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Statutory Review of WHS (MPS) Act
C/- NSW Resources Regulator

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Statutory Review of Work Health and Safety (Mines and Petroleum Sites) Act 2013 and Regulation

Introduction

Glencore Coal Assets Australia (**Glencore**) welcomes the opportunity to make this submission to the review of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW) (**WHS (MPS) Act**) and its associated Regulation.

Glencore is one of Australia's largest coal producers, managing production of around 120 million tonnes of saleable thermal and coking coal in 2019 from 16 operational open cut and underground mines. In NSW Glencore has 10 operational coal mines, with a workforce of approximately 5,900 people. These mines collectively produced about 69 million tonnes of saleable thermal and coking coal in 2019.¹

Glencore is a member of the Mine Safety Advisory Council and considers this to be a valuable and effective forum in which to provide feedback and advice to the Minister on regulatory and policy matters concerning health and safety in NSW's mining industry.

This submission is intended to supplement the NSW Minerals Council (**NSWMC**) submission to the review. Glencore has had input into that submission and supports the content and recommendations contained within it.

In making this submission we do not intend to repeat the responses that have been provided by NSWMC to each of the 25 questions raised in the Discussion Paper. The purpose of this submission is to identify issues that are of particular importance to Glencore and to outline further opportunities for reform of the WHS (MPS) Act and Regulation.

National consistency

As a company that operates mines in both NSW and Queensland, Glencore strongly supports the objective of national consistency for mine safety legislation, and encourages the mining states to continue to work together towards this objective.

If we can achieve cross-jurisdictional alignment in safety regulation, this will lead to significant benefits flowing from commonality of business practices across states. It is our view that a coal mine in NSW and a coal mine in Qld have the same hazards and, largely, the same controls. As such, it would be sensible and efficient to have a common set of mine safety laws. That said, due to the differences in coal and metalliferous mines, we consider that it is appropriate to maintain separate industry-specific safety legislation for those categories of mines.

¹ All figures cited include HVO mine, which is a 51/49 joint venture between Yancoal and Glencore. Glencore provides management services to the HVO joint venture.

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Glencore considers there to be good evidence of information sharing between states. For example, if an industry hazard such as airborne dust exposure is raised as a priority in one state then this is generally communicated and acted upon effectively in other states. However, Glencore would welcome closer interstate regulatory cooperation to achieve a legislative regime that is more consistent across the mining states than is currently the case.

Industrial manslaughter

Glencore notes that other states have been considering introducing an industrial manslaughter offence into their mine safety legislation. Glencore acknowledges that the introduction of this offence is not under active consideration in NSW. Glencore supports this position and provides the following reasons why it does not consider an industrial manslaughter offence to be appropriate or necessary:

- (a) there is no evidence that current laws - if administered and enforced appropriately - leave a gap which industrial manslaughter will address;
- (b) there are a mix of legal and policy tools available which can achieve the objective of addressing workplace fatalities. Punishment of individuals in the courts is one of many tools available to regulators, but it may not always be most effective in driving improved safety outcomes. While it remains important to deter non-compliance with safety legislation, the regulatory focus should remain on proactive, preventative health and safety measures;
- (c) safety regulation in the resources sector is prescriptive and provides a adequate safety protection for mine workers; the introduction of an industrial manslaughter offence would not improve safety outcomes;
- (d) industrial manslaughter laws may in fact be contrary to safety outcomes by fostering a culture of blame, or fear of blame. Punitive models of regulation are inconsistent with enhancing just and safe cultures which prioritise the identification of organisational or systems failures and sharing lessons to prevent similar incidents in the future;
- (e) as recognised by the South Australian Coroner in November 2018, introduction of an indictable offence such as manslaughter would only exacerbate the tendencies for employers and regulators to employ defensive litigious strategies. In comments opposing the introduction of the industrial manslaughter offence, the State Coroner noted that “those tendencies are not conducive to the public exposure and bringing to light of the full facts surrounding an industrial tragedy...”²; and
- (f) introducing an industrial manslaughter offence into the mine safety legislation would cut across existing criminal laws and ‘general’ manslaughter offences.

Gross negligence

Section 31 of the *Work Health and Safety Act 2011* (NSW) currently states that the standard of conduct that is relevant for a Category 1 offence is recklessness. This is appropriate. Glencore does not support the proposal, contained in the *Work Health and Safety Amendment (Review) Bill 2019* (NSW), to introduce the alternative standard of conduct of ‘gross negligence’ for Category 1 offences.

If this amendment were to be made, it would constitute a significant adjustment to the behavioural threshold that applies for the most serious offences in the safety legislation. As such, it should be subject to proper consultation to ascertain whether the inclusion of the ‘gross negligence’ standard assists in meeting the underlying policy intentions of improving standards in work health and safety. From Glencore’s perspective, lowering the threshold for a Category 1 offence to gross negligence will be counterproductive as it will encourage the adoption of defensive legal strategies and hinder the sharing of learnings. It will also increase the difficulty of attracting appropriately qualified people to industry.

Objects of the WHS (MPS) Act and unintended outcomes

In most cases, the objects of the WHS (MPS) Act are still valid, appropriate and working as intended. However, since the objects are applied uniformly to all coal mines irrespective of a mine's specific risk profile, the consequence is an unnecessarily high regulatory burden on mines that are lower in risk profile or where a major hazard does not

² <http://www.courts.sa.gov.au/CoronersFindings/Lists/Coroners%20Findings/Attachments/776/CASTILLO-RIFFO%20Jorge%20Alberto.pdf> paragraph 36.1.

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exist. An example of this is the western coalfields of NSW where methane gas is not present, yet the regulatory provisions applicable to gas still apply to those mines.

If a risk is not in existence at a coal mine, and will never come into existence, the laws should allow relief from at least some, if not all, of the regulatory controls applying to that risk.

A specific example exists in the way in which a "return roadway" is defined in clause 65(6) of the Regulation as "a roadway used for the removal of air and airborne contaminants from mine workings". This is the only definition of the return roadway in the Regulations and applies irrespective of the level of contaminant. The definition is further extended by interpretation contained within the Regulator's Guide "Underground coal mines – identification of returns and hazardous zones" (January 2015) which includes the statement "A return is an airway that carries air from the mine".

This then is interpreted in the Guide to include longwall homotropical conveyor roadways in a general manner without consideration of management of risk or arrangement of these homotropical conveyor roadways.

This results in an unintended outcome where a longwall homotropical conveyor roadway splits from the adjacent intake roadway outbye of the longwall hazardous zone. Irrespective that the airborne contaminants, particularly in the Western NSW coalfield where there is little to no in situ methane content, are well below safe and legislated limits, the roadway is considered a return and thus a hazardous zone.

The result of this classification is that the type of plant that can operate in the roadway is restricted and, without such plant, prevents the roadway being made homotropical. The safety benefits of the roadway, particularly the removal of heat, are then not able to be realised.

The contention here is that a longwall homotropical conveyor roadway as described above should not be considered a return and thus a hazardous zone. The roadway does not have a direct connection (airway) to the working longwall face and does not service the working longwall face ventilation wise as the panel return on the tailgate side of the longwall face does.

A specific exclusion or a change to the definition of a "return roadway" should be considered as part of the review. More broadly, the review should consider whether the legislation can be amended to cater for differing risk profiles across mines, so as to reduce the regulatory burden that results from taking a uniform approach.

Government officials

The function of government officials is well understood across the industry. However, it is our experience that there are sometimes situations where government officials from the Regulator do not follow site procedures such as site access and log on protocols. A reasonable expectation would be that the Regulator, being the agency responsible for enforcing compliance with safety and health laws in NSW, would demonstrate their commitment to health and safety in the industry, particularly when visiting mine sites.

If government officials consider that they are entitled to rely on section 26 of the WHS (MPS) Act in this regard, our view is that this does not promote the best health and safety outcomes for the industry.

Glencore recommends that the legislation makes it clear that government officials are required to comply with relevant site health and safety standards and procedures when they attend mine sites.

Worker representation

As noted in the NSWMC submission, the current arrangements regarding worker representation should be streamlined. The existing requirement in the WHS (MPS) Act to have mine safety and health representatives (SHRs) for coal mines as well as the requirement in the *Work Health and Safety Act 2011* (NSW) (**General WHS Act**) to have health and safety representatives for certain work groups (HSRs) has created unnecessary duplication, confusion and inefficiency.

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Glencore considers this to be an unintended consequence of the legislative reforms in 2012, and that the objective of worker representation in safety matters would be achieved effectively (and without any adverse impacts on safety) by retaining SHRs for coal mines without the additional role of the industry HSR for individual work groups. This would ensure that the SHR, in conjunction with the site management team, can continue to be the point of contact for safety matters as and when required under the General WHS Act.

To provide a specific example, it is currently the case that union officials have the right to enter a mine site under the provisions of Part 7 of the General WHS Act. This causes a conflict with, and duplication of, the powers of SHRs under Part 5 of the WHS (MPS) Act. To avoid this conflict and duplication, union officials should not have a right of entry to a coal mine if a SHR has been elected for that coal mine. Part 5 of the WHS (MPS) Act should be amended to reflect this position.

Incident notification

Complexity of existing requirements

As noted in the NSWMC submission, the incident notification requirements that currently exist are complex and require operators to consider multiple sections in several different pieces of legislation. It would greatly benefit the industry if the Regulator were to issue guidance material to support the regulatory requirements and assist sites in navigating the reporting requirements. Glencore has developed an internal guidance tool and currently uses it to assist our sites in determining what is to be reported. This has been provided to the Resources Regulator in the past. A guideline that is endorsed by the Resources Regulator and issued to the entire industry would improve consistency in reporting and clarify those incidents that do and do not need to be reported.

Notification thresholds and purposes

As a separate issue, the review should examine whether the current thresholds for reporting are too low, and whether the requirement to report certain incidents should involve a consideration of the effect on safety and health of people (if any) that resulted from the incident.

We acknowledge that there will always need to be a threshold for incident notification. However, Glencore is conscious of the fact that, in the past, some of the requirements to report incidents have been introduced so that the Regulator is able to collect data and then work with industry to address any developing trends or concerns. Glencore supports this objective, but the way this approach is currently incorporated into the legislation does still leave open the possibility that this information will be used by the Regulator to take enforcement action. It also requires operations to cease the use of equipment until the Regulator has attended site, and this is not warranted in all cases.

One alternative to the current approach would be a system where the Regulator had the power to nominate a particular focus area for data collection, have it signed off by the Mine Safety Advisory Council, and then require mine sites to report against that focus area for a period of time. These types of low risk incidents would be treated in the legislation as a separate category of incident and would not require equipment to cease operating until the Regulator had arrived at site to conduct an inspection. The Regulator could then work with industry to analyse the data and implement solutions to any issues that had been identified.

This approach would enable the data to be captured whilst keeping issues out of the regulatory enforcement framework. It would facilitate improved information sharing and would not create tension between operators and the Regulator in relation to reporting of low level issues that should not require a mine to cease operating equipment.

One area where this approach would deliver benefits is fires on mobile equipment. In the early 1980s, if the industry didn't report fires on equipment, we would not have had MDG15. However, we are now at the point where the risks associated with fires on equipment are much lower due to the reduction in frequency of events and the control measures that have been introduced.

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In order to move to the next level in terms of reducing fires on equipment, a greater level of data will need to be supplied to the OEMs to be incorporated into equipment design (eg, turbos). Incorporating a more collaborative approach to low-risk incident reporting in the legislation would facilitate and enhance the collection and sharing of this data.

Another example is spontaneous combustion. We recognise that it is undesirable to have spontaneous combustion, not only from a safety perspective but also from a resource recovery and environmental perspective. It is certainly not an issue that should be considered by the industry as an acceptable practice. However, the current notification requirements for spontaneous combustion go further than what is necessary. Glencore submits that spontaneous combustion is another issue that could be treated as a focus area for data collection, rather than approaching it from a strict regulatory enforcement perspective.

Glencore is not advocating for a reduction in incident notification simply as a means of reducing regulatory burden. Rather, we request that the review considers whether the incident notification regime in the legislation can be revisited so that it is structured in a way that genuinely adds value in the management of safety over the longer term. A clear system that separates enforcement and improvement reporting for select issues would deliver significantly improved safety outcomes across the industry.

Consultation with emergency services

Due to the way in which clause 89 of the WHS (MPS) Regulation has been interpreted, in our experience it has been very difficult to undertake consultation with emergency services. In addition to the amendments proposed in the NSWMC submission, we submit that greater and longer-lasting benefits would be achieved if the Resources Regulator were to coordinate and facilitate regular sessions with the relevant emergency services, so that genuine consultation can occur. Glencore recommends that this practice be identified in a guideline.

Technological advancements

Glencore considers that there are many areas in which technological advancements can be used to deliver improved safety outcomes. One example is the Guardvant system, which Glencore has introduced in its open cut mines in NSW to assist with fatigue management. However, it is important that the legislation does not become too prescriptive. Glencore supports outcomes-based regulation rather than a system that is overly reliant on prescription of specific control measures, and this is particularly the case when it comes to technology. The Regulator should not be empowered by the legislation to mandate the introduction of a particular technology at a site. Such a power may lead to adverse outcomes. For example, certain sites may not have the means (financial or otherwise) to introduce the technology. Alternatively, it may be the case that the risk can be, or is already being, managed successfully without that technology.

Specific control measures in the Regulation

Glencore has identified the following issues in the Regulation which should be addressed as part of the review.

1. The issue identified above in relation to the definition of a "return roadway".
2. Clauses 78, 80 and 82 of the Regulation refer to plant, cables and circuits in a "hazardous zone". While clarification has been provided in the Regulator's guide "Underground coal mines – identification of returns and hazardous zones" (January 2015), the definition of hazardous zone is inconsistent in its treatment of standing faces. The definition in clause 3 of the Regulation states that *"hazardous zone, at an underground coal mine, means each of the following:*
...
(c) any part of an intake airway that is on the return side of such points that are within 100 metres outbye of:
...

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(ii) any longwall or shortwall face, but only to the extent that the intake airway is on the intake side of that face (but not if the longwall face is an installation face at which the development of the face, and mining for development coal, have been completed and at which longwall mining has yet to commence)".

Sub-clause (c)(ii) of the definition specifically excludes a longwall installation face that is standing (ie, development is complete). The case of a standing face also occurs regularly in development panels at underground coal mines, particularly in main heading panels where faces could stand for months or years while extraction panels are driven off those headings.

As part of this review, consideration should be given to excluding standing development panels from the definition of hazardous zones.

3. Clause 96 of the Regulation requires an underground mine to have at least two exits to the surface that are trafficable by persons and that comply with subclauses (2) and (3). The relevant parts of the clause are:

"(2) Each exit must: (a) be accessible from each level at the mine in which coal extraction or stoping operations are being carried out, and (b) allow for the passage of rescue persons and rescue equipment, and (c) be marked or signposted so that it can be readily located in an emergency, and (d) be maintained so that it remains effective.

(3)

(4) The mine operator of a mine is not required to comply with subclause (1) in either of the following circumstances if the mine operator ensures that the mine has at least one trafficable exit to the surface that complies with subclause (2): (a) a single entry drive or shaft is being developed, (b) the most distant area of the mine is no more than 250 metres from the mine entrance or a second exit."

This requirement is not practical in some circumstances in underground coal mines, such as:

- (a) a longwall face greater than 250 metres in length and where no take-off chutes are driven and the longwall equipment is being removed. At some point during shield removal the face length is greater than 250 metres and there are not two exits available; and
- (b) the adjacent travel road inbye of the longwall production face that is not connected to the adjacent gate-road. When longwall retreat exceeds 250 metres this roadway does not have two available exits.

Both cases described above are not covered by the provisions of the Regulations requiring an exemption to be sought. Consideration of the above examples as a high risk activity in Schedule 3 should be made as part of the Statutory Review.

4. Clause 34 of the Regulation deals with prohibited items and substances, and refers to Schedule 4. Schedule 4, sub-clause 5(1)(2) and 5(1)(3) are as follows

"(2) Explosives testing equipment or exploders must not be stored at an underground coal mine.

(3) The batteries of explosives testing equipment or exploders must not be changed while at an underground coal mine."

These two sub-clauses do not work as intended in respect of the wording "at an underground coal mine". The intention here when drafted would have been that these prohibitions apply while "underground at an underground coal mine". A correction or change to this language should be considered as part of the Statutory Review.

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Design registration

With regards to the design registration requirements in clause 177 of the Regulation, we make the following comments:

1. Clause 177(1)(e) requires the registration of *“electrically powered hand-held plant, fixed installations and installations on mobile plant (but not tube bundle systems where the analyser is installed at the surface) used to determine or monitor the presence of gas”*

In some applications underground, fixed installation gas monitors are used not for atmospheric testing of the underground environment, where they are installed to protect personnel, but for monitoring the composition of pipelines containing CH₄ or other gases (eg, underground degassing pipelines etc). The required sensor span in these applications is significantly different (typically 0-5% for CH₄ atmospheric monitoring, 0-100% for CH₄ pipeline monitoring) to the atmospheric testing application. There is not a large range of design-registered gas sensors (in some cases none) for monitoring these pipeline applications.

As such, we submit that clause 177(1)(e) should be amended to exclude the requirement for design registration of gas detection monitors where they are used for pipeline monitoring / process control applications (e.g measuring composition of gas ranges in the underground environment).

2. Clause 177(3)(a) requires design registration for winding systems. This is an onerous requirement because minor changes to non-critical system components in a winder can require a significant amount of effort in getting the design registration reviewed and updated. We recommend that this provision be amended to incorporate a materiality threshold so that minor changes to components do not trigger a review and update of the design registration.

Licensed activities

Part 9 of the Regulation deals with licensed activities at coal mines. Clause 153A prohibits a mine operator from using explosion-protected plant that has been overhauled, repaired or modified unless the repairs were carried out by a licensed facility. This prohibition applies in addition to the obligation for mine operators to meet the requirements of the accrediting body for the certifying scheme of which they are a member (ie, IECEx or ANZEx). These bodies regularly audit the workshops performing this work and issue a “Service Facility Number” to certify that the workshops meets the relevant standards.

It is Glencore’s view that the requirement in Part 9 for workshops to be licensed adds an additional administrative burden to these workshops with no perceived benefit. In this regard we note that this licensing requirement does not align with the corresponding provisions in Queensland.

As such, Glencore proposes that the requirement for separate licensing of explosion-protected plant workshops be replaced with a requirement that explosion-protected plant may only be overhauled, repaired or modified by a facility that has a current Service Facility Number issued under an accredited certifying scheme.

Statutory functions

Generally, Glencore considers the provisions for statutory functions to be working as intended and we do not consider there to be a need for major changes in this area.

One issue that we wish to raise is that some of the requirements that relate to the “Qualified mechanical tradesperson” position are overly specific and inflexible.

Schedule 10, clause 15, sub-clause (2) requires a Qualified mechanical tradesperson to *“(a) have a proficiency certificate (issued by State Training Services) in a mechanical trade, or (b) ..., or (c) have a qualification that the regulator has declared, by notice published in the Gazette, to be a qualification equivalent to a qualification referred to in paragraph (a).....”*.

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The State Training qualification for a Mechanical Tradesperson is MEM30205 and any mechanical trade with the core subjects can attain this qualification, yet not have the skills for an underground coal mine appointment. In our experience to date, sub-clause (2)(c) has never been exercised (ie, an equivalent qualification has not been gazetted).

This particular clause does not appear to be not working as intended. The 2020 legislation review could consider allowing alternative trades with qualifications more suited to the mining industry under clause 15(2)(a) such as "AUR31116 Certificate III in Heavy Commercial Vehicle Mechanical Technology". In this regard please refer to Training Services NSW's "Smart and Skilled NSW Skills List – v10.2" document.

Glencore appreciates the opportunity to provide input into the Statutory Review. We are willing to elaborate on any of the issues discussed above if required.

Yours faithfully



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