Work Health and Safety Bill 2011

Explanatory Notes

Objectives of the Bill

The main purpose of this Bill is to provide for work health and safety legislation that will form part of a system of nationally consistent work health and safety laws. The Bill sets out legal duties and operating requirements that are to be applied on a nationally consistent basis to all parties responsible for work health and safety and will be supported in the future by nationally consistent regulations and codes of practice.

The purpose of the amendments to the *Workers' Compensation and Rehabilitation Act 2003* is to provide for a review of the workers' compensation scheme every five years, to strengthen insurance and data collection arrangements in the construction industry, and to ensure workers' entitlements to accrue leave while on workers' compensation.

Amendments applying specifically in the building and construction industry are designed to create whole-of-project relationships and will aim to improve safety, compliance and rehabilitation and influence cultural change in the industry.

Reasons for the Bill

Harmonised work health and safety laws

The harmonisation of work health and safety laws is one of the Council of Australian Governments (COAG) priorities under the *National Partnership Agreement to Deliver a Seamless National Economy.* The implementation of nationally harmonised laws will:

- ensure uniform, equitable and effective safety standards and protections for all Australian workers;
- address compliance and regulatory burdens for employers with operations in more than one jurisdiction;
- create efficiencies for governments in the provision of regulatory and support services for work health and safety; and

- contribute to reductions in the incidence of death, injury and disease in the workplace.

In July 2008, COAG signed the *Intergovernmental Agreement for Regulatory and Operational Reform in OHS* (IGA). The IGA outlined the commitment of the Commonwealth, state and territory governments to work together to develop and implement model work health and safety laws. The IGA also ensures the harmonised work health and safety laws remain consistent over time by requiring any future changes that affect the operation of the laws to be referred to the Workplace Relations Ministers Council (WRMC) for decision at the national level. If WRMC agrees to the proposed amendment, all jurisdictions must adopt the amendment in order to maintain national consistency.

The National Review into Model Occupational Health and Safety Laws was completed in January 2009 resulting in two comprehensive reports being submitted to WRMC. The reports made recommendations on the optimal structure and content of the national model WHS Act (model WHS Act) that could be adopted in all jurisdictions by December 2011.

On 18 May 2009, WRMC made decisions in relation to the recommendations of the National Occupational Health and Safety Review and requested that Safe Work Australia commence the development of the model legislation. An exposure draft of the model WHS Act was released for public comment in late September 2009.

In response to the exposure draft, Safe Work Australia received 480 submissions from individuals, unions, businesses, industry associations, governments, academics and community organisations. Safe Work Australia adopted a number of amendments proposed during the public comment period and submitted a revised version of the national model WHS Act to WRMC. WRMC endorsed the revised laws on 11 December 2009 and authorised Safe Work Australia and the Parliamentary Counsel's Committee to make any further technical and drafting amendments to the national model WHS Act to ensure its workability.

Under the *National Partnership Agreement to Deliver a Seamless National Economy* timeframe, the Commonwealth, state and territory governments have to enact the national model WHS Act and the national model WHS Regulations by end-December 2011. Development and implementation of further model codes of practice and guidance material will continue beyond December 2011.

Unlike most jurisdictions, Queensland has a number of industry specific safety laws including the *Dangerous Goods Safety Management Act 2001* (DGSM Act), the *Electrical Safety Act 2002* (ES Act), the *Coal Mining Safety and Health Act 1999* and *Mining and Quarrying Safety and Health Act 1999* that will be impacted by the harmonisation process. This Bill addresses harmonisation of matters covered by the DGSM Act and the ES Act. The ES Act has been amended to ensure consistency with the national model WHS Act. During the drafting process, analysis of the DGSM Act against provisions of the national model WHS Act and regulations confirmed that the model laws effectively cover existing requirements in the DGSM Act. As a result, the regulation of dangerous goods and major hazards facilities will be under the Bill and the DGSM Act is repealed. The regulation of general WHS matters, hazardous chemicals and major hazards facilities under a single WHS Act will align Queensland with other jurisdictions and will reduce confusion for employers and workers on the required standards to apply.

Workers' Compensation

In April 2010, the Queensland Government established a structural review of institutional and working arrangements in Queensland's workers' compensation scheme. As part of the independent reviewer's report, a recommendation was made that the *Workers' Compensation and Rehabilitation Act 2003* should be amended to provide for a review of the operation of the workers' compensation scheme at least once each five years after 2012.

Also in April 2010, the Government established a working group comprising building and construction industry employers and unions to investigate workers' compensation arrangements in the construction industry. Issues raised by the working group included concerns about premium compliance and rehabilitation and return to work outcomes.

Prior to the referral of State industrial relations powers to the Commonwealth on 1 January 2010, Queensland private sector employees were entitled to accrue sick leave and annual leave while absent on workers' compensation due to the combined effects of sections 10 and 11(5)(b) of the *Industrial Relations Act 1999* and section 108(3) of the *Workers' Compensation and Rehabilitation Act 2003*.

Queensland's private sector employees are now covered by the *Fair Work Act 2009* (Cth) in the federal industrial relations system, under section 130 of which employees who are absent from work and receiving workers'

compensation are not entitled to accrue or take any leave, unless a compensation law provides otherwise.

Other miscellaneous amendments

A technical amendment to the definition of asbestos is required to clarify that only asbestiform mineral silicates are considered to be asbestos. The current definition inadvertently captures non-asbestiform mineral silicates found in products such as imported decorative stone tiles, which do not have the particular characteristics that can cause asbestos related diseases.

The national model WHS Act does not contain provisions that impose a building and construction work fee as per the requirements under part 9 of the *Workplace Health and Safety Regulation 2008*. The building and construction work fee contributes to compliance and awareness activities including increasing the number of dedicated construction inspectors in Queensland. As a result the Bill provides for the transfer of the building and construction fee from the *Workplace Health and Safety Regulation 2008* to the *Building and Construction Industry (Portable Long Service Leave) Act 1991* to maintain this important component of the overall funding for Workplace Health and Safety Queensland activities.

How the policy objectives are to be achieved

The policy objectives of the Bill are to be achieved by:

- giving effect to the national model WHS Act to ensure that Queensland's work health and safety legislation embraces the harmonisation of work health and safety laws as endorsed by the Council of Australian Governments, and ensure that Queensland legislation is in line with other jurisdiction's legislation;
- repealing the *Workplace Health and Safety Act 1995*;
- ensuring the *Electrical Safety Act 2002* is consistent with the national model WHS Act;
- regulating dangerous goods and major hazards facilities under the Work Health and Safety Bill and repealing the *Dangerous Goods Safety Management Act 2001*;
- amending the *Workers' Compensation and Rehabilitation Act 2003* to:
  - implement a key structural review recommendation to mandate a review of the workers' compensation scheme every five years;

  - provide that a worker will accrue leave while off work on workers ' compensation; and
  - strengthen insurance and data collection arrangements in the construction industry.
- making a technical amendment to the definition of 'asbestos' to exclude 'non-asbestiform' products; and
- transferring the building and construction fee from the *Workplace Health and Safety Regulation 2008* to the *Building and Construction (Portable Long Service Leave) Act 1991* to maintain this revenue stream and support workplace health and safety compliance and awareness initiatives in this industry.

Estimated Cost for Implementation

Harmonised work health and safety laws

Business

The national *Decision Regulation Impact Statement for a Model Occupational Health and Safety Act* concludes that the costs and benefits of the national model WHS Act are not readily quantifiable. The main costs to business will be the learning of new work health and safety provisions. However, these costs are unlikely to be high given that the national model WHS Act retains the general duties of care which already existed under Queensland's legislation. Further, jurisdictional health and safety Acts are generally reviewed every five years and changes to subordinate regulation is considerably more frequent; therefore, these costs are unlikely to be greater than the costs of the regular and ongoing change process.

The evidence available suggests that the national model WHS Act is expected to reduce compliance costs for multi-jurisdictional businesses in the order of around $179 million per annum (Queensland share estimated at $31 million) due to a reduction in red tape from no longer dealing with several sets of WHS legislation. Multi-jurisdictional businesses will also face only one set of changes once the model legislation is implemented, rather than potentially several jurisdictionally-specific sets of change. Such benefits are ongoing as all future changes will be conducted on a single, nationally coordinated basis.

For single-jurisdictional employers who do not benefit from a reduction in cross-border red-tape reduction, the cost imposed is likely to be low or

neutral when compared to the normal costs associated with the regular process of legislative review and change.

Workers

The costs to workers are also likely to be low as the cost of training (beyond that required for the normal volume of changes) and of additional safety systems (if any) will be paid for by employers. However, in some labour hire or sub-contracting arrangements, self-employed persons may be workers, while also having responsibilities as persons conducting a business or undertaking. These persons may face slightly higher costs beyond that required for the normal volume of change if additional training is required.

In terms of benefits to workers, the national model WHS Act ensures that all types of workers (not only employees) are equally protected by the new laws. Nationally consistent work health and safety laws will also contribute to the ease with which workers can move between jurisdictions (particularly self employed contractors), by allowing the mutual recognition of licences across jurisdictional borders.

Government

For similar reasons, costs to government are also likely to be low. Jurisdictions are continually rolling out changes to work health and safety regulations, with commensurate education and advice costs. Queensland will not require funding above its normal budget allocation for the implementation arrangements associated with this Bill.

Benefits to government are likely to be more significant in the long term. This is due to the reduction of duplication as future legislative reviews and development of legislation and codes will be undertaken nationally.

The introduction of the national model WHS Act is also linked to the *National Partnership Agreement to Deliver A Seamless National Economy.* Under the agreement, Queensland will received facilitation payments of $41.01 million in 2011-2012 and $112.27 million in total over the period 2008-09 and 2012-13.

Workers' compensation

The amendments to the *Workers' Compensation and Rehabilitation Act 2003* are not anticipated to result in a cost to government. Amendments regarding leave accrual will not affect Queensland Government employees as they are not subject to the *Fair Work Act 2009* (Cth). The financial impact on private sector employers is minimal given that the amendment

restores the status quo prior to the commencement of the *Fair Work Act 2009*. Prior to commencement, annual leave and sick leave continued to accrue during a period of workers' compensation under both Commonwealth and State legislation.

Financial consideration of other miscellaneous amendments

The amendments in relation to the definition of 'asbestos' and the transfer of the building and construction work fee do not affect stakeholders and will not have a net financial impact.

The administration and enforcement of flammable and combustible liquid licenses is devolved to each local council. However, Workplace Health and Safety Queensland trains Environmental Health Officers to undertake this role in their local government area with approximately 4000 licences issued within Queensland. The repeal of the *Dangerous Goods Safety Management Act 2001* will impact on local governments who issue and collect fees for flammable and combustible licences. Based on the information received from local councils during the 'Regulatory Impact Statement for options to maintain an effective and efficient regulatory regime for major hazard facilities and large dangerous goods locations' in 2010, the proposal to abolish the flammable and combustible liquid licences will have an impact on revenue particularly for the larger councils and a minimal impact on employment.

Consistency with Fundamental Legislative Principles

The main purpose of this Bill is to provide for workplace health and safety legislation that will form part of a system of nationally consistent laws. Importantly, the Bill is intended to deliver a higher degree of regulatory harmonisation across Australian states and territories. The Scrutiny of Legislation Committee has in the past been wary of national scheme legislation, due to the restriction on Parliament to amend, refuse to pass or disallow the law. In drafting this Bill, the Office of the Queensland Parliamentary Counsel (OQPC) has kept the policy contained in the national model WHS Act and used various filters in adapting this model to Queensland's drafting practice. However, this approach has not entirely eliminated potential breaches of the fundamental legislative principles.

<u>Sufficient regard to the rights and liberties of individuals – general</u>

In general, the WHS Bill 2011 balances individual rights against the rights and liberties of persons (particularly workers) directly affected by deficiencies in safety standards.

Increased penalties

OQPC notes that maximum penalties for offences contained in the WHS Bill 2011 are substantially higher than penalties for comparative offences in the current WHS Act.

Response: The increased maximum penalties reflect a combination of factors, including recommendations from the national review of WHS legislation throughout Australia to strengthen the deterrent effect of the penalties, to extend the ability of the courts to impose more meaningful penalties where appropriate and to emphasise to the community the seriousness of the offences under this legislation. There has also been a need to take account of inflation over the last 15 years since the WHS Act was introduced in Queensland. The quantum of the penalties supports the policy objective of the COAG endorsed national harmonised work health and safety framework, which is to promote national uniformity in the application of work health and safety laws and ensure that they are observed.

As is the case with road safety provisions and traffic offences under the *Transport Operations (Road Use Management) Act 1995* (the Transport Operations Act), the penalties are proportionate and relevant to the seriousness of the conduct, as there is a risk to personal safety and potential loss of life arising from any breaches. For example, under the Transport Operations Act it is an offence for a person to drive while disqualified by a court order from holding or obtaining a driver licence (section 78 (1)). If the person is found guilty of driving while disqualified, the court must further disqualify the person from holding or obtaining a driver licence for a period of at least two years up to a maximum period of five years. The person may also be given a fine of up to $6,000 or imprisoned for up to 18 months.

Importantly, the penalties in the WHS Bill 2011 are a maximum only and the courts will retain their discretion to impose lesser penalties depending on the circumstances of the breach and mitigating factors.

Liability of officers

OQPC notes that the standard Queensland ‘defence’ for derivative liability offences, as well as providing for reasonable diligence, absolves the officer if the officer was not in a position to influence the conduct of the corporation in relation to the offence. Unlike section 167(4)(b) of the WHS Act, which contains this defence, the WHS Bill 2011 refers only to due diligence.

Response: The provision in the WHS Bill 2011 creates a positive duty that is seen to apply immediately (i.e. the officer must be proactive in taking steps to ensure compliance by the company), rather than accountability only applying after contravention by the corporation. This provision applies whether or not there has been an incident and irrespective of whether the company is prosecuted. The defence of not being in a position to influence the conduct of a corporation is now an element of the definition of an 'officer' of a corporation. The term 'officer' in the WHS Bill 2011 means an officer within the meaning of s9 of the *Corporations Act 2001* (Cth). The definition in the Corporations Act includes a person who has the capacity to significantly affect the corporation's financial standing. The substance of the defence in s167 of the WHS Act is contained in the definition of 'officer' in the WHS Bill 2011 and gives the same protection, albeit by a different route.

Institution of proceedings for offences

OQPC notes that clause 232 of the WHS Bill 2011 allows proceedings for an offence to be brought within two years after the offence first comes to the notice of the regulator, unlike the shorter timeframes contained in the current WHS Act. OQPC is concerned that extending the period of time for the institution of proceedings has the potential to significantly affect the rights and liberties of individuals.

Response: The two year limitation period provides an end date at a reasonable point for the liability to be prosecuted, given the seriousness of the conduct and consistent with fundamental legislative principles. For instance, a Category 1 offence under the WHS Bill 2011 is a criminal offence. Prosecutions for a Category 1 offence must be brought within two years of the alleged offence coming to the notice of the regulator; however this period of time may be extended if fresh evidence is obtained. An important factor in time limitations for actions following work-related injuries is the need for there to be sufficient time to gather evidence relating to varying and complex systems of work.

The limitation period in the WHS Bill 2011 is sufficiently long to allow the regulator to recognise and consider an alleged breach and furthers the public interest by providing a consequence for legally wrong conduct harmful to personal safety, while still protecting individuals from the threat of endless prosecution.

The agreed national compliance and enforcement policy assists in determining whether or not to prosecute. Three criteria common to all

jurisdictions in the Director of Public Prosecution guidelines need to be met. They are as follows:

- the existence of a prima facie case, that is, whether the evidence is sufficient to justify the institution of proceedings;
- a reasonable prospect of conviction, that is, an evaluation of the likely strength of the case when it is presented in court (taking into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter, the admissibility of any confession or other evidence, and any lines of defence available to the defendant).
- a public interest test which may include the following considerations:
  - the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature;
  - any mitigating or aggravating circumstances;
  - the characteristics of the duty holder – any special infirmities, prior compliance history and background;
  - the age of the alleged offence;
  - the degree of culpability of the alleged offender;
  - whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute;
  - the availability and efficacy of any alternatives to prosecution;
  - the prevalence of the alleged offence and the need for deterrence, both specific and general; and
  - whether the alleged offence is of considerable public concern.

Access to courts

Clause 230 states that proceedings may be brought only by the regulator or an inspector with the authorisation of the regulator. Clause 231 does allow a person who believes that an offence has been committed to make a request to the regulator to bring a prosecution. However, this does not constitute direct access to the courts and could be contrary to the common law presumption that the legislature does not intend to deprive the citizen of access to the courts.

Response: Consistent with the current WHS Act, while proceedings for an offence under the WHS Bill 2011 can only be brought by the regulator or

an inspector authorised by the regulator (clause 260), under clause 231 a person who believes that an offence has been committed but a prosecution has not been brought may request the regulator to bring a prosecution. Clause 231 allows for the review by the Director of Public Prosecutions of a regulator's decision not to prosecute a serious offence, that is, a Category 1 or Category 2 offence.

Under subclause 230(3) the regulator must publish general guidelines on the prosecution of offences and the acceptance of WHS undertakings. These guidelines must be published on the regulator's website. Arguably, these guidelines will make a difference and assist in alleviating concerns regarding the limitation on prosecutions.

Effect of the WHS Bill 2011 on the rights and duties of workers

Rights of prisoners

Clause 103 of the WHS Bill 2011 provides that Part 5, relating to consultation, representation and participation, does not apply to a worker who is a prisoner in custody. OQPC notes that to adequately protect the rights and liberties of prisoners it should be ensured that, if not the WHS Bill 2011, then corrective services legislation has adequate protections for working prisoners.

Response: In the prison environment, prisoners may seek internal reviews or confidentially refer matters of concern to prison management, the Director-General or the Minister. In addition, official visitors attend each centre on a regular basis to hear and make recommendations on complaints. Prisoners may also correspond confidentially with the Ombudsman. Part 6 (of Chapter 6) of the Queensland *Corrective Services Act 2006* provides that prisoners can have access to official visitors. This part enables a prisoner to bring any concerns they have about the safety of work activities to the attention of a person who is independent of the prison system and to have the matter investigated by the official visitor.

Rights and liberties of individuals – *Legislative Standards Act 1992* (Qld)

Review of administrative power

Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review. The legislation must also be consistent with the principles of natural justice. OQPC suggests

that to adequately protect the rights and liberties of individuals, a comparison should be conducted to ensure that all equivalent decisions identified in the current WHS Act 1995 remain reviewable under the WHS Bill 2011.

Response: Some jurisdictions provide for a limited review of decision making, and other jurisdictions provide more expansive review powers. The WHS Bill 2011 took the latter approach and lists reviewable decisions. A comparison of the review provisions in the WHS Bill 2011 and the WHS Act 1995 has shown the provisions to be broadly comparable.

There is provision for both internal and external review in a two-tier system under the WHS Bill 2011. Part 12, division 2 of the WHS Bill 2011 sets out the review process. Applicable review bodies in Queensland will be the Queensland Industrial Relations Commission (QIRC) and the Queensland Civil and Administrative Tribunal (QCAT). Clause 226 states that an internal reviewer can confirm or vary the reviewable decision, or set aside the reviewable decision and substitute another decision as appropriate. QCAT, the Queensland external review body, is empowered under section 24 of the *Queensland Civil and Administrative Tribunal Act 2009* to:

(a) confirm or amend a decision on review; or

(b) set aside the decision and substitute its own decision; or

(c) set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions QCAT considers appropriate.

Evidentiary burden on the accused to show a reasonable excuse

OQPC notes that in a number of provisions an evidentiary burden is placed on the accused to show a reasonable excuse. An evidential burden requires a person to provide evidence of an asserted fact in order to prove that fact to a court. In some instances, an evidential burden is placed on an individual to demonstrate a reasonable excuse as to why they have failed to meet a duty or obligation.

Response: In regard to those particular provisions, the reversal of the onus of proof is justified because only the accused is in a position to know whether or not they have a reasonable excuse. Because of this, without the reversal of the onus of proof, it would be difficult for the prosecution to prove the offence and the legislation could not otherwise be practically administered. However, the legal burden remains with the prosecutor. It is appropriate for the accused to provide evidence of any reasonable excuse,

as evidence of that reasonable excuse will not appear in the prosecution case.

Inspectors generally and entering premises

The WHS Bill 2011 gives WHS permit holders and inspectors power to enter premises without a warrant. However, OQPC notes that in each case, the WHS Bill 2011 provides for certain safeguards in relation to the exercise of the powers.

Response: The WHS Bill 2011 reflects a prevailing public interest to protect the community and the focus of inspectors' powers is to establish the cause of workplace incidents. Without these powers, evidence establishing the cause of workplace incidents may be lost.

The WHS Bill 2011 gives WHS permit holders and inspectors power to enter premises without a warrant, but there are safeguards in the WHS Bill 2011 for the exercise of the powers, as noted by OQPC. In relation to WHS permit holders, the power is only exercisable if: the permit holder reasonably suspects a contravention (clause 117(2)); the rights that the permit holder may exercise while at the workplace are clearly set out (clause 118); notice of entry must be given (clauses 119, 120, 122), the right may be exercised only during usual working hours (clause 126); and the right cannot be used to enter any part of a workplace that is used only for residential purposes (clause 129).

The entry powers of the inspectors are more extensive than those of the WHS permit holders, including, for example, powers to seize documents and property. However, the safeguards include provision for the return of seized things (clause 180) and the payment of compensation for damage caused (clause 184). Under clause 161, conditions can be placed on inspectors' powers. The inspectors' powers target workplace premises and are therefore appropriate to the object of the WHS Bill 2011 to protect the health and safety of workers.

OQPC also notes that in the case of the WHS permit holder (section 125), the person exercising the power of entry need only have his or her permit and photographic identification 'available for inspection on request'. OQPC prefers the rule applicable to inspectors, namely, that the permit should be produced or displayed, if practicable. However it should be noted the requirements under section 125 are consistent with current requirements for production of identification for persons performing union right of entry under the WHS Act 1995.

In terms of new requirements for notification on entry (as per the Scrutiny of Legislation Committee Legislation Alert No 1 of 2011), apart from the need to be consistent with the model provisions, the need to provide notice prior to entry would not be practicable or workable, for example, in a construction site there are numerous duty holders in one place (the head contractor, the owner, other contractors, each contractor could also have a separate health and safety representative). The inspector would need to enter to determine who the notice would need to be given to. Further in section 164(2) a safeguard is provided in the provision in that the inspector must notify as soon as possible after entry. Similar to police powers, an inspector does not need to notify if it would defeat the purpose of entry (in some cases there is a need to entry immediately to assess immediate/imminent dangers). This also furthers the public interest in ensuring health and safety of workers and others at the place.

While the WHS Bill does not specifically include that a person may only be appointed as an inspector if the person has satisfactorily finished approved training, all Queensland Work Health and Safety inspectors undergo extensive training before exercising their powers under the legislation. In addition, a national training program is being rolled out this year to all inspectors across the country on the new model legislation. Further, a new feature of the WHS Bill (section 162) requires the regulator to issue directions to inspectors to ensure that any adverse effect on privacy, confidentiality and security is minimised. This provision provides an important quality control measure.

Self-incrimination

Clause 172 provides for abrogation of the privilege against self-incrimination. It states that a person is not excused from answering a question or providing a document, record or information under Part 9 on the ground that the answer, document, etc. may tend to incriminate the person.

Response: The WHS Bill 2011 seeks both to ensure there are strong powers to compel the provision of information to secure work, health and safety, and also to protect the rights of persons under the criminal law. The focus of the provision is on determining the facts leading to the breach of workplace health and safety, rather than on subsequent prosecution. This is because identifying the cause of the breach enhances the public interest by preventing future injuries and loss of life caused by unsafe work practices.

Ensuring work health and safety is regarded as a sufficiently important objective to justify some limitation of the right to silence. Although subclause 172(1) provides for the abrogation of privilege against self-incrimination, subclause 172(2) states that the answer provided is not admissible as evidence against that person in civil or criminal proceedings, other than proceedings arising if the answer is misleading or false. It also provides 'derivative' use immunity in that it includes any other evidence directly or indirectly derived from the answer, information or document is not admissible. This means that the person is protected against the evidence being used against them in subsequent legal proceedings if they have answered truthfully, reflecting the focus of the provision. Under clause 173 the inspector must carry out the steps listed before requiring a person to answer the questions under Part 9, e.g.:

- identify himself or herself to the person as an inspector by producing the inspector's identity card or in some other way; and
- warn the person that failure to comply with the requirement or to answer the question, without reasonable excuse, would constitute an offence; and
- warn the person about the effect of section 172; and
- advise the person about the effect of section 269.

Immunity

OQPC states that the general rule is that all persons are equal before the law and that immunity should not be conferred. There may be justification for immunity if it is necessary for the administration of an Act, which may be the case here. However, in Queensland, it is standard to confer immunity only where the person acts without negligence. Also, the legislation should provide that civil liability attaches instead to the State. Neither clause 66 nor clause 270 mentions negligence. Civil liability attaches to the State as stated in clause 270.

Response: The conferring of personal immunity is necessary to ensure that inspectors are able to carry out their statutory functions. Inspectors may be required to exercise judgments, make decisions and exercise power with limited information and in urgent circumstances. As a result, it is important that they and others engaged in the administration of the legislation are not deterred from exercising their skill and judgment due to fear of personal legal liability. If inspectors could be sued for an incident occurring when they are acting in good faith, they may be reluctant to act

and thereby undermine a primary objective of the WHS Bill 2011 to protect the health and safety of workers. The interests of public safety dictate that inspectors be allowed to exercise these powers from an initial position of scrutiny, provided that the scrutiny is exercised in good faith. This is because of the need to acquire information to address the substantive issues behind any possible unsafe work conditions and practices. Workplace Health and Safety Queensland (WHSQ) notes that similar provisions are found in the disaster management legislation, for actions done 'in good faith and without reckless disregard'.

These provisions also serve the purpose of harmonising the conferral of immunity over several jurisdictions when inspectors are expected to work across jurisdictions.

Importantly, checks and balances on the exercise of inspectors' powers are also provided by inspectors being accountable for their acts and omissions under the *Public Service Act 2008* and the *Public Sector Ethics Act 1994.*

Institution of Parliament – general

Similarity of WHS Bill 2011 to Model WHS Act

The WHS Bill 2011 will implement the model WHS Act which was prepared under a COAG initiative and endorsed by the Workplace Relations Ministerial Council. The Scrutiny of Legislation Committee can be expected to draw to Parliament's attention the concern that Parliament may be required to, in effect, 'rubber stamp' the WHS Bill 2011 because the government has already given a commitment to enact it.

Response: The participation of the Queensland Government in the COAG harmonisation process is in pursuance of Queensland government policy and this is reflected in the development of legislation. OQPC has ensured that Queensland legislative drafting practices are incorporated into the WHS Bill 2011 and also that jurisdictional specific processes, such as review by QCAT, are incorporated.

Delegation of legislative power

Section 4(4)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the institution of Parliament depends on whether a bill allows the delegation of legislative power only in appropriate cases to appropriate persons. Clause 274 provides for the Minister to approve a code of practice for the purposes of the Act. An order approving the code of practice takes effect when notice of it is published in the gazette. OQPC notes that clause 274 does not limit the subject matter of a

code of practice in any way. Also, while the code of practice is available for inspection (clause 274(6)), nothing is said about taking copies, or the cost of those copies. In Queensland, it has also become common to state in legislation that a code of practice must be publicly available via a website.

Response: Codes of practice are not legislative instruments, but provide practical advice and evidence to which courts may refer. Moreover, tri-partite consultation will be required between State, Territory and Commonwealth governments, unions and employer organisations before approving, varying or revoking a code of practice [clause 274(2)]. Codes are not a substitute for expert testimony but are a tool to assess the level of compliance.

Regarding publication on the website and the making of copies, it is considered sufficient to state that the code of practice is to be made available (clause 274). WHSQ publishes codes of practice on its website and in addition, copies are available on request from WHSQ offices.

Amendment of Act only by Act

Section 4(4)(c) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the institution of Parliament depends on whether a bill authorises the amendment of an Act only by another Act. Clauses 36 and 37 provide that the scope of what constitutes a 'serious injury/illness' and 'dangerous incident' can be further extended in the regulations. OQPC believes this would draw comment from the Scrutiny of Legislation Committee. However, OQPC also notes that the Scrutiny of Legislation Committee accepts that definitions may be extended by regulation if there is good policy justification for doing so. Further information would be required to determine whether this is the case.

Response: The WHS Bill 2011 allows certain definitions to be further extended by subordinate legislation, given the breadth of the injuries or illnesses and dangerous incidents possible, for example. This extension is not intended to amend the provisions in question - they would still be read in the same way. Any extension of the definitions is limited to the objects of the WHS Bill 2011. Complex national legislative schemes, such as this one, need to be facilitated by strong regulation making powers.

Consultation

Harmonised work health and safety laws

Representatives of employer associations and trade unions consulted acknowledge the WHS Bill is consistent with the national model WHS Act, as agreed by Workplace Relations Ministerial Council.

At the National level, the development of the national model WHS Act, regulations and codes of practice has been progressed by the Strategic Issues Group - Occupational Health and Safety (SIG-OHS) of Safe Work Australia. This group is composed of representatives of all nine jurisdictions, the Australian Industry Group (AiG), the Australian Chamber of Commerce and Industry (ACCI) and the Australian Council of Trade Unions (ACTU).

At the State level, there has been ongoing consultation on the national model WHS Act, regulations and codes of practice with representatives of the Queensland Council of Unions (QCU); Australian Workers Union (AWU); Construction, Forestry, Mining and Energy Union (Construction Division); Electrical Trades Union (ETU); Builders Labourers Federation (BLF); Australian Industry Group (AIG); Master Builders Queensland (MBQ); Housing Industry Association (HIA); Construction Contractors Federation (CCF); Chamber of Commerce and Industry Queensland (CCIQ); Queensland Resources Council (QRC); Queensland Trucking Association (QTA); the Electrical Safety and Workplace Health and Safety Boards; the Workplace Health and Safety Industry Sector Standing Committees (construction, manufacturing, transport and storage, retail and hospitality, and rural); and the Commissioner for Electrical Safety. The Plastics and Chemicals Industries Association (PACIA) was consulted on the repeal of the DGSM Act. The Commissioner for Electrical Safety, the Electrical Contractors Association and the Electrical Trades Union (ETU) support the retention of the ES Act with necessary amendments.

Workers' compensation

The following organisations were consulted regarding the proposed amendments to the *Workers' Compensation and Rehabilitation Act 2003* – Queensland Council of Unions, Australian Workers Union, Chamber of Commerce and Industry Queensland Australian Industry Group, Master Builders, Housing Industry Association, Civil Contractors Federation, Construction, Forestry, Mining and Energy Union, Builders Labourers Federation, Association of Self Insured Employers of Queensland, Queensland Law Society and Australian Lawyers Alliance.

Consultation on other miscellaneous amendments

The Queensland Asbestos Related Disease Support Society was consulted on the amendment dealing with asbestos.

Notes on Provisions

Part 1 Preliminary

Clause 1 sets out the short title of the Bill to be the *Work Health and Safety Act 2011* (the Act).

Clause 2 states that the Bill commences on a day to be fixed by proclamation, other than certain parts outlined which commence on Assent.

Clause 3 sets out the main object of the Bill, which is to provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by the means set out in the clause.

Subclause 3(2) extends the object of risk management set out in subclause 3(1)(a) by applying the overriding principle that workers and other persons should, so far as is reasonably practicable, be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work and from specified types of substances and plant.

Clause 3 also notes that the numbering of this Act corresponds closely to the numbering in the national model WHS Act. To maximise the uniformity of section numbering, this Act does not use the section numbers of any model WHS Act provisions that are not relevant for Queensland. Furthermore, alphanumeric numbering is used to insert any further provisions that are particular to Queensland.

Clause 4 states that the dictionary in Schedule 4 defines the terms used in this Bill.

Clause 5 provides that the principal duty holder under the Bill is a 'person conducting a business or undertaking' (PCBU). A person may be a PCBU whether:

- the person conducts a business or undertaking alone or with others (e.g. as a partner in a partnership or joint venture) (subclause 5(1)(a)), and
- the business or undertaking is conducted for profit or gain or not (subclause 5(1)(b)).

The term 'person' is not defined but will take its meaning from Acts interpretation laws. It will cover persons including individuals and bodies corporate. To ensure consistency, clause 5(2) makes it clear that the term covers partnerships and unincorporated associations.

Clause 5(3) clarifies that PCBU duties and obligations under the Act fall on each partner of a partnership. This means they could be prosecuted in their capacity as a PCBU and the relevant penalty for individuals would apply.

Who is a PCBU?

The phrase 'business or undertaking' is intended to be read broadly and covers businesses or undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the State, Commonwealth and another State.

Running a household

The Bill will cover householders where there is an employment relationship between the householder and a worker. However, the following kinds of persons are not intended to be PCBUs:

- individuals who carry out domestic work in and around their own home (e.g. domestic chores etc)
- individual householders who engage persons other than employees for home maintenance and repairs in that capacity (e.g. tradespersons to undertake repairs), and
- individual householders who organise one-off events such as dinner parties, garage sales, lemonade stalls etc.

PCBU duties do not apply to workers or 'officers'

Subclause 5(4) clarifies that a worker or officer is not, solely in that capacity, a PCBU for the purposes of the Bill.

PCBU duties do not apply to elected members of local authorities

Subclause 5(5) provides that an elected member of a local authority is not a PCBU in that capacity for the purposes of the Bill.

Exclusions

Subclause 5(6) allows a regulation to exclude prescribed persons from application of the Bill, or part of the Bill.

The duties and obligations under the Bill are placed on 'persons conducting a business or undertaking'. This is a relatively new concept to work health and safety and is currently only used in two jurisdictions in Australia. An exemption contemplated by subclause 5(6) may be required to remove unintended consequences associated with the new concept and to ensure that the scope of the Bill does not inappropriately extend beyond work health and safety matters. For example, regulations could be made to exempt:

- prescribed agents from supplier duties under the Bill (the duties would instead fall to the principal), and
- prescribed 'strata title' bodies corporate from PCBU duties under the Bill.

'Volunteer associations' not covered by Bill

Subclause 5(7) excludes 'volunteer associations' from PCBU duties and obligations under the Bill. Volunteer associations are only excluded if they have one or more community purposes and they do not have any employees (e.g. employed by one or more of the volunteers) carrying out work for the association (subclause 5(8)). Hiring a contractor (e.g. to audit accounts, drive a bus on a day trip etc) would not, however, jeopardise exempt status under this provision.

Volunteer associations with one or more employees owe duties and obligations under the Bill to those employees and to any volunteers who carry out work for the association.

The term 'community purposes' is not defined in the Bill but is intended to cover purposes including:

- philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity, and
- sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations.

Clause 6 defines the term 'supply' broadly to cover both direct and indirect forms of supply, such as the sale, re-sale, transfer, lease or hire of goods in a company that owns the relevant goods. A 'supply' is defined to occur on the passing of possession of a thing from either a principal or agent to the person being supplied.

The term 'possession' is not defined but should be read broadly to cover situations where a person has any degree of control over supply of the thing. A supply of goods does not include:

- sale of goods by an agent who never takes physical custody or control of the thing (see below)—the principal is the supplier in those circumstances
- the return of goods to their owner at the end of a lease or other agreement (subclause 6(3)(a)), and
- any other kind of supply excluded by the regulations (subclause 6(3)(b)).

Supply involving a 'financier'

Subclause 6(4) excludes passive financing arrangements from the definition of 'supply'. This means that the supplier's duty under the Bill would not apply to a financier who, in the course of their business as a financier, acquires ownership or some other kind of right in goods for or on behalf of a customer. Action *not* taken on behalf of the customer would however attract the duty (e.g. on selling the specified goods at the conclusion of a financing arrangement). If the exemption applies subclause 6(5) provides that the supplier's duty instead applies to the person (other than the financier) who had possession of the goods immediately before the financier's customer.

Clause 7 provides a broad definition of 'worker' instead of 'employee' to recognise the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers. The term 'worker' applies to a person who carries out work in any capacity for a PCBU, including work in any of the capacities listed in the provision. The examples of workers in the provision are illustrative only and are not intended to be exhaustive. That means that there will be other kinds of workers covered under the Bill that are not specifically listed in this clause (e.g. students on clinical placement and bailee taxi drivers).

The term 'work' is not defined in the Bill but is intended to include work, for example, that is carried out:

- under a contract of employment, contract of apprenticeship or contract for services
- in a leadership role in a religious institution, as part of the duties of a religious vocation or in any other capacity for the purposes of a religious institution
- as an officer of a body corporate, member of the committee of management of an unincorporated body or association or member of a partnership, and
- as practical training as part of a course of education or vocational training.

Subclause 7(2) is included for the avoidance of doubt only. This subclause clarifies that a police officer is a 'worker' for purposes of the Bill, while on duty or lawfully performing duties as a police officer. It would not cover periods while the police officer was not on active duty.

Subclause 7(3) clarifies that a self-employed person may simultaneously be both a PCBU and a worker for purposes of the Bill.

Clause 8 defines 'workplace' broadly to mean a place where work is carried out for a business or undertaking. It includes any place where a worker goes, or is likely to be, while at work (e.g. areas like corridors, lifts, lunchrooms and bathrooms). This definition is a key definition that in many ways defines the scope of rights, duties and obligations under the Bill. For example, the term 'workplace' is used in the primary duty under the Bill and extensively throughout the Bill. Parts 9 and 10 of the Bill give extensive powers to WHS inspectors to conduct inspections, to require production of documents and answers to questions (clause 171), to seize certain things at workplaces for examination and testing or as evidence (clause 175) and to direct that a workplace not be disturbed (clause 198).

Subclause 8(2) is an avoidance of doubt provision that clarifies that a 'place' should be read broadly to include things like vehicles, ships, off-shore units and platforms. Subclause 8(2)(b) clarifies that a place includes any waters and any installation on land, on the bed of any waters or floating on any waters.

No requirement for an immediate temporal connection

A 'workplace' is a place where work is performed from time to time and is treated as such under the Bill even if there is no work being carried out at the place at a particular time. In other words, there is no requirement for an immediate temporal connection between the place or premises and the

work to be performed: see *Telstra Corporation Ltd v Smith* [2009] FCAFC 103. That is because the main object of the Bill is to secure the health and safety of workers at work as well as others who are in the vicinity of a workplace. A place does not cease being a workplace simply because there is no work being carried out at a particular time. This means for example that a shearing shed used for shearing only during the few weeks of the shearing season does not cease to be a workplace outside of the shearing season and a department store does not cease to be a workplace when it is closed overnight.

Clause 9 is an unused section number. Clause 9 in the national model WHS Act was in relation to examples and notes in the Bill. In Queensland, this matter is addressed in the *Acts Interpretation Act 1954*.

Clause 10 provides for all persons to be bound by the Bill. It clarifies that this state, the Commonwealth and the other states are all liable for an offence against the Bill.

Clause 11 is an unused section number. Clause 11 in the national model WHS Act was in relation to extraterritorial application. In Queensland this matter is addressed by a number of Acts, including the *Acts Interpretation Act 1954* and the *Crimes at Sea Act 2001*.

Clause 12 provides for the application of the Act to dangerous goods and high risk plant and matters dealt with under other legislation. This provision extends the application of the Bill by providing that:

- the term 'carrying out work' refers to the operation and use of high risk plant affecting public safety as well as the storage and handling of dangerous goods;
- the term 'workplace' refers to places where high risk plant affecting public safety is situated or used as well as where dangerous goods are stored and handled, and
- for the purposes of storage and handling of dangerous goods or the operation or use of high risk plant affecting public safety, the term 'work health and safety' includes a reference to public health and safety.

This means for example the continued regulation of high risk plant such as cooling towers, air conditioners or lifts installed in large residential apartment buildings. The details of these matters are found in Schedule 1.

Part 2 Health and Safety Duties

Clause 13, Clause 14, Clause 15, Clause 16 provide that the duties under the Act are non-transferable. A person can have more than one duty and more than one person can concurrently have the same duty.

Subclause 16(2) provides that each duty holder must comply with that duty to the required standard even if another duty holder has the same duty. If duties are held concurrently, then each person retains responsibility for their duty in relation to the matter and must discharge the duty to the extent to which the person has capacity to influence or control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity (subclause 16(3)).

In formulating these principles, the Act makes it clear that:

- a person with concurrently held duties retains responsibility for the duty and must ensure that the duty of care is met,
- the capacity to control applies to both 'actual' or 'practical' control
- the capacity to influence, connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances
- where a duty holder has a very limited capacity, that factor will assist in determining what is 'reasonably practicable' for them in complying with their duty of care.

The provisions of the Act do *not* permit, directly or indirectly, any duty holders to avoid their health and safety responsibilities. Proper and effective coordination of activities between duty holders can overcome concerns about duplication of effort or no effort being made.

Clause 17 specifies that a duty holder can ensure health and safety by managing risks, which involves:

- eliminating the risks, so far as is reasonably practicable, and
- if not reasonably practicable—to minimise the risks, so far as is reasonably practicable.

Clause 18 provides for the standard of 'reasonably practicable'. This standard has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions. This qualifier

is well known and has been consistently defined and interpreted by the courts.

'Reasonably practicable' represents what can reasonably be done in the circumstances and this clause provides meaning and guidance about what is 'reasonably practicable' when complying with duties to ensure health and safety under the Act, regulations and codes of practice. To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, a person must take into account and weigh up all relevant matters, including:

- the likelihood of the relevant hazard or risk occurring
- the degree of harm that might result
- what the person knows or ought reasonably to know about the hazard or risk and the ways of eliminating or minimising the risk, and
- the availability and suitability of ways to eliminate or minimise the risk.

After taking into account these matters, only then can the person consider the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

Clause 19 sets out the primary work health and safety duty which applies to PCBUs. The PCBU has a duty to ensure, so far as is reasonably practicable, the health and safety of workers that are:

- directly engaged to carry out work for their business or undertaking
- placed with another person to carry out work for that person, or
- influenced or directed in carrying out their work activities by the person,

while the workers are at work in the business or undertaking.

The changing nature of work organisation and relationships means that many who perform work activities do so under the effective direction or influence of someone other than a person employing them under an employment contract. The person carrying out the work:

- may not be in an employment relationship with any person (e.g. share farming or share fishing or as a contractor working under a contract for services), or

- may work under the direction and requirements of a person other than their employer (as may be found in some transport arrangements with the requirements of the consignor).

For these reasons, the Bill provides a broader scope for the primary duty of care, to require those who control or influence the way work is done to protect the health and safety of those carrying out the work.

Duties of care are imposed on duty holders because they influence one or more of the elements in the performance of work and in doing so may affect the health and safety of themselves or others. Duties of care require duty holders—in the capacity of their role and by their conduct—to ensure, so far as is reasonably practicable, the health and safety of any workers that they have the capacity to influence or direct in carrying out work.

Primary duty of care not limited to physical 'workplaces'

The primary duty of care is tied to the work activities wherever they occur and is not limited to the confines of a physical workplace.

Duty extends to 'others'

Subclause 19(2) extends whom the primary duty of care is owed to beyond the PCBU's workers to cover all other persons affected by the carrying out of work. It requires PCBUs to ensure, so far as is reasonably practicable, that the health and safety of all persons is not put at risk from work carried out as part of the business or undertaking.

This wording is different to that used in subclause 19(1). Unlike the duty owed to workers in subclause 19(1), the duty owed to others is not expressed as a positive duty, as it only requires that persons other than workers 'not [be] put at risk'. However, the general aim of both subclauses 19(1) and (2) is preventative and both require the primary duty of care to be discharged by managing risks (see clause 17).

Specific elements of the primary duty

Subclause 19(3) outlines the key things a person must do in order to satisfy the primary duty of care. The list does not limit the scope of the duties in subclauses 19(1) and (2). PCBUs must comply with the primary duty by ensuring, so far as is reasonably practicable, the provision of the specific matters listed in the subclause, or that the relevant steps are taken. This means that compliance activities can be undertaken by someone else, but the PCBU must actively verify that the necessary steps have been taken to meet the duty.

Where there are multiple duty holders in respect of the same activities, a PCBU may comply with the duty of care by ensuring that the relevant matters are attended to. For example, a PCBU may not have to provide welfare facilities themselves if another PCBU is doing so. However, the PCBU must ensure that the facilities are available, accessible and adequate.

Duty in relation to PCBU-provided accommodation

Subclause 19(4) requires workers' accommodation provided by a PCBU to be maintained, so far as is reasonably practicable, so that the worker occupying the premises is not exposed to risks to health and safety. This duty only applies in relation to accommodation that is owned by or under the management or control of the PCBU, in circumstances where the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available.

Self-employed persons

Subclause 19(5) deals with the situation where a self-employed person is simultaneously both a PCBU and a worker. In that case, the self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work. The duties owed to others at the workplace would also apply (see subclause 19(2)).

Clause 20 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves, in whole or in part, the management or control of a workplace.

'Workplace' is defined in clause 8. The duty requires the person with management or control of a workplace to ensure, so far as is reasonably practicable, that the workplace and the means of entering and leaving the workplace are without risks to the health and safety of any person.

Clause 20(1)(a) excludes the application of the duty to an occupier of a residence if that residence is not occupied for the purpose of the conduct of the business or undertaking. The exclusion does not apply if the residence is partially used to conduct the business or undertaking.

The duties of a person who owns and controls a workplace and the duties of a person who occupies and manages that workplace differ. For example, the owner of an office building has a duty as a person who controls the operations of the building, to ensure it is without risks to the health and safety of any person. The owner is required to ensure people can enter and exit the building and that anything arising from the workplace is without risk to others. Concurrently, a tenant who manages an office premises in

the building has a duty to ensure people can enter and exit those parts of the premises. For example, this could include entry into facilities for workers. A tenant also has the duty to ensure that anything arising in that office is without risks to the health and safety of any person. For example, this could include ensuring the safe maintenance of kitchen appliances.

Clause 21 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves the management or control of fixtures, fittings or plant at a workplace. 'Plant' is defined in clause 4 and 'workplace' is defined in clause 8. The duty requires the person with management or control of fixtures, fittings or plant at a workplace to ensure, so far as is reasonably practicable, that those things are without risks to health and safety of any person.

For example, a person who manages or controls workplace fixtures, fittings or plant has a duty to ensure, so far as reasonably practicable, that torn carpets are repaired or replaced in that workplace to eliminate or if that is not reasonably practicable, minimise the risk of tripping or falling.

Clause 21(1)(a) excludes the application of the duty to an occupier of a residence if that residence is not occupied for the purpose of conducting a business or undertaking. The exclusion does not apply if the residence is partially used to conduct the business or undertaking.

Clause 22 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves designing plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures this duty also applies if these things are used or to be used as a workplace.

Designers, manufacturers, installers, constructors, importers and suppliers of plant, structures or substances can influence the safety of these products before they are used in the workplace. These people are known as 'upstream' duty holders. Upstream duty holders are required to ensure, so far as is reasonably practicable, that products are made without risks to the health and safety of the people who use them 'downstream' in the product lifecycle. In the early phases of the lifecycle of the product, there may be greater scope to remove foreseeable hazards and incorporate risk control measures.

For example, the designer of call centre workstations must ensure, so far as reasonably practicable, that the workstations are designed without risks to

the health and safety of the persons who use, construct, manufacture, install, assemble, demolish or dispose of the workstations. This would include designing workstations to be adjustable and supportive of ergonomic needs.

Designers of structures have a duty to ensure, as far as is reasonably practicable, that the design does not create health and safety risks for those who construct the structure, as well as those who will later work with it.

The duty is for the designer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in clauses (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in clause (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.

Subclauses 22(3)–(5) outline further matters that a designer must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 22(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in subclauses (2)(a)–(f). The type of information that must be provided is limited by subclause 22(4).

The duty to provide current relevant information is based on what the designer knows, or ought reasonably to know, at the time of the request in relation to their original design. If another person modifies or changes the original design of the plant or structure, this person then has the responsibility of providing information in relation to the redesign or modification, not the original designer.

Clause 23 sets out the duties for a PCBU who manufactures plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or are to be used as a workplace.

The duty is for the manufacturer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in subclauses (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in subclause (2)(e), such as assembly, storage, decommissioning, dismantling, demolition or disposal.

For example, a manufacturer of a commercial cleaning substance must ensure, so far as reasonably practicable, that the substance is without risks to the health and safety of the persons who handle, store and use the substance at a workplace. This may involve ensuring the substance is packaged to reduce the risk of spills and that the container is correctly labelled with appropriate warnings and a Safety Data Sheet is prepared for safe use.

Subclauses 23(3)–(5) outline further matters that a manufacturer must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 23(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in clauses (2)(a)–(f). The type of information that must be provided is limited by subclause 23(4).

Clause 24 sets out the duties for a PCBU who imports plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or to be used as a workplace.

The duty is for the importer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in subclause (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as in carrying out other reasonably foreseeable activities related to the intended purpose listed in subclause (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.

For example, a person who imports machinery must ensure, so far as reasonably practicable, that the imported product is without risks to the health and safety of the persons who assemble, use, maintain, decommission or dispose the machinery at a workplace. This would involve ensuring the machinery is designed and manufactured to meet relevant safety standards.

Subclauses 24(3)–(5) outline further matters that a importer must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 24(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in clauses (2)(a)–(f). The type of information that must be provided is limited by subclause 24(4).

Clause 25 sets out the duties for a PCBU which supplies plant, substances or structures that are to be used or could reasonably be expected to be used

at a workplace. In the case of plant or structures these duties also apply if these things are used or to be used as a workplace.

The duty is for the supplier to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in clauses (2)(a)–(f).The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in clause (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.

Subclauses 25(3)–(5) outline further matters that a supplier must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 25(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in clauses (2)(a)–(f). The type of information that must be provided is limited by subclause 25(4).

For example, a person who supplies chemicals to a workplace must ensure that the chemicals are properly labelled and packaged and that current Safety Data Sheets are provided at the time of supply.

Clause 26 sets out the duty of a PCBU who installs, constructs or commissions plant or substances.

The duty on that person is to ensure, so far as reasonably practicable, that the plant or structure is installed, constructed or commissioned in a way that does not pose a risk to the health and safety of persons listed in clauses (2)(a)–(d).

For example, a person who installs neon business signs must ensure, so far as reasonably practicable, that they are installed without risks to the health and safety of themselves as well as people who will use, decommission, dismantle and work within the vicinity of the sign. This would involve ensuring the equipment is correctly installed, connected and grounded.

Clause 27 casts a positive duty on officers (as defined in the dictionary) of a PCBU to exercise 'due diligence' to ensure that the PCBU complies with any duty or obligation under the Act.

Subclause 27(2) applies if officers fail to exercise due diligence to ensure that the PCBU complies with its health and safety duties under Part 2. Maximum penalties for these offences by officers are specified in clauses 31–33.

Subclause 27(3) sets the maximum penalties if an officer fails to exercise due diligence to ensure the PCBU complies with other duties and obligations under the Bill. In that case, the maximum penalty is the penalty that would apply to individuals for failing to comply with the relevant duty or obligation.

Subclause 27(4) clarifies that an officer may be convicted or found guilty whether or not the PCBU was convicted or found guilty of an offence under the Bill.

These provisions reflect a deliberate policy shift away from applying 'accessorial' or 'attributed' liability to officers, which is an approach currently adopted by several jurisdictions to a positive duty. The positive duty requires officers to be proactive and means that officers owe a continuous duty to ensure compliance with duties and obligations under the Bill. There is no need to tie an officer's failure to any failure or breach of the relevant PCBU for the officer to be prosecuted under this clause.

Importantly, this change helps to clarify the steps that an officer must take to comply with the duty under this clause. Subclause 27(5) contains a non-exhaustive list of steps an officer must take to discharge their duties under this provision, including acquiring and keeping up-to-date knowledge of work health and safety matters and ensuring the PCBU has, and implements, processes for complying with any duty or obligation the PCBU has under the Bill.

An officer must have high, yet attainable, standards of due diligence. These standards should relate to the position and influence of the officer within the PCBU. What is required of an officer should be directly related to the influential nature of their position. This is because the officer governs the PCBU and makes decisions for management. A high standard requires persistent examination and care, to ensure that the resources and systems of the PCBU are adequate to comply with the duty of care required by the PCBU. This also requires ensuring that they are performing effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

Clause 28 sets out the health and safety duties of workers. Workers have a duty to take reasonable care for their own health and safety while at work and also to take reasonable care so that their acts or omissions do not adversely affect the health and safety of other persons at the workplace.

The duty of care, being subject to a consideration of what is reasonable, is necessarily proportionate to the control a worker is able to exercise over his or her work activities and work environment.

Clause 28(c) makes it clear that workers must comply so far as they are able with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Act and regulations.

Clause 28(d) provides that workers must also cooperate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers. Whether an instruction, policy or procedure is 'reasonable' will be a question of fact in each case. It will depend on all relevant factors, including whether the instruction, policy or procedure is lawful, whether it complies with the Act and regulations, whether it is clear and whether affected workers are able to co-operate.

Clause 29 sets out the health and safety duties applicable to all persons while at a workplace, whether or not those persons have another duty under Part 2 of the Act. This includes customers and visitors to a workplace. Similar to the duties of workers, all other persons at a workplace must take reasonable care for their own safety at the workplace and take reasonable care that their acts or omissions do not adversely affect the health and safety of others at the workplace. Other persons at a workplace must also comply, so far as they are reasonably able to, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Bill.

Clause 30 sets out the meaning of a health and safety duty. Contraventions of the Act and regulations are generally criminal offences, although a civil penalty regime applies in relation to right of entry under Part 7. This generally reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable to a criminal sanction for placing another person's health and safety at risk. Such an approach is also in line with international practice.

Penalties and the possibility of imprisonment in the most serious cases are a key part of achieving and maintaining a credible level of deterrence to complement other types of enforcement action, for example, the issuing of inspector notices. The maximum penalties set in the Bill reflect the level of seriousness of the offences and have been set at levels high enough to cover the most egregious examples of offence. Given the increase in maximum

penalties, the Department of Justice and Attorney-General will be seeking the courts to award higher penalties for offences under the Bill.

Clause 31 sets out category 1 offences which are offences involving recklessness. The highest penalties under the Bill apply, including imprisonment for up to five years.

Category 1 offences involve reckless conduct (i.e. relates to a pattern of conduct/behaviour overtime which could include an omission) that exposes an individual to a risk of death or serious injury or serious illness without reasonable excuse. The prosecution will be required to prove the fault element of recklessness in addition to proving the physical elements of the offence.

Sub-clause (3) makes the category 1 offence a crime under the *Criminal Code Act 1899*.

Clauses 32 and 33 set out category 2 and 3 offences. These offences involve less culpability than Category 1 offences as there is no fault element. In each offence a person is required to comply with a health and safety duty. This is the first element of the offence.

The second element of the offence is that the person commits an offence if the person fails to comply with the health and safety duty. Category 2 offences have a third element which provides that a person would only commit an offence if the failure to comply with the work health and safety duty exposed an individual to a risk of death or serious injury or serious illness. Offences without this third element would be prosecuted as Category 3 offences.

Burden of proof

The burden of proof (beyond reasonable doubt) rests entirely upon the prosecution in matters relating to non-compliance with duties imposed by the Act. This includes whether the defendant failed to do what was reasonably practicable to protect the health and safety of the persons to whom the duty was owed. This reflects the generally accepted principle that in a criminal prosecution, the onus of proof to the standard of beyond reasonable doubt normally rests on the prosecution.

Clause 33A provides that the duties set out in sections 32 and 33 of this Act prevail over the excuses provided by sections 23 (intention - motive) and 24 (mistake of fact) provided by the *Criminal Code Act 1899*.

Clause 34 Subclause 34(1) creates an exception for volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and

safety duty, other than as a worker or 'other' person at the workplace (see clauses 28 and 29).

Subclause 34(2) creates an exception for unincorporated associations. Although unincorporated associations may be PCBUs for the purposes of the Bill, their failure to comply with a duty or obligation under the Bill does not constitute an offence and cannot attract a civil penalty. Instead, subclause 34(3) makes it clear that liability may rest with either an officer of the unincorporated association (other than a volunteer) under clause 27 (subject to the exception above), or a member of the association under clause 28 or 29.

Part 3 Incident Notification

All Australian work health and safety laws currently require all workplace deaths and certain workplace incidents, injuries and illnesses to be reported to a relevant authority. Most laws also require workplace incident sites to be preserved by the relevant person. The primary purpose of incident notification is to enable the regulator to investigate serious incidents and potential work health and safety contraventions in a timely manner. The duty to report incidents in clause 38 is linked to the duty to preserve an incident site until an inspector arrives or otherwise directs so that evidence is not compromised.

Clause 35 defines the kinds of workplace incidents that must be notified to the regulator and that also require the incident site to be preserved. A 'notifiable incident' is an incident involving the death of a person, 'serious injury or illness' of a person or a 'dangerous incident'.

Clause 36 defines a 'serious injury or illness' as an injury or illness requiring a person to have treatment of a kind specified in subclauses (a)–(d), including: immediate treatment as an in-patient in a hospital; immediate treatment for a serious injury of a kind listed in subclause (b); or medical treatment within 48 hours of exposure to a substance at a workplace. The regulations may prescribe additional injuries or illnesses for this purpose, and may also prescribe exceptions to the list in this clause.

Clause 37 defines a 'dangerous incident' in relation to a workplace as one that exposes a person to serious risk to their health or safety arising from an immediate or imminent exposure to the matters listed in subclauses

37(a)–(l). These matters include an uncontrolled escape, spillage or leakage of a substance, an uncontrolled implosion, explosion or fire and an uncontrolled escape of gas or steam. Clause 37 enables regulations to be made that add events to this list and exclude incidents from being dangerous incidents.

Clause 38 specifies who must notify the regulator of a notifiable incident and when and how this must be done. Subclause 38(1) requires the PCBU to ensure that the regulator is notified immediately after becoming aware that a 'notifiable incident' arising out of the conduct of the business or undertaking has occurred. The requirement for 'immediate' notification would not however prevent a person from assisting an injured person or taking steps that were essential to making the site safe or from minimising the risk of a further notifiable incident (see subclause 39(3)). Failure to notify is an offence.

Subclause 38(2) requires the notice to be given by the fastest possible means. Subclause 38(3) requires the notice to be given by telephone or in writing. A legislative note advises that written notice can be given by facsimile, email and other electronic means. Notification by telephone must include details requested by the regulator and may require the person to notify the regulator in writing within 48 hours (subclause 38(4)). If the person notifying the regulator is not required to provide a written notice, the regulator must give the relevant PCBU details of the information received or an acknowledgement of receiving the notice (subclause 38(6)). Written notice must be in a form, or contain the details, approved by the regulator (subclause 38(5)). Subclause 38(7) requires the PCBU to keep a record of each notifiable incident for five years from the date that notice is given to the regulator. Failure to do so is an offence.

Clause 39 sets out the duty to preserve incident sites. Subclause 39(1) requires the person with management or control of a workplace where a notifiable incident has occurred to take reasonable steps to ensure that the incident site is preserved until an inspector arrives or until such earlier time as directed by an inspector. Failure to do so is an offence.

Subclause 39(2) clarifies that this requirement may include preserving any plant, substance, structure or thing associated with the incident. Subclause 39(3) sets out the kinds of things that can still be done to ensure work health and safety at the site, including assisting an injured person or securing the site to make it safe. Subclause 39(3)(e) clarifies this does not prevent any action for which an inspector or the regulator has given permission.

Part 4 Authorisations

This Part establishes the offences framework for authorisations that will be required under the model WHS Regulations (e.g. licences for high-risk work). Authorisations such as licences, permits and registrations are a regulatory tool to control activities that are of such high risk as to require demonstrated competency or a specific standard of safety. Authorisation systems place costs on duty holders as well as on regulators and so the level of authorisation is intended to be proportionate to the risk, with a defined and achievable safety benefit. Because authorisations are issued to control high risk activities, it is the Bill rather than the regulations that includes the relevant offence provisions.

Clause 40 clarifies that the term 'authorised' means authorised by a licence, permit, registration or other authority (however described) that is required by regulation. It is intended to capture all kinds of authorisations that are required:

- before work can be carried out by a person (e.g. high-risk work)
- for work to be carried out at a particular place (e.g. major hazard facility), or
- before certain plant or substances can be used at a workplace.

It is not intended to cover notifications to the regulator that do not affect whether work can be carried out lawfully. However the regulations could require such notifications to be made outside the framework provided for under this Part.

Clause 41 sets out the requirements for authorisation of workplaces as the regulations may require certain kinds of workplaces to be authorised (e.g. major hazard facilities). Clause 41 makes it an offence for a person to conduct a business or undertaking at such a workplace, or allow a worker to carry out work at the workplace, if the workplace is not authorised in accordance with the regulations.

Clause 42 provides that a regulation may require certain kinds of plant or substances or their design to be authorised (e.g. high risk plant).

Subclause 42(1) makes it an offence for a person to use such plant or a substance if it is not authorised in accordance with the regulations. A PCBU would 'allow' a worker to use plant or substances in this situation if the PCBU did not take steps to prevent what they knew to be unauthorised

use. Subclause 42(2) makes it an offence for a PCBU to direct or allow a worker to use such plant or a substance if it is not authorised in accordance with the regulations.

The term 'allowed' is not defined but is intended to capture situations where a worker has not been expressly directed or requested to use the relevant plant or substance, but must do so in order to meet the PCBU's requirements (e.g. to carry out a particular task).

Clause 43 provides that a regulation may require certain work, or classes of work, to be carried out only by or on behalf of a person who is authorised. Subclause 43(1) makes it an offence for a person to carry out such work at a workplace if the appropriate authorisations are not in place as required under the regulations. Subclause 43(2) makes it an offence for a PCBU to direct or allow a worker to carry out such work if the appropriate authorisations are not in place under the regulations.

Clause 44 provides that a regulation may require certain kinds of work, or classes of work, to be carried out only by or under the supervision of a person who is appropriately qualified or experienced. Subclause 44(1) makes it an offence for a person to carry out work at a workplace if these requirements are not met under the regulations. Subclause 44(2) makes it an offence for a PCBU to direct or allow a worker to carry out work at a workplace if the relevant requirements are not met under the regulations.

Clause 45 makes it an offence for a person to contravene any conditions attaching to an authorisation.

Part 5 Consultation, Representation and Participation

This Part establishes the consultation, representation and participation mechanisms that apply under the Bill, including the duties to consult and provision for HSRs and Health and Safety Committees. Other arrangements are still a valid option, providing the duties under this Part are complied with.

Clause 46 sets out the duty to consult with other duty holders. Managing work health and safety risks is more effective if duty holders exchange information on how the work should be done so that it is without risk to

health and safety. Co-operating with other duty holders and co-ordinating activities is particularly important for workplaces where there are multiple PCBUs. This clause requires duty holders to consult, co-operate and co-ordinate activities with all other persons who have a work health and safety duty in relation to the same matter. This duty applies 'so far as is reasonably practicable'. The phrase 'so far as is reasonably practicable' is not defined in this context, so its ordinary meaning will apply.

Clause 47 requires PCBUs to, so far as is reasonably practicable, consult with their workers who may be directly affected by matters relating to work health or safety. Consultation must comply with the Bill and any regulations, and also with any procedures agreed between the PCBU and its workers (subclause 47(2)). Agreed procedures must be consistent with requirements about the nature of consultation in clause 48.

Scope of duty to consult

The duty to consult is qualified by the phrase 'so far as is reasonably practicable'. This qualification requires the level of consultation to be proportionate to the circumstances, including the significance of the workplace health or safety issue in question.

What is reasonably practicable will depend on the circumstances surrounding each situation. A PCBU may need to take into account the urgency of the requirement to change the work environment, plant or systems etc., and the availability of workers most directly affected or their representatives. The extent of consultation that is reasonably practicable must be that which will ensure that the relevant PCBU has all relevant available information, including the views of workers and can therefore make a properly informed decision. More serious health or safety matters will generally attract more extensive consultation requirements. The consultation should also ensure that the workers are aware of the reasons for decisions made by the PCBU—and even if they do not agree with the decisions—can understand them. This will make compliance with systems of work, including the use of protective devices or equipment provided, more likely to occur and be effective.

Clause 48 sets out the nature of the consultation required by this Division. Subclause 48(1) establishes the requirements for meaningful consultation. It requires PCBUs to: share relevant information about work health or safety matters (listed in clause 49) with their workers; give workers a reasonable opportunity to express their views; and contribute to the decision processes relating to those matters. It also requires PCBUs to take

workers' views into account and advise workers of relevant outcomes in a timely manner. Subclause 48(2) provides that consultation must involve any HSR that represents the workers. Consulting with HSRs alone may be sufficient to meet the consultation duty, depending on the work health or safety issue in question.

Clause 49 sets out the kinds of work health and safety matters that must be consulted on under this Division, including at each stage of the risk management process. Additional matters requiring consultation under this Division may be prescribed by the regulations.

Clause 50 sets out the process for the election of health and safety representatives. There is considerable evidence that the effective participation of workers and the representation of their interests in work health and safety are crucial elements in improving health and safety performance at the workplace. Under the Act, this representation occurs in part through HSRs who are elected by workers to represent them in relation to health and safety matters at work.

The process for electing HSRs is initiated by a worker's request and clause 50 provides that a worker may ask a PCBU for whom they carry out work to facilitate elections for one or more HSRs.

This clause does not require the request to be in any particular form. The worker's request will trigger the PCBU's obligation to facilitate the determination of one or more work groups providing the worker's request is sufficiently clear. A PCBU is required to facilitate the election of HSRs. Facilitating the election process requires a PCBU to adopt a supportive role during the election process rather than a directive one (see subclause 52(1) below for more information).

Clause 51 establishes the PCBU's obligation to facilitate the determination of one or more work groups, following a request under clause 50. Subclause 51(2) clarifies that the purpose of dividing workers into work groups is to facilitate representation by HSRs in relation to work health and safety matters. The legislation does not otherwise limit the determination of work groups, although the regulations may prescribe the matters that must be taken into account (subclause 52(5)). Clause 51(3) clarifies that a work group may span one or more physical workplaces.

Clause 52 sets some parameters around negotiations for work groups.

Subclause 52(1) provides that work groups are negotiated and agreed between the relevant parties. That is, the PCBU and the workers who are

proposed to form the work group or their representatives. A worker's representative could be a union delegate or official, or any other person the worker authorises to represent them (see the definition of 'representative' in clause 4).

Subclause 52(2) requires the relevant PCBU to take all reasonable steps to commence negotiations to determine work groups within 14 days after a request is made under clause 50.

Subclause 52(3) sets out the matters that are to be determined by negotiation, including the number and composition of work groups and the number of HSRs and deputy HSRs (if any) to be elected to represent them.

Subclause 52(4) provides that any party involved with determining an agreement for a work group or work groups, can negotiate a variation to that agreement at any time.

Subclause 52(5) prohibits the PCBU from, if asked by a worker, refusing to negotiate with the worker's representative or excluding the representative from negotiations. This includes negotiations for a variation of a work group agreement. A breach of these requirements is an offence. This provision does not require the PCBU to reach agreement but requires the PCBU to genuinely try to negotiate with representatives.

Subclause 52(6) allows the regulations to prescribe the matters that must be taken into account in negotiations for and variation of agreements concerning work groups.

Clause 53 provides for the notification of workers on the outcome of negotiations for work groups. Subclause 53(1) requires the PCBU to notify workers of the outcome of negotiations and determination of any work groups, as soon as practicable after the negotiations are completed. Failure to notify is an offence.

Subclause 53(2) requires a PCBU who is negotiating to vary an agreement for the determination of a work group or work groups to notify workers of the outcome of those negotiations (if any) as soon as it is practicable after negotiations are complete. Failure to notify workers is an offence.

Clause 54 sets out the process for determining work groups if negotiations under clause 52 fail. Negotiations are taken to have failed if, after 14 days of a request being made under clause 50 or if a party to the agreement requests a variation to an agreement, the PCBU has failed to take all reasonable steps to commence negotiations. Negotiations are also considered to have failed if an agreement cannot be reached on a relevant

matter or variation to an agreement within a reasonable time after negotiations commence (subclause 54(3)).

Subclause 54(1) allows any person who is, or would be, a party to the negotiations to ask the regulator to appoint an inspector to decide the matter. This includes negotiations for a variation of a work group agreement.

Subclause 54(2) empowers the inspector to decide on the relevant matters (referred to in subclause 52(3) or any matter that is the subject of the proposed variation (as the case requires)) or to decide that work groups should not be established or that the agreement should not be varied (as the case requires). In exercising this discretion, the inspector must have regard to the relevant parts of the Bill, including the objects of the Part and the Bill overall.

Subclause 54(4) provides that the inspector's decision is taken to be an agreement under clause 52. This means that that the inspector's decision operates for all purposes as if it had been agreed between the relevant parties.

Clause 55 allows work groups to be determined in relation to two or more PCBUs (multiple-business work groups).

Subclause 55(2) requires multiple-business work groups to be determined by negotiation and agreement between the relevant parties (e.g. each of the PCBUs and the workers proposed to be included in the work groups).

Subclause 55(3) provides that any party involved with determining an agreement for a work group or work groups, can negotiate a variation to that agreement at any time.

Subclause 55(4) clarifies that the determination of multiple-business work groups would not affect pre-existing work groups or prevent the formation of additional work groups under Subdivision 2.

Clause 56 provides for negotiations concerning work groups. Subclause 56(1) limits negotiations for multiple-business work groups to the matters listed in subclauses (a)–(d), including the number and composition of work groups and the number of HSRs and deputy HSRs (if any) for each work group.

Subclause 56(2) establishes representation rights for relevant workers, which mirror the rights explained in relation to subclause 52(4) above. A breach of these requirements is an offence.

Subclause 56(3) allows an inspector to assist negotiations, if agreement cannot be reached on a relevant matter within a reasonable time after negotiations have commenced.

Subclause 56(4) allows the regulations to prescribe the matters that must be taken into account in negotiations for (and variations of) agreements.

Clause 57 provides for the notification of workers of the outcome of negotiations regarding work groups. Subclause 57(1) sets out the matters that must be notified upon the completion of negotiations, that is the outcome of negotiations and determination of any work groups. A breach of these requirements is an offence.

Subclause 57(2) requires a PCBU who is negotiating to vary an agreement for the determination of a work group or work groups to notify workers of the outcome of those negotiations and variations (if any) as soon as it is practicable after negotiations are complete. Failure to notify workers is an offence. Failure to do so is an offence.

Clause 58 establishes a process that allows a party to withdraw from negotiations for multiple-employer work groups and also to withdraw from an agreement made under this Subdivision. This process is necessary as multiple-employer work groups are voluntary and are only available by agreement between all relevant parties. Withdrawal by one party to an agreement (involving three or more PCBUs) would trigger the need to negotiate a variation to the agreement (in accordance with clause 56), but would not otherwise affect the validity of the agreement for other parties in the meantime (subclause 58(2)).

Clause 59 clarifies that alternative representative arrangements can always be made between two or more PCBUs and their workers, provided that the PCBUs comply with this Subdivision.

Clause 60 sets out the eligibility rules for HSRs. It provides that a worker is eligible to be elected as HSR for a work group if they are a member of that work group and they are not disqualified under clause 65.

Clause 61 sets out the procedure for the election of HSRs. The procedures for the election of HSRs are determined by the workers in the work group for which elections are being held. The regulations may prescribe minimum requirements for the conduct of elections (subclause 61(1)–(2)).

Subclause 61(3) allows elections to be conducted with the assistance of a union or other person or organisation, provided that a majority of affected

workers agree. The Australian Electoral Commission is an example of an 'other organisation'.

Subclause 61(4) requires the relevant PCBU to provide any resources, facilities and assistance that are reasonably necessary or are prescribed by the regulations to enable elections to be conducted. Failure to do so is an offence.

Clause 62 provides that the members of a work group are responsible for electing the HSR or HSRs for that work group and are therefore entitled to vote in the elections conducted for that work group.

Clause 63 sets out the circumstances in which an election is not required. An election is not required if the number of candidates for HSR equals the number of vacancies for that position and the number of candidates for deputy HSR equals the number of vacancies for that position.

Clause 64 sets out details on the term of a HSR. Clause 64(1) provides that an HSR holds office for a maximum term of three years, although that may be shortened upon:

- the person's resignation from office in writing to the PCBU (subclause 64(2)(a))
- the person ceasing to be part of the work group they represent (subclause 64(2)(b))
- the person being disqualified under clause 65 (subclause 64(2)(c)), or
- the person being removed from office by a majority of the work group they represent in accordance with the regulations (subclause 64(2)(d)).

Subclause 67(3) clarifies that an HSR is eligible for re-election, unless they are disqualified under clause 65 (see clause 60(b)).

Clause 65 sets out a process for disqualifying HSRs from office for:

- performing a function or exercising a power under the Bill for an improper purpose, or
- using or disclosing any information acquired as an HSR for a purpose unconnected with their role as a HSR.

The regulator or any person who has been adversely affected by these actions may apply to the commission to have the HSR disqualified from office.

Clause 66 confers immunity on HSRs so they cannot be personally sued for anything done or omitted to be done in good faith while exercising a power or performing a function under the Bill, or in the reasonable belief that they were doing so.

Clause 67 establishes the procedures for the election of deputy HSRs and establishes their powers and functions under the Bill. Subclause 67(1) provides for deputy HSRs to be elected in the same way as HSRs (see the election procedure in clauses 60–63).

Deputy HSRs for a work group may only take over the powers and functions of an HSR for the work group if the HSR ceases to hold office or is unable (because of absence or any other reason) to exercise their powers or perform their functions as HSR under the Bill.

Clause 67(2)(b) makes it clear that the Bill applies to the deputy HSR accordingly. For example, this means a deputy HSR can exercise the powers and functions of the HSR and the PCBU must comply with the general obligations under clause 70.

Subclause 67(3) extends a number of relevant provisions so they apply equally to both HSRs and deputy HSRs. This means that provisions dealing with the term of office, disqualification, immunity and training apply equally to both HSRs and deputy HSRs.

Clause 67A provides the definition of 'applicant' for the purposes of the disqualification process.

Clause 67B provides this sub-division applies in relation to an application to disqualify a health and safety representative under clause 65.

Clause 67C provides that the Commission has the discretion to decide whether to take on an application under section clause 65 on the papers filed.

Clause 67D provides how an application must be decided on the papers.

Clause 67E provides how an application must be decided at a hearing.

Clause 67F provides the Commission must give a notice of its decision and that a decision of the Commission under this section may be appealed under the *Industrial Relations Act 1999*.

Clause 68 confers the necessary powers and functions on HSRs to enable them to effectively represent the interests of the members of their work group and to contribute to health and safety matters at the workplace.

Clause 67 sets out the circumstances in which a deputy HSR may take over the powers and functions of the HSR under this clause.

Subclause 68(1) sets out HSRs' general powers and functions, while subclause 68(2) clarifies the specific powers of HSRs without limiting the general powers in subclause (1). The primary function of HSRs is to represent workers in their work group in relation to health and safety matters at work (subclause 68(1)(a)).

As part of that function, HSRs may monitor the PCBU's compliance with the Bill in relation to their work group members (subclause 68(1)(b)), investigate complaints from work group members about work health and safety matters (subclause 68(1)(c)) and inquire into anything that appears to be a risk to the health or safety of work group members, arising from the conduct of the business or undertaking (subclause 68(1)(d)). These powers are generally exercisable in relation to the HSR's work group members, subject to clause 69.

Subclause 68(2) sets out the specific powers of HSRs, which is intended to reinforce their representative role under the Bill. Subclause 68(2)(a) allows HSRs to inspect the place where any work group member carries out work for the relevant PCBU:

- at any time after giving reasonable notice to the person conducting the business or undertaking at that workplace, and
- at any time without notice in the event of an incident or any situation involving a serious risk to a person's health or safety arising from an immediate or imminent exposure to a hazard.

Subclause 68(2)(b) entitles an HSR to accompany an inspector during an inspection of the workplace at which a work group member carries out work.

Subclause 68(2)(c) entitles an HSR to be present at an interview concerning work health and safety between a worker who is a work group member and either an inspector, the PCBU at the workplace or the PCBU's representative. This entitlement only applies if the HSR has the consent of the worker being interviewed.

Subclause 68(2)(d) entitles an HSR to be present at an interview concerning work health and safety between a group of workers and either an inspector, the PCBU at the workplace or the person's representative. This entitlement only applies if the HSR has the consent of at least one of

their members being interviewed and regardless of whether non-work group members are present (or even object to the HSR's involvement).

Subclause 68(2)(e) allows HSRs to request the establishment of a health and safety committee.

Subclause 68(2)(f) entitles HSRs to receive information about the work health and safety of their work group members. However, there is *no* entitlement to access any personal or medical information about a worker without their consent, unless the information is in a form that does not identify the worker or that could not reasonably be expected to lead to the identification of the worker (subclause 68(3)).

Subclause 68(4) makes it clear that the Bill does not impose, or should be taken to impose, a duty on HSRs to exercise any of these powers or perform any of these functions at any point in time. The HSR's functions and powers are exercisable entirely at the discretion of the HSR.

Clause 69 provides that the HSR and deputy HSR powers and functions under the Bill are generally limited to work health and safety matters that affect or may affect their work group members (subclause 69(1)). However, an HSR may exercise powers and functions under the Bill in relation to another work group for the relevant PCBU if the HSR (and any deputy HSR) for that work group is found, after reasonable inquiry, to be unavailable and (subclause 69(2)):

- there is a serious risk to the health or safety emanating from an immediate or imminent exposure to a hazard that affects or may affect a member for the work group, or
- a member of the work group asks for the HSR's assistance.

What constitutes 'reasonable inquiry' will depend on all the circumstances of the case and especially the seriousness of the risk to health or safety in question.

Clause 70 sets out the general obligations of PCBUs, many of which reflect the corresponding entitlements in clause 68, which establishes HSRs' powers and functions. These obligations will also apply in relation to deputy HSRs while they exercise the powers of HSRs (see subclause 67(2)).

It is an offence for a PCBU to fail to comply or refuse to comply with any of these obligations. PCBUs are required to:

- consult so far as is reasonably practicable with their HSRs on work health and safety matters at the workplace (subclause 70(1)(a))
- confer with HSRs, whenever reasonably requested by the HSR, for the purpose of ensuring the health and safety of their work group members (subclause 70(1)(b))
- give HSRs access to the information they are entitled to have, consistent with subclause 68(2)(f) and subclause 68(3) (subclause 70(1)(c) read together with subclause 70(1))
- allow their HSRs to attend the kinds of interviews they are entitled to attend under subclause 68(2)(c) (subclauses 70(1)(d) and (e))
- provide their HSRs with any resources, facilities and assistance that are reasonably necessary or prescribed by the regulations to enable the HSR to exercise their powers and perform their functions under the Bill (subclause 70(1)(f))
- allow persons assisting their HSRs (under subclause 68(2)(g)) to have access to the workplace, but only if access is necessary to enable the assistance to be provided. This obligation is subject to the qualifications in subclause 71(4). Although no notification requirements are prescribed, a person assisting a HSR would need to meet any of the PCBU's policies or procedures that are applicable to workplace visitors including any work health and safety requirements (subclause 70(1)(g)), and
- allow their HSRs to accompany an inspector during an inspection of any part of the workplace where the HSR's work group members work (subclause 70(1)(h)).

Subclause 70(1)(i) allows the regulations to prescribe further assistance that may be required to enable HSRs to fulfil their representative role.

HSRs must be given such time as is reasonably necessary (e.g. during work hours) to exercise their powers and perform their functions under the Bill (subclause 70(2)). Any time an HSR spends exercising their powers and performing their functions at work must be paid time, paid at the rate that the HSR would receive had they not been exercising their powers or performing their functions (subclause 70(3)). Any underpayment of wages may be recovered under the applicable industrial laws. The intention is that the terminology 'such pay' would not be limited to pay alone, but would encompass other entitlements that occur in paid time, such as leave.

Clause 71 qualifies some of the PCBU's obligations under subclause 70(1).

Subclause 71(2) ensures that the personal or medical information HSRs receive under subclause 70(1)(c) excludes any information that identifies individual workers, or could reasonably be expected to identify individual workers. It would be an offence for a PCBU to release such information to an HSR.

Subclause 71(3) clarifies that PCBUs are not required to provide any financial assistance to help pay for HSRs' assistants that are referred to in subclause 70(1)(g).

Subclause 71(4) applies in relation to certain assistants to HSRs who are or who have been WHS entry permit holders. PCBUs may refuse access to such persons if they have had their WHS entry permit revoked, or during any period that the person's WHS entry permit is suspended or the assistant is disqualified from holding a WHS permit.

Subclause 71(5) allows PCBUs to refuse an HSR's assistant access to a workplace on 'reasonable grounds'. 'Reasonable grounds' are not defined, but it is intended that access could be refused, for example, if the assistant had previously intentionally and unreasonably delayed, hindered or obstructed any person, disrupted any work at a workplace or otherwise acted in an improper matter.

Subclause 71(6) allows an inspector to assist in any dispute over an assistant's proposed entry, upon the HSR's request. In this situation, an inspector could provide advice or recommendations in relation to the dispute or exercise his or her compliance powers under the Bill. This provision is not intended to limit inspectors' compliance powers in any way.

Clause 72 sets out PCBUs' obligations to train their HSRs and deputy HSRs (see subclause 67(3)). This clause establishes the entitlement to HSR training, which is available to HSRs and deputy HSRs upon request to their PCBU (subclause 72(1)). The entitlement allows the HSR or deputy HSR to attend an HSR training course that has been approved by the regulator (subclause 72(1)(a)) and that the HSR is entitled under the regulations to attend (subclause 72(1)(b)). An HSR or deputy HSR is also entitled to attend the course of their choice (e.g. in terms of when and where they propose to attend the course), although the course must be chosen in consultation with the PCBU. If the parties are unable to agree, subclauses 72(5)–(7) will apply.

Subclause 72 requires the PCBU to give the HSR or deputy HSR time off work to attend the agreed course of training as soon as practicable within

three months of the request being made. The PCBU is also required to pay the course fees and any other reasonable costs associated with the HSR's or deputy HSR's attendance at the course of training.

Subclause 72(3)(b) applies to multi-business work groups and provides that only one of the PCBUs needs to comply with this clause.

Subclause 72(4) provides that any time an HSR or deputy HSR is given off work to attend the course of training must be must be paid time, paid at the rate that the HSR or deputy HSR would receive had they not been attending the course. Any underpayment of wages may be recovered under the applicable industrial laws.

Subclauses 72(5)–(7) establish a procedure for resolving a disagreement if an agreement cannot be reached—as soon as practicable within the period of three months—on the course the HSR or deputy HSR is to attend or the reasonable costs of attendance that will be met by the relevant PCBU. In that case, either party may ask the regulator to appoint an inspector to decide matters in dispute. The parties would be bound by the inspector's determination and non-compliance by the PCBU would constitute an offence.

Clause 73 applies where HSRs or deputy HSRs represent multiple-business work groups and provides for the sharing of costs between relevant PCBUs. In general, costs of the HSR exercising powers under the Bill and training-related costs are shared equally, although the parties may come to alternative arrangements by agreement.

Clause 74 requires PCBUs to prepare and keep up-to-date lists of their HSRs and deputy HSRs (if any). The lists must be displayed in a prominent place at the PCBU's principal place of business and also any other workplace that is appropriate taking into account the constitution of the work groups. PCBUs should select a prominent place to display the list that is accessible to all workers, which could be the workplace intranet. Non-compliance with these provisions constitutes an offence. Up-to-date lists must also be forwarded to the regulator as soon as practicable after being prepared.

Clause 75 sets out when a PCBU must establish a health and safety committee, including on the request of one of their HSRs or five or more workers that carry out work for the PCBU at the workplace. The regulations may also require health and safety committees to be established in prescribed circumstances. A health and safety committee must be established within two months after the request is made and

non-compliance constitutes an offence (subclause 75(1)(a)). A health and safety committee may also be established at any time on a PCBU's own initiative (subclause 75(2)).

Health and safety committees will usually be established for a physical workplace at one location. However, the provisions are not intended to be restrictive and it would be possible to establish a committee for workers who carry out work for a PCBU in two or more physical workplaces (e.g. at different locations) or for those who do not have a fixed place of work. Non-compliance with these provisions constitutes an offence.

Clause 76 sets out minimum requirements for establishing and running health and safety committees. The relevant PCBU and the workers for whom the committee is being established must negotiate on how the committee will be constituted (subclause 76(1)).

Unless they do not wish to participate, HSRs are automatically members of a relevant workplace's committee (subclause (76(2)). If there is more than one HSR, the HSRs may agree among themselves as to who will sit on the committee (subclause 76(3)).

Subclause 76(4) ensures genuine worker representation by requiring at least half of the members of the committee to be workers not nominated by the relevant PCBU (subclause 76(4)).

Subclauses 76(5)–(7) establishes a dispute resolution procedure if the constitution of the committee cannot be agreed between all relevant parties. In that case, an inspector may decide the membership of the committee or that the committee should not be established. In exercising this discretion, the inspector must have regard to the relevant parts of the Bill including the objects of the Bill overall. Any decision on how the committee is to be constituted is then taken to be an agreement between the relevant parties.

Clause 77 establishes the functions of health and safety committees, including facilitating co-operation between the PCBU and the relevant workers in instigating, developing and carrying out measures designed to ensure work health and safety and also assisting in developing the relevant standards, rules and procedures for the workplace. Additional functions may be agreed between the health and safety committee and the PCBU or prescribed by regulations.

Clause 78 sets minimum requirements for the frequency of health and safety committees. Under this clause, committees must meet at least once

every three months and also at any reasonable time at the request of at least half of the committee members.

Clause 79 sets out the general obligations of PCBUs in relation to their health and safety committees. The PCBU must allow committee members to spend such time at work as is reasonably necessary to attend meetings of the committee or carry out functions as a committee member (subclause 79(1)).

Subclause 79(2) clarifies that such time must be paid time, paid at the rate that the committee member would have been entitled to receive had they not been attending meetings of the committee or exercising powers or performing their functions as a committee member. Any underpayment of wages may be recovered under the applicable industrial laws.

Subclause 79(3) entitles committee members to access the information the relevant PCBU has relating to hazards and risks at the workplace and the work-related health and safety of workers at the workplace. However, there is *no* entitlement to access any personal or medical information about a worker without the worker's consent, unless the information is in a form that does not identify the worker or that could not reasonably be expected to lead to the identification of the worker (subclause 79(4)).

Failure to provide committee members with the entitlements prescribed under subclauses 79(1) and (3) constitutes an offence. It is also an offence for a PCBU to provide personal or medical information about a worker contrary to subclause 79(4).

Clause 80 defines the parties to an issue, who are:

- the PCBU with whom the issue has been raised or the PCBU's representative (e.g. employer organisation)
- any other PCBU or their representative who is involved in the issue
- the HSRs for any of the affected workers or their representative, and
- if there are no HSRs—the affected workers or their representative.

If a PCBU is represented, subclause 80(2) requires the PCBU to ensure that the representative has, for purposes of issue resolution, sufficient seniority and competence to act as the person's representative. The subclause also prohibits the PCBU from being represented by an HSR. This latter restriction is necessary because HSRs are essentially workers' representatives and representing both sides would constitute a conflict of interest.

Clause 81 establishes a process for the resolution of work health and safety issues. Subclause 81(1) sets out when the issue resolution process applies, that is after the work health and safety matter remains unresolved after the matter is discussed by parties to the issue. At that point, the matter becomes a work health and safety issue that is subject to the issue resolution process under this Division.

Subclause 81(2) requires each party and their representative (if any) to make reasonable efforts to achieve a timely, final and effective resolution of the issue using the agreed issue resolution procedure or—if there is not one—the default procedure prescribed by the regulations. Provision for default procedures in the Bill reflects the view that it is preferable that issue resolution procedures be agreed between the parties. Agreed procedures may accommodate the subtleties of the relationship between the parties, the workplace organisation and the types of hazards and risks that are likely to be the subject of issues.

The intention is that issues should be resolved as soon as can reasonably be achieved to avoid further dispute or a recurrence of the issue or a similar issue; that is, an issue should be resolved 'once and for all' to the extent that is possible in the circumstances.

Subclause 81(3) entitles each party's representative to enter the workplace for the purpose of attending discussions with a view to resolving the issue.

Clause 82 gives parties to an issue under this Division the right to ask for an inspector's assistance in resolving the issue if it remains unresolved after reasonable efforts have been made. It applies whether all parties have made reasonable efforts or at least one of the parties has made reasonable efforts to have the work health and safety issue resolved. A party's unwillingness to resolve the issue would not prevent operation of this clause.

Subclause 82(3) preserves the rights to cease unsafe work, or direct that unsafe work cease, under Division 6 of Part 5 when an inspector has been called in to assist with resolving a work health and safety issue under this clause.

Subclause 82(4) clarifies that the inspector's role is to assist in resolving the issue, which could involve the inspector providing advice or recommendations or exercising any of their compliance powers under the Bill (e.g. to issue a notice). This provision is not intended to limit inspectors' compliance powers in any way.

Clause 83 clarifies that 'ceasing work' includes ceasing or refusing to carry out work.

Clause 84 sets out the right of workers to cease unsafe work. A worker has the right to cease work if:

- they have a reasonable concern that carrying out the work would expose them to a serious risk to their health or safety, and
- the serious risk emanates from an immediate or imminent exposure to a hazard.

This right is subject to the notification requirements in clause 86 and the worker's obligation to remain available to carry out suitable alternative work under clause 87.

'Serious risk'

The term 'serious risk' is not defined, but captures the recommendations of the first report (see subclause 28.42 – 43 of that report). As the report states, this formulation has the advantage of being effective to deal with risks of diseases of long latency from immediate exposure to a hazard and circumstances of psychological threat or other similar conditions. For the right to cease work to apply, the risk (the likelihood of it occurring and the consequences if it did) would have to be considered 'serious' and emanates from an immediate or imminent exposure to a hazard.

'Reasonable concern'

The requirement for the worker to have a 'reasonable concern' is intended to align with equivalent provisions under the Fair Work Act. For this entitlement to apply, it will not be sufficient for a worker to simply assert that their action is based on a reasonable concern about a serious and immediate or imminent risk to his or her safety. A 'reasonable concern' for health or safety can only be a concern which is both reasonably held and which provides a reasonable or rational basis for the worker's action. A concern may be reasonable if it is not fanciful, illogical or irrational. It is not necessary to establish an existing serious health or safety risk to the worker. The question is whether the worker's action was based on a reasonable concern for their health or safety arising from a serious and immediate risk, rather than the existence of such a risk.

Clause 85 establishes HSRs' power to direct that unsafe work cease. In general, this power can only be used to direct workers in the HSR's own work group, unless the special circumstances in clause 69 apply. An HSR's

deputy could also exercise this power in the circumstances set out in clause 67.

Subclause 85(1) sets out the circumstances in which an HSR may direct that unsafe work cease. Similar to clause 84, an HSR may issue the direction under this clause to a work group member if:

- they have a reasonable concern that carrying out the work would expose the work group member to a serious risk to their health or safety, and
- the serious risk emanates from an immediate or imminent exposure to a hazard.

The term 'serious risk' is explained above in relation to clause 84.

Subclause 85(2) requires HSRs to consult with the relevant PCBU and attempt to resolve the work health or safety issue under Division 5 before giving a direction under this clause. However, these steps are not necessary if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction (subclause 85(3)). In that case, the consultation must be carried out as soon as possible after the direction is given (subclause 85(4)).

Subclause 85(5) requires a HSR to inform the PCBU of any direction to cease work that the HSR has given to workers.

Subclause 85(6) provides that only an appropriately trained HSR may exercise the powers under this provision, that is if the HSR has:

- completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU), or
- undertaken equivalent training in another jurisdiction.

Clause 86 requires workers who cease work under this Division (otherwise than under a direction from a HSR) to notify the relevant PCBU that they have ceased unsafe work as soon as practicable after doing so. It also requires workers to remain available to carry out 'suitable alternative work'. This would not however require workers to remain at any place that poses a serious risk to their health or safety.

Clause 87 allows PCBUs to re-direct workers who have ceased unsafe work under this Division to carry out 'suitable alternative work' at the same or another workplace. The suitable alternative work must be safe and appropriate for the worker to carry out until they can resume normal duties.

Clause 88 preserves workers' entitlements during any period for which work has ceased under this Division. It does not apply if the worker has failed to carry out suitable alternative work as directed under clause 87.

Clause 89 clarifies that inspectors may be called on to assist in resolving any issues arising in relation to a cessation of work.

Clause 90 sets out the circumstances when an HSR may issue a provisional improvement notice; that is if the representative reasonably believes that a person:

- is contravening a provision of the Bill, or
- has contravened a provision of the Bill in circumstances that make it likely that the contravention will continue or be repeated.

A HSR may only exercise this power at a workplace, in relation to any work health or safety matters that affect, or may affect, workers in the HSR's work group (see clause 69(2)). Subclause 69(2) provides that a HSR may also exercise powers and functions under the Bill in relation to another work group in some circumstances.

Subclause 90(2) sets out the kinds of things a provisional improvement notice may require a person to do (e.g. remedy the contravention or prevent a likely contravention from occurring).

Subclause 90(3) requires HSRs to consult with the alleged contravenor or likely contravenor before issuing a provisional improvement notice.

Clause 90(4) provides that only a HSR can exercise the powers under this provision, that is if the HSR has:

- completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU), or
- undertaken equivalent training in another jurisdiction.

Subclause 90(5) relates to the situation where an inspector may have already dealt with a matter by issuing or deciding not to issue an improvement notice or prohibition notice. In that case the HSR would have no power to issue a provisional improvement notice in relation to the matter, unless the circumstances were materially different (e.g. the matter the HSR is proposing to remedy is no longer the same matter dealt with by the inspector).

Clause 91 requires provisional improvement notices to be issued in writing.

Clause 92 sets out the kind of information that must be contained in a provisional improvement notice. Importantly, a provisional improvement notice must specify a date for compliance, which must be at least eight days after the notice is issued. The day on which the notice is issued does not count for this purpose.

Clause 93 allows provisional improvement notices to specify certain kinds of directions about ways to remedy the contravention, or prevent the likely contravention, that is subject of the notice.

Clause 94 enables HSRs to make minor changes to provisional improvement notices (e.g. for clarification or to correct errors or references).

Clause 95 requires provisional improvement notices to be served in the same way as improvement notices issued by inspectors.

Clause 96 allows HSRs to cancel a provisional improvement notice at any time. This must be done by giving written notice to the person to whom it was issued.

Clause 97 establishes the display requirements for provisional improvement notices. It requires a person who is issued with a notice to display it in a prominent place at or near the workplace where work affected by the notice is carried out.

It is an offence for a person to fail to display a notice as required by this clause, or to intentionally remove, destroy, damage or deface the notice while it is in force.

Although not specified, it is intended that there is *no* requirement to display notices that are stayed under the review proceedings set out in clause 100, as they would not be considered to be 'in force' for the period of the stay.

Clause 98 ensures that provisional improvement notices are not invalid merely because of a formal defect or an irregularity, so long as this does not cause or is not likely to cause substantial injustice.

Clause 99 makes it an offence for a person to not comply with a provisional improvement notice, unless an inspector has been called in to review the notice under clause 101. If an inspector reviews the notice, it may be confirmed with or without modifications or cancelled. If it is

confirmed it is taken to be an improvement notice and may be enforced as such.

Clause 100 sets out a procedure for the review of provisional improvement notices by inspectors. Review may be sought within seven days after the notice has been issued by the person issued with the notice or, if that person is a worker, the PCBU for whom the worker carries out the work affected by the notice. An application under this clause stays the operation of the provisional improvement notice until an inspector makes a decision on the review (subclause 100(2)).

Clause 101 sets out the procedure that the regulator and the reviewing inspector must follow after a request for review is made. The regulator must arrange for a review to be conducted by an inspector at the workplace as soon as practicable after a request is made (subclause 101(1)). The inspector must review the disputed notice and inquire into the subject matter covered by the notice (subclause 101(2)). An inspector may review a notice even if the time for compliance with the notice has expired (subclause 101(3)).

Clause 102 sets out the kinds of decisions the inspector may make upon review, the persons to whom a copy of the inspector's decision must be given and the effect of the inspector's decision on the notice. The reviewing inspector must either (subclause 102(1)):

- confirm the provisional improvement notice, with or without modifications, or
- cancel the provisional improvement notice.

In some cases the provisional improvement notice under review may have expired before the inspector can make a decision. However, inspectors may still confirm such notices and modify the time for compliance (see subclause 101(3)).

Subclause 102(2) requires the inspector to give a copy of their decision to the applicant for review and the HSR who issued the notice.

Subclause 102(3) provides that a notice that has been confirmed (with or without modifications by an inspector) has the status of an improvement notice under the Bill.

Clause 103 provides that this Part does not apply to a worker who is a prisoner or detainee in custody in a corrective services facility, detention centre or watch house. This exclusion applies in relation to any work performed by such prisoners or detainees, whether inside or outside the

relevant facility. It would also cover prisoners on weekend detention, during the period of the detention. This exclusion does not extend to any persons who are not held in custody in a corrective services facility, detention centre or watch house, including persons on community-based orders.

Part 6 Discriminatory, Coercive and Misleading Conduct

Part 6 prohibits discriminatory, coercive and misleading conduct in relation to work health and safety matters. It establishes both criminal and civil causes of action in the event of such conduct. These provisions complement the remedies contained in other Federal and State laws that deal with discrimination including the General Protections in the Fair Work Act.

The purpose of these provisions is to encourage engagement in work health and safety activities and the proper exercise of roles and powers under the Bill by providing protection for those engaged in such roles and activities from being subject to discrimination or other forms of coercion because they are so engaged. They clearly signal that discrimination and other forms of coercion that may have the effect of deterring people from being involved in work health and safety activities or exercising work health and safety rights are unlawful and may attract penalties and other remedies.

Clause 104 provides that it is an offence for a person to engage in discriminatory conduct for a prohibited reason. What is discriminatory conduct is outlined in clause 105 and prohibited reasons are outlined in clause 106.

Subclause 104(2) provides that a person will only commit an offence if a reason mentioned in clause 106 was the dominant reason for the discriminatory conduct. The Bill contains a rebuttable presumption that once a prohibited reason is proven it will be taken to be the dominant reason (see subclause 110(1)). A note alerts the reader that civil proceedings relating to a breach of clause 104 may be brought under Division 3.

Clause 105 sets out what actions will be discriminatory conduct under the Bill. The actions include:

- certain actions that may be taken in relation to a worker (e.g. dismissing a worker or detrimentally altering the position of a worker (subclause 105(1)(a)))
- certain actions that may be taken in relation to a prospective worker (e.g. a treating one job applicant less favourably than another (subclause 105(1)(b)), and
- certain actions relating to commercial arrangements (e.g. refusing to enter or terminating a contract with a supplier of materials to a workplace (subclauses 105(1)(c) and 105(1)(d))).

In view of the changing nature of work relationships, this clause is cast in wide terms to protect all those who carry out work, or would do so but for the discriminatory conduct, whether under employment-like arrangements or commercial arrangements.

Clause 106 sets out when discriminatory conduct is engaged in for a prohibited reason. The fact that a person is subjected to a detriment that may amount to discriminatory conduct does not by itself render the conduct unlawful. The conduct is only unlawful under the Bill if it is engaged in for a prohibited reason, that is, the person is subjected to a detriment for an improper reason or purpose. The prohibited reasons include discriminatory conduct engaged in because a worker, prospective worker or other person:

- is involved in, has been involved in, or intends to be involved in work health and safety representation at the workplace by being a HSR or member of a health and safety committee
- undertakes, has undertaken, or proposes to undertake another role under the Bill
- assists, has assisted, or proposes to assist a person exercising a power or performing a function under the Bill (e.g. an inspector)
- gives, has given, or intends to give information to a person exercising a power or performing a function under the Bill
- raises, has raised, or proposes to raise an issue or concern about work health and safety
- is involved in, has been involved in, or proposes to be involved in resolving a work health and safety issue under the Bill, or
- is taking action, has taken action, or proposes to take action to seek compliance with a duty or obligation under this Bill.

Clause 107 provides that it is an offence for a person to request, instruct, induce, encourage, authorise or assist another person to engage in discriminatory conduct in contravention of clause 104. This clause ensures that a person who has organised or encouraged other persons to discriminate against a person cannot avoid being potentially penalised under the Bill because they have not directly engaged in the conduct themselves. A note alerts the reader that civil proceedings relating to a breach of clause 107 may be brought under Division 3 of Part 6.

Clause 108 prohibits various forms of coercive conduct taken, or threatened to be taken, intentionally to intimidate, force, or cause a person to act or to fail to act in relation to a work health and safety role.

Subclause 108(1) provides that a person must not organise or take, or threaten to organise or take, any action against another person with the intention to coerce or induce that person or another (third) person to do, not do or propose to do the things described in subclauses 108(1)(a)–(d). These things include to: exercise or not exercise a power under the Bill; perform or not perform a function under the Bill; exercise or not exercise a power or perform a function in a particular way; and refrain from seeking, or continuing to undertake, a role under the Bill. A note alerts the reader that civil proceedings relating to a breach of clause 108 may be brought under Division 3 of this Part.

Subclause 108(2) clarifies that a reference in the clause to taking action or threatening to take action against a person includes a reference to not taking a particular action or threatening not to take a particular action (e.g. threatening not to promote a person if they exercise a power under the Bill).

Subclause 108(3) is an avoidance of doubt provision and ensures that a reasonable direction given by an emergency services worker in an emergency is not an action with intent to coerce or induce a person.

Subclause 108(4) clarifies that an emergency service worker is a person who, under an Act, is authorised to give directions to anyone else for the purposes of an emergency.

Clause 109 provides that it is an offence for a person to knowingly or recklessly make a false or misleading representation to another person about their rights or obligations under the Bill, their ability to initiate or participate in processes under the Bill, or their ability to make a complaint or enquiry under the Bill.

Subclause 109(2) provides that subclause 109(1) does not apply if the person to whom the representation is made would not be expected to rely on it.

Clause 110 relates to discriminatory conduct. The prosecution is required to establish beyond reasonable doubt that the action complained of was carried out for a particular reason or with a particular intent.

Subclause 110(2) provides that once the prosecution has proven that a person's discriminatory conduct is motivated by a prohibited reason, to avoid conviction that person must then establish, on the balance of probabilities, that the prohibited reason was not the dominant reason for the discriminatory conduct. In the absence of such a provision it would be extremely difficult, if not impossible, to establish that a prohibited reason was the dominant reason as the intention of the person who engages in discriminatory conduct will be known to that person alone.

Subclause 110(3) is an avoidance of doubt provision declaring that the burden of proof on the defendant outlined in subclause 110(1) is a legal, not an evidential, burden of proof. The legal burden means the burden of proving the existence of a matter.

Clause 111 sets out the kind of orders a court may make in a proceeding where a person is convicted or found guilty of an offence under clause 104 or clause 107. In addition to imposing a penalty, a court may make an order that the offender pay compensation, that the affected person be reinstated or re-employed, or the affected person be employed in the position they applied for or in a similar position. A court may make one or more of these orders.

Clause 112 sets out the civil proceedings which relate to acts of discriminatory or coercive conduct.

Subclause 112(1) provides that an eligible person may apply to the Magistrates Court for an order provided for in subclause (3). 'Eligible person' is defined in subclause 112(6) as a person affected by the contravention or a person authorised to be their representative. The person's representative may be any person, including a union representative.

In terms of proceedings under this Part, the *Uniform Civil Procedure Rules* 1999 will generally apply.

Subclause 112(2) outlines the persons against whom a civil order may be sought.

Subclause 112(3) sets out the kind of orders that can be made in civil proceedings. These include injunctions, compensation, reinstatement of employment orders and any other order that the Magistrates Court considers appropriate.

Subclause 112(4) provides that, for the purposes of clause 112, a person may be found to have engaged in discriminatory conduct for a prohibited reason only if the reason mentioned in clause 106 was a substantial reason for the conduct. This is a lower threshold than that applicable to criminal proceedings where the prohibited reason must be the dominant reason.

Subclause 112(5) clarifies that nothing in clause 112 limits any other power of the Magistrates Court.

Clause 113 sets out the procedure for civil actions for discriminatory conduct. Subclause 113(1) imposes a time limit on civil proceedings brought under clause 112. A proceeding under clause 112 must be commenced no later than one year after the date on which the applicant knew or ought to have known that the cause of action arose.

Subclauses 113(2)–(4) clarify the way that the onus of proof works in a civil proceeding under clause 112.

Subclause 113(2) provides that if the plaintiff proves a prohibited reason for discriminatory conduct, that reason is presumed to be a substantial reason for that conduct unless the defendant proves otherwise on the balance of probabilities.

Subclause 113(3) provides that it is a defence to a civil proceeding in respect of engagement in or encouragement of discriminatory conduct if the defendant proves that the conduct was reasonable in the circumstances and a substantial reason for the conduct was to comply with the requirements of the Bill or a corresponding work health and safety law.

Subclauses 113(2)–(4) reverse the onus of proof applicable to civil proceedings. Generally, the plaintiff is required to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent. However, subclause 113(2) provides that once the plaintiff has proven that a person's discriminatory conduct is motivated by a prohibited reason, to avoid civil consequences that person (the defendant) must then establish, on the balance of probabilities, that the prohibited reason was not a substantial reason for the discriminatory conduct. Such a provision is necessary as the intention of

the person who engages in discriminatory conduct will be known to that person alone.

Subclause 113(4) is an avoidance of doubt provision and provides that the burden of proof on the defendant outlined in subclauses 113(2) and 113(3) is a legal, not an evidential, burden of proof. The legal burden of proof means the burden of proving the existence of a matter.

Clause 114 sets out the general provisions relating to the making of an order under clause 112. Subclause 114(1) provides that the making of a civil order in respect of conduct referred to in subclauses 112(2)(a) and (b) does not prevent the bringing of criminal proceedings under clause 104 or 107 in respect of the same conduct.

Subclause 114(2) limits the ability of a court to make an order under clause 111 in criminal proceedings under clause 104 or 107 if a court has made an order under clause 112 in civil proceedings in respect of the same conduct (i.e. the conduct referred to in subclauses 112(2)(a) and (b)).

Conversely, subclause 114(3) limits the ability of a court to make an order under clause 112 in civil proceedings in respect of conduct referred to in subclauses 112(2)(a) and (b) if a court has made an order under clause 111 in criminal proceedings brought under clauses 104 or 107 in respect of the same conduct.

Clause 115 ensures that a person may not initiate multiple actions in relation to the same matter under two or more laws of that jurisdiction. Specifically, a person may not:

- commence a proceeding under Division 3 of Part 6 if the person has commenced a proceeding or made an application or complaint in relation to the same matter under a law of the Commonwealth or a State and the action is still on foot
- recover any compensation under Division 3 if the person has received compensation for the matter under a law of the Commonwealth or a State, or
- commence or continue with an application under Division 3 if the person has failed in a proceeding, application or complaint in relation to the same matter under another law. This does not include proceedings, applications or complaints relating to workers' compensation.

Part 7 Workplace Entry by WHS Entry Permit Holders

This Part confers rights on a person who holds an office in or is an employee of a union (WHS entry permit holders) to enter workplaces and exercise certain powers while at those workplaces. This Part also sets out requirements of WHS entry permit holders who are exercising or proposing to exercise a right of entry and describes conduct that must not be engaged in by WHS entry permit holders or other persons at a workplace in relation to WHS entry permit holders.

Clause 116 of Division 1 contains the key definitions for Part 7.

Official of a union is used in this Part to describe an employee of a union or a person who holds an office in a union.

Relevant person conducting a business or undertaking is used throughout Part 7 and is defined to mean a person conducting a business or undertaking in relation to which a WHS entry permit holder is exercising, or proposes to exercise, a right of entry. There may be more than one *relevant PCBU* at a workplace that a WHS entry permit holder is exercising, or proposes to exercise, a right of entry.

Relevant union is defined in this Part as the union that a WHS entry permit holder represents.

The term *relevant worker* is used in this Part to describe a worker whose workplace a WHS entry permit holder has a right to enter. A relevant worker is one:

- who is a member, or potential member, of a union that the WHS entry permit holder represents
- whose industrial interests the relevant union is entitled to represent, and
- who works at the workplace at which the WHS entry permit holder is exercising, or intending to exercise, a right of entry under this Part.

Clause 117 allows a WHS entry permit holder to enter a workplace and exercise any of the rights contained in clause 118 in order to inquire into a suspected contravention of the Bill at that workplace. These rights may only be exercised in relation to suspected contraventions that relate to, or affect, a relevant worker (as defined in clause 116).

Subclause 117(2) requires the WHS entry permit holder to reasonably suspect before entering the workplace that the contravention has occurred or is occurring. If this suspicion is disputed by another party, the onus is on the WHS entry permit holder to prove that the suspicion is reasonable.

Clause 118 lists the rights that a WHS entry permit holder may exercise upon entering a workplace under clause 117 to inquire into a suspected contravention. A WHS permit holder may do any of the following:

- inspect any thing relevant to the suspected contravention including work systems, plant, substances etc
- consult with relevant workers or the relevant PCBU about the suspected contravention
- require the relevant PCBU to allow the WHS entry permit holder to inspect and make copies of any document that is directly relevant to the suspected contravention that is kept at the workplace or accessible from a computer at the workplace, other than an employee record, or
- warn any person of a serious risk to his or health or safety emanating from an immediate or imminent exposure to a hazard that the WHS entry permit holder reasonably believes that person is exposed to.

Subclause 118(2) provides that the relevant PCBU must comply with the request to provide documents related to the suspected contravention unless allowing the WHS entry permit holder to access a document would contravene a Commonwealth, State or Territory law.

Subclause 118(3) provides that failure or refusal of a PCBU to comply with a request of a WHS entry permit holder to inspect documents under clause 118(1)(d) is a civil penalty provision. It is a defence if the PCBU can show they had a reasonable excuse for not complying. A reasonable excuse in such circumstances might be a belief that to provide access to the documents to the WHS entry permit holder would contravene another law. The approach in subclauses 118(3) and (4) reverses the onus of proof generally applicable to civil proceedings because only the PCBU is in a position to show whether the reason they refused or failed to do something was reasonable. It would be too onerous to require the plaintiff in civil proceedings to prove that a refusal or failure to comply with a request of a WHS entry permit holder was unreasonable as they may not be privy to the reasons for that refusal or failure to comply.

Subclause (4) clarifies that the burden of proof on the defendant under subclause (3) is an evidential burden. A legislative note to this provision

provides that the use or disclosure of personal information obtained during entry to a workplace to inquire into a suspected contravention is regulated under the Privacy Act.

Clause 119 sets out the provisions regarding notice after entry by a WHS entry permit holder. Subclause 119(1) requires a WHS entry permit holder to provide notice, in accordance with the regulations, to the relevant PCBU and the person with management or control of the workplace as soon as is reasonably practicable after entering a workplace under clause 117 to inquire into a suspected contravention. The contents of the notice must comply with the regulations.

However, subclause 119(2) provides that a WHS entry permit holder is not required to comply with the notice requirements in subclause 119(1), including to provide any or all of the information required by the regulations, if to do so:

- would defeat the purpose of the entry to the workplace, or
- would cause the WHS entry permit holder to be unreasonably delayed in their inquiry in an urgent case, i.e. in an emergency situation.

Subclause 119(3) provides that the notice requirements in subclause 119(1) do not apply to entry to a workplace under clause 120 to inspect or make copies of employee records or records or documents directly relevant to a suspected contravention that are not held by the relevant PCBU.

Clause 120 authorises a WHS entry permit holder to enter a workplace to inspect, or make copies of, employee records that are directly relevant to a suspected contravention or other documents directly relevant to a suspected contravention that are held by someone other than the relevant PCBU.

Subclause 120(3) requires the WHS entry permit holder to provide notice, in accordance with the regulations, of his or her proposed entry to inspect or make copies of these documents to the relevant PCBU and the person who has possession of the documents.

Subclauses 120(4) and (5) require the entry notice to comply with particulars prescribed in the regulations and to be given during the normal business hours of the workplace to be entered at least 24 hours, but not more than 14 days, before the proposed entry (subclause 119(4). A legislative note to this provision explains that the use or disclosure of personal information obtained by a WHS entry permit holder during entry is regulated under the Privacy Act.

Clause 121 authorises a WHS entry permit holder to enter a workplace to consult with and advise relevant workers who wish to participate in discussions about work health and safety matters. While at a workplace for this purpose, a WHS entry permit holder may warn any person of a serious risk to his or her health or safety that the WHS entry permit holder reasonably believes that person is exposed to.

Clause 122 requires a WHS entry permit holder to give notice, in accordance with the regulations, of the proposed entry under clause 121 to consult with workers to the relevant PCBU during the normal business hours of the workplace at least 24 hours and not more than 14 days, before the proposed entry. The contents of the notice must comply with the regulations.

Clause 123 clarifies that the authorising authority may impose conditions on a WHS entry permit holder at the time of issuing the permit (e.g. to provide a longer period of notice for a specific PCBU than otherwise required under the Bill (see clause 135)). Clause 123 requires a permit holder to comply with any such condition.

This clause is a civil penalty provision.

Clause 124 requires a WHS entry permit holder to hold an entry permit under the Fair Work Act or authorised to enter a workplace under the *Industrial Relations Act 1999* prior to entering the workplace. The Fair Work Act requires a union official of an organisation (as defined under that Act) seeking to enter premises under a State or Territory OHS law (also as defined under that Act) to hold a Fair Work entry permit. This clause is a civil penalty provision.

Clause 125 requires a WHS entry permit holder to produce his or her WHS entry permit and photographic identification, such as a driver's licence, when requested by a person at the workplace.

This clause is a civil penalty provision.

Clause 126 prohibits the exercise of a right of entry under the Bill outside of the usual working hours at the workplace the WHS entry permit holder is entering. This refers to the usual working hours of the workplace the WHS entry permit holder wishes to enter. This clause is a civil penalty provision.

Clause 127 provides that when exercising a right of entry, a WHS entry permit holder may only enter the area of the workplace where the relevant

workers carry out work or any other work area at the workplace that directly affects the health or safety of those workers.

Clause 128 requires a WHS entry permit holder to comply with any reasonable request by the relevant PCBU or the person with management or control of the workplace to comply with a work health and safety requirement, including a legislated requirement that is applicable to the specific type of workplace. Clause 142 would allow the commission to deal with a dispute about whether a request was reasonable. This clause is a civil penalty provision.

Clause 129 prohibits a WHS entry permit holder from entering any part of a workplace that is used only for residential purposes. For example, a WHS entry permit holder could enter a converted garage where work is being conducted but could not enter the living quarters of the residence if no work is undertaken there. This clause is a civil penalty provision.

Clause 130 provides that a WHS entry permit holder is not required to disclose the names of workers. The operation of the definition of 'relevant worker' means that a WHS entry permit holder may only exercise a right of entry at a workplace where there are workers who are members, or eligible to be members, of the relevant union.

Clause 130 protects the identity of workers by providing that a WHS entry permit holder is not required to disclose the names of any workers to the relevant PCBU or the person with management or control of the workplace. However, a WHS entry permit holder can disclose the names of members with their consent. Note that Clause 148 deals separately with unauthorised disclosure of information and documents obtained during right of entry in relation to all workers.

Clause 131 allows a union to apply for a WHS entry permit to be issued to an official of the union. Subclause 131(2) lists the matters that must be included in an application including a statutory declaration from the relevant union official declaring that the official meets the eligibility criteria for a WHS entry permit. This clause duplicates the eligibility criteria that are listed in clause 133 of the Bill.

Clause 132 lists the matters the industrial registrar, when considering whether to issue a WHS entry permit, must take into account when determining an application. This includes the objects of the Bill (in clause 3) and the object of enabling unions to enter workplaces for the purposes of ensuring the health and safety of workers**.**

Clause 133 provides that the industrial registrar must not issue a WHS entry permit unless satisfied of the matters listed in subclauses (a)–(c). The requirement in subclause 133(c) has been included to deal with situations where a person has applied for such an entry permit or authorisation under the *Industrial Relations Act 1999* and is simply waiting for it to be issued.

Clause 134 allows the industrial registrar to issue a WHS entry permit if it has taken into account the matters listed in clause 132 and 133. A person dissatisfied with the decision of the industrial registrar may appeal under the *Industrial Relations Act 1999*.

Clause 135 allows the industrial registrar to impose specific conditions on a WHS entry permit when it is issued.

Clause 136 states that the term of a WHS entry permit is 3 years.

Clause 137 provides for the expiry of a WHS entry permit. Subclause 137(1) provides that unless it is revoked it will expire when the first of the following occurs:

- three years elapses since it was issued, or
- the entry permit held by the WHS entry permit holder under the Fair Work Act expires, or the authorisation under the *Industrial Relations Act 1999* is no longer current or
- the WHS entry permit holder ceases to be an official of the relevant union, or
- the relevant union ceases to be an organisation registered under the *Fair Work (Registered Organisations) Act 2009* or the *Industrial Relations Act 1999*.

Subclause 137(2) makes it clear that an application for the issue of a subsequent WHS entry permit may be submitted before or after the current permit expires.

Clause 138 allows the regulator, a relevant PCBU or any other person affected by the exercise or purported exercise of a right of entry of the WHS entry permit holder to apply to the Queensland Industrial Relations Commission (the commission) for the revocation of the WHS entry holder's permit.

Subclause 138(2) provides the grounds for making an application to revoke the WHS entry permit holder's permit. These include:

- the permit holder no longer satisfies the eligibility criteria for a WHS entry permit or for an entry permit under a corresponding work health and safety law, or the Fair Work Act or the Commonwealth *Workplace Relations Act 1996* or where the person is no longer authorised to enter a workplace under the *Industrial Relations Act 1999*
- the permit holder has contravened any condition of the WHS entry permit they currently hold
- the permit holder has acted, or purported to act, in an improper manner in the exercise of any right under the Bill, or
- the permit holder has intentionally hindered or obstructed a person conducting the business or undertaking or workers at a workplace when exercising, or purporting to exercise, a right of entry under Part 7 of the Bill.

The applicant is required to give written notice of the application, including the grounds on which it is made, to the WHS entry permit holder to whom it relates and the relevant union. Both the WHS entry permit holder and the relevant union will be parties to the application for revocation (subclause 138(4)).

Clause 139 provides that if the commission receives an application for revocation of a WHS entry permit and believes that a ground for revocation exists, the commission must give notice to the WHS entry permit holder of this, including details of the application. The commission must also advise the WHS entry permit holder of his or her right to provide reasons (within 21 days) as to why the WHS entry permit should not be revoked.

Subclause 139(1)(b) requires the commission to suspend a WHS entry permit while deciding the application for revocation if it considers that suspension is appropriate. The WHS entry permit holder must be notified if this occurs.

Clause 140 allows the commission to make an order to revoke a WHS entry permit or an alternative order, such as imposing conditions on or suspending a WHS entry permit if satisfied on the balance of probabilities of the matters listed in subclause 138(2). Subclause 140(2) lists a number of matters that the commission must take into account when deciding the appropriate action to take. In addition to revoking a current WHS entry permit, the commission may make an order about the issuing of future WHS entry permits to the person whose WHS entry permit is revoked. A

person dissatisfied with the decision of the commission may appeal under the *Industrial Relations Act 1999*.

Clause 141 allows the regulator, on the request of a party to the dispute, to appoint an inspector to assist in resolving a dispute about the exercise or purported exercise of a right of entry. An inspector may then attend the workplace to assist in resolving the dispute. However, an inspector is not empowered to make any determination about the dispute. This does not prevent the inspector from exercising their compliance powers.

Clause 142 allows the commission, on its own initiative or on application, to deal with a dispute about a WHS entry permit holder's exercise, or purported exercise, of a right of entry. Subclause 142(1) specifically notes that this would include a dispute about whether a request by the relevant PCBU or the person with management or control of the workplace that a WHS entry permit holder comply with work health and safety requirements is reasonable. It would also include, for example, a dispute about a refusal by a PCBU to allow the WHS permit holder to exercise rights.

Subclause 142(2) provides that the commission may deal with the dispute in any manner it thinks appropriate, such as by mediation, conciliation or arbitration.

Subclause 142(3) provides the orders available to the commission if it deals with the dispute by arbitration. The authorising authority may make any order it considers appropriate and specifically may make an order revoking or suspending a WHS entry permit or about the future issue of WHS entry permits to one or more persons.

In exercising its power to make an order about the future issue of WHS entry permits to one or more persons under subclause 142(3)(d), the commission could, for example, ban the issue of a WHS entry permit to a person for a certain period. This provision is intended to ensure that a permit holder cannot gain a new permit while his or her previous permit is revoked or is still suspended. However, the commission may not grant any rights to a WHS entry permit holder that are additional to, or inconsistent with, the rights conferred on a WHS entry permit holder under the Bill.

A person dissatisfied with the decision of the commission may appeal under the *Industrial Relations Act 1999*.

Clause 143 provides that if the commission makes an order following arbitration of a right of entry dispute a person could be liable to a civil

penalty if they contravene that order. This clause is a civil penalty provision.

Clause 144 prohibits a person from unreasonably refusing or delaying entry to a workplace that the WHS entry permit holder is entitled to enter under this Part.

Subclause 144(2) provides that if civil proceedings are brought against a person for a contravention of this provision the evidential burden is on them, the defendant, to show that they had a reasonable excuse for refusing or delaying the entry of the WHS entry permit holder. A reasonable excuse in such an instance might be, for example, that the person reasonably believed that the WHS entry permit holder did not hold the correct entry permits. This clause is a civil penalty provision.

Clause 145 prohibits a person from intentionally and unreasonably hindering or obstructing a WHS entry permit holder who is exercising a right of entry or any other right conferred on them under this Part. This would cover behaviour such as making repeated and excessive requests that a WHS entry permit holder show his or her entry permit or failing to provide access to records that the permit holder is entitled to inspect. This clause is a civil penalty provision.

Clause 146 prohibits a WHS entry permit holder from intentionally and unreasonably delaying, hindering or obstructing any person, or disrupting any work, while at a workplace exercising or seeking to exercise rights conferred on them in this Part, or from otherwise acting in an improper manner. Conduct by a permit holder that would hinder or obstruct a person includes action that intentionally and unreasonably prevents or significantly disrupts a worker from carrying out his or her normal duties. This clause is a civil penalty provision.

Clause 147 provides that a person must not take action with the intention of giving the impression, or reckless as to whether they give the impression, that the action is authorised by this Part when it is not the case. An example of this behaviour would include where a person represents himself or herself as a permit holder when he or she does not hold a valid entry permit.

However, subclause 147(2) provides that a person has not contravened this clause if, when doing that thing, they reasonably believed that it was authorised by this Part. For instance, if a WHS entry permit holder reasonably believed that they were exercising a right of entry in an area of

the workplace where relevant workers worked or that affected the health and safety of those workers.

This clause is a civil penalty provision.

Clause 148 provides that a person must not use or disclose information or documents obtained by a WHS entry permit holder when inquiring into a suspected contravention. This clause is intended to operate to prevent the use or disclosure of the information or documents for a purpose other than that for which they were acquired. The exceptions at (a) to (e) are the only other authorised reasons for use or disclosure.

Subclause 148(a) authorises use or disclosure if the person reasonably believes that it is necessary to lessen or prevent a serious risk to a person's health or safety or a serious threat to public health or safety.

Subclause 148(b) authorises use or disclosure as part of an investigation of a suspected unlawful activity or in the reporting of concerns to relevant persons or authorities of concerns of suspected unlawful activity.

Subclause 148(c) authorises use or disclosure if it is required or authorised by or under law.

Subclause 148(d) authorises use or disclosure if the persons doing so believes it is reasonably necessary for an enforcement body (as defined in the Privacy Act) to do a number of things such as prevent, detect, investigate, prosecute or punish a criminal offence or breach of a law.

Subclause 148(e) provides that disclosure or use is also authorised if it is made or done with the consent of the individual to whom the information relates. This clause mirrors section 504 of the Fair Work Act. This clause is a civil penalty provision.

Clause 149 sets out the provisions regarding return of WHS entry permits. If a person's WHS entry permit is revoked, suspended or expired, clause 149 requires them to return it to the industrial registrar within 14 days. This clause is a civil penalty provision.

Subclause 149(2) provides that at the end of a suspension period, the industrial registrar must return any WHS entry permit that has not expired to the WHS entry permit holder if they, or the union they represent, applies for its return.

Clause 150 requires the relevant union to advise the industrial registrar if a WHS entry permit holder leaves the union, has their entry permit under the Fair Work Act suspended or revoked, or if the union ceases to be registered

under the *Industrial Relations Act 1999* (or holds the authorisation) or the Fair Work (Registered Organisations) Act. A civil penalty may be imposed if the union does not comply with this clause.

Clause 151 requires the industrial registrar to maintain an up-to-date, publicly accessible register of all WHS entry permit holders in the jurisdiction. The regulations may provide for the particulars of the register.

Part 8 The Regulator

Clause 152 lists the broad areas in which the regulator has functions. Functions set out in subclauses 152(a)–(d) include advising and making recommendations to the Minister, monitoring and enforcing compliance and providing work health and safety advice and information. Subclauses 152(e)–(g) describe the functions of the regulator in fostering and promoting work health and safety. Subclause 152(h) enables the regulator to conduct and defend legal proceedings under this Bill. Subclause 152(i) is a catchall provision that clarifies that the regulator has any other function conferred on it under this or any other Act.

Clause 153 confers a general power on the regulator to do all things necessary or convenient in relation to its functions. Subclause 153(2) confers on the regulator all the powers and functions that an inspector has under the Bill.

Clause 154 allows the regulator to delegate the regulator's powers and functions under the Act to an inspector, appropriately qualified public service employee or a person prescribed under the regulation.

Subclause 154(2) provides that 'appropriately qualified' includes having the qualifications, experience or standing appropriate to perform the functions or excise the power delegated by the regulator. The example following this clause advises that standing can be a person's classification level in the public service.

Clause 155 sets out the powers of the regulator to obtain information from a person in circumstances where the regulator has reasonable grounds to believe that the person is capable of:

- giving information
- producing documents or records, or

- giving evidence

in relation to a possible contravention of the Bill or that will assist the regulator to monitor or enforce compliance with the Bill.

Subclause 155(2) requires the regulator to exercise these powers by written notice served on the person.

Subclause 155(3) sets out the content requirements for the written notice, which must include statements to the effect that the person:

- is not excused from answering a question on the ground that it may incriminate them or expose them to a penalty
- is entitled, if they are an individual, to the use immunity provided for in subclause 172(2)
- is entitled to claim legal professional privilege (if applicable), and
- if required to appear—is entitled to attend with a lawyer (subclause 155(3)(c)(ii)).

Additional pre-requisites apply if the regulator wishes to obtain evidence from a person by requiring them to appear before a person appointed by the regulator (subclause 155(4)). First, the regulator cannot require a person to appear before the nominated person unless the regulator has first taken all reasonable steps to obtain the information by other means (i.e. by requiring production of documents or records etc). Second, if the person is required to appear in person, then the day, time and place nominated by the regulator must be reasonable in all the circumstances (clause 155(2)(c)).

Subclause 155(5) prohibits a person from refusing or failing to comply with a requirement under clause 155 without a reasonable excuse.

Subclause 155(6) clarifies that this places an evidential burden on the accused to show a reasonable excuse.

Subclause 155(7) makes it clear that the provisions dealing with self-incrimination, including the use immunity, apply to a requirement made under this clause, with any necessary changes.

Part 9 Securing Compliance

This Part establishes the WHS inspectorate and provides inspectors with powers of entry to workplaces and powers of entry to any place under a search warrant issued under the Bill. Part 9 also provides inspectors with powers upon entry to workplaces.

Clause 156 lists the categories of persons who are eligible for appointment as an inspector. Only public service employees, employees of public authorities, holders of a statutory office and WHS inspectors from other jurisdictions may be appointed as inspectors (subclauses 156(a)–(d)).

Subclause 156(e) additionally allows for the appointment of any person who is in a class prescribed under a regulation. Regulations could be made, for example, to allow for the appointment of specified WHS experts to meet the regulator's short-term, temporary operational requirements. Restrictions on inspectors' compliance powers are provided for in clauses 161 and 162, which deal with conditions or restrictions attaching to inspectors' appointments and regulator's directions respectively.

Subclause 156(2) provides the link to the *Public Service Act 2008* requirements in terms of arrangements for appointment of an inspector who is already appointed as an inspector under a corresponding WHS law.

Clause 157 provides for the issue, use and return of inspectors' identity cards. The clause specifies that an inspector may exercise a power in relation to another person only if the inspector first produces his or her identity card or has the identity card clearly displayed. Provision is made for the inspector to produce the identity card for inspection by the person at the first reasonable opportunity if it is not practicable to do so when exercising a power.

Clause 158 requires inspectors to report actual or potential conflicts of interest arising out of their functions as an inspector to the regulator.

Subclause 158(2) requires the regulator to consider whether the inspector should not deal, or should no longer deal, with an affected matter and direct the inspector accordingly. The note following this clause advises that failure to comply with the clause may result in action by the regulator under clause 159 of this Act (suspension and ending of appointment of inspectors), or with disciplinary action under the *Public Service Act 2008*.

Clause 159 provides the regulator with powers to suspend or end inspectors' appointments.

Subclause 159(2) clarifies that a person's appointment as an inspector automatically ends upon the person ceasing to be eligible for appointment as an inspector (e.g. the person ceases to be a public servant).

Clause 160 lists the functions and powers of inspectors and cross-references a number of important compliance powers which are detailed elsewhere. However, subclause 160(1)(a) is a stand-alone provision that empowers inspectors to provide information and advice about compliance with the Bill.

Clause 161 allows conditions to be placed on an inspector's appointment by specifying them (if any) in the person's instrument of appointment. For example, an inspector may be appointed to exercise compliance powers only in relation to a particular geographic area or industry or both.

Clause 162 provides that inspectors are subject to the regulator's directions, which may be of a general nature or may relate to a specific matter (subclause 162(2)). For example, the regulator could direct inspectors to comply with investigation or litigation protocols that would apply to all matters. An inspector must comply with these directions. This ensures a consistent approach to the way that inspectors' compliance powers are exercised.

Subclause 162(3) mandates that the regulator must issue directions to inspectors in relation to privacy, confidentiality and security of persons and businesses.

Clause 163 provides for entry at any time by an inspector into any place that is, or the inspector reasonably suspects is, a workplace.

Subclause 163(2) clarifies that such entry may be with or without the consent of the person with management or control of the workplace.

Subclause 163(3) requires an inspector to immediately leave a place that turns out not to be a workplace. The note following the clause explains that this requirement would not prevent an inspector from passing through residential premises if this is necessary to gain access to a workplace under subclause 170(c).

Subclause 163(4) provides for entry by an inspector under a search warrant.

Clause 164 clarifies that an inspector is not required to give prior notice of entry under section 163.

Subclause 164(2) requires the inspector, as soon as practicable after entering a workplace or suspected workplace, to take all reasonable steps to notify relevant persons of his or her entry and the purpose of entry. Those persons are:

- the relevant PCBU in relation to which the inspector is exercising the power of entry (subclause 164(2)(a))
- the person with management or control of the workplace (subclause 164(2)(b)), and
- any HSR for either of these PCBUs (subclause 164(2)(c)).

The requirements in subclauses 164(2)(a) and (b) address multi-business worksites where the worksite is managed by some sort of management company (e.g. principal contractor on a construction site). In those situations, the management company, as well as any other PCBUs whose operations are proposed to be inspected, are subject to the notification requirements in this provision.

Subclause 164(3) provides that notification is not required if it would defeat the purpose for which the place was entered or would cause unreasonable delay (e.g. during an emergency). Special notification rules apply to entry on warrant (see clause 168).

Clause 165 sets out inspectors' general powers on entry. The list of powers reflects a consolidation of powers currently included in work health and safety Acts across Australia. Subclause 165(1)(a) confers a general power on inspectors to inspect, examine and make inquiries at workplaces, which is supported by more specific powers to conduct various tests and analyses in subclauses 165(1)(b)–(e).

Subclause 165(1)(g) allows inspectors to exercise any compliance power or other power that is reasonably necessary to be exercised by the inspector for purposes of the Bill. This provision must be read subject to Subdivisions 3 and 4 of Part 9, which place express limitations around the exercise of specific powers (e.g. production of documents).

Requirements for reasonable help

Subclause 165(1)(f) allows an inspector to require a person at the workplace to provide reasonable help to exercise the inspector's powers in subclauses (a)–(e). This clause provides, in very wide terms, for an

inspector to require any person at a workplace to assist him or her in the exercise of their compliance powers. Although this could include an individual such as a self-employed person or member of the public at the workplace, the request would have to be reasonable in all the circumstances to fall within the scope of the power.

Limits on what may be required

Inspectors may only require reasonable help to be provided if the required help is—for example:

- connected with or for the purpose of exercising a compliance power
- reasonably required to assist in the exercise of the inspector's compliance powers
- reasonable in all the circumstances, or
- connected to the workplace where the required assistance is being sought.

Subclause 165(2) makes it an offence for a person to refuse to provide reasonable help required by an inspector under this clause without a reasonable excuse. What will be a reasonable excuse will depend on all of the circumstances. A reasonable excuse for failing to assist an inspector as required may be that the person is physically unable to provide the required help.

Subclause 165(3) places the evidentiary burden on the individual to demonstrate that they have a reasonable excuse. That is because that party is better placed to point to evidence that they had a reasonable excuse for refusing to provide the inspector with the required reasonable help.

Clause 166 provides for inspectors to be assisted by one or other persons if the inspector considers the assistance is necessary in the exercise of his or her compliance powers. For example, an assistant could be an interpreter, WHS expert or information technology specialist.

Subclause 166(2) provides that assistants may do anything the relevant inspector reasonably requires them to do to assist in the exercise of his or her compliance powers and must not do anything that the inspector does not have power to do, except as provided under a search warrant (e.g. use of force by an assisting police officer to enter premises). This provision ensures that assistants are always subject to directions from inspectors and the same restrictions that apply to inspectors.

Subclause 166(3) provides that anything lawfully done by the assistant under the direction of an inspector is taken for all purposes to have been done by the inspector. This means that the inspector is accountable for the actions of the assistant. This provision is intended to ensure the close supervision of assistants by the responsible inspector.

Clause 167 establishes an application process for obtaining search warrants under the Bill and establishes the process and requirements for their issue. Under this provision, an inspector may apply to a magistrate for the issue of a search warrant in relation to a place if they believe on reasonable grounds that there is particular evidence of an offence against the Bill at the place, or such evidence may be at the place within the next 72 hours.

The search warrant would enable the stated inspector to, with necessary and reasonable help and force, enter the place and exercise the inspector's compliance powers and seize the evidence stated in the search warrant, subject to the limitations specified in the search warrant (subclause 167(5)). The power to seize evidence is subject to the relevant provisions in the Bill (clauses 175–181), in addition to any other limitations specified in the warrant.

Clause 167A allows for the making of an application under clause 167 via phone, fax, email, radio, videoconferencing or through another form of electronic communication. Electronic application is only available if the inspector reasonably considers it necessary because of urgent circumstances or other special circumstances such as remoteness of location.

Subclause 167A(2) provides that the inspector cannot make electronic application before a written application has been prepared under subclause 167(2), but may make electronic application before the application is sworn.

Subclause 167A(3) provides that the magistrate may issue the warrant (the original warrant) only if the magistrate is satisfied that that it was necessary to make the application under clause 167A and that the application was made in an appropriate way.

Subclause 167A(4) provides that after the magistrate issues the original warrant, the magistrate must immediately give a copy of the warrant to the inspector if there is a reasonably practicable way of doing so, for example, by sending a copy of the warrant by fax or email. If this is not possible, the magistrate must tell the inspector the information mentioned in subclause 167(5) and the inspector must complete a form of warrant, which includes

the writing on the form of warrant the information mentioned in subclause 167(5) provided to the inspector by the magistrate.

Subclause 167A(5) provides that the copy of the warrant mentioned in subclause 167A(4)(a), or the form of warrant also mentioned in subclause 167A(4)(b), (in either case, the duplicate warrant), is as effectual as the original warrant.

Subclause 167A(6) requires the inspector to send to the magistrate, at the first reasonable opportunity, the written application complying with subclause 167(2), and the completed form of warrant if one was completed by the inspector under subclause 167A(4)(b).

Subclause 167A(7) requires the magistrate to keep the original warrant, and, on receiving the documents described under subclause 167A(6), to attach the documents to the original warrant and give the original warrant and attached documents to the clerk of the court of the relevant magistrates court.

Subclause 167A(8) clarifies the situation where an issue arises in a proceeding about whether an exercise of power was authorised by a warrant issued under clause 167A, and the original warrant is not produced in evidence. The onus of proving that that a warrant authorised the exercise of power is on the person relying on the lawfulness of the exercise of power.

Subclause 167A(10) clarifies that a relevant magistrates court means the Magistrates Court the magistrate constitutes under the *Magistrates Act 1991*.

Clauses 168 and 169 set out the notification requirements that apply to entry on warrant. Subclause 169(2) clarifies that execution copy includes a duplicate warrant mentioned in subclause 167A(5).

Clause 170 limits entry to residential premises to hours that are reasonable, having regard to the times at which the inspector believes work is being carried out at the place. It also provides that an inspector may only pass through those parts of the premises that are used only for residential purposes for the sole purpose of accessing a suspected workplace and only if the inspector reasonably believes that there is no reasonable alternative access. Entry to residential premises is also permitted with the consent of the person with management or control of the place (subclause 170(a)) and under a search warrant (subclause 170(b)).

Clause 171 sets out the power to require production of documents and answers to questions.

Identify who has relevant documents

Subclause 171(1)(a) authorises an inspector to require a person at a workplace to tell him or her who has custody of, or access to, a document for compliance-related purposes. The term 'document' is defined to include a 'record'. It is intended that the term 'document' includes any paper or other material on which there is writing and information stored or recorded by a computer (see for example section 25 of the Acts Interpretation Act).

Request documents

Subclause 171(1)(b) permits an inspector to require a person who has custody of, or access to, a document to produce it to the inspector while the inspector is at that workplace or within a specified period.

Subclause 171(2) provides that requirements for the production of documents must be made by written notice unless the circumstances require the inspector to have immediate access to the document.

There is no guidance in the Bill as to the time that may be stated for compliance with a notice, but it is intended that the time must be reasonable taking into consideration all of the circumstances giving rise to the request and the actions required by the notice. The required information must be provided in a form that is capable of being understood by the inspector, particularly in relation to electronically stored documents (see for example section 25A of the Acts Interpretation Act).

Interview

Subclause 171(1)(c) authorises inspectors to require persons at workplaces to answer any questions put by them in the course of exercising their compliance powers.

Subclause 171(3) provides that an interview conducted under this provision must be conducted in private if the inspector considers it appropriate or the person being interviewed requests it.

Subclause 171(4) clarifies that a private interview would not prevent the presence of the person's representative (e.g. lawyer), or a person assisting the inspector (e.g. interpreter).

Subclause 171(5) clarifies that a request for a private interview may be made during an interview.

Offence provision

Subclause 171(6) makes it an offence for a person to fail to comply with a requirement under this clause, without having a reasonable excuse. This provision is subject to:

- legal professional privilege, if applicable (see clause 269), and
- the requirements to provide an appropriate warning, as referred to in subclause 173(2).

Subclause 171(7) clarifies that subclause (6) places an evidential burden on the accused to prove a reasonable excuse for not complying with a requirement under that subclause. Clause 173 also sets out the steps an inspector must take before requiring a person to produce a document or answer a question under Part 9.

Clause 172 sets out the abrogation of privilege against self-incrimination. The Bill seeks to ensure:

- that the strongest powers to compel the provision of information currently available to regulators across Australia are available for securing ongoing work health and safety, and
- that the rights of persons under the criminal law are appropriately protected.

Subclause 172(1) clarifies that there is no privilege against self-incrimination under the Bill, including under clauses 171 (Power to require production of documents and answers to questions) and 155 (Powers of regulator to obtain information). This means that persons must comply with requirements made under these provisions, even if it means that they may be incriminated or exposed to a penalty in doing so.

These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Bill and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.

Subclause 172(2) instead provides for a 'use immunity' which means that the answer to a question or information or a document provided by an *individual* under clause 171 is not admissible as evidence against *that individual* in civil or criminal proceedings. An exception applies in relation

to proceedings arising out of the false or misleading nature of the answer information or document.

In addition subclause 172(2) provides a 'derivative use immunity' which means that any information, document or thing obtained as a direct or indirect consequence of the answer or production of the document would be similarly inadmissible.

Clause 173 sets out the steps an inspector must take before requiring a person to produce a document or answer a question under Part 9. These steps are not required if documents or information are provided voluntarily. Under clause 173, an inspector must first identify himself or herself by producing his or her identity card or in some other way and then:

- warn the person that failure to comply with the requirement or to answer the question without reasonable excuse would constitute and offence (subclause 173(1)(b))
- warn the person about the abrogation of privilege against self-incrimination in clause 172 (subclause 173(1)(c)), and
- advise the person about legal professional privilege – which is unaffected by the Bill (subclause 173(1)(d)).

This ensures that persons are fully aware of the legal rights and obligations involved when responding to an inspector's requirement to produce a document or answer a question. If requirements to produce documents are made by written notice (see subclause 171(2)), the notice must also include the appropriate warnings and advice.

Subclause 173(2) provides that it is not an offence for an individual to refuse to answer an inspector's question on grounds of self-incrimination, unless he or she was first given the warning about the abrogation of the privilege against self-incrimination.

Subclause 173(3) clarifies that nothing in the clause would prevent the inspector from gathering information provided voluntarily (i.e. without requiring the information and without giving the warnings required by clause 173).

Clause 174 allows inspectors to copy, or take extracts from, documents given to them in accordance with a requirement made under the Bill and retain them for the period that the inspector considers necessary.

Subclause 174(2) provides for access to such documents at all reasonable times by the persons listed in subclauses 174(2)(a)–(c). Separate rules apply to documents that are seized under clause 175.

Clause 175 deals with the seizure of evidence under Part 9. If the place is a workplace, then the inspector may seize anything (including a document) that the inspector reasonably believes constitutes evidence of an offence against the Bill (subclause 175(1)(a)). The inspector may also take and remove for examination, analysis or testing a sample of any substance or thing without paying for it (subclause 175(1)(b)).

If a place (even if it is not a workplace) has been entered with a search warrant under this Part, then the inspector may seize the evidence for which the warrant was issued (subclause 175(2)). In either case, the inspector may also seize anything else at the place if the inspector reasonably believes the thing is evidence of an offence against the Bill, and the seizure is necessary to prevent the thing being hidden, lost, destroyed, or used to continue or repeat the offence (subclause 175(3)).

Clause 176 allows inspectors to seize certain things, including plant, substances and structures, at a workplace or part of the workplace that the inspector reasonably believes is defective or hazardous to a degree likely to cause serious illness or injury or a dangerous incident to occur.

Clause 177 provides that a thing that is seized may be moved, made subject to restricted access or, if the thing is plant or a structure, dismantled.

Subclause 177(2) makes it an offence to tamper, or attempt to tamper, with a thing that an inspector has placed under restricted access.

Subclauses 177(3) to (7) enable inspectors to require certain things to be done to allow a thing to be seized.

Subclause 177(3) allows an inspector to require a person with control of the seized thing to take it to a stated place by a certain time, which must be reasonable in all the circumstances.

Subclause 177(4) provides that the requirement must be made by written notice unless it is not practicable to do so, in which case the requirement may be made orally and confirmed in writing as soon as practicable.

Subclause 177(5) allows the inspector to make further requirements in relation to the same thing if it is necessary and reasonable to do so. For example, a requirement could be made to de-commission or otherwise make plant safe once it has been moved to the required place.

Subclause 177(6) makes it an offence for a person to refuse or fail to comply with a requirement made under this clause if they do not have a reasonable excuse. The evidentiary burden is on the individual to demonstrate that they have a reasonable excuse (subclause 177(7)).

Clause 178 requires inspectors to give receipts for seized things, as soon as practicable. This includes things seized under a search warrant. The receipt must be given to the person from whom the thing was seized or, if that is not practicable, the receipt must be left in a conspicuous position in a reasonably secure way at the place of seizure (subclause 178(2)).

Subclause 178(3) sets out the information that must be specified in the receipt.

Subclause 178(4) sets out the circumstances in which a recept is not required.

Clause 179 provides that a seized thing may be forfeited if, after making reasonable inquiries, the regulator cannot find the 'person entitled' to the thing or, after making reasonable efforts, the thing cannot be returned to that person.

Subclauses 179(2) and (3) provide that inquiries or efforts to return a seized thing are not necessary if this would be unreasonable in the circumstances (e.g. the person entitled to return of the thing tells the regulator they do not want the thing returned to them).

Subclause 179(1)(c) provides for a seized thing to be forfeited by written notice if the regulator reasonably believes it is necessary to retain the thing to prevent it from being used to commit an offence against the Bill (clause 179(4)). However, written notice is not required if the regulator cannot find the 'person entitled' to the thing after making reasonable inquiries or it is impracticable or would be unreasonable to give the notice (subclause 179(5)).

Subclause 179(6) specifies the matters that must be stated in a notice of forfeiture, including the reasons for the decision and information about the right of review.

Subclause 179(7) specifies matters that must be taken into account in taking steps to return a seized thing or give notice about its proposed forfeiture, including the thing's nature, condition and value.

Subclause 179(8) allows the State to recover reasonable costs of storing and disposing of a thing that has been seized to prevent it being used to commit an offence against the Bill.

Subclause 179(9) defines the 'person entitled' to mean the person from whom the thing was seized (which will usually be the person entitled to possess the thing) or if that person is no longer entitled to possession, the owner of the thing.

Clause 180 sets out a process for the return of a seized thing after the end of six months after seizure. Upon application from the person entitled to the thing, the regulator must return the thing to that person, unless the regulator has reasonable grounds to retain the thing (e.g. the thing is evidence in legal proceedings).

The applicant may be the 'person entitled' to the thing, that is, either the person entitled to possess the thing or the owner of the thing (subclause 180(4)).

Subclause 180(3) allows the regulator to impose conditions on the return of a thing, but only if the regulator considers it appropriate to eliminate or minimise any risk to work health or safety related to the thing.

Clause 181 provides that a person from whom a thing was seized, the owner of the thing or a person they have authorised with certain access rights, including the right of inspection and, if the thing is a document, the right to copy it.

This does not apply if it is impracticable or would be unreasonable to allow inspection or copying (subclause 181(2)).

Documents produced to an inspector under clause 171 are subject to the separate access regime under clause 174.

Clause 182 requires inspectors to take all reasonable steps to ensure that they and any assistants under their direction cause as little inconvenience, detriment and damage as is practicable.

Clause 183 sets out a process for giving written notice to relevant persons of any damage (other than damage that the inspector reasonably believes is trivial) caused by inspectors or their assistants while exercising or purporting to exercise compliance powers.

Clause 184 allows a person to make a claim for compensation if they incur a loss or expense because of the exercise or purported exercise of a power under Division 3 of Part 9.

Subclause 184(2) specifies the forum and process for claiming compensation.

Subclause 184(3) limits the compensation that is recoverable to compensation that is 'just' in all the circumstances of the case. This means that compensation is not recoverable simply because the relevant powers have been exercised or purportedly exercised at a workplace. The intention is to limit the recovery of compensation to those cases where there is a sufficient degree of unreasonableness or unfairness in the exercise or purported exercise of those powers to warrant an award of just compensation. For example, compensation may be awarded if the taking of a sample of a thing by an inspector or forfeiture of a thing resulted in the acquisition of property other than on just terms, or in circumstances where an error by an inspector caused significant detriment.

Subclause 184(4) allows the regulations to prescribe the matters that may or must be taken into account by the relevant court when considering whether it is just to make the order for compensation.

Clause 185 allows an inspector to require a person to tell the inspector his or her name and residential address if the inspector:

- finds the person committing an offence against the Bill (subclause 185)(1)(a)) or
- reasonably suspects the person has committed an offence against the Bill, based on information given to the inspector, or the circumstances in which the person is found (subclause 185(1)(b)).

Before making a requirement under this provision, the inspector must give the person their reasons for doing so and also warn the person that failing to respond without reasonable excuse would constitute an offence (subclause 185(2)).

If the inspector reasonably believes the person's response to be false, the inspector may further require the person to give evidence of its correctness (subclause 184(3)). For example, an inspector could ask to see the person's driver's licence.

Subclause 185(4) makes it an offence for a person to refuse or fail to comply with a requirement under this clause if they do not have a reasonable excuse. Subclause (5) clarifies that there is an evidential burden on the accused to show a reasonable excuse.

Subclause 185(6) provides that a person does not commit an offence against this clause if the inspector required the person to state the person's name and address because the inspector suspects the person of having

committed an offence against this Bill and the person is not proved to have committed the offence.

Clause 186 clarifies that an inspector may take affidavits for any compliance-related purpose under the Bill.

Clause 187 clarifies that an inspector may appear at any coronial inquests into the cause of death of a worker while the worker was carrying out work as provided by the *Coroners Act 2003*.

Clause 188 makes it an offence to intentionally hinder or obstruct an inspector in exercising compliance powers under the Bill, or induce or attempt to induce any other person to do so. This would include unreasonably refusing or delaying entry, as well as behaviour such as intentionally destroying or concealing evidence from an inspection. Any reasonable action taken by a person to determine his or her legal rights or obligations in relation to a particular requirement (e.g. the scope of legal professional privilege) is not intended to be caught by this provision.

Clause 189 makes it an offence for a person who is not an inspector to hold himself or herself out to be an inspector.

Clause 190 makes it an offence to assault, threaten or intimidate, or attempt to do so, an inspector or a person assisting an inspector. Although this is also an offence at general criminal law, the inclusion of this provision is intended to ensure greater deterrence by giving it more prominence and allowing its prosecution by the regulator.

Part 10 Enforcement Measures

Part 10 provides for enforcement measures including notices (i.e. improvement notices, prohibition notices and non-disturbance notices), remedial action and court-ordered injunctions. Many of the decisions that can be made under this Part are subject to review (see Part 12).

Clause 191 provides for the issue of improvement notices. Improvement notices may require a person to remedy a contravention, prevent a likely contravention of the Bill or take remedial action. An inspector may issue improvement notices if the inspector reasonably believe a person:

- is contravening a provision of the Bill, or

- has contravened a provision in circumstances that make it likely that that contravention will continue or be repeated.

Subclause 191(2) lists what action an improvement notice may require, including that the person remedy the contravention or take steps to prevent a likely contravention from occurring.

Clause 192 sets out the mandatory and optional content for improvement notices. The mandatory content aims to ensure that the person who is issued with the notice understands the grounds for the inspector's decision, including (in brief) how the laws are being or have been contravened. The optional content includes such things as directions about measures to be taken to remedy the contravention or prevent the likely contravention from occurring (subclause 192(2)).

Improvement notices must also specify a date for compliance with the notice (subclause 192(1)(d)). The day stated for compliance with the improvement notice must be reasonable in all the circumstances. Relevant factors could include the seriousness of the contravention or the likely contravention.

Clause 193 makes it an offence for a person to fail or refuse to comply with an improvement notice within the time allowed for compliance as stated in the notice, including any extended time for compliance (see clause 194). This is subject to provisions for review of decisions, including stays of decisions to issue notices (see Part 12).

Clause 194 allows inspectors to extend the time for compliance with improvement notices. An extension of time to comply with an improvement notice must be in writing and can only be made if the time for compliance stated in the notice (or as extended) has not expired.

Clause 195 allows inspectors to issue prohibition notices to stop or prevent an activity at a workplace, or modify the way the activity is carried out, if they reasonably believe that:

- if the activity is occurring—it involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard, or
- if the activity is not occurring but may occur, and if it does—it will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

Subclause 195(2) provides that the notice may be issued to the person who has control over the activity. This would ordinarily be a PCBU.

Pre-requisites for issue of prohibition notices

The use of 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard' in subclause 195(1) has the advantage of being effective to deal with risks of diseases of long latency from immediate exposure to a hazard and circumstances of psychological threat or other similar conditions. For a prohibition notice to be issued, the risk would have to be considered 'serious' and be associated with an immediate or imminent exposure to a hazard.

Operation of prohibition notices

A prohibition notice takes effect immediately upon being issued and ordinarily continues to operate—subject to the review provisions in Part 12—until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.

There is no requirement for an inspector to visit a workplace to verify that the risks identified in the notice have been remedied. This recognises that an inspector may be satisfied of compliance with a prohibition notice in some circumstances without the need for a workplace visit (e.g. if an independent expert report is provided to the inspector, or independently verified video footage of the affected activity is submitted).

Oral directions

Because prohibition notices are designed as a response to serious risks to work health or safety, directions may be issued orally at first instance, but must be confirmed by a written notice as soon as practicable (subclause 195(3)). In general, for such oral directions to be enforceable the inspector must make it clear that the directions are being given under this provision and that it would be an offence for the person not to comply.

Clause 196 sets out the mandatory and optional content for prohibition notices. The mandatory content requirements are designed to ensure that the person who is issued with the notice understands the inspector's decision, including the basis for the inspector's belief that a notice should be issued and (in brief) the activity the inspector believes involves or will involve a serious risk and the matters that give or will give rise to the risk. It must also cite the provision of the Bill or regulations that the inspector believes is being or is, likely to be, contravened by the activity.

Prohibition notices may also include directions about measures to be taken to remedy the risk, activities to which the notice related, or any

contravention or likely contravention mentioned in the notice (subclause 196(2)).

Subclause 196(3) gives examples of the ways in which a prohibition notice may prohibit the carrying on of an activity, but does not limit the inspector's power to issue prohibition notices in clause 195.

Clause 197 provides that it is an offence for a person to fail or refuse to comply with a prohibition notice or a direction issued under subsection 195(2) of the Bill. The penalties reflect the consequences that may result from failure to remedy serious risks to health or safety.

Clauses 198 and 199 allow an inspector to issue non-disturbance notices to the person with management or control of a workplace if the inspector reasonably believes that it is necessary to ensure non-disturbance of a site to facilitate the exercise of his or her compliance powers.

A non-disturbance notice may require the person to whom it is issued to preserve the site of a notifiable incident for a specified period or prevent a particular site being disturbed for a specified period. A 'notifiable incident' occurs where a person dies, suffers a serious injury or illness or where there is a dangerous incident (clause 35). The terms 'serious injury or illness' and 'dangerous incident' are defined in clauses 36 and 37 respectively.

A site includes any plant, substance, structure or thing associated with that site (subclause 199(3)).

A non-disturbance notice must specify how long it operates (this cannot be more than seven days), what the person must do to comply with the notice and the penalty for contravening the notice (subclause 199(2)).

Subclause 199(4) allows certain activities to proceed, despite the non-disturbance notice. These activities generally relate to ensuring health or safety of affected persons, assisting police investigations or activities expressly permitted by an inspector.

Clause 200 makes it an offence for a person to, without reasonable excuse, fail or refuse to comply with a non-disturbance notice. This is subject to the provisions for review of decisions, including stays of decisions to issue notices (see Part 12). Subclause 200(2) clarifies that the evidential burden of showing a reasonable excuse is on the accused.

Clause 201 allows inspectors to issue one or more subsequent non-disturbance notices in relation to a site, whether or not the previous notice has expired. This would be subject to the requirements in clauses

198 and 199, which relate to the issue and contents of non-disturbance notices.

Clause 202 clarifies that in this division, notice means improvement notice, prohibition notice or non-disturbance notice.

Clause 203 requires that all notices issued under this Part be given in writing, although enforceable directions may be given orally in advance of a prohibition notice (clause 195).

Clause 204 clarifies that improvement and prohibition notices may include directions (see clauses 192(2), 196(2) and 196(3)), and that a direction included in an improvement or prohibition notice may refer to a Code of Practice and offer the person to whom it is issued a choice of ways to remedy the contravention.

Clause 205 clarifies that improvement and prohibition notices may include recommendations. The difference between a direction and recommendation is that it is not an offence to fail to comply with recommendations in a notice (subclause 205(2)).

Clause 206 allows for notices to be varied or cancelled. It allows inspectors to make minor technical changes to a notice to improve clarity and to correct errors or references, including to reflect changes of address or other circumstances. Subclause 206(2) makes it clear that this provision is in addition to the inspector's power to extend the period for compliance with an improvement notice under clause 194.

Clause 207 also allow for notices to be varied or cancelled. It provides that a notice issued by an inspector may only be varied or cancelled by the regulator. Clause 207 is subject to clause 206 that empowers an inspector to make minor changes to improvement, prohibition and non-disturbance notices for certain purposes.

Subclause 207 requires substantive variations to notices to be made by the regulator. It also empowers the regulator to cancel notices issued under this Part.

Clause 208 makes it clear that formal defects or irregularities in notices issued under this Part do not invalidate the notices, unless this would cause or be likely to cause substantial injustice. Subclause 208(b) clarifies that a failure to use the correct name of the person to whom the notice is issued falls within this provision, if the notice sufficiently identifies the person and has been issued or given to the person in accordance with clause 209.

Clause 209 specifies how notices may be served. The regulations may prescribe additional matters such as the manner of issuing or giving a notice and the steps that must be taken to notify all relevant persons that the notice has been issued (subclause 209(2)).

'Issuing' and 'giving' notices

The terms 'issued' and 'given' in relation to serving notices have been used differently in current work health and safety laws in Australia. Under this Part a notice is 'issued' to a person who is required to comply with it, but may be 'given' to another person (e.g. a manager or officer of a corporation). Those persons who are given the notice need not comply with it, unless they are also the person to whom it was issued.

Clause 210 requires the person to whom a notice is issued to display a copy of that notice in a prominent place in the workplace at or near the place where work affected by the notice is performed. This must be done as soon as possible.

It is an offence for a person to refuse or fail to display a notice as required by this clause. It is also an offence for a person to intentionally remove, destroy, damage or deface the notice while it is in force (subclause 210(2)). There is no requirement to display notices that are stayed under review proceedings, as they would not be considered to be 'in force' for the period of the stay.

Clause 211 allows the regulator to take remedial action in circumstances where a person issued with a prohibition notice has failed to take reasonable steps to comply with the notice. The regulator may take any remedial action it believes reasonable to make the workplace or situation safe, but only after giving written notice to the alleged offender of the regulator's intent. The written notice must also state the owner's or person's liability for the costs of that action.

Clause 212 allows the regulator to take remedial action if the regulator reasonably believes that:

- a prohibition notice can and should be issued in a particular case, but
- the notice cannot be issued after reasonable steps have been taken because the person with management or control of the workplace cannot be found.

In these circumstances, the regulator may take any remedial action necessary to make the workplace safe. The word 'necessary' is intended to imply that the regulator should take the least interventionist approach

possible, while making the workplace safe (e.g. erecting barricades around a site).

Clause 213 enables the regulator to recover the reasonable costs of remedial action taken under clauses 211 or 212 as a debt due to the regulator. For costs to be recoverable from a person under clause 211, the person must have been notified of the regulator's intention to take the remedial action and the person's liability for costs.

Clause 214 provide for the application of the division to certain types of notices.

Clause 215 allows the regulator to apply to a Magistrates court for an injunction to compel a person to comply with a notice or restrain the person from contravening a notice issued under this Part. Injunctive relief may be sought in relation to an improvement notice even if any time for complying with the notice has expired (subclause 215(2)(b)).

Part 11 Enforceable undertakings

Part 11 allows for written, enforceable undertakings to be given by a person as an alternative to prosecuting them. Such undertakings are voluntary—a person cannot be compelled to make an undertaking and the regulator has discretion whether or not to accept the undertaking.

Clause 216 enables the regulator to accept a WHS undertaking relating to a breach or alleged breach of the Bill, with the exception of a breach or alleged breach relating to a Category 1 offence. A Category 1 offence, as defined in clause 31, is the most serious work health and safety offence and involves reckless conduct by a duty holder that exposes an individual to a risk of death or serious illness or injury without reasonable excuse. The use of enforceable undertakings would not be appropriate in such circumstances. A legislative note following subclause 216(1) directs the reader to subclause 230(3), which requires the regulator to publish general guidance for the acceptance of WHS undertakings on its website.

Clause 217 requires the regulator to give the person wanting to make a WHS undertaking a written notice of its decision to accept or reject the undertaking, along with reasons for that decision. In the interests of transparency, if the regulator accepts a WHS undertaking the reasons for

that decision must be published on the regulator's website (subclause 217(2)). However, the decision is not subject to internal review.

Clause 218 deals with when an undertaking becomes enforceable. That is, when the regulator's decision to accept is given to the person or at any later date specified by the regulator.

Clause 219 provides that it is an offence to contravene a WHS undertaking.

Clause 220 applies if a person contravenes a WHS undertaking. Where, on an application by the regulator to a Magistrates Court, the court is satisfied that the person has contravened the undertaking it may, in addition to imposing a penalty, direct the person to comply with the undertaking, or discharge the undertaking. The court may also make any other order it considers appropriate in the circumstances, including orders that the person pay the costs of proceedings and orders that the person pay the regulator's costs in monitoring compliance with the WHS undertaking in the future.

Subclause 220(4) provides that an application for, or the making of, any orders under this clause will not prevent proceedings being brought for the original contravention or alleged contravention in relation to which the WHS undertaking was made. Subclause 232(1)(c) provides for the limitation period for the bringing of such proceedings.

Clause 221 provides that, with the written agreement of the regulator, a person who has made a WHS undertaking may withdraw or vary the undertaking, but only in relation to the contravention or alleged contravention to which the WHS undertaking relates. Once again, in the interests of transparency and accountability, variations and withdrawals must be published on the regulator's website (subclause 221(3)).

Clause 222 prevents a person being prosecuted for a contravention or alleged contravention of the Bill to which a WHS undertaking relates if that WHS undertaking is in effect or if the undertaking has been completely discharged.

Subclause 222(3) enables the regulator to accept a WHS undertaking while related court proceedings are on foot but before they have been finalised. The intention is that before a person has been convicted of an offence against the Act or regulations they may seek to enter an enforceable undertaking (i.e. to avoid a conviction). In such circumstances, the regulator is required to take all reasonable steps to have the proceedings discontinued as soon as possible (subclause 222(4)).

Part 12 Review of Decisions

Part 12 establishes the procedures for the review of decisions that are made under the Bill. In general, reviewable decisions are those that are made by:

- inspectors—these are reviewable by the regulator internally at first instance, and then may go on to external review, and
- the regulator—these go directly to external review.

Clause 223 refers to schedule 2A which sets out the decisions made under the Bill that are reviewable. These decisions are called reviewable decisions.

Subclause 223(1) also provides that a person eligible to apply for review of a reviewable decision is referred to as the eligible person. The body that is conferred jurisdiction to hear and decided the review is called the external review body. The Queensland Civil Administrative Tribunal (QCAT) will review decisions of the regulator and decisions of an administrative nature (e.g. issuing of an improvement notice). The Queensland Industrial Relations Commission will review decisions of an industrial nature (e.g. training of health and safety representatives).

Subclause 223(2) states that, unless a contrary intention appears, a reference in this Part and schedule 2A to a decision includes a reference to a number of actions listed in subclauses (a) to (g), and includes a refusal to make a decision.

Subclause 223(3) defines a person entitled to a thing, for the purposes of a reviewable decision made under clauses 179 or 180.

Clause 224 allows an eligible person to apply for internal review of a reviewable decision within 14 days of the decision first coming to the attention of the eligible person or a longer period as determined by the regulator.

In the case of a decision to issue an improvement notice, an application for internal review must be made within the period allowed for compliance specified in the notice if it is less than 14 days.

An application for internal review cannot be made in relation to a decision of the regulator or a delegate of the regulator (subclause 224(1)). Subclause (2) requires that an application be made in the manner and form required by the regulator.

Clause 225 provides that the regulator may appoint a body or person to conduct internal reviews applied for under this Division. However, subclause 225(2) provides that the regulator cannot appoint the person who made the original decision.

Clause 226 requires an internal reviewer to make a decision as soon as reasonably practicable and within 14 days after receiving the application for internal review.

Subclause 226(2) allows the internal reviewer to confirm or vary the reviewable decision, or set aside the reviewable decision and substitute with another decision that the internal reviewer considers appropriate.

Subclauses 226(3)–(5) provide a process for seeking further information from an applicant. If the internal reviewer seeks further information, the 14 day decision making period will cease to run until that information is provided. Subclause 226(4) states that the internal reviewer can specify a period of not less than seven days in which additional information must be provided. If the information is not provided within the specified period, subclause 226(5) states that the reviewable decision is taken to be confirmed by the internal reviewer.

Subclause 226(6) provides that if the internal reviewer does not vary or set aside a decision within 14 days the reviewable decision is taken to have been confirmed.

Clause 227 requires an internal reviewer to provide to the applicant in writing the decision on internal review and reasons for it as soon as practicable after making that decision.

Clause 228 provides that an application for internal review of a reviewable decision automatically stays the operation of the decision, except in relation to a decision to issue a prohibition or non-disturbance notice.

On a reviewer's own initiative or application, a reviewer may stay a decision in relation to the issue of a prohibition or non-disturbance notice. The reviewer must make the decision on the stay within one working day after receiving an application or it will be taken that the reviewer has made a decision to grant a stay.

Subclause 229(6) provides that a stay that is in place for an internal review continues to have effect until an application is made for external review, or until the prescribed period for applying for external review expires, whichever is earlier.

Clause 229 provides that an eligible person may apply for an external review of any reviewable decision made by the regulator or a decision made, or taken to have been made, on internal review. A review by QCAT will be under the QCAT Act, while a review by the Queensland Industrial Relations Commission will be under division 4 of this part.

Division 4 provides for the external review of certain decisions by the Industrial Commission. The procedural framework provided by this clause and the powers provided to the Commission for the review, is consistent with those given to the Industrial Court in considering other appeals under the *Industrial Relations Act 1999*.

Clause 229A provides that a person who applies to the Industrial Commission for a review is entitled to a statement of the decision and the related reasons for that decision.

Clause 229B provides how a review is to be started in the Industrial Commission.

Clause 229C provides that the Industrial Commission may grant a stay of a decision to secure the effectiveness of the review.

Clause 229D provides the hearing procedures for a review.

Clause 229E provides the powers of the Industrial Commission in deciding the application for review. The Commission may confirm, vary or set aside the decision.

Clause 229F provides that where a person is dissatisfied with the decision of the Commission, that decision may be appealed further under the relevant provisions of the *Industrial Relations Act 1999*.

Part 13 Legal Proceedings

Clause 230 sets out provisions relating to proceedings. Subclause 230(1AA) provides that proceedings for an offence against this Act, other than a proceeding for a category 1 offence, must be taken in a summary way under the *Justices Act 1886*.

Subclause 230(1) provides that proceedings for an offence against the Bill can only be brought by the regulator or an inspector authorised in writing (generally or in a particular case) by the regulator.

Subclause 230(2) provides that the regulator's authorisation is sufficient to authorise an inspector to continue proceedings in a case where the court amends the charge, warrant or summons.

The transparency and accountability of proceedings for an offence against this Bill are facilitated by:

- providing that the regulator must issue and publish on its website general guidelines about the prosecution of offences against the Bill and the acceptance of WHS undertakings under the Bill (subclause 230(3)), and
- clarifying that nothing in clause 230 affects the ability of the Director of Public Prosecutions (DPP) to bring proceedings for an offence against the Bill (subclause 230(4)). Therefore, if the regulator does not bring proceedings for an offence against the Bill the DPP can.

Clause 231 allows for the review by the DPP of a regulator's decision not to prosecute a serious offence, that is, a Category 1 or Category 2 offence.

Subclause 231(1) allows a person who reasonably believes that a Category 1 or 2 offence has been committed, but no prosecution has been brought, to ask the regulator, in writing, to bring a prosecution. The request can be made if no prosecution has been brought between six and 12 months after the occurrence of the act or omission that they reasonably believed occurred. Subclause 231(7) clarifies that an application may be made about the occurrence of, or failure in relation to, an act, matter or thing.

Subclause 231(2) sets out how and when the regulator must respond to a request made in subclause 231(1). In particular, the regulator must provide a written response to a request within three months and must advise the person whether a prosecution will be brought and, if the decision has been made to not bring a prosecution, the reasons for that decision. In the interests of transparency and fairness, paragraph 231(2)(b) requires the regulator to inform the person whom the applicant believes committed the offence of the application and of the regulator's response.

If the regulator advised under subclause 231(2) that a prosecution for an offence will not be brought, subclause 231(3) provides that they must also inform the applicant that they may ask for the matter to be referred to the DPP. If the applicant makes a written request, the regulator must refer the matter to the DPP within one month.

Subclause 231(4) requires the DPP to consider the referral and advise the regulator in writing within one month whether the DPP considers that a prosecution should be brought.

Subclause 231(5) requires the regulator to ensure that a copy of the DPP advice is given to the applicant and again for transparency, the person whom the applicant believes committed the offence.

Subclause 231(6) provides that if the regulator declines to follow the advice of the DPP to bring proceedings, the regulator must give written reasons for its decision to the applicant and the person whom the applicant believes committed the offence.

Clause 232 provides the limitation periods for prosecutions. The limitation periods balance the need of a duty holder to have proceedings brought and resolved quickly with the public interest in having a matter thoroughly investigated by the regulator so that a sound case can be brought.

Subclause 232(1) sets out the limitation periods for when proceedings for an offence may begin. Proceedings must be commenced:

- within two years after the offence first came to the regulator's attention,
- within one year after a coronial report was made or a coronial inquiry or inquest ended that is material to the bringing of the proceedings, or
- if a WHS undertaking has been given in relation to the offence, within six months of the undertaking being contravened or when the regulator becomes aware of a contravention or agrees under clause 221 to withdraw the undertaking.

Reflecting the seriousness of Category 1 offences, subclause 232(2) enables proceedings for such offences to be brought after the end of the applicable limitation period if fresh evidence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.

Clause 233 modifies the criminal law rule against duplicity. This rule means that, ordinarily, a prosecutor cannot charge two or more separate offences relating to the same duty in one count of an indictment, information or complaint.

Unless modified, the rule could complicate the prosecution of work health and safety offences and impede a court's understanding of the nature of the defendant's breach of duty particularly when an offence is ongoing. For

example, the duplicity rule might prevent a charge from including all the information about how the defendant had breached their duty of care because information about a second breach of the duty could not be provided in the prosecution for a first breach of that duty.

Presenting only one aspect of a defendant's failure might deprive the court of the opportunity to appreciate the seriousness of the failure and result in inadequate penalties or orders being made.

Subclause 233(1) provides that more than one contravention of one health and safety duty provision by a person in the same factual circumstances may be charged as a single offence or as separate offences.

Subclause 233(2) clarifies that the clause does not authorise contraventions of two or more health and safety duty provisions being charged as a single offence.

Subclause 233(3) provides that only a single penalty may be imposed when more than one contravention of a health and safety duty provision is charged as a single offence.

Subclause 233(4) provides that in the clause a 'health and safety duty provision' means a provision of Division 2, 3 or 4 of Part 2.

Sentencing for offences

Contemporary Australian OHS laws provide courts with a variety of sentencing options in addition to the traditional sanctions of fines and custodial sentences. The national review of OHS laws concluded that judicious combinations of orders can enhance deterrence, make meaningful action by an offender more likely, be better targeted and permit a more proportionate response. In these ways, the Bill's goals of increased compliance and a reduction in work-related injury and disease will be promoted. A range of sentencing options is provided, and the court may:

- impose a penalty
- make an adverse publicity order
- make a restoration order
- make a community service order
- release the defendant on the giving of a court-ordered WHS undertaking
- order an injunction, or

- make a training order.

Clause 234 provides that Division 2 applies if a court convicts a person or finds them guilty of an offence against the Bill.

Clause 235 provides that one or more orders under this Division may be made against an offender. Subclause 235(2) provides that orders can be made under this Division in addition to any penalty that may be imposed or other action that may be taken in relation to an offence.

Clause 236 sets out the provisions regarding adverse publicity orders. Adverse publicity orders can be an effective deterrent for an organisation that is concerned about its reputation. Such orders can draw public attention to a particular wrongdoing and the measures that are being taken to rectify it.

Subclause 236(1) sets out the kinds of adverse publicity orders that a court may make. For instance, the court may order an offender to publicise the offence or notify a specified person or specified class of persons of the offence, or both. The offender must give the regulator evidence of compliance with the order within seven days of the end of the compliance period specified in the order.

Subclause 236(2) allows the court to make an adverse publicity order on its own initiative or at the prosecutor's request.

Subclauses 236(3)–(4) enable action to be taken by the regulator if an offender does not comply with the adverse publicity order or fails to give evidence of compliance to the regulator.

Subclause 236(5) provides that if action is taken by the regulator under subclauses 236(3) or (4), the regulator is entitled to recover from the offender reasonable expenses associated with it taking that action.

Clause 237 allows the court to order an offender to take steps within a specified period to remedy any matter caused by the commission of the offence that appears to be within the offender's power to remedy.

Subclause 237(2) enables the court to grant an extension of the period to allow for compliance, provided an application for extension is made before the end of the period specified in the original order.

Clause 238 allows the court to make an order requiring an offender to undertake a specified project for the general improvement of work health and safety within a certain period.

Subclause 238(2) provides that a work health and safety project order may specify conditions that must be complied with in undertaking the project.

Clause 239 enables a court to adjourn proceedings, with or without recording a conviction, for up to two years and make an order for the release of an offender on the condition that an offender gives an undertaking with specified conditions. This is called a court-ordered WHS undertaking.

Court-ordered WHS undertakings must be distinguished from WHS undertakings. WHS undertakings are given to the regulator and are voluntary in nature.

Subclause 239(2) sets out the conditions that must be included in a court-ordered WHS undertaking. The undertaking must require the offender to appear before the court if called on to do so during the period of the adjournment. Furthermore, the offender must not commit any offence against the Bill during the period of adjournment and must observe any special conditions imposed by the court.

Subclauses 239(3) and (4) allow the court to call on an offender to appear before it if the offender is given not less than four days notice of the court order to appear.

Subclause 239(5) provides that when an offender appears before the court again, if the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.

Clause 240 allows a court to issue an injunction requiring a person to stop contravening the Bill if they have been found guilty of an offence against it. This power can be an effective deterrent where a penalty fails to provide one. A note to this clause reiterates that an injunction for non-compliance with a non-disturbance notice, improvement notice or prohibition notice may also be obtained under clause 215.

Clause 241 sets out the provisions regarding training orders, which enable a court to make an offender take action to develop skills that are necessary to manage work health and safety effectively. Clause 241 allows a court to make an order requiring a person to undertake, or arrange for workers to undertake, a specified course of training.

Clause 242 makes it an offence for a person to fail to comply with an order made under Division 2 without reasonable excuse.

Subclause 242(3) provides that the clause does not apply to an order under clauses 239 or 240. If a person does not comply with a court-ordered undertaking (made under clause 239) they may be prosecuted for the original offence to which the undertaking related and if a person does not comply with an injunction (issued under clause 240) they may be prosecuted for the contravention they have been ordered to cease. If a person fails to comply with a court ordered sanction the person may be prosecuted and charged with contempt of court.

Clause 243 is an unused section number. Clause 243 in the model WHS Act was in relation to infringement notices. In Queensland this matter is addressed by the *State Penalties Enforcement Act 1999*.

Clause 244 sets out the provisions regarding the imputing of conduct to bodies corporate. A body corporate is an artificial entity that can only act and make decisions through individuals. Therefore, subclause 244(1) provides that any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate is conduct also engaged in by the body corporate. Importantly, the operation of this rule is limited to actions that are within the actual or apparent scope of person's employment or within their actual or apparent authority.

Subclause 244(2) provides that if an offence requires proof or knowledge, intention or recklessness, it is sufficient for an employee, agent or officer of a body corporate to prove they had the relevant knowledge, intention or recklessness in proceedings against a body corporate concerning that offence.

Subclause 244(3) provides that if for an offence against the Act mistake of fact is relevant to determining whether a person is liable, it is sufficient for an employee, agent or officer of a body corporate to prove they made a mistake of fact in proceedings against a body corporate.

Clause 245 provides that if the State, Commonwealth or another State is guilty of an offence against the Bill the penalty to be applied is the penalty applicable to a body corporate.

The State, Commonwealth or another State is also an artificial entity that acts and makes decisions through individuals. Subclause 245(2) provides that conduct engaged in on behalf of the State, Commonwealth or another State, by an employee, agent or officer of the State, Commonwealth or another State is also conduct engaged in by the State, Commonwealth or another State. The conduct must be within the actual or apparent scope of

the person's employment or authority. Clause 247 defines when a person will be an 'officer of the State'.

Subclause 245(3) provides that in proceedings against the State, Commonwealth or another State requiring proof of knowledge, intention or recklessness, it is sufficient to prove that the person referred to in subclause 245(2) possessed the relevant knowledge, intention or recklessness.

Similarly, subclause 245(4) provides that if mistake of fact is relevant in determining liability in proceedings against the State, Commonwealth or another State for an offence against the Bill, it is sufficient that the person referred to in subclause 245(2) made that mistake of fact.

Clause 246 provides that if the State, Commonwealth or another State contravenes a WHS civil penalty provision then the monetary penalty to be imposed is the monetary penalty applicable to a body corporate.

Subclause 246(2) mirrors subclause 245(2). That is, any conduct that is engaged in on behalf of the State, Commonwealth or another State by an employee, agent or officer acting within the actual or apparent scope of their employment or their authority is conduct also engaged in by the State, Commonwealth or another State for the purposes of a WHS civil penalty provision of the Bill.

Subclause 246(3) mirrors subclause 245(3) in providing that if a WHS civil penalty provision requires proof of knowledge, it is sufficient in proceedings against the State, Commonwealth or another State to prove that the person referred to in subclause 246(2) had that knowledge.

Clause 247 defines when a person will be an officer of the State, Commonwealth or another State for the purposes of the Bill. A person will be taken to be an officer if they make, or participate in making, decisions that affect the whole or a substantial part of the business or undertaking of the State, Commonwealth or another State.

However, subclause 247(2) clarifies that, when acting in their official capacity, a Minister of a State or the Commonwealth is not an officer for the purposes of the Bill.

Clause 248 provides that certain notices for service on the State, Commonwealth or another State may be given to or served on the relevant responsible agency. The relevant notices are provisional improvement notices, prohibition notices, non-disturbance notices, infringement notices or notices of WHS entry permit holder entry.

Subclauses 248(2) and (3) provide, respectively, that if an infringement notice is to be served on the State, Commonwealth or another State or proceedings are to be brought against the State, Commonwealth or another State for an offence or contravention of the Bill, the responsible agency may be specified in the infringement notice or document initiating or relating to the proceedings.

Subclause 248(4) provides that the responsible agency in respect of an offence is entitled to act for the State, Commonwealth or another State in proceedings against the State, Commonwealth or another State for the offence. Also, subject to any relevant rules of court, the procedural rights and obligations of the State, Commonwealth or another State as the accused are conferred or imposed on the responsible agency.

Subclause 248(5) allows the prosecutor or the person bringing the proceedings to change the responsible agency during the proceedings with the court's leave.

Subclause 248(6) defines the expression 'responsible agency' and includes rules governing what happens if the relevant agency of the State, Commonwealth or another State has ceased to exist.

Clause 249 provides that Division 6 is applicable only to public authorities that are bodies corporate or local governments.

Clause 250 provides that proceedings under the Bill can be brought against a public authority in its own name. Subclause 250(1A) clarifies proceedings can be brought against a local government, and that a local government can be prosecuted and punished, as if it were a body corporate. Subclause 250(2) clarifies that Division 6 does not affect any privileges that such a public authority may have under the State, Commonwealth or another State.

Clause 251 is an imputation provision that is similar to clause 244 (relating to bodies corporate) and subclause 245(2) (relating to the State, Commonwealth or another State). That is, conduct engaged in on behalf of a public authority by an employee, agent or officer within the actual or apparent scope of their employment or authority is conduct also engaged in by the public authority.

Subclause 251(2) provides that in proceedings against the public authority requiring proof of knowledge, intention or recklessness, it is sufficient to prove that the person referred to in subclause 251(1) possessed the relevant knowledge, intention or recklessness.

Similarly, subclause 251(3) provides that where proof of mistake of fact is relevant in proceedings against the public authority for an offence against the Bill, it is sufficient if the person referred to in subclause 251(1) made that mistake of fact.

Clause 252 defines the expression 'officer of a public authority', which is used in clause 251. An 'officer of a public authority' is a person who makes or participates in making decisions that affect the whole or a substantial part of the business or undertaking of a public authority.

Clause 253 provides that where a public authority has been dissolved, proceedings for an offence committed by that authority that were, or could have been, instituted against it before its dissolution, action can be taken against its successor if the successor is a public authority. A similar rule applies to infringement notices (subclause 253(2)).

Subclause 253(2) and (3) provide, respectively, that an infringement notice served on a public authority for an offence against the Bill or a penalty paid by a public authority in respect of such an infringement notice is taken to be an infringement notice served on, or penalty paid by, its successor if the successor is a public authority.

Clause 254 clarifies that a provision in Part 7 is a 'WHS civil penalty provision' if it is identified as such in that Part. Part 7 contains right of entry offences subject to a civil penalty regime consistent with that in the Fair Work Act.

Subclause 254(2) clarifies that 'WHS civil penalty provisions' will also be identified as such in regulations made under the Bill.

Clause 255 provides that, subject to Division 7, court proceedings may be brought against a person for a contravention of a WHS civil penalty provision. In terms of proceedings, the *Uniform Civil Procedure Rules* 1999 will generally apply.

Subsection 255(2) clarifies that if a body corporate contravenes a civil penalty provision, the value of the penalty unit which applies to the contravention by the body corporate, is calculated under section 181B of the *Penalties and Sentencing Act 1992* (the calculation section).

Subsection 255(3) further clarifies that a reference in the calculation section to the maximum fine for an offence, includes the maximum penalty for the contravention of a civil penalty provision by a body corporate.

A note to this provision clarifies that the term penalty unit has the meaning given under section 5 of the *Penalties and Sentencing Act 1992* and

definition of penalty unit under section 36 of the *Acts Interpretation Act 1992*.

Clause 256 provides that a person who is involved in a contravention of a WHS civil remedy provision is taken to have contravened that provision.

Subclause 256(2) clarifies that a person will be involved in a contravention of the civil remedy provision only if they have been involved in one of the acts listed in subclauses (a) to (d). For example, if the person has aided and abetted the contravention or conspired in the contravention.

Clause 257 clarifies that it is not a criminal offence to contravene a WHS civil penalty provision.

Clause 258 requires a court to apply the civil proceeding rules of evidence and procedure when hearing proceedings for a contravention of a WHS civil penalty provision.

Clause 259 provides that in a proceeding for a contravention of a WHS civil penalty provision, if the court is satisfied that a person has contravened a WHS civil penalty provision, it may order the person to pay a monetary penalty and make any other order it considers appropriate, including an injunction.

Subclause 259(2) provides that a monetary penalty imposed under subclause (1) cannot exceed the maximum specified under Part 7 or the regulations in respect of the WHS civil penalty provision contravened.

Clauses 260 and 261 set out provisions regarding proceedings for a contravention of a WHS civil penalty provision. Similar to the bringing of proceedings for an offence against the Bill, clause 260 provides that proceedings for a contravention of a WHS civil penalty provision can only be brought by the regulator or an inspector authorised in writing by the regulator. Authorisation may be granted generally or to bring proceedings in a particular case. Clause 261 provides that the limitation period for bringing proceedings for a contravention of a WHS civil penalty is two years after the contravention first came to the regulator's notice.

Clause 262 provides that a pecuniary penalty is payable to the State and the State may enforce the order as if it were a judgment of the court.

Clause 263 applies the rule against double jeopardy to civil remedy proceedings under the Bill. That is, it disallows a court from making an order against a person under clause 259 if an order has been made against that person under a civil penalty provision of the Commonwealth, a State

or a Territory in relation to conduct substantially the same as the conduct constituting the contravention of the Bill.

Clause 264 provides that proceedings against a person for a contravention of a WHS civil penalty provision are stayed if criminal proceedings commence or are already on foot against the person for an offence constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention of the WHS civil penalty provision.

If the person is not convicted of the criminal offence, subclause 264(2) allows the proceedings for the civil contravention to be resumed. If proceedings are not resumed they are taken to be dismissed.

Clause 265 provides that regardless of any court order made under 259 for a contravention of a civil penalty provision that a person has found to have made, criminal proceedings may be commenced against the person for conduct that is substantially the same as the conduct constituting the civil contravention.

Clause 266 provides that evidence of information given or documents produced by an individual in proceedings against them for contravention of a WHS civil penalty provision is not admissible in criminal proceedings against the individual if conduct alleged to constitute the criminal offence involved substantially the same conduct. This is the case regardless of the outcome of the proceedings.

Subclause 266(2) is an exception to subclause 266(1). It provides that such evidence is admissible in a criminal prosecution for giving false evidence.

Clause 267 provides that except as provided in Parts 6 and 7 and Division 7 of Part 13, nothing in the Bill is to be interpreted as conferring a right of action in civil proceedings because of a contravention of the Bill, conferring a defence to a civil action or otherwise affecting a right of action in civil proceedings, or as affecting the extent to which a right of action arises with respect of breaches of duties or obligations imposed by the regulations.

Part 14 General

Clause 268 provides for the offence of giving false or misleading information. Subclause 268(1) prohibits a person from giving information,

when complying or purportedly complying with the Bill, knowing either that the information is false or misleading in a material particular or that it omits any thing without which the information is false or misleading.

Subclause 268(2) prohibits a person from producing a document, when complying or purportedly complying with the Bill, knowing that it is false or misleading in a material particular unless the person:

- indicates how the document is false or misleading and, where practicable, provides the correct information, or
- accompanies the document with a written statement indicating that the document is false or misleading in a material particular and setting out or referring to the material particular in which the document is false or misleading.

Clause 269 provides that nothing in the Bill requires a person to produce a document disclosing information or otherwise provide information that is the subject of legal professional privilege.

Clause 270 sets out provisions regarding immunity from liability. Inspectors, in particular, have a crucial role to play in the promotion of work health and safety and in eliminating or minimising serious risks to health and safety. They may be required to exercise judgment, make decisions and exercise powers with limited information and in urgent circumstances. As a result, it is important that they and others engaged in the administration of the Bill are not deterred from exercising their skill and judgment due to fear of personal legal liability.

Subclause 270(1) provides that inspectors and others engaged in the administration of the Bill are not personally liable for acts or omissions so long as those acts or omissions are done in good faith and in the execution or purported execution of their powers and functions. The protection provided by this subclause covers civil liability.

Subclause 270(2) states that any civil liability that would otherwise attach to the person instead applies to the relevant State.

Clause 271 sets out provisions regarding confidentiality of information. Inspectors are given broad powers and protections under the Bill and clause 271 is one of a number of mechanisms designed to ensure that inspectors are accountable and credible when they perform functions and exercise powers.

Clause 271 applies where a person obtains information or gains access to a document in exercising a power or function under the Bill, other than under

Part 7. Part 7 deals with workplace entry by WHS permit holders and contains its own provisions dealing with the use or disclosure of information or documents.

Subclause 271(2) prohibits the person who has obtained information or a document from doing any of the following:

- disclosing the information or the contents of the document to another person
- giving another person access to the document, or
- using the information or document for any purpose, other than in accordance with subclause 271(3).

Prohibited disclosures are an offence. Subclause 271(3) provides a list of circumstances in which subclause 271(2) does not apply. These include where disclosure is necessary to exercise powers or functions under the Bill, certain disclosures by the regulator, or where it is required by law or by a court or tribunal or where it is provided to a Minister. It also enables the sharing of information between inspectors who exercise powers or functions under different Acts. Personal information can be disclosed with the relevant person's consent.

Subclause 271(4) prohibits a person from intentionally disclosing to another person the name of an individual who has made a complaint against that other person unless the disclosure is made with consent of the complainant or is required by law.

Clause 272 deems void any term of any agreement or contract that purports to exclude, limit or modify the operation of the Bill or any duty owed under the Bill, or that purports to transfer to another person any duty owed under the Bill. This upholds the principle that duties of care and obligations cannot be delegated therefore agreements cannot purport to limit or remove a duty held in relation to work health and safety matters.

Clause 273 prohibits a PCBU from charging workers for anything done or provided relating to work health and safety.

Clause 274 permits the Minister to approve a code of practice for the purposes of the Bill and to revoke or vary such a code.

Subclause 274(2) provides that tri-partite consultation between State, Territory and Commonwealth governments, unions and employer organisations is a prerequisite for approving, varying or revoking a code of practice.

Subclause 274(3) provides that a code of practice can apply, incorporate or adopt anything in a document, with or without modification as in force at a particular time or from time to time.

Subclause 274(4) provides that an approval, variation or revocation of a code of practice takes effect when the Minister gives notice of its making.

Subclause 274(4A) and 274(4B) specifies the notice given by the Minister is subordinate legislation and links the commencement of a code of practice or its variation to the day the notice commences or as specified in the notice.

Subclause 274(5) provides that, as soon as practicable after approving, varying or revoking a code of practice, the Minister must ensure that notice is published in the Gazette and a newspaper circulating generally throughout the State.

Subclause 274(6) provides that a regulator must ensure that members of the public are able to inspect free of charge, at the office of the regulator during normal business hours, a copy of each code of practice that is currently approved and each document applied, adopted or incorporated by a code of practice.

Clause 275 sets out provisions regarding the use of codes of practice in proceedings.

Codes of practice provide practical guidance to assist duty holders to meet the requirements of the Bill. A code of practice applies to anyone who has a duty of care in the circumstances described in the code. In most cases, following an approved code of practice would achieve compliance with the health and safety duties in the Bill, in relation to the subject matter of the code.

Duty holders can demonstrate compliance with the Bill by following a code or by another method which provides an equivalent or higher standard of health and safety than that provided in a code. This allows duty holders to take into account innovation and technological change in meeting their duty and to implement measures most appropriate for their individual workplaces without reducing safety standards.

Subclause 275(2) provides that a code of practice is admissible in proceedings as evidence of whether or not a duty or obligation under the Bill has been complied with.

Subclause 275(3) enables a court to use a code of practice as evidence of what is known about hazards, risk, risk assessment and risk control. A code

may also be used to determine what is reasonably practicable in the circumstances to which the code relates.

Clause 275 does not prevent a person introducing evidence of compliance with the Bill apart from the code of practice—so long as this provides evidence of compliance at a standard that is equivalent to or higher than the code of practice (subclause 275(3)).

Clause 276 contains regulation-making powers that allow the Governor in Council to make regulations under the Bill. Without limiting the power in subclause 276(1), subclause 276(2) provides that a regulation may make provision for any matter stated in Schedule 3.

Part 15 Repeals

Clause 277 repeals the *Workplace Health and Safety Act 1995*.

Clause 278 repeals the *Dangerous Goods and Safety Management Act 2001*.

Part 16 Transitional provisions

Clause 279 provides the definitions for this part.

Clause 280 allows the contravention of an obligation under sections 28, 30, 30C, 31, 34C, 34D, 35 and 36 of the repealed Act to be prosecuted under the repealed Act as if it were not repealed. Where an obligation holder under the repealed Act is contravening after repeal and where it constitutes a contravention of duties under the Bill, the offence may be prosecuted under this Bill for any continuing offences after the repeal.

Clause 281 provides that proceedings may be taken against certain obligation holders listed in sub-clause (1) who contravened their obligation before the repeal, as if the repeal did not happen. This applies whether some of the act or omissions that caused the contravention occurred both before and after the repeal. However proceedings for these offences must be taken within two years (for those obligation holders with design, installation or construction obligations) or within one year (for obligation

holders with other certain obligations including manufacturing and supply). In addition, a person cannot be convicted of a contravention under the repealed Act, if the acts or omissions all happened under the Bill.

Clause 282 provides that where an offence committed by a person against the repealed Act and investigations or proceedings have not been commenced before the repeal, that the investigation or proceedings may be undertaken as if the repeal did not happen (although where relevant provisions mention 'chief executive' that reference is taken to be 'the regulator').

Clause 283 provides for the continuation of certain principal contractor appointments. Under the repealed Act, there is a safety obligation for a principal contractor and a principal contractor is to be appointed where the value of the work is $80000 or more. Under this Bill, there is no duty a principal contractor and the model WHS regulation contains duties (regulatory requirements) of principal contractors where the work is valued at $200000 or more.

This means any principal contractor appointed before the repeal for work valued over $80000 but under $200000 will no longer be the principal contractor. Instead they will have a duty as a person conducting a business or undertaking and a person conducting a business or undertaking involving management or control of a workplace (or control of fixtures, fittings and plant at workplaces). The regulatory requirements for a principal contractor will not apply to them as the value of the work is below $200000. Under the repealed Act, where a principal contractor has been appointed and the value of work is $200000 or more, the principal contractor will have a duty as a person conducting a business or undertaking and a person conducting a business or undertaking involving management or control of a workplace (or control of fixtures, fittings and plant at workplaces). In this case, the regulatory requirements for a principal contractor will apply.

Clause 284 provides that a code of practice that is made under the repealed Act and that is still in force at the time the Bill commences, is taken to be a code of practice made under clause 274 of the Bill. The 'preserved code' is effective despite it does not comply with requirements for its approval. In addition, a preserve code can be varied or revoked without complying with the requirements in clause 274(2) regarding national consultation.

Clause 285 provides that an enforceable undertaking made under the repealed Act will continue and be subject to the enforceable undertaking

provisions in the repealed Act (although where these provisions mention 'chief executive' that reference is taken to be 'the regulator'). Where an application for an enforceable undertaking has been received before the repeal and no decision has been made, the chief executive must decide on the application and that enforceable undertaking will be subject to the enforceable undertaking provisions in the repealed Act. The provision also allows the regulator to accept an undertaking under part 11 of this Bill for a contravention of the repealed Act.

Clause 286 preserves the appointments to the Work Health and Safety Board and supporting Industry Sector Standing Committees. The duration of a person's appointment is taken from when they were last appointed under the repealed Act.

Clause 287 deals with the transition of health and safety representatives. The clause provides that a representative appointed under the repealed Act will continue as a representative under the Bill for a period of three years, with the three year period starting from when they were last appointed under the repealed Act.

Where an election process has commenced under the repealed Act and is not complete, it must be completed within three months of the commencement of the Bill otherwise a new election process must be commenced in accordance with the provisions in the Bill.

A representative/s 'area of representation' under the repealed Act, is taken to be their 'work group' under the Bill. This transitional does not prevent workers from requesting to have new work groups determined as per the new requirements in the Bill.

Clause 288 allows health and safety representatives to exercise their powers to issue provisional improvement notices and direct workers to cease work for a period of one year from the commencement of this Bill, without having to satisfy the training requirements for these particular powers. If a representative has not completed the requisite training in this time, they will not be allowed to exercise these powers after the one year period expires.

Clause 289 preserves a provisional improvement notice (or one confirmed by an inspector) which was issued under the repealed Act. This means the provisional improvement notice remains in force as if it was given to a person under the relevant provision of the Bill.

Clause 290 provides that if a health and safety representative had their entitlement to issue a provisional improvement notice suspended or cancelled under the repealed Act, that the representative cannot issue a provisional improvement notice under the Bill (i.e. for a suspension until the end of the suspension or for a cancellation, indefinitely).

Clause 291 preserves any workplace health and safety committee established under the repealed Act as if it were established under the Bill. Where the constitution of the committee does not meet the requirements in the Bill, a transition period of one year is provided to allow the committee to be adjusted. After this period, if the constitution does not meet the legislative requirements, an inspector may decide on the appropriate constitution of the committee.

Clause 292 provides that an authorised representative under the repealed Act is taken to be a WHS entry permit holder under the Bill. The duration of their appointment under the Bill is taken from when they were appointed under the repealed Act. The identity card issued under the repealed Act is taken to be the entry permit issued under the Bill. However, if the industrial registrar issues a person with a new permit under the Bill, this transitional provision does not apply.

Clause 293 provides that an inspector appointed under the repealed Act is taken to be an inspector under the Bill. In addition, any conditions on an inspector's appointment or any directions given under the repealed Act continue as if they were made under the relevant provisions of the Bill.

Clause 294 provides any warrant issued under the repealed Act has effect under the Bill. In addition, any power exercised by an inspector before the repeal continues to have effect.

Clause 295 preserves all improvement notices that were in force before the repeal. This means all improvement notices issued prior to the Bill commencing are still current and enforceable by inspectors as if the repeal did not happen. In addition, if the contravention in the notice issued corresponds with a contravention (or likely contravention) under the Bill, the improvement notice continues in force as if it was issued under the Bill.

Clause 296 provides any prohibition notice issued under the repealed Act continues in force as if the repeal did not happen.

Clause 297 provides that any appeal taken under the repealed Act continues under the provisions of the repealed Act.

Clause 298 provides the definitions for this division. In this division, repealed Act means the *Dangerous Goods Safety Management Act.*

Clause 299 allows the contravention of an obligation under sections 16, 23 or 24 of the repealed that occurred before the repeal, to be prosecuted under the repealed Act after its repeal. These provisions cover the obligations for safety, the obligations of occupiers, employees and other persons under the repealed Act. Where a duty under the repealed Act is contravened after the repeal and where it constitutes a contravention of duties under the Bill, the offence may be prosecuted under this Bill for any continuing offences after the repeal.

Clause 300 provides that proceedings may be taken against certain obligation holders listed in sub-clause (1) who contravened their obligation before the repeal, as if the repeal did not happen. This applies whether some of the act or omissions that caused the contravention occurred both before and after the repeal. However proceedings for these offences must be taken within two years (for those obligation holders with design, installation or construction obligations) or within one year (for obligation holders with other certain obligations including manufacturing and supply). In addition, a person cannot be convicted of a contravention under the repealed Act, if the acts or omissions all happened under the Bill.

Clause 301 provides that where an offence committed by a person against the repealed Act and investigations or proceedings have not been commenced before the repeal, that the investigation or proceedings may be undertaken as if the repeal did not happen. In the event that local government has issued a fine under section 175 of the repealed Act for an offence committed before the repeal, the fine continues to apply after the repeal.

Clause 302 preserves the application of a directive issued by an authorised officer under part 6, division 3 of the repealed Act where it has been issued before the repeal. It allows a further directive to be issued under part 6, division 3 of the repealed Act for the same matter after the Act has been repealed. However, for any action taken under the preserved provisions of the repealed Act after the repeal, the reference to authorised officer is taken to be a reference to an inspector appointed under the Bill.

An application to the chief executive for a review under section 102 part 6, division 3 of the repealed Act before the repeal or an action taken by the administering executive after the repeal is taken to be a reference to the regulator under the Bill.

Clause 303 preserves a warrant issued by an authorised officer and a power exercised by an authorised officer under part 6 of the repealed Act to continue to have effect after the repeal of the Act where it has been issued or exercised before the repeal. Where there is a corresponding provision in the Bill to the power exercised under the repealed Act by the authorised officer, the power will be considered to be exercised by an inspector appointed under the Bill.

Clause 304 provides that a claimant under section 107A of the repealed Act may issue a cost recovery notice after the repeal of the Act in relation to costs incurred under section 107 before the repeal. Section 107A continues to apply to cost recovery notices which were issued both before and after the repeal of the Act for any amount for which the notice was issued.

Clause 305 preserves the application of part 9 covering appeals under the repealed Act to decisions made before the repeal. However reference to the chief executive under section 154F(1) of the repealed Act is taken to be a reference to the regulator under the Bill.

Clause 306 provides that a regulation under the Bill may decide how matters under Part 4 of the repealed Act in relation to major hazard facilities and large dangerous goods locations will have continuing or modified effect under the Bill.

Clause 307 provides the power to further amend or repeal subordinate legislation irrespective of the amendment under the Bill.

Part 17 Amendment of asbestos definition

Clause 308 provides that the *Coal Mining Safety and Health Regulation 2001* is amended in this Division.

Clause 309 amends Schedule 9 to replace the definition of asbestos with a new definition that clarifies that that only asbestiform mineral silicates are considered 'asbestos'.

Note: "Asbestiform" refers to a particular type of fibrous mineral, where the fibres are composed of smaller fibrils, which can be separated further, similar to rope, and the fibres are very flexible. Asbestiform minerals have

a high aspect ratio (long, thin particles). "Aspect ratio" refers to the ratio of the length to the width of the particle. Other mineral morphologies sometimes also have high aspect ratios, but these are unable to be separated into fibrils, and are brittle and tend to fragment into shorter particles. These are able to be distinguished from asbestiform fibres using polarised light microscopy.

Clause 310 provides that the *Public Health Regulation 2005* is amended in this Division.

Clause 311 amends section 2B to replace the definition of asbestos with a new definition that clarifies that that only asbestiform mineral silicates are considered 'asbestos'. See note under Clause 310 for explanation of the term asbestiform.

Clause 312 provides that the *Mining and Quarrying Safety and Health Regulation 2001* is amended in this Division.

Clause 313 amends Schedule 7 to replace the definition of asbestos with a new definition that clarifies that that only asbestiform mineral silicates are considered 'asbestos'. See note under Clause 310 for explanation of the term asbestiform.

Clause 314 provides that the *Workplace Health and Safety Act 1995* is amended in this Division.

Clause 315 amends Schedule 3 to replace the definition of asbestos with a new definition that clarifies that that only asbestiform mineral silicates are considered 'asbestos'. See note under Clause 310 for explanation of the term asbestiform.

Clause 316 provides that the *Workplace Health and Safety Regulation 2008* is amended in this Division.

Clause 317 amends references to tremolite, actinolite, amosite and fibrous anthophyllite in Schedule 9 section 1. These mineral silicates have the same mineral term for both the asbestiform and nonasbestiform varieties. The word "asbestos" has been included when listing these minerals to emphasise that only the asbestiform habit of these minerals is regulated as asbestos.

Part 18 Amendment of other legislation relating to safety Amendment of the Building and Construction Industry (Portable Long Service Leave) Act 1999, the Building and Construction Industry (Portable Long Service Leave) Regulation 2002 and the Workplace Health and Safety Regulation 2008

Clause 318 provides that the *Building and Construction Industry (Portable Long Service Leave) Act 1991* is amended in this Division.

Clause 319 makes a consequential amendment to the definition of 'eligible worker' to insert a reference to the new Work Health and Safety Act 2011. This amendment does not alter the original scope of the definition.

Clause 320 amends section 32 to include reference to the work health and safety levy because of the transfer of the building and construction fee from the *Workplace Health and Safety Regulation 2008*. The work health and safety and safety levy is paid to the department that administers the WHS Bill.

Clause 321 amends section 66 to include a reference to the work health and safety levy because of the transfer of the building and construction fee from the *Workplace Health and Safety Regulation 2008*. The fee has been renamed to 'levy' to be consistent with the terminology of this part of the *Building and Construction Industry (Portable Long Service Leave) Act 1991*.

Clause 322 amends section 72 to include a reference to the work health and safety levy because of the transfer of the building and construction fee from the *Workplace Health and Safety Regulation 2008*.

Clause 323 amends the schedule to include a reference to the work health and safety levy and insert a definition of the health and safety levy.

Clause 324 inserts a transitional provision that provides that where the building and construction fee under the *Workplace Health and Safety*

Regulation 2008 is unpaid at the time this provision commences, that the fee is enforceable and recoverable under those repealed provisions of the *Workplace Health and Safety Regulation 2008*.

Clause 325 provides that the *Building and Construction Industry (Portable Long Service Leave) Regulation 2002* is amended in this Division.

Clause 326 amends section 6 to clarify the scope of the health and safety levy for building and construction work and where it is not payable.

Clause 327 amends section 7 to insert the percentage rate of the health and safety levy.

Clause 328 provides that the *Workplace Health and Safety Regulation 2008* is amended in this Division.

Clause 329 and clause 330 omits part 9 and the related building and construction fee percentage in Schedule 1 of the *Workplace Health and Safety Regulation 2008* as these provisions are transferred to the *Building and Construction Industry (Portable Long Service Leave) Act 1991* and the associated regulation.

Amendment of Electrical Safety Act 2002

These explanatory notes refer to amendments to the *Electrical Safety Act 2002* (the ES Act). This legislation regulates public and work-related electrical safety risks and shares many of the same concepts and terms as existing Queensland workplace health and safety legislation. In many cases the amendments to the ES Act mirror the provisions of the national model Work Health and Safety Act (model WHS Act) and are intended to ensure consistency of concepts and term between the ES Act and the Work Health and Safety Bill.

Where relevant, specific requirements to ensure electrical safety have been retained. Where explanations refer to WHS provisions these should be read in an electrical safety context. For example, appropriately qualified inspectors are appointed under the ES Act and they have additional powers with respect to electrical safety; legal proceedings are taken under the ES Act and there are different compliance notices.

Clause 331 provides that Part 17, Division 3 of the Bill amends the ES Act.

Clause 332 amends existing section 3 to clarify that this state, the Commonwealth and the other states are all liable for an offence against the Bill.

Clause 333 amends section 5 to ensure consistent concepts and terminology with the model WHS Act by substituting 'duties' for 'obligations'.

Clause 334 amends section 10 to ensure consistent concepts and terminology with the model WHS Act by amending the definition of 'free from electrical risk' to incorporate the concept of 'reasonable practicable'.

Clause 335 replaces sections 14 and 15 with new meanings for 'electrical equipment' and 'electrical installation' for consistency of concepts and terminology with the model WHS Act. While the wording of the new meanings is different, the original intent remains.

Clause 336 replaces section 18 with a new meaning for 'electrical work' for consistency of concepts and terminology with the model WHS Act. While the wording of the new meaning is different, the original intent remains.

Clause 337 amends section 21 by replacing the meaning of 'employer' with 'person conducting a business or undertaking' to ensure consistency of concepts and terminology with the model WHS Act. Refer to clause 5 of this Bill for a detailed explanation.

Clause 338 amends section 22 by replacing the current meaning of 'worker' with the definition of 'worker' from the model WHS Act to ensure consistent concepts and terminology. Refer to clause 7 for a detailed explanation. The term 'worker' is inclusive of both electrical and non-electrical workers and may include licensed electrical contractors in particular circumstances. A self-employed person may simultaneously be both a PCBU and a worker for purposes of the ES Act. This is particularly relevant for licensed electrical contractors (see section 27A).

Clause 339 omits section 23 of the ES Act ('Meaning of self-employed person') to ensure consistent concepts and terminology with the national model WHS Act. The definitions of 'person conducting a business or undertaking' (PCBU) and 'worker', as amended, now cover 'self employed persons'.

Clause 340 amends the heading of Part 2 to ensure consistent concepts and terminology with the national model WHS Act by substituting 'duties' for 'obligations'.

Clause 341 replaces Part 2, Division 1 to introduce consistent concepts and terminology between the national model WHS Act and the ES Act. The requirements of Section 27A are particularly relevant for licensed electrical

contractors who work, for example, for another PCBU whilst employing their own workers. In such circumstances, the electrical contractor would owe duties both as a worker and as a PCBU. See clauses 13 – 16 and 17 of this Bill for a detailed explanation.

Clause 342 amends the heading of Part 2, Division 2 'Duties of care' to ensure consistent concepts and terminology with the national model WHS Act.

Clause 343 amends section 29 to maintain consistent concepts and terminology with the national model WHS Act by substituting 'duty' for 'obligation'.

Clause 344 amends section 30 to 'Primary duty of care' to maintain consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation' and confirming the person conducting the business or undertaking as the duty-holder. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provisions. See clause 19 of this Bill for a detailed explanation.

Clause 345 amends section 31 to 'Duty of PCBU that designs electrical equipment or an electrical installation' to maintain consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation' and confirming the person conducting the business or undertaking as the duty-holder. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provisions.

Clause 346 amends section 32 to 'Duty of persons conducting a business or undertaking that manufactures electrical equipment' to maintain consistent concepts and terminology with the model WHS Act. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provisions.

Clause 347 amends section 33 to maintain consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation' and confirming the person conducting the business or undertaking as the duty-holder. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provisions.

Clause 348 replaces section 34 to ensure that concepts, terminology and drafting style are consistent with the model WHS Act. The intent of the section remains the same.

Clause 349 amends section 35 to ensure consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation'. Amendments to subsections reflect the drafting style of the model WHS Act by referring specifically to preceding provisions without changing the intent of the provisions.

Clause 350 amends section 36 to ensure consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation'. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provision.

Clause 351 amends section 37 to ensure consistent concepts and terminology with the national model WHS Act by substituting 'duty' for 'obligation'. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provision.

Clause 352 amends section 38 to ensure consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation'. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provision.

Clause 353 inserts a new section 38A 'Duty of officers'. See clause 27 of this Bill for a detailed explanation.

Clause 354 omits section 39 with a new section 'duty of worker' to ensure consistent concepts and terminology with the model WHS Act. While the new wording of this provision reflects the national model provision, the original intent remains. See clause 28 of this Bill for a detailed explanation. It is important to note that a worker also has a duty to comply with instructions given for electrical safety of persons and property at a place by the person conducting a business or undertaking or the person in control of the place.

Clause 355 omits section 40 with a new section 'Duty of other person' to ensure consistent concepts and terminology with the model WHS Act. While the new wording of this provision reflects the national model provision, the original intent remains. See clause 29 of this Bill for a detailed explanation. Similar to the duties of workers, all other persons at a place where electrical equipment is located must take reasonable care for their own electrical safety and take reasonable care that their acts or omissions do not adversely affect the electrical safety of other persons. Other persons at a workplace must also comply, so far as they are reasonably able to, with any reasonable instruction that is given by the person in control of the electrical equipment.

Clause 356 amends section 40A to ensure consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation'.

Clause 357 renumbers Part 2 Division 2A as the section references in this part are updated to reflect the renumbering of the provisions.

Clause 358 inserts a new Division 2A 'Offences and Penalties'. See clauses 31 – 34 of this Bill for a detailed explanation.

Clause 359 amends the heading for Part 2, Division 3 to ensure consistent concepts and terminology with the model WHS Act by substituting 'duties' for 'obligations'.

Clause 360 removes section 41 'Effect of regulation for discharge of electrical safety obligation' as the model WHS Act is based on the concept of duties qualified by 'reasonable practicability' rather than providing specific defences against the duties such as compliance with the regulation. The intent, which is to achieve a high level of electrical safety, is still the same.

Clause 361 amends section 42 to ensure consistent concepts and terminology with the model WHS Act by substituting 'duties' for 'obligations'.

Clause 362 amends section 43 to ensure consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation'. In addition, the reference to the obligation offence provision is omitted as the corresponding section (section 41) has been deleted from the ES Act. See clause 360 above.

Clause 363 amends section 44 to ensure consistent concepts and terminology with the model WHS Act by substituting 'duty' for 'obligation'.

Clause 364 replaces section 45 with a new section 'Use of code of practice in proceedings' to ensure consistency with the model WHS Act. See clause 275 of this Bill for a detailed explanation.

Clause 365 omits Part 2, Division 4 'Defences'.

Clause 366 omits Part 2, Division 5 'Effects of Act on civil liability'. This matter is now covered by clause 191.

Clause 367 replaces the whole of Part 3 'Enforceable undertakings' with the enforceable undertakings provisions from the model WHS Act. See

clauses 216 – 222 of this Bill for a detailed explanation. Note that these clauses also refer to enforceable undertakings under the ES Act.

Clause 368 amends section 57AA by omitting references to 'Employer or self employed person' and inserting 'Person conducting business or undertaking' to ensure consistent concepts and terminology with the model WHS Act. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provisions

Clause 369 amends section 57AB by omitting references to 'Employer or self employed person' and inserting 'Person conducting business or undertaking' to ensure consistent concepts and terminology with the model WHS Act. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provisions.

Clause 370 replaces section 57AC and inserts 'Licence holder engaged by a person conducting a business or undertaking must notify changes' to ensure consistent concepts and terminology with and the model WHS Act. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provisions.

Clause 371 amends section 63 by omitting references to 'chief executive' and inserting 'regulator' to ensure consistent concepts and terminology with the model WHS Act. Amendments to subsections reflect the drafting style of the model WHS Act without changing the intent of the provisions.

Clause 372 amends section 67 by replacing the heading to read 'Safety management system', however the requirement that applies to a prescribed electrical entity under this section remains unchanged.

Clause 373 amends section 77 by omitting references to 'the chief executive' and inserting 'the regulator' to ensure consistent concepts and terminology with the model WHS Act.

Clause 374 amends section 94 (Functions of equipment committee) by deleting the word 'hire' from subsection 94(3)(f). This activity is covered by the revised meaning of 'sell' as amended by the *Electrical Safety and Other Legislation Amendment Act 2011* (section 13).

Clause 375 amends the heading of Part 10 to include a reference to 'Regulator'.

Clause 376 renumbers Part 10, Division 2 as Part 10, Division 3.

Clause 377 replaces Part 10, Division 1 with a new Division 1 'Regulator'. See clauses 152 – 155 of this Bill for a detailed explanation.

The new Division 2 'Appointment of inspectors' ensures consistent concepts and terminology with the national model WHS Act. While the wording and drafting style in the new Division 2 is different, the original intent of the ES Act is preserved. Note that electrical safety inspectors are appointed under the ES Act and have specific additional powers in relation to electrical safety matters.

Section 123 – see clause 156. Note that the amendment to the ES Act also requires that electrical safety inspectors be appropriately qualified in terms of experience, expertise of approved training.

Section 123A – see clause 157.

Section 124 – see clause 158.

Section 125 – see clause 159.

Section 126 provides for the appointment of a temporary inspector for urgent investigation of a serious electrical incident or dangerous electrical event when there is no inspector available. While the appointee need not be a person who could be appointed as an inspector, the regulator must be satisfied that the appointee has the appropriate expertise or experience for the work to be done. If practicable, the regulator must provide documentary evidence of his or her appointment to the temporary inspector.

Section 127 allows the exercise of powers by a temporary inspector only under the direction of an inspector and complying with any conditions attached. The temporary inspector must show the appointment document to the greatest practicable extent. Subject to this provision, the temporary inspector is taken to be an inspector under the ES Act.

Clause 378 inserts a new section 136B that states a person must not misrepresent himself or herself to be an accredited auditor. The maximum penalty for a contravention is 100 penalty units.

Part 11 Securing Compliance

Clause 379 replaces Part 11 with a new Part 11 'Securing compliance' to be consistent with the model WHS Act provisions. The corresponding clauses in this Bill provide a detailed explanation, which is to be applied in an electrical safety context.

Section 137 – see clause 160

Section 137A – see clause 161

Section 137B – see clause 162

Section 138 – see clause 163. In addition, under this clause an electrical safety inspector may enter to investigate serious electrical incidents or dangerous electrical events.

Section 138A – see clause 164

Section 138B – see clause 165. With respect to electrical safety, inspectors appointed under the ES Act may make inquiries or conduct surveys and tests to determine electrical risk levels and electrical safety standards. Where a serious electrical incident or dangerous electrical event has occurred, an inspector has the power to investigate the situation, including possible reasons for the occurrence. Under subclauses 138B(1)(f) and (g) inspectors may exercise any compliance power or other power that is reasonably necessary for the purposes of the ES Act.

Section 138C – see clause 166.

Section 138D provides that the regulator may arrange for a substance, thing or sample, taken by an inspector, to be analysed and deals with related issues including tampering, analysis method and certification of results by the analyst.

Section 139 – see clause 167.

Section 139A – see clause 167A.

Section 139B – section clause 168.

Section 139C – see clause 169.

Section 140 – see clause 170.

Section 141 – see clause 171.

Section 141A – see clause 172.

Section 141B – see clause 173.

Section 141C – see clause 174.

Section 141D – see clause 175.

Section 141E replicates the existing section 146, which was deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety.

Section 141F replicates the existing section 146A, which was deleted under these amendments. This provision is reinserted to retain specific requirements to ensure electrical safety and amended to ensure consistency with the national model WHS Act. An amendment to subclauses (1)(b) and (1)(c) adds 'examination' as a reason to seize unsafe electrical equipment. References in subclauses (1)(a) and (1)(b) are updated to reflect renumbering of provisions..

Section 141G replicates the existing section 147, which was deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety. The provision is renumbered to ensure consistency with the model WHS Act.

Section 141H replicates the existing section 148, which was deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety.

Section 141I replicates the existing section 149, which was deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety and amended to ensure consistency with the model WHS Act. The reference in subclause (1) is updated to reflect renumbering of provisions.

Section 141J – see clause 179.

Section 141K replicates the existing section 151, which was deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety. To ensure consistency with the national model WHS Act, the terminology is amended so that 'person entitled to the thing' replaces 'owner'.

Section 141L replicates the existing section 151A, which was deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety The reference in subclause (1)(c) is updated to reflect renumbering of provisions and, for consistency with the national model WHS Act, the terminology 'person entitled to the thing' replaces 'owner'.

Section 141M – see clause 181.

Section 142 – see clause 182.

Section 142A – see clause 183.

Section 142B – see clause 184.

Section 143 replicates the existing section 157A which is deleted under these amendments. The reinserted provision retains the intent of the original and is amended to ensure consistent terminology with the model WHS Act.

Section 144 – see clause 185.

Section 144A – see clause 186.

Section 144B – see clause 187.

Section 145 – see clause 188.

Section 145A – see clause 189. Note that this clause also applies to accredited auditors under the ES Act.

Section 145B – see clause 190.

Part 11a Enforcement Measures

The existing Part 11, which deals with enforcement, is deleted under these amendments and replaced by mirror provisions from the national model WHS Act. Where relevant and appropriate, existing provisions are reinserted and renumbered to accommodate drafting style, and amended to ensure consistency with the model WHS Act and to retain specific requirements to ensure electrical safety.

Divisions 1-4 deal with improvement notices, electrical safety protection notices, unsafe equipment notices and non-disturbance notices.

Section 146 – see clause 191.

Section 146A – see clause 192.

Section 146B – see clause 193.

Section 146C – see clause 194.

Section 147 ‘Electrical safety protection notice’ replicates the existing section 154, which is deleted under these amendments, and is reinserted to

retain specific requirements to ensure electrical safety and renumbered to maintain consistency with the model WHS Act.

Section 148 'Unsafe equipment notice' replicates the existing section 155, which is deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety and renumbered to maintain consistency with the model WHS Act.

Section 149 – see clause 198.

Section 149A – confirms that a non-disturbance notice may require the person to whom it is issued to preserve the site of a serious electrical incident or dangerous electrical event for a specified period or prevent a particular site being disturbed for a specified period. See clause 199 of this Bill for a detailed explanation..

Section 149B – see clause 200.

Section 149C – see clause 201.

Division 5 addresses the general requirements applying to all notices.

Section 150 – see clause 202. Note that under the ES Act prohibition notices are not issued and this clause also refers to electrical safety protection notices and unsafe equipment notices.

Section 150A – see clause 203.

Section 150B – see clause 204. Note this clause also refers to electrical safety protection notices.

Section 150C – see clause 205. Under the ES Act prohibition notices are not issued and this clause refers to electrical safety protection notices.

Section 150D – see clause 206.

Section 150E – see clause 207.

Section 150F – see clause 208.

Section 150G – see clause 209.

Section 150H – see clause 210.

Section 151 – see clause 211. Note that under the ES Act prohibition notices are not issued and this clause refers to electrical safety protection notices.

Section 151A – see clause 212. Note that under the ES Act prohibition notices are not issued and this clause refers to electrical safety protection notices.

Section 151B – see clause 213.

Section 152 – see clause 214. Note that under the ES Act prohibition notices are not issued and this clause also refers to electrical safety protection notices and unsafe equipment notices.

Section 152A – see clause 215.

Section 153 replicates the existing section 153, which was deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety. To maintain consistent terminology with the national model WHS Act, 'regulator' replaces 'chief executive'.

Part 12 Reviews

Clause 380 provides a new heading for Part 12 as 'Reviews'. This part covers both internal and external review processes.

Clause 381 provides a new heading for division 2 as 'Internal review'.

Clause 382 amends existing section 170 to remove reference to 'appeal' and replace with 'review' to align with the terminology in the model WHS Act.

Clause 383 replaces existing section 171, mirroring the comparable provision from the model WHS Act – see clause 228 of this Bill for a detailed explanation. This provision applies in an electrical safety context and therefore refers to the relevant electrical safety statutory notices (e.g. electrical safety protection notice, unsafe equipment notice or a non-disturbance notice).

Clause 384 replaces existing division 3 and provides that a person may apply for an external review of a decision to the Queensland Civil Administrative Tribunal (QCAT) as provided under the QCAT Act.

Clause 385 renumbers 'Miscellaneous provisions' as Part 14A.

Clause 386 replaces Part 13, Divisions 2, 2A, 3 to allow insertion of replacement provisions to maintain consistency with the model WHS Act.

Note that this Part also applies to proceedings for an offence under the ES Act as appropriate.

Section 186 – see clause 230.

Section 186A – see clause 231.

Section 186B – see clause 232. Note that this clause also refers to electrical safety undertakings.

Section 186C – see clause 233. Note that this clause also refers to electrical safety duties.

Section 187 – see clause 234.

Section 187A – see clause 235.

Section 187B – see clause 236.

Section 187C – see clause 237.

Section 187D – see clause 238. Note this provision is inserted in the ES Act as an 'electrical safety project order'.

Section 187E – see clause 239. Note that this clause also refers to court ordered electrical safety undertakings. It is important to note that court ordered electrical safety undertakings differ from an electrical safety undertaking which is given to the regulator and is voluntary in nature (Part 3).

Section 187F – see clause 240.

Section 187G – see clause 241.

Section 187H 'Forfeiture on conviction' replicates the existing section 161 which is deleted under these amendments and is reinserted to retain specific requirements to ensure electrical safety.

Section 187I 'Dealing with forfeited thing' replicates the existing section 162, which is deleted under these amendments, and is reinserted to retain specific requirements to ensure electrical safety. For consistency of terminology, 'regulator' replaces 'chief executive'.

Section 187J – see clause 242.

Section 188 – see clause 244.

Section 189 - see clause 245.

Section 189A – see clause 247.

Section 189B – see clause 248.

Section 190 – see clause 249.

Section 190A – see clause 250.

Section 190B – see clause 251.

Section 190C – see clause 252.

Section 190D – see clause 253.

Section 191 – see clause 267.

Part 14 General

Section 192 – see clause 268.

Section 192A – see clause 269.

Section 192B – see clause 270.

Section 193 – see clause 271.

Section 194 – see clause 272.

Section 195 – see clause 273.

Clause 387 replaces sections 205, 205A and 205B with 205 'Fee recovery' and 205A 'Disciplinary action and offences'.

Section 205 replicates the existing section 190, which is deleted under these amendments, and is reinserted to retain specific requirements to administer electrical safety. To maintain consistent terminology with the national model WHS Act, 'regulator' replaces 'chief executive'.

Section 205A replicates the existing section 192 and clarifies that the taking of disciplinary action against an electrical licence holder does not prevent their prosecution for the offence on which the disciplinary action is based. Further, a court may impose a penalty for an offence, if prosecuted, after taking into account the disciplinary action taken.

Clause 388 omits section 207 'Delegation by chief executive' as it is inconsistent with the model WHS Act. This matter is addressed under clause 154.

Clause 389 inserts a new part after section 246 – Part 20 'Transitional provisions for Work Health and Safety Act 2011'.

Section 247A provides the definitions applicable for this part.

Section 248 applies to an offence committed under a provision of the ES Act before this amendment and for which an investigation or proceedings had not been initiated or completed. In this case, this provision allows such an investigation, or proceedings to be conducted, taken or continued as if the amendment had not occurred. The existing provisions for prosecution for an offence (section 186) and the limitation on time for starting proceedings (section 187) which are omitted by these amendments will continue to apply as if they had not been omitted. Reference to 'chief executive' is to be read as 'regulator' if proceedings commence after the amendment.

Section 249 preserves enforceable undertakings made, and in force immediately before the amendment. Further the undertaking continues in force as if it were accepted under the new provisions (section 49). Importantly, this provision does not apply to acts or omissions that are Category 1 offences. References to 'chief executive' are to be read as 'regulator' for continuing arrangements.

Section 250 provides that the appointment of an inspector, including any imposed conditions or limits on compliance powers, continues after the amendment with the person taken to be appointed by the regulator under Section 124.

Section 251 preserves improvement notices issued by an inspector and provides that this amendment has no effect on the issue or enforcement of a notice that was in force immediately before this amendment. This relates to a notice issued under Section 153 as it existed before this amendment and which is enforceable for an offence against the old Section 153(5). Following this amendment the notice may be enforced under Section 146.

Section 252 preserves warrants issued under Part 11 before its amendment by this amending Act and allows for continuation of their effect. Similarly, powers exercised by inspector before amendment also continue to have lawful effect and, where applicable, are taken to have been exercised under a corresponding provision of the ES Act as amended.

Section 253 provides that any review or appeal taken under Part 12 before the amendment continues under the provisions as if they were not amended.

Section 254 deals with the adoption of the term 'regulator' to replace 'chief executive' to ensure consistency with the national model WHS Act. Schedule 4 replaces the term 'chief executive' with 'regulator' in all listed provisions. The provision clarifies that decisions made and actions taken by the chief executive before the amendment continue to have effect afterwards.

Clause 390 amends schedule 2 'Definitions' of the ES Act to ensure consistent concepts and terminology between the ES Act and the model WHS Act.

Amendment of Electrical Safety and Other Legislation Amendment Act 2011

Clause 391 provides for the amendment of the *Electrical Safety and Other Legislation Amendment Act 2011* (the ESOLAA). The ESOLAA amends electrical safety legislation with respect to national harmonisation of electrical equipment approvals. This legislation was passed prior to finalisation of the model WHS Act and therefore does not included the adopted terminology.

Clause 392 omits section 4 of the ESOLAA that made an amendment to existing section 26. This amendment is no longer required due to the changes made to align with the model WHS Act.

Clause 393 amends section 5 of the ESOLAA by amending the reference to section 32 to 'Duty of person conducting business or undertaking that manufactures electrical equipment' to maintain consistent concepts and terminology. The reference in subclause (2) reflects renumbering of provisions.

Clause 394 amends section 6 of the ESOLAA by amending the reference to section 33 to 'Duty of a person conducting business or undertaking that conducts recognised external certification scheme' to maintain consistent concepts and terminology. The reference in subclause (2) reflects renumbering of provisions.

Clause 395 amends section 7 of the ESOLAA by amending the heading of section 40AA to 'Duty of person conducting business or undertaking that manufactures electrical equipment' to maintain consistent concepts and terminology. The reference in subclause (2) reflects renumbering of provisions.

Clause 396 amends section 8 of the ESOLAA by amending the definition of 'responsible supplier' to include the reference to PCBU for consistency with the drafting style of the national model WHS Act. Similarly, the numerous references to 'chief executive' are changed to 'regulator'.

Clause 397 amends section 10 of the ESOLAA by updating the Part number to reflect renumbering of the ES Act. To maintain consistent concepts and terminology with the national model Act, the reference to 'chief executive' is changed to 'regulator'.

Clause 398 amends section 13 of the ESOLAA which amends the dictionary in schedule 2.

Clause 399 amends section 15 of the ESOLAA, updating the un-commenced Part 6A section 126 of the *Electrical Safety Regulation 2002* by removing the words "testing, maintenance, repair, alteration, removal, or replacement" in order to clarify the definition for the term "particular electrical equipment". The inclusion of these words has been interpreted by some stakeholders to broaden the requirements of the provision to apply to the sale of all forms of electrical equipment. This is not the intent as the only electrical equipment intended to be impacted is that requiring the performance of electrical work at the point of installation.

Clause 400 amends section 19 of the ESOLAA to omit the term 'particular electrical equipment' from the dictionary.

Clause 401 relates to the commencement of these changes.

Amendment of Penalties and Sentences Act 1992

Clause 402 provides that the *Penalties and Sentences Act 1992* is amended in this Division.

Clause 403 amends section 5 that provides for penalty units and sets the value of a penalty unit. The clause inserts a local penalty unit for the Work Health and Safety Act 2011 and the Electrical Safety Act 2002 and sets the value of the penalty unit for those Acts at $100. It has been necessary for the value of the penalty unit to be separated out from the generally applicable value under the *Penalty and Sentences Act 1992* to ensure the penalties in Work Health and Safety Act 2011 and the Electrical Safety Act 2002 can be amended and not get out of step with the nationally agreed quantums into the future.

Clause 404 provides that minor and consequential amendments made to other Acts and Regulations in Schedule 4 amends those laws mentioned.

Part 19 Amendment of Workers' Compensation and Rehabilitation Act 2003

Clause 405 provides this part amends the *Workers' Compensation and Rehabilitation Act 2003*.

Clause 406 amends section 108 of the Act to remove an obsolete reference to sick leave under the *Industrial Relations Act 1999*.

Clause 407 inserts new section 119A to allow an injured worker to accrue, and require an employer to pay an entitlement to, accrued leave while an injured worker is away from work on workers' compensation benefits. Liability for leave entitlements is the responsibility of the worker's employer.

Prior to the referral of State industrial relations powers to the Commonwealth on 1 January 2010, Queensland private sector employees were entitled to accrue sick leave and annual leave while absent on workers' compensation due to the combined effects of sections 10 and 11(5)(b) of the *Industrial Relations Act 1999* and section 108(3) of the *Workers' Compensation and Rehabilitation Act 2003*.

Queensland private sector employees are now covered by the *Fair Work Act 2009* (Cwlth) in the Federal industrial relations system, under section 130 of which employees who are absent from work and receiving workers' compensation are not entitled to accrue or take any leave, unless a compensation law provides otherwise. The *Workers' Compensation and Rehabilitation Act 2003* is silent on the accrual of leave.

Stakeholder support for the referral of Queensland's private sector industrial relations was based on a commitment from the Queensland Government that employees would not lose any entitlements derived under State law. It was not the intention of the referral to alter the benefits of private sector workers with respect to the accrual of sick, annual and long service leave entitlements while receiving workers' compensation benefits.

Clause 408 inserts a new part 1A in chapter 14 to authorise WorkCover to release project-specific injury data to principal contractors in charge of construction projects. The injury data provides the dates and types of injuries sustained on a project as well as the site on which they were sustained. The data is able to be used internally to monitor project safety

performance, however protections apply to prevent the unauthorised disclosure of commercially sensitive data.

The part also requires construction contractors who are employers to provide evidence of their workers' compensation insurance to the principal contractor in charge of the project. Evidence of a construction contractor's insurance policy can be requested at any time before or during the project. Non-compliance with the provisions will attract a financial penalty.

Clause 409 inserts a new section 584A to require that the workers' compensation scheme be reviewed at least once in each period of five years after 2012.

Clause 410 amends the dictionary in schedule 6.

Schedule 1 Application of Act

Clause 1 clarifies that the Bill applies to the storage and handling of dangerous goods, even if the dangerous goods are not at a workplace, or not specifically for use in carrying out work. The clause also clarifies that the Bill applies to the operation or use of any high risk plant which may affect public safety, even if the plant is not situated, operated or used at a workplace, or not specifically for use in carrying out work. All references in the Bill to workplace health and safety include a reference to public health and safety in the context of the operation or use of high risk plant. For example, this means that the Bill will apply to and cover lifts in high rise residential apartments.

Clause 2 specifies the application of the Bill in relation to mining safety Acts and provides that the Bill does not apply to certain mines and plant.

Clause 3 provides that the Bill does not have application to a matter that relates to the design or construction of proposed operating plant, that impacts on the integrity or safe use of the plant, to the extent that the *Geothermal Exploration Act 2004* or the *Petroleum and Gas (Production and Safety) Act 2004* also has application to the matter.

Clause 4 provides that the Bill does not have application to the circumstances covered by the *Electrical Safety Act 2002* and that the Bill does not apply to the extent that the *Electrical Safety Act 2002* has application.

Clause 5 provides that the Bill does not have application to the circumstances covered by part 3, division 2 of the *Transport (Rail Safety) Act 2010* and that the Bill does not apply to the extent that part 3, division 2 of the *Transport (Rail Safety) Act 2010* has application.

Clause 6 provides that, subject to the provisions set out in clauses 2 to 5, a person must discharge the health and safety duty imposed on them by this Bill, even if another Act prescribes a lesser duty in the same circumstance. However, the clause also provides that this Bill does not limit the following Acts:

- *Explosives Act 1999*
- *Public Safety Preservation Act 1986*
- *Radiation Safety Act 1999*
- *Transport Operations (Marine Safety) Act 1994*
- *Transport Operations (Road Use Management) Act 1995*

and clarifies that where any of these Acts are inconsistent with the provisions of this Bill, then these Acts prevail to the extent of the inconsistency.

Schedule 2 The regulator and local tripartite consultation arrangements and other local arrangements

Clause 1 provides for the appointment of the regulator. The regulator may be a public service officer who is appointed by the Governor in Council under the *Public Service Act 2008*. The public service officer may hold the office of regulator in conjunction with his or her other public service office.

The regulator must act independently when he or she is making decisions under this Bill, but otherwise is subject to direction in his or her capacity as a public service officer and an officer of the department.

Clause 2 sets out that the purposes of this part are to establish the workplace health and safety board and provide for the establishment of industry sector standing committees.

Clause 3 establishes the work health and safety board (the board).

Clause 4 provides that the primary function of the board is to give advice and make recommendations to the Minister about policies, strategies, allocation of resources and legislative arrangements for work health and safety. The clause also provides actions that the board may take in discharging this primary function. The clause further provides that the regulator must give the board reasonable help to enable it to perform its functions.

Clause 5 provides that as soon as practical (but within 4 months) after the end of each financial year, the board must prepare and give to the Minister a report on the board's operations for the year

Clause 6 sets out the provisions governing membership of the board. The board consists of a chairperson and at least six other members, all appointed by the Minister. The chairperson appointed by the Minister must be representative of industry. In appointing members to the board, the Minister must consider the potential member's experience and competence in the management of work health and safety. The Minister must ensure that the number of members representing employers equals the number of members representing workers. The Minister must also seek to appoint both men and women as members of the board.

Clause 7 provides that the board may hold meetings when it decides; however, the board must meet at least four times a year. The chairperson may call a meeting of the board at any time or when requested by at least one third of the other members of the board. This clause also allows the Minister to call a meeting of the board at any time.

Clause 8 sets out the conduct of proceedings for board meetings, the requirements for a quorum and the voting rights of members. It also provides for valid resolutions to be passed outside of board meetings subject to certain conditions.

Clause 9 provides that a member of the board should disclose any possible professional or commercial advantage from an issue discussed by the board. Disclosure is required when the member believes, or should reasonably believe, that an issue being considered or about to be considered by the board may give the member, or an entity associated with the member, a possible professional or commercial advantage. The disclosure must be recorded in the board's minutes.

The member must not be present when the board discusses the issues, nor take part in a board decision on the issue. If a member is not present at a board deliberation because of a disclosure of interest, and there would be

quorum if that member was present, the remaining members present at the deliberation are a quorum for the board's deliberation or decision about the issue.

The clause further provides that an entity is 'associated with' a board member if the member is an employee or member of, or advisor to, the entity.

Clause 10 requires the board to keep minutes of its proceedings.

Clause 11 provides for the duration of appointment of a member to the board (not longer than three years) and the circumstances in which an office of a member becomes vacant. It also provides that the Minister may, at any time, end the appointment of a member for any reason or none.

Clause 12 allows the Minister to approve a leave of absence for a member of the board. Where a leave of absence is approved, the Minister may appoint someone else as an acting member for the duration of the leave.

Clause 13 provides that a member of the board is appointed on a part-time basis and is entitled to be paid the remuneration and allowances fixed by the Minister.

Clause 14 establishes the following industry sector standing committees:

- construction sector standing committee
- manufacturing sector standing committee
- rural sector standing committee
- health and community services sector standing committee
- retail and wholesale sector standing committee
- transport and storage sector standing committee.

The clause also allows the Minister to establish other industry sector standing committees by gazette notice.

Clause 15 provides that the primary function of an industry sector standing committee is to give advice and make recommendations to the work health and safety board about work health and safety in the industry sector the committee was established for. The clause also provides actions that the industry sector committee may take in discharging their primary function.

Clause 16 sets out the provisions governing membership of an industry sector standing committee. Each industry sector standing committee consists of a chairperson and at least six other members, all appointed by

the Minister. In appointing members to the board, the Minister must consider the potential member's experience and competence in the management of work health and safety. The Minister must ensure that the number of members representing employers equals the number of members representing workers. The Minister must also seek to appoint both men and women as members of the committee.

Clause 17 provides that an industry sector standing committee may hold meetings when it decides; however, it must meet at least four times a year. The chairperson may call a meeting of the committee at any time or when requested by at least one third of the other members of the committee. This clause also allows the Minister to call a meeting of a committee at any time.

Clause 18 sets out the conduct of proceedings for committee meetings, the requirements for a quorum and the voting rights of members. It also provides for valid resolutions to be passed outside of board meetings subject to certain conditions.

Clause 19 provides that a member of an industry sector standing committee should disclose any possible professional or commercial advantage from an issue discussed by the committee. Disclosure is required when the member believes, or should reasonably believe, that an issue being considered or about to be considered by the committee may give the member, or an entity associated with the member, a possible professional or commercial advantage. The disclosure must be recorded in the committee's minutes.

The member must not be present when the committee discusses the issues, nor take part in a committee decision on the issue. If a member is not present at a committee deliberation because of a disclosure of interest, and there would be quorum if that member was present, the remaining members present at the deliberation are a quorum for the committee's deliberation or decision about the issue.

The clause further provides that an entity is 'associated with' a committee member if the member is an employee or member of, or advisor to, the entity.

Clause 20 requires an industry sector standing committee to keep minutes of its proceedings.

Clause 21 provides for the duration of appointment of a member to an industry sector standing committee (not longer than three years) and the circumstances in which an office of a member becomes vacant. It also

provides that the Minister may, at any time, end the appointment of a member for any reason or none.

Clause 22 allows the Minister to approve a leave of absence for a member of an industry sector standing committee. Where a leave of absence is approved, the Minister may appoint someone else as an acting member for the duration of the leave. In appointing an acting member, the Minister must have regard to the committee's membership requirements.

Clause 23 provides that a member of a committee is appointed on a part-time basis and is entitled to be paid the remuneration and allowances fixed by the Minister.

Clause 24 provides that for an application or renewal of self-insurance for an employer or group employer under the *Workers' Compensation and Rehabilitation Act 2003*, the Workers' Compensation Regulatory Authority must apply to the regulator for a report about the occupational health and safety performance of that employer or group employer. The clause also clarifies provisions around the preparation of the report and the payment of fees.

Schedule 2A Reviewable decisions

Schedule 2A sets out the decisions made under the Bill that are reviewable. These decisions are called reviewable decisions. The table lists the reviewable decisions by reference to the provisions under which they are made and lists who is eligible to apply for review of a reviewable decision. Item 13 in the table allows the regulations to prescribe further decisions that can be reviewable and who would be eligible to apply for the review of any such decision.

Schedule 3 Regulation-making powers

Clause 276 allows the Governor in Council to make regulations under the Bill for any matter stated in this Schedule. Schedule 3 details a variety of matters that may be the subject of regulations (see clause 276). These include duties imposed by the Bill, the protection of workers, and matters relating to records, hazards, work groups, health and safety committees and WHS entry permits. These more specific regulation-making powers deal

with matters that are not expressly identified within the scope or objects of the Bill for which regulations may be required. They do not limit the broad regulation making power in subclause 276(1).

Schedule 4 Minor and consequential amendments

Schedule 4 lists the consequential amendments to be made to other Acts and Regulations due to the enactment of the Work Health and Safety Bill 2011 or the repeal of the Dangerous Goods Safety Management Act 2001.

Schedule 5 Dictionary

Schedule 5 contains a dictionary that provides definitions of words and terms used in this Bill. Some substantial definitions include:

Compliance powers

The term 'compliance powers' is used throughout the Bill as a short-hand way of referring to all of the functions and powers of WHS inspectors under the Bill.

Employee record

The term 'employee record' takes its meaning from the *Privacy Act 1988 (Cwlth).*

Health
The term 'health' is defined to clarify that it is used in its broadest sense and covers both physical and psychological health. This means that the Bill covers psychosocial risks to health like stress, fatigue and bullying.

Import
The term 'import' is defined to mean importing into the jurisdiction from outside Australia. This means that interstate movements are excluded from the definition. It is not intended to capture any movement of goods to or from the external territories as defined by the *Acts Interpretation Act 1901 (Cwlth).*

Plant
The term 'plant' is defined broadly to cover a wide range of items, ranging

from complex installations to portable equipment and tools. The definition includes 'anything fitted or connected', which covers accessories but not other things unconnected with the installation or operation of the plant (e.g. floor or building housing the plant).

Officer
The term 'officer' is defined by reference to the 'officer' definitions in section 9 of the *Corporations Act 2001*, but does not include a partner in a partnership. It also includes 'officers' of the State within the meaning of clause 247 and 'officers' of public authorities within the meaning of clause 252. All of these 'officers' owe the officers' duty provided for in clause 27, subject to the volunteers' exemption from prosecution in clause 34.

This Act

'This Act' is defined to include the regulations unless a particular provision provides otherwise.

Volunteer
The term 'volunteer' is defined to mean a person who acts on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses. Whether an individual is a 'volunteer' for the purposes of the Bill is a question of fact that will depend on the circumstances of each case. Out-of-pocket expenses' are not defined but should be read to cover expenses an individual incurs directly in carrying out volunteer work (e.g. reimbursement for direct outlays of cash for travel, meals and incidentals) but *not* any loss of remuneration. Any payment over and above this amount would mean that the person was not a volunteer for purposes of the Bill and the volunteers' exemption would *not* apply. For example, a director of a body corporate that received money in the nature of directors' fees would not be covered by the volunteers' exemption.

General concepts covered but not defined in the Bill include:

Employment

References to 'employment', 'employer' and 'employee' are intended to capture the traditional meaning of those terms.

Evidential burden

An evidential burden requires a person to provide evidence of an asserted fact in order to prove that fact to a court. In some instances, the Bill places an evidential burden on an individual to demonstrate a reasonable excuse as to why they have failed to meet a duty or obligation.

Subclauses 118(4), 144(2), 155(6), 165(3), 171(7), 177(7), 185(5), 200(2), 242(2) and 268(3) shift the evidential burden by requiring the defendant to show a reasonable excuse. This is because the defendant is the only person who will be able to provide evidence of any reasonable excuse for refusing or failing to meet the relevant duty or obligation.