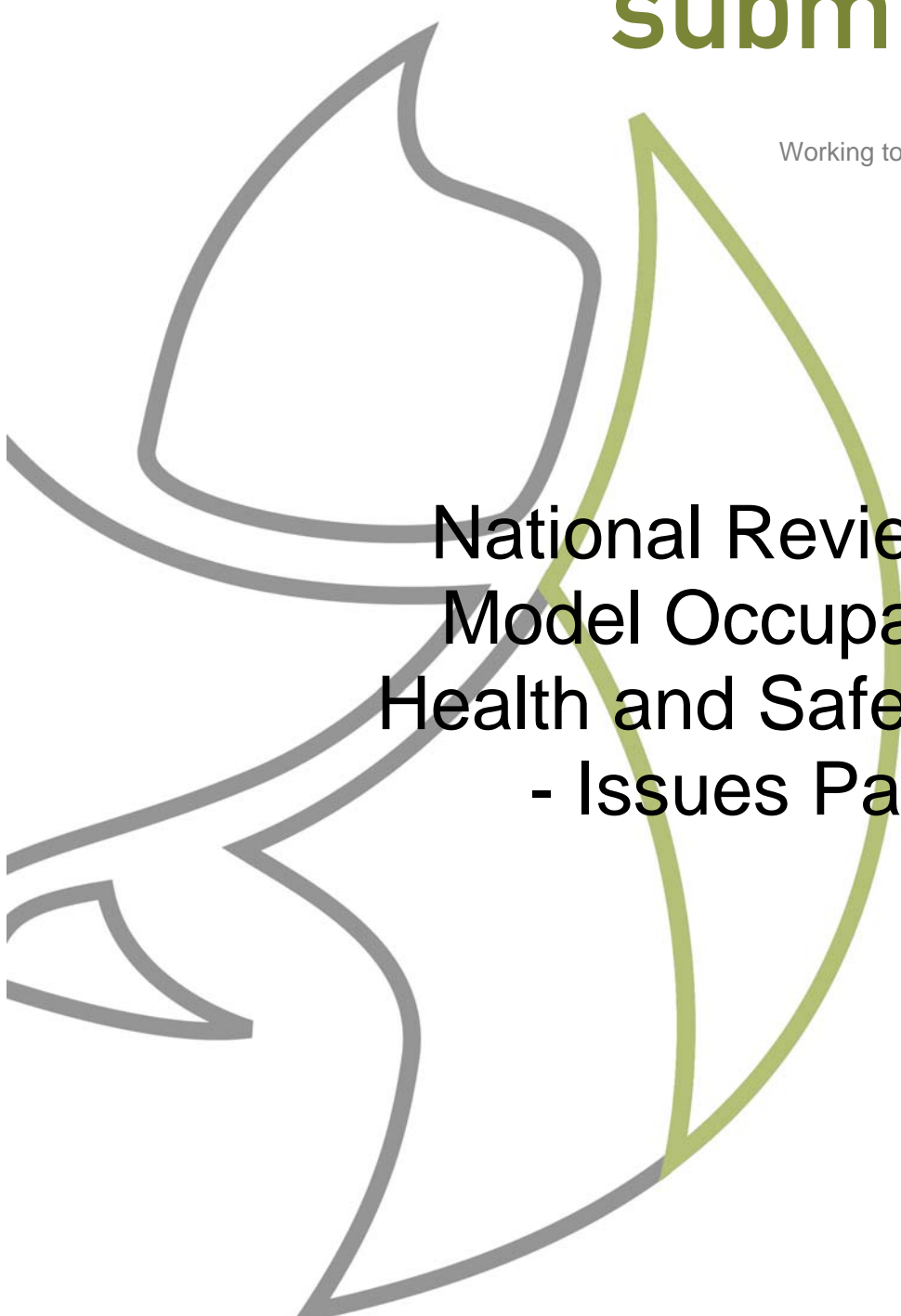


QRC

submission

Working together for a shared future

A large, stylized graphic of a leaf or branch, composed of several overlapping, curved lines. The lines are in shades of grey and green, creating a sense of movement and growth. The graphic is positioned on the left side of the page, partially overlapping the central text.

National Review into Model Occupational Health and Safety Laws - Issues Paper

To
National OHS Review Secretariat
Department of Education, Employment and Workplace
Relations
10 July 2008

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Executive summary

The Queensland Resources Council (QRC) is pleased to provide this submission to the review panel on the issues paper.

The QRC is the peak industry body representing the minerals and energy sector in Queensland.

This submission builds on the oral presentation by a QRC delegation to the review panel at our meeting in Brisbane on 13 May 2008. The QRC has worked with other peak minerals industry bodies such as the Minerals Council of Australia (MCA) and the Chamber of Mines and Energy (WA) in the preparation of our respective submissions. Rather than duplicate responses contained in the MCA submission, this submission focuses on areas where we have a separate Queensland position or where we wished amplify support for the MCA position.

The QRC is committed to the National Mine Safety Framework (NMSF) as the instrument for achieving national consistency or harmonisation of mining legislation. This is in preference to single uniform national OHS model laws with mining-specific content relegated to regulations and codes of practice.

In support of this position, the QRC contends that the following:

- 1 The specialist nature of mining requires regulatory specialists and integration with more generic OHS regulators will potentially dilute the role of mining regulators. Safety legislation outcomes must improve the competency not only of industry *but also of safety regulators*.
- 2 There is no convincing case that harmonisation through nationally consistent model OHS laws will improve safety. There should be no change just to increase efficiency and cost of administration. Changes must improve safety at its heart.
- 3 The QRC supports 'reasonably practicable' as the standard for duty of care, not 'strict liability'. Risk-based management of safety represents a real future for enhanced safety, not the strict liability and reverse onus of proof of New South Wales legislation. Consistent with the position of the Minerals Council of Australia, the QRC does not support third-party prosecutions, noting there is no evidence that third-party prosecutions improve safety.
- 4 The NMSF has made significant progress, and appears to be on track to deliver a model that represents leading practice OHS model legislation for mining well before the National Review's forthcoming recommendations are likely be worked through state and federal governments with industry and employee stakeholders. The QRC remains to be convinced that the National Review process will be able to deliver agreement around leading practice OHS model legislation.

The QRC recommends the Review Panel examine body of the QRC submission for further information, and then appraise the Minerals Council of Australia submission, in which responses to remaining matters within the issues paper are addressed, with QRC's endorsement.



The QRC would welcome the opportunity to participate in the proposed further round of targeted consultations by the review panel.

General comments

This submission outlines the specific QRC position on mining safety legislation and its harmonisation, and provides Queensland commentary on duties and enforcement, which are the initial priority focus for the National Review into Model OHS Laws (NRMOHSL).

This QRC submission therefore focuses on matters of QRC emphasis, as distinct from those of the MCA. This is a reflection of the specific safety experience in Queensland, under the acknowledged leading-practice mining legislation in this state, as distinct from the national perspective of the MCA and its members.

The QRC submission in total may be taken to address elements of the issues paper as follows:

Chapter 1 : Legislative Approach

Chapter 2 : Scope....Questions 7, 8 and 9

Chapter 3 : Duties of Care – additional comments in relation to Question 23

Chapter 4 : 'Reasonably Practicable' & Risk Management – additional comments on Questions 37 and 43

Chapter 6 : Regulator Functions....- additional comments

Chapter 7 : Compliance & Enforcement - additional comments and Question 98

Chapter 8 : Prosecutions – additional comments on Questions 110, 111, 117-127 Burden of Proof and Defences, and 139-141 Enforcement of Penalties.

QRC further advises the review panel that its position on the issues and principles in the remaining (majority) of questions in the issues paper is aligned with the position of the MCA, and the QRC therefore refers the panel to the MCA's submission responses to all of those remaining questions.

The QRC acknowledges the MCA for its close consultation and leading position on many of the responses to the Review questions in this submission. This highlights the strong degree of alignment between the two organisations built around the foundation of the National Mine Safety Framework (NMSF), and the absolute commitment of both the MCA and the QRC to improved safety outcomes for the mining workforce.



Introduction

The Queensland Resources Council (QRC) is a not-for-profit peak industry association representing Queensland's minerals and energy sector. QRC works to secure an environment conducive to the long term sustainability of the minerals and energy sector in Queensland.

While it is important to recognise the many health and safety achievements of the past decade, including significant reduction in injuries to the industry's workforce, QRC believes that even more can be achieved.

The QRC emphasises that it has always worked closely with all stakeholders to ensure continuous improvement of health and safety in the mining industry. The resources sector presents occupational hazards that are more diverse and more extreme than most other industries. The overall health and safety performance has improved over the past decade because all stakeholders have worked together to achieve this outcome.

Mining safety legislation in Queensland

It needs to be remembered that Queensland's mine safety legislative and administrative framework was developed out of the harsh experience of a disastrous mining accident. In 1994, when 11 men were fatally injured at the Moura No 2 Underground Coal Mine. The underground mine explosion was explosion attributed to spontaneous combustion behind a recently sealed section of the mine.

The disaster resulted in a review of the Queensland Mines Inspectorate (QMI); the requirement for mine safety management plans using risk/hazard analysis; periodic assessment of statutory certificates; changes to emergency facilities; and changes to gas monitoring protocols.

In addition, the disaster lead to the introduction of a new statutory framework governing mining in Queensland--the *Coal Mining Safety and Health Act 1999 (CMSHA)* and *Mining and Quarries Safety and Health Act 1999 (MQSHA)* together with accompanying regulations. The mining legislation is administered by the QMI, which is part of the Department of Mines and Energy (DME).

The *CMSHA* and *MQSHA* were drafted with the aim of establishing common objectives and elements, avoiding overlaps or gaps in coverage, and ensuring consistency in wording and intent between the mining acts.

The differing approaches taken by the *CMSHA*, the *MQSHA* and the *Workplace Health and Safety Act (WHS Act) 1995* to achieving health and safety outcomes is the driver behind different administrative arrangements for mines.

Because the nature of the risks faced at mines are fundamentally different to those faced in a non-mining workplace, separate legislation was developed to deal with the mining-related risks. Consequently, the mining acts comprise risk-based legislation, which imposes liability based on whether the risk to workers has been maintained at 'an acceptable level'. This approach is consistent with the approach being taken on a national level by the National Mines Safety Framework (NMSF- addressed on p.7).



By contrast, the WHSA takes a different approach to liability, requiring employers to 'ensure workplace health and safety'. These two approaches incorporated in the two statutes results in significant practical differences to the manner in which the legislation is administered and enforced.

For example, the approach taken by the WHSA reverses the onus of proof, while the mining acts do not. This distinction requires greater investigative skills and specialised industry knowledge on the part of the DME's inspectorate.

Chapter 6: Regulator functions--QRC response and position

The QMI is currently redeveloping its extensive expertise and experience in administering and enforcing the requirements of the mining OH&S legislation. The loss of key staff and the inability to replace them would place this capability at risk.

While in recent years the inspectorate has enlarged its staff with generalist workplace health and safety skills; mining, and particularly underground mining, require specialist skills to identify risks.

Individuals in the mining industry see the role of the QMI as a significant part of the sector. There is a long history of people moving between the regulator and industry to improve safety. Any move of QMI into WHS, even as a separate entity reporting to the minister, is likely to see this movement of people and skills diminish.

With the current skills shortage experienced by industry, this would have an adverse impact on health and safety.

The CMSHA is administered by the DME and the WHSA is administered by the Queensland Department of Employment and Industrial Relations (DEIR). It may be assumed that if all industries were covered by a single health and safety law, then there would be efficiency gains to have one government agency regulating that generic law. In this environment, investigative staff are likely to be generalists rather than specialists.

QRC is concerned that the perceived efficiencies and improvements that might arise from an amalgamated regulatory structure in Queensland are at risk of being illusory. One generalised regulatory structure might in fact have negative implications for health and safety in the mining industry.

The specialised nature of open-cut and underground mining work means that the mining inspectorate needs to have specialised experience and training in the mining industry. The *Coal Mining Safety and Health Regulation 2001 (Qld)* (CMSHR) currently details the prescriptive health and safety requirements that must be observed by coal mines. These requirements are extremely detailed and contain provisions such as the technical requirements for longwall shearers and mobile bolting machines. This level of detail requires inspectors who are specialists in mining operations. The level of prescription in the current WHSA and associated regulations is not as great as the CMSHR and is generally limited to a few key areas.



An amalgamation of the OHS regulator is likely to reduce the effectiveness of the inspectorate, (as inspectors may become generalists and inspect matters for which they may not have appropriate training or expertise) or reduce the efficiency of the inspectorate (as inspectors may require cross-industry training).

The QRC holds this position due to:

- a very strong practical state mining legislative model, with proven health and safety outcomes for Queenslanders
- mining, petroleum and gas, and explosives inspectorates have risks that can be best identified by specialist staff in an independent regulator
- the risk-management based approach embodied in Queensland mining legislation and a regulator within the DME structure more attuned to the benefits to enhanced safety of this approach
- previous government reviews of the QMI highlighting significant advantages to maintaining an independent regulator for mines, petroleum and gas, and explosives
- QMI requiring staff with specialist skills to identify risk in both open-cut and underground mining operations with this best obtained in a regulator that has a history of qualified and experienced people moving between industry and the QMI
- future COAG recognition of the national mine safety framework benefits to its work program.

The QRC contends that intended safety legislation outcomes must improve the competency not only of industry *but also of safety regulators*. A focus on 'black-letter' law by regulators is a minimalist approach. The role of regulators ultimately is to ensure compliance with legislation and regulation, not to 'punish' or enforce penalties. This is the domain of the courts. The workplace challenges of the mining industry require not only the industry workforce and management, *but also the regulator* to be competent, if any nationally consistent mining safety legislation is to be truly effective.

Industry's challenge and focus is to drive down these injury frequency rates, and particularly fatalities, even further. The responsibility of governments cannot be any less. There is no convincing case available to QRC that national model OHS laws will contribute to this goal.

While the QRC can understand the theoretical benefits for arguing for change to a national OHS legislative framework, in relation to mine safety (including, petroleum and gas, and explosives), QRC cannot see any practical safety advantages in this approach.

Should the review be contemplating a recommendation for change to current legislative arrangements for mine safety, the QRC would urge the review to demonstrate in its report how such change would improve health and safety outcomes for workers. This must be the touchstone for any change, not some theoretical focus on 'administrative tidiness'.

Fundamentally, any steps to improve the efficiency and administration of health and safety laws cannot come at the expense of health and safety, and in particular, the expense of health and safety in the mining industry.



QRC notes that the Inter-Governmental Agreement for Regulatory & Operational Reform in Occupational Health & Safety signed on 3 July 2008 at a meeting of COAG set that a fundamental objective of national OHS reform should be to '*achieve significant and continual reductions in the incidence of death, injury and disease in the workplace.*' The separate COAG Communique '*reaffirmed its commitment that there be no reduction or compromise in workplace safety.*'

The mining industry however is not sitting still on safety, and is well advanced in a national initiative, which includes progressing consistency in mining safety legislation. QRC is an advocate of this initiative, the National Mine Safety Framework (NMSF).

National Mine Safety Framework

Since 2002 the MCA, its member companies and state and territory industry bodies including QRC have participated in a review of minerals safety regulation through the NMSF, managed by the Council of Australian Governments through the Ministerial Council for Mineral Resources and Petroleum (MCMRP). This tripartite review across all Australia jurisdictions has made significant progress towards a nationally consistent legislative environment for all mineral operations across Australia.

The framework consists of seven key strategies, focussed on areas where consistency across jurisdictions would be most beneficial:

- nationally consistent legislation
- competency support
- compliance support
- a consistently applied enforcement protocol
- effective data collection, management and analysis
- consistent approaches to consultation
- a strategic approach to mine safety and health research and development.

The legislative principles of the NMSF are detailed at www.ret.gov.au/General/Resources-MS/Pages/NationalMineSafetyFramework.aspx

Chapter 1: Legislative approach--QRC response and position

The QRC is committed to the NMSF as the instrument for achieving national consistency or harmonisation of mining legislation, rather than single uniform national OHS model law, which has any mining specific content relegated to regulations and codes of practice.

The NMSF scope incorporates and surpasses the objectives of the NRMOSHSL. As indicated in the NRMOSHSL issues paper, the review panel will '*examine the extent to which such laws could be accommodated under a model OHS Act*'. The QRC respectfully contends that further enhanced mining safety cannot be demonstrated by absorption into model uniform legislation for all industries.



The NMSF timelines for deliverables presently target final recommendations to the MCMPR in October 2008. QRC notes that the COAG Business Regulation and Working Group outcomes of 3 July 2008 identify Occupational Health and Safety (OH&S) as a 'hot spot', while on the NMSF '*COAG has asked the Ministerial Council on Minerals and Petroleum Resources to report on options for reforms to national mine safety regulation to the COAG meeting in October 2008*'.

The NMSF is on track, is progressing outcomes, and it is therefore difficult to perceive why this work could be justifiably sidelined in favour of single uniform model OHS legislation for which no completion timeline can yet be foreseen.

Despite the seductive attraction of uniform OHS legislation across all industries nationally, administrative efficiency and accommodation are not guarantors of improved safety. For this reason alone, the QRC cannot lend its support to single uniform OHS legislation. To do so would be to gamble on the future safety of the state's mining workforce. The industry takes its responsibilities too seriously and values its people too highly to gamble on ill-defined expectation of enhanced or 'no reduction or compromise' mine safety under single uniform OHS legislation.

The arguments against the QRC stance may be pressed by many, however it would be simplistic to dismiss the Queensland industry as 'parochial'. Force of proposed policy objectives and weight of numbers do not necessarily constitute what is right for the safety of the people in our workforce. The QRC will adhere to this position, remaining open to further persuasive evidence, until the case for enhanced safety arising from single uniform model OHS legislation can be unequivocally demonstrated, or any other material impacts emerge to give grounds for review of this position.

Chapter 2: Scope...Question 7 Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific legislation?--QRC response and position

QRC strongly endorses the principles and strategies of the NMSF and urges the continuation of the NMSF work in order to achieve a nationally consistent framework for mining safety laws.

QRC considers that there is a need to keep mining safety laws and non-mining safety laws separate. QRC advocates that the model OHS law which is to be produced by the national OHS harmonisation review should exclude mining from its scope and application.

The assumptions underpinning this QRC position include:

- that the Australian Government recognises and values the NMSF independent of the NRMOSHSL and its recommendations
- that NMSF strategies will receive both MCMPR approval and subsequent consistent legislative implementation by each and every state and territory
- that no overriding policy or industrial imperative exists for the Australian Government to incorporate all extant safety legislation in Australia within a single national OHS model law.

The leading work on the NMSF, particularly the NMSF Legislation Framework and its overarching principles, provides a rigorously developed model for any recommended nationally harmonised OHS legislation.



Despite this, should a totally new model be developed, the inclusion of unique elements of mining-specific legislation consistent with the NMSF and its principles within overarching national OHS legislation, could be further considered. QRC notes in particular the views of the Chamber of Minerals & Energy Western Australia who support a national OHS framework that does not preclude state-specific mining safety legislation, based on the NMSF Legislation Framework.

Chapter 3: Duties of Care and Chapter 4 : Reasonably practicable & risk management--QRC response and position

The QRC rejects the New South Wales legislative approach to duty of care ie strict liability and reverse onus of proof as the standard for any nationally harmonised mining legislation. The Queensland WHSA and NSW equivalent workplace provisions impose a series of duties on an employer that do not contain any qualification. Under the WHSA an employer has an obligation to 'ensure health and safety'. WHSA and the NSW equivalent therefore impose strict or absolute liability, with a reverse onus of proof in any breaches.

Where there is a reverse onus of proof the defendant has the onus of proving that an obligation wasn't breached. Effectively, a defendant has the burden of proving it is innocent. A reverse onus of proof deviates from the general criminal law principle that the prosecution should bear the onus of proving every element of an offence. It is also inconsistent with general human rights principles that a person who has been charged with a crime has the right to be presumed innocent until proven guilty. OHS offences are generally objective, rather than subjective, so it is both legally and morally appropriate that the prosecution should bear the onus of proving every element of the offence.

By comparison, the CMSHA is risk-based legislation which imposes liability based on whether the risk to workers has been maintained at 'an acceptable level'. This approach is consistent with the approach being taken at a national level by the National Mines Safety Framework and from a practical mining perspective, is far more achievable. The onus is on the prosecution to determine that the risk wasn't at an acceptable level.

The standard of liability under a single national OHS model is likely to be one or the other, not both. The QRC supports 'reasonably practicable' as the standard for duty of care, not 'strict liability'.

Most legislation has a large amount of duplication. There is no better example than legislation setting up enforcement procedures that are considered elsewhere through criminal and civil offences legislation. There is no foundation for offences that are criminal or civil in nature to be regulated by an industry or issue-specific Act such as the proposed model OHS legislation, where there is existing legislation available.

Given that regulatory reform is aimed at removing inconsistencies and unnecessary duplication, it would be counter productive if a piece of national OHS model legislation developed its own civil or criminal roles.



Chapter 8 : Prosecutions--QRC response and position

The QRC is again completely aligned with the MCA on this area. The MCA position **does not** support:

- prosecutions that are pursued as part of an industrial agenda or could be construed as politically motivated
- specific industrial manslaughter laws that seek to identify industrial manslaughter as a separate crime or, the more politically palatable, extension of existing sentencing penalties to gaol terms for directors;
 - they are unnecessary and will not assist in reducing workplace fatalities
 - they focus on after the fact retribution and will encourage prosecutions
 - they will have a negative effect on investments
 - they will not encourage OH&S improvements, detracting from current programs and activities aimed at improving safety and health performance
 - they will act as a deterrent for sharing lessons learned within and between industries and will detract from the cooperative approach between employers and employees.
- specific industrial manslaughter laws forming part of occupational health and safety legislation separate and discrete from consideration of negligent, wilful or reckless behaviour causing fatalities or other serious injuries under the Crimes Act.
 - the MCA recognises the essentiality and adequacy of existing criminal law provisions for gross negligence or reckless indifference
 - offences under the OH&S Act are absolute liability offences where those charged concerned in the management of a corporation can be found proven by virtue of the deeming provisions of the OH&S Act-- this is a serious diminution of an individual's rights as defined in natural justice.
- the current system in New South Wales where alleged breaches of criminal law in respect of occupational safety and health are heard in the arbitration courts, rather than the criminal courts:
 - is at odds with differentiating safety and health and industrial relations legislation
 - tends to emphasise the industrial relations aspects of prosecution rather than any allegations of negligence in safety and health
 - gives rise to perceptions of a conflict of interest--when the prosecutor, whether regulator or union, ie. can institute prosecution and can receive a moiety (50 percent share) of any penalty imposed--this could be perceived as encouraging a prosecution rather than a preventive focus
 - is a denial of natural justice in that (restricts right of appeal to the Supreme Criminal Appeal Court in NSW or the High Court)
- the transfer of regulatory frameworks governing the safety and health of operations to agencies with responsibility for workers' compensation. This simply confuses 'before the fact' preventive systems with 'after the fact' compensation.
 - the skills and expertise needed to understand the specific safety and health risks associated with the minerals industry are currently located within the minerals departments and should be enhanced and retained
 - a transfer of responsibility for safety and health in the minerals sector from the minerals departments to Workcover would diminish the focus on prevention and drive down the prosecution route.



Third-party prosecutions

The *CMSHA* and *MQSHA* do not currently permit third parties (such as industrial organisations) to institute prosecutions for breaches. By comparison the NSW OHS Act 2000 contains provisions that allow proceedings to be instituted 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.' QRC is not aware of any evidence that would indicate that third-party prosecutions improve safety.

Third-party prosecution increases the perception of the industrialisation of safety matters and it offends an historical legal principle that the enforcement of laws should lie in the hands of the state. The QRC considers that this legal principle must be adhered to, through investigation and reporting by the regulator, and prosecution determined by the Director of Public Prosecutions. Until the form and content of a model OHS Act is known, amalgamation into one single national OHS law gives rise to the potential risk of extended third-party initiated prosecutions being imposed in all jurisdictions.

Conclusion

The Queensland mining industry is committed to zero harm in its workplaces. While it is important to recognise the many health and safety achievements of the past decade, including significant reduction in injuries to the industry's workforce, QRC believes that even more can be achieved, if efforts of all stakeholders are focused in the correct areas.

The QRC's position with regard to the National Review into Model OHS Laws is that the National Mine Safety Framework provides the looming high-water mark for national consistency of mining legislation in Australia. This is not to preclude possible further improvements to Queensland mine-safety legislation, which may further reduce prescription, advance risk-management based safety systems, and maintain accepted legal principles including presumption of innocence for all duty holders, proportionality of enforcement and the burden of proof on the prosecution for breaches brought before civil or criminal courts.

Industrial ideologies typical of the mid-late 20th century have no place in safety management. Zero harm and safety of the mining workforce individually and collectively transcends industrial ideology.

The QRC directs the review panel to the MCA submission, in which responses to remaining matters within the issues paper are addressed, with QRC's endorsement.