

7. Conclusions, recommendations and options for addressing the issues

7.1 Conclusions

Overall, the review found that many of the rosters, and in particular the more intensive 12 hour rosters, are having an adverse impact on employee health, safety and family life. Problems are manifesting themselves now in terms of fatigue and impaired performance. There is also a set of latent problems emerging associated with increased risk of accidents and employee ill-health.

Many mining families are struggling to cope with the rosters. The absence of spouses, fathers and partners is adversely affecting family life and the relationships within them. It is placing enormous responsibility on women both inside and outside the family. **Put simply, the longer the hours, the more days worked, the more adverse the impact on family life.**

Current management of the OHS hazards associated with extended shifts is inadequate. Awareness of the risks is low and systems are not in place to manage current or future risks. Management attitude, displacement of costs, weak consultative arrangements, deterioration of workplace safety standards and limited employment opportunities all further compromise the safe operation of the rosters.

The current regulatory mechanisms are limited in scope and application. Changes in the industrial relations arena are creating new pressures, removing the capping effects that paid overtime and penalty rates had on working hours. This means that the control of excessive hours and fatigue hazards falls to the current occupational health and safety laws which seem to be unable to deal with them effectively. The absence of clear, enforceable performance standards makes compliance and enforcement difficult and inadequate. Inadequate inspectorate resources and reticence to intervene are affecting safety outcomes across parts of the industry. OHS legislation also appears unable to trigger effective management of work systems and health hazards such as silica and respirable dust, vibration, noise. It is also lacking in terms of providing strong guidance on consultative arrangements, inspectorate intervention and requirements for employee health monitoring. All of these issues will require closer attention in Stage 2 of the Review.

Overall, the fundamental finding of the Review is that there are problems manifesting themselves now and latent problems emerging. The fact that the costs are most likely to be borne not by companies, but by individuals, families, the health system and the broader community requires a careful and considered response from policy makers.

There is a need to ensure that a much better balance is struck between the needs of industry in the short term and the adverse impact that current practices are having on employee health safety and family life now and in the future. This is imperative since a failure to address adverse effects now will lay the groundwork for future ill-health and family dysfunction. Cost and other incentives that might normally trigger a response from the industry to better manage health and safety appear to be absent or ineffective. **There is thus a serious gap in the management of risk in this area that needs to be filled by government.**

Finally, there are compelling equity reasons why individuals, families and communities should not, on their own, be required to bear the costs of work practices that are compromising the health and safety of employees, intruding on family life and damaging the fabric of fragile isolated communities. Policy makers have a critical role in ensuring that a better balance between the needs of industry and the need of workers and their families is found.

7.2 Options and recommendations

The terms of reference under which this Review was conducted permit the development of options and recommendations for improving/addressing the identified issues.

To this end it was agreed with Workplace Standards Tasmania that:

- Feedback would be sought from stakeholders and the community to the general and specific findings of the Review. This feedback would form part of the input to Stage 2 of the review
- Options would be suggested in order to elicit stakeholder input and to develop more specific options and recommendations
- Recommendations would be made about the issues that require closer attention in Stage 2 of the Review.

This approach was undertaken because ensuring feedback and consultation has been an integral part of the Review process. Stakeholders made it clear from the outset that they wished to be informed of the findings of the Review. They were not prepared (and made this very clear) for it to be a report that “never saw the light of day”.

In addition, the nature of the problems and solutions are such that providing an opportunity for stakeholders to have input at an early stage would (hopefully) increase the chances that constructive solutions would be put forward. All too often, reports such as this are produced and the findings become immersed beneath arguments about specific recommendations. The aim here was to avoid this.

It is important that the initial focus of this part of the Review remains – initially at least - on understanding the impact of extended shifts on employee health, safety and family life. There will no doubt be disagreements about the findings. There will always be exceptions to general claims but the hope is that the focus and feedback will be on the overall trends that have been identified. The aim has been to try to capture – as accurately as possible - the broad sweep of the story. For this reason we have drawn on different kinds of information – survey, interview, objective measures – in the hope that consistent trends across all three will increase the confidence of the findings and conclusions.

We have also been cautious about setting out recommendations and options. Moving too quickly and inappropriately to specific recommendations for change will take the focus away from the findings and force stakeholders into assuming a position prematurely. There needs to be time for stakeholders and the community to consider the findings of the Review, rather than merely react to recommendations. It this way options for

constructive change are more likely to emerge that are based on a careful reflection of all of the issues, as complex as they are.

Broad options for change

In setting out the options, we have tried to be realistic and balance what is likely with what is possible. We also tried to ensure that they were options that stakeholders could respond to and justify in light of the findings of the Review. There will be opportunity for those who are of the opinion that the status quo is sustainable, but there will be a need to justify this position. Similarly, there may be limitations associated with the introduction of new standards that need to be considered from a number of different standpoints.

In terms of a regulatory response, there appears to be three broad options:

- (a) Maintain the status quo
- (b) Ensure compliance with existing regulatory obligations
- (c) Develop and implement new standards.

Option (a): Maintain the status quo

This would involve doing nothing and letting the current situation continue. However, given that the Review found both manifest and latent problems affecting health, safety and family life and highlighted a range of practical limitations with the existing regulatory regime, this appears untenable. Further, the Review found that current incentives are not likely to trigger appropriate responses from companies, as the costs are not being borne by them at the moment and are unlikely to be in the future.

It is likely that some stakeholders will disagree with the findings of the Review, or argue that despite the findings of the Review, there is no need to intervene. This clearly requires a response and justification from those who would argue such a position. Whilst it is clearly an option, there will be costs for some and benefits for others of doing so. These will need to be acknowledged. In particular, we encourage feedback to the following questions:

- **Is the “do nothing” option viable in light of the findings of the Review?**
- **What are the likely implications of doing nothing?**
- **Who will (should) bear the costs of the continuation of the status quo?**

Option (b) Strengthen compliance with existing regulatory obligations

This option involves not changing the existing legislation, but strengthening compliance with obligations where they exist.

(i) Industrial relations legislation

There are few obligations under state industrial relations legislation with respect to the regulation of excessive or maximum hours in the mining industry. Moreover, there are employment contracts in place across the sector registered in the federal jurisdiction, thus outside the scope of state legislation.

However, the Review did find that there a level of non-compliance with some award conditions especially within smaller contracting companies in the mining industry. These are conditions associated with sick and annual leave entitlements. For employees who already work very long hours, the need for cumulative recovery is critical. Anything that can be done to ensure that employees receive their entitlements will be a positive intervention.

This raises a number of questions:

- **Is there a need to improve with existing state award and agreement compliance and in what areas?**
- **What mechanisms/strategies are required for improving such compliance if required?**

(b) Occupational health and safety legislation

There is currently a broad general duty under current Tasmanian occupational health and safety legislation to maintain safe systems of work and to manage all hazards. Thus there is already an existing legislative obligation that should **theoretically** trigger effective management of the kinds of work systems hazards that have been highlighted in this Review.

However, the Review found the current OHS regulatory regime does not appear to be acting as this trigger. The reasons outlined were systemic and included: a lack of clear enforceable performance standards, the way that costs associated with the rosters accrue and can be displaced, management culture, weak structures of employee representation and fragmented bargaining, the ease of avoiding compliance and enforcement difficulties. **It was clear during the Review that the lack of enforceable standards was one of the main barriers to more effective managements of work schedule hazards.**

These issues are not likely to be fully addressed under the current legislation given the systemic nature of the problems. However, it is possible that improved awareness and enforcement of existing risk management obligations could achieve an improvement. This might involve:

Increased information to industry: The Review identified that many employers found it difficult to understand how a duty of care applied to work systems hazards and how to demonstrate their compliance. Many also did not accept that fatigue hazards posed a significant risk for employee health and safety. It may be useful to provide information and training to industry about:

- existing obligations under the Act with respect to duty of care
- the hazards associated with extended shifts
- the techniques available to minimise the risks
- award entitlements especially in smaller companies.

Increased inspectorate resources: The Review identified that there were inadequate inspectorate resources, a reticence to intervene and low levels of awareness about fatigue hazards. Despite the fact that the inspectorate has carriage for both workplace safety and State industrial relations, workplace practices did not receive the same level of attention as more concrete safety issues. It is possible that the industry could benefit from:

- Increased inspectorate personnel dedicated to the mining industry
- An assessment of the current appropriateness of the current skills mix amongst the inspectorate
- Increased training of inspectors about work systems hazards such as fatigue
- Increased priority given to monitoring compliance with existing conditions of employment, especially among smaller contracting companies in the mining industry.

This raises a range of questions:

- **Are there limitations with the existing legislation with respect to management of work systems hazards (such as fatigue, exposure to harmful agents) that this Review has not identified?**
- **To what extent would increased information to industry help to address some of the identified problems?**
- **To what extent would increased inspectorate resources and skill level help to address some of the identified problems?**
- **What, if any other initiatives would improve compliance with existing IR and OHS obligations?**

Option (c): Develop and enforce new standards

This option involves making substantive changes to existing legislation in order to establish new standards for working hours. The need for legislative intervention has already been recognised by a number of state governments. For example, both Queensland and New South Wales have inserted specific requirements to manage fatigue in their mining legislation, while Western Australian has Guidelines on fatigue for the mining industry. The recent decision by the AIRC is the first time that the federal industrial tribunal has enshrined generally applicable rights with respect to the rights of employees to refuse unreasonable overtime.

In Tasmania there are a number of opportunities to make changes to legislation that would establish new standards on working hours, set out the criteria against which particular work schedules can be assessed and create more enforceable standards.

The most appropriate location of any such initiative is the state occupational health and safety legislation, however this should be backed up with supporting changes in the industrial relations legislation. This is because, as outlined below, the scope of any changes to industrial relations legislation on its own would be limited. State OH&S legislation takes precedence over federal industrial relations law and common law, so any

solution located within the state OHS arena would have coverage of all employees, irrespective of their employment status or specific employment contract.

The options outlined below are a starting point for discussion in terms of development of new effective standards for working hours in the mining industry.

(i) Industrial relations legislation

In general, changes to state industrial relations legislation would be limited in scope. Any modifications would apply only to workplaces where employment conditions were regulated under state awards or agreements. Agreements or awards registered in the federal arena, or made under common law would be outside of the scope of any state IR legislation. This may defeat the purpose of the modifications and lead to fragmented and inequitable outcomes. Moreover, workplaces where conditions are currently registered in the state jurisdiction may attempt to opt out by moving to the federal jurisdiction.

Nonetheless, there may still be merit in making modifications to state industrial relations legislation to ensure that there is consistency with federal legislation. The recent Full Bench Decision to reaffirm the right of employees to refuse “unreasonable” overtime (using the baseline of ordinary hours) on the basis of family responsibilities, occupational health and safety, notice, needs of the workplace and any other factors may be appropriate. This would formally bring the determination of state awards and the resolution of any dispute into line with federal legislation.

This raises a number of questions:

- **Are changes needed to state industrial relations legislation to address the identified problems? What are they?**
- **Is it appropriate to make modifications that would ensure consistency between the recent provisions of the AIRC to reaffirm the right of employees to refuse “unreasonable” overtime?**
- **What would be the implications of not making any modifications to state industrial relations legislation?**
- **What, if any other changes could be made to industrial relations legislation that would help to address the identified problems?**

(ii) Occupational health and safety legislation

There are a number options open with respect to changes that could be made to State occupational health and safety legislation. Without pre-empting Stage 2 of the Review, there are changes that could be made to address some of the specific problems highlighted in this Review.

This might include a combination of prescription (through regulation) and/or guidance (through code of practice). First, regulation could raise the status of working hours as a hazard by prescribing the need to control the risks. This would address the identified blockage in parts of the industry to accept that risks exist. Second, a code of practice would provide practical guidance on how to control the associated risks. Codes of

practice have no primary legal status, although they do have evidentiary status. Prescribing the need to control risks associated with working hours, without prescribing how to do it, would provide for greater clarity with a degree of flexibility.

Regulation

This would involve insertion into the Act (by way of Regulation) of hours of work as a specific hazard (such as is included for noise, manual handling, isolated work). This could also specify the risks associated with working hours (including fatigue, increased exposure to harmful agents). The effect of such an initiative would be to prescribe the requirement to control the risks associated with working hours, and strengthen the capacity of the inspectorate to enforce such compliance.

Code of practice

Codes of practice can be industry specific and address specific occupational hazards. They are agreed means of achieving compliance with legislative requirement.

The effect of such an initiative would be to provide some practical guidance on how to control the risks associated with a specific hazard. This would provide guidance to industry by setting out minimum standards that would meet their requirements under the Act. It would also strengthen the inspectorate role with respect to working hours and give them improved clarity and capacity to enforce such standards.

National Standard (NOHSC)

Once approved through the Ministerial Council, a national standard could provide a national basis for managing the fatigue hazard.

These would be new initiatives and as such require extensive input and support from industry stakeholders.

However, some threshold questions that need to be addressed:

- **Is there a need for interventions by way of regulation and/or code of practice in the *Tasmanian Workplace Health and Safety Act 1995*?**
- **What would the advantages and disadvantages of such an approach?**
- **What would be the content of regulation?**
- **What would be the content of a code of practice?**
- **What would be the content of a National Standard?**
- **How effective would such regulatory intervention be in addressing the problems identified in the Review?**
- **Are there regulatory interventions other than those outlined above that would address the identified problems?**

None of the initiatives outlined above directly address the impact of the rosters on family life that were identified in the Review. However, initiatives that would have the effect of controlling the most intensive rosters would by extension help to address some of the adverse family effects. The problems posed by some of these rosters are complex and are in part compounded by the isolation of the communities and the activities and policies of local mining companies. They are thus intimately linked to the resources within and effects on the communities within which these mining families live and work.

An assessment of the impact of the rosters on the community was expressively excluded from this Review. However, in exploring the impact on families it became apparent that the depleted social and economic resources within the communities were critical factors in how the rosters were impacting on families.

There is a need to assess the community impact of the rosters on the community.

Families do not exist in isolation from their communities, especially when these communities are small and remote. Moreover, there is an interdependent relationship between the resources and personnel required to operate the mining operations and the provision of labour and other services by the communities. **The mining companies are as reliant on the communities as the communities are on the companies.**

One way of strengthening the families is to ensure the provision of better health, welfare, transport and educational services to the communities. There is also a need to recognise and respond to the changes in the population mix and profile of these communities caused by changes in work practices and other policies of the mining companies (such as selling houses).

It is recommended that the Government undertake a review of the impact of the rosters and other mining company practices and policies on the West Coast communities. The Review should seek to establish the impact of the changes in the economics and operation of the mining companies and of the Government's policies with respect to the provision of health, education and social services in these communities.

Specific issues requiring attention in Stage 2 of the review

The analysis of the impact of the roster on other hazards (such as harmful agents and environmental contaminants) and the assessment of the effectiveness of current regulatory options highlighted a range of issues that warrant closer attention in Stage 2 of the Review. Four, in particular stand out.

a) The effectiveness of management of the health and safety effects of harmful agents

This Review found serious inadequacies with the way that parts of the industry are managing particular hazards, and the way that standards are being enforced. Part 2 of the report found evidence that some core hazards are not being managed well and that the inspectorate finds it difficult to consistently enforce standards. Stage 2 of the Review needs to assess the adequacy of the current legislation and the way this legislation is being enforced with respect to the following:

- Silica and respirable dust

- Noise
- Heat
- Vibration
- Ventilation and the effective control of environmental contaminants such as diesel particulate
- Other harmful agents (including chemical and the mix of chemicals)
- Working in isolation.

In addition, Stage 2 needs to assess the adequacy of the current legislation and the way this legislation is being enforced with respect to

- Health monitoring of individuals exposed to the health hazards outlined above
- Appropriateness of exposure standards and limits across a range of hazards
- Record keeping of health monitoring information
- The adequacy of workplace amenities, in particular the provision of potable water.

b) Inspectorate resources and skill mix

Particular attention needs to be paid to the level and quality of inspectorate resources. This Review found that inspectorate numbers were inadequate, they sometimes appeared reticent to intervene on work systems hazards. The skills mix required to cover the broad range of health, safety and industrial relations issues within their brief stretched available resources. This is potentially compromising health and safety outcomes on the ground.

c) Effectiveness of consultative arrangements

This Review found the quality of consultative arrangements to be highly variable. At some sites they were effective and at others woefully inadequate. The effectiveness of OHS consultation is absolutely critical to health and safety outcomes and cannot be overstated. Stage 2 of the Review needs to examine the provisions in the legislation and whether they are operating to ensure effective consultation.

d) Utilisation of a risk management

The Review found that the adoption and effectiveness of risk management as an industry approach to hazard control was patchy. At some sites it seemed to be utilised well and involvement of employees was high. At others it was only marginally used and employees were not properly trained or routinely involved. It was not a method that appeared to be well utilised with respect to the control of health hazards. In the absence of prescriptive health and safety legislation for the mining industry, it would be appropriate for Stage 2 to focus closely on the effectiveness of safety management systems across the industry.

A final comment

This Review has involved over 1000 individuals and stretched across many months. It has been broad in its scope and level of involvement of a range of stakeholders. The issues have been complex and sensitive. It has required employees and families to share their views on sometimes very personal matters honestly. It has required managers to make their workforce available and to share their own views on sometimes very sensitive issues frankly. The openness and co-operation of all of the individuals who gave of their time and views has been an overwhelmingly. The Review would not have been possible

The struggle for time

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without all of the individuals and companies who participated so willingly. This has been warmly appreciated

The findings of this stage of the Review highlight the need for action and intervention in a number of areas. There is now an opportunity for all stakeholders to respond to the findings of the Review and the options put forward. This will be an important part of the process and will hopefully elicit further insights and positive ideas for addressing what are clearly complex and challenging issues.