

**To: NSW DEPARTMENT OF COMMUNITIES AND JUSTICE**

**Re: WHS REGULATION REFORM**

**17 February 2023**

## **Introduction**

The Association of Mining and Exploration Companies (AMEC) welcomes the opportunity to provide stakeholder feedback for the consultation by NSW Department of Communities and Justice, in conjunction with the NSW Departments of Customer Service and Regional NSW, on the proposal in relation to appeals arising in the context of work, health and safety prosecutions. We note that we have received only the limited information in the Consultation Pack (15 slide PowerPoint) and as this consultation was marked 'confidential', we were unable to distribute it widely for member comment.

## **About AMEC**

AMEC is a leading national minerals industry association representing over 500 member companies across Australia. Our members are explorers, emerging miners, producers, and a wide range of businesses and services working in and for the minerals industry. AMEC has a growing number of companies working and investing in NSW.

## **Work, health and safety reform is important to the minerals industry**

Work, health and safety (WHS) is, and should always be, a top priority for the minerals industry.

NSW has a wide scope of minerals operations from a one-person exploration site to the complex deep underground coal and metalliferous mines that are all covered by the current WHS Act and Regulation. AMEC continues to support review of the current regulatory framework and consultation with industry to improve outcomes and processes that support work, health and safety.

AMEC supports the objective of Government to secure and promote improved safety outcomes for workers in mines and petroleum sites in NSW while establishing a safer and more modern work health and safety system, improving clarity and transparency.

## Comments on key issues for the minerals industry

AMEC provides the following answers to the stakeholder questions related to impact of the proposed change for the minerals industry:

### 1. Do you support the reform proposal?

The proposed legislative reform would allow SafeWork NSW and the NSW Resources Regulator (together, the WHS Regulators) to bring their own appeals against sentence under the *Criminal Appeals Act 1912* (CA Act). Currently, s 5D of the CA Act requires the WHS Regulators to ask the Attorney-General or Director of Public Prosecutions (DPP) to bring an appeal against sentence, as they are not empowered to bring these appeals directly.

The Consultation Pack notes that the “*proposed reform would be to the same effect as the power granted to the Environment Protection Agency (EPA) under s 5D(1A) of the CA Act*” and that the amended provision would be “*modelled on s 5D(1A)*” but does not provide clarity on the wording of the amendment. The Consultation Pack also notes that this change would provide the WHS Regulators as the same powers as the EPA and that the “*Attorney-General or DPP would no longer have oversight and serve a gatekeeper function in relation to sentence appeals*”.

With the limited information provided, AMEC is not able to support the removal of an important stage that provides independent oversight before an appeal is sought. Appeals require significant time and resources for both regulators and industry. Oversight of this stage provides some assurance that the appeal has merit before public, and then private, funds and resources are committed and invested.

### 2. Is the proposal appropriate and well-tailored to achieve its aim?

As above, AMEC is not able to support the removal of an important stage that provides independent oversight before an appeal is sought. Further, there is insufficient information in the Consultation Pack to provide comment on whether the proposal is appropriate and well-tailored to achieve the aim.

A full review of WHS costs and enforcement mechanisms is needed to ensure that NSW has a system that firstly encourages compliance that is then supported with fair, reasonable and timely compliance measures that minimise legal costs and promote education following incidents. The proposal is a minor change to a system that deserves holistic review.

### 3. Is there a risk of unintended consequences flowing from the proposal?

The consequence from this proposal is that the Government could launch appeals that require significant public money and resources that do not have merit nor benefit to the public.

NSW is already out of step with other jurisdictions. In WA on 28 January 2021, Alcoa of Australia Ltd was fined \$210,000 in the Perth Magistrates Court and ordered to pay \$75,000 in costs after a contractor fell to his death

at the company's Kwinana Alumina Refinery in 2015<sup>1</sup>. This is in comparison to a 2021 appeal where AMEC understands that there was the award of \$3.3million<sup>2</sup> in costs to the Resources Regulator following the resolution of an unsuccessful case linked to a 2014 death. Effectively these significant costs are industry funded though fees, levies and charges paid by industry to Government by the broader industry.

The very significant costs in NSW could act as a deterrent to investment in the minerals industry in NSW.

#### **4. Are there further benefits or risks associated with the proposal not identified in this presentation?**

See above for further comment.

#### **5. If the proposal is implemented, what steps should be taken to manage the associated risks?**

If the proposal is implemented, a stage of independent review of the proposed appeal should be build into the process to provide some certainty that public funds and Government resources are invested wisely. This independent review should be made public or at least provided to the party as part of the appeal process.

The minerals industry looks forward to the outcome of this confidential consultation and AMEC would welcome further consultation on this important matter. If you have any queries regarding this submission, please do not hesitate to contact:

Lucy McClean  
Director – New South Wales, Victoria & Tasmania  
AMEC

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<sup>1</sup> Media Statement from WA Department of Mines, Industry Regulation and Safety, Thurs 28 Jan 2021

<sup>2</sup> Personal communication from Resources Regulator in meeting, Tues 22 Dec 2020