

## NEW SOUTH WALES MINERALS COUNCIL LTD

11 February 2009

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Manager  
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NSW Department of Primary Industries  
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Dear Sir / Madam,

The NSW Minerals Council (NSWMC) welcomes the opportunity to make a submission to the NSW Department of Primary Industries (DPI) on the discussion paper "Review of Coal Mine Health & Safety Act 2002" on behalf of our coal industry members.

Safety is the number one priority for the mining industry. NSWMC understands that legislation can be a powerful tool in creating an environment that promotes safety. Consequently, it is important to ensure that the Coal Mine Health & Safety Act (CMHSA) provides a fair, practicable and transparent process for all to follow. The current CMHS Act and Regulation often entrenches outcomes that do not meet these criteria. For example, the overlapping requirements between the CMHS legislation and Occupational Health and Safety legislation can be contradictory and create confusion for meeting compliance.

NSWMC's detailed submission on the CMHS Act is attached. In summary, NSWMC submits that the following amendments are required:

- In order to reduce duplication and unnecessary administrative burden, the CMHS Act should be amended to incorporate relevant provisions from other legislation including the OHS Act and Regulation.
- The application of the CMHS Act must be clarified to remove inconsistencies and double negatives (see for example the wording in Schedule 1). As the provisions in the CMHS Act are very prescriptive, it is critical that the geographic and activity based tests for application of the Act be retained. This will ensure that only activities on a colliery holding are subject to the onerous obligations.
- The OHS Regulation should only apply to non-mining activities, such as construction work, on the colliery holding.
- NSWMC supports simplifying the current nomination and approval provisions by removing the requirement for approval by DPI. There are a number of concerns with the current approval process, including the unreasonableness of the grounds for rejection and the time delay in the process. These have substantial commercial and employment impacts for operations.
- Where relevant, the CMHS legislation must be consistent with the OHS legislation to remove unnecessary duplication. The CMHS legislation must also reflect the risk based approach in the OHS legislation.
- NSWMC recommends that the provision under the CMHS Act and Regulation should be simplified to eliminate duplication regarding the role of NSW DPI and the industry check inspector.

NSWMC notes that while the Terms of Reference for the Review appear broad, the issues on which public comment has been sought are limited. There are other issues relating to the operation of the CMHSA and Coal Mine Health and Safety Regulation 2006 (CMHSR) which NSWMC believes must be urgently addressed. For example, the operation of clauses 51 and 52 of the CMHSR enables the



DPI to exercise discretionary powers of a subjective nature which may have adverse consequences and leave the operator without an adequate avenue for review and/or appeal. The *Occupational Health and Safety Act 2000* (NSW) at Part 6, Division 4 is illustrative of this point. NSWMC will make a separate submission on these issues.

Please contact Nehal Rajani, Manager Occupational Health & Safety on (02) 9274 1405 or [nrajani@nswmin.com.au](mailto:nrajani@nswmin.com.au) for further information.

Yours faithfully

**Dr Nicole B Williams**  
CHIEF EXECUTIVE OFFICER



## INDUSTRY COMMENT TEMPLATE

### Review of the *Coal Mine Health and Safety Act 2002*

<p><b>TO:</b>  <b>Manager, Industry Standards &amp; Practice</b>  <b>Mine Safety Performance</b>  <b>NSW Department of Primary Industry</b>  <b>Mail:</b> PO Box 344          Hunter Region MC NSW 2310  <b>Fax:</b> (02) 4931 6790  <b>Email:</b> mine.safety@dpi.nsw.gov.au</p>	<p><b>FROM:</b>          Dr. Nicole Williams          CEO          NSW Minerals Council          P O Box A244          Sydney South NSW 1235  <b>Phone:</b> (02) 9274 1400  <b>Fax:</b> (02) 9274 1455</p>
<b>Closing date:</b> 27 January 2009	<b>Date of submission:</b> 11/ 02 /2009

### SPECIFIC COMMENTS

<b>ISSUE 1. APPLICATION OF THE ACT</b>	
<p>The Government seeks industry comment on any practical difficulties in understanding if and when the Act is meant to apply to a business.</p>	
<b>CLAUSE NO.</b>	<b>COMMENT</b>
Section 8	<p><b>Assessing when the Act applies to a 'colliery holder'.</b></p> <p>There are a number of circumstances in which it is difficult to determine when the Act applies and to which activities (for example, non-mining). This includes the requirement to consult multiple pieces of legislation and interpret confusing provisions.</p> <p><b>Recommendation</b>          The CMHS Act must be amended to incorporate relevant provisions from other legislation so that companies only have to consult a single piece of legislation. For example, to make an assessment when the CMHS Act applies requires the interpretation of various parts of the CMHS Act, the CMHS Regulations 2006, the Mining Act 1992 (NSW) and the Mining Regulations 2003 (NSW). This duplication creates unnecessary red tape and compliance burden.</p> <p><b>Understanding which activities the Act applies to.</b></p> <p>The Act uses geographic and activity based tests to assess whether or not it applies. The geographic test refers to a requirement that the Act applies to places of work, for example, a 'colliery holding' or 'coal exploration site'.</p> <p><b>Recommendation</b>          Retain the geographic and activity based tests for application of the Act; particularly, the</p>

	<p>activity based tests as these are needed to assess when certain prescriptive provisions in the Act and /or the Regulation will apply.</p> <p><b>Assessing how the Act applies to an activity ancillary to mining that is carried out in a registered colliery holding.</b></p> <p>It is unclear which parts of the Act apply where construction of infrastructure is being carried out in new and not presently operating coal operations.</p> <p>Where a colliery holding is unregistered, it appears that the <i>Occupational Health and Safety Act 2000 (NSW) (OHS Act) and Occupational Health and Safety Regulation 2001 (NSW) (OHS Regulation)</i> would apply to the exclusion of the Act. Once the colliery holding is registered, and there is construction work for infrastructure intended to form part of a coal operation, the Act will apply. However, prescriptive provisions of the OHS Regulation regarding construction work will also continue to apply, for example, excavation work.</p> <p>Where a colliery holding is registered, this may result in those performing non-mining activities being required to comply with parts of the Act that apply to mining activities, for example, ventilation arrangements.</p> <p>In addition, DPI may be responsible for supervising construction work, a sector traditionally regulated by the WorkCover Authority of NSW.</p> <p><b>Recommendation</b> The position regarding construction work must be clarified in the Act. The Discussion Paper (at 4.1a) expresses the intention that inappropriate duties are not placed on those performing non-mining activities (farming and fishing) within a colliery holding.</p> <p>NSWMC recommends that this intention is extended to other non-mining activities such as construction work. That is, the provisions of the OHS Regulation will apply to construction work carried out in a colliery holding and not to activities within the colliery holding itself.</p>
<p><b>Schedule 1</b></p>	<p>Schedule 1 of the Regulation addresses places where the Act does not apply and outlines a list of activities that the Act does apply to. The language used in Schedule 1 of the Regulation contains a double negative by including reference to places where the Act 'does not apply' and 'to places of work at which the work is carried out is not an activity listed in the schedule'. This may cause confusion in understanding what Schedule 1 requires.</p> <p><b>Recommendation</b> The language in Schedule 1 must be simplified to remove the use of the double negative and should clearly identify which places the Act does not apply.</p>
<p><b>Section 3</b></p>	<p><b>Understanding whether drilling for coal on a registered colliery holding is an activity covered by the Act.</b></p> <p>The Act states that it applies to a 'coal exploration site' which section 3 defines to include where drilling from the surface is undertaken to discover or prove the existence of coal. Further, Schedule 1 of the Regulation lists 'mining' as an activity covered by the Act, though the definition in section 3 of 'mine' specifically states that it does not include exploring for coal by drilling from the surface.</p> <p>Schedule 1 also lists 'drilling from the surface, for a mining purpose in connection with the mining of coal for the purpose of discovering coal or proving the existence of coal' as an activity covered by the Act.</p> <p><b>Recommendation</b></p>

	NSWMC recommends that these apparent inconsistencies are resolved in the Act.
<b>ISSUE 2. NOMINATION OF OPERATORS</b>	
<p>Comments are sought on the appropriateness of the CMHS Act and Regulation provisions for the nomination of operators and their “de facto” approval by NSW DPI.</p> <p>In particular, comments are sought on whether the current provisions could be simplified to require colliery holders to appoint operators and notify the NSW DPI of the appointment and for NSW DPI to rely on its general enforcement powers to address non-compliance by colliery holders.</p>	
<b>CLAUSE NO.</b>	<b>COMMENT</b>
<b>Section 17</b>	<p>The following comments are made regarding the current nomination and approval process:</p> <ol style="list-style-type: none"> <li>1. The CMHS Act prescribes grounds for rejection of a nomination. These grounds may not be properly assessed by the DPI. For example: <ol style="list-style-type: none"> <li>a. One of the prescribed grounds for rejecting a nomination is that the nominated operator is not the employer with day to day control of the workforce. <p>NSWMC notes that an assessment of who an ‘employer’ is and what ‘control’ is, requires the consideration of both factual and legal issues, including the application of legal tests.</p> </li> <li>b. Another ground for rejection used by DPI in situations where multiple operators are nominated for separate operations within the colliery holding, is to argue that different operators may be detrimental to health and safety. <p>Multiple operators are not uncommon in the industry generally. It is possible to appropriately control, if not eliminate, any detriment to health and safety by applying appropriate health and safety management systems and principles.</p> </li> </ol> </li> <li>2. DPI may reject the nomination within 28 days of receiving the nomination (or later if DPI requests additional information). <p>If there is a change in an operator during mining activities, the current nomination and approval process can mean that mining activities stop until the approval has been granted. This delay in DPI completing an administrative process can have significant commercial and employment implications, which is not an appropriate or reasonable outcome. This delayed administrative process has the potential to impact on commercial operations.</p> </li> <li>3. The approach proposed by DPI will require an operator to be nominated and notified to the DPI and to allow the DPI to use its enforcement powers to deal with any failure to follow this process. <p>There are reasonable grounds to amend and simplify the current nomination and approval process.</p> <p>A similar approach is applied in Queensland. For example, section 53 of the Queensland Act allows for the appointment of a coal mine operator by written contract for a mine (including a separate part of a surface mine). Under section 49 of the Queensland Act, the Chief Inspector is to be notified of this appointment and</p> </li> </ol>

	<p>a coal mine operator may not be changed without first notifying the Inspector. This process though does not require an approval process that may impact mining activities.</p> <p>This approach would also have the additional benefit of relieving the additional administrative burden on all parties concerned in the process including the DPI, owners and operators.</p> <p><b>Recommendation</b> NSWMC agrees with the DPI proposal to simplify the current nomination and approval provisions. NSWMC recommends that this is achieved by removing the requirement for approval by DPI. There are a number of concerns with the current approval process, particularly as it relates to grounds for rejection and the potential impact on commercial operations. The proposed changes will remove these concerns and have the additional benefit of alleviating the administrative burden for DPI, owners and operators.</p>
<p><b>3. CONTENTS OF HSMS</b></p> <p>Comments are sought on examples of where the volume and complexity of HSMS requirements may result in practical problems in understanding the totality of legal requirements for HSMSs, the ease of their implementation, and unintended risks.</p> <p>Comments are sought on possible options for:</p> <ul style="list-style-type: none"> <li>- Simplifying and clarifying CMHS Act requirements for HSMS, and their relationship to relevant OHS Regulation and AS4804 provisions; and</li> <li>- The extent to which regulatory requirements for HSMS may be supported or partly replaced by approved codes of practice and NSW DPI guidelines.</li> </ul>	
<p><b>CLAUSE NO.</b></p>	<p><b>COMMENT</b></p>
<p><b>Section 23</b></p>	<p><b>Duplication of Legislation</b></p> <p>The CMHS Act and Regulation requirements for the HSMS and associated plans have additional performance and prescriptive requirements for specific hazards and work activities. In addition, the OHS Regulation imposes general requirements to apply risk management processes to all workplace hazards and additional requirements for specific hazards and work activities. The Australian Standard AS4804 includes requirements and guidance for all HSMS components. These overlapping requirements create confusion.</p> <p>Training and competence is one of the components of the HSMS. The training requirements referenced in the OHS Regulation are relevant to CMHS Act and Regulation. The training and competence systems are also prescribed by the Coal Services and are not referenced in the CMHS Act e.g. requirements of Order 34. In fact, their enforcement is also not coordinated with NSW DPI HSMS audit activities. This creates complexity in its application and administration.</p> <p><b>Recommendation</b> NSWMC agrees with the DPI proposal to amend the CMHS Regulation provisions for coal mining hazard and risk controls to be outcomes based and consistent with the OHS Regulation.</p> <p>Training as a component of HSMS must have a risk based approach consistent with the OHS Regulation to eliminate duplication. Any mining specific risk can be addressed in the CMHS Regulation.</p>

<p><b>Clause 15, and 17</b></p>	<p>The CMHS Regulation prescribes the requirements for Inspection Programs and Supervision Programs. The approach taken in the OHS Regulation for inspection and supervision arrangements are risk based.</p> <p><b>Recommendation</b> NSWMC strongly recommends that the current prescriptive inspection and supervision arrangement in the CMHS Regulation is amended to be risk based. This will ensure consistency with the arrangements in the OHS Regulation which applies to other industries.</p> <p>The review of CMHS legislation must include an expanded application of a risk based approach consistent with the OHS Regulation to remove unnecessary duplication.</p>
<p><b>4. CONTENT OF EMS</b></p> <p>Comments are sought on practical problems in understanding the CMHS Act and Regulation requirements for EMSs and their practical implementation while maintaining current high standards for emergency response arrangements.</p> <p>In particular, comments are sought on options for simplifying and clarifying CMHS Act and Regulation requirements for the EMS, including:</p> <ul style="list-style-type: none"> <li>- Consistency with OHS Regulation emergency and first aid provisions; and</li> <li>- The extent to which regulatory requirements may be supported or partly replaced by an approved code of practice.</li> </ul>	
<p><b>CLAUSE NO.</b></p>	<p><b>COMMENT</b></p>
<p><b>Section 47 &amp; Clause 44</b></p>	<p>The CMHS Act and Regulations prescribes various requirements for an EMS. In addition, the OHS Regulation and Code of Practice include requirements and guidance material for the development of an EMS. These overlapping requirements create confusion.</p> <p><b>Recommendation</b> EMS requirements for coal mines and workplaces should be simplified under the CMHS Act to ensure consistency with the OHS Regulation. If necessary, the mining specific requirements can be addressed in supporting guidance material.</p>
<p><b>5. HSMS AND EMS REVIEW</b></p> <p>Comments are sought on whether the CMHS Act provisions for the review of the HSMS and EMS should be simplified and clarified, taking into account relevant AS4804 and OHS Regulation provisions.</p>	
<p><b>CLAUSE NO.</b></p>	<p><b>COMMENT</b></p>
<p><b>Section 28 &amp; 52</b></p>	<p>The CMHS Act prescribes requirements for the review of all relevant parts of HSMS and EMS. The OHS Regulation requires the review of relevant risk assessment and risk control measures. AS4804 requires the periodic review of HSMS and EMS system effectiveness. The review requirements under the CMHS Act, the OHS Regulation and AS4804 are conflicting and confusing to the operators.</p> <p><b>Recommendation</b> The provisions for the HSMS and EMS review under the CMHS Act must be simplified to reflect a risk based approach. This is consistent with the OHS Regulation.</p>

6. SUBMISSION OF HSMS AND EMS DOCUMENTATION	
<p>Comments are sought on any practical difficulties that stakeholders have experienced in relation to the CMHS Act and Regulation provisions for the submission of HSMS and EMS outlines to the NSW DPI.</p>	
CLAUSE NO.	COMMENT
<p>Section 26 &amp; 27 Clause 22</p>	<p>The provisions under the CMHS Act require the Coal Operator to notify DPI and submit details of any proposed changes to the HSMS arising from the periodic HSMS review process. The CMHS Regulation (Clause 22) requires the summary of the HSMS to be submitted to NSW DPI. NSW DPI may notify the operator if they object to the change within a 21 day time frame. The industry check inspector may raise objections regarding the HSMS with NSW DPI and / or the operator.</p> <p>There are several practical issues regarding the implementation of these sections:</p> <ul style="list-style-type: none"> <li>▪ The purpose of changing the HSMS or EMS is to improve health &amp; safety. The waiting period of 21 days for objection from the NSW DPI or the industry check inspector for implementation of the improvement poses a risk to health and safety of the employees. It also creates unnecessary delay and interruption to operations.</li> <li>▪ It is unclear, what level of detail is required to be submitted to DPI.</li> <li>▪ The definition of what constitutes an 'outline' of HSMS is unclear and inconsistent. This creates confusion and variation between different inspectors' request for information.</li> <li>▪ The requirement for both DPI and the industry check inspector to review the HSMS and EMS is unnecessary duplication.</li> </ul> <p><b>Recommendation</b> NSWMC recommends that the waiting period of 21 days for objection is removed as it prevents operations from immediately addressing and preventing the health and safety risk that the proposed change is seeking to address.</p> <p>The CMHS Act and Regulation should be simplified to eliminate duplication regarding the role of NSW DPI and the industry check inspector. The requirement for providing information to the check inspector must be removed.</p> <p>There must be clarification in the Act as to what details of the change must be notified to DPI.</p>
7. TOURIST / EDUCATION PERMITS	
<p>Comments are sought on whether the CMHS Act provisions for the issue of permits for tourists and educational activities at coal operations should be retained.</p>	
CLAUSE NO.	COMMENT
	None
8. OTHER ISSUES	
CLAUSE NO.	COMMENT



<b>Clause 55 &amp; 56</b>	<p>Notification of low severity incident requirements of Clauses 55 &amp; 56 can be subjective: open to interpretation by operators and inspectors. It creates a high volume of notification for no apparent additional safety outcomes. For example:</p> <ul style="list-style-type: none"><li>a) The amount of time involved in notifying the DPI of issues related to low severity incidents such as when a methanometer trips power to a machine.</li><li>b) Time required completing follow up reports frequently requested by inspectors as the official notification forms limit the amount of information you can put on them.</li></ul> <p><b>Recommendation</b> The reporting requirements for low severity incidents must be simplified to reduce the volume of reporting to DPI. The reporting requirements for these incidents can be collated as a set of trend data with a requirement to submit a quarterly report to DPI.</p>
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