# STATUTORY REVIEW OF THE *WORK HEALTH AND SAFETY ACT 2011*

SUBMISSION

19 December 2016

**NSW MINERALS COUNCIL**

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# Executive summary

NSW Minerals Council (NSWMC) and its members place worker health and safety as the highest priority when conducting mining operations. As such, the NSWMC welcomes the opportunity to comment on the Discussion Paper for the statutory review of the *Work Health and Safety Act 2011* (the Act).

As noted in the Discussion Paper, the present statutory review looks at the NSW-specific provisions. A comprehensive national review of the model laws is planned for 2018. The current review also does not cover the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* or *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014*. This submission covers specific key issues raised in the Discussion Paper, including:

- Consideration should be given to whether certain objects should be removed or guidance be provided on the prioritisation of the objects under section 3 of the Act to place emphasis on promotion of workplace safety over enforcement.

- The District Court being the appropriate forum for proceedings for an offence under the Act and review of external decisions made under the Act.

- The Director of Public Prosecutions should be the only party with responsibility for bringing proceedings under the Act to maintain impartiality and transparency.

The NSWMC looks forward to continuing to engage with the government to strive for continued improvement and workplace safety performance.

# Discussion Paper: response to key issues

## Objects of the Act

Section 3 of the *Work Health and Safety Act 2011* (the Act) sets out the main objects of the Act to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. The objects of the Act are significant as they contain an express statement of purpose for the Act which assists the administration, enforcement and interpretation of the Act.

There can be tension with the objects set out in section 3(1)(a)-(h) of the Act. For example, section 3(d),(e) and (f). Often parties and/or a regulator are reluctant to share information post an incident (i.e. consistent with 3(d)) for fear of the evidence being used against them (i.e. section 3(e)). The regulator may be reluctant to share statements and evidence whilst an investigation is being undertaken which could result in promoting earlier learnings, partly due to section 3(e) and 3(f). Whilst the role of enforcement is recognised as playing an important role in workplace safety, it may assist with the exercise of prosecutorial discretion and improve the promotion of industry learnings if some objects were removed and/or certain objects given priority over others.

**Recommendation**

Consideration should be given to whether certain objects should be removed or guidance be provided on the prioritisation of the objects under section 3 of the Act to place emphasis on promotion of workplace safety over enforcement.

## The District Court as the appropriate forum

Presently proceedings for an offence against the Act are to be dealt with before the Local Court or the District Court, as prescribed under section 229B of the Act. Providing for proceedings under the Act to come under the jurisdiction of two courts adds unnecessary complexity and inefficiencies. In addition, the Industrial Relations Commission is the nominated external body to review the decisions made by the regulator.

The District Court should be designated the forum to deal with all proceedings for an offence against the Act, or external review of decisions made under the Act, for the following reasons:

- focusing proceedings under the Act in one forum will build the capability and expertise of the District Court to deal with such matters.
- the District Court has a criminal jurisdiction which is the appropriate mindset to view offences against the Act.

**Recommendation**

The District Court is the appropriate forum to deal with proceedings for an offence against the Act and external review of decisions made under the Act.

## The Director of Public Prosecutions should have sole responsibility for prosecutions under the Act

The Act provides that proceedings for an offence against the Act may be brought by:

- the regulator
- an Inspector acting with the written authorisation of the regulator
- the Director of Public Prosecutions
- the secretary of a union, in certain circumstances
- an Australian legal practitioner authorised in writing to represent a person who is authorised by section 230 of the Act

A prosecutor should be consistent, independent and impartial. In remaining impartial, the prosecutor should perform their duties without fear, favour or prejudice and should be unaffected by individual or sectional interests and public or media pressure. The prosecutor should have regard to the public interest. It is fundamental that proceedings for an offence against the Act are brought in a fair and transparent manner.

The ability of the regulator to bring proceedings under the Act can be seen to conflict with the other functions of the regulator including the early learning process, causal investigations and the influence of government. The role of the prosecutor should be separate and independent.

Similarly, the ability under section 230(3) of the Act for the secretary of a union to bring proceedings for a Category 1 offence or a Category 2 offence where the regulator has declined to follow the advice of the Director of Public Prosecutions to bring proceedings, is completely inconsistent with independence and impartiality.

Responsibility for bringing proceedings under the Act should solely rest with the Director of Public Prosecutions.

**Recommendation**

The Director of Public Prosecutions should be the only party with responsibility for bringing proceedings under the Act.