Department of Natural Resources, Mines and Energy

Discussion Paper

Industrial Manslaughter and Other Legislative Amendments for Resources Safety and Health

November 2018

Queensland Government

This publication has been compiled by Resources Safety and Health, Department of Natural Resources, Mines and Energy.

Table of contents

Glossary

CMSHA	*Coal Mining Safety and Health Act 1999*
DNRME	Department of Natural Resources, Mines and Energy
Explosives Act	*Explosives Act 1999*
FWA	*Fair Work Act 2009 (Commonwealth)*
MQSHA	*Mining and Quarrying Safety and Health Act 1999*
P&G Act	*Petroleum and Gas (Production and Safety) Act 2004*
Resources Safety Acts	Collectively, the *Coal Mining Safety and Health Act 1999, Explosives Act 1999, Mining and Quarrying Safety and Health Act 1999,* and *Petroleum and Gas (Production and Safety) Act 2004*
WHS Act 2011	*Work Health and Safety Act 2011*

Executive summary

This discussion paper considers the following four measures that have been implemented through the WHS Act 2011, for possible implementation through the Resources Safety Acts:

- industrial manslaughter offences;
- dispute resolution processes;
- prohibition of discriminatory, coercive and misleading conduct; and
- workplace entry by entry permit holders.

The first two measures have been implemented through amendments to the WHS Act 2011 included in the *Work Health and Safety and Other Legislation Amendment Act 2017*, in response to incidents resulting in multiple loss of life at Dreamworld and on an Eagle Farm work site. The last two have been implemented since the WHS Act 2011 commenced on 1 January 2012.

These measures are being considered for their potential to:

- strengthen the current approaches to discouraging breaches of safety and health obligations under the Resources Safety Acts;
- improve the effectiveness of the compliance and enforcement frameworks under the Resources Safety Acts; and
- improve consistency with the WHS Act 2011.

Stakeholders are encouraged to comment on each of the measures, and in particular to respond to the questions posed in this discussion paper, to help inform the decision-making process.

Comments and answers to discussion paper questions should be provided using the stakeholder feedback form. Completed stakeholder feedback forms may be submitted via email or post to:

Email: RSHPolicy@dnrme.qld.gov.au

Post: IM Discussion Paper Stakeholder Feedback
Resources Safety and Health
Department of Natural Resources, Mines and Energy
PO Box 15216
City East QLD 4002

Stakeholder feedback must be submitted by **Thursday 31 January 2019**.

Purpose

During Parliamentary debate of the Work Health and Safety and Other Legislation Amendment Bill 2017, the government explained that it would not move to introduce industrial manslaughter offences to the Resources Safety Acts until appropriate consultation had occurred with the resources industries.

The government is committed to consulting with stakeholders to ascertain their views about whether similar provisions to those in the WHS Act 2011 for industrial manslaughter, dispute resolution, prohibitions on discriminatory, coercive and misleading conduct, and entry permit holders should be implemented for the resources industries.

This discussion paper considers the current approaches under the WHS Act 2011 and the Resources Safety Acts for each of these measures, noting key similarities and differences and what would change if these measures were adopted. This is the first step in consulting on these issues.

Industry stakeholders and other interested parties may answer the questions at the end of each discussion topic and provide any further comments to assist DNRME in finalising any proposals for implementation.

The driver for possible change

The Palaszczuk Government is committed to the safety and health of all workers across all industries, and ensuring equitable safeguards, where relevant, for them.

In late 2017, the WHS Act 2011 was amended by the *Work Health and Safety and Other Legislation Amendment Act 2017*. Among other things, this legislation introduced the new offence of industrial manslaughter and expanded health and safety dispute resolution processes to include the Queensland Industrial Relations Commission. The new industrial manslaughter offences commenced on 23 October 2017. The dispute resolution process changes commenced on 13 November 2017.

These amendments resulted from an independent review of Workplace Health and Safety Queensland following incidents resulting in fatalities at Dreamworld and Eagle Farm. A discussion paper published in April 2017 as part of this review commenced as follows:

> *"In October 2016, the Premier, the Honourable Annastacia Palaszczuk MP and the Honourable Grace Grace MP, Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, announced that a best practice review of work health and safety laws is to be undertaken in response to the recent tragic fatalities at Dreamworld and an Eagle Farm worksite in 2016.*
>
> *In particular, the high profile incident at Dreamworld, which resulted in four fatalities due to the catastrophic failure of an amusement device, has raised concerns about the regulation of public safety matters in Queensland.*
>
> *Additionally, the multiple fatalities at both Dreamworld and Eagle Farm Race Course, where two workers were crushed when a ten tonne precast concrete slab toppled over, have raised concerns about the effectiveness of current offences and penalties under the Work Health and Safety Act 2011."*

The review resulted in recommendations to strengthen legislation to protect workers, including the introduction of a new offence of industrial manslaughter for negligence causing the death of a worker, and expanding the jurisdiction of the Queensland Industrial Relations Commission to include hearing and determining disputes under the WHS Act 2011.

The review also made recommendations to improve public safety, primarily in response to the Dreamworld incident.

Information from this review can be found on the Workplace Health and Safety Queensland website at https://www.worksafe.qld.gov.au/laws-and-compliance/best-practice-review-of-workplace-health-and-safety-queensland.

The Australian Capital Territory introduced specific offences for industrial manslaughter in 2004. One prosecution was commenced under these provisions but this case was discontinued. Similar offences have been proposed in other Australian jurisdictions including New South Wales, South Australia and Victoria, but laws have not been enacted in these States.

Discussion of possible further measures to discourage unsafe work practices in the resources industries

Mining industry stakeholders will be aware that there is a tragic history behind the current CMSHA and MQSHA. Queensland suffered a series of underground coal mining disasters which had a profound and lasting impact on the affected communities, industry and government.

The CMSHA and the MQSHA were developed through close collaboration by government, industry and unions after the 1994 Moura mining disaster that killed 11 men. This event was the fourth major mining disaster in Queensland between 1972 and 1994 in which a total of 53 workers lost their lives, including some mine rescue personnel.

The recommendations from the inquiry into the 1994 disaster (the Moura Inquiry) substantially influenced the new legislation and regulations under the current Queensland mining safety and health framework. The lessons learnt from each disaster led to legislative improvements and subsequent improvements in safety over time.

Government is now considering whether the industrial manslaughter offences and expanded health and safety dispute resolution processes introduced to help safeguard workers in general workplaces through the *Work Health and Safety and Other Legislation Amendment Act 2017*; and the reprisal and work permit holder approaches in the WHS Act 2011, would further improve protection of workers in the resources industries and the broader community.

In considering these changes it is important to bear in mind that the Resources Safety Acts have evolved in a different context having regard to industry-specific considerations. Measures adopted under general work health and safety legislation need to be carefully considered to determine their appropriateness in effectively regulating safety and health within the resources industries.

Industrial manslaughter

Industrial manslaughter in the WHS Act 2011

Sections 34A to 34D of the WHS Act 2011 contain the industrial manslaughter offences. Equivalent offences have been included in the *Electrical Safety Act 2002* and the *Safety in Recreational Water Activities Act 2011*.

Industrial manslaughter is separate to the existing category 1 to 3 offences and penalties approach in the WHS Act 2011, where a 1 to 3 offence category reflects the seriousness of the breach of the health and safety duty.

Sections 30 to 34 of the WHS Act 2011 contain the category 1 to 3 offences. Category 1 offences are the most serious, attracting possible imprisonment for up to 5 years for an individual and the highest financial penalties of up to 30,000 penalty units ($3 million) for a corporation. A category 1 offence involves reckless conduct that exposes an individual to a risk of death, serious injury or illness. Category 2 offences apply where there is a breach that exposes an individual to a risk of death, serious injury or illness. Category 3 is for failing to comply with a health and safety duty. Terms of imprisonment do not apply to category 2 or 3 offences.

A primary objective of the 2017 industrial manslaughter amendments was to ensure sufficient penalties and offences under the WHS Act 2011 where actions or omissions allegedly involving gross negligence lead to catastrophic incidents causing the death of a worker. The review of Workplace Health and Safety Queensland leading to these amendments found:

> *"…a new offence is considered necessary and appropriate to deal with the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect."*

The industrial manslaughter provisions make it an offence for a person conducting a business or undertaking (PCBU), or a senior officer, to negligently cause the death of a worker.

The existing Queensland approach to criminal negligence is applied to the industrial manslaughter offences. The prosecution must prove the civil components of negligence, but must go further and prove that the negligence was of such a serious degree that it amounted to a crime. Also, the negligent conduct must substantially contribute to the death to convict a person under these provisions.

A senior officer is defined as an executive officer of a corporation, or for a non-corporation, the holder of an executive position who makes, or takes part in making, decisions affecting all, or a substantial part, of a PCBU's functions. This is intended to capture individuals of the highest levels in a corporation who can create and influence safety management and culture at their workplace.

If convicted of industrial manslaughter, the maximum term of imprisonment for an individual is 20 years and the maximum financial penalty for a body corporate is 100,000 penalty units ($10 million). This is more than triple the current maximum term of imprisonment and financial penalty for a WHS Act 2011 category 1 offence. However, the category 1 offence potentially applies to a broader range of incidents, as it does not require a death or serious injury to occur – it is the risk of death or serious injury that triggers this offence.

The industrial manslaughter provisions were also introduced to overcome difficulties with successfully prosecuting large corporations for manslaughter under the Queensland Criminal Code. Under the new offences, the conduct of employees, agents and officers can be attributed to the corporation.

How do the Resources Safety Acts compare?

The Resources Safety Acts do not have the same category 1 to 3 offences, nor the same maximum financial and imprisonment penalty levels, as the WHS Act 2011. The approach under these Acts is instead very similar to what existed in the Queensland *Workplace Health and Safety Act 1995,* which was repealed and replaced by the WHS Act 2011.

The CMSHA and MQSHA do not have analogous provisions to category 1 offences under the WHS Act explicitly involving reckless conduct as an element. Rather, the CMSHA and MQSHA impose a suite of safety and health obligations on the holders of specific mining positions. Further, section 39(2)(f) of the CMSHA and section 36(2)(f) of the MQSHA impose obligations on persons generally not to do anything wilfully or recklessly that might adversely affect the safety and health of someone else at the mine. In cases of alleged breaches of these obligations, the prosecution may argue recklessness as being relevant to increase culpability and seek higher penalties. In comparison, the P&G Act mentions reckless or wilful acts by a person at an operating plant in section 704, whilst the Explosives Act does not explicitly mention recklessness.

Under the Resources Safety Acts, maximum penalties are aligned with the number of fatalities and/or severity of the injury or extent of the harm. The highest financial and imprisonment penalties are for causing multiple deaths; the next for death or grievous bodily harm; the next for exposure to a substance likely to cause death or grievous bodily harm; then “otherwise” for other remaining contraventions.

The maximum imprisonment penalties are very similar across the Resources Safety Acts with the highest maximum imprisonment penalty being 3 years imprisonment, if a contravention causes multiple deaths. Unlike the WHS Act 2011, recklessness need not be established under the Resources Safety Acts to attract a penalty of imprisonment.

The highest maximum financial penalties in the Resources Safety Acts are significantly lower than those for category 1 to 3 offences in the WHS Act 2011. The Mines Legislation (Resources Safety) Amendment Bill 2018 proposes to align penalties under the CMSHA and MQSHA more closely with the WHS Act, including by increasing the maximum financial penalty for a contravention causing multiple deaths to 30,000 penalty units ($3.9 million), and for a contravention causing death or grievous bodily harm to 15,000 penalty units ($1.9 million). However, penalties under the Resources Safety Acts will remain much lower than the $10 million maximum penalty under the industrial manslaughter offences in the WHS Act 2011.

The highest maximum imprisonment penalty of 3 years imprisonment in the Resources Safety Acts is now also in stark contrast to the highest maximum imprisonment penalty of 20 years under the industrial manslaughter provisions.

What would change if this measure is adopted?

The introduction of industrial manslaughter offences would have the effect of providing for substantially higher penalties in cases of criminal negligence causing the death of a worker or workers in the resources industries.

Specifically, this means the introduction of a higher maximum term of imprisonment (20 years compared to the current 3 years) where there is criminal negligence causing death. However, the current sliding imprisonment scale would be retained where there is a contravention of safety and health obligations that does not meet the criminal standard of negligence, or where the conduct does not result in worker fatalities, namely:

- 3 years maximum imprisonment when the contravention caused multiple deaths;
- 2 years maximum imprisonment when the contravention caused death or grievous bodily harm; and

- 1 year maximum imprisonment when the contravention caused bodily harm or exposure to a substance is likely to cause death or grievous bodily harm.

There would also be substantially higher maximum financial penalties (100,000 penalty units or $13 million) in cases of criminal negligence causing the death of a worker or workers. This would not align exactly with the maximum penalty of $10 million under the WHS Act 2011, as the value of a penalty unit under the WHS Act is set at $100 (for national consistency reasons) whereas the value of a penalty unit under the Resources Safety Acts is currently $130.55 (as at 1 July 2018 – noting this increases annually with CPI).

Prosecution developments since late 2017

The amendments to the WHS Act 2011 providing for the industrial manslaughter offences are not retrospective. Accordingly, prosecutions for industrial manslaughter cannot be brought in respect of the Eagle Farm work site and Dreamworld fatalities. Further, industrial manslaughter would not be applicable to the Dreamworld incident in any event as it did not involve worker fatalities.

No prosecutions have been commenced under the new industrial manslaughter provisions since their introduction. However, there are current prosecutions relating to the Eagle Farm work site fatalities for category 1 offences under the WHS Act 2011. Further information can be found on the Workplace Health and Safety Queensland website at https://www.worksafe.qld.gov.au/news/2017/multiple-reckless-conduct-charges-laid-for-2016-eagle-farm-deaths.

Questions to consider regarding industrial manslaughter

1. Are the current offence categories and maximum financial and imprisonment penalties for breaches of safety and health obligations under the Resources Safety Acts adequate to deter or address grossly negligent conduct causing an incident involving one or more fatalities? Please provide reasons for your view.

2. If not, should industrial manslaughter offences be included in the Resources Safety Acts? If yes, who should the industrial manslaughter offences apply to?

3. Alternatively, is there merit in strengthening the existing offence framework under the Resources Safety Acts without introducing separate industrial manslaughter offences, for example by introducing a circumstance of aggravation attracting a higher penalty where recklessness is proven as an element of the offence?

Dispute resolution

Dispute resolution in the WHS Act 2011

Following the recommendations of the review into the multiple fatality tragedies at Dreamworld and a work site at Eagle Farm, the WHS Act 2011 was also amended in 2017 to increase issue and dispute resolution mechanisms. The amendments expand the jurisdiction of the Queensland Industrial Relations Commission (QIRC) to include hearing and determining additional work health and safety disputes.

The reforms moved jurisdiction for the review of reviewable decisions under the WHS Act 2011 from the Queensland Civil and Administrative Tribunal (QCAT) to the QIRC, and added to the categories of dispute which can be heard by the QIRC.

The dispute resolution processes in part 5, division 7A of the WHS Act 2011 concern disputes about the following matters (each called a "WHS matter"):

- The provision of information by an employer to a health and safety representative about hazards or risks at the workplace or the health and safety of workers in the work group under section 70(1)(c) of the WHS Act 2011
- A request by a health and safety representative for assistance from a WHS entry permit holder under section 70(1)(g) of the WHS Act 2011
- A matter subject to the issue resolution process under part 5, division 5 of the WHS Act 2011
- Cease work matters under part 5, division 6 of the WHS Act 2011.

Since the commencement of the WHS Act 2011, inspectors have had a dispute resolution role and encourage disputes to be resolved between the parties where possible at the workplaces. The dispute resolution role of inspectors has included, for example, disputes about the exercise of right of entry to a workplace by a WHS entry permit holder.

Under the 2017 amendments, disputes about WHS matters cannot be lodged with the QIRC until 24 hours after an inspector is requested to assist with resolving a dispute and the dispute remains unresolved.

The 2017 amendments enable a relevant union for the WHS matter to participate in the resolution of the dispute through the QIRC. The QIRC may deal with the dispute in any way it thinks fit, including by means of mediation, conciliation or arbitration.

In dealing with a dispute the QIRC may review a decision made by an inspector to exercise, or not to exercise, compliance powers under part 10 of the WHS Act 2011 to assist in resolving the dispute. The QIRC can decide to confirm, vary, set aside, substitute another decision, or return the matter to the inspector with directions the QIRC considers appropriate.

If the QIRC decides to review a compliance decision, the compliance decision then is taken to not be a reviewable decision under section 223 of the WHS Act 2011. However, if a compliance decision has been subject to a review process under part 12 of the WHS Act 2011 where an internal reviewer initially reviews the reviewable decision before application may be made to the external review body for an external review, any review under the part 12 process ends when the QIRC decides to review the compliance decision under new part 5, division 7A of the WHS Act 2011.

How do the Resources Safety Acts compare?

The CMSHA and MQSHA currently have some similar dispute resolution processes that may involve an inspector and site safety and health representatives, industry safety and health representatives, district workers' representatives, workers or obligation holders.

The CMSHA and MQSHA also currently enable representations to be made by a worker or obligation holder to an inspector or inspection officer about safety and health matters, with the name of the person making the representation not disclosed unless the person consents to the disclosure or if there is a prosecution.

While these mechanisms do not involve resolution by an arbiter such as the QIRC, they are legislated processes for raising and resolving serious safety and health matters. The inspector must investigate and report on each matter.

There are counterpart provisions in the MQSHA and the CMSHA. Using the MQSHA provisions as the examples:

Section 92(5) – (7) of the MQSHA provides for a dispute resolution process involving a site safety and health representative, site senior executive and an inspector:

> (5) If a site safety and health representative believes a safety and health management system is inadequate or ineffective, the representative must inform the site senior executive.
>
> (6) If the site safety and health representative is not satisfied the site senior executive is taking the action necessary to make the safety and health management system adequate and effective, the representative must advise an inspector.
>
> (7) The inspector must investigate the matter and report the results of the investigation in the mine record.

Section 118 of the MQSHA similarly provides for a dispute resolution process involving a district workers' representative, site senior executive and an inspector as follows:

> 118 Inadequate or ineffective safety and health management Systems
>
> (1) If a district workers' representative believes a safety and health management system is inadequate or ineffective, the representative must advise the site senior executive stating the reasons for the representative's belief.
>
> (2) If the district workers' representative is not satisfied the site senior executive is taking the action necessary to make the safety and health management system adequate and effective, the representative must advise an inspector.
>
> (3) The inspector must investigate the matter and report the results of the investigation in the mine record.

Section 254 of the MQSHA provides the following process:

> 254 Representations about safety and health matters
>
> (1) This section applies to a person who is—
> (a) a worker; or
> (b) another person with obligations under this Act; or
> (c) an employee of a person mentioned in paragraph (b).

(2) The person may make, either personally or by a representative, a representation to an inspector or inspection officer about—
  (a) an alleged contravention of this Act; or
  (b) a thing or practice at the mine that is, or is likely to be, dangerous.

(3) The inspector or inspection officer must investigate the matter and make a written report of the investigation to the worker or the worker's representative.

(4) A public service officer must not disclose the name of the person making the representation—
  (a) except for a prosecution under subsection (5); or
  (b) unless the person consents to the disclosure.

(5) The person must not make a false or frivolous representation.

Maximum penalty for subsection (5)—40 penalty units.

It should be noted that where an inspector or inspection officer gives a directive to a person as a result of any investigation, there is a right to a review of the directive by the chief inspector and, subsequently, the Industrial Court (see for example sections 172 to 175 and 223 to 228 of the MQSHA).

The P&G Act and the Explosives Act do not have any safety dispute resolution processes that require the involvement of an inspector and do not provide for safety and health representatives.

What would change if this measure is adopted?

The jurisdiction of the QIRC would be expanded to include hearing and determining work safety and health disputes for the resources industries under the Resources Safety Acts. For the CMSHA and MQSHA, this would require additional dispute resolution processes to be integrated with existing mechanisms under this legislation. For the P&G Act and Explosives Act, this would require the introduction of a new dispute resolution framework given there are no existing processes under this legislation.

Questions to consider regarding dispute resolution

4. Are additional dispute resolution processes needed under the CMSHA and MQSHA? Please provide reasons for your view, including how you consider the current processes are deficient.

5. If yes, what types of dispute should be subject to these processes and how could any additional processes be integrated with the current approach in the CMSHA and MQSHA?

6. Are dispute resolution processes needed under the P&G Act and Explosives Act frameworks? Please provide reasons for your view.

7. If yes, what approach may be most relevant or suited to the characteristics of the petroleum and gas and explosives industries?

Prohibition of discriminatory, coercive and misleading conduct

Background to the existing protection from reprisal provisions in the Resources Safety Acts

In 2008, the Ombudsman released a report titled "*The Regulation of Mine Safety in Queensland: A review of the Queensland Mines Inspectorate"*. One of the recommendations in the report was to make it an offence for a person to cause, or attempt to cause, detriment to another person because a person has provided, may provide or is believed to have provided information to the Queensland Mines Inspectorate (QMI), another government agency, or the mine operator itself about a mine safety concern.

At pages 69 to 70, the Ombudsman's Report stated:

> "Under the Coal Act and the Mining and Quarrying Act, anyone with a concern about safety at a mine may contact the QMI and report their concern. Typically, safety concerns will be reported by a mine worker about conditions directly affecting him or her or a fellow worker. As with any other workplace, individuals in the mining industry who wish to report unsafe or illegal practices are often reluctant to do so because of fear of retribution or victimisation. This may not always be by the employer – in many instances colleagues can victimise a fellow employee on the basis that the employee has 'dobbed them in' and potentially jeopardised their jobs. QMI staff advised us that, although rare, there have been cases where workers had either been victimised or been in fear of being victimised because they had spoken to QMI inspectors about mine safety concerns. Having regard to the fact that we are dealing with life and death issues, there is clearly a need to give greater protection to individuals who report safety concerns in the mining industry. The provisions of the *Whistleblowers' Protection Act 1994* on reprisal are a useful model for statutory protection for persons in the mining industry who report safety concerns.
>
> **Recommendation 17** That the DME (Department) proceed with proposed amendments to the Coal Act and the Mining and Quarrying Act to make it an offence for a person to cause, or attempt to cause, detriment to another person because anybody has provided, may provide or is believed to have provided information to the QMI, another government agency, or the mine operator itself about a mine safety concern."

The intent of the Ombudsman was to provide greater protection to persons who wish to report unsafe or illegal practices but are fearful to do so because of retribution or victimisation by the employer or colleagues.

In 2009, the Resources Safety Acts were amended to implement the recommendation, with the new provisions (other than the penalty levels) based on the then *Whistleblowers' Protection Act 1994* and its successor, the *Public Interest Disclosure Act 2010*.

The current protection from reprisal provisions of the Resources Safety Acts are contained in sections 275 to 275AB of the CMSHA, sections 254 to 254B of the MQSHA, sections 708C and 708D of the P&G Act and sections 126A and 126B of the Explosives Act.

The focus of these provisions is quite specifically on protecting from reprisal a person who has made a safety complaint or raised a safety issue, or contacted or given help to an official in relation to a safety issue. They create an offence for a person to cause detriment to another person because of, or in the belief that, the person has made the complaint, raised the issue, or contacted or helped an official. The maximum penalty for this offence is 40 penalty units. These provisions also make reprisal a tort, to ensure whistleblowers in these industries have a right to pursue civil action where they suffer detriment as a result of the reprisal.

How is the WHS Act 2011 different in its approach?

There are comparable, but broader as well as more specific and detailed provisions encompassing this topic in the WHS Act 2011. Part 6 of the WHS Act 2011 prohibits discriminatory, coercive and misleading conduct in relation to work health and safety matters.

The purpose of the WHS Act 2011 provisions is to broadly encourage engagement in work health and safety activities and the proper exercise of roles and powers under the WHS Act 2011 by providing protection for those engaged in such roles and activities from being subject to reprisals, discriminatory conduct, coercion or misrepresentation which may otherwise deter people from being involved in work health and safety activities or exercising work health and safety rights.

Its focus is much broader than protecting against reprisals following complaints about safety issues, as it seeks also to protect those in more visible, proactive safety and health roles who may be discriminated against or coerced in the day to day performance of their role, for example as a health and safety representative. There are people in these safety and health roles at mines under the CMSHA and MQSHA, but not under the P&G Act or the Explosives Act.

The WHS Act establishes both offences and civil causes of action for discriminatory, coercive and misleading conduct.

The maximum penalty for the comparable but broader provisions under the WHS Act 2011 is 1,000 penalty units.

What would change if this measure is adopted?

The existing protection from reprisal sections in the Resources Safety Acts would largely be replaced with provisions based on part 6 of the WHS Act prohibiting discriminatory, coercive and misleading conduct, including the higher penalty levels.

Questions to consider regarding prohibition of discriminatory, coercive and misleading conduct

8. Should workers in the resources industries have the same or very similar protection from discriminatory, coercive and misleading conduct, as workers in general workplaces in Queensland? Please provide reasons for your view.

9. Should penalties be increased to be consistent with the WHS Act 2011?
   Please provide reasons for your view.

10. The comparable provisions in the WHS Act 2011 are arguably broader and more comprehensive than the reprisal provisions in the Resources Safety Acts. Stakeholders are invited to specifically comment on whether these provisions will provide greater protection to persons who report unsafe or illegal practices at resource industry sites from retribution or victimisation by the employer or colleagues.

Workplace entry by entry permit holders

What are the current worker representative arrangements under the Resources Safety Acts?

Currently, only the CMSHA and the MQSHA provide for particular union representatives to represent workers. The P&G Act and Explosives Act do not specifically mention worker representation through union representative involvement.

The CMSHA defines "union" to mean the Construction Forestry Mining and Energy Union—Mining and Energy Division Queensland District Branch. Under part 8 of the CMSHA, the union may appoint up to 3 persons to be industry safety and health representatives to perform substantial safety and health functions at coal mines. The industry safety and health representatives must hold a first or second class certificate of competency or a deputy's certificate of competency.

The CMSHA also refers to "industrial organisations" representing coal mine workers more broadly when setting out the process for representatives to be appointed to the Minister's Coal Mining Safety and Health Advisory Committee under part 6 of the CMSHA. At least one of the members and one substitute member must be from the industrial organisation that represents the majority of the workers.

The MQSHA refers to "industrial organisations". Under part 8 of the MQSHA, an industrial organisation with members in the mining industry may nominate individuals to be district workers' representatives to perform substantial safety and health functions at mines and quarries. There may be up to 4 district workers' representatives if the Minister is satisfied that they have appropriate competencies and adequate experience to perform the functions of a district workers' representative; and are in a position to adequately represent the safety and health interests of a majority of workers.

The MQSHA also refers to industrial organisations representing workers having representatives on the Minister's Mining Safety and Health Advisory Committee. At least one of the members and one substitute member must be from the industrial organisation that represents the majority of the workers.

"Industrial organisation" is defined in both the CMSHA and MQSHA to mean an association of employees registered under the *Industrial Relations Act 2016* as an employee organisation.

What are key differences of approach in the CMSHA and MQSHA compared to the WHS Act 2011?

Under part 7 of the WHS Act 2011, a union may apply for a WHS entry permit to be issued to a union official. To be eligible for an entry permit, the official must have completed the required training under the WHS Act 2011 and hold or will hold an entry permit under the Commonwealth's *Fair Work Act 2009* (FWA) or the *Industrial Relations Act 2016*.

The WHS Act 2011 defines "union" to mean—

(a) an employee organisation that is registered, or taken to be registered, under the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth; or
(b) an employee organisation under the *Industrial Relations Act 2016*; or
(c) an association of employees or independent contractors, or both, that is registered or recognised as such an association (however described) under a State or Territory industrial law.

Under the CMSHA and MQSHA there is an established system of experienced workers' representatives' involvement. Queensland has had union involvement at coal mines through check inspectors, more recently named industry safety and health representatives under the CMSHA, for more than 60 years.

At coal mines and mineral mines and quarries, industry safety and health representatives and district workers' representatives carry out a proactive role of audits and inspections based on the risk management framework of the CMSHA or MQHSA. This preventative work is well established, well understood and generally accepted and has helped to ensure safety and health at mines.

WHS entry permit holders' roles are not similarly proactive. Under the WHS Act 2011, a permit holder may enter a workplace for the purpose of inquiring into a suspected contravention of that Act, or enter to consult with and advise workers on health and safety matters.

The industry safety and health representatives under the CMSHA are required to have statutory certificates of competency i.e. competencies relevant to safety and health in the mining industry. District workers' representatives are required to have appropriate competencies and adequate experience to perform their functions.

Industry specific technical competencies are not required by part 7 of the WHS Act. Sections 131 and 133 specify that a person applying for a WHS permit must have completed prescribed training. The training is outlined in section 25 of the *Work Health and Safety Regulation 2011* and includes: right of entry requirements, issue resolution requirements, the duties framework of the WHS Act 2011 and its regulations, sections 17 and 18 of the WHS Act 2011 covering the management of risks and the relationship between the WHS Act 2011 and the FWA or any other relevant industrial laws. This training appears to cover more generic administrative, legal and industrial matters rather than knowledge or competency relating to the specific industry and work environment.

The 'right of entry' also exists under the FWA. However, right of entry under the WHS Act 2011 is more focussed on safety matters whereas under the FWA, it is a potentially broader right of entry.

Under the CMSHA and the MQSHA, industry safety and health representatives and district workers' representatives must not perform any functions or exercise any powers for purposes other than a safety and health purpose, otherwise they may be subject to prosecution for an offence. Under the WHS Act 2011, if WHS entry permit holders do not comply with the provisions pertaining to them civil penalties apply.

What would change if this measure is adopted?

Provisions would be added to each of the Resources Safety Acts based on Part 7 of the WHS Act 2011 which is titled "Workplace entry by WHS entry permit holders".

This would enable the potential involvement of a broader range of unions during resources industries operations. It may also have the effect of allowing people without industry specific technical knowledge on to resource industry sites, and broaden the current role of inspectors in dealing with disputes about right of entry and permit holders' activities.

Questions to consider regarding workplace entry by entry permit holders

11. Is union representation of workers adequate under the current framework in the CMSHA and MQSHA? Please provide reasons for your view.

12. If not, how could entry permit holders be integrated with the current approach to worker representation in the CMSHA and MQSHA?

13. Should worker representation provisions be included in the P&G Act and Explosives Act? Please provide reasons for your view.

14. If so, what is the most suitable model for these industries?

Next steps

Stakeholders are encouraged to comment on each of the measures, and in particular to respond to the questions posed in this discussion paper, to help inform the decision-making process.

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