation.</td>
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<th>Recommendation 55</th>
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<td>That the Board have additional functions to:</td>
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<td>(a) Establish, keep under review and adjust as necessary, the required competencies in the Regulations for the various positions for which certificates of competency are presently required;</td>
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<td>(b) Ensure that as far as possible the competencies for the existing certificates of competency are consistent with the competency requirements for like positions in other States; and</td>
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<td>(c) Inquire into and deal with any matter referred to it by the responsible Minister.</td>
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<th>Recommendation 56</th>
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<td>That for the purposes of the performance of its functions under the MSI Act or Regulations the Board be empowered to engage consultants, appoint committees or engage other assistance as it may require.</td>
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<th>Recommendation 57</th>
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<td>That the Board be required to provide to the responsible Minister an annual report which is to be tabled in both Houses of Parliament.</td>
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<th>Recommendation 58</th>
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<td>That save for Winder Drivers, the existing educational requirements prescribed in the Regulations for the various certificates of competency be confirmed as appropriate.</td>
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<th>Recommendation 59</th>
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<td>That consistent with Recommendations 55 and 58 the Board and the MSB keep the existing educational requirements for the various certificates of competency under review.</td>
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Recommendation 60

That subject to Recommendations 62 and 63, consistent with the powers of similar bodies in other mining jurisdictions, the Board be given a broad discretion to waive or vary the practical experience requirements of the FCCC as long as the candidate has at least five years practical experience.

Recommendation 61

That overall the number of years of practical experience requirements for the various certificates of competency under the Regulations be confirmed as appropriate.

Recommendation 62

That for a FCCC, the practical experience component be varied to link it with graduate experience guidelines over a period of 5 years of practical experience. This should be based on the use of suitably modified graduate professional training programmes, such as that prepared by the AusIMM, for example.

Recommendation 63

That commensurate practical experience programs be developed for Quarry Manager’s and Underground Supervisor’s certificates of competency consistent with Recommendation 62.

Recommendation 64

That if Recommendations 62 and 63 are not adopted, in the case of the FCCC and the Quarry Manager’s certificate of competency, there be a practical experience requirement of at least 6 months supervisory experience as a minimum.

Recommendation 65

That in principle, the certificate of competency requirement should be extended to minerals processing. This should include an appropriate educational qualification and practical experience profile for such a position, including provision for a competency based option.

Recommendation 66

That the existing practices for the conduct of examinations for certificates of competency be generally confirmed as appropriate.
Recommendation 67
That an oral examination component be introduced as a requirement for all certificates of competency except for Winder Driver’s Certificates.

Recommendation 68
That the concept of “Applicable Training” or a form of CPD presently conducted by a mining industry professional body be adopted as a part of ongoing competency requirements for the holders of certificates of competency in this State.

Recommendation 69
That the requirement referred to in Recommendation 68 be introduced by appropriate amendment to the Regulations.

Recommendation 70
That if a CPD or like scheme is introduced into the certificate of competency requirements and it is conducted by a mining industry professional body, that a representative of that body administering the CPD scheme, be considered for appointment as a member of the Board, to assist in the oversight and maintenance of standards. Provision would need to be made in the Regulations for this.

Recommendation 71
That the requirements for any ongoing competency assessment that may be recommended via a CPD scheme or the like, for the industry, also apply to the senior Inspectorate positions.

Recommendation 72
That subdivision C of Division 3 of Part 2 of the Regulations be amended to require all applicants for mine management certificates of competency, for both underground and open cut operations, to have completed the risk management competency course “MNMNSM617A Establish the Risk Management System” or an alternative course, considered equivalent by the Board. This should also extend to those seeking mutual recognition in Western Australia.

Recommendation 73
That as a condition of appointment of a Registered Manager the appointee should have substantial demonstrated experience in the mining industry in some capacity eg engineering, science or other technical field or construction activity associated with the development or operation of a mine.
Recommendation 74

That as a condition of appointment of a Registered Manager the appointee should have passed the Mining Law examination set by the Board and undertaken a recognised course in risk management such as the “G3” or an equivalent course.

Recommendation 75

That the obligation on a Principal Employer to appoint and the core responsibility of appointed positions be retained in the MSI Act. All remaining provisions in Part 4 of the MSI Act such as qualifications for appointment and conditions of appointment should be transferred to the Regulations.

Recommendation 76

That Part 3 Division 6 of the Regulations be amended to insert provisions as to the composition of the MSB in relation appointments in default of nominations; the term of appointment of members; vacation of office by members; and the appointment of deputy members, in the same terms as regs 2.12 to 2.15 of the Regulations applicable to the Board.

Recommendation 77

That the MSB introduce a requirement for an oral examination or at least the interviewing of candidates for Authorised Mine Surveyor’s Certificates.

Recommendation 78

That Recommendations 51 to 53 and 55 to 57 above in relation to the Board, apply with such modifications as may be necessary, to the MSB.

Recommendation 79

That regs 3.50-3.53 be reviewed and updated where necessary to ensure consistency with the Mines Survey Code of Practice 2005 and sound mines survey practice.
CONSULTATION AND WORKPLACE REPRESENTATION

Recommendation 80
That Recommendations 10, 11 and 12 of the Hooker Review be endorsed and s 3 of the MSI Act be amended accordingly.

Recommendation 81
That the MSI Act be amended in relation to consultation obligations to give effect in particular to clause 2 of the NMSF Consultation Framework specifying the circumstances when consultation is required.

Recommendation 82
That reg 2.6 of the Regulations be amended to require safety and health representatives to receive their introductory training course as soon as possible but no later than six months after their appointment.

Recommendation 83
That the ability of safety and health representatives to obtain recognition for the attendance at introductory training courses and time spent as safety and health representatives towards higher level qualifications be considered in the context of the AQTF.

Recommendation 84
That the MSI Act be amended in Part 5 Division 3 in the same terms as cls 44 and 45 of the former Industrial and Related Legislation Amendment Bill 2007, if re-introduced into Parliament and as ultimately enacted.

Recommendation 85
That the Regulations be amended to enable representatives to attend refresher courses in health and safety in a second term of office without cost to the representatives.

ISSUE RESOLUTION

Recommendation 86
That s 74(2) of the MSI Act be amended to delete reference to “any party to the dispute” and in lieu thereof, there be inserted the words “the employee or the employer as the case may be.”
Recommendation 87

That in relation to all references to “person”, where the context clearly discloses it is meaning “employee” in ss 72 to 74A of the MSI Act, the MSI Act be amended accordingly.

Recommendation 88

That the jurisdiction and powers of the Tribunal under s 102 of the MSI Act be confirmed as appropriate.

ENFORCEMENT

Recommendation 89

That s 21(4) of the MSI Act be amended to:
(a) Delete the reference to “responsible person” and insert in lieu thereof “quarry manager, underground manager, exploration manager, foreman or supervisor”; and
(b) Require an Inspector to take all reasonable steps to notify the persons in s 21(4), as soon as practicable after entering the mine.

Recommendation 90

That the definition of “practicable” in s 4 of the MSI Act be amended to make it clear that the defined term only extends to those parts of the statute that impose duties of the kind to which it applies.

Recommendation 91

That subject to Recommendation 89 the existing provisions of Part 3 of the MSI Act in ss 21(4), (5); 23 and 25 be confirmed as appropriate.

Recommendation 92

That Mines Inspectors make contact with safety and health representatives on site visits and undertake inspections in the company of a relevant safety and health representative unless it cannot be done.

Recommendation 93

That s 21(1)(i) of the MSI Act be amended to empower an Inspector to tape record an interview conducted with persons to whom the section refers.
Recommendation 94
That for the purposes of Recommendation 93 above that Mines Inspectors be prescribed as law enforcement officers under reg 4 of the Surveillance Devices Regulations 1999.

Recommendation 95
That the MSI Act be amended to make it clear that the privilege against self incrimination does not extend to corporations. That s 29(2) and (3) of the MSI Act be re-drafted consistent with the provisions of s 47(2), (3) and (4) of the OSH Act.

Recommendation 96
That the obligation on a person under the MSI Act to answer a question or to produce a document should be qualified by the existence of a claim of legal professional privilege.

Recommendation 97
That the MSI Act be amended in relation to the powers of Inspectors to take a sample with the amended provision modelled on s 46 of the OSH Act.

Recommendation 98
That the MSI Act be amended in Part 3 Division 2 to enable an Inspector’s powers to be exercised outside of Western Australia.

Recommendation 99
That the Mines Inspectorate review compliance records and follow up duty holders who fail to establish compliance with Improvement Notices with a view to any necessary and appropriate enforcement action as may be required.

Recommendation 100
That all applications to the State Mining Engineer and the Tribunal to review Improvement Notices and Prohibition Notices under the MSI Act be published in the DMP Annual Report.

Recommendation 101
That the MSI Act be amended to enable the State Mining Engineer and the Tribunal as the case may be, on a referral to review a Notice, to dispose of the referral without the need to inquire into the circumstances of the Notice, on the parties reaching agreement as to the matters in dispute.
Recommendation 102

That the MSI Act and Regulations be amended to introduce an infringement notice scheme broadly consistent with the ALRC recommendations at annexure 11. Guidelines should be developed to assist Mines Inspectors in relation to the appropriate use of infringement notices. The guidelines should provide transparency as to the scheme and be incorporated into the Mines Inspectorate’s enforcement policy.

Recommendation 103

That the MSI Act be amended to enable the State Mining Engineer to accept an enforceable undertaking from a duty holder in relation to an alleged contravention of the MSI Act. An undertaking so given and not complied with should be enforceable in the Safety and Health Magistrates Court. Guidelines should be developed to assist Mines Inspectors in relation to the appropriate use of enforceable undertakings. Such guidelines should be incorporated into the Mines Inspectorate’s enforcement policy.

Recommendation 104

That there be developed and promulgated amongst Mines Inspectorate staff an investigations and prosecution manual. The manual should set out an appropriate methodology to follow and provide guidance to Inspectors on the use of the “Enforcement Pyramid” and in particular progression up the enforcement scale, in appropriate circumstances.

Recommendation 105

That the statutory authority to commence a prosecution under the MSI Act remain vested in the State.

Recommendation 106

That the MSI Act be amended to enable a person to request that the Mines Inspectorate investigate and prosecute a contravention of the MSI Act in terms similar to s 131 of the OSH Act (Vic).
NMSF SUPPLIMENTARY MATTERS

Recommendation 107

(a) That s 3 of the MSI Act be amended to incorporate reference to the principles of continuous improvement, safety and health management systems and a preventative focus; and

(b) That s 3 of the MSI Act be divided into two parts. The first setting out the principal objects of the MSI Act. The second setting out the means by which those objects are to be achieved. Part 1 Division 3 of the Queensland coal and metalliferous legislation could be used as a guide in this respect.

Recommendation 108

That Part 4 Division 3 of the Regulations be amended, particularly in reg 4.30 – Preparation of emergency plan, to incorporate a requirement for liaison with and use of local or state emergency services as may be required.

MISCELLANEOUS MATTERS

Recommendation 109

That the Regulations be amended to enable classified plant that is subject to a current classified plant registration under a law of the Commonwealth, a State or a Territory, by a competent authority with responsibility for plant safety, to be used at a mine without any further registration requirement.

Recommendation 110

That Recommendation 109 be subject to a condition that before plant is used, proof of registration of such plant by another authority is provided and included in the Classified Plant Record Book at a mine.

Recommendation 111

That subject to Recommendation 18 any appeal from a decision of a Mine Manager to suspend or cancel a certificate under reg 15.9 of the Regulations be to the Tribunal in terms similar to appeals under ss 52 and 86 of the MSI Act.
Recommendation 112

That s 104(1) of the MSI Act be amended to enable regulations to be made to enable the charging for, recovery of and waiver of the payment of fees.

Recommendation 113

That the MSI Act be amended to enable the Mines Inspectorate to share information with a corresponding authority under a law of the Commonwealth, another State or Territory, responsible for administering occupational safety and health and other relevant legislation.

Recommendation 114

That the MSI Act be amended to provide for claims of bullying to be referred to the Tribunal in the same terms as proposed amendments to the OSH Act as provided in Part 5 of the former Industrial and Related Legislation Amendment Bill 2007 (WA), if re-introduced into Parliament and as ultimately enacted.

Recommendation 115

That there be a comprehensive review of the Regulations under the auspices of the MIAC undertaken by a tri-partite working party(s).

Recommendation 116

That the MSI Act be amended to make provision for the responsible Minister to establish a Board of Inquiry to inquire into a serious accident, high potential incident or other matter referred to it by the Minister. Such a provision could be based on the relevant provisions of the Queensland and New South Wales coal and metalliferous mining legislation.
Recommendation 117

That s 45 of the MSI Act in relation to the provision of an engineering report to the State Mining Engineer be amended in the terms along the following lines:

“(1) If at any time the State mining engineer so requires by notice in writing, the principal employer or a manager of a mine must, procure and provide to the State mining engineer at the principal employer’s expense an independent study…

(2) The State mining engineer must state in any notice referred to in subsection (1) the reasons why the independent study is required and the time within which the independent study is to be provided to the State mining engineer.

(3) The State mining engineer may extend the time within which an engineering report is to be provided to him, upon request by the principal employer or the manager of the mine…”

Recommendation 118

That the title of the MSI Act be amended such that it be known as the “Mines Safety and Health Act 1994”.

Recommendation 119

That the definition of “mining operations” in s 4 of the MSI Act be amended by the insertion of a new par (ha) along the following lines:

“the operation of any control room or like facility used for the purposes of the control or monitoring of mining operations remote from the mine site but an integral part of the mining operation”.
CHAPTER 1 – INTRODUCTORY MATTERS

Introduction

1. This is a statutory review of the Mines Safety and Inspection Act 1994 (“the MSI Act”) (“the Review”) pursuant to s 110 of the statute. Whilst a statutory review of the MSI Act is not required until after 1 December 2009, it was determined by the then responsible Minister, the Hon Michelle Roberts MLA, that it was appropriate that the Review be brought forward. The Review was announced on 5 October 2007. As at the date of this Report, the Minister responsible for the MSI Act is the Minister for Mines and Petroleum the Hon Norman Moore MLC.

2. The Terms of Reference for the Review are partly reflected in s 110 of the MSI Act which provides as follows:

“(1) The Minister shall carry out a review of the operation and effectiveness of this Act as soon as is practicable after 1 December 2009 and every fifth anniversary of that day, and in the course of such a review the Minister shall consider and have regard to —
(a) the attainment of the objects of this Act; and
(b) the effectiveness of the operations of the department, the Board of Examiners, and the Mines Survey Board; and
(c) the need for the continuation of the functions of the Boards referred to in paragraph (b); and
(d) such other matters as appear to be relevant to the operation and effectiveness of this Act.

(2) The Minister shall prepare a report based on such a review and shall, as soon as practicable after the report is prepared, cause it to be laid before each House of Parliament.”

3. In undertaking the Review, my Instrument of Appointment from the Minister also requires me to take into consideration:

“(a) Areas in the construction of the legislation that could be improved, such as application to rail safety, mine sites during construction and interaction with other occupational health and safety legislation;

(b) The goals and strategies of the National Mines Safety Framework (NMSF) and the draft model legislation;

(c) The recent Hicks Feasibility Study of Resources Safety in Western Australia that recommended the introduction of a safety case
regime into the mining industry, and specifically what amendment to the MSI Act (if any) is required to allow the development of safety case regulations;

(d) The outstanding recommendations from the Laing Report in respect to the review of Parts 3 and 4 of the Act; and

(e) The recent review of the Occupational Safety and Health Act 1984 (“the OSH Act”) by Richard Hooker to ensure alignment with the OSH Act is maintained.

4. A full copy of the Terms of Reference is attached at annexure 1.

Conduct of the Review

5. Following the announcement of the Review, advertisements were placed in “The West Australian” newspaper on 22 October 2007 and in regional newspapers calling for submissions from interested persons. A further notice was published in the “West Australian” on 22 December 2007 and in regional newspapers in early January 2008 extending the time for written submissions. Whilst the nominal closing date for written submissions was 31 January 2008, I received and granted a number of extensions of time to both individuals and organisations in making submissions to the Review. I thank all those who made submissions for their efforts and, whilst not mentioning all of them in this Report, I have taken all of their views into account.

6. A total of 23 submissions were received from individuals and organisations. I have interviewed many of those making submissions. A list of the written submissions appears at schedule 1. Additionally, I have visited a number of mine sites throughout the Pilbara, the Goldfields and the Southwest of the State and spoken with a broad range of mining personnel including mine management, supervisors, safety and health representatives, and others. Those face to face meetings and discussions have been invaluable in getting a sense of the issues “on the ground” at operating mines in this State. The list of those I have interviewed appears at schedule 2 and the mine sites visited at schedule 3.

7. I have been ably assisted by Ms Melina Newnan, the Principal Legal Policy Officer of the Resources Safety Division, Department of Mines and Petroleum, who has acted as the Executive Officer for the Review. I have been in constant contact with Mr Martin Knee, the State Mining Engineer, throughout the course of the Review, whose font of knowledge and experience has been invaluable. I have also had the benefit of research undertaken by my former Associate Ms Nandini Pinto. I am very thankful to all of them for their assistance.

8. At the outset of the Review, I formed an Advisory Group of senior and experienced mining industry professionals including Dr Peter Lilly, Director, Minerals Down Under National Research Flagship CSIRO and former Director WA School of Mines (“the WASM”), Mr John Dunlop, Principal
John Dunlop and Associates, Mr Mike Spreadborough, General Manager Coastal Operations, Rio Tinto, and Mr Richard Flanagan, Richard Flanagan Mining Consultancy, to advise and discuss with me matters arising under my Terms of Reference in relation to Parts 3 and 4 of the MSI Act. Their knowledge and experience has been of great assistance to me in shaping my thoughts and recommendations in relation to those matters and I am very grateful to them.

9. In terms of the preparation of this Report, the bulk of the preparation and writing took place over the period March to July 2008. There was a hiatus in the Review on the calling of the State general election in August 2008. Following the election of the Liberal-National Government a draft of my Report was provided to the Government in early September 2008. Since that time there has been a re-allocation of Ministerial responsibility for the MSI Act from the Minister for Commerce to the Minister for Mines and Petroleum. The content of the draft Report has now been revised to update statistical and other material as far as possible.

10. At all times, my guiding moral compass in the conduct of this Review, and consideration of any legislative amendment to the MSI Act or Regulations that may be recommended flowing from it, has been the need for any changes to facilitate the achievement of the principal object in s 3(1)(a) “to promote, and secure the safety and health of persons engaged in mining operations”.

**Brief Legislative History of the Act**

11. The MSI Act itself has a brief legislative history, emanating from its predecessors, the Coal Mines Regulation Act 1946 and the Mines Regulation Act 1946.

**Coal Mines**

12. Western Australian legislation dealing with health and safety mines, including coal mines, was first introduced in 1895 in the Mines Regulation Act 1895. However, legislation specifically addressing coal mines was first introduced in 1902, with the commencement of the Coal Mines Regulation Act 1902. On the introduction of the Bill, the Hon. F T Crowder, the then Parliamentary member for the East, explained that the legislation was a replica of Acts which had been in effect in other States and said:

“The real object of introducing the Bill is that it has been discovered that the Mines Regulation Act of 1895 is not sufficient to meet the circumstances of a coal mine ... The dangers connected with coal mining are of a peculiar character, and they are dealt with by specific provisions solely peculiar to the industry.”

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1 *Western Australian Parliamentary Debates*, Vol. 20, 16 Oct 1901 – 19 Feb 1902
13. During Parliamentary debates in 1926, the Coal Mines Regulation Act 1902 was considered “a well-drafted piece of legislation because it remained practically unchanged for 24 years, despite three minor amendments in 1915.” There was considerable discussion over the 1926 amendments, mainly in relation to the number of hours worked underground. Amendments to the legislation reducing the number of hours coal miners worked underground from 8 hours to 7 hours were finally reflected in 1946, when the Act was consolidated and formed the basis for the Coal Mines Regulation Act 1946.

14. The Coal Mines Regulation Act 1946 underwent minor amendments in 1951, 1962 and 1965, all of which involved nominal changes to the principal Act. Significant amendments were made in 1976, dealing with the practical experience qualifications for a certificate of competency for an open cut mine manager’s certificate. The debate centred on the Coal Miners’ Union’s disagreement in allowing an open cut mine manager to obtain an “open cut certificate of competency” with any open cut mining experience, not merely in the coal mines. The union argued that coal mining is different to other types of mining and therefore an appointed (open cut) mine manager must have coal mining experience in order to be suitably qualified for the position. However, the union’s opposition was unsupported because in the Coal Mines Regulation Act 1946 any open-cut “mine” is defined as a coal mine. Consequently, if a person was sufficiently experienced in general open cut mining, it was unnecessary for them to have had specific experience in an open cut coal mine. Amendments were also made in 1985, when certain discriminatory provisions in the Coal Mines Regulation Act 1946 against female workers within the mining industry were removed.

15. The Coal Mines Regulation Act 1946 was repealed in 1994 by the MSI Act. The amalgamation of coal mines safety into general mine safety followed the Kelly Inquiry, which recommended that one statute encompassing the mining industry would contribute to uniformity and assist in the implementation of a common approach to the regulation of health and safety legislation.

Metalliferous Mines

16. The Mines Regulation Act 1895 was assented to on 12 October 1895. It was developed similarly to the then Queensland legislation, and focused on covering miners working underground in the goldfields, an area of extensive development at the time.

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2 Western Australian Parliamentary Debates, Vol. 74, 29 Jul 1926 – 28 Oct 1926
3 However, the restriction on the number of hours worked underground was amended again in 1990.
6 Western Australian Parliamentary Debates, Vol 283, 19 Feb 1985 – 27 March 1985, p.711-712. The discriminatory provisions were removed and replaced with an amendment to allow females to work underground.
7 The Legislative History of the Coal Mines Regulation Act 1946, K G Brown, April 1999, p.5
8 Enquiry into Occupational Health and Safety in the Mining Industry in Western Australia 1991 E M Kelly, p. 75
17. In 1906, the Mines Regulation Act 1895, the 1899 and 1904 amendments, and the Sunday Labour in Mines Act 1899 were amalgamated, consolidating the mine safety legislation to form the Mines Regulation Act 1906. The Mines Regulation Act 1906 was consolidated again in 1946 to incorporate minor amendments that occurred in 1915, 1938 and 1945. Minor amendments were again made during the 1950s and 1960s, and in 1968 there was significant debate over the hours miners worked on weekends.

18. The Mines Regulation Act 1946 was substantially revised in 1968. In particular, the amendments at this time inserted provisions for quarrying and open cut mines, reflecting the rapid expansion of open cut operations in the Pilbara region of the State. This included the requirement for an appointed Quarry Manager for mines in excess of 25 employees to possess an appropriate certificate of competency.

19. Further changes were made in 1974. These incorporated provisions for mining other than underground gold mining and reflected new mining methods developed from the use of modern machinery, raising the Mines Regulation Act 1946 to “modern standards”. The revisions were supported by the Mines Regulation Act Regulations 1976 which were published in 1976, bringing the regulations into conformity with other States.

20. In 1990, Parts 3 and 4 of the Occupational Health, Safety and Welfare Act 1984 as it then was, were introduced, marking significant amendments to the Mines Regulation Act 1946. These amendments were the outcome of recommendations made in the Kelly Inquiry, and covered general duties of care, and health and safety representatives and committees. Mr Carr, the then Minister for Mines, stated that the implementation of these amendments was important in improving safety performance and it:

"... effectively brings mines safety legislation provisions into line with those of the Occupational Health, Safety and Welfare Act which is fundamental to Government policy."  

21. The issue of continuous mining in underground mines was a contentious amendment to the Mines Regulation Act 1946, introduced in the Legislative Assembly in November 1991. The debate focused on attempts to introduce continuous mining at Western Mining’s Kambalda nickel and goldmines, and caused extensive public debate throughout 1992. Due to changes made to the proposed legislation by the then Government, the Legislative Council opposed the amendments. Consequently, the Bill was not passed.

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10 Mines Regulation Amendment Act 1968
11 As was noted by Mr May, the then Member for Clontarf. Western Australian Parliamentary Debates, Vol. 206, 12 Nov 1974, p.3100
13 Western Australian Parliamentary Debates, 5, 6 and 7 May 1992, pp. 1779-1790.
22. As noted below, substantial amendments were made in 1990 to the Mines Regulation Act Regulations 1976, to replicate amendments in the Act, most notably the incorporation of the general duty provisions and employee identification of health and safety issues.\textsuperscript{14} The Mines Regulation Amendment Act 1993 was assented to on 16 December 1993. This Act deleted certain provisions of the existing Mines Regulation Act 1946 and amended it to grant power to the Governor to make regulations dealing with various issues.\textsuperscript{15}

**MSI Act**

23. The MSI Act was introduced and passed by the Parliament in 1994. It brought the administration of mine safety in all types of mines under a single administrative body and piece of legislation, repealing the Coal Mines Regulation Act 1946 and the Mines Regulation Act 1946.

24. The MSI Act received the Royal Assent on 7 November 1994 and commenced in December 1995. This legislation was enacted following extensive consultation within the community. The legislation received broad bi-partisan support in the Parliament. It returned health and safety regulation of the mining industry in this State to the position that existed in the late 19th century, when mining operations were conducted under a single piece of legislation, given that separate legislation was enacted for the coal and metalliferous mining sectors of the industry in 1902 and 1906 respectively\textsuperscript{16}. On the introduction of the Bill leading to the Act into the Legislative Assembly in September 1994 the then Minister for Resources Development said:

"The Bill consolidates the legislation, again almost 100 years after the original enactment of mine safety legislation. This Bill will provide the mining industry with a clear, logical, comprehensive and well structured framework for legislation for occupational health and safety which will enable it to build on the sustained improvement in safety performance which it has demonstrated to-date. Improved standards in occupational health and safety performance is fundamental to government policy."

25. As noted above, the MSI Act incorporated the general duties provisions which had previously been introduced into the Mines Regulation Act 1946 by amendment, which were based on the general duties provisions introduced into the OSH Act as it then was, in 1987. Similarly, the then new Parts 5 and 6, dealing with health and safety representatives and committees, and the resolution of health and safety issues in the workplace, were incorporated into the MSI Act from the amended Mines Regulation Act 1946. The effect of the enactment of the MSI Act and the repeal of the Mines Regulation Act 1946 and the Coal Mines Regulation Act 1946 was to introduce the general duties provisions and those applicable to health and safety representation and dispute resolution in the workplace, into the coal mining industry for the first time.

\textsuperscript{14} Mines Regulation Amendment Act, No. 85 of 1990, s.33
\textsuperscript{15} Mines Regulation Amendment Act 1993, s. 8(1)
\textsuperscript{16} Hansard Legislative Assembly 14 September 1994 at 4295
26. The MSI Act was further amended by the Mines Safety and Inspection Amendment Act 2002 which came into effect in August 2002. This amendment changed the definitions of “manager” to make it clear that the term only referred to the Registered Mine Manager of the mine and to clarify the obligations imposed upon this position. Additionally, and importantly, s 43A was inserted providing for the duties and responsibilities of the Underground Manager and Quarry Manager positions. Whilst the amendments were straightforward, they were significant, in particular, in imposing specific duties upon Underground and Quarry Managers and penalties for their breach.17

27. The MSI Act was substantially amended in 2004 following recommendations from the Laing Review, mentioned below. Those amendments came into effect in February and April 2005.

2008 Amendments

28. The Mines Safety and Inspection Amendment Act 2008 recently amended the MSI Act. The Amending Act came into operation on 18 April 2008. The stated intention of the Act is to strengthen and improve the existing MSI Act, and correct errors and clarify provisions relating to amendments which came into force on 4 April 2005 following recommendations from the Laing Review. The key areas of change include:

- the Occupational Safety and Health Tribunal – conferring additional jurisdiction concerning reviewable decisions of the State Mining Engineer;
- correcting typographical errors;
- safety and health representatives – protection from civil liability for the issuance of Provisional Improvement Notices;
- review of notices – procedural requirements for reviews;
- penalties in line with general penalty provisions – removal of former general penalty provisions and alignment with the 2005 provisions;
- alternative labour hire arrangements – to ensure the four level penalty regime applies for breaches; and
- clarification of the definition of Exploration Manager – to insert provision for an Exploration Manager and to ensure that exploration operations are fully covered by the MSI Act.18

The Current Legislative Scheme

29. The long title to the MSI Act provides that it is:

17 Hansard Legislative Assembly 24 October 2001 at 4782. See also Mines Safety and Inspection Amendment Act 2001 Explanatory Memorandum.
“An Act to consolidate and amend the law relating to the safety of mines and mining operations and the inspection and regulation of mines, mining operations and plant and substances supplied to and used at mines; to promote and improve the safety and health of persons at mines and for connected purposes.”

30. By s 3(1) the objects of the MSI Act are set out. Those objects are:

(a) to promote, and secure the safety and health of persons engaged in mining operations; and
(b) to assist employers and employees to identify and reduce hazards relating to mines, mining operations, work systems and plant at mines; and
(c) to protect employees against the risks associated with mines, mining operations, work systems at mines, and plant and hazardous substances at mines by eliminating those risks, or imposing effective controls in order to minimize them; and
(d) to foster and facilitate cooperation and consultation between employers and employees, and associations representing employers and employees, and to provide for the participation of those persons and associations in the formulation and implementation of safety and health standards and optimum working practices; and
(e) to provide procedures for employers and employees to contribute to the development and formulation of safety legislation for mines and mining operations and to consult regarding its administration.

31. Of significance, is the object in s 3(1)(a) “to promote, and secure the safety and health of persons engaged in mining operations.” Stripped of the notion of “practicability” in s 4 and the general duties provisions in Part 2 of the MSI Act, on one view, the object in s 3(1)(a) is expressed in absolute terms. No notion of reasonable practicality is imported into this provision. Similar observations were made in the Maxwell Review of the Victorian OHS legislation.19

32. By s 4, various definitions are set out, including important definitions as to “exploration operations”; “mine”; “mining operations”; and “workplace”. The definition of “mining operations” in s 4 is extremely wide. It contains a general, introductory meaning as follows:

“any method of working by which the earth or any rock structure, coal seam, stone, fluid, or mineral bearing substance is disturbed, removed, washed, sifted, crushed, leached, roasted, floated, distilled, evaporated, smelted, refined, sintered, pelletized, or dealt with for the purpose of obtaining any mineral or rock from it for commercial purposes or for subsequent use in industry, whether it has been previously disturbed or not, and includes — ”

19 C Maxwell QC Occupational Health and Safety Act Review March 2004 at 100-106
33. There follows a number of express inclusions within the definition such as, for example, exploration operations; construction work; the operation of private railways; transport of ore on other than public roads; crushing, screening, sorting stacking etc, amongst a number of other activities. They are followed by a number of express exclusions, prescribing a number of facilities such as steel making plants, rolling mills and others. The breadth of this definition has received judicial attention. It is a matter that I will return to later when dealing with the relationship between the MSI Act and other legislation.

34. By Part 2, the general duties relating to occupational safety and health are set out. This Part, in addition to prescribing the meaning of “gross negligence” in relation to certain offences under the MSI Act, provides for the general duties of employers, employees, self employed persons, corporations deemed to be employers by being party to certain contract arrangements, principal employers and managers, and manufacturers. The general duties are expressed in terms as set out in the OSH Act from which they have been derived, such that a duty holder is required:

“so far as is practicable, to provide and maintain at a mine a working environment in which that employer’s employees are not exposed to hazards and, in particular, but without limiting the generality of that general obligation, an employer must –”

35. To incorporate the gross negligence provisions, there are corresponding “breach” sections, attaching to the obligations of each duty holder, specifying penalties beyond the general MSI Act penalty, where the breach occurs in the defined circumstance of gross negligence. Provisions in relation to employer provided accommodation, and duties in relation thereto, are also specified.

36. By Part 3, the general administration provisions of the MSI Act are provided. This Part contains provisions dealing with the statutory appointments of the State Mining Engineer and State Coal Mining Engineer, along with District, Special and Employee’s Inspectors.

37. The terms of Division 2 of Part 3, sets out relevant provisions in relation to inspection by Mines Inspectors. Various powers of Inspectors are prescribed as are provisions for complaints to Inspectors and liaison with health and safety representatives. Surprisingly however, I note that there is nothing in Division 2, in contrast to other jurisdictions, setting out what the duties and functions of Mines Inspectors are. This is a matter that I return to in Chapter 8.

38. Division 3 deals with improvement notices and prohibition notices. New provisions introduced in 2004, enabling safety and health representatives to issue provisional improvement notices are also contained in Part 3.

39. Part 4 deals with the management of mines. This Part sets out the duties of employers and managers. Specific obligations on the Principal Employer.

Leighton Contractors Pty Ltd v Simon Luigi John Ridge WASC November 1998 per Miller J Lib No: 980650
being the person who may be the proprietor, lessee or occupier of the mine and who has the overall control and supervision of the mine and mining operations, are set out. Obligations on the Registered Manager are prescribed, who is responsible under the MSI Act on a daily basis for the control and supervision of the mine and mining operations. The Registered Manager also has statutory responsibility to make appointments on behalf of the Principal Employer to other management positions such as Alternate and Deputy Registered Managers, Certificated Underground Managers and their Alternates and Deputies and certificated Quarry Managers and their Alternates and Deputies. Importantly, in particular, the Registered Manager must, pursuant to s 33 of the MSI Act, so far as is practicable:

(a) manage and control the operation of the mine;
(b) ensure that those appointed to perform duties under the Act understand the nature and scope of those duties; and
(c) ensure that persons other than the Principal Employer and those acting on its behalf, perform all duties required by the Act.

40. This Part also deals with the requirements of certificates of competency for appointment to positions that are required under the MSI Act. This provides for the establishment of a Board of Examiners (“Board”) which is required to examine candidates and issue certificates of competency in accordance with the terms of the Regulations for prescribed positions. The Board also has powers to inquire into complaints against holders of a certificate of competency and it may impose disciplinary action. Such decisions may be appealed to the Safety and Health Tribunal (“the Tribunal”).

41. The terms of Part 5 make provision for the appointment and functions of safety and health representatives and committees. Safety and health representatives are required to be elected where an employee who works at a mine requests such an election. A process of consultation is required by the employer for the purposes of such an election which can be conducted either by the State Electoral Commissioner or an organisation registered under the Industrial Relations Act 1979. For the purposes of an election, an “election scheme” may be established which may include provision for the election of safety and health representatives across more than one mine site and which may include a contractor or an employee of a contractor, within such a scheme. The Part also makes provision for the disqualification of safety and health representatives on certain specified grounds, by the Tribunal.

42. Part 6 of the MSI Act deals with resolution of safety and health issues. This provides, not surprisingly, that where an issue arises in relation to occupational health and safety in relation to a mine, the employer and the employees, and any safety and health representative or committee involved, must attempt to resolve the issue in accordance with any procedure agreed between them. A default procedure exists in the Regulations. This simply provides that the parties meet.

43. In the event that parties cannot reach agreement to resolve an issue, and there exists a risk of imminent and serious injury to or imminent and serious harm to
the health of any person as a result, a District Inspector is to be notified who
must attend the mine and take whatever action is necessary. Nothing in the
MSI Act prevents an employee from refusing to undertake work where the
employee has reasonable grounds to believe that to continue working would
expose them to risk of imminent and serious injury or imminent or serious
harm to health. In such cases, the employee’s entitlements will continue, but
they may be reassigned other work in the interim.

44. Part 7 deals with specific duties relating to occupational safety and health.
This Part requires that the Principal Employer and every employer at a mine
maintain a system for the surveillance of the health of employees. Additionally, obligations are imposed on employers to record accidents and
occurrences by notice to the District Inspector and recording such events in an
accident log book. Other occurrences, that do not result in bodily injury to any
person or damage to property, but are of a prescribed kind such as extensive
earth movements or other significant events at a mine, must be reported to a
District Inspector and recorded in the mine record book. Furthermore,
potentially serious occurrences, which could have but did not, result in serious
injury or harm to health, must also be reported to a District Inspector.

45. The Mines Survey Board (“the MSB”) is also established by this Part and its
functions and powers are set out. Essentially the MSB is to examine
qualifications relevant to the grant of an Authorised Mine Surveyor’s
Certificate, to deal with complaints concerning holders of such certificates and
to advise the Minister on survey matters. Similar to the Board, the MSB has
powers to receive and inquire into complaints and impose disciplinary action
against holders of authorised mine survey certificates. Determinations of the
MSB in relation to such matters can be appealed to the Tribunal. No such
appeals have been brought to date. Importantly, this Part also provides for the
keeping and maintenance of the mine record books that are required to be
maintained.

46. Part 8 prescribes the responsible Minister’s safety and health powers. This
includes the approval of Codes of Practice considered by the Mining Industry
Advisory Committee (“the MIAC”). It is provided that Codes of Practice are
admissible in evidence in proceedings for an offence against the MSI Act and
the Regulations, however proof that a person complied with the MSI Act or
Regulations, other than by following a relevant Code of Practice, is a
satisfactory defence. Furthermore, no civil or criminal liability is imposed
upon a person by reason of failure to comply with a Code of Practice.

47. Part 9 sets out general provisions in relation to offences, penalties and legal
proceedings. These include the general penalty provisions, provisions in
relation to continuing offences and time limits and other evidentiary matters
concerning averments in any particular charges which are brought. This Part
also deals with the vicarious responsibility of employers, managers and
supervisors in general terms, which imposes liability on those persons where it
is proved that a person was complicit in the committing of the offence by act
or omission.
Part 10 deals with what are described as “final provisions”. Somewhat curiously, in terms of arrangement, in this Part, are found provisions dealing with obligations on visitors to comply with directions issued by authorised persons. This provision enables a visitor to a mine to be directed to cease any particular conduct or to leave a mine if that person’s conduct or presence may constitute a hazard to any person. This Part also deals with other miscellaneous matters such as exemption of statutory office holders from personal liability and the general regulation making power under the MSI Act.

Robens Committee

The general duties scheme in the MSI Act, as adopted from the OSH Act, is modelled upon the work of the Report of the Committee into Safety and Health at Work chaired by Lord Robens (“the Robens Committee”) and published in 1972. Much has been written about the Committee’s work previously and it is widely known. There is little to be gained by repeating much of it for present purposes.

The focus of the Robens Committee recommendations was the move away from a highly prescriptive regulatory approach, to one based on general duties of care with an emphasis on self regulation. The Robens Committee referred to the defects of the then statutory system in place in the United Kingdom and observed that the:

“First and perhaps most fundamental defect of the statutory system is simply that there is too much law. The nine main groups of statutes which we have mentioned above are supported by nearly 500 subordinate statutory instruments containing detailing provisions of varying length and complexity. They are added to every year. It was argued in some submissions made to us that the sheer mass of this law, far from advancing the cause of safety and health, may well have reached the point where it becomes counterproductive. We share this view. The existence of such a mass of law has an unfortunate and all pervading psychological effect.”

Additionally the Robens Committee, in terms of identifying an ideal legislative scheme, suggested that the general requirements of a consolidated occupational health and safety Act, be supplemented by more detailed provisions in the form of (a) regulations and (b) voluntary standards and codes of practice.

In terms of regulations, it was suggested by the Robens Committee that regulations could fall into three broad categories. The first category being applicable to most forms of employment, such as general environmental standards, accident notification and the like. The second group of regulations could deal with specific types of hazards such as electricity and toxic

21 Safety and Health at Work Report of the Committee 1970-72 Chairman Lord Robens July 1972
22 Ibid at par 134
23 Ibid at par 136
substances for example. The third group of regulations could deal with specific industries such as agriculture, construction and so on.

53. Significantly, it was also suggested that consistent with the new approach, regulations are drawn in terms of statements of broad requirements rather than excessive precision. Whether the Robens Committee ideal, in particular as to its original intention as to the nature of regulations, has been achieved, is questionable. I return to this issue later in Chapter 15.

54. Whilst the terms of the MSI Act are now firmly grounded in the Robens Committee approach, it is still the case that there exists a considerable degree of prescription both in the MSI Act itself, and particularly in the accompanying Regulations. The MSI Act is an amalgam of the Robens approach, and the former legislative regime, providing for significant prescription in particular, in relation to technical matters. Similar observations can be made about the OSH Act and its accompanying Regulations.

Prior Reviews and Inquiries

Kelly Inquiry

55. Prior to the enactment of the MSI Act, in 1991, Mr Eric Kelly AM, a former Chief Commissioner of the Western Australian Industrial Relations Commission, undertook an inquiry into occupational health and safety in the mining industry in Western Australia (“the Kelly Inquiry”). This inquiry into the then Mines Regulation Act 1946 and the Coal Mines Regulation Act 1946, led to the publication of a three volume report that covered many areas relevant to occupational health and safety in the mining industry.24 By the time of the Kelly Inquiry, the legislation had been amended to incorporate the general duty of care provisions from the OSH Act, but which amendments had yet to come into effect.25

56. One matter taken up by Mr Kelly was the issue of whether the then Mines Inspectorate should be consolidated into the general industry occupational safety and health Inspectorate within the then Department of Occupational Health, Safety and Welfare. Having considered the matter, Mr Kelly, whilst concluding that an amalgamation would be consistent with the Robens Committee approach to the regulation of occupational health and safety across all industries, considered that for the foreseeable future, the Mines Inspectorate should remain located within the then Department of Mines.26 This was a matter subsequently taken up by the Ritter Inquiry, which I also mention below, which led to administrative responsibility for mine safety transferring to the Minister for Employment Protection in 2005.

Laing Review

24 Enquiry into Occupational Health and Safety in the Mining Industry in Western Australia 1991 E M Kelly
25 see the Mines Regulation Amendment Act No 85 of 1990
26 see Kelly Enquiry at 140
57. Significant changes to the MSI Act flowed from a review by Mr Robert Laing, a former Commissioner of the Australian Industrial Relations Commission, published in January 2003 ("the Laing Review"). This review was conducted simultaneously with a statutory review of the OSH Act. This review by Mr Laing resulted in some 61 recommendations of which 30 were in common with recommendations to amend the OSH Act, as contained in the Final Reports of November 2002 and January 2003. The key features of the Bill amending the MSI Act following this review were outlined by the then Minister for State Development as follows:

“For the most part, the changes to the Mines Safety and Inspection Act represent a strengthening or improvement of existing provisions. The significant changes in the amendment package include –

Expansion of the general duties of care, largely to “close the gaps” particularly with respect to the labour hire industry;

A change to the penalty provisions to reflect the gravity of an offence that ends a person’s life or causes injury. The Bill provides for imprisonment in cases involving serious harm or death where the breach constitutes “gross negligence”;

More flexible processes for the election of safety and health representatives and the establishment of safety and health committees;

Introduction of the right of appropriately trained and accredited safety and health representatives to issue provisional improvement notices – PINs – and

The establishment of a Safety and Health Tribunal under the auspices of the Western Australian Industrial Relations Commission, to hear designated matters that will be dealt with by a tribunal.”

58. I am conscious of the fact that the substantial amendments to the MSI Act flowing from the Laing Review, as noted above, only came into operation in the main, in 2005. Thus, they have only been in operation for a relatively short period of time. One substantial change arising from the 2004 amendments was the repeal of s 90, which established the Mines Occupational Safety and Health Board (“MOHSAB”), a tri-partite body providing guidance and policy advice to the Minister responsible for the mining industry, in relation to occupational health and safety issues.

59. In its place the MIAC was established as a permanent advisory committee to the Commission for Occupational Safety and Health ("COSH"). This change was effected by the introduction of s14A into the OSH Act by the Occupational Safety and Health Legislation Amendment and Repeal Act 51 of 2004.

60. The MIAC has the function of advising and making recommendations to the Ministers responsible for the administration of the OSH Act and the MSI Act, and to the COSH, on matters concerning occupational health and safety in the
The MIAC is also required to generally liaise with COSH and to maintain parallel standards. The MIAC continues to operate on a tri-partite, basis with the Chairperson being a nominee of the Minister responsible for administration of the MSI Act.

61. The clear purpose and intent of these amendments in 2005, consistent with the tenor of the Laing Review, was to facilitate a closer alignment of the policy development and advisory functions undertaken with respect to both the MSI Act and the OSH Act. The operation and effectiveness of these arrangements is a matter I deal with later in this report in Chapter 9.

Ritter Inquiry

62. At the time of the 2005 amendments to the MSI Act being progressed through the State Parliament, a Ministerial Inquiry was established in May 2004 into occupational health and safety systems and practices of all BHP Billiton Iron Ore and Boodarie Iron sites in Western Australia and related matters. That Ministerial Inquiry, undertaken by Mr Mark Ritter SC (“the Ritter Inquiry”) was established following a series of workplace fatalities at sites owned and/or operated by BHP Billiton Iron Ore Pty Ltd and Boodarie Iron in May 2004. Whilst the Ritter Inquiry was primarily concerned with occupational health and safety practices at BHP Billiton mine sites, it was also called upon to consider whether the Department of Industry and Resources (“DOIR”) was “appropriately and effectively administering the Act”.

63. The terms of reference of that Inquiry also envisaged recommendations may be made in relation to the policies and procedures of DOIR in relation to the Act’s administration. In the resulting recommendations in the Report of November 2004, one recommendation in relation to DOIR was that the Mine Safety and Dangerous Goods units of DOIR, as they were then described, be relocated to the Department of Consumer and Employment Protection (“DOCEP”), as discreet operational units. Additionally, and as a consequence of this recommendation, it was also recommended that the office of the State Mining Engineer be moved to DOCEP.

64. These recommendations were accepted by the State Government with the establishment of the Resources Safety Division (“RSD”) of DOCEP coming into effect in July 2005.

Mines Safety Improvement Group

65. Following the Ritter Inquiry the then Minister for State Development established a Mines Safety Improvement Group (“MSIG”) in January 2005. A tri-partite group, constituted by government, Chamber of Minerals and Energy (“CME”) and a principal mining union, the CFMEU, the MSIG was given the

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28 See Ritter Inquiry vol 1 at 8 and vol 2 at 324
29 Ritter Inquiry vol 2 at 377
responsibility for examining a number of matters arising from the Ritter Inquiry, including the appropriate roles and responsibilities of the Mines Inspectorate functions within the then Safety and Health Division of the then Department of Industry and Resources. Additionally, the MSIG was to consider the content of the MSI Act and the Regulations, with a view to enhancing their effective regulation of health and safety in the mining industry.

66. The MSIG published its Interim Report in April 2005. Two substantial recommendations arising from the Interim Report were firstly the establishment of a safety case regime for the minerals industry in Western Australia, and secondly, that a feasibility study be undertaken with a view to the establishment of a new independent safety authority, to be responsible for the regulation of health and safety in the mining industry.\(^\text{30}\) It was also recommended that in the medium term, consistent with previous reviews, in particular the Laing Review, that the MSI Act be ultimately amalgamated with the OSH Act, to form a single legislative regime, supplemented by industry specific regulations and Codes of Practice where necessary.\(^\text{31}\) The issue of the establishment of a safety case regime for the Western Australian mining and minerals processing industry is commented on in Chapter 6.

**Hooker Review**

67. One of the terms of reference for this Review, is to take into account the recent review of the OSH Act by Mr Richard Hooker, to ensure that alignment with the OSH Act is maintained. Mr Hooker undertook a statutory review of the OSH Act pursuant to s 61 of that Act, the Final Report of which was published on 6 December 2006. A summary of the recommendations arising from Mr Hooker’s review appears at annexure 2. I will take into account those recommendations and the relevant parts of Mr Hooker’s Report dealing with them, where those recommendations are relevant to the maintenance of consistency between the terms of the MSI Act and the OSH Act.

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\(^{30}\) See Mines Safety Improvement Group Interim Report April 2005 summary of recommendations at 6-11

\(^{31}\) Ibid at 8
CHAPTER 2 – INDUSTRY AND NATIONAL DEVELOPMENTS

The Industry Setting

Demand for Commodities

68. Western Australia has a world leading mining industry. Until the recent global economic contraction, the resources “surge” generated by demand largely from China, has propelled mineral and petroleum resources total sales values to $58.6 billion in 2007-08\(^{32}\) with the value of mining resource production being some $39 billion over 2007-08.\(^{33}\) This is a marked increase on the corresponding period 2006-07.\(^{34}\) Similarly, in terms of royalty revenue, the total Western Australian mineral and petroleum royalties for the 2007-08 financial year were some $2.3 billion.\(^{35}\)

69. Presently Western Australia hosts some 531 commercial mineral projects, including some 1,032 operating mine sites (open-cut, underground mines and quarries), in addition to some 171 processing plants. Iron ore, gold and alumina are the primary minerals produced in Western Australian, and together with petroleum, these minerals provide some 83% of the total value of resource production. The diversity of the Western Australian minerals production profile is demonstrated by there being some 50 different minerals in commercial production which is far greater than any other State or Territory in Australia.\(^{36}\) Excluding petroleum products, the minerals and resources industry now employs approximately 70,000 people in Western Australia.\(^{37}\) Additionally, there is some $75 billion in projects that are either being planned or are current in the State.\(^{38}\)

70. There are challenges ahead for the mining industry in Western Australia. These challenges are in part driven by the great success of the industry in response to the unprecedented demand for commodities that has occurred in the last few years and that is projected to continue for many years into the future. As a consequence of the progressive reduction of trade barriers, enhanced capital flows and in response to competitive pressures from the progressive opening up of other world mining regions, the industry has had to

\(^{32}\) Department of Industry and Resources Western Australian Mineral and Petroleum Statistics Digest 2007-08
\(^{33}\) Ibid
\(^{34}\) Department of Industry and Resources Western Australian Mineral and Petroleum Statistics Digest 2006-07
\(^{35}\) Ibid, 2007-08 Digest
\(^{37}\) RSD Employment Statistics - DMP, December 2008
ensure its work practices, the use of new technologies and labour arrangements generally, maintain its competitive position.

**Demand for Labour**

71. Prior to the recent contraction, demand for labour had been the highest for decades, at least since the gold boom of the 1980’s. The skills shortage manifested itself in a variety of ways. Competition for skilled labour in the mining industry, in particular at senior levels, has been, and to an extent still remains, a global issue. This was reflected in high staff turnover rates at all levels in the industry and the consequent cost and disruption for employers in terms of recruitment, induction and training. Many mines I visited in the consultation stage of the Review had gaps in their organisation charts.

72. Of course, the skills shortage in Western Australia was not confined to the mining industry. However, the industry’s then hunger for labour had knock-on effects in other sectors of the labour market. Prior to the recent global financial shocks, it was estimated that general demand for labour in Western Australia would exceed supply to the extent that some 40,000 employees per annum will be required to meet projected demand for the next 10 years. The skills shortage in industry generally has been the subject of considerable debate and comment in recent times. In the mining industry in particular, it was forecast that a further 86,000 people will be required nationally and 47,700 in Western Australia alone, to meet industry demand by 2020, representing an increase in demand for labour of 85 per cent in this State. The largest predicted increase was in iron ore. Time will tell as to the impact of current events on these long term forecasts. Such demand factors however, if sustained in the long run, will also be affected by the ageing population generally, as illustrated in the Commonwealth Government’s Intergenerational Reports 2002-2003 and 2007.

**Other Challenges**

73. There are also other factors impacting on the overall environment in which mining and minerals processing activity will most likely take place in the future. With the rapid depletion of high grade ore reserves, new ore bodies will need to be discovered under increasingly challenging geological conditions. Mines, both open cut and underground, will in all likelihood, need to be deeper to harvest better grade ores as near surface deposits are progressively mined out.

39 *Building Human Capital: A Discussion Paper*, November 2007 Chamber of Commerce and Industry of Western Australia
40 Senate debate Skills Australia Bill 2008 (Cth) House of Representatives 11 March 2008 pp 65-83
74. This will involve the need to use more advanced technologies and will entail working in hotter, gassier and more geo-technically challenging and stressed environments at greater depths.

75. This will in all likelihood, be accompanied by the progressive use of automated mining systems over the next 10 to 15 years. Already, significant work is being done in the field of remote mining techniques and robotics. Indeed the CSIRO’s “Minerals Down Under National Research Flagship” suggests that by about 2015:

“(a) There would be developed and demonstrated new geologically controlled autonomous mining systems for surface mining operations. Such systems would have the capacity to mine ore to a selected grade and sort ore as it is mined. Mining systems control will be continuous and remote or automated. They will operate collaboratively with other equipment and will be able to follow grade profiles as required.

(b) New prototype equipment will be able to operate and have been tested in limited trials including keyhole mining techniques for minerals including mineral sands, alluvial gold and uranium; and

(c) New mining systems will have been demonstrated in deep mines to restrict people from hazardous activities such as explosive placements, drilling, ore haulage and road construction.”

76. Thus in the medium to longer term, mines will be hotter, deeper and operate in more stressed environments. Overall mining environments will be more complex and technology intensive. These challenges will require those managing mining operations in the future to have the qualifications, skills and experience to meet them and a system of certification or other process that is sufficiently rigorous to ensure that the quality of mine management is maintained. There will need to be a commensurate commitment to investment in skills and on-going professional development, to maintain skills in a rapidly changing environment. This is a matter I consider further in Chapter 10.

The Changing Labour Market

77. The profile of the labour market generally, including that in the mining industry, is markedly different now to what it was even a decade ago. The rise of the “non traditional” modes of employment, such as independent contracting, labour hire and other forms of non-traditional employment, have significantly changed the face of the modern workplace. The mining industry has not been immune from these changes. Indeed, labour contracting and labour hire are now firmly entrenched features of the mining industry labour market. Of the total number of persons employed in the mining industry of

43 CSIRO Minerals Down Under National Research Flagship
http://www.csiro.au/org/MineralsDownUnderOverview.html. Additional personal observations of Dr Peter A Lilly former head WA School of Mines; former Member Board of Examiners; Expert Member MIAC; Current Director CSIRO Minerals Down Under National Research Flagship
about 70,000 to December 2008, some 38,600 were employed by contractors. This trend has been evident for some years.

78. The extensive use of contract and other labour hire arrangements informed the amendments to the MSI Act in 2004, to introduce ss 15A, 15B, and 15C, having the effect of imposing the general duties obligations upon parties to such relationships, following the Laing Review.

79. Another evident trend has been the continued decline in union membership nationally. The mining industry, traditionally with high levels of union density, has been impacted by this trend. Total union membership density in Western Australia presently stands at 15.7 per cent of all employees. Whilst the ABS data do not break down union membership levels by industry by State, nationally, 21.5 per cent of employees in the mining industry are union members.

80. In conjunction with these structural changes to the labour market, has also been the increasing use of fly-in fly-out employment in the mining industry in Western Australia. The level of fly-in fly-out employment in the mining industry in this State is now approaching 60 per cent of all employed persons.

National Developments

National Mines Safety Framework

81. My Terms of Reference require me, in reviewing the MSI Act, to have regard to the goals and strategies of the National Mines Safety Framework ("NMSF") and the draft model legislation. There is yet to be produced by the NMSF draft model legislation. I take this reference to mean the strategy dealing with a Nationally Consistent Legislative Framework that I refer to below.

82. The NMSF had its origins in March 2002 when the Ministerial Council on Mineral Petroleum Resources ("MCMPR") forged an agreement, Realising a Safe and Healthy Mining Industry: the Contribution of Government in the form of a National Mine Safety Framework.

83. Additionally, the Ministerial Council has endorsed an implementation plan containing seven priority goals, and proposed broad strategies to address them. The primary goal of the implementation plan is to establish national consistency in the approach to the delivery of best practice in safety and health.

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44 Resources Safety Division, DMP
45 Mines Safety and Inspection Amendment Act No. 68 of 2004 s 10
47 Ibid.
48 Chamber of Minerals and Energy Fly-in Fly-out in the Western Australian Resources Sector January 2008 www.cmewa.com
49 See Commonwealth Department of Industry, Tourism and Resources website www.industry.gov.au
in the mining industry across the various Australian jurisdictions.\textsuperscript{50} The seven elements of the implementation plan include:

- Strategy 1: A Nationally Consistent Legislative Framework
- Strategy 2: Competency Support
- Strategy 3: Compliance Support
- Strategy 4: A Nationally Coordinated Protocol On Enforcement
- Strategy 5: Consistent and Reliable Data and Analysis
- Strategy 6: Effective Consultation Mechanisms
- Strategy 7: A Collaborative Approach to Research

84. The overall responsibility for implementation originally fell to the respective Chief Inspectors of Mines in the various jurisdictions across Australia. Following its re-endorsement by the MCMPR in November 2005, the responsibility for implementation was transferred to a tri-partite Steering Committee. A copy of the National Mine Safety Framework Implementation Plan is at annexure 3.

85. To-date, three strategy documents have been published. The first, Strategy 1, forms the basis of the Nationally Consistent Legislative Framework. This framework deals with broad legislative principles and key features, which it is intended for all jurisdictions to ultimately implement, to ensure overall legislative consistency.

86. The second publication is in relation to Strategy 6 and provides for a Consultation Framework. It is intended by this publication that various jurisdictions be requested to legislate to ensure effective consultation between various stakeholders in the workplace. The third relates to Strategy 5 and deals with a Nationally Consistent Data Set. The purpose of this strategy is to develop a national mining safety and health data set, to allow data analysis across jurisdictions. A copy of the three published strategies is at annexure 4.

87. The NMSF Strategy 1, providing for a nationally consistent legislative framework, incorporates overarching principles and key features. It is not intended by the NMSF Strategy 1, that legislation in each jurisdiction be identical. It is a foundation of the NMSF legislative framework, that as a minimum, all legislation in all jurisdictions should incorporate the intent of ILO Convention 176: Safety and Health in Mines ("ILO 176"). A copy of ILO 176 is at annexure 5.

88. The overarching principles set out in the draft model legislative framework include:

\begin{itemize}
  \item[(a)] A legislative and regulatory framework that is clear and enforceable and requires all involved with mining operations to appropriately discharge their responsibility for health and safety;
\end{itemize}

\textsuperscript{50} National Mine Safety Framework Implementation Plan 2002 – Commonwealth Department of Industry, Tourism and Resources website http://www.industry.gov.au
(b) Clear and specific legislative obligations for all those involved in mining operations, including owners, managers, suppliers, employees and providers of services, with the level of obligations being appropriate to the degree of responsibility and control held;

(c) Effective risk based safety and health management systems that apply to all types of risk of personal harm, addressing all actual and potential hazards not just major accident events;

(d) A preventative approach supported by the identification and promotion of leading practice, sharing information and learning from experience;

(e) Genuine consultative arrangements between management and mine employees which actively seek the representation of all in the development of safety and health policies and practices;

(f) The ability of employees to collectively select safety and health representatives;

(g) A workforce empowered to identify and report potential hazards without discrimination or retaliation;

(h) Assessment, monitoring, auditing/validation and review of the safety and health management systems including emergency response procedures and comprehensive reporting against appropriate performance criteria;

(i) Training, accreditation and competence of all employees appropriate to their duties;

(j) Regulatory powers for incident investigation;

(k) Application of graduated enforcement measures;

(l) States/Territory regulatory authorities demonstrate independence, transparency and openness and have adequate competent and experienced skilled personnel; and

(m) Provision for a process for resolving issues.

89. The three strategy documents have been the subject of a public consultation process in June 2007 around Australia. All have now been submitted to State Governments for their endorsement. The former Western Australian Government endorsed the strategies in March 2008. The Steering Group commenced work in preparation of the remaining strategies and submitted an Implementation Report in October 2008 to the MCMPR which was endorsed by the MCMPR in late 2008. The Implementation Report is to be considered by the Council of Australian Governments (“COAG”) in March 2009.
90. In the written submissions to the Review, all of the key stakeholders are generally supportive of greater harmonisation in mining health and safety legislation across jurisdictions and the broad goals underpinning the NMSF process. As an active participant in the NMSF process, the CME supports the work being done towards achieving national consistency within the mines safety legislation framework. In particular in its submission, the CME emphasised the following:

(a) that legislation reinforces a risk management approach rather than prescription;
(b) that unnecessary duplication be removed and there be consistency in standards applied;
(c) the importance of competency for those in the industry; and
(d) that data collection and information dissemination leads to continuous improvement.

91. One area opposed by the CME however, in the Legislative Framework, is cl 21 dealing with the power of health and safety representatives to direct employees to leave their place of work in the event of a threat to health and safety arising. It is said by the CME that ample ability exists now under the MSI Act in s 72 for employees to refrain from working in circumstances where there is a risk of serious and imminent injury or harm to the health of an employee.

92. Support for the CME position was also advanced by the Australian Mines and Metals Association (“AMMA”). Whilst also endorsing the harmonisation approach through the NMSF, the Chamber of Commerce and Industry of Western Australia (“CCIWA”) suggested that the process should proceed under the auspices of the ASCC and its harmonisation approach for industry generally, rather than under separate Ministerial control through the MCMPR.

93. As a major union involved in the mining industry, and also a participant in the process, the CFMEU noted that the NMSF Legislative Framework identifies broad legislative principles and advocates the adoption of a risk based safety management system approach to safety and health in mines. This involves the identification, mitigation and monitoring of hazards as the central element of managing safety and health in the workplace. It is submitted by the CFMEU that the Review should consider the Legislative Framework in terms of what amendments may be necessary to the MSI Act to give effect to it.

94. A number of others made submissions broadly in support of the approach of the NMSF. MARSCTA, an organisation promoting safety and health training in the mining industry, suggests that the activity of the Steering Group should be supported in moving towards a nationally consistent legislative framework for the mining industry. In doing so however, their submission emphasised the importance of a genuine commitment by all States in order that workable outcomes can be achieved.

95. The Recruitment and Consulting Service Association (“the RCSA”) also indicated its support for the seven strategies of the NMSF, in particular the
Legislative Framework and encourages the Review to take advantage of the opportunity to achieve greater legislative consistency.

Recommendation 1

That there be continued progress in relation to the implementation of harmonised standards in occupational health and safety in the mining industry through the principles and Strategies of the NMSF.

96. Whilst developments through the NMSF form a part of my Terms of Reference, there have been other developments at the national level of note that I now turn to.

Productivity Commission

97. A general thrust towards greater consistency across occupational health and safety jurisdictions has not been exclusive to the mining industry. Whilst there are limitations on Commonwealth powers under the Commonwealth Constitution in relation to matters concerning occupational health and safety, the Productivity Commission publication *National Workers Compensation and Occupational Health Safety Framework* \(^{51}\) sets out consideration of various models for national standards and frameworks concerning occupational health and safety and workers compensation.

98. These matters were dealt with at some length in the Hooker Review.\(^{52}\) I do not comment on these matters any further save to observe that the Productivity Commission recommended the development of a cooperative health and safety National Framework Model. It noted that due to Commonwealth constitutional limitations, the enactment of a uniform scheme will require the cooperation of the various State and Territory legislatures. Whether this remains the view following the judgement of the High Court in the “Work Choices” case remains to be seen.\(^{53}\)

NOHSC/ASCC

99. The National Occupational Health and Safety Commission (“NOHSC”), came into operation in December 1985, with the objective of providing guidance on a national strategy for occupational safety and health in Australia. The activities of the NOHSC were subsequently taken over by the Australian Safety and Compensation Council (“ASCC”). The ASCC operates under the Australian Workplace Safety Standards Act 2005 (Cth) which came into effect in January 2006.

\(^{51}\) Productivity Commission Inquiry Report *National Workers Compensation and Occupational Health Safety Framework* No 27, 6 March 2004

\(^{52}\) Final Report Review of the Occupational Safety and Health Act 1984 Mr Richard Hooker 6 December 2006 at pp 28-35

\(^{53}\) New South Wales Ors v Commonwealth (2006) 81 ALJR 34
100. These matters were also discussed in some detail in the Hooker Review and I need not refer to them other than very briefly.54 The ASCC undertook a project identifying areas of occupational health and safety legislation that can be harmonised and reported to the Workplace Relations Ministerial Council in December 2007. Additionally, the ASCC is continuing with the work of its predecessor the NOHSC, in implementing the National OHS Strategy 2002-2012, endorsed by the Workplace Relations Ministers Council in May 2002.55

101. The National Strategy has as overarching national targets to:

(a) Sustain a significant, continual reduction in the incidence of work related fatalities with a reduction of at least 20% by 30 June 2012 (and with a reduction of 10% being achieved by 30 June 2007); and

(b) Reduce the incidence of workplace injury by at least 40% by 30 June 2012 (with a reduction of 20% being achieved by 30 June 2007).

**Council of Australian Governments**

102. The issue of inconsistency in health and safety legislation across State boundaries was first identified as a regulatory “hot spot” by COAG in its meeting of February 2006.56 It has been noted as an area of activity where inconsistent and overlapping regulation is impeding economic activity. The same theme has also been identified by the Productivity Commission of Australia, and a matter to be given priority, given that the NMSF process started in 2002. In its recent report, *Annual Review of Regulatory Burdens on Business: Primary Sector*57, the Productivity Commission noted the views of the mining, farming and other primary industry sectors as to the regulatory burden placed on them by Government.

103. It is noted also that greater co-ordination between jurisdictions is a key point in the regulatory reform process.58 Specifically in relation to health and safety in the mining industry, the Productivity Commission has the view that the NMSF process has moved too slowly and urges Governments to maintain their commitment to the implementation of the NMSF as soon as possible.59

104. On 26 March 2008, COAG held its 21st meeting and arising from it, agreed to accelerate the process of business regulatory reform. In particular, it was agreed that the reform of health and safety law, through the national harmonisation process, will be expedited. An implementation plan for the

54 Hooker Report at 35-39
55 National OHS Strategy 2002-2012 Australian Government, Canberra
56 COAG Communiqué 10 February 2006
57 Productivity Commission *Annual Review of Regulatory Burdens on Business: Primary Sector* 5 November 2007 in particular Chapter 4 Mining Oil and Gas
58 Ibid at xii-xiii
59 Ibid at 242
harmonisation process was reached in May 2008. COAG, in the implementation plan in relation to health and safety noted that:

“Our national harmonisation of OH&S laws is a top priority and that this should be reflected in an intergovernmental agreement (IGA) by May 2008, COAG to consider scope for a reduced implementation timetable in July 2008; and model legislation to be developed and submitted to the Workplace Relations Ministers’ Council by September 2009.”

105. The stated objective of the process is to:

“Achieve national consistency of OH&S laws, through development and implementation of model legislation, to address a key area of regulatory burden commonly identified by business.”

106. It is also intended the body to replace the ASCC be established by October 2008.

107. The NMSF process is now part of the COAG reform agenda.

108. As a consequence of the COAG meeting on 3 July 2008, an Inter Governmental Agreement (“IGA”) was concluded between the Commonwealth, the States and Territories, in relation to occupational health and safety.

109. This agreement commits the States and Territories to a nationally uniform legislative framework based on a model Act, Regulations and Codes of Practice, to be prepared by the Commonwealth and enacted by the States and Territories by December 2011.

National Review

110. To facilitate this process, a national review of health and safety legislation (“the National Review”) was agreed which was announced on 4 April 2008. This review was required to consider and report on the terms of national model health and safety legislation in two parts, by October 2008 and January 2009 respectively. A discussion paper was released in May 2008. The First Report was published in October 2008 and the Second Report was published in January 2009. Whilst the outcomes of these two reports and the IGA, if implemented by the respective State, Territory and Commonwealth governments, may ultimately overtake much of this Review, my Terms of Reference, settled well prior to these developments, do not include consideration of these matters.

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60 COAG Communique 26 March 2008 Adelaide
61 COAG Implementation Plan at 2
62 Ibid at 5
63 COAG Implementation Plan at 6
64 See media release the Hon Julia Gillard MP Deputy Prime Minister 4 April 2008
State and Territory Developments

111. Given the focus of this Review is on the mining industry in Western Australia, consideration of interstate developments will focus on the two other principal mining States, they being Queensland and New South Wales. That is not to say that I am not cognisant of developments more generally in other jurisdictions.

Victoria

112. In Victoria, a review of its occupational health and safety legislation undertaken by Mr Maxwell QC (as he then was) was published in March 2004. That review led to a substantial revision and update of the then Occupational Health and Safety Act 1985, in the form of the Occupational Health and Safety Act 2004.

113. There was a further administrative review undertaken by a member of the Victorian Parliament, Mr Bob Stensholt MP, which commenced in mid 2007 and was completed in December 2007. In his Report, Mr Stensholt concluded that overall, the Victorian legislation, as amended following the Maxwell Review in 2004, was working well and had the ongoing support of the major stakeholders in Victoria.

114. A number of recommendations have been made of an administrative nature, in particular that WorkSafe Victoria, the agency responsible for the administration and enforcement of the legislation, increase its resourcing in relation to enforcement and refine its published material in relation to compliance matters under the legislation.66

Northern Territory

115. In the Northern Territory the former relevant legislation was the Work Health Act 1986 and the Mining Management Act 2001. A review of this legislation was completed in June 2007.67 Amongst a range of recommendations contained in this report, are recommendations that the separate regulatory functions including the Inspectorate, for the mining industry be transferred to WorkSafe Northern Territory. Additionally, the report recommends that the Work Health Act be amended such that it covers all employees in Northern Territory workplaces, including those in the mining industry. Mining specific provisions are recommended to be the subject of specific regulations under the Work Health Act.

116. The reviewers recommended that the mining regulations require a management and supervisory structure similar to that under the Queensland coal and metalliferous legislation. Additionally, it was recommended that a

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67 Review of the NT Work Health Act and Mining Management Act Final Report Shaw Idea Pty Ltd and Others 22 June 2007
risk based safety management system, incorporating the provisions of Principle 16 of the NMSF Legislative Framework, be implemented.

117. In December 2007, the Northern Territory Legislative Assembly passed legislation creating the Workplace Health and Safety Act 2007 (Northern Territory). This Act, along with the new Workers Rehabilitation and Compensation Act,\(^68\) covers occupational health and safety and worker’s compensation and rehabilitation functions which previously existed concurrently under the Work Health Act.\(^69\) The new legislation retains the NT WorkSafe as the administrative arm of the Work Health Authority\(^70\) and was due to commence in early April 2008 but came into force on 1 July 2008.

118. The Act is designed to provide and promote a modern, comprehensive occupational health and safety legislative framework for all workplaces in the Northern Territory. In particular, it:

- strengthens consultative arrangements and cooperation between employers and employees by providing for direct worker input and improved management of health and safety performance in workplaces;
- identifies more specific powers for Northern Territory WorkSafe Workplace Safety Officers;
- establishes the Workplace Health and Safety Advisory Council to review the operation of the Act, make recommendations as the Minister requests, carry out investigations and perform other functions;\(^71\)
- coordinates Occupational Health and Safety regulators; and
- promotes community awareness and understanding of the nature and importance of issues affecting occupational health and safety.\(^72\)

The new legislation extends to mining operations.

**Tasmania**

119. In Tasmania, the relevant legislation is the Workplace Health and Safety Act 1995. As noted in the Hooker Review, during the course of 2005 and 2006 this legislation has been the subject of a review. A discussion paper was published in June 2006 and a final review report was concluded in November 2007. The matter is awaiting consideration by the Tasmanian Government.

**Queensland**

120. In Queensland the principal general statute is the Workplace Health and Safety Act 1995. There is also mining specific legislation, the Coal Mining Safety

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\(^{68}\) Which was also assed by the Legislative Assembly in December 2007  
\(^{70}\) Which operates independently and reports directly to the responsible Minister  
\(^{71}\) s 22, Workplace Health and Safety Act 2007 (Northern Territory)  
and Health Act 1999 ("CMSH Act (Qld)") and the Mining and Quarrying Safety and Health Act 1999 (MQSH Act (Qld)). As with the present Western Australian legislative scheme, in Queensland the mining specific legislation operates in parallel to the general legislation in terms of general obligations and ancillary provisions.

121. In contrast to the position in Western Australia under the MSI Act, Queensland adopts an “acceptable level of risk” approach, whereby the focus under the legislation is the management and control of risk.\

122. The identification of what is an “acceptable level of risk” for the purposes of the CMSH Act (Qld) is found in s 29 which relevantly provides:

“29(1) For risk to a person from coal mining operations to be at an "acceptable level", the operations must be carried out so that the level of risk from the operation is –

(a) within acceptable limits; and
(b) as low as reasonably achievable.

29(2) To decide whether risk is within acceptable limits and as low as reasonably achievable regard must be had to –

(a) the likelihood of injury or illness to a person arising out of the risk; and
(b) the severity of the injury or illness.”

123. The remainder of Part 2 of the CMSH Act (Qld) then provides how an acceptable level of risk can be achieved, having regard to what is described as both an “acceptable” and “unacceptable” level of risk. It has been noted that the “acceptable level of risk” as opposed to the “general duties” approach to legislation, may imply a process of “risk ranking”, by which low risks do not attract remedial action. This is in contrast to the all encompassing general duties approach, contained for example, under the MSI Act presently.\n
Also, notably absent from the Queensland model, is the notion of “reasonable practicability”, which involves the balancing of risk and cost, in terms of the maintenance of the requisite environment. Whilst the obligation to maintain an acceptable level of risk under this approach seems to be absolute, it is a defence for a duty holder to establish that they complied with a regulation or standard, or otherwise exercised due diligence and took proper precautions to avoid the breach.

124. The Queensland mining legislation adopts safety and health management systems principles, incorporating requirements to implement principal hazard management plans in relation to coal mining operations. The requirements of hazard management plans and safety management systems are

73 see s 30 CMSH Act (Qld); s 26 MQSH Act (Qld)
74 N Gunningham Mine Safety Law Regulation Policy Federation Press 2007 at 21
75 See Part 2 Division 4 CMSH Act (Qld)
76 See Part 4 Division 3 CMSH Act (Qld) and Part 4 Division 3 MQSH Act (Qld)
comprehensive and significantly, as with the relevant New South Wales legislation, require the existence of such plans before mining commences.

125. In terms of employee representation in health and safety on mine sites, the Queensland legislation contains similar provisions to the MSI Act in relation to site safety and health representatives and committees. However, unlike under the MSI Act, safety and health representatives in Queensland have no power to issue provisional improvement notices. Safety and health representatives may however, require operations to cease in the event of danger to mine workers.

New South Wales

126. New South Wales has adopted a somewhat different regulatory scheme to that in Queensland and Western Australia. In New South Wales there exists general health and safety legislation, in the form of the Occupational Health and Safety Act 2000 (“the OHS Act (NSW)) and mining specific legislation principally contained in the Coal Mine Health and Safety Act 2002 (“the CMHS Act (NSW)”) and the Mine Health and Safety Act 2004 (“the MHS Act (NSW)”) to complement the provisions of the “mainstream” legislation. The MHS Act (NSW) was proclaimed on 21 December 2007 and commenced on 1 September 2008.

127. The mining health and safety legislation contains specific provisions applicable to the metalliferous and coal mining industries which are to be read in addition to and not in derogation of, any provision of the OSH Act (NSW). In this sense, it seems clear that the OHS Act (NSW) is to be regarded as the principal law applicable in New South Wales. This is made express in the legislation, which provides that in the event of an inconsistency between the OHS Act (NSW) and the mining legislation, the former prevails to the extent of any inconsistency.

128. In terms of administration, unlike in Western Australia, where both the OHS Act and the MSI Act are now administered by the Minister for Employment Protection, in New South Wales, the general legislation is administered by the Minister for Industrial Relations however the mining legislation, is the responsibility of the Minister for Primary Industry.

129. The effect of the legislative scheme in New South Wales is to subject the mining industry to the general duties provisions contained in the main OHS Act (NSW), in addition to the mining industry specific provisions contained in the complementary mining legislation. The general duties provisions in the OHS Act (NSW), in contrast to provisions in other jurisdictions, impose, at least technically, an absolute obligation on an employer to ensure the health, safety and welfare at work of all the employees of the employer. There is no notion of “reasonable practicability” to qualify this absolute duty, which

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77 See Part 7 MQSH Act (Qld) and Part 7 CMSH Act (Qld)
78 See s 101 CMSH Act (Qld)
79 Section 13 CMHS Act (NSW); s 4 MHS Act (NSW)
80 See Part 2 Division 1 – General Duties OHS Act (NSW)
qualification exists for an example under the corresponding Victorian legislation\textsuperscript{81} and in Western Australia under both the OHS Act and MSI Act.\textsuperscript{82}

130. Under the OHS Act (NSW), the notion of “reasonable practicability” only arises as an element of a defence to a prosecution. Such a defence may be advanced if compliance with the relevant provision of the legislation was not reasonably practicable or that the commission of the offence was due to reasons over which the person had no control and it was impracticable for a person to make provision to prevent it.\textsuperscript{83}

131. Thus in New South Wales there is a reverse onus in relation to reasonable practicability, which forms no part of the prosecution obligation to prove all elements of an offence beyond reasonable doubt. It enables however, a defendant to establish reasonable practicability, as a defence, according to the balance of probabilities. On one view, it may be said that the Queensland obligation to ensure an acceptable level of risk, is also absolute, subject to a statutory defence for a duty holder to demonstrate compliance with a relevant regulation, or guideline, or in their absence, the exercise of due diligence and the taking of reasonable precautions.\textsuperscript{84}

132. As with Queensland, the New South Wales legislation proceeds beyond general duties obligations and imposes a requirement upon operators of coal and metalliferous mines to develop, implement and review health and safety management systems.\textsuperscript{85} These health and safety management systems impose comprehensive obligations on operators to prepare a statement in accordance with the requirements of the legislation, as to how the health and safety of people who work at the mining operations or who are directly affected by those operations, will be protected. Additionally, operators of coal mines may be required to prepare major hazard management plans in circumstances where the responsible Minister makes a declaration.

133. A major hazard management plan requires, similar to a health and safety management system, a statement as to how the health and safety of people who work at or are affected by the coal mining operation will be protected from any major hazard so declared. A number of major hazards are identified in the relevant regulations applicable to coal mining.

134. Additionally, under both coal and metalliferous mining health and safety statutes, operators of mining operations must prepare an emergency management system, requiring an operator to identify and set out processes to manage and control an emergency situation that might arise at a mine.\textsuperscript{86}

135. Employee participation in health and safety in New South Wales is principally covered by the OHS Act (NSW)\textsuperscript{87} as are provisions concerning the

\textsuperscript{81} See Part 3 Occupational Health and Safety Act 2004 (Vic)
\textsuperscript{82} See s 4 and Part 2 Act; and s 3 and Part III OHS Act (WA)
\textsuperscript{83} Section 28 OHS Act (NSW)
\textsuperscript{84} Gunningham 2007 op cit at 24-25
\textsuperscript{85} Division 2 Sub Division 1 CMHS Act (NSW); ss 27; 30 MHS Act (NSW)
\textsuperscript{86} Division 2 Sub Division 5 CMHS Act (NSW); s 42 MHS Act (NSW)
\textsuperscript{87} Division 2
establishment of health and safety committees and the election of representatives. These also are prescribed in the Occupational Health and Safety Regulation 2001. The general obligations concerning employee consultation in the main legislation, is complemented by the mine specific legislation, which has retained the positions of site check inspectors, electrical check inspectors and industry check inspectors which have been long standing positions in particular in the coal mining industry. For metalliferous mining, the position of site check inspectors remains in similar terms to the coal mining industry provisions.

Additionally in May 2006, Work Cover New South Wales undertook a review of the OHS Act (NSW) and published a report of its findings. This review and a draft Bill to amend the New South Wales legislation was the subject of further consideration by a former judge of the New South Wales Court of Appeal the Hon Paul Stein, in a report prepared in May 2007. This review was not released publically until July 2008, as a part of the New South Wales State Government’s submission to the National Model OHS Act Review. No legislative amendments have been forthcoming to date and nor are any planned at this stage.

New Zealand

New Zealand has a relatively small mining industry with about seven to nine underground mines, including coal and metalliferous. The underground coal sector employs around 300-350 employees. The industry is regulated by the general industry safety and health legislation with specific regulations for mining.

In March 2008 the New Zealand Department of Labour published a discussion paper “Improving health and safety hazard management in the Underground Mining Industry”. The purpose of the discussion paper is to illicit responses from the industry on possible reforms to underground mining industry safety legislation to improve hazard management practices in the industry.

Part of the consideration advanced for discussion is the concept of a mix of regulatory responses, to accommodate different sizes of mining operations. The stated objective of the consideration of this approach is to achieve “the optimal mix of approaches that will improve the ways hazards are indentified and managed in underground mining.”

The mix of possible approaches advanced for comment includes:

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88 See s 17
89 See Chapter 3 Occupational Health and Safety Regulation 2001
90 See Part 10 Division 3 CMHS Act (NSW)
93 Improving health and safety hazard management in the Underground Mining Industry Discussion Paper March 2008 Department of Labour
94 Ibid at 8
• A new safety case hazard management system
• The licensing of certain high risk work
• Third party monitoring of certain activities eg mine survey work
• A notification to the Inspectorate for certain high risk activities
• A health and safety management system approach incorporating major hazard management plans
• The expansion of guidance material including an approved code of practice on hazard management
• Expanding the scope of the regulations to cover new areas
• Amending statutory management requirements for small coal mines
• Expanded employee participation requirements
• The imposition of specific requirements on Inspectors when visiting a mine

141. It was anticipated that the responses to the discussion paper were to be considered and provided to the responsible Minister by mid August 2008.
Overview

142. There has been a very significant improvement in safety performance in the mining industry in Western Australia over the long term. Published statistical analysis reveals a downward trend in the number of injuries and fatalities recorded since the early 1980s.

Data Sources

AXTAT

143. The RSD collates data on accidents and incidents specific to reporting requirements in the MSI Act in its AXTAT and incident reports databases. The AXTAT database is used to record and retrieve information on lost time and disabling injuries resulting from accidents in the workplace. The collated data is used to identify work practices causing frequent injury, the frequency of injury to particular parts of the body and the frequency of particular types of injury sustained in accidents. Data is obtained from mining and exploration operators using two AXTAT forms:

- the mining injury report form which must be submitted as soon as practicable after the calendar month in which the accident occurs; and
- the monthly status form which must be submitted monthly for a mine or exploration company, regardless of whether an accident has occurred at the mine or exploration site during the particular month. 95

144. An occurrence report form must also be submitted as soon as possible after the incident. The Incident Reports database records and retrieves information about incidents in the workplace and is used to identify trends in reported incidents and to assess risk.

Accident Notification

145. The comprehensive reporting provisions in relation to surveillance and accidents and occurrences fall under Division 1 and 2 of Part 7 of the MSI Act. These provide the foundation for the recording and reporting of the industry safety performances. Section 75 requires each employer at a mine to establish and maintain a system for the surveillance of the health of their employees in accordance with the regulations. Pursuant to s 76 of the MSI

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95 Regulation 3.42 Regulations
Act, the manager is required to report incidents and accidents to the District Inspector in the following terms:

“s 76 MSIA: Notice of accident to be given

(1) Where a person suffers injury in an accident at a mine and is disabled by that accident from performing his or her duties of employment as they were being performed at the time the accident occurred, the manager must cause notice of the accident to be given —
   (a) in accordance with the regulations, to the district inspector for the region in which the mine is situated; and
   (b) if the injured person so requests, to the secretary or local representative of a trade union of which that person is a member.

(2) The notice required to be given under subsection (1) must —
   (a) if the injury appears to be serious, be given by the fastest practicable method of communication as soon as it is reasonably practicable to do so, and must subsequently be confirmed in writing; and
   (b) if the injury appears not to be serious, be given in writing at the end of the month.”

146. A serious injury is defined as an injury that results in the injured person being disabled from following his or her ordinary occupation for a period of two or more weeks; or involves unconsciousness arising from inhalation of fumes or poisonous gases, or asphyxiation due to lack of oxygen or displacement of oxygen by an inert gas; or results from an accident, including fuming, arising from the use of explosives or blasting agents. 96 Similarly, s 77 of the MSI Act requires that an accident log book must be established and maintained by the manager, to record all accidents that occur at the mine site. The log book must be kept open at all reasonable times to the examination of an Inspector, safety and health representative for the mine, a representative of a trade union of which a member is employed at the mine, and any other person authorised by the State mining engineer. 97

147. In relation to the recording of occurrences, the Manager must immediately report the events listed under s 78 of the MSI Act, whether or not any bodily injury to any person or damage to property has resulted from the occurrence. Under s 79 Managers must report all potentially serious occurrences to the District Inspector as soon as is practicable after the facts and circumstances of the occurrence are known. Further, the Manager must also provide a detailed written report of the incident if required to do so by the District Inspector.

148. These specific provisions ensure that RSD is able to provide timely and accurate reporting of statistics in relation to safety performances. In this respect however, some submissions to the Review contended that there is a need to utilise the data collected in a more meaningful way. One submission in particular noted that whilst not opposed to the provision of data for

96 s 76(4) MSIA
97 s 77(2) MSIA
reporting purposes, there needs to be a greater effort on the part of RSD to compile, analyse and feedback the information and trends identified to industry. Another view highlighted the fact that data collection methodologies facilitate targeted inspection and enforcement. These issues are taken up further in Chapter 8.

Performance Indicators – Injury Rates

149. Statistics from the AXTAT database for 2006-07 exhibit a minor but continuing improvement in the overall safety performance of the Western Australian mining industry, however various key indicator numbers are reaching plateaus. Most statistics are categorised by injury rate and frequency rate. An injury rate is measured by an incidence rate – the number of injuries per 1000 employees for a 12 month period. The frequency rate of an injury is the number of injuries per million hours worked.

Lost Time Injuries

150. It is evident that over the long term, there has been a significant decline in the frequency of lost time injuries (“LTIs”) in the Western Australian mining industry. A lost time injury is defined as one that results in the loss of at least one day or shift or work, excluding the day of the incident. During 2006-07 there were 460 LTIs in Western Australia’s mining industry, 448 in metalliferous mines and 12 in coal mines. This is only a slight improvement from the 462 LTIs recorded in the State’s mining industry in 2005-06 however it must be noted that the total mining workforce grew by almost 5000 employees in 2006-07, with an average workforce of 60,861 employees. This has substantially grown since.

Table 1: Initial lost time injuries during 2006 – 07

<table>
<thead>
<tr>
<th>Mines</th>
<th>No. of employees</th>
<th>No. of LTIs</th>
<th>Incidence</th>
<th>Frequency</th>
<th>Duration</th>
<th>Injury index</th>
<th>Days lost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Metalliferous surface</td>
<td>53,782</td>
<td>382</td>
<td>7.1</td>
<td>3.5</td>
<td>19.2</td>
<td>67</td>
<td>7,323</td>
</tr>
<tr>
<td>Metalliferous underground</td>
<td>6,308</td>
<td>66</td>
<td>10.5</td>
<td>4.4</td>
<td>28.1</td>
<td>124</td>
<td>1,852</td>
</tr>
<tr>
<td>Metalliferous total</td>
<td>60,090</td>
<td>448</td>
<td>7.5</td>
<td>3.6</td>
<td>20.5</td>
<td>74</td>
<td>9,175</td>
</tr>
<tr>
<td>Coal total</td>
<td>771</td>
<td>12</td>
<td>15.6</td>
<td>9.5</td>
<td>19.2</td>
<td>183</td>
<td>230</td>
</tr>
<tr>
<td>TOTAL MINING</td>
<td>60,861</td>
<td>460</td>
<td>7.6</td>
<td>3.7</td>
<td>20.4</td>
<td>75</td>
<td>9,405</td>
</tr>
</tbody>
</table>

98 Mineral Industry Safety Performance 2006-07 Explanatory Notes at p.3
99 RSD Safety Performance, p. 10
The graph below illustrates Lost Time Injury Frequency Rate (LTIFR) on a long term trend basis since the late 1980’s. The statistic as at 2005-06 stands at an LTIFR of 4.1, down 37.8 since the late 1980s.  

Figure 1 – Lost Time Injury Frequency Rate 1987-88 – 2005-06

Since June 1990 there has been a joint standard for recording workplace injuries and diseases designed to be used by individual workplaces.  

There are two significant differences between reporting practices for the AXTAT database and the Australian Standard. The Australian Standard treats fatalities as LTIs with a penalty of 220 workdays lost for each, while the AXTAT database calculates LTIs separately with no penalty. The Australian Standard calculates injuries per hundred employees whereas the AXTAT data calculates incidence per thousand employees (see table below).
Table 2: Initial time lost injuries during 2006 – 07 (Australian Standard AS 1885.1:1990)\textsuperscript{102}

<table>
<thead>
<tr>
<th>Mines</th>
<th>No. of employees</th>
<th>No. of LTIs</th>
<th>Injuries per hundred</th>
<th>Frequency</th>
<th>Duration</th>
<th>Days lost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Metalliferous surface</td>
<td>53,782</td>
<td>383</td>
<td>0.7</td>
<td>3.5</td>
<td>19.7</td>
<td>7,543</td>
</tr>
<tr>
<td>Metalliferous underground</td>
<td>6,308</td>
<td>68</td>
<td>1.1</td>
<td>4.6</td>
<td>33.7</td>
<td>2,292</td>
</tr>
<tr>
<td>Metalliferous total</td>
<td>60,090</td>
<td>451</td>
<td>0.8</td>
<td>3.6</td>
<td>21.8</td>
<td>9,835</td>
</tr>
<tr>
<td>Coal total</td>
<td>771</td>
<td>12</td>
<td>1.6</td>
<td>9.5</td>
<td>19.2</td>
<td>183</td>
</tr>
<tr>
<td>TOTAL MINING</td>
<td>60,0861</td>
<td>463</td>
<td>0.8</td>
<td>3.7</td>
<td>21.7</td>
<td>10,065</td>
</tr>
</tbody>
</table>

\textit{NOTE:} Duration in the above Table does not take into consideration time lost after 30 June 2007 by persons still off work at the end of the fiscal year, time lost from recurrent injuries, or time lost by persons with carry-over injuries from before July 2006.

152. When comparing the number of LTIs that have occurred in metalliferous underground mining over the last ten years, whilst the number of LTIs that have occurred have remained generally constant or declined, the number of employees, as a proportion of the total has remained constant, at approximately 10% of the total number of employees in the mining industry. In particular, despite an increasing number of employed persons underground since about 2000, in trend terms, the incidence rate has remained constant or has declined. This is shown in the graph below.

\textsuperscript{102} RSD Safety Performance, p. 12
Figure 2: Lost time Injuries for metalliferous underground mines: 1997-98 to 2006-07

153. The data reveals that in 1997-98 there were 4,095 employees in metalliferous underground mines and a total of 88 LTIs, compared to 2006-07, where there were 6,308 employees in metalliferous underground mines and 66 LTIs. That is over this period, whilst the number of employees underground has increased by about 54 per cent, the number of LTI's has reduced by 25 per cent.

**Serious Injuries**

154. A serious injury is a lost time injury that results in the injured person being disabled for a period of two weeks or more. During 2006-07 there were 348 serious injuries reported in the mineral industry, of which 338 were in metalliferous mines and ten were in coal mines. Common serious injuries included a fractured foot or leg, sprained or broken ankles, crushed fingers and bruising. During 2002-03 and 2006-07, the underground mining serious injury incidence rate (10.9) was almost double the serious injury incidence rate at surface operations (5.7). Coal (13.5) recorded the highest five-year average serious incidence rate whilst iron ore had the lowest (3.8).

155. For 2006-07, leg injuries accounted for the largest proportion of serious injuries at underground mines, at 23%. The majority of serious injuries underground were in production and development areas, and the recurrent

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103 Safety Performance in the Western Australia mineral industry: Accident & Injury Statistics, p.10
104 RSD Safety Performance, p.3 ‘Definitions’
105 RSD Safety Performance, p.7
106 RSD Safety Performance, p. 8
serious injuries were over-exertion or strenuous movement (30%), followed by rock fall (14%), then struck by an object (12%). Injuries to the legs formed the largest proportion of serious injuries at surface mines, with most serious injuries occurring mainly in treatment plants and then open pits. The most common accident types associated with serious injuries at surface included over-exertion or strenuous movements (33%), slip or trip (11%) and stepping (10%).

**Disabling Injuries**

156. A disabling injury is a work injury, not a LTI, that renders the injured person being unable to fully perform his or her ordinary occupation any time after the day or shift of which the injury occurred, and where either alternative or light duties are performed.

157. Disabling injuries have been collected since the 2001-02 financial year with the aim of establishing a more effective safety performance indicator than the current LTI-based system that was in place. They are not susceptible to the claim that statistics have been ‘managed’ to provide favourable accident reporting data, as was sometimes the allegation with LTIs prior to 2001-02, and are generally more numerous than LTIs. In 2006-07 there were 705 disabling injuries recorded; a substantial increase from the 506 figure recorded in 2005-06. Of this figure, 387 resulted in the injured person being disabled for two weeks or more. The overall disabling injury incidence and frequency rates both deteriorated, rising to 11.6 and 5.6 respectively. Gold and bauxite and alumina mines recorded the highest number of disabling injuries during 2006-07, along with the highest incidence and frequency rates.

**Performance Indicators – Fatalities**

158. During 2006-07 there were four fatal accidents in the Western Australian mineral industry, one less fatality than 2005-06. This is a significant decrease from the 18 fatalities a decade ago in 1997-98. Regrettably over the past five years, the underground fatal incidence rate (0.28 fatalities per 1000 employees) has been more than five times higher than the fatal incidence rate for surface operations (0.05 fatalities per 1000 employees). While the overall fatal incidence rate continues to decline (see Figure 3), there are still occurrences each year. In 2007-08 there were two fatalities. Tragically at the time of writing, for 2008-09 there have been five fatalities. This is at odds with the long term trend of falling fatality rates across the mining industry.

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107 Ibid, p. 9
108 RSD Safety Performance, p. 3
109 RSD Safety Performance, p. 24
111 RSD Safety Performance p. 5 – Based on 2002-03 to 2006-07 figures.
Figure 3: Fatal incidence rate 1997–98 to 2006–07

Figure 3 shows a year-by-year scatter of the incidence rate because of the low number of occurrences.

159. Whilst employment numbers are not available with any degree of reliability prior to 1940, the graph below plots the fatality incidence rate since that time, revealing the diminishing trend over the long term.113

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112 RSD Safety Performance, p. 11
113 Graph extracted from the submission of the State Mining Engineer
160. Over the past three years, the most common causes of fatality in the mining industry were vehicle accidents, which accounted for 28% of fatalities, followed by being hit by a moving object, which also accounted for 28% of fatalities, and then long term contact with chemicals or substances, accounting for 12% of fatalities.\footnote{ASCC Mining Information Sheet, 2008, \url{http://www.ascc.gov.au/NR/rdonlyres/E84E474B-D42E-4922-A5B7-0DC7BD7084AE/0/ASCCfactsheet_Mining.pdf} (As at 19 March 2008)}

**Workers’ Compensation Data**

161. Workers’ compensation data is also a source of information for measuring health and safety performance, including work-related injuries.\footnote{Comparative Performance Monitoring Report 2005-06, p. 5} As previously noted, Work Cover WA regulates and administers workers’ compensation claims in Western Australia. The ASCC leads research and analysis of workers’ compensation arrangements in Australia. The results of this research are used by the ASCC to engage State and Territory governments and employer and employee representatives, in progressing nationally consistent workers’ compensation arrangements. However, as the ASCC is a policy advisory body for government, it does not manage individual workers’ compensation claims.\footnote{\url{http://www.ascc.gov.au/ascc/WorkersComp/RoleInWorkersComp/} (Accessed 19 March 2008)}
National OHS Strategy

162. As noted in Chapter 2, the National OHS Strategy 2002-12 was agreed to by all Australian governments, the Australian Chamber of Commerce and Industry and the Australian Council of Trade Unions. The Strategy is a key initiative to improve Australia’s OHS performance and establishes clear goals for safety and health.\(^\text{117}\) The National OHS Strategy has an aspirational target for Australia to have the lowest work-related traumatic fatality rate in the world by 2009. The Comparative Performance Monitoring Report considers Australia’s ability to reach this goal as unlikely, unless substantial improvements are recorded over the next few years. However, fatality incidence rates have shown encouraging levels of improvement over time and the incidence of compensable fatalities from injury and musculoskeletal disorders decreased by 8% between 2000-01 to 2002-03 and 2005-06.

Compensation and Premium Rates

163. The workers’ compensation recommended premium rates determined by the Premium Rates Committee is a sound commercial indicator of cost to industry and reflects past safety performance.\(^\text{118}\) Figure 5 (see below) indicates trends in workers’ compensation costs for selected mineral groups in the Western Australian mining industry in the ten year period since 1998-99.\(^\text{119}\) During this period, the compensation rate for coal mining decreased by 69% to 2.03% of payroll and the rate for underground gold operations decreased by 17% to 3.04% of payroll. The compensation rate for surface gold operations fell by 45% to 1.45% of payroll and the rate for iron ore operations decreased by 57% to 0.47% of payroll.\(^\text{120}\)

164. Australia wide, in 2005-06 there were 2270 claims for compensation made by employees in the mining industry, accounting for 2% of all serious workers’ compensation claims.\(^\text{121}\) The mining industry incidence rate of claims fell 44% from 43 claims per 1000 employees in 1997-98 to 24 claims per 1000 employees in 2004-05. However, the rate remains greater than the average rate for Australia of 17 claims per 1000 employees (for 2004-05).

165. The most common causes of compensated injury and disease in the mining sector for 2005-06 were muscular stress (34% of claims), followed by falls and trips (23% of claims) and then being hit by a moving object (16% of claims).\(^\text{122}\)

\(^{117}\) http://www.ascc.gov.au/ascc/HealthSafety/OHSstrategy/
\(^{118}\) RSD Safety Performance, p. 22
\(^{119}\) RSD Safety Performance, p. 13
\(^{120}\) RSD Safety Performance, p. 13
\(^{122}\) Ibid
Figure 5 (see below), indicates the current recommended premium rates for 2007-08 for various mineral groups and for other industries in Western Australia. The average recommended premium rate for the Western Australian mining industry for 2007-08 is currently 1.63% of payroll, a 14% reduction from the 2006-07 figure.\(^{123}\) As a commercially derived indicator of risk, the premium rate for the mining industry compares very favourably with other industry groups.

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\(^{123}\) RSD Safety Performance 2006-07, p.13
Industry Comparison

166. ASCC data show that in 2005-06, the manufacturing industry reported the highest incidence rate for serious claims at 28.6 claims per 1000 employees, followed by the transport and storage industry (28.3 claims) and the agriculture, forestry and fishing industry (25.9 claims). The mining industry recorded the greatest percentage fall in incidence rates over the period of 2001-02 to 2004-05, decreasing by 30%. The graph below illustrates the incidence rate of claims across industries in Australia in descending order, based on the 2005-06 figures.\footnote{Comparative Performance Monitoring Report 2005-06, p. 32}

167. Muscular stress due to manual handling or repetitive movement was the most common cause of compensated injury and disease in 2005-06 for the mining, manufacturing, transport and storage and the agriculture, forestry and fishing industries. In these same industries, vehicle accidents were the most common cause of fatality.\footnote{Australian Safety and Compensation Council Industry Information Sheets, 2008 (As at 19 March 2008)}

Figure 7
Indicator 24 – Incidence rate of serious claims by industry

![Graph showing incidence rate of claims by industry]

168. It is useful to compare the premium rates charged for workers’ compensation in different industries. The graph below\footnote{Comparative Performance Monitoring Report 2005-06, p. 33} presents the average premium rates for various Australian industry groups. The agriculture, forestry and fishing
industry recorded the highest average premium at 4.4% of payroll. The mining industry premium rate for 2005-06 was 1.7%, compared to industries such as construction and manufacturing, which were significantly higher. 127 Australia’s standardised average premium rate fell 9% from 2.16% of payroll in 2003-04 to 1.96% of payroll in 2005-06, whilst the Australian average funding ratio in 2005-06 rose to 115%. 128

Figure 8
Indicator 25 – Australian average premium rates by industry

*NOTE: The premium rates are based on premiums in each industry divided by remuneration in that particular industry.

Conclusion

169. Whilst caution must always be exercised when considering statistical data, in particular that from different data sources, as noted at the outset, the mining industry in Western Australia and nationally, has demonstrated a significant improvement in its overall safety performance over the long run, in trend terms. Its performance now rivals many other industries.

170. The recent plateau in performance however, and the fact that serious accidents and fatalities are still occurring, indicates that the industry still has much work to do to achieve its goal of zero harm.

127 Comparative Performance Monitoring Report 2005-06, p. 31
128 Comparative Performance Monitoring Report 2005-06, Summary Findings, p. viii
CHAPTER 4 – GENERAL DUTIES FRAMEWORK

Approaches to Best Practice Regulatory Design

171. It is accepted that there are four distinct approaches to regulatory design in relation to health and safety law. Gunningham,\textsuperscript{129} succinctly identifies the various approaches in the following terms:

“In essence, OHS law may incorporate four main, conceptually distinct, types of standards aimed at influencing behaviour through a variety of techniques. These are (1) prescriptive; (2) general duties; (3) performance based; and (4) systematic process based standards. This classification is now well recognised (Gunningham & Johnstone 1999, See ch 2; Bluff & Gunningham 2004). A prescriptive approach (also known as a “specification standards” approach) tells duty-holders precisely what measures to take and requires little interpretation on their part. Such a standard identifies “inputs”, that is, the specific preventative action required in a particular situation. General duties (sometimes referred to as “goal setting” regulation) sets out principles which duty-holders must follow, such as ensuring health and safety as far as practicable, leaving it to the discretion of the duty-holder how they achieve those principles or goals. A performance standard specifies the outcome of the OHS improvement or the desired level of performance but leaves the concrete measures to achieve this end open for the duty-holder to adapt to varying local circumstances. Process based standards identify a particular process, or series of steps, to be followed in the pursuit of safety, and range from the requirement to identify hazards and assess and control risks (found in many national standards), to the more ambitious requirement to engage in a systematic approach to OHS at organisational level.”

172. Gunningham notes that in the principal mining States of Queensland, New South Wales and Western Australia, historically, legislation in relation to health and safety has been of the detailed prescriptive kind. However amendments to existing and new legislation, has more recently shifted regulation towards a more modern approach, utilising various systems and process based standards, particularly in Queensland and New South Wales. Similarly, whilst the adoption of the general duties regime for the mining industry in this State has also somewhat modernised the legislation, it is more of a hybrid, by way of the attachment of the general duties provisions to an otherwise highly prescriptive regime.\textsuperscript{130}

173. The adoption of the general duties provisions into mining legislation in this State in the early 1990s and the enactment of the MSI Act in 1994 could be characterised as the grafting of general duties principles and ancillary provisions, on to mining legislation which had its origins at the

\textsuperscript{129} Gunningham N Mine Safety Law Regulation Policy The Federation Press 2007 at 14
\textsuperscript{130} Ibid at 14-18
commencement of the last century. Necessarily as a consequence, the terms of
the MSI Act, and additionally resulting from more recent amendments
reflective of many aspects of the OSH Act applying to industry generally, now
comprises somewhat of a “patchwork quilt” of provisions, the structure and
arrangement of which, is not easy of understanding, particularly to the lay
reader.

174. Indeed many whom I have spoken to during the initial consultation stage of
this Review, have commented on the difficulties in reading the legislation, no
doubt as a consequence of the processes of amendment over the years. Some
have said that the legislation needs to be completely re-written. Whilst this is
a very large undertaking indeed, it is a sentiment that I have some sympathy
with.

175. The form of the MSI Act and its relationship to the OHS Act has been
considered previously. As noted earlier, the initial draft report of the Laing
Review, recommended the amalgamation of the MSI Act into the OHS Act, to
create one piece of legislation in relation to health and safety throughout the
State, with specific regulations for the mining industry. This was said to be
consistent with the Robens Committee approach to the consolidation of
industry specific legislation into one regulatory regime. However in the Final
Report, the Laing Review retreated from this position, and recommended that
the MSI Act be amended to transfer the general duties and ancillary provisions
into the OHS Act with the MSI Act retaining those provisions relating
specifically to the mining industry. This recommendation was not adopted.
The MSI Act retains its “stand alone” status.

176. However, a further recommendation, to disband the MOHSAB under the MSI
Act and incorporate it as the MIAC as a permanent advisory committee to the
WorkSafe Western Australia Commission, was accepted. An issue that arises
is to what extent there has been an integration of health and safety policy
development between the mining and general industries throughout the State,
and as a corollary, whether this is desirable. This matter is commented upon
in Chapters 7, 8 and 9.

General Observations

177. As noted above, the provisions of the OSH Act in relation to general duties
upon various duty holders have been incorporated into the mining legislative
regime in Division 2 of Part 2 of the MSI Act. The general duties principles
flowed from the Robens Committee recommendations to establish a broad, all
inclusive legislative framework, to re-focus regulation from a prescriptive to a
more self regulatory approach and to encompass a range of duty holders
within its scope. In particular was the central tenant to establish “the basic
and overriding responsibility of the employer to provide a safe working system
including safe premises, a safe working environment, safe equipment, trained
and competent personnel, and adequate instruction and supervision”131. This
is reflected in the terms of s 9 of the MSI Act.

131 Robens Committee at pars 128-131
178. A virtue of the general duties approach, which no one took issue with in submissions, either oral or written to the Review, is their capacity for flexibility. That is, they provide duty holders with the ability to adopt compliance measures to suit the circumstances of the enterprise, without mandating a particular approach to safety management. It has also been suggested that this approach encourages innovation and enables an enterprise to respond to emerging hazards as they arise.\(^{132}\)

179. The general duties provisions of the MSI Act have, in my opinion, served the mining industry well in Western Australia and there appears to have been a reasonably strong commitment to the Robens principles in the industry. No one has suggested to the contrary. Additionally, those commenting on this issue said that the alignment with the OSH Act general duties provisions should be maintained.

180. Evidence of the practical application of the Robens model, is perhaps evident in the commitment of the mining industry to the training of health and safety representatives. The mining industry consistently has trained a significant number of representatives in the introductory course for health and safety representatives under reg 2.6 of the Regulations.\(^{133}\) Whilst only employing about five per cent of the total workforce, the industry training rate has been consistently around the thirty per cent level, of all representatives trained over many years considerably higher than most other industries. This is a significant achievement. The role of health and safety representatives generally is a matter that I comment on in more detail in Chapter 11.

**Employer Specific Duties**

181. The specific duties of the employers, under s 9 of the MSI Act, without limiting the general obligation to so far as is practicable provide and maintain at a mine a working environment in which that employer’s employees are not exposed to hazards include:

- (a) To provide and maintain workplaces, plant and systems of work which so far as is practicable do not expose employees to hazards;
- (b) Provide information, instruction and training to and supervision of employees;
- (c) Consult and cooperate with safety and health representatives and other employees at a mine in relation to OHS at the mine;
- (d) Provide appropriate personal protective clothing and equipment without cost to employees; and
- (e) Provide that the use, cleaning, maintenance, transport and disposal of plant and substances is done safely.


\(^{133}\) Introductory training courses for health and safety representatives under both the MSI Act and the OSH Act must be accredited by the COSH (WA)
**Principal Employer**

182. Importantly, s 9(5) specifies that the appointment by a Principal Employer of a Registered Manager for a mine does not discharge the Principal Employer’s general duties under s 9(1). That is, the Principal Employer must be actively involved in the discharge of its obligations under s 9(1) in addition to ensuring the appointment of a competent manager who by that appointment, assumes the responsibilities under the MSI Act set out in particular by ss 33 and 43.

183. No suggestion was made in submissions to the Review, or in other consultations, that this provision was inappropriate or otherwise warranted amendment. No change is recommended.

**Other Duty Holders**

184. The general duties provisions of the MSI Act extend obligations to:

(a) Employees at a mine to take reasonable care for themselves and to avoid adversely affecting the safety and health of others (s 10);

(b) Self employed persons to take care for their safety and health and for employers to not adversely affect the safety or health of persons who are not the employer’s employees (s 12);

(c) That Principal Employers and Registered Managers at a mine must take measures that are practicable to ensure the mine and the means of access to egress from the mine are free of hazards (s 13); and

(d) That various “up stream” responsibilities such as design, manufacture, installation etc of plant, buildings or structures and those who manufacture, import or supply substances for use at a mine, do so in such a manner so as to avoid hazards (s 14).

185. Again, perhaps not surprisingly, it has not been suggested that any of these statutory obligations are failing to meet the requirements of the objects of the MSI Act. Additionally, given the need to retain general consistency with the relevant provisions of the OSH Act, no change has been suggested as necessary and none is recommended.

**Common Law**

186. The formula used in the MSI Act, and the OHS Act, in relation to the general duties provisions, is a familiar one. It exists in a number of other health and safety statutes in Australia. The touchstone for health and safety statutes in terms of general duties, are the common law principles in relation to negligence. That is, the common law employer liability to ensure employee safety at work. The essential common law obligation on an employer is to
take reasonable care for the safety of an employee in all of the circumstances of his or her employment. In *Hamilton* Dixon CJ and Kitto J said:

“It has been said that a reasonable and prudent employer is (i) bound to take into consideration the degree of injury likely to result; (ii) bound to take into consideration the degree of risk of an accident; (iii) entitled to take into consideration the degree of risk, if any, involved in taking precautionary measures; per Parker LJ as cited by Lord Cohen, Morris v West Hartlepool Steam Navigation Co Ltd (1956) AC at 579.”

187. Whilst the authorities express the common law obligation as a single duty on an employer to take reasonable care, the three elements accepted as comprising the single duty include the provision of:

- safe premises;
- safe plant and equipment; and
- a safe system of work.

The third of these elements is taken to include within a safe system of work, the provision of suitably experienced and competent employees.

**Practicability**

188. In s 9(1), when read with the definition of “practicable” in s 4 of the MSI Act, the obligation on an employer as part of the general duties, is to act as far as “reasonably practicable” in the discharge of the obligation to not expose employees to hazards in the workplace. Most general industry health and safety statutes in the Australian jurisdictions, adopt the concept of “practicable” or “reasonably practicable” as a statement of the reach of the duty imposed on a duty holder, or as an element of a defence to an alleged contravention. The notion of “practicability” for the purposes of statutory obligations has again, its origin at common law, in relation to an employer’s acts or omissions breaching the standard of care required to be exercised to meet the common law duty of care in a particular case.

189. At common law, whether the duty has been breached by an employer in a particular case has fallen to be considered in the context of an assessment of the risk of injury expressed in the well known test in terms of:

“whether a reasonable person in the defendant’s position would have foreseen, in all the circumstances of the case, that his or her conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. …a risk is “real” and sufficiently foreseeable so as to

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134 Hamilton v Nuroof (WA) Pty Ltd (1956) 96 CLR 18 per Dixon CJ and Kitto J at 25
135 Hamilton at 26
136 Hudson v Ridge Manufacturing Co Ltd (1957) 2 All ER 229
require the defendant to consider taking precautions against it provided it
"is not far fetched or fanciful."

Bluff and Johnstone\textsuperscript{138} have described this foundation as the “calculus of
negligence”.

190. Importantly, in the general duties regime, the obligation is to maintain the
requisite environment that is as far as practicable, one free of hazards. A
breach of this duty is not dependant on actual injury or harm to health.
Offences under the legislation are inchoate in nature.

191. What do we mean by “reasonably practicable”? It might be said that in the
context of Western Australian legislation, because “practicable” is defined in
both the MSI Act and the OHS Act, determining a duty holder’s obligation
should be relatively straightforward. The case law however would suggest
this is not the case. The preponderance of authority indicates that in each
circumstance, whether a duty holder has breached the obligation to as far as
practicable, provide a workplace in which employees are not exposed to
hazards, involves a balancing exercise between the nature and severity of the
risk concerned, and the objectively determined knowledge in relation to it, and
the cost, availability and practicality of averting or minimising such a risk.

192. Again, the resemblance of the statutory duties and its common law parentage
relatively recently found expression in the High Court in \textit{Slivak v Lurgi
(Australia)} Pty Ltd in which Gaudron J said:\textsuperscript{139}

\begin{quote}
“The words “reasonably practicable” have, somewhat surprisingly, been
the subject of much judicial consideration. It is surprising because the
words “reasonably practicable” are ordinary words bearing their
ordinary meaning. And the question whether a measure is or is not
reasonably practicable is one which requires no more than the making of
a value judgment in light of all the facts. Nevertheless, three general
propositions are to be discerned from the decided cases:

- The phrase “reasonably practicable” means something narrower than
  “physically possible” or “feasible”;
- What is “reasonably practicable” is to be judged on the basis of what was
  known at the relevant time;
- To determine what is “reasonably practicable” it is necessary to balance
  the likelihood of the risk occurring against the cost, time and trouble
  necessary to avert that risk.”\textsuperscript{140}
\end{quote}

193. In Western Australia, in the context of s 9(1) of the MSI Act, this extends to
an obligation on an employer to also ensure as far as reasonably practicable,
that contractors do not expose the employer’s employees to hazards. In

\textsuperscript{137} Bluff and Johnstone \textit{The Relationship Between “Reasonably Practicable” and Risk Management
CLR 40 at 48 per Mason J (Stephen and Aicken JJ agreeing)
\textsuperscript{138} Op.cit
\textsuperscript{139} (2001) 205 CLR 304 at 322-3
\textsuperscript{140} see generally the discussion in Bluff and Johnstone op.cit at 204-212
Hamersley Iron Pty v Robertson\(^\text{141}\) an operator of a bucket wheel reclaimer employed at the appellant company was killed when the bucket wheel reclaimer collapsed through equipment failure. The company was convicted at first instance of a breach of s 9(1) of the MSI Act. In dismissing the appeal from conviction Steytler J, in considering the issue of the “non delegable duty at common law, to provide a safe workplace”, said of s 9:\(^\text{142}\)

“It seems to me that s 9, in requiring an employer, so far as is practicable, to provide a safe working environment, imposes a duty, personable to the employer, not only to do what is reasonably practicable for the purposes of attaining that objective in the course of its own activities but to ensure, where that is reasonably practicable, that reasonable care is taken by subcontractors whose assistance is necessary in circumstances in which their failure to take such care might expose employees of the employer to hazards”.

194. This approach has been generally endorsed in Western Australia. An example is found a decision of the Full Court of the Supreme Court in Connector Drilling Pty Ltd v Equigold NL\(^\text{143}\).

195. Additionally, in terms of assessing the statutory concept of “reasonably practicable”, the state of knowledge referred to in s 4 of the definition of “practicable” in the MSI Act, is to be determined objectively, that is by “persons generally who are engaged in the relevant field of activity and not the actual knowledge, in fact, possessed subjectively by a specific defendant in particular circumstances”.\(^\text{144}\)

A Single Offence

196. In terms of the nature of a breach of the general duties provision, such as s 9(1) of the MSI Act, it has been held that the terms of s 9(1) constitute a single indivisible duty with the separate paragraphs identifying various acts or omissions, constituting an exemplification of the overarching obligation. In Meiklejohn v Central Norseman Gold Corporation Ltd\(^\text{145}\) the Full Court of the Supreme Court of Western Australia, was called upon to interpret the then s 30B (1) of the Mines Regulation Act 1946 (WA), the predecessor to s 9(1) of the MSI Act, which for all intents and purposes, was in the same terms.

197. An issue arose in that appeal, as to whether the paragraphs in (a) to (e) of the then s 30B (1) were capable of constituting separate offences when particularised in separate counts. Consideration was given by the Court to the legislation and authority in different jurisdictions, in particular in Victoria where the terms of the then ss 21 and 47(1) of the Occupational Health and Safety Act 1985 (Vic) were considered when read together, to enable the

\(^{141}\) Unreported SCWA 2 October 1998 per Steytler J
\(^{142}\) at p19
\(^{143}\) [2003] WASCA 78 unreported 11 April 2003 per Malcolm CJ, Murray and Wheeler JJ
\(^{144}\) Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249 at 261; Morrison v De Bono (2005) 147 IR 454; Hamersley Iron per Steytler J at 22; Reilly v Tobiasson [2008] WASC 6 per EM Heenan J at pars 110-125
\(^{145}\) Meiklejohn v Central Norseman Gold Corporation Ltd (1998) 19 WAR 298
conclusion that, from a construction of that legislation, the separately identified particular duties were capable of constituting a separate offence as charged.\textsuperscript{146}

198. The Court also considered other conflicting authority, but referred to the obiter observations of Pidgeon J in \textit{Interstruct Pty Ltd v Wakelam}, to the effect that s 19(1) of the OSH Act, in the separate subparagraphs, constitutes “no more than particulars” and not separate offences.\textsuperscript{147}

\section*{Absolute Liability}

199. It is also generally accepted in cases interpreting occupational health and safety offence provisions for breaches of a general duty, that such offences, subject to the notion of reasonable practicability, constitute absolute liability offences, without the requirement for the establishment of the mental element of intention or “mens rea.”: \textit{Chugg v Pacific Dunlop}.\textsuperscript{148} Some of the case law however uses strict and absolute liability interchangeably when dealing with safety and health offences. The distinction between the two concepts at law being the availability of the defence of honest and reasonable mistake in the case of strict liability, and its unavailability for an absolute liability offence. This matter was dealt with by the South Australian Industrial Court in \textit{Broken Hill Associated Smelters Pty Ltd v Stevenson}.\textsuperscript{149} In this case Stanley J referred to the common law position in relation to criminal responsibility and that the applicability of \textit{mens rea} depends upon (a) the words of the statute in question, (b) the subject matter; and (c) whether the imposition of strict liability will assist in the enforcement of the legislation: \textit{He Kaw The v R}.\textsuperscript{150}

\section*{Deemed Employment and Control}

200. An important but problematic issue in terms of liability under health and safety statutory provisions is the concept of “control”. This matter has perplexed employers in particular in the past. This is apposite to obligations cast upon employers in respect of independent contractors, and also other persons, which principally find expression in the MSI Act in Division 3 of Part 2, which deals with certain workplace situations being treated as employment.

201. These provisions apply to contract work arrangements, labour arrangements in general and labour hire. In both the OHS Act and the MSI Act, as a consequence of the 2004 amendments to both statutes, the common expression in relation to various contracting arrangements is defined in terms of the “capacity to exercise control”, and under s 22 of the OHS Act, a person that has “to any extent, control of a workplace or access to or egress from a

\begin{footnotesize}
\begin{enumerate}
\item Interstruct Pty Ltd v Wakelam (1990) 3 WAR 100 per Pidgeon J at 118
\item Chugg v Pacific Dunlop (1990) 170 CLR 249
\item Broken Hill Associated Smelters Pty Ltd v Stevenson (1991) 42 IR 130 per Stanley J at 144-145
\item He Kaw The v R (1985) 157 CLR 523. See also \textit{R v Commercial Industrial Construction Group Pty Ltd} [2006] VSCA 131 at par 24; Chugg v Pacific Dunlop Ltd [1988] VR 411 at 415 per Fullagar J
\end{enumerate}
\end{footnotesize}
workplace”. Given the consideration of these matters as set out below and recent judgements of the Supreme Court of Western Australia, little would appear to turn on the distinction between “capacity to exercise control” on the one hand and “control” on the other, in terms of the relevant statutory provisions.

202. The notion of “control” has been considered problematic in the past because of the degree of overlap in responsibility between duty holders. Employers are required to take care for their own employees, contractors, and employees of contractors, in relation to events over which they exercise control. Given the origins of these provisions in the non-delegable common law duties naturally, confusion arises as to who actually has the duty of care in any particular case. The answer is that in many cases, more than one duty holder is responsible.

203. “Control” has been interpreted broadly. In Morrison in considering the meaning of the concept for the purposes of s 22 of the OHS Act, Le Miere J put it this way:

“Section 22 of the Act requires persons who have control of premises used as a place of work to ensure that the premises are safe and free from risks to health. Section 22 applies to any person who has some degree of control over the premises so that he can make the premises safe. A person may have a sufficient degree of control over premises that he is able to make the premises safe for workers working on the premises, notwithstanding that they are not his employees and he has no control over their method of work. For example, a person may be able to ensure the safety of premises on which workers are working by removing or giving adequate notice of a concealed hazard.”

204. Thus “control” in the context of this statutory provision is not limited to an employer’s actual ability to exercise influence over the method of work itself. It will also include an ability to take steps to implement safety measures in relation to a particular hazard or hazards.

205. In Stratton v Van Driel Ltd an issue arose in the interpretation of s 21(3) of the former OHS Act 1985 (Vic). By that provision, an employer was deemed responsible for “matters” over which they have control or but for an agreement to the contrary, would have control. In considering this issue Byrne J took the view that the word “matter” was broad enough to embrace “any activity or thing in the working environment which might involve risk to the health and safety of a worker.” In this case, Byrne J also adopted the view that the words “in relation to”, which are the same words used in ss 15A, 15B and 15C

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151 See Complete Scaffold v Adelaide Brighton Cement and Anor [2001] SASC 1999 per Doyle CJ at 50
152 Morrison v De Bono (2005) 147 IR 454 at 457
153 see also WorkCover Authority (NSW) v Woolworths Ltd and Growth Equity Services Pty Ltd (unreported IRC NSW per Peterson J 9 September 1994); McMillan Britton and Kell Pty Ltd v WorkCover Authority (NSW) (1998) 87 IR 151
154 (1998) 87 IR 151 at par 16
of the MSI Act, further broadened the relationship between the duties and the subject matter of those duties.  

206. Most recently, the breadth of the notion of control, in terms of its disparate and tiered nature, was affirmed by the Supreme Court of Western Australia in Reilly v Tobiassen and also considered and contrasted in the context of the former ss 19(4) and current 22(1) of the OSH Act in Reilly v Devcon Australia Pty Ltd [2008] WASCA 84. It is important to observe however that both of these cases involved consideration of different provisions of the OSH Act. In Devcon, the Court of Appeal was called upon to consider the operation of the then s 19(4) of the OSH Act, in terms of the deeming of a principal as an employer for the purposes of attribution of the general duty in s 19(1) of the OSH Act. In particular, the Court concluded that s 19(4) required, when construed in context, a narrower focus on the relevant “matters” over which the principal has control, and is to be contrasted with, for example, s 22(1), considered in Tobiassen, which has, as its object, a person who has “to any extent control of a workplace”. The Court in Devcon did not need to consider the breadth of s 22(1) of the OSH Act for the purposes of the disposition of the appeal before it. In particular, the Court in Devcon referred to and endorsed the approach of the Full Court of the South Australian Supreme Court in Complete Scaffolding Services Pty Ltd v Adelaide Brighton Cement Ltd that “control” for these purposes, refers to “actual control, that is to things that the deemed employer is managing or organising”.

207. Many in my initial consultations in visiting mine sites raised this as an issue of concern. There is confusion as to where the boundaries are and where they should be. A construction undertaking on mine site is a classic case where the scope for overlapping obligations will arise. This is quite aside from the other issue as to which legislation applies in the first place, being either the MSI Act or the OSH Act, which issue I consider in Chapter 7. In this situation there will be, depending on whether an Instrument of Declaration has been made under s 4(3) of the OSH Act, obligations on the Principal Employer under the MSI Act, the main contractor and possibly a myriad of subcontractors, including labour hire firms, self employed persons and others on site.

208. In such a circumstance, there are cascading obligations created by the MSI Act. All of the relevant employers may have duties under s 9 for their employees. Similarly, the principal contractor will have obligations to the subcontractors and their employees under s 15A to the extent that it has the capacity to exercise control over the relevant “matters”. Likewise, any other relevant labour arrangements falling within ss 15B and 15C will extend obligations, again to the extent that there is the capacity to exercise control,

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156 (1998) 87 IR 151 at par 16
157 Reilly v Tobiassen [2004] WASC 6 per EM Heenan J at pars 82-104; However in Tobiassen v Reilly [2009] WASCA 26 the Court of Appeal overturned the judgment of EM Heenan J on other grounds. See also Reilly v Devcon Australia Pty Ltd [2008] WASCA 84. See also the judgment of Murray J at first instance in relation to equating “control” to “the capacity to control” for the purposes of the then s 19(4) of the OSH Act not disturbed on appeal: Reilly v Devcon Australia Pty Ltd [2007] WASC 106
158 Devcon at 16
159 Complete Scaffolding Services Pty Ltd v Adelaide Brighton Cement Ltd [2001] SASC 199
160 Complete Scaffolding at [56] and [57]
Employers and self employed persons will have duties under s 12 to not adversely affect the health and safety of persons other than their employees and finally, the Principal Employer as defined in s 4 of the MSI Act, will have overarching duties under s 13, to all persons who may be on the site at the time.

209. The only written submission to the Review that directly raised the issue of control, in the context of the general duties obligations under the MSI Act, was the RCSA. It represents employment services providers in Australia and New Zealand. The RCSA submitted that one of the key issues for what it described as “on-hired service providers” (those involving provision of services by an organisation in the form of one or more of its employees to clients to perform work as specified at a place nominated by the client) is the “capacity on the part of the OES provider to practically control safety hazards at the client’s workplace”.

210. In essence, the RCSA submission sought to establish that the legislation should sheet home responsibility to its members only to the extent that they can in reality, exercise real and effective control over the workplaces at which employees of providers are providing services to clients.

211. It was submitted that clarification was necessary in relation to a number of issues including principal responsibility for workplace risk assessments and who should carry them out; principal responsibility for job specific instruction and training and the provision of supervision; and responsibility for notification of reportable incidents and the enforcement of safety procedures.

212. The question of control can be, as noted above, a complex one and obligations may overlap. Two cases in particular have illustrated the issue and the obligations on labour hire firms to ensure that those who they “on-hire” to clients, are not exposed to risks to their health and safety. In both of those cases, the New South Wales Industrial Relations Commission emphasised the breadth of the obligations on labour hire firms and in particular, the obligation to monitor the work situation at client premises, to ensure employees of the labour hire firm are not exposed to risks.

213. The legislature has, to a considerable degree, endeavoured to address these issues through the enactment of s 15C which was acknowledged by the RCSA. Section 15C(1) defines an “agent” as a person who carries on the business of providing workers to carry out work for clients and includes a group training organisation as defined under the Industrial Relations Act 1979 (WA). The obligation of the agent to which the terms of s 9 of the MSI Act attach, only extends to “matters” over which the agent has the “capacity to exercise control”: s 15C(4)(d). The same situation applies to the client. The terms of Division 3 of Part 4 of the MSI Act are aligned with Division 3 of Part III of the OSH Act, following the Laing Review. Whether the approach of the Court

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161 RCSA submission at 4
162 See Drake Personnel Ltd v WorkCover Authority (NSW) (1999) 90 IR 432; Ankucic v Drake Personnel Limited [1997] NSWIRComm 157
in *Devcon*, in terms of the focus on the relevant “matters”, will be considered in future to narrow the scope of provisions such as s 15C remains to be seen.

214. Despite the concerns raised in my initial consultations and by the RCSA, I do not consider that the legislation is defective. The reality is that there will be overlapping duties as a matter of fact in any given circumstance. It would be extremely difficult to expand the existing provisions to cater for all possible tiers of responsibility. There is a risk in such an approach that difficulties arise as a matter of statutory interpretation. When a drafts person expressly includes some elements in a definition or statutory provision, it can often be interpreted as the implied exclusion of others.\(^\text{163}\) Unintended consequences can arise. Indeed, in the Hooker Review, one such matter was identified in relation to s 23F of the OSH Act that I consider below.

215. Nonetheless, the provisions as they are now arose from concerns expressed to the Laing Review that there was insufficient clarity in the duties of those in a principal/contractor relationship.\(^\text{164}\)

216. A different approach and one that may be more effective, is to address the matter by an extended definition of “worker” to include those falling within a range of relationships. This approach has been adopted in a number of other jurisdictions. I touch on this again in Chapter 15. Whilst in my view, the existing terms of ss 15A, 15B and 15C of the MSI Act are somewhat cumbersome in their drafting, and are not amendable to ease of reading, I am constrained in recommending amendments to the existing provisions by the requirement in my Terms of Reference, to maintain alignment with the OSH Act, which contains provisions in almost identical terms.

217. The issue of control in the context of general duties obligations was the subject of considerable attention in the Maxwell Review of the Victorian legislation.\(^\text{165}\) It was recommended arising from that Review that the legislation be amended to incorporate control elements into the concept of “practicability”. This recommendation was not adopted. In my view, there is considerable merit in such an approach. Mr Maxwell also recommended that the Work Cover Authority publish safety rulings in relation to this issue.\(^\text{166}\)

218. There is also considerable merit in the publication of more guidance material in relation to the scope of the control imposed obligations under the MSI Act. I note that this was also a recommendation arising from the Laing Review of the OSH Act.\(^\text{167}\) WorkSafe published a Guidance Note in 2005 on the general duty of care under the OSH Act that contains a section dealing with these matters.\(^\text{168}\)

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\(^\text{163}\) See Pearce and Geddes *Statutory Interpretation in Australia* 5\(^\text{th}\) Ed pars 4.26-4.28
\(^\text{164}\) Laing Review op cit at pars 276-281
\(^\text{165}\) Maxwell op cit at pars 444-501
\(^\text{166}\) Ibid at pars 496 and 501
\(^\text{167}\) Laing Review 2002 OSH Act at p 73
219. For the purposes of the MSI Act, a General Duty of Care Guideline was published under the auspices of MOSHAB in April 2000. Subsequent to amendments to the MSI Act to introduce Division 3 of Part 2, prescribing certain workplace situations to be treated as employment, in 2006 a revised General Duty of Care Guideline was published. Whilst that Guideline deals with the Division 3 Part 2 amendments, there could be specific consideration of the issue of control, as dealt with in the corresponding WorkSafe Guideline. This is particularly so given recent consideration of the issue under both the MSI Act and the OSH Act by the Supreme Court in Western Australia referred to above. In my view it would be helpful for such material to be revised. This could entail an update of the current General Duty of Care Guideline consistent with the WorkSafe publication and recent case law.

Visitors

220. Additionally, an issue considered in the Laing Review, was the extent to which visitors to a mine should be the subject of control by the principal employer and manager. Concerns were raised as to the inability for mine managers to control visitors who may engage in inappropriate conduct whilst on site. This led to a recommendation that provision be made for such situations, which was adopted by an amendment to the MSI Act.

221. It is noted however that the amendments to the MSI Act in response to this recommendation led to the enactment of s 102A, somewhat curiously located in Part 10 - Final Provisions, along with the regulation making power and the exemption from personal liability provisions. This seems an inappropriate location given that it is, for all intents and purposes, a general duty, the breach of which constitutes an offence. In my view this can be reasonably simply addressed as I recommend below.

Hooker Review

222. In the Hooker Review, the issue of the application of the corresponding provisions of the OSH Act in relation to contract work arrangements in Part 3 of Division 3 were considered. As a consequence, two recommendations were made, the first being what could be described as a technical amendment, to clarify the status of persons “deemed” to be employees in ss 41A and 47A, and the second to insert a “non avoidance” provision in s 23F, to the effect that no arrangement or agreement can purport to shift control from a duty holder. The specific recommendations made were in the following terms:

“R3. The Occupational Safety and Health Act 1984 (WA) be amended so that the definitions in ss.41A and 47A define “employers” and “employees” to include people who, under ss.23D, 23E or 23F are treated as an employer, or employee respectively, for the purpose set out in those sections.

169 See par 206 and n 157 above
170 Laing Review at 76-77
171 See s 102A MSI Act
R4. *The Occupational Safety and Health Act 1984 (WA) be amended to insert in s.23F a provision similar, or analogous in kind, to s.23D(5) and s.23E(5).”*

223. The CME submission noted the Hooker Review recommendations. As to these matters, both are supported in the CME submission to the effect that appropriate amendments to the MSI Act should be made.

224. In terms of Recommendation 3, the only corresponding provisions of the MSI Act are s 20A, dealing with inspections in Division 2 of Part 3, and s 104(1a) in relation to the regulation making power. They are in the same terms. There is no corresponding provision to s 47A of the OSH Act, dealing with Notices, in Division 3 of Part III. This may be because in the main, obligations in this Division of the MSI Act fall on the Principal Employer and Manager (as defined in s 4), thus avoiding the necessity for any extended definition in relation to the Notices generally.

225. However, my consideration of this issue has identified what I consider to be an omission in the MSI Act of some consequence. It is this. For the purposes of the general duties obligations under the legislation, as noted above, as a consequence of the Laing Review and the subsequent amendments of 2004, by Division 4 of Part 2, a general duty of care now extends to an employer who provides residential premises owned or controlled by the employer, to an employee and which occupancy is necessary for the purposes of the employment, it not being reasonably available elsewhere. This provision is in similar terms to Division 4 of Part III of the OSH Act.

226. By s 15A of the MSI Act, in particular s 15A (3), (4) and (5), it is clearly intended by the legislature that for the purposes of contract work arrangements to which that provision relates, where a principal provides residential accommodation to a contractor, that principal and that contractor respectively, are to have attached to that relationship, the general duty imposed by s 15D, as if they were employer and employee respectively.

227. In Subdivision 3, of Division 3 of Part 3, the capacity of a Mines Inspector to issue a Prohibition Notice is set out, in the case of a breach by an employer of the general duty in s 15D(2) to maintain the premises, as far as practicable, free of hazards. However, it is clear from their terms that ss 31AH and 31AJ, only empower an Inspector to issue a Notice, and constitute an offence respectively, in respect of an employee and employer as defined in s 4 of the MSI Act, that is who are parties to a contract of employment. Thus, if this is correct, then there is no present capacity for Prohibition Notices to be issued by a Mines Inspector, in the case of defective premises occupied by a contractor in a principal/contractor relationship, despite the clear intent of s 15A that the respective duties in s 15D should apply. The reason for this is the absence of a provision such as s 47A of the OSH Act, to extend the meaning of “employer” and “employee” respectively, to those in a principal/contractor relationship for the purposes of s 15A of the MSI Act, in relation to Notices,
including Prohibition Notices, in relation to the occupation of residential premises by an “employee”.

228. In my view this substantial gap in the MSI Act in relation to the general duties regime should be remedied without delay. Presently there is no statutory protection, in terms of the enforcement of the law by way of the issuance of Prohibition Notices, for this category of persons, occupying residential premises, in present circumstances. This amendment however, in the case of the MSI Act, need only refer to s 15A dealing with contract work arrangements.

229. Subject to these additional observations, I see no reason not to adopt the same approach to amendment to the MSI Act as to these matters, as recommended in the Hooker Review.

NMSF Compliance

230. The terms of Principles 8 and 9 of the NMSF require that obligations of all persons covered by legislation be clear and specific. Also that the obligations extend to persons whose actions could affect the safety and health of persons at mine sites, including on site and off site personnel, manufacturers, designers and suppliers of equipment and providers of services. This is also an overarching obligation in Principle 2b. No one has suggested that the legislation in its present form, in relation to these matters, is problematic.

231. Section 9 also supports training, competence, and relevant accreditation, of all employees, appropriate to their duties, as required in Principle 2i.

232. The general duties provisions clearly articulate what obligations exist and upon whom they fall. Levels of responsibility are also consistent with the degree of control, accountability and responsibility exercised and held. The obligations imposed on those not on a mine site, such as designers, manufacturers and suppliers, are also clear and to the extent relevant, indicate how the respective obligations are to be fulfilled. These provisions as a whole set out with some particularity, the circumstances in which they will operate and are consistent with the broad framework prescribed by the NMSF, in particular Principles 2a, 2b, 2i, 8, 9 and 10.

Recommendation 2

That the general duties provisions in the MSI Act remain in their current form and that the alignment with the OSH Act general duties provisions is maintained.
Recommendation 3

That the General Duty of Care Guideline be reviewed and updated under the auspices of the MIAC, to incorporate commentary in relation the scope and application of the principles relevant to control exercised by duty holders in terms similar to the corresponding WorkSafe Guideline and having regard to recent Western Australian case law.

Recommendation 4

That s 102A of the MSI Act be repealed and re-enacted in Division 4 of Part 2 as a new s 15G entitled “Duty of visitors to comply with directions.”

Recommendation 5

That the MSI Act be amended to insert a new s 29A at the commencement of Part 3 Division 3 to the same effect as s 20A, but only as to s 15A, as modified to incorporate Recommendation 6.

Recommendation 6

That the existing ss 20A, 104(1a) and the proposed s 29A of the MSI Act make it clear that the reference to ss 15A, 15B and 15C, as the case may be, is only to the extent that the reference to “employer” and “employee” is for the limited purpose of those provisions.

Recommendation 7

That the MSI Act be amended in s 15C to incorporate the intent of ss 15A(5) and 15B(4).

Public Safety

233. The issue of public safety was somewhat contentious in the Laing Review. It was noted that generally speaking, matters concerning public safety were the province of environmental and other legislation concerning public liability.\(^{172}\) I am in general agreement with this proposition, although it must be also noted that this was a matter identified by the Robens Committee in its consideration of the scope of health and safety legislation generally.\(^{173}\) It was the view of the Robens Committee that health and safety legislation should extend to protect the public.

234. In the course of the Laing Review, the matter arose as a consequence of concerns expressed by some living close to mines that they were subject to deleterious impacts from mining operations, in particular noise, dust and in one case, atmospheric chemical pollutants. The Laing Review recommended

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\(^{172}\) Laing Review at 90-94

\(^{173}\) Robens Committee Chapter 10
that in relation to matters that are work related, the coverage of both the OHS Act and the MSI Act should be extended to protect the public. However, no such amendments were forthcoming.

235. The only submission allied to the issue of the protection of persons working outside of mining operations strictly speaking, was a submission from pastoralists on a station in the Meekatharra region. The submission goes to the safety aspects of mining operations conducted on pastoral leases. This submission raised a number of matters of concern. The first is the lack of adequate barriers to open pits after mining operations have ceased to prevent stock entering the area and hazards to station personnel who are required to retrieve them. The second relates to inadequate notice from miners to pastoralists of material changes to locations. An example is given of mining vehicles in an undesignated area that involved an accident with a station vehicle. The other two matters raised went to a lack of dust suppression on roads and inadequate speed restrictions both in the submission, said to have led to a number of near misses with mining vehicles.

236. The terms of pastoral leases and the requirements upon lessees are governed by the Land Administration Act 1997 (WA). From the terms of the MSI Act read as a whole, it extends to those persons at a “mine”, which is defined in s 4 to mean “a place” “at” which mining operations are conducted. The scope of “mining operations” as defined in s 4 is very broad indeed and in my view, there is no warrant as a matter of construction, to read its meaning in any restrictive sense.

237. In the case of the submission from the pastoralists and any others in their position, it is beyond the scope of this Review to consider in any detail the issues relevant to their particular circumstances. However, it is noted that the terms of the MSI Act in s13, as to the obligations on Principal Employers and Managers are broad. They extend to ensuring that all persons at the “mine” (as defined in s4) and who use the means of access to or egress from the “mine”, are not exposed to hazards. Accordingly, some of the issues raised by the pastoralists in their submission may well go to these duties and their enforcement. It is also to be noted that by s 12 of the MSI Act, an employer and a self employed person have an obligation to not expose persons, who are not an employer’s employee, to hazards. This clearly contemplates visitors or members of the public who may otherwise be at or close to a mining workplace and who may be affected by the work so undertaken.

238. As a general proposition however, by s 3 of the MSI Act when read with the long title, the legislation is primarily concerned with the safety and health of employers and employees, self employed persons, those in various contract arrangements and others engaged in the supply of substances and plant to a mine. I do not consider, without further debate, that its scope should be extended any further.
A State of Transition

239. My overwhelming impression, from my engagement with the very many persons, organisations and groups I have conferred with as a consequence of this Review process, is that the mining and minerals processing industry in Western Australia, in terms of regulatory architecture as to occupational health and safety, is in a state of transition. What design, or mix of designs, the MSI Act should adopt for the future is a question that I now turn to in the next Chapter and in Chapter 6.
CHAPTER 5 – RISK MANAGEMENT AND SAFETY MANAGEMENT SYSTEMS

Risk Assessment and Management

240. There seems to be an increasing acceptance, both as a consequence of judicial consideration, and practical application, of an inherent requirement of general duties provisions, for employers to engage in at least risk assessment, if not risk management processes, to fulfil their statutory obligations.

241. In the context of Victorian health and safety legislation, it has been held that the general duty imposed on employers requires an employer to take a proactive approach to the identification of potential hazards in the workplace. This is also noted by Bluff and Johnstone in relation to New South Wales case law, with an emerging trend from the cases suggesting that a proactive approach to the management of risk is implicit in the general duties regime.

242. In a number of decisions, in particular of the New South Wales Industrial Commission, a focus on a proactive approach to managing safety in the workplace has been emphasised. For example in Work Cover Authority of NSW (Inspector Egan) v Atco Controls Pty Ltd Hill J observed:

“This case is yet another illustration of the need for employers to exercise abundant caution, maintain constant vigilance and take all practicable precautions to ensure safety in the workplace. It is essential that the approach should be a pro-active and not a re-active one; employers should be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace”

243. Whilst in the context of the MSI Act, risk assessment and risk management is not expressly and comprehensively dealt with at all, the objects s 3(1)(b) and (c) are directly relevant and they include:

“(b) to assist employers and employees to identify and reduce hazards relating to mines, mining operations, work systems and plant at mines; and

(c) to protect employees against the risks associated with mines, mining operations, work systems at mines, and plant and hazardous substances at mines by eliminating those risks, or imposing effective controls in order to minimize them; and...”

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174 Holmes v Spence (1992) 5 VIR 119 at 123
175 See Bluff and Johnstone op cit at 212-218
176 (1998) 82 IR 80
244. In considering the breadth of the general duties obligations in s 9, read with and informed by the objects of the MSI Act in s 3, the conclusion seems inevitable that a similar construction of the legislation to that referred to above, is open to be adopted in this jurisdiction.

245. Various provisions of the Regulations refer to the identification of hazards and the reduction of risks by an employer in relation to, for example, use of certain types of plant in mines. Furthermore, at the commencement of mining operations, an operator must include a Project Management Plan which outlines a broad assessment of the major risks associated with the mine and a summary of strategies proposed to manage those risks. Apart from these references in the various Regulations, there is no express statutory obligation in relation to hazard identification, risk assessment and risk control under either s 9 of the MSI Act or the Regulations.

246. By way of contrast, in the OHS Regulations 1996 (WA), there is a general obligation on various duty holders to identify hazards, assess risks and consider means by which those risks may be reduced.

247. As noted above, assuming it may be concluded that such a process is implied in relation to the operation of s 9(1), given the objects of the MSI Act, there seems to be no logical explanation for the absence of express obligations in this regard. This issue was touched on in the Laing Review when it was said as follows:

“While there appears near universal acceptance of the efficacy of the combination of general duties and the hazard identification, risk assessment and control process, the current statutory and regulatory arrangements do not fully develop the latter. For example, although it is implied at section 9(1) of the MSIA there is no direct reference to risk control in the Act...Given the pivotal role the process plays in occupational safety and health and its implicit acceptance as the basis for all occupational safety and health prevention activity, it is appropriate that it should be explicitly established in the general duties of the Act.”

248. This issue was also referred to by the MSIG. Following the Laing Review, s 104 of the Act, dealing with the power to make regulations was amended, by the insertion of the following:

“(ca) without limiting paragraph (c), imposing duties on persons in relation to —

(i) the identification of hazards at mines;

(ii) the assessment of risks resulting from such hazards; and

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177 See Part 6 – Safety in using certain types of plant in mines
178 Reg 3.13(1)(b)
179 Reg 3.1 OSH Regulations
180 Laing Review op cit at par 324
181 MSIG op cit at 3.2
(iii) the taking of remedial or other action;”¹⁸²

249. This amendment was made for the express purpose of enabling Regulations to be made in terms similar to reg 3.1 of the OSH Regulations, to provide for a general hazard identification, risk assessment and risk control process.¹⁸³ It was noted that whilst some of the Regulations require hazard identification and risk assessment, there was no general requirement to control and reduce risk so identified.

250. However, the regulation making power has not been acted upon and no regulations have been made to date. It can therefore be said in summary that the express obligations on duty holders presently to engage in formal hazard identification, risk assessment and control under the MSI Act, is at best, partial. This is in my view an omission of some significance that needs to be remedied.

Contentions of Stakeholders

251. The issue of risk management was the subject of a number of submissions to the Review, in the context of the proposal to introduce a safety case regime or similar approach, into the mining and minerals processing industry in Western Australia, which is the subject of further consideration below. Others also commented on the issue more generally.

252. All of the key stakeholders support a transition to the adoption of a risk management, systems based model of health and safety regulation in the mining industry in Western Australia. Others however, submitted that there has been no case made for any change to the general duties framework as it is, and any further amendment is unnecessary. Where those who do support a change differ, however, is the form that it should take.

253. From the perspective of the industry, the CME submission indicated broad support for the development of a risk management based regulatory model in the Western Australian minerals sector, which is aligned to a safety case approach. Particularly important from the industry perspective, is the requirement that any such model take account of the characteristics of the mining industry, in recognition of the differences that exist between it and others where such approaches have been adopted, such as the petroleum and major hazard facility approaches to regulation.

254. In terms of the legislative mode of delivery of a risk management approach, the CME view is that no amendment to the MSI Act is necessary and the approach supported can be accommodated by an appropriate amendment to and substantial review of the Regulations, to remove excessive prescription with the progressive transfer to Codes of Practice and guidance material, of those parts amenable to this approach.

¹⁸² Mines Safety Inspection and Amendment Act No.68 of 2004 s 92
¹⁸³ Ibid Explanatory Memorandum pars 137-140
255. From its perspective, the AMMA also generally supports such a change.

256. The union perspective, as expressed in the CFMEU submission, developed in more detail in the next Chapter, whilst supportive of a risk management regime, prefers an approach consistent with existing regulatory regimes in the mining industry elsewhere.

257. From the health management perspective, the Department of Health commented that in particular the objects of the MSI Act could be used to further promote risk assessment and control in relation to health management in mining workplaces. A range of matters are raised in their submission, such as fatigue management; infection control particularly as a consequence of increased immigration arising from the current skills shortage; appropriate recreation and accommodation facilities and the general well being of mine employees, particularly those on fly-in fly-out rosters.

258. As I have already noted at the outset of this Chapter, and in Chapter 3 commenting on the safety performance of the industry, the general duties regime in effect under the MSI Act and its predecessor, the Mines Regulation Act 1946, since 1990, has served the industry generally well. This was also the general sentiment of those with whom I conferred on these issues.

259. Since the introduction of the Robens inspired model in Western Australia, the industry safety performance has very substantially improved. Whilst it has been previously suggested, somewhat controversially, that the earlier improved safety performance in the mining industry was attributable in large part, if not totally, to the decline in the number of underground operations, for the reasons outlined above, this cannot have been a contributing factor since about 2000.

260. This material points to other factors at work in the continued level of improvement in safety and health performance. Taking into consideration the effects of the introduction of new technology and improved mining methods, the other major change from the early 1990’s was the introduction of the Robens inspired general duties regime into the industry.

261. The correlation in safety performance outcomes appears to be significant and one could reasonably conclude that the introduction of the Robens model, and the initiatives to promote health and safety in the industry accompanying it, have been positive.

262. In terms of any transition, risk assessment approaches to health and safety management however, have not been without criticism. It has been suggested in the literature and in other Reviews that an emphasis on risk assessment, may inevitably lead to the prioritisation of risk from low to high, with the possibility that low level risks are not given sufficient attention. This is in

184 Kelly Report at 7.1 in particular at p 39 and adopted in the Ritter Inquiry at 327
contrast to the general duties approach, which requires as far as practicable, all hazards in the workplace to be addressed, without any “ranking” process.\(^{185}\)

**Management Systems Approach**

263. If one accepts the analysis outlined above, it is arguably implicit within the general duties framework in s 9 of the MSI Act, that a systematic and proactive approach to the management of risk should be adopted. Large sophisticated organisations generally adopt this approach as a matter of course.

264. Much has been written in relation to a management systems approach to health and safety. The arguments are now well rehearsed and I only comment briefly.

265. Bohle and Quinlan canvass the literature extensively in discussing the development and evaluation of the effectiveness of such approaches to health and safety in the workplace.\(^{186}\) In traversing the early development of systemic approaches both in Australia and overseas, in particular the Scandinavian “Internal Control” model, some of the advantages are noted as enabling management to:

   (a) identify, assess and address all significant hazards;
   (b) prioritise OHS activities;
   (c) address some hazards at the entry point or design stage;
   (d) address changes to the workplace and hazards;
   (e) monitor and audit OHS processes and outcomes; and
   (f) meet ethical as well as legal requirements in relation to safety and health.\(^{187}\)

266. In the recent review of the Northern Territory general health and safety and mining legislation, the reviewers cautioned, in relation to management system requirements, against the creation of “paper tigers” that are directed to the achievement of paper compliance, rather than the systematic implementation of health and safety management principles directly into the workplace. That is, put another way, the classic “tick and flick” approach to safety management.\(^{188}\) I share that caution.

267. Other research suggests that an over focussing on compliance procedures and rigid rules, can in fact be counter productive and lead to heightened risk.\(^{189}\) As has been said, the issue is not so much a focus on the quality of health and safety management systems, but rather on the commitment and quality of

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\(^{186}\) Bohle and Quinlan op cit at 296-300; 503-511

\(^{187}\) Ibid at 504

\(^{188}\) Review of the NT Work Health Act and Mining Management Act Final Report. 22 June 2007 at Chapter 8.2

\(^{189}\) K E Weick, K M Sutcliffe and D Obstfeld *Organising for High Reliability : Processes for Collective Mindfulness*. Research in Organisational Behaviour 21, 1999
management itself.\textsuperscript{190} Without senior management commitment, adequate resourcing and employee involvement, any approach to safety and health in the workplace, regardless of the regulatory model, is likely to be sub-optimal.

268. An illustration of the “disconnect” between systems and their implementation was evident as a result of the Esso Longford disaster in September 1998 in which two operators at the Esso Longford gas plant in Melbourne lost their lives and the city of Melbourne was without gas for about two weeks.

269. The subsequent Royal Commission identified the failings of the Esso health and safety management system, in particular the absence of adequate engineering surveillance, the inability of the management system to respond to change and the failure to carry out critical safety assessments.\textsuperscript{191} In his work on the Esso disaster, Hopkins commented on the existence of “informal systems” in the workplace, and the absence of surveillance and the problems that this can create.\textsuperscript{192}

270. In the recent Northern Territory review, whilst the reviewers did not recommend the adoption of a specific management systems approach to health and safety in the proposed merged statute, it was recommended that mining specific regulations contain a risk based management system, consistent with NMSF requirements, and aligned to those in Queensland and New South Wales, with the focus on implementation rather than documentation.\textsuperscript{193}

271. Additionally, while there is yet to be any published research that I have been able to locate, specifically considering the operation of the Queensland and New South Wales mining approaches to safety management systems, there seems to be broad continued support for such an approach in those jurisdictions. Views have been expressed that this regulatory model has been of benefit to both the industry and the regulators.\textsuperscript{194}

\section*{NMSF Compliance}

272. It is an overarching principle of the NMSF Legislative Framework at Principles 2c, 5, 6 and 7 that key features of a nationally consistent legislative framework in the mining industry, provide for the control and management of risk using risk management processes, including hazard identification, risk analysis, risk reduction and risk monitoring. Additionally, Principle 2h deals with the assessment, auditing/validation and review of safety management systems.

273. This approach includes the recognised hierarchy of hazard controls including elimination, substitution, separation, engineering controls, administrative

\textsuperscript{190} Gunningham op cit at 75-76.
\textsuperscript{192} A Hopkins Lessons from Longford: The Esso Gas Plant Explosion 2000 at 52-53
\textsuperscript{193} NT Review op cit at Recommendations 22 (p83) and 24 (p88)
\textsuperscript{194} Discussions with the Chief Inspectors of Mines of Queensland and New South Wales March 2008
controls and personal protective equipment. It is intended that these techniques operate within an overall performance based legislative scheme.

274. The current provisions of the MSI Act and Regulations are not consistent with the NMSF legislative requirements in this regard. There is no express requirement for a mine operator to engage in risk management. As a consequence, and importantly, there is also no express requirement upon the regulator to regulate in accordance with a systems approach, despite criticisms in the past that it has failed to do so.

275. Principle 16 of the NMSF requires legislation to include a “risk based safety and health management system” that:

- “Forms a documented and auditable system constituting part of the overall management system of the mine;
- Defines the safety and health policy for the mine and covers such aspects as organisational structure and resources, responsibilities, policy and procedures for the operation of the mine, measuring, monitoring auditing and reviewing of processes and work practices;
- Defines methods for developing, implementing, maintaining and reviewing safety and health practices and policies;
- Acknowledges the size and complexity of a safety system will depend on the size and complexity of the mine site, and attendant risks.”

276. Given that there is general support for the adoption of a risk management model in Western Australia, and that the exiting legislative regime falls short of that specified in the NMSF, and that there has been a commitment to the NMSF process both by the industry and the State Government, it now seems the appropriate time for a step change in health and safety regulation in the mining industry in this State.
CHAPTER 6 – A RISK MANAGEMENT APPROACH FOR THE WESTERN AUSTRALIAN MINING INDUSTRY

Hicks Feasibility Study

277. My terms of Reference require me as part of the Review of the MSI Act to take account of this study.

278. The Final Report of the Hicks Feasibility Study has yet to be released publicly and is still subject to State Cabinet deliberative processes. Thus I am not able to comment on its content.

279. Further consideration should to be given to the adoption of the model suggested by the Hicks Feasibility Study, once it is released into the public domain. This will enable full consultation within the mining and minerals processing industry and amongst the key stakeholders.

MSIG

280. The Hicks Feasibility Study follows the MSIG Report recommendation for the adoption of a safety case regime in the minerals industry in Western Australia. The particular features of a safety case regime for the minerals industry as recommended by the MSIG include:

- safety case requirements should apply to all mines, regardless of size, on the understanding that the smaller and less complex the mine, the simpler the safety case;
- safety cases should incorporate trigger action response plans where appropriate;
- safety cases in the mining industry should address all risks including those to occupational health, and risks which can cause single fatalities;
- safety cases should include a detailed consideration of fatigue management;
- mining industry safety cases should not normally be required to carry out quantitative risk analysis;
- the workforce and their representatives should have a right to be consulted in the development of a safety case and to raise concerns about a safety case after it has been accepted;
- the safety case regime should specify guidelines for participation of the workforce and their representatives;
- safety cases should include provision for adequate training for the workforce and management; and
- the development of the three safety case regimes (minerals, dangerous goods and onshore petroleum) should be coordinated and aligned where possible.

195 MSIG Interim Report Stage 1 pp7 and 41
Origins of the Safety Case

281. Safety case regimes have been applied in the offshore oil and gas, petrochemical and nuclear industries for many years. The principal focus of safety case regimes has been on low probability/high consequence events in the control of major hazards.

282. Such regimes have tended to follow catastrophic failures involving multiple fatalities. These include the 1974 Flixborough chemical explosion in the UK that claimed 28 lives and caused many more casualties; the environmental disaster in Seveso in Italy in 1976; the Piper Alpha platform fire in offshore oil and gas and Australia’s chemical plant tragedy at Esso Longford in Melbourne in 1998. The latter event led to the Victorian major hazard facility regime following the Royal Commission of Inquiry.

Offshore Petroleum

283. Prior to 2005, the offshore oil and gas industry safety case regime was regulated by State law. From January 2005, on the establishment of the National Offshore Petroleum Safety Authority (NOPSA) the administration of Commonwealth and State legislation in relation to offshore oil and gas facilities was transferred to that body. NOPSA was established under the Petroleum Submerged Lands Act 1967 (Cth) and continues under the new Offshore Petroleum Act 2006 (Cth), which I refer to below. NOPSA is funded by way of levies on operators in the industry under this legislation and the Offshore Petroleum (Safety Levies) Act 2003 (Cth).

Major Hazard Facilities

284. Additionally in this State, major hazard facilities have been regulated under the National Standard for the Control of Major Hazard Facilities [NOHSC; 101 4 (2002)] (“the National Standard”) which deals with the control of sites storing and handling large quantities of hazardous materials. These materials are designated major hazard facilities (“MHF”), based on a predetermined percentage of specified materials as set out in schedule 1 to the National Standard. Importantly, the National Standard extends only to the handling of the prescribed materials and its focus is on the prevention of major accident events.

285. As of March 2008, the regulation of major hazards in Western Australia falls under the Dangerous Goods Act 2004 (“the DG Act”) and the Dangerous Goods Safety (Major Hazards Facilities) Regulations 2007 (“the DG Regulations”)
Definition and Components

286. Whilst definitions of safety cases vary, it is generally accepted that there are three elements involved in a safety case they being;

- a facility description
- a formal safety assessment; and
- a safety management system

287. The facility description provides an outline of the location and nature of the operation, along with a summary of the equipment utilised and its operation.

288. The formal safety assessment comprises a formal and systematic identification and assessment of all hazards and the methods by which the risks associated with those identified hazards may be controlled.

289. The safety management system is the integrated system for the control and management of all safety and health issues within the enterprise. It is this element that binds the safety case into an integrated whole. A summary of these principles and how the various components of a traditional safety case model may apply to a typical mining operation appears at annexure 6.

290. There is no one single definition of a safety case. Heiler approaches the issue this way:

“One of the first challenges is that there appears to be no single, all-encompassing definition of a SCR. Rather, “safety case” appears to be a “concept” underpinned by a set of criteria, principles, components, not all of which are identical across either industry, jurisdiction or commentator. There also appears to be differences in emphasis and detail around a number of the key components. These include: the role of "prescription", the function of the regulator, the nature of the licensing arrangements, the definition of principles such as “ALARP”, the role of associated safety and other legislation and funding arrangements.” 196

291. In dealing with differential approaches to what is a safety case, Heiler further notes:

“As the above example demonstrates, while there are common elements associated with a safety case regime, there are differences in emphasis. For example the level of detail required in the particular safety case will differ depending on the level of risk and complexity of the operations; similarly, the methods used and the standards to which a facility must aim in order to demonstrate that risk has been managed (and or improved) appear to vary. For example some commentators advocate the use of a quantitative risk assessment (eg Pitblado and Smith (2001); whilst others

criticise the use of QRA and in the case of the WA task force recommendation, do not mandate its use for the mining industry.\(^{197}\)

\[A\] \[L\]\[i\]\[s\]\[c\]\[i\]\[n\]g \[R\]\[e\]\[g\]\[i\]\[m\]e\[e\] \[n\]

292. Whilst it may be said that a safety case is in principle, a relatively advanced form of risk management, the vital difference to other forms of risk management, is the role of the regulator. Where permissioning is a feature, the acceptance or rejection of a safety “case” operates as a formal licensing regime. As the expert report for the MSIG observed:

“But the crucial additional feature of a safety case regime is that it is a licensing regime. Operators are required to make a case to the regulator indicating how they intend to comply with these requirements (hence the term “safety case”). Regulators must ultimately accept or reject the safety case. Evaluating safety cases is a time consuming business and, for complex safety cases, it requires considerable expertise. This is, at least in part, because of the amount of detail in complex safety cases. Indeed, once accepted by the regulator, all the detail in the case is enforceable. Safety case regimes are, therefore, not a retreat from prescription; it is simply what is prescribed as set out in the safety case rather than in legislation or regulation. However, it should be noted that the amount of detail in a safety case regime is resource intensive. This is especially true where the facilities require complex safety cases. Any Government which wishes to embark on safety case regulation must recognise this crucial fact. Unless the regime is well resourced it is likely to fail, in the sense that it will offer no advantages over and above non-safety case regimes."\(^{198}\) (My emphasis)

293. There are presently no safety case regimes in operation in the mining and mineral processing industries in Australia. Whilst in Western Australia, it may be said that a limited form of “safety case” regime already exists through the requirement in reg 3.13 of the Regulations for a project management plan to be provided to the State Mining Engineer prior to commencement of mining operations, as currently drafted, such a requirement is not ongoing and only requires a “broad assessment” of major risks, without the detail that would be expected in a safety case.\(^{199}\)

294. Additionally by reg 4.30 a Principal Employer or manager of a mine must ensure that there is an emergency plan in place that identifies hazards that may cause an emergency; assesses the risk of such and consider control mechanisms to prevent or deal with such an emergency.

\[M\]\[i\]\[n\]g \[R\]\[i\]\[s\]\[k\] \[M\]\[a\]\[n\]\[a\]\[g\]e\[e\] \[n\]

295. As outlined earlier, the mining safety and health legislation in Queensland and New South Wales, adopts a risk management approach through the utilisation

\(197\) Heiler at 8
\(198\) MSIG op cit at 34
\(199\) Regulation 3.13 Regulations
of safety and health management systems and mine safety management plans, variously described, respectively.

296. In addition to a requirement on an employer to prepare a safety and health management plan, in New South Wales coal mines, requirements are imposed by the legislation for the preparation of major hazard management plans.\textsuperscript{200} Such major hazards include for surface operations slope stability and mobile equipment. In the case of underground they include transport systems, strata control, in rush, fire and explosion and ventilation. Similarly in the case of Queensland coalmines, principal hazard management plans identifying, analysing and assessing risks that may lead to multiple fatalities are mandated.\textsuperscript{201}

297. Whilst in this regard such a focus on low frequency/high consequence events may be said to be features in common with a traditional safety case regime, the distinguishing feature of these arrangements is the absence of any requirement for regulator approval, or “acceptance”, as a condition of the commencement or continuation of operations.

298. An exception to this is under the Queensland metalliferous legislation. Where an operator has on site hazardous substances in excess of that prescribed under the major hazard facilities standard, the site senior executive is required to develop and lodge with the Chief Inspector a safety report within 16 months.\textsuperscript{202} Save that in Queensland, this requirement is incorporated under the mining regulations this is in essence, no different to the position in Western Australia presently. In cases where a mine satisfies the requirements of the DG Act and Regulations as a major hazard facility, it is also required to prepare and lodge a safety report with the Chief Executive, in accordance with the legislative requirements, as noted below.

Western Australian Safety Case Experience

299. As noted, the safety case concept is not new. In Western Australia, safety case principles have applied to the on shore and off shore oil and gas industries for many years. This extended to all phases of the industry including exploration, production and supply. Prior to the formation of NOPSA in January 2005, the regulator in Western Australia applied safety case methodologies to the regulation of the oil and gas sector.

300. Following the establishment of NOPSA, the RSD maintains its role in regulating major hazard facilities under the DG Act and Regulations. This new legislation, noted above, follows the National Standard and focuses on the control of hazards arising from the use and storage of hazardous substances as prescribed.

\textsuperscript{200} See CMHS Act 2002 (NSW) s 32
\textsuperscript{201} Sections 62 and 63 CMSH Act 1999 (Qld)
\textsuperscript{202} See Part 7 Division 1 Mining and Quarrying Safety and Health Regulation 2001
301. Once classified as a major hazard facility, the operator is required under the DG Act to embark upon a systematic process of risk assessment and prepare and submit to the RSD, a safety report for its approval. The safety report must meet a number of prescribed requirements and the RSD may only approve the safety report and grant a licence to operate if it is satisfied that an operation has met the following requirements:

(a) there exists an appropriate safety management system;
(b) all major events that could occur have been appropriately identified and documented;
(c) all hazards that could cause such major events are identified and control measures are in place to either eliminate or reduce the risks of those hazards;
(d) a suitable emergency plan for the facility has been prepared;
(e) that there has been employee consultation and employees are to receive appropriate induction, training and education; and
(f) there has been appropriate consultation with the local community regarding safety matters relevant to the particular facility.

Effectiveness of a Safety Case Regime

302. The available research material in relation to the performance of safety case regimes in the industries to which they have been most closely aligned, is somewhat mixed.

303. In referring to published research conducted between about 1995 and most recently in 2003, for the Health and Safety Executive in the United Kingdom, Gunningham observes:

“The conventional wisdom is the safety case model has achieved considerable success. This is not only the view of senior and experienced regulators closely associated with this approach (Wilkinson 2002), but also of a number of independent studies, (for example, Saksvik & Nytro 1995a; Saksvic & Nytro 1995b; Pitblado & Smith 2001) which draw from research commissioned by UK Health and Safety Executive which states that:

“Overall a cost-benefit analysis is positive. It is certainly true that whilst there were two major accidents in a seven year period there have been none in the thirteen year period since then. In that time major efforts have been carried out in the industry to analyse risks and having found them to design those out. Safety case was a key tool in this process.”

Similarly positive assessments have been made by Australian studies including the Longford Royal Commission which viewed a safety report as “for some time recognised as one of the most effective means of risk management where reliance is placed on self-regulation” (Dawson & Brooks 1999, [14.30]). Another report goes so far as to suggest that the introduction of the safety case regime in the offshore oil industry has resulted in a reduction in individual risk of up to 70% (ISR md).
However not all the evidence is in one direction (Woolfson, Foster & Beck 1997, 385-402). Heiler (2006), in an important review, concludes that:

[O]bjective evidence about the effectiveness of a [safety case regime] is difficult to locate... there are more assertions about the effectiveness of a SCR than hard evidence. This may not detract from the actual effectiveness of a SCR...but it is clear that claims about the demonstrable effects must be treated carefully.  

304. Both Gunningham and Heiler refer to a “meta-analysis” undertaken by the VECTRA Group Ltd for the United Kingdom Health and Safety Executive in relation to the perceived benefits and disadvantages of safety case regimes in the United Kingdom.204 As noted by Heiler,205 the VECTRA literature search concluded that there had been very few objective research papers published in relation to benefits of a safety case regime. Of the 156 papers reviewed, only about six involved original analysis and research.206

305. In particular, the following extract from the VECTRA report executive summary is of note where it was said:

“There is good support for SCR’s acting to improve overall hazard identification and control. This is largely due to the need to systematically review and assess systems and processes. In some instances this assessment was the first time the organisation had thought about their operations in such a structured and vigorous way. However, there is some evidence that after the initial identification of improvements (that can lead to a step change in risk reduction), there is less potential over time for identifying improvements. This raises important questions regarding how the regime should be managed and led as it matures, and raises the potential need to shift the focus on to softer issues to ensure that the maximum value is realised over time.

There are mixed views about whether the SCR improves overall safety culture and safety communications within a company. Generally there is a positive view on this with improved workforce understanding of major hazards. The impact in this area, however, appears to be variable and depends very much on the management approach of the company and to some extent the “spirit” in which the regulations are implemented.”207

306. There therefore seems to be a need for some caution as to the evaluation of the effectiveness of safety case regimes in terms of enhanced safety and health performance. There also seems to be an appreciable risk of a fall off in both enthusiasm and results from safety case regimes, requiring a “kick start” to reinvigorate the process. This is illustrated in the offshore oil and gas industry

203 Gunningham 2007 op cit at 71
204 Literature Review on the Perceived Benefits and Disadvantages of UK Safety Case Regimes VECTRA Group Limited August 2003
205 Heiler op cit at 9
206 VECTRA op cit at 17-18
207 Ibid at 3
in the United Kingdom, with the launching of the “Step Change in Safety” initiative in September 1997.208

A Safety Case for the Western Australian Mining Industry

Initial Impressions

307. Given the absence of any established safety case regime in the mining industry in Australia or elsewhere in the world, consideration of its application to the Western Australian mining and minerals processing industry is entering uncharted waters. Whilst risk management based systems approaches have been adopted in New South Wales and Queensland, as identified earlier, no jurisdiction has yet progressed to the next level of regulation by way of a safety case or a derivative thereof.

308. This issue in the course of my initial consultations, with those in or involved with the industry, has been somewhat controversial. Strong opinions have been expressed both for and against the concept of a safety case.

309. Some who I have spoken with in the industry, including some within the Mines Inspectorate, consider that the existing general duties regime under the MSI Act, is both comprehensive and enables operators to adapt safety and health management approaches consistent with the nature of the operations in terms of size, complexity, resources and sophistication.

310. In particular, it has been put to me from some quarters that in relation to small and medium sized mines, a safety case regime or some derivative thereof, could not possibly succeed. It is said that they are too complex, too resource intensive and in the case of such mines, many operators have neither the commitment nor resource capacity to engage in such a process.

311. Of course, there are contrary views. Some senior managers in some large mining operators with whom I spoke, were supportive of the introduction of any new approach that has the potential to improve health and safety outcomes in the industry. Several other large operators expressed the view to me, that they were interested in the concept of a safety case for the mining industry, but wished to learn more as to how it may impact on their operations and the “fit” with their existing procedures and systems. The distinct impression I gained from these particular organisations was that they were keen to learn more, but would proceed cautiously.

312. Consideration of a safety case regime in the context of the mining and minerals processing industry appears in some published research literature to date.

208 Step Change in Safety www.stepchangeinsafety.net
Some Research Commentary

Characteristics of Mining

313. Rasche notes that while it may be desirable to introduce a safety case approach to the mining industry, in particular gaining a better understanding of safety processes and their maintenance and improvement during the life of an operation, there are restraints. He posits the following matters for consideration in implementing a safety case regime in the mining industry including:

(a) the inherent complexity of a safety case and the resource requirements involved given the amount of information involved;
(b) the specialised and expensive resources required and the difficulty in describing and modelling major accident events realistically;
(c) the possible divergence between “what is written” into a safety case and the actual understanding of risk and the utility of the safety case itself at the workplace level; and
(d) concerns raised in relation to outside assistance and the lack of ownership in the outcome by the operation concerned209.

314. Whilst recognising there were a number of similarities between mining operations and other high risk industries that have adopted a safety case regime, Rasche also referred to differences between the mining and other industries and in particular noted that:

“The main differences between the mining and other industries are in the dynamic mining and beneficiation processes of ore and waste materials, either in an open cut or underground mining operation. A key point there is that the mining process must deal with the inhomogeneity of the ore body and the uncertainties arising from geological and geomechanical properties of the ground, which often are key contributing factors of many mining incidents and accidents (e.g. rock falls).

A further main difference is that many industries (eg nuclear and offshore) are highly control-system intensive and are able to operate their process remotely (thereby minimising the operators exposure to hazards). The mining industry on the other hand is characterised by the reliance on people intensive “manual” activities (by necessity) with mine workers often having to deal with hazards directly as part of their day-to-day work (eg barring down loose rocks)210.

315. Heiler, after considering the application of safety case regimes to a variety of industries and lessons that may be learnt, gave consideration to its application to the mining industry. After noting the differences cited by Rasche, Heiler notes further factors of distinction in the mining industry from other industries, that would need to be considered in the introduction of a safety case regime including:

209 Rasche Development of a Safety Case Methodology for the Minerals Industry – a Discussion Paper
The University of Queensland Minerals Industry Safety and Health Centre, October 2001
210 Rasche op cit at 7
"• mining is a technologically heterogeneous industry— it combines complex and simple systems and processes within and between operations;
• mining is a dynamic environment— the product and factory “move together” and there are daily and hourly uncertainties, and decisions which have to be made;
• mining is made up of small and very large operations— some complex and other “truck and shovel” operations;
• mining is geographically dispersed especially in Western Australia, and the tyranny of distance will impact on regulatory resources;
• mining is differentially located in isolated, LDC commute and in settled communities;
• mining is still very labour intensive, especially underground and so the management of hazards associated with human factors is critical;
• skills and training levels in the mining industry are inadequate and this would need to be addressed as a matter of urgency;
• levels of labour turnover are very high (over 30% in some operations) and this will continue to impact on skill levels and training and;
• large parts of metalliferous mining industry are unionised. This is combined with very high levels of unionisation in other sectors, such as coal and the construction areas of mining. Consideration must be given to a SCR which accommodates both.”

A Differential Approach

316. Given that safety case regimes have their origins in, and have applied traditionally to, generally static major hazard facilities with a view to identifying those low probability/high consequence events that may lead to multiple fatalities, how can such a concept be adapted to the requirements of the mining and minerals processing industry? Can such a regime be implemented universally across the industry or is a differential approach required to take account of the variations in size, complexity, sophistication, resourcing and commitment of the mine operator?

317. These and other issues have been addressed by Gunningham when, in considering the various challenges confronting the adoption of a safety case regime in the mining industry, he observed as follows;

“Nor is a safety case approach well suited to a number of other characteristics of the mining industry. Even large sophisticated companies may own a substantial number of mines which themselves are not large and sophisticated (as well as a number that are). For example, mines owned by large companies may range in size from over one thousand employees to less than two hundred, and in some cases, less than one hundred (NSW 2006 Coal Industry Profile). Irrespective of individual mine size, such companies face the challenge of ensuring that objectives and priorities established by senior management at Head
Office are successfully communicated to and implemented by it’s various operations. This is no simple matter. Corporations have considerable difficulty in ensuring that their various far flung operations behave as corporate HQ would wish them to and in making commitments at the centre work at the edges. Put differently aligning corporate social goals with those managers, supervisors and workers at individual sites is a substantial problem confronting large organisations (Wran & McClelland 2005, 7)."

318. In focusing specifically on small and medium sized mining operations, Gunningham further notes:

"The challenges are even greater for medium sized companies – those who own less than 10 mines, and whose appreciation of the complexity of implementing OHS systems and other management tools is limited. And for small and medium sized companies (SME’s), whose grasp of such issues is rudimentary at best (and non-existent at worst), the challenge is likely to prove overwhelming. Although Hopkins and Wilkinson (2005) have suggested that a suitably simplified and slimmed down version could be applied to SME’s, it seems doubtful whether this is practicable or appropriate. It is particularly hard to imagine applying a safety case to these circumstances of SME’s in the metalliferous sector, such as the many very small Lightning Ridge opal mines, or for many quarries. These types of enterprise are extremely unsophisticated in their management approaches, lack the capacity to apply basic safety concepts and would find the costs of doing so prohibitive. The task of an inspectorate in approving multiple safety cases would be overwhelming and a misuse of scarce regulatory resources, given that there are some 2800 mines in Australia of which over 2500 are classified as “small”. Or taking New South Wales as an example there are 1258 “non-employing” (very small) mines, 491 with less than 20 employees, 88 with 20-199 employees and 23 with over 200 employees (ABS 2004).

Similarly while a safety case might arguably be suited to some types of mines it is manifestly unsuited to others. For example, underground mines present different and greater OHS challenges to open cut mines. As the Productivity Commission has pointed out it would be inappropriate to regulate open cut coal mining under the same safety regime as underground mining because “while open cut coal mining involves the management of serious hazards...it does not face the unique catastrophic hazards of underground coal mining...the open cut coal sector also has a substantially better safety record than the underground sector” (Productivity Commission 1998, 261). Again some mines particularly those relying heavily on contractors and without a permanent workforce, are likely to lack one crucial ingredient of a successful safety case; active workforce involvement, without which OHS outcomes are likely to be suboptimal. In the spirit of responsive regulation, regulatory design must take account of these differences.”

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211 Gunningham 2007 op cit at 72
212 Gunningham 2007 op cit at 72-73
319. A number of those making submissions to the Review referred to the proposal for a safety case regime. As noted above, the CME adopts the in principle position that there is support for the adoption of a risk based regulatory regime in the mining industry in Western Australia, aligned to a safety case regime. It is emphasised however, that the adoption of a safety case approach to regulation in the Western Australian mining industry, needs to have regard to the particular characteristics of the resources industry, and not be based upon any assumptions that regimes in operation in for example the offshore petroleum and major hazard facility schemes, would have direct application.

320. In particular, the CME raise a number of issues that would require consideration in adopting a safety case regime or something like it, in this State including:

- The potential for the imposition of bureaucratic and unrealistic process;
- A lack of practical examples of application of safety case methodologies in the mining and mineral processing sector;
- The lack of competency and experience in the current regulator to develop and implement a safety case regime; and
- A lack of competency and experience in industry to develop and implement safety cases and undertake robust risk management.

321. In recognition in particular of these issues, the CME has embarked upon an experimental process involving a number of “Exemplars”, comprising volunteer member companies of the CME, to trial a safety case approach to safety management within their organisation. These processes commenced in late 2007 and are continuing. The objective of the Exemplar program is to:

- Inform stakeholders and advance the discussion in relation to a proposed safety case framework;
- To gather industry specific information regarding a safety case regime including development of legislation, guidance material and competency requirements; and
- To “front end load” the safety case development rather than trying to resolve issues within the existing regulatory scheme.

322. To further aid in the achievement of these objectives, the CME is identifying required competencies within the resources industry to undertake risk management procedures. According to the CME, this has the twin objective of identifying gaps in existing competencies and then matching, as may be required, existing and future training needs.

323. Emphasised from the perspective of the CME, is the need for the State Government to commit sufficient resources to enhance the capacity of the Mines Inspectorate, in addition to a commitment by the industry.
324. In terms of the mode of legislative delivery, from the perspective of the industry submission, no substantial amendment to the MSI Act is considered necessary. It is suggested however, that substantial amendment would be required to the Regulations to give effect to such a regime.

325. As previously noted dealing with other issues in the arising on the Review, the AMMA generally supports the position adopted by the CME, in favouring a move to a risk management based regulatory regime. It is accepted that the MSI Act and the Regulations do not currently provide for risk management or performance based standards and they should do so. A legislative move towards a safety case model would be consistent with this broad theme.

326. The issue of resource intensity is a theme pursued by the CCIWA in its submission to the Review. Whilst not opposed to the concept of a safety case regime, it is noted that the resource implications, both in terms of the establishment and the maintenance of a safety case, are significant. Furthermore, a matter of serious concern identified by the CCIWA is the potential impact of a safety case regime on contractors.

327. In particular, the view is advanced that the direct impact of any such regulatory regime upon the contracting sector of the industry has not been explored. It is suggested that it is essential that the contracting sector be involved in any consideration of a safety case model, either through the current “Exemplar” program being conducted by the CME, or any alternative approach. In my view this is a substantial issue. Contractors now employ a large percentage of employed persons in the mining industry. The impact on the contracting sector of the industry of a safety case approach to regulation is an issue that must be explored.

328. Consistent with its earlier expressed views as to the impact of regulation on business generally, the CCIWA also recommends that before consideration is given to the implementation of a safety case regime in the mining industry, that the State Government undertake a regulatory impact statement, outlining its effect on mining and contracting companies in the industry.

329. The adoption of goal setting regimes in the form of a safety case approach to risk management, are noted in the submission by the AusIMM. In particular, reference is made to developments in the offshore petroleum industry and the MHF regime in Victoria.

330. Whilst noting these developments, the AusIMM has concerns regarding the applicability of a safety case regime, given the inherent characteristics of the mining industry, including its dynamic nature; the significant technical challenges facing the industry; the high level of employee turnover, in particular in the present demand cycle, and the high reliance on contractors. Concern is expressed in particular, as to the capacity of small and medium sized mining operations to accommodate a safety case approach to regulation.

331. Reservations are also expressed as to the benefits to be derived from a permissioning regime, based on available research material. In particular,
given the absence of any data as to the application of safety cases in the mining and minerals processing industry, it is suggested that the present Exemplar programme may provide a useful source of information as to the development of an appropriate model.

332. Finally, in terms of national harmonisation through the NMSF, the AusIIMM expresses reservations about the adoption of a safety case regime, independently of other jurisdictions, and suggests that such a course would be inconsistent with the NMSF Legislative Framework.

333. Reservations about a safety case based approach are also evident from the perspective of the union movement. The CFMEU notes that the Hicks Feasibility Report has yet to be publicly released, thus precluding consultation within the mining industry. Of particular importance to the union, in its consideration of this issue, is the terms of the NMSF Legislative Framework, in particular Principle 16, dealing with a requirement for a risk based safety and health management system, the terms of which have been set out above.

334. To achieve harmonisation, as the overarching principles of the NMSF have as their objective, the CFMEU refers to the safety management systems in force under the regulatory frameworks applying to the New South Wales and Queensland coal mining industries. It is noted that under the Queensland coal mining legislation, safety management systems and principal hazard management plans, developed in consultation with employees, are required. Similarly, the terms of the New South Wales legislation also require a systems approach to safety management, along with the adoption of major hazard management plans for particular identified risks in both open cut and underground operations.

335. From this perspective, the adoption of a formalised safety management system approach to safety and health regulation in Western Australia is timely. In the union’s view, the approach undertaken in the coal mining industry in Queensland and New South Wales provides an appropriate model to adopt in this State. It is also suggested that this approach would be entirely consistent with the NMSF Legislative Framework, and reflects that called for by the Regulator, for some years.213

336. As with the CME, the CFMEU in its submission does not see a need to amend the MSI Act, to introduce a risk management approach.

337. MARCSTA expresses concern as to any proposal to extend a safety case regime across the entire mining industry in this State. It outlines the origins of safety case regimes, noting their commencement in the nuclear industry and gaining currency across the offshore oil and gas and major hazard facility sectors. In particular, it is emphasized that such regimes have had a traditional focus on catastrophic risk and complex plant and processes with high risk profiles.

213 See CFMEU submission at 16 referring to submissions by the DIOR to the Ritter Inquiry at 344.
338. These regimes have in the past focussed on major asset damage and loss of productivity (Longford); the potential for significant lose of life and danger to the public (Piper Alpha); and large scale environmental damage (Chernobyl).

339. From this perspective, MARCSTA suggests that if these features are present in any mining operation, then it may be appropriate to make provision for appropriate regulatory capacity under the MSI Act. This could also be accommodated by a separate piece of legislation.

340. In an overall sense, it is submitted that whilst the proposal for a safety case regime in the mining industry in Western Australia appears to have originated from the Ritter Inquiry, subsequently significantly widened by the MSIG, concern is expressed that little attention has been paid to the full consequences of such a recommendation. Furthermore, it is said that “No credible justification for dispensing with the existing regulatory structure has ever been put forward. The current safety and health performance of the mining industry, by any measure, provides no basis for such a recommendation.”

341. Also noted, are the reservations expressed by researchers in the field, in particular Rasche, outlined above, and that a requirement for an industry wide safety case regime would be inappropriate in particular, for small mining operations.

342. Professor Joy observes that any progression to a safety case regime will have significant implications for mine manager and regulator competencies. In particular, the implications for the regulator will depend entirely on the nature of the process and regulatory requirements imposed.

343. As an example, Professor Joy outlined the requirements of the NOPSA safety case regime, and the significant demands that this imposes on the regulator, compared to the traditional role played by a mining inspectorate. One issue identified in particular by Professor Joy in his submission, is the requirement for risk management competencies both within the regulator and the industry. In this respect, he referred to the risk management programs being conducted in Queensland, as outlined later in Chapter 10.

344. Many of the themes taken up by Professor Gunningham in his submission to the Review are reflected in references already made to his published work above. In reiterating those reservations and expressing concern in relation to a safety case or safety case type of approach in particular for small and medium size mines, Professor Gunningham advances for consideration a phased or differential approach to safety regulation. In particular, he notes that:

“For all these reasons, it would be inappropriate to apply a safety case regime to all mines regardless of size, complexity, capacity or motivation, at least initially. To do so would be to ignore the considerable heterogeneity of the mining industry, the inappropriateness of a safety

214 See MARCSTA submission at 18
case regime for some types of organisation, and the challenge of convincing unsophisticated and reluctant organisations to engage in the spirit of meta-regulation under such a regime. Accordingly, it would be wise to introduce a safety case regime on a phased and experimental basis, mindful of the edict of adaptive management that ‘social policies are experiments – learn from them’. Such a phased approach would have the benefits of “testing by results” and of applying the safety case regime to the groups most likely to respond well to it, before extending it to others who might be reticent to adopt it, or less equipped to do so. It would also give time for an inspectorate that is currently wholly unsuited to this approach to change direction and accommodate to what would be a radical change of direction, requiring very different skills and background.”

345. Consistent with this broad theme, Professor Gunningham proposes a three phased approach to the adoption of a safety case regime.

346. The first phase would involve a voluntary option for “OHS leaders”, they being most likely, large sophisticated organisations who have a desire to “go beyond compliance and could be entrusted with much greater autonomy (albeit still subject to regulatory and third party oversight) as to how they achieve that goal.”

347. Consistent with this approach, it is those organisations that are seeking to enhance their “social licence to operate” that may be attracted to such an option. Additionally, such a voluntary option would enable, by essentially an experimental process, the system to be “de-bugged” and to enable the Mines Inspectorate to become more familiar with a significantly different mode of safety and health regulation.

348. A second phase would involve a mandatory step to extend a safety case regime to a further substratum of mining operations, perhaps determined by criteria including size, complexity and risk. Professor Gunningham suggests that for the purposes of this phase, given that other than “OHS leaders” may be involved, sufficient incentives may be required for such a sub group, along with effective employee involvement and an enhanced capacity of the regulator.

349. A final phase suggested, is the extension of any safety case regime to a broader range of enterprises, dependant upon the success of the first two phases.

350. The issue of small and unsophisticated operators is also the subject of consideration in Professor Gunningham’s submission. For this group, he suggests that a systems-based approach may be suboptimal, and may well be beyond the capability of such operations. Instead, a more fruitful mode of regulation at this level may include the existing general duties, supplemented by codes of practice and other guidance material.

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215 See submission Professor Gunningham at 19-20
351. The views of the RSD as to this issue were expressed as requiring consideration of a range of matters including the type of mine to be regulated by a safety case in terms of size and complexity of operations etc. Furthermore, consideration will need to be given to the role of safety and health committees and representatives, in terms of their degree of involvement in the development of any safety case. Also referred to by the RSD is the possibility of using existing mechanisms, such as the project management plan requirement of the Regulations, suitably amended, to enable the introduction of a safety case regime in a timely fashion.

352. The State Mining Engineer made extensive submissions in relation to this issue. He considers the traditional features of a safety case approach, and the major differences of these approaches as applied to a mining environment. Some of the academic research and commentary referred to above is noted in this regard. In particular, the State Mining Engineer observes, in my view entirely appositely, that in the absence of any safety case regimes applicable in the mining industry, comparison with existing schemes in other industries is of limited value. In particular, reference is made to a number of matters that would need to be considered some of which include:

- To what extent any regime would extend to all mining operations including exploration;
- The fact that a safety case is a staged and “living” process that will evolve with the development of a mine;
- To what extent the regulator could or should have the power to and would revoke a licence to operate a mine and any appeal process from such a decision;
- Any liability imposed on the regulator arising from the process of “acceptance” or “approval” of a safety case given there may be little practical difference between the two;
- Who will meet the substantial funding costs of such an approach, including training and development of both the industry and the regulator and any demonstrated cost/benefit analysis;
- Related to the above, what improvement if any, in safety performance is expected from the adoption of such an approach in the absence of any demonstrated thus far;
- The absence of any objectively verifiable data, both quantitative and qualitative, as to what safety risks can be managed under such an approach in the mining industry;
- The role of consultation, in particular the role of a safety and health committee, given they are not mandatory anywhere in Australasia and the competency and skills of the members to extensively participate in the safety case development process may be open to question; and
- The assignment of the appropriate levels of responsibility between the mine operator and the regulator, noting the primary responsibility should be with the operator.

353. The State Mining Engineer in his submission proposes two options to give effect to a safety case form of regulatory regime in the mining industry in Western Australia, a “minimalist” and a “selectivist” model.
**Minimalist Option**

354. A minimalist option to adopt a form of safety case model, would involve the use of the project management plan requirement in reg 3.13 and the emergency management plan requirement in reg 4.30 of the Regulations. Both of these provisions apply to a new operation. A new mining operation is unable to commence without the agreement of the State Mining Engineer as required in s 42 of the MSI Act. An appropriate project management plan is a necessary precondition to the State Mining Engineer’s agreement to commence operations.

355. For new mining operations, it is suggested there would only be a need to modify the project management plan requirements to make the evaluation more vigorous and if necessary, to slightly amend the terms of reg 3.13 to incorporate traditional safety case elements. The emergency management plan required under reg 4.30, would, according to the State Mining Engineer, form a part of a safety management system within a safety case methodology.

356. This plan is required to be revised and updated in response to changes in mining operations, equipment, systems or mine procedures. It is noted by the State Mining Engineer in his submission, that a failure to comply with these regulations constitutes an offence, which could lead to the imposition of not insignificant fines.

357. In the case of an existing operation, a somewhat different approach would be required. As the project management plan only applies to a new mining operation, it is suggested that the powers conferred on the State Mining Engineer under s 45 of the MSI Act, requiring the provision of an engineering report, may be used.

358. This provision empowers the State Mining Engineer to request a Principal Employer or manager of a mine, to provide an independent engineering study concerning safety and health at the mine either in general terms or in a particular respect. The engineering report is to be prepared by a professionally qualified engineer or other qualified professional person, approved by the State Mining Engineer. A reason for requesting such a report must be provided. Failure to provide such a requested report constitutes an offence and the offender is liable to a level one penalty under the MSI Act.

359. In terms of sanctions under such a model, the State Mining Engineer suggests that upon receipt and evaluation of the engineering report, it would be open to the Mines Inspectorate, to utilise Improvement and Prohibition Notices as might be required to ensure compliance. In terms of the requirement for a reason for such a report as specified in s 45(2), it is suggested that this could simply be:
“To establish whether (or confirm that) operations at the mine are being conducted in accordance with the provisions of s 9 of the MSIA, in that, in so far as is practicable, operations are conducted so as to avoid the exposure of employees to hazards”.

Selectivist Model

360. The State Mining Engineer has proposed an alternative model to that outlined above for the adoption of a safety case regime. This model is premised upon the principle that it must be recognised that there is a large disparity between the motivation, resourcing and ability to participate, between on the one hand, large mining companies and small mining enterprises.

361. It is submitted that in terms of organisational sophistication, small to medium sized enterprises would lack the necessary resources, understanding and ability to negotiate a safety case regime. On the other hand, it is likely that large multinational mining operators, which already have well developed and sophisticated safety management systems, would be more capable of implementing a more autonomous approach to safety and health management, characterised in the safety case approach.

362. These larger operators, may well have already in place, most of the systems required and may be more receptive to embracing a safety case regime, as being consistent with their overall corporate goals and aspirations. In relation to this selectivist model, the State Mining Engineer proposes that there be an approach that has the following elements:

(a) a staged implementation of a safety case regime;
(b) that it initially be based on “self selection” by invitation to those operators who would consider themselves to be appropriately equipped and motivated to enter such a regime;
(c) that this approach would provide an interim period to “bed down” the safety case regime and deal with problems that might arise and also provide an opportunity for education and training programs for the industry;
(d) other mines could be brought on to the system over time; and
(e) the existing regime in the MSI Act and Regulations could be retained for those operators in the industry remaining who did not wish to or were not able to participate in the new regime.

363. The implementation of such a selectivist model for change could be achieved by:

(a) the enactment of a new Act and Regulations for a safety case regime with the existing legislation remaining for others;
(b) a mechanism be developed to enable mines to pass between both systems such as “instruments of declaration” presently utilised in s 6A of the MSI Act; or
(c) the maintenance of a single Act with a separate part for safety case provisions, utilising the statutory instrument of declaration approach as above.
Furthermore it is suggested by the State Mining Engineer, that the minimalist and selectivist models, are not mutually exclusive, and both could be combined to produce a hybrid approach, which could achieve the required outcomes at relatively small cost and with minimal disruption to the existing mining industry regime.

Both of these approaches as suggested, have commendable features. The obvious attraction of the first suggested model is an ability to utilise the existing legislative framework to implement, perhaps on at least a trial basis, a form of safety case regime to enable it to be tested in the mining and minerals processing industry in this State.

Subject to the outcome of such a process, there would be nothing preventing movement to the second selectivist model suggested, based upon new legislation or an amendment to the existing MSI Act, as the concept gains acceptance in the industry. An advantage of these approaches, is, as the State Mining Engineer has suggested, a relatively low cost methodology which could be delivered within the existing broad legislative framework and administrative structure, with relatively minimal change.

It will still require, however, in my view, necessary further substantial resources being allocated to the Mines Inspectorate in order to assess and either “accept” or “approve” the safety cases prepared and submitted by mines operators under either model.

Conclusions

In light of the submissions and research material, I have substantial reservations as to the suitability of a safety case or safety case type of regime for small and medium sized mines, in particular having regard to the heterogeneous nature of mining operations. On the other hand, larger, more sophisticated and well resourced operations may obtain considerable benefit from the implementation of a risk management approach based on safety case principles. I concur with the observations of Professor Gunningham in his submissions to the Review in this regard. I consider there is much to be said for an incremental approach to the adoption of a regime incorporating safety case principles.

Any proposal to adopt a safety case approach will need to recognise its essentially experimental nature in relation to mining. It will be a first as far as the mining and minerals processing industry is concerned. That being so as with all experimental processes a cautious approach would be prudent in my opinion. The mandatory application of a safety case model should not be considered at this early stage of development. Given their untested nature in the mining industry, there will have to be developed over time, a body of data as to what constitutes a mining industry safety case. Additionally, the establishment of the necessary competencies, both within the industry, and the regulator, will take considerable time to develop. There also needs to be
identified and developed the necessary training to accommodate the required competencies. This will entail a significant learning process for all relevant participants. The Exemplar programme commenced by the CME with some of its members is certainly a step in this direction. The role of contractors, given their prominence in modern mining operations, will need consideration.

370. In light of these matters, and considering the submissions and research available, I consider that it would be prudent to provide for a differential approach to safety and health regulation in the mining industry in Western Australia. Such an approach should accommodate the differing size, complexity, motivation, level of sophistication and resourcing of mine operations across the State. There is no reason in principle why a mix of regulatory regimes cannot be made available. This would enable over time, as an interim measure, a staged approach.

A Further Alternative

A Differential Approach

371. In recognition of the differing size, complexity and sophistication of mine operations in the State, an alternative approach can involve a mix of regulatory models. This alternative, responsive, regulatory approach could comprise three tiers.

372. The first tier would be the safety case option, available on an “opt-in” basis, essentially for those mine operators who “self select”, and who wish to take part in this regulatory regime on a voluntary basis. Those participating at this level would be more than likely to be high performance organisations that wish to push their safety and health performance “above and beyond” any existing level of regulation. As a condition of entering the safety case option, and acceptance of their safety case, these mines should be exempted from compliance with the Regulations, by way of a general exemption or some other mechanism, in recognition that their safety and health obligations will be self contained in the “case” put to and accepted by the regulator. An exemption from the second tier below would also be required.

373. The second tier, and one that could extend to the majority of the industry, could comprise a safety management system and principal/major hazard management plan approach, modelled on the Queensland and New South Wales metalliferous and coal mining legislation. The system should incorporate a trigger action response plan (“TARP”) for critical hazards. The principal/major hazard plans would embrace the most safety critical aspects of both underground and surface operations such as in-rush, strata control, ventilation, fire and explosion, mine wall stability, mobile plant any other relevant high risk activities. As to the latter, the New South Wales coal mining major hazard management plans, contained in the coal regulations, could provide a useful guide. There should be a focus on implementation of the system and appropriate demonstration of adequacy.
374. The third tier comprising the existing general duties could extend to small open cut and quarry operations employing ten or less employees. This would recognise that a different approach should be applied to the small mine sector. This would include sand pits and small quarries. Whilst the exemption from a management systems approach would apply to this sector, in my view it should not extend to underground operations, given the well known risks associated with underground mines. These risks are present regardless of the number of employees engaged. A similar exemption exists in the Queensland metalliferous legislation, but it extends to both underground and surface operations. Some consideration would need to be given to whether this exemption is defined in terms of those working under contracts of service, or more broadly, other working arrangements such as labour only contracting, to ensure there is no evasion of obligations. An approach that could be considered is a broader definition of “worker”, to include those engaged on a variety of contractual arrangements.

375. Depending upon the success of the optional tier for a safety case approach, consideration could be given in the longer term to extending it across a broader sector of the industry by mandatory application, according to predetermined criteria such as size, complexity, underground, etc, depending upon the model adopted.

**Benefits of Approach**

376. Such a differential approach to regulation has a number of advantages in my view. Firstly, those wishing to self-select into the safety case tier would not only receive the benefit of exemption from the existing Regulations, but their involvement would enable a degree of “debugging” of the safety case approach as applying to the mining industry. A body of knowledge as to what should comprise a safety case for a mining operation would be accumulated over time.

377. Secondly, the required competencies for both the industry and the regulator could be progressively developed in an environment where the resourcing demands of any such transition would be more manageable that a mandated scheme across the industry, at least initially.

378. Thirdly, the remainder of the industry operating under safety management systems and principal/major hazard management plans, will have the opportunity over time, to become accustomed to operating under such a regulatory regime, incorporating risk management principles. It will also enable the Mines Inspectorate to adjust to a new approach, regulating on a systems based model. This could provide a solid foundation for the ultimate progression to a safety case approach more widely, if considered desirable, and the refinement of any model as proposed.

**Mode of Delivery**

379. In terms of the mode of legislative delivery for such a differential approach, it could be achieved with very little or no amendment to the MSI Act. I see no
reason in principle why the opt-in safety case and safety management system principal/major hazard management plans, could not be achieved by separate regulations, or separate Parts to the existing Regulations. However, as is the case in Queensland and New South Wales, the safety management system principal/major hazard management plan obligations would perhaps be better contained in the statute itself, with the detailed requirements the subject of regulations. This would promote a measure of consistency with the other principal mining jurisdictions and moreover, be consistent with the goals of the NMSF in terms of legislative content. The form of the safety case regulations could be modelled on those applicable for MHF in Western Australia, as contained in the relatively simple design of the DG Act and DG Regulations and those applicable in the offshore oil and gas industry, suitably modified, as a guide. In my view, it would be preferable for there to be as much alignment with the existing State regimes as is practicable.

380. The existing general duties regime will underpin the risk management approaches adopted in the amended MSI Act and regulations. Any decent safety case and safety management plan would satisfy the general duties requirements.

381. The appropriate exemptions as suggested above could be incorporated into the regulations and the MSI Act as the case may be.

382. Additionally, the matters identified at par 352 above, as expressed in the submission of the State Mining Engineer, need to be taken into account.

383. As an interim measure consideration could be given to the use of a suitably modified version of a project management plan, in conjunction with s 45 of the MSI Act, to enable, at a relatively early stage, the trialling of a safety case, consistent with the views expressed by the State Mining Engineer based on the “minimalist model”. I see no reason in principle why this approach could not be utilised and many reasons why it should. No substantive legislative amendments are necessary; it can be implemented relatively expeditiously; it involves minimal cost and could enable those wanting to “opt in” to a safety case approach to do so to test their approach. Some amendments would be necessary to regs 3.13 and 4.30 to enable this to occur. There is also a recommended amendment to reg 4.30 in Chapter 14.

**Transitional Arrangements**

384. There will need to be appropriate transitional arrangements concerning the transition to any new system. This will include the drafting of new regulations, the recruitment and training of staff of the regulator, and information and awareness-raising in the industry to prepare for the system implementation. A sufficient period of time would be needed.

385. Any transition to a new system would allow for:

- the drafting and promulgation of new Regulations
- a “root and branch” review of the existing Regulations
• the establishment of education and training programmes by the regulator and industry groups; and
• the identification of the required competencies for a risk management approach, within both the regulator and the industry.

386. This alternative approach involves the retention of the existing but amended legislative framework in the MSI Act, with the adoption of new and separate sets of regulations to give effect to a safety management systems/principal hazard management plan approach and the “opt in” safety case regime. Such an approach has a number of other advantages including:

(a) the significant delay involved in the enactment of a new Act of Parliament can be avoided;
(b) it avoids an additional layer of legislation;
(c) the existing and familiar legislative framework under the MSI Act can be retained; and
(d) such an approach is consistent with the approach taken to the delivery of risk management regimes in the other principal mining jurisdictions.

387. As to the latter point, it is pertinent to note that the safety case regime having application to offshore oil and gas industry administered by NOPSA, is implemented by separate regulations, the Petroleum Submerged Land (Management of Safety on Offshore Facilities) Regulations 1996 enacted under the then PSL Act (Cth). The offshore oil and gas safety case regime, as set out these regulations, gave effect to the general duties provisions set out Schedule 7 of the PSL Act, which are in similar terms to the general duties provisions found in most safety and health legislation, including the MSI Act and the OSH Act. This legislation was replaced by the Offshore Petroleum Act 2006 (Cth) effective from 1 July 2008. The new legislation, whilst largely replicating the PSL Act (Cth), modernises the drafting of the former law. The new Schedule 3 of this legislation, replaces the former Schedule 7 of the PSL Act (Cth), and contains some minor amendments in relation to the general duty of care provisions.

388. That is, the legislative regime for the offshore oil and gas industry comprises general duties which general duties are given effect by the requirement upon an operator to prepare and submit a safety case to NOPSA, under the Regulations. Schedule 3 of the Offshore Petroleum Act 2006 (Cth) contains provisions not dissimilar to the requirements presently imposed by the MSI Act, in relation to consultation with employees, workplace arrangements including health and safety representatives and committees, emergency procedures and an inspection regime for Inspectors, and other miscellaneous provisions.

389. Whether or not such regulations could be promulgated, is a specific issue posed in my Terms of Reference, that being whether “specifically what amendment to the MSI Act (if any) is required to allow the development of safety case regulations:” Given the proposal for a safety management system/principal hazard management plan approach to also apply,
consideration needs to be given to an appropriate head of power for such regulations, as may be required to supplement the amendments to the MSI Act.

**Head of Power**

**General Power**

390. To support regulations providing for a risk management model in the mining and minerals processing industries in this State, the MSI Act must have a sufficient head of power. The power to make regulations is prescribed by ss 104 of the MSI Act. By s104(1) it is provided:

“The governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed, for achieving the objects and giving effect to the purposes of this Act, and in particular - “

391. This general regulation making power is expressed in familiar terms to that contained in many statutes and is described as the “necessary or convenient” clause, variations of which represent common statutory formula. Such a general regulation making power, commonly found in statutes, does not extend to everything that the Governor General or Governors respectively consider “necessary or convenient”. It does not enable regulations to extend the scope or general operation of a statute, but is strictly ancillary. It authorises a subsidiary means to give effect to what is enacted in the principal statute.

392. The scope and purpose of the MSI Act is to be found in s 3 dealing with the objects of the legislation. In particular, those parts of the objects in s3(1)(a); (b); and (c) in relation to securing the health and safety of persons engaged in mining operations; identifying and reducing hazards and protecting employees against risks and eliminating or minimising such risks are apposite for present purposes. The manner in which such objects and purposes of the MSI Act principally find expression, are contained in Part 2 dealing with general duties in relation to occupational safety and health which imposes various obligations on the prescribed duty holders.

393. For present purposes, those broad duties of care in relation to employers, employees, and self-employed persons, principal employers and managers and those subject to so called “contingent” employment arrangements, are specified in ss 9, 10, 12, 13, 15A, 15B, 15C of the MSI Act. These provisions taken in their totality, in particular those for example set out in s 9 imposing duties on employer’s generally, are all encompassing and require “so far as is practicable” an employer to provide and maintain in a mine a working environment in which the employer’s employees are not exposed to hazards.

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216 See generally S D Hotop *Principles of Australian Administrative Law* 6th Ed at 114-115
217 *Commonwealth and PMG Progress v Progress Advertising Agency Co Ltd* (1910) 10 CLR 457
218 *Shannahan v Scott* (1957) 96 CLR 245 at 250; *Utah Construction & Engineering Pty Ltd v Pataky* [1966] AC 629
Without limiting that general obligation, the particular obligations are then set out in s 9(1)(a) to (e) respectively.

394. Taking these general duties provisions, which are *enacted and specified* in the statute, in the context of the scope and purpose of the legislation as a whole, it may well be said that regulations providing for risk management approaches to safety and health regulation, are “necessary and convenient for achieving the objects and giving effect to the purposes of” the MSI Act, within the context of the authorities referred to above.

**Specific Power**

395. Other specific heads of power set out in s 104(1) of the MSI Act include regulations in particular:

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"(c) dealing with and imposing duties on employers, managers, supervisors, superintendents, deputys, foreman and employees under this Act;

(ca) without limiting paragraph (c), imposing duties on persons in relation to –

(i) the identification of hazards at mines;

(ii) the assessment of risks resulting from such hazards; and

(iii) the taking of remedial or other action; …

(f) providing for the safety and health standards and procedures to be complied with -

(i) at any mine;

(ii) in the performance of any work in connection with a mine;

(iii) in the use, cleaning, maintenance, disposal or transportation of any plant in connection with a mine;

(iv) in the use, handling, treatment, removal, processing, storing, transport or disposal of any substance in connection with a mine; …

(g) prescribing measures or precautions to avoid any accident or dangerous occurrence in a mine;…"
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396. As I have already noted, the amendment to insert s 104(1)(ca) into the MSI Act,²¹⁹ was made for the express purpose, following the Laing Review, of empowering regulations to be made to enable comprehensive risk management in mines, by way of hazard identification, assessment of risk and control of risk processes.²²⁰ This head of power, despite Mr Laing’s recommendations, has yet to be acted upon.

397. In my view, regardless therefore, as to whether the general regulation making power will support regulations prescribing a safety case and regulations to support safety management systems, for the reasons outlined, the specific heads of regulation making power arguably provide sufficient scope for the

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²¹⁹ See Amending Act 68 of 2004 s13, 39, 72 and 92
²²⁰ See Mines Safety Inspection Amendment Bill 2004 clause 92 and Explanatory Memorandum pars 137-140
enactment of new regulations for these purposes. However, in an abundance of caution, an additional head of power could be inserted into s 104(1) along the following lines:

“(cb) without limiting paragraphs (c) and (ca) imposing duties on persons in relation to safety and health management systems and critical controls for major hazards at mines”

Recommendation 8

That a risk management model of safety and health regulation be implemented in the Western Australian mining and minerals processing industry.

Recommendation 9

That implementation of a risk management model to safety and health regulation be implemented by a combination of amendments to the MSI Act and the enactment of new regulations. The form and content of those amendments and regulations should be consistent with Recommendations 10-13.

Recommendation 10

That a differential approach to safety regulation be adopted in the mining and minerals processing industry in Western Australia as set out in Recommendations 11-13.

Recommendation 11

That a safety case approach to regulation be available on an “opt-in” basis for those mining operations that wish to select this option voluntarily by new regulations or an amendment to the Regulations. On “opting in” and acceptance/approval by the Regulator the mine should be exempted from compliance with the Regulations by way of a general exemption and with the requirements specified in Recommendation 12. Additionally, and as an interim or alternative approach, use be made of s 45 of the MSI Act and suitably modified regs 3.13 and 4.30 of the Regulations.

Recommendation 12

That for all other mining operations, subject to Recommendation 13 below, the MSI Act be amended to incorporate a safety management system and principal/major hazard management plan approach using as a guide the CMSH Act (Qld) and Regulations and the CMHS Act (NSW) and Regulations consistent with Principle 16 of the NMSF Legislative Framework, incorporating a Trigger Action Response Plan (TARP). The focus should be on implementation and demonstration of adequacy.
**Recommendation 13**

That small open cut mines and quarries employing 10 employees or less be exempt from the requirement to prepare a safety management system and principal/major hazard management plan.
CHAPTER 7 – INTERACTION WITH OTHER LEGISLATION

398. My Terms of Reference as to the interaction of the MSI Act with other legislation include consideration of:

“(a) Areas in the construction of the legislation that could be improved, such as application to rail safety, mine sites during construction and interaction with other occupational health and safety legislation:…”

General Legislative Scheme

399. In dealing with matters in this section of the Report, in particular matters concerning construction activity on mine sites, some discussion of the relationship between the MSI Act and the OSH Act and the statutory scheme thereby created, is necessary. By s 4(2) of the OSH Act, it is provided that the OSH Act has no application to a “mine” as defined in the Mining Act 1978 ("the Mining Act") and the MSI Act.

400. Furthermore, the OSH Act has no application to a petroleum well or petroleum pipeline to which the Petroleum Act 1967 (reitled the Petroleum and Geothermal Energy Resources Act 1967), the Petroleum (Submerged Lands) Act 1982 or the Petroleum Pipelines Act 1969, applies.

401. The general qualification to this exclusion is that Part II of the OSH Act constituting the COSH and its functions and powers, continues to apply in respect of a workplace that is a mine as defined in the excluded legislation. This is plainly intended to give effect to the policy making and advisory functions of the MIAC and the COSH respectively.

402. For the purposes of the Mining Act “mine” in s 8 is defined to mean “any place in, on or under which mining operations are carried on.” The definition of “mining operations” in s 8 is similar to, but not nearly as extensive as, the definition of mining operations under the MSI Act.

403. The contrast in the definitions of “mining operations” under both the Mining Act and the MSI Act, and the expansive definition in relation to the latter, appears to be an indication of the intention of the legislature to create an all embracing definition of mining operations for the purposes of health and safety regulation in this State. The statutory scheme outlined so far, means that the OSH Act is intended to be excluded completely from a “mine” as so defined.

404. For the purposes of the MSI Act, “mine” is defined in s 4 as follows:

““mine” means a place at which mining operations are carried on and, where mining operations are being carried on in conjunction with one
another at 2 or more places, those places are to be taken to constitute one mine unless the State Mining Engineer notifies the principal employer in writing otherwise in accordance with subsection (3): and “to mine” includes to carry on any manner or method of mining operations;”

405. Section 4(2) of the OSH Act was introduced in 1987, along with the remainder of the substantive provisions of the legislation, including the general duties regime. At the time of its introduction, s 4(2) referred to the definition of “mine” as set out in the Mines Regulation Act 1946 and the Coal Mines Regulation Act 1946. At this time, the definition of “mine” in the Mines Regulation Act 1946 was as follows:

“mine” means a place where any operation to obtain any rock, metal, mineral or mineral substance for commercial purposes or for subsequent use in industry has been, is being, or is to be carried on, or where the products of such a place are transported, treated or otherwise dealt with and includes pellet plants, sinter plants, smelter and blast furnaces, privately owned railways built to transport the mine ore material and the ore storage at the rail terminal and quarries, together with any project for the time being declared to be a mine pursuant to subsection (2) of this section, but does not include steel making plants, rolling mills, administration offices, residential areas, or recreation centres and the ground used in connection therewith.

406. On the enactment of the MSI Act in 1994, and the subsequent amendment of s 4(2) of the OSH Act to reflect this, the current definition of “mining operations” was introduced. As I will be referring to it during the course of this discussion, although somewhat lengthy, I set it out in full as follows:

“mining operations” means any method of working by which the earth or any rock structure, coal seam, stone, fluid, or mineral bearing substance is disturbed, removed, washed, sifted, crushed, leached, roasted, floated, distilled, evaporated, smelted, refined, sintered, pelletized, or dealt with for the purpose of obtaining any mineral or rock from it for commercial purposes or for subsequent use in industry, whether it has been previously disturbed or not, and includes —

(a) exploration operations; and

(b) developmental and construction work associated with opening up or operating a mine; and

(c) the removal and disposal of overburden or waste or residues by mechanical or other means and the stacking, depositing, storage, and treatment of any substance considered to contain any mineral; and

(d) the operation of blast furnaces and direct reduction furnaces; and

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221 Occupational Health, Safety and Welfare Amendment Act No 43 of 1987 s7
222 See Mines Regulation Amendment Act No. 54 of 1946; Mines Regulation Amendment Act No. 68 of 1968 and Mines Regulation Amendment Act No. 63 of 1974
223 Mines Safety and Inspection Act No. 62 of 1994 Schedule 2
(e) the operation of privately owned railways to transport ore or other mining products, or to provide related services; and

(ea) the transport of ore or other mining product that takes place on a road that is not a road as defined in the Road Traffic Act 1974; and

(f) the crushing, screening, sorting, stacking, and loading and handling of ore or other mining products at any rail or road terminal or any loading or transhipment points, including seaports; and

(g) the operation of any support facilities on the minesite, including mine administration offices, workshops, and services buildings; and

(h) borefields remote from the minesite but an integral part of the mining operation; and

(i) operations by means of which salt or other evaporites are harvested; and

(j) operations by means of which any mineral is recovered from the sea or sea bed or a natural water supply; and

(k) operation of residential facilities and recreational facilities and the ground used for that purpose, where such facilities are located on a mining tenement and are used solely in connection with mining operations; and

(l) the operation of any project which is for the time being declared by the Governor to be a mining operation under section 6; and

(m) operations undertaken for the environmental rehabilitation of the minesite during production operations and after their completion; and

(n) operations for the care, security and maintenance of a mine and plant at the mine undertaken during any period when production or development operations at the mine are suspended; and

(o) operations undertaken to leave a mine safe to be abandoned, but does not include the operation of —

(p) steel making plants; or

(q) rolling mills; or

(r) facilities for the manufacture of goods from mining products; or

(s) residential facilities or recreational facilities and the ground used for the purpose where such facilities are not located on a mining tenement and directly associated with mining operations; or

(t) sand, gravel, limestone, or rock excavation carried on by or for any State agency or instrumentality or any local government for the use or disposition by any such agency, instrumentality or local government; or

(u) excavation activities on private land by and for the use of the owner of the land;
When introducing the Bill for the MSI Act into the Parliament, the then responsible Minister referred to the terms of s 4 in relation to the definition of “mining operations” in the following terms:

“Part 1 – Section 4 Interpretation: Exploration Activities are now included in the scope of mining operations covered by this Bill. The definitions of mine and mining operations have been aligned with the Mining Act 1978 and the scope of mining operations is more comprehensively defined. Offshore mining is included, as relevant State legislation is now invoked by the Commonwealth Offshore Minerals Act No. 28 of 1994. Administration offices and accommodation and catering facilities located on mines are now also brought under the legislation by this Bill.

In summary, this Bill includes in mining operations all of the following activities: Exploration, development and construction work associated with opening up or operating a mine, ore body development, production, suspension, rehabilitation, demolition or closure.”

It was the evident intent of Parliament in the amendment to the definition of “mine” in the new MSI Act, to align the definition with the corresponding provision in s 8 of the Mining Act.

However, whilst that may have been the Parliamentary intention, given the somewhat different meaning of “mine” under s 4 of the MSI Act and s 8 of the Mining Act, that intention may not have been achieved. The possibility of a legislative lacuna may arise in these circumstances.

The meaning to be ascribed to the words in the statute will always be shaped by the context in which they are used. It is particularly so in this case, which refers to “place” at which “mining operations” as very broadly defined, in s 4 of the MSI Act, are conducted. I can see no reason for giving the words in the definition of “mine” being “a place at which mining operations are carried on” a limited or restricted interpretation. I deal with this issue in more detail below.

A further issue is one raised by some in their submissions, and which has been raised in prior Reviews, that being whether the MSI Act should be amalgamated with the OSH Act. I turn to consider this matter now.

Amalgamation with the OSH Act

The Issue

As noted earlier, in both Queensland and New South Wales, mining health and safety legislation is still separately regulated to general industry. Moreover, in both States, not only does mining retain separate legislation, there is also a
separation between coal mining and metalliferous mining, although the legislation is broadly similar and in some cases, identical.

413. The situation in New South Wales also referred to earlier, however, is somewhat different, in that the general industry legislation extends to all workplaces. This general statute is complimented by coal and metalliferous mining industry specific legislation, containing particular provisions having application to those industries. Thus, a coal or metalliferous mining industry employer in New South Wales is required to comply with the terms of both the general industry legislation, and the mining specific legislation, to discharge its obligations. In the case of any conflict in the application of the legislation, the general legislation prevails.

414. The issue of separate legislation was also considered by the Laing Review and the Final Report recommended that the general duties and other ancillary provisions, be transferred to the OSH Act. The mining specific provisions were recommended to be retained in the MSI Act, as is the case in New South Wales.226 The Expert Report commissioned for the tripartite MSIG Interim Report Stage One, recommended that the most logical form of model for regulation in this State be a “single umbrella OHSA, with industry specific regulations made under that Act”.227

Contentions

415. Whilst travelling extensively throughout the State speaking with those directly involved in mining industry operations, various views were expressed as to this issue. Many took the view that they would prefer to have the mining industry continue to be regulated by a separate piece of legislation, to accommodate long standing mining industry specific issues and to recognise the inherently hazardous nature of the industry, in particular underground operations. Some others expressed the view that there may not be any major difficulty in an amalgamation of the general duties provisions for example. However, those adopting this position suggested there would need to be mining specific regulations or complimentary legislation, perhaps along the New South Wales lines, to recognise the specific circumstances of mining in this State.

416. On the whole however, from my broad range of discussions on the issue, I did not detect from the many I spoke with, any appetite to completely remove separate legislative coverage for the mining industry in this State.

417. The written submissions to the Review supported this impression. The CME, in its initial submission to the Review on behalf of members in the industry submitted that the separate legislative regime should be maintained in recognition of the specific risks and the operating environment of the mining industry, many of which are unique. It was also said that the existence of separate legislation and a separate regulator, will enhance the accountability of

226 Laing Review at pp50-51
227 Professor A Hopkins and Mr P Wilkinson Recommendations for the Western Australian Minerals Industry Mines Safety Improvement Group Interim Report Stage One
the industry. Concern was also expressed that any combination of legislation would be a precursor to a combined regulator which is not supported.

418. A further matter raised by the industry, as set out above, is the impact of such an amalgamation on the progress of the NMSF, in that progress towards its goals would be more achievable by keeping the legislation separate. The views of the CME in this, and indeed in all respects, were endorsed by the AMMA. The general view of the CME on these issues was expressed in its submission as follows:

“Mine Specific Legislation

The Government has made its position quite clear in wanting to integrate the mines safety and inspection legislation and general occupational safety and health legislation. The CME acknowledges the majority of the two pieces of legislation are currently aligned but does not agree they should be amalgamated into a single Act. The sector is unique in some of the hazards it faces. As such, the CME and the industry it represents consider accountability for safety performance in the industry is best achieved by having dedicated legislation combined with a dedicated inspectorate.

In addition, the industry is concerned any further integration of the MSIA and the OSHA will result in the removal of the specialised regulator. The support of a dedicated competent regulator is important to achieving further health and safety improvements and addressing the specific risks and operating environment that are peculiar to the resources industry.

In addition, the CME considers if progress is to be made towards a national mine safety model, as discussed below, this will be more achievable if the two pieces of legislation remain separate. To integrate the two pieces at this stage would delay the progress and degree of harmonisation that would be achieved.

The CME considers the MSIA and OSHA remain as separate statutes to ensure the focus on safety and health in the resource sector and facilitate movement towards national harmonisation.”

419. However, subsequent to their initial submissions, the CME informed me that in relation to its submission to the National Review into Model OHS Laws (“the National Review”), it had received instructions from its members to now support a single national model safety and health statute to apply in all workplaces, including mines. In its correspondence to me, and in referring to its submission to the National Review, the CME observed:

“CME supports a national OHS model providing for one principal OHS Act consistently implemented in all jurisdictions and applying to all industries—including mining. This support is subject to the model OHS Act and its manner of implementation:

• being limited to establishing an overall OHS framework;
facilitating continuation of industry specific OHS legislation that is consistent with the model Act; and

ensuring maintenance of specialist mining safety regulators within each jurisdiction.

While CME supports national harmonisation of OHS laws in principle, it is absolutely opposed to the national model OHS Act providing for:

- strict liability duties of care;
- right of entry entitlements for unions or other parties; and
- unions or other third parties to have any role in the commencement of OHS prosecutions or other enforcement actions.

The submission outlines the view of the CME that the NMSF process should continue and focus on the development of mining safety legislation that is consistent with the national model Act and deals with issues that are specific to the mining industry.”

420. The CCIWA identified in its submission that the critical issue at least in the short term, is not amalgamation of the legislation, but harmonisation across jurisdictions, to reduce the regulatory burden on industry. The principal focus according to the CCIWA is that employees and employers should be subject to the same sound regulatory requirements regardless of where they work.

421. In addressing these issues, the CFMEU submission supported the retention of the existing legislative regime for the mining industry as being appropriate. It is said that the existing arrangements provide the general duties framework contained in the OSH Act, but also incorporate the appropriate industry specific provisions, to reflect the nature of the mining industry. It said in its submission as follows:

“2.1 The union supports a higher level of regulation in the WA minerals industry than in other industries. The current legislative regime of dedicated occupational safety and health legislation through the Mines Safety and Inspection Act 1994 (WA) (The MSIA) which reflects the general duties embodied in the Occupational Safety and Health Act 1984 (WA) (the OSHA) but also makes provision for industry specific regulation achieves this. The union does not see a great need to change this structure.

2.2 The maintenance of a separate Act regulating the minerals industry will also assist in the development of a consistent approach under the NMSF. One of the aims of the NMSF is to develop a nationally consistent legislative framework for the mining industry. Continuing to have separate legislation will assist in WA being involved in this process. Indeed the NMSF is proceeding on the basis that the majority of jurisdictions have mining industry specific legislation (NSW, Qld, WA and NT).”

Proposition 1: There should continue to be a separate Act regulating the WA Minerals Industry.”
Also emphasised by the union, is that the attainment of the objectives of the NMSF will be aided by the retention of a separate legislative regime, and furthermore, the process is predicated on the continued existence of largely separate legislation applying to the mining industry in the principal jurisdictions.

In its submission, MARCSTA adopted the position that given the alignment between the MSI Act and the OSH Act, there was no conflict between the legislative regimes and the reasons for separation remain as valid now as in the late 1980’s.

The contrary argument was advanced by some who made submissions to the Review. The State Mining Engineer suggested that it may be an opportune time to reconsider the issue, given the similarity of the legislation as a result of amendments to bring the schemes closer together. One way of addressing the change could be, it was posited, to adopt the approach in the New South Wales mining legislation, with the general statute covering all workplaces and mining specific provisions contained in a separate statute.

This was also the view of the RSD, which suggested that a single piece of legislation, supported by industry specific regulations, codes of practice and guidance notes, would remove existing duplication.

Whilst principally concerned about electrical safety issues, the Goldfields Electrical Safety Group, a non-profit industry group representing electrical personnel in the Goldfields region, also expressed support as a long term goal, the amalgamation of mining and general industry regulation.

In my view, this issue needs to be addressed in the context of how any such amalgamation would improve health and safety in the mining industry, in terms of the attainment of the principal object of the Act in s 3(1)(a) to “promote and secure the health and safety of persons engaged in mining operations”.

Conclusion

For the following reasons, in my view, no case exists for the complete replacement of the MSI Act with the OSH Act, supplemented by mining specific regulations. The mining industry should retain, in whole or at least in part, separate legislation, with provision for subordinate regulations, specific to its circumstances.

Most of the arguments previously advanced in relation to this issue, seemed to have been concerned primarily with administrative convenience by an amalgamation of the statutes. Further, it was suggested that policy development would be enhanced as a consequence of one single tri-partite voice, which would be the most effective and efficient process. Save for the

Laing Review op cit at par 174
relatively limited circumstance of construction on mine sites, which I deal
with below, no other substantive ground has been developed to support
complete amalgamation, based upon the further attainment of the principal
object of the MSI Act in s 3(1)(a), that being securing the safety and health of
persons engaged in mining operations. That is, nowhere have there been
persuasive arguments put that I have been able to discern, as to how such an
amalgamation will make mines safer.

430. The hazard profile of the mining industry is unique. The physical
characteristics of a mine, open cut or underground, in terms of geological and
geotechnical considerations are subject to constant change. Other major risk
factors include ventilation, in-rush/flooding, explosion, fire and mine wall
stability. In my view, there needs to be separate legislation, either complete or
at least in part, to accommodate mining industry specific risks, particularly in
the underground sector. One should never forget that much mining industry
safety and health legislation around Australia has been born out of tragic
events. Whilst Australia has yet to ratify it, the fact of the existence of ILO
176, providing for separate international safety and health obligations for
mining operations, to that contained in ILO 155 for general workplaces, is
some recognition of the principle of separate requirements for mining law.

431. Furthermore, the abolition of the MOSHAB, and the constitution of the
MIAC, as a special advisory committee of the COSH under the OSH Act,
along with the addition of mining industry representation on the COSH itself,
has, for reasons developed in Chapter 9, led to considerably closer policy
alignment between the mining and general industries.

432. The industry support for and movement towards harmonisation, via the
NMSF, is also a matter of some significance. The content of the NMSF
Legislative Framework and other strategies released to date, are mining
industry specific, having been developed initially through offices of the Chief
Inspectors of Mines and more recently, the tripartite Steering Committee.

433. Any move at this juncture to completely repeal the MSI Act and amalgamate
all statutory obligations, even with separate regulations for mining, has in my
view, the potential to delay, complicate and undermine, this process occurring
at the national level. Such a development will inevitably occupy considerable
energy and resources, which could be otherwise applied to the legislative
harmonisation process through the NMSF, which has now progressed to the
stage of preparing drafting instructions and the development of model clauses,
for consideration by the NMSF participants. As an alternative however, it
may now be time, given the degree of support for it, and the continued
alignment of the general duties and ancillary provisions, to consider the partial
amalgamation of the MSI Act, in terms of those provisions in common with
the OSH Act, along the lines of the New South Wales model. This would
have the effect of the OSH Act extending to mines, with mining specific
provisions remaining in the MSI Act. The mining specific provisions of the
legislation should be complimentary to and build on, the safety initiatives
contained in the OSH Act. There would be no derogation of safety standards
under such a scheme. On the contrary, the complimentary legislation,
consistent with my views above, will incorporate enhanced safety protection for those engaged in mining operations. This would be consistent with the continuation of the NMSF process.

434. Under such an approach, there should be no change to the status or location of the Mines Inspectorate. There should be no amalgamation with WorkSafe. A well resourced and independent Mines Inspectorate is essential for the promotion and enforcement of mines safety in Western Australia. Additionally, such a change would also have no impact on the policy making approach under the MSI Act as mining specific policy matters have been, and should continue to be, dealt with through the tripartite structure of the MIAC.

435. The importance of dedicated mining legislation was also recently referred to by the Tasmanian Coroner, in his Inquest Findings into the deaths of three miners at the Renison Tin Mine in 2001 and 2003. In the context of criticisms of the existing general industry legislation that also extends to mining, it was said:

“These Inquests highlight what I believe to be fundamental deficiencies in the legislation applicable to mining in Tasmania. Whilst the current legislation, the Workplace Health and Safety Act 1995 is applicable to mining, it is a more generalised approach while mining requires more industry specific legislation due to the nature of its operations.

Mining has always been referred to as hazardous, certainly when considering underground mining. Such activity can only benefit by specific regulatory legislation to assist all involved in the issues of safety and safe workplaces.”

Recommendation 14

That the provisions of the MSI Act presently in common with the OSH Act be repealed and the application of the OSH Act extend to mines with such modifications to the OSH Act as may be necessary. The MSI Act should continue to apply as complimentary legislation, in addition to the OSH Act, containing mining specific provisions as is the case in the New South Wales mining industry.

436. Furthermore, as a consequence of such a change, it will be necessary to amend s 6A of the MSI Act dealing with the application of the MSI Act to any workplace under the OSH Act. Presently, this section enables an Instrument of Declaration to be made by the Ministers concerned to extend the MSI Act to a workplace under the OSH Act as if it was a mine. Any inconsistent provision of the OSH Act is presently excluded. Whilst a provision such as s 6A may still be useful to retain, given that under an amalgamated regime the

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229 Inquest into the deaths of miners at the Renison Tin Mine May 2008 Tasmanian Coroner’s Court at 104. Additionally, in the recent Inquest Findings into the death of Larry Paul Knight at the Beaconsfield Gold Mine handed down on 26 February 2009 the Tasmanian Coroner strongly affirmed the findings of the Coroner in the Renison Tin Inquest as above and also strongly affirmed the importance of and need for separate mining specific regulation to cater for the inherent risks of the industry. See BGM Inquest Report at 78-80.
MSI Act would be complimentary to the OSH Act, an appropriate amendment to s 6A to reflect this would be required. Necessarily, as Instruments of Declaration under the OSH Act will no longer be required, and as the OSH Act will extend to a mine, consequential amendments to s 4 of the OSH Act will also need to be made to remove from s 4(2) the reference to both the MSI Act and the Mining Act. The latter will be necessary to ensure that no legislative lacuna arises, given the definition of “mine” in s 8 of the Mining Act. This is dealt with below when considering the application of the MSI Act to railways. Despite these Recommendations in relation to a partial amalgamation of the statutes, other Recommendations made earlier and below, make no assumption to this effect.

Recommendation 15

That subject to Recommendation 14 s 6A of the MSI Act be amended to enable the MSI Act to operate in a workplace under the OSH Act to compliment the terms of the OSH Act.

Construction Work

437. My attention has been drawn to an issue which has apparently, caused some confusion in the industry that being the appropriate legislative coverage in relation to construction work on mine sites. Whilst my Terms of Reference at (a), set out in annexure 1, refers to “mine sites during construction” which may be read more narrowly to only include consideration of the construction phase of a mine project, I will deal more generally with the question of construction work on mine sites.

438. I have set out the definition of “mining operations” in the MSI Act above. It is evident both from its terms and from the extract of Parliamentary debates on the Bill leading to the MSI Act, that the meaning of “mining operations” both in its ordinary and natural sense, and consistent with its intended effect, is to be construed broadly. This view has judicial support.

439. Additionally, as a general principle, health and safety legislation, being remedial in character, should be construed beneficially and a generous approach to interpretation adopted, as long as any interpretation is “restrained within the confines of the actual language employed and what is fairly open on the words used”.

440. This question of construction on mine sites seems to have arisen most recently, in the context of the current heightened level of activity in the mining industry and in particular, a major mine construction project undertaken in the Pilbara, which involves, in addition to the mine infrastructure itself, the construction of

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230 Section 4 MSI Act
231 See Leighton Contractors Pty Ltd and Ors v Simon Luigi John Reg [1998] WASCA 318 23 November 1998 per Miller J at 11
railway and port facilities. In the submission of the State Mining Engineer, he noted there has been some contention between the RSD and WorkSafe as to whether the MSI Act may have any application to a port, railway and mine during construction. As a corollary of this, whether in any particular case, there is the need for an Instrument of Declaration to be made, to extend the OSH Act to the particular work in question.\(^{233}\)

441. There were a number of submissions made in relation to this point. From the perspective of the State Mining Engineer, the issue is one of certainty. In his submission, the point is made that there can be doubt not only as to which legislation applies to what might be termed “major construction”, but also, whether the MSI Act extends to the construction of various other infrastructure and facilities, and which are particularised in the definition of mining operations, which is presently expressed as incorporating by reference, “the operation of” various types of equipment and facilities.

442. Similar issues were raised by WorkSafe in terms of potential uncertainty, duplication or overlap in coverage between the MSI Act and the OSH Act concerning construction work. Whilst accepting that there may be a range of views as to the scope of “mining operations” in s 4 of the MSI Act, it is said that the inherent uncertainty created, makes it difficult for the regulators to provide advice to the mining industry and also, there are difficulties in crafting Instruments of Declaration where they may be required.

443. From the perspective of the industry, the CME in its submission maintains that it is the responsibility of government to ensure that legislation in a variety of areas, including safety and health, dangerous goods, energy safety, environmental and other areas, is clear in its scope of application to avoid duplication of effort by industry in compliance.

444. Allied to the issue of clarity of legislative coverage, in the view of the CME, is the importance of coordination in the activities of various regulators responsible for such legislation, to most efficiently use scarce available resources. Given its general concurrence with the CME submissions, this necessarily must also be the view of AMMA.

445. A somewhat different approach, and the only one which sought to delineate the line of demarcation between the MSI Act and the OSH Act in relation to construction work, was advanced by the CCIWA. The issue of lack of clarity of the boundary is raised and a proposal advanced that one way of addressing the issue, is to provide that the OSH Act would have application to “substantial construction projects” on a mine site. Necessarily, consistent with this proposition, there would need to be defined criteria as to what may be “substantial” construction in any particular given case.

446. From this perspective, the CCIWA also suggested that the relevant criteria could be developed by the COSH, which should also include a process to determine coverage, in circumstances where the criteria may not strictly be

\(^{233}\) Section 4(3) OSH Act
met. In essence, in accordance with this approach, it is suggested that the MSI Act should not automatically extend to an activity that may occur both off and on a mine site, during the life of a specific mining operation.

447. From its perspective MARCSTA did not see any difficulty in coverage arrangements concerning construction work and that the current flexibility, between the two pieces of legislation is adequate. It contends that the major issue to be considered from any change that might arise from the Review would need to be justified on the basis that it would lead to a higher standard of occupational safety and health for those employees who are engaged on construction work on mine sites.

448. The union view on this issue was advanced by the CFMEU in its written submission. The potential confusion and inconsistency arising from the existing arrangements as they apply to construction work is acknowledged. In the union’s view, this matter should be resolved in favour of the complete coverage of the MSI Act and it should be made clear, that the legislation will apply to all work performed on a mine including all aspects of construction work and rail operations. The union in its written submission noted the width of the definition of “mining operations” in s 4 of the MSI Act.

Breadth of Meaning

449. For the purposes of interpreting a provision such as par (b), it must be considered in the context of the relevant section and the MSI Act as a whole. The scope of the definition of “mining operations” has been referred to earlier. In my view, given the ordinary and natural meaning of the words used in the definition, in particular that referring in par (b) to “developmental and construction work associated with opening up or operating a mine”, there is no warrant for a narrow or restrictive meaning to be given to the words used. It is apparent from a full reading of the definition of “mining operations” in s 4, and correspondingly, the definition of “mine”, that it was the intention of the legislature that the operations of a mine be extended in the widest sense. Many elements of the extended definition would not fall within the ordinary meaning of the words used in the introductory part of the definition.

450. There is no definition of “construction work” in s 4 of the MSI Act. There is a definition in reg 4.18 of the Regulations, contained in Division 2 – Construction Work, which provides for construction work, other than construction work carried out underground, to be carried out by competent persons with appropriate supervision and in compliance with relevant Australian Standards. Being a definition specific to the Regulations as opposed to a definition in the MSI Act, it cannot be called in aid in interpreting the scope of “construction work” for the purposes of s 4 of the MSI Act. Similarly, any conflict between the MSI Act and the Regulations is to be resolved in favour of the former.

234 Division 2 – Construction Work of the Regulations.
235 Pearce and Geddes op cit at par 6.32; s 44 Interpretation Act 1984 (WA)
451. The ordinary and natural meaning of “construction” is:

“1. The action of framing, devising, or forming by the putting together of parts, erection, building: the art or science of constructing. 2. the manner in which a thing is constructed or formed...”\(^{(236)}\)

Similarly, “opening up” in its ordinary and natural meaning, includes:

“to make (a building, box or enclosed space) open...to render available for settlement, use...to develop...to lay open; to become open to enterprise”\(^{(237)}\)

The use of the words “associated with” means “combined (with); occurring in combination”\(^{(238)}\)

452. The words “opening up” a mine, must be construed in accordance with their ordinary parlance, and be given a broader definition than that of merely “opening up the ground” in my view. This is for two reasons. First, if the draftsperson of the provision had meant to limit the meaning in this way, the words used could have been drafted quite simply to make this clear. Secondly this later activity is already contemplated in the introductory part of the definition of “mining operations” in terms of “any method of working by which the earth or any rock structure, coal seam, stone, fluid or mineral bearing substance is disturbed, removed...whether it has been previously disturbed or not...”

453. These introductory words of the definition clearly contemplate the opening up of the ground for the purposes of a development opening or development heading in relation to an underground mine, or pre-stripping for an open cut mine.

454. Furthermore, given the definition of “development” in s 4, there seems no reason why the draftsperson could not have linked construction work to it, if the intention was for the notion of construction work to be limited to opening up the ground.

455. In my opinion, the better view is that “opening up” in the context of par (b) in the definition of “mining operations” in s 4 of the MSI Act, is to become open to an enterprise or business in the same sense of the commencement of an operation from the beginning. Putting it another way, the “opening up” of a mine, extends well beyond just the opening ceremony. I see no reason to restrict the meaning of construction work associated with opening up or operating a mine. On this view, all activities, from the turning of the first sod of soil, to the construction of all mine infrastructure including where relevant, port and rail operations, would be covered by par (b).

\(^{(236)}\) Shorter Oxford Dictionary
\(^{(237)}\) Ibid
\(^{(238)}\) Ibid
456. As noted above, the breadth of meaning of the definition of “mining operations” was referred to in *Leighton Contractors Pty Ltd v Simon Luigi John Ridge and Anor.* This was an appeal from a conviction at first instance under s 9(1) of the MSI Act arising from the death of an employee of the appellant. The appellant had been engaged to undertake expansion works at a mine site in the Southwest of the State and engaged the deceased as a contractor to undertake fencing works in connection with modifications to a tailings dam being undertaken by the appellant. The deceased was killed as a consequence of a tractor he was operating overturning on an embankment.

457. For the purposes of determining the appeal, the Court was required to consider whether the deceased was engaged by the appellant in “mining operations” as defined in s 4 of the MSI Act, and also, whether, under the then s 9(3), the appellant exercised control over the deceased. In dismissing the appeal, Miller J considered the meaning of “mining operations” in s 4 and said:

“(3) The definition of "mining operations" is extremely wide, including "developmental and construction work associated with opening up or operating a mine" and in this case there was sufficient evidence to justify the conclusion that the appellant was engaged in either developmental or construction work associated with the operation of the Hedges Gold Mine, as it was engaged for the purpose of the Hedges Gold Mine tailing facility extension project. That extension project necessitated raising the wall of the tailings dam, and an associated task was the clearing of trees and fencing at or near the wall.”

458. In the State Mining Engineer’s written submission, the further issue is raised as to whether the definition of “mining operations” would cover, for example, the construction and operation of an airstrip for the purposes of transporting persons and goods to and from a mine site.

459. As to this, it may depend on the particular circumstances in question. If, given the location of the mine and the means of access and egress to and from the mine are such that it is necessary for air transport to be used for transporting persons, materials and provisions to conduct the mine operations, then it would seem strongly arguable that a private airstrip, used solely for these purposes on the mine site, would be regarded as a “support facility” in terms of par (g). That is on its ordinary meaning, the operation of an airstrip, in terms of delivering persons and things to a mine necessary for it to operate, is as much a support to the continuation of an operation as is a workshop to service mobile plant for the operation. If this be so, then it is but a short step to conclude that if such a support facility is necessary to operate a mine, then construction of it would be “associated with” it, in the required sense, for the purposes of par (b). Similarly, this would also extend in my opinion, to the construction of residential facilities for the purposes of par (k) of the definition of mining operations. It is difficult to imagine how a mine could be operated in an isolated location, far from other residential accommodation, without

239 [1998] WASCA 318 per Miller J
240 *Leighton Contractors* at 22
accommodating employees, and as a consequence, the construction of such facilities not being considered “associated with” such operations.

460. In relation to the construction and operation of a private aerodrome as described, it will be subject to the terms of the Civil Aviation Act 1988 (Cth), the Civil Aviation Safety Regulations 1998 (Cth) and the Manual of Standards Part 139 – Aerodromes, made under these regulations. The focus of this legislation however, as with the rail safety legislation, is on the engineering, technical and safe operating procedures of such a facility, rather than occupational health and safety. In my view, it should also be made clear that “mining operations” does not include “air transport to and from a mine which falls within the scope of the OSH Act as a “workplace” as defined in s3.

461. Allied to this point, the State Mining Engineer also refers to the circumstance of a power station operation that otherwise may fall within the definition of a “support facility” for the purposes of par (g). In former times, it was common for power stations to be owned and operated by a mining company to supply power to the mine. The contemporary position is somewhat different, with power stations, although still situated on a mining tenement, now being conducted as business enterprises in their own right. Their customers may be various including other commercial enterprises apart from mining operations and may include several mines.

462. In general terms, I have little doubt that a power station, on a mining tenement, established for and engaged in the supply of power solely for the purposes of the conduct of mining operations, would fall within the scope of “the operation of support facilities” for the purposes of par (g) of the definition of mining operations. When read in the context of the definition as a whole, such facilities are intended to be in my view, for the dedicated purposes of a mine operation. If a power station operator provides a mine with power but the mine is but one of a number of other commercial customers, unconnected to mining operations, then in my view the nexus between the provision of power and the mining process would be tenuous, if not broken. If however, a power station only provides power to a number of mine operators as its exclusive activity, I see no reason why that operation should not be regarded as properly falling under the MSI Act as being engaged in mining operations. The issue of corporate ownership should not determine statutory coverage, rather the activity engaged in should.

463. Given however, the above recommendation to extend the OSH Act to a mine, which will cover the types of operations just discussed, it is probably unnecessary to clarify these definitions any further. That is, there will be clear coverage under the OSH Act for this type of activity on the basis they will constitute a “workplace” for the purposes of the present s 3 of the OSH Act.

464. My recommendation above that there be an amalgamation of the MSI Act with the OSH Act in relation to common provisions, and the OSH Act extending its coverage to mining operations, will go a considerable way to resolving these issues. That is, the OSH Act will apply to all activity on a mine site, including construction work. What remains to be determined however, is what
construction work should also be covered by the complementary MSI Act, to ensure that the appropriate mining industry safety standards are applied. In New South Wales, both the CMSH Act (NSW) and the MHS Act (NSW) extend to construction work, as well as the general OHS Act (NSW), in a complimentary manner. Additionally, as in New South Wales, Mines Inspectors under the MSI Act, would need to be taken to be also appointed as Inspectors under the OSH Act in relation to mining operations, to enable them to administer both pieces of legislation at mining operations. An appropriate amendment to Part V of the OSH Act will be necessary for this purpose.\(^{241}\)

The extent of the deployment of appropriate regulatory capacity, between the Mines Inspectorate and WorkSafe in any given case, such as major construction work for example, should be an administrative matter between the regulators under both the OSH Act and MSI Act, within such a complimentary scheme.

465. Given my recommendation above in relation to the creation of a complimentary scheme, and having considered the definition in relation to construction work, in the context of the breadth of the definition of mining operations as a whole, greater certainty will be created in my view by limiting the scope of the definition. I propose that construction work to be covered by the MSI Act under such a scheme be limited essentially to construction activity undertaken on a mining tenement in relation to structures that are intended to be part of a mine. This is similar to the approach taken in New South Wales under the principal and complimentary Acts in that jurisdiction. This means, in the main, construction work in and about a mine proper. This would include the initial construction of a mine project and any necessary on going construction work once a mine is operational, is suspended and is being decommissioned. I do not consider this should include railways as there is particular expertise required for such work under the RS Act. Given the OSH Act would also apply there would be appropriate occupational health and safety coverage of such work.

466. There is also the question, for example, of the construction of a port. Once operational, there is no doubt a port is a “mine” for the purposes of s 4 of the MSI Act. However, during construction, there are aspects of a port’s infrastructure that I would have thought would be of vital interest to the Mines Inspectorate. For example, the construction of reclaimers, conveyor systems and infrastructure used for the purposes of the secondary processing of minerals, would seem to me to be of as much interest to the Mines Inspectorate, as the construction of similar infrastructure on the mine site itself, and which are integral to a mining operation once operational.

467. Consistent with this, the deployment of appropriate inspectorial resources will essentially be, and should be, an administrative matter between the Mines Inspectorate and WorkSafe, in each particular case, using the existing flexibility contemplated by the Parliament in enacting the relevant provisions of both the MSI Act and the OSH Act. The objective must be to ensure that the appropriate inspectorial resources are deployed, to maintain safety.

\(^{241}\) See for example s 47A OSH Act (NSW)
468. In an endeavour however to make the position clearer par (b) could be redrafted along the lines as below. There will be a need to consequentially amend the definition of mining operations in relation to the excluded activities also. Given that the OSH Act extends to it presently, the exclusions should also cover air transport to and from a mine.

Recommendation 16

That subject to Recommendation 17 below, par (b) of the definition of “mining operations” in s 4 of the MSI Act be repealed and there be inserted in lieu thereof words along the following lines:

“the constructing, erecting, maintaining, or demolishing of any excavation, dam, building, structure, plant, machinery, equipment or work that is on a mining tenement and is intended to be part of a mine.”

Recommendation 17

That the definition of “mining operations” in s 4 of the MSI Act be amended by deleting the current exclusions and inserting in lieu thereof words along the following lines:

“but does not include –
(p) the operation of steel making plants; or
(q) the operation of rolling mills; or
(r) the operation of facilities for the manufacture of goods from mining products; or
(s) the operation of residential facilities or recreational facilities and the ground used for the purpose where such facilities are not located on a mining tenement and directly associated with mining operations; or
(t) the operation of sand, gravel, limestone, or rock excavation carried on by or for any State agency or instrumentality or any local government for the use or disposition by any such agency, instrumentality or local government; or
(u) the operation of excavation activities on private land by and for the use of the owner of the land; or
(v) the construction and installation of surface railways; or
(w) air transport to and from a mine.”

Rail Operations

469. An issue arises in relation to the coverage of the MSI Act in respect of existing and new rail transport operations used for the purposes of transporting ore or other mining products. The definition of “mining operations” set out above, extends to in par (e)”the operation of privately owned railways to transport ore or other mining products, or to provide related services;” Consistent with
the wide definition of mining operations, it was the plain intention of Parliament that the MSI Act would extend to all such rail transport.

470. However, in 1998 the MSI Act was amended, such that it would not apply to a railway that was covered by the Rail Safety Act 1998 ("the RS Act"), enacted by the State Parliament at that time. The RS Act was enacted to give effect to a cooperative arrangement between the Commonwealth and the States to introduce a national framework for the regulation of rail safety throughout Australia. The RS Act is primarily concerned with the promotion of the safe construction, maintenance and operation of railways, principally from an engineering perspective. It is not directed to occupational health and safety. Only one section of the legislation presently refers specifically to railway employees.

471. As a part of obtaining required accreditation by the either an owner or operator of a railway to which the RS Act applies, a safety management plan must be submitted to the relevant authority which identifies significant potential risks arising from the construction, maintenance and/or operation of a railway. There is no provision currently contained in the legislation of the kind in the MSI Act or the OSH Act, by way of general duties or otherwise, providing for all hazards to be identified, risk assessments to be performed and appropriate control measures implemented, for all persons, including employees and others, in or about a railway. Furthermore, from my brief review of their terms, the line of delineation between the OSH Act and the RS Act, in terms of occupational health and safety coverage for railway employees, and regulatory responsibility, is less than clear. This is a matter upon which comment has been made previously.

472. The scope of the RS Act is provided in s 4 as follows:

"4. Application of Act

(1) This Act applies to and in relation to —
(a) a railway within, or partly within, the State with a track gauge equal to or greater than 600 mm; and
(b) any other system designed to transport passengers or freight or both and prescribed to be a railway for the purposes of this Act, and to the operation of any such railway.

(2) This Act does not apply to or in relation to —
(a) a railway in a mine which is underground or predominantly underground and used in connection with the performance of mining operations;
(b) a slipway;

[Sources and references included]
(c) a crane-type runway; or
(d) a railway or system of a class prescribed as a railway or system to which this Act does not apply.

(3) The Minister may, by notice published in the Gazette and on such conditions, if any, as are specified, exempt from this Act, or specified provisions of this Act —
(a) specified persons or persons of a specified class; or
(b) specified railways or railways of a specified class.

(4) In subsection (3) —
“specified” means specified in the notice.

(5) The Minister may amend or repeal a notice at any time by subsequent notice published in the Gazette.

(6) Sections 41 and 42 of the Interpretation Act 1984 apply to and in relation to a notice under subsection (3) or (5) as if the notice were a regulation.

(7) A person must not contravene a condition imposed under this section.
Penalty: $20,000.”

473. As can be seen from s 4(2), there are two circumstances in which the RS Act will not apply to a railway. The first is where a railway or system or a class thereof, is prescribed under s 4(2)(d). The second circumstance is where a Ministerial notice is published in the Gazette, exempting a railway from the legislation.

474. As a consequence of amendments to the Rail Safety Regulations 1999, the provisions in relation to excluded railway systems for the purposes of s 4(2)(d) of the RS Act are expressed as follows in regs 5(1) and (2):

“5. Act not to apply in certain cases — section 4(2)(d)

(1) Under section 4(2)(d) of the Act, the following railways are railways to which the Act does not apply —
(a) a railway used solely by horse-drawn trams;
(b) a railway used solely for a static display;
(c) a railway used solely for a fairground amusement;
(d) an established Pilbara iron ore railway as defined in subregulation (2);
(e) any extensions to, or alterations of, an established Pilbara iron ore railway that were made after the commencement of the Rail Safety Amendment Regulations 2000.

(2) For the purposes of subregulation (1), a railway is an established Pilbara iron ore railway if—
(a) it is located wholly or substantially in one or more of the local government districts of Ashburton, East Pilbara, Port Hedland and Roebourne;
(b) it was in operation at the time of commencement of the Rail Safety Amendment Regulations 2000;
(c) it was, at that time, and continues to be, operated by a person who mines iron ore; and
(d) it was, at that time, and continues to be, used wholly or substantially for the transportation of iron ore mined by or on behalf of that person."

475. The effect of this regulation is that the exemption from the operation of the RS Act only covers "an established Pilbara Iron Ore railway as defined in subregulation (2)" if the railway:

(a) was in operation 2000; and
(b) was and continues to be, operated by a person "who mines iron ore".

476. The significance of reg 5(2) is that only one privately owned railway operation in the Pilbara is now subject to the MSI Act. The railway operations conducted by another major iron ore company, in existence at the time of the enactment of the RS Act, but whose rail operations are now conducted by a subsidiary rail services company, and not a company that mines iron ore, no longer falls within the scope of the exclusion provided in reg 5(2), and thus the MSI Act does not apply to that railway.

477. To add a further complication, as this particular rail operation also falls within the definition of a "mine" for the purposes of the Mining Act, by reason of s 4(2) of the OSH Act, that legislation was also excluded, and an Instrument of Declaration was required under s 4(3) of the OSH Act, to extend its operations to that railway. Any new entrant into the mining industry, also owning and operating a private railway, will also fall outside of the exclusion in reg 5(2) above and will thus also not be covered by the MSI Act.

478. Given the point just made, any new rail operation that is also considered to fall within the definition of a "mine" for the purposes of the Mining Act, which presumably it would, then likewise, an Instrument of Declaration under s 4(3) of the OSH Act will be required to ensure that there is occupational safety and health legislative coverage of that activity.

479. As a consequence of the above, there are now three statutes, and their subsidiary legislation, that may have coverage of private railways conducted in the iron ore industry in this State. The RS Act and the OSH Act will both apply to railway operations not covered by the MSI Act, as long as an Instrument of Declaration, as may be necessary, is made under the OSH Act.

480. The intention of the Government of the day, at the time of the enactment of the RS Act, was to exclude then existing Pilbara iron ore railway systems from its coverage. There was considerable debate in Parliament as to whether such exclusion should be determined by way of Ministerial Notice or through a general exemption by regulation.\(^\text{246}\) It seems this led to the introduction of s 4(6) of the RS Act, which provides that under the Interpretation Act 1984, a Ministerial Notice will be regarded as a regulation and be open to a disallowance motion by the Parliament.

\(^{246}\) Hansard 1 April 1998 1282-1284; Hansard 24 June 1998 4553-4567
481. In my view, the terms of the MSI Act itself, in relation to its application to privately owned railways for the purposes of transporting ore or other mining products, which has applied for many years, is clear and unambiguous. No amendment is required to enhance its clarity or scope of operation. The interaction of this legislation will also inevitably involve policy matters between the Commonwealth and State Governments, in terms of any uniform scheme for rail safety within Western Australia and indeed, throughout the Commonwealth.

482. The State Mining Engineer in his submission suggests that the current situation is, however, an anomaly. I tend to agree. In my opinion, it would also seem, as MARCSTA has suggested, that in principle, no good reason exists why there should not be a nationally consistent regime for rail safety regulation, as long as the safety standards do not involve any compromise to those prevailing in the mining industry in this State presently.

483. That is, as a minimum, the present rail safety standards as prescribed in the MSI Act and the Regulations would need to at least be met if not exceeded, in any revision of the OSH Act and the RS Act and its accompanying regulations. This is particularly so, as any new entrant into the mining industry, which owns and operates a railway system, will fall outside of the coverage of the MSI Act.

484. It is undesirable that there be, in effect, a “patchwork quilt” of legislative coverage in relation to private railway operations in this State. The current arrangements lead to uncertainty and undue complexity. Whilst I recognise that the existing mining operation still subject to it has established systems in operation under the MSI Act and Regulations, and change would no doubt be disruptive, in the longer term, it may well be to the advantage of all rail operators for there to be a consistent legislative scheme. It seems difficult to justify in the longer term, a separate legislative scheme and regulator for the only operation remaining in this State under the MSI Act.

485. Furthermore, if as I have proposed in Recommendation 14 above, the OSH Act extends to mines and the MSI Act operates as a complimentary statute for mining specific provisions only, then the case for the removal of rail operations from the MSI Act becomes compelling. The Recommendation below is also to be read in conjunction with my comment above regarding the need to amend s 4(2) of the OSH Act to remove reference to the MSI Act and the Mining Act. This will avoid any lacuna in legislative coverage for rail operations.
**Recommendation 18**

That subject to the establishment of satisfactory occupational health and safety standards for rail operations:

(a) the MSI Act be amended to remove from its coverage the operation of privately owned railways by the repeal of par (e) in the definition of mining operations in s 4; and

(b) as a consequence, Part 15 of the Regulations be repealed.

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**Dangerous Goods Safety**

486. As noted above, the storage, handling and transportation of dangerous goods is now subject to the DG Act and the DG Regulations, and a suite of other regulations, from March 2008. Major hazard facilities are now also covered by this legislative scheme. The regulatory responsibility for dangerous goods was transferred to the RSD following the initial recommendations of the Laing Reviews of both the OSH Act and the MSI Act to the effect that regulatory responsibility for the then Explosives and Dangerous Goods Act 1961 be transferred to DOCEP, along with the responsible Division of the then Department of Mineral and Petroleum Resources.\(^{247}\)

487. This issue was subsequently re-canvased in the Ritter Inquiry, which recommended to the same effect.\(^{248}\)

488. In relation to the Regulations, given that the Dangerous Goods Safety (Explosives) Regulations 2007 will now cover mining operations, relevant provisions of Part 8 Explosives of the Regulations have been repealed.

489. Given the legislation has just commenced to operate, not surprisingly no submissions or other comment was made to me as to this legislative scheme. Its enactment and commencement reflects a current policy setting of the State Government, for separate legislative and regulatory coverage in this area of responsibility.

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**Petroleum Safety**

490. As also noted above, safety and health regulation of offshore petroleum is now subject to Commonwealth law under the PSL Act (Cth) with regulation the responsibility of NOPSA, Safety and health provisions of State petroleum legislation have been “disapplied”, leaving one body of law, under the PSL Act (Cth), applicable to offshore petroleum installations. Other State laws, that may have some safety and health components, such as those applicable to gas, electricity and radiation safety for example, still, with some modifications, apply to offshore activity, but their administration is governed

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\(^{247}\) Laing Review op cit at pars 210-216

\(^{248}\) Ritter Inquiry at p 377
by memorandums of understanding between NOPSA and the relevant State agency.

491. Onshore petroleum regulation, in terms of the Petroleum and Geothermal Energy Resources Act 1967, the Petroleum Pipelines Act 1969 and the Petroleum (Submerged Lands) Act 1992, is administered by DOIR. By s 4(2) of the OSH Act, it does not apply to a well or petroleum pipeline the subject of the above mentioned State law.

492. In relation to pipeline safety, the RSD provides regulatory assistance and advice to the DOIR in relation to a range of issues including conditions that may be imposed on pipeline licenses and the development of risk assessment and safety cases for pipeline operations.

493. Again, no submissions were made or commentary directed to this legislation, by any party participating in the Review.

Radiation Safety

494. By s 7(1), the MSI Act is subject to the Radiation Safety Act 1975, with the latter prevailing in the case of any inconsistency.

495. The Radiation Safety Act 1975, deals with the regulation of the use, operation, manufacture, storage, transport, sale and other dealings with radioactive substances, irradiating apparatus or electronic products. The legislation prescribes a licensing and registration regime for the same.

496. Part 16 of the Regulations sets out comprehensive provisions for the use and control of radioactive substances on mines. If a mine satisfies the requirements of Division 2 as to the mining of thorium or uranium ores, or the exposure of employees or members of the public to levels of radiation above prescribed levels, then obligations are imposed upon that mining operation. In short, this involves the preparation of a radiation monitoring programme; a radiation management plan; the appointment of a radiation officer; and other obligations including the use, storage and disposal of such material.

497. Having briefly reviewed this legislation, there is no apparent inconsistency between it and the MSI Act. In any event, even if there was, the plain effect of s 7(1) of the MSI Act is to give primacy to the radiation legislation.

498. No submissions or comments were directed to this legislation and no recommendations for change are made.
CHAPTER 8 – ADMINISTRATION OF THE MSI ACT

The Department

499. The terms of s 110(1)(b) of the MSI Act require consideration of the effectiveness of the Department, the Board of Examiners, and the Mines Survey Board, the latter of which I consider in Chapter 10. Given the specific Terms of Reference in relation to Part 3 of the MSI Act, the focus will be on those matters. Additionally, few who made submissions to the Review, commented on matters other than those specifically arising in relation to Part 3. However, some observations of a general nature in relation to the Department follow.

500. For the purposes of s 4 of the MSI Act, “Department” is defined to mean “the department of the Public Service of the State principally assisting the Minister in the Administration of this Act;”. As a consequence of recommendations made by the Ritter Inquiry, the responsibility for the administration of the MSI Act was transferred from the DOIR to the DOCEP, through the creation of a new division responsible for resources safety, the RSD. The RSD also has responsibility for safety and health in relation to dangerous goods, onshore petroleum and major hazard facilities.

501. The transfer of administrative responsibility for mine safety from the DOIR to the DOCEP was seemingly as a consequence of a perceived conflict between the role of the DOIR as both a promoter and developer of the mining and resources sector in this State, and its role concurrently, as that of the regulator in relation to health and safety matters. This shift in responsibility was largely said to avoid any actual or perceived “capture”, by the industry of the regulator and was said to be consistent with notions of best practice regulation. I note that neither the Queensland nor the New South Wales Mines Inspectorates are administered in this way.

502. For present purposes, I do not propose to re-visit these issues to any extent, particularly given that the operations of the Department generally, and the performance of the Mines Inspectorate in particular, have been subject to extensive consideration in prior Reviews and Inquiries. No submissions or other observations were made in relation to the issue. I do not propose to engage in what amounts to a “performance review” of the Inspectorate, in any substantial sense.

503. However, in the Laing Review of the OSH Act in 2002, in relation to the location of the Mines Inspectorate, the following was said:

“In many respects, it is of no great consequence whether the inspectorate were administered by Worksafe as a division of the Department and Consumer Employment Protection or Mining Operations Division of DMPR. The key objective is to maintain the specialist functions but with co-ordination of the legislative policy and functional direction. Because
of the concerns within the mining industry and the need to establish confidence, it is not proposed that there should be a change in administration of the Inspectorate.  

504. Following the election of the Liberal-National government in September 2008, a re-organisation of government agencies took place. The RSD was transferred from DOCEP to the newly created Department of Mines and Petroleum (“the DMP”) effective 1 January 2009. Additionally, DOCEP was abolished and the responsibilities of that Department transferred to a new Department of Commerce also from 1 January 2009. Furthermore, a new Department of State Development was also created. The following commentary however deals with aspects of the RSD operations when a division of DOCEP at the material times for the purposes of the Review. I have not, apart from noting its structure, and the RSD promotional material mentioned on its website, considered the operations of the new DMP.

Structure and Functions of the Department

505. The newly created DMP has six operational divisions they being Corporate Support, RSD, Petroleum and Environment, Mineral Titles, Geological Survey and Strategic Policy. As noted above, the RSD is divided into six branches including Mines Safety, Dangerous Goods Safety, Petroleum Safety, Business Services, Strategic Development and Health Management.  

506. In terms of its overall profile, the RSD has a number of identified key functions as follows:

(a) administering occupational safety and health legislation and providing policy and legislative advice to Government;
(b) promoting community safety through dangerous goods safety regulation and public risk management advice;
(c) providing education and information to employers and employees to assist in preventing work-related injury and disease and improving work safety and health performance;
(d) providing technical, risk management, policy and legislative advice to other government agencies; and
(e) contributing to technical and legislative committees and standard-setting organisations, both State and National.

507. In terms of significant issues and trends identified relevant to the RSD for 2006-07 the following is noted:

(a) the implementation of the Dangerous Goods Safety Act 2004 and accompanying regulations pose a key challenge. Referred to in this regard is extensive community consultation and the development of codes of practice and guidance materials;

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249 Laing 2002 op cit at par 1076
250 DMP Organisation Charts as at January 2009
251 Ibid at 18
(b) counter terrorism measures in relation to explosives and other security risk substances under development by RSD. It is noted that this will require the development of new enforcement and administrative procedures in conjunction with extensive industry and community consultation;

(c) the recommendations of the Hicks Review may result in a very significant change to the regulatory regime applying to the mining industry along with funding implications for RSD;

(d) the unprecedented rapid expansion and diversification of the resources industry in the State, combined with the Australia-wide shortage of skills, is noted as continuing to place increasing pressure on regulatory capacity;

(e) significant staff resources are allocated from RSD to other government agencies by way of the provision of specialist technical and risk advice which is noted to be expected to increase; and

(f) the move by occupational safety and health regulatory agencies towards greater national legislative consistency and the COAG national reform agenda to reduce the regulatory burden on business\textsuperscript{252}

508. Specifically, the services provided by the RSD in relation to its role in enforcing and administering the MSI Act and Regulations is noted to include general regulatory advice; technical advice; policy advice; audit services; educational services; and the provision of information systems.

Resource Material and Promotional Activity

509. The RSD is the agency responsible for promoting safety and health of persons engaged in mining operations in accordance with s 3(1)(a) of the MSI Act. This key object is supported by the publication of a wide range of material by RSD, all of which is available on the new DMP website. The range of material is extensive and includes Codes of Practice; Guidance Notes and Guidelines; industry safety performance statistics and significant incident reports; legislation, regulations and relevant policy documents; the “MineSafe” magazine; various online databases; toolbox presentation materials and a range of posters. These materials are available either electronically or alternatively, in hard copy form on request.

510. These publications contain a range of useful general and technical material including a number of audit templates, to assist industry in conducting their own self audits, in relation to a number of generic and mining industry specific functions and operations. This self audit material is in my view, valuable in particular for small to medium sized mining operations, to undertake self audits to ascertain whether they are at least meeting, and preferably exceeding, legislative requirements.

\textsuperscript{252} Ibid at 30-31
511. One excellent resource available in electronic form is the “Minerals Industry Safety Handbook”. This handbook is the result of a collaborative effort by mines regulators across Australia, with the initial preparation undertaken by the Department of Mineral Resources of New South Wales. The handbook is an initiative under the NMSF. In electronic form, it is available chapter by chapter, and enables a mining operator to obtain valuable resource information in relation to risk assessment and risk control, and the implementation and review of health and safety workplace practices and procedures. The Handbook covers topics including:

- Administration-Management Responsibilities, Documentation and Safety Systems;
- Procedures and Processes;
- People;
- Working Environment;
- Equipment and Machinery;
- Shafts, Winding and Hoisting Systems; and
- Reference Information

It is a very comprehensive publication and provides a wealth of useful information.

512. The RSD links on the new DMP website are clear and access to them is straightforward. The layout is logical, and readers have ready access to the full range of publications and other resource information in a clear and easily navigable format. The “MineSafe” magazine, which is published quarterly, is a good source of general commentary as to events and activities in relation to mines safety throughout the State, and contains a comprehensive summary of news, events, and other matters of interest to those engaged in the industry.

513. The full range of publications available electronically, and in hard copy format are contained at annexure 7.

514. With internet access now widespread in the community, these electronically accessible materials are a good resource for the industry and would appear, in terms of the manner of presentation and layout on the DMP website, to be a significant improvement on the electronically available material considered at the time of the Laing Review.

515. In addition to the published material, to promote health and safety of persons engaged in mining operations, the RSD engages in other initiatives. One, which attracted significant positive comment in my initial consultations, is the “Mines Safety Road Show”, which is a public conference/seminar based program which has been running since 2005. The program is designed for safety and health representatives, safety and health mine site professionals, supervisors, managers, and employers generally, from mining and exploration companies and those providing services to them. The 2008 program was conducted throughout regional centres including Bunbury, Kalgoorlie, Karratha and also Perth. The program, conducted over four days during October featured a range of expert speakers across a broad spectrum of
subjects including safety culture, occupational health, hazard identification, incident reporting, communication and consultation.253

516. The Department’s information and promotional activities engaged in to date, and the developments since the Laing Review are to be strongly commended. Initiatives such as the *Road show* are a significant contribution to taking the safety and health message directly out into the regions in which the industry operates and is particularly positive. Whilst the availability and frequency of such initiatives will inevitably depend upon resourcing constraints, smaller, specifically tailored, information sessions or seminars made available to specific sectors of the industry would also be invaluable. This was raised with me many times. I am aware that individual Inspectors are invited to speak to groups within the industry and participate in community based events. The recent 2008 Underground Mine Emergency Response Competition held in November 2008 at Coolgardie is a good example of such an initiative.

**Safety and Health Representatives Resources**

517. In recognition of the role of safety and health representatives in the workplace, the RSD has a specific location on its website, containing a broad range of information in connection with the election of representatives and establishing safety and health committees, broad consultative processes generally, and other information and resources. In particular, a Safety and Health Representative’s Handbook is now available electronically, as a day-to-day reference guide for those newly elected to the role. This is a useful publication which provides an overview of the role and responsibility of a safety and health representatives, and specific guidance on matters that arise under the legislation. In my view this material now available, goes a considerable distance to overcoming the shortcomings identified in the Laing Review, as to the then paucity of information available for those occupying a safety and health representative role.254

518. One issue raised with me in my initial consultations, was the concept of a dedicated safety and health representatives network in the mining industry. It was emphasised with me on several occasions, that in remote locations in particular, safety and health representatives would benefit from an ability to share information, discuss issues and to have another avenue of communication. This was an issue identified in 2005 in a survey of minerals industry safety and health representatives, commissioned by the MOSHAB.255 Of those surveyed in this project, 80% supported the establishment of a network of some form, to enhance communications between safety and health representatives. Various options were canvassed, including email or other means. Whilst acknowledging that some do not have computer access in the workplace, one concept receiving strong support, and one I consider would be of substantial value, is the establishment of a web based network, which would

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253 Mines Safety Road Show 08 promotional material RSD DOCEP
254 Laing Review op cit at par 233
255 Survey of Minerals Industry Safety and Health Representatives TNS Social Research March 2005 at 24-25
be available on the basis of a “members only” type of approach. This could involve the further development of the existing dedicated RSD web page for representatives, and the incorporation of useful links such as MiRMgate, which from what was said to me, is used quite frequently, and others.

519. Given the importance of safety and health representatives, all means of support that can be provided to them should be strongly encouraged. The concept of a dedicated web based network should be investigated. This theme is taken up further in Chapter 11.

Provision of Information and Advice

520. The provision of information and the advisory role of the Mines Inspectorate is highly valued and seen as an important function by the industry. Throughout the course of my many discussions with a broad range of personnel in the industry, this aspect of the Mines Inspectorate’s activity was commented upon favourably. As one senior manager in the Northwest put it to me:

“We get visits from ....I think they provide a very important function and I am not one of those people that get fearful when we are getting visits from the Mines Inspector which is something I see a bit...I am not like that at all because my belief is that the Mines Inspector has a role to play in the big scheme which is their coming here to help me do my job and help me make sure that everything is in place to ensure that my people aren’t going to get hurt.”

521. Other observations in the Goldfields and the Southwest reflected a similar sentiment. A senior manager from a major Southwest mine put it in these terms:

“But we certainly appreciate the advice we get from the Inspectors and the discussions we have regularly when they come out, because it is a good discussion because he’s talking about it from a different angle. They see things right across the industry so we get to understand that perhaps they are doing it differently in this kind of place or so it provides that discussion we have and that facility we have with the Inspectors is really important.”

522. These observations were not restricted to management. A number of safety and health representatives I spoke with also noted as a positive, the ability to obtain advice from and discuss issues with an Inspector. As one put it to me:

“...so it’s certainly a very good resource. The guys that I have spoken to find you have a very useful sounding board for questions or problems that you might have. For example, the safety rep who has a problem on site can ring an Inspector and talk about the issue and raise an issue...would be spot on for a safety rep to do that when they have got something they cannot resolve...The just ring up the Inspector and they will talk through the issue...So its certainly a good resource to think about using”.

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523. However, as would be expected, not all observations were positive. The most prevalent complaint expressed to me was that Inspectorate personnel are not seen enough on site. In particular, a number of safety and health representatives expressed some frustration at the lack of contact with them when a site visit takes place. Some said they are not even aware of the presence of an Inspector until they have left site. I take up these matters in more detail in Chapter 13.

524. It is helpful in this respect, when discussing the role of the regulator in relation to safety and health promotion and regulation, to return to first principles in terms of what the Robens Committee intended it to be.

Robens Approach

525. In particular, in dealing with the basic tasks of a regulatory body and what its responsibility should be, the Robens Committee noted that the former approach of merely ensuring compliance with minimum legal requirements must now be regarded as too narrow and restrictive. It was suggested that Inspectors should seek to raise standards above the minimum levels required by law and should advise on better organisation. The Committee observed that the regulator should be concerned with the broad aspects of safety and health organisation at work places, as much as with detailed statutory regulation. It was said that:

"as a matter of explicit policy, the provision of skilled and impartial advice and assistance should be the leading edge of the activities of the unified inspectorate. We do not mean by this that the inspectorate should attend to provide services which employers can and should provide and pay for themselves. Nevertheless we think that there is considerable scope, even within limited resources for the development of high quality advisory and consultancy services that would utilise and apply the great store of experience and expertise that has been built up within the inspectorates." 256

526. The Robens Committee adopted the view that there was considerable scope for new types of inspection methodologies, involving audits and team visits. 257 These insightful observations, made over 35 years ago, are as apposite now as when they were made.

Industry Survey

527. Not only do these views reflect the general consensus of opinion that was expressed to me during the initial consultations for the Review, and in written submissions, but also, they bear a striking resemblance to an extensive survey

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256 Robens Committee at pars 206-216
257 Ibid
undertaken of the mining industry, by the CME, in 1996, in relation to the value and future role of the Mines Inspectorate. The survey audience was operations managers to gain a “first hand appreciation of their needs and expectations in relation to the role of the Mines Inspectorate” In summary, the overall responses to the survey, were summarised in the report as follows:

“-Safety performance and standards were held extremely important to the industry.
-Safety performance could be improved considerably.
-Management, company culture, consultative mechanisms and an informed and professional mines inspectorate were the major influences on health and safety performance.
- The role of the Inspectorate should be to promote the development of standards, codes and guidelines, give advice on health, safety and technical matters, attend operations frequently and be readily available for all those purposes.
- The professional specialisations available in the Inspectorate should include:
  • Safety Management and Systems
  • Mining, Civil and Electrical Engineering
  • Occupational Health/Hygiene
  • Risk Analysis and Management

and should provide a broad base of expertise available to provide advice and support rather than an “inspection” mentality.
- More emphasis should be placed on the personal attributes of Mines Inspectors if they are to fill the role identified by industry.
- Communication skills, approachability and commitment to the philosophy underpinning mining legislation were considered essential.
- Adequate remuneration was strongly identified by industry as the principal risk of loss of inspectorial expertise. Across the board support was given for salary packages commensurate with industry and this problem needed to be addressed urgently.
- Retention of a dedicated inspectorate for the industry was considered imperative.
- A more flexible approach to the use of specialist personnel on a needs basis was recognised.
- Strong support for a continuation of technical service and information functions was expressed.
- An increased liaison with manufacturers in the safety aspect associated with mechanisation and the design standards on plant and equipment was identified as a priority.”

528. As noted above, the correlation between these responses, to a confidential survey some ten years ago and responses to questions I put to site personnel when travelling throughout the State, was strong. Little seems to have changed over this period of time. The fact that the issue of resourcing of the Inspectorate was identified as such an important issue in 1996 and which from

258 “Future Role of the Mines Inspectorate Survey” The Chamber of Minerals and Energy of Western Australia Inc September 1996
259 Ibid at 1
my analysis which will appear later in this Chapter, appears to still not have been addressed, is a matter of major concern.

Data Collection and Analysis

Current Databases

529. There are a number of data recording systems maintained by the RSD. The content of these diverse databases includes detailed information on mining safety and health, including industry performance of Western Australia’s mining industry, mining statistics and fatalities. The current data recording systems include:

- Accident and Incident Reporting (AXTAT)
- Incidents Reports Database
- Contaminant Monitoring (CONTAM)
- MineHealth database
- A link to the Minerals Industry Risk Management Gateway (MIRMgate-University of Queensland)
- Western Australian mining fatalities database
- Safety and Health Representatives Database (for internal use only)

AXTAT

530. The RSD also collates data on accidents and incidents specific to reporting requirements in the MSI Act in its AXTAT and incident reports databases. The statutory obligations in relation to reporting are primarily found in Divisions 1 and 2 of Part 7. These deal with obligations to record and report in relation to health surveillance and accidents and occurrences respectively.

531. These reporting obligations are comprehensive and require mine operators to report not only accidents that cause injury to persons (not only employees), but also occurrences of specified kinds, such as fire, inrush, rock falls and others. Furthermore, is a requirement to report those incidents that had the potential to, but did not, cause serious injury or harm to health.260

532. From these reports, the AXTAT database is used to record and retrieve information, in the form of published statistics, annually, on lost time and disabling injuries resulting from accidents in the workplace. The collated data is used to indentify work practices causing frequent injury, the frequency of injury to particular parts of the body and the frequency of particular types of injury sustained in accidents. This statistical material is also analysed by industry sector and subsector.

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260 See generally ss 76-79 MSI Act
Data is obtained from mining and exploration operators using two AXTAT forms and an occurrence report form that must also be submitted as soon as possible after the incident. The AXTAT forms required are:

- the mining injury report form which must be submitted as soon as is practicable after the calendar month in which the accident occurs; and
- the monthly status form which must be submitted monthly for a mine or exploration company, regardless of whether an accident has occurred at the mine or exploration site during the particular month. (see Reg 3.42 Regulations)

The Incident Reports database records and retrieves information about incidents in the workplace and is used to identify trends in reported incidents and to assess risk.

CONTAM

CONTAM is a contaminant monitoring computerised system used by the RSD to record sample results of atmospheric contaminants from the mining industry, as required by Part 7, Division 3 (Hazardous substances) and Part 9 (Ventilation and control of dust and atmospheric contaminants) of the Regulations. A manager is required to inform the District Inspector for the region, of any occurrence at the mine which had the potential to cause serious injury or harm to health, even if no injury or harm has occurred.

CONTAM uses a database to retrieve and record representative, personal exposure monitoring results randomly collected from Western Australia mining and exploration activities. The CONTAM system has been in operation since 1977. Three forms are used to record information for the CONTAM system:

- a registered sampler form;
- a workforce survey form; and
- a sample record sheet.

Only CONTAM registered samplers may submit results to the CONTAM system. The minimum qualification to become a CONTAM registered sampler is the Certificate III (Technician) or IV (Officer) in Surface Ventilation, or completion of a similar course that has been approved by the State Mining Engineer.

Registration expires after five years and samplers whose registration expires must complete a one-day CONTAM refresher course and provide proof of
competency. The course is designed to update skills and knowledge of common problems in contaminant monitoring and introduces new policies and technologies that affect the operation of the CONTAM system.264

MineHealth

539. Resources Safety administers the health surveillance system for mining employees in Western Australia. Mining industry employers are required by Part 7 of the MSI Act and Part 3 Division 4 of the Regulations, to establish and maintain a health surveillance system for employees. The mining industry is a leader in the development and implementation of health monitoring.

540. There are two categories of health assessment, an initial assessment and a periodic assessment. The initial health assessment, for both new and existing employees, consists of:

- a work history;
- a respiratory questionnaire;
- a lung function test;
- an audiometric (hearing) test; and
- a chest x-ray265

541. The periodic assessment, which must be conducted at no longer than five year intervals, is broadly similar.266 Results from these health assessments are forwarded to the RSD and the information is stored in the online MineHealth database. The health surveillance records, containing personal health particulars in relation to employees, are considered confidential information, accessible by protected password for the individuals concerned. However, the Health Surveillance Numbers and expiry dates are available from the database.

MIRMgate

542. The Minerals Industry Risk Management Gateway (MIRMgate) provides access to information related to hazard and risk management in the mining, minerals processing and quarry operations industry.267 MIRMgate was introduced at a National Minerals Industry Guidelines Workshop in October 2001, which was attended by Australian state mining regulators and representatives from the Minerals Industry Safety and Health Centre (“MISHC”) at The University of Queensland. By May 2002 all State regulators, except for South Australia,268 had endorsed the project development and MIRMgate was officially launched in March 2004.269

265 Reg 3.25 Regulations and Guide to Health Surveillance System for mining employees, RSD – DOCEP, November 2007, p.4
266 Regulations 3.26
268 Which endorsed the project development in June 2003.
269 MIRMgate, http://www.mirmgate.com/about_mirmgate.asp (As at 27/03/08)
543. The RSD has a direct link to this website under its ‘Mining – Risk Management’ section. The site, which is managed by MIRMgate personnel at the MISHC, is designed to specifically assist with risk assessment processes and provide direct access to online resources sourced from Australian and global mineral industry bodies. MIRMgate was created as a process of making good practice information, innovations and lessons learned information readily available to the minerals industry. MIRMgate is sponsored by both the Minerals Council of Australia and the International Council on Mining and Metals.

544. A recent MIRMgate feature is the Earth Moving Equipment Safety Round Table (“EMERST”) Portal, formally established in 2006 by global mining companies. The purpose of EMERST is to develop and adopt leading practice designs for earth moving equipment to minimise the risk to health and safety through a process of original equipment manufacturers and user engagement. The EMERST is presently developing design philosophies to provide information to assist with equipment design, to achieve an acceptable level of risk. Given that many soft tissue injuries in the mining industry arise from slips, trips and falls from on or around various forms of mobile equipment, this initiative is very positive and is to be applauded.

**Western Australian Mining Fatalities Database**

545. The fatalities database comprises information on workplace fatalities recorded in Western Australian mines and the results of related inquests. The recorded data can be organised by category, commodity, date, fiscal year, type of operation, rider or status (for example, intermediate report or final report).

**MSIG**

546. The various data bases outlined above were the subject of some consideration and comment by the MSIG. This followed a recommendation from the Ritter Inquiry that the then DOIR data bases be reviewed and upgraded where necessary. Data collection, analysis and publication, is now the responsibility of the RSD.

547. As a consequence of the MSIG review, a number of recommendations were made concerning the various data bases. These recommendations included the following:

"MSIG R33 The Accident Information/Reporting Mining Incident Reports and Western Australian Mining Fatalities databases be upgraded as a matter of urgency to ensure relevant accurate data collection and allow for comprehensive integrated analysis of the data."

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270 MIRMgate, http://www.mirmgate.com/about_mirmgate.asp (As at 27/03/08)
271 MIRMgate, EMERST: http://www.mirmgate.com/emesrt.asp (As at 27/03/08)
MSIG R34  Data collection systems be developed to allow for on-line data transfer and data access.

MSIG R35  Data definitions and data sets be revised to ensure clarity and consistency with national and international trends.

MSIG R36  Resourcing levels for this area to be increased significantly to be adequate to implement agreed strategies and allow for analysis and publication of data.

MSIG R37  Data collection, analysis and publication to be the responsibility of the Government department responsible for administering the Mines Safety and Inspection Act 1994.

MSIG R38  The revised data recording system should ensure that the needs of all end users are met.”

548. In response to these and prior Review recommendations, the RSD has received significant additional funding to upgrade its data management systems. Given the need for the upgrade of data systems within other divisions of the then responsible DOCEP, a decision was made in 2006 to undertake a review and upgrade across various divisions of DOCEP including the RSD, WorkSafe and Energy Safety, in relation to safety and health and compliance monitoring systems, to form a common corporate platform to address many of the shortcomings of the existing systems. It was recognised that many of the existing data systems across the various DOCEP divisions use obsolete technologies that require upgrading and consolidation.

549. As a result, a scope of works for the “Enterprise Safety and Health Project” was developed in February 2007. This scoping study identified the various disparate data management systems and needs of the then relevant DOCEP divisions.

550. The project had made substantial progress in relation to the licensing stage and work was being undertaken in relation to Compliance Management. Given the scope of the project, the data management system of the RSD was intended to be substantially enhanced, including various on line reporting features and secure portal access by authorised users.

Queensland Review

551. A development of significance for present purposes is the review of the Queensland Mines and Quarries Annual Safety Performance and Health Report, which was completed in October 2007. The aim of the project was to review the content and communication effectiveness of the Annual Report, taking into account specific considerations, including the validity and accuracy
of accident and incident data reported and the possible inclusion of other key performance indicators in relation to international best practice in the area of mine safety.

552. In this in depth study, industry was consulted over a three month period in order to include the views of various stakeholders including unions, management, regulatory authorities and others. Consultation took place in the form of focus group discussions, individual discussions and online submissions.

553. Significantly also, the project authors noted that only Western Australia offered a reporting process that is of comparable depth to Queensland. In this context, particularly noted is the development of a report of disabling injuries in Western Australia, from 2001-02, in response to suggestions that lost time injuries (“LTI’s”) were possibly amenable to manipulation.

554. The review resulted in a total of some 36 recommendations. The general conclusion by the reviewers being that there is no “best practice” model for reporting safety and health performance, and that the Department of Mines and Energy, Queensland (DME) Annual Report represents the most comprehensive safety performance statistical report available for an industry. However, the recommendations indicated that there are improvements that can be made in relation to reporting methods and safety performance.

555. Issues raised included that the current data reported in the Annual Report is inadequate because of various factors, such as a lack of detail, a limited analysis of injuries, some industry personnel have an inadequate understanding of terms when completing reports and limited data checking and validation carried out by the DME. The review identified the possible inclusion of other key performance indicators such as occupational hygiene exposure of workers to various common hazards, other lead indicators of safety performance and information regarding work related travel incidents.

556. Of note for the purposes of this Review, one comment highlighted that the mining industry wants the data that is provided to be interpreted rather than merely reported. This same theme was raised with me in a number of discussions in the initial consultation stage of the Review and in some submissions subsequently received.

557. It is suggested, for example by the CME, that data that is reported as required by the MSI Act to the RSD, needs to be collated, analysed and fed back to industry so that it can be utilised effectively to assist with industry planning and improve safety performance. This was also put in the context of the

274 Ibid at 17
275 Ibid at 18
276 Ibid
277 Ibid, p. 6
278 Ibid
publication of safety bulletins and incident reports, in that their frequency and content could be improved. A similar comment was made to me whilst visiting mines in the Southwest of the State, to the effect that it would be useful if information could be electronically accessed by individual mines to enable them to undertake their own analysis.

558. The review of the Queensland Report also recommended that further training and education be provided to mining personnel (including contractors) to ensure uniform application of definitions relating to the reporting of accidents and incidents, with the DME conducting frequent audits to ensure that the training is effective.279

559. Other criticisms of the Queensland Annual Report included omissions and data inaccuracies (for example, the number of LTIs recorded), too much focus on the number of incidents and not the actual severity of the incidents and that the DME needs adequate resources for the enhanced collection,280 analysis and reporting of information in the Annual Report.

560. It was also suggested that the Annual Report should incorporate the outcomes of generic and operational lead indicators for safety effectiveness and occupational health281 and that other forms of data such as the occupational exposure risk of mine workers which could be reported to the DME, collated and reported back to industry.

561. The question of the development and reporting of lead or positive performance indicators ("PPI’s") is, in my view, an important one. Traditional approaches to the measurement of safety performance, based on lag indicators such as LTI’s and other historical measures, have been noted in the past as providing limited predictive utility. Various attempts have been undertaken to develop guidelines in the use of PPI’s in the mining industry and industry generally.282 A number suggested include:

- Percentage of planned workplace inspections against actual;
- Percentage of employees receiving safety training;
- The extent of health and environmental monitoring;
- Employee assessment of management commitment; and
- Percentage of incidents reported that do not result in injury compared to those that do.283

562. This is an area that was suggested by the reviewers of the Annual Report that could be the subject of dialogue between the DME and the industry, to develop a list of lead indicators and that the Annual Report include reporting

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279 Recommendations 31 and 32, Annual Safety Performance Report, p. 9
280 Similarly in WA, resourcing of the RSD in the then DOCEP is a significant issue that needs to be addressed.
281 Recommendation 17, Annual Safety Performance Report, p.42
283 Parker & Cliff op cit at 41
on the outcomes of generic and operational lead indicators for safety effectiveness and occupational health.\textsuperscript{284}

563. In my view, this is a matter that needs to be examined in Western Australia and progressed. Given the quantity and quality of data reported to and by the RSD in this State under the MSI Act, there is a significant opportunity to substantially enhance the utility of this material for the industry. This process should involve consultation between the RSD and the industry to establish what capacity exists to adopt this approach in this State. The MCA guidelines would appear to provide an initial basis to progress this issue.

564. No other issues were raised with me or referred to in the submissions in relation to data reporting and publication, and while the material published by the RSD is, as noted above, some of the most comprehensive available, there will always be room for improvement. There have been no issues raised in the present Review, in relation to allegations of underreporting for example, as were raised in the Laing Review.\textsuperscript{285}

565. The Queensland study, given its recency and comprehensive nature, in relation to the Queensland Annual Report, which has similarities with the “Safety Performance” series published by the RSD, may provide a useful benchmark for analysis and comparison, and to apply any learning applicable in the local context. In particular, whilst the RSD publications are very commendable in terms of their detail and initiatives such as the disabling injuries series are very positive, there are a number of issues that appear to be worth pursuing further.

566. The most substantial is the use to be made of information reported to the RSD, in the form of analysis of trends; the reporting of case studies and best practice examples; and the capacity of mines to access data on an individual basis and industry aggregate basis. Some of this is referred to in the review of the data systems being presently undertaken, as noted above. A focus on the development and reporting of PPI’s will also enhance the quality and capacity of the various data bases to contribute to positive improvements in the industry.

\begin{boxedtext}
\textbf{Recommendation 19}

That there be an analysis of the Queensland Annual Report Review to consider the issues and recommendations that may be relevant to the reporting of information to the RSD and the use of that information in RSD publications and data systems for the benefit of the mining industry.
\end{boxedtext}

\begin{flushleft}\textsuperscript{284} Ibid at 7 \\
\textsuperscript{285} Laing Review at 6.2 \end{flushleft}
Recommendation 20

That in particular the RSD consider:

(a) the means by which trends, case studies and incidents may be reported to improve safety and health performance in the mining industry;

(b) the means by which individual mines may electronically access reported information as to their individual and aggregated industry data for their use in improving their safety and health performance; and

(c) the means by which information contained in safety reports and bulletins may be improved in terms of their frequency of publication and content.

NMSF Data Set Working Group

567. Strategy Five of the NMSF is to develop a consistent and reliable national mining safety and health data set, which will allow analysis across Australian jurisdictions. Sound statistical data is vital in identifying trends and monitoring industry performance and, providing a factual basis for consultation between all parties.

568. Whilst the proposed data that will be collected is a nationally consistent data set, it is not intended that jurisdictions will stop collecting their own injury and disease report statistics.286

569. The NMSF Data Working Group was convened to develop a data set for public consideration. The group comprises industry, union and government representatives and has adopted the Australian Standard ‘Workplace injury and disease recording standard’, customising it for the mining industry.

570. The national data set will consist of information collected from an incident report form completed by companies and quarterly statistics. The incident/disease report form (based on the customised Australian Standard ‘Workplace injury and disease recording standard’) will be completed after an incident resulting from a fatality, lost time injury, restricted duty injury, medical treatment injury or near miss has occurred. Quarterly statistics relating to mine sites will be collected to complete calculations such as the type of mine (open cut or underground), incident rates, lost time injury rates and fatality rates.287

571. The NMSF process in relation to a National Data Set is ongoing and may consider incorporating other statistical indicators such as lead, health and regulatory activity indicators. How and where data will be stored and managed is being explored. It is intended that mining companies will be able to access web-based forms or paper based forms.

286 For example, the nationally consistent data set may become a subset of a jurisdictions’ total data collection or it may be the entire set

287 National Mine Safety Framework – Nationally Consistent Data Set Strategy
NMSF Compliance

572. Principle 31 of the Legislative Framework refers to the specification of timeframes for the reporting of accidents, occurrences and incidents to the regulator. These matters are dealt with variously in ss 76, 78 and 79 of the MSI Act and Division 5 of the Regulations.

573. Presently, some obligations are immediate, such as reporting of occurrences under s 78, and others are as soon as practicable, as for serious injuries under s 76 and for potentially serious occurrences under s 79. In order to provide for greater certainty, specified time frames should be inserted into these notification provisions.

574. In relation to the collection of data generally, Principle 32 of the Legislative Framework specifies that legislation should provide for the collection, analysis and publication of mine accident, incident, occupational disease and dangerous occurrence statistics. This is to be in accordance with a uniform national standard.

575. The reporting obligations under the MSI Act and Regulations in relation to these matters are comprehensive. Whilst the analysis of this data may be further refined and developed as recommended above, there is adequate compliance with this Principle in my view.

576. In terms of national standards, that is a matter to be further progressed within the NMSF process.

Recommendation 21

That the MSI Act and Regulations be amended where relevant to specify time limits within which reporting obligations are to be met.

The Mines Inspectorate

577. It is a specific Term of Reference of this Review that consideration is given to the terms of Part 3 of the MSI Act concerning its administration. Whilst Part 3 contains four Divisions, two of which, Divisions 3 and 4, concern Improvement, Prohibition and Provisional Improvement Notices, the focus in relation to Part 3, is in relation to Divisions 1 and 2, dealing with the Mines Inspectorate.

578. That is not to say that I will not comment on or consider the terms of Divisions 3 and 4 in relation to provisions dealing with the various
administrative sanctions that are available under Part 3. These will be dealt with further below in relation to enforcement generally in Chapter 13.

Activities

General overview of inspectorate work

579. The Mines Inspectorate engages in a broad range of specific activity which in summary includes:

- Fatal and serious accident/incident investigations;
- Prosecutions and preparation of prosecution briefs;
- Consideration and approval of Project Management Plans;
- Technical reviews and audits;
- Site safety inspections;
- Issuance of notices (improvement and prohibition);
- Complaint investigations;
- Enquiries/short advice;
- Site visits/safety meetings and presentations; and
- Desk assessments (non technical reviews);

Some aspects of this activity are dealt with in this part of this Report. Others are commented upon in later Chapters dealing with particular statutory provisions.

Inquiries

580. Data from the WA Mines Safety Branch Outputs (between June 2004 and October 2007)\(^\text{288}\) indicates that addressing enquiries and providing short advice forms a significant part of the Inspectorate activity. On average there are 7000-8000 enquiries and short advice matters dealt with annually. For the period July to October 2007, an output total of 2799 enquiries is recorded. Inspectors have commented to that some enquiry and short advice matters can be quite involved and complex, and tie up considerable resources.

Site Inspections

581. Site Inspections are an important element of regulatory activity. Both planned and unplanned inspections form part of the regulator’s armoury of methods by which compliance can be encouraged and enforced.

582. A perennial issue facing all regulators, however, not just Mines Inspectorates, is resourcing and how to best use scarce resources most effectively. This is an issue I touch on later in this Chapter. Also relevant, is consideration of the movement to a more modern paradigm of the role of the regulator, from one focussed on “inspections” for purposes of prescriptive compliance, to one

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\(^{288}\) Mines Safety Branch Outputs, Resources Safety Division, DOCEP
focused more on an auditing role, subject to the form of the regulatory regime and regulator resourcing.

583. Subject to these caveats, of more immediate concern however, is the steady decline in site inspection activity, commensurate with the decline in the resourcing of the Mines Inspectorate.

The following table shows this decline in trend terms over the period 1998 to 2008.\textsuperscript{289}

**Table 3: Number of Site Inspections 1998 – 99 to June 2008**

<table>
<thead>
<tr>
<th>Years</th>
<th>Site Inspections</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998-1999</td>
<td>2,162</td>
</tr>
<tr>
<td>1999-2000</td>
<td>2,026</td>
</tr>
<tr>
<td>2000-2001</td>
<td>1,901</td>
</tr>
<tr>
<td>2001-2002</td>
<td>2,246</td>
</tr>
<tr>
<td>2002-2003</td>
<td>1,760</td>
</tr>
<tr>
<td>2003-2004</td>
<td>1,779</td>
</tr>
<tr>
<td>2004-2005</td>
<td>2,170</td>
</tr>
<tr>
<td>2005-2006</td>
<td>1,552</td>
</tr>
<tr>
<td>2006-2007</td>
<td>1,348</td>
</tr>
<tr>
<td>2007-2008</td>
<td>1,596</td>
</tr>
</tbody>
</table>

584. From this Table, the decline in the number of inspections over the period 1999 to 2007 was in the order of about 38%. Some increase in activity took place over 2007-08 but it is significantly down on activity over previous years.

585. The substantial downward trend in site inspection activity, was, at least anecdotally, reflected in a number of comments made to me in my initial consultations travelling throughout the State which I have already touched on. Most said they saw Inspectors too infrequently.

\textsuperscript{289} Ibid
Audits, Assessments and Reviews

586. The Mines Inspectorate undertakes a number of auditing, assessment and review functions as a part of its operations. In Table 4 below there is set out the activity level in relation to these various functions. The audit system comprises a Management Systems Audit and a further 23 High Impact Function Audits, which are stored as a part of the MODAMS data base. These audits are available in the form of audit guidelines and templates on the RSD website under the “guideline” heading. Given their accessibility, as noted these audit templates and guidelines provide a readily available and sound resource base particularly for small and medium sized mines, to conduct their own self audits of various aspects of their mining operations.

587. The Audit Templates and Guidelines, in relation to High Impact Function Audits, cover a range of areas including emergency plans and response; exploration; fixed plant; quarrying systems management; various aspects of underground operations; and others. The Management Systems Audit is a comprehensive audit checklist, which covers corporate and enterprise leadership; safety plans to ensure continuous improvement; occupational health programs; safety support services; risk assessment and hazard analysis; work practices; pre-employment and training etc; employee involvement and accountability; information collection; and key performance indicators.

588. The High Impact Function Audits and the Management Systems Audits, once completed onsite, are then provided to the mining operation audited, with commentary as to compliance or non compliance as the case may be, and areas of improvement or change required.

589. I have reviewed a number of completed audits, both Management Systems and High Impact Function audits. The audit process and documents used, are a helpful resource to mining enterprises, in terms of the identification of compliance with legislative requirements or otherwise. In particular, the Management Systems Audit has a comprehensive scope of coverage which is of significant value.

590. Regrettably however, given the resources required for auditing, in particular Management Systems Audits, that may require up to a week of intensive on-site activity, it would appear that in conjunction with the progressive decline in the resourcing of the Mines Inspectorate, as Table 4 below demonstrates, the number of such audits has been in decline, as have the numbers of High Impact Function Audits.

591. Whilst there have been some criticisms of these audit processes in the past, in my view they do provide a helpful “snapshot” of an organisation’s general level of compliance with good practice and provide a sound foundation on which to test whether the enterprise has implemented, and is able to demonstrate, compliance. In this respect, as with all audit processes, their

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290 Ritter and Gunningham 2004 op cit at appendix 4
utility is ultimately dependant upon the integrity and reliability of the data obtained during the audit process.

592. The audit data is also a useful contributor to the Mines Inspectorate’s database of information to determine inspection priorities, in conjunction with the RMI and other data sources. The audit system also provides overall indicator of compliance amongst mining enterprises in the industry.

593. Whilst such auditing is a useful practice, it should not be overlooked that employers and others with duties under the MSI Act, have an obligation themselves to ensure that their own compliance is monitored and audited. That is there should not be reliance by duty holders on a regulator to audit compliance for them. For those organisations with less sophisticated internal processes however, the audit template material available on the RSD website, should be regarded as and clearly is, a valuable resource.

594. Additionally, from observations made to me by mine operations personnel, the onsite audit process is valued by the industry. A heightened focus on the implementation of systems and procedures as a part of the audit process should be developed and encouraged. That is the audit process should be focussed as much on outcomes and implementation, as the existence of procedures and processes themselves. This is consistent with the available research to the effect that it is not the safety and health management system itself, but a systematic approach to safety and health management, combined with senior management commitment, adequate resourcing and employee involvement that are most important.

595. Technical reviews and audits include reviews of applications for exemptions and approvals under the Regulations. Included in this category of work is the review of classified plant registration, dealt with in Chapter 15. Additionally are reviews of accident and incident investigations and any necessary follow up activity that may be required.

596. Desk assessments involve reviews generally of a non technical nature, including the development and review of internal or external documents in relation to systems, procedures and legislation.
As noted above, as a consequence of recommendations made by the Ritter Inquiry in November 2004, the responsibility for the administration of the MSI Act was transferred from the then DOIR to the RSD within DOCEP. Responsibility now lies with the RSD within the DMP.

The statutory structure of Part 3 in relation to the Mines Inspectorate is as follows. By Division 1 there are established “Inspectors of Mines”. Under s16, persons may be appointed as the State Mining Engineer and the State Coal Mining Engineer respectively, who are appointed under and subject to the Public Sector Management Act 1994 ("the PSM Act"). Both such persons to be eligible for appointment must hold a First Class Mine Managers Certificate of Competency ("FCCC").

By s 17, the responsible Minister may appoint three categories of Inspectors they being District Inspectors, Special Inspectors and Employee’s Inspectors, all of whom are to be appointed under and subject to the PSM Act. A District Inspector appointed under s18 is required to hold a FCCC, as for the State Mining Engineer and the State Coal Mining Engineer. A Special Inspector may be appointed under s18(3):

"for the purpose of making inspections, inquiries, and investigations that require technical or scientific training or knowledge as directed by the State mining engineer."

Importantly, a person may also be appointed as a Special Inspector, who is employed elsewhere in the Public Service or the public sector, on the same terms and conditions as their original appointment. This provision was introduced into the legislation to enable the Mines Inspectorate to engage appropriate expertise as may be required from time to time.

The final category of Inspector is the Employee’s Inspector, appointed under s 19. The appointment of an Employee’s Inspector, is made following an election in accordance with the Regulations, by a majority of employees in

Table 4: Audits, Assessments and Reviews Branch Outputs during June 2004 - 2008

<table>
<thead>
<tr>
<th>Mines Safety Branch Outputs</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2004</td>
</tr>
<tr>
<td>Audits – Management Safety Systems (MSS)</td>
<td>10</td>
</tr>
<tr>
<td>Audits – High Impact Function (HIF)</td>
<td>129</td>
</tr>
<tr>
<td>Desk Assessment</td>
<td>143</td>
</tr>
<tr>
<td>Technical Review Audit</td>
<td>429</td>
</tr>
</tbody>
</table>
mines in regions designated by the State Mining Engineer, for the purposes of
the appointment. 291

602. The prerequisites to appointment to the position of an Employee’s Inspector, is
that the person must hold an Underground Supervisor’s Certificate of
Competency or be a Deputy for underground coal mines, and have at least five
years general practical experience in underground mining. This latter
requirement may be waived by the State Mining Engineer in particular
circumstances. 292 Employee’s Inspectors are appointed for a maximum term
of four years and are eligible for reappointment following re-election. 293

603. There is also a further position under Division 1 of Part 3 of “Assistant
Inspector” appointed under s 20. Such a person may be appointed to that
office if they have not less than 12 years experience as an Employee’s
Inspector. 294 There are no such appointments presently.

604. As at March 2009, the Mines Safety Branch is structured according to districts
comprising Perth, Karratha, Collie and Kalgoorlie. The respective Mines
Inspectorate District officers report to the State Mining Engineer. 295 Within the
Perth Regional Office, there is located the State Mining Engineer, a Senior
Inspector, four District Inspectors, Senior Inspectors for mechanical and
electrical, Special Inspectors in relation to machinery, and electrical and
gеotechnical and structural engineering, and an Employee’s Inspector.

605. Additionally, the State Mining Engineer was until recently, a Director of the
RSD, consistent with the corporate structure of the division. The Kimberley
region of the State is serviced from the Perth regional office as a matter of
administrative convenience, given the region can be accessed by air from
Perth.

606. For the Karratha and Collie regions there is some overlap. There is a dedicated
District Inspector, an Employee’s Inspector, and a Special Inspector
Machinery for Karratha. There is presently one vacancy for an Employee’s
Inspector for Karratha. For the Collie/Karratha combined regions, there is a
Senior Inspector, who also oversees the Collie and Karratha Regions, and two
District Inspectors. There is also a dedicated Special Inspector and an
Employee’s Inspector for the Collie region.

607. In the Kalgoorlie Region, there is a Special Inspector, two District Inspectors,
a Special Inspector (Perth based) and two Employee’s Inspectors. There are
presently two vacancies for District Inspectors.

608. An organisational chart setting out the structure of the Mines Safety Branch
within the RSD as part of the new DMP as at March 2009 is set out below. As
at this time, there were 33 Inspectors, including engineering positions, of an

291 Section 19(1) MSI Act
292 Section 19(2) MSI Act
293 Section 19(3) & (4) MSI Act
294 Section 20 MSI Act
295 Section 16(2) MSI Act
establishment of 40 positions, excluding the State Mining Engineer. Additionally, there are some nine positions presently within the Health Management Branch of the RSD that are designated as Special Inspector positions as scientific officers and occupational safety and health officers. Presently, some six of these positions are filled. Thus in total there are some 39 Inspectors currently appointed within a total establishment of 49, including the Health Management positions. This actual and establishment level is required to service an industry of approximately 70,000 employees.  

296 Source: Information Services Section, Resources Safety Division, DMP provided on 10 February 2009. Note that this employee figure refers only to direct employment in mining operations on a mine site. This includes contractors and labour hirers (where the number of employees is averaged out).
Other Mining Jurisdictions

Queensland

609. Under the MQSH Act (Qld) provisions dealing with the Mines Inspectorate are dealt with in Part 9 of that legislation. The power of appointment of inspectors and inspection officers under Division 1 resides in s 122, in the Chief Executive Officer of the Department in which the legislation is administered, which is presently the Department of Mines and Energy. Within that Department is a Mining and Petroleum Division which in turn, contains the office of the Executive Director, Safety and Health. Both positions of Chief Inspector of Mines and Chief Inspector of Coal Mines have a reporting relationship to the Executive Director, Safety and Health.

610. The Queensland Department has administrative responsibility for the CMSH Act (Qld), the Coal Mining Safety and Health Regulation 2001, the MQSH Act (Qld), and the Mining and Quarrying Safety and Health Regulation 2001. The key provisions of both sets of legislation are, in the main, identical. The CMSH Act (Qld) and Regulations, cover underground and open-cut coal mines and associated surface operations, but exclude railways, ports, environmental and mining tenure issues.

611. The MQSH Act (Qld) and Regulations cover the metalliferous mining sector including underground and open-cut mines, concentrators, smelters located at mines, quarries with blasting and crushing operations, and exploration. Port and rail operations integral to a mine, are covered by the legislation, however other facilities, such as refineries and smelters which are remote from mine site locations are, excluded from coverage.

612. Environmental and mining tenure issues are excluded from coverage. These matters are dealt with by the relevant environmental protection agency and the Mineral Resources Act respectively. In terms of operational responsibility, the Queensland Mines Inspectorate operates as one Inspectorate, covering both coal and metalliferous mining, but is not involved in relation to the administration of environmental and matters concerning mining tenure.

613. The Queensland Inspectorate, similar to the structure in Western Australia in the RSD, works in close cooperation with separate Inspectorates dealing with explosives and petroleum and gas, both of which Inspectorates are also located in the Safety and Health area of the Department’s operations.

614. Under the Queensland legislation both the MQSH Act (Qld) and the CMSH Act (Qld) have identical provisions in relation to the appointment of Inspectors and Inspection Officers. Under Part 9 of both Acts, the Chief Executive of the Department responsible for the administration of the legislation must appoint officers or employees of the public service, as Inspectors or Inspection Officers. There is now no requirement under either Act for an Inspector or Inspection Officer to have any prescribed qualification, rather the Chief
Executive is empowered to appoint a person to either office on the basis that the person has the:

“appropriate competencies and adequate experience to effectively perform the functions of an inspector and inspection officer under the legislation”.  

615. Under both Acts, the functions of Inspectors and Inspection Officers are specified and are generally the same, save that Inspectors have additional functions of advising the Chief Inspector on safety and health at mines and to make recommendations to the Chief Executive in relation to the commencement of prosecutions.  

616. Previously, both the CMSH Act (Qld) and the MQSH Act (Qld) required that persons appointed as Inspectors were required, in the case of coal mining, to possess a relevant professional engineering qualification relevant to coal mining operations from an Australian University or an equivalent qualification, and to also have appropriate competencies and adequate experience, at a senior level in mining operations to perform the functions of an Inspector.  

617. The appointment to a position of Inspection Officer formerly required the person to possess appropriate competencies or adequate experience in order to undertake the role of an Inspection Officer. The main difference for appointment as an Inspector under the MQSH Act (Qld) for metalliferous mining was a requirement that an engineering qualification be relevant to the two operations and that any type of mining experience was necessary. There was no difference for qualifications for Inspection Officers.  

618. As a consequence of a review of the Queensland Mines Inspectorate in 2005, amendments have now been made to the legislation, to an enable the Mines Inspectorate to establish different grades of Inspector positions, such that career paths can be developed to allow officers to progress based upon the acquisition of competencies.  

619. Additionally, a new position of “Authorised Officer” has been created, such officers to include ergonomists and occupational hygienists, who will be given some of the powers of Inspectors, but are not appointed as Inspectors and who are intended to provide increased knowledge of general safety and health matters to the Mines Inspectorate, and who will be able to provide advice to industry. Furthermore, Authorised Officers may also be appointed as “Investigation Officers”, whose functions and powers will relate specifically to the investigation of accidents and allegations of breaches of the legislation. 

297 See ss 126 and 127 CMSH Act (Qld) and ss 123 and 124 MQSH Act (Qld)  
298 See ss 128 and 129 CMSH Act (Qld) and ss 125 and 126 MQSH Act (Qld)  
299 See former s 126 CMSH Act (Qld)  
300 See former s 127 CMSH Act  
301 See former s 123 MQSH Act (Qld)  
302 See Parts 3 and 7 Mining and Other Legislation Amendment Act 2007 and Explanatory Notes
620. These amendments have the stated intention of giving effect to a more flexible organisational structure within the Queensland Mines Inspectorate. It is said this will enable a broader mix of professional backgrounds and skills within that Inspectorate.

621. As at December 2008, the Queensland Mines Inspectorate had some 38 Inspectors and Inspection Officers across the various regions, with a further eight Inspectors in the process of being recruited. This results in an establishment of some 46 Inspectors and Inspection Officers. As at June 2008 there were approximately 38,000 employees in the coal and metalliferous mining industry in that State.

New South Wales

622. Statutory provisions in relation to the Mines Inspectorate in New South Wales are contained respectively in Part 10 of the CMHS Act (NSW) and Part 10 of the MHS Act (NSW), these provisions are in identical terms. Under this legislation oversight of coal and metalliferous mining operations is undertaken by persons described as “government officials”, which includes the positions of:

(a) Chief Inspector;
(b) Inspector;
(c) Mine Safety Officer; and
(d) Investigator.

623. Additionally, under the New South Wales legislation, there is provision for the election of Site Check Inspectors, who are elected for the purpose of enabling inspections to be carried out at a mine on behalf of employees. In terms of qualifications of Inspectors, a person may be appointed as an Inspector if the person has a professional engineering qualification relevant to coal mining, mining or quarrying from an Australian University or any equivalent qualification and appropriate competencies and adequate experience in coal mining operations, mining or quarrying operations as the case may be.

624. Both the CMHS Act (NSW) and the MHS Act (NSW) represent a new regulatory model for New South Wales. The coal legislation covers all underground and open-cut mines and associated surface operations including environmental matters. The metalliferous legislation covers all underground and open-cut mines and associated surface operations.

625. The Mines Inspectorate in New South Wales is located within the Mine Safety Operations Branch of the Department of Mineral Resources. Similar to the structure in Western Australia, the Branch is headed by a Director Mine Safety

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303 Figures provided by Statistician, Safety & Health Division, Queensland Department of Mines and Energy on 22 December 2008
304 Department of Mines and Energy, Queensland, ABS Labour Statistics August 2008
305 See s 146 CMHS Act (NSW) and s 128 MHS Act (NSW) Note the MHS Act 2004 was proclaimed on 21 December 2007, but the Act and its accompanying Regulations only came into force on 1 September 2008
Operations who is also the Chief Inspector of Mines, and the Chief Inspector of Coal Mines. The Branch is arranged on a regional basis with Inspectors allocated to each region.

626. As at July 2008 there were some 56 Inspectors and Mines Safety Officers across the New South Wales regions. As at November 2008 there were approximately 34,000 employees in the coal and metalliferous sectors of the mining industry in that State.

Appointment and Skills

627. The genesis for the present review of Part 3 of the MSI Act arose from recommendations made by the Laing Review. In the section dealing with “Operational Issues” the Laing Review dealt with various submissions concerning the effectiveness of the various institutions referred to in s 110(b) of the MSI Act, including the Mines Inspectorate.

628. The submissions made to the Laing Review, were made in the context of the then location of the Mines Inspectorate within the then Department of Mineral and Petroleum Resources in the Mining Operations Division. Reference was made to the then Department’s submissions to that Review, in particular the challenges posed with an increasing focus on performance based safety systems and the consequent demand upon the Inspectorate’s skill set to adapt to the changing health and safety environment. These issues found expression in Laing Review in the following terms:

“The task confronting the MOD in achieving each of these directions is considerable. The increased focus on performance-based safety systems requires greater emphasis on auditing safety and health management systems. As well as technical skills, therefore, the Mines Inspectorate now needs skills in risk management systems, safe systems of work, safety promotion, behavioural safety, and effective communication. This implies a broader mix of professional backgrounds than has traditionally been the case in mining. In developing new systems and process-based strategies, the MOD culture is changing. While there remains a heavy emphasis on the necessary engineering and structural characteristics of mining safety, there is an increasing awareness of systems and of risk dynamics. A meeting with a number of inspectors demonstrated that they are well aware of how non engineering issues can, in many circumstances, alter the risk of an incident. While recognising the need for greater skill diversification however, there also remains a clear need for the inspectorate to retain a strong presence of experienced mining engineers to deal with the issues specific to mining practice.”

306 Figure provided by Resource Officer, Mines Safety Operations Branch, NSW Department of Primary Industries on 8 July 2008
307 ABS Labour Statistics November 2008
308 Laing Review at pars 714-720
629. These observations were of course, against the background of a legislative regime under the MSI Act then, as now, which did and does not, prescribe a systems based approach to regulation and which still does not prescribe processes for hazard identification, risk assessment and control. I note that this stands in contrast to the OSH Act and Regulations, which does, at least by reg 3.1, require a process of hazard identification, risk assessment and risk control.

630. Whether, and to what extent WorkSafe, as the regulator under that legislation, which in terms of the general duties, is essentially the same as the MSI Act, has adopted a mode of regulation more systemically oriented, is beyond the scope of the present Review and was not a matter touched on in the Hooker Review.

631. In particular, the Laing Review, referred to comments in submissions on the statutory requirements of Part 3 of the MSI Act, in relation to the appointment of Mines Inspectors, in particular, the then Department’s submissions in this regard as follows:

“The Department submitted that its ability to adapt to these changing needs is constrained, to a significant degree, by Part 3 of MSIA. Part 3 provides for the appointment of inspectors of mines and outlines the responsibilities, powers and duties of the State Mining Engineer, the State Coal Mining Engineer and inspectors.

Part 3 also provides for the appointment of different categories of inspector, including District, Special and Employees (sic) Inspector. It sets out the qualifications and experience required for appointment and the statutory responsibilities of each. Importantly, s18(2), requires that a District Inspector hold a First Class Mine Manager’s Certificate, which effectively means that only qualified mining engineers may be appointed District or Senior Inspectors.”

632. The question therefore is whether the present statutory requirements concerning the Mines Inspectorate are relevant and adequate to the needs of the modern mining industry in this State?

**Role of the Inspectorate**

633. Why have a Mines Inspectorate, and, what is its role in the 21st century? The answer to these questions lays partly in history and partly in the legislation itself. At the outset, as to the latter, in my view, the role of the regulator, whilst very important in contributing to safe workplaces, is not to keep the mining industry safe. That is primarily the responsibility of the duty holders under the MSI Act, they being the Principal Employer, other employers, employees and the various others to whom the MSI Act applies and in respect of whom the law imposes obligations to act or not to act as the case may be. This is fundamental in my view, to understanding the proper role of the regulator.

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309 Ibid at pars 721-722
634. In this context, the role of the Inspectorate should be to:

(a) advise and assist duty holders to achieve and to provide incentives to exceed compliance with their legal obligations to maintain a safe workplace;
(b) take appropriate administrative and criminal enforcement measures as may be necessary in an appropriate case;
(c) advise Governments on and to develop policy and recommendations for legislative change; and
(d) engage in health and safety awareness and promotional activity in the broader mining community.

Industry Competency

635. Likewise, and as corollary to this, it is also not the proper role of the State, via the various mechanisms in the MSI Act and the Regulations, that I turn my attention to in relation to Part 4 below, to ensure that the industry is constituted by competent personnel. The ultimate responsibility for this must always rest with the Principal Employer and other employers, in the discharge of their statutory and common law duties. What the State can and should do however is to ensure that appropriate competency standards exist for certain operational and safety critical positions in the mining industry, and that there is an appropriately rigorous means of ascertaining whether or not, a person meets those standards.

Origins

636. The origins of the need to have a regulator at all can be traced back to developments in the United Kingdom in the nineteenth century. With the introduction of the Mines Act 1842, which prohibited the employment of women and children underground, a limited Inspectorate was established for compliance and enforcement purposes. Further developments took place in 1850, with the enactment of the Coal Mines Inspection Act 1850, which introduced an Inspectorate that was responsible, for the first time, to ensure compliance with minimum safety and health obligations. This legislation was controversial, and was strongly opposed by some in the industry.

637. This led to the formation of the Royal School of Mines in 1851, following the requirement for Inspectors to have academic qualifications. The School became not only a centre of learning, but also considered means of improving mine safety, leading to significant improvements. Subsequent legislative developments led to more stringent controls, reflecting advances in underground mining techniques and the requirement for the first time, for managers of mines to have certificates of competency.

310 See the submission of the State Mining Engineer op cit at D1-D2 citing L Woodward The Age of Reform 1815-1870 (Vol XIII of the Oxford History of England) 2nd Ed 1962 at 148-157
311 Ibid
312 Ibid
Coal Mines Regulation Act 1946

638. The first provisions relating to Inspectors in this legislation were outlined in Division 2 of the 1946 Act. There were three classes of Inspectors established they being:

- Departmental Inspectors (appointed)
- Special Inspectors (appointed)
- Workmen’s Inspectors (elected)

639. Departmental Inspectors were engaged under the then Public Service Act 1904-35, but Special and Workmen’s Inspectors were not, by reason of their appointment, subject to the provisions of the said Act.313 Departmental Inspectors had the full powers of Inspectors under the principal Act.314 Under s 7 of the Act, every Inspector of Mines was under the control of such person as the Minister may appoint. However, at that time, there was no reference to a position of a State Coal Mining Engineer, or equivalent office.

640. In amendments in 1951, the position of State Coal Mining Engineer was introduced, an appointment to be made by the Governor.315 Additionally at the same time, every Inspector of Mines was placed under the control of the State Coal Mining Engineer.316

Mines Regulation Act 1946

641. The legislative regime relating to Inspectors was outlined in Division 2 of the 1946 Act and was very similar to those in the Coal Mines Regulation Act 1946.

642. As with the Coal Mines Regulation Act 1946, there were also three classes of Inspectors:

- District Inspectors (appointed)
- Special Inspectors (appointed)
- Workmen’s Inspectors (elected)

643. As with Departmental Inspectors, District Inspectors came under the Public Service Act 1904, but Special and Workmen’s Inspectors were not, by reason of their appointment, subject to the provisions of the Act.317 District Inspectors had the full powers of Inspectors under the principal Act, similar to the Departmental Inspector under the Coal Mines Regulation Act 1946.318 Again, under s 7 of the principal Act, every Inspector of Mines was under the control

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313 Section 9 Coal Mines Regulation Act 1946
314 Section 8(a) Ibid
315 Section 4 Coal Mines Regulation Act Amendment Act 1951
316 Section 5 Coal Mines Regulation Act 1951
317 Section 9 Mines Regulation Act 1946
318 Section 8(1) Ibid
of such person as the Minister may appoint. The Act did not mention the position of a State Mining Engineer. Subsequently provision was made for the Governor to appoint a person to hold that office.

The Work of Inspectors

644. Having accompanied Inspectors to remote regions of this State, and observed them at work, and from my own general knowledge, there is no doubt that the job is demanding and challenging. Mines Inspectors are required to service a vast geographical area, in often remote locations, with limited resources. They are often required to make significant decisions “on the spot” in relation to operational matters that may have major consequences for a mine operator, up to and including shutting down all or part of an operation. The nature of the inspectorial role was well encapsulated in the following description by Mr Maxwell when he observed that:

“Being a good inspector is, therefore, an extraordinarily difficult job. The inspector has to be, variously, an expert at hazard identification and risk assessment; an expert at systems engineering; an expert at micro economics; competent at statutory interpretation; and have skills as a diplomat/negotiator/mediator. He/she also has to have a fairly thick skin, given that site inspections are often unpopular events with duty holders.”

645. To ensure that Inspectors are able to perform their responsibilities adequately, not only do they need to be appropriately qualified and experienced, but they also need to be well resourced and have had appropriate training.

Appointment Process

646. The first point to note is that by ss16 and 18 of the MSI Act, all Mines Inspectors are to be appointed under and subject to the Public Sector Management Act 1994 (“the PSM Act”). The MSI Act does not specify that such appointees are to be appointed and subject to Part 3 of the PSM Act, constituting the Public Service, although in practice I understand that this is the case. Similar arrangements exist in Queensland and New South Wales with the Mines Inspectorate personnel being employed within the relevant Government department responsible for the administration of the legislation.

647. However, a significant difference of note in Queensland is the capacity under the relevant public service legislation, for the engagement of Inspectors and Inspection Officers under contract arrangements, which are not limited to public sector industrial instruments. Such contractual arrangements followed the Coronial Inquiry into the Moura No. 2 mining disaster. A subsequent review of the Queensland Mines Inspectorate in 1996, led to

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319 Section 9(b) Mines Regulation Act Amendment Act 1974
320 Maxwell op cit at par 1335
321 Formerly s 70 Public Service Act 1996 (Qld) now s 122 Public Service Act 2008 (Qld)
322 Moura No. 2 Inquiry Report January 1996
recommendations that “s 70 contracts” (as they then were) under the relevant public service legislation, be used to enable improvements in remuneration within the Mines Inspectorate, to attract and retain appropriately skilled professionals. Such contracts are on a fixed term basis, as opposed to appointment on tenure.\textsuperscript{323}

648. No such flexibility is presently available in the Western Australian public sector, although term appointments not exceeding five years, may be made.\textsuperscript{324} Such appointments are however, still subject to the relevant industrial instrument of the Industrial Commission and to approved procedures of the relevant employing authority. In the context of present considerations, this poses a significant limitation on the capacity of the Mines Inspectorate to attract and retain professional staff and is a matter I return to later.

Categories

649. Save for the position of State Mining Engineer, as noted above there are three substantive categories of Inspectors, they being District Inspectors, Special Inspectors, and Employee’s Inspectors. The position of Assistant Inspector, a position created in 1994, under s 20 of the MSI Act, has never been used and is the subject of further comment below.

650. The highest qualification for appointment to any office in the mining industry is the FCCC. The holders of the offices of State Mining Engineer and District Inspector are required to hold this qualification, which imposes an academic requirement for a mining engineering degree from a recognised tertiary institution, and the possession of a minimum level of practical experience. Holders of these positions in the Western Australian Inspectorate are generally mining engineers, who have held senior mine management positions in Australia and overseas.

651. The District Inspector position has additional responsibilities under the MSI Act, including the receipt of various reports required to be lodged by duty holders. Those responsibilities may be either in relation to a particular geographical area, or in respect of a certain number of mining operations. A Senior Inspector is a District Inspector, who has been appointed by the State Mining Engineer, who is responsible for a particular region of the State.\textsuperscript{325}

652. The position of Special Inspectors is a broad category of Inspector, and as noted above, persons can be appointed for “the purpose of making inspections, inquiries and investigations that require technical or scientific training or knowledge as directed by the State Mining Engineer.”\textsuperscript{326}

\textsuperscript{323} Former s 70(1) Public Service Act 1996 (Qld) now s 122(1) Public Service Act 2008 (Qld)
\textsuperscript{324} Section 64(1) Public Sector Management Act 1994
\textsuperscript{325} Section 4 MSI Act
\textsuperscript{326} Section 18(3) MSI Act
653. All Inspectors under the terms of Part 3, except the Employee’s Inspector, have the same range of powers under the MSI Act. For an Employee’s Inspector to initiate and conduct a prosecution for an offence, the authority of the State Mining Engineer is required.

654. There were a range of submissions in relation to the operation of Part 3. For its part, the CME made a number of general observations in addition to some specific submissions. More generally, it was said that to be effective, the regulator needs to have appropriate competencies, adequate resources and a positive culture. This is accepted. Some concern was expressed by the CME that currently, these attributes may not be maximised. In general terms also, the CME submission expressed the view that the role of the regulator in a changing mining industry environment, should shift from a focus on compliance against prescriptive regulation, to a focus on the auditing and verification of safety management systems and risk management approaches to workplace safety, implemented by mining industry operators. I also agree with this but, pause to observe at this juncture, that this is also a function of the legislative scheme in effect.

655. Consistent with this general theme, the CME submission emphasised the importance of the Mines Inspectorate having a balance of generalist and specialist skills, including competencies to determine whether safety management systems and risk management approaches, adopted in the industry, are appropriate and adequate.

656. To this end, it was said that the legislation should be sufficiently flexible to enable the Mines Inspectorate to engage the appropriate skilled and experienced personnel to undertake these responsibilities. The CME submission also suggested that the Inspectorate should have a range of expertise in mining, process plants, dangerous goods, pipeline, onshore petroleum and major hazard facility operations. This was also a theme taken up by the Goldfields Electrical Industry Group, who raised the issue of electrical inspection under both the MSI Act and Regulations and the role played by Energy Safety Inspectors under the general electrical safety regime, on mine sites. The concern raised is the overlapping of functions between them.

657. I note at this point however, that this composite approach, commendable as it may be, would require a substantial shift in the State Government’s current policy setting, given the existence of separate legislative and regulatory regimes in each of these areas presently.

658. As a part of this refocussing, some benefit could be obtained from a broader examination of the role, functions and performance of the Mines Inspectorate, particularly in the context of the possible implementation of a safety case regime in Western Australia.

327 Section 21 MSI Act
328 Section 21(2) MSI Act
Important considerations in this regard include, according to the CME submission, a determination of the appropriate competencies required within the Inspectorate and appropriate performance indicators and professional training and development in aid of these objectives. In this respect, reference was made to work undertaken by NOPS, in an internal review of its operations.

In terms of specific positions, the CME commented on the role of the Employees’ Inspector. The mining industry continues to support the ongoing role of the Employee’s Inspector and the current process of appointment by election. However, it also said that if such a process were to be reviewed, then an alternative may be the appointment of Employee’s Inspectors on the same basis as other Inspectors under Part 3 of the MSI Act.

As to the role of an Employee’s Inspector, the CME submission expressed the view that some refocussing of the activity of the position would be helpful, particularly to provide a greater level of support to safety and health representatives and safety and health committees.

Further education and training would need to be provided to Employee’s Inspectors, if such an approach is adopted. A controversial issue arising in relation to the role of an Employee’s Inspector, is the suggestion put by the CFMEU in its submission, that at least some Employee’s Inspectors be appointed on the nomination of the union movement. From the perspective of the industry, any such development would be inconsistent with the independence of the Mines Inspectorate generally, and also, given the current very low level of union density in the mining industry in this State, would not necessarily be reflective of the broader views of employees the industry.

For its part, the AMMA did not comment specifically on the appointment and competency requirements for the existing Inspectorate. However, a general submission was made to the effect that Mines Inspectorate staff should be trained and competent to audit risk management practices and the implementation of safety management systems adopted by mining operations. The focus should not be, according to its submission, on determining compliance against prescriptive regulations. Also supported, is the development of inspectorial resources that contain a broadening of professional and academic skills, along with appropriate workplace knowledge.

Consistent with the views of the CME, the AMMA also is of the view that the identification of key performance indicators and competency requirements for Mines Inspectors would be of value and as with the CME submission, also referred to the initiatives undertaken by NOPS in this regard.

Allied to this broad theme, and the submissions noted earlier in this Report in relation to support for a risk management based legislative model, the AusIMM proposed that Inspectors, in order to undertake performance based regulation effectively, need high levels of technical proficiency, and competency in risk management systems, safe systems of work, safety
promotion, behavioural safety and effective communication skills. In particular, the AusIMM supported the development of clearly defined competencies for the Mines Inspectorate personnel, and training and development programs being implemented to support the attainment of these objectives.

666. As to the issue of the appropriate skills required, a broader mix of professions and skills, along with a strong mining presence, was seen as key attributes of a successful Inspectorate. Whilst it was the only submission to raise the issue, the AusIMM also noted, importantly in my view, that any changes to the Mines Inspectorate, should have regard to developments in other jurisdictions, consistent with the NMSF process, in particular, that relating to Strategy 2: Competency Support.

667. From the union perspective the CFMEU noted that changes are necessary to Part 3 of the MSI Act to broaden the range of skills available within the Mines Inspectorate. In particular, it was submitted that a broad range of professional backgrounds and skills including those with a mining industry background, engineering, broad education skills, consultative skills, health and safety experience and administrative and legal skills would be an advantage. The union also noted however, and emphasised, the importance of the continuation of District Inspectors, who have a mining industry background. It was said in this context, that the District Inspector should be supported by a broad range of specialists who can provide particular support in relevant areas.

668. One issue raised by the CFMEU submission, was the importance of the independence of the State Mining Engineer and the State Coal Mining Engineer positions. However, whilst noting this, it was also said that to reflect the broad responsibility of the role, the title of the office should be changed. No particular suggestion was made in that regard.

669. As with the views expressed by the industry, specific comment was made by the union in relation to Employee’s Inspectors. It was suggested that the current election process for the appointment has proven to be unworkable in practice and, as for other Inspector positions, they should be subject to the normal appointment process. However, as foreshadowed earlier, any such amendment to the MSI Act should allow the appointment of at least three Employee’s Inspectors, on the nomination of Unions WA.

670. The particular issue of risk management skills was taken up in a submission from Professor Jim Joy, of the University of Queensland. Professor Joy referred to the 2005 Review of the Queensland Mines Inspectorate, and noted recommendations made in that review in relation to a broadening of the Inspectorate, into what he described as “classic health and safety” approaches in both technical and management areas. Professor Joy noted the contentious nature of what should be an ideal skills and knowledge base for a modern Mines Inspectorate. He referred to a range of views, from those believing that possession of a mine manager’s “ticket” and relevant mining experience is critical, to those suggesting that a broader range, including industrial hygienists, ergonomists and other health and safety professionals, should be
the target recruitment group. Further again, others suggest a combination of those approaches.

671. Irrespective of which approach one adopts, in Professor Joy’s view, a sound competency in risk management is essential. In referring to the Robens inspired safety and health law, embodying the duty of care principle, Professor Joy noted that an Inspector’s role within such a model is to “assist, coach and judge the quality of the mine managers (and others) if it is to manage the risk. As such, an inspector with a background of mine management or OH and S should have a solid understanding of risk management, possibly developed through successful completion of the “G3” (MNMMSM 617A(329) establish the risk management system).”

672. From its perspective, the CCIWA viewed the Mines Inspectorate, as with any regulatory agency, as at least requiring a basic knowledge of the mining industry and a sound knowledge of relevant occupational safety and health principles. It is accepted by the CCIWA, that Mines Inspectors should have a working knowledge of the mining industry gained through a working involvement. A technical background, preferably in mining engineering, geology or an allied discipline, would be preferable. It is acknowledged that the current demand for labour significantly impacts on the ability of the Mines Inspectorate to attract highly skilled technical specialists.

673. In recognition of this, it is suggested that an approach by Government, to ensure the continuation of an Inspectorate in this climate, is to develop an appropriate training framework under Australian Quality Training Framework (AQTF), for non technical personnel to be able to train as Mines Inspectors as required. Such a scheme would embrace recognition of prior learning for those with skills and experience in mining operations and appropriate support should be available from technical specialists, with relevant mining industry expertise.

674. It is also proposed that such a program could be developed under the auspices of the COSH. On this approach, different categories of Inspectors would not be necessary, and all would be engaged through DOCEP. In saying this however, the CCIWA submission added that the Mines Inspectorate so structured should remain independent and be limited to the mining industry.

675. A somewhat similar theme was adopted in the RSD submission. It was put that in the current labour market, it is increasingly difficult to maintain the appropriate competent and qualified staffing levels for the Mines Inspectorate and that the specific requirements of Part 3 of the MSI Act exacerbate this difficulty. By way of comparison, no such restrictions apply to the required office holders under the new DG Act, which extends to all dangerous goods, explosives and major hazard facilities. In that regard also, reference is made in the RSD submission, to the nature and qualifications for appointment as an Inspector under the OSH Act.

329 See submission Professor Jim Joy at 7-8
676. On this view, in particular in relation to the office of State Mining Engineer, there may not be a need for a mandatory mining industry qualification. Similarly, the same could apply for all other Mines Inspectorate positions, as long as administratively, in the job specification requirements, a tertiary qualification in a relevant discipline is specified. Furthermore as to Employee’s Inspectors, it is suggested that the election process is not relevant in today’s climate, and such a position should merely be appointed, as with all others.

677. A jurisdiction which substantially changed its approach to the appointment of Mines Inspectors is the Northern Territory under its mining legislation. These changes were referred to by Associate Professor Lawrence, who has had practical, senior experience in that jurisdiction. He referred in particular to changes in the late 1990s, in response to difficulties in recruiting mining engineers for the Inspectorate in the Northern Territory, to employ staff who did not have “the traditional skills, qualifications and experience.”

678. To enable such a change, the then Mine Management Act was amended to remove the title of “Chief Government Mining Engineer”, and any reference to any “Mines Inspectors” in the legislation. Instead, the position of “Mine Audit Officer” was created, which did not have any essential qualification criteria, rather desirable criteria, including a generic health and safety qualification and some mining experience.

679. From a cost point of view, it is said that the cost reduction was significant, with such an appointment representing approximately half of the cost of the appointment of a person with traditional mining engineering experience. Furthermore, an advantage cited was the capacity to fill vacancies more easily. However, Associate Professor Lawrence referred to significant disadvantages of this approach, and in particular noted in his submission that:

"• Audit officers did not necessarily have the qualifications and experience to understand mining concepts particularly the geomechanics, ventilation and other disciplines
• It is much easier for senior management to hide and mask an issue with an inexperienced government official
• They were also understandably, subordinate in their approaches to the mining companies

  o Unlike previous mines inspectors who were mine managers in previous lives and could relate on a similar level to mine and general managers
  o Therefore a policing approach was more likely rather than the advisory, cooperative approach traditionally adopted by mines inspectors”

330 See submission Associate Professor Lawrence at 2
331 Under the now Mining Management Act 2001 “Mining Officers” are appointed under s 59 without any specified qualifications or experience. They are required to have “appropriate competencies or adequate experience”: s 59(3)
332 See submission Associate Professor Lawrence at 2
680. From the perspective of the overall function of a mining regulator, Associate Professor Lawrence focussed on what he considered should be emphasised, this being:

(a) Overseeing and encouraging leading practice in safety and health;
(b) Overseeing and encouraging sustainable mining practices with regard to the community and the environment; and
(c) Ensuring extraction of the mineral resource is optimised for the benefit of the community.333

681. Whilst the need for a diversity of skills is acknowledged, in his submission, Associate Professor Lawrence pointed out that it is the discipline of mining engineering that in particular will demand them. Finally, in terms of titles, his submission referred to the term “mines inspector” as being somewhat archaic, and a more modern title or position description, would be preferred.

682. The issue that arises then is what are the core functions of a regulator and to what extent is there the necessity for a Mines Inspector, to be able to stand on equal terms with those whom they are charged with the task of regulating? When discussing the role of a regulator in a world class safety case regime, the MSIG commented:

“Regulatory staff must therefore have personal credibility with senior company staff. A key aspect of this credibility is knowledge and (preferably) first hand experience of managing a complex operation in a technically challenging environment.”334

683. These observations are in my view, equally apposite in any regulatory environment.

684. The issue of qualifications of the Mines Inspectorate, and the various skills required, was also the subject of comment by the State Mining Engineer. As previously noted from an historical perspective, the need for an inspectorial capacity led to the formation of the Royal School of Mines in London in 1851. Moving to more recent times, the recognition of the importance of appropriate qualifications for Mines Inspectors has been considered on a number of occasions. In particular, reference is made to the 1976 Canadian Royal Commission on the Health and Safety of Workers in Mines (“the Ham Commission”) which recognised the importance of qualifications for Mines Inspectors, and which made a recommendation that:

“mines inspectors, not only be persons of professional experience in mining and related fields of engineering, but this expertise be supplemented by special training in occupational health and safety.”335

685. Similar questions arose in the Royal Commission into the Westray mine disaster in Nova Scotia, Canada, which occurred in 1992. This accident

333 Ibid
334 MSIG op cit at 35
335 See submission State Mining Engineer at D13
involved an explosion at the Westray underground coalmine, in which 26 miners were killed instantly, as a consequence of the ignition of a lethal build up of methane gas due in part, to inadequate mine ventilation. The Report of the Royal Commission was published in November 1997.\textsuperscript{336}

686. The Westray Royal Commission Report along with the Moura and Gretley disasters, are yet more sobering reminders of the inherent hazards of underground coal mining, and underground mining generally, and how an operation can go catastrophically wrong. In particular, in relation to the role of the Mines Inspectorate, reference is made to the following passage from the Report of Justice K. Peter Richard, the Commissioner, as follows:

\begin{quote}
“It has been stressed on several occasions that mine inspectors must be certified mining engineers. This follows the approach to mine inspection adopted in the United Kingdom and in most Canadian jurisdictions. The U.S approach is to engage technicians who enforce very comprehensive regulations and who have engineering back-up when needed. Virtually all mine managers and most underground managers are professionally trained mining engineers. The inspectorate must be able to face them on an equal professional basis.” (My emphasis)
\end{quote}

687. In his submission, the State Mining Engineer opined that the above quote, “encapsulates the justification for formal mining qualifications in at least some members of the inspectorate.”\textsuperscript{337}

688. Additionally, in the recent Inquest Findings into the deaths of three miners at the Renison Tin mine in Tasmania, the Coroner commented on the composition and technical capacity of the Mines Inspectorate in the following terms:

\begin{quote}
“The Chief Inspector of Mines holds mine specific engineering qualifications. Other inspectors with more general qualifications or training are likely to be at a disadvantage when asked to inspect and identify technical aspects in mines. In many cases, investigating officers will be discussing technical issues with mining staff who are significantly more qualified and experienced than they are. This puts the officers at an immediate disadvantage and is an issue that requires further consideration.”\textsuperscript{338}
\end{quote}

689. It should be emphasised however that formal mining engineering qualifications are not the only qualifications required in an Inspectorate. A broad range of qualifications and experience will be necessary. There presently exists in the Mines Inspectorate, personnel from the following disciplines:

- Mining engineering

\textsuperscript{336} \textit{Report of the Westray Mine Public Inquiry} Justice K Peter Richard, Commissioner 1997  
\texttt{http://www.gov.ns.ca/enla/pubs/westray/execsumm.asp}  
\textsuperscript{337} See submission State Mining Engineer at D14  
\textsuperscript{338} Renison Tin Mine Inquest op cit at 93
• Geotechnical engineering
• Mechanical engineering
• Electrical engineering
• Structural engineering
• Chemical and Process and Metallurgy
• Noise and Vibration
• Chemistry
• Radiation
• Occupational Hygiene
• Occupational health and safety

690. It is noted that no reduction in the spectrum presently existing is proposed, and that the skills set could be broadened. However, the point is made in the State Mining Engineer’s submission, and in my view well made, that there will be a necessity to maintain at least an adequate level of experienced mining engineering skills and experience. This may become more important, with the inevitable expansion of underground mining operations, as near surface deposits of ores are progressively mined out through open cut operations.

691. The above range of skills is broad and reflects a range of technical and OSH expertise. These could be supplemented by additional skills in relation to ergonomics and organisational design and psychology. This would provide a wide range of disciplines in both technical mining expertise and broader safety and health and organisational performance.

692. In its submission, MARCSTA noted that the issue of greater flexibility in the Mines Inspectorate, and a broadening of the range of professional specialisations, was previously identified in the CME survey in 1996 that I have referred to above. From that proposition, and looking at the current range of expertise in the Mines Inspectorate now, the view is expressed that the range and flexibility of personnel as previously identified as being needed, exists, and no further adjustment is necessary.

693. What is emphasised in this submission however is that the remuneration payable to Mines Inspectors, relative to that in the mining industry, has been the major impediment to the attraction and retention of the necessary resources for the Inspectorate to carry out its statutory responsibilities effectively. It is noted that this has placed unreasonable stresses on the regulator, which has not been adequately recognised in the past.

694. In particular, in Queensland, another major mining State where the industry has expanded substantially, it is said that steps have been taken to ensure that remuneration levels are adequate for the purposes of attracting and retaining the appropriate skilled personnel. In concluding its submission, MARCSTA says that the issue of flexibility in the appointment and utilisation of inspectorial personnel will not be possible, until the real issues of remuneration and retention are addressed.

695. I have canvassed a very wide range of views in relation to this aspect of my Terms of Reference. This includes discussions with a broad spectrum of
senior and experienced mining personnel from mining companies, academics with mining industry experience, a large number of the Inspectors themselves and numerous others, in addition to consideration of the content of the written submissions. I have spoken to well over a 100 people in the course of my initial consultations, formally and informally. Whilst naturally, the views vary, few if any, have suggested that there should be a de-skilling of either the industry or the regulator. Most argue for greater flexibility and a broadening of the skills and competency base, of the Inspectorate. All have said that mining engineering skills are an essential element.

696. I have carefully considered all of the written submissions and taken into account the very many and varied discussions I have had. I have also consulted extensively with my Advisory Group in relation to these matters. Those views have necessarily informed my thinking as to the present structure of Part 3 of the MSI Act and whether it really is an impediment to the operation and effectiveness of the Mines Inspectorate.

697. Having regard to the demands placed upon the industry, in terms of the increasingly complex mining environment that will unfold in the future, and the inevitable likely expansion of the underground sector, a core skill of the regulator must remain that of mining engineering. That is the mining engineering discipline should be seen as the “hub of the wheel”, supported by a broad range of specialist and generalist skills and experience, as may be required.

698. Such an approach does not in any way diminish the need for a broad range of skills to be available to the Inspectorate. On the contrary, the existing skills base can and should be expanded to accommodate a range of generalists and specialists, to provide a balanced approach between core mining engineering skills, and other disciplines. This is particularly so, in moving towards a risk management model of regulation. Amongst others, a key and necessary skill within the regulator, for all Inspectorate personnel, will be appropriate training in risk management. This competency should be an inherent requirement of all those exercising inspectorial functions, regardless of whether they be mining engineers, health and safety specialists or from other disciplines.

**Recommendation 22**

That the mining engineering discipline remain a core competency for the most senior level in the Inspectorate. That mining engineering Inspectorate expertise be supported by other specialist and generalist disciplines, more broadly based, as may be required.

**Other Skills Required**

699. In addition to the above technical and safety and health skills, an Inspector needs to possess appropriate communication and leadership skills in order to influence and lead behaviour of those who are the subject of regulatory
activity, on mine sites. These skills, if not already present, need to be acquired through appropriate training and development. I comment on this further below.

700. An initiative developed for regulators generally in Australia, is the Diploma programmes in workplace inspection. These programmes are part of the Public Sector Training Package, which has been approved by State, Territory and Commonwealth authorities and have been utilised for health and safety inspectorate training around Australia. They were the subject of consideration in both the Queensland Inspectorate Review and in the Maxwell Review. The competency frameworks referred to in these programmes were recommended for the Queensland Inspectorate, as being consistent with those adopted in mining inspectorates in New South Wales and Victoria. The frameworks are comprehensive and cover core skills necessary for effective regulatory activity.

<table>
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<th>Recommendation 23</th>
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<tr>
<td>That the Mines Inspectorate adopts the Public Sector Training Package for workplace inspection as part of its core competency for Inspector positions.</td>
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State Mining Engineer and State Coal Mining Engineer

701. The offices of the State Mining Engineer and State Coal Mining Engineer are both established under s 16 of the MSI Act as follows:

"16. State mining engineer and State coal mining engineer"

(1) A person shall be appointed under and subject to the Public Sector Management Act 1994 to be the State mining engineer.

(2) A person shall be appointed under and subject to the Public Sector Management Act 1994 to be the State coal mining engineer.

(3) To be eligible for appointment as the State mining engineer or the State coal mining engineer, a person must hold a first class mine manager’s certificate of competency.

(4) The State mining engineer, the State coal mining engineer, and the deputy State mining engineer have the powers conferred on an inspector by Division 2.

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339 Maxwell op cit at 1399-1401
(5) The State mining engineer may, either generally or as otherwise provided by the instrument of delegation, by instrument in writing delegate to any person any power or duty conferred or imposed on the State mining engineer under this Act other than this power of delegation.

(6) Any act or thing done by a delegate under a delegation under this section has the same force and effect as if it had been done by the State mining engineer.

(7) Subject to the control and direction of the State mining engineer, the State coal mining engineer is responsible for the administration of this Act and the regulations in relation to coal mines and has the control and direction of inspectors engaged in matters relating to coal mines.”

702. As is prescribed, only holders of a FCCC are eligible to hold the offices. There is no statutory requirement that the same person occupies both offices, but in recent years, that has been the practice. In addition to all of the powers of an Inspector under s 21 of the MSI Act, the State Mining and Coal Mining Engineers also have a considerable number of other statutory functions and powers. These include:

- The constitution of mines as single or composite, for the purposes of s4;
- The general direction, control and certification of appointment of Inspectors: ss16-18; s27;
- The grant of authority to Employee’s Inspectors to initiate prosecutions: s21(2);
- Various powers in relation to mine record books: ss23; 77;
- The review of improvement and prohibition notices: s31AY;
- The cancellation of improvement notices and prohibition notices: s31BE;
- The designation of a Principal Employer who is not otherwise nominated: s32;
- Approvals for all Registered Mine Managers to manage more than one mine: s33;
- The grant of conditions or exemptions in relation to requirements for the holding of various certificates for competency for various mine positions: ss33-37;
- Requirements for the appointment of more than one certified manager in certain circumstances: s39;
- The approval to commence mining operations: s42;
- Requiring the provision of an engineering report: s45;
- The resolution of disputes in relation to the election of safety and health representatives and safety and health committees: ss55; 55A; 56; 59; 67; 67C; 67E;
- The receipt of health surveillance reports: s75;
- The receipt of mine survey plans and requests for check surveys of the same: s88;
• The receipt of plans for the abandonment or discontinuance of mining operations: s88;
• The entering into undertakings with offenders following conviction for offences: ss101C; 101H; 101K; 101L;
• The chairmanship of the Board and the MSB under the Regulations; and
• A range of other functions and powers under the Regulations, including a general power of exemption: regs 1.3; 1.4 Regulations.

703. As the most senior technical officer under the MSI Act, the State Mining Engineer plays a central role and is responsible for critical decision making in relation to mine safety through the State. In addition to the various technical decision making responsibilities as set out above, as also noted, the State Mining Engineer has a significant role in relation to workplace level dispute resolution.

704. In addition to the office of State Mining Engineer, administratively, the occupant, until recently, also held the position of Director-Mines Safety. This corporate position, reports to the Executive Director of the RSD, and is responsible for the overall management of the Mines Inspectorate. A similar corporate structure exists in New South Wales, with the responsible Chief Inspector of Mines, also occupying the corporate position of Director Mine Safety Operations. In Queensland, the position is slightly different. In that jurisdiction, the respective Chief Inspectors of Mines and Coal Mines, report to an Executive Director Safety and Health, which office is also responsible for the petroleum, gas and explosives Inspectorates.

705. In terms of the statutory responsibilities of the office of State Mining Engineer, as the ultimate authority under the MSI Act in relation to many technical matters, it is appropriate that the holder of the office be required to possess the highest qualification for appointment in the mining industry, that being a FCCC.

706. Additionally, as the Chair of the Board, constituted as necessary for the granting of the various certificates of competency for those seeking positions in the industry for which those certificates are required, it would in my view, be inappropriate for the occupant of such an office, to not be required to possess the highest qualification under the statutory scheme. To not require the State Mining Engineer to hold such a qualification, would be tantamount to suggesting that the Chair of the Legal Practice Board or the Medical Board, would not be required to be legally or medically qualified as the case maybe.

707. It is of some significance to note that there is no necessary correlation between the statutory office of State Mining Engineer, on the one hand, and the administrative position of Director-Mines Safety, on the other. There is no in principle reason, why occupants of the office and the position respectively, could not be different persons. Indeed, there may be good reason depending upon the background, skills and experience of a particular candidate for appointment as State Mining Engineer, that they not occupy both positions. It is to be noted that this is now the position, with different persons occupying
the office of State Mining Engineer and the position of Director-Mines Safety. However, from the perspective of the discharge of the management function of the Inspectorate, and the statutory responsibilities under the MSI Act, it would seem to be preferable that both roles be performed by the same person.

708. The need to maintain the independence of the office of State Mining Engineer is in my view, paramount. Given the nature of the statutory responsibilities of the office, the State Mining Engineer must be immune from any external interference in the discharge of the statutory responsibilities.

709. For example, a circumstance may arise where the State Mining Engineer, because of concerns regarding the operational safety of a mine, considers that the mine or a part of it should cease operations. Such a decision, subject to any powers of statutory review under the MSI Act, must be insulated from any influences brought to bear, upon that decision making process.

710. This is particularly important in my opinion, in the context of any consideration being given to a safety case or some such regimen, whereby the State Mining Engineer may be required to consider whether, in an appropriate case, an operator’s licence to operate should be suspended or revoked. Such critical decision making responsibilities, must be, and must be seen to be, exercised completely independently. The retention of this independence is, in my view, critical to ensure the proper administration of the law concerning safety and health in the mining industry in this State.

711. The only written submission to focus specifically on the position of the State Mining Engineer was from the CFMEU. In this submission, the importance of the independence of the role of the office was affirmed. Additionally, it was suggested that in the union’s view consideration could be given to changing the title of the State Mining Engineer, to reflect the broad nature of the role and functions of the office. As I understand the submission, this proposition was advanced consistent with the State Mining Engineer’s broader management responsibilities for the operations of Mines Inspectorate generally.

712. One difficulty with this approach however, is that such a change assumes that the person occupying the office of State Mining Engineer, and the position of Director-Mine Safety, will always be one and the same. Notwithstanding this, there seems to me to be no reason why there could not be some modernisation of the titles of officers within the Inspectorate.

713. Consistent with the changes to titles that I suggest in relation to other Inspector positions, as discussed below, the title to the statutory office of State Mining Engineer and State Coal Mining Engineer could be respectively, changed to a more contemporary, title such as “Chief Mining Officer” or similar. It needs to be made clear that the suggested amendment is to the office, established under the MSI Act, and not the position.
Recommendation 24

That the key and independent positions of State Mining Engineer and State Coal Mining Engineer be retained.

Recommendation 25

That the positions of State Mining Engineer and State Coal Mining Engineer be re-titled “Chief Mining Officer” or like title.

District Inspector

714. The District Inspector is the only of the three Inspectorate positions to require formal qualifications and experience in mining engineering. This requirement finds expression in s 18(2) of the MSI Act as follows:

“(2) To be eligible for appointment as a district inspector, a person must hold a first class mine manager’s certificate of competency”

715. As senior members of the Inspectorate, District Inspectors have, in addition to the statutory powers and functions of Inspectors generally, a number of particular responsibilities under the MSI Act. These include:

- Directing Employee’s Inspectors to take witness statements and appear at coronial proceedings: s 21(2)
- Receipt of confirmation of compliance with improvement notices: s 31AA;
- Receipt of notices as to the identity of a Principal Employer prior to the commencement of mining operations and any changes to the identity: ss 32(1) and (4); 32A;
- Receipt of notification of appointments of Registered Managers for mines and other managerial appointments: ss 33(1); 33A;
- The grant of exemptions for the appointment of Underground Managers to certain mines: s 35(4)
- The grant of exemptions for the appointment of Quarry Managers to certain mines: s 37(4)
- Receipt and confirmation of notifications of assumption of control by Registered Managers and mine managers: s 40;
- Receive, assess, and verify that a mine operator’s evidence of notification of commencement, recommencement, abandonment or suspension of mining operations, are in accordance with the requirements of the MSI Act. This requires attendance at the mine by the District Inspector for the verification process: s 42;
- Liaise with exploration managers in relation to exploration works for which the exploration manager is responsible: s 47;
- Dispute resolution assistance in relation to health and safety issues in the workplace: s 71;
- Receiving notices of accidents and potentially serious occurrences: ss 76 and 79; and
716. I note the views expressed above that the Inspectorate should maintain a central role for mining engineering expertise, in particular in relation to underground operations, given their complexity and inherently hazardous environments. Particularly in these circumstances a senior mining engineer, possessing the highest statutory qualification of a FCCC, in the words of Commissioner Richards in the *Westray Inquiry*:

“needs to be able to be meet and interact with senior mine management, on an equal footing”.

717. Additionally, it is clear from the existing statutory responsibilities of District Inspectors, that whilst some functions, in particular those involving receipt of various reports and information from mine operators, could perhaps be equally received by other Inspectorate personnel, there are particular responsibilities that plainly require mining qualifications and experience.

718. For example, the statutory responsibility to grant exemptions for the appointment of statutory managers to certain mines, requires considerable expertise and understanding, of the inherit requirements of those particular mining operations. In particular, the statutory responsibility to investigate and assess whether, commencement, recommencement, abandonment or suspension of mining operations obligations under the MSI Act have been met, requires senior mining engineering expertise.

719. It would be inconceivable that other than a senior and experienced mining engineer, could be called upon to make such potentially critically important decisions. Likewise is the requirement to assess and verify the adequacy of mine plans in similar circumstances.

720. It may be the case that given the current shortage of, and demand for experienced mining engineering personnel in the industry, and the present difficulties experienced by Mines Inspectorates generally to attract and retain such staff, there will in the future, be fewer District Inspectors than presently. In the future, the role of a District Inspector may become more focused on leading team based regulatory activity and providing a resource for other generalists and specialist within the Inspectorate, and adopting more of a “troubleshooting” role.

721. The importance of the retention of a mining industry background for District Inspectors was emphasised in the CFMEU submission, outlined above. Whilst it may be said that an alternative approach could simply be to abolish the District Inspector position, and have experienced mining engineers as part of the general mix of Inspectors, as a single category, that would not address the requirement for those in that position to have the required qualifications and experience. This presently finds expression, appropriately in my view, in the requirement for the holder of the office to have a FCCC.
722. Whilst this could conceivably be simply a required competency in a job description for example, I have a degree of discomfort that such a requirement could be relatively easily changed by the keystroke of a word processor, without any requirement for legislative scrutiny. Furthermore, whilst this could conceivably be accommodated by creating a sub category within the generalist Inspector office, for mining engineers which the requisite qualifications and experience, this would seem to defeat the purpose of the creation of a generic office in the first place.

723. In summary, in my view, I do not see any necessity for a fundamental alteration to the statutory scheme in relation to District Inspectors and qualifications for appointment. However, there is much to be said in my opinion, consistent with observations of Associate Professor Lawrence in his submission that the title generally, of “Inspector” is now, in the 21st century, somewhat archaic.

724. Furthermore, as I have noted above, the title “Inspector” connotes a particular approach and function, based upon compliance with regulatory regimes, which is now not consistent with the more contemporary paradigm, as to the role of a mines regulator, of which inspection is only one component.

<table>
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<th>Recommendation 26</th>
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<td>That the position of District Inspector be retained.</td>
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<th>Recommendation 27</th>
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<tr>
<td>That the title of the position be changed to “District Mining Officer” or like title.</td>
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<th>Recommendation 28</th>
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<tr>
<td>That the required qualifications and experience for a District Inspector be retained as being the holder of a FCCC.</td>
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**Special Inspector**

725. The position of Special Inspector as presently structured, enables a wide range of skilled personnel to be appointed to the Mines Inspectorate. For the reasons outlined above, I do not suggest that any significant change to Part 3 of the MSI Act is necessary to enable the Inspectorate to recruit the widest possible skill set as may be necessary for its present and future operations. It may be argued on the one hand, that the terms of s 18(3) of the MSI Act, are broad and is directed to the *purpose* for which a particular appointment is made, without prescribing any particular qualifications or experience. However, the better view in my opinion is that as a matter of statutory construction, that specific skill sets are at least an implied requirement, given the language of the section.

726. With relatively minor amendment, s 18(3) of the MSI Act can be made sufficiently flexible to enable the appointment of a very broad range of
persons with technical and generalist skills, to complement the specific mining and engineering skills possessed by a District Inspector. In terms of the “ideal” Inspectorate, following the Queensland Inspectorate Review, only a few additional skill sets may be required. This flexibility can be achieved by an amendment to s 18(3) of the MSI Act along the following lines:

“Special Inspectors may be appointed for such purposes as may be directed by the State Mining Engineer in the instrument of appointment.”

727. Such an amendment would provide the State Mining Engineer with complete flexibility to appoint appropriately qualified and skilled persons as Special Inspectors, in accordance with the needs of the Inspectorate from time to time.

728. Consistent with my views above as to the title of “Inspector”, I also consider an appropriate change to the title for a Special Inspector should be made.

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<th>Recommendation 29</th>
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<tr>
<td>That the qualifications for appointment of Special Inspectors in s 18(3) of the MSI Act be broadened to enable the State Mining Engineer to appoint a Special Inspector “for such purposes as may be directed by the State Mining Engineer in the instrument of appointment”.</td>
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<th>Recommendation 30</th>
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<tr>
<td>That the position of Special Inspector be re-titled “Special Mining Officer” or “Mining Officer” or like title, consistent with Recommendations 25 and 27 above.</td>
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Investigation Skills

729. It is well beyond the scope of this Review to undertake any detailed analysis of Mine Record Book entries to determine the nature of the investigative process undertaken within the Mines Inspectorate. Suffice to say that in previous Inquiries and Reviews, the investigative and forensic skills of the Inspectorate has been raised as an issue.341 Presently, all Inspectors are from time to time, involved in various investigations, whether they are fatalities or serious accidents and incidents. These processes are very resource intensive. It was often said to me in my initial consultations when speaking to members of the Inspectorate that a major incident investigation can tie up resources for many months on end.

730. In one case, a District Inspector informed me that he and at least one other technical Inspector were involved for over nine months on a particular fatality investigation, which involved preparation of reports for the coroner, expert reports and the compilation of a prosecution brief for the State Solicitor’s Office (“SSO”). Additionally, it is often the case that such investigations may

341See Ritter Inquiry at 352-353
require expert analysis of plant or equipment which may be required to be obtained, sent off site, and be the subject of analysis and report.

731. Investigative and forensic skills are vitally important for any regulator. The quality of an investigation may have a very significant impact on the ultimate outcome of a matter, particularly if a prosecution is commenced against a duty holder. Decisions made at various stages of an investigation, including matters such as persons to interview; the use made of that information; the compilation of witness statements in a timely fashion and in a useful form; the collection and analysis of real evidence, such as various items of plant and equipment, photographs, plans and sketches; the obtaining of expert opinion and reports; and decisions made in the course of the investigation process, as to the use of that material, can all have a potentially significant impact on the outcome. Whilst major investigations are being undertaken, the responsible Inspectors are also required to attend to their other day to day responsibilities. This in some cases can significantly impact on their capacity to engage in proactive inspectorial work.

732. In my view it is well and truly time that the Mines Inspectorate obtained a dedicated investigative capacity. In saying this, I do not suggest however that all Inspectors, other than dedicated investigator personnel, cease investigation activity. On the contrary, it is important that all Inspectors at least maintain some basic skills in investigative and forensic activities. What in my view is required however is a structure whereby there is a “lead investigator(s)” who provides overall direction and leadership in a particular investigation, and who can act as an internal resource for the Inspectorate as a whole. Such an officer(s) would ideally have law enforcement or other forensic backgrounds and some familiarity with the mining industry.

733. Such an investigations capacity would need to be carefully constructed, and promoted, given the sensitivities in relation to the formation and operation of “prosecutions units” in other jurisdictions. If such a resource is established, it would have the major benefit of not only enabling leadership and enhancing the quality of investigative and forensic work of the Mines Inspectorate generally, but also, would free up other Inspectors so that they are able to devote more time to general regulatory activity.

734. Such a position(s) should be appointed as a Special Inspector. Whilst it is the case in New South Wales, I see no need for the creation of a special position of Investigator. There should be a minimal number of Inspector categories in my opinion. Additionally, given what I envisage would be the function of such a position, it would need to be able to exercise all of the statutory powers available to Inspectors generally, which is the case in New South Wales. If as I recommend, s 18(3) of the MSI Act is amended, this will provide ample capacity for the appointment of such officers.

342 See Part 10 Division 2 MHS Act (NSW)
343 Ibid and subdivision 3
Overall, so structured, the Special Inspector category of appointment should contain the broadest possible skills base, such that, in conjunction with the mining engineering capacity of a District Inspector, the combined skills and resources of the Inspectorate should embrace the full range of professional, technical, and generalist skills and experience that is necessary for a modern mine regulator.

**Recommendation 31**

That the Mines Inspectorate develop a dedicated investigations capacity comprising appropriately skilled and experienced personnel to lead investigative activity and to provide an internal resource to the Inspectorate generally.

**Recommendation 32**

That the position of Special Inspector (or retitled position) should include, but not be limited to, the following existing and additional expertise:

(a) Geotechnical engineering;
(b) Mechanical engineering;
(c) Electrical engineering;
(d) Structural engineering;
(e) Chemical and Process engineering and metallurgy;
(f) Noise and vibration specialists;
(g) Chemistry;
(h) Radiation;
(i) Occupational health and safety generalists;
(j) Occupational hygienists;
(k) Ergonomists;
(l) Organisational psychologists/human behaviouralists; and
(m) Investigators with investigative and forensic skills and experience including but not limited to:
   (i) leading investigations and investigation teams;
   (ii) securing accident/incident sites;
   (ii) gathering and securing evidence;
   (iii) interviewing skills and witness statement preparation; and
   (iv) the preparation, in conjunction with other Inspectorate staff, of reports for coronial inquests and prosecution briefs to the State Solicitor’s Office.

**Employee’s Inspector**

A number of submissions made particular mention of the role of the Employee’s Inspector, the history of which position is helpfully outlined in the State Mining Engineer’s submission.

The position has been in existence in one form or another, since 1915, commencing as the former Workman’s Inspector of Mines under the earlier repealed legislation. There are presently five Employee’s Inspectors positions in Western Australia, with one vacant.
738. The role of the Employee’s Inspector has, according to the State Mining Engineer, traditionally been one to “give voice” to the employees in the mining industry and has also provided a useful conduit between the workforce and the Inspectorate, for those employees who may not feel at ease in raising issues with District Inspectors. This was also emphasised in a discussion I had with a District Inspector when he said that the Employee’s Inspector:

“...is a person the workforce can relate to and use as a source of information...represents the workforce and the role provides intelligence as to what is going on...”

739. A particular matter of concern raised is the requirement for Employee’s Inspectors to be appointed following an election process, in accordance with the Regulations. This procedure appears to be both cumbersome and expensive and as noted, entails a significant investment of resources by the Mines Inspectorate, the industry and the Western Australian Electoral Commission. Often there are issues with the accuracy of the electoral role, given the degree of turnover of employees in the industry in the present climate. Additionally, other difficulties noted include the fact that on occasions, only a relatively small number of those eligible to vote actually do so.

740. In my view it may well be said that the current process for the appointment of Employee’s Inspectors has outlived its original purpose. The procedural requirements of the Regulations for the election process are of doubtful utility in a modern mining environment. One need only examine the relevant Regulations, to appreciate the procedural steps that are required for the nomination, election and declaration of a successful candidate for appointment.\(^\text{344}\) Given the difficulties identified by most of those involved in the industry, in both their written submissions to the Review, and in the many discussions I have had, I can see no need to retain what is now a somewhat archaic process, rooted in a time long since past, and which it seems, adds little to the essential nature of the role.

741. However, that having been said, the position of Employee’s Inspector is a valuable one. It performs an important link between the mining industry workforce and the Mines Inspectorate generally and from my observations in the field, is a respected role.

742. Furthermore, whilst by s 25(1) of the MSI Act an Employee’s Inspector is to “liaise” with safety and health representatives and committees, it is not entirely clear to me as to what this means in practice. I think that there is much to be said for the proposal put by the CME that the role of an Employee’s Inspector be re-focussed, to provide a greater level of support for the activities of safety and health representative and committees, particularly in any move towards a risk management regulatory model. This could take the form of being a conduit for the provision of specific information and advice, in particular for those new to the role of a representative or committee

\(^{344}\) See reg 2.3 and Schedule 1 Regulations
member. Specific training and education programmes could also be considered for the role.

743. Whilst the position of Employee’s Inspector should remain, I see no need to alter the qualifications for appointment and no-one suggested that it should be changed.345 However, it should be an appointed position, as for any other within the Inspectorate. Appropriate transitional arrangements should be implemented. Those currently serving a term, at the time of any amendments to the MSI Act and Regulations necessary to give effect to these changes, could be deemed appointed for the remainder of their term, and thereafter, be eligible for appointment under the new provisions.

744. I also see no reason, consistent with this approach, that the powers of an Employee’s Inspector should be any different to District and Special Inspectors, subject to any necessary training and development that may be required.

745. As to the suggestion from the CFMEU that at least two Employee’s Inspectors be appointed from nominations by Unions WA, I am not persuaded that this should occur. As a matter of principle, the position of Employee’s Inspector should be to act as a contact point and liaison for all employees in the industry. Given the decline in union membership generally, I do not consider that it would be particularly representative, assuming that the present number are appointed, to have a third of them nominated by the union movement. Additionally, there has never been the equivalent of a Site Check Inspector in Western Australia, as has long been the custom on the Eastern seaboard.

746. Consistent with my views as to the title of other Inspectorate positions, I also consider that the name “Employee’s Inspector” should be changed to “Employee’s Mining Officer” or some such title.

Recommendation 33

That the position of Employee’s Inspector be retained.

Recommendation 34

The position of Employee’s Inspector be an appointed position and the district election provisions of the MSI Act and the Regulations should be repealed. The qualifications for appointment should remain the same.

345 See s 19(2) MSI Act
Recommendation 35

That the responsibilities of an Employee’s Inspector be re-focused to provide in particular, further support and assistance to health and safety representatives and committees in the performance of their role in the workplace. In particular emphasis should be placed on assistance in relation to the development of risk management principles and procedures.

Recommendation 36

That the powers of an Employee’s Inspector under the MSI Act be the same as those exercisable by all Inspectors and that subject to Recommendations 33-35, s 21(2) of the MSI Act be repealed.

Recommendation 37

That the position of Employee’s Inspector be re-titled consistent with Recommendations 25, 27 and 30, to “Employee’s Mining Officer” or like title.

Assistant Inspector

747. Provision is made in the legislation for the appointment of a fourth category of Inspector that being an Assistant Inspector.346 This position was created on the enactment of the MSI Act. The original intent was to enable those who had been Employee’s Inspectors for many years, but were unable to continue in that position for whatever reason, to be appointed Assistant Inspectors, so their skills and experience would not be lost to the mining industry.347

748. Since the MSI Act has been in operation no-one has been appointed to such a position. Given that in my view Employee’s Inspectors should simply now be appointed and not elected, the need for this category of Inspector falls away.

Recommendation 38

That the position of Assistant Inspector be abolished and that s 20 of the MSI Act be repealed with any necessary consequential amendments.

Legal Services

749. Whilst it is not a matter strictly relevant to Part 3 of the MSI Act, the provision of legal services to the Mines Inspectorate is a matter upon which I wish to comment. Presently, there exists within the RSD a legal capacity within the Strategic Development Branch through the position of Manager Legal and Policy. There are also two Senior Legislation and Policy Officer positions.

346 Section 20 MSI Act
347 See Hansard 14 September 1994 at 4292
750. As I understand it, these positions are not directly involved in the provision of legal advice in relation to investigations or potential prosecution activity. Rather, their focus is more on legal advice associated with policy and legislative matters.

751. In my view, the Mines Inspectorate would benefit from an expanded legal capacity to extend to advice on investigation activity to complement the investigation team and the preparation of prosecution briefs to the State Solicitor’s Office.

**Recommendation 39**

That the Mines Inspectorate maintain an internal legal capacity to provide general legal advice and assistance to the State Mining Engineer and other Mines Inspectorate staff. This capacity should be expanded to provide advice and assistance in relation to investigations into accidents and incidents and in the provision of any necessary assistance in relation to prosecution action by the State Solicitor’s Office.

**Resourcing Generally**

**Inspector/Employee Ratios**

752. As noted earlier, as at March 2009, the total actual number of Mines Inspectors in the Western Australian Inspectorate was, in both the Mines Safety and Health Management Branches, 39, within a total establishment of some 49 positions. It is also to be noted as referred to above, that excluding petroleum products, the minerals and resources industry now employs some 70,000 people in Western Australia.  

753. This compares to the total number of persons employed in the mining industry in Queensland being approximately 38,000 with an establishment of approximately 46 Inspectors and Inspection Officers within the Inspectorate, inclusive of those presently being recruited. In New South Wales there are approximately 34,000 employees in the industry with about 56 Mines Inspectors.

754. On the material available, this means that the present ratio of actual Mines Inspectors to employees in the industry in this State is approximately one to some 1,795 employees, with an establishment ratio of about one to some 1,430 employees. This compares to a ratio of about one to 880 for Queensland. The ratio is about one to 550 mining employees in New South Wales. Whilst the number of employees in the other principal mining States has also increased,

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348 Source: Information Services Section, Resources Safety Division, DMP
349 Discussions Chief Inspectors of Mines 11 March 2008; Annual Reports and Organisation Charts; ABS op cit (As noted earlier, a further eight positions have been advertised across all regions in June 2008 and remain vacant as at December 2008.)
the ratio of Inspectors to employees in Western Australia remains by far the lowest of any jurisdiction. These comparisons must also be considered in the context of the vast geographical dispersion of the mining industry in this State.

755. This strongly suggests the need to address this state of affairs in a premier mining State such as Western Australia.

756. Additionally is the ongoing issue of the inability of the Inspectorate to retain professional staff. In the period January 2003 to October 2005, the Mines Safety branch lost some nine Inspectors/technical staff. In the period January 2006 to December 2008 another twelve left the Branch. Whilst a few replacements have been made, attempts at recruitment have generally been less than successful.

757. A number of submissions went to the issue of the resourcing of the Mines Inspectorate. From the perspective of the industry, the CME emphasised, as part of its broader submission in relation to the operation of the regulator, the importance of strategies being implemented by Government to attract and retain appropriate skills and competencies. A significant element of this, in the view of the CME, is the need for flexible remuneration packages that reflect the skills and experience that is required.

758. Given that the Inspectorate has professional appointees, and in light of remuneration levels in the mining industry, there will be a limitation in attracting new staff in these circumstances. The view was expressed that unless Government is prepared to address this issue, then the capacity for change will be limited and this will have a detrimental impact on the mining industry. As part of the overall resourcing issue, it is also suggested that there be considered a process of secondments between the industry and the regulator, in an endeavour to build greater capacity. I endorse this concept strongly. An issue will be however, competitive remuneration.

759. Others supported these views. In its submission, the AMMA emphasised the need to attract and retain Inspectorate staff through competitive remuneration. The concept of an exchange of staff between the industry and the regulator was also supported, with the objective of creating a greater degree of understanding between the two to enhance safety and health outcomes more generally.

760. From the union perspective, remuneration that is competitive with the industry is also a theme taken up by the CFMEU. It is suggested that all Inspectors should be remunerated under the same arrangements and that industry matched salaries are needed to attract and retain the appropriate skills and experience.

761. As a professional body representing mining professionals throughout Australia, the AusIMM also identified the issue of competitive remuneration for Mines Inspectors as a key issue. It further suggested that industry could provide funding, in addition to that already provided by Government, to achieve such an outcome.
762. Associate Professor Lawrence from the University of New South Wales commented that the current severe shortage of mining engineers in Australia is hurting the capacity of regulators to recruit. It is noted that in the past in Western Australia recruitment abroad was necessary in times of strong demand, to resource the Inspectorate. Given the demand in the industry, in Associate Professor Lawrence’s view, salaries also must be high to attract and retain the staff needed.

763. In its submission, whilst not commenting on the specific issue of remuneration, the RSD noted that given the increased workload of the division, and the loss of staff, it is being increasingly required “to do more with less”. This is placing significant strain on the Inspectorate to maintain the standards required of it by legislation. This issue in the submission of the State Mining Engineer found expression in the following way:

“...The difficulty in attracting and retaining skilled and experienced staff of all disciplines to the inspectorate is notorious and has become even more acute in the present climate of a rapidly expanding, skills-hungry industry - the problem is not specifying the skill set, but in obtaining the requisite skilled (and experienced) staff within the inspectorate and then retaining their services in the face of industry offers of remuneration packages beyond the scope of the public sector where salaries and benefits are fixed across the sector”.

764. In my initial consultations for the Review, the lack of resourcing and availability of candidates for vacant positions was raised frequently, by those in the industry and by Inspectors. This was in the context of the lack of capacity to visit sites as frequently as would be preferable and to service regions. As it was put to me in one meeting:

“If you look at the Collie area here is one employee’s inspector, we don’t have a machinery inspector in Collie because he is based in Perth, machinery inspector we used to have in Collie in Perth at the moment, occ health, employee’s inspector, special inspector of mining, myself, the regional mining engineer...8 or 9...here now looking after two areas in this office. There used to be eight looking after this area and there was the Collie office on top of that... we’ve basically halved.”

765. The issue of the resourcing of regulators in the mining industry is not unique to Western Australia. Most regulators have and are facing the same challenge. In a South African study of attraction and retention in international mine health and safety inspectorates, the authors surveyed inspectorates from Canada, Argentina, Brazil, the United States, the United Kingdom, Russia, India, Namibia, Tanzania, Australia, Malaysia and Indonesia.  

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This study, which involved five Mines Inspectorates from Australia, identified that remuneration, in terms of the market differential, as a significant issue. It was concluded that “Almost all respondents, regardless of whether they felt that they were struggling to retain skills or not, felt that the mining industry’s ability to offer more competitive remuneration packages was an advantage they battled against in the war for talent.”

Similarly, in the 2005 Review of the Queensland Mines Inspectorate, the issue of remuneration was identified as a significant matter to be dealt with. The South African study suggested that various strategies, such as training and development programs, may play a useful role in skills retention. Additionally, a recurrent theme has also been the age profile of the Inspectorates, with a high percentage of officers in the Inspectorate in Queensland and in Western Australia, being close to retirement age. Coupled with the issue of salaries not being competitive with those available in the mining industry, particularly currently, these recruitment and retention challenges, are significantly heightened.

Furthermore, the lack of resourcing of Mines Inspectorates and the need for appropriate technical qualifications for Inspectors was the subject of critical observation recently by the Tasmanian Coroner’s Inquest into the deaths of three miners at the Renison Tin mine in Tasmania in 2001 and 2003.

In Western Australia, an initiative implemented from March 2006, to attempt to bridge the gap between industry and regulator remuneration, was the introduction of an attraction and retention bonus scheme. This entailed the payment of a bonus on top of existing salaries ranging from 10 per cent to 30 per cent, depending upon the level of the office. However, it seems that industry remuneration significantly increased over this period of time, substantially reducing the effectiveness of the scheme.

Additionally, whilst specific comparisons between Inspectorates given the somewhat differing classification structures, is not exact, the total remuneration levels in both Queensland and New South Wales, also appear to be higher.

There are other elements of remuneration that could be considered. For example, only Inspectors in Western Australia at or above level 8 appear to be eligible to participate in the Government Vehicle Scheme.

This compares for example to the Queensland Inspectorate, where Inspectors, except for Inspection Officers, are provided private plated vehicles although it is noted that these are available under “s 70 packages”, providing flexibility in remuneration arrangements, noted above.

352 Ibid at 6
353 Ibid at 10
354 Reforms to the Queensland Mines Inspectorate October 2005 at 5
355 Resolve Group op cit at 14
356 Renison Tin Mine Inquest op cit
357 See salary and benefit schedules WA, Qld and NSW Inspectorates
773. Also in Queensland, at the time of the establishment of “s 70 packages” for Inspectors in 1996, the relativity set between Inspectors with mining and engineering qualifications was some 70% of the average salaries for Mine Managers. The most recent review suggests that further consideration is being given to the issue of remuneration and conditions of service of Inspectorate staff. A matter that could be the subject of further consideration in Western Australia is the level of the attraction of retention bonus and whether it could be further adjusted, to more reflect market movements in remuneration, in particular in those positions in greatest demand.

774. In addition, the Queensland State Government announced recently that it would impose a “health and safety levy” on the mining industry in that State, to boost the resources of the Queensland Mines Inspectorate. The levy is expected to raise $19.5m in 2008-09, to add to the $26m cost of the provision of safety and health services to the industry. This is in conjunction with the recruitment of additional Inspectors for 2008 and a boost to inspection services. The concept of a levy appears to have been opposed by the industry in this State. It is not a matter upon which any submissions have been made and is a matter ultimately for Government.

775. A significant advantage exists in Queensland however, through the capacity as noted above, to use fixed term contracts of employment that are not restricted by public service remuneration levels. This means that particularly for those positions that require skills and experience in the greatest demand outside of the public sector, a greater degree of flexibility is available to tailor flexible remuneration packages, for a fixed term appointment. Of course, such positions do not carry the security of tenure of permanent officer positions, but provide a tool to be used in the “recruitment mix” available.

776. Even allowing for the current fall off in labour demand in the Western Australian economy, resulting from the global economic shocks, having such a capacity under public sector law could only be an advantage, in the battle for the recruitment of labour in demand, across a number of sectors. Whilst strictly outside of my Terms of Reference, I consider that the Public Sector Management Act 1994 (WA) should be amended in similar terms to s 122 of the Public Service Act 2008 (Qld).

777. As noted, the amendment to the public sector legislation in Queensland arose directly from a review of the Queensland Mines Inspectorate in 1996, following the Mining Warden’s Inquiry into the Moura No 2 mine disaster, and recommendations in relation to recruitment, training and remuneration of mines inspectors.

778. The issue of resourcing was also identified in the Ritter Inquiry, and comment was made that “urgent attention needs to be given to doing what is required to

358 Reforms to the Queensland mines Inspectorate op cit at 5
359 See Queensland Government Budget media release 4 June 2008
provide for sufficient remuneration for those working in the inspectorate."\textsuperscript{361} However no specific recommendations in relation to increased resourcing were seemingly made, in the particular section of the Report dealing with recommendations.\textsuperscript{362}

779. In its submission, the RSD noted that from the commencement of the MSI Act, the industry workforce has grown by about 80 per cent, in an environment in which the regulator cannot attract, and has great difficulty in retaining, technical staff. It is noted that over the last two years, the Division has consistently operated at about 20 per cent under establishment level, despite aggressive recruitment campaigns.

780. This is not to say that the existing resources cannot be utilised more effectively. However, until these fundamental issues are resolved, in my view there will inevitably continue to be a “disconnect”, between what the industry expects of its regulator, and what it can deliver.

Conclusion

781. In a premier mining State such as Western Australia with its geographic challenges, relative to other principal mining States, the present resourcing of the Mines Inspectorate is in need of urgent attention.

<table>
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<th>Recommendation 40</th>
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<td>That there is a substantial increase in the resourcing of the RSD to ensure that the Mines Inspectorate is able to meet the demands placed upon it by the mining industry.</td>
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<th>Recommendation 41</th>
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<td>That the ratios of Mines Inspectorate staff to those persons employed in the mining industry, is placed on a more sustainable footing in comparison to other mining jurisdictions and that this is kept under review.</td>
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<th>Recommendation 42</th>
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<td>That in conjunction with Recommendations 40 and 41, there is a review of remuneration levels and conditions of appointment within the Mines Inspectorate to ensure that as far as possible, there is a closer correlation between salaries and conditions of appointment offered, to those prevailing in the mining industry.</td>
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\textsuperscript{361} Ritter Inquiry op cit at 375
\textsuperscript{362} Ritter Inquiry op cit at 374-377 in particular Recommendations 25-32. There was recognition of the need for an adequately resourced regulator under the heading “DOIR – Findings and Conclusions” however none of the points made were the subject of specific recommendations in the “DOIR Recommendations” section at 376-377 or the summary of recommendations at 378-383
Recommendation 43

That the Public Sector Management Act 1994 (WA) be amended to enable the appointment of persons on fixed term contracts of employment in similar terms to s 122 of the Public Service Act 2008 (Qld)

Powers Yet No Functions

782. The terms of Division 2 generally set out the powers of Mines Inspectors and obligations upon them, when intending to inspect a mine and various other matters such as notifying results of mine inspections; inquiring into complaints received from a person working at a mine; liaison between Employee’s Inspectors and safety and health representatives and other machinery type provisions.

783. Notably, and surprisingly, whilst the terms of Division 2 deal extensively with the powers of Inspectors, nowhere to be found is any provision which sets out the duties and functions of Mines Inspectors for the purposes of the MSI Act. I note that similarly, under Part IV of the OSH Act, whilst the powers of Inspectors under that legislation are set out in s 43, there is also no provision dealing with the duties and functions of Inspectors.

784. This stands in contrast to other jurisdictions in relation to both mining and general industry, where the duties and functions of inspectors are generally set out. For example, under the MQSH Act (Qld), s 125, dealing with functions of Inspectors and Inspection Officers, is in the following terms:

“Functions of inspectors and inspection officers

Inspectors and inspection officers have the following functions—

(a) to enforce this Act;
(b) to monitor safety and health performance at mines;
(c) to inspect and audit mines to assess whether risk is at an acceptable level;
(d) to help persons to achieve the purposes of this Act by providing advice and information on how the purposes are to be achieved;
(e) to check that safety and health management systems and procedures are in place to control risk to persons affected by operations;
(f) to provide the advice and help that may be required from time to time during emergencies at mines that may affect the safety or health of persons;
(g) if unsafe practices or conditions at mines are detected, to ensure timely corrective or remedial action is being taken and, if not, require it to be taken;
(h) to investigate serious accidents and high potential incidents and other matters at mines that affect the
successful management of risk to persons;
(i) to investigate complaints about matters relating to safety”

785. In my view the absence of a provision in the MSI Act setting out the functions of Inspectors is a significant omission that should be rectified. The specification of the functions and role of a regulator in legislation is an important means of specifying how the attainment of the objects of the MSI Act in s 3(1)(a) to (d) in particular, will be aided. Whilst there is some limited reference to particular functions, such as for example, the inquiring into and dealing with complaints received\(^\text{363}\) the omission of a key function of the Mines Inspectorate, such as advising and assisting persons to meet their obligations under the MSI Act, is significant.

786. This is particularly notable in the context of the express power for a Mines Inspector to provide information to any person for the purpose of facilitating compliance with the MSI Act, introduced following the Laing Review.\(^\text{364}\)

787. The specification of the functions of the Inspectorate is also important in shaping the “culture” of the organisation. Guideposts are needed so that not only individual Inspectors, but the Inspectorate as a whole, will have clarity in terms of what the statute says as to why they exist and what they are in an overall sense, required to do. Correspondingly, duty holders will also have some guidance as to the role of the regulator vis a vis them.

**Recommendation 44**

That the MSI Act be amended by inserting a new s 22 prescribing the functions of the Mines Inspectorate in similar terms to that contained in s 125 of the MQSH Act (Qld).

**Inspection Methodology**

788. Consistent with the transition to a risk management based model of regulation, the role of the Inspectorate will require change. In particular, emphasis needs to be placed upon the requirement for the regulator, in moving into an environment where a risk management model is in place, to adequately respond to the demands that may impose on the regulator’s resources. The State Mining Engineer, in his submission, noted that in relation to the modus operandi of the Inspectorate:

“\text{It may well be time for the regulatory authority to let go the reins in respect of detailed and specific directions to mining enterprises. This does not mean that intervention strategies and actions will not be required of the inspectorate. However, the most effective approach for the inspectorate in the future may well be to concentrate on auditing, advising, educating and fostering a self-regulatory approach by the}"

\(^{363}\) Section 24 Act
\(^{364}\) Section 21(1)(ca) as introduced by the Mines Safety and Inspection Amendment Act No. 68 of 2004
industry (at least, in so far as the various industry sectors may be capable of indicting such an approach).\textsuperscript{365}

789. This is a particularly salient observation and one with which I am in agreement. As noted earlier, it is my perception that the mining industry in this State, in terms of safety and health regulation, is in a period of transition. That transition, will, as I have earlier recommended, inevitably entail a movement to a risk management based approach to safety and health regulation in the workplace. This transition will have significant implications for the Inspectorate, in terms of not only its current composition, but also its regulatory methodology.

790. I have no doubt a different modus operandi by the regulator, focusing on auditing and reviewing a mine operator’s approach to safety and health management is inevitable. This has been a trend in the mining industry, in more pronounced terms in New South Wales and Queensland. It is arguably a logical extension of the Robens general duties approach to health and safety regulation, in terms of the means by which general duties obligations can be fulfilled.

791. This transition will entail the Inspectorate moving away from a focus on compliance with regulations to an approach focussed on auditing the self regulatory activities of mine operators (“auditing the auditors”); a more pro-active rather than re-active approach and one that focuses on team based site visits and inspection methodologies. As was noted by the expert group of the MSIG:

“With the advent of the safety management systems approach, some regulators have switched their emphasis to auditing these systems which essentially means checking for compliance with these systems. This can be a time consuming process and, in any case, companies should be doing this themselves. A potentially more efficient policy for the regulator is therefore to audit the auditors, that is to examine the audits done for the company and identify weaknesses in the audit process and ways it can be improved. This will be most effective if it is not just a desk-top process but involves going out and independently collecting data to verify the conclusions in audit reports. However, for this approach to be successful, companies must have well developed audit systems. As with other aspects of management systems, it is far from certain that companies have developed their internal systems to a level of maturity that permits “bad news” as may be discovered by audits, to be communicated back up the management chain and acted upon. Even in mature safety case regimes, it is rare to find internal company audit systems able to be used in this way by the regulator, therefore, we conclude that an important role for the regulatory body is to carry out its own audits...

In conclusion, at the highest level, the principle activity of a regulator is concerned with making a judgment of whether the site operator has identified the hazards, assessed the risks, implemented appropriate

\textsuperscript{365} See submission of the State Mining Engineer at B37
control measures for the risks and has an adequate management system for all these processes which are implemented on site. Where there are deficiencies, the regulator must have the capability to recognise these and develop appropriate strategies, including legal options where necessary, to persuade senior staff to make appropriate changes..."

792. A constant challenge for all regulators, not just in the mining industry, is the most effective use of scarce regulatory resources. In the case of the Mines Inspectorate, those resources have been, as I have outlined earlier, declining over recent years to a point where in my view, the resourcing constraints are now parlous.

793. Notwithstanding this, the Mines Inspectorate has recently developed a strategic tool, to assist it in adopting priorities for inspections throughout the State, based upon a risk assessment model. The Resource Management Index ("the RMI") establishes a systematic approach to assessing the risk profile of an operation, by the incorporation of intrinsic hazards which are a part of the fundamental underlying risk profile of a mining operation.

794. The RMI enables an overall risk profile or risk rating to be established for a mining operation, as a consequence of the consideration of mine type (eg underground, surface, processing plant), mining stage (eg exploration, development, operations), and number of personnel, in addition to the application of further variables, for site specific hazards that may exist at these various types of mining operations.

795. It is emphasised that the RMI is focused on the incorporation of intrinsic hazards not influenced by initiatives taken by mine management to manage risks. In addition to the risk ranking system produced by the RMI, the Mines Inspectorate also relies upon other factors, to validate and support the inspection activity based on the RMI system. These factors include results of audits conducted as a part of the MODAMS audit system; overall injury data from the AXTAT system, including relevant information from the CONTAM and incident data bases.

796. In combination with the RMI, these other sources of data, enable individual Inspectors to make an informed decision, in relation to targeted inspection strategies.

797. Whilst the RMI system is based upon priorities determined two or so years ago, and they may now be in need of updating, the development of this risk based approach to inspection planning, is a very welcome initiative. It would appear to be similar to approaches to inspection methodology adopted in the Queensland and New South Wales mining inspectorates respectively.

798. Given that the RMI was developed some years ago now, it would be appropriate to devote sufficient resources to review and update the system to ensure that the inspection priorities remain current.

366 MSIG op cit at 36-37
367 See Gunningham 2007 op cit at 103
A Team Based Approach

799. Generally as I understand it, and from my observations during the initial consultations, and from a review of mine record book entries, the Mines Inspectorate has tended to adopt an individual approach to inspection within the various districts. Sometimes site inspections are performed in pairs. Given the resourcing constraints previously and presently, this is understandable. Subject to additional resourcing as I have earlier recommended, there may be additional benefit derived from a broader based compliance focus, involving a more multi disciplinary team approach. This would be particularly valuable in a shift to a risk management regulatory model, which would involve a greater focus on auditing mine operations.

Training and Development

800. As has been previously identified, training and development is crucial to the up skilling of any regulator, and may provide a competitive edge in recruitment and retention, in the current skills hungry environment in which the regulator struggles to compete with industry salaries and conditions of employment.

801. Also, the reality is in my view, unless the current differentials between regulator and industry remuneration can be narrowed, and those from industry can be attracted to the regulator, or the regulator be seen as a viable career alternative, the Mines Inspectorate may need to increasingly rely upon internal training and development, to acquire the necessary skills.

802. The Mines Inspectorate has previously identified the issue of training and development as a priority issue, however, due to resource constraints the initiative has not progressed adequately. A training matrix has been prepared for Mines Inspectorate staff, which encompasses a broad range of learning areas from hazard identification and risk assessment and management through to investigative techniques, including preparing and gathering evidence.

803. Various other administrative and management planning learning areas are included in the training matrix. Whilst I understand recent additional resources have been devoted to internal training and development, in my view, considerable additional resources need be devoted to this important activity. In particular, given the inevitable shift to a risk management regulatory model, and consistent with Professor Joy’s submissions to the Review, an appropriate competency in risk management is essential. This will incorporate courses such as “G3” or similar, such as the “MNMMISM 617A Establish the risk management system” risk management competency program referred to above. Such training and development would be in addition to, and supplement the generic competency based training for Inspectorate staff, referred to above. A general training needs analysis should be completed, to identify individual training needs for Inspectors and plans developed accordingly.
804. In addition, and as noted in Chapter 13, all Mines Inspectors and those involved in enforcement activity, should receive appropriate training in the application of the Inspectorate’s Enforcement Policy (as may be amended), within the overall framework of the Enforcement Pyramid approach. In particular, a focus of such training needs to be the circumstances where escalation up the Enforcement Pyramid is appropriate.

805. In conjunction with an enhanced training and development program, there should be a commitment to the preparation of key performance indicators by which the individual performance of Mines Inspectors can be evaluated.

806. In this respect, I have been provided with up to date JDF’s for the Director Mines Safety (State Mining Engineer), Senior, District and Special Inspectors (Machinery and Electrical) and Employee’s Inspector positions.

807. As well as setting out the relevant statement of duties to be performed in the roles, the JDFs also specify relevant criterion in relation to personal qualities, qualifications and experience and knowledge. With a shift in regulatory focus as recommended above, and the shift generally to a risk management regulatory regime, these criterion may need revision.

Recommendation 45

That the Mines Inspectorate continue to use the Risk Management Index along with other indicators, such as prior safety performance history, responsiveness to inspectorial activity and other relevant considerations, in its inspectorial approach.

Recommendation 46

That the Mines Inspectorate, subject to appropriate resourcing, adopt a team based approach to inspection and focus on broad compliance reviews in conjunction with the suggested reorientation set out above.

Recommendation 47

That the Mines Inspectorate personnel undergo training and development in relation to:

(a) risk management;
(b) workplace inspection methodology with a focus on “whole of mine” reviews and OHS system audits and reviews;
(c) the Mines Inspectorate Enforcement Policy and the DPP guidelines on prosecution (as may be amended); and
(d) communications and leadership skills, report writing and other administrative skills.
Recommendation 48
That there be developed key performance indicators and individual training and development plans for personnel in the Mines Inspectorate.

NMSF Compliance

808. Also relevant to a review of Part 3 of the MSI Act, are Principles 21, 23 and 24 of the NMSF. These require that legislation provide for the establishment of a professional and technically competent Mines Inspectorate, with appropriate experience, skills and qualifications. Additionally, it provides that the Inspectorate shall be provided with adequate powers and resources to undertake an independent evaluation of an operator’s safety and health management system. Whilst the legislative framework of the MSI Act generally complies with these principles, inherent in them is a consideration of the issues I have identified above, in particular the pressing issue of resourcing and the identification and acquisition of the necessary competencies.
CHAPTER 9 – TRIPARTITE POLICY DEVELOPMENT

809. Since the enactment of the OSH Act and the subsequent enactment of the MSI Act, the principle of tripartite policy development in health and safety this State has been firmly entrenched. Under the OSH Act the COSH, known more generally as the WorkSafe Western Australia Commission and its predecessors, were established in 1985 as the peak tripartite body.

810. This body is responsible for health and safety policy development comprising representatives of employers, employee organisations, the WorkSafe Commissioner, public service officers and persons with particular knowledge and expertise in health and safety matters. The COSH has an independent Chair, who is appointed by the responsible Minister. The statutory functions of the COSH are set out in s 14 of the OSH Act.

Background to the MIAC

811. The Mining Industry Advisory Committee (MIAC) was established in April 2005 under s 14A of the OSH Act as a statutory advisory body on matters relating to occupational safety and health matters in the mining industry. The MIAC replaced the MOSHAB which was established under s 90(3) of the then MSI Act and was abolished following the Laing Review.368

Structure and Functions

812. The functions of the MIAC are to:

• advise and make recommendations to the Minister and the COSH on occupational safety and health matters concerning the mining industry;
• liaise with the COSH to coordinate activities on related functions and to maintain parallel standards;
• inquire and report into matters relating to occupational safety and health in the mining industry referred to by the Ministers;
• make recommendations to the Minister regarding the formulation, amendment or repeal of occupational safety and health laws;
• prepare or recommend the adoption of codes of practice, guidelines, standards, specifications or other guidance material for the purpose of assisting employers, self-employed persons, employees, manufacturers or other persons to maintain appropriate standards of occupational safety and health in the mining industry; and

368 Note that s 115 of the Occupational Safety and Health Legislation Amendment and Repeal Act 2004 (No. 51 of 2004) repealed s 90 of the MSI Act
provide advice on education and publications, and training and training courses, with respect to occupational safety and health in the mining industry.  

813. Membership of the MIAC continues the tripartite philosophy, ensuring representation from industry, unions and government. The Chairperson of the MIAC is to be a member of the COSH nominated under s 6(2)(c)(ii) of the OSH Act. The present membership appointed includes the Director-General Department of Commerce and the State Mining Engineer, two industry representatives, two union representatives and two expert members. All members (excluding the Chair) hold office for a term of up to three years, and are eligible for re-election. Currently meetings are held every second month, with the first meeting occurring in October 2005.

814. The MOSHAB delivered a final report in March 2005, prior to being replaced by the MIAC. The report highlighted those initiatives and emerging issues affecting occupational safety and health in the mining industry for consideration by the MIAC on its formation. These issues included:

- enhancing the role of, and participation by, safety and health representatives within the minerals industry;
- promoting compliance by the minerals industry on electrical safety matters;
- progressing a Code of Practice for the training and certification of the competency of winder drivers in WA mines;
- an extended working hours review; and
- other emerging issues of interest.

815. The MIAC has since addressed and progressed some of these issues. In particular, as noted below, a Code of Practice for working hours was issued by the MIAC and the COSH in 2006.

816. In terms of submissions and made to the Review, and my initial consultations, there is continued support for the MIAC.

817. The issue raised however, is said to be the lack of an overarching long term strategic direction for the MIAC. This sentiment was shared by some of the major industry representatives, who expressed the need for a greater strategic focus of the MIAC in their respective submissions. Whilst these key representatives have welcomed the establishment of the MIAC, the level of goodwill that exists amongst members and the improvements that have been made since the abolition of the MOSHAB, they also highlight the need for a formal strategic planning process and suggest that a review of the structure and operations of the MIAC be undertaken.

369 See s 14A(3) OSH Act
370 See s 14A(4) OSH Act
818. A significant development since the last Review of the MSI Act has been the addition of mining industry representatives to the membership of the COSH, in terms of persons nominated by the CME and Unions WA. This flowed from recommendations of the Laing Review. Combined with the formation of the MIAC and the cross over of membership between the two bodies, the heightened degree of policy co-ordination is already recognised. The working relationship between both the MIAC and the COSH has been described to me as positive and productive, and represents a significant improvement on the prior arrangements in existence with the MIAC’s predecessor, the MOSHAB.

819. The MIAC Rules of Operation provides guidance on how MIAC is to liaise with the COSH, handle the decision making process and seek public comment on publications issued. These rules have assisted in matters affecting the operation of both tripartite bodies. Some submissions expressed the need to clarify and strengthen the role of the MIAC and its connection with the COSH. However, the general consensus of members of these tripartite bodies is that the interaction between the MIAC and the COSH has improved.

820. Of those that did comment on the MIAC, from an employer perspective, the CCIWA supported its formation and focussed in particular on the closer working relationship between it and the COSH, in terms of policy development and co-ordination. However, in its view, the structure and operations of the MIAC could benefit from a review, particularly in relation to its working relationship with the COSH. In this respect the view expressed is that the present arrangement between the two policy bodies is uncertain and the preferred position is that the COSH assumes responsibility for the MIAC and that it report directly to the responsible Minister on all matters, including mine safety and health.

Outcomes – Codes, Guidance Materials and Other Activity

821. Under s 93(1) of the MSI Act, the Minister may approve a Code of Practice which has been considered by the MIAC, for the purpose of providing practical guidance to employers, self-employed persons and employees and other persons to whom a duty of care is imposed under the MSI Act. A Code of Practice may consist of any code, standard rule, specification or provision relating to occupational safety or health that is prepared by any appropriate body.

822. During 2005-06, MIAC met five times and endorsed three sets of Guidelines on noise control, general duty of care and accident reporting, two Guidance Notes on formal consultative processes at the workplace and flashback arrestors, and two Codes of Practice on working hours and welding. During the course of 2006-07 MIAC endorsed a Code of Practice and a Guideline on

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372 See s 6(2)(d) OSH Act
373 Laing Review at 48
374 Section 93(2) MSI Act
375 DOCEP Annual Report 2005-06, at 46
bullying in the workplace. For 2007-08 three Draft Codes of Practice have been released for public comment. The Codes include:

- Consultation at work;
- Design of mobile plant for use on mines; and
- Operation of mobile plant on mines.

823. The Consultation Code is designed to effectively foster cooperation and consultation between employers and employees in the workplace. The two Mobile Plant codes are intended to assist those involved in designing and operating mobile plant on mines to meet the legislative requirements of the MSI Act and Regulations.

824. In relation to Winder Drivers, a matter referred to the MIAC by the MOSHAB in October 2007, it was resolved to outsource the preparation of a draft Code of Practice, in accordance with a report previously prepared under the MOSHAB and consistent with the relevant NMSF principles. Whether this progresses at this juncture is uncertain, given the second stage of the review of the Licensing of High Risk Work, presently being undertaken by the ASCC. Other activities of MIAC over the 2006-07 year include consideration of developments arising under the NMSF and the outcomes of the MSIG and the Hicks Feasibility Study.

825. In terms of output, the MIAC has initiated a range of issues over the period of its existence and undoubtedly, compared to its predecessor, has been considerably more productive. However the nature of some of the guidance material produced by the MIAC, in terms of its complexity and volume, was the subject of comment by the CME.

826. In particular, is the suggestion that some of this material, because of its proposed scope across all industries, may have content that is not suited to the resource sector, and that there should be a greater focus on matters of priority to the mining industry. For example, there are still, despite the industry’s commitment to zero harm, fatalities and serious accidents occurring, with incidence rates still at levels above some other sectors of industry. This is one area that the MIAC could apply particular focus to in terms of where and in what circumstances those accidents are taking place; the taxonomy of those accidents; and the preventative strategies that mining operators can consider to address the root causes. It is noted that a presentation by the CME to the MIAC in August 2007 dealt with this issue, with further consideration to be given to it at subsequent meetings. Given the history the incidence of fatalities in the mining industry, and the inherently hazardous nature of the industry, this could be a matter to be given priority by the MIAC.

376 Ibid
377 See Laing Review at 210
The Future

827. If the mining industry in this State is to retain separate legislative coverage as I have recommended, then consistent with this approach, in principle, there seems to be no compelling argument to alter the existing structure and policy formulation approach of the MIAC, which stakeholders consider to be generally effective in the discharge of its statutory functions.

828. Whilst I can appreciate the view expressed above that there should be essentially one policy making body that reports to the responsible Minister on safety and health matters for all industries, it is important that particularly in the present context of developments nationally, the mining industry retains its own voice in relation to policy matters and that there be an appropriate focus on mining specific issues. A dilution of approach, in an effort to maintain consistency across jurisdictions, is not desirable in the present context in my view.

829. There has been no suggestion that I have detected, during the initial consultation stage of the Review, or in written submissions, that the current tripartite constitution and role of the MIAC should fundamentally change or be discontinued. There appears to be a general consensus among stakeholders that the current tripartite approach should be maintained and that the MIAC continues to perform a useful role. It is to be noted however, consistent with some of the observations above that as compared to the COSH the MIAC has not to date, prepared a strategic plan that focuses on its overall policy objectives for the improvement of safety and health in the mining industry.

830. Whether this is because as a special advisory committee to the COSH and the MIAC does not see the need for such a strategic approach has not been explored. There exists a plan of work that the MIAC prepares for endorsement by members, for the upcoming year. This is updated.

831. It is an object of the MSI Act in s3 (1) (d) and (e) that the legislation foster and facilitate cooperation and consultation between employers and employees and associations representing them and to provide for participation of those groups in the formulation and implementation of safety and health standards and working practices.

832. Procedures are also required to enable a contribution by employers and employees to the development of safety and health legislation for mines and mining operations and matters concerning its administration. The structure, operations and functions of the MIAC are broadly consistent with these objects, and consistent with the COSH for the purposes of the objects of the OHS Act in s 5(e),(f) and (g).

378 See the COSH Strategic Plan 2006-2010
Recommendation 49

That the MIAC:

(a) prepare a strategic plan as to its vision for safety and health in the mining industry in Western Australia;

(b) the plan should have a five year timeframe and be kept under review on an annual basis; and

(c) reporting against achievements should be incorporated into the COSH Annual Report.

NMSF Compliance

833. Importantly also, for present purposes, is the terms of the NMSF Legislative Framework. Within the general area of consultative arrangements, Principle 18 of the NMSF Legislative Framework refers to “Where appropriate, tripartite industry advisory safety and health councils shall be established to undertake jurisdiction-wide consultation.” Recognised in the NMSF framework is the importance of communication, consultation and the sharing of ideas not only at the operational level at a mine site, but also at the jurisdictional level.

834. Workforce, industry and government participation is encouraged, to enable those stakeholders to have relevant input to the policy development and legislative process. With the notable exception that the MIAC, unlike its counterpart bodies in Queensland and New South Wales for example, is not established under the MSI Act, but rather the OSH Act, it would appear that the role of the MIAC otherwise satisfies the thrust of this principle of the NMSF.
CHAPTER 10 – MANAGEMENT OF MINES

Background

835. The terms of Part 4 of the MSI Act were the subject of brief mention in the Laing Review. Submissions from the Department were noted to the effect that Part 4 should be reviewed as the current requirements to identify in the statute specific office holders with their requisite qualifications, “may not be consistent with modern occupational safety and health legislation, which places clear and undelegated responsibility on the principal employer.”

836. Furthermore, submissions were made to the Laing Review by the Department and others in relation to the requirement for various positions to possess certificates of competency under the MSI Act and the Regulations. In the Final Report of the Laing Review, as to the requirement for prescribed certificates of competency, it was observed that:

“In the context of the proposed review process it might well be concluded that it is not appropriate for the Act to detail the specific requirements for mine managers in legislation that provides for general duties and obligations. How the parties fulfil their obligations is substantially in their hands so long as the obligations are fulfilled. However, it had been considered that because of mining’s high hazard environment, it was necessary to continue some of those provisions which had been included in the Act for the specific purpose of allocating specific duties so that there could be no mistakes as to who carried particular responsibilities.”

Competent Persons

Historical Perspective

837. Certificates of competency in relation to specific occupational groups have had a long history in the coal and metalliferous mining industries, both in this State and in other jurisdictions in Australia and overseas.

838. As noted earlier, the origins of the requirement to have competent persons in charge of mining operations can be traced to the United Kingdom in the 19th century, in relation to the employment of children and women underground. Legislation in the United Kingdom gradually, not without opposition, introduced an inspection regime, and legislation in relation to both coal and metalliferous mines in 1872, prescribed that mine managers hold certificates of competency.

379 Laing Review at par 313.
380 Laing Review at par 317
839. The present requirements for the various certificates in Western Australia came into effect in regulations made in 1976. They have remained largely unchanged since that time. The provenance of these provisions has been extremely difficult to determine. A detailed search of the DOIR files from the relevant period revealed little as to their origin.

**Contemporary Challenges**

840. Can it be said that the same reasons for the introduction of minimum standards in the mining industry then, ie the need to have minimum standards of competency, to ensure safe operations, still exist today? Are the circumstances of the industry now more challenging such that the requirement for competency is indeed greater? In this connection as has been discussed earlier:

- Mining operations will, in the future, be more challenging in terms of deeper and hotter mines with more complex geotechnical environments;
- There will be a greater reliance on automation and attendant complexity in operations; and
- There will be greater corresponding complexity in minerals processing.

841. This was also recognised in 1998, when in “*Back from the Brink: Reshaping Minerals Tertiary Education*” the authors, observed at 13:

> “Within Australia, the massive underground and open-cut ore bodies developed in the 1960’s and 1970’s are well advanced in their lives. In many cases they are becoming harder to mine cost effectively and their replacement is becoming a significant issue. Finding and developing new ore bodies in the future and efficiently exploiting existing ore bodies will demand higher levels of technical expertise than the industry has previously needed. The Taskforce believes that industry has not yet properly understood how dependant it is on technical, engineering and scientific skills and the education system that develops them.”

842. In my view, these observations, made some ten years ago now, are particularly relevant in the context of the cyclical global demand for commodities, the progressive mining out of near surface deposits, and the long term demand for skills facing the industry.

843. In these circumstances, should consideration be given to a relaxation of standards, in particular in the underground sector of the industry? Indeed, could it even be said that, in terms of the various practical experience elements of the certificates, that they are presently not rigorous enough?

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381 See 1976 Regulations Government Gazette 1 April 1976 at 910
Present Statutory Requirements

Registered Manager

844. Under Part 4 of the MSI Act, the Principal Employer at the mine must appoint a Registered Manager for the mine and ensure the continuation of such an appointment. The Registered Manager is responsible on a daily basis for the control and supervision of the mine and mining operations at the mine in accordance with the MSI Act. There is of course, contrary to popular community perception, no statutory requirement for a Registered Manager to have any qualification or practical mining experience to occupy such a position.

845. The Registered Manager also has the management and control of the mine subject to any particular directions by the Principal Employer. Furthermore, the Registered Manager must, as far as is practicable:

- manage and control the operation of the mine in accordance with the MSI Act;
- ensure that every person who is appointed to perform any duty under the MSI Act understands the nature and scope of that duty; and
- ensure that every person, other than the Principal Employer and persons acting on behalf of the Principal Employer, perform all duties imposed on that person under the MSI Act.

There is also a requirement that a Registered Manager appointed to such a position must not act as the Registered Manager for more than one mine, without the approval of the State Mining Engineer. This provision is clearly intended to require that the duly appointed Manager, devote his full time and attention to the operation of the particular mine in respect of which he has been appointed.

Other Appointments

Underground Operations

846. In addition to the Registered Manager position, certain other management appointments are required to be made. In any underground mine the Principal Employer (or the Registered Manager under s 33A) must appoint an Underground Manager for the mine, who has responsibility to control and supervise the underground mining operations on a daily basis. There are two categories of such appointment. In the case of an Underground Manager at a mine which employs 25 or more persons underground such a person:

- may be the Registered Manager; and

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383 Section 33(3) MSI Act
384 Section 43 MSI Act
385 Ibid
386 Section 33(5) MSI Act
must hold a FCCC or an equivalent certificate deemed appropriate by the Board.\textsuperscript{387}

847. In the case of a mine employing less than 25 persons underground the Underground Manager:

- again may be the Registered Manager; and
- must have an Underground Supervisor’s Certificate of Competency or an equivalent certificate deemed appropriate by the Board; or
- if the State Mining Engineer so directs, must hold a FCCC, because of the nature of the underground operations.\textsuperscript{388}

848. As with the Registered Manager position, an alternate and deputy underground manager must also be appointed from such qualified persons, to cover during the absence of the duly appointed Underground Manager.\textsuperscript{389}

Quarry Operations

849. In the case of quarry operations, the Principal Employer (or Registered Manager under s 33A) must appoint a Quarry Manager who has the control and supervision of a quarry on a daily basis.\textsuperscript{390} Again, as with underground operations, the same criteria, by size of operation, applies to a quarry as to underground operations. Where 25 or more persons are employed the Quarry Manager:

- may be the Registered Manager; and
- must hold either a FCCC or a Quarry Manager’s Certificate of Competency or, in a quarry in which explosives are not used, a Restricted Quarry Manager’s Certificate of Competency.\textsuperscript{391}

850. In the case of a quarry employing less than 25 employees, the Quarry Manager:

- may be the Registered Manager; and
- must hold a FCCC, a Quarry Manager’s Certificate of Competency, or a Restricted Quarry Manager’s Certificate of Competency.\textsuperscript{392}

851. In the case of a quarry with less than 25 employees in which no explosives are used, an exemption may be granted from compliance with these requirements.\textsuperscript{393} Likewise, in a “small quarry” (which is not a term defined in the MSI Act), but I take to mean one in which fewer than 25 persons are employed...
employed, even where explosives are used, the State Mining Engineer may grant an exemption from compliance with the certification requirements. Alternate and Deputy Quarry Managers are, as with Underground Managers, required to be appointed in the absence of the appointed Quarry Manager.394

852. Furthermore, as with the Registered Manager, an Underground Manager and a Quarry Manager have generally the same duties and responsibilities in respect of supervision and control, as applicable under s 43, in relation to the operations within their respective responsibilities.395

Certificates of Competency

853. The certificates of competency provisions are set out in Division 2 of Part 4 of the MSI Act. This Part establishes the Board, which is required to examine candidates for certificates of competency and issue the same; deal with complaints concerning holders of certificates of competency and perform such other functions as may be required by the Regulations.396 Presently, no other functions are prescribed.

854. Division 3 of Part 2 of the Regulations deals with the Board, its constitution and proceedings and the issuance of certificates of competency. By Sub Division C, reg 2.21 specifies the requirements for a FCCC. Regulation 2.22 sets out the requirements for a Quarry Manager’s Certificate and reg 2.23 the requirements for an Underground Supervisor’s Certificate.

855. Additionally, regs 2.24 and 2.25 set out a requirement for an Underground Deputy’s Certificate and a Restricted Quarry Manager’s Certificate respectively. Further, by regs 2.26 – 2.28 are set out the various requirements for the holding of a Winding Engine Driver’s Certificate, Classes 1 and 2. By Sub Division B persons are not to act in the positions for which the respective certificates of competency are required, unless they are in possession of the appropriate certificate, otherwise an offence is committed.

FCCC

856. In order to obtain a FCCC an applicant must satisfy the Board that the applicant has:

- a degree of Bachelor of Engineering in mining from any Australian University or an equivalent qualification deemed appropriate by the Board;
- has passed an examination set by the Board on the MSI Act and the Regulations;
- is at least 25 years old;
- has had at least five years experience at a mine with at least three years of which being in underground operations;
- is of good character; and

394 Section 37 MSI Act
395 Section 43A MSI Act
396 Section 48(2) Act
857. By reg 2.21(4), the practical experience required for the FCCC includes for underground coal mining operations:

- six months coal face experience winning coal;
- three months experience in ventilation control including dust and gas monitoring; and
- competency in roof support, persons and materials transport, and general mining applications.

858. In other cases, the person must have;

- face experience in operating a rock drill on developing and stoping faces for at least three months;
- experience using explosives for both development and stoping for not less than three months; and
- at least six months full time underground employment in ground support, haulage and transport and general mine servicing.

859. Other certificate of competency requirements as prescribed by the Regulations are set out in annexure 8.

Queensland and New South Wales

860. The two other principal mining jurisdictions of Queensland and New South Wales have somewhat similar statutory requirements in relation to the appointment of competent persons. The method by which such competency is assessed and certified, by way of an independent body, is in similar terms to the Board in this State. An outline of those provisions by way of comparison with the Western Australian requirements is contained at annexure 8.

The Role of the Principal Employer

861. The philosophy underpinned by Part 4 of the MSI Act, is to require accountability and responsibility through the Principal Employer who by s 4, may be the proprietor, lessee or occupier of the mine and the person or entity (normally) which has the overall control and supervision of the mining operation. The accountability of the Principal Employer is provided by s 13 of the MSI Act, which requires the Principal Employer:

“to take such measures as are practicable to ensure that the mine and the means of access to and egress from the mine are such that persons who are at the mine, or use the means of access to or egress from the mine, are not exposed to hazards.”

862. This provision is very significant. It creates an overarching responsibility which cannot be avoided by the appointment of statutorily required positions under the legislation. The Principal Employer is ultimately accountable for
ensuring that appropriate statutory appointments are made in respect of surface and underground mining operations, which appointment power may be conferred upon the Registered Manager by written authority.

863. Crucially in my view, and a provision which is seldom referred to, is the requirement that the Principal Employer make such financial and other provisions as:

“are necessary to ensure so far as is practicable, that the mine is planned, laid out, managed, and worked in accordance with the relevant statutory provisions and the imposition of a duty imposed by this Act on some other person does not derogate from the duties imposed on principal employers by this section.”  

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864. This ensures that the entity with overall responsibility for the mine operation, cannot lawfully withhold necessary financial resources that are required to satisfy the obligations imposed by the MSI Act. This provision is particularly relevant to the relationship between the Principal Employer and the Registered Manager, and is to be read with ss 44 and 46 of the MSI Act, to appreciate its full implications, in particular s 46(4).

865. Whilst, therefore, the statutory appointments may be made by the Registered Manager, it is plain from the terms of the MSI Act read as a whole, that the Principal Employer remains responsible and accountable in respect of the mine operations. Importantly, the general duties responsibilities of the Principal Employer are not discharged by the appointment of a Registered Manager for a mine.  

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866. No submissions or commentary was directed to these provisions. Given their importance, I do not recommend any change.

Questions

867. Given the existence of the non delegable duty of care prescribed by s 9(1) of the MSI Act, requiring an employer, so far as is practicable, to maintain a system of work, that includes the provision of appropriately skilled and qualified personnel:

(a) Should Part 4 of the MSI Act continue to prescribe the requirement to appoint management positions for open cut and underground operations at all?; or

(b) Should the legislation merely require the Principal Employer to ensure a competent management structure is in place?

NMSF Considerations

868. Consideration also needs to be given to the terms of the NMSF Legislative Framework, as provided for in Principles 11 to 15. Principle 11 provides:

397 Section 32(2) MSI Act
398 Section 9(5) MSI Act
“The legislation shall specify key positions within the mine management and supervision structure of the mine and the functions, responsibilities and required competences of persons in those positions.”

869. It is intended by this principle, that the legislation should identify what key functions, responsibilities and competencies of a person in these key positions should have.

870. Recognition of the role of the Registered Manager or other such office is dealt with by Principle 12 which refers to the appointment of:

“the most senior management executive based at, or near, the mine site as the person with specified key obligations and responsibilities for safety and health issues at the mine.”

871. Recognition is also given in the NMSF Framework to the particular hazards arising in underground mining where, by Principle 13, it is noted that:

“specific obligations may need to be placed on key personnel supervising underground mining operations.”

872. Principles 14 and 15 deal respectively with obligations being proportionate to the degree of control exercised and provision existing for replacement personnel in the absence of a primary appointee. The NMSF principles do not require any particular mechanism for the determination of the competency for appointments required by legislation. Thus, whether Boards are retained, or other mechanisms are ultimately developed, is unaffected by the NMSF Framework.

873. Whilst not specifically the subject of the NMSF Legislative Framework, the question of competencies more generally, is the subject of Strategy 2: Competency Support. This is has yet to be developed to the point of the publication of a strategy document for public consultation, as is the case for the strategies on legislation, consultation and a national data set. However, the goal of this strategy is:

“To encourage and promote continuous skills development and competency nationwide, in support of the progressive move to industry-based assessments of competency.”

874. It is recognised that the task of migrating from the existing competency system, based on certificates and Boards in the respective jurisdictions, is a very large and complex one. This is undoubtedly the case. Each jurisdiction has its own legislative framework, with some having the relevant mining statutory positions in other than health and safety legislation, such as that relating to resource management.

399 NMSF Strategy 2 : Competency Support Outline
875. Differing policy approaches to the application of statutory requirements, are applied by the various Boards in each jurisdiction. There is no alignment of key positions prescribed in each jurisdiction which makes interstate comparisons difficult. Some jurisdictions already recognise some competency based qualifications, as an alternative to the traditional academic and practical experience requirements, in parallel. Others presently do not.

876. Thus while the ultimate goal may be a national competency based model, in my view, in at least the short to medium term, realistically, the existing arrangements will need to continue. It would also defeat the overall purpose of the NMSF process, to which the respective States appear to be committed, for one jurisdiction to strike out on its own in this regard, at least at this juncture.

Answers

877. Returning to the questions posed above, for legislation to comply with the NMSF Legislative Framework, key positions with relevant competencies, need to be retained. Thus to be compliant in this respect in answer to the two questions above in (a) and (b), and the Laing Review observations, it would seem that the MSI Act or the Regulations need to retain in some form, the nomination of key positions within a mine and the competencies for those positions.

Board of Examiners

History

878. The Board and its predecessors have a long history in this State. A brief outline follows.

879. The first Board came into existence under the Mines Regulation Act 1895, formed to determine competency for engine drivers under that legislation. The Board was required to examine candidates who may qualify as engine drivers, and was empowered to grant a “certificate of fitness and competence” if so satisfied.400

880. The principle of a Board was carried through into the Mines Regulation Act 1946, where all underground workings were required to be under the control of a Registered Manager holding a Mine Manager’s Certificate of Competency or Service, granted by the Board. Similar provisions existed for Underground Supervisor’s Certificates.401

881. In the coal sector, two Boards were established under the Coal Mines Regulation Act 1902. The two separate Boards included:

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400 Sections 33 and 34 Mines Regulation Act 1895
401 Section 25 Mines Regulation Act 1946
• a Board for Mining Managers, Under-managers and Overmen; and
• a Board for Engine-Drivers in coal mines.

882. The Boards were formed for the purposes of granting certificates of competency and of service and consisted of not more than three members and a secretary.

883. At the time under this legislation, there existed two classes of certificates they being first-class certificates, dealing with fitness to be a mine manager and second-class certificates, providing for fitness to be an under-manager or overman.

884. Both required practical experience in coal mines of at least five years.

885. In terms of procedure, the Board was required to conduct examinations of applicants for certificates of competency or service, on a partly oral and partly written basis, and issue certificates to the successful parties.

886. The Boards were also able to inquire into the competency of a manager and cancel a certificate in case of unfitness for holding such a position. These provisions continued on, with some modifications, under the Coal Mines Regulation Act 1946.

887. On the enactment of the MSI Act and repeal of the Coal Mines Regulation Act 1946 and the Mines Regulation Act 1946, the principle of an independent Board, responsible for the examination and certification of persons holding responsible positions prescribed by the statute, was continued.

**Functions and Powers**

888. The Board is established under s 48 of the MSI Act. There is only one Board established by the legislation. The Board however is differently constituted under the Regulations, depending upon the certificate of competency under consideration. The Board’s functions are:

   (a) to examine candidates for certificates of competency and issue certificates;
   (b) to deal with complaints in relation to certificates of competency holders; and
   (c) to deal with such other matters as may be prescribed by the regulations.

889. In terms of complaints, the Board is empowered to enquire into a complaint brought by a Mines Inspector or other person concerning the conduct of a holder of a certificate of competency. An inquiry held by the Board, if considered desirable and justified, enables the holder of the certificate of competency the subject of the complaint, a right to be heard.

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402 Sections 23-26 Coal Mines Regulation Act 1902
403 Sections 40-42 Coal Mines Regulation Act 1946
404 Section 50 MSI Act
890. The Board is empowered, after holding an inquiry, in circumstances where a complaint is established, to impose a number of sanctions including a reprimand; the suspension of the holder’s certificate of competency; or to cancel the certificate of competency. An appeal lies from a determination of the Board to the Tribunal. These complaint provisions are rarely, if ever utilised.

891. The corresponding Boards in Queensland and New South Wales do not have this function. However, under the New South Wales regulations, the responsible Minister has the power to suspend or cancel a person’s certificate of competency on various grounds.

892. Importantly also, in terms of the discussion below, the New South Wales regulations enable the responsible Minister to establish requirements for the maintenance of competence for the holders of the various certificates of competency. Such requirements become a condition of the relevant certificate of competency.

Constitution

893. The constitution of the Board in relation to the grant of the various certificates of competency under the MSI Act is prescribed by Division 3 of Part 2 of the Regulations. The Board is differently constituted depending on the particular certificate being considered. In outline form it is as follows.

894. For Mine Manager’s and Underground Supervisor’s certificates, the Board comprises:

- the State Mining Engineer;
- a senior Inspector appointed by the Minister;
- the Principal of the WASM; and
- two other persons, each of whom must be the holder of a Mine Manager’s certificate, appointed by the Minister nominated by the CME.

895. In the case of Quarry Manager’s certificates the Board is to comprise:

- the State Mining Engineer;
- a senior Inspector appointed by the Minister;
- an officer of TAFE appointed by the Minister; and
- two other persons, each of whom must hold a Quarry Manager’s certificate appointed by the Minister on the nomination of the CME.

896. For Underground Coal Mine Certificates, the Board is to comprise:

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405 Section 52 MSI Act
406 See for example s 116 MSH Act (NSW); s 185 CMSH Act (Qld)
407 See Part 8 Division 6 Mine Health and Safety Regulation 2007
408 Ibid Part 8 Division 5
the State Mining Engineer;
• a Senior Inspector appointed by the Minister;
• the Principal of the WASM; and
• two other persons each of whom must be holders of a mine manager’s certificate appointed by the Minister on the nomination of the CME.

897. Finally, in the case of Winder Drivers:

• the State Mining Engineer;
• an officer of the department who is formally qualified as a mechanical engineer appointed by the Minister; and
• a person appointed by the Minister on the nomination of the Trades and Labour Council of Western Australia.  

Procedure

898. Appointees to the Board, have a term of a maximum period of three years. Members are able to be re-appointed. Members may appoint a deputy member in cases where they are unable to attend a meeting of the Board and in all cases the State Mining Engineer chairs the Board.

899. The Board meets at such times and places as it sees fit but as a matter of practice, this tends to be bi-annually. Members of the Board are able to vote and in such cases the decision of the Board is by majority, with the chairman having both a casting and deliberative vote if members are evenly divided. In most cases however, the Board operates on a consensual basis.

Output

900. The activity level of the Board in Western Australia, in terms of the issuance of the various certificates of competency, is relatively high and considerably higher than its counterparts in New South Wales and Queensland.

901. Table 5 below, sets out the number of certificates granted each year by the Board over the period 2003-2008, in each category.

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409 See generally Part 2 Division 3 Regulations
410 Regulation 2.13
411 Except for the Underground Coal Board which is chaired by the State Coal Mining Engineer. The present incumbent holds both offices. Since the closure of the last underground coal mine in Collie this board has not met
Table 5: Number of certificates of competency issued 2003 to 2008

<table>
<thead>
<tr>
<th>Certificates</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Class Mine Manager</td>
<td>44</td>
<td>18</td>
<td>42</td>
<td>50</td>
<td>22</td>
<td>46</td>
</tr>
<tr>
<td>Underground Supervisor</td>
<td>62</td>
<td>45</td>
<td>98</td>
<td>102</td>
<td>49</td>
<td>99</td>
</tr>
<tr>
<td>Quarry Manager</td>
<td>48</td>
<td>19</td>
<td>36</td>
<td>35</td>
<td>34</td>
<td>53</td>
</tr>
<tr>
<td>Restricted Quarry Manager</td>
<td>73</td>
<td>46</td>
<td>28</td>
<td>17</td>
<td>26</td>
<td>35</td>
</tr>
</tbody>
</table>

902. In terms of total numbers, the Board issued some 1127 certificates over the period 2003-2008.

903. Including the issuance of Authorised Mines Surveyor is certificates by the MSB that I deal with below the total for the period under review is 1025 certificates, averaging about 205 per annum. As one would expect, since the closure of the Western No.2 deep coal mine in Collie in the mid 1990’s, the last underground coalmine operating in Western Australia, there have been no Underground Coal Mine Certificates issued since that period.\textsuperscript{412}

904. In trend terms, it would seem that over the period 1995-2005, Western Australia has maintained a relatively constant, if not improving level of activity in the issuance of certificates, particularly for FCCC and Quarry Manager’s Certificates, compared to Queensland and New South Wales that have experienced a decline over the same period, as noted below.\textsuperscript{413}

**Queensland**

905. The corresponding Boards in Queensland are similar in terms of composition and functions to those in Western Australia. Under both the coal and metalliferous legislation, there are constituted two Boards of Examiners under identical provisions in both statutes. Whilst there are separate Boards for both branches of the industry, the Boards meet concurrently as if in practice, they were one and the same. In the most recent Annual Report, it is observed that:

\textit{“The Boards of Examiners trace their origin in The Mining Act of 1898 (Queensland). Their activities contribute to securing the safety and health of workers in mines by ensuring only qualified and competent people are entrusted with key roles in mines which, if mishandled, could contribute to injury and loss of life, perhaps on a large scale. The Boards grant certificates of competency to persons assessed as being appropriately qualified to fill...”}

\textsuperscript{412} Ibid
\textsuperscript{413} D Laurence and J Galvin Educating Future Mine Managers-Maintaining the Gene Pool Paper presented to the International Mine Management Conference October 2006
statutory safety and health mine management positions in the metalliferous and coal mining industries." 414

**Functions**

906. In terms of the functions of the Boards in Queensland, they are expressed to be as follows:

- To decide the competencies necessary for holders of certificates of competency for persons who are appointed under the mining Acts;
- To assess applicants, or have applicants assessed, for certificates of competency;
- To grant certificates of competency to persons who have demonstrated to the Boards’ satisfaction the appropriate competencies necessary to hold the certificates;
- To ensure the competencies under the above Acts are consistent with the competencies required by other States for the holders of certificates of competency;
- To cancel certificates of competency obtained by use of false information. 415

**Certificates**

907. The range of certificates that the Boards in Queensland issue are:

- First Class Mine Manager’s Certificate of Competency (Underground Metalliferous Mines)
- First Class Mine Manager’s Certificate of Competency (Underground Coal Mines)
- Second Class Mine Manager’s Certificate of Competency (Underground Coal Mines)
- Deputy's Certificate of Competency
- Open Cut Examiner’s Certificate of Competency. 416

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415 Ibid
416 Ibid
In the reporting period 2004-2005 and 2005-2006, the Queensland Boards issued some 69 certificates of competency.\textsuperscript{417} The breakdown of the certificates issued is set out in Table 6 and Table 7 below.

**Table 6: 2005-06 Outcomes**

<table>
<thead>
<tr>
<th>Certificate of Competency</th>
<th>Written examinations June and October 2005</th>
<th>Oral examinations 2005-06</th>
<th>Certificates issued 2005-06</th>
<th>Registrations under Mutual Recognition 2005-06</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Passed</td>
<td>Failed</td>
<td>Passed</td>
<td>Failed</td>
</tr>
<tr>
<td>First Class Mine Manager’s Certificate of Competency (Underground Metalliferous Mines)</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>Nil</td>
</tr>
<tr>
<td>First Class Mine Manager’s Certificate of Competency (Underground Coal Mines)</td>
<td>6</td>
<td>Nil</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Second Class Mine Manager’s Certificate of Competency (Underground Coal Mines)</td>
<td>Nil</td>
<td>Nil</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Deputy’s Certificate of Competency</td>
<td>38</td>
<td>5</td>
<td>46</td>
<td></td>
</tr>
<tr>
<td>Open Cut Examiner’s Certificate of Competency</td>
<td>17</td>
<td>6</td>
<td>14</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{417} Ibid at Appendix 1
Table 7: 2004-05 Outcomes

OUTCOMES OF THE BOARDS’ EXAMINING AND REGISTRATION ACTIVITIES

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. sat</td>
<td>No. failed</td>
<td>No. sat</td>
<td>No. failed</td>
</tr>
<tr>
<td>First Class Mine Manager’s Certificate of Competency (Underground Metalliferous Mines)</td>
<td>8</td>
<td>1</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>First Class Mine Manager’s Certificate of Competency (Underground Coal Mines)</td>
<td>5</td>
<td>Nil</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Second Class Mine Manager’s Certificate of Competency (Underground Coal Mines)</td>
<td>4</td>
<td>Nil</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Deputy’s Certificate of Competency</td>
<td></td>
<td></td>
<td>31</td>
<td>7</td>
</tr>
<tr>
<td>Open Cut Examiner’s Certificate of Competency</td>
<td></td>
<td></td>
<td>18</td>
<td>3</td>
</tr>
</tbody>
</table>

New South Wales

909. The Boards in New South Wales include the Coal Competence Board 418 and the Metalliferous Mines and Extractive Industries Competence Board, 419 the latter of which came into effect on September 2008.

Composition

910. The statutory provisions in terms of the composition and functions of the Boards under the coal and metalliferous legislation are the same. In the case of the metalliferous Board, its composition is as follows:

- the Chairperson of the Board;
- two employer representatives selected from a panel of 4 submitted to the Minister by a body or bodies representing employers;
- two employee representatives selected from a panel of 4 submitted to the Minister by a body or bodies representing employees;

418 See Part 9 Division 2 of the CMSH Act (NSW)
419 See Part 9 Division 2 of the MHS Act (NSW)
between two and four persons who have expertise in the development and assessment of competence of persons performing functions at mines; and
- two officers of the Department.

Functions

911. In terms of functions of the Boards they are described as follows:

- to oversee the development of competence standards for persons performing functions at mines that may impact on health and safety;
- to undertake initial and ongoing assessments of the competence of persons performing functions at mines;
- to advise the Minister on matters related to the competence required of persons to perform functions at mines; and
- any other functions that the Minister may confer on the Board from time to time.

912. For the purposes of carrying out these functions, the Boards may do a number of things including engaging consultants; develop competence standards or cause competence standards to be developed; assess a person's competence; cause a person's competence to be assessed or accept an assessment of a person's competence.420

913. Importantly, in the context of the discussion below, the New South Wales legislation also empowers regulations for the maintenance of competency standards for those who hold certificates of competency.

914. A comparative schedule, setting out the composition and functions of the respective Boards in Western Australia, Queensland and New South Wales is at annexure 10.

420 Sections 114 and 116 MHS Act (NSW)
915. By comparison, in New South Wales, Table 8 sets out the issuance of certificates of competency over the longer period of 1995-2005, for open cut and underground manager positions, in both the coal and metalliferous sector.

Table 8: NSW Mine Manager’s Certificates of Competency 1995-2005

<table>
<thead>
<tr>
<th>Year</th>
<th>Coal</th>
<th>Metal</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Underground</td>
<td>Open cut</td>
</tr>
<tr>
<td></td>
<td>Manager</td>
<td></td>
</tr>
<tr>
<td>1995</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>1996</td>
<td>17</td>
<td>16</td>
</tr>
<tr>
<td>1997</td>
<td>13</td>
<td>9</td>
</tr>
<tr>
<td>1998</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>1999</td>
<td>15</td>
<td>8</td>
</tr>
<tr>
<td>2000</td>
<td>14</td>
<td>1</td>
</tr>
<tr>
<td>2001</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>2002</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>2003</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>2004</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>2005</td>
<td>2</td>
<td>6</td>
</tr>
</tbody>
</table>

Specific Observations

Submissions

916. Most submissions, with one or two exceptions, in relation to Part 4 of the MSI Act were general in character, and did not specifically address the detailed questions in the Terms of Reference.

917. I can only conclude from this that subject to the broader observations expressed below, that in the absence of any particular issues arising, and despite the fulsome opportunity to express views to the contrary, there is a general sentiment that the existing provisions are adequate and no substantial change is considered warranted, at least for the time being. Notwithstanding the lack of specificity in most of the submissions, I have conferred with members of some academic institutions. I have also consulted with members of the Board and the Mines Survey Board, and others, to ascertain their views as to the operation and effectiveness of the Boards. I have also conferred extensively with my Advisory Group on these issues and the recommendations advanced are endorsed.

918. From the perspective of the industry, it was said that whilst there is a recognition that the existing legislative framework in relation to the Boards

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421 D Lawrence and J Galvin op cit at 8
and certificates of competency may not be consistent with a performance based model, placing emphasis on the employer to ensure that competent staff are appointed, in the short term, the existing Part 4 of the MSI Act is supported.

919. The CME expressed the view however that presently there is an absence of any reference to ongoing competency assessment and demonstrated knowledge in relation to risk management. Looking to the future, a system of accreditation that enables cross jurisdictional movement, and involves peak professional bodies would be supported.

920. From the union perspective, the first point made by the CFMEU in its submission is that no need is seen to amend Part 4 of the MSI Act itself. This is my view is an entirely correct observation. The issues arising under this aspect of my Terms of Reference, in essence concern the operation and effectiveness of provisions of the Regulations, and not the MSI Act, the relevant parts of which, have been identified in the above discussion and are set out in the comparative table at annexure 8.

921. It was further suggested by the CFMEU that the Board could benefit from more industry experience amongst its membership and that a greater focus on advice to the industry would be positive. The ongoing review of educational requirements for the various certificates of competency was suggested as a role for the Board.

922. The integration of the current certification process into one similar to that developed for the Licensing of High Risk work under the OSH Regulations, was the subject of a submission from the CCIWA. This proposal, which could be viewed over the longer term, was suggested as a means of developing the required competencies and training programmes through the Australian Quality Training Framework (“AQTF”) system. In following this approach, it is suggested that the mining industry would be able to take advantage of an existing framework, and either work within it, or develop its own along similar lines. According to the CCIWA, such a training package should be developed under the auspices of the COSH.

923. At the time of the enactment of the MSI Act, MARCSTA submitted that the role of the Board was reviewed by a joint industry/department committee and it was considered by those involved from the industry at the time, that the retention of the Board system was important to maintain standards in the industry. In the context of future demands of the mining industry, it is particularly noted that an expansion of the underground sector is likely along with a corresponding need for additional mining engineering and geotechnical skills.

924. These probable developments should be taken into consideration in any review of the existing arrangements. As an overarching view, the MARCSTA submission suggested that the industry could also be surveyed to ascertain what changes, if any, should be made.
From the perspective of the RSD, the role of the Board could be subsumed into the AQTF approach, and involve registered training organisations, overseen by the regulator in an auditing capacity. If a safety case approach to regulation is adopted, then this would remove the necessity for certificates of competency, as the operator would be required to demonstrate the required competencies to operate its facility as part of its case to the regulator.

In an individual submission, Mr Jones raised concerns as to the pressure young managers are under in the industry, and that in his view, some are not adequately prepared for the responsibilities that they assume, in particular in relation to managing an underground mine. In this respect, whilst not suggesting any particular modification to the certification or Board process, Mr Jones indicated one approach may be to develop an interim type of qualification, perhaps as an Alternate Manager, prior to being eligible to obtain a FCCC. In a further observation, Mr Jones also commented, consistent with the views of others, that the lack of ongoing competency assessment is presently a gap in the scheme for competency of mine management that should be remedied.

In terms of the obligation to appoint managers under Part 4 of the MSI Act, this issue attracted the attention of the Civil Contractors Federation, an employer body representing the interests of civil contractors in Western Australia.

In the Southwest of the State, a number of member companies operate small sand pits, which are not staffed on a full time basis, and are used irregularly. Recently, these operations have come to the attention of the Mines Inspectorate and due to apparent non-compliance with ss 32 and 33 of the MSI Act, Improvement Notices have been issued. Discussions with the Mines Inspectorate are continuing. The issue raised in this submission is the applicability of Part 4 of the MSI Act, to very small operations, that are not regularly used or staffed. Whilst the Federation fully accepts the application of these provisions to larger mining enterprises, it has concerns as to the practicality of the existing requirements for its members affected as described.

The importance of the rigour of the certification processes, such as those prescribed by Part 4 of the MSI Act, is emphasised by Associate Professor Lawrence. In particular, he notes that the process of examining Mine Managers is an important part of their “rite of passage”.

From Associate Professor Lawrence’s experience, “the combination of sound knowledge of the law through a written examination and the ability to think on one’s feet, under some duress, in the oral examination, is very important. The “dumbing down” of the discipline of mine management is, I believe, a backward step”

This latter observation is a sentiment with which I am in total agreement.

In my view, in the context of an inherently hazardous and complex industry such as mining, it would be an error for those responsible for setting and
implementing mine safety policy in this State, to weaken in any material way, the standards required for managing mines and for those in other positions of responsibility in a mine. Similarly, it would also be an error in my opinion, to materially weaken the means by which those who are to occupy such positions, are assessed as holding the requisite qualifications and experience. The caveat on the latter observation must always be, as I have noted above, that the ultimate responsibility for the determination of competency must rest with those who employ and engage such persons in and about a mine.

933. It is axiomatic in my view, that in light of these observations, it would also be in error to materially weaken the capacity and competence of the regulator to oversee those responsible for running and keeping safe, a mining operation in this State.

Constitution of the Board

934. This assumes that the Board continues to exist.

935. The constitution of the Board in relation to the various certificates of competency is set out earlier. There are in all cases, except for the Winder Driver’s Certificate, which has three members, five persons constituting the Board. Whilst this is less than the numbers constituting the corresponding Boards in Queensland and New South Wales, I am not persuaded that by that fact alone, the structure is inadequate.

936. The clear legislative intent of the current constitution of the Board is to provide a balance of industry, regulator, and academic input into the certification process.

937. The regulator members and generally the academic members also are the holders of the highest qualification, being the FCCC. This would tend to ensure that the Board constitution remains of a high calibre, when considering candidates’ competencies required by the Regulations. It is appropriate that the respective stakeholders, they being the regulator, the industry and academia, be represented. No submission has suggested this overall composition should fundamentally change.

938. The only employee representative input is in relation to the Winder Driver’s Certificate, which is understandable, given the nature of the position and no one has suggested that this should change. This may have historical linkages to industrial coverage of this classification of employee in the past.

939. As noted above, I have as a part of my consultations, canvassed the views of the members of the Board, as to a range of matters falling within my Terms of Reference. Without exception, all current members expressed the view that the current composition of the Board, reflecting its constitution for each of the certificates of competency, comprises an appropriate blend of skills, experience and qualifications.
940. In particular, it is noted that the academic members of the Board provide valuable input in relation to the consideration of the academic qualifications of candidates. Industry representatives provide extensive practical knowledge and experience and the Inspectorate, a perspective from the regulator, in addition to industry experience, given the backgrounds of Inspectorate members of the Board. None have suggested that there should be any significant compositional change, in terms of the present functions.

941. The only alternate view expressed was from Dr Andrew Jarosz, presently a member of the MSB. He suggested, as will be developed below, that the functions of the Board be expanded to include the issuance of Authorised Mine Surveyors’ Certificates and that the Board and the MSB be combined. On this view, the Board could be constituted by sections for different activities.

942. I have canvassed this concept with others. Whilst I recognise the intent behind such a proposal, given that all those I have consulted in relation to the Board consider the current composition, different as it is for each of the various certificates, to be appropriate, I am not inclined to recommend any change at this juncture.

943. A major benefit of the present constitution of the Board in my view is balance. All the relevant stakeholders have a voice. If it is concluded that the Board is to be retained, it would seem that the present mix of industry, regulator and academic representatives, with their knowledge, qualifications and experience, is appropriate.

944. Very importantly also in my view, the present constitution of the Board also ensures its independence and rigour, and in particular, insulates it from any commercially driven imperatives, that may arise from alternative accreditation schemes.

Recommendation 50

That the current constitution of the Board for the various certificates of competency be confirmed as appropriate.

Should the Board be Continued or Outsourced?

945. The Board as constituted for each the classes of certificates of competency available meets approximately on a six monthly basis normally in or about January and July of each year. The timing of the meetings of the Board generally follows approximately three months after the examination set for the relevant certificate, which are held generally in March and September each year.

946. The Board operates as essentially a collegiate body. As noted above, in the other principal mining states of Queensland and New South Wales, similar bodies exist to perform the functions of the oversight of competency standards
and the granting of competency certificates within the legislative framework operating in those two States. The composition of the bodies in those States is broadly similar to the composition of the Boards in Western Australia.

947. Their functions powers and responsibilities are also broadly similar. That is, in the three principal mining jurisdictions, the State provides a body established and governed by legislation, to maintain certain minimum standards of competency for various mining occupations, within these respective jurisdictions.

948. An overarching issue at this juncture is whether such a body should continue to exist at all? This issue is in large part contingent upon conclusions reached as to the requirement to maintain the various statutorily required positions presently prescribed by Part 4 of the MSI Act and furthermore, whether the concept of certificates of competency is to be retained. I have already answered the first question.

949. If a form of statutory competency for open cut and underground operations is to be retained, and minimum competency standards, independently verifiable and regulated, are also to be retained in some form, at least in the short to medium term, then the conclusion would appear inevitable that a regulatory mechanism must exist to fulfil that function.

950. Additionally, the maintenance of minimum competency standards, by way of the grant of certificates of competency, also has implications for the tertiary education system, which is presently largely responsible for the education and training of graduates in the respective courses presently prescribed as acceptable qualifications for the various certificates of competency under the Regulations. A fundamental change to those requirements, will in turn, necessarily, impact on those educational institutions and the courses that they may provide.

951. Assuming that a form of statutory certification requirement is retained in the MSI Act or Regulations, at least in the medium term, consideration needs to be given to whether there is scope for an alternative to the continuation of the Board. That is whether its functions may be performed by outsourcing them to, for example, a tertiary institution, or one of the various professional bodies.

952. In 2005, the conduct of examinations for certificates of competency was outsourced to the Central TAFE for one year with a further one year option. From the copies of minutes of the various Board meetings to July 2007, and from other advice to me, this arrangement is continuing.

953. On the basis that the marking of examination papers has been outsourced to TAFE, which appears to generally be satisfactory, (although from the minutes of meetings I have reviewed there were some initial teething problems) the question arises as to whether another institution could equally provide the services presently provided by the Board.

422 See minutes of BOE Quarry/Restricted Quarry Managers minutes 21 January 2005 par 3.3
954. If it is outsourced to one of the professional bodies, tertiary institutions or a registered training organisation, as noted above, it would no doubt have to be done on a fee for service basis. This would no doubt more properly reflect the true cost of the service presently provided by the State. Issues that would arise from outsourcing entirely the operations of the Board would seem to include:

- The costs of the provision of such a service and who bears it?
- The extent to which the fees paid by applicants for the various certificates of competency meet the costs of the provision of such a service ie whether it is provided on a full cost recovery basis; and
- The extent to which the loss of industry/regulator experience and oversight from those conducting such an assessment process is undesirable.

955. Even if the operations of the Board is outsourced in such a fashion, the State, presently through the DMP, could still maintain an involvement in setting standards to be attained and the issuance of the relevant certificate.

956. These themes were taken up by the State Mining Engineer in his submission to the Review and also in his capacity as the Chair of the Board.

957. In the State Mining Engineer’s view, there is arguably no need for the State Government to indefinitely maintain the current licensing regime, as long as a system as, if not more, effective could be developed. The suggestion advanced is that the present certification regime could be undertaken by an external body such as a university, professional body or a registered training organisation.

958. On this approach, it would be anticipated that such a service would need to be structured on a fee for service basis which would no doubt, more accurately reflect the actual cost of the service provision. Given the fees charged under the present arrangements, it is unlikely that the true cost of the provision of these services is being recovered.423

959. Furthermore, by adopting such a model, the State could maintain a role in the setting of standards and the issuance of certificates. The present standards could be seen as the appropriate commencing benchmark. If such an approach were to be adopted, according to the State Mining Engineer, the external body would determine the suitability of the candidate, and the Government would endorse this view by the issuance of the appropriate certificate, subject to a qualification that the issuance of the certificate is without independent verification by the Government.

960. In consultations with other Board members, it was recognised that the issue of paramount importance is the maintenance of high standards to ensure as far as possible, that appropriately qualified and experienced personnel occupy the

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423 See Reg 2.31 and Schedule 2 Regulations. The average fee is $135.00 for an application for the relevant certificate and the same for a replacement certificate
senior positions, in mining operations. The concept of the functions of the Board in the longer term, being undertaken by an external body such as a professional association or tertiary institution, is not one that is seen as unattainable.

961. Furthermore, the outcomes of the Board’s processes, in terms of the grant of the various certificates of competency, are seen as the continuation of a consistent and high standard. This general consistency in standards is reflected in the examination results for the various certificates, over the Review period 2003 – 2007 as set out in annexure 13.

962. I should emphasise however that no sentiment has been expressed that the present arrangements are unsatisfactory or that fundamental reform is presently necessary. On the contrary, the majority view is that the system works well as it is. Most certainly, improvements can be made. I deal with these matters further below.

963. As a matter of broad principle, in the longer term, I can see no fundamental impediment to the performance of the activity of the Board by an external provider such as a professional body or tertiary institution. Of critical importance however, is the maintenance of appropriate qualification and competency standards, such that the safe operation of mines is not compromised. In my view, one should never forget the reason why standards of competency for those occupying key positions in mines were established in the first place.

964. However, any such decision to move outside of the existing Board system should be taken very carefully, in order that the benefits of the existing system are not lost. An alternative system would need to match or exceed the benefits of the present otherwise little purpose would be achieved in making change. Apart from the maintenance of standards at a high level, one would need to consider a number of factors such as, perhaps most significantly, cost.

965. In terms of its operating budget, the Board has operated on an annual budget of some $35,000 over the last three years. As of October 2007, the budget allocation has increased to $90,000, in recognition of the higher costs incurred in the outsourcing of the examination process to TAFE. This budget allocation also takes into account the activities of the MSB, dealt with further below.

966. The necessity to increase the budget allocation for the outsourcing of the examination process to TAFE is perhaps an illustration of the potential dramatic escalation in costs, if the entire Board process was outsourced. This cost would need to be born by the industry or the end user, ie the candidate, presumably in the payment of vastly increased fees. Those individuals and the industry would need to be fully aware of and support this.

967. Other factors that would need to be considered include the potential for competitive rivalry between service providers and ensuring that there is strong scrutiny and oversight of training providers, such that any attempt to “undercut” standards is detected and remedied.
968. In my view, it would be potentially disastrous if a decision was taken to outsource the Board operations and once done, it was discovered that no external organisation wanted to take on the role because it was not economically viable.

969. In summary, given the activity of the Board, as outlined above, and the level of expertise represented on it from industry, academic institutions and the Inspectorate, and the rigor in its approach, standards are presently maintained in the mining industry in this State at a high level. The cost of the delivery of this service to the mining industry can only be regarded as extremely modest. On the basis of the present operating model, this represents exceptional value in my opinion. There is no presently identified alternative proposal to the Board model at this point in time.

970. As noted in annexures 8 and 10 and in the discussion above, Queensland and New South Wales still retain their respective Boards for the purposes of accreditation of candidates for the mining positions for which statutory minimum qualifications and experience is required.

971. In 2002, a sub committee of the Queensland Mining Safety and Health Advisory Council undertook a review of the operation and effectiveness of the Board of Examiners under the Queensland coal and metalliferous mining legislation. As noted above, the Board in that jurisdiction is very similar in terms of composition and operation to the Board in Western Australia.

972. Arising from its deliberations, the sub committee concluded that:

"Having due regard to the information presented and discussed in committee, and by representation of the opinion of stakeholders, and in accordance with the terms of reference, it is the unanimous view and finding of this sub-committee that:

3. The functions of the BoE are being conducted in a consistent manner and in accordance with the legislation and to the satisfaction of stakeholders.
4. There is no alternative system at the present time to replace the functions of the BoE, although the development of the "National Competency Package" is ongoing.

973. In the case of New South Wales, the continuation of the Board of Examiners model has been recently affirmed with the commencement of the MHS Act (NSW), for metalliferous mines in September 2008. The new Metalliferous Mines and Extractive Industries Competence Board will assume responsibility for the assessments of competency and the development of competency standards for New South Wales metalliferous mines.

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425 Part 9 MSH Act (NSW)
974. I see no reason to come to any other conclusions in relation to the Board system in Western Australia, at least for the foreseeable future.

975. Some States, such as Queensland and New South Wales, as set out in annexure 8, do presently provide for some competency based qualifications as being acceptable to the relevant Boards for the grant of certificates of competency, as an alternative to the academic qualification stream.

976. In Western Australia, presently there is no general acceptance of competency based training by the Board, save for one programme considered to be a suitable alternate qualification for the Quarry Manager’s certificate.426

**Recommendation 51**

That in the short to medium term the Board mechanism be retained for the purposes of the grant of the existing certificates of competency, with a view to the ultimate adoption of a competency based system, administered by a professional mining industry body or tertiary institution.

**Recommendation 52**

That such a transition as in Recommendation 51 should be progressed in accordance with the NMSF. In particular that relating to the development of nationwide, industry-based assessments of competency, consistent with the objectives of Strategy 2: Competency Support.

**Recommendation 53**

That in the event of the ultimate outsourcing of the functions of the Board the State retain a role in competency assessment, including the setting of standards and the issuance of certificates if retained.

**The Practices and Procedures of the Board**

**Applications and Administrative Processes**

977. The day to day administration of the Board is the responsibility of the Executive Officer.

978. The Executive Officer of the Board is currently the Secretary to the Board in Western Australia, as variously constituted. The Secretary’s general duties include:

- providing secretarial service to the Mine Manager’s, Quarry Manager’s and Mine Survey Board;

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426 The Diploma in Surface Metalliferous Mining or in Extractive Industries under the AQF
• processing applications for Certificates of Competency (checking for accuracy and completeness);
• dealing with correspondence, enquiries, applications and maintain records;
• liaising with Central TAFE regarding draft examination papers and applicants for examinations;
• advising and assisting applicants on procedures and interpretation of the Regulations with responses to applications;
• typing of correspondence and preparation of Certificates; and
• record keeping.

979. All applicants for the various certificates, including those seeking mutual recognition under the Mutual Recognition Act 2001 (WA), are required to complete the appropriate application form and accompanying statutory declaration. The candidate lists are then sent to TAFE for the purposes of the administration of the examination process.

980. Examinations in both mining law (the MSI Act and Regulations) and mining practice are generally held in March and September each year in the regions of Perth, Kalgoorlie, Karratha and Collie. Examination dates are advertised with the closing date one month prior to the examination.

981. Once the examination results are known they are compiled along with the relevant verified material in relation to practical experience and other matters required by the MSI Act and Regulations.

982. Generally, as noted above, the Board sits within three months of the examination dates. Any urgent requests for approval of certificates can be dealt with in the interim, with the concurrence of the Chairman and at least three other members of the Board.

983. All of whom I have conferred with in relation to these procedures, regard them as very efficient and no alternative is recommended.

Meeting Procedure

984. The existing procedure of the Board is as follows. Meetings will start with a review of the past meeting minutes and action items to be attended to. There is a review of candidate examination marks and a comparison with prior results, to ensure that standards remain appropriate. The gross distribution of marks is considered to ensure that no bias in marks is present. Failure rates are discussed. Each candidate’s applications are then considered, to ensure they meet the minimum standard for each class of certificate. This entails consideration by each Board member of each candidate individually.

985. Correspondence may need to be prepared to a candidate to clarify any matters of concern to the Board. Other general correspondence is then considered along with any other matters of interest that have come to the Board’s attention. Draft examination papers may also be reviewed by the Board for the next round of examinations.


Approval of Candidates

986. Once approved, a candidate is entered on a register of certificate holders maintained by the Board for that purpose. A replacement certificate may be obtained in the case of a lost or destroyed certificate, subject to proof by statutory declaration.

Frequency of Meetings

987. In my initial consultations, observations were made quite frequently to the effect that as the Board only meets approximately each six months, candidates who may just miss the deadline to sit, for example, the mining exam for the various certificates, have to wait until the next exam sitting to satisfy this requirement. This may add fuel the current skills shortage, in terms of the capacity of the industry to get persons into positions requiring certificates of competency in a timely fashion. It is suggested that more frequent meetings of the Board would assist in alleviating this pressure.

988. I also well appreciate however, that no doubt there are some candidates and their sponsors, who have not arranged their affairs efficiently to meet the current Board timetable.

989. Perhaps with the exception of Winder Drivers who are very few in number, in my view there is considerable merit in considering more frequent meetings of the Board. The Board determines its own procedure and may meet at such times and places as it considers appropriate. Whilst additional meetings will no doubt place greater demands on the busy professionals who constitute the Board and who volunteer their time, such an initiative will in my opinion, significantly enhance the service to the mining industry presently provided. More frequent meetings of the Board were also supported by the majority of Board members with whom I discussed the issue.

990. Any additional burdens on existing members may be alleviated by the appointment of a deputy, who may attend a Board meeting on behalf of a member, if the member is unable to do so.

991. As to what frequency of meetings there should be, that is a matter which ultimately I would leave for the Board to consider. However having conferred with many members of the Board, who have recognised this as an issue, it is suggested that a further examination and meeting to three per year will assist in service delivery to the industry. In my view, this would seem to be reasonable and no doubt would enable candidate’s applications to be processed more expeditiously.

427 Reg 2.32 Regulations
428 Reg 2.33 Regulations
429 Reg 2.18 Regulations
430 Reg 2.15 Regulations
992. More resources will be necessary for the Board to meet more frequently, as with other recommendations I make below.

**Recommendation 54**

That examinations set by and meetings of the Board be more frequent than at present. The revised frequency of examinations and meetings of the Board should be as determined by the Board in light of this Recommendation.

**Additional Functions**

993. The Board has the functions under s 48 of the MSI Act, as set out above. Additionally, as earlier noted, by s 48(2)(c) the Board is:

“(c) to perform such other functions as may be conferred in the regulations.”

994. There are presently no other functions specified in the Regulations to which this provision refers. However, the legislature, by the incorporation of this power in the MSI Act, clearly contemplated that the Board could be given other tasks.

995. Given the workload of the Board under the existing arrangements, it is clear that the majority of its time is spent on determining candidates’ applications for the various certificates of competency. Only a limited opportunity exists presently to deal with other matters.

**Establishing and Consistency in Competencies**

996. The issue that arises is given the level of expertise on the Board, is there potential for a wider scope of activity that could be usefully performed by the Board to the benefit of the mining industry? For example, and by way of comparison, the equivalent Board in Queensland is empowered to not only be responsible for the examination of candidates for certificates, but also for establishing such competencies.\(^\text{431}\)

997. Additionally, the Queensland Board is also required to ensure that the competencies so established, are consistent with competencies required by other States for holders of certificates of competency.\(^\text{432}\) This latter function is in my opinion, particularly important in the context of the NMSF processes presently underway. The Board in Queensland also has the power to appoint committees to advise it on particular issues.\(^\text{433}\)

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\(^{431}\) For metalliferous for example see s 182 MSH Act (Qld)
\(^{432}\) Ibid.
\(^{433}\) Section 190 MSH Act (Qld)
Ministerial Referrals

998. Similarly, the Boards in New South Wales have a broader range of powers, as with those of Queensland. Not only are they required to develop competency standards and assess competency, but they are also empowered to perform such other functions as may be conferred on them by the responsible Minister from time to time. 434 For the purposes of carrying out their tasks, the New South Wales Boards are also able to engage consultants.

Annual Report

999. Both the Queensland and New South Wales Boards are also required to prepare and publish an annual report. 435

Conclusion

1000. In my view there is much to be said for the adoption of this broader range of powers and functions in this jurisdiction. It seems to me to be entirely appropriate that the body that is responsible for assessing candidates for certificates of competency to the extent that those processes continue in the future, also be empowered to determine and keep under review those competencies. Furthermore, I think that it could be of value to the industry that the responsible Minister be able to refer any matter to the Board that is considered appropriate for the Board to inquire into and deal with. The very high level of expertise and experience on the Board could, I am confident, make a further and substantial contribution to the industry.

1001. These additional functions and powers could be conferred by the Regulations, as contemplated by s 48(2)(c) of the MSI Act.

Recommendation 55

That the Board have additional functions to:

(a) Establish, keep under review and adjust as necessary, the required competencies in the Regulations for the various positions for which certificates of competency are presently required;

(b) Ensure that as far as possible the competencies for the existing certificates of competency are consistent with the competency requirements for like positions in other States; and

(c) Inquire into and deal with any matter referred to it by the responsible Minister.

434 Section 116 MQSH Act (NSW)
435 Section 117 MQSH Act (NSW); s 194 MSH Act (Qld)
Recommendation 56

That for the purposes of the performance of its functions under the MSI Act or Regulations the Board be empowered to engage consultants, appoint committees or engage other assistance as it may require.

Recommendation 57

That the Board be required to provide to the responsible Minister an annual report which is to be tabled in both Houses of Parliament.

Educational and Practical Experience Requirements

1002. Given that this and other issues arising in relation to the review of Parts 3 and 4 of the MSI Act and more accurately, the Regulations, are but one of many issues to consider in this Review, consideration of the following matters are necessarily by way of overview. Time and resources preclude a review of these issues in greater detail. If consistent with my recommendations expressed both above and below, in relation to the role of the Board concerning these matters, then closer consideration may be warranted. I also reiterate my observation above, that none of the major stakeholders made any particular submissions as these matters. It must therefore be assumed, that the existing requirements are seen as generally appropriate.

Mining Education in Australia

General Observations

1003. By way of background, the seminal report commissioned by the Minerals Council of Australia National Tertiary Education Taskforce Back from the Brink: Reshaping Minerals Tertiary Education\(^\text{436}\) recognised the threat then existing to the adequacy of minerals education in Australia and the viability of the tertiary education sector, as a supplier of quality graduates to the mining and minerals processing industry. At that time, chronic shortages in the supply of minerals graduates, in particular in mining engineering and metallurgical engineering, were identified.

1004. It was noted that:

“The quality of minerals education in Australia is being undermined by the combined effects of a fragmented system, government funding framework and salary disparity. Changes in higher education are threatening the stability of the system to the point that current minerals-specific education could become a thing of the past.”\(^\text{437}\)

\(^{436}\) Back from the Brink op cit in 1998

\(^{437}\) Back from the Brink op cit
1005. In terms of laying the foundation for their analysis, the authors in *Back from the Brink* noted the technical challenges facing the mining industry, to which I have made reference earlier in this Report. Additionally, noted also, is the combined effects of fierce cost competition with the increase in the number of minerals supplied coming “on stream” and rapid technological advances being made in the industry. The impact of globalisation, which whilst a recent phenomenon at that time, has progressed a pace with developing countries, notably in South America, South East Asia and Africa, progressively opening up their mineral resources to overseas mining companies. In particular, the increasingly global outlook of the mining industry is noted.\(^{438}\)

1006. The taskforce discussed the change required amongst key stakeholders and amongst others for the industry including:

- Developing a greater commitment to continuing professional development amongst employees through structured CPD programs;
- Identifying skill requirements for new graduates and developing and implementing appropriate graduate programs;
- Developing a greater commitment to undergraduate practical experience; and
- Adopting a broader view of a range of graduates suitable for a career in the minerals industry

1007. From the perspective of the tertiary education sector, amongst other things, it was observed that Universities needed to encourage a greater level of cooperation both within and between themselves and to focus on sharing resources in order to develop a world class minerals education sector.

1008. From the perspective of professional associations in the minerals industry, their role was discussed in terms of:

- Broadening their view of the necessary tertiary qualifications and professional experience profiles for positions within the minerals industry; and
- Encouraging the growth of continuing professional development within the sector.\(^{439}\)

1009. In relation to the latter issue of continuing professional development, the Taskforce made the following observations in terms of the required effort by the minerals industry:

> “Above all else, the minerals industry must acknowledge there are limitations to the outcomes that can be achieved in an undergraduate degree course, and except the need for the continuing further education of its professionals. This means recognising the fundamental role which continuing professional development (CPD) plays in the effectiveness of a

\(^{438}\) *Back from the Brink* op cit at 11-13  
\(^{439}\) *Back from the Brink* op cit at 10
companies professionals and in a companies continued success. This role will only become more important in the future.

To quote from Galvin and Roxborough: “The concept of Continuing Professional Development (CPD) is not new. It has, however, come to the fore over recent years in most professions, stimulated by the expediential growth of knowledge and information. Prior to that, certainly in mining, it was fondly assumed that if the employing company did not provide CPD then people were keeping themselves up-to-date through private reading, involvement in professional societies and the like”

1010. The Taskforce continued as follows:

The Taskforce believes many industries still “fondly assume” their professionals are keeping at the forefront of technical and other advances. Industry rewards are also biased towards time spent at work rather than continual professional education (CPE), further impeding the development of a strong CPD culture.

One cause of this has been the lack of good education support but this will only change when industry demands, drives and backs it with resources. This means providing work time for professionals to undertake training and giving a higher priority to this activity. For this to be effective, companies need, properly conceived development programs. It should not be merely a reward for some good work.

1011. It was then further said:

The lack of strong CPD culture causes other problems. For example the recurrent shortage of experienced professionals is partly a result of beliefs that general work facilities are unsuitable for training professionals who have experience in other fields and who wish to move into the minerals industry. Similarly, the current CPD approach lacks the capability to establish educational programs for the conversion of professionals from other disciplines. Further, it is driving employers to demand increasing specific skills training from the undergraduate degree. This is pushing many in industry, and some in academia, towards an increasingly vocational view of undergraduate education, which will be to the longer-term detriment of both the industry and the graduates from these courses.

Following from this, industry must recognise that a system of minerals education will never deliver graduates with skills tailored to the needs of individual companies. The industry must develop systems which identify the specific skills needed and implement on-the-job training and structured graduate orientation programs to develop these “generic” graduates to best suit the individual employers needs.\footnote{Back from the Brink op cit at 42-43.}

1012. This issue of continuous professional development is a theme that I take up later in this Chapter.
1013. The upshot of the Taskforce’s analysis of the state of minerals education in Australia, were recommendations, through a number of initiatives including:

- The creation of a select network of educational centres linked with industry;
- The creation of a system of alternative educational pathways to tap into the strength and depth of graduates from a wider tertiary background; and
- Establishing the Australian School of Mineral Resources to create a world class centre of post graduate minerals education.\(^{441}\)

1014. Arising from the seminal Taskforce report, the Minerals Council of Australia (“the MCA”) established the Minerals Tertiary Education Council (“MTEC”) tasked with managing a five year development program to engage with University groups across the broad spectrum of earth sciences, mining engineering and metallurgy.

**Minerals Education Australia**

1015. Born out of the initiatives of the MTEC and Universities acting in partnership, has been the development of a national mining school the Minerals Education Australia (“MEA”), a joint venture between the WASM, the University of Queensland and the University of New South Wales. The stated vision of the MEA is:

> “Mining Education Australia is one program and one school delivering world class undergraduate education in mining engineering. A national education joint venture between the three major mining education providers in Australia; Curtin University of Technology, the University of New South Wales and the University of Queensland, MEA is a world first in undergraduate mining education.”\(^{442}\)

1016. The MEA program, which commenced in 2007, involves the three joint venture Universities offering a common third and fourth year program in the Bachelor of Engineering (Mining Engineering) curriculum, developed in conjunction with funding from the MCA. The mining industry is represented on the Advisory Board of the MEA, and therefore has direct input into the content of the course work programs, to ensure they are consistent with the needs of the mining industry. The benefits of the “virtual school” concept set out in Table 9 below.

\(^{441}\) Back from the Brink op cit at 8-9  
\(^{442}\) See MEA website [http://mea.edu.au/content/]
### Table 9: Benefits of Mining Education Australia\(^ {443}\)

<table>
<thead>
<tr>
<th>Industry</th>
<th>University</th>
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</thead>
<tbody>
<tr>
<td>• Involvement of experts</td>
<td>• Better utilisation teaching staff and involvement of experts in key fields</td>
</tr>
<tr>
<td>• Achieving target graduate skills attributes</td>
<td>• Increasing the level of student satisfaction</td>
</tr>
<tr>
<td>• Increased number of graduates</td>
<td>• Increased student numbers</td>
</tr>
<tr>
<td>• Mining education becomes sustainable in Australia</td>
<td>• More students for the same cost</td>
</tr>
<tr>
<td></td>
<td>• Benefits across institutional boundaries</td>
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1017. A diagrammatical outline of the model of the MEA is illustrated in Figure 7 below.

**Figure 7: Proposed National School Model (MEA)\(^ {444}\)**

![Diagram of the Proposed National School Model](image)

1018. The MEA initiative is a major development in mining education in Australia. In discussions with Professor Bruce Hebblewhite, from the University of New South Wales, the current Executive Director of the MEA, I was very

\(^{443}\) See MEA materials and submission of Dr E Chandra WASM

\(^{444}\) See n 443 above
impressed by the potential for the MEA program to contribute to a harmonisation of educational standards in the tertiary minerals education sector. In particular, the capacity to expand the MEA program through the establishment of “associate” programs with other tertiary education providers, which would enable first and second year students at those Universities to transfer into the MEA program, in their third year of study. An early example of this is the announcement in June 2008, that the University of Adelaide has now joined the MEA programme, enabling it to extend throughout mainland Australia for the benefit of the mining industry nationally. At a general level, undergraduate education for mining professionals, in particular from the mining engineering stream, has changed significantly over the last ten years or so. As has been said:

“The focus on mining engineering existing to serve the mining industry has given rise to much debate over the years as to what should be included in the education program. Different sectors of the mining industry have different priorities. Moreover, the required skills and knowledge base may need to change with time to be in step with rapidly developing mining technologies and industry’s embrace of the new one. Course developers have to guard against the “flavour of the month syndrome” the question arises as to whether an industry which has different and changing requirements can be expected to agree on what constitutes the correct mix of topics and subjects in a degree program in mining engineering and also to specify the depth of knowledge required in each of them.

Mining engineering curricula in Australia generally evolved by focusing on the academic requirements associated with a mine manager’s statutory certificate of competency. This focus has changed substantially in the last decade. It is no longer adequate to just educate mining engineers on how to design and operate a mine safely. Mining engineers are also expected to practice in a broader operational, economic and social framework. Graduates are required to have an understanding and empathy for the implication of their decisions on health, safety, environment and community. Good interpersonal and communication skills, cultural awareness, a global outlook and ethical values also assume higher importance in the practice of their profession.”

1019. Additionally, there have been significant developments, consistent with the urgings of the Taskforce in Back from the Brink, for a “widening of the net” in terms of tertiary qualifications that can form the foundation for mine managers in Australia. These alternative pathways include the development of graduate diploma mining engineering courses from Universities recognised for this purpose. This enables non mining engineering graduates, to qualify as Mine Managers by obtaining an appropriate post graduate qualification, such as the Graduate Diploma which presently satisfies the required educational standards

445 Discussions with Professor Bruce Hebblewhite and Mining Education Australia (MEA) Joint Venture Agreement.
446 See MCA media release 12 June 2008
for the Boards of Examiners in New South Wales, Queensland and Western Australia.

1020. In the case of Western Australia, to qualify for a FCCC, the Graduate Diploma in Mining, presently from the University of New South Wales, Ballarat University and Curtin University of Technology, is required to be held with an appropriate engineering or minerals related degree, as specified by the Board in its list of acceptable qualifications. A further initiative being progressively developed is the establishment of “conversion courses” through the MCA, mining companies and the MEA, in order that final year civil, and mechanical engineering students can ultimately convert a mining engineering qualification, acceptable to the various Boards of Examiners.  

Educational Requirements

FCCC

1021. The requirements of each of the certificates, is set out above and in annexure 8. The educational qualifications for the FCCC require a Bachelor of Engineering Mining presently available from:

- The WASM;
- The University of Queensland;
- The University of New South Wales; and
- The University of Wollongong

1022. As opposed to the requirements for a Quarry Manager’s certificate, which does not require a mining engineering degree, the requirement for a FCCC reflects the technical knowledge and expertise required for underground mining, as a prerequisite for appointment as an Underground Manager, such as geotechnical, underground mining systems, and ventilation, amongst others.

1023. Queensland and New South Wales academic qualifications components for the equivalent of a FCCC in the metalliferous sector, similarly require mining engineering at either degree or diploma level.

1024. The Board has a range of alternate degree qualifications, many of them from overseas that are assessed against the “Washington Accord” on engineering qualifications. This attempts to determine equivalence across the parties to the accord. In the case of degrees from America, they are generally considered individually. Where there is doubt, the Board will examine the matter, both internally and externally, as may be required, as noted below.

1025. There are also some qualifications that are not acceptable, with one example being the South African Higher National Diploma. A number of candidates from South Africa, who seek a FCCC, may have many years of good quality practical experience, but lack the required academic component for this

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448 Laurence and Galvin op cit at 26
reason. This has been mentioned to me as an issue, on several occasions, when travelling around the State in my initial consultations.

1026. Given that the existing academic qualifications are broadly consistent, if not higher than those applicable in other jurisdictions, which have more recently enacted and reviewed legislation, can it be said that the WA jurisdiction is out of step?

1027. What changes have occurred in the industry since about 1976, when the Regulations prescribing the current academic requirements came into effect that would cause there to be any substantial revision of their content?

1028. It also must be assumed for present purposes, that the course content of the various qualifications has also changed to reflect the general requirements of industry, given the charter of tertiary institutions offering such courses, to ensure that course content, particularly for vocationally oriented courses such as mining engineering, remain attuned to the needs of the industry. This is certainly the case in relation to the MEA stated objectives referred to above.

1029. As noted, no submissions or observations have been made that to the effect that the existing requirements in the Regulations prescribing academic qualifications are inappropriate. On the contrary, the general requirement for a tertiary qualification, accompanied by relevant practical experience, is strongly supported. For the FCCC, in addition to the acceptable educational qualifications from Australian Universities, the Board for the purposes of reg 2.21(2) of the Regulations is also able to accept an alternative qualification, considered by the Board to be equivalent to a mining engineering degree from any Australian University.

1030. The Board presently has a detailed list of acceptable qualifications for this purpose. These educational qualifications include international and Australian alternative qualifications, the latter being acceptable with certain provisos attached. In general, the acceptable Australian qualifications with provisos are those referred to above ie the Graduate Diploma in Mining category, underpinned by a general engineering degree. Additionally, there are several other Bachelors Degrees specified, including surveying and engineering, which are required to be held in conjunction with either an Engineering Degree or a Graduate Diploma. The range of acceptable qualifications, including relevant Australian, international and those acceptable with provisos, is extensive.

1031. Additionally, for educational qualifications not presently on the Board’s list of acceptable qualifications, an individual assessment is made of the candidate’s qualifications, in particular from overseas countries. In such cases, where there is doubt, the academic members of the Board will provide general guidance, by way of a review of the academic transcript supplied by the candidate in the application. In some cases, depending upon the origin of the qualification concerned, the Board may require the candidate to have the qualification assessed by the Commonwealth Department of Education, Employment and Workplace Relations to “map” the overseas qualification
against an acceptable domestic equivalent. In the case of local and generally lower level qualifications a registered training organisation will sometimes be requested to assess the qualification. This process ensures, as far as possible, that the qualification at least meets a minimum standard acceptable to the Board.

1032. It is clear that these processes involve significant rigour. The acceptable Australian University qualifications, in particular those now provided through the MEA, not only have a high degree of academic rigour, but also the strong endorsement of the mining industry through the participation on the Industry Advisory Group, which is part of the MEA process. The Industry Advisory Group process, comprising senior representatives of the mining industry, involves a vigorous review of the MEA course program, content and structure and the content of each course within the MEA program. The Group also, as a part of the launch of the MEA, agreed to meet annually, to review the MEA program and courses to ensure continued relevance and compliance with the needs of the mining industry.

1033. Thus, in so far as the MEA programs are concerned, are they can be regarded as “cutting edge” industry endorsed tertiary education programs for mining engineering professionals. They are therefore plainly appropriate and reflective of the needs of the mining industry.

1034. There can be no question however, that apart from the MEA education courses, the Board has a policy of accepting a relatively broad range of Australian and international qualifications for the purposes of the FCCC. There are however, some qualifications which are considered not acceptable by the Board a number of which are from South Africa, touched on above. These qualifications are not considered to have the appropriate academic rigour, as a number are considered to be more in the nature of qualifications equivalent to TAFE vocational programs.

1035. Whilst it is acknowledged by many with whom I spoke regarding these matters, that candidates possessing such educational qualifications have, in many cases, very broad and valuable practical experience, the educational component is not considered to be adequate for the highest certificate of competency available in this State.

1036. I have conferred with all of the members of the Board as to these matters. The Board members, including the Chair, comprising senior academic (including the current head of the WASM), regulator and industry experienced professionals, are virtually ad idem, that the existing educational requirements imposed by the Regulations, and applied by the Board, are appropriate and suitable to the needs of the industry. As outlined above, in the case of candidates presenting with qualifications in the suitable alternate category, all members of the Board affirmed the rigour and adequacy of the present processes, to ensure that appropriate standards are maintained. No one has suggested to me, in any of my consultations, that the standards should be in any way diminished.
There were two submissions specifically addressed to the question of the present educational requirements for the certificates of competency.

The first submission is from Dr Chanda, the Head of Mining Engineering at WASM. In his submission, Dr Chanda refers to the development of the MEA program and its background. In his submission, Dr Chanda emphasises the strong linkage of the MEA program, through the MCA, to the mining industry. In his view, given the structure and operation of the MEA, the course content is now particularly relevant to the role of mining engineers, in the current and future context of the mining industry.

In considering the present requirements of the Regulations in particular for the FCCC and the Quarry Manager’s Certificate, Dr Chanda expresses the view that on the commencement of the MEA program, mining education at the tertiary level in Australia is going to be increasingly standardised. A consequence of these industry backed initiatives is that the tertiary mining educational requirement for statutory certificates of competency should now be more specific. On this analysis, Dr Chanda suggests that for example, a candidate for an FCCC should possess a Bachelor of Engineering (Mining Engineering) degree from a recognised tertiary institution in Australia. Secondly, in his view, the case is now strong for tertiary mining educational requirements for statutory certificates, to be uniform across Australia.

Additionally, in terms of training, Dr Chanda emphasised the importance of the mining industry, consistent with the views of the Taskforce in Back from the Brink as outlined above, committing to the development of standard graduate development programs, to enable MEA graduates to gain the necessary practical experience for the purposes of the relevant statutory certificates of competency. It is noted by Dr Chanda, that the current industry practice in this regard is somewhat fragmented.

In a brief submission, the University of Western Australia, submitted that the current requirements of the Regulations concerning certificates of competency are too restrictive. In particular, reference is made to the requirements for a FCCC, being limited to those in possession of a Mining Engineering Degree, thereby excluding others with different qualifications. The view is expressed that whilst accepting the current educational requirements are important, the rigidity of the existing arrangements excludes many other eligible candidates.

The UWA submission considers that a preferred approach would involve the evaluation by the Board, of each candidate based upon their particular competency. An academic qualification would be a part of this assessment and an example is given of a metallurgist, with 30 years working experience at a mine and who, on the present criteria, is ineligible for a FCCC.

As to this latter submission, whilst no doubt the degree of flexibility created may be welcomed in some respects, I would have concerns as to the absence of a mining engineering requirement, for the most technical aspects of a mining operation, in particular, in relation to underground mines. In these
circumstances, it would seem that the rigour of a mining engineering qualification would be essential.

1044. Furthermore, to open the qualification base as broadly as proposed, would require the Board to engage in a detailed evaluation of each candidate in terms of academic qualification and practical experience, to a far greater degree than presently required. This would require a very significant increase in time and resources for the assessment of each candidate, which given the volume of certificates considered by the Board each year, as outlined above, may be prohibitive.

1045. The proposal advanced by Dr Chandra in his submission, as to the future standardisation of tertiary qualifications for the mining statutory certificates, as a consequence for example, of the MEA, has a considerable merit. The development of a common curriculum for the MEA programme across Australia, in the principal mining States of Western Australia, Queensland and New South Wales, and now also South Australia, is a major step forward in laying the foundation for greater national consistency. In my view, this is a matter that should also be taken up through the NMSF process, as it lends itself to a national, and thus seamless, approach to minerals tertiary education. This will however, need to be developed over time, given the recency of the commencement of the MEA programmes.

**Quarry Managers**

1046. To the extent that the requirement for a Quarry Manager’s Certificate of Competency extends to the possession of a tertiary qualification, as with the FCCC, the Board, dealing with applications for Quarry Manager’s Certificates, has a broad range of acceptable Australian qualifications, which include most if not all those acceptable for the FCCC. Additionally, as with the FCCC, the Board also has a range of international tertiary qualifications which are considered acceptable, with provisos. This list is almost identical to that for the FCCC.

1047. As noted above, the only competency based qualification accepted by the Board, for the Quarry Manager’s Certificate, is currently the Diploma in Surface Metalliferous Mining or Extractive Industries. This is an AQTF qualification, which is delivered through TAFE institutions, and registered training organisations. This qualification is based on the MNM05 Metalliferous Mining Training Package.

1048. The Metalliferous Mining Training Package is developed under the auspices of the National Industry Skills Council, which includes stakeholders from the coal mining and metalliferous mining industries. The training package is developed in close conjunction with industry and industry bodies, training providers and government agencies. The training packages are therefore tailored to meet the needs of the industry. Training providers, either the TAFE sector or registered training organisations, are sourced to deliver the
appropriate training content for the purposes of satisfying the qualification requirements.

1049. There can therefore be a degree of confidence, that the metalliferous mining training packages, with their associated qualifications, presently accepted by the Board for the Quarry Manager’s Certificate, are appropriate to the needs of the industry.

1050. The acceptance by the Board of this qualification for Quarry Managers provides an alternative pathway, consistent with the urgings of the Taskforce Back from the Brink, for those candidates who may have some difficulty in pursuing an appropriate University based qualification. This particular route to the obtaining of a Quarry Manager’s Certificate, is now being increasingly pursued which can only, in the current environment, be an advantage to the mining industry in this State. The fact that an increasing number of candidates for the Quarry Manager’s Certificate are utilising this qualification route, is indicative of its suitability and attraction for both employees and employers in the industry. No one has suggested this approach should be changed. On the contrary, in my view, it should be encouraged as a means of providing an alternative pathway to a mine management qualification, for those individuals motivated to pursue this option.

**Restricted Quarry Manager’s Certificate**

1051. The Restricted Quarry Manager’s Certificate is a qualification for use essentially in small quarry operations or a larger operation at which no explosives are used. The qualification requirements for this certificate are set out in annexure 8. The qualification for a Restricted Quarry Manager’s Certificate is essentially experienced based, requiring at least two years work in and about a quarry with specified sub components of practical exposure. Additionally, a Mining Practical examination and a Mining Law examination are required to be passed before a certificate can be issued by the Board. The Mining Law examination for the Restricted Quarry Manager’s Certificate for both explosives and non explosives, is very similar in scope to the examination for the Quarry Manager’s Certificate, save that logically, the restricted examination where explosives are used contains content in relation to the use and management of explosives. The Quarry Practical examination is very similar for both.

1052. There is no academic qualification required for the restricted certificates.

1053. This class of certificate provides a useful qualification point for in particular, small quarry operations, to ensure that appropriately qualified and experienced persons are in management positions. There has been no general suggestion that the restricted certificates are no longer of value or should otherwise be amended in any way. It is also to be noted that the requirement for a Quarry Manager to be appointed to a small quarry with less than 25 employees, may be waived by the Mines Inspectorate, where no explosives are used.449

449 Section 37(4)(a) MSI Act
Similarly in a small quarry where explosives are used, the State Mining Engineer may still, in a particular case, waive the requirement for the appointment of a Quarry Manager. In both cases, the Registered Manager will be responsible for the management and the operations of the quarry concerned.\footnote{Section 37(4)(b) and (5) MSI Act}

1054. These provisions entail sufficient flexibility to enable the management and operation of small quarries in this State to be conducted effectively and with appropriate oversight.

**Underground Supervisors**

**Current Requirements**

1055. The education and training requirements for an Underground Supervisor’s Certificate of Competency are in two streams. The first stream is a tertiary qualification by way of a degree, diploma or associate diploma in mining engineering from a recognised University, School of Mines or Institute of Technology. The second stream is the passing of examinations in both mining practice and mining law as set by the Board. The practical experience requirements are dependant on which education and training stream is pursued. Without an academic qualification, at least five years underground experience is required. With an academic qualification, at least two years underground experience is required.

1056. For the purposes of qualifications accepted by the Board, all courses listed as suitable for the FCCC are also acceptable qualifications for the purposes of the Underground Supervisor’s Certificate. There are additionally, a number of alternative Australian and international qualifications which are considered acceptable by the Board. The international qualifications are largely the South African metalliferous mining qualifications, not presently considered acceptable by the Board for the FCCC.

1057. The same general observations apply in relation to the acceptable tertiary qualifications, as for the Quarry Managers and the FCCC, as noted above.

1058. Additionally, for those candidates seeking an Underground Supervisor’s Certificate of Competency who do not possess tertiary qualifications, as noted, they are required to sit both the Mining Practical examination and the Mining Law examination. The Mining Law examination is in general terms, in relation to provisions of the MSI Act, very similar to that for Quarry Manager’s and Restricted Quarry Manager’s Certificates. Specific aspects of the Regulations are examined, in relation to both general requirements, and specific requirements for underground operations, such as ventilation, explosives, and other matters.

1059. The Mining Practical examination examines a range of practical circumstances that may arise in day to day mining operations such as ventilation, the
operation of mobile equipment and drilling equipment, face mining techniques and safety procedures associated with these operations.

1060. Again, as with the FCCC, no member of the Board dealing with applications for Underground Supervisor’s Certificates of competency took issue with any of the current education and training requirements. For those candidates in possession of the prescribed tertiary qualifications, the same degree of rigour in assessing candidates is applied as for those seeking Quarry Manager’s Certificates and FCCC’s respectively.

1061. In the case of the non tertiary qualified candidates, who undertake the Mining Law and Mining Practical examinations, again the rigour of that process was affirmed.

1062. This latter observation seems to be consistent with the pass/fail rates for the Mining Law examination and Mining Practical examination results for candidates for Underground Supervisor’s certificates of competency, as set out in annexure 13. In relation to the Mining Law examination results, there is a relatively high failure rate. It has been put to me on numerous occasions in my initial consultations, that for those candidates that do not come from a tertiary educational background, this aspect of the certificate requirement is challenging. Indeed, I understand that it is not uncommon, for some candidates for the Underground Supervisor’s Certificate, to make several attempts at the Mining Law examination, before passing.

1063. As would be expected, given the significant practical experience requirements, the same challenges do not appear from the results of the Mining Practical examination component. In the latter case, the majority of candidates seem to undertake this examination requirement without great difficulty.

1064. There is presently no provision made by the Board for the acceptance of any competency based qualification for this category of certificate. This may be in large part no doubt due to the position being presently unique to Western Australia. However, given that there is an existing alternative pathway by the possession of appropriate practical experience and the undertaking of the Mining Practical and the Mining Law examination, it would seem unnecessary for any competency based program to be considered, at least at this stage.

Winder Drivers

Current Requirements

1065. The requirements for a winder driver’s certificate of competency, either Class 1 or Class 2, set out at annexure 8. The qualifications for the grant of Winder Driver’s certificates are essentially on the job training, by the performance of a minimum number of operating hours of a winder of a designated power capacity. Presently for a Class 1 certificate, there is a requirement that a candidate, under supervision of a qualified Winder Driver, operate an electric winding engine of a capacity of not less than 75kw for at least 300 hours. In
the case of a Class 2 certificate, a person must have operated under the supervision of a qualified Winder Driver, a winding engine of between 25kw and 75kw for a period not less than 300 hours. Other duties are also required as specified in the Regulations.

1066. Winder Drivers are responsible for operating winding engines that transport persons and materials in mine shafts. For the purposes of s4 of the MSI Act, a “winding engine” is defined to mean:

“any machinery used to raise or lower, by means of a rope or ropes, conveyances in a shaft or winze for the transport of persons, material or rock but does not include any lifting machine, endless rope haulage or scraper winch installation;”

1067. A winding engine is to be distinguished from a “hoist”, which does not require a certificate of competency to operate, which is defined to mean:

“‘hoist’ means a single undivided drum winding engine driven by a motor or engine having a capacity not exceeding twenty five kilowatts;”

1068. Competency to operate a hoist is to be determined by the Manager of a Mine in accordance with the requirements of the Regulations.451

1069. The operation and maintenance of a winder and particular winding applications such as shaft sinking are highly specialised. There are relatively few certificated winding engine operators in Western Australia. The Board sits very infrequently for the purposes of consideration of the grant of the relevant certificate.

1070. The operations of winders, winding ropes and signals, and requirements in relation to shaft sinking, are the subject of detailed requirements as specified by the Regulations.452 Western Australia is one of only two jurisdictions, the other being New South Wales, that presently require certificates of competency under mining legislation for the operation of winding engines at mines. The New South Wales requirements are also set out at annexure 8, and in short require the completion of a training course based on the endorsed Metalliferous Training Package (MNM 99), adapted for the class of winder or hoist concerned, in addition as being assessed as competent by the Board. There is also, as with Western Australia, a practical experience requirement for operation of a relevant winder or hoist, which requires a shorter period of at least sixty hours of operation under supervision, or for such other period as specified in the relevant training package.

1071. Queensland does not have a certificate of competency requirement for Winder Drivers.

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451 See reg 11.11 Regulations
452 See Parts 11 and 12 Regulations
1072. The competency and certification of Winder Drivers at mines in Western Australia, was the subject of a report in November 2003 by a working group established under the former MOSHAB. The working group was requested to make recommendations as to any necessary changes to the legislation concerning the certification of winder drivers in Western Australia. The working group comprised the State Mining Engineer and two other members representing the CME and Unions WA respectively, both of whom were experienced Winder Drivers holding Class 1 certificates of competency.

1073. Having considered the history, current operations, present certification requirements and the current and projected need for Winder Drivers in the mining industry, the working group came to a number of broad conclusions. It was considered that a training and legislative regime entailing a basic Winder Driver certificate qualification, which was able to be “endorsed” for additional responsibilities such as the operation of a manual winder; maintenance functions; and shaft sinking, itself a particular specialty, was generally supported.

1074. In terms of the current requirement for 300 hours of practice operating winders, it was considered by the industry and union representatives of the working group that such a requirement was inadequate and that 800 operating hours would be more appropriate. The Chair of the committee, adopted the view that an appropriate competency based training program was to be preferred, underpinned by significant practical experience, which would be determined based on the capacity of an individual to achieve the required competency.

1075. However, any reduction in the existing required operating hours was not supported by the industry and union representatives.

1076. In terms of the categories of winders, the working group considered that it may be appropriate to revise the Class 1 and Class 2 Winder Driver classification and remove altogether the capacity for a hoist to be used on hoisting persons, material or rock in a mine shaft. It was also discussed and agreed that the development of appropriate competencies would need to be consistent with the then ANTA competency framework, with a view to developing national consistency within the NMSF.

1077. Arising from the deliberations of the working group, a number of recommendations were made. These recommendations included:

- That there be developed a basic certificate of competency for automated winding systems with further endorsements being required for;
  - the operation of manual winders;
  - winding system maintenance; and
  - shaft sinking
• that the (then) ANTA National Competencies for Winder Drivers be the basis of competency assessment for Winder Drivers in Western Australia and that this facilitate compliance with the NMSF;
• That a code of practice be developed to establish the nature and extent of training necessary for the grant of a certificate of competency for a winder driver with the various endorsements as noted above;
• That the training and experience based competency assessment be underpinned by a requirement of a minimum of an aggregate of 500 hours of operating a winder under appropriate supervision; and
• That hoists be restricted to operations other than the winding of personnel, rock or materials in mineshafts, subject to any permitted exceptions or conditions.

1078. Consistent with the theme developed earlier in this Report, with the progressive mining out of near surface deposits, the likelihood is that there will be an expansion of underground mining operations in Western Australia. Despite the progressive development of automated winding systems, there will inevitably remain a need for manual Winder Driver skills in the future. This is particularly so, in relation to the specialist winding operations, such as shaft sinking and other maintenance requirements, albeit infrequent, such as rope cuts; rope re-capping and other ongoing maintenance requirements, as prescribed by the Regulations.

**National Competencies for Winder Drivers**

1079. The Report considered and recommended the adoption of the then ANTA National Competencies, then in the process of development, for Winder Drivers. The ANTA national competency system has now been superseded by the activity of various industry skills councils, with the development of Metalliferous Mining Training package (MNM05).

1080. More recently, at the MIAC meetings of February, April and June 2007, the recommendations of the working group for the preparation of a Code of Practice for Winder Drivers was endorsed. It was ultimately agreed that the national industry skills council Skills DMC, be approached for the purposes of developing such a code.

1081. Additionally, however, the issue of competencies for Winder Driver operations is to be considered as part of the second phase for the National Licensing of Persons Performing High Risk Work. As a consequence, progress on a Code seems to have been deferred.453

1082. Given that the issue of the competency and certification of Winder Drivers in Western Australia under the MSI Act and Regulations has progressed to this stage, there is little purpose in my view, in revisiting these issues to any extent. However, I note the position in New South Wales, where the relevant Board

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453 See the MIAC meeting minutes April 2008
specifies the Metalliferous Training Package for Winder Drivers (MNM 99), which is the successor to the ANTA suite of competency standards for such a classification, considered by the Report. It would seem to me to be logical, and consistent with the NMSF underlying principles that as far as practicable, consistency be achieved between Western Australia and New South Wales. This is particularly so, given that these two States are now the only jurisdictions which require certificates of competency for Winder Drivers issued by their respective Boards.

1083. Also, the focus of competency and certification of Winder Drivers in Western Australia should primarily be based upon the acquisition of the relevant competencies consistent with the standards prescribed in the Metalliferous Training Package, rather than focusing on a fixed minimum number of hours of on the job practice. To that extent, I agree with the observations of the Chair of the MOSHAB committee. There must of course, be a minimum practice requirement. I note however, the standards in New South Wales in this regard, which are seemingly significantly less onerous than Western Australia. The extent to which a prospective Winder Driver will achieve the required competencies will naturally, vary with the individual attributes of each operator.

1084. For these reasons, if any Code of Practice is ultimately developed in relation to the competency of Winder Drivers in Western Australia, it should take into account these factors in my opinion.

**Recommendation 58**

That save for Winder Drivers, the existing educational requirements prescribed in the Regulations for the various certificates of competency be confirmed as appropriate.

**Recommendation 59**

That consistent with Recommendations 55 and 58 the Board keep the existing educational requirements for the various certificates of competency under review.

**Practical Experience**

**Current Requirements**

1085. The Regulations presently set out the levels of practical experience required for the attainment of the various certificates. Those requirements have, by and large, been in place also since 1976 with minor amendment. For example, to remove from the FCCC requirement reference to general timbering and shaft inspection and repair work, to no doubt reflect the decline in these mining methods.

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454 *Mines Regulation Act Regulations* see GG 1 April 1976 at 911-914
1086. The FCCC requirement reflects the necessity to have both underground and open cut experience, broadly proportionate to the experience requirements for each sector. Presently, there are mandatory requirements for minimum periods in face operations, explosives and particular aspects of underground operations. Generally similar, experience qualification requirements are imposed in the other principal mining jurisdictions, although the specific type of experience and periods required, vary.

1087. The current practical experience levels are five years (at least three years underground) for a FCCC; at least two years for a Quarry Manager and at least five or two years respectively for an Underground Supervisor/Deputy, depending on whether academic qualifications are also held. As set out in annexure 8, in the other principal mining jurisdictions, which do not have the equivalent of the WA FCCC, for senior manager positions, open cut or underground, at least three years practical experience is generally required, in addition to relevant academic qualifications.

Variation of Requirements

1088. Subject to discussion further below in relation to the practical experience requirements of the certificates, and the recommendations made, there is presently no capacity within the Regulations for the Board to vary or waive any of the particular requirements for each of the certificates.

1089. In the case of a candidate for a FCCC, who has met all of the requirements for the grant of the certificate, but has for example, perhaps for entirely legitimate reasons, only two and a half months face experience, the Board cannot grant the certificate. In contrast for example, the Queensland Board, in relation to a FCCC for metalliferous mines, is empowered to vary the specific practical experience requirements as long as the candidate has at least five years post graduate experience in metalliferous mining.

1090. This was a matter raised with me by some in my initial consultations in the industry in relation to the FCCC. It was suggested that the prescriptive nature of some of the practical experience requirements meant, particularly for senior mining professionals who may have moved into management roles, returning to the “face” for example, to fully satisfy the requirements of the Regulations for a FCCC, made it difficult.

1091. I can appreciate these concerns. I also can understand the contrary perspective that to provide the Board with a general power of variation may “open the flood gates”, with the result that the Board may need to develop guidelines in relation to exemptions, that are as prescriptive as the current Regulations.

1092. It is of course difficult to foresee what practical implications such a power would have with any real accuracy. If my Recommendations below in relation to practical experience are adopted, the issue would largely fall away in any event. However, if not, then I consider that on balance such a power should be conferred on the Board. On its implementation, its operation could be the
subject of review. If it is seen as being problematic and imposing burdens on the Board disproportionate to any tangible benefit to the industry, then the issue could be revisited.

**Recommendation 60**

That subject to Recommendations 62 and 63, consistent with the powers of similar bodies in other mining jurisdictions, the Board be given a broad discretion to waive or vary the practical experience requirements of the FCCC as long as the candidate has at least five years practical experience.

**Supervision Experience**

1093. The current experience requirements do not refer expressly to supervision of a work team in production operations i.e. the management of people. It may be inferred that this is included in the requirement for “general underground mining experience” for the purposes of a FCCC, and for a Quarry Manager’s Certificate, “experience in or about a quarry”.

1094. This issue is referred to in the Queensland coal and metalliferous requirements, for the relevant Mine Manager’s certificate, which require at least nine months supervisory experience.

- Should there be such a requirement in express terms? or
- Is it appropriate to leave this to the employer in the discharge of their general duty to appoint competent persons under the MSI Act? i.e. those with appropriate supervisory experience.

1095. Effective supervision is an essential skill in any management position in a mine, whether it be open cut or underground. Whilst technical competence is a given, a major component of modern mine management is the capacity to organise and lead a team of people.

1096. In my consultations for the Review, and in my discussions with the Board members, the concept of a supervisory requirement was generally supported. One issue raised however, is the suggestion that for a FCCC, requiring at least three years underground experience, that a requirement for a supervisory component would effectively mandate candidates to first obtain an Underground Supervisor’s Certificate. In my view this is not necessarily so. This would assume that the supervisory experience must be obtained underground.

1097. However, only three years of the FCCC requirement must be underground experience. Two years can be in other mining operations and any required supervision could be obtained in that time. It is not the sector of the industry in which supervisory experience is gained which is paramount, rather the fact of the experience itself.

1098. In my view, the issue of demonstrated supervisory experience is of sufficient importance for Mine Managers to make it a requirement of both a FCCC and a
Quarry Manager’s Certificate. A period of at least six months such experience would be appropriate.

_A Broader Approach_

1099. The prescriptive nature of the existing practical experience requirements has been commented on above. Additionally, the Taskforce, in _Back From the Brink_, urged the mining industry, in support of the growth and development of Mine Managers in Australia, to commit to graduate development programmes, to compliment graduate education and to foster a broad experience base for the industry.

1100. Additionally, these sentiments were supported in the submission of Dr Chanda, from the WASM, as noted above, who emphasised the importance of the encouragement of graduate development programmes in the industry and the present fragmented approach.

1101. In my opinion, this Review provides an opportunity to address this issue. In consultation with senior and experienced practitioners within my Advisory Group, it is proposed that the existing sub categories of practical experience for a FCCC, be replaced by an overall minimum five years practical experience requirement, based on a suitably modified graduate development programme.

1102. An example of a graduate development programme prepared by an industry professional body is the Graduate Program Best Practice Guidelines developed by the AusIMM. This has been developed by the organisation’s Education and Career Opportunities Taskforce with input from technical professionals. A copy of the programme for a graduate mining engineer, and other professional streams, is at annexure 12. This programme encompasses a broad range of experiential requirements including general induction; a range of discipline specific activity including the current “hands on” practical requirements for the FCCC and Quarry Manager’s Certificates, and health and safety/ risk assessment and supervision; business and management skills; personal development; statutory requirements; further education and continuous professional development. Other programmes exist for different disciplines including metallurgy, geology and geotechnical engineering.

1103. There are a number of advantages of this approach in the context of the contemporary mining industry in my view.

1104. First, it will provide a more flexible, and comprehensive, basis upon which the necessary practical experience can be gained, necessary for the attainment of a mine management certificate of competency. The range of experiential requirements will be broad, encompassing not only the essential current components, but also, many other desirable attributes in graduate management training in a modern mining environment.

1105. Secondly, and equally importantly, such a concept, if adopted, lends itself well to the development of a national and harmonised approach to competency requirements, in that the relevant professional bodies, such as AusIMM, and others, are national bodies with operations in all of the principal mining States.

1106. Thirdly, this approach is also complimentary to developments such as the MEA, which is now providing seamless and harmonised tertiary education courses for the mining industry, across State borders. I am certain that this will only grow further over time. If the graduate programme concept was endorsed and implemented, it would provide a strong foundation for almost, if not complete, consistency across jurisdictions in the principal mining States.

1107. Finally, such a concept also links relatively seamlessly, with the introduction and development of a comprehensive CPD scheme, through the various professional bodies in the mining industry, which issue I deal with further below.

1108. Such a training programme could be tailored to meet the specific requirements of the industry in Western Australia for a “Mine Manager”. I would suggest that this concept be investigated and developed collaboratively between the industry, the WASM, the relevant professional bodies and the Board.

1109. The concept could equally extend to the practical experience requirements for the Quarry Manager’s Certificate, on the same basis as that outlined above for a FCCC. It could also form part of the accreditation requirements for an Underground Supervisor’s Certificate.

**Recommendation 61**

That overall the number of years of practical experience requirements for the various certificates of competency under the Regulations be confirmed as appropriate.

**Recommendation 62**

That for a FCCC, the practical experience component be varied to link it with graduate experience guidelines over a period of 5 years of practical experience. This should be based on the use of suitably modified graduate professional training programmes, such as that prepared by the AusIMM, for example.

**Recommendation 63**

That commensurate practical experience programs be developed for Quarry Manager’s and Underground Supervisor’s certificates of competency consistent with Recommendation 62.
Recommendation 64

That if Recommendations 62 and 63 are not adopted, in the case of the FCCC and the Quarry Manager’s certificate of competency, there be a practical experience requirement of at least 6 months supervisory experience as a minimum.

Removal of the Legislative Framework

1110. To remove the current legislative framework for the assessment of competency would be inconsistent with the present approach to certification of competency in other jurisdictions. Whilst the NMSF Principles may not expressly require such procedures, they do require that legislation specify key positions, and the key functions, competencies and responsibilities of such positions. It is not recommended.

Extending Statutory Certification

1111. This issue has been raised with me on several occasions in my initial consultations. Many of those I spoke with said that it would be appropriate to extend the principle of certificates (or some other method) of competency to minerals processing. Many plants are now technically complex and involve high pressure and high temperatures, combined with the use of hazardous chemicals. These provide particularly challenging operational environments. Why should those responsible for such operations not be required to satisfy at least a minimum standard of competency? It may of course be said that it is again the responsibility of the employer or Principal Employer to, in the discharge of their general duties under s 9 of the MSI Act, appoint competent persons. But in the modern mining environment is this enough?

1112. In general terms, I see no reason in principle why those responsible for managing minerals processing plants, in particular those operations involving hazardous chemicals operating under high temperatures or pressure, should not be required to hold an appropriate certificate of competency. Consistent with the current framework, this should comprise both an educational and a practical experience requirement and also provide a competency based option. Consideration would need to be given to the criteria to apply to such a requirement. This may include size and complexity of plant and other factors. Most of the Board members I have discussed this concept with, support it in principle.

1113. It would seem that if the existing mechanisms are retained for determining compliance with statutory requirements for competencies, a profile for a “Minerals Processing Manager” could be complied, along with the requisite competencies, both academic and practical. I note in this regard that the “AusIMM Graduate Program Guidelines-Metallurgist”, as set out in annexure 12, may provide some guidance.
Recommendation 65

That in principle, the certificate of competency requirement should be extended to minerals processing. This should include an appropriate educational qualification and practical experience profile for such a position, including provision for a competency based option.

Assessment and Grading of Examination Papers

Western Australia

1114. In order to determine the qualifications of a candidate, reg. 2.20(1) provides that “the Board may examine the applicant in writing or orally, or both, as it thinks fit, or may appoint examiners to conduct such examinations.” In Western Australia, there is currently no requirement for an oral examination for any of the certificates of competency issued by the Board.

1115. An oral examination may be granted where for example, a candidate for an Underground Supervisor’s Certificate or a Restricted Quarry Manager’s Certificate achieves a near pass for the written examination, and the Board needs to make an assessment as whether he or she meets the requirements set out in the Regulations.

1116. In order for a candidate to pass the mining law examination for any of the certificates of competency that requires it, he or she must obtain an aggregate of 60 percent. The quarrying examination for the Restricted Quarry Manager’s Certificate of Competency and the mining practical examination for an Underground Supervisor’s Certificate of Competency also require a pass rate of 60 percent.

Examination Procedures

1117. As noted above, the Board currently outsources the examination process to TAFE, under reg.2.20(1) of the Regulations. Whilst Central TAFE has been appointed by the Board to conduct examinations, there are certain guidelines, including a Guidance Note for markers of written examinations and for interviewers of candidates (including oral examiners), provided by the RSD to assist TAFE in its grading and assessment of examination papers. The examination papers are set by Central TAFE using the RSD’s database of exam papers and questions.

1118. The draft examination papers are scrutinised by the Board as variously constituted and amended as required, to ensure currency and appropriateness.

1119. The Mining Law examination for any certificate of competency is to determine whether the candidate has a working knowledge of the MSI Act and

456 The current pass mark is 60%. For those candidates that achieve between 50% and 60%, an oral examination can be conducted
the MSI Regulations as they apply to the class of mines for which the candidate is being examined. The Guidance Note highlights that the markers should be solely concerned with the candidate’s knowledge of the MSI Act and Regulations, not with practical knowledge. The written examination papers are marked by Central TAFE. Marking is to be completed within one month of the examining date and results are forwarded to the Executive Officer of the Board.

1120. As noted, oral examinations are generally only granted by the Board for candidates who achieve a near pass mark in their written examination, providing them with the opportunity to respond further to questions in a format which may be easier for them to accommodate than a formal written examination. Other reasons for subjecting a candidate to an oral examination alone include temporary incapacity or disability of a candidate.

1121. Oral examinations are conducted by at least two people who are either members of the Board, or persons authorised by the Board for the purpose and who hold qualifications at least equivalent to those for which the candidate is to be examined. Oral examinations for Underground Supervisor’s and Restricted Quarry Manager’s, who score between 50 percent and 59 percent, are presently conducted by Central TAFE in Perth.

1122. Following the conclusion of an oral examination, each examiner is required to make a signed, written report of the candidate’s performance and a recommendation to the Board on whether the candidate should pass or fail the examination. If a candidate fails the oral examination, then he or she must re-sit the written examination.

1123. Interviews may also be conducted in conjunction with oral examinations (in the case certificates of competency) or without examination (for Authorised Mine Surveyor’s certificates). However, I am informed that in the cases of the MSB, interviews are rarely, if ever held. The interview is designed to assist the Board to determine whether a candidate meets the experience and qualification requirements under the regulations establishing the criteria for the grant of various certificates, and to assess whether the person is of good character, fit to hold a certificate.

1124. Similar to oral examinations, the Guidance Note stipulates that interviews should be conducted by at least two people who should be members of the Board (or the MSB) or persons the Board authorises for the purpose and who hold qualifications at least equivalent to those for which the candidate is to be interviewed. Interviewers are required to make a signed written, report on the candidate’s performance in their interview and a recommendation to the Board on whether the candidate meets or fails the Board’s requirements.

1125. The procedure in relation to examinations for obtaining certificates of competency in Queensland and New South Wales is not dissimilar to the

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457 Guidance Note for Markers, WA Board of Examiners
458 However, it may be necessary for Regional Inspectors to conduct some oral examinations if candidates are unable to sit in Perth.
position in Western Australia. However, the Queensland and New South Wales Boards have compulsory written and oral components to their examinations, in order to determine a candidate’s competency.

1126. As noted above the results of the examination process in Western Australia in respect of the respective certificates of competency, in the period 2003-2008 are set in annexure 13. As noted earlier, these results are scrutinised closely by the Board and are under constant review.

Queensland

1127. In Queensland, for an applicant to be eligible to be granted a certificate of competency by the Board, as noted, he or she must submit an application to the Board and must pass both written and oral examinations.

1128. Candidates for all certificates of competency must initially sit a three hour, closed book written examination in mining law. Successful candidates (those who obtain a pass mark of 70 percent or higher) can progress to the oral examination for the relevant certificate, which predominantly covers the principal mining hazards and focus on practical safety issues arising in specimen mining scenarios. Corrections from the written examination in mining law are made available to candidates to assist their further study prior to the oral examination, highlighting questions where they obtain half marks or less.

1129. Applicants for Deputy’s and Open Cut Examiner’s Certificates of Competency may sit the written mining law examination at venues in Queensland or interstate and are arranged by the Secretariat of the Board after considering candidates’ availability and location preferences. Applicants for First and Second Class Certificates of Competency may sit the written examination whenever they are ready, at the mutual convenience of themselves and a sitting venue that is prepared to provide an appropriate supervisor for the examination.

1130. Candidates for coal mining Certificates of Competency are asked questions addressing topics in the Board’s core competencies from the Mining National Coal Training Package MNC.04 and are assessed on how they would apply risk management principles in the context of work situations. Prior to the exam candidates are provided with a self-assessment checklist to assist in their preparation.

1131. Candidates for the First Class Mine Manager’s Certificate of Competency (Underground Metalliferous Mines) will be asked questions aimed at assessing their ability to apply risk management principles to modern underground mining situations and problem scenarios.

1132. Reports from completed oral examinations together with relevant file details on successful candidates are then sent to Board members for their approval to issue a certificate of competency. The results of the examination process for the Queensland certificates have been set out above in Tables 7 and 6.
New South Wales

1133. The New South Wales Department of Primary Industries holds examinations throughout the year for examinations of candidates for certificates of competency under the Mines Inspection Act 1901 (for metalliferous and extractive) and the Coal Mine Health and Safety Act 2002 (for coal).

Metalliferous

1134. There is an examination process for Above and Below Ground Mine Production Managers Certificates of Competency. Examinations are held at the Department of Industries, Mineral Resources NSW head office and other Regional Offices, depending on the number of candidates. There are two Boards of Examiners for Production Managers – an Above Ground Board and a Below Ground Board. The Boards set and mark the examination papers, reviewing results and making recommendations for the issue of certificates of competency. Both the written and the oral examinations are conducted on the same day.

1135. Similar to Western Australia and Queensland, the written examinations for both above and below ground consists of a three hour examination on the requirements and application of the Mines Inspection Act 1901, General Rule 2000, Occupational Health and Safety Act 2000 and the parts of the Occupational Health and Safety Regulations 2001 that currently apply to mines. The paper consists of three parts and candidates are required to obtain a minimum of 60 percent for each part and for the combined examination.

1136. The oral examination is conducted separately for each candidate to establish his or her practical knowledge of mining and their ability to manage the safety and health of persons working in an above or below ground mine. Oral examinations are conducted by a panel of two or three Board members or other competent persons nominated by the Chairman of the Board. The oral examination usually consists of three to five questions which take approximately 20 to 30 minutes and involve practical hazardous situations at a mine. The pass mark for the oral examination is set by the Board, but as a guide it is a minimum of 60 percent.

1137. The overall pass mark combining written and oral marks is a minimum of 65 percent. Following the examination process the Board meets to review the compiled results supplied by the Secretary and decides whether applicants have passed or failed.

Coal

1138. The examinations for all coal certificates of competencies are held annually\(^{459}\) and comprise of both a written section and an oral section. Examinations are conducted by the Coal Competence Board. There are separate examinations, written and oral, for each of the various certificates of competency. Similar to

\(^{459}\) Or more often if the Board so approves.
metalliferous, and for Queensland and Western Australia, candidates are required to demonstrate their knowledge of the safety and health legislation and practical mining methodology and techniques for each of the areas of specialty.

1139. *Deputy’s Certificate of Competency* – candidates must pass the Coal Mining Practice and Legislation written examination and an oral examination on matters relating to the duties of a Mine Deputy/Mining Supervisor, and in particular to safety and mining practices in New South Wales coal mines. Candidates must be assessed by the examiner as ‘competent’ to perform the functions of a Deputy/Mining Supervisor in order to pass the oral examination.

1140. *Open Cut Examiner* – candidates must sit and pass a written examination consisting of Paper 1 – Legislation, where they are required to demonstrate practical knowledge of both the Coal Mine Health and Safety Act 2002 and Occupational Health and Safety Act 2000 and related regulations as they apply to the Open Cut Examiner; and Paper 2 – Practical Open Cut Operation, where candidates are expected to have knowledge of the causes and prevention of accidents. The oral examination is conducted in respect of practical aspects of mining related safety practices in New South Wales may include subject matter from the written examinations.

1141. *Open Cut Manager* – candidates must pass the written examination consisting of Paper 1 – Legislation and Paper 2 – Open Cut Mining practice. Similar to other oral examinations for other certificates, the oral examination for an Open Cut Manager’s Certificate of Competency covers mining and related safety practices in New South Wales.

1142. *Undermanager* – candidates must sit and pass a written and oral examination. The written examination consists of three papers: Paper 1 – Legislation, Paper 2 – Ventilation and Paper 3 – Coal Mining Practice. The oral examination relates to mining conditions and safety practices in New South Wales coal mines. To pass the oral examination a candidate must be assessed by the examiner as “competent”.

1143. *Mine Electrical Engineer* – there are three papers: Paper 1 – Electrical Engineering Applied to Mining; Paper 2 – Legislation & Australian Standards applicable to underground mines; and Paper 3 – Legislation, Australia Standards & Electrical Engineering applicable to Open Cut mining. Candidates for certificate as a Mine Electrical Engineer (underground) must sit for papers 1 and 2, whereas candidates for Mine Electrical Engineer of an open cut mine must sit only paper 3. Candidates for both certificates must sit papers 1, 2 and 3. The oral examination concentrates on electrical engineering and related safety practices applicable to coal mines in New South Wales.

1144. *Mechanical Engineer* – similar to the Mine Electrical Engineer Certificate of Competency, there are three papers for the written examination. Paper 1 – Mechanical Engineering Applied to Mining; Paper 2 – Legislation; and Paper 3 – Safety and Mining Legislation. Candidates sitting for a certificate as a Mine Mechanical Engineer (underground) must sit for papers 1 and 2 only,
whereas candidates for a Mine Mechanical Engineer of an open cut mine only have to sit paper 3. Candidates for both must sit all three papers. The oral examination focuses on colliery mechanical engineering and related safety practices applicable to coal mines in New South Wales.

1145. **Manager of a Mine** – candidates must pass all three papers of the written examination. Paper 1 (Legislation) – candidates are required to demonstrate a working knowledge of the Coal Mine Health & Safety Act 2002, the Occupational Health and Safety Act 2000, and the Mines Rescue Act and any related regulations. Paper 2 (Ventilation) – candidates are required to provide answers to practical problems having regard to safety considerations and legal requirements using mine plans supplied. Paper 3 (Coal Mining Practice) – candidates are expected to have knowledge of the causes and prevention of mine accidents and safe working procedures generally. The oral examination relates to mining conditions and safety practices in New South Wales coal mines. To pass a candidate must be assessed by the examiners as being “competent”.

1146. By way of comparison with the Australian experience, I turn briefly to the determination of competency process as adopted for mining operations in the United Kingdom.

**United Kingdom**

1147. The United Kingdom Health and Safety Executive (HSE) in consultation with the Mining Qualifications Board (MQB) outlines the eligibility criteria for certificates of qualification for coal mines. The MQB convenes half-yearly meetings and advises the HSE on the setting of standards for mining qualifications required for use at mines of coal, shale and fireclay, under Regulation 17 of the Management and Administration of Safety and Health at Mines Regulations 1993 (UK). It is the HSE’s role to approve the qualifications for appointments in the mining industry.

1148. For all appointments for which the HSE approves qualifications, the Management and Administration of Safety and Health at Mines Regulations 1993 (UK) also requires that the candidate is competent. Whilst ‘qualification’ confirms a person is suitably educated and has practical experience for a position, ‘competence’ is a legal requirement enforceable by the HSE and refers to the relevant experience, fitness and capacity to discharge duties and exercise authority in a particular mine.

1149. The Institute of Materials, Minerals and Mining conducts a mining law examination relating to mining health and safety, the syllabus of which is approved by the MQB and reviewed annually.\(^{460}\) Candidates must obtain a pass mark (not less than 50 percent) in both Section A and B of the examination.

\(^{460}\) Health and Safety Executive, Mining Qualification: [http://www.hse.gov.uk/mining/qual.htm](http://www.hse.gov.uk/mining/qual.htm) (As at 19/05/08). Examinations were previously organised by the Mining Qualifications Board. The Institute of Materials, Minerals and Mining have been involved with the administration of the examination since the spring of 2004, with the first organised examinations commencing in 2007
1150. Section A is an open book examination accounting for 60 percent of the total marks and is designed to test a candidate’s knowledge of mining legislation and its practical application to specific situations. Candidates are permitted to take in copies of Acts, Regulations and Approved Codes of Practice.

1151. Section B is a closed book examination accounting for 40 percent of total marks available and is intended for candidates to have knowledge of those parts of mining related legislation which they should be able to recall without the assistance of any reference material.

1152. In 2006, only seven of the 18 candidates achieved the requisite pass marks in both sections of the examination, resulting in a 39 percent pass rate. However, out of those 18 candidates, the marks varied considerably.

Conclusion

1153. Subject to the issue of the frequency of examinations and meetings of the Board that I have dealt with above, all with whom I have conferred as to these issues, consider that overall, the existing system of examinations is adequate. One issue that arises however, and which was the subject of comment by the Advisory Group and the members of the Board with whom I conferred, is the absence of an oral examination component as a requirement for the grant of a certificate of competency in Western Australia.

1154. As noted above, it is mandatory in both Queensland and New South Wales, for candidates to sit not only a written examination, but also an oral examination, covering a range of topic areas. It has been emphasised that the oral examination process is a means by which candidates can be tested “on their feet” with practical, real life situations that may unfold at an operating mine.

1155. I have also conferred with a number of senior mine managers as to this issue, who have experienced the qualification process in those jurisdictions where an oral examination is a requirement. All confirm that the rigour of this process was very beneficial.

1156. Undoubtedly, given the additional time required to administer an oral examination, the certification process will be more involved and entail additional expense, based on the higher volume of candidates in Western Australia. Additional resources will be required to be allocated for this purpose. However, in my view, having examined the processes in the other principal mining States, and conferred extensively about the matter, I am persuaded that this is a course that should be adopted in this jurisdiction, as a requirement for the various certificates. The exception should be for the Winder Driver certificates, given the specialised nature of this position, the fact that training is essentially “on the job” based, and the very few certificates granted.
1157. Such an examination process could be conducted generally in accordance with the existing Guideline. Additionally, there is ample power in the Regulations to make oral examinations a requirement. The conduct of oral examinations, as for the written component, could be outsourced if necessary.

Recommendation 66

That the existing practices for the conduct of examinations for certificates of competency be generally confirmed as appropriate.

Recommendation 67

That an oral examination component be introduced as a requirement for all certificates of competency except for Winder Driver’s Certificates.

Mutual Recognition

Western Australia

1158. In Western Australia, the Mutual Recognition (Western Australia) Act 2001 models the Mutual Recognition Act 1992 (Cth) and was proclaimed on 1 March 2001. The Act is designed to provide the means for promoting the freedom of movement of persons in registered occupations between Australian States and Territories by providing recognition of regulatory standards adopted in each State and Territory. It enables a person who is registered in connection with an occupation in one State, to continue the equivalent occupation in another state, subject to specified requirements.

1159. The critical elements are first, registration in the first State, and secondly, that the occupation is equivalent, in the sense that the work performed under the registration in the first State, is substantially the same as that for which registration is sought in the second State. An occupation may be held to be substantially the same by the imposition of conditions.

1160. In Western Australia, the Chairman of the Board (the State Mining Engineer) is responsible for approving, postponing or refusing routine applications after consulting with the relevant interstate authority. Any application that does not prima facie conform to the criteria is forwarded to the Board for determination. It is important to note however, that an equivalent Western Australian certificate is not issued.

1161. There is no capacity for mutual recognition between Western Australia and any overseas country. I mention this because issues have been raised with me by some in relation to, for example, the capacity of Mine Managers from overseas, in particular South Africa, to gain a relevant certificate of competency in Western Australia, based on their existing qualifications and

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461 Regulation 2.20 Regulations
462 Ibid
experience in that jurisdiction. Those coming from overseas jurisdictions are required to satisfy the Board in Western Australia that they meet the requirements for the relevant certificate. This entails sitting the prescribed examinations in Western Australia and demonstrating that they meet the practical experience requirements. I have not recommended any change to this process for the time being.

1162. The operation of the mutual recognition regime, in Western Australia and elsewhere, was the subject of detailed consideration by the Full Court of the Federal Court in Board of Examiners under the Mines Safety and Inspection Act 1994 (WA) v Lawrence. 463

1163. It is beyond the scope of the present Review to examine these issues in any detail. Suffice to say however, the operation of mutual recognition has proved problematic in some circumstances that I am aware of. The relevant field of law and discourse is an interesting one and it may be profitable to examine the issue further on another occasion. The movement via the NMSF process to greater alignment between States in relation to competencies for key mining operations positions may lessen these difficulties. Furthermore, if the recommendations below, in relation to additional powers for both the Board and the MSB are adopted, this will also enable consideration of the requirements for each of the certificates, in terms of greater alignment with the requirements of the other principal mining States.

1164. I briefly comment however, on the position in relation to mutual recognition in the other principal mining States as well.

New South Wales

1165. In New South Wales, a holder of a statutory certificate of competency may make an application for registration under the provisions of the Mutual Recognition (NSW) Act 1992. This Act requires the State registration authorities to prepare and make available guidelines and information regarding the operation of mutual recognition in relation to occupations for which an authority is responsible.

1166. The New South Wales Department of Primary Industries, Mineral Resources division is the registration authority in New South Wales for occupations relating to mining. The Department has published on their website Guidance Notes for making an application for the recognition of a statutory occupation in both the coal mining industry of New South Wales and in New South Wales mines (metalliferous).

1167. All applications under the Mines Inspection Act 1901 for mutual recognition for an equivalent occupation are considered by the Board of Examiners relevant to that occupation. Similarly, all applications under the CMHS Act (NSW) for mutual recognition for an equivalent occupation will be considered by the Coal Competence Board.

1168. Each Board has a process for dealing with applications expeditiously. If registration is refused\(^{464}\), the applicant will have to cease practising within a time specified (not less than two weeks) in a letter, but a right of appeal to a Tribunal exists.

**Queensland**

1169. The State regulatory agencies are empowered to require applicants to demonstrate their competency as safe practitioners to the State’s usual standards before granting them registration under mutual recognition. In Queensland, mutual recognition is governed by the Mutual Recognition (Queensland) Act 1992. The Queensland Board of Examiners can only consider applications for registration under mutual recognition for a:

- First Class Mine Manager’s Certificate of Competency (Underground Metalliferous Mines);
- First Class Mine Manager’s Certificate of Competency (Underground Coal Mines);
- Second Class Mine Manager’s Certificate of Competency (Underground Coal Mines);
- Deputy’s Certificate of Competency (Underground Coal Mines); and
- Open Cut Examiner’s Certificate of Competency (Surface Coal Mines).

1170. Applicants for Deputy's Certificates of Competency and Open Cut Examiner’s Certificates of Competency must also provide evidence that they hold a current Senior First Aid Certificate or equivalent. As the mining Boards of Examiners in Tasmania, Victoria and the Northern Territory have been abolished, persons holding similar statutory certificates of competency issued in these States and Territories are not eligible to apply for an equivalent certificate in Queensland.

1171. From 31 January 2006, those seeking to have their interstate statutory certificates of competency registered in Queensland by mutual recognition must first undertake and pass a written examination in Queensland mining safety and health law as is applicable to their certificate of competency and must hold relevant risk management competencies.\(^{465}\) There is no oral examination component.

1172. Applications for registration under mutual recognition should only be made after these requirements have been satisfied. In 2005-06 there were a total of

\(^{464}\) Due to any statements, documents, or information is misleading, false, incomplete, or if the occupation is not equivalent

81 registrations under mutual recognition for the various statutory certificates of competency in Queensland.\textsuperscript{466}

\textbf{Risk Management Competency and CPD}

1173. Shortly before midnight on 17 August 1994 at the Moura No 2 underground coal mine in Queensland, disaster struck. At that time 21 miners were working underground in the mine. As a result of an explosion, 11 miners lost their lives.

1174. As a consequence of the Mining Warden’s Inquiry into that disaster, which reported on 3 January 1996, a number of significant recommendations were made. One of those recommendations related to statutory certificates of competency for Mine Managers. In particular, the Mining Warden made the following comments and recommendations:

\textit{“STATUTORY CERTIFICATES}

\textit{As demonstrated repeatedly in evidence, it should not be taken for granted that a statutory certificate of competency to practice as a mine manager, under manager or deputy carries an assurance that the person possessing it is maintaining and where necessary developing the original knowledge base required for the appointment.}

\textit{It is recommended therefore, that the procedures for granting statutory certificates for underground coal mining and the conditions in which they are awarded, be reviewed. In particular, it is recommended that certificates not be granted for life and that a system needs to be developed and put into effect as soon as practicable that requires certificate holders to demonstrate their fitness to retain the certificate of competency on a regular basis, at intervals of not less than three and not more than five years.}

\textit{The process should aim to ensure that certificate holders maintain a sound knowledge based on, and keep abreast of technical developments in coal mining and most particularly those relevant to coal mine safety.”}\textsuperscript{467}

1175. These recommendations resonated through the mining industry in Queensland and in my opinion, have significant implications for the industry generally throughout Australia.

1176. As noted, there is presently in this State under the MSI Act and Regulations, no provision for on going professional development or the attainment of competency in management, supervision, health and safety, or risk management generally. That is a holder of a FCCC can, to cite an extreme\textsuperscript{466}\textsuperscript{467}
example, maintain such a competency without setting foot on a mine site for 20 years, and still be entitled to run an underground mine under the MSI Act.

1177. No doubt prudence in the appointment process by an employer, and the obligation under the MSI Act and at common law, to appoint competent persons, would hopefully militate against the worst case situations that may arise.

1178. But in this jurisdiction, under the legislation, this situation is quite possible. Is this desirable? A number of other professional groups and those engineering professionals in the mining industry seeking to acquire chartered status from the professional engineering bodies are required to undergo continuous professional development of one form or another. Why should not Mine Managers, who are in charge of multi million dollar mining operations and who are responsible for the health and safety of perhaps hundreds of employees, also have such a requirement?

1179. In my opinion, this is a yawning gap in the regulatory regime in this State. It is long over due for it to be addressed.

1180. Having said that however, I have no doubt that enlightened mining industry employers, and some from my own knowledge and experience, do have a strong commitment to ensuring that skills are maintained and developed, both through in-house and external, continuous professional development. However, I cannot say that this reflects the position throughout the mining industry. To address this, in my view, there needs to be a regulatory response of some form. This Review is an opportunity to pursue that response.

1181. This is in contrast to New South Wales for example. Presently, under the Mines Inspection Act 1901 (NSW), the Mines Inspection Amendment Act 1998 (NSW) and the Mines Inspection General Rule 2000 (NSW), there is a requirement on the holders of prescribed statutory positions in the metalliferous sector, such as production managers and others, to undergo development programmes in relation to matters such as risk management, emergency preparedness, ground control, ventilation, and the application of legislation, and that they maintain that level of competency.468

1182. Furthermore inquiries with the responsible Department in New South Wales, indicate that consideration is being given to the introduction in that jurisdiction, of a form of continuous professional development for both the coal and metalliferous sectors of the industry.469

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469 Discussions with the New South Wales Department of Primary Industries Minerals Division April 2008. The process will begin with the Coal Competence Board and subsequently the Metalliferous Mines and Extractive Industries Competence Board, established under the new legislation and which came into effect in September 2008
Queensland

1183. Also, in Queensland, the respective Boards of Examiners may establish requirements for maintenance of competence for holders of a certificate of competency. Compliance with any such requirement is a condition of the relevant certificate. Furthermore, the Site Senior Executive at a coal mine in Queensland, must ensure that the holder of a certificate of competency or management or advisory position, is given refresher training under the mine’s training scheme at least each five years.470

Previous Initiatives

1184. Some years ago in this State, a proposal was developed to introduce the concept of “Applicable Training”, as a compliment to the existing certificates of competency. This was to involve matters such as general management and supervision, and occupational health and safety. The training was to be endorsed via the Board and could be undertaken by means of study, training and recognition of current and prior learning. The administration of it was to be the province of the Board.

1185. This initiative arose as a result of the former MOSHAB inquiry into fatalities into the mining industry in Western Australia in 1997. Additionally, at about the same time, consideration was being given in the Eastern States mining sector, to the concept of the renewal of statutory certificates of competency for mine managers every three years, flowing from the Moura mine disaster. Whilst this was also proposed for Western Australia, it was considered that to adopt such a scheme would involve an excessive administrative burden, without any tangible impact on improving safety in mines.

1186. According to the State Mining Engineer in his submission, the “Applicable Training” concept was developed by the then Department, in conjunction with the CME, as an alternative option to a three yearly renewal of certificates of competency. It would be a requirement under the Regulations, for Applicable Training to have been received, in addition to the relevant certificate of competency issued by the Board. It was proposed that if adopted, mining industry employers would be required to demonstrate that management and supervisory personnel in such positions had undertaken the appropriate Applicable Training, which could be verified by the Mines Inspectorate at any time. The delivery mechanism was intended to be the “Frontline Management Initiative”, recommended in 1995.471

1187. Applicable Training, being competency based, was to be linked with the relevant AQTF recognition process, which would involve formal training, work and other experience, and incorporate the principles of recognition of prior learning and recognition of current competencies. Ultimately, the

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470 Reg 84 Coal Mining Safety and Health Regulation 2001 (Qld)
qualifications to be available were the Certificate and Diploma qualifications in Frontline Management, at AQTF levels three to five.

1188. As I understand it, the proposal progressed to the level of the preparation of a Guidance Note to launch the concept. Additionally, a detailed “Applicable Training Package” was prepared, setting out the various units of competency and a guide as to their use and implementation. Ultimately however, the concept did not proceed to implementation.

1189. In my view, there is much to be said for redevelopment of a concept such as the originally proposed “Applicable Training”, as a supplement to the grant of certificates of competency in this State. However, I add the caveat that if my Recommendations above, as to the development of graduate training programmes are accepted, and form the basis of the practical experience requirements for mine management certificates, this will go a long way to achieving a similar result. This will only then require some form of “Applicable Training” or similar requirement for those, for example, undertaking the Restricted Quarry Manager’s Certificate.

**CPD Schemes**

1190. As an alternative to Applicable Training, or as a complement to it, there are powerful arguments in my view in favour of introducing a continuous professional development (“CPD”) requirement into the regulatory architecture in Western Australia. This could be achieved through an appropriate linkage with one or more of the professional bodies representing mining management, such as the AusIMM and the Institute of Quarrying Australia, the Mine Managers Association of Australia, and other like bodies. These professional bodies have developed comprehensive CPD programmes. These programmes encourage, support, and reward, ongoing professional development through attendance at seminars, conferences, training programs and other activities, which are then credited towards the attainment of a particular status within the industry such as “certified” or “chartered” or the like. Similar schemes operate in professional bodies in other sectors.

1191. The Taskforce, in *Back from the Brink*, as noted above, urged a greater commitment by the industry to CPD. The Moura mine disaster Report, also endorsed the concept. This was also a theme pursued in the submission of Dr Chandra of the WASM. In my view, the way of ensuring that the message gets to the point of comprehensive implementation, is to require CPD as part of a regulatory regime.

1192. There is much to be said for the formal development in this jurisdiction, of such a requirement. This is particularly so in the contemporary mining environment, in which there is rapid and continuous technological and other change that mining industry professionals need to keep abreast of.

1193. In discussions I have had with many and in interviews with members of the Board, the concept of a form of CPD for the mining industry in this State, formally recognised within the regulatory framework, was strongly supported.
In its submission to the Review, the CME, whilst identifying the current certification requirements as being supported in the short term, noted the absence of a requirement for demonstration of currency of knowledge. This was also supported in the submission from the State Mining Engineer.

1194. In my view, if carefully implemented, the principle of “Applicable Training” and/or a formalised CPD scheme, in conjunction with one of the professional mining industry bodies, will substantially contribute to improving the level of currency of knowledge in the industry, which currency would be able to be demonstrated. It will also assist employers in fulfilling their duty of care obligations under s 9 of the MSI Act, and in terms of their obligations at common law, in relation to the provision of competent and trained staff.

1195. Furthermore, if such an approach is adopted in this jurisdiction, then given the role presently played by the Board, there should be established a formal linkage between the Board and the relevant CPD provider, in order that the relevant professional bodies have some input into and oversight of the program. A logical means of achieving this could be having a formal linkage between the Board and the CPD board of the relevant professional body, through a member of the CPD board being a member of the Board in this State.

1196. Ultimately, if this concept is implemented as recommended, and developed to its full potential, then I can see no reason in principle, consistent with my observations above as to the outsourcing of the activities of the Board, why the entire certification or some such process, could not be wholly conducted by such a professional body. This of course, as noted, would be subject to the retention of State involvement in the establishment of the appropriate regulatory standards. This could then also form the basis of a cross jurisdictional approach, and would fit neatly with the ultimate harmonisation of competency standards, nationally consistent, in accordance with the NMSF underlying principles.

1197. Additionally, if a CPD programme is implemented, then in relation to the FCCC, it should also have equal application to the Mines Inspectorate personnel required to hold the qualification, presently the State Mining Engineer and a District Inspector.

**Recommendation 68**

That the concept of “Applicable Training” or a form of CPD presently conducted by a mining industry professional body be adopted as a part of ongoing competency requirements for the holders of certificates of competency in this State.

**Recommendation 69**

That the requirement referred to in Recommendation 68 be introduced by appropriate amendment to the Regulations.
Recommendation 70

That if a CPD or like scheme is introduced into the certificate of competency requirements and it is conducted by a mining industry professional body, that a representative of that body administering the CPD scheme, be considered for appointment as a member of the Board, to assist in the oversight and maintenance of standards. Provision would need to be made in the Regulations for this.

Recommendation 71

That the requirements for any ongoing competency assessment that may be recommended via a CPD scheme or the like, for the industry, also apply to the senior Inspectorate positions.

Risk Management

1198. As I have already observed, there is absolutely no requirement on a holder of a statutory certificate of competency of any kind in this State, to demonstrate any ongoing maintenance of competency in risk management or indeed any other competency, to be a sound manager or supervisor.

1199. This issue was taken up in the submission to the Review by Professor Joy. He referred to developments in Queensland in particular in the activity of various tripartite task forces, established in the wake of the Moura No 2 disaster, to consider and define the requirements for “competent mine management”. According to Professor Joy at an initial level, there were some eleven topic areas identified, one of which was risk management.

1200. As a consequence of this initial work undertaken, there was established a unit of competency entitled “establishing the Risk Management System” or alternative, which is now a recognised competency based unit within the Metalliferous Mining Training Package. A copy of the risk management competency unit “MNMNSM617A Establish the Risk Management System” is at annexure 9.

1201. As noted earlier in relation to the comparative requirements between the principal mining State jurisdictions as to certificates of competency, it is a requirement in Queensland that all new and existing underground coal managers possess this risk management or an equivalent competency. These requirements are set out at annexure 8.

1202. Additionally, Professor Joy referred in his submission, to the related “Mine Managers Risk Management” course, which has been developed and is now delivered by a number of institutions and registered training organisations throughout the Queensland and New South Wales mining industries. This course, colloquially known as the “G3”, is a modular based program involving

as a final component an intensive five day face-to-face workshop, which covers all facets of minerals industry risk management. A copy of the “G3” course outline is also at appendix 9.

1203. The absence of a requirement to demonstrate competency in risk management, was also noted in the submission of the CME. The concept is supported by the industry.

1204. Whilst I recognise that relevant principles of risk management are now being incorporated into tertiary education courses for the mining industry, including those being developed under the auspices of the MEA, outlined above, in my opinion, a regulatory requirement for the incorporation of such a competency within the certificate of competency requirements in this State, as long as they continue, is long overdue.

1205. This is a change that can be and should be made relatively promptly. Accordingly, I recommend that without delay, there be introduced a mandatory requirement for all mine management certificates of competency, to have as a component, the “MNMNSM617A Establish the Risk Management System” course, or equivalent, completed. No certificate of competency should be issued by the Board, until evidence that a candidate has successfully completed such a course, is furnished to the satisfaction of the Board.

1206. Similarly, the requirement to undertake a risk management programme should also extend to the Inspectors in the Mines Inspectorate. I have already dealt with this above.

1207. Given the importance of this issue, I also recommend that those persons seeking mutual recognition in Western Australia from other jurisdictions also be required to demonstrate completion of this risk management course or an equivalent. For those who are unable to do so, they should be required to complete such a course, as a condition of registration in Western Australia.

Recommendation 72

That subdivision C of Division 3 of Part 2 of the Regulations be amended to require all applicants for mine management certificates of competency, for both underground and open cut operations, to have completed the risk management competency course “MNMNSM617A Establish the Risk Management System” or an alternative course, considered equivalent by the Board. This should also extend to those seeking mutual recognition in Western Australia.

Competencies of the Registered Manager

1208. As noted above, contrary to popular perception outside of the industry, a Registered Manager is not required to hold any particular qualifications for appointment to such office, as opposed to those positions directly supervising operations in a mine. This is not unique, as in Queensland for example, the
Senior Site Executive as a general rule, is also not required by the statutes in force in that jurisdiction, to hold any particular qualifications.

1209. The statutory obligations imposed on a Registered Manager are set out above.

1210. It is implicit in s 43(2)(a) of the MSI Act, that in order to so manage and control a mine, a Registered Manager must have the required knowledge to do so. However, neither the MSI Act nor the Regulations require, for example, a Registered Manager to demonstrate such a capability. Should there be a requirement for example, as a minimum, that a Registered Manager (who is not otherwise a prescribed certificate of competency holder) sit the mining law examination, in relation to the requirements of the MSI Act and the Regulations as a prerequisite to appointment in such a position? Should there also be a requirement that an appointee to such a position have at least some practical experience and connection with the mining industry?

1211. The Registered Manager is the principal accountable officer under the MSI Act and Regulations with overall responsibility for what occurs at a mine. In such a position, the Registered Manager is the most senior officer recognised by the MSI Act. It is, in my opinion therefore somewhat incongruous that such a position has no qualification or practical experience requirements at all. Very many of those with whom I discussed this issue, also considered the current position to be in need of review.

1212. This extended to a Registered Manager having at least some association with the mining industry. Furthermore, such a person, given the statutory responsibilities of the position, should be required to sit the Mining Law examination to demonstrate an understanding of the MSI Act and the Regulations, and complete a risk management course that all others are recommended to have completed.

1213. Furthermore, apart from the core provisions of Part 4 of the MSI Act dealing with the obligation on the Principal Employer, to make appointments, all remaining provision of Part 4 could be transferred to the Regulations. I note that this is at least in part, consistent with a recommendation of the MSIG\textsuperscript{473}

\begin{center}
\textbf{Recommendation 73}
\end{center}

That as a condition of appointment of a Registered Manager the appointee should have substantial demonstrated experience in the mining industry in some capacity eg engineering, science or other technical field or construction activity associated with the development or operation of a mine.

\textsuperscript{473} MSIG op cit at 60
Recommendation 74

That as a condition of appointment of a Registered Manager the appointee should have passed the Mining Law examination set by the Board and undertaken a recognised course in risk management such as the “G3” or an equivalent course.

Recommendation 75

That the obligation on a Principal Employer to appoint and the core responsibility of appointed positions be retained in the MSI Act. All remaining provisions in Part 4 of the MSI Act such as qualifications for appointment and conditions of appointment should be transferred to the Regulations.

NMSF Compliance

1214. In terms of the NMSF Legislative Framework, there is no specific reference to the means by which the competency of those in positions prescribed by statute, are to be assessed. Principle 11 specifies that key positions are to be included, along with the responsibilities and competencies of those positions.

1215. However, as I have already noted, work is presently being undertaken in relation to Strategy 2: Compliance Support. This strategy has the objective of the ultimate development of a national approach to mining industry competency assessment. As noted earlier, the complexity of this process is acknowledged, given the diversity of statutory positions, existing competency requirements, Boards of Examiners (where they exist) with differing policies, all within somewhat diverse legislative frameworks.

Mines Survey Board

1216. The importance of proper mine surveying and mine planning cannot be overstated. The experience of the Gretley mine tragedy in New South Wales in November 1996, where four miners died as a result of an inrush of water from abandoned mine workings, starkly illustrate the significance of this point.474

1217. Apart from the submission of the State Mining Engineer, referred to above, there were only two other submissions that commented directly on the MSB.

1218. To the extent that the State Mining Engineer addressed his submission to the Boards generally, his observations as to the Board of Examiners which I have set out earlier, applies equally to the MSB.

1219. The CCIWA, after noting the function of the MSB, considered that the role played presently by the MSB could be essentially split into two. The first, as

to safety certification processes, being conducted in the manner proposed by the CCIWA as for certificates of competency ie as part of the Licensing for High Risk Work, on a similar basis to that now operating under the OSH Regulations.

1220. For survey matters not associated with safety and health, those matters could be referred to the DOIR, via an appropriate consultative process.

1221. The other submission was from Dr Andrew Jarosz, who is presently a member of the MSB and is on the academic staff of the WASM. I have already referred to part of Dr Jarosz’s submission above.

1222. Dr Jarosz also proposed that the academic qualifications for the certificate prescribed in reg 3.47(4) of the Regulations be amended to provide that:

- For a Grade 1 Authorised Mine Surveyor’s Certificate there be required a minimum of a four year degree in mine surveying from a University including units for geology, mining systems, geomechanics and mine management and safety.

- For a Grade 2 Authorised Mine Surveyor’s Certificate, there be required a minimum of a three year mine surveying degree or diploma from a University or TAFE including units in geology, mining systems, and mine management and safety.

1223. A proposal was also advanced for a change to electronic recording in a mine record book for the purposes of s 84 of the MSI Act and also to modify the particulars presently specified in the Regulations for the establishment of datum stations and for mine plans in regs 3.50-3.53.

Functions and Powers

1224. As with the Board, the MSB was established and constituted under the former Mines Regulation Act 1946 and was continued under the MSI Act on the repeal of the former and the commencement of the latter. The MSB is required, by s 82 (3):

- to advise the Minister on survey matters relating to mines and mining operations, including quarries and quarry operations; and

- to examine the qualifications, experience and, character of persons applying for Authorised Mine Surveyors Certificates and issue such certificates where appropriate.

1225. The MSB is also empowered, by ss 83, 84 and 85 of the MSI Act, to inquire into and deal with complaints to it in respect of the conduct of the holder of an Authorised Mine Surveyor’s Certificate. An appeal from a determination of the MSB is to the Tribunal, which by s 86 (3) of the MSI Act, is empowered to either dismiss an appeal or to substitute its decision for that of the MSB in the first instance. As with the equivalent provision for the Board, no appeal has been instituted to the Tribunal under these provisions.
1226. The corresponding Regulations in relation to the MSB are found in Division 6 Part 3, and deal with the composition of the MSB and the requirements for Grade 1 and Grade 2 Authorised Mine Surveyor’s Certificates. A Grade 1 Certificate authorises a person to make or draw surveys or plans of underground mines and quarries, while a Grade 2 Certificate only authorises a person to make or draw surveys or plans for quarries.475

1227. The required qualifications for consideration by the MSB for the issuance of a Grade 1 or Grade 2 Authorised Mines Surveyor’s Certificate is prescribed in reg 3.47. For either a Grade 1 or Grade 2 certificate, an applicant must possess a Degree or Diploma in Mine Surveying Technology from WASM, a three year Diploma of Mine Surveying from TAFE or an equivalent qualification. Additionally, a Grade 1 applicant must have passed two mining units and a geology unit and a Grade 2 applicant at least one mining unit, as a part of their academic qualifications.

1228. Practical experience for a Grade 1 applicant is not less than twenty four months underground surveying and, in the case of a Grade 2 applicant quarry operations surveying of not less than twelve months. The relevant practical experience requirements for each of the two certificates have been prescribed by the MSB.

1229. In the case of a Grade 1 certificate they are:

- Primary surface control
- Precise, closed surface traversing
- Transfer of azimuth from surface to underground
- Underground traversing (closed)
- Underground traversing (open)
- Stope volumetric surveys
- Transfer of elevation from surface to underground, including the precise establishment of underground benchmarks
- Shaft plumbing (or plumbing other vertical openings)
- Set-out for decline development
- Set-out for level development
- Set-out for rise development
- Borehole set-out
- Periodic face position surveys
- Excavation offsetting
- Calculation plotting and record keeping for the above work

1230. In the case of Grade 2 certificates the practical requirements as determined by the MSB are:

- Primary surface control
- Precise, closed surface traversing
- Bench stockpile volumetric surveys

475 Reg 3.45 Regulations
• Transfer of elevation, including the precise establishment of benchmarks
• Set-out for ramp development
• Set-out for bench development
• Blast hole and bore hole set-out
• Periodic face position surveys
• Calculation, plotting and record-keeping for the above work

1231. The remainder of Division 6 prescribes the requirements for the taking of measurements and the particulars of mine plans and their submission to the State Mining Engineer. Additionally, by reg 3.54, at the request of the Coroner, a survey or location plan may be requested at the scene of any fatal accident at a mine.

Composition and Procedure

1232. A quorum for a meeting of the MSB requires four members.⁴⁷⁶

1233. From my interviews with them, the overall sentiment of members of the MSB is that the constitution of the MSB is well balanced and has members with the appropriate blend of skills and experience to perform the Board’s functions. The majority of members expressed the view that it was not necessary to alter the size of the MSB’s membership, as it would not achieve or significantly improve current arrangements. Conclusions reached as to the composition of the Board, as variously constituted for the certificates, apply equally to the MSB. This is of course qualified by the submissions of Dr Jarosz noted above.

1234. Notably however, currently, the MSB has no provision for the appointment of a deputy to act for the Board member when the member is unable to attend a MSB meeting, as is the case with other Boards under Reg. 2.15 of the Regulations. All members interviewed agreed that the ability to appoint a deputy would be an advantage. This would provide flexibility for members who may have conflicting commitments with Board meetings. It may also have the effect of indentifying a pool of potential candidates for appointment, on the retirement of existing members.

1235. The MSB usually sits twice a year (approximately every six months) to consider applications for Authorised Mine Surveyor’s Certificates. Most MSB members agree that there is scope to increase the frequency of Board meetings, however some members expressed the view meetings are scheduled in response to demand from the industry.

1236. Board meetings generally consist of confirmation of the minutes from the previous meeting, legislative issues, education units and requirements for certification, considering applications for Authorisation of Mines Surveyor’s Certificates (both Grade 1 and Grade 2) and any other business that may arise. Meetings generally are held over one half to three quarters of a day and are held in Perth. The concept of mutual recognition and the authorisation

⁴⁷⁶ Reg 3.44(4) Regulations
process/legislative requirements for mine surveyors in other jurisdictions has been an issue of contention. It has been deliberated upon on a number of occasions, including most recently in March 2008.

1237. Having reviewed the relevant parts of the Regulations in Part 3 Division 6, dealing with the constitution of the MSB, in my view a number of changes of procedural nature could be made.

1238. Whilst by reg 3.44(1)(b), there is prescribed the process for nomination of MSB members, is no provision in the Regulations for a procedure in default of a nomination. Thus, there is no capacity for an appointment to be made by the responsible Minister in these circumstances. Whilst perhaps such an occurrence may rare, none the less most legislative appointment processes make provision for such events and I see no reason why the MSB should not have such a procedure.

1239. Secondly, once appointed, there is no provision prescribing the term of the appointed member, under either s 82 of the MSI Act or the Regulations. As a consequence, an appointed member may technically be regarded as permanent. I do not think this could have been the intention and this should be remedied. Provision for re-appointment should be made.

1240. Thirdly, there is no provision in the Regulations for the vacation of the office of a member of the MSB.

1241. In my view these matters need to be resolved, as by s 82(2) of the MSI Act, the MSB is to be “constituted in the manner provided in the regulations” The most appropriate way to deal with these issues would seem to apply the same broad approach as that applied to the constitution of the Board.

Recommendation 76

That Part 3 Division 6 of the Regulations be amended to insert provisions as to the composition of the MSB in relation appointments in default of nominations; the term of appointment of members; vacation of office by members; and the appointment of deputy members, in the same terms as regs 2.12 to 2.15 of the Regulations applicable to the Board.

Assessment Process

1242. The MSB, unlike the Board for the various Certificates of Competency, has no examination requirements (written or oral) for a candidate for an Authorised Mine Surveyor’s Certificate. Consequently, when considering the grant of certificates the MSB members do not have the opportunity to interview or examine candidates that they have to assess.

1243. Certificates are issued to any candidate who holds the requisite qualifications for an Authorised Mine Surveyor’s Certificate (Grade 1 or Grade 2), has made mine surveys of a nature and under supervision satisfactory to the Board for a set period of time, and is of good character.
1244. The MSB has, however, recently implemented a new policy as to these matters. It now requires referees to endorse an applicant’s application and suitability as an Authorised Mine Surveyor in Western Australia.

1245. There is provision under the Guidance Note for Markers provided by the RSD, for interviews to be conducted for the purpose of determining a candidate’s fitness to hold a certificate of competency as an Authorized Mine Surveyor Grade 1 or an Authorized Mine Surveyor Grade 2. The Guidance Note outlines the matters to be canvassed at the interview for such certificates of competency. However, this provision for interviews is not utilised by the MSB.

1246. Having considered the operation of the MSB, compared to the method of operation of the Board in relation to certificates of competency, and similar bodies in other jurisdictions, this is an area that in my view requires some reconsideration. This is particularly so when compared to other Boards that certify surveyors (both in Western Australia and in other jurisdictions) which tend to have more rigorous methods of assessment. Mine surveying is a specialised and important profession, which discharges important responsibilities in a hazardous industry. In my view, there should accordingly, be a rigorous assessment process, to satisfactorily examine the qualifications and experience of candidates seeking to practice in the industry.

1247. The MSB members whom I have interviewed tend to agree that the level of rigour in the current method of assessing candidates could be improved. Budgetary and time constraints appear to have been the major obstacles to reforming the procedures of the MSB in the past.

1248. In my view, at least an oral examination or interview process for candidates should be implemented by the MSB, to provide for a more thorough assessment of candidates which would be more aligned with the approach adopted in other jurisdictions.

1249. Additional resources, both in terms of this recommendation, and the several below, would need to be provided to the MSB for these purposes.

**Recommendation 77**

That the MSB introduce a requirement for an oral examination or at least the interviewing of candidates for Authorised Mine Surveyor’s Certificates.

**Code of Practice**

1250. A significant achievement of the MSB has been the development a Code of Practice on Mines Survey which received endorsement by the MOSHAB and approval from the then Minister for State Development. The Code is

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477 See minutes of meeting MSB 7 March 2008
478 Mines Survey – Code of Practice, Department of Industry and Resources, Safety and Health Division, 2005
designed to be used in the compilation of a mine plan for each mining operation.

1251. All underground and surface check or control surveys for the production of the mine plan should be carried out in line with this Code. The Authorised Mine Surveyor is responsible for becoming acquainted with the survey methods, which will achieve the standards of accuracy outlined in the Code. This comprehensive Code has been well received by the mining industry, with positive feedback that the MSB is taking a proactive rather than reactive approach to mine surveying.

1252. As a point of comparison, and for the purposes of consideration of any further Recommendations in relation to the MSB, I propose to comment on the scheme of regulation for general surveying in Western Australia, and the mining surveying regulatory systems in New South Wales and Queensland.

Other Jurisdictions

Land Surveyor’s Licensing Board, WA

1253. The Land Surveyor’s Licensing Board (LSLB) of Western Australia is established under s 4 of the Licensed Surveyor’s Act 1909. The Board’s Charter is to “provide for the registration regulation and supervision of persons who undertake surveys and to assist the profession in the control of matters incidental thereto”.

1254. The Board is responsible for assessing the fitness of candidates for registration under the provisions of the Licensed Surveyors (Licensing and Registration) Regulations 1990. The LSLB, unlike the MSB, has a formal examination process designed to ensure that a candidate is suitable for registration as a licensed surveyor.

1255. The examination assures the Board that candidates have acquired the requisite skills and knowledge and have a clear understanding of the practical and professional application of such skills and knowledge to fulfil the role of a licensed surveyor.

1256. In particular, candidates are required to sit a written examination which tests their knowledge of survey law (including the relevant Acts and Regulations); a practical examination which requires them to undertake a series of projects set by the Board (unsupervised) and supervised practical field tests; and an oral examination.

1257. As part of the oral examination, candidates may be required to attend a preliminary interview with one or more examiners on aspects of any or all of

479 Mines Survey – Code of Practice, p. 3
the examination activities and a professional interview conducted by the full Board before a candidate’s competence is registered to assess his or her professional opinions, their responsibilities as a surveyor and the extent to which they have absorbed academic and practical training. Examinations are usually held biannually during February/March and August/September of each year. In this respect, the operation of the LSLB has a rigorous assessment process that is more akin to the Eastern States’ surveying Boards, dealt with below.

1258. Under s 11B of the Licensed Surveyors Act 1909, the Board requires licensed surveyors with a practising certificate, to attend specified courses to maintain and improve their knowledge and skills in the surveying profession. There is an annual requirement for continuing education for renewal of practising certificates in order to undertake authorised surveys.

1259. The continuing education requirement can apply to all surveyors (global) or apply to specific surveyors (individual) and works on a points system. If the Board is not satisfied that a licensed surveyor has complied with the continuing education requirements, it may suspend their practising certificate until specified conditions are fulfilled, renew the practising certificate subject to specified conditions or refuse to renew the certificate until specified conditions are fulfilled or refuse to renew the practising certificate altogether.\(^\text{482}\)

1260. By way of contrast, there is no continuing education or professional development required by the MSB for the holder of Authorised Mine Surveyor’s Certificate in Western Australia. Most MSB members interviewed, although unsure of the implementation process, agreed that the concept of continuing professional development should be addressed, in order to maintain standards and update skills and knowledge, in relation to changing techniques in mine surveying.

**New South Wales**

1261. Under the New South Wales mining legislation, mining surveyors are required to be deemed competent and registered under the Surveyors Act 2002 (NSW). It is an offence for a person to carry out a mining survey (including any survey carried out for the purposes of the mining legislation), for fee or reward, unless that person is a registered mining surveyor.

1262. This is prescribed by Division 6 of Part 4 of the Coal Mine Health and Safety Regulation 2006 (and corresponding metalliferous provision). Division 6 of the New South Wales regulations prescribes the requirements for an operator of a mining operation to put in place arrangements to ensure up to date surveys and plans are prepared and retained at the operation. The requirements to do so are similar to the requirements in relation to mine plans under the MSI Act.

\(^{482}\) Section 11B(2) *Licensed Surveyors Act 1909*
Under the New South Wales legislation, an independent board, The Board of Surveying and Spatial Information, is established. 483

1263. This Board has the function of registering surveyors and enquiring into and dealing with complaints and other matters in relation to registered surveyors.

1264. The Board consists of 10 – 12 members from the surveying profession and mining industry 484 and members are appointed for a term of two years, but can be re-elected for a further term(s). In 2007/08 the Board met formally on five occasions 485 and for a total of eight working days during September 2006 and March 2007 to assess the professional competence of graduate surveyors through examinations. 486 The Board is primarily funded by fees levied on surveyors and through contributions from spatial information stakeholders.

1265. The Board has published various types of material, both for the public (such as the ‘History of the Board’) and to provide information for surveyors (for example, the ‘Surveyor General’s Directions’). Similar to Western Australia’s Land Surveyor’s Licensing Board, the Board requires surveyors applying for renewal of annual registration to certify that they have met the continuing professional development requirements set by the Board for the period prior to the renewal. 487

1266. Surveyors can establish compliance with the Board’s CPD requirements through attainment of points awarded for attendance at CPD activities, which include lectures, seminars, workshops and demonstrations. Surveyors must annually achieve a minimum of 15 points and are required to certify, as part of the registration renewal, that the number of CPD points in the necessary categories has been obtained during the requisite CPD period. 488

Queensland

1267. Both the CMSH Act (Qld) and the MQSH Act (Qld) contain similar provisions in relation to plans of mine workings and mine records. 489

1268. The legislation, which is in identical terms, requires the mine Site Senior Executive to keep accurate plans of the mine workings. The mine plans concerned must be certified as accurate by, in the case of surface operations, a surveyor or surveying associate under the Surveyors Act 2003 (Qld). In the case of underground operations, certification is required by a person having the competencies for underground mining surveying recognised by the Mining Safety and Health Advisory Council, established for metalliferous mining

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484 Section 27 Surveying Act 2002 (NSW). During 2007/08 there were 13 members on the Board.
485 The Department of Lands Annual Report 2007/08, Board of Surveying and Spatial Information Report, p. 83.
486 Board of Surveying and Spatial Information Annual Report 2007/08, p. 82.
487 The CPD period is aligned to the financial year. A revised CPD Determination was implemented by the Board on 1 July 2005.
488 Determination: Continued Professional Development, The Board of Surveying and Spatial Information of New South Wales, p. 7.
489 See Part 4 Division 4 CMSH Act (Qld) and Part 4 Division 4 MQSH Act (Qld).
operations and the Coal Mining Safety and Health Advisory Council, established in relation to coal mining operations. Both councils operate on a tripartite consultative basis.

1269. The Surveyor’s Board of Queensland is established under s 7 of the Surveyor’s Act 2003 (Qld) and is accountable to the Minister for Natural Resources. The Board is designed to be the link between the community and surveyors. It performs functions set out in the Act\textsuperscript{490} by setting standards for the competency and conduct of surveyors, administering a registration system for surveyors and investigating complaints made against surveyors.

1270. The Board consists of eight members appointed by the Governor in Council, six of whom must be surveyors and two who represent the interests of the community generally in the conduct and practice of the profession.\textsuperscript{491}

1271. Prior to being granted a Mining Endorsement, candidates need to display their competency at the surveyor level and complete their competency in this discipline of surveying work. Mining Endorsement candidates must complete units in management of data and information, presentation of information, communications and controlling the location of developments.\textsuperscript{492}

1272. A registration or registration endorsement is valid for 12 months.\textsuperscript{493} Renewal applications are subject to the completion of the CPD requirements, including the CPD log being satisfactorily.

1273. The Board does not specify CPD content. Instead, registered surveyors must maintain and expand their existing skills, experience and knowledge by determining their own CPD portfolio, in line with the Board’s CPD Guidelines. The Board has decided to continue the current format for CPD for the 2009 registration year, requiring registered persons to complete a stipulated number of professional development hours, depending on their category of registration.\textsuperscript{494}

1274. The Board has produced various publications, including a Code of Practice for Surveyors designed to provide guidance on appropriate professional conduct for surveyors. The Code includes survey standards, professional competence, professional and personal conduct, client relations and business practice, highlighting professional surveying practice in Queensland.

\textbf{Consideration}

1275. In both Queensland and New South Wales and within Western Australia, there exists an independent body that assesses the competence of those engaged in mining surveying work. The same body is responsible for regulating the

\textsuperscript{490} Section 9, Surveyors Act 2003 (Qld)
\textsuperscript{491} Section 12 Surveyors Act 2003 (Qld)
\textsuperscript{492} Surveyors Board Queensland, Competency Frameworks (Mining A & O Endorsements), p.4
\textsuperscript{493} Section 51, Surveyors Act 2003 (Qld)
\textsuperscript{494} Continuing Professional Development: Maintenance of Competency, Surveyors Board of Queensland Policy, p. 1
performance of those undertaking such work, including complaints and disciplinary matters. The principal difference being that in Queensland and New South Wales, the licensing process for surveyors is under the general surveying legislation.

1276. What is apparent from a consideration of the operation of similar Boards in other jurisdictions, and the general surveying Board in Western Australia, is the greater degree of scrutiny of candidates for the grant of a licence to operate as a surveyor, compared to the current requirements of the MSB. The additional requirements for the demonstration of ongoing competency, through the operation of schemes of practicing certificates and CPD programmes, is another point of distinction.

1277. There are a number of issues that arise for consideration in relation to the operation and effectiveness of the MSB. These include:

(a) Whether the MSB continues to be effective; and
(b) Whether there is any preferable alternative to the MSB

Effectiveness

1278. Subject to my Recommendations above, the general consensus from Board members is that the MSB continues to be necessary and relevant in setting the direction for mines surveying in Western Australia, therefore it should remain in operation.

1279. Additionally, the views of those making submissions in relation to the operation and effectiveness of the Board also extended those views to the MSB. That is, in the short to medium term the mechanism provided by the MSB for the grant of Authorised Mines Surveyor’s Certificates is supported.

Alternatives

1280. Similarly, my conclusions as to the ultimate possible outsourcing of the activities of the Board apply equally to the operation of the MSB. I see no reason in principle, why, in the longer term the current licensing scheme could not be conducted by one of the professional surveying bodies, with the State playing a role in the setting of standards. As with the Board however, I should emphasise that no one has suggested that this occur in the short term. Another possibility could be the adoption of the approach as in Queensland and New South Wales, with the general surveying regulatory regime being given responsibility for the certification of mine surveyors. However, no submissions have been made that this should be the structure in this State.

1281. One distinguishing feature of the MSB that would need to be considered in this regard however is the function of the MSB to provide advice to the responsible Minister on mine survey matters. If ultimately the function of the MSB is outsourced to an external body, another means of providing this
advice, suitably independent, and representative of the range of relevant interests, would need to be considered.

1282. In overall terms, I see no reason to depart from the views I have expressed above in relation to the Board, which have broad application to the MSB, and which I adopt for present purposes. That is, Recommendations 51 to 53, and 55 to 57, above apply equally to the operation of the MSB.

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<th>Recommendation 78</th>
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<td>That Recommendations 51 to 53 and 55 to 57 above in relation to the Board, apply with such modifications as may be necessary, to the MSB.</td>
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1283. In relation to the proposed changes to regs 3.50 to 3.53, concerning the datum station, as submitted by Dr Jarosz, these seem to be directed to updating the Regulations to be consistent with the terms of the Code of Practice for Mines Survey published in 2005.

1284. In my view, this seems an inherently sensible suggestion and should be implemented.

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<th>Recommendation 79</th>
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<td>That regs 3.50-3.53 be reviewed and updated where necessary to ensure consistency with the Mines Survey Code of Practice 2005 and sound mines survey practice.</td>
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1285. As to the proposal to reconsider the qualifications for Grade 1 and Grade 2 Certificates, this is not a matter within my Terms of Reference in relation to the MSB. However if consistent with Recommendation 78 above, the MSB is given the power to keep under review the qualifications and experience requirements for the Authorised Mines Surveyor’s Certificates, then logically, this is a matter that should be given further consideration by the MSB in due course.

NMSF Compliance

1286. The terms of the NMSF Principles 33 – 35 deal with mine plans. These provide for the surveying of mines by competent survey personnel and the preparation by competent personnel of appropriate plans and their retention and accessibility by the regulator. The terms of the MSI Act and the Regulations as they are, would appear to meet the requirements of the NMSF in this regard.
CHAPTER 11 – CONSULTATION AND WORKPLACE REPRESENTATION

Employee Involvement Generally

1287. Employee involvement is crucial to improved safety and health outcomes in workplaces. Its importance has been referred to in academic research undertaken both in Australia and overseas. It has been affirmed by all of those who I have consulted with in the initial stages of the Review and more generally. These observations have been made by senior mine management, employees and safety and health representatives in the various operations I have visited. A number of large employers, in addition to functioning health and safety committees and representative structures, have embarked upon innovative, and in my view, quite excellent, programs of employee involvement of various kinds, in an endeavour to raise the level of awareness and commitment to health and safety improvements in the enterprise.

1288. There were many initiatives and observations that I encountered in my initial consultations. My references to only a few should not be taken as any disregarding of the many others I have been exposed to or the diminution of their achievements. Whilst we often hear of the “bad news”, in terms of accidents and incidents in the mining industry, we hear less often, about the good work being done; the “good news”.

1289. An example of this is the Rio Tinto “5S’s”, which is part of the Rio Tinto LEAN business improvement programme, which I observed in action at the West Angeles mine in the Pilbara. The programme involves the implementation of 5 steps, “Sort, Set, Shine, Standardise, Sustain”, with regular auditing within and between departments on the mine, with the objective of keeping workplaces organised, safe and efficient; to highlight problems and waste. Management commitment to and enthusiasm for the programme is essential and was obviously high, as was the case with employees from all levels that I spoke with. The results, from my observations and the site safety performance indicators, spoke for themselves.

1290. Similarly is the BHP Billiton PRAISE behavioural observation programme that I had the opportunity to discuss at the company’s Nelson Point operation at Port Hedland. This programme promotes safety and health leadership in all employees, through participation in groups that are not safety and health committees under the MSI Act.

1291. Further examples include an excellent presentation from the safety and health committee at the Alcoa Refinery in Pinjarra. The activities and initiatives of the committee are impressive. What stood out in particular for me was the

495 Blewett, B Working Together: Review of the Effectiveness of the Health and Safety Representative and Workplace Health and Safety Committee System in South Australia, WorkCover Corporation, Adelaide 2001; Walters, D et al The Role and effectiveness of safety representatives in influencing workplace health and safety HSE Brooks, Norwich
enthusiasm and commitment of the members and the demonstrable achievements of the group.

1292. I was also fortunate to attend a meeting of the Iluka Resources safety and health committee at its site in Capel in the South west of the State. This was an excellent opportunity to witness a dynamic, site wide committee operation. Again, I was impressed by the enthusiasm and contribution of the members to the variety of issues raised and discussed.

1293. Discussions with management and safety representatives at Wesfarmers Premier Coal and the Griffin Coal Mining operations in Collie were held to gain an appreciation of issues relevant to those operations.

1294. In the Perth region, I attended meetings at the Rio Tinto Hismelt operation, and held discussions with management, supervision and employees. I also visited several small quarries, including a limestone quarry and sandpits.

1295. The above are merely examples of much of the good work done every day in the mining industry in Western Australia. A full list of the mine operations visited appears at schedule 3.

Robens Approach

1296. The Robens Committee, in considering the introduction of general duties legislation in the United Kingdom, recognised the importance of the involvement of employees both directly and through representatives in the workplace. In dealing with this issue, it was said:

“The appointment of safety representatives and joint safety committees are not the only methods of seeking to increase the involvement and commitment of work people. Some firms have arrangements whereby all employees in a particular working unit meet periodically for discussions about safety. This approach, sometimes referred to as “total involvement”, lays stress on participation by every individual employee. Other ways in which employees can take a direct part in the actual work of safety assessment and accident prevention are by participation in exercises such as safety sampling and hazard spotting.”

1297. After considering all of the relevant issues concerning participation, representation and consultation matters, the Robens Committee made a number of recommendations succinctly summarised by Maxwell as follows:

“(a) There should be a statutory duty on every employer to consult with his employees, or their representatives at the workplace, on measures for promoting safety and health at work, and to provide for arrangements for the participation of employees in the development of such measures;

496 Robens Committee op cit at 18 – 22
(b) The form and manner of such consultation and participation should not be specified in detail, so as to provide the flexibility needed to suit a wide variety of particular circumstances and to avoid prejudicing satisfactory existing arrangements;

(c) Guidance should, however, be given in a code of practice outlining model arrangements, including advice on joint safety committees and the appointment of employees safety representatives;

(d) The code should deal with such matters as the qualifications, training, duties and rights of employees safety representatives, arrangements for joint inspections, the objectives, composition and procedures for joint safety committees and so on; and

(e) Above all, the code would stress that simply talking together about safety and health is not enough. It is essential to ensure the act of follow-through of the measures discussed.”

1298. Importantly, however, the Committee at par (b) above recognised that flexibility should be accorded to the parties themselves, to work out the most appropriate consultative arrangements to suit their needs. This is no doubt why the general duties provisions in s 9 of the MSI Act and under the corresponding provision of the OHS Act497 are expressed in general terms, without descending to particularity. Additionally, international obligations in the form of Conventions and Recommendations, also deal with the importance of employee involvement in safety and health matters, in particular the Occupational Safety and Health Convention (No. 155) and ILO Convention 176 Safety and Health in Mines, 1995.498 The NMSF Framework incorporates, as a minimum, compliance with the intent of ILO 176.

Consultation

1299. When considering the issue of “consultation” it is important in my view to determine what is meant by the term, as from time to time I think its meaning has been misconstrued. From my experience in another setting, there have been many disputes about what the concept encompasses. One thing is certain. An obligation to consult, regardless upon whom the obligation falls, is not an obligation to agree, although an objective may be to do so. The Shorter Oxford Dictionary defines “consult” to include:

“1. To take counsel together, deliberate, confer...2. To confer about, deliberate upon, consider...3. To take counsel to bring about; to plan, devise, contrive...4. To provide for by consultation; to have an eye to.”499

497 s 19 (1)
499 Shorter Oxford Dictionary at 409
1300. The objects of the MSI Act s 3(1)(d) refer to consultation in the following way:

“to foster and facilitate cooperation and consultation between employers and employees, and associations representing employers and employees, and to provide for the participation of those persons and associations in the formulation and implementation of safety and health standards and optimum working practices;”

1301. Additionally, the obligation to consult finds expression in the general duties of employers in s 9 (1) of the MSI Act, whereby at par (c), an employer must:

“Consult and cooperate with safety and health representatives, if any, and other employees at the mine where that employer’s employees work, regarding occupational health and safety at the mine;”

1302. These provisions are virtually identical to the corresponding provisions of the OSH Act.

1303. This mandatory obligation in s 9(1) of the MSI Act is in my view, broad and all embracing. It is not to be confined or read down as being limited to those specific heads of the legislation that deal with consultation in a variety of circumstances. When read with the objects of the MSI Act which must inform the meaning of such provisions, the MSI Act requires employers to generally consult with employees and safety and health representatives present in the workplace about safety and health matters. This includes for example, the preparation and modification of safety and health management plans and systems, however they may be described. There is no doubt about this in my view.

1304. Regardless of this overarching obligation, specific circumstances in which both employers and employees are required to consult arise as follows:

- Representatives must consult with persons to whom provisional improvement notices are to be given prior to their issue;\textsuperscript{500}
- Representatives must consult and cooperate with the manager of the mine and employers on all matters concerning safety and health;\textsuperscript{501}
- Employers must consult with delegates in relation to the election of representatives for a workplace;\textsuperscript{502}
- The manager of and employers at a mine must consult with representatives in relation to any intended changes at the mine, including plant and substances, that may impact on health and safety at the mine;\textsuperscript{503} and

\textsuperscript{500} Section 31BH MSI Act
\textsuperscript{501} Section 53(1)(f) MSI Act
\textsuperscript{502} Section 55(3a) MSI Act
\textsuperscript{503} Section 60(4) MSI Act
Employers must consult with representatives and other nominated persons in relation to the constitution of safety and health committees.\textsuperscript{504}

1305. In other jurisdictions, as an extension of the general duty to consult, the requirement to do so has been particularised. For example, in New South Wales under the general health and safety legislation, which applies to all workplaces including mines, there is a general duty to consult which includes:

- Consultation with employees to enable them to contribute to making decisions affecting their health safety and welfare at work;
- Specifying the specific nature of consultation including the sharing of information, the opportunity to express views and for employers to take those view into account;
- Specifying times when consultation is required, eg in risk assessment and risk management and control, the introduction of change and provisions concerning consultation itself; and
- How consultation is to be undertaken.\textsuperscript{505}

1306. In a different legislative setting, consistent with these broad principles, the Queensland coal and metalliferous legislation helpfully defines “consultation” as follows:

“Consultation with workers is discussion between the site senior executive or supervisors and affected workers about a matter with the aim of reaching agreement about the matter.”\textsuperscript{506}

1307. In addition to the general obligations set out above, under both the coal and metalliferous mining health and safety legislation in New South Wales, additional consultation provisions exist in relation to the preparation of health and safety management systems and emergency management plans.\textsuperscript{507} Similar specific consultation obligations exist in other general industry legislation, such as in Victoria and South Australia.\textsuperscript{508}

1308. Whether there should be such particular obligations under the MSI Act is a matter that it may now be convenient to turn to, in considering matters arising from the Hooker Review, which by my Terms of Reference, I am required to take into account.

**Hooker Review**

1309. Consultation was a matter addressed in the Hooker Review. After considering the provisions of the OHS Act, a number of recommendations were made including an amendment to the objects of that legislation. These included the promotion of consultation in the workplace; an expanded obligation on an

\textsuperscript{504} Section 67B(2) MSI Act

\textsuperscript{505} OHS Act (NSW) Part 2 Division 2

\textsuperscript{506} See MQSH Act (Qld) s 14; CMSH Act (Qld) s 13

\textsuperscript{507} See for example ss 24 and 48 CMHSA (NSW)

\textsuperscript{508} See Occupational Health and Safety Act 2004 (Vic); Occupational Health, Safety and Welfare Act 1986 (SA)
employer to consult with the employees on matters including intended changes to the workplace or plant and substances used at the workplace; and the monitoring of safety conditions or health conditions in the workplace.

1310. As I understand it, in short, these stemmed from Mr Hooker’s conclusion that there was some ambiguity in terms of when and in what circumstances consultation was required under the OSH Act.\textsuperscript{509} The specific recommendations made were as follows:

“R10. Section 5(e) of the Occupational Safety and Health Act 1984 (WA) be amended to express as a statutory object the encouragement and promotion of consultation and cooperation between participants at the workplace, with the remaining components of the present section 5(e) being contained in a separate statutory object.

R11. There be inserted a discrete statutory object in section 5 to require the resolution of occupational safety and health issues, so far as reasonably practicable, at the workplace.

R12. A provision be inserted to the effect that nothing in the statutory objects concerning consultation and resolution of issues at the workplace is intended to provide any basis for civil liability in the event that those objects are unsatisfied.

R13. Regulation 2.6 be amended so as to provide for a default “relevant procedure” for the purposes of s.24(2) of the Act containing a meaningful and appropriate level of prescription, with guidance being obtained from examples of dispute resolution procedures commonly found in industrial instruments.

R14. A provision be inserted expanding on the nature of consultation for the purposes of s.19(1)(c) as applying whenever an employer, or other like duty holder, is involved in any of the following aspects relating to the performance of work:
- any of the steps contained in regulation 3.1;
- either of the matters referred to in s.35(1)(c);
- undertaking any monitoring of safety conditions or health conditions at the workplace; and
- such other matters as may be prescribed.

R15. The Commission for Occupational Safety and Health and WorkSafe, both independently and in collaboration with each other, develop measures for the publication of obligations on workplace participants concerning consultation, workplace resolution of issues, and risk assessment and seek to educate the workforce as to those three distinct matters as effectively as possible.”\textsuperscript{510}

1311. To date, no amendments to the OHS Act, to give effect to these recommendations, have been made.

\textsuperscript{509} See Hooker 2006 at Chapter 6
\textsuperscript{510} Hooker 2006 Appendix B at 2
1312. There were three submissions that dealt with the issue of consultation in various ways. The CFMEU considered the matter as a stand alone issue, without regard to the Hooker recommendations. In contrast, the CME commented specifically on whether it supported or otherwise, the Hooker Recommendations.

1313. From its perspective, the CFMEU relies upon the terms of the NMSF Strategy on Consultation, as developing those parts of the Legislative Framework Strategy, dealing with consultation, in support of its submission that greater attention needs to be paid generally to the issue of consultation, and specifically, when and in what circumstances it should occur. A copy of this Strategy is at annexure 4.

1314. According to the union, the consultation provisions of the MSI Act are presently inadequate. It is emphasised by the CFMEU that the safety management system approach to safety and health within the NMSF Legislative Framework requires “genuine consultation with the workforce to identify hazards, appropriate mitigation and monitoring strategies.”

1315. Whilst it is recognised that the MSI Act in Part 5, dealing with safety and health representatives and committees contain some consultation obligations, the concern expressed by the CFMEU is that these statutory provisions are complex and do not provide for mandatory consultation obligations between employers and employees generally. It is noted, in support of its position, that the provisions of the legislation concerning representatives and committees are not mandatory and there is no absolute obligation on an employer to consult with employees, concerning safety and health matters as they might arise.

1316. Particular attention is drawn in this respect, to the terms of the NMSF Consultation Strategy document which relevantly provides as follows:

“Duty of the Employer to Consult
1. An employer must consult with employees to enable them to contribute to the making of decisions affecting their safety and health at work.

When Consultation is Required
2. Consultation must occur in all matters related to safety and health, including but not limited to:
   • The development of risk-based safety and health management systems;
   • Identification of hazards;
   • Making decisions about measures to be taken to control risks;
• Changes to premises, work systems or methods, or plant or substances which may affect health or safety;
• Procedures for consultation; and
• Monitoring of health."

1317. In the view of the union, the MSI Act should be amended to provide for enhanced consultation mechanisms across all mining operations. In particular, the union expressed the view that there should be an obligation on a mine operator to appoint representatives and committees in the workplace.

1318. From the point of view of the CME, Recommendations 10, 11 and 12 of the Hooker Review are supported. However those matters the subject of Recommendations 13 and 14 are opposed.

1319. In particular as to Recommendation 14, the industry view as expressed in the CME submission is that the existing consultation provisions set out in the legislation are considered to be in an overall sense, adequate. In particular, the CME drew attention to the draft Code of Practice in relation to Consultation at Work\(^{511}\) and the joint COSH/MIAC guidance note on formal consultative processes in the workplace.\(^{512}\) In the CME’s view, when read with the guidance note and the draft code, the existing provisions of the legislation are adequate for the purposes of requiring and explaining consultation obligations in workplaces.

1320. Consideration of these issues also requires attention be given to the relevant NMSF principles which I turn to now.

NMSF Compliance

1321. Principles 2e, 2m, 17 and 22 of the NMSF Legislative Framework refer to consultation processes, and the right of all employees to be involved in the development of risk based safety and health management systems, policies and practices. These requirements of the Legislative Framework are to be read in conjunction with the Consultation Framework, which specifically deals with the broader issue of consultative arrangements, which was the subject of the CFMEU submission.

1322. In particular Principle 2e of the Legislative Framework requires that there be “Genuine consultative arrangements between management and mine employees which actively seek the representation of all in the development of safety and health policies and practices.”

1323. Whilst in my view the overarching obligation in s 9(1)(c) of the MSI Act to consult should not be read down or limited in any way, there are legitimate arguments that the scope and clarity of this provision is open to question. There may well be for example, ambiguity in meaning, as between matters of process and procedure on the one hand, and substantive matters on the other.

\(^{511}\) See Consultation at Work Code of Practice draft for public comment MIAC September 2007

\(^{512}\) Formal Consultative Processes at the Workplace: Guidance Note COSH/MIAC 2006
It may be helpful and desirable, for the circumstances as to when consultation is required, to be made clearer in the legislation. Consistent with the NMSF Consultation Framework, the requirement to consult and the circumstances under which it should occur should be clarified. This does not however, in my view, extend to an obligation on an employer to appoint a safety and health representative or committee.

1324. In this context, to a significant extent, the requirements of the NMSF Frameworks which have been published and endorsed by the respective State and Territory Governments have largely overtaken the recommendations of the Hooker Review in this respect. Notwithstanding this, I consider that the suggested amendments to the objects provisions of the legislation are sound and reflect changes that I consider should be made to the MSI Act. Furthermore, the MSI Act should be amended to reflect the terms of the NMSF Consultation Framework. The legislation does not presently meet these requirements in a clear and transparent manner in my view.

Recommendation 80

That Recommendations 10, 11 and 12 of the Hooker Review be endorsed and s 3 of the MSI Act be amended accordingly.

Recommendation 81

That the MSI Act be amended in relation to consultation obligations to give effect in particular to clause 2 of the NMSF Consultation Framework specifying the circumstances when consultation is required.

Safety Representatives and Committees

1325. The MSI Act in Part 5 contains detailed provisions in relation to safety and health representatives and safety and health committees.

Representatives

1326. The Robens Committee recommendations in relation to employer obligations to consult with employees or employee representatives at the workplace, have found expression in Part 5. At the outset it is to be noted that nothing in the MSI Act requires an election for a safety and health representative. For that matter also, nor does anything in the MSI Act require the formation of a safety and health committee.

1327. As Creighton and Rozen have noted,\(^{513}\) neither the United Kingdom provisions in relation to employee consultation, nor those applicable in Victoria, mandate the election of health and safety representatives or the formation of health and safety committees. If in a particular workplace, the employer and employees

\(^{513}\) Op cit at par 11.13
are content with their voluntary arrangements in relation to consultation, then those arrangements can be maintained. At least one major mining operation I visited in my initial consultations operates in this fashion, which appears to be quite satisfactory.

1328. Under the MSI Act an employee working at a mine may request the employer to have an election for a safety and health representative.\footnote{Section 54 MSI Act} If such a request is made, a consultation process is then triggered, involving the appointment of workplace delegates to consult with the employer concerning prescribed matters involving the election of a health and safety representative.\footnote{Section 55 MSI Act}

1329. A part of the consultation process envisages the possibility of an “election scheme” to bring into the process employees, at another mine operated by the employer or a group of employees of the employer, within a particular unit of the workforce. The scheme arrangement can include contractors and employees of a contractor who are for present purposes, treated as employees of the principal.\footnote{Section 55 and 56 MSI Act} Provision is then made for the election process by secret ballot conducted either by the Western Australian Electoral Commissioner or by an organisation registered under the Industrial Relations Act 1979 (WA).

1330. An elected safety and health representative may serve office for a term of two years, which term may be renewed by re-election. The functions of a safety and health representative under the MSI Act are broad and include:

(a) mine inspections;
(b) investigations of accidents, or other serious incidents;
(c) to be kept informed in relation to safety and health matters at the workplace;
(d) to report hazards;
(e) to refer relevant matters to a safety and health committee;
(f) to broadly consult and cooperate with the Registered Manager and employees in relation to safety and health matters at the mine; and
(g) to generally liaise with employees, employers and Employee’s Inspectors at a mine.\footnote{Section 53 MSI Act}

1331. The role and responsibilities of representatives was the subject of many observations to me in the initial consultation stage of the Review. Their value, and specifically their contribution to making mines safe, was acknowledged by all with whom I spoke.

1332. I met a number of representatives, both new and more experienced, from a range of mines, large and small. I discussed with them why they became representatives, their experiences on the job and some of their challenges. I was impressed with their enthusiasm and genuine commitment to what is no doubt, at times, a somewhat daunting role.
1333. The RSD introduced in July 2007, a database recording the election of Safety and Health Representatives in the industry. It was developed in response to a recommendation arising from research commissioned in 2004 by the MOSHAB, to clarify the training needs of representatives in the mining industry and to develop improved levels of communication between representatives across the industry. This measure is very positive and is to be applauded.

1334. This database is derived from election returns that are required by the MSI Act and the Regulations. Because of this, the accuracy of the database is dependant on those conducting elections, including those standing for re-election, to furnish the returns as required.

1335. There were as at 20 January 2009, some 1535 active representatives in the mining industry. The average tenure is about 315 days and most only serve one term. Whilst it is open to conjecture as to why this is so, at least anecdotally, the high rates of employee turnover in the industry may be at least partly responsible for this. It seems that the numbers of representatives vary around the 1300 to 1500 level.

1336. A number of persons with whom I spoke during initial consultations in the Review, commented on the difficulty in getting employees to nominate for safety and healthy representative positions. Several said that quite often, it is because of the responsibility that a safety and health representative has under the MSI Act, that many are reluctant to take on such responsibility.

1337. Some said to me that on occasions, it was because “they were the only ones “volunteered” for the job”, or that others in the work group had encouraged them to nominate. More so however, were comments to the effect that there was an interest in the field and that a positive contribution could be made. These observations would seem to be consistent with some of the survey results from the earlier cited research.

1338. In the mining industry, as with industry generally, representatives form a valuable conduit between the workforce and management. Their role should be encouraged, promoted and supported in as many ways as possible. The value and contribution of representatives to the industry was considered by the former MOSHAB Safety and Health Representatives Working Group when, in a Report prepared in 2004, it was concluded that:

"Safety and health representatives make a vital contribution towards improving safety and health standards at work in partnership with employers, employees and their representatives..."

518 Survey of Minerals Industry Safety and Health Representatives TNS Social Research March 2005
519 Section 56(10) MSI Act; Regulation 2.6B Regulations
520 See RSD Representatives Database as at 20 January 2009
521 Ibid
522 TNS op cit at 16
Strategies to assist safety and health representatives in securing the participation and involvement of the workforce need to be clearly identified along with ensuring arrangements exist in the workplace that encourage and assist safety and health representatives to carry out their roles. There is a need to ensure that appropriate facilities and assistance are provided to safety and health representatives to allow for the development of a proactive partnership with employers...

The provision of quality training is one of the most important mechanisms whereby individuals can develop the competencies necessary for the role of a safety and health representative. Without these skills, safety and health representatives will not be able to assist in promoting good standards of safety and health in the workplace, thereby limiting their ability to effectively contribute to the prevention of deaths, injuries and ill health...

Competent and well-motivated safety and health representatives, provided with training, support and encouragement, will add value to the minerals industry by assisting in the industry’s approach to reducing accident and injury rates and eliminating fatalities.”

1339. These views should be strongly endorsed and supported.

1340. Employers have a number of obligations to safety and health representatives under the MSI Act. This includes providing information in relation to hazards, plant and substances and the safety and health of employees working at the mining operation. Additionally, a health and safety representative:

- May attend a meeting between an employer and an employee in relation to a safety and health matter;
- As noted above, must be consulted on changes to the mine or plant and substances used at the mine that may affect safety and health;
- Must be notified of accidents or dangerous events; and
- Must be provided with facilities and assistance in order to perform safety and health representative duties.

1341. There has been no suggestion made, either formally or informally, that these provisions are no longer adequate or necessary. No recommendations for amendment are made.

Training of representatives

1342. The training of health and safety representatives is prescribed by reg 2.6 of the Regulations. Presently, a safety and health representative must try to attend an introductory training course within the first twelve months of his or her election. The five day introductory training courses for safety and health

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524 Section 60 (2) Act
525 Reg 2.6 (3) Regulations
representatives are to be accredited by the COSH and guidelines are published for this purpose.

1343. These provisions are supported by ss 60(7) and (7a) and 62 of the MSI Act, in relation to the taking of time off work to attend training courses and for the performance of representative functions.

1344. The timely training of safety and health representatives is vital in terms of their effectiveness in the workplace. Of those who raised issues with me, some spoke of difficulties they have had in attending safety and health representative introductory training courses in a timely fashion. One representative with whom I spoke had been elected for over twelve months and still had not received his introductory training course. The latter was not however, I hasten to add, a common observation, but was of a concern nonetheless.

1345. These observations are supported by the research commissioned by the MOSHAB in 2005 in relation to safety and health representatives, to which I have referred above. That research revealed that of the safety and health representatives that had received their training, about 25% had only received it at six months and a further 20% had not received any training at all after their election as representatives. 526

1346. Those who I spoke with on mine site visits about this issue, commented on the importance of receiving training, in order that they may properly perform their role confidently, and with the appropriate knowledge. The effectiveness of a safety and health representative may be significantly influenced by the timeliness of the training they receive.

1347. The Regulations further provide that if a safety and health representative has not attended an introductory course they may give written notice to their employer of their wish to do so. An employer given such a notice may then consult with the representative and regard must be had to any inconvenience to the employer occasioned by the employee’s request.

1348. The employer is permitted to decline the employee’s request but enable the representative to attend the next available introductory training course. The present scheme of the Regulations contemplates that a safety and health representative may be in that position not only up to, but in excess of, twelve months after being first elected, without receiving his or her introductory course. This is not a desirable state of affairs, given the significance of training for a representative and the benefit to both the representative and the employer, of early training in safety and health matters. Consideration arises therefore as to whether changes can be made to the present scheme.

1349. In my view, irrespective of what may be the position of those who are responsible for general industry training for safety and health representatives, a period of twelve months within which to try to attend an introductory

526 See TNS op cit at 4-5
The training course is simply inadequate. Timely training can only benefit the representative, other employees and the employer in enabling the representative to be in possession of relevant information and knowledge, relevant to the discharge of their responsibilities. This was a matter the subject of consideration by the MOSHAB Working Party.\(^{527}\) I am aware that consideration was given to this matter by the MIAC in June 2006 but it does not appear to have been further progressed.

1350. I consider that a period of no more than six months should elapse before a representative receives their introductory training. If it is practicable to provide training earlier, then it should be provided. A period of this length recognises the difficulties that can arise, in particular in attendance from remote locations throughout the State.

1351. I note that by comparison, in Queensland for example, the metalliferous legislation precludes a site safety and health representative from continuing to act in the role, if they have not attained the required competency within three months of their selection or election.\(^{528}\) In the case of the coal legislation, a person must hold the appropriate competencies before being able to so act.\(^{529}\) In my opinion, there is much to be said for provisions of this kind. The inadequacy of the current provisions, are only highlighted by these comparisons.

### Recommendation 82

**That reg 2.6 of the Regulations be amended to require safety and health representatives to receive their introductory training course as soon as possible but no later than six months after their appointment.**

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**A Career Path**

1352. An issue raised by several representatives during my initial consultations, was the ability for health and safety representatives to be encouraged into further training in health and safety with a view to a career path in the field. Allied to this, is whether any training received by a safety and health representative can be recognised, by way of recognition of prior learning, in any subsequent formal qualification process.

1353. If the position of safety and health representatives are to be encouraged, and they clearly should be, then linking the introductory and refresher accredited training courses for representatives, with higher level qualifications within the AQTF, for example, such as the Certificate III, can only provide an added incentive for those with a genuine interest in safety and health to consider a career path beyond the safety and health representative role. This must of

\(^{527}\) MOSHAB op cit at 17-18

\(^{528}\) Section 86 MQSH Act (Qld)

\(^{529}\) Section ss 93(3) and 95 CMSH Act (Qld)
course, only be voluntary. This was also a recommendation of the MOSHAB Working Party and is one that should be re-endorsed.

**Recommendation 83**

That the ability of safety and health representatives to obtain recognition for the attendance at introductory training courses and time spent as safety and health representatives towards higher level qualifications be considered in the context of the AQTF.

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**Immunity and Discrimination**

1354. The legislation affords a safety and health representative immunity from civil liability in connection with the representative’s performance or failure to perform, in good faith, a function prescribed by the MSI Act.\(^{530}\) Recent amendments to the MSI Act have clarified these provisions in relation to the issuance of Provisional Improvement Notices by representatives, to ensure that the immunity applies.\(^{531}\)

1355. Additionally, protection exists under the MSI Act for representatives and others from discrimination on various grounds.\(^{532}\) No submissions or comments were made to me in my initial consultations to suggest that these provisions are in any way inadequate or could be improved. However, these matters received some consideration in Hooker 2006 which I now turn to.

**Hooker Review**

1356. In the course of the Hooker Review, a number of submissions raised the issue of detrimental treatment of employees in connection within the enforcement of the OSH Act. This was in the context of an earlier recommendation in the Laing Review, not implemented, that s 56 of the OSH Act be amended to place the onus of proof on a defendant employer, to establish that safety and health activity of the employee was not the dominant or substantial reason for any detriment suffered.

1357. The corresponding provisions under the MSI Act are ss 68A, 68C, 68D and 69. These provisions establish that it is an offence to discriminate against employees who are involved as safety and health representatives or who are otherwise involved in safety matters. In addition to the offence provisions, a safety and health representative also has a right to a remedy before the Tribunal as a consequence of the same conduct.

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\(^{530}\) Section 53 (3) MSI Act  
\(^{531}\) Section 53(2) MSI Act  
\(^{532}\) Part 5 Division 3 MSI Act
1358. No one could seriously debate the importance of protections such as these. Persons elected to the position of a safety and health representative, do so sanctioned by the law of the State, and carry substantial responsibilities. It is only entirely proper that the same law that imposes duties and rights upon them also provides protection from conduct that would cause disadvantage.

1359. Likewise, any employee or prospective employee is entitled to appropriate protection from discrimination, as a consequence of their involvement in safety and health issues in the workplace.

1360. Consideration of these matters led Mr Hooker to make the following recommendation:

“R19. The Occupational Safety and Health Act 1984 (WA) be amended to empower the Occupational Safety and Health Tribunal to inquire into and deal with allegations of discriminatory and detrimental treatment of employees and potential employees for reasons connected with the operation of the Act and its statutory purposes. The power of the Tribunal ought include conciliation and the granting of remedies to reinstate, re-employ, employ, engage and to pay compensation capped consistently with analogous limits under the Industrial Relations Act 1979 (WA).”

1361. It is assumed that the Recommendation refers to other than employees who are safety and health representatives, given the existing provisions of ss 35A – 35D of the OSH Act. Thus, the Recommendation is directed to those persons presently covered by s 56 of the OSH Act.

1362. The only comment on this matter, apart from the pre-existing opposition of the CCIWA, was from the CME. It also does not support the Recommendation.

1363. There was before the State Parliament, prior to the State election in September 2008, the Industrial Relations and Related Legislation Amendment Bill 2007 (WA). Clauses 44 and 45 of that Bill proposed to amend s 56 of the OSH Act, to reconstitute it in much the same way as the existing ss 35A-35D of the OSH Act. It was proposed by the new ss 56A and 56B, to provide a right of an employee or prospective employee, or a contractor, to bring an application to the Tribunal for a remedy.

1364. If legislation is re-introduced to the Parliament to give effect to these changes, to maintain alignment with the OSH Act, a corresponding amendment should be made to the MSI Act.

**NMSF Compliance**

1365. Principle 2g of the NMSF Legislative Framework provides that legislation should enable all persons covered by it to identify and report hazards without
discrimination or retaliation. The existing provisions of the MSI Act identified above, and those recommended below, well satisfy this Principle.

Recommendation 84

That the MSI Act be amended in Part 5 Division 3 in the same terms as cls 44 and 45 of the former Industrial and Related Legislation Amendment Bill 2007, if re-introduced into Parliament and as ultimately enacted.

Refresher Training

1366. An allied issue to initial training for safety and health representatives is the issue of refresher training. The Regulations presently provide that a safety and health representative attending an introductory course prior to March 2005, may attend a transitional training course, if one has not previously been completed after February 2005. This was introduced to enable representatives to be trained in relation to matters arising from the Laing Review, in particular the introduction of Provisional Improvement Notices.

1367. In other than in these circumstances, the Regulations confer no entitlement to ongoing training for safety and health representatives. The importance of ongoing training was emphasised by many of those who I spoke to in the initial consultations. That having been said, it should also be noted that a number of organisations, conduct their own in house training, or facilitate the attendance by employees at external courses. This is however, by no means universal. The matter was also raised in the research project earlier referred to. Seventy six per cent of those surveyed considered refresher training important and was needed periodically. 534

1368. Additionally, there is of course nothing preventing a safety and health representative endeavouring to update their own skills and qualifications, by way of attendance at further training courses. Many in fact do this, again as established by the earlier research. 535 The issue no doubt in such cases, is whether the employer ought to provide time off work without loss of entitlements for such additional training. There are competing arguments for and against such a proposition. However given that the issue has been raised, it is worthy of consideration.

1369. In my view, refresher training for representatives should be viewed as equally as important as the initial program. Refresher training should be able to be accessed by those who enter a second term as a representative. As with the initial course, it should be without cost to the representative and time off work, without loss of benefits, should be provided by the employer.

534 TNS op cit at 5 and Chapter 4.5
535 Ibid
Recommendation 85

That the Regulations be amended to enable representatives to attend refresher courses in health and safety in a second term of office without cost to the representatives.

Safety and Health Committees

1370. Provisions in relation to the functions, powers and processes for the appointment of safety and health committees are dealt with in Division 2 of the MSI Act. As has been noted earlier, there is no requirement for the establishment of a safety and health committee. It can be established following a request under s 66 by an employee, or by a notice issued by the State Mining Engineer under s 65.

1371. In most cases, safety and health committees are established by consensus between the employer and the employees and the workplace, or following a request by an employee employed at a mine. A very positive amendment made to the MSI Act in 2005, was to provide the facility for “multi mine” committees, to enable one committee to be established in respect of more than one mine operated by an employer. One mining operation I visited in the initial consultations used these provisions of the legislation.

1372. Safety and health committees perform an important function. They act as a conduit and communication mechanism between management, employees and other persons affected in the workplace, in relation to safety and health issues. As with safety and health representatives, they formed an integral part of the Robens Committee recommendations in relation to consultative processes. In this regard, the Robens Committee said:

“We have stressed that the promotion of safety and health at work is first and foremost a matter of efficient management. But it is not a management prerogative. In this context more than most, real progress is impossible without the full cooperation and commitment of all employees. How can this be encouraged? We believe that if work people are to accept their full share of responsibility (again, we’re not speaking of legal responsibilities) they must be able to participate fully in the making and monitoring of arrangements for safety and health at their place of work. Moreover, if the new inspection approaches which we discuss in subsequent chapters are to work increasing reliance will have to be placed on the contribution that work people themselves can make towards safety monitoring. We have heard a great deal of evidence on this sometimes controversial topic. In visiting firms at home and overseas we made a particular point of studying and discussing the arrangements for the participation of employees in safety and health matters. A number of approaches exist. Since 1872 coal miners have had a statutory right to appoint representatives to inspect mines on their behalf, and the Mines and Quarries Act 1954 extended this right to all employees in mines and

536 Robens Committee op cit at pars 59 and 62
quarries. Representatives are appointed through the trade unions, and they have the right to carry out an inspection at least once a month and to investigate accidents and dangerous occurrences. In 1970 Workman’s representatives made over 5500 inspections of coal mines and over 300 inspections of quarries. We found evidence of very close cooperation between mine managers, the Mines Inspectorate, and the workmen’s inspectors. These arrangements, as well as the extensive arrangements for joint safety committees at mine, area and national level, are obviously highly valued within the industry. Somewhat similar provision for the appointment for worker’s safety representatives (as well as joint safety committees) is contained in Swedish legislation and, the arrangements appear to be valued for their practical contribution to cooperation on safety matters at shop floor level.”

1373. Not surprisingly, no submissions were made in relation to the safety and health committee provisions of the MSI Act.

Legislative Complexity

1374. Despite some changes to Division 2 arising from the Laing Review, on any view, the provisions in relation to the appointment and operation of safety and health committees, and for representatives, are still lengthy and prescriptive. Other jurisdictions have far simpler provisions in relation to these matters with detailed arrangements being left to the parties themselves.537 This was a matter referred to in the Laing Review when it was said:538

“The provisions of the Act dealing with the election of safety and health representatives are, however, highly prescriptive and inflexible. Some submitted the level of prescription with regard to elections is inconsistent with the Robens emphasis on effective workplace consultation. They were concerned that the prescriptive nature of the election process inhibited the appointment of committees and representatives. Concerns were also raised on the related issue of the term of office and appointment process for safety and health representatives.”

1375. The Laing Review recommended that the provisions in relation to the election process for safety and health representatives be simplified. It was further recommended that the Regulations be amended to prescribe the essential elements of the election process.539

1376. There is much to be said for this in my view. It is quite unnecessary for there to be some 24 pages of the MSI Act dealing with this subject matter, in highly prescriptive terms. The complexity of these provisions is unwieldy to say the very least. What the MSI Act should do is provide the broad rights and obligations, with the parties being left to agree on other arrangements and the detailed provisions transferred into revised Regulations, taking into account the requirements of the NMSF principles.

537 For example see ss17-18 OHS Act (NSW)
538 Laing Review at par 617
539 Ibid at par 633
1377. For example, under the general New South Wales legislation, the obligations and rights to establish committees and elect representatives are set out in just two sections, with the remaining provisions contained in the Regulations.\(^{540}\) The retention of the level of detail presently specified in the statute is inconsistent with the Robens approach. More responsibility in relation to these matters should be placed directly in the hands of the parties in the workplace.

1378. Whilst I am required to maintain alignment with the OSH Act, which contains similar provisions, I nonetheless consider that this issue should be raised again. I refrain from a specific recommendation because of the alignment issue but in my view, the existing provisions contribute to the somewhat prolix nature of the drafting of some provisions of the OSH Act, and in turn the MSI Act, as a consequence of amendments made over recent years. I also comment on some of these matters further in Chapter 15.

NMSF Compliance

1379. The NMSF framework deals with employee representation in Principles 2f, 19 – 21 and 22. Provision is to be made for employees to be informed about hazards in the workplace and to collectively select safety and health representatives to be involved in safety and health matters. Principle 20 refers to the common law right of employees to remove themselves from any location at a mine in circumstances posing a serious danger to their safety or health. The terms of Part 5 of the MSI Act are generally compliant with these principles in my view.

1380. Additionally, and somewhat contentiously, Principle 21 deals with a safety and health representative being able to direct an employee to remove themselves from an immediate danger on the basis of a reasonable belief. It is noted that this provision is not agreed. Neither the MSI Act nor the OHS Act presently contains such a provision.

1381. However elsewhere, for example in Victoria and South Australia, health and safety representatives do have such powers in the face of serious and imminent threats to the health and safety of employees.\(^{541}\) Additionally, in the recent review of the Northern Territory legislation, it was recommended that such a provision be included in any new legislation.\(^{542}\) This has been implemented in the new legislation. A safety and health representative may issue a “non binding direction” for an employee to cease work.\(^{543}\) As under the MSI Act and the OSH Act presently, an employee may discontinue work if a serious and immediate risk arises. Additionally, a Workplace Safety Officer of the Authority in the Northern Territory may direct that work cease in such a situation.\(^{544}\)

\(^{540}\) Sections 17-19 OHS Act (NSW)
\(^{542}\) Review of the Northern Territory Work Health Act and Mining Management Act Final Report June 2007 at 127
\(^{543}\) Section 41 Work Health Act 2007 (NT)
\(^{544}\) Section 77 Work Health Act 2007 (NT)
1382. The only submissions to raise this issue were from the CME and AMMA, both of which opposed any grant of such a power to a safety and health representative. In the absence of a more fulsome debate on the issue, and in view of its contentious nature within the NMSF Legislative Framework, no recommendation is made. Moreover, I am not persuaded that the existing statutory provisions enabling an employee to cease work in the face of a serious threat to their safety and health, and the remedies available before the Tribunal, are inadequate.
CHAPTER 12 – ISSUE RESOLUTION

Procedures

Discussion

1383. As with many jurisdictions, provisions exist in the MSI Act in relation to the resolution of safety and health issues at a mine. These are primarily dealt with in Part 6. In essence, the provisions prescribe a traditional type of escalation of unresolved issues. In the first place under s 70, where an issue in relation to safety and health arises at a mine, the matter must first be discussed between the manager and a safety and health representative, safety and health committee or other employees and employer as relevant. The procedure to resolve issues is that agreed between the parties and in default of agreement, the Regulation procedure at reg 2.5 applies, which simply requires the employer or manager to meet with the employees and the relevant safety and health representative as the case may be. Nothing further is provided in the Regulations as to this process.

Referral to Committee

1384. In the event however, where attempts in this manner are unsuccessful at resolution of the issue, and there is a safety and health committee at the mine, the matter then must be referred to the committee. Where all such attempts have failed to resolve an issue, and there is a risk of imminent and serious injury or harm, then the Mines Inspectorate may be notified and a District Inspector can take appropriate steps under the MSI Act in order to resolve the issue. Additionally in common with legislation in other jurisdictions, a right for an employee to refuse to continue working in circumstances of imminent serious injury or harm is prescribed, in which case entitlements continue, subject to the employer’s right to allocate other work to the employee. This reflects the common law position.\(^545\) Despite this, for reasons to follow, I am not persuaded there should be any fundamental change to this provision.

State Mining Engineer as Arbiter

1385. Apart from these issues, other disagreements may arise in relation to matters such as the safety and health representative and safety and health committee processes. The first step required is referral of such disagreements to the State Mining Engineer. There are a range of matters over which the State Mining Engineer has jurisdiction, which have been set out in Chapter 8 above. In default of agreement, either party may refer the matter to the Tribunal.\(^546\) The Inspectorate does not keep a record of the numbers of reviews that go before the State Mining Engineer in relation to these matters.

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\(^{545}\) See sections 70-74A MSI Act

\(^{546}\) See sections 55A, 56, 59, 62 and Division 2 MSI Act
1386. No one has suggested that the existing arrangements are in any way inadequate or in need of amendment. In my view they are quite appropriate given the position occupied by the State Mining Engineer, as the most senior technical mining officer in the State. No change is suggested.

**Role and Jurisdiction of the Tribunal**

1387. The jurisdiction and powers of the Tribunal in relation to matters that may be referred to it under the MSI Act are set out in Division 3 of Part 9. Whilst the Tribunal is constituted under Part VIB of the OSH Act, the effect of the provisions of Division 3 is to deem a matter referred to the Tribunal under the MSI Act, as being one in relation to which the Tribunal may exercise jurisdiction and power under the OSH Act. For these reasons, and given I am required to take into account matters the subject of recommendations made in the Hooker Review, which did consider the jurisdiction and powers of the Tribunal, I propose to deal with some of them later in this section.

1388. In my initial consultations for the Review, most I spoke with indicated that few difficulties seemed to be experienced with the issue resolution processes under the MSI Act. In most cases, matters in dispute seem to be able to be resolved promptly at the workplace level, without the need to refer matters to the State Mining Engineer or the Tribunal, as the case may be. This is encouraging. Safety and health issues should be dealt with as and when they arise and the best place for the resolution of those issues is directly at the workplace concerned. This is obviously so in any circumstance where there may be immediate risks to the health and safety of employees and other persons.

1389. This issue resolution processes and procedures, under the MSI Act are almost identical to those under the OHS Act. The Tribunal is constituted by a Member of the Commission, appointed by the Chief Commissioner under s 8(2a) of the IR Act. The jurisdiction of the Tribunal as set out in Division 3 of Part 9 of the MSI Act, prescribes the broad range of matters that may be referred to the Tribunal which presently includes:

- Reviews of the State Mining Engineer’s decision following an appeal of an inspector’s improvement or prohibition notice or confirmation of a provisional improvement notice: s 31BA;
- Whether employees (and/or contractors) should be paid and/or receive an entitlement where work has ceased due to reasonable belief of imminent and serious risk of injury or harm to health: s 74(1);
- Matters referred to the State Mining Engineer in relation to consultation about safety and health representatives and which remain unresolved: s 55(6); The State Mining Engineer’s decision on any unresolved issue regarding the proposed ‘election scheme’ for health and safety representatives that cannot be resolved: s 55A(4);
• The State Mining Engineer’s decision on any unresolved issue regarding the actual election process for health and safety representative(s) that cannot be resolved: s 56(11);
• Whether a health and safety representative(s) (employee and/or contractor) has been discriminated against in employment for carrying out his/her duties: s 68A;
• Whether a health and safety representative(s) ought be disqualified: s 59;
• Whether entitlements for health and safety representative's time for performing functions ought be varied (no less favourable to the health and safety representatives than prescribed in the regulations): s 62(1)(a);
• Whether entitlements for health and safety representative(s)’ time for attending courses of training accredited under s 14(1)(h) ought be varied (no less favourable to the health and safety representative(s) than prescribed in the regulations): s 62(1)(b);
• Where an employer considers a committee ought not be established at the mine(s) and has sought the approval of the State Mining Engineer. The decision of the State Mining Engineer may be referred: s 67(3);
• Where an employer considers a committee ought not be established at the mine(s) and has sought the approval of the State Mining Engineer. The decision of the State Mining Engineer may be referred: s 67(3);
• Where matters remain unresolved in relation to whether one committee can cover more than one mine following consideration by the State Mining Engineer then the issue can be referred: s 67B;
• Where matters remain unresolved in relation to the abolition of, or variation of agreements for committees, following consideration by the State Mining Engineer then the issue can be referred: s 67E(5);
• An appeal where a mine surveyor’s certificate has been suspended or cancelled by the Mines Survey Board: s 86;
• An appeal where a Board of Examiners, following an inquiry, suspends or cancels a certificate of competency: s 52;
• A new general jurisdiction to review reviewable decisions made by the State Mining Engineer under the Regulations: s 102AA

1390. From records of the Registry of the Industrial Commission, very few applications concerning unresolved issues under the MSI Act have been referred to the Tribunal for resolution to date.

1391. Between 1987 and 1995, jurisdiction in relation to administrative review applications was exercised by the State Industrial Commission under the former s 3A of the OSH Act. The figures in Table 10 indicate the number of applications filed over these years.

1392. From 2005, these and other matters now fall within the jurisdiction of the Tribunal. The numbers of applications to the Tribunal are also set out in Table
10. These figures do not include 227 applicants joined to proceedings in two matters before the Tribunal. They do include some 79 applications filed in connection with other proceedings before the Tribunal.

Table 10: Number of applications before the Commission and the Tribunal

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Western Australian Industrial Relations Commission</th>
<th>Occupational Safety and Health Tribunal</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 1987 – June 1995</td>
<td>60</td>
<td>0</td>
</tr>
<tr>
<td>2005 – December 2008</td>
<td>0</td>
<td>111</td>
</tr>
</tbody>
</table>

1393. In the period 1995 to 2005, administrative review matters were heard before a Safety and Health Magistrate. Whilst accurate figures for applications in this period are very difficult to determine, relatively few matters proceeded in that jurisdiction over this period of time.

1394. It is an encouraging sign that the parties in the mining industry seem to be able to resolve most safety and health matters amongst themselves at the workplace level, without the need to refer matters to the Tribunal. There is to a large extent, a culture in the industry that is supportive of the resolution of issues at the workplace level. This has been, by and large, evident from my experience in dealing with industrial matters in the mining industry over many years.

1395. What emerges from this data however is that the Tribunal’s jurisdiction is an expanding one and which will expand further, if proposed legislation comes into effect.

Hooker Review

1396. The role and powers of the Tribunal was given quite extensive consideration in the Hooker Review. This was a matter of some controversy. The CCIWA did not, and still does not, support the creation or continuation of the Tribunal. If it is to remain, strong opposition to any extension of its powers is expressed. Given that the CCIWA re-asserted its submissions to the Hooker Review in its submissions to me, on general matters where there is common ground, this must be taken to remain its position.

1397. Other employer groups were described by Mr Hooker in his Review as adopting a more moderate approach, whom, whilst not opposing the existence of the Tribunal, opposed any extension of its jurisdiction and powers. Yet
others maintained that the former jurisdiction exercised by Safety and Health Magistrates was more appropriate for such disputes.\textsuperscript{547}

1398. From the perspective of the union movement, Mr Hooker identified the views expressed by union and employee interests as supportive of the creation and continued existence of the Tribunal. Moreover, the unions also were in favour of a general expansion of the Tribunal’s jurisdiction, in relation to the settlement of safety and health disputes generally, including matters concerning an alleged breach of the legislation.\textsuperscript{548}

1399. I should emphasise however, that none of the submissions in the context of the present Review, have been to this effect.

1400. In response to submissions from parties to the Hooker Review, Mr Hooker concluded after due consideration, that the jurisdiction and powers of the Tribunal be expanded to enable it to enquire into and deal with any matter or dispute concerning safety and health, on the basis that all reasonable endeavours to resolve the issue have been unsuccessful.\textsuperscript{549} Some other related Recommendations were also made. The Recommendations made included as follows:

\begin{center}
\quad “R5. Section 51J(1) of the Occupational Safety and Health Act 1984 (WA) be amended to insert a reference to s.51A, thereby enabling the Tribunal to undertake conciliation on the further review of notices.

R6. The Occupational Safety and Health Act 1984 (WA) be amended so as to confer jurisdiction on the Tribunal to extend the time for the making of a reference for the further review of a notice under s.51A(1). Such a discretion to extend time may only be granted where the Tribunal is satisfied that it would be manifestly unjust not to allow an extension of time.

R7. The entitlement of “any party” to refer a dispute under s.28 of the Occupational Safety and Health Act 1984 (WA) (being confined to parties directly affected by such a dispute) be monitored in its operation by the Commission for Occupational Safety and Health and by WorkSafe and be reconsidered in the next review of the Act’s operations.

R8. The Tribunal be empowered to inquire into and deal with a matter, issue or dispute concerning occupational safety and health upon being satisfied that reasonable and diligent efforts have been made by the party referring the matter, issue or dispute to resolve the issue at the workplace, but that it remains unresolved. Where the matter issue or dispute gives rise to a risk of imminent and serious injury or harm, the Tribunal must be further satisfied that an inspector has been notified and has complied with s.25 of the Act, and that the matter, issue or dispute remains unresolved.”
\end{center}

\textsuperscript{547} Hooker Review 73-77
\textsuperscript{548} Ibid
\textsuperscript{549} Hooker Review Chapter 5 in particular at 94
R9. In dealing with such a matter, issue or dispute, the Tribunal should be empowered to:
- conciliate and make recommendations analogously to the powers contained in s.44 of the Industrial Relations Act 1979 (WA)
- issue an improvement or prohibition notice on satisfaction of the requisite “opinion required by s.48(1) and s.49(1) respectively.”

1401. I propose to deal with each subject matter separately for ease of reference.

**Extension of Time**

1402. Under the MSI Act, as a consequence of the recent amendments made in 2008, the Tribunal now has a broad discretionary power to extend the seven day time limit for applications to the Tribunal for a further review of an Improvement or Prohibition Notice.\(^{550}\) Therefore this matter falls away.

**Conciliation of Reviews**

1403. The issue that arises in this context is whether the Tribunal should be afforded a general power to conciliate in relation to applications to it to further review Improvement and Prohibition Notices. This arose in the Hooker Review in the context of S 51J of the OSH Act that enables the Tribunal to conciliate in relation to specified matters before it. WorkSafe, in submissions to the Hooker Review, opposed the Tribunal having such a power on a variety of grounds. In particular, because it considered that the nature of such Notices, concerning breaches of the legislation and the existence of unsafe workplaces, as a matter of fact, were not amenable to the conciliation process.

1404. The only party to comment on this matter was the CME in its submissions in response to the Hooker Review recommendations. This proposal was not supported by the CME largely on the foundation that it considers that the provisions of the MSI Act currently provide the appropriate level of consultation and review. Moreover, the view is expressed that there is nothing to suggest that such an amendment would enhance the attainment of the objects of the MSI Act or improve safety performance in the mining industry.

1405. For the following reasons, and with due respect to the views of Mr Hooker, I am not persuaded that such an amendment to the MSI Act should be made.

1406. Firstly, it is necessary to consider the basis for the establishment of the Tribunal’s jurisdiction arising from recommendations in the Laing Review. In my opinion, it was clearly intended that the administrative review jurisdiction then exercised by Safety and Health Magistrates, be transferred to the new Tribunal. On a fair reading of the relevant parts of the Laing Review, it was not intended in my opinion, that the jurisdiction then exercised by Safety and Health Magistrates, was to be enlarged or supplemented.\(^{551}\) This was also acknowledged by Mr Hooker.\(^{552}\)

\(^{550}\) Section 31BA MSI Act; Section 9(1) Mines Safety Inspection Amendment Act No. 16 of 2008
\(^{551}\) See Laing Review at pars 874-899
\(^{552}\) See Hooker Review at 75-76
1407. Secondly, it is of note that this was the approach of the Parliament when it amended both the OSH Act and the MSI Act, to create the Tribunal by the enactment of Part VIB of the former. The Parliament expressly conferred upon the Tribunal the powers which it did and limited the matters over which the Tribunal could conciliate. The Parliamentary debates confirm that this was the intention.553

1408. Thirdly, in my view it is relevant to consider the nature of the Notices from which reviews to the State Mining Engineer and in turn, to the Tribunal, are brought. In the case of Improvement Notices under s 30 of the MSI Act, they may be issued by an Inspector and Assistant Inspector, in circumstances where the Inspector forms the opinion that a person:

- Is contravening the MSI Act; or
- Has previously contravened the MSI Act where such a contravention may either continue or be repeated.

1409. In the case of Prohibition Notices, the relevant opinion to be formed by an Inspector under s 31AB of the MSI Act is the same as that above, but with the added circumstance that:

- The contravention constitutes or is likely to constitute a hazard; or
- The mine, plant, mining practice or hazardous substance at a mine is dangerous or is likely to become so.

1410. It has been held that the consideration on review by the Commission (formerly) and now the Tribunal, is essentially one of fact, by the standing of the Tribunal “in the shoes” of an Inspector to “inquire into the circumstances relating to the notice” and whether, in the Tribunal’s view, the Inspector’s opinion on the facts, was valid.554 This necessarily involves the Tribunal hearing the matter de novo.555 No question of onus of proof arises in such proceedings.556

1411. In light of these matters, and that reviews of this kind are essentially factual, and give rise to whether in some circumstances a workplace is safe or not, it is difficult to see how further conciliation could aid in the Tribunal’s determination of the matter. As a factual issue, the requisite circumstances are either in existence or not, to warrant the Inspector forming the relevant opinion at the material time. In my view, proceedings of this kind are not amenable to offers of “settlement” or other strategies by which disputes may be resolved through conciliation.

553 See Hansard 25 August 2004 at 5584-5586; 26 October 2004 at 7310-7315
554 Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1993) 73 WAIG 2 (IAC)
555 The WorkSafe Western Australia Commissioner v The Original Croissant Gourmet Pty Ltd (2007) 87 WAIG 22 at pars 90-96
556 Wormald
1412. I do not therefore recommend any amendment to the MSI Act to expand the jurisdiction of the Tribunal in these terms.

**Party to a Dispute**

1413. Another issue arising in the Hooker Review, which requires consideration, is the issue of the identity of the proper “party” to a dispute referred to the Tribunal under s 74(2) of the MSI Act, in relation to the recovery of entitlements, where an employee(s) refuses to work for the reasons specified in s 72.

1414. This matter arises following the decision of the Full Bench of the Commission in *Thiess Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Union of Employees – Western Australian Branch*. In that case the Full Bench held that for the purposes of s 74(2) of the MSI Act, “any party to the dispute” means the “putative employee and employer” and not any organisation registered under the IR Act on their behalf.

1415. Whilst Mr Hooker considered the relevant provisions of the OSH Act for his purposes, they are in virtually identical terms to the MSI Act. Having considered the matter and invited some responses, the view was taken that at this point no amendment to the OSH Act should be made. Rather, as the Recommendation above refers, the issue should be monitored by the COSH and be considered at any subsequent Review of the legislation.

1416. The only submission on this issue was again from the CME, who in commenting on the Hooker Review Recommendations, considered that there should be no change to the OSH Act in relation to disputes of the above kind, as there is an insufficient basis for broadening the parties able to refer such disputes to the Tribunal. It must be taken therefore, that this is also the CME position in relation to s 74(2) of the MSI Act.

1417. In my view, it is also relevant to consider the subject matter of the dispute that may be referred to the Tribunal under s 74(2) of the MSI Act. It is clear from the provisions of ss 72 to 74A when read together and in the context of the MSI Act as a whole, that what is in issue on any such referral is the question of an “entitlement” to “pay and other benefits”. That being so it is also clear that the principal object of s 72(1) of the MSI Act is an “employee.” This is so notwithstanding that other provisions of ss 72 and 74 refer, unhelpfully, to “person”, when it is quite clear from the context, that it is in fact the “employee” to who reference is being made. Given that the subject matter concerns an entitlement to pay and other benefits, in respect of an employee, which can only derive from a contractual relationship between that employee and some other person it seems to me to be axiomatic, that that other person, party to the dispute, can only be the employee’s employer.

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557 (2006) 86 WAIG 2495
558 *Thiess* at pars 68-75
1418. This approach would seem to accord with the terms of s 74A of the MSI Act which deals with acceptance by an employee from his or her employer, or payment by an employer, of “pay or other benefits”, which is in almost identical language to s 74.

1419. If this approach is correct, when read with the reasoning of the Full Bench in Thiess, that “party” must only be those most directly concerned in the dispute, as putative employee and employer, it seems inevitable that the only reasonable construction open is that the phrase “any party to the dispute” can only mean the relevant employee and employer. It is difficult to see in my opinion, how another court could reasonably come to any other conclusion in respect of this matter.

1420. That being so I do not consider that this issue should be left in abeyance. Those persons affected by the law need certainty and in my view, the law as it has been presently stated, should be reflected in the legislation. This is a different issue as to whether, as a matter of policy, a union should be able to bring such proceedings on behalf of employees collectively. This is a much larger policy question and it should be considered as and when it arises for debate.

**Recommendation 86**

That s 74(2) of the MSI Act be amended to delete reference to “any party to the dispute” and in lieu thereof, there be inserted the words “the employee or the employer as the case may be.”

**Recommendation 87**

That in relation to all references to “person”, where the context clearly discloses it is meaning “employee” in ss 72 to 74A of the MSI Act, the MSI Act be amended accordingly.

**General Dispute Resolution Power**

1421. Whilst the absence of any significant number of disputes under the MSI Act being referred to the Tribunal, should not be determinative of the issue, I have not in my consultations thus far, or in any written submissions, detected any general desire for any general expansion of the jurisdiction and powers of the Tribunal. I have not been persuaded by anything put to me or said in submissions, that in relation to disputes under the MSI Act, small as they may be, there is any pressing need for the jurisdiction of the Tribunal to be altered.

1422. There certainly has been nothing raised with me to suggest the existence of “intangible” hazards in mining workplaces, that seemed to be persuasive in Mr Hooker’s mind, to recommend that the Tribunal have a broad conciliation and arbitration power in relation to safety and health matters.559

559 Hooker Review at 92
1423. Nor am I persuaded that any such expansion of jurisdiction would enhance the attainment of the principal object of the MSI Act in s 3(1)(a) “to promote and secure the safety and health of persons engaged in mining operations.” The existing dispute resolution mechanisms, comprising workplace consultation, Inspectorial involvement, the issuance of Notices, and their review and other reviews by the State Mining Engineer and in turn the Tribunal, are adequate in my opinion.

**Recommendation 88**

That the jurisdiction and powers of the Tribunal under s 102 of the MSI Act be confirmed as appropriate.

**Jurisdiction of the Commission**

1424. In my view, notwithstanding the above, there may be arguments in any event that the jurisdiction of the Tribunal in relation to safety and health matters under either the OSH Act or the MSI Act, by reason of s7 (3) of the IR Act 1979, is not exclusive. It may be said that the Industrial Commission may have jurisdiction in relation to some health and safety issues not referred to or the subject of an appeal to the Tribunal, as matters falling within the definition of an industrial matter as:

“affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry”

Section 7(3) of the IR Act provides as follows:

“3) A matter or claim that has been referred, or appeal that has been brought, to the Tribunal provided for by section 51G of the Occupational Safety and Health Act 1984 under a provision mentioned in —

(a) subsection (1) of that section; or
(b) section 102(1) of the Mines Safety and Inspection Act 1994; or
(c) clause 69(1) of Schedule 1 to the Petroleum and Geothermal Energy Resources Act 1967, clause 69(1) of Schedule 1 to the Petroleum Pipelines Act 1969, or clause 70(1) of Schedule 5 to the Petroleum (Submerged Lands) Act 1982, is not an industrial matter.”

1425. If the general jurisdiction of the Industrial Commission has no application, then it seems passing strange why the legislature sought fit to enact s 7(3) of the IR Act, to otherwise exclude the jurisdiction of the Industrial Commission in such circumstances. These matters also involve consideration of the terms of s 16 of the Workplace Relations Act 1996 (Cth), in relation to the exclusion of State industrial laws. However, I need not explore this issue any further for

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560 Section 7 IR Act.
present purposes. Whether or not this argument has any cogency, will no doubt, have to await another day and occasion.

NMSF Compliance

1426. The NMSF Legislative Framework at Principle 2m specifies that health and safety legislation should make provision for resolving issues in the workplace. The existing provisions of the MSI Act would appear to satisfy this requirement.
CHAPTER 13 – ENFORCEMENT

General

1427. The general enforcement provisions of the MSI Act are found in Part 9. These provisions are subject to the specified penalties in respect of particularised offences elsewhere in the MSI Act, in particular for example, s 4A in relation to level 1 to level 4 offences, the latter of which being a penalty for an offence involving gross negligence. Proceedings for offences against the MSI Act are to be commenced within three years from the time of the commission of the offence: s 97. Save for those expressly elsewhere provided in the MSI Act, the general penalty regime prescribed is a level 1 penalty set out in s 4A of the MSI Act.

1428. Provisions in relation to vicarious responsibility in terms of general offences and for those involving gross negligence, are found in ss 99 and 99A. Offences by corporations are also committed by corporate officers, in the circumstances prescribed, for both general offences and for those involving gross negligence, as found in ss100 and 100A.

Role of Enforcement

1429. Enforcement is an important role for any regulator. The enforcement process, either administrative or criminal, is essential in maintaining the integrity of the legislation and the confidence of the community covered by it. The community places its trust and confidence in a regulator, in this case the Mines Inspectorate, as the repository of power to enforce the terms of the MSI Act and to ensure that appropriate safety and health standards are maintained in the mining industry. This is of itself, an onerous responsibility. The Mines Inspectorate is the “public face” of the State in terms of the administration of the MSI Act.561

1430. The role of enforcement, in particular criminal enforcement, in relation to safety and health has been very contentious. Debate on the issue tends to be polarised. Employers and their representatives tend to see little role for criminal enforcement, in particular prosecution, whereas others, usually representing employee interests, consider that it should play a far greater part in regulation under health and safety law. The issue is complex. The role of a regulator, as contemplated within original framework recommended by the Robens Committee, is a multifaceted one. It ranges from that of information provider, advisor and consultant, on the one hand, to the enforcer, on the other.

1431. It is instructive to return to the views of the Robens Committee in this regard, when considering the role of enforcement. In relation to the general issue of sanctions and enforcement, the Robens Committee said:562

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561 Maxwell 2004 at par 284
562 Robens Committee at pars 254-255
“One of the basic themes of this report is that occupational safety and health law should seek to promote, as much as to control. We have suggested changes in the law and its administration designed to produce a framework for stimulating and encouraging self-regulation by industry and the exercise of individual and cooperative responsibility. We have looked for ways of reducing the negative influence of an excessively regulatory approach. Amongst other things we have suggested that the basic function of the state inspection services should be, and should be clearly seen to be, the provision of advice and assistance towards progressively better standards. At the same time it must be recognised that there will always be some who are indifferent to the demands of safety and to their obligations towards others. Flagrant offences call for the quick and effective application of the law. In what follows we are not arguing in favour of a generally milder, more tolerant approach but in favour of a much more discriminating and efficient approach-constructive where appropriate, rigorous where necessary.

It will be clear from what we have already said that any idea that standards generally should be rigorously enforced through the extensive use of legal sanctions is one that runs counter to our general philosophy. Our views on this are to a large degree shared by the various government departments and inspectorates who have enforcement responsibilities, as well as by some legal bodies and other interested organisations. In the submissions made to us there was a very considerable body of opinion to the effect that the sanctions of the criminal law have only a very limited role to play in improving standards of safety and health at work. We found that those who took the opposite view were unable to deal convincingly with the fundamental weakness of legal sanctions in this field- that the criminal courts are inevitably concerned more with events that have happened than with curing the underlying weakness that caused them. The main need is for better prevention. Technical problems of safety organisation and accident prevention are matters for experts in the industrial field rather than the courts.” (My emphasis)

1432. The Committee further recommended that the use of criminal sanctions be limited to those circumstances:

“...where the imposition of exemplary punishment would be generally expected and supported by the public. We mean by this offences of a flagrant, wilful or reckless nature which either have or could have resulted in serious injury.” 563 (My emphasis)

1433. The Robens Committee preferred to see greater reliance upon administrative enforcement through the use of Improvement and Prohibition Notices as an immediate and effective means of intervening to deal with health and safety issues in the workplace. 564 These views have been the subject of criticism in some quarters. 565 Also, Johnstone suggests that the Robens Committee’s...
failure to “rethink” the criminal law, outside of the paradigm of the traditional
criminal law model of enforcement, with an event focus, has, in itself,
contributed to the ineffectiveness of criminal sanctions.566 Nonetheless, it is
not insignificant that those on whose views Australian safety and health
legislation is largely based saw the role of criminal sanctions in this light.

Enforcement Theory

1434. There has been considerable academic research and debate, in relation to the
effectiveness of different approaches to regulatory enforcement. Gunningham
distinguishes between the approaches of “deterrence” on the one hand, which
includes a rigorous enforcement method including prosecution, and
“compliance”, which embraces advice, persuasion and less adversarial means
of regulation.567

1435. The effectiveness of either approach, used in isolation, appears to be less than
optimal. Excessive timidity, through the exclusive use of compliance
approaches, is suggested, except perhaps in the case of large and sophisticated
organisations, to lead the discouragement of compliance and be
counterproductive. On the other side of the coin, a heavy handed approach
focussing only on punitive action such as prosecution, depending upon the
type of organisation regulated can also be counterproductive, as firms are
reluctant to engage with the regulator and share information, for fear of
prosecution.568

A Balanced Approach

1436. A balanced approach, in which the judicious use of both compliance and
deterrence strategies, depending upon the circumstances of the regulated, is to
be preferred. An approach that seeks to overcome many of the disadvantages
of the deterrence and compliance focus, and one now adopted broadly by
regulators, including the Mines Inspectorate, is one involving a graduated
approach to enforcement, as reflected in the “Enforcement Pyramid”, as
depicted in figure 8 below.569 It enables an escalation of the seriousness of
regulatory responses to increasingly serious non compliance with legislation.
It also enables the regulator to enter the pyramid at any level, on the basis that
commencing at the bottom is not mandatory. Although in practice, a graduated
approach, with rapid escalation from bottom to top in appropriate
circumstances, appears to be the most effective.570

566 R Johnstone  From Fact to Fiction-Rethinking OHS Enforcement  National Centre for OHS Regulation
Working Paper 11 July 2003 at 7-8
567 Gunningham  2007 op cit at 116-117
568 Ibid at 121-122.  See also in a mining context J Galvin  Occupational Health and Safety Acts-Performance
and Prosecution in the Australian Minerals Industry, Mining Technology 114(4) at 251
569 I Ayres and J Braithwaite  Responsive Regulation 1992 Oxford University Press
570 N Gunningham and R Johnstone  Regulating Workplace Safety: Systems and Sanctions 1999 Oxford
University Press
1437. The Inspectorate’s approach is one based on the use of the range of sanctions from record book entries and letters of concern and warnings, middle tier administrative sanctions of Improvement and Prohibition Notices, the latter of which include directions, through to prosecutions in appropriate cases.

1438. These enforcement tools are deployed in a variety of ways, through planned and unannounced site inspections, responses to complaints, and various audit processes including Management Systems Audits and High Impact Function Audits.

![Figure 8: Braithwaite’s enforcement pyramid (Gunningham and Johnstone)](image)

**Court Sanctioned Undertakings**

1439. Undertakings in lieu of the imposition of a fine, by way of a court order, are found in Division 2 of Part 9 of the MSI Act, and flow from the Laing Review. These provisions enable an offender to enter into an agreement with the State Mining Engineer, for an undertaking for the offender to commit to various courses of action, such as:

- taking steps to improve health and safety at a mine or part of it or in connection with its business;
- publicise details of the relevant offence;
- to remedy any consequences of a specified offence; and
• to undertake specified projects or activities in the community to improve safety and health.571

1440. Such a provision reflects the importance of corporate reputations and the impact that safety and health offences can have upon them. Importantly however, their effectiveness is dependant upon the willingness of the courts to consider such a sentencing option and for offenders to utilise them. They can have the benefit of directing resources to an improvement of health and safety either generally or specifically, in a particular industry or community.572

1441. Furthermore orders by a court in relation to such undertakings, are only available in relation to a limited range of offences, and do not include offences arising from a breach of any of the general duties provisions of the MSI Act in Division 2 of Part 3.

1442. Notwithstanding these limitations, such remedies are of value in terms of available responses to regulatory contraventions. No one has made any submissions in relation to them. I do not recommend any change.

Jurisdiction for Enforcement

1443. All proceedings for an offence under the MSI Act are heard summarily before a Safety and Health Magistrate, including offences involving gross negligence as prescribed by Division 2 of Part 2 of the MSI Act. An issue arises as to whether the latter offences, that is those involving gross negligence, leading to death and serious injury, should continue to be heard summarily or alternatively, should be tried on indictment.

1444. This issue arose in the Laing Review. It was recommended after some consideration, that the OSH Act be amended to require serious offences to be tried on indictment before the superior courts.573 Whilst an amendment to the MSI Act in these terms was not recommended, consideration would be given to this issue. In the Hooker Review574 this matter was noted. It was also said that further consideration could be given to the matter, as insufficient had been put to that Review to warrant any recommendation for an amendment to the OSH Act in that regard.575

1445. This has not been raised as an issue in submissions, apart from the CCIWA submission originally put to the Hooker Review which opposed any transfer of jurisdiction. On one view, it may be said that serious offences such as those involving gross negligence, which are punishable, in the case of an individual, by a substantial fine and up to two years imprisonment, should be tried on

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571 Section 101H MSI Act
573 The Laing Review of the OSH Act November 2002 Recommendation 31. No such recommendation was made in relation to the MSI Act.
574 Hooker Review at pp 113-114
575 Ibid at par 7.22
indictment, given that the gross negligence offences involve the death or serious harm to a person, in circumstances where the offender has knowledge of the likelihood of this result. The offence is one tantamount to conduct constituted by reckless indifference to the welfare of employees and other persons in the workplace. On the other, there are equally persuasive arguments that the existing jurisdictional arrangements, including appellate rights to the Supreme Court, have been satisfactory in practice.

1446. In the absence of any fulsome and considered debate on the issue, and having due regard to the alignment with the existing provisions of the OSH Act, it would be premature to make any recommendations. However, I consider that it is a matter that should be the subject of further inquiry and examination.

**Administrative Enforcement**

**Inspections**

1447. The administrative enforcement regime under the MSI Act includes the exercise of powers by the Mines Inspectorate to enter the premises of a mine and to do the various things set out in s 21(1).

**Inspector’s Powers**

1448. The power of a Mines Inspector to enter the premises of a mine is exercisable without a warrant and has a broad scope, for any purpose prescribed by the MSI Act. This is in contrast to some other jurisdictions, where the powers of the respective Inspectors to enter premises for purposes in connection with the commission of an offence under the respective Act, require the obtaining of a warrant.\(^{576}\)

1449. The power under the MSI Act is essentially unrestricted, such that a Mines Inspector may “enter, inspect, and examine any mine and examine any plant, substance, or other thing whatsoever at the mine...”\(^{577}\) It is exercisable at “all times of the day or night”. Such a power to enter is not dependant upon an occupier’s consent before it is exercised.

1450. This right of entry however, is vital for the ongoing compliance with the terms of the MSI Act. It enables a Mine Inspector to not only undertake planned inspections, but also enables unannounced inspections for the purposes of insuring compliance. Although in my view, too much emphasis should not be placed on the latter. Whilst some may suggest that planned inspections can have the effect of putting operators on notice and therefore enabling them to rectify any defect, it can also be looked at from the perspective of aiding the attainment of the objects of the legislation. There should be a balance of both.

\(^{576}\) See for example s104 *Occupational Health and Safety Act 2004* (Vic)

\(^{577}\) Section 21(1)(a) MSI Act
1451. The purpose of inspections should be to encourage compliance and promote safe workplaces. It is noted that in some European jurisdictions, such as the Netherlands for example, the approach to inspection is almost in an entirely planned way, based on specific projects, using multidisciplinary teams, in conjunction with the industry.578

1452. Additionally, in the case of planned inspections, major deficiencies are not able to be corrected easily or quickly. An experienced and qualified Inspector, will be able to see through any attempt to mask major problems.

1453. There was no suggestion in my initial consultations, or in submissions, that the existing powers of entry of Mines Inspectors are causing any difficulties, or that there are concerns that the existing provisions should be tightened up. There are however, as follows, some improvements that I consider could be made to the existing provisions.

Notification

1454. By s 21(4) of the MSI Act, a Mines Inspector must give notice of his intention to inspect a mine to the Principal Employer or Registered Manager or in their absence some other “responsible person”. This is subject to the requirement of “practicability”. The essential part of the subsection is as follows:

“the inspector or assistant inspector must, where practicable on entering the mine, give notice of his or her intention to do so, either to the principal employer or to the manager, or in their absence to another responsible person.”

1455. There are three issues with this provision.

1456. Firstly, it is only presently in circumstances where it is practicable to do so, that the obligation on an Inspector to notify on entry arises. In my view, this is inadequate. In all cases of an entry to a mine, there should be an obligation on an Inspector to notify of their presence. Safe working practices and procedures simply require it. This is invariably not an issue on large mine sites that now use security gates and employ “swipe card” security access technology, that record the movement of personnel on site. However such technology is far from universal.

1457. The corresponding provision in the OSH Act is for an Inspector to “take all reasonable steps” to notify their presence to “any relevant employer” “as soon as practicable”.579 In my view, this places the appropriate emphasis on notification, with practicability concerning the timeliness of the notification, rather than the fact of it.

1458. Secondly, the obligation on an Inspector is to notify, in the absence of the principal employer or the Registered Manager, “another responsible person”.

579 Section 45(1) and (2) OSH Act
There is no definition in the MSI Act, as to who such a “responsible person” may be. There is a definition in the Regulations of “responsible person”, in relation to a mine, which means the principal employer, manager or other employer, but that can only be called in aid for the purposes of the Regulations.580

1459. To add to the confusion, there is a further definition in s 31AR of the MSI Act of “other responsible person”, in relation to those who are required to comply with a Prohibition Notice. It seems reasonably clear that the provision in s 23(4) is directed to someone for example, who may temporarily be appropriate to notify, given the absence of a Manager, their alternate and deputy, such as a supervisor.

1460. However, it is significant to note that the person so notified, is further required to immediately notify, where practicable, a safety and health representative, of the Inspector’s presence, the failure to do which, constitutes an offence by that person.

1461. Given that this is an offence creating provision, greater particularity should apply. It is inappropriate in my view that such a provision, to which attaches criminal responsibility, should be left to the vagaries of identification of a “responsible person” on a case by case basis, depending upon each particular mine.

1462. In addition to those positions nominated, there should be added the positions of Quarry Manager, Underground Manager, Exploration Manager, Foreman or Supervisor. The reference to “responsible person” should be deleted. These positions are well known in the industry and are defined in s 4 of the MSI Act. Whilst in some cases the Manager may also be the Quarry Manager or Underground Manager, this will provide more than adequate contact opportunities for notifications of entry to mines and to provide greater certainty. The inclusion of the position of Exploration Manager compliments recent amendments to the MSI Act, focussing greater attention on exploration operations.

1463. Furthermore, in the context of this provision, it seems clear enough that “practicable” is not used in the sense as defined is s 4 of the MSI Act, but rather in accordance with its ordinary and natural meaning. There are a number of occasions where “practicable” appears in the legislation, apparently used in the same sense. As it is plainly not intended to have its defined meaning in s 4, to avoid confusion, the definition in s 4 of “practicable”, for the purposes of the general duties, should be amended make it clear that it is so limited.

580 See Reg 1.3 Regulations
**Recommendation 89**

That s 21(4) of the MSI Act be amended to:

(a) Delete the reference to “responsible person” and insert in lieu thereof “quarry manager, underground manager, exploration manager, foreman or supervisor”; and

(b) Require an Inspector to take all reasonable steps to notify the persons in s 21(4), as soon as practicable after entering the mine.

**Recommendation 90**

That the definition of “practicable” in s 4 of the MSI Act be amended to make it clear that the defined term only extends to those parts of the statute that impose duties of the kind to which it applies.

**Outcome-Contact with Representatives**

1464. Once an inspection is completed, a Mines Inspector is required to complete a Record Book entry and to notify the Principal Employer or the Registered Manager and “where practicable”, a relevant safety and health representative of the outcome of the inspection.\(^\text{581}\) The importance of contact by Inspectors with safety and health representatives is well known.

1465. It is appropriate to pause and focus on what the existing law requires. “Practicable”, in its ordinary grammatical meaning, means “Capable of being carried out in action”\(^\text{582}\) In other words, if it can be done it should be. The only circumstance where I can envisage that an Inspector would not make contact with a safety and health representative is where that person is absent from the site. Given the importance of contact, it is not a sufficient reason in my view for that person to be too busy to be available. The law obliges an employer to provide such facilities and assistance as may be required to enable a safety and health representative to perform their functions, including accompanying a Mines Inspector on an inspection of a mine if requested.\(^\text{583}\)

1466. It has been suggested in the past that the intended notification of safety and health representatives is not as frequent in practice as it should be. Subject to the discussion and analysis below, in the context of the present administrative Review, such assertions are difficult to examine. The matter has not been raised with me in submissions to the Review, although as I have mentioned above, on one or two occasions, safety and health representatives I spoke with, noted that that they seldom saw Mines Inspectors. Additionally, the results of the research commissioned by the MOSHAB, dealt with above in Chapter 11 also pointed to this as an issue. In the research questions posed, it was revealed that of those surveyed, whilst some 28 per cent reported regular or

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581 Section 23(1)(a) and (b) MSI Act
582 Shorter Oxford English Dictionary at 1645
583 Sections 53 and 60 MSI Act
occasional contact with Mines Inspectors, some 69 per cent reported either rare or no contact.\textsuperscript{584}

1467. I should also add that a number of others indicated to me that whilst in many cases, endeavours are made to notify a health and safety representative of an Inspector’s presence on site, this does not always happen. Moreover, health and safety representatives accompanying Mines Inspectors, other than Employee’s Inspectors, during inspections, is not as frequent as many would wish. It is noted that Employee’s Inspectors are required to liaise with health and safety representatives and committees.\textsuperscript{585}

1468. This issue has also been raised in prior Reviews and Inquiries.\textsuperscript{586}

1469. Furthermore, there is presently a two step process by which safety and health representatives are notified of the presence of an Inspector, which requires firstly the notification by the Inspector to the Principal Employer or Registered Manager or other responsible person, and then secondly, in turn, notification by that person to the relevant health and safety representative. It may be the case that the second step is not always complied with, or at least in a timely manner. In such circumstances, it may be difficult for the Mines Inspector to seek out a health and safety representative on site, although I know from discussions with and observations of some Inspectors at work, that many do so. An issue that arises, therefore, is whether the legislation should impose such a requirement?

1470. There is no doubt that interaction between Inspectorate staff and health and safety representatives is to be valued. It has been the subject of discussion and examination in the literature and is a matter about which there seems no dispute and in relation to which there is a compelling logic. This was confirmed by most I spoke with on this issue. This matter was also the subject of consideration by the MSIG. It was suggested by the MSIG that it should be made mandatory for Inspectors who visit mine sites to consult with health and safety representatives.\textsuperscript{587}

1471. The re-focussing of the role of the Employee’s Inspector, as recommended above, will be an aid in this process. However, I have some reservations as to imposing a mandatory requirement to consult, as a matter of practicality, given the nature of the mining industry.

1472. Moreover, I am required by my Terms of Reference, to maintain alignment with the OSH Act. Under it, the provisions in relation to an Inspector’s requirement to notify an employer of the Inspector’s presence are very similar to those under the MSI Act, in that the same two stage process of notification is required.\textsuperscript{588}

\textsuperscript{584} TNS op cit at 40
\textsuperscript{585} Section 25(1) MSI Act
\textsuperscript{586} See Laing Review and Ritter Inquiry
\textsuperscript{587} MSIG op cit at 44
\textsuperscript{588} Section 45 OSH Act
Since 2004, the Mines Inspectorate has kept a record of contacts between Inspectors and safety and health representatives. The data for the period 2004-October 2007 appears in Table 11 below.
Table 11: Safety and Health Representatives Contacts (June 2004 – 2008)

<table>
<thead>
<tr>
<th>Mines Safety Branch Outputs</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2004</td>
</tr>
<tr>
<td>Safety &amp; Health Reps contacts</td>
<td>1123</td>
</tr>
<tr>
<td>Site Safety Inspections</td>
<td>1779</td>
</tr>
<tr>
<td>Complaints</td>
<td>137</td>
</tr>
<tr>
<td>Serious Accident/Incident Investigations</td>
<td>66</td>
</tr>
<tr>
<td>Audits - Management Safety Systems</td>
<td>10</td>
</tr>
<tr>
<td>Audits - High Impact Function</td>
<td>129</td>
</tr>
</tbody>
</table>

1474. These safety and health representative contacts arise from site visits, complaint and accident investigations and the various audits undertaken by the Mines Inspectorate. The recorded outputs for these activities are also set out in the Table above. It is difficult to be definitive from the recorded data, and the numbers are only indicative. However, when one compares the recorded data in relation to site safety inspections alone, as set out in the Table, where there is a statutory requirement under ss 21 and 23 of the MSI Act, on the notified person, that is the person notified by the Inspector of the Inspector’s presence on site, to make contact with representatives, it is seen that the level of contact as against the bare number of site inspections, is substantial. To that, if one adds the other opportunities for contact, such as the other outputs in the Table, the number of contacts overall, is still not insubstantial.

1475. One must therefore be cautious in relation to assertions of a lack of contact between Mines Inspectors and representatives, in view of this objective evidence as to contact. The steps taken by the Inspectorate to record and encourage this practice, is to be applauded.

1476. It must also be recognised that it is not in all cases, that a representative is readily available to be notified of the outcome of an inspection. This is particularly so in the case of fly-in fly-out operations. This can be more evident in the case of unannounced inspections. There are obviously practical considerations that arise, in remote locations in which many mining operations are conducted in the State. Additionally, from some of my own observations on attending sites with members of the Mines Inspectorate, attempts were generally made to establish contact with representatives. This may simply be a case of seeking the representative out, whilst moving around the mine site.

1477. Mine record book entries that I have reviewed, also note contact with representatives. When being made, Inspectors should ensure that contacts are
recorded in the mine record book. Given the important role safety and health representatives play in mine safety, in my view, there should be every effort to make contact when Inspectors visit sites.

1478. This obligation exists under the OSH Act. On the completion of an inspection, an Inspector is required to notify any relevant safety and health representative or committee of any action taken, and to be taken, as a consequence of the inspection. However, whilst this is appropriate in the context of general industry, the practical realities of the mining sector would make this inappropriate. As noted above, the prevalence of fly-in fly-out arrangements for example, now present in more than 50 per cent of employment would make this unworkable in my view.

1479. The interaction between Inspectors and safety and health representatives was referred to by the Robens Committee in the following observation:

“In the development of new approaches to inspection work we attach very great importance to more contacts and co-operation between inspectors and work people and their representatives. It should be as natural for inspectors to discuss safety and health problems with work people and their representatives as it is to discuss them with management. Sometimes it might be helpful to have joint discussions between inspectors, management and employee representative. None of this seems to happen widely at present. We are convinced that more contact and dialogue between inspectors and work people would not only greatly assist the inspectors in their day-to-day work but would also make an invaluable contribution towards increasing the involvement of work people in the fight against safety and health hazards.”

Recommendation 91
That subject to Recommendation 89 the existing provisions of Part 3 of the MSI Act in ss 21(4), (5); 23 and 25 be confirmed as appropriate.

Recommendation 92
That Mines Inspectors make contact with safety and health representatives on site visits and undertake inspections in the company of a relevant safety and health representative unless it cannot be done.

589 Robens Committee op cit at par 213
**Interviews and Answering Questions**

1480. By s 21(1)(i), (ia) and (j) of the MSI Act, a Mines Inspector may require a person to attend for an interview and be required to answer questions. It is expressed as follows:

(i) in accordance with subsections (1a) and (1b), interview any person who the district inspector or special inspector (the “inspector”) has reasonable grounds to believe —

(i) is, or was at any time during the preceding 3 years —

(I) an employee working at a mine; or

(II) an employee occupying residential premises mentioned in section 15D(2),

in relation to which the inspector is inquiring;

(ii) was at such a mine or such residential premises at a time that is relevant to a matter about which the inspector is inquiring; or

(iii) may otherwise be able to provide information relevant to a matter about which the inspector is inquiring;

(ia) require the attendance of any person for an interview under paragraph (i);

(j) require any person whom the inspector interviews under paragraph (i) to answer any question put to that person and, if the inspector considers it appropriate, to verify any such answer by statutory declaration;

1481. Where the Mines Inspector requires it, such answers are to be verified by a statutory declaration. This power extends to the interview of those persons who previously were employed on a mine within a period of three years of the Inspector’s entry to a mine. This period was enacted to correspond with the time limit for the bringing of a prosecution under both the OSH Act and the MSI Act, which was increased from two to three years.\(^{590}\)

**Hooker Review**

1482. An issue arising in the Hooker Review was the ability for Inspectors to tape record interviews held in accordance with the corresponding power under the OSH Act.\(^{591}\) Given the terms of the Surveillance Devices Act 1998 (WA) this can only be done if a Mines Inspector is prescribed as a “law enforcement officer” for the purposes of that legislation. Mr Hooker recommended that this be done to enable the tape recording of interviews where required. Whilst it has not been raised as an issue with me, I agree with this course. It can only aid in the execution of the powers of an Inspector when undertaking inquiries.

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\(^{590}\) See Laing Review 2002 at pars 1143-1148; s 97 MSI Act.

\(^{591}\) Hooker Review at 167-168.
Recommendation 93
That s 21(1)(i) of the MSI Act be amended to empower an Inspector to tape record an interview conducted with persons to whom the section refers.

Recommendation 94
That for the purposes of Recommendation 93 above that Mines Inspectors be prescribed as law enforcement officers under reg 4 of the Surveillance Devices Regulations 1999.

Obstruction-Self Incrimination

1483. The statutory provision to exclude a requirement imposed on a person to answer a question, on the basis that such an answer may tend to incriminate the person, is dealt with in s 29(3) of the MSI Act. Whilst the subsection refers to “a requirement made under this Act”, it more correctly I think should say “a requirement imposed by this Act”.

1484. However, the present provision runs into some difficulty by reason of the fact that under s 5 of the Interpretation Act 1984 (WA), a “person”, is defined to include a body corporate or a company. This provision must be read subject to the general law. Following the decision of the High Court in Environmental Protection Authority v Caltex Refinery Co Pty Ltd the privilege against self incrimination is no longer available to corporations. The OSH Act recognises this and excludes the privilege against self incrimination, in the case of a body corporate. The MSI Act should be amended in similar terms.

1485. Generally, the drafting of the relevant provision in s 47(2), (3) and (4) of the OSH Act, is to be preferred to that currently contained in s 29(3) and (4) of the MSI Act. In the OSH Act, whilst privilege is not grounds for a person to resist answering a question or producing a document, the subsequent use of that evidence is subject to immunity, except for a corporation or a document obtained by an Inspector, under the general power to require production.

Recommendation 95
That the MSI Act be amended to make it clear that the privilege against self incrimination does not extend to corporations. That s 29(2) and (3) of the MSI Act be re-drafted consistent with the provisions of s 47(2), (3) and (4) of the OSH Act.

Workplace Not To Be Disturbed

1486. A Mines Inspector may require under s 21(1)(h) of the MSI Act, that a mine or part of it, be left undisturbed. Additionally by s 81, a place of an accident in

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592 Environmental Protection Authority v Caltex Refinery Co Pty Ltd (1993) 178 CLR 477
593 See s47(4) OSH Act
the case of a fatality or serious injury, is not to be disturbed by any person, irrespective of any direction of a Mines Inspector. No change is suggested to this provision.

**Legal Professional Privilege**

1487. There is no reference in the MSI Act, or indeed the OSH Act, to the existence of legal professional privilege, in relation to persons who are required to provide information by way of answering questions or providing documents. This issue was identified in Maxwell 2004, as a deficiency which should be remedied. In my view the same should apply under the MSI Act, in light of the decision of the High Court in *Daniels Corporation International Pty Ltd v ACCC.*

**Recommendation 96**

That the obligation on a person under the MSI Act to answer a question or to produce a document should be qualified by the existence of a claim of legal professional privilege.

**Samples**

1488. Section 21(1)(d) of the MSI Act enables an Inspector to “take and remove samples of any substance or thing...” An identical power exists under the OSH Act. However, under the OSH Act there is amplification of this power, such that a sample so taken, must be divided and one portion be given to the employer, one used for any testing required, and the other retained for future comparison, as a form of a chain of custody.

1489. In my view this type of provision is entirely appropriate. Given the existence of the power to take samples, there should be the corresponding obligation to split them. There may well be a circumstance where a test on a sample of a substance is challenged. In the absence of split samples, the capacity to effectively do so is compromised. The safeguard for personal samples, as in s 46(3) of the OSH Act, should be retained. The split sample should be given to the Principal Employer or the Manager.

**Recommendation 97**

That the MSI Act be amended in relation to the powers of Inspectors to take a sample with the amended provision modelled on s 46 of the OSH Act.

**Extra Territorial Exercise of Powers**

1490. It was a Recommendation arising from the Hooker Review to:

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594 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543
595 Section 43(1)f OSH Act
“…- Insert a provision in Part V to expressly provide that any of the powers of inspectors conferred by that Part is capable of being exercised in a place outside Western Australia for the purposes of the OSH Act.”

1491. No issues have been raised with me concerning the exercise off-shore of the investigative powers of Inspectors. In its response to the Hooker Review, the only organisation to comment, the CME did not support this Recommendation.

1492. Whilst I have not been made aware of it as presenting as an issue to date, there may be occasions on which an Inspector may need to exercise their powers outside of Western Australia. In those circumstances, I can see no impediment to an amendment to the MSI Act in the same terms.

Recommendation 98

That the MSI Act be amended in Part 3 Division 2 to enable an Inspector’s powers to be exercised outside of Western Australia.

Complaints

1493. The MSI Act enables a person to notify an Inspector of a complaint under s 24, in relation to a matter that an Inspector has an obligation to report on or remedy. An Inspector receiving such a complaint is required to investigate the matter and take any necessary action. The nature of these matters varies considerably. Records of these complaints are kept by the Mines Inspectorate.

1494. From the Internal Complaints Register that was provided to me, and my review of it, matters range from allegations of unsafe work practices, alleged failures to report incidents and occurrences, to allegations of bullying and harassment in the workplace. I have also been provided with bundles of material relevant to specific complaints, all of which I have reviewed.

1495. The volumes of complaints are not inconsiderable and totalled 137 to June 2004, 134 to June 2005, 171 to June 2006, 98 to June 2007 and 110 to June 2008. These figures are set out in the Table 11 above, dealing with various aspects of the Inspectorate’s activities.

1496. The register contains a detailed record of the date, name of complainant (many are anonymous), the description of the complaint, the action taken by the relevant Inspector and others, and the outcome. The process involves the receipt of the complaint by telephone, letter, email or facsimile. Once received it is passed to the relevant Senior Inspector who then allocates the matter to be investigated. On completion, the complainant is notified by telephone or in writing of the outcome.

1497. The time spent in the investigation and resolution of complaints also varies considerably. Of those I have reviewed, this ranges from some telephone calls

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596 RSD Mine Safety Branch Outputs June 2004-October 2007
and internal liaison, to an in depth investigation from a 51 page complaint that took over twelve months to resolve and involved at least two Inspectors and many persons externally, including at the subject mine.

1498. Another example reviewed involved members of the workforce of an iron ore mine who made various allegations in the media concerning alleged intimidation and unsafe work practices. This entailed an intensive and thorough onsite investigation, including interviews with the workforce, by a District and Senior Inspector over the course of two months.

1499. In addition to a detailed review of this material, I have also spoken to a number of Inspectors and employees at mines in relation to the complaint process.

1500. From my review of these records and in the information provided to me in the course of my many interviews, in my opinion, the responses of the Inspectorate have been timely and appropriate. The Inspectorate should be commended for the manner in which these matters are dealt with. I do not recommend any change to the statutory provisions or the Inspectorate practice in this regard.

NMSF Compliance

1501. Principle 25 of the NMSF Legislative Framework provides for sufficient powers to be given to investigators to investigate accidents, incidents and occurrences and for information arising from such to be available to all stakeholders at the earliest opportunity. Additionally, Principle 26 deals with the site of accidents being left undisturbed, pending the completion of investigations. Whilst I have some reservations in relation to the scope of “notification to all stakeholders”, in the NMSF Framework, in other respects, the provisions of the MSI Act dealt with above satisfy these provisions.

Improvement and Prohibition Notices

1502. These administrative remedies are a relatively recent initiative in the mining jurisdiction, having replaced the former s 22 Direction procedure, following the Laing Review and came into effect in 2005.597 As a consequence of the Laing Review, the Improvement and Prohibition Notice procedures, as largely applying under the OSH Act, were recommended.598

1503. The former s 22 Direction procedure empowered an Inspector, to give a direction to the Principal Employer or Manager of a mine, to remedy any contravention of the MSI Act or direct that a hazard be removed. This included the power to direct that work at a mine be stopped and persons be removed. The failure to comply with a s 22 Direction constituted an offence.

597 See former ss 22, 23, 30 and 31 MSI Act
598 Laing Review at par 475
1504. A person aggrieved by the issuance of a s 22 Direction was able to refer the matter to arbitration under the Commercial Arbitration Act 1985.599 I understand that except for once, this procedure was never used and on the one occasion which it was, the matter did not proceed to finality.600

1505. The importance of the administrative sanctions of Improvement and Prohibition Notices generally was recognised by the Robens Committee, in recommending that greater focus be placed on these enforcement tools as enabling Inspectors where necessary to “exert effective pressure to ensure the prompt rectification of unsatisfactory conditions and circumstances.”601

1506. Since their introduction, the general consensus appears to be that Improvement and Prohibition Notices are working well. This is the view of the industry, the union interests and the Inspectorate. No one has suggested in submissions, to the extent that they dealt with these matters, or in my initial consultations, that the Notice regime is in any way defective or in need of revision.

1507. Furthermore, no concerns have been expressed as to the manner in which they are being used by the Inspectorate as an enforcement tool. Subject to what follows, no changes are recommended to the legislative provisions in relation to the Notices or the manner of their use.

**Improvement Notices**

*A Useful Tool*

1508. Administrative enforcement tools such as Improvement and Prohibition Notices available under Part 3 Division 3 of the MSI Act are an essential component of the Inspectorate’s arsenal of available remedies. They are a powerful enforcement tool. They are immediate in their impact and specific as to the remedial action required. An Inspector or Assistant Inspector may issue an Improvement Notice if he/she is of the opinion that a person:

(a) is contravening any provision of the MSI Act; or
(b) has contravened any provision of the MSI Act in circumstances that make it likely that the contravention will continue or be repeated.602

1509. A person who is issued with an Improvement Notice may be required to remedy the contravention or likely contravention, or the matters or activities occasioning the contravention or likely contravention.603 If a person is issued with an Improvement Notice and fails to comply with it within the time specified, the person commits an offence.604

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599 Former ss 30(4); 31 MSI Act
600 Advice obtained from the State Mining Engineer
601 Robens Committee at par 268.
602 Section 30(1) MSI Act
603 s 30(2) MSI Act
604 Section 31A MSI Act
1510. After the requirements of an Improvement Notice in relation to a mine have been complied with, the Manager of the mine must, as soon as practicable, give written notice of the compliance to the Inspector who issued the notice, or if he/she is unavailable, to the District Inspector of the region in which the mine is located. I comment on this issue in more detail below.

1511. The Mines Inspector is required in the Notice, to specify the time for compliance which time is a matter of discretion. By Subdivision 4, once issued, the Registered Manager of a mine must display the Notice in accordance with the Regulations. This was not formerly required under the s 22 Direction procedure and is a significant improvement. Previously, the Direction was required to be entered into the Mine Record Book, but no other steps were required.

1512. Now Notices must be displayed on notice boards and on any particular plant or equipment to which the Notice relates, which substantially increases the transparency of the process and brings the notice to the attention of those directly affected.

1513. Importantly also, by Subdivision 5, both the Registered Manager and the Principal Employer must take all reasonably practical steps to ensure that the person who is issued the Notice by a Mines Inspector, complies with its terms. Thus the overriding responsibility, consistent with the primary obligations on the Principal Employer and the Registered Manager under s13 of the MSI Act, is to ensure compliance.

**Issuance**

1514. Available data suggests that since their introduction in 2005, the Mines Inspectorate has used Improvement Notices as a significant enforcement tool in the application of graduated enforcement measures. As the Table below shows, to June 2005 there were some 409 issued. For 2006 the figure was 1102 and for 2007 it was 663. To June 2008 the number issued was 787. This compares with a lower number of s 22 Direction previously issued.

1515. Account also needs to be taken, when drawing comparisons, with the former Directions, of the number of Prohibition Notices issued, over the same periods, also dealt with Table 12.

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605 Section 31AA MSI Act
606 Section31(d) MSI Act
607 Sections 31 AK and 31 AL MSI Act and Reg 2.4A
608 RSD Mines Safety Branch Outputs.
609 Laing Review at par 469.
Table 12: Improvement Notices and Prohibition Notices issued during June 2004 – 2008

<table>
<thead>
<tr>
<th>Mines Safety Branch Outputs</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2004</td>
</tr>
<tr>
<td>Improvement Notices Issued</td>
<td>N/A</td>
</tr>
<tr>
<td>Prohibition Notices Issued</td>
<td>N/A</td>
</tr>
</tbody>
</table>

**Compliance**

1516. In relation to Improvement Notices, a person issued a Notice is required to notify the relevant Inspector as soon as practicable after the time specified, of compliance with the notice.\(^{610}\) This is to be in writing and the Improvement Notice form contains a compliance slip that is required to be completed and returned to the Inspectorate. Failure to comply with this requirement constitutes an offence.\(^{611}\)

1517. This process is important. Given the number and geographic spread of mining operations throughout the State, and the limited resources available to the Mines Inspectorate, it is obviously not tenable for all Improvement Notices to be followed up by the Inspector responsible for their issuance. The law imposes an onus on the Manager to comply with the Notice and notify of the fact, in default of which, a sanction applies.

1518. From the material provided to me, it seems that there are a substantial number of Improvement Notices in relation to which, compliance notices have not been received by the Mines Inspectorate. For example, for the period to June 2007, of the 664 Improvement Notices issued, only 450 compliance notifications are recorded as having been received. To June 2006, the figures were 1102 issued and 925 compliance notices. For 2005, the figures were 409 and 300 respectively. To June 2008 the figures are improved with 787 notices issued and 711 compliances in response.

1519. On examining a sample of Improvement Notices from each District, and comparing them with the overall summary material, it seems that on some occasions, whilst the data summary does not record a compliance notice as having been received, in fact one has been. Thus the omission is simply a failure to record. It is obviously well beyond the scope of this Review to examine each District’s returns in any detail.

1520. However, the above figures, even if broadly accurate, do demonstrate a cause for concern that in many cases, there is a failure to comply with the MSI Act in relation to the obligation on Managers to complete and return compliance notices. What this analysis does not of course disclose, is whether or not the Improvement Notices themselves have been complied with.

\(^{610}\) Section 31AA MSI Act.
\(^{611}\) Section 31AA(2) MSI Act. For offences not otherwise specified, as in this instance, a level 1 penalty applies: s 94 MSI Act
1521. Furthermore, from the materials provided to me in relation to prosecutions and prosecution briefs, it would seem that there have not been any prosecutions for failing to comply with Improvement Notices. These are matters that in my view need to be promptly followed up by the Mines Inspectorate. Further attention needs to be given to prosecution to enforce the compliance obligations in this regard. Duty holders need to be aware that if they do not meet their obligations, then appropriate action will be taken.

**Recommendation 99**

That the Mines Inspectorate review compliance records and follow up duty holders who fail to establish compliance with Improvement Notices with a view to any necessary and appropriate enforcement action as may be required.

**Prohibition Notices**

1522. An Inspector may issue a Prohibition Notice where he/she is of the opinion that a contravention of any provision of the MSI Act is occurring at a mine, or has occurred and will continue to be repeated, and constitutes a hazard to any person; or if a mine, or any plant, mining practice or hazardous substance at or related to a mine is dangerous; or is likely to become dangerous so as to continue to be a hazard to any person.612

1523. When a Prohibition Notice for hazards arising from a breach of the MSI Act is issued, the Inspector may issue the Notice to the person carrying on the activity and to the Principal Employer or the Manager. When a Prohibition Notice is issued for other hazards, the Inspector may issue the Notice to the person who has control over the plant, mining practice or hazardous substance, and to the Principal Employer or the Manager.

1524. If a person issued with a Prohibition Notice fails to comply with it, an offence is committed.613 I comment on this further below.

1525. There is a difference between the Prohibition Notice scheme under the OSH Act and the MSI Act. In the latter, the prior power of Inspectors under the former s 22 Direction procedure, such as to stop work and to direct that persons be removed from the mine or part of it, have been retained.614

1526. These requirements that may be imposed by a Prohibition Notice are in addition to any directions that a Mines Inspector may also make, as to measures to be taken to remedy any contravention of hazard that the notice relates to.615

1527. Both the direction so made, and the requirements as to the prohibition of mining operations and other requirements that may be imposed under s 31AE,
are plainly to be regarded as part of the Prohibition Notice and enforceable accordingly.

1528. Perhaps as is to be expected, the numbers of Prohibition Notices issued is considerably less than that for Improvement Notices. The Table above indicates that for the period to June 2005, 72 notices were issued. For June 2006 the figure was 115. In 2007, 76 were issued and for 2008 a total of 75 issued.616

Breach of Notices

1529. Historically in both Australia and the United Kingdom, there have been few prosecutions for breaches of Notices under health and safety legislation.617 As I have noted above, there have been none under the MSI Act.

1530. One issue of concern relates to the penalty regime for a breach, in particular of a Prohibition Notice. As already mentioned, presently, under the MSI Act, the failure to comply with a Notice attracts a level one penalty.618 In the case of a Prohibition Notice, they are to be issued when a dangerous circumstance arises such that employees or other persons are exposed to hazards. Whilst the potential circumstances that may arise are very wide, it is plain that the legislative intent is for an activity or work place circumstance that can put employees or others in harm’s way, is to be remedied immediately.

1531. Given this, the breach of in particular, a Prohibition Notice should be regarded as a serious offence in my view. A failure to comply with a Prohibition Notice, not only has the potential to keep employees and others in a potentially dangerous situation, but also constitutes a deliberate flouting of the authority of the Mines Inspectorate.

1532. In these circumstances, I regard a level one penalty as inadequate. To illustrate the point, a failure by a person commencing a review of an Improvement or Prohibition Notice, to give a copy of the review notice to a Manager of a mine, being merely a procedural matter, attracts the same penalty as for a breach of a Prohibition Notice, the latter of which may constitute a serious threat to the safety and health of an employee(s) or other persons.619

1533. These observations necessarily also apply to the penalty regime under the OSH Act, from which the current MSI Act penalty regime is drawn.

1534. Such offences are the subject of more stringent penalties in other jurisdictions. For example, in Victoria, a failure to comply with a Notice, constitutes an indictable offence and attracts a significant monetary penalty.620 Similarly, in New South Wales, the relevant provisions of the general legislation, which applies to both coal and metalliferous mining, also contains a substantial

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616 Mines Safety Branch Outputs, Resources Safety Division, DOCEP
617 Creighton and Rozen op cit 179-180
618 Sections 31A and 31AG MSI Act.
619 Section 31AY(4) and (5) MSI Act
620 Section 112 OHS Act (Vic)
penalty by way of a fine, which is about double that applying under the MSI Act.621

1535. In Queensland, under both the coal and metalliferous legislation, a breach of a Direction, a similar remedy to that formerly in place under s 22 of the MSI Act, attracts a maximum penalty of two years imprisonment and a substantial fine.622 Indeed, under the former s 22 Direction procedure of the MSI Act, the penalty for a breach of a Direction was about double that currently applying to a breach of a Prohibition Notice.

1536. Whilst I do not suggest that such a contravention should, in this jurisdiction, attract a term of imprisonment or be tried on indictment, the penalty does need to reflect the gravity of the offence, as it does elsewhere, and as was formerly the case under the MSI Act.

1537. Again, given my Terms of Reference and the need to maintain alignment with the OSH Act, which contains the same, in my view, inappropriate penalty structure, and notwithstanding that I regard these penalty provisions as being in need of review, I make no specific recommendation.

Internal and External Review

1538. The issuance of an Improvement and Prohibition Notice may be the subject of an internal review by the State Mining Engineer under s 31AY of the MSI Act, following which the State Mining Engineer may affirm, affirm with modifications or cancel the Notice.623 On such a review, the State Mining Engineer is required to “inquire into the circumstances” of the issuance of the Notice.

1539. No issues have been raised in the submissions or in my consultations concerning this review process. The review process has been availed of relatively infrequently under the MSI Act. There are no records kept of any review applications. In my view, whilst they are seemingly a relatively rare event, any reviews of notices by the State Mining Engineer and the Tribunal, should be published in the DMP Annual Report in the same manner as review of Notices issued by WorkSafe were published in the former DOCEP Annual Report.

1540. Otherwise, subject to what follows below, I do not recommend any substantive amendment to these provisions.

1541. The MSI Act also provides for the external review of the issuance of Notices by way of a review of the State Mining Engineer’s decision to the Tribunal under s 31BA. On hearing the matter, the Tribunal may either affirm, with or without modification, the issuance of the Notice, or dismiss the application.624 In the interim pending the hearing and determination of such a review, an

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621 Section 94 OHS Act (NSW).
622 See section 171 MQSH Act (Qld)
623 Section 31AZ MSI Act
624 Section 31BB MSI Act
Improvement Notice is suspended. Given their nature, subject to any order of the Tribunal to the contrary, a Prohibition Notice continues to operate.

1542. In terms of the procedure on a review to the Tribunal, it is provided by s 31BB(2)(a), that the review is to be in the nature of a “rehearing”. There is a significant body of law as to the nature of a rehearing. In short, the description of the proceeding as an “appeal by way of a rehearing” or a “review” by way of “rehearing”, is not determinative of the issue. The nature of a “rehearing”, takes its colour from the surrounding statutory provisions, including the nature of the matter from which the appeal or review is brought.625

1543. Consideration of this issue under the Occupational Health and Safety (Commonwealth Employment) Act 1991(Cth), arose in a decision of the Australian Industrial Relations Commission in Australian National Railways Commission v Rutjens.626 It was concluded on an analysis of the relevant statutory provisions, in particular, the nature of the process leading to a Prohibition Notice, that an appeal under that provision, involved a hearing de novo. The AIRC was to hear the matter afresh, with the parties being free to adduce whatever new evidence they wished to, in connection with the appeal.

1544. The approach of the Full Bench of the Commission and the Tribunal in this jurisdiction, has also interpreted the provisions of the OSH Act and the MSI Act, concerning a review to the Tribunal under s 51A, as a hearing de novo.627

Recommendation 100

That all applications to the State Mining Engineer and the Tribunal to review Improvement Notices and Prohibition Notices under the MSI Act be published in the DMP Annual Report.

Hooker Review

1545. The administrative review process under the OSH Act was the subject of consideration in the Hooker Review. Three Recommendations were made as follows:

“R16. Part VI Division 1 of the Occupational Safety and Health Act 1984 (WA) be amended to provide that:

- The powers of the Commissioner on internal review and the Tribunal on further review extend to the making of any decision open to previous decisionmakers (sic) on the entirety of material before the reviewer.

625 Powell v Streatham Manor Nursing Home [1935] AC 243
626 Australian National Railways Commission v Rutjens (1996) 66 IR 237
627 Thiess Pty Ltd v AFMEPKIU (2006) 86 WAIG 2495; Also see generally Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194.
- The Commissioner and the Tribunal each be empowered to order an extension of time for compliance with a notice on the basis of such inquiry (if any at all) into the circumstances relating to the notice as they see fit.

- The Commissioner and the Tribunal be empowered to issue orders with the consent of the parties to a review, whether before, during, or after any inquiry has been undertaken.”

**Any Decision**

1546. Dealing with the first issue, given that a review by the State Mining Engineer and a hearing by the Tribunal on further review, is to be conducted as a hearing de novo, I think this gives adequate power to address any issues as they arise. The nature of a hearing de novo, being a rehearing from the outset, with the reviewer standing in the shoes of the Inspector, enables the State Mining Engineer or the Tribunal as the case may be, to take into account any matters they think fit, including any and all matters placed before the review. I do not recommend any amendment to the MSI Act as to this matter.

**Extension of Time**

1547. This issue arose in the context of a number of reviews of WorkSafe Notices having as their subject matter, a request for an extension of time for compliance. The issue has not arisen in the present context.

1548. The powers conferred by the MSI Act on both the State Mining Engineer and in turn, the Tribunal to “inquire into the circumstances relating to the …..notice” are very broad. They would extend to providing more time for compliance if justified, in my view.

1549. I therefore do not recommend any amendment to the provisions of the MSI Act as to these matters.

**Consent of Parties**

1550. The final issue relates to a power for the State Mining Engineer or Tribunal to accept an agreement reached by parties to a review. Given that the obligation on the State Mining Engineer or the Tribunal under the MSI Act to “inquire into the circumstances relating to the Improvement Notice or Prohibition Notice” is mandatory then there is arguably no capacity to accept an agreement of the parties to the review, without so inquiring. It would in these circumstances, be prudent to insert such a power.

**Recommendation 101**

That the MSI Act be amended to enable the State Mining Engineer and the Tribunal as the case may be, on a referral to review a Notice, to dispose of the referral without the need to inquire into the circumstances of the Notice, on the parties reaching agreement as to the matters in dispute.
Provisional Improvement Notices

1551. Division 4 of Part 3 of the MSI Act dealing with the issuance of Provisional Improvement Notices by safety and health representatives was inserted following recommendations of the Laing Review. These provisions enable a suitably trained safety and health representative to issue, subject to the qualifications set out in Division 4, Provisional Improvement Notices in circumstances where the representative forms the opinion that a contravention of a MSI Act has occurred. Prior to the issuance of such a Notice, the safety and health representative must consult with the person to whom a Notice is to be issued, and additionally, any other safety and health representative, if any, at the mine.

1552. Once issued, there is a review process in respect of a Provisional Improvement Notice, which enables a person issued with a Notice to seek a review of it by an Inspector. As with Improvement Notices, an application to review operates as a suspension of the Notice and the Inspector must attend at a mine, inquire into the circumstances of the Notice and either affirm it, affirm it with modifications or cancel the Notice, as the case may be.

1553. The proposal to introduce Provisional Improvement Notices was at the time, controversial. In particular, employer interests were opposed to their introduction on a number of bases. Concerns were expressed that such a mechanism would promote an adversarial approach to safety and health issue resolution in the workplace, and that there was potential for abuse.

1554. Furthermore, it was also suggested, that there was the potential for Provisional Improvement Notices, issued by safety and health representatives, to be confused with Improvement Notices issued by Inspectors. Another concern was that the issuance of Provisional Improvement Notices may constitute a “black mark” against the employer in, for example, contract negotiation processes, concerning safety and health performance.

1555. In terms of submissions, except for the CCIWA, which reiterated its opposition to Provisional Improvement Notices in its submissions to the Hooker Review, no other submission initially made to the Review raised the operation and effectiveness of these measures. Following further inquiries by me, the industry view expressed through the CME in relation to Provisional Improvement Notices, was the same as that in relation to Improvement and Prohibition Notices. That is, from the perspective of the CME, no concerns have been expressed regarding the operation of the relevant provisions of the MSI Act.

1556. Similarly, from the perspective of the regulator, the State Mining Engineer expressed the view that he also has not identified any difficulties with the operation of these provisions of the legislation and supports their retention.

1557. It is fair to observe that since their introduction, none of the concerns expressed to the Laing Review in relation to Provisional Improvement Notices, appear to have materialised. Their use in the mining industry
however, whilst uncontroversial, seems to be very infrequent. No record is kept of such Notices being issued or reviews of them by Inspectors.

1558. That notwithstanding, the concerns of the CCIWA as to the power of safety and health representatives to issue Provisional Improvement Notices is acknowledged. The principal concern is that the power to issue such Notices is inconsistent with the inherent role of safety and health representatives under safety legislation, which should have its focus on consultation and corroboration in the workplace. The view is also expressed that the statutory power to issue such Notices, is more appropriately the province of the Inspectorate performing its regulatory function.

1559. It may be open to question the utility of provisions which have been used so little in the industry. However, given their establishment now for several years, without any expression of dissatisfaction, I do not recommend any alteration to their operation. Certainly, there is no evidence or suggestion that Provisional Improvement Notices have sought to be misused in any way in the mining industry.

1560. In any event, the review mechanism involving an Inspector provides a powerful check and balance in respect of any alleged misuse. Additionally, the obligation on a safety and health representative to first consult with the person to whom a Provisional Improvement Notice is to be issued, also provides a mechanism by which the particular alleged contravention of the MSI Act may be resolved by agreement. This is consistent with the clear purpose of such a provision and with the objects of the MSI Act in s 3(1)(d).

1561. Recent amendments to the MSI Act have clarified and confirmed the exclusion of civil liability for safety and health representatives who may issue a Provisional Improvement Notice. No change to these provisions of the legislation is recommended.

**Infringement Notices**

1562. As “a middle level” enforcement tool, “on the spot” fines and infringement notices have been recognised as a useful remedy available to a regulator. Consideration was given to “on the spot” fines in the Laing Review, only however, in the context of an operator’s failure to comply with an Improvement Notice.

1563. In my view, if consideration is to be given to such an enforcement tool, then it ought to be able to apply in a broader context. It should be a general enforcement option within the armoury of the Mines Inspectorate, in the case of a breach of the MSI Act. It should not be limited to only failure to comply with Improvement Notices.

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628 See sections 22 and 25 Mines Safety and Inspection Amendment Act 2008
629 Gunningham 2007 op cit at 140-141
630 See Laing Review at 126
1564. Infringement Notices are used in other jurisdictions for example, under the New South Wales general OHS legislation. Additionally, they form a part of the enforcement regime in Victoria, the ACT, Queensland, Tasmania and the Northern Territory. The incorporation of infringement notices into the MSI Act enforcement regime was recommended by the tripartite MSIG. This was also the subject of consideration by the Industry Commission in 1995, which recommended that all Australian safety and health legislation contain such schemes.

1565. Additionally, EnergySafety, now a division of the Department of Commerce, recently introduced in Western Australia, an infringement notice scheme to apply under electrical and gas legislation in this State.

1566. From the perspective of the regulator, the submission by the State Mining Engineer supports the implementation of an infringement notice scheme in Western Australia, as does the RSD. It is suggested that the benefit of such a scheme lies in its ability to enable offences to be “officially noticed” without the necessity to establish the elements of the relevant offence in court proceedings.

1567. Whilst supportive of the concept, the State Mining Engineer also notes the potential disadvantages of such an approach to enforcement, such as a lack of court scrutiny, the possibility of discrimination against vulnerable persons in the community and the “net widening” effect, and of the use of infringement notices where less punitive sanctions such as warnings may be more appropriate.

1568. From the perspective of the industry, the CME does not support the use of infringement notices. It is suggested that such an approach will have the effect of diverting the regulator from focussing on higher consequence risks to the prescriptive enforcement of minor breaches of regulations that may have little overall impact on safety outcomes on mine sites. Existing remedies such as Improvement Notices are available to deal with such circumstances on this view.

1569. Whilst not opposed out right to the concept, the CCIWA expressed the opinion that it would only be in circumstances such that an employer does not dispute the relevant breach, and has the option of contesting the allegations through the judicial process, that such an approach could add value. In all cases, the presumption of innocence should apply.

1570. Infringement notice schemes are appropriate for lower level, high volume offences where a clear breach of law can be established. They would not be

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631 See s108 OHS Act 2002 (NSW)
632 See MSIG Interim Report 2005 at 47
634 See Energy Bulletin April 2007
635 See submission State Mining Engineer at B14
appropriate, for example, for general duties offences. A number of advantages arise from such schemes in that they:

- avoid the transaction costs of criminal prosecution;
- provide both the regulator and the regulated with an alternative option to proceedings in the courts for these types of offences; and
- constitute an immediate and credible response to a breach of the law.

1571. Infringement notice schemes are not however without their critics. It has been suggested that they can encourage submission to the payment of a prescribed penalty simply to avoid having to contest a matter in court. Furthermore, there are arguments that such arrangements are indiscriminate and tend to trivialise criminal behaviour.636

1572. I have some reservations that infringement notice schemes may encourage a prescriptive approach to regulation, by focussing on technical breaches of the Regulations, rather that a systemic approach. There also does not seem to be any clear consensus in the research literature as to their effectiveness.637 In one body of research, my reservation above is taken up, with the authors suggesting that as infringement notices may be relatively easily issued, that a focus on technical, as opposed to substantive breaches of safety and health law may result.638

1573. Among a number of other recommendations, the Australian Law Reform Commission (“ALRC”) in 2002 supported the introduction of infringement notice schemes for minor criminal offences of strict or absolute liability.639 In relation to penalties, the ALRC recommended that as a general rule, the level of penalty should be about one fifth of the penalty for the prescribed offence under the statute. A copy of the ALRC recommendations in relation to infringement notice schemes is at annexure 11.

1574. Despite the reservations that I have expressed above, I consider it is an appropriate time to introduce an infringement notice scheme in under the MSI Act, as but one further tool available to the Mines Inspectorate. The principles applicable should be broadly consistent with the ALRC recommendations. Guidelines will need to be developed for Inspectors, in the judicious use of infringement notices. Such guidelines should be transparent and be incorporated into the Mines Inspectorate’s enforcement policy.

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637 See discussion of this research in the Review of the NT Work Health Act and Mining Management Act June 2007 at pp 138-139
Recommendation 102

That the MSI Act and Regulations be amended to introduce an infringement notice scheme broadly consistent with the ALRC recommendations at annexure 11. Guidelines should be developed to assist Mines Inspectors in relation to the appropriate use of infringement notices. The guidelines should provide transparency as to the scheme and be incorporated into the Mines Inspectorate’s enforcement policy.

Enforceable Undertakings

1575. Division 2 Part 9 of the MSI Act presently provides for a court to sanction an enforceable undertaking in lieu of the payment of a fine, imposed by the court, following agreement between the offender and the State Mining Engineer. Significantly, this penalty option is only available upon a conviction before the court by a plea of guilty or a trial.

1576. In my view there is scope to consider the broader use of enforceable undertakings, outside of the process of prosecution, as another form of sanction available to the Mines Inspectorate. Undertakings should be seen as part and parcel of a restorative justice approach to safety and health law enforcement. Such processes stop short of prosecution and retribution, but encourage enterprises to return to a mindset and culture of compliance.640

1577. Both the CME and the CCIWA are not opposed to the concept of enforceable undertakings and see them potentially as adding value to the regulator’s toolkit, and providing employers with a negotiated alternative to prosecution.

1578. Enforceable undertakings would enable the Mines Inspectorate to require an employer to adopt a particular course of action or program directed to safety and health improvement. A process of negotiation is often involved. They have the benefit of being:

- a positive approach to focus on future safety and health improvements and not just past events;
- able to be publicised; and
- enforceable.

1579. The remedy of an enforceable undertaking should not be seen just as an alternative to prosecution. Rather, it should be seen as compliance tool in its own right, to be used at the discretion of the regulator, in an appropriate circumstance. A difficulty with the existing undertaking regime under the MSI Act is that it is only available as a consequence of a conviction, and is not available as a lower to middle tier sanction.

1580. Enforceable undertakings are a feature of regulatory regimes in a number of jurisdictions. In Victoria and Queensland, under the general safety and health

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640 Gunningham 2007 op cit at 144-145
legislation, the regulator can accept an undertaking in writing by a duty holder who is alleged to have committed a contravention of the statute.\(^{641}\) Where an undertaking is breached the matter is enforceable in the court which can enforce the original undertaking or impose another penalty.\(^{642}\) Similar arrangements apply in Tasmania.\(^{643}\) The recently enacted Northern Territory legislation also enables an enforceable undertaking to be given as an alternative to prosecution.\(^{644}\) Additionally, the use of undertakings is quite common in corporate and securities regulation and in trade practices compliance regimes.

1581. As an enforcement option, enforceable undertakings were also recommended by the ALRC in its 2002 report on federal regulation and penalties.\(^{645}\) In the United Kingdom, recommendations have also been made for their adoption as a part of a regulator’s armoury.\(^{646}\)

1582. I consider that the MSI Act should provide for enforceable undertakings, outside of the judicial process, as another tool available to the Inspectorate to aid in compliance. They should provide for a broad scope of matters that can be agreed between the Inspectorate and the relevant party. The Queensland or Victorian legislation could be used as an appropriate guide. Notably, the Queensland provisions only refer to an “alleged contravention” by a duty holder.\(^{647}\) Clear guidelines will need to be prepared as to the use to be made of enforceable undertakings. The process should be transparent and as with infringement notices, incorporated into the Mines Inspectorate’s enforcement policy.

**Recommendation 103**

That the MSI Act be amended to enable the State Mining Engineer to accept an enforceable undertaking from a duty holder in relation to an alleged contravention of the MSI Act. An undertaking so given and not complied with should be enforceable in the Safety and Health Magistrates Court. Guidelines should be developed to assist Mines Inspectors in relation to the appropriate use of enforceable undertakings. Such guidelines should be incorporated into the Mines Inspectorate’s enforcement policy.

**Enforcement Policy**

1583. The Mines Inspectorate in Western Australia has adopted a prosecution policy for the purposes of guidance as to when and in what circumstances, enforcement action generally and prosecution in particular, will be considered by the regulator. The “Resources Safety Enforcement and Prosecution Policy”

\(^{641}\) Part 2 Division 4 OSH Act (Vic); Part 5 Workplace Health and Safety Act 1995 (Qld).
\(^{642}\) Section 17 OSH Act (Vic)
\(^{643}\) Section 55A Workplace Health and Safety Act 1995
\(^{644}\) Section 80(3) and (4) Work Health and Safety Act 2007 (NT) (yet to commence)
\(^{645}\) ALRC op cit at Chapter 16
\(^{646}\) R Macrory Regulatory Justice: Making Sanctions Effective Final Report 2006 at 63-68
\(^{647}\) See s 420 Work Health and Safety Act 1995 (Qld)
is a published document available on the DMP website.\textsuperscript{648} The adoption by the Mines Inspectorate, of a formal policy on enforcement, was a recommendation of the Laing Review.\textsuperscript{649}

1584. The enforcement and prosecution policy was last reviewed in October 2005.

1585. Appropriately in my view, the policy refers to and applies the terms of the Director of Public Prosecutions Act 1991 (WA) \textit{Statement of Prosecution Policy and Guidelines 1999}.\textsuperscript{650} The Policy sets out, under the heading “Principles of enforcement” guidance as to when RSD will apply appropriate enforcement action as follows:

- **Objective:** Enforcement action will achieve a clear outcome.

- **Proportionality and responsiveness:** Enforcement action will be responsive, timely and in proportion to risk and potential impact.

- **Transparency:** Recognising transparency is important in maintaining public confidence and helping those regulated to understand what is expected of them. Enforcement measures will be transparent so that parties understand what constitutes compliance.

- **Consistency:** Enforcement action will be administered fairly, consistently and equitably, taking into account the attitude and actions of the alleged offender and any history of previous incidents or breaches.

- **Targeting:** Regulatory effort will be directed primarily towards those whose activities generate considerable risk or serious harm, with action primarily focused on law breakers or those directly responsible for the risk.

- **Due process and natural justice:** Enforcement action will be carried out within the powers and processes of the legislation, using principles of natural justice.

- **Cost-effectiveness:** Enforcement action will be exercised to produce the desired outcome.

- **Policy compatibility:** Enforcement will be carried out within the context of wider government policy and other statutory requirements, and consistent with the national framework.”

1586. Under the Policy, prosecution is described as “an important part of enforcement. It aims to punish wrongdoing, avoid recurrence and act as a deterrent”.

\textsuperscript{649} Laing Review pars 466-467
\textsuperscript{650} See http://www.dpp.wa.gov.au
1587. A decision to prosecute may occur if the RSD “is satisfied there is sufficient, admissible and reliable evidence that an offence has been committed and that it is in the public interest to proceed.” Various circumstances where prosecution will be considered are set out in the Policy, as are the relevant principles of enforcement to be adopted. They are expressed as follows:

“Where there is sufficient evidence, Resources Safety will prosecute for:
- incidents or breaches having significant consequences or health and safety of persons and the environment
- operating without a relevant licence
- persistent breaches of regulatory requirements
- failure to comply with an accepted safety case or safety management plan
- failure to comply with prescribed remedial requirements
- reckless disregard for standards
- failure to supply information without reasonable excuse or knowingly or recklessly supplying false or misleading information
- obstructing investigators or authorised officers.”

1588. As to public interest factors to be considered the Policy states:

“The following public interest factors will be used to help decide whether to prosecute:
- potential to impact on health and safety of people and the environment
- foreseeability of the offence
- intent of the offender
- history of offending
- attitude of the offender
- deterrent effect.”

1589. Under the Policy the Mines Inspectorate forwards all prosecution briefs to the State Solicitor’s Office (“the SSO”), for its opinion as to whether a prosecution should proceed. Invariably, where the SSO advises the Mines Inspectorate that there is insufficient evidence, or for other good reason, a prosecution is unlikely to be successful, that advice is accepted. This equally applies to whether once commenced, a prosecution should be discontinued.

1590. It is commendable that RSD has prepared and published a policy in relation to enforcement and it has as an important element, recognition of the proportionality of prosecution to risk and potential impact. Features of the RSD policy, in relation to the principles of enforcement, are not dissimilar to those expressed in the current UK Health and Safety Commission (“HSC”) “Enforcement Policy Statement”.651 The HSC policy is under review

following the release of the Macrory Review of Penalties, commissioned by the United Kingdom Government.652

1591. The other principal mining jurisdictions of New South Wales and Queensland have also published enforcement policies.653

1592. In outlining the “seven characteristics” of a framework for the operation of penalties principles, Macrory referred to the importance of regulators preparing and publishing enforcement policies in the following way:

“Characteristic # 1 – Enforcement policy
Regulators should publish an enforcement policy. This will improve transparency and accountability from regulators by signaling to business and society the kind of responses and standards they can expect from regulators in dealing with non-compliance. A public enforcement policy will also show that regulators will use their sanction powers in a proportionate and risk based way. The regulator would need to be able to justify any departure from its own enforcement policy. Research carried out for my review indicated that currently only 17 out of 56 national regulations have a published enforcement policy. Enforcement policies will need to incorporate the new range of sanction options that I recommend and should be consistent, where appropriate, with the Regulators’ Compliance Code to be issued under Part Two of the Legislative and Regulatory Reform Act 2006.”654

1593. The relationship between policy and practice in relation to enforcement is the issue that I now turn to.

Policy into Practice

1594. The issue of the approach of the Inspectorate to prosecution has, in Western Australia, as in other mining jurisdictions, been contentious. It has been the subject of observations in the Laing Review and criticism in the Ritter Inquiry, more recently. It has been suggested that the Inspectorate, along with the Queensland Inspectorate, has a “cultural antipathy” to prosecution.655 There were also criticisms of the then DOIR approach to enforcement in Kelly 1991.656

1595. I do not propose to revisit these issues in any great depth. This Review is not a performance assessment of the Inspectorate in any meaningful sense and the time and resources are simply not available to embark upon such an exercise. Furthermore, few submissions were made that touched on the issue of enforcement. Those that did however, were, perhaps not surprisingly, opposed

652 Macrory op cit
653 See Queensland Department of Natural Resources and Mines Compliance Policy November 2001; Department of Mineral Resources NSW The Enforcement of Health and Safety Standards in Mines January 1999
654 Macrory op cit at 33
655 N Gunningham Prosecution for OHS Offences: Deterrent or Disincentive? Sydney Law Review Vol 29 359 at 364-365
656 Kelly op cit at Ch 7.3.1
in their views, given the general dichotomy that exists between employer and employee interests in relation to enforcement generally, and prosecution in particular. I pause to note however, that in those jurisdictions embracing what may be regarded as a more aggressive approach to prosecution for safety and health offences, any positive consequences, in terms of enhanced safety outcomes, which must be the objective, is less than clear. In the recent Comparative Performance Monitoring Report of February 2008, a comparison of prosecution activity with incidence rates of injury and disease, did not disclose any improved performance in New South Wales, a jurisdiction with a high level of prosecution activity, compared to for example, Western Australia and Victoria, with much lower incidences of prosecution activity. Additionally, workers compensation premiums are also lower in the latter two jurisdictions.

1596. From the union perspective, the CFMEU suggested that it is concerned that “not enough is being done on the enforcement side” Whilst no examples are given, in referring to the Laing Review and the Ritter Inquiry, the union expressed the view that there has been a lack of response to the issues arising from those Reviews.

1597. The union’s concerns however, as to the relative paucity of prosecutions commenced by the Inspectorate, is a difficult matter to address in the context of this administrative Review. I am not in a position to “second guess” ex post facto, the exercise of prosecutorial discretion to test the assertions made, both in the present context, and as a consequence of prior Reviews and Inquiries. The capacity to do so is well beyond the time and resources available to me for present purposes.

1598. In any event, to do so would require, except in the clearest case of a serious breach, occasioning high risk, unattended by an adequate response by the Inspectorate, the full circumstances of not only the alleged offence but also the alleged offender to be both fully available and to be considered. As to the offence, it would require an informed judgment as to the existence of a prima facie case, whether there was a reasonable prospect of a conviction, and any relevant public interest considerations.

1599. As to the alleged offender this would include their compliance history, attitude and cooperation with the regulator, and other relevant considerations, consistent with the terms of the prosecution policy outlined above. Without all of that relevant information available, any attempt to engage in after the event post mortems of the exercise of prosecutorial discretion, is fraught with difficulty in my view.

1600. On the other hand, the CME in its submission, notes that there has been detected in the industry a change in the attitude of the Mines Inspectorate in recent years. According to the CME, a tendency is evident for the Inspectorate to be less prepared to advise and consult with industry. It is suggested that this

657 See ASCC 2005-06 op cit
658 See CFMEU submission at 6.8
may be as a consequence of the criticism directed to it from prior reviews and the events in New South Wales, such as the Gretley accident in 1996.

1601. This sentiment finds expression in the following observation from the CME:

“The tangible changes that have been noted are a lack of willingness on behalf of inspectors to engage in discussion on strategies to resolve safety and health issues for concern that it will be perceived as advice. This is despite Section 211(ca) of the MSIA providing for an inspector being able to ‘provide information to any person for the purpose of facilitating compliance with this Act’.

From an industry perspective the preparedness of inspectors to resolve safety and health matters through discussion is highly valued. There has been a noted change in some inspector’s willingness to do this with the perception existing in industry there is an increased focus on enforcement.

While there remains a need for the regulator to have the ability to undertake enforcement it is also necessary for the industry and regulator to establish a co-operative environment and have open and meaningful discussion on issues rather than an adversarial system to ensure the outcome of improved safety performance is achieved. Adoption of a prosecutorial approach to enforcement leads to behaviours being reinforced that do not lead to improved safety performance.”

1602. From materials made available to me by the Mines Inspectorate, a preliminary analysis of prosecution activity over the last twenty years or so, for offences in the period 1987 to 2006 reveals the following.

1603. Over this period of time, there were 100 prosecutions commenced, that proceeded to trial and which resulted in conviction or acquittal. Over that same period, there were a further 40 odd matters, the subject either of proceedings commenced but withdrawn, or prosecution briefs forwarded to the SSO, but without the commencement of a prosecution on advice that there was insufficient evidence to proceed. A schedule setting out the details of prosecutions commenced since 1987, resulting in conviction or acquittal to 2006, appears at annexure 14. This only incorporates those matters actually proceeding to trial.

1604. As is evident from annexure 14, a number of proceedings arise from the same accident or incident, and reflect charges brought against different defendants. A number of the defendants listed as “Employee”, were either Registered Managers, a supervisor or another responsible person. In the period since the commencement of the MSI Act, many, if not most, of the prosecutions proceeding to trial, have involved a breach of the general duties in either ss 9 or 10, often in conjunction with a contemporaneous breach of relevant provisions of the Regulations. The highest defendant penalty imposed thus far, has been $100,000 in respect of prosecutions concluded in June 2006.

659 See CME submission at 8
1605. In the period between 2000 to 2006, of the successful prosecutions and those in respect of which a prosecution brief was forwarded to the SSO, but no proceedings were commenced or others were withdrawn, most of those matters involved either a serious accident leading to injury or a fatality. Whilst a number fall into other categories of offences, including various breaches of the Regulations, the former category tend to dominate. This seems to be indicative of a greater preparedness by the Mines Inspectorate to commence prosecution in the case of a fatality or serious injury, as opposed to a serious breach of the law, with the attendant risk of such an outcome.

1606. It is of course difficult to reach any firm conclusions about such matters, without a detailed analysis of all mine record book entries over a corresponding period, to determine whether serious breaches of the MSI Act or Regulations, have occurred in circumstances where no prosecution action has followed. However, as noted above, such an after the event analysis, is also problematic for the reasons outlined.

1607. There is little purpose however in analysing prosecution activity simply in terms of numbers of concluded matters or matters in respect of which prosecution briefs have been sent to the SSO. Whichever direction the regulator takes, either increasing its prosecution activity, or not prosecuting in circumstances when some consider that it should, it is open to criticism. This reflects the polarised position adopted by the employer and the employee interests in relation to health and safety prosecution. This is reflected above, in the submissions to this and prior Reviews and Inquiries.

1608. Furthermore, the enforcement activity of the Mines Inspectorate cannot be gauged by prosecution activity alone. One must consider the full range of regulatory responses to alleged contraventions of the MSI Act and Regulations including the various administrative sanctions dealt with above. From all of the material I have examined, it cannot be concluded in my opinion, that the Mines Inspectorate is not responsive to regulatory contraventions. There will always, however, be debate as to the nature of that regulatory response, depending on the perspective of the observer.

1609. However, the materials provided to me, at least for the period since 2000, would tend to suggest that there has been a greater focus on enforcement activity involving prosecution, in cases of fatalities and serious injury, as opposed to serious breaches of the MSI Act and/or the Regulations, with the potential for serious injury or a fatality. It is important to restate that the law requires that duty holders maintain the requisite environment, that being one that is, as far as is practicable, free of hazards. It is the risk of a significant hazard having the potential to cause injury that should be the focus of the inquiry by the Mines Inspectorate, not just the consequences, along with other relevant considerations in accordance with the Enforcement Policy. Whilst recognising there are resourcing implications involved in prosecution activity, this is an area that the Mines Inspectorate needs to place a greater emphasis upon, given the role played by deterrence in any enforcement regime. An

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660 See for example the observations in Maxwell op cit at 369-371
over emphasis on prosecuting only in the event of fatalities and serious injury tends to lead to the “split pyramid” effect, with the greatest penalties applying to injury or death at the top of the pyramid, and milder sanctions predominating at the lower end, even where serious breaches of the law may be involved.661

1610. It is equally important however that the State provide the regulator with sufficient resources, to enable it to carry out this significant function, which issue I have dealt with above. This includes appropriate resourcing to enable Mines Inspectors to be trained in investigative techniques, as recommend above, which will in my view, be of substantial assistance. There has not been any resourcing provided for this purpose to date, despite the issue having been raised on prior occasions. This is a significant omission that should be remedied.

1611. Furthermore, it is also important for Mines Inspectors to receive training in the application of the Mines Inspectorate Enforcement Policy and enforcement principles generally. In this regard, it is my understanding that some preliminary work was undertaken some years ago, to prepare a prosecution manual, in order to assist Inspectors in the investigative and prosecution process, in order that informed and appropriate enforcement decisions can be made. In my view, adequate resources need to be made available to the Mines Inspectorate for this vital task. It is not something that can or should be left to just “on the job” development of skills and experience. These themes were also taken up by the Industry Commission.662

1612. The issue of enforcement generally, is the subject of a strategy being developed through the NMSF, in an endeavour to promote greater consistency and transparency amongst mining industry regulators, in relation to the approach to enforcement generally. I touch on this matter further below.

Recommendation 104

That there be developed and promulgated amongst Mines Inspectorate staff an investigations and prosecution manual. The manual should set out an appropriate methodology to follow and provide guidance to Inspectors on the use of the “Enforcement Pyramid” and in particular progression up the enforcement scale, in appropriate circumstances.

Penalties

1613. All offences under the MSI Act are summary offences to be tried before a Safety and Health Magistrate.663 The MSI Act does not prescribe any indictable offences, as noted above.

661 R Johnstone  From Fact to Fiction-Rethinking OHS Enforcement National Centre for OHS Regulation Working Paper 11 July 2003 at 17-18
662 Industry Commission 1995 op cit Vol 1 at 109, 112, 139 and 145
663 Section 96A MSI Act
1614. The penalty regime under the MSI Act presently prescribes four levels of penalty, with those applicable to corporations ranging from $50,000 at level one, to those involving “gross negligence” as defined, at level four. A level four offence carries a maximum penalty of 2 years imprisonment and a fine of $250,000 for an individual and $500,000, for a corporation in respect of a first offence, and $312,500 and imprisonment for two years for an individual and $625,000 for a corporation respectively, for a repeat offence. 664

1615. The current penalty regime was substantially increased and commenced in 2005, as a consequence of amendments to the MSI Act flowing from the Laing Review. One can always point to higher penalties elsewhere, by comparison with existing penalty regimes in other jurisdictions. No submissions were made or other observations noted during my initial consultations, to suggest that these penalty levels are no longer appropriate.

1616. As at the time of writing different jurisdictions have differing levels of maximum penalties. These range up to $250,000 for individuals and up to about $1m for corporations. Additionally, offences involving recklessness causing death can carry fines up to $1.65m for a corporation and imprisonment of up to five years for individuals. For example the new Northern Territory general industry legislation carries penalties for aggravated offences for an individual of $275,000 and for a corporation of $1.375m.

1617. Subject to my observations above in relation to the penalty for a breach of a Prohibition Notice, and in recognition of alignment with the OSH Act penalty regime, I do not recommend any revision of the maximum penalty levels at this point in time.

Standing to Prosecute

1618. Proceedings for offences under the MSI Act are to be commenced by a Mines Inspector or a member of the public service, the latter requiring written authority from the Minister. 665 There is no provision under the MSI Act, for the initiation of a prosecution by, for example, a union on behalf of a member or other arrangements. This is in contrast to some other jurisdictions such as:

(a) New South Wales – where there is a capacity for prosecutions to be brought by a union on behalf of a member; 666
(b) Victoria – where there is capacity for an individual to request the Victorian Worksafe Authority to bring a prosecution on a person’s behalf; 667 and
(c) South Australia – where an injured employee may prosecute if the regulator has not done so within a period of 12 months from the date of an accident. 668

664 Sections 4A and 8B MSI Act
665 Section 96 MSI Act.
666 Section 106(1)(d) OHS Act 2000 (NSW).
667 Section 131 OHS Act 2004 (Vic).
668 Section 58(7)(c) OHS Act (SA).
1619. The Industry Commission also recommended that all safety and health legislation contain provisions enabling private prosecutions.\(^669\)

1620. The standing of persons to commence criminal proceedings for breach of safety and health legislation is contentious.

1621. The CFMEU submitted that the lack of enforcement action taken by the Inspectorate warrants the capacity to commence prosecutions vesting in third parties, such as unions. It is suggested that because of the continued failure by the Inspectorate to enforce breaches of the MSI Act, others should be able to do so.

1622. In support of its position, the CFMEU referred to the relevant provisions of the New South Wales general legislation, where, by s 106, it is provided:

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106 Authority to prosecute

(1) Proceedings for an offence against this Act or the regulations may be instituted only:
   (a) with the written consent of a Minister of the Crown, or
   (b) with the written consent of an officer prescribed by the regulations, or
   (c) by an inspector, or
   (d) by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate.

(2) In proceedings for an offence against this Act or the regulations, a consent to institute the proceedings, purporting to have been signed by a Minister or a prescribed officer, is evidence of that consent without proof of the signature of the Minister or prescribed officer.\(^670\)
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1623. By contrast it is said that the terms of s 96 of the MSI Act, are too restrictive and there should be an amendment in the terms as outlined above.

1624. Perhaps not surprisingly, the capacity for third party prosecutions is strongly resisted by employers. In its submission to the Review, the CME took issue with the above contention and said that:

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“The CME would not support in any capacity an expanded role for unions, or other third party, to be able to commence enforcement action against companies, as can occur in other jurisdictions.

The CME is firmly of the view that transparency and credibility of the system can only be maintained while it is the regulators (sic) role and responsibility to undertake enforcement action.”\(^671\)
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\(^{669}\) Industry Commission op cit at 124

\(^{670}\) Section 106 OHS Act (NSW).

\(^{671}\) CME submission at 8.
1625. Similarly, the CCIWA voiced strong opposition to the capacity of unions or other persons to prosecute. Its opposition is based on three principal contentions, they being:

- That there is no demonstrated deficiency in the present system;
- That the exercise of prosecutorial discretion should be exercised by State as the impartial and independent entity responsible; and
- That the State prosecution arm is the most qualified and experienced to undertake such activity.

1626. From the perspective of the impact of prosecution the CCIWA observed:

“Prosecutorial discretion is critically important because of the significant impact that such decisions will invariably have on a range of parties including: the alleged offender, the asserted victim, witnesses and members of the public. An incorrect exercise of the discretion to prosecute (or to discontinue a prosecution) not only impacts on individuals directly but also tends to undermine public confidence in the justice and criminal justice system as a whole.” 672

1627. Having considered this matter I am firmly of the view that given the gravity of the decision to prosecute, and the consequences of such a decision, for both individuals and corporations, the only proper person to exercise the prosecutorial function under State law is the State itself. There are several reasons why this is so in my opinion.

1628. Firstly, the State prosecutor has an established body of expertise and authority in criminal prosecution which should be the exclusive channel of the exercise of the prerogative to enforce State law in the courts of the State. The Director of Public Prosecutions Statement of Prosecution Policy and Guidelines 2005 used by the State comprehensively considers relevant matters going to the requirement for a prima facie case and appropriate public interest considerations.

1629. Secondly, I have considerable reservations as to the impact on workplace relationships, in safety and health in particular, if a union is able to act as an advisor, workplace representative and prosecutor. Trust and good faith are essential ingredients in sound workplace relationships. This is equally so in safety and health matters. The possibility that an organisation with whom an employer has dealings in the workplace over a range of issues, including safety and health, can unilaterally bring the force of the criminal law to bear upon that relationship, would not be a positive development in my view.

1630. Thirdly, the decision to prosecute must be and seen to be completely independent and impartial. Any perception that the person who intends to bring a prosecution, under the authority of the statute, has a vested interest in so doing or the outcome of the proceedings, has the capacity to bring the system of justice into disrepute.

672 CCIWA submission attachment 1 at 12.
Recommendation 105

That the statutory authority to commence a prosecution under the MSI Act remain vested in the State.

Private Prosecution

1631. Section 96 of the MSI Act, is drafted in terms that a prosecution may be brought by the authority of the Minister by a member of the Public Service. This is in addition to a prosecution by a Mines Inspector. The language of s 96(1) by the use of “may” read in context appears to be permissive, prescribing those person who may initiate a prosecution. Does this impliedly exclude the possibility of a private prosecution?

1632. At common law, it is still the case that a private citizen may initiate proceedings for an offence under a statute.673 This is now controlled by statutory provisions to the effect that certain persons may initiate prosecutions. Whilst s 96 of the MSI Act, at first blush, may seem to be such a provision, notionally, all actions of enforcement are “private” in nature, in that the offence is commenced in the name of the Mines Inspector or other public officer and not in the name of the State, as in the case of proceedings for an indictable offence. A useful Western Australian summary of the common law position in relation to private prosecutions is found in Caruso & Anor v Holtby.674

1633. It has been held that “clear and express” language is needed in a statute, to abrogate the common law right to bring a private prosecution.675 It was further considered in Davis v Grochon Ltd676 that in the context of the then Victorian safety and health legislation, the relevant provisions, when read together, including a procedure for an individual to request the Authority to prosecute, ousted the common law position.

1634. Notably a contrary conclusion was reached in another first instance case, also before the Victorian Supreme Court.677

1635. However, the combined effect of the repeal of s 720 of the WA Code, which enabled a person to seek leave of the Supreme Court to present an information against another for an indictable offence, and the enactment of the Criminal Procedure Act 2004 (WA), in particular s 20(5), requiring express words in an enactment to enable a private prosecution to be brought, taken together, probably mean that, even if possible previously, the capacity for a private prosecution under s 96 of the MSI Act is now precluded. Given my Recommendation above in relation to the prosecution function remaining with

673 Gouriet v Union of Post Office Workers and Ors [1977] 3 All ER 70
674 Caruso & Anor v Holtby [1999] WASCA 39
675 Armstrong v Hammond [1958] VR 479 at 481
676 Davis v Grochon Ltd [1992] 5 VIR 63 per Hayne J at 71-72
677 United Transport Services Pty Ltd v Evans [1990] 4 VIR 101 per Southwell J at 107
the State, and my Recommendation immediately below, I do not recommend any change to s 96 of the MSI Act in this regard.

Petitioning the Regulator

1636. This raises the issue as to whether, in an appropriate case, a person directly affected by a breach should be able to petition the Mines Inspectorate to commence a prosecution. The position in Victoria is that under the OSH Act 2004 (Vic), a person may request the Authority to bring a prosecution if they consider that an offence against the Act has been committed. This provision is contained in s 131 as follows:

“131 Procedure if prosecution is not brought

(1) If—

(a) a person considers that the occurrence of an act, matter or thing constitutes an offence against this Act; and

(b) no prosecution has been brought in respect of the occurrence of the act, matter or thing within 6 months of that occurrence—

the person may request in writing that the Authority bring a prosecution.

(2) Within 3 months after the Authority receives a request it must—

(a) investigate the matter; and

(b) following the investigation, advise (in writing) the person whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought.

(3) If the Authority advises the person that a prosecution will not be brought, the Authority must refer the matter to the Director of Public Prosecutions if the person requests (in writing) that the Authority do so.

(4) The Director of Public Prosecutions must consider the matter and advise (in writing) the Authority whether or not the Director considers that a prosecution should be brought.

(5) The Authority must ensure a copy of the advice is sent to the person who made the request and, if the Authority declines to follow advice from the Director of Public Prosecutions to bring proceedings, the Authority must give the person written reasons for its decision.

(6) The Authority must include in its annual report, and publish on its website, a statement setting out—

(a) the number of requests received by the Authority under subsection (1); and
(b) the number of cases in which the Authority has advised under subsection (2)(b) that a prosecution has been or will be brought, or will not be brought; and

(c) the number of cases in which the Director of Public Prosecutions has advised under subsection (4) that a prosecution should be brought or should not be brought.”

1637. It has been suggested that this provision and its predecessor in the 1984 Victorian legislation, has been seldom used.678

1638. In the relevant mining legislation, apart from the New South Wales provisions identified above, in Queensland, a district or industry safety and health representative and a senior site executive, may recommend to the Chief Executive of the responsible department, that a prosecution be brought for an offence against the metalliferous or coal legislation respectively.679

1639. This issue was also the subject of consideration by the tripartite MSIG, which recommended that as a part of the range of enforcement measures available:

“the workforce, in particular safety and health representatives, should have the right to request the regulator to initiate an investigation with a view to enforcement action, including prosecution.”680

1640. Subject to the adequate resourcing of the Inspectorate as outlined above, in my view there should be such a provision in the MSI Act. This will provide an opportunity for those who have a genuine basis for requesting a review by the Inspectorate, in cases of allegations of contravention of the law, said to justify prosecution.

1641. However, it should not be as broad as that recommended by the MSIG, which includes any enforcement action. It should be confined only to consideration of whether circumstances justify a prosecution. The Victorian legislation could be used as a relevant guide.

Recommendation 106

That the MSI Act be amended to enable a person to request that the Mines Inspectorate investigate and prosecute a contravention of the MSI Act in terms similar to s 131 of the OSH Act (Vic).

678 Creighton and Rozen op cit at pars 917-921.
679 Section 235 MQSH Act (Qld); s 256 CMSH Act (Qld).
680 MSIG op cit at 7 and 48.
General Criminal Responsibility

1642. In principle, the general criminal law offences for serious crimes such as manslaughter and others endangering life or health may be pursued in cases involving safety and health incidents in the workplace. There has been however, a general reluctance of regulators to prosecute under the general criminal law and few prosecutions have been taken in the past. These matters were canvassed in the Laing Review and no repetition is necessary.681

1643. However, no notion of the offence of manslaughter is incorporated into either the MSI Act or the OSH Act. That is a matter for the general criminal law or criminal codes in the Code States.

1644. The WA Code offences most relevant to workplace fatalities and serious accidents are the provisions of ss 266 and 267 concerning duties imposed on persons in charge of dangerous things and in relation to certain acts; manslaughter in s 280 and acts or omissions causing bodily harm or danger in s 304 of the Code.

1645. The essence of manslaughter by criminal negligence is “a great falling short of the standard of care which a reasonable person would have exercised, involving such a high risk that death or grievous bodily harm would follow that the doing of the act merited punishment”682

1646. A breach of such an obligation has been held to constitute criminal negligence which can then be a basis for a manslaughter charge. Whilst criminal negligence is not expressly referred to in these relevant WA Code provisions, they have been held to be implied.683

1647. Three elements are required to found manslaughter by reason of criminal negligence, they being:

- the existence of a duty of care;
- the existence of a standard of care; and
- a gross departure from the standard of care expressed.

1648. There is no requirement in relation to manslaughter by reason of criminal negligence for:

- any unlawful act; 684
- intention-an act or omission may be voluntary; or 685
- inadvertence-an accused may act with foresight.

1649. Criminal negligence has been described as a “failure by a person under a duty of care to another to foresee or to avoid taking the risk of causing death or

681 See Laing Review at pars 477-503
682 Nydam v R [1977] VR 430 at 445
683 R v Scarr 684 [1945] St R Qd 38; Callaghan v R (1952) 87 CLR 115
685 R v Larkin 686 [1943] KB 174; 1 All ER 217
687 Ryan v R [1967] 121 CLR 205
grievous bodily harm in circumstances where that failure is a gross departure from the standard of care expected of a reasonable person in the position of the person in question".686

Corporate Criminal Responsibility

1650. Corporations act through employees and agents and have no separate legal personality. This is founded on the separate legal entity doctrine.687 This means that for a corporation to be guilty of a crime there must be evidence of attribution to it of the conduct of its officers. There must be a linkage between the acts of an individual or individuals, such that they become the “directing mind and will” of the corporation.688

1651. The principles developed in Tesco were considered in a safety and health context in R v AC Hatrick Chemicals Pty Ltd.689 In Hatrick an explosion in the workplace led to the death of an employee and serious injury to others. The company was charged with manslaughter and negligently causing serious injury under the Victorian Crimes Act 1958, as well as various offences under the Victorian OHS legislation.

1652. It was held that the conduct of the managers concerned, in not ensuring compliance with this procedure, could not be attributed to the corporation itself. Hampel J considered in so acting, the managers did not act as the corporation. Both employees chose not to implement the safe system of work that the corporation had developed, and therefore that conduct was theirs and not that of the corporation, thus absolving the corporation of liability.

1653. It has been suggested that by reason of these principles, it is in reality extremely difficult for a corporation to be held liable under the general criminal law for serious offences arising from workplace accidents.690 The only other occasion where a corporation has been prosecuted arising from a workplace death arose in R v Denbo Pty Ltd.691 In this case a sole working director of a corporation pleaded guilty to negligence causing death of an employee which led to the imposition of a fine.

1654. Various proposals for offences in Australia of “industrial manslaughter” have been proposed but not proceeded with. In particular, the Victorian Government proposed the Crime (Workplace Deaths and Serious Injuries) Bill 2001, which Bill was ultimately abandoned. Whilst corporate responsibility is sought to be imposed by principles involving the collective conduct of officers of a corporation, including “corporate culture”, under the Criminal Code Act 1995 (Cth), this only applies to Commonwealth offences. The closest perhaps

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686 See Laws of Australia 10.1.149
690 Creighton and Rozen op cit at 197
691 Unreported Supreme Court Victoria 14 June 1994 per Teague J
to the concept of “industrial manslaughter” legislation, is contained in the Crimes Act 1900 (ACT).692

1655. Additionally however, in New South Wales, the OSH Act 2000 (NSW) has been recently amended to introduce new provisions and to increase penalties for “reckless conduct” leading to a workplace death. As noted above, these penalties include a fine of $165,000 and up to 5 years in prison for an individual and a fine of up to $1.65 million for a corporation.693

1656. Proposals for amendment to safety and health legislation to introduce concepts of “industrial manslaughter”, whilst tending to be supported by those representing employee interests, have been highly contentious and strenuously opposed by the employer community. No issues have been raised in the context of this Review and they are not considered any further, save to observe that they are matters, as noted above, properly the province of the general criminal law in my view.

**Individual Officer Criminal Responsibility**

1657. Those provisions of the MSI Act dealing with individual and corporate criminal responsibility are found in ss99 and 99A dealing with vicarious liability, and s100 and 100A dealing with accessorial liability by officers of corporations. Both ss 99A and 100A are new provisions flowing from the Laing Review, in connection with the new offences involving gross negligence. Both sections seek to attribute criminal responsibility to “superior officers” as defined and other corporate officers, in the event that they are knowingly engaged in, neglectful of or consent or connive, in the conduct leading to the relevant offence.

1658. The accessorial liability in ss 100 and 100A, imposes criminal responsibility on individual officers of a corporation where it is proved that the relevant offence occurred with the “consent or connivance of”, or is “attributable to any neglect on the part of,” any such officer. Amendments to these provisions of the MSI Act which came into effect in early 2005, also flowed from various Recommendations of the Laing Review, in particular those directed to the accountability of directors and senior officers of corporations.

1659. Some have suggested in my initial consultations, the difficulty, if not impossibility, of sustaining prosecutions against individual corporate office holders, under these provisions. It is suggested that the requirement to establish “consent or connivance of, or neglect on the part of” any such officer, is a hurdle which could rarely if ever, be surmounted.

1660. Similar observations have been made, for the same reasons, about establishing individual criminal culpability under the relevant WA Code provisions.

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692 See Part 2A Crimes Act 1900 (ACT)
693 See Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Act 2005 (NSW)
1661. The issue of individual officer duties was given some consideration in the Maxwell Review in the context of the Victorian legislation. Excluding the gross negligence provisions, the accessorarial provisions in the MSI Act and the OSH Act, have their origins in the Victorian statute. Those provisions also made an officer of a corporation liable for an offence, in circumstances where it was committed with “the consent or connivance of” or the “wilful neglect” of the officer, which are in similar terms to the present provisions of the Western Australian legislation.

1662. Resulting from the Maxwell Review, the Victorian OHS Act has been amended to impose individual liability on officers of a body corporate, for failing to take “reasonable care”. Factors to be taken into account by a court in determining whether an officer is guilty of an offence include:

- what the officer knew about the matter concerned,
- the extent of the officer’s ability to have an impact on decision making in relation to the matter;
- whether any other person was involved in the contravention; and
- any other relevant matter.

The definition of “officer” is as prescribed by s 9 of the Corporations Act 2001 (Cth). This encompasses a potentially wide range of persons who may be involved in the conduct of the affairs of a corporation.

1663. The underlying foundation for recommendations in the Maxwell Review leading to such provisions was the view that:

“The critical concept in relation to officer responsibility is that the legislation should require that individual officers play their part—and no more than that. Nothing in what I am recommending would involve the imposition of unrealistic expectations on anyone participating in the management of a company. On the contrary, the legislation should explicitly recognise—as is the fact—that there will in every case be limits on the ability of individual officers to influence decision-making within a company.”

1664. Importantly in this context, is the requirement further identified, that individual officers also appreciate their contribution to workplace safety and that they, in addition to the corporation, may be held liable for any default.

1665. The meaning of “consent or connivance” for these purposes, was considered in AB Oxford Cold Storage Co Pty Ltd v Arnott. In this case a director of a Victorian company was charged, along with the company itself, with offences.

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694 See former s 52 OHS Act 1985 (Vic)
695 Section 144 OHS Act 2004 (Vic)
696 The definition includes not only a director or secretary of a corporation but also those who participate in the corporation’s decision making that affects the whole or a substantial part of the activities of the corporation or its financial standing
697 See Maxwell Review at par 784
698 See Maxwell op cit
699 AB Oxford Cold Storage Co Pty Ltd v Arnott (2003) 8 VR 288
under the Occupational Health and Safety Act 1985 (Vic) as a consequence of employees of the company being overcome with carbon monoxide fumes. On an appeal against the director’s conviction of the relevant offence, consideration was given to the meaning of “consent” for the purposes of the relevant provision. Kellam J said:

“...consent involves assent, agreement, acquiesce or permission. No-one may be convicted of aiding and abetting the commission of a criminal offence, unless with full knowledge of all the essentials facts which made what was done an offence, he intentionally aides and abets the principal offender. Likewise, in my view, it is necessary for the required consent under s52 of the OHS Act to be given with full knowledge of all the essential facts.”

1666. Given the language of the comparable provisions of the MSI Act, it is likely that a similar approach would be taken by the courts in this State.

1667. The approach of the current Victorian legislation to officer liability, adopting as it does the definition of an “officer” for the purpose of the Corporations Act 2001 (Cth), and incorporating the matters referred to above, could be considered as an alternative approach to that presently contained in the OSH Act and the MSI Act.

1668. There have not been any submissions or other observations, other than those referred to above, more broadly to the effect that the existing provisions are defective or otherwise should be the subject of re-consideration in this Review. Also, the terms of the MSI Act are aligned with the relevant provisions of the OSH Act which alignment I am required to maintain. In the absence of broader expressions of view, and the opportunity for a more fulsome debate, consideration of these matters further should await another occasion.

Proposal for a New Offence

1669. As a part of the submission by the State Mining Engineer, a proposal for a new offence “Having an Accident to an Employee” is advanced. Such an offence would be one of strict liability, where each and every accident at a mine would be deemed to be a breach of the employer’s or other duty holder’s duty of care. On such an accident event, it is suggested that the penalty regime of infringement notices would be suitable, with the magnitude of the penalty increasing with recurrent offences.

1670. It is proposed that the defence all due diligence, would be available in such cases. However, given the offence is proposed to be strict liability, without any reference to “reasonable practicability”, such a defence would constitute a reverse onus. That is the employer would be required to establish that it exercised all due diligence to the civil standard of proof, that being on the

700 AB Oxford Cold Storage Co Pty Ltd v Arnott per Kellam J at 306 as discussed in Creighton and Rozen op cit at pars 1006-1009
balance of probabilities, that every reasonably practicable effort to prevent the accident was taken.

1671. It was also suggested that given the nature of the offence, automatically following, then the terms of s 76(3) of the MSI Act, obliging the reporting of accidents would need to be accompanied by an increased penalty, to deter non compliance.

1672. The rationale advanced in support of such a new offence, is fairly and squarely based on the cost of accident prevention. The State Mining Engineer submitted that there tends to be an inverse relationship between the expenditure of monies by mine operators on safety initiatives, and the corresponding benefit derived from such expenditure. A point is reached in the equation, not dissimilar to a classic supply and demand curve, whereby there is no incentive for safety expenditure to be continued in the face of diminishing returns.

1673. Thus, the logic is that if a strict liability offence is created in these terms, the incentive to implement safety measures in the workplace will be maintained. It is also suggested that another consequence of such an approach, is to directly link the financial benefit of compliance with the obligation imposed by the law, compared to the present requirement imposed by the general duties provisions of the MSI Act, which are more obscure.

1674. The opportunity was provided to other key stakeholders to comment on the proposal for such a new offence. The industry view, as expressed by the CME, was one of strong opposition. In particular, concern was expressed as to the impact of the reverse onus of proof, placing the obligation on the alleged offender to demonstrate the defence of due diligence.

1675. On a broader plane, the CME submitted that in any event, there seems little justification for creation of such an offence in the circumstances of the mining industry in Western Australia. It was put that there is no lack of commitment by mining companies to fund safety and health initiatives in the workplace. Rather, the focus is on the identification and implementation of new strategies to improve safety outcomes in the industry.

1676. There were a number of other points raised in opposition to such a proposal. Firstly, concern is expressed that the creation of a strict liability offence on the event of each and every accident would not be conducive to a productive relationship between the industry and the regulator. In this context, mining companies would be encouraged to contest such offences for the purposes of protecting their reputations.

1677. Secondly, it was said that a consequence of the requirement to establish a “due diligence” defence may of necessity, require an employer to involve its workforce in preparation for any such defence, which would be unproductive in terms of general workplace relationships.

1678. Finally, the CME also expressed the view that such a proposal may well encourage the under reporting of accidents as a technique of avoidance. In
general terms, it is said that there is no established need for such a new offence in the industry view.

1679. Similar expressions of position emanated from the CCIWA. It adopts the view that the imposition of such liability and the reverse onus created by it would only be appropriate to low level offences and not those which may be involved in having an accident. Furthermore, on a more general level, the principal focus of legislation should be directed towards the prevention and mitigation of risk of injury and it is counter intuitive to establish a penalty regime in relation to an “incident”, as opposed to initiatives directed to prevention and control of hazards and risks in the mining industry.

1680. In an overall sense, the CCIWA doubts whether such a new offence would have the effect of contributing to the prevention of injury and harm in the workplace. The existing provisions of the MSI Act and Regulations, applied in the context of the readily available guidance material, adequately “covers the field” in terms of the regulation of safety and health in the workplace.

1681. The proposition advanced by the State Mining Engineer is somewhat novel. I am not aware of any such similar offence existing under safety and health legislation elsewhere in Australia. That of itself of course, would not preclude its consideration in this jurisdiction. However, I do have some reservations as to the rationale underpinning the proposal and the possible consequences of it.

1682. In terms of rationale, it is of course implicit in the proposal, as identified by the CME in its submission, that the industry is presently unprepared to commit sufficient expenditure in relation to safety initiatives in the workplace. It is difficult to test that proposition within the context of the present Review. Additionally, the creation of a strict liability offence of this kind, with a reverse onus, is inconsistent with the existing statutory offence scheme under both the MSI Act, and the OSH Act, in relation to general duties, which requires as far as is practicable, workplaces be kept free of hazards. Reasonable practicability is an element of the offence, the burden of proof of which is on the prosecution.

1683. Such a change of emphasis, which would operate in relation to any accident, which by definition as proposed, would constitute a breach of the duty of care, would entail a fundamental shift in regulatory thinking in this jurisdiction.

1684. Accordingly, and having regard to the views of the CME and the CCIWA, whilst I acknowledge the evident intent of the proposal as a direct means of further encouraging expenditure on safety initiatives, I do not consider that the time has yet arrived when such an obligation should be imposed by the law of this State.

1685. I therefore do not recommend the adoption of this proposal.
NMSF Compliance

1686. The terms of Principles 2j, 2k, 37, 38 and 39 of the NMSF are relevant to enforcement. Principle 37 concerns itself with the legislation providing for a range of corrective measures, including penalties in the event of a breach of the legislation. Principle 38 provides for the existence of graduated enforcement measures and penalties being proportionate to the gravity of the offence. Finally, Principle 38 deals with the existence of defences and an appeal process.

1687. I see no impediments to the conclusion that the relevant provisions of the MSI Act in relation to compliance, substantively discussed above, meet the terms of these Principles. The statutory provisions prescribe a range of enforcement options consistent with the “Enforcement Pyramid”. These may be expanded if my Recommendations as outlined above are endorsed. Furthermore, the enforcement regime enables the administration of appropriate remedies, depending on the consequences of the contravention.

1688. Whilst for the purposes of Principle 39, the MSI Act does not specify the term “appeal” in relation to, for example, the various Notices, plainly the review mechanisms prescribed in the legislation constitute, in effect, an appeal by way of a hearing de novo, and well satisfy such a provision.

1689. In terms of appellate review of decisions of Safety and Health Magistrates, flowing from jurisdiction conferred by s 96A of the MSI Act that is established under the Criminal Appeals Act 2004.\(^{701}\)

1690. These matters may also need to re-visited, once the NMSF process outlined below, is completed.

NMSF Enforcement Protocol

1691. Strategy 4 of the NMSF concerns a Nationally Co-ordinated Protocol on Enforcement. This protocol has as its goal:

“To develop a nationally consistent and transparent approach to enforcement that provides clear and consistent standards for duty holders, and supports equitable outcomes from government’s contribution to safety and health in the mining industry.”

1692. A draft National Enforcement Protocol has been prepared by an NMSF Working Party dealing with this issue. It incorporates the Braithwaite Enforcement Pyramid and the Reason model, in relation to the characterisation of mining enterprises in terms of their safety record and compliance history. It provides a comprehensive rationale for enforcement action and, importantly in my view also recognises the importance of linking any enforcement policy to the competency development of regulators, in terms of training on compliance.

\(^{701}\) See Part 2 Criminal Appeals Act 2004.
approaches and the means by which escalation up the Enforcement Pyramid may be achieved.

1693. It is noted that observations have been made to the effect that the draft protocol does not yet identify key elements of a compliance policy and thus will not enable each jurisdiction to compare their existing policy with it. Further, it is also suggested that desirable features of other approaches to enforcement, such as the HSE Enforcement Management model and the sanctioning approach referred to in Macrory, could be incorporated.\textsuperscript{702} I have referred to the Macrory Review above. This entailed a comprehensive review of the system of regulatory sanctions in the United Kingdom across all industry sectors and at all levels of government. The upshot of the review is a series of recommendations based on a Compliance Code incorporating risk based principles of enforcement. In particular, Macrory considered that a sanctioning regime should be underpinned by six principles and a regulator’s approach to enforcement should adopt seven characteristics as follows:

\textbf{“Six Penalties Principles}

\textit{A sanction should:}

1. Aim to change the behaviour of the offender;
2. Aim to eliminate any financial gain or benefit from a non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
6. Aim to deter future non-compliance

\textbf{Seven characteristics}

\textit{Regulators should:}

1. Publish an enforcement policy;
2. Measure outcomes not just outputs;
3. Justify their choice of enforcement actions year on year to stakeholders, Ministers and Parliament;
4. Follow-up enforcement actions where appropriate;
5. Enforce in a transparent manner;
6. Be transparent in the way in which they apply and determine administrative penalties; and
7. Avoid perverse incentives that might influence the choice of sanctioning response.\textsuperscript{703}

\textsuperscript{702} N Gunningham and D Sinclair \textit{Multiple Inspection Tools: Balancing Deterrence and Compliance in the Mining Sector} National Research Centre for OHS Regulation June 2007 at 11

\textsuperscript{703} Macrory op cit at 99
1694. In my view there is much to be said for the above concepts. These could and perhaps should, be incorporated into the RSD approach to enforcement generally and the Enforcement Policy. However, given the work being presently undertaken in relation to the NMSF Nationally Co-ordinated Protocol on Enforcement, I do not recommend any amendment to the RSD Enforcement Policy at this stage, as to do so would be to pre-empt the outcomes of the NMSF process in relation to enforcement and be contrary to the harmonisation approach underlying it. I do, however, commend the Macrory approach, as part of the NMSF considerations. The RSD Enforcement Policy should in due course, be reconsidered in light of the NMSF Strategy 4, when it is adopted for implementation, to ensure consistency.
CHAPTER 14 – NMSF SUPPLIMENTARY MATTERS

1695. I have endeavoured throughout this Report, to comment on compliance with the NMSF Legislative Framework in accordance with my Terms of Reference when dealing with relevant statutory provisions. There are however, some areas of the NMSF Legislative Framework which have not been dealt with which I now consider.

Objects

1696. Section 3 dealing with the objects of the MSI Act has been set out in Chapter 1 and is not repeated. Principle 3 of the Legislative Framework specifies that legislation is to clearly state its objectives and the ways in which the objectives are to be achieved. Objectives stated include improved safety and health outcomes; continuous improvement of safety and health systems; focus on prevention; performance based; and the identification and control of hazards.

1697. The objects of the MSI Act are generally consistent with these requirements save for some exceptions. Firstly, the objects do not refer to or incorporate the principle of continuous improvement in safety management. Secondly, there is no reference to prevention as an object of the law. Thirdly, the means by which the objects are to be achieved are also not clearly defined and stated.

1698. By comparison, as to the latter issue, it is noted that the Queensland coal and metalliferous legislation in Division 3 of both Acts, refers to not only the objects of the legislation but how the objects are to be achieved as a separately identified and particularised section. In my view this is helpful in expressing the primary objects of the law and the means by which they will be implemented. Furthermore, if my Recommendations earlier set out in relation to the adoption of a safety management system approach is accepted, reference should also be made to this in the objects of the statute.

Recommendation 107

(a) That s 3 of the MSI Act be amended to incorporate reference to the principles of continuous improvement, safety and health management systems and a preventative focus; and

(b) That s 3 of the MSI Act be divided into two parts. The first setting out the principal objects of the MSI Act. The second setting out the means by which those objects are to be achieved. Part 1 Division 3 of the Queensland coal and metalliferous legislation could be used as a guide in this respect.
Glossary

1699. Principle 4 of the Legislative Framework refers to the existence of a comprehensive glossary to define all major terms that are used in the legislation.

1700. Section 4 of the MSI Act is a detailed interpretation provision, which defines all of the key terms in the legislation. In my view no further amendment is required for the purposes of compliance. There are also appropriate definitions set out in the Regulations.

Fitness for Work

1701. Principles 27 and 28 of the Legislative Framework deal generally with fitness for work. Principle 27 refers to provision being made for health surveillance of employees exposed to occupational health hazards specific to mining and means to determine an employee’s fitness to safely perform specific duties. The particular method of health surveillance is to be dependent upon the nature of the hazards and the levels of exposure. A broad range is to be considered.

1702. Furthermore, by Principle 28, a mine’s safety management system is to identify and manage appropriate hazards associated with fitness for work including fatigue management; drug and alcohol impairment; the effects of exposures in the working environment eg heat and chemical exposure; and appropriate health surveillance for occupational health hazards specific to a mine. Nationally consistent codes of practice, standards or guidelines can be utilised.

1703. In relation to health surveillance, the mining industry is a leader in this area.

1704. Section 75 of the MSI Act along with Part 3 Division 4 of the Regulations sets out a comprehensive scheme of health surveillance for mining industry employees. Specific hazards are addressed and specific provision is made for targeted testing in relation to audiometric, chest and lung function and biological monitoring where certain criteria are met. The health assessment process covers both an initial health assessment and a periodic health assessment. No amendment is necessary for the purposes of compliance with the Legislative Framework.

1705. In relation to Principle 28 there are relevant provisions in the Regulations dealing with matters such as drug and alcohol impairment, hot work procedures and procedures governing hazardous substances in Parts 4 and 7. Presently however, absent is a statutory requirement for a safety and health management system to incorporate these elements. In this sense, the legislation is presently deficient. It can be addressed if my earlier Recommendations are accepted.
Emergency Response

1706. Principles 29 and 30 deal with emergency response. The Legislative Framework specifies that provision is to be made for the establishment of mine emergency response resources and procedures, including mines rescue where necessary. Furthermore, by Principle 30 the legislation is to provide for liaison with emergency authorities, the conduct of emergency operations and testing and review of emergency response capacity.

1707. The emergency response provisions of the legislation are contained Division 3 of Part 4 of the Regulations. These provide a comprehensive scheme for required emergency equipment, the preparation of an emergency plan and specific provision for particular emergency precautions required for underground operations. No amendment is required in this respect.

1708. However, absent from the Regulations presently, is a provision dealing with liaison with emergency authorities. By way of a comparative example, reg 32 of the Mining and Quarrying Safety and Health Regulation 2001 (Qld) specifies that in developing a risk management process for emergencies, the Site Senior Executive must ensure that liaising with and using, local or state services is included. Similar provision is made in Division 4 of Part 3 of the Mine Health and Safety Regulation 2007 (NSW).

Recommendation 108

That Part 4 Division 3 of the Regulations be amended, particularly in reg 4.30 – Preparation of emergency plan, to incorporate a requirement for liaison with and use of local or state emergency services as may be required.

Regulatory Framework and Content

1709. Principle 40 of the Legislative Framework refers to the nature of regulations. It is specified that they cover risks in mining operations, in particular, principal hazards and safety and health practices.

1710. The Regulations are comprehensive and address all major hazards and relevant safety and health issues particular to the mining industry. Subject to my earlier Recommendations, and what appears below, no amendment is necessary.

1711. Principle 41 deals with the issue of continuous improvement being encouraged by the legislation and a mix of approaches including principles, performance and process-based standards and prescription being included.

1712. As noted earlier, the MSI Act and Regulations do not generally contain provisions encouraging continuous improvement for safety and health outcomes at mines. There is a mix of general duties and prescription, with the emphasis on the latter, particularly in the Regulations. There exists no comprehensive process based standards, such as a systemic approach to safety
and health regulation, although this is recommended. Earlier Recommendations have addressed these issues.

1713. Finally, Principle 42 specifies that legislation may be supplemented by nationally consistent Standards or Codes. The legislative implications of Codes and Guidelines are to be identified.

1714. The MSI Act in s 93 enables the Minister to approve a Code of Practice considered by the MIAC. Such Codes are to provide guidance to employers, self employed persons and employees and others covered by the legislation. In my view, Principle 42 is largely satisfied, however, further attention may need to be paid in the future to the issue of national consistency of Codes of Practice and Guidelines.
CHAPTER 15 – MISCELLANEOUS MATTERS

1715. A number of supplementary matters have been referred to me for consideration for the purposes of this Review.

1716. Additionally, I comment on a number of other miscellaneous issues, including some in relation to the drafting of the current legislation.

Registration of Classified Plant

1717. The issue that arises is this. Presently under the Part 6 Division 3 of the Regulations, certain defined items of classified plant, which includes any boiler, crane, hoist, lift or pressure vessel, are to be registered with the State Mining Engineer.\textsuperscript{704} The application for registration of the prescribed classified plant to be used on a mine requires the provision of a substantial body of information including detailed drawings of the plant design, design calculations and verification that the design meets the applicable Australian Standards.\textsuperscript{705}

1718. The obligation to register falls upon the Principal Employer, the Manager, or any other employer at a mine.\textsuperscript{706}

1719. There are also a number of other obligations on persons using registered classified plant on a mine site in relation to repairs and modifications, the reporting of incidents and inspection requirements.

1720. Under the OSH Regulations there also exists in Part 4, a regime for the registration of classified plant. The impact of the requirements under both the Regulations and the OSH Regulations, in so far as mines are concerned, is that all plant that is to be used at a mine, that has been previously been used elsewhere, and is accordingly required to be registered under the OSH Regulations, is subject to a dual registration requirement under both sets of Regulations.

1721. The practice to date, in order to attempt to manage this dual registration requirement, has been for the State Mining Engineer to grant general exemptions from requirements to register certain classified plant in accordance with the general power of exemption under the Regulations.\textsuperscript{707}

1722. A series of general exemptions have been made by the State Mining Engineer one, in March 2006, to provide a general exemption for registration for plant described as “certain itinerant classified plant”. The intent of this general exemption, from its terms, is clearly to endeavour to overcome the obvious practical difficulty of dual registration for the owners and users of classified

\textsuperscript{704} Regulation 6.34(1) Regulations
\textsuperscript{705} Regulation 6.34(3) Regulations
\textsuperscript{706} Regulation 1.3A Regulations
\textsuperscript{707} Reg 1.5 Regulations
plant, which is registered under the OSH Regulations, not owned by a Principal Employer or other employer at a mine, and is used for a period of time not exceeding the inspection schedule prescribed by the Regulations.708

1723. Plant the subject of this general exemption, must be registered with a Commonwealth, State or Territory authority responsible for the registration of plant. Furthermore, the use of such plant is subject to a satisfactory prior inspection.

1724. This broad issue of dual registration is, as I understand it, causing considerable consternation amongst those involved in the use of classified plant in or about mines, in particular that falling into the “itinerant” category.

1725. The matter appears to have some history in this State. Responsibility for the registration of classified plant, formerly governed by machinery safety regulations, has oscillated over time, between the departments responsible for the administration of the OSH Act and the MSI Act, and its predecessors, respectively. The present position is that classified plant required to be registered under the OSH Regulations is administered by WorkSafe. Classified plant required to be registered under the Regulations is administered by the Mines Inspectorate.

1726. In my opinion, the requirement for dual registration of classified plant under both the OSH Regulations and the Regulations is an anomaly that should be resolved. In the context of a mining operation, it imposes significant and unnecessary burdens upon the relevant responsible person who is required to ensure registration of classified plant by the State Mining Engineer under the Regulations.

1727. The purpose of registration of classified plant is to ensure that hazardous plant that has the potential to cause or contribute to workplace accidents, is subject to appropriate controls concerning its design and usage. The relevant regulatory regime should not impose unnecessary burdens upon industry in my view.

1728. It is of note that this principle is recognised in classified plant regimes generally. In most jurisdictions, including under the OSH Regulations, there are blanket exemptions from the requirement to register, if an individual item of plant is already subject to an existing and current registration granted by another regulatory authority under Commonwealth, State or Territory law.709 Such general exemptions clearly recognise the foundation principle prescribed in the relevant National Standard, that dual registration of classified plant is unnecessary and that current registration in one jurisdiction should be sufficient to constitute statutory compliance in another.710

1729. The Regulations should be amended to recognise an existing plant registration from another authority. This should be subject to the condition that proof of

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708 See general exemption State Mining Engineer March 2006
709 Regulation 4.14 OSH Regulations
710 See National Standard for Plant [NOHSC: 1010 (1994)] clause 71
such registration is to be provided. I see no reason in principle why the Mines Inspectorate should not continue to deal with the registration of plant that is solely based at and for use on a mine. It is the itinerant plant that seems to have caused the problem.

**Recommendation 109**

That the Regulations be amended to enable classified plant that is subject to a current classified plant registration under a law of the Commonwealth, a State or a Territory, by a competent authority with responsibility for plant safety, to be used at a mine without any further registration requirement.

**Recommendation 110**

That Recommendation 109 be subject to a condition that before plant is used, proof of registration of such plant by another authority is provided and included in the Classified Plant Record Book at a mine.

**Rail Appeal Provision**

1730. Another matter referred for my consideration, is a proposal for an amendment to the Regulations in Part 15 dealing with railway operations. It is proposed that the Regulations be amended to insert provision for an appeal to the State Mining Engineer, from a decision of the manager of a railroad under reg 15.9 to suspend or cancel a certificate of competency for a railway vehicle driver.

1731. If my Recommendation in Chapter 7 to remove private railway operations from the MSI Act is endorsed, then as a consequence, Part 15 of the Regulations will fall away and also this issue along with it.

1732. In the alternative however, on the basis that the MSI Act continues to have application to rail operations, I consider the matter as follows.

1733. I understand that the proposed amendment would enable a person who has had their certificate of competency suspended or cancelled to “appeal” this decision to the State Mining Engineer, who it is intended, would be the final arbiter of such disputes. No further right of appeal is proposed. It is not clear to me from the material I have been provided, what the MIAC intends the process to be on such an “appeal” to the State Mining Engineer. That is whether it is intended that such a process be by way of a hearing de novo, an appeal by way of a rehearing or an appeal *strictu sensu*, that being only for the purposes of the correction of error.

1734. Given the range of other reviews that may be conducted by the State Mining Engineer under the MSI Act that have been referred to earlier in this Report, I will assume for present purposes that what is intended is the same in this case.
Power

1735. The first issue to consider is whether, even if such a regulation should be made, there is a sufficient head of power under s 104 of the MSI Act to support it.

1736. Relevantly, s 104(1), amongst a range of powers, provides that regulations may be made:

“(o) dealing with matters connected with railways or other mechanical transport in or at a mine;”

1737. There are a range of matters dealt with in Part 15 of the Regulations concerning the operation of railways. These include the requirement to have in place operating rules and procedures; the competency and certification of drivers and the suspension and cancellation of certificates; requirements for rolling stock and tracks to be safe and the implementation of train control systems, amongst others.

1738. The phrases “connected with” and “in connection with” are very wide indeed and should be so interpreted. In Re Warden Heaney; Ex parte: Flint v Nexus Minerals NL,711 Kennedy J said:

"It is important for the present purposes to note that the expenditure does not have to be on mining, as such, to satisfy the terms of reg 21. It may be 'in connection with' mining. The words 'in connection with' are words of wide import and, as with the words 'connected with', and, subject to the context in which the words are used, are capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote ... in the present context, the words 'in connection with' can readily extend to matters leading up to mining."

1739. In the context of the terms of reg 15.9, which confers a power on the manager of a mine to suspend or cancel a certificate to drive a railroad vehicle, it is but a short step in my view, to also confer a power of review of such a decision. I consider that such a regulation would fall within the range of relationships “connected with railways”, under s 104(1)(o) of the MSI Act.

Merit

1740. The next issue is whether such an “appeal” should be to the State Mining Engineer. In my opinion, for the following reasons, it should not be.

1741. I have set out in Chapter 8 above, the range of powers of the State Mining Engineer and relevantly for present purposes, the nature of decisions that may be referred to him for review. Those reviewable decisions are, in the main, of

711 Full Court WASC; Unreported No 1652/96, 26 February 1997
an administrative character. They do not involve the determination of substantive disputes of right, such as employment disputes, normally the province of industrial tribunals.

1742. What then is the nature of a dispute concerning the cancellation of a certificate to drive a railway vehicle?

1743. In ordinary circumstances, a decision of the kind under consideration will, by reason of the requirement to hold the requisite certificate as a condition of lawfully being able to drive a locomotive under the Regulations, inevitably have the consequence of also depriving the person concerned of the capacity for on going employment, at least in that occupation. Termination of employment is the most likely consequence of such a decision by a Mine Manager.

1744. I do not consider that such a decision would, without anticipating any determination of an Industrial Commission, necessarily constitute a “constructive dismissal”. Such a case only strictly arises in circumstances where the employer has committed a repudiatory breach of the contract of employment, entitling the employee to treat the contract of employment at an end and suing for damages. None the less, it probably would be open for such a person to bring a claim before an industrial tribunal, alleging they had been unfairly dismissed.

1745. I am therefore of the view that such a matter is more in the nature of a dispute of right and of a different character to the range of administrative decisions presently open to review by the State Mining Engineer under the MSI Act.

1746. The legislature has already indicated how such matters should be dealt with under the MSI Act. In ss 52 and 86, an appeal to the Tribunal may be brought from a decision of the Board or the MSB, to suspend or cancel a certificate of competency or an Authorised Mines Surveyor’s Certificate. The Tribunal is empowered to dismiss the appeal or make any decision in relation to the (subject) matter of the appeal that the relevant Board might have made. I consider that the suspension or cancellation of a certificate to drive a railway vehicle should be treated in the same way.

1747. Accordingly, if there is to be an appeal from a decision made under reg 15.9 by a Mine Manager, then I consider it should be an appeal to the Tribunal along the lines of ss 52 and 86 of the MSI Act.

**Recommendation 111**

That subject to Recommendation 18 any appeal from a decision of a Mine Manager to suspend or cancel a certificate under reg 15.9 of the Regulations be to the Tribunal in terms similar to appeals under ss 52 and 86 of the MSI Act.
Charging of Fees

1748. Presently under regs 2.31 and 2.33 and Schedule 2 of the Regulations, provision is made for the charging of fees in relation to applications for certificates of competency and replacement certificates. The issue arising is whether the regulation making power supports these regulations.

1749. In general terms, for fees to be payable under subsidiary legislation such as the Regulations, a substantive head of power must exist to support them. This is so unless it can be said that the “necessary and convenient” power in s 104(1) is sufficient. ⁷¹²

1750. Unlike many statutes there is no express power in s 104(1) of the MSI Act for the charging and recovery of fees for any purposes under the MSI Act or Regulations. Whilst it may be arguable that the general regulation making power enables the Regulations to specify the payment of fees for certain purposes, to put the matter beyond doubt, the MSI Act should be amended in s 104(1) to provide expressly this capacity.

Recommendation 112

That s 104(1) of the MSI Act be amended to enable regulations to be made to enable the charging for, recovery of and waiver of the payment of fees.

Sharing of Information

1751. The issue of information sharing between regulatory agencies was a matter the subject of submissions from WorkSafe. Reference was made in the WorkSafe submission, to the observations of Mr Hooker in the Hooker Review, commenting on the general issue of sharing of information between government agencies. No specific recommendations were made arising from the Hooker Review.

1752. In particular, WorkSafe referred to issues arising in the course of the administration and enforcement of the OSH Act, raising limitations on its capacity to obtain relevant information from other agencies including the RSD. According to WorkSafe, there can also be interest from other jurisdictions administering safety and health legislation, including the RSD, obtaining information and material in the possession of WorkSafe. Noted in this regard, are matters relating to the licensing of high risk work, commercial drivers and perhaps most appositely for present purposes, the movement of registered plant between jurisdictions.

1753. The matter of investigations jointly conducted with other enforcement agencies is also referred to. In terms of initiatives in other jurisdictions, the WorkSafe submission referred to cabinet approval being granted in Western Australia in late 2007, for the drafting of appropriate amendments to the OSH

⁷¹² Seen 228-230 above
Act, for the purposes of information sharing concerning safety and health matters with other government authorities. Additionally, reference is also made to corresponding activity in New South Wales, with a view to similar amendments to the general industry legislation in that State for the same purpose.

1754. The increasing attention being placed upon harmonisation of legislation relevant to safety and health, both generally and in the mining industry, has brought into sharper focus the issue of cooperation between jurisdictions concerning information. The present activity of the NMSF, in particular the Strategy dealing with a National Data Set, and other Strategies, may well require underpinning legislation, to enable the sharing of information between mining industry regulators. Additionally, given the interaction between the OSH Act and the MSI Act, the capacity to share information between regulatory agencies has potential benefit. An obvious example, to which I have already made reference, is in relation to the registration of classified plant that may be designed, constructed and used in different jurisdictions.

1755. Some jurisdictions have legislated for information sharing in various ways. Perhaps the most comprehensive is that in Victoria, under the Occupational Health and Safety Act 2004 (Vic). Relevantly, s 7 dealing with the functions of the Victorian Work Cover Authority includes reference to the following:

“(e) to co-operate with and give advice and information to the following persons in relation to occupational health, safety and welfare –
(i) corresponding Authorities;”

1756. A “Corresponding Authority” for the purposes of the Victorian legislation, means a Government department or a statutory authority of the Commonwealth, or of the Government of another State or Territory, responsible for administering a safety and health law. Reference is also made to the administration of dangerous goods, equipment (public safety) and road transport (dangerous goods) legislation.

1757. To enable such sharing of information, the Victorian Work Cover Authority, is empowered to enter into agreements or contracts with corresponding authorities in the terms as set out in the legislation.713

1758. In the mining jurisdictions, under both the CMSH Act (Qld) and the MQSH Act (Qld), a limited form of information sharing exists to enable the disclosure of information by the Chief Inspector under the legislation, to another officer or authority responsible for the administration of a law of Queensland, the Commonwealth or another State or Territory, concerning safety and health in mining.714

1759. Additionally, in the Queensland general safety and health legislation, there also exists provision for the authority in that jurisdiction, to on request,

713 See ss 7 and 8 Occupational Health and Safety Act 2004 (Vic)
714 See s 275A CMSH Act (Qld) and s 255 MQSH Act (Qld)
provide information to another authority under a Commonwealth or State law concerning workplace safety and health.715

1760. There is also presently before the New South Wales Parliament, a Bill to amend the OHS Act (NSW), to, amongst other matters, provide for WorkCover to communicate certain information to an officer or authority engaged in administering a law in another jurisdiction, concerning occupational health and safety.716

1761. In my opinion, subject to appropriate protections concerning privacy of material, provisions such as those in the Victorian legislation, and others to which I have referred, are a significant step forward in enabling regulatory authorities to share appropriate information. This is particularly apposite given the present acceleration of the harmonisation of legislative provisions across jurisdictions. The Victorian legislation could be used as a guide for this purpose.

**Recommendation 113**

That the MSI Act be amended to enable the Mines Inspectorate to share information with a corresponding authority under a law of the Commonwealth, another State or Territory, responsible for administering occupational safety and health and other relevant legislation.

**Bullying**

1762. The issue of bullying activity in the workplace, either in respect of employees or contractors, was not specifically raised in submissions to the Review. However, as noted earlier in this Report in relation to the activities of the Mines Inspectorate, in particular the activity of investigating into and dealing with complaints made under s 24 of the MSI Act, material reviewed revealed some cases of alleged bullying behaviour in mine workplaces. One complaint in particular, to which broad reference has already been made, involved a very extensive investigation by the Mines Inspectorate over a lengthy period of time. It would seem that such complaints are becoming more prevalent.

1763. I have already referred to issues relating to alleged discrimination against employees and safety and health representatives, recommendations made in the Hooker Review and those to be adopted for present purposes. In that regard, reference has also been made to the Industrial and Related Legislation Amendment Bill 2007 (WA), which was before the State Parliament immediately prior to the last State general election.717 Part 5 of that Bill dealt with a range of amendments to the OSH Act. One element of those amendments was the insertion of new provisions dealing with allegations of bullying in the workplace. The proposed s 56AB of the OSH Act set out the meaning of “bullying” as being:

715 Section 185D Workplace Health and Safety Act 1995
716 See cl 50 Occupational Health and Safety Amendment Bill 2007 (NSW)
717 See n 533
“unreasonable or inappropriate behaviour at a workplace –
(a) that is repeatedly directed towards an employee or contractor or a group of employees or contractors; and
(b) that creates a risk to safety or health.”

1764. The definition further set out what is not bullying conduct and by a proposed Division 3 of Part VIII of the OSH Act, claims of bullying were to be referred to the Tribunal. Various powers were to be conferred on the Tribunal by the then proposed amendments, including the capacity to make orders of various kinds, to prevent bullying behaviour.

1765. Given the seeming increasing incidence of allegations of bullying activity in the mining industry, to which the Mines Inspectorate’s attention has been drawn, this is a matter that could be considered by the Parliament. If legislation is re-introduced into the Parliament to amend the OSH Act to incorporate relevant provisions dealing with bullying behaviour, consistent with the former Bill, given my requirement under my Terms of Reference to maintain alignment with the OSH Act, then, subject to that amending legislation proceeding through the Parliament, a similar amendment should be made to the MSI Act.718

**Recommendation 114**

That the MSI Act be amended to provide for claims of bullying to be referred to the Tribunal in the same terms as proposed amendments to the OSH Act as provided in Part 5 of the former Industrial and Related Legislation Amendment Bill 2007 (WA), if re-introduced into Parliament and as ultimately enacted.

**Regulations and the Regulatory Labyrinth**

1766. I have already referred to the need for a “root and branch” review of the Regulations. A number of submissions touched on this issue. Most dealing with this issue in their submissions and in other relevant observations made to me over many occasions have referred to the excessive prescription of the current Regulations.

1767. The State Mining Engineer advanced the view that a review of the Regulations is overdue and the opportunity should be taken to commence the process. From the perspective of the CCIWA, by way of general observations, it is suggested that the body of regulation generally in safety and health should be the subject of review, in light of observations in the Productivity Commission’s Taskforce report *Reducing the Regulatory Burdens on Business*. It is also suggested that Regulatory Impact Statements should accompany any new regulation. I agree with that view.

1768. There is however, always a balance to be struck between the burdens of regulation on the one hand, and the provision of guidance to duty holders and

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718 See n 533
others upon whom the law imposes obligations. For example, many small enterprises, including many small mining operations, simply want to be told what to do to be compliant with the law. They may simply not have the level of resourcing and other capacity to respond to outcomes or process based forms of regulation.

1769. Presently, there are some 17 Parts to the Regulations, which collectively run to some 362 pages excluding schedules. In many respects, the current provisions extend to matters of minutiae and as the AusIMM correctly observed, are drafted in “command and control” language in most respects.

1770. There are plainly provisions in the Regulations which require prescription. These include for example, areas of mining operations with the potential for catastrophic events such as specific requirements for underground mines including geotechnical considerations, ventilation, in-rush and matters such as winding operations and other specialised activities. There are other areas of the Regulations, allied to the general duties requirements, of a more generic nature, that are amenable to incorporation into guidance material.

1771. Given my earlier Recommendations in particular in relation to the adoption of a safety management system/principal hazard management plan approach in this jurisdiction that will in itself, necessitate a thorough review of the existing Regulations.

1772. Additionally, wherever practicable, subject matter presently contained in the Regulations which is more amenable to guidance material such as Codes of Practice and Guidance Notes, should be removed.

1773. The task, although a very large one, should be undertaken through a joint consultative process with all relevant stakeholders represented. Logically, the process should be overseen by the MIAC. It may be appropriate for a tri-partite working party(s) to be established for this purpose.

Recommendation 115

That there be a comprehensive review of the Regulations under the auspices of the MIAC undertaken by a tri-partite working party(s).

Codes of Practice

1774. Under s 93 of the MSI Act the responsible Minister may approve a Code of Practice which has been considered by the MIAC. The purpose of a Code of Practice is to provide practical guidance to duty holders under the legislation. Furthermore, any Code of Practice may also incorporate provisions of any “code, standard, rule, specification or provision relating to occupational safety and health” which is prepared by an appropriate authority.

1775. Within the Robens Committee principles, guidance material such as Codes, represent the third tier of the regulatory mix, originally intended to be given
effect under the general duties regime in place in all Australian safety and health jurisdictions. Indeed, it was the original intent of the Robens Committee that guidance material such as Codes of Practice, largely replace requirements prescribed, for example, in regulations.\textsuperscript{719}

1776. It is clear however, that both in the mining and general industry jurisdictions in this State, that ideal has been far from realised. Not only under both the OSH Act and the MSI Act are there extensive and prescriptive regulations, but additionally, there is an ever increasing suite of guidance material, in the form of Codes of Practice and Guidance Notes. It is also fair to observe, that some of this material, is detailed, complex, and may present a significant challenge in particular, for small and relatively unsophisticated enterprises.

1777. The statutory status of Codes of Practice varies betweens jurisdictions. Under the MSI Act, s 93(7) provides as follows:

\textbf{“(7)”} Where it is alleged in a proceeding under this Act that a person has contravened a provision of this Act or the regulations in relation to which a code of practice was in effect at the time of the alleged contravention —

\textbf{(a)} the code of practice is admissible in evidence in that proceeding; and

\textbf{(b)} demonstration that the person complied with the provision of the Act or regulations otherwise than observing that provision of the code of practice is a satisfactory defence.

\textbf{“(8)”} A person is not liable to any civil or criminal proceeding only because the person has not complied with a provision of a code of practice.”

1778. This provision is in identical terms to s 57(8) of the OSH Act, which, among other matters concerning Codes, received consideration in the Hooker Review.\textsuperscript{720}

1779. Apart from the admissibility of a relevant Code of Practice in any prosecution proceedings, the utility of this provision is difficult to determine. On the one hand by s 93(8) it is intended that no legal consequence follows from a duty holder not complying with the terms of a Code of Practice. However on the other hand, s 93(7)(b) does not appear to have any particularly meaningful purpose. It certainly does not provide, as is the case in some other jurisdictions, in positive terms that compliance with a Code of Practice will be taken to mean compliance with the relevant provisions of the MSI Act and/or the Regulations, as the case may be.

1780. Additionally, as Mr Hooker pointed out, with respect, quite correctly in my view, when considering the corresponding provision of the OSH Act, s 93(7)(b), appears to contemplate a burden being imposed on a defendant to

\textsuperscript{719} Robens Committee op cit at par 142
\textsuperscript{720} Hooker Review at 139 – 144
establish, as a defence, compliance with a relevant provision of the MSI Act and/or the Regulations. No such burden exists in law, given the overarching obligation on the prosecution, to establish the requisite elements of the offence charged, beyond reasonable doubt.

1781. In my view, far from providing clarity, provisions such as these are apt to confuse and mislead.

1782. Mr Hooker also expressed concern in relation to s 57(2) of the OSH Act, the comparable provision of which under the MSI Act is s 93(2). Mr Hooker’s concerns related to the inherent uncertainty of the incorporation of various documents such as codes, standards and other material, within a Code. Also raised is what is said to be the inherent conflict between the incorporation of prescriptive standards, from other sources, within a Code intended for guidance purposes only.

1783. This led to two relevant recommendations in the Hooker Review they being:

“R.21 s.57(2) of the Occupational Safety and Health Act 1984 (WA) be repealed.

R.22 s.57(8) of the Occupational Safety and Health Act 1984 (WA) be either repealed or, at the very least substantially amended, so as to restrict its operation to provide that where a court is satisfied that a code of practice is relevant, the code of practice is admissible in evidence in that proceeding.”

1784. No such amendments to the OSH Act have yet been forthcoming.

1785. The only submissions as to these issues were from the CME and the CCIWA. The CME does not support either Recommendation 21 or 22 of the Hooker Review. As to the latter, the CME position is, as I understand it, that a provision such as s 93(7) should be retained to provide clarity in relation to the evidentiary status of Codes of Practice. The CCIWA did not consider any amendment necessary to alter the intent of s 57 of the OSH Act and that the evidentiary status of Codes of Practice should be confirmed.

1786. As noted above, the legal status of Codes of Practice varies between jurisdictions. In some, compliance with a Code is sufficient to establish compliance with the relevant legislation, alternatively, constitutes a defence to a prosecution. Others provide that failure to comply with a Code of Practice, unless compliance with the legislation is otherwise established, constitutes a breach.

1787. Given the intent of Codes to provide guidance to duty holders as to how their obligations under safety and health legislation may be satisfied, then in my view, it makes sense that they be admissible in evidence in court proceedings without the requirement for formal proof.
However, with due respect, I differ from Mr Hooker as to the use to which Codes of Practice should be put in legal proceedings and their content. First as to content, I do not see any particular difficulty in a Code incorporating by reference, other materials, such as for example, an Australian Standard. Standards are so widely referred to in industry generally, both as to technical and business matters, that it is appropriate that they be referred to in guidance material such as Codes.

Secondly, it is clear that Codes have a substantial status under the legislation, being required to be approved by the responsible Minister under s 93(1) of the MSI Act. Additionally, it was the original intent of the Robens Committee, that duty holders be encouraged to comply with their general duties, through the use of such guidance material. This was even in preference to, for example, regulations.

One way it seems to me, that greater encouragement for duty holders to use guidance materials such as Codes of Practice in the manner intended, is to provide that compliance with such a Code, satisfies the relevant statutory duty as dealt with in the particular Code.

This is the approach adopted in both Victoria and Queensland in the general safety and health legislation and is one that in my view should be adopted in this jurisdiction. I note that this is also the approach taken in the recently commenced DG Act, which provides that it is a defence in proceedings for an offence under the legislation, to establish compliance with an approved code of practice to which the offence relates.721

However, given the requirement under my Terms of Reference to maintain alignment with the OSH Act, even though I regard the existing provisions as deficient, I make no recommendations.

**Boards of Inquiry**

Under the MSI Act, save for the investigative powers of the Mines Inspectorate, and the capacity for the Coroner under the Coroners Act to inquire into the death of a person working at a mine, there is no capacity under the legislation for the constitution of an independent inquiry process into an accident or high potential incident.

This is in contrast to the Queensland and New South Wales jurisdictions, where under the relevant legislation, a Board of Inquiry may be established by the responsible Minister, to inquire into the circumstances of a particular occurrence, whether it be an accident, incident, or other matter, that in the opinion of the Minister, warrants investigation. The Boards of Inquiry so established have broad powers to inquire into the relevant circumstances of the matter, and furnish a report to the responsible Minister.

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721 Section 62 DG Act
1795. In my view, such a capacity is an important one in an inherently hazardous industry such as mining. It is in some respects, surprising that the MSI Act does not presently contain such a capacity. Whilst it is of course an obligation on duty holders under the MSI Act to report accidents and incidents, and for the Mines Inspectorate to undertake relevant investigations, the wider scope of an inquiry process, the learning and sharing of information throughout the entire industry, as a result of a formal Board of Inquiry process, cannot be overstated. That is not to say, that one would expect such proceedings to be regular events. On the contrary, one would hope that they would be relatively rare. Nonetheless, in my view, a facility should exist under the legislation for their establishment.

**Recommendation 116**

That the MSI Act be amended to make provision for the responsible Minister to establish a Board of Inquiry to inquire into a serious accident, high potential incident or other matter referred to it by the Minister. Such a provision could be based on the relevant provisions of the Queensland and New South Wales coal and metalliferous mining legislation.

**Provision of Engineering Report**

1796. By s 45 of the MSI Act, the State Mining Engineer may at any time, require a Principal Employer or Manager of a mine, to provide to the State Mining Engineer, an independent engineering report in relation to safety and health at the mine or with respect to a particular accident or dangerous occurrence.

1797. There presently is no requirement for the provision of an engineering report to be furnished to the State Mining Engineer either within a time as prescribed by s 45, or within such period of time as may be specified by the State Mining Engineer. This matter has been referred to me for my consideration. I understand that in the absence of a time limit, it is the general practice of the State Mining Engineer, to specify a time for compliance within any requisition made under s 45.

1798. In my view the current provision is deficient. It requires a recipient of a request by the State Mining Engineer, to furnish an engineering report to him “without delay”. Given that the failure to comply with s 45 of the MSI Act constitutes an offence, the existing provision is vague, uncertain and inappropriate.

1799. Section 45(1) could be redrafted along the following lines:

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“(1) If at any time the State mining engineer so requires by notice in writing, the principal employer or a manager of a mine must, procure and provide to the State mining engineer at the principal employer’s expense an independent study...
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The State mining engineer must state in any notice referred to in subsection (1) the reasons why the independent study is required and the time within which the independent study is to be provided to the State mining engineer.

The State mining engineer may extend the time within which an engineering report is to be provided to him, upon request by the principal employer or the manager of the mine…”

Recommendation 117

That s 45 of the MSI Act in relation to the provision of an engineering report to the State Mining Engineer be amended in the terms along the following lines:

“(1) If at any time the State mining engineer so requires by notice in writing, the principal employer or a manager of a mine must, procure and provide to the State mining engineer at the principal employer’s expense an independent study…

(2) The State mining engineer must state in any notice referred to in subsection (1) the reasons why the independent study is required and the time within which the independent study is to be provided to the State mining engineer.

(3) The State mining engineer may extend the time within which an engineering report is to be provided to him, upon request by the principal employer or the manager of the mine…”

Title

1800. The legislation is presently titled the “Mines Safety and Inspection Act 1994”. By its long title, it is described as;

“An Act to consolidate and amend the law relating to the safety of mines and mining operations and the inspection and regulation of mines, mining operations and plant and substances supplied to or used at mines; to promote and improve the safety and health of persons at mines and for connected purposes.”

1801. Additionally, as earlier set out in this Report, are the objects of the MSI Act in s 3. It is clear from an examination of the objects of the legislation that the principal focus of the law is on promoting and securing the safety and health of persons engaged in mining operations. The various other objects are directed generally toward that principal purpose. The objects of the legislation are silent in relation to inspection.

1802. In my view, it is beyond doubt that inspection, in terms of the role of the regulator and the requirement of regular inspection of mines by duty holders, is now well ingrained in the mining industry. Except for the establishment of the Mines Inspectorate and its powers in relation to inspection, the obligations
on duty holders under the legislation in relation to the inspection of mines are principally dealt with in the Regulations.\textsuperscript{722}

1803. A more contemporary approach to the title to the legislation, placing a primary focus as it should, on safety and health at mines, would be to re-title it as the “Mines Safety and Health Act 1994”. This would also be consistent with approaches taken in the other principal mining States.

**Recommendation 118**

*That the title of the MSI Act be amended such that it be known as the “Mines Safety and Health Act 1994”.*

**Remote Mining Operations**

1804. As I have dealt with in the introductory observations to this Report, the mining and minerals processing industry in Western Australia is undergoing a period of rapid technological change. Remotely operated autonomous mining systems are almost a reality. One major mining company has undertaken extensive work in relation to technology to facilitate the introduction of driverless ore trains across its rail network. Other remotely operated mining systems, some of which will be operated from control centres in Perth, are fast becoming a reality.

1805. Thus, in the not too distant future, one could see significant aspects of current mining operations, being controlled, by relatively large numbers of people, from places far from a mine site.

1806. As a consequence, and as has been brought to my attention by the State Mining Engineer, this begs the question as to whether, for example, those who may be based in a control room operation in Perth, controlling and monitoring remote automated mine technology at a mine site, for example, in the Pilbara, would be covered by the MSI Act.

1807. Such a circumstance raises issues which are far from academic. For example, in the event of an accident or incident occurring at a mine site involving remotely operated mine equipment, controlled and monitored from Perth, which legislation applies? Would it be the MSI Act, as being part of a “mining operation”, or would it be the OSH Act, being an operation conducted so remotely from the mine site that it could not be regarded as integral to mining operations?

1808. Furthermore, and as a consequence, would a Mines Inspector have jurisdiction to enter the control room premises in Perth, to interview persons, and inspect and take copies of relevant records? That is, would such a control room operation be regarded as a “mine” for the purposes of ss 4 and 21 of the MSI Act?

\textsuperscript{722} See Part 3 Division 3 Regulations
1809. Whilst my earlier Recommendation as to an amalgamation of the common provisions of the MSI Act with the OSH Act, and the latter’s extension to mines, if accepted, may lessen the impact of these issues, given the proximity of these developments, including trial operations, these issues need to be addressed.

1810. There are presently “mining operations”, conducted throughout the State, that may not necessarily be conducted on the relevant “mine site”. A refinery and a port spring to mind. Notwithstanding this, they are still regarded as a “mine” for the purposes of the MSI Act, by reason of the extended definition of “mining operations” in s 4. Furthermore, the legislation, in recognition of this, acknowledges that mining operations may be conducted in conjunction with one another at two or more places, in the definition of “mine”. The State Mining Engineer has the statutory capacity to declare those operations separate mines for the purposes of the MSI Act.

1811. There may be some nice legal arguments as to whether such a control room operation in Perth falls within the definition of “mine” and “mining operations” as presently provided in the legislation. However, this matter should be put beyond doubt. It seems to me that one way of dealing with this issue, is to extend the definition of “mining operations” in s 4 of the MSI Act, by the insertion of a new par (ha) along the following lines:

“the operation of any control room or any like facility used for the purposes of the control or monitoring of mining operations remote from the mine site but an integral part of the mining operation”

1812. A definition in such terms would make it clear that the MSI Act extends to these operations which, being integral to and part of a mining operation, it clearly should.

**Recommendation 119**

That the definition of “mining operations” in s 4 of the MSI Act be amended by the insertion of a new par (ha) along the following lines:

“the operation of any control room or like facility used for the purposes of the control or monitoring of mining operations remote from the mine site but an integral part of the mining operation”

**Drafting Issues**

1813. I have endeavoured to comment on drafting issues as they have arisen earlier in this Report. There are a number of further provisions of the MSI Act, where in my view the drafting could be improved. Some, in the main those arising from contemporaneous amendments to the OSH Act, have led to provisions which are somewhat lengthy, and difficult to navigate.
1814. A number of provisions of the statute fall into this category and they include the following:

- the reference to “serious harm” in s 4A(4) (s 3(3) OSH Act);
- the separate identification and definition of “gross negligence” in s 8B (s 18A OSH Act);
- the “layered” penalty structure following all duty provisions in ss 9A, 10A, 12A, 12C, 13A, and 15 (ss 19A, 20A, 21A, 22A, 23AA and 23B OSH Act); and
- the provisions dealing with certain workplace situations being treated as employment in ss 15A, 15B, and 15C and the corresponding provisions applicable to corporations in s 12B and 12C (ss 23D, 23E and 23F; ss 21B and 21C OSH Act).

1815. Some of these matters were the subject of submissions from the State Mining Engineer, who referred to their complexity and the need for refinement. I share these views. However, in every case to which I have made reference above, there is a corresponding provision of the OSH Act, (referred to in brackets) which is in identical terms and from which the amendments to the MSI Act originated. Given the requirement by my Terms of Reference to maintain alignment with the OSH Act, I am limited in terms of any recommended amendments to the MSI Act, from a drafting point of view, that would in turn create inconsistency with the identical provisions in the OSH Act.

1816. However, I make the following general observations.

**Definitions**

1817. In relation to the notions of “serious harm”, and “gross negligence” as referred to in ss 4A(4) and 8B respectively, I see no reason in principle why those provisions could not be incorporated in s 4 of the MSI Act proper as defined terms.

**Labour Arrangements**

1818. The MSI Act, as with the OSH Act, sets out in Division 3, provisions concerning workplace situations that are to be treated as employment. Some of those have been dealt with earlier in this Report. In essence, ss 15A, 15B, and 15C seek to capture various contract work arrangements other than employment, and impose the general duties provisions accordingly. They are drafted in considerable detail and are relatively lengthy and complex in their construction. A consequence of such an approach is the risk of omission through too much detail.
1819. An alternative approach, and one that has been adopted in Queensland and Victoria, is to recast the obligations on those in and around a workplace, by embracing the concept of the “conduct of an undertaking”. This broad approach imposes an obligation on an employer to not expose persons to risks to their safety and health, arising from the conduct of the undertaking, even though those persons are not the employer’s employees.

1820. These principles have found most recent expression in the new Workplace Health and Safety Act 2007 (NT) where, by extended definitions of “employer” and “worker”, the focus is on the conduct of a business and covers all persons who do work for another person, including contractors, employees of labour hire companies and others. This all embracing and broad approach, avoids the pitfalls of the specific and detailed provisions presently in the MSI Act and the OSH Act, whilst ensuring that the appropriate persons are covered by safety and health obligations.

**Offences**

1821. In relation to the gross negligence and other offence provisions, presently, the offence provisions are restated in separate sections following each statutory duty provision. This would seem to be unnecessary and simply adds to the prolixity of the drafting of the legislation.

1822. An alternative approach could be simply to adopt a single “aggravated offence” provision, such as in the new Workplace Health and Safety Act 2007 (NT) in relation to offences involving death or serious injury in circumstances where the offender foresaw the likelihood of that result. A similar approach has been adopted in the DG Act. The remaining offence penalties could be particularised in the same single section, as is the approach adopted in Queensland, under the general safety and health statute, which particularises the penalties for breaching obligations, including those causing death or serious injury.

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723 See s 82 Workplace Health and Safety Act 2007 (NT)
724 See s 17 DG Act
725 See s 24 Workplace Health and Safety Act 2007 (Qld)
BIBLIOGRAPHY


13. Department of Natural Resources and Mines, Queensland (2005), Reforms to the Queensland Mines Inspectorate


55. Tasmanian Coronor’s Court, (February 2009), Beaconsfield Gold Mine Inquest Report.


Schedules

Schedule 1: Written Submissions

Schedule 2: Interview and Meeting List

Schedule 3: Mine Sites visited for the Review
Schedule 1: Written Submissions

Government

Department of Consumer and Employment Protection, Resources Safety Division
Executive Director, Malcolm Russell

Department of Consumer and Employment Protection, Resources Safety Division
Director – Mines Safety Branch
State Mining Engineer, Martin Knee

Department of Health (Western Australia)
Principal Project Officer (Legislation), Simon Denniss

Minerals Industry Safety and Health Centre (MISHC), University of Queensland
Professor and Director, Jim Joy

Office of Energy and Minerals Initiative, University of Western Australia
Director, Tim Shanahan

The Australian National University
Professor Neil Gunningham

University of New South Wales
Associate Professor David Laurence

Western Australian School of Mines, Curtin University (WASM)
Head – Mining Engineering, Dr Emmanuel Chanda and Dr Andrew Jarosz

WorkSafe Western Australia
WorkSafe Western Australia Commissioner, Nina Lyhne

Industry

Chamber of Commerce and Industry Western Australia (CCI)
Director, OSH and Workers’ Compensation Policy, Anne Bellamy

The Chamber of Minerals and Energy of Western Australia (CME)
Director, Nicole Roocke

Unions

Construction Forestry Mining Energy Union (CFMEU), Mining and Energy Division, WA
District Branch
WA State Secretary, Gary Wood
Other Organisations

Australian Institute of Mining and Metallurgy (AusIMM)
Chief Executive, Michael Catchpole

Australian Mines and Metals Association (AMMA)
Employee Relations and Legal Consultant, Geoff Bull

Civil Contractors Federation of Western Australia (CCFWA)
Chief Executive Officer, Nigel Haywood

Common Interest Work Group – Itinerant Classified Plant
Equipment Compliance Consultant (Alcoa), David Griffin

Goldfields Electrical Industry Group (GEIG)
Committee Representative, Gary Scott

Intrepid Mines
Underground Manager, Craig Jones

Mining and Resource Contractors Safety Training Association (MARCSTA)
Director of Safety and Health, Patrick Gilroy

Recruitment and Consulting Services Association (RCSA)
Chief Executive Officer, Julie Mills

Individuals

Mr and Mrs Bernhardt

Mr Alan Burnham

Mr David White
### Schedule 2: Interview and Meeting List

<table>
<thead>
<tr>
<th>Name / Meeting</th>
<th>Organisation</th>
<th>Title</th>
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<tbody>
<tr>
<td>Mr Martin Knee</td>
<td>Resources Safety Division (RSD), Department of Consumer and Employment Protection (DOCEP)</td>
<td>State Mining Engineer</td>
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<td></td>
<td></td>
<td>Director, Mines Safety Branch</td>
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<tr>
<td>Mr Peter O’Loughlin</td>
<td>RSD Mines Safety Branch (Karratha Office), DOCEP</td>
<td>Senior Inspector of Mines (Karratha and Collie)</td>
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<tr>
<td>BHP Billiton Safety Coordinators</td>
<td>BHP Billiton</td>
<td>Safety Coordinators</td>
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<td>BHP Billiton Occupational Safety and Health (OSH)Representatives</td>
<td>BHP Billiton</td>
<td>OSH Representatives</td>
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<tr>
<td>Mr Tony Kennett</td>
<td>BHP Billiton, Area C Mine</td>
<td>Safety Advisor</td>
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<tr>
<td>Mr Ian Austin</td>
<td>Rio Tinto, West Angelas</td>
<td>Maintenance/Plant Manager and Acting Registered Manager</td>
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<tr>
<td>Mr Patrick Warrand</td>
<td>Wesfarmers Premier Coal</td>
<td>General Manager</td>
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<tr>
<td>Mr Gary Wood</td>
<td>Construction, Forestry, Mining and Energy Union (CFMEU)</td>
<td>WA State Secretary, Mining and Energy Division</td>
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<tr>
<td>Mr Bill Knight</td>
<td>Alcoa World Alumina Australia</td>
<td>Manager of Mines, WA Operations</td>
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<tr>
<td>Mr Mal Briggs</td>
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<td>Engineering &amp; Operations Manager,</td>
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<tr>
<td>Mr Jim Boucaut</td>
<td>RSD Mines Safety Branch (Kalgoorlie Office), DOCEP Senior Inspector of Mines (Kalgoorlie Region)</td>
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<tr>
<td>Mr Mike Andrews</td>
<td>Kingsrose Mining Limited, Sand Queen Gold Mine Director</td>
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<tr>
<td>Dr Emmanuel Chanda</td>
<td>Western Australian School of Mines (WASM) Head – Mining Engineering</td>
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<tr>
<td>Mr Martin Haugg</td>
<td>Black Swan Nickel Pty Ltd Managing Director</td>
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<tr>
<td>Mr Russell Cole</td>
<td>Kalgoorlie Consolidated Gold Mines (KCGM), Fimiston Plant General Manager</td>
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<tr>
<td>Mr Russell Cole (and other staff members)</td>
<td>KCGM Super Pit and Gidji Roaster Safety and Health Representatives</td>
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<tr>
<td>Mr David Robinson</td>
<td>Unions WA Secretary</td>
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<tr>
<td>Ms Melina Newnan</td>
<td>RSD, DOCEP Principal Legal Officer</td>
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<tr>
<td>Ms Nicole Roocke</td>
<td>Chamber of Minerals and Energy of Western Australia Director</td>
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<tr>
<td>Mr Tim Daly</td>
<td>Australian Workers’ Union Secretary, WA Branch</td>
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<tr>
<td>Mr Simon Denniss</td>
<td>Department of Health, WA Principal Project Officer (Legislation)</td>
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<tr>
<td>Ms Anne Bellamy</td>
<td>Chamber of Commerce and Industry, Western Australia Director, OSH and Workers’ Compensation Policy</td>
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<tr>
<td>Mr Geoffrey Bull</td>
<td>Australian Mines and Metal Association (AMMA) General Manager, Workplace Policy</td>
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<tr>
<td>Mr Christopher Platt</td>
<td>AMMA Employee Relations &amp; Legal Consultant</td>
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<tr>
<td>Mr Eugene Dardengo</td>
<td>TIWEST Pty Ltd Principal Advisor, Safety, Health, Environment &amp; Risk Management</td>
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<tr>
<td>The Hon. Clive Brown</td>
<td>National Mine Safety Framework (NMSF) Chair, NMSF Steering Group</td>
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<tr>
<td>Mr Tony Cooke</td>
<td>Commission for Occupational Safety and Health (COSH) Chair, CME SouthWest Regional Council Members</td>
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<tr>
<td>Mr Richard Flanagan</td>
<td>CME SouthWest Regional Council Meeting</td>
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<tr>
<td>Mr Brett Boneham</td>
<td>RSD Mines Safety Branch, DOCEP Chair, Committee Members</td>
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<tr>
<td>Mr Bob Legerini</td>
<td>Special Inspector of Mines (Machinery) Employees Inspector</td>
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<tr>
<td>Mr Stuart Wallace</td>
<td>HISmelit Operations Pty Ltd Safety Advisor</td>
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<tr>
<td>Mr Ian Misich</td>
<td>RSD Mines Safety Branch, DOCEP</td>
<td>Senior Geotechnical Engineer</td>
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<tr>
<td>Mr Jay Ranasooriya</td>
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<td>Senior Geotechnical Engineer</td>
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<tr>
<td>Mr Patrick Gillroy</td>
<td>Mining And Resource Contractors Safety Training Association (MARCSTA)</td>
<td>Director of Safety and Health</td>
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<tr>
<td>Mr John Clegg</td>
<td>National Offshore Petroleum Safety Authority (NOPSA)</td>
<td>CEO</td>
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<tr>
<td>Mr Simon Schubach</td>
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<td>General Manager, Regulatory</td>
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<tr>
<td>Mr John Dunlop</td>
<td>John Dunlop &amp; Associates</td>
<td>Principal and Managing Director</td>
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<tr>
<td>Dr Peter Lilly</td>
<td>Commonwealth Scientific and Industrial Research Organisation (CSIRO)</td>
<td>Director, Minerals Down Under National Research Flagship</td>
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<td>Professor Bruce Hebblewhite</td>
<td>University of New South Wales (UNSW)</td>
<td>Head of School and Research Director</td>
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<td></td>
<td>Mining Education Australia</td>
<td>Executive Director</td>
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<tr>
<td>Mr Mike Spreadborough</td>
<td>Rio Tinto</td>
<td>General Manager, Coastal Operations</td>
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<tr>
<td>Mr Malcolm Russell</td>
<td>RSD, DOCEP</td>
<td>Executive Director</td>
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<td>COSH Meeting</td>
<td>COSH</td>
<td>Chairman and Commission members</td>
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<tr>
<td>Ms Alice Gibson</td>
<td>NMSF</td>
<td>NMSF Secretariat</td>
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<tr>
<td>Mr Roger Billingham</td>
<td>Department of Mines and Energy, Queensland</td>
<td>Chief Inspector of Mines (Metalliferous)</td>
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<tr>
<td>Mr Gavin Taylor</td>
<td></td>
<td>Chief Inspector of Mines (Coal)</td>
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<td>Mr Rob Regan</td>
<td>Department of Primary Industries, NSW</td>
<td>Chief Inspector of Mines</td>
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<td>Chief Inspector of Mines (Coal)</td>
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<tr>
<td>Ms Nina Lyhne</td>
<td>WorkSafe Western Australia</td>
<td>WorkSafe Western Australia Commissioner</td>
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<td>Mr Donald Irvine</td>
<td>Rapallo – Consulting &amp; Contracting Engineers</td>
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<tr>
<td>CME Exemplar Safety Case Progress Review Meeting</td>
<td>CME Exemplar Project</td>
<td>BHP Billiton Iron Ore – Port Headland Jabiru Metals</td>
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<tr>
<td>Mr Terry Carlson</td>
<td>Mines Survey Board</td>
<td>Barminco – Project Chief Surveyor</td>
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<tr>
<td>Mr Andrew Haslam</td>
<td>Quarry Manager’s Board</td>
<td>Vital Metals</td>
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<td>Mr Russell Haigh</td>
<td>Mines Survey Board</td>
<td>Spectrum Survey &amp; Mapping</td>
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<td>Mr Dino Busuladzic</td>
<td>Winding Engine Driver’s Board</td>
<td>RSD, DOCEP – Senior Mechanical Inspector</td>
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<tr>
<td>Mr Mervyn Kennedy</td>
<td>Winding Engine Driver’s Board</td>
<td>Newcrest – Winding Engine Driver</td>
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<tr>
<td>Mr Peter O’Loughlin</td>
<td>Mine Manager’s/Underground Supervisor’s Board</td>
<td>RSD, DOCEP – Senior Inspector of Mines</td>
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<td>Mr Anil Atri</td>
<td>Mine Manager’s/Underground Supervisor’s Board</td>
<td>RSD, DOCEP – Regional Mining Engineer</td>
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<td>Mr Tony Snow</td>
<td>Mines Survey Board</td>
<td>Department of Spatial Sciences, Curtin University</td>
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<td></td>
<td></td>
<td>– Senior Lecturer</td>
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<tr>
<td>Mr Clive Hicks</td>
<td>Quarry Manager’s Board</td>
<td>Swan TAFE – Principal Lecturer</td>
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<tr>
<td>Mr Martin Spibey</td>
<td>Quarry Manager’s Board</td>
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<td>Mr Scott Donaldson</td>
<td>Mine Manager’s/Underground Supervisor’s Board</td>
<td>Jabiru Metals – Chief Operations Officer</td>
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<tr>
<td>Mr Ben Ingham</td>
<td>Mines Survey Board</td>
<td>Oxiana Golden Grove – Manager, Organisational Improvement</td>
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<tr>
<td>Mr Mark Morcombe</td>
<td>Mine Manager’s/Underground Supervisor’s Board</td>
<td>Agnew Gold Mine – General Manager</td>
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<tr>
<td>Professor Paul Dunn</td>
<td>Mine Manager’s/Underground Supervisor’s Board</td>
<td>WASM – Director</td>
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<tr>
<td>Mr Chris White</td>
<td>CME</td>
<td>Executive Officer – Occupational Health and Safety</td>
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</table>
Schedule 3: Mine Sites Visited for the Review

NORTHWEST
- Dampier Salt, Port Headland
- BHP Billiton, Nelson Point
- Rio Tinto, West Angelas
- BHP Billiton, Mt Whaleback

SOUTHWEST
- Wesfarmers Premier Coal
- Griffin Coal
  - Muja Open cut
- Iluka Resources
  - Cloverdale
  - North Capel Synthetic Rutile Plant
- Alcoa World Alumina
  - Huntly Bauxite Mine
  - Pinjarra Refinery

KALGOORLIE
- Kingsrose Mining, Sand Queen Gold Mine
- Norilsk Nickel, Black Swan Nickel Mine
- Kalgoorlie Consolidated Gold Mines (KCGM)
  - Fimiston Super Pit
  - Gidji Roaster

PERTH
- Rio Tinto, HISmelt (Operations) Pty Ltd, Kwinana
- Sandpit operations, Kwinana
- Stoneridge Quarries WA, Hope Valley
ANNEXURES

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Annexure 2: Summary of Recommendations: Hooker Review


Annexure 4: National Mine Safety Framework Published Strategies

Annexure 5: ILO Convention 176: Safety and Health in Mines

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Annexure 9: Competency Provisions: NSW and QLD

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Annexure 13: Certificates of Competency Exam Results

Annexure 14: Table of Prosecutions
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Terms of Reference

It is an express requirement of section 110 of the Mines Safety and Inspection Act 1994 (the MSI Act) that a review of the Act’s operation and effectiveness be carried out as soon as is practicable after 1 December 2009 and every fifth anniversary of that day.

In conducting the review having regard to –

(a) the attainment of the objects of this Act; and
(b) the effectiveness of the operations of the department, the Board of Examiners, and the Mines Survey Board; and
(c) the need for the continuation of the functions of the Boards referred to in paragraph (b); and
(d) such other matters as appear to be relevant to the operation and effectiveness of this Act.726

Section 110 of the MSI Act requires that the Review consider and have regard to the attainment of the objects of the Act itself.

3. Objects

(1) The objects of this Act are —

(a) to promote, and secure the safety and health of persons engaged in mining operations; and
(b) to assist employers and employees to identify and reduce hazards relating to mines, mining operations, work systems and plant at mines; and
(c) to protect employees against the risks associated with mines, mining operations, work systems at mines, and plant and hazardous substances at mines by eliminating those risks, or imposing effective controls in order to minimize them; and
(d) to foster and facilitate cooperation and consultation between employers and employees, and associations representing employers and employees, and to provide for the participation of those persons and associations in the formulation and implementation of safety and health standards and optimum working practices; and
(e) to provide procedures for employers and employees to contribute to the development and formulation of safety legislation for mines and mining operations and to consult regarding its administration.

The Review should also take account of -

- Areas in the construction of the legislation that could be improved, such as application to rail safety, mine sites during

construction and interaction with other occupational safety and health legislation;

- the goals and strategies of the National Mines Safety Framework (NMSF), and the draft model legislation;

- the recent Hicks Feasibility Study of Resources Safety in Western Australia that recommended the introduction of a safety case regime into the mining industry, and specifically what amendment to the MSI Act (if any) is required to allow the development of safety case regulations;

- the outstanding recommendations from the Laing Report in respect of the review of Parts 3 and 4 of the Act;

- the recent review of the Occupational Safety and Health act 1984 (OSH Act) by Richard Hooker to ensure alignment with the OSH Act is maintained.
Laing Review Recommendations

Recommendations 19 and 54 of the Review of the Mines Safety and Inspection Act 1994 Report of January 2003 conducted by former Western Australian Industrial Commissioner Robert Laing, Cabinet approved the recommendations that:

- a review be undertaken of the requirements of Part 4 of the Mines Safety and Inspection Act 1994, in particular of certification requirements; and
- that Part 3 of the Act be reviewed and as necessary amended to provide greater flexibility in the appointment of inspectors.

The Laing review also noted that the review of Part 4 should provide an opportunity to review the effectiveness of the operations of the Mines Survey Board.

Issues for review:

Part 4 - Management of Mines - Certificates of Competency:

- To assess and report on the effectiveness of the Board of Examiners in meeting its objectives as stated in Section 48 of the MSI Act.
- To review the constitution of the Board to determine whether it are appropriate and effective in light of the current culture and practices in the mining industry.
- To review the operation of the Board, including:
  - existing administrative procedures, and
  - policy formulation methodology and its efficiency and effectiveness in achieving the stated objectives, and in delivering acceptable client service.
- To identify and recommend changes that will improve efficiency, effectiveness and quality of client service.
- Establish whether the Board of Examiners remains the optimal mechanism for establishing and testing the qualifications and competence for industry certification.
- Establish whether it should be continued.
- If so, whether its structure or functions should be altered.

The following aspects should be reviewed and assessed to ascertain whether they continue to be effective and efficient in achieving the stated objectives.

- Consider the relative benefits of harmonising the legislative requirements with other States and Territories of Australia.
- Consider whether the constitution of the Board is still appropriate, in terms of the knowledge, experience and objectivity of the members when judging the merits of applications.
- Consider whether the amounts and types of practical experience required for eligibility to attain various Certificates of
Competency are still appropriate given the current mining practices.

- Consider whether the educational qualifications required for attainment of various Certificates of Competency are still appropriate given current mining practices.
- Consider the potential for, and appropriateness of, removing the legislative framework governing assessment of applications and granting of certificates entirely.
- Consider the merits of extending the statutory certification concept to other occupations within the mining industry (i.e.: occupations in mineral processing).
- Consider the feasibility of outplacing the function, in part or in full, to an external organisation/s. Summarise the arguments for and against this action.
- Examine and report on the current administrative arrangements, and the efficiency of these arrangements in providing client services.
- Review, assess and report on the current methods of conducting examinations and grading and re-grading examination papers to determine if they are appropriate and equitable.

Mines Survey Board

Review the effectiveness of the operations of the Mines Survey Board to -

- Establish whether the Board continues to be necessary; and/or
- Whether there is any preferable alternative;
- Review or analyse Board minutes;
- Review the activity of the Mines Survey Board;
- Whether all the functions undertaken are necessary under a self-regulatory general duties environment;
- Whether there are better alternatives.

Part 3 – Administration of Act – Inspectors of mines

- Review and as necessary consider amendments to provide greater flexibility in the appointment of inspectors.
- Review and consider the need for the mines inspectorate to be comprised with a broad mix of professional backgrounds and skills.
- Investigate is there is a need for greater skill diversification within the inspectorate.
- Review the need to maintain a strong presence of experienced mining engineers in the inspectorate to deal with issues specific to mining practice.
- Review the provisions relating to the appointment of different categories of inspectors, including district, special and employee inspectors.
• The review is to ensure that the critical, focal and independent role of the position charged with the administration of mining safety (at present the State Mining Engineer) is maintained.
• The review will need to ensure the benefits of the independent role of the position are not lost to enhance administrative convenience.
Annexure 2

Summary of Recommendations: Hooker Report

R1. The *Occupational Safety and Health Act 1984* (WA) be amended to remove the reference to the *Mining Act 1978* in s.4(2).

R2. The Commission for Occupational Safety and Health undertake a quarterly review of the progress being made in Western Australia in meeting the Australian Safety Compensation Council-endorsed national priorities and areas of action contained in the national strategy, measured and assessed in the context of the Commission’s Strategic Plan 2006-2010.

R3. The *Occupational Safety and Health Act 1984* (WA) be amended so that the definitions in ss.41A and 47A define “employers” and “employees” to include people who, under ss.23D, 23E or 23F are treated as an employer, or employee respectively, for the purpose set out in those sections.

R4. The *Occupational Safety and Health Act 1984* (WA) be amended to insert in s.23F a provision similar, or analogous in kind, to s.23D(5) and s.23E(5).

R5. Section 51J(1) of the *Occupational Safety and Health Act 1984* (WA) be amended to insert a reference to s.51A, thereby enabling the Tribunal to undertake conciliation on the further review of notices.

R6. The *Occupational Safety and Health Act 1984* (WA) be amended so as to confer jurisdiction on the Tribunal to extend the time for the making of a reference for the further review of a notice under s.51A(1). Such a discretion to extend time may only be granted where the Tribunal is satisfied that it would be manifestly unjust not to allow an extension of time.

R7. The entitlement of “any party” to refer a dispute under s.28 of the *Occupational Safety and Health Act 1984* (WA) (being confined to parties directly affected by such a dispute) be monitored in its operation by the Commission for Occupational Safety and Health and by WorkSafe and be reconsidered in the next review of the Act’s operations.

R8. The Tribunal be empowered to inquire into and deal with a matter, issue or dispute concerning occupational safety and health upon being satisfied that reasonable and diligent efforts have been made by the party referring the matter, issue or dispute to resolve the issue at the workplace, but that it remains unresolved. Where the matter issue or dispute gives rise to a risk of imminent and serious injury or harm, the Tribunal must be further satisfied that an inspector has been notified and has complied with s.25 of the Act, and that the matter, issue or dispute remains unresolved.

R9. In dealing with such a matter, issue or dispute, the Tribunal should be empowered to;

- conciliate and make recommendations analogously to the powers...
contained in s.44 of the *Industrial Relations Act 1979* (WA)

R10. Section 5(e) of the *Occupational Safety and Health Act 1984* (WA) be amended to express as a statutory object the encouragement and promotion of consultation and cooperation between participants at the workplace, with the remaining components of the present section 5(e) being contained in a separate statutory object.

R11. There be inserted a discrete statutory object in section 5 to require the resolution of occupational safety and health issues, so far as reasonably practicable, at the workplace.

R12. A provision be inserted to the effect that nothing in the statutory objects concerning consultation and resolution of issues at the workplace is intended to provide any basis for civil liability in the event that those objects are unsatisfied.

R13. Regulation 2.6 be amended so as to provide for a default “relevant procedure” for the purposes of s.24(2) of the Act containing a meaningful and appropriate level of prescription, with guidance being obtained from examples of dispute resolution procedures commonly found in industrial instruments.

R14. A provision be inserted expanding on the nature of consultation for the purposes of s.19(1)(c) as applying whenever an employer, or other like duty holder, is involved in any of the following aspects relating to the performance of work;

- any of the steps contained in regulation 3.1;
- either of the matters referred to in s.35(1)(c);
- undertaking any monitoring of safety conditions or health conditions at the workplace; and
- such other matters as may be prescribed.

R15. The Commission for Occupational Safety and Health and WorkSafe, both independently and in collaboration with each other, develop measures for the publication of obligations on workplace participants concerning consultation, workplace resolution of issues, and risk assessment and seek to educate the workforce as to those three distinct matters as effectively as possible.

R16. Part VI Division 1 of the *Occupational Safety and Health Act 1984* (WA) be amended to provide that;

- The powers of the Commissioner on internal review and the Tribunal on further review extend to the making of any decision open to previous decision makers, on the entirety of material
before the reviewer.

- The Commissioner and the Tribunal each be empowered to order an extension of time for compliance with a notice on the basis of such inquiry (if any at all) into the circumstances relating to the notice as they see fit.

- The Commissioner and the Tribunal be empowered to issue orders with the consent of the parties to a review, whether before, during, or after any inquiry has been undertaken.

R17. WorkSafe maintain and develop its work in consulting with affected or concerned industries about the nature and operation of the enforcement powers in Part VI Division 1 of the Act.

R18. Section 3(2) of the Occupational Safety and Health Act 1984 (WA) be amended to extend the operation of that deeming provision so as to encompass service on other duty holders where a document or thing may require service.

R19. The Occupational Safety and Health Act 1984 (WA) be amended to empower the Occupational Safety and Health Tribunal to inquire into and deal with allegations of discriminatory and detrimental treatment of employees and potential employees for reasons connected with the operation of the Act and its statutory purposes. The power of the Tribunal ought include conciliation and the granting of remedies to reinstate, re-employ, employ, engage and to pay compensation capped consistently with analogous limits under the Industrial Relations Act 1979 (WA).

R20. The Commission for Occupational Safety and Health review its own composition in the course the next 12 months, consistently with its Strategic Plan 2006-2010 and the parameters identified in this Report, with the objective of making a recommendation to the Minister on the appropriateness of any amendments to s.6(2) of the Occupational Safety and Health Act 1984 (WA) accordingly.

R21. Section 57(2) be repealed.

R22. Section 57(8) be either repealed or, at the very least substantially amended so as to restrict its operation to that where a court is satisfied that a code of practice is relevant, the code of practice is admissible in evidence in that proceeding.

R23. The Occupational Safety and Health Commission review, as a priority, its structures for;

- Assessing the need for, and content of, the present Regulations and any new Regulations (before undertaking a review of the Regulations themselves); and

- Assessing the need for, and in due course drafting of, codes of practice.
R24. Funding and other resourcing for the ThinkSafe Small Business Assistance Program be reviewed to meet the reasonable requirements of WorkSafe to assist in minimising the significant regulatory burden on small to medium-sized businesses in understanding and complying with their OSH obligations.

R25. The *Occupational Safety and Health Act* 1984 (WA) be amended to;

- Amend s.42A to enable the appointment of any person employed or engaged in the Public Sector of Western Australia to be a restricted inspector, rather than in the Public Service under Part 3 of the *Public Sector Management Act* 1994.

- Amend the power in s.43(1)(1) to expressly enable the tape recording of answers given under the power therein contained.

- Expressly provide that a WorkSafe inspector is a “law enforcement officer” for the purposes of the *Surveillance Devices Act* 1988 (WA).

- Amend s.45(4) so as to require the notification “as soon as practical” rather than “forthwith” of any relevant employer (as defined) and not, additionally, any relevant safety and health representative.

- Insert a provision in Part V to expressly provide that any of the powers of inspectors conferred by that Part is capable of being exercised in a place outside Western Australia for the purposes of the OSH Act.
Annexure 3

NMSF Implementation Plan

INTRODUCTION

Safety in mining operations and the health of mine workers is of the utmost priority for industry and for governments.

Nationwide consistency in approach to safety and health in mining offers many benefits, not least enhanced confidence within the industry in addressing statutory requirements and cost-effectiveness in implementing them.

It is Governments’ role to encourage this consistency across the full spectrum of issues impacting on safety and health, from the legislative framework, competency support, compliance and enforcement issues through to data collection and research. This was the basis for the Ministerial Council on Mineral and Petroleum Resources’ agreement in March 2002 to a National Mine Safety Framework — Realising a Safe and Healthy Mining Industry: the Contribution of Government.

It is the basis, also, of the Ministerial Council’s endorsement of this Implementation Plan to give the Framework full effect. The Plan is based on extensive analysis by Chief Inspectors of Mines, drawing also on the information provided by parties interested in mining safety and health in consultations during the Plan’s development.

UNDERLYING PRINCIPLES

The primary responsibility for mine safety and health rests with the industry parties.

Sound workplace structures and operational arrangements for mine safety are essential, so that employers and employees at all levels within the industry are empowered and encouraged to identify mine safety and health issues and options for dealing with them.

Governments have a responsibility to set the standards of safety management they expect to be observed, and a responsibility on behalf of both mine site workers and the broader community to require performance to these standards.

Governments also have a crucial role in complementing and supporting industry initiatives to ensure the delivery of best practice in safety and health.

The National Mine Safety Framework identified seven priority goals, and proposed broad strategies to address them. The Implementation Plan specifies the steps to be taken to give practical effect to the Framework, and the timeframes for achieving them.

The primary goal of the Implementation Plan is to establish nationwide consistency of approach. At the same time, it is designed to allow for flexibility within individual jurisdictions in dealing with specific mine safety and health issues and solutions.
The Implementation Plan is intended to provide not only the opportunity but also encouragement for individual enterprises to go beyond basic measures to find better, more innovative and effective mine safety practices.

Mine safety and health, while critical in its own right, needs to be considered in the context of broader national efforts to improve occupational health and safety. Initiatives undertaken as part of this Plan will be implemented in close collaboration with these broader efforts under the aegis of the National OHS Strategy 2002-2012.

**KEY TASKS AND RESPONSIBILITIES**

This Implementation Plan identifies the key tasks to be undertaken in pursuit of each of the seven strategies, and the timeframes within which they are to be performed.

Reflecting the legal context within which mine safety and health is managed, it will be the ultimate responsibility of the Governments in individual States and Territories to finally implement the agreed outcomes. The Ministerial Council on Mineral and Petroleum Resources will consider and agree on the matters of principle to which individual Governments will give effect. The Council will also maintain an overview of achievements in implementation of the framework and, as required, address issues of common concern that may arise in the course of its implementation.

Overall responsibility for giving effect to this Implementation Plan rests with the Standing Committee of Officials (SCO), which reports to the Council. Individual SCO members from the jurisdictions identified in each strategy will support co-ordination of nationwide action on that strategy. The Chief Inspectors of Mines will take day-to-day responsibility for activities under this Implementation Plan.

**REPORTING REQUIREMENTS**

SCO shall report to the Council twice yearly on progress towards implementing each of the strategies in this Implementation Plan. The report shall include, as a minimum:

- a summary of actions taken in pursuit of each strategy;
- consultations undertaken with stakeholders by the Chief Inspectors of Mines in undertaking their tasks;
- major issues encountered that may influence the extent of or timetable for implementation, and that may require senior officials’ or Ministerial consideration; and
- a forward work program, and the resource requirements to undertake the work program.

Each second report to the SCO, being an end-of-year report, will provide an expenditure statement, which reconciles against the budget or resources agreed/allocated to implement the Framework.

Matters that require special consideration by the Council will be brought forward separately from the six-monthly reports and in accordance with established Council practice.
**GOAL**

- To provide, within five years, a nationally consistent legislative framework that protects the safety and health of mine employees and persons who may be affected by mining operations. The legislative framework shall incorporate the principles adopted in the International Labour Organisation’s *Convention 176: Safety and Health in Mines.* (ILO C176).

**KEY TASKS AND TIMEFRAMES**

A consistent legislative framework is essential for an efficient, effective and equitable regulatory system nationwide. Legislation in individual jurisdictions need not be identical, but should embody the key principles and outcomes agreed by the Ministerial Council on Mineral and Petroleum Resources (the Council). As a first step in implementing this strategy, all legislation will be reviewed against the provisions of ILO C176 to ensure that the key principles and intent of the Convention are addressed.

The Chief Inspectors of Mines will:

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<th>Task</th>
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<tr>
<td>develop, in consultation with key industry stakeholders, a template of core mine safety performance requirements, with objectives-based outcomes consistent with the principles of ILO C176.</td>
<td>By end June 2005</td>
</tr>
<tr>
<td>initiate in each jurisdiction a review of existing legislation to determine extent to which existing provisions fit the template and identify additional provisions currently incorporated in legislation.</td>
<td>Review to be completed by June 2006</td>
</tr>
<tr>
<td>develop for consideration by the Council an agreed legislative structure requiring appropriate standards of performance and safety and health outcomes, but which may also provide specific actions that comply with performance outcome requirements;</td>
<td>For consideration by Council at 2006 meeting</td>
</tr>
<tr>
<td>adopt the legislation protocol, once endorsed by the Council, as the basis for drafting Mining Occupational Safety and Health legislation in individual jurisdictions.</td>
<td>To be completed within five years of Council agreement.</td>
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**MANAGEMENT**

Implementation of this strategy will be managed on behalf of the Ministerial Council by the Standing Committee of Officials representative from Queensland.

All measures undertaken in support of this initiative shall, if required, be subjected to Regulatory Impact Assessments or associated requirements in accordance with the Principles and Guidelines for National Standard Setting and Regulatory Action endorsed by the Council of Australian Governments in November 1997.
GOAL

- To encourage and promote continuous skills development and competency nationwide, in support of the progressive move to industry-based assessments of competency.

KEY TASKS AND TIMEFRAMES

The transition from current practice to a competency-based system will be a complex process. It will require close consultation with industry, educators, registered training organisations and training advisory bodies, within individual jurisdictions and nationally. The maintenance of nationwide consistency, especially in the light of mutual recognition principles, and quality control over the development and administration of competency training modules, particularly in the transition phase, will be particularly important, and will require a detailed strategic approach in which all key interested parties are involved.

The Chief Inspectors of Mines will:

**| TASK | TIMELINE |
---|---|---|
| • extend existing consultation arrangements to establish a working party of representatives of jurisdictions, key industry stakeholders and relevant education bodies, as required | By end 2004 |
| • through the working party, address issues arising from the move to industry-based assessments of competency, and develop a national approach to resolution; | By end 2005 |
| • ensure ongoing consultation on these issues and the strategic directions to be adopted in resolving them; | Ongoing |
| • develop a structured national approach (audit/verification tool) for use when requiring enterprises to demonstrate they have systems in place to ensure the ongoing competence of employees. | By end 2006 |

MANAGEMENT

Implementation of this strategy will be managed on behalf of the Ministerial Council by the Standing Committee of Officials representative from New South Wales. A working party (Queensland/New South Wales) has been established to address transition issues and, augmented by other jurisdictions as appropriate, will take overall responsibility for carrying out these tasks.
GOAL

- To develop a national approach to providing advisory information for duty holders to assist them in achieving compliance, recognising the varying needs of individual operations.

KEY TASKS AND TIMEFRAMES

The principle of duty of care underpins the mining industry’s operation and the legislation that deals with it. Information is needed to support the industry in ensuring compliance. There is a substantial array of guidance material at various levels currently available. Efficient and effective mining industry safety and health systems demand that this information be apposite, properly codified, national in character but well suited to local needs, up-to-date and well maintained, properly distributed and easily accessed.

The Chief Inspectors of Mines will:

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<tr>
<td>establish and maintain the national Minerals Industry Safety Handbook;</td>
<td>Ongoing, building on current handbook</td>
</tr>
<tr>
<td>establish a working party to coordinate the development of a standardised range of guidance information, and means of enhancing timely and cost-effective distribution of and access to information;</td>
<td>Working party to be in operation by June 2005</td>
</tr>
<tr>
<td>examine, and advise the Council on, the development or adoption of a range of additional tools, ranging from site self-assessment and self-auditing/evaluation tools to computer-based expert systems.</td>
<td>Ongoing responsibility</td>
</tr>
</tbody>
</table>

MANAGEMENT

Implementation of this strategy will be managed on behalf of the Ministerial Council by the Standing Committee of Officials representative from New South Wales. It will require extensive input from key stakeholders able to advise on industry needs and priorities and accessibility of materials.

Where appropriate, measures undertaken in support of this initiative shall be subjected to Regulatory Impact Assessments or associated requirements in accordance with the Principles and Guidelines for National Standard Setting and Regulatory Action endorsed by the Council of Australian Governments in November 1997.
GOAL

- To develop a nationally consistent and transparent approach to enforcement that provides clear and consistent standards for duty holders, and supports equitable outcomes from governments’ contribution to safety and health in the mining industry.

KEY TASKS AND TIMEFRAMES

There is already broad consistency of approach among all jurisdictions on a graduated approach to enforcement of mining safety and associated legislation, commonly referred to as the Enforcement Pyramid. There is considerable scope, however, for improving transparency, consistency in definition and codifying points of gradation. A draft protocol to achieve these goals has been prepared. Detailed analysis of and consultation on specific elements of the protocol will ensure that the Council is in a position to adopt a nationally recognised and understood approach to enforcement.

The Chief Inspectors of Mines will:

- consult with key stakeholders in each jurisdiction on detailed elements of the draft protocol, including on the merits of additional/alternative steps in the enforcement process; By end March 2005
- in light of those consultation outcomes, present a final draft protocol to the Council for formal adoption of the protocol in all jurisdictions; and For consideration by Council at its 2005 meeting.
- develop a basis for monitoring enforcement activity.

MANAGEMENT

Implementation of this strategy will be managed on behalf of the Ministerial Council by the Standing Committee of Officials representative from Western Australia.

These measures will require Regulatory Impact Statements to be prepared in accordance with the Principles and Guidelines for National Standard Setting and Regulatory Action endorsed by the Council of Australian Governments in November 1997.

Data and analysis issues will be addressed within the broader mine safety and health data strategy.
GOAL

- To develop a national mining industry data set, in consultation with the National Occupational Health and Safety Commission (NOHSC), which allows analysis across jurisdictions.

KEY TASKS AND TIMEFRAMES

Substantial data collections already exist both within the mining sector itself and as part of the broader NOHSC National Data Set. However, they are not complete, nor are they necessarily consistent across all jurisdictions, which limits their utility as an analytical tool in monitoring performance and trends, and targeting improvements in mine safety and health. Considerable effort is required to ensure completeness and enhance consistency nationwide and, in the process, improve the efficiency and cost-effectiveness of data collection processes. These improvements will be developed in consultation with the industry and in collaboration with NOHSC, the Australian Bureau of Statistics and other relevant bodies.

The Chief Inspectors of Mines will:

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<tr>
<td>• establish a working party to develop a national mining industry data set;</td>
<td>By end 2004</td>
</tr>
<tr>
<td>• working party to develop an agreed national mining industry data set, in consultation with all interested parties</td>
<td>By end 2005</td>
</tr>
<tr>
<td>• develop a consistent system for data collection, storage, transmission, retrieval and access that can be implemented across jurisdictions;</td>
<td>September 2006</td>
</tr>
<tr>
<td>• conduct periodic reviews of data needs, priorities and the efficiency/effectiveness of collection and analysis systems; and</td>
<td>Three-yearly cycle of reviews, from start of new system</td>
</tr>
<tr>
<td>• seek to ensure the incorporation of such information as will allow the development of lead indicators to help prioritise and target industry and government activities.</td>
<td>Ongoing</td>
</tr>
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MANAGEMENT

Implementation of this strategy will be managed on behalf of the Ministerial Council by the Standing Committee of Officials representative from Victoria.

To the extent required, these measures will be subjected to Regulatory Impact assessments in accordance with the Principles and Guidelines for National Standard Setting and Regulatory Action endorsed by the Council of Australian Governments in November 1997. Other review processes, such as the Australian Bureau of Statistics’ Data Clearinghouse are also to be consulted.
GOAL

• To establish an effective national approach to consultation with stakeholders and between jurisdictions on safety and health in the mining industry.

KEY TASKS AND TIMEFRAMES

Effective consultation at the workplace and at industry/employee/government levels are primary indicators of good practice in occupational safety and health. Jurisdictions have in place consultative frameworks for consultation; in some cases, they are embodied in legislation. The quality and utility of consultation will be enhanced by encouraging the development of consistent practice nationwide and the specific measures in this strategy are designed to that end.

Consideration also needs to be given to the merits of establishing a consultative framework to deal specifically with issues on a national level.

The Chief Inspectors of Mines will:

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<tr>
<td>• develop a model and guidelines to provide a consistent nationwide basis for consultation on occupational safety and health in the mining industry at both the workplace and state levels;</td>
<td>Draft guidelines developed by end 2004</td>
</tr>
<tr>
<td>• seek the views of interested parties on the model before presentation to the Council for endorsement and adoption in jurisdictions; and</td>
<td>By end 2005, for consideration by Council.</td>
</tr>
<tr>
<td>• canvass the views of stakeholders on the need for and functions of a national consultative body, and report to the Council on options for action.</td>
<td>For consideration by Council at 2006 meeting.</td>
</tr>
</tbody>
</table>

MANAGEMENT

Implementation of this strategy will be managed on behalf of the Ministerial Council by the Standing Committee of Officials representative from South Australia.
GOAL

- To establish appropriate mechanisms for governments to foster effective research into occupational safety and health in the mining industry.

KEY TASKS AND TIMEFRAMES

Governments have an important part to play in ensuring that mine safety and health benefit from research. This role does not necessarily encompass direct sponsorship of specific research and development projects. It is a matter for companies and organisations to determine how best to avail themselves of broader Government support mechanisms.

Governments’ role is to encourage basic or strategic research into occupational safety and health, and assist in identifying ongoing research priorities. The effective dissemination of research outcomes — including, if appropriate, its uptake in compliance support and associated advisory material — is also an important role of government.

The Chief Inspectors of Mines will:

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<tr>
<td>• convene forum of interested/expert parties within and outside of the mining industry to consider models/options for more strategic approach to mining OSH research.</td>
<td>By end June 2005</td>
</tr>
<tr>
<td>• identify, in consultation with stakeholders, including the research community, a national model for OSH research in mining, including processes for identification of priorities;</td>
<td>For report to Council by end 2005</td>
</tr>
<tr>
<td>• with input from jurisdictions identify potential research needs; and</td>
<td>Ongoing</td>
</tr>
<tr>
<td>• work with research organisations and the industry to ensure the effective dissemination of research outcomes.</td>
<td>Ongoing</td>
</tr>
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</table>

MANAGEMENT

Implementation of this strategy will be managed on behalf of the Ministerial Council by the Standing Committee of Officials representative from Queensland.
Annexure 4

NMSF Published Strategies

Strategy 1 – Nationally Consistent Legislative Framework

The National Mine Safety Framework (NMSF) identified that a nationally consistent legislative framework is essential for an efficient, effective and equitable regulatory system in each jurisdiction and across jurisdictions. The legislative framework shall include objectives that seek to foster continuous improvement. This does not mean that legislation should be identical, but rather that each jurisdiction should follow these overarching principles and key features. As a minimum, the legislation shall incorporate the intentions of the International Labour Organisation Convention 176: Safety and Health in Mines (ILO C176), and be aimed at making worksites in the Australian mining industry free from death, injury and disease.

All parties, government and private, agree that mine safety and health legislation shall provide ways to regulate the safety and health practices at mines, ranging from those employing the most modem and sophisticated safety management practices and technology, to small mining operations operated by just a few people using basic equipment and methods.

This clause summarises the central intent of the document, consistent with Strategy I of the National Mine Safety Framework (NMSF), which aims to deliver a nationally consistent legislative framework.

Despite the constant challenge of achieving a mining industry free from death, injury and disease in practice, it was agreed that this is the goal towards which the industry as a whole should strive.

This clause is drafted to reflect that all mines, no matter what their scope or how complex, should be covered by these principles and key features.
Overarching principles of a nationally consistent legislative framework shall include:

a. legislative and regulatory framework that is clear and enforceable and requires all involved with mining operations to discharge their responsibility for health and safety;

b. clear and specific legislative obligations on those involved in the mining industry including owners, employers, employees, contractors, and includes suppliers of goods or services, manufacturers, designers and importers, with the level of obligation being commensurate with the degree of responsibility or control held.

c. effective risk-based safety and health management systems, developed and implemented, that apply to all types of risk of personal harm, addressing all reasonably foreseeable hazards not just major accident events;

d. a preventative approach supported by the identification and promotion of leading practice, sharing information and learning from experience.

e. genuine consultative arrangements between management and mine employees which actively seek the representation of all in the development of safety and health policies and practices;

f. the ability of employees to collectively select safety and health representatives;

g. all persons covered by the legislation be empowered to identify and report hazards without discrimination or retaliation;

h. assessment, monitoring, auditing/validation and review of the safety and health management systems including emergency response procedures and comprehensive reporting against appropriate performance criteria;

i. training, competence and relevant accreditation, of all employees

The intention of this clause is to ensure the legislation applies broadly to those directly involved in or supply to the mining industry.

It should be noted that ‘Strategy 6-effective consultation mechanisms’ of the NMSF details a proposed national approach to consultation in the workplace. This strategy is also available for public comment.
appropriate to their duties;

j. regulatory powers for investigation and reporting;

k. application of graduated enforcement measures; and

l. State/Territory regulatory authorities demonstrate independence, transparency and openness and have adequate competent and experienced skilled personnel;

m. provision for a process for resolving issues.
Objectives

3. The legislation shall clearly state its objectives and the ways in which these are to be achieved. These objectives shall include:
   - securing the health and safety of all persons at the mine site;
   - continuous improvement and effective implementation of safety and health systems;
   - focus on prevention;
   - identification and control of all hazards;
   - effective consultation.

Glossary

4. A comprehensive glossary covering all major terms used in the legislation shall be included.

Control and management of risk

5. The legislation shall encompass the principle that the management of safety and health shall be undertaken using risk management practices.

6. All mining operations shall be conducted such that risks are managed using risk management practices so that residual risks are as low as reasonably practicable. The risk management process shall include hazard identification, risk analysis, risk reduction and risk monitoring. The hierarchy of hazard controls in the order of elimination, substitution, separation, engineering controls, administrative controls and personal protective equipment should be used.
7. Particular attention shall be given to core risks of the industry, ensuring that high consequence/low probability events are addressed.

Obligations

8. The obligations of all persons covered by the legislation shall be clear and specific and, where practicable, indicate how those obligations shall be fulfilled.

The responsibility of safety and health at a mine site does not rest with one person; everyone has a part to play. This ‘principle-based standard’ allows a person with obligations the flexibility to determine how they intend to meet their obligations within their specific circumstances. However, sometimes it is practicable that the legislation clearly identify how people should fulfil their obligations.

9. Obligations shall extend to any person whose actions could affect the safety and health of those involved in the mining industry including owners, employers, employees, contractors, and includes suppliers of goods or services, manufacturers, designers and importers.

This clause explicitly acknowledges that all people whose actions could affect the safety and health of persons at mine sites have obligations. Specifically, onsite and offsite personnel may include, but is not limited to, managers and board members that have control of or influence over safety at a mine site, but may not physically work at that mine site.

10. The level of obligations imposed shall be commensurate with the degree of control, accountability and responsibility held.

This clause explicitly acknowledges that while all involved have health and safety responsibilities, some positions/people have a greater degree of control over the health and safety at a mine site, and their obligations should therefore be appropriate to that degree of control, accountability and responsibility. I.e. responsibilities of some positions/people will be more onerous than others.

Management

11. The legislation shall specify such key positions which are considered necessary for the safe operation of the mine within the mine management and supervision structure and the functions, responsibilities and required competencies of persons in those positions.
12. Whenever two or more employers undertake activities at the same mine, the employer in charge of the mine shall be primarily responsible for the safety and health of all persons at the mine site and coordinate the measures concerning the safety of the operations. This shall not relieve individual employers from responsibilities for the implementation of all measures concerning the safety and health of their workers.

13. Where appropriate, specific obligations may need to be placed on key personnel supervising underground mining operations.

14. The obligations imposed in this section shall be commensurate with the degree of control accountability and responsibility held.

15. Arrangements may be required for the appointment of replacement personnel in the absence from duty of certain key personnel.
16. Legislation shall require the development and implementation of risk-based safety and health management systems that:

- form a documented and auditable system constituting part of the overall management system of the mine;
- define the safety and health policy for the mine and cover such aspects as organisational structure and resources, responsibilities, policy and procedures for the operation of the mine, measuring, monitoring auditing and reviewing of processes and work practices;
- define methods for developing, implementing, maintaining and reviewing safety and health practices and policy;
- acknowledge the size and complexity of a safety system will depend on the size and complexity of the mine site, and its attendant risks.

17. Legislation shall provide for consultation processes, which acknowledge the right of all employees to be involved in the development of the risk-based safety and health management system, policies and practices. The consultation process shall include mine-site consultation which can involve safety and health committees and mine employees’ safety and health representatives, and shall provide a mechanism for resolution of safety and health disagreements.
18. Where appropriate, tripartite industry advisory safety and health councils shall be established to undertake jurisdiction-wide consultation.

Consultation and communication, sharing ideas and solving issues are important, not just at the mine site level, but also at a jurisdictional level. Workforce, industry and government participation should be catered for, where these stakeholders want to be involved.

Employee representation

19. Provision shall be made for employees to be informed about hazards in their workplace and to collectively select safety and health representatives to represent them in such matters as:
   • workers’ inspections and investigations conducted by the employer and the competent authority; and
   • the formulation of safety and health procedures and policies.

20. Employees have the right to remove themselves from any location at the mine when circumstances arise which appear, with reasonable justification, to pose a serious danger to their safety or health.

This is explicitly acknowledging what is already a common-law right.

21. If a site safety and health representative reasonably believes there is an immediate danger to the safety and health of mine workers from mining operations, the representative shall have the right to direct the persons to remove themselves from that immediate danger. (*please note that this clause is not unanimously agreed.)

This acknowledges that work pressures can sometimes cloud individuals’ judgement of a situation, and it requires someone, in this case the safety and health representative, to give the direction for people to remove themselves from an unsafe situation. Appropriate checks and balances would be detailed in legislation. It should be noted that ‘safety and health representatives’ referred to in this clause will have a different nomenclature in different jurisdictions.

22. The legislation shall recognise that employees, and their safety and health
representatives, have an important role to play in the review of safety and health procedures, the detection and assessment of workplace hazards that may impact on safety and health, the formulation of control measures and the investigation of safety and health concerns raised by employees. They should be empowered to do this without fear of discrimination or retaliation.

Clause 17 sets out the requirement for employee representation in the development of the health and safety management system. This clause requires that employees are to be involved in the on-going maintenance/review of that system, as set out above.

Mines inspectors

23. Legislation shall provide for the establishment of a professional and technically competent mines inspectorate with appropriate experience, skills and qualifications.

It should be noted that ‘Strategy 2—competency support’ and ‘Strategy 3—compliance support’ of the NMSF will address aspects of the appropriate experience, skills and qualifications required.

24. The inspectorate shall be provided with adequate powers and resources to undertake an independent evaluation of the operator’s safety and health management system. This shall include: enforcing the legislation; monitoring safety and health performance; inspecting and auditing mines; providing coaching, mentoring, education and sharing of information including during emergencies; directing remedial actions to be undertaken in the event of unsafe practices; and investigating complaints, fatalities, serious accidents, dangerous occurrences and any other matter relating to the safety and health of mine workers.

Accidents, Incidents and dangerous occurrences

25. Legislation shall include provisions for the investigation of accidents, incidents and dangerous occurrences and define the means by which these events are investigated and reported upon.

Key findings and preventative measures arising from investigations shall be made available to all stakeholders at the earliest opportunity.
26. Legislation shall provide for sites and associated equipment to be left undisturbed until investigations are complete and for those that are allowed to be disturbed with the approval of the inspectorate.

Fitness for work

27. Provision may be made to cover the health surveillance of workers exposed to occupational health hazards specific to mining and to determine a worker’s fitness to safely perform specific duties. The type of health surveillance required will need to consider the types of hazards, the exposure of individuals to hazards and whether any hazardous exposure would result in health deterioration after long-term or short-term exposure. A broad range of health hazards should be considered.

28. The mine safety management system shall identify and manage the hazards associated with fitness for work issues, including:
   • fatigue management;
   • drugs and alcohol impairment;
   • the effects of exposures in the working environment, such as dust, noise, heat and chemicals;
   • relevant health surveillance for occupational health hazards specific to the mine.

These fitness for work issues shall be addressed through nationally consistent codes of practice, standards or guidelines.

It should be noted that Strategy 5 of the NMSF aims for a ‘consistent and reliable data and analysis’. It is intended that in the future health surveillance will be included in a national data set, collected in all jurisdictions. The initial proposed data set is also available for public comment.
Emergency response

29. Provision must be made for the establishment of mine emergency response resources and procedures and, where necessary, mines rescue facilities and personnel for reasonably foreseeable events.

30. Emergency response plans shall clearly specify how the mine will interact with emergency authorities, the conduct of emergency operations and the regular testing and review of emergency response capabilities.

Reporting

31. The legislation shall provide for specified timeframes for reporting accidents, incidents and dangerous occurrences to the regulator.

32. Legislation shall also provide for regulatory authorities to collect accident, incidents, occupational disease and dangerous occurrence statistics and analyse and publish such statistics in a timely fashion. Statistics collected and published shall be to a uniform national standard.

It should be noted that Strategy 5 of the NMSF aims for a ‘consistent and reliable data and analysis’. An initial national data set has been developed, and is also available for public comment.

Mine plans

33. The legislation shall provide for the surveying of mines by competent survey personnel and the preparation by competent personnel of appropriate plans drawn to an accuracy and to a scale that are ‘fit for purpose’. The plans shall be prepared before the start of operations and shall be brought up to date periodically during operations and at cessation of operations. The plans should show surface and underground workings, relevant features and escape routes and should be referenced to the Geocentric Datum of Australia (GDA) and the Australian Height Datum (MLD).

Accurate plans can then be referred to in the future, ensuring management informed of previous mining activities, or activities undertaken near the mine.

34. Where more than one seam, level or deposit is worked at a mine, plans shall be prepared so that the location of the workings of each seam or deposit can be clearly related to each other.

35. Provision shall be made for retention and accessibility of appropriate mine plans by a government agency following cessation of mining operations.
36. These provisions shall apply unless the regulator otherwise determines.

Small mines may be exempted from the operation of these provisions where the regulator forms the view that lesser requirements are appropriate, having regard to the relative risks of the mine and the practicality and reasonableness of applying these requirements.

Offences

37. The enforcement provisions of the legislation shall include a range of corrective measures including penalties in the event of non-compliance with the legislation.

38. Such corrective measures and penalties shall be framed to reflect the nature of non-compliance and the potential consequence. Provision shall be made for graduated enforcement measures.

It should be noted that Strategy 4 of the NMSF is a ‘nationally co-ordinated protocol on enforcement.’ This protocol, which is still being developed, will include graduated enforcement measures.

39. Any provisions for penalties shall include provisions for defences and an appeal process to safeguard the rights of individuals and corporations.

Regulatory framework and content

40. The nature and scope of the subordinate mining safety and health regulations shall be specified and be capable of covering the risks that may be present in mining operations. In particular, principal hazards and safety and health practices which are relevant to the mining industry shall be addressed in regulations. Issues may be mining specific, for example, mine ventilation, ground or strata control, and means of egress; or they may be generic, for example, explosives, fire fighting, or hazardous atmospheres.

This clause is drafted to acknowledge that in some jurisdictions, the safety and health at mines falls under broader OHS legislation, thus the importance of safety and health regulations which are specific to mining. There are some well-known risks in the mining industry, such as those listed above, and some of these have tried and tested management solutions. These risks, and where necessary the management of these risks may be included in the regulations.
Structure and Relationships

41. Legislation and standards covering mining operations shall encourage continuous improvement in OHS outcomes. They shall consist of a range of approaches, incorporating a mix of principles, performance and process-based standards and prescription. Such a mix shall strike a balance between a proactive and systematic approach to safety management, the identification of outcomes to be achieved and, where necessary, the specification of prescriptive measures.

42. The Act and Regulation may be supplemented by nationally consistent Standards or Codes of a subordinate legislative nature, such as guidelines or codes of practice. The legislative implications of such guidelines or codes of practice shall be specifically identified.

The intention of this clause is that new national codes of practice or guidelines will be developed over time. State/Territory based codes of practice or guidelines will continue to operate until replaced by an appropriate national code or guideline.
Strategy 5 – Consistent and Reliable Data Analysis

Incident/Disease Report form

Mine Owner

Definition. The name of the organisation that owns the mine.

Purpose. To identify the owner of the mine. This may or may not be the same as the mine operator.

Mine Operator

Definition. The name of the organisation that operates the mine, and is therefore responsible for the health and safety at the mine site.

Purpose. To identify the operator of the mine. This may or may not be the same as the mine owner.

Individual’s employer

Definition. The name of the organisation that directly employs the injured worker/s.

Purpose. To identify the organisation that directly employs the injured worker. This may be the mine operator, or it may be a (sub)contractor, or labour hire suppliers.

Comment: Individuals who are self employed would list their own business name in this data field.

Industry of the employer

Definition. The main activity of the employer at the mine site where the incident occurred.

Purpose. To enable comparison of aggregate data within specific sectors of the industry.
Classification/coding. It is intended that classifications options will be given, based on the ANZSIC code ‘Industry of the Employer’. The activity of the establishment should generally be determined as the main income earning activity of the establishment.

Location

Definition. The name and physical address of the mine site where the incident occurred.

Purpose. To enable identification of the geographic location of injury/disease occurrences.

Severity indicator

Definition. Identification of the incident as either a fatality, lost-time injury or high potential incident.

Purpose. To enable identification of the category of incident for comparison of aggregate data.

Classification/coding. Fatality, permanent incapacity, lost-time injury, high potential incident.

Name of injured worker

Comment. This would be highly confidential information, with access limited to the relevant inspectorate and the database manager.

Sex

Definition. The sex of the worker.

Purpose. To facilitate analysis of injury and disease experience by sex of the worker.

Classification/coding. To be recorded as male or female.

Comment. Analysis of this data item should not be undertaken in isolation of other data items as there is a risk that incorrect conclusions, possibly of a discriminatory nature, may be drawn.

Date of birth

Definition. The date of birth of the worker.
Purpose. To enable analysis of occurrences by age to determine any links between types of occurrences and specific age groups. To assist in the unique identification of workers.

Classification/coding. To be recorded in day, month, year format.

Comment. Analysis of this data item should not be undertaken in isolation of other data items as there is a risk that incorrect conclusions, possibly of a discriminatory nature, may be drawn.

Working and Travel Hours

Definition. The worker’s shift start time, shift finish time, and number of hours worked in their roster prior to the time of the incident.

Purpose. To identify any possible links between specific types of shift arrangements and injury/disease experience so that preventive action can be targeted more effectively.

Classification/coding. Shift start time, shift length time, hours worked in current roster cycle, travel time to work this shift, travel time to work this roster cycle. [These classifications need to be confirmed.]

Occupation

Definition. The worker’s occupation at the time of the injury or reporting of the disease.

Purpose. To identify the occupation of injured workers, allowing analysis of occupationally related injury/disease experience. To assist in targeting high-risk occupation groups for priority prevention activity and to enable the comparison of employers’ experiences with aggregate statistics.

Classification/coding. It is intended that classifications options will be given, based on the ANZSCO code of ‘Occupation’ as the basis (with additions suitable for the mining industry).

Date of injury occurrence or report of disease

Definition. The date of the injury occurrence or the date the disease was first reported.

Purpose. To enable comparison of data over time, to monitor performance and to indicate seasonal trends.

Classification/coding. To be recorded in day, month, year format.
Time of occurrence

*Definition.* The time of the injury occurrence. Not relevant for disease occurrences.

*Purpose.* To enable analysis of occurrence by time of day.

*Classification/coding.* To be recorded in 24-hour clock format.

Place on mine site where incident occurred

*Definition.* Identification of where the injury occurrence or disease exposure occurred.

*Purpose.* To enable analysis by place on mine site, and identify links between other factors such as bodily location of injury or disease.

*Classification/coding.* It is intended that classifications options will be given, yet to be finalised.

Description of occurrence

*Definition.* Description of the processes and circumstances leading to the injury/disease occurrence.

*Purpose.* Fundamental to identifying the nature of the occurrence.

*Classification/coding.* Information should be recorded in the form of a structured narrative with details provided under the following headings:

- a) What was the worker(s) doing at the time of the disease exposure or just before the injury occurrence (for example, driving a haul truck)?

- b) What happened unexpectedly, including the name of any particular chemical, product, process, or equipment involved (for example, brakes failed on truck, slipped on wet floor, scaffolding collapsed)?

- c) How exactly was the injury or disease sustained and what particular chemical, product, process or equipment was involved (for example, hit head on cabin of truck, lacerated knee when landing on ground)?

In addition, coding options will be given based on TOOCS codes of ‘Mechanism of incident’ and ‘Agency of injury/disease’.

Bodily location of injury or disease

*Definition.* The bodily location of the most serious original injury or part of the body affected by disease.
**Purpose.** To enable analysis of injuries or diseases affecting specific bodily locations to assist in the development of programs to counteract such injuries, for example, eye injuries via an eye protection program. To enable a more detailed analysis of the nature of the work injury/disease.

**Classification/coding.** It is intended that classifications options will be given, based on TOOCS code of ‘Bodily Location of Injury or Disease’.

**Nature of injury or disease**

**Definition.** The most serious injury or disease sustained or suffered by the worker.

**Purpose.** To provide additional information essential to the assessment of each injury or disease occurrence for use in determining corrective action and rehabilitation requirements and in monitoring the employers injury and disease experience.

**Classification/coding.** It is intended that classifications options will be given, based on TOOCS code of ‘Nature of Injury or Disease’.

**Employment arrangements**

**Definition.** The employment arrangements of the worker at the time of the injury occurrence or reporting of the disease.

**Purpose.** To identify any possible links between employment arrangements and injury and disease experience so that preventive action, in particular the development of training programs, can be targeted more effectively.

**Classification/coding.** Employee (of operator), self-employed persons, employee of contractor, labour-hire employee, other (including visitors, volunteers, work experience persons)

**Quarterly Statistics**

**Commodity Processed**

**Definition.** The primary commodity produced at the mine site where the injury occurred or disease identified.

**Purpose.** To identify any possible links between commodity processed and injury and disease experience so that preventative action can be targeted more effectively.
Classification/coding. It is intended that classifications options will be given, yet to be finalised.

**Number of employees**

*Definition.* The average number of workers who worked in the recording unit during the recording period.

*Purpose.* To enable the calculation of incidence rates for the recording unit, for identifying high risk groups and for monitoring the success of preventive strategies over time.

Classification/coding. Employees, contractors.

**Number of hours worked**

*Definition.* The total number of hours worked by employees in the recording unit during the recording period.

*Purpose.* To enable the calculation of frequency rates for the recording unit and the enterprise as a whole, for identifying high risk groups and for monitoring the success of preventive strategies over time.

Classification/coding. Employees, contractors.

*Comment* In calculating the total number of hours worked, any extra hours worked, such as additional shifts and overtime, should be included.

**Number of incidents**

*Definition.* The total number of incidents (including lost time injuries, medical treatment injuries, restricted duties injuries and high potential incidents) recorded in the reporting period.

*Purpose.* To enable the calculation of incidence rates for the recording period.

**Number of lost time injuries**

*Definition.* Total number of injuries/disease occurrences that resulted in lost time, i.e. the inability to work the next day or longer (whether they are rostered on or not).

*Purpose.* To enable the calculation of lost time rates for the recording period.

Classification. Employee/contractor.
Days lost from work

Definition. The total number of days lost from work as a result of the injuries/disease.

Purpose. To provide an indication of the severity of lost-time injuries and diseases in terms of lost working time and to enable the calculation of average time lost rates.

Classification/coding. Recorded in total days by employee and contractor.

Comment Time lost for part-time workers is calculated as for full-time workers irrespective of the number of hours usually worked each day or shift. For example, if a worker usually works two hours a day and is off work for five days the time lost is five days. The day of the injury is not counted as a lost day. Lost days start from the day after the incident occurred, and includes all days unable to work until the person resumes work. An injury sustained by a worker under a labour hire arrangement, would also be calculated as for full-time workers, irrespective of the number of hours or days they have been hired. For example, if a labour hire worker is hired for a period of time, and is injured during this time, the lost time is counted until they are able to return to work, irrespective if they are hired or not.

Number of restricted duties injuries (employee/contractor)

Definition. Total number of injuries/disease occurrences that resulted in restricted duties.

Purpose. To enable the calculation of incidence rates for the recording period.

Classification/coding. Employee/contractor.

Number of days on restricted duties

Definition. The total number of days where employees/contractors have to work on restricted duties.

Purpose. To enable the calculation of incidence rates for the recording period.

Classification/coding. Recorded in total days by employee and contractor.

Comment The day of the injury is not counted as a restricted duty day. Restricted duties start from the day after the incident occurred, and includes all days on restricted duties until the person resumes normal work (equal to that they were undertaking before the injury/disease).
Strategy 6 – Effective Consultation Mechanisms

Duty of employer to consult

1. An employer must consult with employees to enable them to contribute to the making of decisions affecting their safety and health at work.

When consultation is required

2. Consultation must occur in all matters related to safety and health, including but not limited to:
   - the development of risk-based safety and health management systems;
   - identification of hazards;
   - making decisions about measures to be taken to control risks;
   - changes to premises, work systems or methods, or plant or substances which may affect health and safety;
   - procedures for consultation; and
   - monitoring of health.

How consultation is undertaken

3. The broad mechanisms for consultation can include one or more of the following:
   - Health and Safety Representatives (HSRs) and/or;
   - Occupational Safety and Health (OSH) Committee and/or;
   - Other agreed arrangements.

   The employer must consult with employees on the formal OSH consultative arrangements to be adopted at the workplace.

   *The broad mechanisms of consultation is aimed to be sufficiently flexible to suit a wide variety of circumstances. It shall provide for employees and employers to shape their own consultative arrangements.*

Advice, Assistance and Representation

4. To assist with consultation employers and employees (including HSRs) may seek assistance, advice or representation as required.

Establishment of Committees, election of representatives or other arrangements

5. Employees can collectively select through democratic processes, committee members and/or health and safety representatives. Alternatively the workplace
may choose another arrangement provided such an arrangement is agreed to by a majority of employees.

6. The employer shall provide for:
   • the formation of a committee where the majority of employees so request or where initiated by the employer;
   • the election of HSRs when requested by one or more employees;
   • alternative arrangements where the majority of employees agree;
   • consultation to occur on the level of coverage for HSRs and committees.

7. In the case of an OHS Committee the following procedures are to apply:
   • The employee representatives must be elected by and from the employees in the relevant workgroup the committee represents;
   • The number of employer representatives on a committee must not exceed the number of employee representatives on the Committee;
   • The chairperson of a committee is not to be an employer representative;
   • The employer representatives have the appropriate authority to make decisions or effectively act upon OHS issues raised by the Committee.

Establishing consultation arrangements

8. As part of the consultation process the employer and employees shall establish as appropriate:
   • procedures for consultation;
   • representation of workgroups;
   • number of employer and employee representatives;
   • reporting and meeting arrangements;
   • training of HSRs and committee representatives;
   • relationships with other workgroups of other employers (e.g. contractors);
   • arrangements for elections;
   • a dispute resolution mechanism.

   Any of these matters that remain unresolved may be referred by either party to the jurisdictions’ regulatory body.

Functions of health and safety representatives

9. The functions of the HSRs, may include the following:
   • conduct investigations;
   • accompany an inspector in investigations and inspections;
   • accompany an employer in their investigations;
   • in consultation with the employer to inspect all or part of the workplace at any time in relation to OHS matters;
   • make enquiries about operations relevant to health and safety;
   • access to relevant documents and information;
   • consult and cooperate with the manager of the mine and liaise with the employees on OHS matters;
   • participate in the development and implementation of the safety management system;
   • make recommendations on OHS training;
• receive a copy of any improvement/prohibition notices issued;
• be informed immediately of any accident or hazardous occurrence that may affect the safety and/or health of any worker and to be given copies of any reports prepared by or on behalf of the employer in relation to the occurrence.

Functions of Health and Safety Committees

10. The functions of OHS Committees may include the following:

• To facilitate consultation and cooperation between employers and the employees in relation to OHS matters.
• To keep itself informed as to standards relating to safety and health
• To recommend to the employer and employees the establishment, maintenance and monitoring of programmes relating to the health and safety of employees
• To keep in a readily accessible place, information in relation to hazards that arise or may arise at the workplace;
• To consider and make such recommendations to the employer as to any changes or intended changes to the workplace that may reasonably be expected to affect the health and safety of employees at the workplace;
• To consider any matters referred by a health and safety representative; and
• To perform such other functions which may be prescribed in regulations or given to the committee, with its consent, by the employer

Workgroups represented by HSRs or OHS Committees

11. The relevant workgroups to be represented by HSR’s or Committee’s are to be determined in a manner that ensures that they are able to represent effectively the employees in each workgroup and to have meaningful communication with the employees in the workgroup they represent. The following factors shall be considered in identifying the matters, areas or kinds of work in respect of which each HSR or Committee is to perform their functions:
• hours of work, including shift work and roster schedules;
• patterns of work (e.g. part time, seasonal or short term employees);
• number and grouping of employees;
• location of work;
• different types of work performed;
• attributes of employees (e.g. age, ethnicity, gender);
• relationships with other workgroups of other employers (e.g. contractors and the interaction of employees with the employees of other employers).

Obligations of employer with respect to duty to consult

12. The employer is obligated to ensure that consultation can occur and those involved in consultation are both given assistance to do so and not discriminated against or disadvantaged by virtue of that consultation.
13. To ensure adequate consultation can occur, the employer shall:
   • keep records;
   • communicate outcomes;
   • make time available for consultation during work hours;
   • provide reasonable facilities and access for the purpose of consultation;
   • ensure employees participating are not financially disadvantaged and any reasonable costs incurred are met;
   • facilitate consultation with representatives of other employers at the mine site;
   • ensure that employees participating in consultation are not discriminated against because of that representation;
   • allow HSRs time off work to attend relevant and agreed training without loss of remuneration or other entitlements;
   • provide relevant information in an accessible format.

Training

14. HSRs and OHS committee members shall undertake training, to ensure they have the relevant skills to undertake their responsibilities. Training is to be conducted by a provider that has been accredited by the relevant regulatory authority, and has been agreed between the employer and employee.
Annexure 5

ILO Convention 176

C176 Safety and Health in Mines Convention, 1995
Convention concerning Safety and Health in Mines (Note: Date of entry into force: 05:06:1998)
Convention: C176
Place: Geneva
Session of the Conference: 82
Date of adoption: 22:06:1995
Subject classification: Industries and Occupations
Subject: Occupational Safety and Health
Status: Up-to-date instrument This Convention was adopted after 1985 and is considered up to date.

The General Conference of the International Labour Organization,
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Eighty-Second Session on 6 June 1995, and


Considering that workers have a need for, and a right to, information, training and genuine consultation on and participation in the preparation and implementation of safety and health measures concerning the hazards and risks they face in the mining industry, and

Recognizing that it is desirable to prevent any fatalities, injuries or ill health affecting workers or members of the public, or damage to the environment arising from mining operations, and

Having regard to the need for cooperation between the International Labour Organization, the World Health Organization, the International Atomic Energy Agency and other relevant institutions and noting the relevant instruments, codes of practice, codes and guidelines issued by these organizations, and
Having decided upon the adoption of certain proposals with regard to safety and health in mines, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this twenty-second day of June of the year one thousand nine hundred and ninety-five the following Convention, which may be cited as the Safety and Health in Mines Convention, 1995:
PART I. DEFINITIONS

Article 1

1. For the purpose of this Convention, the term *mine* covers -

(a) surface or underground sites where the following activities, in particular, take place:

(i) exploration for minerals, excluding oil and gas, that involves the mechanical disturbance of the ground;

(ii) extraction of minerals, excluding oil and gas;

(iii) preparation, including crushing, grinding, concentration or washing of the extracted material; and

(b) all machinery, equipment, appliances, plant, buildings and civil engineering structures used in conjunction with the activities referred to in (a) above.

2. For the purpose of this Convention, the term *employer* means any physical or legal person who employs one or more workers in a mine and, as the context requires, the operator, the principal contractor, contractor or subcontractor.

PART II. SCOPE AND MEANS OF APPLICATION

Article 2

1. This Convention applies to all mines.

2. After consultations with the most representative organizations of employers and workers concerned, the competent authority of a Member which ratifies the Convention:

(a) may exclude certain categories of mines from the application of the Convention, or certain provisions thereof, if the overall protection afforded at these mines under national law and practice is not inferior to that which would result from the full application of the provisions of the Convention;

(b) shall, in the case of exclusion of certain categories of mines pursuant to clause (a) above, make plans for progressively covering all mines.

3. A Member which ratifies the Convention and avails itself of the possibility afforded in paragraph 2(a) above shall indicate, in its reports on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organization, any particular category of mines thus excluded and the reasons for the exclusion.
Article 3

In the light of national conditions and practice and after consultations with the most representative organizations of employers and workers concerned, the Member shall formulate, carry out and periodically review a coherent policy on safety and health in mines, particularly with regard to the measures to give effect to the provisions of the Convention.

Article 4

1. The measures for ensuring application of the Convention shall be prescribed by national laws and regulations.

2. Where appropriate, these national laws and regulations shall be supplemented by:

(a) technical standards, guidelines or codes of practice; or

(b) other means of application consistent with national practice,

as identified by the competent authority.

Article 5

1. National laws and regulations pursuant to Article 4, paragraph 1, shall designate the competent authority that is to monitor and regulate the various aspects of safety and health in mines.

2. Such national laws and regulations shall provide for:

(a) the supervision of safety and health in mines;

(b) the inspection of mines by inspectors designated for the purpose by the competent authority;

(c) the procedures for reporting and investigating fatal and serious accidents, dangerous occurrences and mine disasters, each as defined by national laws or regulations;

(d) the compilation and publication of statistics on accidents, occupational diseases and dangerous occurrences, each as defined by national laws or regulations;

(e) the power of the competent authority to suspend or restrict mining activities on safety and health grounds, until the condition giving rise to the suspension or restriction has been corrected; and

(f) the establishment of effective procedures to ensure the implementation of the rights of workers and their representatives to be consulted on matters and to participate in measures relating to safety and health at the workplace.
3. Such national laws and regulations shall provide that the manufacture, storage, transport and use of explosives and initiating devices at the mine shall be carried out by or under the direct supervision of competent and authorized persons.

4. Such national laws and regulations shall specify:

(a) requirements relating to mine rescue, first aid and appropriate medical facilities;

(b) an obligation to provide and maintain adequate self-rescue respiratory devices for workers in underground coal mines and, where necessary, in other underground mines;

(c) protective measures to secure abandoned mine workings so as to eliminate or minimize risks to safety and health;

(d) requirements for the safe storage, transportation and disposal of hazardous substances used in the mining process and waste produced at the mine; and

(e) where appropriate, an obligation to supply sufficient sanitary conveniences and facilities to wash, change and eat, and to maintain them in hygienic condition.

5. Such national laws and regulations shall provide that the employer in charge of the mine shall ensure that appropriate plans of workings are prepared before the start of operation and, in the event of any significant modification, that such plans are brought up to date periodically and kept available at the mine site.

PART III. PREVENTIVE AND PROTECTIVE MEASURES AT THE MINE

A. Responsibilities of employers

Article 6

In taking preventive and protective measures under this Part of the Convention the employer shall assess the risk and deal with it in the following order of priority:

(a) eliminate the risk;

(b) control the risk at source;

(c) minimize the risk by means that include the design of safe work systems; and

(d) in so far as the risk remains, provide for the use of personal protective equipment, having regard to what is reasonable, practicable and feasible, and to good practice and the exercise of due diligence.
Article 7

Employers shall take all necessary measures to eliminate or minimize the risks to safety and health in mines under their control, and in particular:

(a) ensure that the mine is designed, constructed and provided with electrical, mechanical and other equipment, including a communication system, to provide conditions for safe operation and a healthy working environment;

(b) ensure that the mine is commissioned, operated, maintained and decommissioned in such a way that workers can perform the work assigned to them without endangering their safety and health or that of other persons;

(c) take steps to maintain the stability of the ground in areas to which persons have access in the context of their work;

(d) whenever practicable, provide, from every underground workplace, two exits, each of which is connected to separate means of egress to the surface;

(e) ensure the monitoring, assessment and regular inspection of the working environment to identify the various hazards to which the workers may be exposed and to assess their level of exposure;

(f) ensure adequate ventilation for all underground workings to which access is permitted;

(g) in respect of zones susceptible to particular hazards, draw up and implement an operating plan and procedures to ensure a safe system of work and the protection of workers;

(h) take measures and precautions appropriate to the nature of a mine operation to prevent, detect and combat the start and spread of fires and explosions; and

(i) ensure that when there is serious danger to the safety and health of workers, operations are stopped and workers are evacuated to a safe location.

Article 8

The employer shall prepare an emergency response plan, specific to each mine, for reasonably foreseeable industrial and natural disasters.

Article 9

Where workers are exposed to physical, chemical or biological hazards the employer shall:

(a) inform the workers, in a comprehensible manner, of the hazards associated with their work, the health risks involved and relevant preventive and protective measures;
(b) take appropriate measures to eliminate or minimize the risks resulting from exposure to those hazards;

(c) where adequate protection against risk of accident or injury to health including exposure to adverse conditions cannot be ensured by other means, provide and maintain at no cost to the worker suitable protective equipment, clothing as necessary and other facilities defined by national laws or regulations; and

(d) provide workers who have suffered from an injury or illness at the workplace with first aid, appropriate transportation from the workplace and access to appropriate medical facilities.

**Article 10**

The employer shall ensure that:

(a) adequate training and retraining programmes and comprehensible instructions are provided for workers, at no cost to them, on safety and health matters as well as on the work assigned;

(b) in accordance with national laws and regulations, adequate supervision and control are provided on each shift to secure the safe operation of the mine;

(c) a system is established so that the names of all persons who are underground can be accurately known at any time, as well as their probable location;

(d) all accidents and dangerous occurrences, as defined by national laws or regulations, are investigated and appropriate remedial action is taken; and

(e) a report, as specified by national laws and regulations, is made to the competent authority on accidents and dangerous occurrences.

**Article 11**

On the basis of general principles of occupational health and in accordance with national laws and regulations, the employer shall ensure the provision of regular health surveillance of workers exposed to occupational health hazards specific to mining.

**Article 12**

Whenever two or more employers undertake activities at the same mine, the employer in charge of the mine shall coordinate the implementation of all measures concerning the safety and health of workers and shall be held primarily responsible for the safety of the operations. This shall not relieve individual employers from responsibility for the implementation of all measures concerning the safety and health of their workers.
B. RIGHTS AND DUTIES OF WORKERS AND THEIR REPRESENTATIVES

Article 13

1. Under the national laws and regulations referred to in Article 4, workers shall have the following rights:

(a) to report accidents, dangerous occurrences and hazards to the employer and to the competent authority;

(b) to request and obtain, where there is cause for concern on safety and health grounds, inspections and investigations to be conducted by the employer and the competent authority;

(c) to know and be informed of workplace hazards that may affect their safety or health;

(d) to obtain information relevant to their safety or health, held by the employer or the competent authority;

(e) to remove themselves from any location at the mine when circumstances arise which appear, with reasonable justification, to pose a serious danger to their safety or health; and

(f) to collectively select safety and health representatives.

2. The safety and health representatives referred to in paragraph 1(f) above shall, in accordance with national laws and regulations, have the following rights:

(a) to represent workers on all aspects of workplace safety and health, including where applicable, the exercise of the rights provided in paragraph 1 above;

(b) to:

(i) participate in inspections and investigations conducted by the employer and by the competent authority at the workplace; and

(ii) monitor and investigate safety and health matters;

(c) to have recourse to advisers and independent experts;

(d) to consult with the employer in a timely fashion on safety and health matters, including policies and procedures;

(e) to consult with the competent authority; and

(f) to receive, relevant to the area for which they have been selected, notice of accidents and dangerous occurrences.
3. Procedures for the exercise of the rights referred to in paragraphs 1 and 2 above shall be specified:

(a) by national laws and regulations; and

(b) through consultations between employers and workers and their representatives.

4. National laws and regulations shall ensure that the rights referred to in paragraphs 1 and 2 above can be exercised without discrimination or retaliation.

**Article 14**

Under national laws and regulations, workers shall have the duty, in accordance with their training:

(a) to comply with prescribed safety and health measures;

(b) to take reasonable care for their own safety and health and that of other persons who may be affected by their acts or omissions at work, including the proper care and use of protective clothing, facilities and equipment placed at their disposal for this purpose;

(c) to report forthwith to their immediate supervisor any situation which they believe could present a risk to their safety or health or that of other persons, and which they cannot properly deal with themselves; and

(d) to cooperate with the employer to permit compliance with the duties and responsibilities placed on the employer pursuant to the Convention.

**C. COOPERATION**

**Article 15**

Measures shall be taken, in accordance with national laws and regulations, to encourage cooperation between employers and workers and their representatives to promote safety and health in mines.

**PART IV. IMPLEMENTATION**

**Article 16**

The Member shall:

(a) take all necessary measures, including the provision of appropriate penalties and corrective measures, to ensure the effective enforcement of the provisions of the Convention; and
(b) provide appropriate inspection services to supervise the application of the measures to be taken in pursuance of the Convention and provide these services with the resources necessary for the accomplishment of their tasks.

PART V. FINAL PROVISIONS

Article 17

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 18

1. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General of the International Labour Office.

2. It shall come into force 12 months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member 12 months after the date on which its ratification has been registered.

Article 19

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 20

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications and denunciations communicated by the Members of the Organization.

2. When notifying the Members of the Organization of the registration of the second ratification, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Convention shall come into force.
Article 21

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations, for registration in accordance with article 102 of the Charter of the United Nations, full particulars of all ratifications and acts of denunciation registered by the Director-General in accordance with the provisions of the preceding Articles.

Article 22

At such times as it may consider necessary, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 23

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides -

   (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 19 above, if and when the new revising Convention shall have come into force;

   (b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 24

The English and French versions of the text of this Convention are equally authoritative.
Annexure 6
RMSD Summary: Safety Case

Safety Case

1. Facility Description

2. Formal Safety Assessment

3. Safety Management System

Figure 1: Safety Case Diagram 2. Safety Case Components
# 2.1 Facility Description

In broad terms this describes the facility’s location, extent and nature of activities, equipment used and operation. The interaction of the facility with its surroundings and other facilities also enables the regulator to verify that its design and operating philosophy is consistent with the assumptions and outputs of the FSA.

<table>
<thead>
<tr>
<th>1.1</th>
<th>Traditional FD</th>
<th>What it could mean to a mining operation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>Introduction</td>
<td></td>
</tr>
<tr>
<td>1.2</td>
<td>Purpose and operation</td>
<td>Description of the facility, geographical location, facility life, purpose and operating history</td>
</tr>
<tr>
<td>1.3</td>
<td>Overview of facility, highlighting key assumptions and phases of development</td>
<td>Overview of design, development, operating and mine closure stages</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Basis of the overview (including geological, geotechnical, financial or market parameters etc)</td>
</tr>
<tr>
<td>1.4</td>
<td>Summary of design parameters with cross references to key technical documents</td>
<td>Key design parameters with cross references to key technical documents (eg mine plan) including geotechnical, geological, meteorological and environmental parameters</td>
</tr>
<tr>
<td>1.5</td>
<td>Description of key functions, processes and layout of the facility</td>
<td>Description of mining methods and layouts, ventilation, equipment used, fixed and mobile plant, ore handling, stockpiling, beneficiation and waste handling methods, procurement and maintenance. Estimated numbers of people on site</td>
</tr>
<tr>
<td>1.6</td>
<td>Hazardous substances inventories</td>
<td>Summary of on site quantities of fuel, blasting materials, lubricants, chemical process reagents, storage and handling, delivery to site. Storage of tailings</td>
</tr>
<tr>
<td>1.7</td>
<td>Description of design safety philosophy, features and systems with emphasis on safety philosophy</td>
<td>Description of design safety philosophy, features and systems</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Mine design is usually based on a series of assumptions that cannot be fully verified until operations commence. Verification may result in significant changes to the operation</td>
</tr>
<tr>
<td>1.8</td>
<td>Description of key processes, equipment layout and process flow</td>
<td>Description and impact of key process plants. (Explosives manufacture/storage/use, ventilation systems, winding and haulage systems etc)</td>
</tr>
<tr>
<td>1.9</td>
<td>Description of interaction between facility and surroundings</td>
<td>Proximity to other mines, sources of flooding, interaction with proposed/current operations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Proximity to residences and other businesses. Methods of goods and services delivery to mine</td>
</tr>
<tr>
<td>1.10</td>
<td>Description of interaction between facility and other facilities, industries and operations</td>
<td>Supply of services onto mine site eg power, gas, road transport, etc</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Interaction with pastoral industry, local communities (including aboriginal communities) etc</td>
</tr>
</tbody>
</table>

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727 Based on Rashe, T. *Development of a safety case methodology for the minerals industry – a discussion paper.* Minerals Industry Safety and Health Centre (MISHC), University of Queensland, 2001. p 15
2.2 Formal Safety Assessment

This is a formal investigation of the nature, likelihood, interaction and impact of hazards and the means to prevent or control the probability of their occurrence and/or their consequences. It must demonstrate that overall facility risk is at an acceptable level. The implementation and ongoing management of controls is covered by the SMS.

<table>
<thead>
<tr>
<th>Traditional FSA</th>
<th>What it could mean to a mining operation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1 Introduction</td>
<td>Introduction</td>
</tr>
<tr>
<td>2.2 Formal safety assessment process</td>
<td>Overview of assessment processes undertaken</td>
</tr>
<tr>
<td>2.3 Hazard identification</td>
<td>Systematic identification and assessment of all hazards using techniques such as “Hazard and Operability” studies, “What-If” analysis etc. Justification of techniques used Create and maintain hazard register</td>
</tr>
<tr>
<td>2.4 Hazard and risk assessment studies</td>
<td>Systematic assessment and identification of all potential consequences and risk reduction measures for identified hazards. Qualitative Risk Analysis (may be some application in some specific areas for Quantitative Risk Analysis), Fault/Event Tree analysis etc. Justification of techniques used Maintain hazard register</td>
</tr>
<tr>
<td>2.5 Assessment of results</td>
<td>Summarised in a risk assessment matrix Justification for risk criteria used</td>
</tr>
<tr>
<td>2.6 Control measures</td>
<td>To reduce risks assessed (need to establish acceptability criteria for mining) as marginal or unacceptable to As Low As Reasonably Practicable through design, procedures, training etc.</td>
</tr>
</tbody>
</table>

2.3 Safety Management System

The Safety Management System is a comprehensive integrated system for controlling and managing all aspects of safety in the facility on a day to day basis. The SMS must cover all safety-related issues, not just those related to major accident/high consequence events and should contain the procedures for preparing and maintaining the safety case.
<table>
<thead>
<tr>
<th></th>
<th>Traditional SMS</th>
<th>What it could mean to a mining operation</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>Introduction</td>
<td>Introduction</td>
</tr>
<tr>
<td>3.2</td>
<td>Policy and objectives</td>
<td>Defined achievable safety objectives and annual safety plans providing for all activities at the mining operation. Management commitment to safety</td>
</tr>
<tr>
<td>3.3</td>
<td>Organisation and responsibility</td>
<td>Accessible and clear organisation charts. Documented safety roles and responsibilities. Management safety leadership and commitment</td>
</tr>
<tr>
<td>3.4</td>
<td>Risk assessment and risk management</td>
<td>Continual and systematic hazard identification, classification and documentation in a hazard register. Continual and systematic risk analysis, assessment and control</td>
</tr>
<tr>
<td>3.5</td>
<td>Employee involvement</td>
<td>Employees participation in the development of the Safety Case. All employees to have ongoing involvement. Areas targeted for employee involvement detailed in safety planning and policy. Employee consultation and communication mechanisms defined</td>
</tr>
<tr>
<td>3.6</td>
<td>Employee selection, competency &amp; training</td>
<td>Formal training in OS&amp;H for all personnel. Training records available to confirm competencies</td>
</tr>
<tr>
<td>3.7</td>
<td>Contractors and support services</td>
<td>Verification of contractor competency, training, etc. Compliance assurance with SMS by contractors</td>
</tr>
<tr>
<td>3.8</td>
<td>Design, construction and commissioning</td>
<td>Design safety philosophy, features applied to the mine with emphasis on safety philosophy. Use of relevant engineering and design standards</td>
</tr>
<tr>
<td>3.9</td>
<td>Safe operational procedures</td>
<td>Process for developing, controlling and training in safe operational procedures. Procedures for controlling identified hazards</td>
</tr>
<tr>
<td>3.10</td>
<td>Maintenance, inspection, testing and modification</td>
<td>Technical integrity addressed. Detailed inspection and maintenance procedures. Necessary changes implemented to ensure safety</td>
</tr>
<tr>
<td>3.11</td>
<td>Change management</td>
<td>Documented processes for appropriate level of review, authorisation and training prior to implementing change</td>
</tr>
<tr>
<td>3.12</td>
<td>Health system</td>
<td>System in place for identification of health hazards. Provision of access to medical care. Policy in place on fitness for duty including fatigue</td>
</tr>
<tr>
<td>3.13</td>
<td>Emergency response</td>
<td>Emergency response plan in place with strategies developed for potential situations, warning systems in place, contingency plans, emergency response drills/training and defined roles and responsibilities</td>
</tr>
<tr>
<td>3.14</td>
<td>Incident investigation and reporting</td>
<td>System in place for investigation of all incidents, tracking the status of incident investigations and the action items arising from them</td>
</tr>
<tr>
<td>3.15</td>
<td>Performance audit and review</td>
<td>Performance standards for each critical SMS component against which actual performance can be compared. System</td>
</tr>
<tr>
<td>in place for employees to raise problems Review process in place that includes a review of performance measures and indicators Process for review of the Safety Case in the light of changes to the operating system or baseline parameters</td>
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## Annexure 7

**Resources Safety Division: Publication List**

As at January 2009

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<td>Development of high headings underground * Guideline Template</td>
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<td>Electrical safety management systems Guideline Template</td>
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<td>Explosives storage surface part 1 Guideline Template</td>
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<td>Explosives usage surface Guideline Template</td>
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<tr>
<td>Explosives usage underground Guideline Template</td>
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<td>Management systems Guideline Template</td>
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<td>Noise Guideline Template</td>
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Quarry systems Guideline Template
Surface atmospheric contaminant management * Guideline Template
Surface dust management * Guideline Template
Surface trackless mobile plant Guideline Template
Tailings dam Guideline Template
Tipping * Guideline Template
Underground fire prevention * Guideline Template
Underground ventilation management * Guideline Template
Workshops * Guideline Template

* Updated 2008

Codes of practice
Mines survey - code of practice (PDF 503 kb)
Prevention and management of violence, aggression and bullying - code of practice (PDF 447 kb)
Surface rock support for underground mines - code of practice (PDF 110 kb)
Working hours - code of practice (PDF 146 kb)
Working hours code of practice - risk management guidelines (PDF 79 kb)

Fact sheets
Authorised mine surveyor’s certificate grades 1 and 2 (PDF 36 kb)
Exams information 2008 certificates of competency (PDF 41 kb)
First class mine manager’s certificate of competency (PDF 36 kb)
Manual tasks 10: Occupational safety and health legislation (PDF 104 kb)
Manual tasks 1: Terminology (PDF 95 kb)
Manual tasks 2: Extent and cost of injuries (PDF 125 kb)
Manual tasks 3: How injuries can happen at work (PDF 99 kb)
Manual tasks 4: Manual tasks and the risk management process (PDF 114 kb)
Manual tasks 5: Participative ergonomics (PDF 94 kb)
Manual tasks 6: Whole-body vibration (PDF 106 kb)
Manual tasks 7: Hand-arm vibration (PDF 109 kb)
Manual tasks 8: Machinery and vehicle cab design (PDF 107 kb)
Manual tasks 9: Safe design (PDF 104 kb)
Mutual recognition of occupations (PDF 225 kb)
Quarry manager’s certificate of competency (PDF 37 kb)
Restricted quarry manager’s certificate of competency (PDF 34 kb)
Underground supervisor’s certificate of competency (PDF 34 kb)

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Guide to health surveillance system for employees (PDF 657 kb)
Guide to testing and tagging PEE and RSDs (PDF 96 kb)
MSH Guide to submitting SHR election notification form (PDF 97 kb)

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Approved procedures for dose assessment (PDF 535 kb)
Asbestos management in mining (PDF 5 MB)
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Fitness for mine rescue personnel (PDF 1 MB)
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Geotechnical considerations in underground mines (PDF 710 kb)
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Management of asbestos in mining operations (PDF 686 kb)
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Managing NORM 1 - Applying the system of radiation protection to mining operations (PDF 499 kb)
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Managing NORM 2.2 - Preparation of a radiation management plan – mining and processing (PDF 321 kb)
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Managing NORM 3.5 - Measurement of particle size (PDF 1 MB)
Managing NORM 4.1 - Dust control strategies (PDF 1 MB)
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Managing NORM 7 - Boswell – assessment and reporting database (PDF 2 MB)
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Railway vehicle drivers (loco drivers) medical fitness (PDF 402 kb)
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Safety and health risk management (PDF 319 kb)
Safety bund walls around abandoned open pit mines (PDF 492 kb)
Safety management of underground combustible sulphide dust (PDF 278 kb)
Tyre safety, fires and explosions (PDF 356 kb)
Underground barring down and scaling (PDF 272 kb)
Underground ventilation (metalliferous mines) (PDF 199 kb)
Vertical opening safety practice in underground mines (PDF 2 MB)

**Information sheets**
Information sheet for SH reps - investigating incidents (PDF 245 kb)
Manual tasks: review of manual handling (PDF 95 kb)

**Medical bulletins**
MB No.001 High pressure hydraulic oil injection injuries (PDF 61 kb)
MB No.002 Mine fuming and post explosive blast gases (PDF 83 kb)
MB No.003 Crush injury (PDF 74 kb)
MB No.004 Hydrofluoric acid burns (PDF 83 kb)
MB No.005 Cyanide poisoning - revised April 2008 (PDF 121 kb)

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MineSafe Magazine - October 1999 (PDF 379 kb)
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Mine safety matters - Railway crossings (PDF 1 MB)
Mine safety matters - Remote bogging (PDF 1 MB)
Mine safety matters - Rockfalls underground (PDF 1 MB)
Mine safety matters - Safety case management of large structures (PDF 1 MB)
Mine safety matters - Travelling in remote locations (PDF 2 kb)
Mine safety matters - Truck driving (PDF 897 kb)
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Occupational noise management in mining (PDF 1 MB)
Protect your hearing (PDF 1 MB)
Reporting an accident or incident - poster (PDF 81 kb)
Safety performance in WA mineral industry 2000-01 (PDF 397 kb)
Safety performance in WA mineral industry 2001-02 (PDF 729 kb)
Safety performance in WA mineral industry 2002-03 (PDF 220 kb)
Safety performance in WA mineral industry 2003-04 (PDF 313 kb)
Safety performance in WA mineral industry 2004-05 (PDF 103 kb)
Safety performance in WA mineral industry 2005-06 (PDF 380 kb)
Safety performance in WA mineral industry 2006-07 (PDF 368 kb)
Safety performance in WA mineral industry 2007-08 (PDF 386 kb)
Your safety and health representative is... (PDF 76 kb)

Safety bulletins
MSB No.082 Emergency management act 2005 (PDF 94 kb)
MSB No.081 Unattended vehicles rolling away (PDF 150 kb)
MSB No.080 Asbestos- imported gaskets containing asbestos (PDF 69 kb)
MSB No.079 Cyclone emergency preparation, planning, preparedness (PDF 77 kb)
MSB No.078 Explosive mortar devices for bringing down hang-ups (PDF 79 kb)
MSB No.077 Use of telehandlers (PDF 70 kb)
MSB No.076 Use of explosive mortar devices (PDF 401 kb)
MSB No.075 Fire and explosion in a working party magazine (PDF 52 kb)
MSB No.074 Explosive gases associated with mining (PDF 39 kb)
MSB No.073 Loss of control on highway-type vehicles (PDF 91 kb)
MSB No.072 Loss of control LME on gradients (PDF 74 kb)
MSB No.071 Booster compressor explosions - RC drilling (PDF 176 kb)
MSB No.070 Franna mobile cranes- uncontrolled movement (PDF 108 kb)
**Significant incident reports**

SIR No.001 Pressurised gearbox explosion (PDF 6 kb)
SIR No.002 Conveyor belt - fatal accident (PDF 6 kb)
SIR No.003 Compressed air hose connection - fatal accident (PDF 6 kb)
SIR No.004 Welding equipment electrocution - fatal accident (PDF 6 kb)
SIR No.005 Split ring tyre assembly explosion - fatal (PDF 6 kb)
SIR No.006 Safe use of radiation gauges (PDF 6 kb)
SIR No.007 Chemical handling - caustic burn (PDF 6 kb)
SIR No.008 Rock bolting underground - fatal accident (PDF 6 kb)
SIR No.009 Gold room explosion - molten metal burns (PDF 6 kb)
SIR No.010 Cyanide poisoning (PDF 6 kb)
SIR No.011 EMU mine disaster (PDF 8 kb)
SIR No.012 Slope failure - open pit mine (PDF 6 kb)
SIR No.013 Tramp metal fired from jaw crushe (PDF 6 kb)
SIR No.014 Electric shock involving P and H shovel (PDF 6 kb)
SIR No.015 Haul truck tyre explosion (PDF 8 kb)
SIR No.016 Substation transformer explosion (PDF 7 kb)
SIR No.017 Caught by rock drill (PDF 6 kb)
SIR No.018 High pressure water jetting (PDF 8 kb)
SIR No.019 Explosion of drill steel subject to high temperature (PDF 7 kb)
SIR No.020 Drilling rig fire (PDF 6 kb)
SIR No.021 Operator safety - earthmoving scrapers (PDF 6 kb)
SIR No.022 Winding rope detachment (PDF 6 kb)
SIR No.023 Underground fires (PDF 8 kb)
SIR No.024 Crane dogman survives shock from 22Kv transformer (PDF 6 kb)
SIR No.025 Buried electrical cable - fatal accident (PDF 7 kb)
SIR No.026 Truck toppled over edge of stockpile (PDF 6 kb)
SIR No.027 Shrink stope - fatal accident (PDF 6 kb)
SIR No.028 Mud rush - fatal accident (PDF 7 kb)
SIR No.029 Stope draw-point (Mill Hole) - fatal accident (PDF 7 kb)
SIR No.030 Elevating platform operation - serious injury (PDF 6 kb)
SIR No.031 Hot oil boiler - potential explosion (PDF 6 kb)
SIR No.032 Storage tank explosion (PDF 6 kb)
SIR No.033 Passenger lift - a serious accident (PDF 6 kb)
SIR No.034 Underground vehicle fire (PDF 6 kb)
SIR No.035 Safe welding practice (PDF 6 kb)
SIR No.036 Injury sustained whilst working on drilling mast (PDF 6 kb)
SIR No.037 Lead-acid battery explodes (PDF 6 kb)
SIR No.038 Uncontrolled movement of mobile unit (PDF 6 kb)
SIR No.039 Uncontrolled movement of cherry pickers (PDF 7 kb)
SIR No.040 Near-miss underground blasting incident (PDF 10 kb)
SIR No.041 Haul truck rear wheel falls off (PDF 6 kb)
SIR No.042 Remotely operated machinery - fatal accident (PDF 6 kb)
SIR No.043 Remote control loader fire in an open stope (PDF 7 kb)
SIR No.044 Rockfall - fatal accident (PDF 7 kb)
SIR No.045 Fatal agricultural traffic accident in quarry (PDF 7 kb)
SIR No.046 Contact with overhead powerline - fatal accident (PDF 6 kb)
SIR No.047 Injuries sustained while working on drilling mast (PDF 9 kb)
SIR No.048 EWP users tipped from basket (PDF 10 kb)
SIR No.049 Hazard alert - auger mixers (PDF 11 kb)
SIR No.050 Trailing cable coupler - electrical accident (PDF 6 kb)
SIR No.051 Failure of mast supports on drill rigs (PDF 6 kb)
SIR No.052 Rope power shovel maintenance - fatal accident (PDF 6 kb)
SIR No.053 Elevated work platform - falling (PDF 6 kb)
SIR No.054 Structural collapse of an iron ore stacker (PDF 7 kb)
SIR No.055 Conveyor belt - fatal accident (PDF 6 kb)
SIR No.056 Uncontrolled discharge of stored energy source - fatal (PDF 7 kb)
SIR No.057 Remotely operated mobile machine - fatal accident (PDF 6 kb)
SIR No.058 Removal of a rise ladder - fatal accident (PDF 6 kb)
SIR No.059 Offloading unpalletted articles (PDF 9 kb)
SIR No.060 Uncontrolled movement of elevated work platform (PDF 6 kb)
SIR No.061 Caught in a rotating drill rod - fatal accident (PDF 6 kb)
SIR No.062 Anchorage of underground scraper hoists (PDF 6 kb)
SIR No.063 Remotely operated underground LHD - near miss (PDF 7 kb)
SIR No.064 Fire on front end loader (PDF 6 kb)
SIR No.065 Children exposed to hazards at unattended mine (PDF 7 kb)
SIR No.066 Structural failure of bucketwheel reclaimer - fatal (PDF 6 kb)
SIR No.067 High voltage circuit switched to earth (PDF 6 kb)
SIR No.068 Electrical test instrument - serious accident (PDF 6 kb)
SIR No.069 Anfo mixing vehicle fire (PDF 8 kb)
SIR No.070 Thermal lancing of crusher concaves - serious accident (PDF 6 kb)
SIR No.071 Sudden collapse of ground - sinkhole formation (PDF 7 kb)
SIR No.072 Split wheel rim - fatal accident (PDF 7 kb)
SIR No.073 Conveyor belt failure (PDF 6 kb)
SIR No.074 Driver killed in tractor rollover (PDF 7 kb)
SIR No.075 Explosion in underground magazine (PDF 7 kb)
SIR No.076 Stormwater inflow into decline mine (PDF 7 kb)
SIR No.077 Hazardous drill hole intersection (PDF 6 kb)
SIR No.078 Blasting accidents (PDF 17 kb)
SIR No.079 Exploration drill hole intersection (PDF 15 kb)
SIR No.080 Overheating radiator - burn injury (PDF 16 kb)
SIR No.081 Serious burns involving disposable overalls (PDF 15 kb)
SIR No.082 Crushed in articulation point of LHD (PDF 14 kb)
SIR No.083 Explosion of split-ring tyre assemblies (PDF 16 kb)
SIR No.084 Loss of control of water cart - fatal accident (PDF 15 kb)
SIR No.085 Explosion of flammable gas in underground stope void (PDF 18 kb)
SIR No.086 Structural failures of large span gantry crane (PDF 16 kb)
SIR No.087 Drill rod handling - serious incident (PDF 16 kb)
SIR No.088 Remotely operated LHD - dangerous occurrences (PDF 16 kb)
SIR No.089 Remotely operated LHD machine - fatal accident (PDF 14 kb)
SIR No.090 Remotely operated machinery - rockfall - fatal (PDF 14 kb)
SIR No.091 Fall of material - fatal accident (PDF 14 kb)
SIR No.092 RC drill rig 3 sample hose connection - fatal (PDF 15 kb)
SIR No.093 Ventilation doors - fatal accident (PDF 14 kb)
SIR No.094 Fall from height in gig rise - fatal accident (PDF 69 kb)
SIR No.095 Death of exploration worker (PDF 17 kb)
SIR No.096 Remotely operated LHD - brake failure (PDF 14 kb)
SIR No.097 Radio-operated crane - uncontrolled movement (PDF 14 kb)
SIR No.098 Jumbo drilling rig fire - underground fire (PDF 14 kb)
SIR No.099 Remotely operated LHD - runaway (PDF 15 kb)
SIR No.100 Pressure vessel entry - scalding injury (PDF 15 kb)
SIR No.101 Lime tanker pressure piping connection failure (PDF 14 kb)
SIR No.102 Fatal methane gas explosion - South Africa (PDF 17 kb)
SIR No.103 Hazards associated with dehydration (PDF 17 kb)
SIR No.104 Dislodgement of a crane load above a person (PDF 15 kb)
SIR No.105 Failure of a galvanised grade 80 chain sling (PDF 16 kb)
SIR No.106 Operator trapped by suction hose (PDF 14 kb)
SIR No.107 Multiple fuming and gas explosion (PDF 21 kb)
SIR No.108 Detonation of misfire in pit floor (PDF 20 kb)
SIR No.109 Fitting of tile boxes on drilling rigs (PDF 32 kb)
SIR No.110 Vehicle over stope edge (PDF 14 kb)
SIR No.111 Mine rescue team members collapse during exercise (PDF 74 kb)
SIR No.112 Loading service vehicle onto trailer (PDF 76 kb)
SIR No.113 Drillers offsider struck by stillson type wrench (PDF 39 kb)
SIR No.114 Wrong gas used during gas purge resulted in burns (PDF 38 kb)
SIR No.115 Tyre rolling down a ramp (PDF 38 kb)
SIR No.116 Operator safety - earthmoving scrapers (PDF 36 kb)
SIR No.117 Underground electrical equipment - fatal accident (PDF 40 kb)
SIR No.118 Grader incident - loss of control (PDF 37 kb)
SIR No.119 Drillers offsider blasted with dust under pressure (PDF 36 kb)
SIR No.120 Contamination of high pressure compressed air - plant (PDF 105 kb)
SIR No.121 Haul road stability in open-cut operations (PDF 40 kb)
SIR No.122 Dumptruck tyre failure (PDF 33 kb)
SIR No.123 RTA at intersection of mine road and bush track (PDF 24 kb)
SIR No.124 Tyre inflation - fatal accident (PDF 36 kb)
SIR No.125 Transport of explosives underground -vehicle incident (PDF 45 kb)
SIR No.126 Accidental initiation of explosives during blasting (PDF 39 kb)
SIR No.127 Operator tipped out of elevated work platform (PDF 46 kb)
SIR No.128 Steering failures on haul trucks (PDF 39 kb)
SIR No.130 Employee sprayed with rocks when a truck tyre failed (PDF 52 kb)
SIR No.131 Drill rig fire - self-rescuer failed (PDF 64 kb)
SIR No.133 Use of torque multiplier — fatal accident (PDF 65 kb)
SIR No.134 Detonator found inside ANFO loader (PDF 64 kb)
SIR No.135 Aluminium drill rod failure (PDF 100 kb)
SIR No.136 Caught between headboards of two trucks - fatal (PDF 271 kb)
SIR No.137 Emergency response members struck by falling cylinder (PDF 60 kb)
SIR No.138 Paste fill wall failure (PDF 71 kb)
SIR No.139 Loss of control of service vehicles (PDF 64 kb)
SIR No.140 Service truck tyre failure (PDF 63 kb)
SIR No.141 Rockfall fatality (PDF 52 kb)
SIR No.142 Explosion of flammable containers at hot demo Site (PDF 66 kb)
SIR No.143 Use of dozers for tree clearing operations (PDF 60 kb)
SIR No.144 Roll-over of front-end loader (PDF 60 kb)
SIR No.145 Driller’s offsider struck by dust deflector box (PDF 66 kb)
SIR No.146 Hazard posed by cyclone draw in RC drilling (PDF 115 kb)
SIR No.149 Loader falling into an open slope (PDF 61 kb)
SIR No.150 Failure of escape ladderway in underground rise (PDF 65 kb)

Templates
Classified plant administration audit template (PDF 40 kb)
Cyanide usage audit template (PDF 32 kb)
Development of high headings underground audit template (PDF 62 kb)
Electrical safety management systems audit template (PDF 38 kb)
Emergency plan audit template (PDF 80 kb)
Explosives storage surface part 1 - audit template (PDF 27 kb)
Explosives storage surface part 2 - audit template (PDF 28 kb)
Explosives usage surface - audit template (PDF 30 kb)
Explosives usage underground - Audit template (PDF 34 kb)
Fixed plant audit template (PDF 57 kb)
Fixed plant management - audit template (PDF 28 kb)
Geotechnical considerations - audit template (PDF 40 kb)
Gold rooms audit template (PDF 69 kb)
Isolation and tagout - audit template (PDF 67 kb)
Management systems - audit template (PDF 47 kb)
MS Notification of outcome of health assessment – pro forma (PDF 89 kb)
Noise - audit template (PDF 963 kb)
Quarry systems - audit template (PDF 35 kb)
Surface Atmospheric Contaminant Management audit template (PDF 120 kb)
Surface dust management - audit template (PDF 94 kb)
Surface trackless mobile plant - audit template (PDF 30 kb)
Tailings dam - audit template (PDF 31 kb)
Tipping on stockpiles - audit template (PDF 25 kb)
Underground fire prevention - audit template (PDF 72 kb)
Underground ventilation management audit template (PDF 93 kb)
Workshops - audit template (PDF 85 kb)
## Annexure 8

**Comparative Table: Certificates of Competency**

### Western Australia

*Minas Safety and Inspection Act 1994 (Part 4)*
*Minas Safety and Inspection Regulations 1995 (Part 2, Division 3, Subdivision C)*

<table>
<thead>
<tr>
<th>CERTIFICATE</th>
<th>QUALIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>First class mine manager’s certificate</strong></td>
<td>r. 2.21</td>
</tr>
<tr>
<td><strong>Education &amp; Training</strong></td>
<td><strong>Practical Experience</strong></td>
</tr>
<tr>
<td>Holds a Degree of Bachelor of Engineering in Mining from any Australian University; or a Degree of Bachelor of Science (Mining) from the Western Australian School of Mines; or such other qualification the Board may consider to be equivalent.</td>
<td>Not less than 5 years, 3 of which has been general underground mining experience which includes:</td>
</tr>
<tr>
<td>Has passed a separate examination set by the Board requiring knowledge of the Act and Regulations.</td>
<td>• At least 3 months face experience in operating a rockdrill on development and stoping faces;</td>
</tr>
<tr>
<td></td>
<td>• At least 3 months personal experience in using explosives in charging and firing both development and stoping rounds; and</td>
</tr>
<tr>
<td></td>
<td>• 6 months fulltime underground employment directly involved in ground support, haulage and transport, and in general mine servicing.</td>
</tr>
</tbody>
</table>

*Note: there are different practical experience requirements in the case of a first class mine manager’s certificate for underground coal.*
Quarry manager’s certificate
r. 2.22

- Degree of Bachelor of Engineering from any Australian University
- Diploma in Mining or Engineering from any recognised Australian Technical Institute
- An Associate Diploma in Surface Mining from any recognised Australian Tertiary Education Institution
- Degree or Diploma in geology, or mining or a earth sciences related discipline;
- Other mining qualification the Board may consider to be equivalent to the above qualifications.

Has passed a separate examination set by the Board requiring knowledge of the Act and regulations.

Experience in or about a quarry for not less than 2 years and at least one of that 2 year period has been first hand practical experience in production operations in a quarry or open pit, including at least 3 months personal experience in the charging and firing of explosives in the quarry or pit.

*Note: different requirements for practical experience if application was made before 9 December 1997.

Has attained the age of 24 years.

- Is of good character;
- Has received satisfactory training in First Aid

Underground supervisor’s certificate

Degree, Diploma or Associate Diploma in Mining Engineering in Mining from a recognised University, School of Mines, or Institute of

Has had:
- General experience in underground mining, and has

Has attained the age of 23 years

- Is of good character;
- Has received
### Has passed the mining practice and the mining law examinations set by the Board.

- Successfully completed a Degree, Diploma or Associate Diploma in Mining Engineering from a recognised University, School of Mines or Institute of Technology and has been in full-time employment underground for at least 2 years.

Has had:
- Face experience in operating a rockdrill on development and stoping faces for at least 3 months;
- Personal experience in using explosives in charging and firing both development and stoping rounds for a period of at least 3 months; and
- 6 months full-time underground employment directly involved in ground support, haulage and transport, and general mine servicing work.

<table>
<thead>
<tr>
<th>Deputy’s certificate</th>
<th>Completed a Degree, Diploma or Associate Diploma in Mining Engineering from a recognised University, School of Mines or Institute of Technology</th>
<th>Has had:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>General experience in underground mining and has</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Has attained the age of 23 years.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Is of good character; and</td>
</tr>
</tbody>
</table>

satisfactory training in First Aid.
<table>
<thead>
<tr>
<th>r.2.24</th>
<th>University, School of Mines, or Institute of Technology.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Has passed the mining practice and the mining law examinations set by the Board.</td>
</tr>
<tr>
<td></td>
<td>Has been employed underground for at least 5 years; or</td>
</tr>
<tr>
<td></td>
<td>• Successfully completed a Degree, Diploma or Associate Diploma in Mining Engineering from a recognised University, School of Mines, or Institute of Technology and has been in fulltime employment underground for at least 2 years.</td>
</tr>
<tr>
<td></td>
<td>Has had:</td>
</tr>
<tr>
<td></td>
<td>• Face experience in coal mining operations and development for at least 6 months;</td>
</tr>
<tr>
<td></td>
<td>• 6 months fulltime underground employment directly involved in ventilation control, roof support, shotfiring, conveyor haulage and transport.</td>
</tr>
<tr>
<td></td>
<td>• Has received satisfactory training in First Aid.</td>
</tr>
</tbody>
</table>
| **Restricted quarry manager’s certificate** r.2.25 | Has passed relevant examinations set by the Board. | Has had experience in quarry operations for at least 2 years, of which at least 1 year has been first hand practical experience in production operations in a quarry or open pit, including at least 3 months personal experience in the charging and firing of explosives in the quarry or pit.  
*Note: different requirements for practical experience if the application was made before 9 December 1997.*  
*Personal experience in the charging and firing of explosives does not apply to persons whose experience has been in a quarry where explosives were not used, but any certificate issued to such a person must be restricted to quarries where explosives are not used.* | Has attained the age of 21 years. | • Is of good character; and  
• Has received satisfactory training in First Aid. |
<table>
<thead>
<tr>
<th><strong>Winding engine driver’s certificate – Class I</strong></th>
<th>Applicants must have passed relevant examinations set by the Board</th>
<th>Has:</th>
</tr>
</thead>
<tbody>
<tr>
<td>r.2.27</td>
<td></td>
<td>- Assisted, under the supervision of a qualified person, in driving an electric winding engine fitted with dead weight power operated brakes or multi-spring applied unit brakes, operated by an electric motor of not less than 75kW for at least 300 hours at the rate of a minimum of 12 hours and a maximum of 40 hours per week.;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Assisted in carrying out the duties of a platman, skipman or set rider, including shaft maintenance and shaft repairs for not less than 12 hours per week for a period of 6 weeks; and</td>
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<tr>
<td></td>
<td></td>
<td>- A knowledge of the ancillary equipment normally associated with winding engines.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Has attained the age of 21 years.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Is of good character; and</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Is medically fit</td>
</tr>
<tr>
<td><strong>Winding engine driver’s certificate – Class 2</strong></td>
<td>Applicants must have passed relevant examinations set by the Board.</td>
<td>Has:</td>
</tr>
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</tr>
<tr>
<td>r.2.28</td>
<td></td>
<td>• Assisted, under the supervision of a qualified person, in driving a winding engine driven by a power source having a power input of not more than 75kW and not less than 25kW for a period of not less than 300 hours, at the rate of a minimum of 12 hours and a maximum of 40 hours per week;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Assisted in carrying out the duties of a platman, skipman or set rider and has had experience in shaft maintenance and shaft repairs for not less than 12 hours per week over a period of not less than 6 weeks; and</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• A knowledge of the ancillary equipment normally associated with winding engines.</td>
</tr>
<tr>
<td></td>
<td>Has attained the age of 21 years.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Is of good character; and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Is medically fit</td>
<td></td>
</tr>
</tbody>
</table>

*NOTE:*
Pursuant to r.2.20(2) Mines Safety and Inspection Regulations 1995, The Board of Examiners may examine the applicant in writing or orally, or both, as it thinks fit, or may appoint examiners to conduct such examinations.
### New South Wales

*Mines Inspection Act 1901*
*Coal Mine Health and Safety Act 2002*
*Coal Mine Health and Safety Regulation 2005*

<table>
<thead>
<tr>
<th>CERTIFICATE</th>
<th>QUALIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Education &amp; Training</td>
</tr>
<tr>
<td><strong>METALLIFEROUS</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Production mine manager’s certificate</strong></td>
<td>A degree or diploma in mining engineering from a recognised university or other educational body approved by the Board.</td>
</tr>
<tr>
<td><em>(Above Ground)</em></td>
<td>OR A qualification recognised by the Board as equivalent to such a degree or diploma</td>
</tr>
<tr>
<td><em>(Mine Safety Operations – NSW Department of Primary Industries – As at February 2007)</em></td>
<td>Applicants are required to pass the examination for an above ground mine production manager’s certificate of competency which consists of both written and oral parts.</td>
</tr>
</tbody>
</table>
Production mine manager’s certificate (Below Ground)

(Mine Safety Operations – NSW Department of Primary Industries – As at February 2007)

<table>
<thead>
<tr>
<th>A degree or diploma in mining engineering from the University of Sydney or University of NSW or other educational body approved by the Board.</th>
</tr>
</thead>
<tbody>
<tr>
<td>OR</td>
</tr>
<tr>
<td>A qualification recognised by the Board as equivalent to such degree or diploma.</td>
</tr>
</tbody>
</table>

Applicants must have a minimum of 3 years practical experience made up as follows:

- 12 months practical experience in a below ground metalliferous mine under the ground of a certified mine production manager. This must include at least 3 months work at the face, or in the long hole drilling, charging or ore loading, with associated ground control during those operations, and the balance in some approved mining work such as: ground control, plant operation or drilling.

- 18 months experience in some approved type of mining work such as surveying, work study, quality control, mine ventilation etc.

No minimum age is specified, but applicants are required to provide proof of identity (such as a driver’s licence) at the examination.

- Applicants must possess a current First Aid certificate issued by the St John Ambulance.

(i.e. surveying, sampling, equipment evaluation)

- 6 months experience in some approved type of mining work (i.e. budgets, mine design, geology)

*Note: “approved” means approved by the Board.
| **Engine driver’s certificate of competency for raising or lowering people by a winding engine** | **Applicants must have successfully completed a training course approved by the Board, which is based on the Metalliferous Industry Competency Standards from the endorsed Metalliferous Training Package (MNM99) and adapted to the class of winder or hoist for which the application applies.** | **Has practiced upon the particular winder or hoist for which the application applies (or similar winder or hoist) for the period specified in the approved training package or otherwise for a period of not less than 5 hours p/wk for 12 weeks under the supervision of a certified engine-driver or other suitable person approved by the Board.** | **The applicant must be at least 21 years of age.** | **The applicant must provide a certificate verifying the applicant’s physical fitness, sight, hearing and other faculties are unimpaired, and ensure that they hold a current medical certificate obtained within the last 2 years.** |
| --- | --- | --- | --- |
| **6 months experience in some approved type of mining work (i.e. budgets, mine geology, metallurgy)** | | **Note: “approved” means approved by the Board.** | | |
| **Under manager certificate** | An applicant must possess an accredited degree or diploma in Mining Engineering or have passed an accredited course conducted by TAFE or other Registered Training Provider approved by the Board, such as competencies from MNC50204 Diploma in Underground Coal Management qualification from MNC04 Coal Training Package or Achieved a Pass in the Under Manager’s Part A exam.  

An applicant shall submit evidence that he/she has obtained a certificate in mine rescue awareness or equivalent from the Mines Rescue Service of NSW.  

Applicants must submit themselves to an examination conducted by the Coal Competence Board which consists of both written and oral components. |
| --- | --- |
| **Applicants must have a minimum of 3 years of mining experience.**  
Where an applicant has engineering qualifications entitling graduate membership of the Institution of Engineers, or where evidence is produced of possession of a qualification in mining approved by the Board, evidence of 3 years practical experience in or about a mine shall be required.  

This experience may include up to 1 year at a mine other than an underground coal mine. 2 years of it shall have been underground experience concerned with the winning of coal for one of which the candidate shall have taken part in, or been present during, production mining operations and the support of openings. | Applicants must be 21 years of age to be eligible to receive a certificate of competence and are required to include a JP certified copy of their birth certificate or passport for identification purposes and proof of age. |
| Applications must hold current competencies in first aid and include a JP certified copy of their current first aid qualification.  
On 3 November 2005 the Coal Mining Qualifications Board (NSW) ratified changes to the section in relation to ‘Gas Testing’.  
The certification in relation to the prerequisites for underground mining (Under Manager and Deputy) certificates of competence is no longer required by the majority of the industry.  
At mine sites where the LOFSL is in use, it will be the Mine Manager’s responsibility to ensure that all relevant personnel are competent and have the required certification and ongoing training for the equipment at all times. |
| Manager of a mine certificate | Applicants must possess an accredited degree or diploma in Mining Engineering or have passed an accredited course conducted by TAFE or other Registered Training Provider approved by the Board, such as competencies MNC60204 Advanced Diploma of Underground Coal Mining qualification form MNC04 Coal Training Package, or achieved a Pass in the Manager’s Part A exam. Applicants must also have obtained a certificate in mine rescue awareness or equivalent from the Mines Rescue Service of NSW and include a JP certified copy of the certificate. An applicant must pass the examination for certificate of competence as manager of a mine. The exam consists of a written and oral component. (Paper 1 – Legislation, Paper 2 – Ventilation, Paper 3 – Coal Mining Practice). | Applicants must have a minimum of 3 years of mining experience. Where an applicant has engineering qualifications entitling graduate membership of the Institution of Engineers, or where evidence is produced of possession of a qualification in mining approved by the Board, evidence of 3 years practical experience in or about a mine shall be required. This experience may include up to 1 year at a mine other than an underground coal mine. 2 years of it shall have been underground experience concerned with the winning of coal for one of which the candidate shall have taken part in, or been present during, production mining operations and the support of openings. | Applicants must be 21 years of age to be eligible to receive a certificate of competence and are required to include a JP certified copy of their birth certificate or passport for identification purposes and proof of age. Applicants must hold current competencies equivalent to a Senior First Aid Certificate with St John’s and submit evidence in the form of a JP certified copy of their current first aid qualification. On 3 November 2005 the Coal Mining Qualifications Board (NSW) ratified changes to the section in relation to ‘Gas Testing’. The certification in relation to the prerequisites for underground mining (Under Manager and Deputy) certificates of competence is no longer required by the majority of the industry. At mine sites where the LOFSL is in use, it will be the Mine Manager’s responsibility to ensure that all relevant personnel are competent and have the required certification and ongoing training for the equipment at all times. |
| **Open Cut mine manager’s certificate (Coal Mine)** | Applicants must provide evidence of having passed an accredited course or courses in Engineering, accredited by the Board, such as a degree or diploma issued by TAFE or other Registered Training Provider approved by the Board, such as competencies from MNQ50103 Diploma of Extractive Industries Management, qualification from MNQ03 Extractive Industries Training Package or coal equivalent. Applicants who hold a technical management post superior to an open cut examiner at an open cut mine in NSW and who attain 3 years or more experience in that post shall be deemed to have the educational requirements. Applicants must pass an examination for certificate of competence as manager of an open cut mine – both written (legislation and principles of open cut mining practices) and oral (mining and related safety practices in NSW) components. | Candidates with accredited qualifications must provide evidence of a total of 3 years experience at surface mining operations acceptable to the Board, 1 year of which has been at an open cut coal mine. 1 year underground experience in a coal mine will be acceptable in lieu of one years experience at surface mining operations or one years experience at an open cut coal mine. | The minimum age at which a person will be issued with a certificate is 21. A person may sit for the examination before attaining this age. An applicant must submit evidence that he/she has obtained a certificate in First Aid from the NSW Government Ambulance Corp, the St Johns Ambulance Association or other approved bodies. |
| Deputy’s Certificate of Competency | Applicants must possess a Certificate IV in Underground Coal Mining (MNC40304) or an accredited degree, advanced diploma or diploma in mining engineering or other qualification as approved by the Board. Applicants must pass the examination for certificate of competence as deputy. The exam consists of both written and oral components. | Applicants must have gained 3 years practical experience in or about a mine. This may include up to 1 year in a mine other than a coal mine. 2 years of it shall have been underground experience concerned with the winning of coal for 1 of which the candidate shall have taken part in, or been present during production mining operations and the support of openings. | The minimum age at which a person will be issue with a certificate is 21. A person may sit for the examination which a person will be issued with a before attaining this age. | An applicant must submit evidence that he/she has a current certificate in First Aid (with validity of at least 6 months). The minimum qualification should be Senior First Aid issued by an approved supplier recognised by the Board. |
| Mine electrical engineer | Applicants must have passed an accredited course in electrical engineering such as a degree from a university or an advanced diploma conducted by TAFE or other Registered Training Provider approved by the Board. Applicants must pass the examination for certificate of competence as mine electrical engineer. The examination comprises of a written and oral section. | Underground Applicants must produce detailed evidence of 1 years experience in or about an underground coal mine associated with the installation, examination, testing and maintenance of plant equipment. 6 months of such experience shall have been gained underground. Applicants may have up to 3 months of relevant experience at a licensed or approved workshop accredited as experience in or about an underground coal mine. Open Cut Applicants must produce detailed evidence of 1 years experience in or about | Applicants must be 21 years of age to be eligible to receive a certificate of competence and are required to include a JP certified copy of their birth certificate or passport for identification purposes and proof of age. | Applicants must: • hold current competencies in first aid from the NSW Government Ambulance Corps, the St Johns Ambulance Association or other body approved by the Board, and • include a JP certified copy of their current first aid qualification. |
Mechanical engineer certificate (open cut or underground)

Applicants must have 1 years experience in or about a coal mine associated with the mechanical engineering aspects of the installation, examination, testing and maintenance of plant and equipment. 6 months of such experience shall have been gained underground.

Applicants must have 6 months experience in or about an open-cut coal mine associated with the mechanical engineering aspects of the installation, examination, testing and maintenance of mechanical plant and equipment.

Applicants must pass the examination for the certificate of competency as mine mechanical engineer for underground and open-cut coal mines. The examination comprises of a written

Mine Mechanical Engineer

Applicants must produce evidence of having passed an accredited course in Mechanical Engineering as approved by the Board such as a degree, associate diploma or certificate.

Applicants holding an accredited certificate in mechanical engineering from TAFE issued after 1 January 1983 must also have successfully undertaken an approved post certificate course in colliery mechanical engineering.

Applicants must have 21 years of age.

An applicant must submit evidence that he/she has obtained a certificate in First Aid from the NSW Government Ambulance Corp, the St Johns Ambulance Association or other approved bodies.

Applicants must have up to 3 months relevant experience at an organisation that installs, maintains, services, inspects, overhauls or repairs electically powered mobile plant for use in open cut mines.

Applicants may have up to 3 months relevant experience at an organisation that installs, maintains, services, inspects, overhauls or repairs mobile plant for use in open cut mines.

Applicants must be a minimum of 21 years of age.

An open cut coal mine associated with the installation, examination, testing and maintenance of plant and equipment.

Applicants must be a minimum of 21 years of age.

Applicants must have 1 years experience in or about a coal mine associated with the mechanical engineering aspects of the installation, examination, testing and maintenance of plant and equipment. 6 months of such experience shall have been gained underground.

Applicants must have 6 months experience in or about an open-cut coal mine associated with the mechanical engineering aspects of the installation, examination, testing and maintenance of mechanical plant and equipment.

Applicants must pass the examination for the certificate of competency as mine mechanical engineer for underground and open-cut coal mines. The examination comprises of a written
## Open Cut Examiners Certificate of Competency

(Coal Competence Board – NSW Department of Primary Industries, Mineral Resources, as at 1 January 2008)

<table>
<thead>
<tr>
<th>Applicants must have passed:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• an accredited course in Engineering such as a degree or diploma, or</td>
</tr>
<tr>
<td>• passed an accredited course conducted by TAFE or other Registered Training Provider approved by the Board such as <em>MNC40104 Certificate IV in Surface Coal Mining (Open Cut Examiner)</em>; or</td>
</tr>
<tr>
<td>• having in lieu of formal qualifications, an applicant may have a minimum of 5 years supervising production operations at a large open cut mine acceptable to the Board.</td>
</tr>
</tbody>
</table>

Applicants must pass the examination set by the Coal Competence Board. The examination is both written (based on legislation and practical open cut operation knowledge) and oral (practical aspects of mining and safety practices in NSW).

<table>
<thead>
<tr>
<th>Applicants who have passed an accredited course in Engineering must produce evidence of 1 years experience in open cut coal mining production operations.</th>
</tr>
</thead>
</table>

Applicants who have passed an accredited course conducted by TAFE or other Registered Provider or have a statutory qualification in open cut mining from elsewhere in Australia must produce evidence of 3 years experience in open cut mining operations acceptable to the Board, with at least 1 year working in production areas and at least 3 months in open cut coal mining production operations.

Applicants who have 5 years experience supervising production operations must have at least 3 months experience in open cut coal mining production operations.

<table>
<thead>
<tr>
<th>Applicants must be a minimum of 21 years of age.</th>
</tr>
</thead>
</table>

Applicants require a current certificate in first aid from the NSW Government Ambulance Corps, the St Johns Ambulance Association or other approved body.
*NOTE*


- The *Mine Health and Safety Act 2004* supplements the *Occupational Health and Safety Act 2000* (NSW) and replaces the *Mines Inspection Act 1901* (NSW). It requires the operator of a mine to implement health and safety, and emergency systems. There is also a strong emphasis on workforce consultation.
Clause 109, Part 8 – *Mine Health and Safety Regulation 2007*

Functions to which Part 9 of the *Mine Health and Safety Act 2004* applies and evidence of competence to perform those functions are specified in the Table below.

<table>
<thead>
<tr>
<th>Specified Function</th>
<th>Specified Evidence of Competence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Functions of a production manager for a mine that is an above ground mine.</td>
<td>Certificate of competence to be a production manager for an above ground mine, or production manager permit for an above ground mine.</td>
</tr>
<tr>
<td>Functions of a production manager for a mine that is an underground mine.</td>
<td>Certificate of competence to be a production manager for an underground mine, or Production manager permit for an underground mine.</td>
</tr>
<tr>
<td>Functions of mine operator for an opal mine.</td>
<td>Completion of Mine Operators Workshop (as approved by the Department of Primary Industries).</td>
</tr>
<tr>
<td>Functions of a qualified electrical engineer.</td>
<td>Registration on the National Professional Engineers Register (administered by Engineers Australia).</td>
</tr>
<tr>
<td>Functions of a qualified electrical tradesperson.</td>
<td>Both an electrical trades certificate and a Qualified Supervisor Certificate (issued by the Department of Commerce), OR Employment as an electrical tradesperson at a mine for a period of not less than 2 years prior to the commencement of this clause.</td>
</tr>
</tbody>
</table>
Queensland

_Mining and Quarrying Safety and Health Act 1999_ (Part 10)
_Coal Mining Safety and Health Act 1999_
_Coal Mining Safety and Health Regulation 2001_

<table>
<thead>
<tr>
<th>CERTIFICATE</th>
<th>QUALIFICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Education &amp; Training</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Practical Experience</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Age</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Other</strong></td>
</tr>
<tr>
<td><strong>METALLIFEROUS</strong></td>
<td></td>
</tr>
<tr>
<td><strong>First class mine manager’s certificate</strong></td>
<td><strong>Bachelor of Engineering (Mining, UQ)</strong> or a degree, diploma or other qualification in mining engineering recognised by the Board.</td>
</tr>
<tr>
<td>(Underground Metalliferous Mines)</td>
<td>Alternatively, a Graduate Diploma in Mining or Mining Engineering from a recognised tertiary institution which is acceptable to the Board, based on a selection of modules acceptable to the Board.</td>
</tr>
<tr>
<td>(Qld Department of Mines and Energy – <em>Mining and Quarrying Safety and Health Act 1999</em>, Part 10, as at 31 January 2006)</td>
<td>Competency MNM.MSM.617.A: “Establish the risk management system”, or equivalent.</td>
</tr>
<tr>
<td></td>
<td>At least 3 years experience, of a nature and standard acceptable to the Board, in and around an underground mine, or which:</td>
</tr>
<tr>
<td></td>
<td>• At least 2 years underground mining activities is in metalliferous mine, including 9 months directly involved in face operations, including:</td>
</tr>
<tr>
<td></td>
<td>o At least 16 weeks directly involving work in mine development or stoping, with personal experience in the handling of explosives, and</td>
</tr>
<tr>
<td></td>
<td>o At least 10 weeks experience in at least 2 of</td>
</tr>
<tr>
<td></td>
<td>No minimum age requirement is specified. However, the Board requires proof of identity through a birth certificate (copy to be certified true copy by a Justice of the Peace).</td>
</tr>
<tr>
<td></td>
<td>Certificate in First Aid at a minimum of Senior level, current at date of application (or reapplication).</td>
</tr>
</tbody>
</table>

No minimum age requirement is specified. However, the Board requires proof of identity through a birth certificate (copy to be certified true copy by a Justice of the Peace).
the following:
  ▪ ground support systems
  ▪ transport of ore, wast, supplies and equipment
  ▪ stope preparation and filling
  ▪ shaft maintenance

The Board may vary these requirements where an applicant has had at least 5 years post-graduation experience in metalliferous mining.

**Practical experience – supervisory**

At least 9 months having been a front line supervisor in direct control of and instructing in a team of people engaged in mining activities in an underground mining situation, including directly controlling the mine physical environment.
| First class mine manager’s certificate (Underground Coal Mines) | Successful completion of a degree, diploma or other tertiary academic qualification in mining engineering acceptable to the Board. Applicants holding overseas qualifications are required to have those qualifications assessed against Queensland’s equivalent qualifications. OR Successful completion of all the mandatory competencies from the current or former Black Coal Training Packages. Applicants must have obtained a National MNC.04 (Coal) competency relating to underground coal mine shotfiring. Both the MNC.U1048A Conduct shotfiring or the MNC.U1049A Support shotfiring operations are acceptable. Applicants must demonstrate their knowledge of the properties and | There are 4 categories of practical experience: • Category 1: Underground coal mining work experience as a supervisor • Category 2: Underground coal mining work experience in face mining operations, • Category 3 – underground coal mining work experience additional to that reported in Categories 1 & 2 • Category 4 – Mining work experience in and around any kind of underground mining operations additional to that reported in Categories 1, 2 & 3 The applicant must have had at least a total of 141 weeks (3 years) mining experience working in and around underground mines of a nature and standard acceptable to the Board. This must include: • Not less than 94 weeks obtained in underground coal mining activities, to include: | No minimum age requirement is specified. However, the Board requires proof of identity through a certified copy of: • a birth certificate, or an Australian passport | First-time applicants and previous applicants must have endorsement by the employer’s Site Senior Executive – a letter recommending the applicant’s suitability to undertake the examination for the First Class Mine Manager’s Certificate of Competency (Underground Coal Mines). Applicants must have satisfactorily completed an accredited course in senior first aid. |
physiological effects of mine gases and the use and care of gas detection instruments. Applicants must be assessed as competent in this area by the Qld Mines Rescue Service during the last 5 years, and provide documented evidence if having successfully undertaken such training.

- at least 36 weeks underground coal mining supervisory experience, and
- At least 36 weeks underground coal face mining experience
  - Up to 47 weeks obtained in and around any underground mining operations, if necessary.

**Category Specific Requirements**

**Category 1** – at least 36 weeks work experience in underground coal mines as a supervisor of a mining team engaged in mining activities, including directly controlling the mine’s physical environment.

**Category 2** – at least 36 weeks underground coal mining experience that directly involved face mining operations. Applicants must have been directly involved in production activities, including mine development or second workings.

**Category 3** – at least 94 weeks must have been underground coal mining activities. Applicants may meet these requirements from work undertaken in Categories 1 & 2. However, the underground coal mining experience of at least 94 weeks must
| Second class mine manager’s certificate (underground mines) | Bachelor of Engineering (Mining, UQ) or a degree, diploma or other qualification in mining engineering recognised by the Board. Alternatively, 8 “core” competencies from the Training Packages specified. Applicants are also required to have successfully completed:  
- MNC.G1002.A: “Implement and apply risk management processes”  
- MNC.U49.A: “Support shotfiring operations” or MNC.U48.A: “Conduct shotfiring operations” | At least 3 years mining experience, of a nature and standard acceptable to the Board, in and around an underground mine, including:  
- At least 2 years in underground coal mining activity, including  
  - At least 9 months directly involved in coal face operations.  
*Credit is given to applicants with suitable vacation experience. | No minimum age requirement specified, but proof of identity is required – a birth certificate, copy to be certified true copy by a Justice of the Peace. | Applicants must obtain a certificate in First Aid at a minimum of Senior level, current at the date of application. |
- MNCU1152A: “Implement mine emergency management system”, if holding an acceptable mining engineering degree and not electing to undertake the Mines Rescue Brigade Preliminary Training Course.

Applicants must also complete Mines Rescue Brigade Preliminary Training for 2 weeks. In lieu of this requirement, persons holding an acceptable mining engineering degree may elect to complete MNCU1152A: “Implement mine emergency management system”.

Applicants must also have undertaken a Gas Test at a Mines Rescue Station, to have been achieved within 5 years of the date of their application.
| Deputy’s certificate (Underground coal mines) | Successfully completing a degree, diploma or other tertiary academic qualification in mining engineering acceptable to the Board. Applicants holding overseas qualifications are required to have those qualifications assessed against Queensland’s equivalent qualifications. OR Successfully completing all the mandatory competencies from the current or former Black Coal Training packages. (*Note: applicants who possess qualifications from the Republic of South Africa must also complete additional requirements). | There are 3 different categories, each with different requirements. Applicants for any category must have had at least a total of 141 weeks (i.e. 3 years) mining experience working in and around underground mines of a nature and standard acceptable to the Board. This must include:  
- Not less than 94 weeks obtained in underground coal mining activities, to include at least 36 weeks underground coal face mining experience  
Up to 47 weeks obtained in and around any underground mining operations, if necessary.  
Category Specific Requirements  
**Category 1 – Underground coal mining work experience in face mining operations**  
- At least 36 weeks underground coal mining experience that directly involved face mining operations. Applicant must have been directly involved in production activities, including mine development or second | No minimum of age specified, but each applicant must provide a copy of one of the following documents as evidence of identity:  
- An official birth certificate or official extract of birth certificate, and  
- Australian passport  
First-time applicants and previous applicants must have endorsement by the employer’s Site Senior Executive – a letter recommending the applicant’s suitability to undertake the examination for the Deputy’s Certificate of Competency (Underground Coal Mines).  
Applicants must have satisfactorily completed an accredited course in senior first aid. |

| | | | |
shotfiring operations

An applicant must provide a certified copy showing he/she has satisfied the competency requirements of National MNC.04 (Coal) Competency MNC.G1002.S – Implement and apply the risk management processes
OR
A qualification recognised by the Coal Mining Safety and Health Advisory Council as equivalent to MNC.G1002.A

workings.

Category 2 – Underground coal mining work experience additional to that reported in Category 1
- At least 94 weeks must have been in underground coal mining activities. AN applicant may make these requirements from work undertaken in Category 1.
  - Of these 94 weeks, at least 20 weeks must involve experience in 11 specified areas (see Category 2 for details).

Category 3 – Mining work experience in and around any kind of underground mining operations additional to that reported in Categories 1 & 2
- If the applicant has not had at least 141 weeks total underground coal mining experience, he/she may claim up to a maximum of 47 weeks experience obtained in underground metalliferous mines or other underground operations, where the nature and standard of the experience is acceptable to the Board.
| Open cut examiner’s certificate (Surface Coal Mines) | 8 “core” competencies plus 3 electives, to complete the requirements for a Certificate IV in Surface Coal Mining. OR Bachelor of Engineering (Mining, UQ) or a degree, diploma or other qualification in mining engineering recognised by the Board, plus: MNC.G1002.A: “Implement and apply risk management processes”, and MNCO1041A: “Support shotfiring operations” or MNCO1040A: “Conduct shotfiring operations” | At least 3 years mining experience, of a nature and standard acceptable to the Board, including:  - At least 12 months experience in the open cut coal mining excavation, and  - A verified log of activities in and around blasting in an open cut coal mine, open cut metalliferous mine or quarry, including verified evidence of direct involvement in at least 10 separate blasting events to ensure that all aspects of MNCO1041A: “Support shotfiring operations” have been achieved | No minimum age requirement is specified. However, the Board requires proof of identity through a birth certificate (copy to be certified true copy by a Justice of the Peace). Certificate in First Aid at a minimum Senior level, current at date of application (or reapplication). For every application and reapplication after a failed examination, the SSE is to write a letter in support of an applicant. |
## Annexure 9

### Competency Provisions: New South Wales and Queensland

**Risk Management Competency**  

4. MNMMSM617A Establish the risk management system

<table>
<thead>
<tr>
<th>ELEMENT</th>
<th>No</th>
<th>PERFORMANCE CRITERIA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Establish the risk management system</td>
<td>1.1</td>
<td>Identify and document site/enterprise policy and strategic safety and risk management goals and approaches</td>
</tr>
<tr>
<td></td>
<td>1.2</td>
<td>Establish structures and frameworks for the implementation and on-going management of the risk management system</td>
</tr>
<tr>
<td></td>
<td>1.3</td>
<td>Identify, record and allocate responsibility for site specific functional and/or area aspects of the risk management system</td>
</tr>
<tr>
<td>2. Establish processes to support the risk management system</td>
<td>2.1</td>
<td>Establish and communicate detailed processes covering risk assessment, risk analysis and risk control</td>
</tr>
<tr>
<td></td>
<td>2.2</td>
<td>Provide/arrange appropriate development and/or training for those who have responsibilities within the risk management system</td>
</tr>
<tr>
<td></td>
<td>2.3</td>
<td>Identify, obtain, maintain information sources required to support the risk management system and make available to those who implement the control processes</td>
</tr>
<tr>
<td></td>
<td>2.4</td>
<td>Make available information on known and intended process changes and enhancements to those responsible for implementing control processes</td>
</tr>
<tr>
<td></td>
<td>2.5</td>
<td>Determine site criteria for assessing the acceptability of risks and make available to those responsible for implementing control</td>
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<td>---</td>
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</tr>
<tr>
<td>2.6</td>
<td>Obtain advice and provide, as necessary, to those responsible for implementing control processes</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Implement the <em>risk management</em> system</td>
<td>3.1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3.4</td>
</tr>
<tr>
<td>4.</td>
<td>Audit <em>risk management</em> system and processes</td>
<td>4.1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4.2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4.3</td>
</tr>
<tr>
<td>5.</td>
<td>Complete records and reports</td>
<td>5.1</td>
</tr>
</tbody>
</table>
“G3” Course outline

Course name: Minerals Industry Risk Management
UQ Course code: M1NE7033 (G3)

Learning objectives

On successful completion of this course you should be able to:

- Identify the key components of risk management within any process or system;
- Describe the ethical importance of risk management for today’s mining industry;
- Identify improvement opportunities in a risk management process;
- Apply appropriate risk analysis tools, with reference to relevant minerals industry standards and guidelines;
- Use the audit criteria in the MIRM framework to identify any gaps in a risk management process.

Course structure

This course consists of one self-paced module and an intensive 5-day face-to-face workshop component. The self-paced module must be completed before the workshop. This includes a marked assignment that will be discussed on the first day of the workshop.

Pre-workshop Study

Introduction to risk management

- Week 1: Concepts and issues in risk management
- Week 2: Major issues in risk management
- Week 3: Key conceptual models used in risk management
- Week 4: Management strategies
- Week 5: Face-to Face Workshop
Expected 5-day workshop outcomes:

**Human factors—Basics of human behaviour**
- Understanding of decision-making processes within an organisation
- Application of the concepts and terms used in human behaviour analysis
- Categorisation of the human error factors that impact upon RM processes
- Recognition of the interaction between humans and machines including reliable control

**Risk assignment and risk analysis tools**
- Understand the difference between informal and formal assessment of risk
- Understand the concepts of risk analysis and risk assessment
- Know what is meant by acceptable risk
- Develop an understanding of adequate risk control
- Know how to select and implement risk assessment tools
- Use the MCA National Minerals Industry RA Guidelines effectively
- Scope a RA

**Regulatory and corporate factors**
- Understand the philosophy behind the current RM legislative trends
- Understand the terminology specific to your legislation

**Major Hazards**
- Know the requirements for addressing the risk associated with the major mining hazards at your operation
- Know how to ensure that the risks are well managed
- Apply the energy concept to the major mining hazards
- Implications of managing low frequency—high consequence events
- Understand risk reduction of major hazards in the workplace by designing management systems and work processes that include barriers and controls
- Understand where hazard identification and control fits into the MIRM Framework

**Integrating mining risk management activities**
- Identify the RM practices within an organisation
- Understand the strengths and weaknesses of an organisation from an RM perspective
- Understand how to design and assess risk management processes

**Auditing and investigation**
- Identify areas within your organisation where ‘gaps’ exist
- Use of a gap analysis MIRM framework to review the status of a selected organisation versus your expectations in that area
- Suggesting a set of recommendations to move the organisation closer to those expectations
Annexure 10

Board of Examiners: Comparative Table – Western Australia, New South Wales and Queensland

**Western Australia**

**Queensland**
*Mining and Quarrying Safety and Health Act 1999* (Part 10); *Coal Mining Safety and Health Act 1999* (Part 10)

**New South Wales**
*Mine Health and Safety Act 2004*; *Coal Mine Health and Safety Act 2002*

<table>
<thead>
<tr>
<th>Establishment of the Board of Examiners</th>
<th>Western Australia</th>
<th>Queensland</th>
<th>New South Wales</th>
</tr>
</thead>
<tbody>
<tr>
<td>s.48(1) Board of Examiners</td>
<td>Metalliferous</td>
<td>Metalliferous</td>
<td></td>
</tr>
<tr>
<td>There is established a Board of Examiners which is to be constituted in the manner provided in the regulations; and the regulations may provide for the Board to be constituted differently for different purposes.</td>
<td>s.181 Board of examiners</td>
<td>s.112 Constitution of Metalliferous Mines and Extractive Industries Competence Board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The board of examiners is established.</td>
<td>(1) There is constituted by this Act a body corporate with the corporate name of the Metalliferous Mines and Extractive Industries Competence Board.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Metalliferous</td>
<td>(2) The Board represents the Crown.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Coal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>s.184 Board of examiners</td>
<td>Coal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The board of examiners is established.</td>
<td>Coal</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


### Coal

**s.130 Constitution of Coal Competence Board**

1. There is constituted by this Act a body corporate with the corporate name of the Coal Competence Board.

2. The Coal Competence Board represents the Crown.

### Metalliferous

**s.182 Functions of the board of examiners**

The board of examiners has the following functions—

(a) to decide the competencies necessary for holders of certificates of competency;

(b) to assess applicants, or have applicants assessed, for certificates of competency;

(c) to grant certificates of competency to persons who have demonstrated to the board’s satisfaction the appropriate competencies necessary to hold the certificates;

(d) to ensure the competencies

### Metalliferous

**s.116 Functions of Board**

1. The Board has the functions conferred or imposed on it by or under this Act.

2. Without limiting subsection (1), the functions of the Board include the following:

(a) to oversee the development of competence standards for persons performing functions at mines that may impact on health and safety,

(b) to undertake initial and ongoing assessments of the competence of persons...
functions as may be conferred in the regulations.

Coal

s.185 Functions of board of examiners

The board of examiners has the following functions—

(a) to decide the competencies necessary for holders of certificates of competency;

(b) to assess applicants, or have applicants assessed, for certificates of competency;

(c) to grant certificates of competency to persons who have demonstrated to the board’s satisfaction the appropriate competencies necessary to hold the certificates;

(d) to ensure the competencies under this Act are consistent with the competencies required by other States for the holders of certificates of competency;

(c) to advise the Minister on matters related to the competence required of persons to perform functions at mines,

(d) any other functions that the Minister may confer on the Board from time to time.

(3) Without limiting subsection (2), the Board may do any or all of the following for the purpose of carrying out its functions:

(a) engage consultants,

(b) develop competence standards or cause competence standards to be developed,

(c) assess a person’s competence, cause a person’s competence to be assessed or accept an assessment of a person’s competence.
Coal

s.134 Functions of Board

(1) The Board has the functions conferred or imposed on it by or under this Act.

(2) Without limiting subsection (1), the functions of the Board include the following:

(a) to oversee the development of competence standards for people performing functions at coal operations that may impact on health and safety,

(b) to undertake initial and ongoing assessments of the competence of people performing functions at coal operations,

(c) to advise the Minister on matters related to the competence required of people to perform functions at coal operations,

(d) any other functions that the Minister may confer on the Board from time to time.
(3) Without limiting subsection (2), the Board may do any or all of the following for the purpose of carrying out its functions:

(a) engage consultants,

(b) develop competence standards or cause competence standards to be developed,

(c) assess a person’s competence, cause a person’s competence to be assessed or accept an assessment of a person’s competence.

Membership

Reg 2.8. Constitution — Mine manager’s and underground supervisor’s certificates

When dealing with matters concerning mine manager’s and underground supervisor’s certificates (other than certificates for underground coal mines), the Board is to consist of —

(a) the State mining engineer;

(b) a senior inspector appointed by the Minister on the nomination of the State mining

Metalliferous

s.183 Membership and conduct of board proceedings

(1) The board of examiners is to consist of a chairperson and at least 6 other members.

(2) An inspector is to be chairperson.

(3) Each member must have at least 10 years practical experience in the mining industry.

(4) No more than 3 members may be

Metalliferous

s.114 Membership of Board

(1) The Board is made up of the following persons appointed by the Minister:

(a) the Chairperson of the Board, and

(b) 2 employer representatives selected from a panel of 4 submitted to the Minister by a body or bodies representing employers, and
engineer;
(c) the principal of the Western Australian School of Mines; and
(d) 2 persons, each of whom must be the holder of a mine manager’s certificate, appointed by the Minister on the nomination of the body known as the Chamber of Mines and Energy of Western Australia Inc.

Reg 2.9. Constitution — Quarry manager’s certificate
When dealing with matters concerning quarry manager’s certificates, the Board is to consist of —
(a) the State mining engineer;
(b) a senior inspector appointed by the Minister on the nomination of the State mining engineer;
(c) an officer of the Department of Technical and Further Education (TAFE) appointed by the Minister on the nomination of the Director of that Department; and
(d) 2 persons, each of whom must be the holder of a quarry manager’s certificate, appointed inspectors.

(5) At least 6 of the members must be currently engaged in the mining industry.

(6) Inspectors and district workers’ representatives are taken to be currently engaged in the mining industry.

(7) A member may be appointed for a term of not more than 5 years.

Coal
s.186 Membership and conduct of board proceedings
(1) The board of examiners is to consist of a chairperson and at least 6 other members.

(2) An inspector is to be chairperson.

(3) Each member must have at least 10 years practical experience in the mining industry.

(4) No more than 3 members may be
(c) 2 employee representatives selected from a panel of 4 submitted to the Minister by a body or bodies representing employees, and
(d) between 2 and 4 persons who have expertise in the development and assessment of competence of persons performing functions at mines, and
(e) 2 officers of the Department.

(2) The regulations may make provision for or with respect to the submission of representatives under this section and the appointment of members of the Board.

Coal
s.132 Membership of Board
(1) The Board is made up of the following people appointed by the Minister:
(a) the Chairperson of the Board (who is not to be an officer of the Department), and
Reg 2.10. Constitution — Underground coal mine certificates
When dealing with matters concerning certificates for underground coal mines (other than winding engine driver’s certificates), the Board is to consist of—
(a) the State coal mining engineer;
(b) a senior inspector appointed by the Minister on the nomination of the State mining engineer;
(c) the principal of the Western Australian School of Mines; and
(d) 2 persons, each of whom must be the holder of a mine manager’s certificate, appointed by the Minister on the nomination of the body known as the Chamber of Mines and Energy of Western Australia Inc.

Reg 2.11. Constitution — Winding engine driver’s certificate
inspectors.

(5) At least 6 of the members must be currently engaged in the mining industry.

(6) Inspectors and industry safety and health representatives are taken to be currently engaged in the mining industry.

(7) A member may be appointed for a term of not more than 5 years.

(b) 2 employer representatives selected from a panel of 4 submitted to the Minister by a body or bodies representing employers, and
(c) 2 employee representatives selected from a panel of 4 submitted to the Minister by a body or bodies representing employees, and
(d) between 2 and 4 persons who have expertise in the development and assessment of competence or people performing functions at coal operations, and
(e) 2 officers of the Department.

(2) The regulations may make provision for or with respect to the submission of representatives under this section and the appointment of members of the Board.
When dealing with matters concerning winding engine driver’s certificates, the Board is to consist of —

(a) the State mining engineer;

(b) an officer of the department who is formally qualified as a mechanical engineer appointed by the Minister; and

(c) a person appointed by the Minister on the nomination of the body known as the Trades and Labour Council of Western Australia.

**Other**

**s.49. Complaint to Board of Examiners**

(1) An inspector or other interested person may lodge a written complaint with the Board of Examiners if the inspector or person has reason to believe that the holder of a certificate of competency —

(a) has acted in an incompetent, negligent, or improper manner in performing any duty under this Act; or

(b) has been convicted of an offence under this Act; or

(c) is incompetent or unfit to perform his or her duties.

**Metalliferous**

**s.194 Annual report**

(1) As soon as practicable, but within 4 months, after the end of each financial year, the board of examiners must prepare and give to the Minister a report on the board’s operations for the year.

(2) The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving it.

**Coal**

**s.197 Annual report**

The Board must, at any time or within any period that the Minister may direct, make an annual report of its proceedings during the preceding year to the Minister.
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<tr>
<td>(2) A complaint under this section must specify the reasons for the belief on which the complaint is based.</td>
<td>(1) As soon as practicable, but within 4 months, after the end of each financial year, the board of examiners must prepare and give to the Minister a report on the board’s operations for the year.</td>
</tr>
<tr>
<td>(3) On receiving a complaint, the Board of Examiners must meet promptly and decide whether to hold an inquiry.</td>
<td>(2) The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after receiving it.</td>
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</table>
Annexure 11

Australian Law Reform Commission Summary of Recommendations
Chapter 12: Infringement Notices

Recommendation 12–1.

In criminal penalty schemes, an infringement notice scheme should apply only to minor offences of strict or absolute liability.

Recommendation 12–2.

In civil penalty schemes, an infringement notice scheme should apply only to minor contraventions in which no proof of a fault element or state of mind is required.

Recommendation 12–3.

The payment of the amount specified in an infringement notice should act as a bar to proceedings in respect of the alleged offence or contravention.

Recommendation 12–4.

In the absence of any clear, express statutory statement to the contrary, regulators should have the power to withdraw an infringement notice issued in error or to correct an infringement notice issued in error by withdrawing it and issuing a fresh notice.

Recommendation 12–5.

Subject to Recommendation 12–6, if a record of the issue of an infringement notice or payment or non-payment of the amount specified in an infringement notice forms part of the formal compliance history maintained by the regulator (or any other person or agency) about the person to whom the infringement notice was issued, this record should:

(a) expressly note that the issue of an infringement notice constitutes no more than an allegation of a breach and that payment does not constitute an admission for any purpose;

(b) be reviewed periodically and stale information expunged (for example, two years after the date of issue of the infringement notice); and

(c) be subject to the *Freedom of Information Act 1982* (Cth) (i.e. able to be corrected by the person).

Recommendation 12–6.

A regulator may keep a record of the issue of an infringement notice and payment or non-payment of the amount specified in an infringement notice for the purpose of recording, monitoring and reporting on the enforcement activities undertaken by the regulator in compliance with any relevant Commonwealth policies or procedures (for example, the Commonwealth Fraud Investigation Model Procedures or the *Archives*
Any public reporting (for example, in the regulator’s annual report or on its website) should be on an aggregate or anonymous basis.

**Recommendation 12–7.**

No public announcement should be made by a regulator about the issue of an infringement notice to, or the payment or non-payment of the amount specified in an infringement notice by, an identified or identifiable person.

**Recommendation 12–8.**

The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, the design and use of infringement notice schemes in federal regulatory law should follow a model scheme that should incorporate the following features:

(a) The options for the regulator should include:
   (i) the commencement of action to seek a criminal or civil penalty;
   (ii) the issue of an infringement notice;
   (iii) a formal caution;
   (iv) an informal warning; and
   (v) no action.

(b) The amount payable under an infringement notice should not exceed a small proportion (say, one-fifth) of the maximum penalty which might be imposed if the matter is dealt with by a court, or a set penalty specified in the legislation or for which a method of calculation is specified in the legislation.

(c) Before an infringement notice may be issued, the regulator must have reasonable grounds to believe that the alleged offence or contravention has been committed.

(d) The payment of an amount by a person under an infringement notice, including payment by instalments, should not be taken for any purpose to be an admission by that person of any liability for the alleged commission of the offence or contravention.

(e) The consequence of failing to pay an amount set out in an infringement notice should be action to seek a penalty for the alleged offence or contravention and not an alternative or substitute penalty such as licence suspension or cancellation.

(f) Guidelines should be developed and published by regulators in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 on how they will exercise their discretion to issue, withdraw and correct infringement notices.

(g) Only one notice should be issued for each alleged offence or contravention — if the conduct might amount to several different offences or contraventions, the regulator must choose which offence or contravention upon which it will base the infringement notice.

(h) There should be a 12 month time limit after the occurrence of the alleged offence or contravention within which an infringement notice may be issued.

(i) The nature of the alleged offence or contravention should be set out clearly in the infringement notice (including the section of the legislation creating the offence or contravention).

(j) The rights of the recipient of the infringement notice should be set out clearly in the infringement notice in plain English. These should include, in particular:
(i) the right to elect to contest liability in court;
(ii) the right to apply for withdrawal of the notice;
(iii) the effect of payment; and
(iv) information about what records (if any) will be kept by the regulator about the issue, payment or non-payment of the amount specified in the infringement notice.

(k) The recipient of the infringement notice should have the right to seek to have the infringement notice withdrawn by presenting material to the issuing authority demonstrating that the factual basis on which the infringement notice was issued was erroneous.

(l) Where the issue of the infringement notice is based on information provided to the regulator by any person, the person to whom the infringement notice is issued should have the right to request a written copy of any information considered relevant by the decision maker in making the decision to issue the infringement notice.

(m) If the amount payable under an infringement notice is more than two penalty units, the recipient of the infringement notice should have the right to request, on the ground of financial hardship, that the time to pay that amount be extended or that the penalty be paid by agreed instalments. Agreement to pay that amount by instalments should not be unreasonably withheld. Agreement to pay that amount by instalments should have the effect of making the unpaid portion of that amount a debt due to the Commonwealth.

(n) Infringement notice schemes may apply to continuing offences or contraventions.

(o) The issue of an infringement notice does not limit the penalty that may be imposed by a court on a person convicted of an offence or found liable for a contravention.

(p) The statements of principle contained in Recommendations 12–3 to 12–7.

**Recommendation 12–9.**

The form of an infringement notice should be specified in delegated legislation and in the guidelines referred to in Recommendation 12–8(f). This form might be based on the *Customs Act 1901* (Cth) Infringement Notice set out in Appendix C to the Customs Act Guidelines for Serving Infringement Notices. At a minimum, an infringement notice should specify:

(a) To whom it is issued (including the name of the individual or corporation and address);
(b) By whom it is issued (including the name and work address of the delegate);
(c) A unique form of identification (such as a notice number);
(d) The date on which it is issued;
(e) The nature of the alleged offence or contravention (including the provision of the legislation that it is alleged has been contravened);
(f) When and where the offence or contravention is alleged to have been committed;
(g) The amount payable under the notice (including its relationship to the maximum fine or penalty a court could impose);
(h) The date by which payment is due;
(i) Where and how payment may be made;
(j) The effect of payment, including a statement that, if payment is made within the period specified in the notice (or any further period that is allowed):
(i) the person’s liability is taken to be discharged;
(ii) further proceedings cannot be taken against the person for the offence or contravention;
(iii) the person is not regarded as having been convicted of the offence or found liable for the contravention; and
(iv) payment does not constitute an admission of liability for any purpose;
(k) The effect of non-payment;
(l) The right to request an extension of time to pay or to pay the amount payable under the notice by instalments (if applicable);
(m) The right to apply for withdrawal of the notice (including to whom an application for withdrawal should be made);
(n) The right to elect to contest liability in court;
(o) Information about what records (if any) will be kept by the regulator about the issue, payment or non-payment of the infringement notice;
(p) The details of any corrections (if any) to any previous infringement notice issued in respect of the same alleged contravention (if any);
(q) Contact details for further information; and
(r) Any other information appropriate in the circumstances.

Recommendation 12–10.

The officer within the regulator who considers an application for withdrawal of an infringement notice should be different from the officer who made the decision to issue the infringement notice.
Annexure 12
AusIMM Graduate Program Best Practice Guidelines

Part 1 – General Aspects of a Graduate Program

<table>
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<tr>
<th>Over-Arching Principles</th>
<th>Checklist</th>
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<td>1. Agreement to a Plan at the Commencement of Employment</td>
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<tr>
<td>• time frame</td>
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<td>• transparent and realistic expectations</td>
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<td>• division/department rotations</td>
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<td>• training</td>
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<td>• people to be involved (supervisors, mentors)</td>
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<td>2. On the Job Learning</td>
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<td>• being entrusted with responsibility as opposed to being 'intelligent clerks' (i.e. not just data collation, reports, informal IT support)</td>
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<td>• development opportunities</td>
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<td>3. Formal Training</td>
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<td>• technical (engineering, science, IT)</td>
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<td>• personal development skills (interpersonal, emotional intelligence)</td>
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<td>• leadership</td>
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<td>• managing people</td>
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<td>• project management</td>
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<td>• practical exercises</td>
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<td>• ongoing study and professional development</td>
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<tr>
<td>4. Provision of a Formal Mentor/Coach</td>
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<tr>
<td>• responsibilities in the relationship</td>
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<td>5. Documentation of Progress and Review Process</td>
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<tr>
<td>• document to record achievements and comments (e.g. log book)</td>
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<tr>
<td>• regular meetings to discuss progress</td>
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<td>• grievance procedure</td>
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<tr>
<td>6. Flexibility</td>
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<tr>
<td>• reaction to business needs/conditions/requirements</td>
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<td>• long term development view vs. short term bottom lines</td>
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<td>7. Rewards and Recognition</td>
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<td>• Promotions</td>
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<td>• salary relativity</td>
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<td>• awards (safety, training etc)</td>
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<tr>
<td>Cryptographic</td>
<td>Network Security</td>
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<tr>
<td>Key Management</td>
<td>Traffic Encryption</td>
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<tr>
<td>Authentication</td>
<td>Access Control</td>
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<tr>
<td>Authorization</td>
<td>Policy Enforcement</td>
</tr>
<tr>
<td>Accounting</td>
<td>Logging</td>
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**Layer 5: Network**
- Cryptographic: Ensures data confidentiality through encryption.
- Key Management: Manages cryptographic keys for secure communication.
- Authorization: Controls access based on user credentials.
- Accounting: Tracks and manages network usage.

**Layer 6: Application**
- Access Control: Controls access to application resources.
- Authentication: Verifies user identity.
- Authorization: Allocates application resources.

**Layer 7: System**
- Traffic Control: Manages network traffic flow.
- Session:Manages client-server interactions.
- Authentication: Verifies user identity.
- Reporting: Generates reports for system activities.

**Layer 8: Host**
- Resource Management: Allocates and manages system resources.
- Security: Protects host systems from vulnerabilities.
- Verification: Validates system integrity.
- Auditing: Monitors and records system activities.

**Layer 9: Device**
- Verification: Validates device integrity.
- Monitoring: Monitors device activities.
- Security: Protects devices from threats.

**Layer 10: Physical**
- Environment: Manages physical environment conditions.
- Configuration: Sets up and configures physical devices.
- Operations: Manages physical device operations.
- Indicator: Monitors physical device status.

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**Figure 1: Layered Security Model**

This layered security model is designed to provide a comprehensive approach to security by dividing it into ten layers. Each layer builds upon the one below it, ensuring that all aspects of security are addressed from the physical environment to the application layer.
| 2.10. | Underground | Experience all aspects of underground mining including design, mining, development, ventilation, safety, health, awareness of underground mining practices and regulations. |
| 2.11. | Near Mine Exploration | Experience aspects of exploration in its role, mine and surface operations including commodities such as nickel, cobalt, copper, gold, diamond, and diamond exploration techniques where relevant, exploration mapping, exploration program design, contractor management and risks, use of existing data in drill program design. |
| 3.19. | Regional Exploration | Experience aspects of exploration including project management, geology, geophysical, sampling, geotechnical techniques, asset disposition, processing and analytical equipment, target generation, contractor and subcontractor selection, understanding internal mine programs, emergency and contingency planning. |
| 3.29. | Software | Experience in complex software used on drill sites, including, data logging, geotechnical, mining, and other software. |

### Business Management (BM):

| 3.40. | Business Analysis/Management | Understand and analyze the business, market and economic climate. |
| 3.41. | Business Improvement | Understand or assist in improvement projects. |
| 3.42. | Capital Projects | Understand the projects, risks, and opportunities. |

### Financial Analysis/Accounting

| 3.43. | Financial Analysis/Accounting | Understand and analyze the financial impact of various business decisions. |

### Human Resources

| 3.44. | Human Resources | Understand and analyze the human resources needs of the business. |
| 3.45. | Human Resources Management | Understand and analyze the human resources management of the business. |

### Marketing

| 3.46. | Marketing | Understand and analyze the marketing of the business. |

### Operations Management

| 3.47. | Operations Management | Understand and analyze the operations of the business. |

### Information Technology

| 3.48. | Information Technology | Understand and analyze the information technology needs of the business. |

### Safety Management

| 3.49. | Safety Management | Understand and analyze the safety management of the business. |

### Environmental Management

| 3.50. | Environmental Management | Understand and analyze the environmental management of the business. |

### Environmental Health & Safety

| 3.51. | Environmental Health & Safety | Understand and analyze the environmental health & safety management of the business. |

### Environmental Sustainability

| 3.52. | Environmental Sustainability | Understand and analyze the environmental sustainability of the business. |

### Corporate Social Responsibility

| 3.53. | Corporate Social Responsibility | Understand and analyze the corporate social responsibility of the business. |

### Social Responsibility

| 3.54. | Social Responsibility | Understand and analyze the social responsibility of the business. |

### Governmental Affairs

| 3.55. | Governmental Affairs | Understand and analyze the governmental affairs of the business. |

### Public Relations

| 3.56. | Public Relations | Understand and analyze the public relations of the business. |

### Technical Management

| 3.57. | Technical Management | Understand and analyze the technical management of the business. |

### Legal

| 3.58. | Legal | Understand and analyze the legal aspects of the business. |

### Human Resources

| 3.59. | Human Resources | Understand and analyze the human resources of the business. |

### Finance

| 3.60. | Finance | Understand and analyze the financial aspects of the business. |

### Accounting

| 3.61. | Accounting | Understand and analyze the accounting aspects of the business. |

### Information Technology

| 3.62. | Information Technology | Understand and analyze the information technology aspects of the business. |

### Marketing

| 3.63. | Marketing | Understand and analyze the marketing aspects of the business. |

### Sales

| 3.64. | Sales | Understand and analyze the sales aspects of the business. |

### Operations Management

| 3.65. | Operations Management | Understand and analyze the operations management aspects of the business. |

### Logistics

| 3.66. | Logistics | Understand and analyze the logistics aspects of the business. |

### Supply Chain

| 3.67. | Supply Chain | Understand and analyze the supply chain aspects of the business. |

### Production

| 3.68. | Production | Understand and analyze the production aspects of the business. |

### Quality Control

| 3.69. | Quality Control | Understand and analyze the quality control aspects of the business. |

### Environmental Management

| 3.70. | Environmental Management | Understand and analyze the environmental management aspects of the business. |

### Environmental Health & Safety

| 3.71. | Environmental Health & Safety | Understand and analyze the environmental health & safety aspects of the business. |

### Corporate Social Responsibility

| 3.72. | Corporate Social Responsibility | Understand and analyze the corporate social responsibility aspects of the business. |

### Social Responsibility

| 3.73. | Social Responsibility | Understand and analyze the social responsibility aspects of the business. |

### Governmental Affairs

| 3.74. | Governmental Affairs | Understand and analyze the governmental affairs aspects of the business. |

### Public Relations

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### Technical Management

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### Finance

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### Accounting

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### Information Technology

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### Marketing

| 3.80. | Marketing | Understand and analyze the marketing aspects of the business. |

### Sales

| 3.81. | Sales | Understand and analyze the sales aspects of the business. |

### Operations Management

| 3.82. | Operations Management | Understand and analyze the operations management aspects of the business. |

### Logistics

| 3.83. | Logistics | Understand and analyze the logistics aspects of the business. |

### Supply Chain

| 3.84. | Supply Chain | Understand and analyze the supply chain aspects of the business. |

### Production

| 3.85. | Production | Understand and analyze the production aspects of the business. |

### Quality Control

| 3.86. | Quality Control | Understand and analyze the quality control aspects of the business. |

### Environmental Management

| 3.87. | Environmental Management | Understand and analyze the environmental management aspects of the business. |

### Environmental Health & Safety

| 3.88. | Environmental Health & Safety | Understand and analyze the environmental health & safety aspects of the business. |

### Corporate Social Responsibility

| 3.89. | Corporate Social Responsibility | Understand and analyze the corporate social responsibility aspects of the business. |

### Social Responsibility

| 3.90. | Social Responsibility | Understand and analyze the social responsibility aspects of the business. |

### Governmental Affairs

| 3.91. | Governmental Affairs | Understand and analyze the governmental affairs aspects of the business. |

### Public Relations

| 3.92. | Public Relations | Understand and analyze the public relations aspects of the business. |

### Technical Management

| 3.93. | Technical Management | Understand and analyze the technical management aspects of the business. |

### Finance

| 3.94. | Finance | Understand and analyze the finance aspects of the business. |

### Accounting

| 3.95. | Accounting | Understand and analyze the accounting aspects of the business. |

### Information Technology

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### Marketing

| 3.97. | Marketing | Understand and analyze the marketing aspects of the business. |

### Sales

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### Operations Management

| 3.99. | Operations Management | Understand and analyze the operations management aspects of the business. |

### Logistics

| 3.100. | Logistics | Understand and analyze the logistics aspects of the business. |

### Supply Chain

| 3.101. | Supply Chain | Understand and analyze the supply chain aspects of the business. |

### Production

| 3.102. | Production | Understand and analyze the production aspects of the business. |

### Quality Control

| 3.103. | Quality Control | Understand and analyze the quality control aspects of the business. |

### Environmental Management

| 3.104. | Environmental Management | Understand and analyze the environmental management aspects of the business. |

### Environmental Health & Safety

| 3.105. | Environmental Health & Safety | Understand and analyze the environmental health & safety aspects of the business. |

### Corporate Social Responsibility

| 3.106. | Corporate Social Responsibility | Understand and analyze the corporate social responsibility aspects of the business. |

### Social Responsibility

| 3.107. | Social Responsibility | Understand and analyze the social responsibility aspects of the business. |

### Governmental Affairs

| 3.108. | Governmental Affairs | Understand and analyze the governmental affairs aspects of the business. |

### Public Relations

| 3.109. | Public Relations | Understand and analyze the public relations aspects of the business. |

### Technical Management

| 3.110. | Technical Management | Understand and analyze the technical management aspects of the business. |

### Finance

| 3.111. | Finance | Understand and analyze the finance aspects of the business. |

### Accounting

| 3.112. | Accounting | Understand and analyze the accounting aspects of the business. |

### Information Technology

| 3.113. | Information Technology | Understand and analyze the information technology aspects of the business. |

### Marketing

| 3.114. | Marketing | Understand and analyze the marketing aspects of the business. |

### Sales

| 3.115. | Sales | Understand and analyze the sales aspects of the business. |

### Operations Management


### Logistics

| 3.117. | Logistics | Understand and analyze the logistics aspects of the business. |

### Supply Chain

| 3.118. | Supply Chain | Understand and analyze the supply chain aspects of the business. |

### Production

| 3.119. | Production | Understand and analyze the production aspects of the business. |

### Quality Control

<p>| 3.120. | Quality Control | Understand and analyze the quality control aspects of the business. |</p>
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Annexure 13
Certificates of Competency Exam Results
March 2003 – September 2008

First Class Mine Manager’s Certificate of Competency

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Underground Supervisor’s Certificate of Competency – Law Examination

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Restricted Quarry Managers Certificate of Competency – Law Examination (Explosives)

<table>
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<tr>
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<th>Mar 03</th>
<th>Sept 03</th>
<th>Mar 04</th>
<th>Sept 04</th>
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<th>Sept 05</th>
<th>April 06</th>
<th>Oct 06</th>
<th>April 07</th>
<th>Oct 07</th>
<th>April 08</th>
<th>Sept 08</th>
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<tr>
<td>Total Applicants</td>
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<td>24</td>
<td>27</td>
<td>14</td>
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<td>25</td>
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<td>Pass</td>
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<td>14</td>
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</table>

Restricted Quarry Managers Certificate of Competency – Quarrying Examination (Explosives)

<table>
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<th>April 07</th>
<th>Oct 07</th>
<th>April 08</th>
<th>Sept 08</th>
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<tr>
<td>Total Applicants</td>
<td>16</td>
<td>18</td>
<td>19</td>
<td>12</td>
<td>10</td>
<td>13</td>
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<td>2</td>
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Annexure 14

Table of Prosecutions

Prosecutions under the Mines Safety and Inspection Act 1994 (MSI Act) and MSI Regulations 1995 (MSI Regulations); and Mines Regulation Act 1946 (MRA) and Mines Regulation Act Regulations (MRAR)

<table>
<thead>
<tr>
<th>Date of Offence</th>
<th>Defendant</th>
<th>Notes on Incident</th>
<th>Legislation</th>
<th>Decision / Court</th>
</tr>
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<tbody>
<tr>
<td>2006</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>14/02/2006</td>
<td>Employer</td>
<td>Causing the death of employee by a breach of s.9(1) of the Act. Further charge against another defendant (Principal Employer) still pending.</td>
<td>MSI Act: s.9(1) and s.9A(2)</td>
<td>Defendant Penalty:$240,000&lt;br&gt;Defendant Costs: $2100&lt;br&gt;Final Hearing: 30/01/2009&lt;br&gt;Coolgardie Magistrates Court</td>
</tr>
<tr>
<td>03/02/2006</td>
<td>Employer</td>
<td>Failing to provide a safe working environment in respect of the use of the cannon at the mine.</td>
<td>MSI Act: s.9(1) and s.9A(2)</td>
<td>• Defendant Penalty: $50,000&lt;br&gt;Final Hearing: 07/09/2007&lt;br&gt;Kalgoorlie Magistrates Court</td>
</tr>
</tbody>
</table>

2004
<table>
<thead>
<tr>
<th>Date</th>
<th>Type</th>
<th>Description</th>
<th>Act/Regulations</th>
<th>Penalty/Costs</th>
</tr>
</thead>
</table>
| 19/05/2004 | Employer   | Causing the death of employee by a breach of s.9(1) of the Act.             | MSI Act: s.9(1) and s.9(8)| • Defendant Penalty: $100,000  
|            |            |                                                                             |                          | • Defendant Costs: $58,449.45 (total for 3 charges arising from this incident – see below) |
|            |            |                                                                             |                          | Final Hearing: 13/06/2006                               |
| 19/05/2004 | Employer   | Causing serious harm to employee by a breach of s.9(1) of the Act.          | MSI Act: s.9(1) and s.9(8)| • Defendant Penalty: $50,000                           |
|            |            |                                                                             |                          | Final Hearing: 13/06/2006                               |
| 19/05/2004 | Employer   | Causing serious harm to employee by a breach of s.9(1) of the Act.          | MSI Act: s.9(1) and s.9(8)| • Defendant Penalty: $50,000                           |
|            |            |                                                                             |                          | Final Hearing: 13/06/2006                               |
| 14/10/2003 | Employee   | The defendant failed to wear a seatbelt while operating a haul truck. The   | MSI Regulations: 4.16(3) | • Defendant Penalty: $250  
<p>|            |            | operator fell asleep, received cuts and bruising to her upper body and a    |                          | • Defendant Costs: $57.70                              |
|            |            | short stay in hospital. The truck sustained considerable accident damage    |                          | Karratha Court of Petty Sessions: 27/11/2003            |
|            |            | to the value of $100,000.                                                   |                          |                                                        |
| 06/05/2003 | Employer   | An employee was fatally injured when a loaded truck rolled back down the    | MSI Act: s.9(1) and s.9(8)| • Defendant Penalty: $75,000                           |
|            |            | ramp and hit the cabin of the employee’s                              |                          |                                                        |</p>
<table>
<thead>
<tr>
<th>Date</th>
<th>Role</th>
<th>Details</th>
<th>MSI Act</th>
<th>Defendant Penalty:</th>
<th>Defendant Costs:</th>
</tr>
</thead>
<tbody>
<tr>
<td>13/09/2002</td>
<td>Employer</td>
<td>The defendant pleaded guilty to an offence against s.9(1) of the MSA Act which did not have causing the death of the deceased as an element.</td>
<td>s.9(1)(a) and 9(8) Regs: 13.8(1), 13.8(2)(a), 13.8(2)(c), 13.8(2)(e), 13.8(2)(g), 13.7(3) and 17.1</td>
<td>$40,000</td>
<td>$11,000</td>
</tr>
<tr>
<td>Kungunurra Court of Petty Sessions: 23/03/2005</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>30/05/2002</td>
<td>Contractor</td>
<td>Failure to ensure an electrical installation was in accordance with standards (AS 3000), failure to ensure electrical supervisors were appointed in writing by the principal employer or manager, failure to ensure that a maintenance system was in place.</td>
<td>s.9(1)(a) and (b), s.9(1)(e)(ii), s.43(2)(b) and 78(3)(b) MSI Regulations: 5.3, 5.9, 5.10, 5.14, 5.27 and 5.30</td>
<td>$3000</td>
<td>no order for costs made</td>
</tr>
<tr>
<td>Kalgoorlie Court of Petty Sessions: 19/01/2004</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>30/05/2002</td>
<td>Employee</td>
<td>Failure to ensure electrical installation was in accordance with AS 3000 and failure to ensure parts in a switchboard were arranged so that protection against</td>
<td>MSI Regulations 5.3, 5.10, 5.14, 5.27(1) and 2(b) and 5.30</td>
<td>$2500</td>
<td>no order for costs made</td>
</tr>
<tr>
<td>Kalgoorlie Magistrates Court: 07/12/2004</td>
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</tbody>
</table>
direct contact was provided by barriers or enclosures.

<table>
<thead>
<tr>
<th>Date</th>
<th>Role</th>
<th>Description</th>
<th>Legislation and Regulations</th>
<th>Order for Costs Made</th>
</tr>
</thead>
<tbody>
<tr>
<td>30/05/2002</td>
<td>Contractor</td>
<td>Failure to ensure electrical installation was in accordance with AS 3000, failure to ensure active conductors were protected etc.</td>
<td>MSI Act: s. 9(1)(a) and (b), 9(1)(e)(ii), 43(2)(b) and 78(3)(h).&lt;br&gt;MSI Regulations: 5.3, 5.9, 5.10, 5.14, 5.27, and 5.30</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Defendant Penalty: $6000&lt;br&gt;Defendant Costs: no order for costs made&lt;br&gt;Department Costs: no order for costs made&lt;br&gt;Kalgoorlie Magistrates Court: 07/12/2004</td>
</tr>
<tr>
<td>27/02/2002</td>
<td>Employer</td>
<td>Failure to provide a safe place of work</td>
<td>MSI Act: s. 9(1)</td>
<td></td>
</tr>
<tr>
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<td></td>
<td></td>
<td></td>
<td>Defendant Penalty: $15,000&lt;br&gt;Defendant Costs: $1,500&lt;br&gt;Hearing: 23/10/2003</td>
</tr>
<tr>
<td>29/06/2001</td>
<td>Employee</td>
<td>The defendant proceeded across the highway driving a Hi-rail vehicle when it was not safe to do so. Caused a private vehicle travelling along the highway to collide with the Hi-rail vehicle. The driver was taken to</td>
<td>MSI Regulations: 15.4(9)</td>
<td></td>
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<tr>
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<td></td>
<td>Defendant Penalty: $200&lt;br&gt;Defendant Costs: $57.70</td>
</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Details</td>
<td>Act(s)</td>
<td>Defendant Penalty</td>
</tr>
<tr>
<td>------------</td>
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<td>--------------------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>12/04/2001</td>
<td>Employer</td>
<td>Whilst lowering a length of polypipe down into the pit the hemp rope broke and the pipe free fell into the pit. The end of the polypipe whipped around and hit an employee on the head.</td>
<td>MSI Act: s. 9(a)</td>
<td>• Defendant Penalty: $15,000</td>
</tr>
<tr>
<td>12/07/2000</td>
<td>Employer</td>
<td>Failed to maintain so far as was practical a working environment in which its employees were not exposed to hazards.</td>
<td>MSI Act: s.9(1) and 9(7)</td>
<td>• Defendant Penalty: $12,500</td>
</tr>
<tr>
<td>26/06/2000</td>
<td>Employer</td>
<td>Failed so far as practicable to provide and maintain a working environment in which its employees were not exposed to hazards. Failed to take such measures as were practicable to ensure that persons who were at the mine were not exposed to hazards.</td>
<td>MSI Act: s.9(1), 9(7), 13(1) and 13(2)</td>
<td>• Defendant Penalty: $60,000</td>
</tr>
<tr>
<td>25/05/2000</td>
<td>Employee</td>
<td>The Registered Manager failed to ensure that no dumping was carried out over the edge of a stockpile at a mine.</td>
<td>MSIR: 13.5(6) and 17.1</td>
<td>First mention was set down at the Karratha Court, hearings</td>
</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Description</td>
<td>MSI Act: s.76(1), 76(2)(a) and 76(3)</td>
<td>later heard in Perth.</td>
</tr>
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<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>05/04/2000</td>
<td>Employee</td>
<td>Being the manager of a mine where a person suffered an injury that appeared to be serious failed without reasonable excuse to give the required notice.</td>
<td>Defendant Penalty: N/A</td>
<td>Defendant Costs: Defendant was awarded costs of $3977 under the Official Prosecutions (Defendant’s Costs) Act 1973</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>Defendant Costs: Defendant was awarded costs of $3977 under the Official Prosecutions (Defendant’s Costs) Act 1973</td>
<td>Kalgoorlie Court of Petty Sessions (preliminary hearing, 30/03/2001)</td>
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<tr>
<td></td>
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<td>Kalgoorlie Magistrates Court: 8/10/2001</td>
<td></td>
</tr>
<tr>
<td>16/03/2000</td>
<td>Employee</td>
<td>Failed to take reasonable care to ensure his own safety and health at work and to avoid adversely affecting the safety or health of an employee through an act or omission at work, contrary to s.10(1) and 10(4) of the MSI Act.</td>
<td>MSI Act: s.10(1) and 10(4)</td>
<td>Defendant Penalty: $750</td>
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<td>Defendant Cost: $994</td>
<td>Karratha Court: 13/03/2001</td>
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### 1999

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<tr>
<th>Date</th>
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<th>Description</th>
<th>MSI: Section(s)</th>
<th>Defendant Penalty:</th>
</tr>
</thead>
<tbody>
<tr>
<td>19/03/1999</td>
<td>Employer</td>
<td>Failed to provide a safe place of work by not erecting a physical barrier where there was a potential for fall.</td>
<td>Part 2, section 9(8)</td>
<td>$50,000</td>
</tr>
<tr>
<td></td>
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<td>$1,800</td>
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<td></td>
<td>Finalised: 09/05/2001</td>
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</tr>
<tr>
<td>25/03/1999</td>
<td>Contractor</td>
<td>Failed so far as was practicable to provide an maintain at a mine a working environment in which its employees were not exposed to hazards, and that by contravention caused the death of an employee.</td>
<td>s.9(1) &amp; 9(8)</td>
<td>$75,000</td>
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<td>Department Costs:  $11,721.01</td>
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<td>Full Court of the Supreme Court: 18/03/2002 (final decision)</td>
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### 1998

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<tr>
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<th>Description</th>
<th>MSI: Section(s)</th>
<th>Defendant Penalty:</th>
</tr>
</thead>
<tbody>
<tr>
<td>19/03/1998</td>
<td>Employer</td>
<td>The employer failed to provide and maintain a working environment in which its employees were not exposed to hazards and by that contravention caused the death of an employee, contrary to s.9(8) of the Act.</td>
<td>s.9(1) and 9(8)</td>
<td>$20,000</td>
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<td></td>
<td>Defendant Costs:  $200</td>
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<td></td>
<td>Perth Court of Petty Sessions: 16/11/1999</td>
</tr>
</tbody>
</table>

### 1997

**Note:** The table contains a mix of years (1997, 1998, 1999), roles (Employer, Contractor), and descriptions of workplace safety issues, penalties, and court decisions. Each entry provides a brief description of the workplace safety issue, the relevant sections of the Indian Mines Safety Act, and the penalty and costs associated with the violations, along with the date of finalisation or court decisions.
<table>
<thead>
<tr>
<th>Date</th>
<th>Type</th>
<th>Description</th>
<th>Relevant Laws/Regulations</th>
<th>Defendant Penalty:</th>
</tr>
</thead>
</table>
| 01/09/1997 | Employer   | Failed to provide a working environment in which its employees were not exposed to hazards. Failed to ensure appropriate support, pillar dimensions and geotechnical considerations. | MSI Act: s. 9(1), 9(8), 13(1) and 13(3)  
MSI Regulations: 10.28(1) and 10.28(3)(b) | • Defendant Penalty: $75,000  
Perth Court of Petty Sessions: 25/06/1999 |
| 13/04/1997 | Employee   | Failed to give warning of firing/barricade and signpost firing area.         | MSI Regulations: 8.25(1)(a), 8.25(1)(b)                         | • Defendant Penalty: charge for breach of Reg. 8.25(1)(a) was withdrawn. Defendant was fined $500.  
• Defendant costs: $400 |
| 13/04/1997 | Employee   | Failed to give warning of firing/barricade and signpost firing area.         | MSI Regulations: 8.25(1)(a), 8.25(1)(b)                         | • Defendant Penalty: charge for breach of Reg. 8.25(1)(a) was withdrawn. Defendant was fined $500.  
• Defendant costs: $400 |
| 10/04/1997 | Employer   | Failed to provide ROPS and seatbelt on an agricultural tractor.              | MSI Regulations: 4.15 & 4.16.                                  | • Defendant Penalty: $10,000  
• Defendant Costs: $200 |
<p>| 10/04/1997 | Contractor | Failed to provide and maintain environment such that employee was not exposed to hazard and thereby | MSI Act: s.9(1), s.9(8)                                         | • Defendant Penalty: $15,000 |</p>
<table>
<thead>
<tr>
<th>Date</th>
<th>Role</th>
<th>Description</th>
<th>MSI Regulations: 4.15 &amp; 4.16</th>
<th>Defendant Costs: $3,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/04/1997</td>
<td>Employee</td>
<td>Failed to provide ROPS and seatbelt on an agricultural tractor.</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>MSI Regulations: 4.15 &amp; 4.16</td>
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<tr>
<td></td>
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<td></td>
<td>Defendant Penalty:</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>$1000</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Defendant Costs: $200</td>
<td></td>
</tr>
<tr>
<td>19/01/1997</td>
<td>Contractor</td>
<td>Employer failed to ensure that employee was not exposed to hazard from conveyor.</td>
<td>MSI Act: s.9(1)(e), 9(7)</td>
<td></td>
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<tr>
<td></td>
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<td></td>
<td>Karratha Court of Petty Sessions (17/11/1998)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Full Bench of the Supreme Court – defendant convicted and fined $15,000 on the original charge with costs for all proceedings, including all appeals, to be paid by the defendant.</td>
<td></td>
</tr>
</tbody>
</table>
### 1996

<table>
<thead>
<tr>
<th>Date</th>
<th>Party</th>
<th>Description</th>
<th>Act Section(s)</th>
<th>Defendant Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>24/07/1996</td>
<td>Employee</td>
<td>Failed to provide and maintain safe plant bucket wheel reclaimer which collapsed whilst in operation resulting in fatal injuries to the operator.</td>
<td>MSI Act: s.9(1)(a), 9(8)</td>
<td>$40,000</td>
</tr>
<tr>
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<td></td>
<td></td>
<td>$10,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Supreme Court Appeal: 30/07/1998</td>
<td></td>
</tr>
<tr>
<td>30/01/1996</td>
<td>Employer</td>
<td>Prosecution initiated after fatal accident to employee.</td>
<td>MSI Act: s.9(1)(a) and 9(8)</td>
<td>$60,000</td>
</tr>
<tr>
<td></td>
<td></td>
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<td>$700</td>
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</tbody>
</table>

### 1995

<table>
<thead>
<tr>
<th>Date</th>
<th>Party</th>
<th>Description</th>
<th>Act Section(s)</th>
<th>Defendant Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>30/08/1995</td>
<td>Employer</td>
<td>Failed to provide a safe working environment.</td>
<td>MRA: s.30B(a), 30B(7) and 55</td>
<td>$2,500</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$1,000</td>
</tr>
<tr>
<td>Date</td>
<td>Role</td>
<td>Incident Description</td>
<td>MRA/ MRARs</td>
<td>Defendant Penalty</td>
</tr>
<tr>
<td>------------</td>
<td>------------</td>
<td>-------------------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>01/08/1995</td>
<td>Employee</td>
<td>Switched on the power to a conveyor and started it when danger tags were attached.</td>
<td>MRAR: 6.7 and 6.8(2)</td>
<td>• Defendant Penalty: $1,500</td>
</tr>
<tr>
<td>01/08/1995</td>
<td>Employee</td>
<td>Was the supervisor at a mine where an offence was committed with his consent.</td>
<td>MRA: s.30(3), 54 and 55.</td>
<td>• Defendant Penalty: $1,500</td>
</tr>
<tr>
<td>10/04/1995</td>
<td>Employer</td>
<td>Failed to provide a safe system of work.</td>
<td>MRA: s.30B(1)(a), 30B(7) and 54</td>
<td>• Department Costs: $3,196</td>
</tr>
<tr>
<td>10/04/1995</td>
<td>Employee</td>
<td>Failed to ensure a safe system of work was maintained.</td>
<td>MRA: s.30B(1)(a), 30B(7), 60A and 54</td>
<td>• Department Costs: $5,088</td>
</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Description</td>
<td>MRAR</td>
<td>Defendant Penalty</td>
</tr>
<tr>
<td>------------</td>
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<td>-----------------------------------------------------------------------------</td>
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<td>-------------------</td>
</tr>
<tr>
<td>13/02/1995</td>
<td>Employee</td>
<td>Failed to ensure no work was done in a development heading before adequate ventilation was provided.</td>
<td>8.23(1) and 8.24(1)</td>
<td>$3,650</td>
</tr>
<tr>
<td>01/02/1995</td>
<td>Employer</td>
<td>Failed to maintain a safe system of work and failed to maintain supervision of employees.</td>
<td>-</td>
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</tr>
<tr>
<td>1994</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>12/10/1994</td>
<td>Employer</td>
<td>Failed to provide adequate ventilation and personal protective equipment to employees doing a ball mill recline.</td>
<td>s.30B(1)(a), 30B(1)(b) and 54</td>
<td>$10,000</td>
</tr>
<tr>
<td>12/10/1994</td>
<td>Employer</td>
<td>Failed to provide adequate ventilation and personal protective equipment to employees doing a ball mill recline.</td>
<td>2.4</td>
<td>$10,000</td>
</tr>
<tr>
<td>Date</td>
<td>Party</td>
<td>Allegation</td>
<td>MRA:</td>
<td>Magistrate's Decision</td>
</tr>
<tr>
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<td>-----------------------------------------------------------------------------</td>
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<td>-----------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| 10/09/1994 | Employer       | Failed to provide and maintain safe plant.                                 | s.30B(1)(a), 30B(7) and 55 | • Department Costs: $700
Dismissed – Magistrate was not satisfied that the accident was caused by a defective park brake. |
| 10/09/1994 | Contractor     | Failed to maintain safe plant.                                              | s.30B(1)(a), 30B(7) and 55 | Dismissed – Magistrate was not satisfied that the accident was caused by a defective park brake.                                                      |
| 12/04/1994 | Employee       | Being an employee at a mine, failed to take reasonable care to avoid adversely affecting the safety of another person through an act at work, in that he drilled into a hole containing misfired explosives at a time when other persons were nearby. | 30C(1)(b)     | • Defendant Penalty: $1700
• Defendant Costs: $575 |
<table>
<thead>
<tr>
<th>Date</th>
<th>Type</th>
<th>Offence Description</th>
<th>MRA:</th>
<th>Defendant Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>14/02/1994</td>
<td>Employee</td>
<td>Failed to give an inspector information he reasonably required</td>
<td>s.17(2), 55</td>
<td>$200</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Defendant Costs: $143</td>
</tr>
<tr>
<td>06/12/1993</td>
<td>Employer</td>
<td>Failed to maintain plant in a safe state</td>
<td>s.30B(1)(a), 30B(7), 55</td>
<td>$30000 (defective brakes) + $15000 (providing inherently dangerous plant)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Defendant Costs: $1500</td>
</tr>
<tr>
<td>06/12/1993</td>
<td>Employee</td>
<td>Failed to provide and maintain a safe plant</td>
<td>s.30B(1)(a), 30B(7), 55</td>
<td>$3000 (defective brakes) + $2000 (providing inherently unsafe plant)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Defendant Costs: $500</td>
</tr>
<tr>
<td>06/12/1993</td>
<td>Employee</td>
<td>Failed to give an Inspector information which he reasonably required</td>
<td>s.17(2), 55</td>
<td>$300</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Defendant Costs: Nil – other offences attracted costs</td>
</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Offense Description</td>
<td>MRA:</td>
<td>Defendant Penalty:</td>
</tr>
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<td>------------------------------------------</td>
</tr>
<tr>
<td>06/12/1993</td>
<td>Employer</td>
<td>Failed to provide and maintain safe plant.</td>
<td>30B(1)(a), 30B(7), 55</td>
<td>$25,000</td>
</tr>
<tr>
<td>03/12/1993</td>
<td>Employee</td>
<td>Failed to report a significant incident.</td>
<td>30E(1)(a), 30E(4)</td>
<td>$400</td>
</tr>
<tr>
<td>29/09/1993</td>
<td>Employee</td>
<td>Defendant did not give warning to an employee before causing the face to be fired where the employee was working.</td>
<td>30C(1)(b), 30C(2)(a)</td>
<td>$3000</td>
</tr>
<tr>
<td>06/02/1993</td>
<td>Employee</td>
<td>Performing rigging work whilst not being the holder of Certificate of Competency issued in accordance with the Occupational Health Safety and Welfare Regulations 1988 contrary to Regulation 6A.1</td>
<td>6A.1</td>
<td>$300</td>
</tr>
<tr>
<td>22/12/1991</td>
<td>Employee</td>
<td>Rang the manager of the William Ford Decline allowed work other than work that was necessary for the purpose of remedying the situation in part of the mine, namely between Sections 21 &amp; 23; after an Inspector has suspended operations in that part of the mine by means of an entry to that effect in the Records Book; contrary to Regulations</td>
<td>30, 54, 55</td>
<td>$250</td>
</tr>
</tbody>
</table>

1991
<table>
<thead>
<tr>
<th>Date</th>
<th>Role</th>
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<th>MRA:</th>
<th>MRAR:</th>
<th>Details</th>
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<tbody>
<tr>
<td>22/12/1991</td>
<td>Employer</td>
<td>Allowed work other than work that was necessary for the purpose of remedying the situation in part of the mine.</td>
<td>s.8.11(3)</td>
<td>30, 54 and 55</td>
<td>• Department Costs: $2,100</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Application dismissed</td>
</tr>
<tr>
<td>11/12/1991</td>
<td>Employee</td>
<td>Failing to ensure that an employee complied with Reg. 43(1)(d) this failure being a breach of Section 30(3)=Being an employee who had been supplied with a safety helmet failed to wear that safety helmet in a place in or about a mine where he may have been struck by a falling object.</td>
<td>30(3), 54, 55</td>
<td></td>
<td>• Defendant Penalty: $400</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Defendant Costs: $41</td>
</tr>
<tr>
<td>22/10/1991</td>
<td>Employee</td>
<td>By his negligence, endangered the safety of a person.</td>
<td>54, 55</td>
<td></td>
<td>• Defendant Penalty: $500</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Defendant Costs: $41.20</td>
</tr>
<tr>
<td>22/10/1991</td>
<td>Employee</td>
<td>Failed to use ventilating equipment.</td>
<td>s.55</td>
<td>8.19</td>
<td>• Defendant Penalty: $300</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Defendant Costs: $41.20</td>
</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Description</td>
<td>Code</td>
<td>Defendant Penalty:</td>
<td></td>
</tr>
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<td>---------------------------------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>21/08/1991</td>
<td>Employees</td>
<td>Being persons employed in a mine failed to wear safety helmets in a quarry excavation contrary to Regulations 1.9 and 4.3 (1)(c) of the MRA Regulations, 1976 and Sections 54 and 55 of the MRA 1946.</td>
<td>MSI Act: s.54 and 55</td>
<td>• Each party fined $300</td>
<td></td>
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<td></td>
<td></td>
<td>• Defendant Costs $40.80</td>
<td></td>
</tr>
<tr>
<td>18/08/1991</td>
<td>Employee</td>
<td>Failed to use a respiratory protective device and was exposed to SO2 gas and ash from burning pyretic black shale</td>
<td>MRA: s.56</td>
<td>• Defendant Penalty: $250</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Defendant Costs: $41.20</td>
<td></td>
</tr>
<tr>
<td>31/07/1991</td>
<td>Employees</td>
<td>Prior to firing a charge of explosive or blasting agent failed to remove workman to the ventilation intake side of the place where firing was to be done and where the resultant smoke and dust would not affect them contrary to Regulation 7.30(1) and 1.9 of the MRA Regulations 1976 made under the MRA 1946 and Section 55 of the Act.</td>
<td>MRA: s.55</td>
<td>• Defendant Penalty: $750</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>MRAR: 7.30(1), 7.28(1)(a)</td>
<td>• Defendant Costs: $35.20</td>
<td></td>
</tr>
<tr>
<td>18/07/1991</td>
<td>Employee</td>
<td>Did not hold current certificate of competency to operate a crane</td>
<td>MRAR: 6.9(2), 1.9</td>
<td>• Defendant Penalty: $1000</td>
<td></td>
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<td></td>
<td></td>
<td>• Defendant costs: $41.20</td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Employee</td>
<td>Offense</td>
<td>Act/Regulation</td>
<td>Defendant Penalty</td>
<td>Defendant Costs</td>
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</tr>
<tr>
<td>20/06/1991</td>
<td>Employee</td>
<td>Being a person intending to mix or manufacture blasting agent, failed to first obtain a “License to Manufacture a Blasting Agent” from the Chief Inspector of Explosives as required by Regulation 7.38 of the Regulations, contrary to Regulation 1.9 of the Regulations and section 55(b).</td>
<td>MRA: s.55(b) MRAR: 7.38, 1.9</td>
<td>Defendant Penalty: $700</td>
<td>Defendant Costs: $200</td>
</tr>
<tr>
<td>13/06/1991</td>
<td>Employee</td>
<td>Due to defendant’s negligence while in charge of machinery, defendant caused personal injury to another individual.</td>
<td>MRA: s.12(1) and 54 MRAR: 2.4(1)</td>
<td>Department Costs: $550</td>
<td></td>
</tr>
<tr>
<td>19/09/1990</td>
<td>Employee</td>
<td>Drilled blast hole in butt located in face of u/g development heading</td>
<td>MRAR: 7.24(2)</td>
<td>Defendant Penalty: $300</td>
<td>Defendant Costs: $33.70</td>
</tr>
<tr>
<td>20/06/1990</td>
<td>Employee</td>
<td>Drilling in face with untreated misfire present</td>
<td>MRAR: 7.24(3)</td>
<td>Defendant Penalty: $500</td>
<td>Defendant Costs: $28.70</td>
</tr>
<tr>
<td>Date</td>
<td>Role</td>
<td>Description</td>
<td>MRA</td>
<td>MRAR</td>
<td>Defendant Penalty:</td>
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<tr>
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</tr>
<tr>
<td>07/04/1990</td>
<td>Employee Person in</td>
<td>Person in charge of machinery on mine, failed to operate Grove RT740 Crane</td>
<td>s.54 and 55</td>
<td>6.2</td>
<td>$500</td>
</tr>
<tr>
<td></td>
<td>charge of machinery</td>
<td>in safe manner, therefore endangering safety of persons and causing risk of</td>
<td></td>
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<tr>
<td></td>
<td>on mine, failed to</td>
<td>damage to said machinery and other property</td>
<td></td>
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</tr>
<tr>
<td>14/12/1989</td>
<td>Employee Failure to</td>
<td>Failure to operate machinery (Hiab crane reg. no: B11647)</td>
<td>s.54</td>
<td>6.2</td>
<td>$250</td>
</tr>
<tr>
<td>16/11/1989</td>
<td>Employee Failure to</td>
<td>Failure to install ventilating equipment whilst boring blast holes in a</td>
<td>54</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>install ventilating</td>
<td>development heading.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>17/07/1989</td>
<td>Employee Being</td>
<td>Being Registered Manager, failed to ensure that working place, namely 3L</td>
<td>s.30, 54, and 55</td>
<td>3.22(1), 12.8</td>
<td>$1000</td>
</tr>
<tr>
<td></td>
<td>Registered Manager,</td>
<td>east drive was safe for persons employed within and failed to ensure said</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>failed to ensure</td>
<td>working place was scaled and maintained in safe condition.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>09/07/1989</td>
<td>Employee Failing to</td>
<td>Failing to ensure that 3 workers were not employed in or about a mine for</td>
<td>38(1)(c)</td>
<td></td>
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<tr>
<td></td>
<td>ensure that 3 workers</td>
<td>more than 13 consecutive days without a break of not less than 1 full day.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Role</td>
<td>Description</td>
<td>MRA</td>
<td>Penalty/Costs</td>
<td></td>
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<td>------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>01/05/1989</td>
<td>Employer</td>
<td>Employer of workmen who were employed in or about a mine and who accepted employment for more than 13 consecutive days without a break of not less than 1 full day.</td>
<td>38(4), 55</td>
<td>• Defendant Penalty: Fined on 25 charges x $2000&lt;br&gt;• Defendant costs: $1214.78</td>
<td></td>
</tr>
<tr>
<td>01/05/1989</td>
<td>Employees</td>
<td>Being workmen employed in a mine accepted employment in or about a mine for more than 13 consecutive days without a break of not less than 1 full day.</td>
<td></td>
<td>• Defendant Penalty: All fined $200 each&lt;br&gt;• Defendant costs: $173.54 each</td>
<td></td>
</tr>
<tr>
<td>01/05/1989</td>
<td>Employers</td>
<td>Failing to ensure that workmen were not employed in or about a mine for more than 13 consecutive days without a break of not less than 1 full day</td>
<td>40(3), 55</td>
<td>• Defendant Penalty: $187500&lt;br&gt;• Defendant Costs: $9718</td>
<td></td>
</tr>
<tr>
<td>17/04/1989</td>
<td>Employer</td>
<td>Extended working hours.</td>
<td>39(1)(b), 39(4), 42, 43(1), 39(1)(a)</td>
<td>• Defendant Penalty: $1000 x 3&lt;br&gt;• Defendant Costs: $48.70 x 3</td>
<td></td>
</tr>
<tr>
<td>17/04/1989</td>
<td>Employee</td>
<td>Extended working hours.</td>
<td>s.39(1)(a), 30(1)(b), 42</td>
<td>• Defendant Penalty: $400 x 2, $200 x 1&lt;br&gt;• Defendant Costs: $48.70 x 3</td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Description</td>
<td>MRA Section(s)</td>
<td>Penalties and Costs</td>
<td></td>
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<tr>
<td>17/04/1989</td>
<td>Employer</td>
<td>MRA: s.39(1)(2)(b)</td>
<td></td>
<td>• Defendant Penalty: $2000 x 2</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Defendant Costs: $48.70 x 2</td>
<td></td>
</tr>
<tr>
<td>16/03/1989</td>
<td>Employee</td>
<td>Defendant had been carrying out alterations to the coiring of the main switchboard while not holding an Electrical workers licence and he was aware that he required one.</td>
<td>MRA: s.61</td>
<td>• Defendant Penalty: 40</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• Defendant Costs: $114.20</td>
<td></td>
</tr>
<tr>
<td>01/11/1988</td>
<td>Employee</td>
<td>Being the owner of a mine, failed to inform MRA by failing to ensure that employees were not employed in or about the mine for more than 13 consecutive days without a break of not less than one full day.</td>
<td>MRA: s.38(1)(c)</td>
<td>• Defendant Penalty: $570</td>
<td></td>
</tr>
<tr>
<td>26/10/1988</td>
<td>Employee</td>
<td>Excessive hours worked in mine.</td>
<td>MRA: 38(1)(c), 40(3)</td>
<td>• Defendant Penalty: $50 x 6 charges</td>
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<td></td>
<td>• Defendant Costs: $283.20 x 1</td>
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<td></td>
<td></td>
<td>• Defendant Costs: $23.20 x 5</td>
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</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Reason</td>
<td>MRA:</td>
<td>Defendant Penalty</td>
<td>Defendant Costs</td>
</tr>
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</tr>
<tr>
<td>20/09/1988</td>
<td>Employee</td>
<td>Excessive hours worked.</td>
<td>s.38(1)(c) and 40(3)</td>
<td>$500 x 2</td>
<td>$106.40</td>
</tr>
<tr>
<td>20/09/1988</td>
<td>Employer</td>
<td>Excessive hours worked.</td>
<td>s. 38(1)(c) and 40(3)</td>
<td>$1500 x 2</td>
<td></td>
</tr>
<tr>
<td>18/09/1988</td>
<td>Employee</td>
<td>Illegal mining.</td>
<td></td>
<td>$100</td>
<td></td>
</tr>
<tr>
<td>16/09/1988</td>
<td>Employee</td>
<td>Defendant being a person in charge of u/g operations in a mine failed to ensure that an employee working alone was not in frequent communication within easy hearing of other employees was visited or communicated with at least every 2 hours</td>
<td>MRAR: 12.2(1)</td>
<td>$400</td>
<td>$63.20</td>
</tr>
<tr>
<td>10/09/1988</td>
<td>Employer</td>
<td>Excessive hours worked in mine</td>
<td>s.38(1)(c) and 40(3)</td>
<td>$100 each</td>
<td>$283.20 for first complaint, $23.20 for 5 other complaints</td>
</tr>
<tr>
<td>Date</td>
<td>Type</td>
<td>Description</td>
<td>Code</td>
<td>Department Costs:</td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>----------</td>
<td>-----------------------------------------------------------------------------</td>
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<td></td>
</tr>
<tr>
<td>31/08/1988</td>
<td>Employee</td>
<td>Being manager of a mine where dry drilling was being undertaken in surface mining operations failed to ensure that drilling machine was filled with a device to collect the dust produced by that drilling or to discharge that dust through ducting to a position where it could not be breathed by the frill operator or other persons.</td>
<td>MRAR</td>
<td>$3,059</td>
<td></td>
</tr>
<tr>
<td>29/08/1988</td>
<td>Employee</td>
<td>Failed to wash down face and clean butts and examine butts for misfires prior to drilling an underground face.</td>
<td>MRAR: 7.24(1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>22/08/1988</td>
<td>Employees</td>
<td>Excessive hours worked.</td>
<td></td>
<td>Defendant Penalty: $500</td>
<td></td>
</tr>
<tr>
<td>24/07/1988</td>
<td>Employees</td>
<td>Excessive hours worked in mine.</td>
<td>MRA: s.38(1)(c)</td>
<td>Defendant Costs: $118.20</td>
<td></td>
</tr>
</tbody>
</table>

- Defendant Penalty: $500
- Defendant Costs: $63.20
- Defendant Costs: $400
- Defendant Costs: $63.20
<table>
<thead>
<tr>
<th>Date</th>
<th>Employee</th>
<th>Description</th>
<th>MRAR:</th>
<th>Defendant Penalty:</th>
<th>Defendant Costs:</th>
</tr>
</thead>
<tbody>
<tr>
<td>16/06/1988</td>
<td>Employee</td>
<td></td>
<td>14.3, 13.3</td>
<td>$750</td>
<td>$139.20</td>
</tr>
<tr>
<td>08/06/1988</td>
<td>Employee</td>
<td>Failed to wear a safety helmet in a hard-hat area.</td>
<td>4.3(1), 1.9</td>
<td>$40</td>
<td>$23.60</td>
</tr>
<tr>
<td>24/02/1988</td>
<td>Employee</td>
<td>Failed to clean and wash out butts prior to drilling a face.</td>
<td>7.24(1)</td>
<td>$23.20</td>
<td></td>
</tr>
<tr>
<td>24/02/1988</td>
<td>Employee</td>
<td></td>
<td>7.24(1)</td>
<td>$50</td>
<td>$30.70</td>
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</tbody>
</table>

**1987**

<table>
<thead>
<tr>
<th>Date</th>
<th>Employee</th>
<th>Description</th>
<th>MRAR:</th>
<th>Defendant Penalty:</th>
<th>Defendant Costs:</th>
</tr>
</thead>
<tbody>
<tr>
<td>30/12/1987</td>
<td>Employee</td>
<td>Negligence and endangering safety of 3 individuals. Endangered safety of 3 people inside a crusher by a tipping a load of ore into the crusher contrary to precautionary signal. Defendant was a truck driver.</td>
<td>s.54 MRAR: 6.2</td>
<td>$1450</td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Role</td>
<td>Description</td>
<td>Code</td>
<td>Penalty/ Costs</td>
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<tr>
<td>11/12/1987</td>
<td>Employee</td>
<td>Failed to ensure that rock or other material was not dumped from motor vehicle over a bank unless there was an effective back stop provided or a person suitable stationed to guide and direct the drivers to a safe dumping position.</td>
<td>MRA: s.30(1) and 54 MRAR: 17.10</td>
<td>• Department Costs: $450 Application dismissed</td>
<td></td>
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<tr>
<td>04/12/1987</td>
<td>Employee</td>
<td>Registered Manager absent from site 4/12/87 to 14/12/87 and failed to notify District Inspector.</td>
<td>MRA: s.24(5) and 55</td>
<td>• Defendant Penalty: $50 Defendant Costs: $60.20</td>
<td></td>
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<tr>
<td>23/11/1987</td>
<td>Employee</td>
<td>Defendant drilled in a face with misfires. He failed to clean out all butts and correctly examine the face for misfires.</td>
<td>MRAR: 7.24(1)</td>
<td>• Defendant Penalty: $80 Defendant Costs: $20.20</td>
<td></td>
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<tr>
<td>23/11/1987</td>
<td>Employee</td>
<td>Defendant being a shift boss failed to ensure that a portion of the mine assigned to him in his round was maintained in safe condition. Evidence that misfires in the rockface. Traces of unused explosives</td>
<td>MRAR 3.25(2)</td>
<td>• Defendant Penalty: $80 Defendant Costs: $135.20</td>
<td></td>
</tr>
<tr>
<td>09/09/1987</td>
<td>Employer</td>
<td></td>
<td>MRA: 155</td>
<td>• Defendant Penalty: $300 Defendant Costs: $60.20</td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Employee</td>
<td>MRAR</td>
<td>Defendant Penalty</td>
<td>Defendant Costs</td>
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<td>29/06/1987</td>
<td>29/06/1987</td>
<td>5.8</td>
<td>$100</td>
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<tr>
<td>01/01/1987</td>
<td>01/01/1987</td>
<td>61</td>
<td>$50</td>
<td>$105.37</td>
<td></td>
</tr>
</tbody>
</table>

Defendant wilfully interfered with and damaged electrical apparatus whilst he was not authorised to do so.
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