CD267 – Consultation on the Proposal for New Regulations on Health and Safety in Mines

Q1. Do you agree or disagree with the proposed scope of the new regulations ie that they apply to all mines? (paras 19-20)

Regulations as they currently exist apply to all areas of mining activity and therefore take into account the fact that mine workers operate in difference types of mine and experience a range of hazards. This fact is dealt with more effectively by the existing regulations.

There is therefore no benefit in the intention to apply the new regulations to all mines and this should not be seen as an argument in favour of change.

At para 20, HSE indicates that they "do not intend to extend the scope of the current requirements" and that the effect will be to "*ensure that no mine is required to do more than at present* [emphasis added]".

We cannot agree to changes which are not intended to enhance health and safety and Thompsons therefore disagrees with the proposed scope of the new legislation.

Q2. Do you agree or disagree with the proposal to make the mine operator, ie the person or corporate body in control of the operation of the mine, the principal dutyholder under the new regulations? [para 21]

Para 21 states that current legislation places most duties on the individual mine manager rather than the business that operates the mine. This statement is not wholly accurate because MASHM 1993 Regulation 6 places duties on the owner of a mine to finance and make such other provision to ensure that the mine is managed and worked in accordance with statutory requirements. The owner's duty also extends to those statutory provisions whether or not they impose duties on him or some other person.

"The owner is also required to appoint suitably qualified and competent personnel, who are identified in legislation, to assist the owner in the discharge of his duties. The effect of the proposed changes is to allow for additional tiers in the ownership and operation of mines; whereas the existing structure is owner and owner-employed staff (manager, engineers, supervisors and so on) the proposal recognises an owner, operator and then either directly employed staff or sub-contractors."

The new regulations will therefore provide for several combinations of owner, operators and sub-contractors, a structure which would run contrary to the aim to improve managerial control. A primary function in the drafting of MASHM 1993 was to enhance supervision and to highlight an identifiable line of command from the owner via qualified, nominated individuals, to the workforce. This principle is lost in the proposed regulations.

Q3. Do you agree or disagree with our mines rescue proposals as set out in paras 22-26?
HSE, Para. 24, identifies that the Mines Rescue Scheme (MRS) was designed to be funded by fees from mines.

This scheme was established having a recognition that the coal mining industry would contract out and it was considered that the most appropriate manner of providing rescue provision was to require mine owners to share the burdens of cost.

The proposals do not appear to require owners and operators to share resources, although that could be an option, with each operator instead having the freedom to establish whatever system they consider appropriate.

HSE state, para 22, that specialist assistance needs to be available to rescue personnel from underground but proposed regulation 58 only requires that the operator has suitable arrangements. There is no legal requirement to have specialist assistance - it is instead left to the discretion of the operator.

Existing regulatory provision establishes the important details of how rescue operations should be facilitated with accommodation, organisation, staffing, training and so on, but these requirements are removed by the proposed new regulations.

Perhaps the HSE envisages that the fire brigade will play a role in underground firefighting and rescue?

Consider the role of self-rescuers in the proposed changes. The proposed regulation requires "the mine operator must ensure that, so far as is reasonably practicable, every person who has been issued with a self-rescuer keeps it within the person's reach at all times when below ground". Currently there would be an expectation that a person provided with a self-rescuer would carry it on his person. It would seem inappropriate to allow for self-rescuers to be placed off the person. People move in the course of working and it would be folly to expect someone to travel upwind towards the site of a fire to recover their self-rescuer. Filter self-rescuers are designed to be carried without much difficulty and only when additional oxygen escape sets are required do they become a little unwieldy.

Does HSE recognise the role that Mines Rescue personnel play in administering emergency first aid?

Mines Rescue personnel always play a vital role in administering emergency first aid and then transporting the injured person to the surface. Those in need of rescue without skilled Mines Rescue personnel available stand a worse chance of survival.

Q4. Do you agree or disagree that the provisions in MQA section 123 are unnecessary given the provisions in the 1977 Regulations and the proposed regulation 18? [para 27-29]

The HSE identifies that the changes will alter the inspection periods for areas of the mines extending these from one month intervals to three monthly intervals. How it can be argued at para 28 that the extension of the inspection interval can be *"….relevant to the dynamic and challenging environment in parts of extracting mines… ",* is unclear.

123 inspection reports currently have to be sent to HSE and it is proposed that this requirement should be replaced with an option that they can be sent to HSE by the safety inspector if:

1. Two safety inspectors agree there is imminent risk of serious injury
2. They have made representation to the operator

This process relies on safety inspectors recognising imminent risk; being prepared to approach the operator but does not require the operator to make similar notification if they recognise imminent risk.

HSE, para 29, indicates "Such matters may be picked up as part of a periodic inspection or at any other time" and believe this to be commensurate with the potential for disaster and is similar to a provision in offshore legislation. 123 inspection reports provide fundamental information to HSE who are then in a position to determine the broader significance and any proposals which reduce the requirement to use 123 inspection reports is at odds with HSWA 1974 s 1(2).

There is much public debate on whistle blowing and the effect of the existing 123 requirements is not to place employees in the position of taking on this responsibility and potentially facing the consequences experienced by whistle blowers. Currently there is simply a health and safety inspection at a mine with the operator able to participate and then required to send a report to HSE.

Q5. Given the proposed duty on the mine operator to ensure all people are competent for their work, and the existing structure that is in place for gaining appropriate qualifications, do you agree or disagree with the proposal to remove the existing requirements on HSE approval etc of qualifications? [para 30-31]

In the proposed replacement regulations there is no reference to qualification in the definition of 'competent' (Reg. 2(1)). Previous explanations of competence (MASHM 1993) include consideration of education, knowledge and experience – is the HSE suggesting that qualification is no longer appropriate?

There is no reference in the proposed regulations regarding the Minerals Products Qualification Council as appropriate qualifications. Operators can also apply their own discretion when deciding whether a person is competent.

HSE approvals of qualifications are not unusual and apply in other sectors of work.

However, HSE are distancing themselves from any involvement in establishing fundamental criteria such as qualifications for mining activities which only the most reckless would consider to have no effect on health and safety.

We believe that the HSE should be actively involved in approval of qualifications and that recognised qualifications for key roles should be maintained in the mining industry.

The HSE identifies unique mining hazards (para 18) as fire, flammable gases and dust, ground movement, inrushes, transport through shafts, mass transport below ground, and explosives. Required notifications to HSE largely relate to the identification and control of these hazards.

Notifications to the HSE form two main categories which can be characterised as proactive and reactive and these are identified below.

Proactive notification

During the evolution of mining-based legislation, it appears that there had been recognition of important events in the mining cycle and at these identified, significant, periods the HSE was invited by various notifications to consider the appropriateness of the mining plans.

These replacement regulations appear to remove the requirement for the HSE to be kept informed and therefore limit the information routinely being provided to the HSE for consideration. Some notifications/requirements which do not appear to be required by the replacement regulations are listed below:

- Safety of Exit regulations required if there was an intention to employ more than nine people in a single entry then notification was given to the HSE. In previous years this would have prompted an HSE inspection.

- Electricity regulations required that the HSE was notified of an intention to introduce electricity into a part of the mine. In previous years this would have prompted an inspection of the location and the installation of the electrical equipment.

- MASHM regulations required the HSE to be notified of the scheme of training and hence invited the HSE to consider the appropriateness of the training. The removal of reference to recognised qualifications can also further diminish an essential ingredient in the prevention of incidents.

- The Coal Mines (Owners Operating Rules) Regulations 1993 require the development of rules to deal with issues of ventilation in blind end, prevention of mine fires and prevention of ignitions. Model rules are provided but owners are directed to seek the HSE's involvement if deviation is considered necessary.

- Notifications of precautions against inrushes to be made when there is an intention to work within prescribed areas.

- Notifications of the installation of fans other than auxiliary fans, colloquially known as 'Booster Fans', together with the information necessary to justify the installation and confirm that it is appropriately sited.

In the HSE Discussion document of the 29 January 2014 (2014/26725) the argument was made "As an industry with potential for major accidents and multiple casualties, HSE considered the introduction of a permissioning type regime in the new legislative framework for the sector. While this was viewed as a possible approach for the future, it was felt unreasonable to expect the industry to move in one step from a deeply prescriptive framework to one based on a general duty and a requirement to demonstrate risks are ALARP. However, this can be re-visited as an option when the proposed regulations are reviewed…". Currently the combined effect of notifications to the HSE requires the demonstration by owners that they have considered those matters recognised - even in the proposed 2014 regulations - as fundamental to the safe working of a mine.

In tandem the notifications invite the HSE to consider the appropriateness of owner/operator proposed controls which influence support, ventilation, ignition sources, hazards from inrushes, egress, supervision, mine layouts, transportation, training, flammable dust controls, barriers to flame propagation, selection of equipment, and so on. Historically the above notifications have been made in a piecemeal manner but there is no obvious barrier which would prevent them from being consolidated into one comprehensive document for submission to HSE.

Reactive Notifications

The proposed 2014 regulations appear to remove the need for some notification to the HSE - examples of which are encompassed in the following events:

- Significant changes to the system of support
- Samples of inhalable dust above a prescribed level
- Withdrawal of locomotives where roadways contain + 1.25% firedamp
- Where a determination of firedamp exceeds 1% firedamp (with some exceptions, Regulation 7)
- 123 inspection reports not automatically sent to the HSE but reliant on recognition by safety inspectors of a matter likely to affect safety and the preparedness of those persons to involve the HSE.

The removal of reactive notifications minimises the intelligence automatically provided to the HSE. This is basic intelligence which invites events to be reviewed before negative consequences arise, and invites early proactive intervention, if necessary, by those whose access to information can be broader than an individual operator.

Q7. Do you agree or disagree that the proposal set out in paras 35-37 will provide adequate controls on dust in coal mines?

New proposals remove regulations made in 2007 and replace them with amended COSHH regulations, which pre-date them.

Q8a. Do you agree or disagree with the proposal to produce a single supporting guidance document in place of the current ACOPs? [para 11]

This question refers to something that is not part of the consultation process and thefinal drafting of this supporting guidance has not been made available and has not been consulted upon. There is no indication what the legal status of this guidance would be.

Thompsons would need more information to give a considered view on the supporting guidance document.

What would be the status of this guidance document and what would it deal with? If the ACOPs are withdrawn how will the HSE ensure that this does not result in less compliance and a watering-down of the effect of the regulations in maintaining health and safety standards?

If it considered that the current ACOPs are not effective would it not be more sensible for there to be proper consultation on this and, if it is accepted that any ACOP is not effective, then why not change it rather than abolish it altogether?

Q8b. Do you agree or disagree with the proposal to withdraw the ACOP. 'The use of electricity in mines' and replace it with new guidance on the application of EAW in mines? [para 15]

As above - if it is thought that the current ACOP is not effective would it not be more sensible for there to be proper consultation on this? And if it is accepted that the ACOP is not effective then why not change it rather than abolish it?

Q9. Do you agree or disagree with the initial estimated costs and benefits included in the IA?

This costs-benefits analysis is simply an attempt to justify the changes and is therefore not central to our concerns, which are to maintain health and safety in the mining industry.

General comment

HSE describes the current suite of regulations as 'prescriptive' and state an intention to modernise by moving to goal-setting regulations. However, the effect of this goal-setting is to allow operators to set their own benchmarks of what is an appropriate
standard.

Legislation is already in place which sets goals *and* identifies minimum standards. Replacing this with weaker legislation is not acceptable.

It is unacceptable that the final consultative document CD267 is obviously incomplete as evidenced by PART 10 Regulations 70 (8) & (9), pg 25, and contains errors, as in Schedule 5, 12(a), pg 36.

It is unacceptable that consultees should be asked to consider the proposed
regulations in isolation when there are references in the HSE's documentation to new guidance on the application of the regulations.

The hazards in mining remain and changes to the health and safety regime in mines should only be made if they make the environment safer for workers. The current legislation in this area is not improved upon by the proposed changes.

Q10a. Coal mines - as there would be no approved rescue scheme, an estimate is requested of your current costs for rescue provision (scheme fees plus the costs of your own arrangements).

No response to make.

Q10b. Coal mines - as there would be no approved rescue scheme, an estimate is requested of what your costs will be, based on the rescue provision you think you will need (your own arrangements plus anything you may need to purchase from MRSL or elsewhere).

No response to make.

Q11a. The consolidation of mines legislation into one set of regulations with one supporting guidance document is expected to make it easier to reference both the law and the guidance [IA paras 38 - 39]. To enable us to quantify this, it would be helpful if you could estimate the number of days you or your staff currently spend consulting mining regulations and/or ACOPs annually?

No response to make.

Q11b. Based on the draft regulations and the available draft of the guidance, please estimate (after the initial familiarisation phase) the time you or your staff might spend consulting mining regulations and guidance annually in the future?

No response to make

Q12. Are there any further comments you would like to make on the issues raised in this consultative document and the draft Regulations?

Thompsons Solicitors question the HSE's rationale behind making these proposals. Doubtless the importance of health and safety in mines is utmost. However, the current legislation is broadly effective. Therefore what is the reason for proposing to change it in such a significant way?
It would be a travesty if the Government and the HSE is moving to a lighter touch form of health and safety regulation for mine workers but, if this is the case, Thompsons would not be wholly surprised. The Government has consistently under-resourced the HSE and it is obvious that health and safety in the workplace is an area of the law that the Government has taken a principled stand against: it assumes all health and safety legislation as being part of 'red-tape' that must be cut at all costs. Ultimately, the only beneficiaries will be negligent employers who will find it easier to ignore health and safety requirements and easier – and cheaper - to defend themselves against employees who have been injured as a direct result of bad practice.