**Submission**

**to**

**Minister Palaszczuk MP**

**on**

# Coal Mining Safety & Health Act 1999 (Qld) and Coal Mining Safety & Health Regulation 2001 (Qld)


**Submitted by:** Australian Mines and Metals Association (AMMA)

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**Executive summary**

1. AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries. AMMA's membership includes the majority of employers operating in the Queensland coal industry.

2. AMMA submits that section 42(7) of the *Coal Mining Safety and Health Regulation 2001* (the Regulation) be amended to remove the requirement that a Site Senior Executive (SITE SENIOR EXECUTIVE) may establish criteria for assessment of workers for fatigue, physical impairment, psychological impairment and drugs *only* in agreement with a majority of workers at the mine.

3. AMMA submits that section 46 of the Regulation be amended to allow for an employer, who has reasonable grounds, to request an employee to undergo a health assessment.

4. AMMA submits that the Health Assessment Form required under section 46 of the Regulation should be in the form contained in Appendix A to this Submission.

**AMMA and Resources Sector Profile**

5. AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries. It is the sole national employer association representing the employee relations and human resource management interests, including OH&S, of Australia's onshore and offshore resources sector and associated industries.

6. AMMA represents all major minerals and hydrocarbons producers as well as significant numbers of construction and maintenance companies in the resources sector and has in excess of three hundred member companies Australia wide. AMMA member companies who operate in Queensland, and engage employees and subcontractors on Queensland Coal Mine sites, include:

    - Rio Tinto Coal Australia Pty Ltd
    - Anglo Coal Australia Pty Ltd
    - BHP Billiton Mitsubishi Alliance
    - Thiess Pty Ltd
    - Roche Mining Pty Ltd
    - Leighton Contractors Pty Ltd
    - MacMahon Holdings Ltd.

7. The resources sector has contributed:

    7.1. Minerals and energy exports in the order of $67.1 billion in 2004-2005.[1] This represents approximately 67 per cent of Australia's total commodity export earnings in 2004-2005.[2] This equates to 32 per

[1] ABARE, *Australian Commodities-Forecasts and issues,* Vol. 12 No. 1, March quarter 2005 at 19-21
[2] ABARE, *Australian Commodities*, Vol. 1 No. 1, March 2005 at 19

cent of Australia's overall export earnings during this period.[3] Over half of Queensland's export revenue ($9.8 billion) comes from the minerals sector.[4]

7.2. New capital expenditure in the mining industry was around $9.3 billion in 2003-2004[5] which is approximately 24 per cent of private new capital expenditure in Australia (2003-4)[6]; around 20.9% of all capital expenditure in Queensland in 2004 – 2005 was from the mining sector.[7]

7.3. Total government revenue payments of $4.6 billion (2003-4)[8]; the coal sector in Queensland alone contribute an estimated $550 million in royalties to the State Government annually.[9]

7.4. These statistics highlight the enormous significance of the resources sector, both in terms of export revenue and domestic capital investment.

8. AMMA members in Queensland have witnessed a significant improvement in safety and health performance and AMMA generally supports any proactive legislative initiatives which support this ongoing improvement.

**Current legislative framework for dealing with risks associated with fatigue, physical and psychological impairment and drug use**

9. The *Coal Mining Safety and Health Act 1999* (the Act) places safety and health obligations on coal mine operators, Site Senior Executives, contractors and other service providers.

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[3] RBA, *Statement On Monetary Policy*, February 2005 at 43
[4] Queensland Resources Council Industry Statistics, 2004 - 2005
[5] ABS, 'Private New Capital Expenditure and Expected Expenditure', Catalogue 5625.0, June 2004 at 12
[6] Ibid.
[7] Queensland Resources Council Industry Statistics, 2004 - 2005
[8] Ibid.
[9] Queensland Resources Council Industry Statistics, 2004 - 2005

9.1. Section 30 of the Act requires that management and operating systems must be put in place for each coal mine to achieve an acceptable level of risk.

9.2. Section 30(3) provides that regulations may prescribe the way in which an acceptable level of risk of injury or illness may be achieved.

9.3. Section 36 provides that nothing in the Act that imposes a safety and health obligation on a person relieves another person of the person's safety and health obligations under the Act.

10. Section 37(1) of the Act provides as follows:

*"If a regulation prescribes a way of achieving an acceptable level of risk, a person may discharge the person's safety and health obligation in relation to the risk only by following the prescribed way."*

11. The *Coal Mining Health and Safety Regulation 2001* ( the Regulation) prescribes, in Part 6, ways of achieving an acceptable level of risk for the assessment of workers' fitness for work.

11.1. Section 42(7) deals with the manner in which criteria for assessment of workers' fatigue, physical and psychological health and drugs may be established.

11.2. Section 46 provides for the manner in which health assessments of coal mine workers are to be carried out.

**Current difficulties experienced with section 42(7) of the Regulation**

12. Section 42(7) of the Regulation provides that the Site Senior Executive (SITE SENIOR EXECUTIVE) may establish criteria for assessment of workers for:
    - fatigue
    - physical impairment
    - psychological impairment
    - drugs

    only in agreement with a majority of workers at the mine.

13. Workers at Queensland coal mines are typically employed by numerous different employers, who in turn are either mine owners, mine operators, contractors, subcontractors or service providers.

14. The requirement that a Site Senior Executive can only establish criteria in agreement with the majority of workers must be viewed against the background of the absolute liability of *all persons* who hold safety and health obligations under the Act. All employers who have employees at the mine site therefore have equally onerous safety and risk management obligations under the Act.

15. In practice obtaining majority approval from all workers on site has been problematical.

    15.1. The issue of majority approval of drug policies was the subject of a major dispute in 2000 which lead to unlawful industrial action and significant disruption at the South Blackwater Opencut and the Laleham and Kenmare underground coal mines (see *South Blackwater Coal Ltd v CFMEU and CEPU* Print S9023).

    15.2. Last year one of AMMA's member companies had extensively consulted with their employees over a period of eight months regarding the introduction of a drug and alcohol testing program, only to be unable to attain majority approval from all workers on

site. This is against the background of substantial education and training programs preceding the consultation process and a proposed testing program that was in accordance with the Australian Standard.

15.3. Recently a contractor at a mine site was ordered by the Australian Industrial Relations Commission (the AIRC) at first instance to cease using its drug and alcohol testing policy, only to have the decision on appeal allowing the contractor to continue using its policy despite the requirements of section 42(7) (see discussion below).

16. In *Construction, Forestry, Mining and Energy Union and MacMahon Contractors Pty Ltd* PR963322 Commissioner Bacon of the AIRC had the opportunity to consider the meaning and effect of section 42(7) of the Regulation.

16.1. Commissioner Bacon came to the conclusion that a contractor's ability to implement its own drug and alcohol testing policy was limited by section 42(7) and the site safety and health system established by the SITE SENIOR EXECUTIVE under the Act.

16.2. Even though the contractors own workers agreed to random drug testing, the contractor was prohibited by the AIRC from performing random testing on the basis that the procedural requirements of section 42(7) had not been met.

16.3. In an obiter remark Commissioner Bacon indicated that a Site Safety and Health Management System would prevail, even in circumstances where the contractor's policy was safer.

16.4. Though Commissioner Bacon's decision was overturned by the Full Bench of the AIRC, for reasons discussed below, the uncertainty regarding the proper interpretation of section 42(7) remains.

17. Commissioner Bacon's decision has been overturned by the Full Bench of the AIRC in *MacMahon Contractors Pty Ltd and Construction, Forestry, Mining and Energy Union* PR965459. The decision on appeal does not, however, provide a solution to the short-comings of section 42(7) for the following reasons:

17.1. The decision on appeal was primarily based on jurisdictional grounds, and the Full Bench's remarks on the correct interpretation of section 42(7) were *obiter*.

17.2. The Full Bench's view on a contractor's ability to rely on its own policies does not provide relief from the onerous requirements of section 42(7) for Site Senior Executives and mine operators.

17.3. The Full Bench did not address the interaction of the Regulation and the Act, specifically section 37 of the Act that requires that risk management procedures prescribed by regulation is the only manner in which those specific risks can be addressed. This aspect of Commissioner Bacon's decision at first instance therefore still stands.

**Impact of Section 42(7) on Industry**

18. Where a contractor's own assessment criteria for issues such as fatigue and drugs differ from those established by the Site Senior Executive there is now uncertainty as to whether the contractor can rely on its own risk and safety management systems. A survey conducted by AMMA of its members in the coal sector revealed that *all* of the largest contract mining employers on coal

sites have their own drug and alcohol testing policies and procedures in place.

19. In the approach of the Full Bench of the AIRC is to be followed (ie. Contractors may establish their own criteria outside the requirements of section 42(7)), this will lead to circumstances where contractors and mine operators have different criteria for assessment. This undermines the legislative intent of coordinating and consolidating safety and health management systems in a site safety and health management system through the Site Senior Executive.

20. Contractors and service providers often operate in both metalliferous and coal mining and have difficulty in establishing uniform policies due to the different requirements contained in the coal mining safety legislation. In fact, the Regulation is the only legislative instrument in Australia that requires majority agreement of workers for the implementation of safety and risk management processes (see comparative table attached in Appendix B).

21. Anecdotal evidence suggests that the section 42(7) requirement to have a majority agreement has prevented the introduction of processes designed to make workplaces safer and thus the Regulation is in effect obstructing the Site Senior Executive at these sites to control the risks for the four critical health and safety issues mentioned in section 42. More than 70% of the 18 mine sites covered by the AMMA survey conducted random drug testing.

22. As the South Blackwater Coal experience illustrates, a mine operator's ability to manage risks and safety can become a casualty of industrial politics where the Regulation in effect provides workers with the power to "veto" risk management initiatives.

23. In a recent survey of AMMA members, 64% of members indicated that they viewed section 42(7) as a limiting factor in their ability to manage safety and health on site.

**AMMA's proposal to amend section 42(7)**

24. The assessment criteria for workers' fatigue, physical and psychological impairment and drugs should be established in consultation with the workforce.

25. The requirement that a majority of the workforce must be in agreement with the criteria as proposed by the Site Senior Executive, must however be removed.

26. It is recommended that section 42 should provide for a similar process as the management system provided for alcohol in section 41. Section 42 should be amended as follows:

***42 Safety and health management system for personal fatigue and other physical and psychological impairment, and drugs***

*(1) A coal mine's safety and health management system must provide for controlling risks at the mine associated with the following:*

*(a) personal fatigue;*

*(b) other physical or psychological impairment;*

*(c) the improper use of drugs.*

*(2) The system must provide for the following about personal fatigue for persons at the mine—*

*(a) an education program;*

*(b) an employee assistance program;*

*(c) the maximum number of hours for a working shift;*

*(d) the number and length of rest breaks in a shift;*

*(e) the maximum number of hours to be worked in a week or roster cycle.*

*(3) The system must provide for protocols for other physical and psychological impairment for persons at the mine.*

*(4) The system must provide for the following about drug use for persons at the mine—*

*(a) an education program;*

*(b) an employee assistance program;*

*(c) an obligations of a person to notify the Site Senior Executive for the mine of the person’s current use of medication that could impair the person’s ability to carry out the person’s duties at the mine;*

*(d) an obligation of the Site Senior Executive to keep a record of a notification given to the Site Senior Executive under paragraph (c);*

*(e) the following assessments to decide a person’s fitness for work—*

*(i) random testing before starting work;*

*(ii) testing the person if someone else reasonably suspects the person is under the influence of drugs.*

*(5) In developing the fitness provisions, the Site Senior Executive must comply with section 10 other than section 10(1)(a), as if a reference in the section to a standard operating procedure were a reference to the fitness provisions.*

*(6) In this section—*

***fitness provisions*** *means the part of the safety and health management system that provides for the things mentioned in subsections (2) to (4).*

***reasonably suspects*** *means suspects on grounds that are reasonable in the circumstances.*

**Current difficulties experienced with health assessments under the Regulation**

27. Part 6, Subdivision 3 of the Regulation deals with how health assessments and health monitoring in the industry is to occur.

    27.1. Section 46 of the regulation provides that an employer must ensure that a health assessment is carried out for each coal mine worker.

    27.2. Such assessment must be carried out in accordance with the instructions, and covering the matters, in the approved Form (section 46(2)).

    27.3. Assessments must be carried out before a person is employed, at least once every five years or when the nominated medical adviser is notified of an increased level of risk from hazards at the mine (section 46(4).

    27.4. Section 48 provides a worker with the right to request a review of his/her health assessment report where the original health assessment report showed the worker is unable to carry out the workers' tasks at the mine without creating an unacceptable level of risk.

28. The legislative scheme, and particularly section 46 of the Regulation, limits an employer's right to require a health assessment of an employee in

circumstances where the employer perceives there is a risk to health and safety. The Supreme Court of Queensland recently gave a very limited and strict interpretation as to the circumstances under which health assessments of employees may be carried out under the Regulation.

28.1. In *Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242 the Court declared that:

- a nominated medical adviser can only carry out a medical examination to ascertain an employee's fitness for work where such a medical examination is conducted as a health assessment for the purposes of Subdivision 3 of Part 6;
- a health assessment can only lawfully be carried out in accordance with the prescribed form without consideration to any other medical or related reports;
- specifically, an employer is not given the power under the Regulation to require any further tests not found in the health assessment form; and
- a nominated medical adviser may not require a test or a report by a third party (apart from further tests for colour vision and hearing).

29. Furthermore, recent decisions from the AIRC and the Supreme Court of Queensland have provided conflicting interpretations on who is responsible for making the ultimate decision if an employee is fit for work or not.

29.1. In *Hail Creek Coal Pty Ltd v CFMEU* (PR948938) the Full Bench of the AIRC had to consider the effect of a nominated medical adviser placing a restriction on a coal mine worker when completing the health assessment report. The Full Bench found that under the health assessment scheme the decision to declare an employee unfit for work is to be made by the employer or SITE SENIOR EXECUTIVE, and NOT the nominated medical adviser.

29.2. In *Johnson v Anglo Coal (Callie Management) Pty Ltd* [2005] QSC 255 the Court found that section 48(1) must be construed as providing that it is the health assessment report that must show that a coal mine worker is unable to carry out the worker's tasks at the mine without creating an unacceptable level of risk. The Court distanced itself from the approach of the Full Bench in the *Hail Creek* decision.

**Impact of section 46 on Industry**

30. Against the background of the employer's absolute liability for the safety and health of employees, the employers' ability to meet its obligations under the Act is severely curtailed by the Regulation because an employer is unable to:

    - Obtain relevant and critical medical information outside the limited categories provided for in the current health assessment form;

    - Request a health assessment for an employee where the employer has reasonable grounds to believe that there is an increased risk to the employee's safety and health due to factors other than those listed in section 49 of the regulation (which deals with increased hazards and risk *at the mine*).

31. The Supreme Court's interpretation of section 46 limits the type of information and assessments of an employee's health that a nominated medical adviser may consider, in effect precluding a thorough and objective assessment of an employee's health. As the current prescribed form is by no means exhaustive in its coverage of medical conditions, this approach puts employees' health and safety at risk.

32. The decision in *Anglo Coal* has created uncertainty as to who is to make the final decision on an employee's fitness for duty. A nominated medical adviser is not necessarily aware of the detail of the tasks required of an employee as this information is not disclosed in the approved form. An employer, properly informed by a nominated medical adviser of the fitness of an employee, is best placed to assess the employee's fitness for his/her particular tasks.

33. The legislative framework ought to place an employer in the position to make informed decisions on an employee's fitness for duty. Adequate protection against abuse of this obligation of the employer is already provided for through section 48 of the regulation. Further safeguards can be provided to employees by requiring employers to provide to the employee in writing the reasons why a medical assessment is requested.

**AMMA proposal to amend the Regulation**

34. An employer must be able to request a health assessment of a worker where there is a perceived need, based on hazard identification and risk assessment which includes the employee's own fitness for duty, for an additional medical assessment on a worker.

35. The employer is to advise the worker, in writing, of the reasons why the assessment is being sought.

36. A new Section 46A is to be inserted in the Regulation as follows:

*"Where the employer has reasonable grounds to doubt a worker's fitness for work, the employer may require a coal mine to have a health assessment prior to the five year period stated in 46(4)(c). When requiring an assessment, the employer must notify the coal mine worker in writing of:*

*(a) the requirement to undertake the health assessment; and*

*(b) the reasons why the health assessment is required.*

37. The Health Assessment Form for Coal Workers should provide for a more through assessment of individual’s health and should make it possible for a nominated medical adviser to access and consider all relevant information that may impact on his/her final assessment of the worker’s health.

38. The current Health Assessment Form for Coal Workers should be replaced with the form contained in Appendix A.

**Conclusion**

The proposed amendments to the Regulation and Health Assessment Form will significantly improve industry’s ability to meet its health and safety obligations and to act in the best interest of the safety of all workers on coal mine sites.

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**Appendix B**

Metalifferous, Coal and Hydrocarbon Mining - Legislative Provisions regarding DATP – Comparative Table.

| **Legislation and Sector** | **Specified Obligation to implement SHMS** | | **Specific obligation to implement Alcohol SHMS** | | **Specific obligation to implement Drug and other psycho-impairment SHMS** | | **Majority Vote rule** | |
|---|---|---|---|---|---|---|---|---|
| | **SSE/ Equivalent** | **Contractor** | **SSE/ Equivalen t** | **Contractor** | **SSE/ Equivalent** | **Contractor** | **SSE/ Equivalent** | **Contractor** |
| **Queensland Coal Sector** - CMSH Act 1999 and Regulations 2001 | **YES** Reg, Div 2 s10 | No | **YES** Reg, Part 6, s41 | No | **YES** Reg, Part 6, s42 | No | **YES**, SITE SENIOR EXECUTIVE must consult with majority w/force and achieve majority support | No |
| **Queensland Other Mining** Mining and Quarrying Safety and Health Act 1999 | **YES** Div 3 s39 | **YES** Div 3 s40 | No | No | No | No | No | No |
| **Queensland General** Workplace Health and Safety Act | No s21 General duty of care | No s21 General duty of care | No | No | No | No | No | No |
| **New South Wales** | **YES** Act, | No | No | No | No | No | | No |

| **Legislation and Sector** | **Specified Obligation to implement SHMS** | | **Specific obligation to implement Alcohol SHMS** | | **Specific obligation to implement Drug and other psycho-impairment SHMS** | | **Majority Vote rule** | |
|---|---|---|---|---|---|---|---|---|
| | **SSE/ Equivalent** | **Contractor** | **SSE/ Equivalen t** | **Contractor** | **SSE/ Equivalent** | **Contractor** | **SSE/ Equivalent** | **Contractor** |
| **Coal Sector**<br><br>Coal Mine Health and Safety Act NSW<br><br>Coal Mine General Regulation, 1999 | Subdiv 1, sec 22 | | | | | | **No**<br>Act s24 requires consultation with w/force<br><br>No majority rule required.<br><br>s27<br>SHMS be vetted by Industry Check Inspectors | |
| **New South Wales Mining generally**<br><br>Mine Health and Safety Act 2004<br><br>Mining Regulation 2003 | **YES,** Mine Safety M'ment Plan Subdiv 2, | **YES**, Contractor M'ment Plan Subdiv 4 s37 Obligation to comply with | No | No | No | No | No | No |

| Legislation and Sector | Specified Obligation to implement SHMS | | Specific obligation to implement Alcohol SHMS | | Specific obligation to implement Drug and other psycho-impairment SHMS | | Majority Vote rule | |
|---|---|---|---|---|---|---|---|---|
| | **SSE/ Equivalent** | **Contractor** | **SSE/ Equivalen t** | **Contractor** | **SSE/ Equivalent** | **Contractor** | **SSE/ Equivalent** | **Contractor** |
| **New South Wales General**<br><br>Occupational Health and Safety Act 2000 | No<br>s8<br>Employer General duty of care | No<br>s8<br>Employer General duty of care | No | No | No | No | No<br>s13<br>General duty to consult employees | No<br>s13<br>General duty to consult employees |
| **South Australia**<br><br>OHS and Welfare Act 1986<br><br>No mining acts specifically dealing with DATP as identified risk/hazard | s19<br>General duty of care | s19 General duty of care | No | No | No | No | s20 General duty for consultation and s1.3.1 of Regs | s20 General duty for consultation and s1.3.1 of Regs |
| **Western Australia Mining**<br><br>Mines Safety and Inspection Act 1994 | S9 (3) Principal deemed ER - General duty of care | s9 General Duty of Care | No | No | No | No | No<br>s70 General duty to consult with employees | No<br>s70 general duty to consult with employees |

| Legislation and Sector | Specified Obligation to implement SHMS | | Specific obligation to implement Alcohol SHMS | | Specific obligation to implement Drug and other psycho-impairment SHMS | | Majority Vote rule | |
|---|---|---|---|---|---|---|---|---|
| | SSE/ Equivalent | Contractor | SSE/ Equivalent | Contractor | SSE/ Equivalent | Contractor | SSE/ Equivalent | Contractor |
| | | | | | | | | |
| OHS Act and Guidance Notes | s19 General duty of care | s19 General duty of care | No | No | No | No | Guidance notes express obligation for consultation with employees/reps | Guidance notes express obligation for consultation with employees / reps |
| **Victoria**<br><br>Occupational Health and Safety Act 2004 | s21 General duty of care | s21 General duty of care | No | No | No | No | Guide: Consultation with employees Expected from 01.01.06 | Guide: Consultation with employees Expected from 01.01.06 |