Work Health and Safety and Other Legislation Amendment Bill 2023

Explanatory Notes

Short title

The short title of the Bill is the Work Health and Safety and Other Legislation Amendment Bill 2023.

Policy objectives and the reasons for them

The objectives of the Bill are to give effect to the Queensland Government's response to recommendations from the *Review of the Work Health and Safety Act 2011 – Final Report 2022* (the WHS Act Review Report) and particular recommendations from the *2018 Review of the Model Work Health and Safety Laws* (the Boland Review).

The WHS Act Review Report made 31 recommendations, consisting of 55 sub-recommendations, all of which the Queensland Government accepted in full or in-principle. The WHS Act Review Report and Queensland Government response were published on 5 May 2023. The Bill implements the majority of the WHS Act Review Report's sub-recommendations. The remaining recommendations will be implemented either through future amendment to the *Work Health and Safety Act 2011* (WHS Act) or the *Work Health and Safety Regulation 2011* (WHS Regulation), administratively, or will be subject to national review, targeted Queensland reviews and further consultation with stakeholders.

The Boland Review was the first full review of the national model Work Health and Safety (WHS) laws which were implemented in Queensland on 1 January 2012. The Boland Review found that the model WHS laws are working as intended, and made recommendations to improve clarity and consistency in the model laws. The Bill gives effect to nine recommendations from the Boland Review.

The Bill also makes additional amendments to improve the operation and administration of the WHS Act identified through consultation with the Office of the National Rail Safety Regulator and the Work Health and Safety (WHS) Prosecutor. The Bill includes amendments to remove inconsistencies with rail safety legislation, and also amends the WHS Act to allow the WHS Prosecutor to authorise an appropriately qualified member of staff to bring proceedings under the WHS Act.

Achievement of policy objectives

To achieve its policy objectives, the Bill will amend the WHS Act to:

- strengthen and promote the role of health and safety representatives (HSRs), including clarifying powers they can exercise and functions they can perform at the workplace;
- promote consultation about WHS with workers and their representatives;

- clarify rights that WHS entry permit holders can exercise at a workplace to assist workers in relation to suspected contraventions of the WHS Act;
- clarify which entities or persons may assist workers and act as their representatives in relation to WHS issues by:
  - ensuring a relevant union whose rules entitle it to represent the worker's industrial interests may assist workers or act as their representatives in relation to a WHS issue; and
  - excluding other entities such as: associations of employees or independent contractors; other entities that represent or are purporting to represent the industrial interests of the worker; entities that demand or receive a fee from such bodies; and individuals connected with excluded bodies. Excluding associations of employees or independent contractors which are not registered unions under the *Fair Work (Registered Organisations) Act 2009* (Cwlth) or the *Industrial Relations Act 2016* (IR Act) is consistent with 2022 amendments to the IR Act;
- clarify and streamline the dispute resolution process;
- move certain proceedings from the Magistrates Court to the Queensland Industrial Relations Commission (QIRC);
- amend the Category 1 offence to include negligence as a fault element, in addition to reckless conduct;
- enable HSRs to choose their training provider;
- prohibit persons from entering insurance contracts or being granted indemnity, or benefiting from these arrangements, to cover liability for WHS fines;
- extend the 12-month deadline, to 18 months, for a person to request the WHS Prosecutor bring a prosecution for a Category 1 or 2 offence; and
- make other amendments to enhance the operation and administration of the WHS Act, including minor technical amendments for clarity or consistency.

In addition to amendments to the WHS Act, the Bill makes complementary amendments to the *Safety in Recreational Water Activities Act 2011* (SRWA Act) and a consequential amendment to the *Public Health Act 2005*.

Key measures in the Bill, and how these measures achieve policy objectives, are outlined below.

WHS Act Review

Strengthening and promoting the role of health and safety representatives

The Bill implements changes to strengthen the operation of the existing HSR framework in the WHS Act. This reflects one of the WHS Act Review's core findings that safety performance is improved when there is effective worker representation on WHS matters. The WHS Act Review identified broad support for the role of HSRs in the workplace, although submissions to the review expressed significant concern that many workplaces do not have an HSR. The WHS Act Review found it imperative to improve the take up of the HSR role given the capacity of HSRs to improve health and safety at the workplace. To achieve this, the Bill requires persons conducting a business or undertaking (PCBUs) to advise workers about:

- their ability to request the election of an HSR and establishment of a work group;
- the role, powers and functions of an HSR;
- the process for electing HSRs; and

- who may represent workers in negotiations about work groups.

Further, a PCBU must invite workers to make a request for the facilitation of an election of one or more HSRs either annually or in other specific circumstances.

Submissions to the WHS Act Review also provided examples of circumstances where PCBUs sought to discourage the establishment of a work group and the election of an HSR or took action to prevent this from occurring. As recommended in the WHS Act Review, the Bill prohibits PCBUs from intentionally hindering, preventing or discouraging workers from making a request about facilitating the conduct of an election for one or more HSRs. Similarly, the Bill also prohibits a PCBU from intentionally hindering, preventing or discouraging the election of an HSR or deputy HSR. Both offences have a maximum penalty of 200 penalty units. This is consistent with penalty levels for similar offences in other legislation.

Determination of work groups

The WHS Act Review found that provisions relating to the process and timeline for the negotiation of work groups are vague and do not provide clear timeframes for resolution. In particular, the current provisions do not identify when the negotiations are taken to have failed and do not provide for an expeditious resolution of disputes or for an inspector's decision to stand while the dispute is being resolved.

Given the central importance of the role of HSRs and establishing work groups, the WHS Act Review determined that the timeframe for work group negotiations needs to be made clear and the dispute resolution process needs to provide for an expeditious outcome.

The Bill sets out new processes and timeframes for work group negotiations as follows:

- the negotiations must be completed within 14 days of the request for the facilitation of an election for one or more HSRs, but the completion date can be extended if the parties mutually agree;
- if an inspector is appointed to resolve a dispute regarding work groups, the inspector must first assist in resolving the matter or otherwise make a decision within seven days. The inspector's decision will not be subject to internal review, rather any further dispute will proceed to the QIRC;
- a decision made by the inspector will stand until the matter is otherwise determined by the QIRC. This ensures workers can still be appropriately represented in the event that disputes are protracted; and
- the work group is to be negotiated with workers who are proposed to form the work group as recommended by the Boland review.

Enabling relevant unions to be a party principal to work group negotiations

Currently, unions may participate in various matters under the WHS Act as a 'representative' of a worker when requested by the worker, including during the negotiation of work groups. This requires the worker to identify themselves as a member of the union and as the person who requested the union to participate in the matter on their behalf.

The WHS Act Review found it is understandable that workers may be reticent to identify themselves as either a member of a union or the person who had asked for assistance from the union, particularly noting examples of employers taking action against workers for having raised safety matters.

To resolve this concern and recognise the institutional role played by registered unions and the impediments for workers to request union involvement, the Bill provides for a *relevant union* to be a party principal to negotiations regarding HSRs and agreements about work groups. A *relevant union*, for a worker (whether the worker is an HSR or another worker) is defined in the Bill to mean, a union of which the worker is a member or is eligible to be a member, and whose rules entitle the union to represent the worker's industrial interests. In addition, unions must be employee organisations registered under the FW(RO) Act or the IR Act. These amendments recommended by the WHS Act Review align with amendments made to the IR Act through the *Industrial Relations and Other Legislation Amendment Act 2022* and the Government's long-standing position that primacy is given to registered employee organisations with appropriate coverage.

In practice, this means a relevant union will have a right to be a party to work group negotiations where it involves workers they are eligible to represent, and a formal request from a worker for union representation will no longer be required (although this is still permitted). A relevant union will need to advise the PCBU in writing if they would like to participate in the negotiations as a party. This ensures there is adequate notice that the relevant union wants to participate and enables relevant unions to select the negotiations in which they would like to participate.

Powers and functions of health and safety representatives

The WHS Act sets out specific powers and functions an HSR can perform in the interests of the workers they represent including:

- representing the work group in health and safety matters;
- monitoring compliance measures taken by the PCBU that relate to the workers in their work group;
- investigating WHS complaints from members of their work group; and
- inquiring into any risk to the health or safety of workers in the work group arising from the conduct of the business or undertaking.

The WHS Act Review found that for HSRs to be able to perform the role envisaged by the WHS Act, it is necessary for HSRs to be completely integrated into the identification and resolution of safety issues at the workplace. The reviewers identified the need to clarify:

- the interaction between HSRs, inspectors and WHS entry permit holders; and
- the right of HSRs to receive relevant information about work health and safety.

To address these issues, the Bill requires PCBUs to:

- inform an HSR when an inspector or WHS entry permit holder is on site, and permit the HSR to accompany them, where the visit is relevant to their work group; and

- provide HSRs with copies of enforcement notices issued by an inspector, copies of entry notices provided by WHS entry permit holders, and mandatory incident notifications made to the regulator by the PCBU.

The Bill also enables HSRs to request that a PCBU provide information concerning the work health and safety of workers in their work group. The PCBU is obliged to comply with such a request.

As an extension of the policy intention for the recommendation to require PCBUs to provide HSRs with a copy of enforcement notices, the Bill also inserts new section 155A which enables the regulator to provide a WHS entry permit holder or HSR with relevant information from an improvement notice, prohibition notice or non-disturbance notice issued by an inspector under Part 10 of the WHS Act. While an HSR will be entitled to receive a copy of an enforcement notice under the proposed amendments to section 70, establishing a mechanism for informal administrative release of information from enforcement notices on request is intended to assist both WHS entry permit holders and HSRs in fulfilling their roles under the WHS Act and enhance awareness of WHS issues identified by inspectors that may be relevant to the entry permit holder or HSR. Personal information about an individual or confidential commercial information cannot be disclosed under new section 155A. In addition, the Bill provides that section 271 (Confidentiality of information) applies to a WHS entry permit holder or HSR who obtains information under new section 155A.

Health and safety representative remuneration entitlements during training

Concerns were raised during the WHS Act Review that, despite section 72(4) of the WHS Act, there are issues with the payment of an HSR's equivalent wages while attending training. Many workers do not work a standard Monday to Friday 38-hour week, for example, shift workers and part-time workers. Submissions to the review indicated there are issues with shift workers only receiving their ordinary time pay rate and not their usual remuneration including overtime and shift allowances. This means non-standard workers may be disadvantaged financially in attending an HSR training course and this could be a disincentive for them to become an HSR.

As recommended by the WHS Act Review, the Bill provides that while attending training HSRs are entitled to receive payment of the usual remuneration they would have received if they had been at work instead of at training, including any overtime, penalties or allowances. The Bill also clarifies that if an HSR works additional hours to attend training, for example where a HSR usually works part-time, they are to be paid their usual remuneration for the additional hours.

Health and safety representative's right to direct unsafe work to cease

Under section 85 of the WHS Act, if an HSR has a reasonable concern that the health and safety of a worker in their work group is at serious risk from immediate or imminent exposure to a hazard, the HSR can direct the worker to cease work.

The term 'serious risk' captures risks that may cause death or serious injury or illness including diseases of long latency from immediate exposure to a hazard such as crystalline silica dust, 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 emanate from an immediate or imminent exposure to a

hazard. For example, a worker working at heights with no fall arrest system, or a worker removing asbestos without using the appropriate personal protective equipment or safe work methods.

An HSR, before giving such a direction, must first consult the PCBU and attempt to resolve the matter using the issue resolution process under section 81 of the WHS Act. However, if the risk is so serious and immediate or imminent that it would not be reasonable to consult before giving a direction, the HSR can give the direction without consultation and then conduct consultation as soon as practicable after giving the direction. HSRs cannot give directions to cease work unless they have completed HSR training.

The WHS Act Review identified that section 85 is not being used effectively due to:

- a lack of understanding by workers about whether the HSR has complied with all necessary steps to issue a direction and concern regarding complying with a direction that has been issued unlawfully (e.g. the risk of workers taking unlawful industrial action);
- contrary directions being given by the HSR and the PCBU/employer; and
- concern about the HSR's job security.

As recommended by the WHS Act Review, the Bill provides that:

- a direction to cease work by an HSR must be issued to the PCBU if attempts to resolve the matter as an issue under Part 5, Division 5 have failed;
- the PCBU has an obligation to direct workers to cease work that is the subject of the direction until such time as the issue is resolved or the direction is set aside in accordance with the dispute resolution process; and
- HSRs retain the ability to issue a direction to a worker in circumstances where there is an immediate exposure to risk so serious that prior consultation is not reasonable.

Under section 85 and new section 85A, the Bill requires a cease work notice to be in writing at the time the cease work direction is given to provide clarity and support resolution of the issue. The notice will also provide assurance the HSR has satisfied the pre-conditions for a cease work direction and minimise the risk of workers taking unlawful industrial action. In addition, the requirement to display a copy of the cease work notice in a prominent way at the workplace assists in providing clear information to affected workers.

Provisional improvement notices

If an HSR reasonably believes that a person is contravening, or has contravened, the WHS Act in circumstances that make it likely the contravention will continue or be repeated, section 90 allows the HSR to issue a provisional improvement notice (PIN) requiring the person to remedy the contravention.

Section 92(d) of the WHS Act requires PINs to state a day by which the person is required to remedy the contravention. This day must be at least eight days after the PIN is issued. Within seven days of a PIN being issued, section 100 enables the person who was issued the PIN to ask the regulator to appoint an inspector to review the notice.

The WHS Act Review considered concerns raised that under the existing framework for PINs, the risk identified by an HSR in a PIN can remain unaddressed for at least eight days before it

is remedied. The Review Report acknowledged that while some time is required for remedial action or rectification work to be undertaken, eight days may be excessive as some matters that were the subject of PINs could be actioned quickly. However, the reviewers also recognised that more complex issues could require a longer period and the HSR should be able to extend the period for compliance.

The Bill implements the WHS Act Review recommendation by reducing the time for compliance with a PIN from eight days to four days, except in circumstances where all parties agree to extend the timeframe. As a consequential amendment, the period for when a person can ask the regulator to appoint an inspector to review a PIN is reduced to three days.

Discriminatory conduct

Discriminatory conduct under section 105(1)(a) of the WHS Act is similar to the conduct which constitutes adverse action under section 282(1) of the IR Act.

While discriminatory conduct under the WHS Act and adverse action under the IR Act include dismissal of a worker or altering the position of the worker to their detriment, section 282(1)(d) the IR Act extends the definition to circumstances where an employer discriminates between the employee and other employees of the employer. Submissions to the review raised that the definition of discriminatory conduct under the WHS Act is of a lesser standard than that provided for workers under the IR Act.

The Bill amends the definition of *discriminatory conduct* in section 105 of the WHS Act to include treating a worker less favourably than other workers to more closely reflect section 282(1)(d) of the IR Act, providing an additional circumstance in which discriminatory matters can be brought under the WHS Act. For the purposes of the WHS Act, this will include situations in which a worker is treated less favourably than other workers on the basis that the worker has been or seeks to be involved in WHS issues at the workplace.

The WHS Act Review also found that proceedings for contravening Part 6 (Discriminatory, coercive and misleading conduct) of the WHS Act should be dealt with in the QIRC rather than the Magistrates Court, given the QIRC is a specialist employment tribunal with existing jurisdiction for allegations that a person has taken action against another person because they have exercised a protected attribute. Consistent with other recommendations of the review, the WHS Act Review also found there is a substantial benefit in relevant unions being able to commence proceedings for discriminatory or coercive conduct under Part 6, Division 3 of the WHS Act.

The Bill gives effect to these recommendations by enabling civil proceedings relating to discriminatory or coercive conduct to occur in the QIRC rather than the Magistrates Court, with clarification that a *relevant union* for a worker has standing to apply to the commission for an order. Workers will continue to be able to engage legal representation in accordance with relevant tribunal rules for these proceedings. This is distinct from being a worker's *representative* under the WHS Act.

Consultation with workers

The WHS Act Review considered that, due to the nature of some hazards and concerns about reprisal, some workers may feel more comfortable with a representative to assist in raising WHS concerns during consultation. Representatives may have technical expertise or otherwise be able to assist workers to understand WHS issues raised in consultation and formulate their response. The ability for workers to request a representative is a feature elsewhere in the WHS Act.

As recommended by the WHS Act Review, the Bill requires PCBUs to consult with a *representative* of a worker where this has been requested by the worker. In addition, where a *representative* is requested to participate in consultation, the parties must agree on details of when and where the consultation will occur.

Health and safety committees

During the WHS Act Review, concerns were raised that the two-month timeframe for establishing a health and safety committee (HSC) is unnecessarily long and denies workers a mechanism for consultation about health and safety. It was argued this is particularly critical for high-risk industries, such as construction, where the role of the HSC is considered essential to the coordination of health and safety activities.

The WHS Act Review found that the process for resolving disputes about the constitution of HSCs does not provide clear timeframes for resolution. In addition, where inspector decisions are disputed, the timeframe before an HSC is established is further extended as the inspector's decision is stayed while it is subject to internal and external review.

The Bill reduces the timeframe for a PCBU to establish an HSC, if requested, from two months to 28 days and simplifies the dispute resolution process for HSCs. In the event of a dispute, a party can ask for an inspector to be appointed to assist the parties in reaching an agreement about the formation of an HSC. The inspector must attempt to assist the parties to reach agreement about the constitution of an HSC. If the inspector reasonably believes the parties are unlikely to reach an agreement within seven days of the inspector being appointed to assist, the inspector must either decide the constitution of the HSC or that a committee should not be established. The inspector's decision will not be subject to internal review. Instead, a party to the dispute can proceed to the QIRC. The inspector's decision about the HSC will remain in force until the matter is heard and determined by the QIRC.

Clarifying WHS entry permit holders may remain at the workplace to exercise rights

The WHS Act Review recommended making section 118 (Rights that may be exercised while at workplace) of the WHS Act consistent with the *Summary Offences Act 2005* (SO Act). The amendments to the SO Act followed a February 2020 decision of the District Court of Queensland – *Commissioner of Police v Seiffert & Ors* [2020] QDC 50 (*Seiffert*) which considered the interaction of the trespass offence and the right to enter a workplace under section 117 of the WHS Act.

In *Seiffert*, the court invoked the presumption that the legislature does not intend to interfere with fundamental common law rights, immunities, freedoms, or principles, unless there is a

clear statement to that effect. The court found a clear intent to displace common law privacy rights with respect to entry, but not with respect to remaining (in the event of a dispute).

The amendments to the SO Act in 2020 consequently established a clear legislative intent to displace the presumption of privacy rights with respect to authorised industrial officers both entering and remaining in a workplace.

Consistent with the amendments to the SO Act, the Bill amends section 118 of the WHS Act to clarify that WHS entry permit holders are permitted to remain at a workplace for the time necessary to complete the exercise of their statutory powers, subject to the limitation that such rights can only be exercised during the usual working hours at the workplace.

When further notice is not required for a WHS entry permit holder - access to employee records relating to a suspected contravention and providing advice on action taken in relation to a suspected contravention

Submissions to the WHS Act Review identified confusion about:

- a WHS entry permit holder's right in section 118(1)(b) to consult with relevant workers in relation to the suspected contravention;
- a WHS entry permit holder's right in section 118(1)(d) to inspect documents that are kept at the workplace or accessible from a computer kept at the workplace and are directly relevant to a suspected contravention; and
- a WHS entry permit holder's obligation to give at least 24 hours' notice for similar matters under sections 120 and 122.

Stakeholders submitted that a suspected contravention being investigated by a WHS entry permit holder will often concern the adequacy of training or qualifications of a particular worker to perform work. In particular, where the PCBU's records about their workers are directly relevant to the suspected contravention, it would undermine the scheme and the entry under section 117 of the WHS Act if the WHS entry permit holder had to wait an additional 24 hours.

To address this issue, the Bill amends section 119 to clarify that if a WHS entry permit holder has given notice of entry in relation to a suspected contravention, while the entry permit holder remains at the workplace they will not be required to give an additional 24 hours' notice of entry for access to employee records held at, or accessible from a computer at the workplace, where they relate to the suspected contravention. However, at least 24 hours' notice will still be required for entry to inspect or make copies of other documents that are directly relevant to a suspected contravention that are not held by the relevant PCBU.

Similarly, the Bill amends section 119 of the WHS Act to clarify that where a WHS entry permit holder has already given notice of entry under section 119(1), while the entry permit holder remains at the workplace they may consult with workers about the suspected contravention without giving an additional 24 hours' notice under section 122. This acknowledges the difference between consulting with workers about a suspected contravention and the separate right to enter a workplace to consult and advise workers more generally about work health and safety matters where at least 24 hours' notice is required.

Notice of entry – WHS entry permit holder inquiring into a suspected contravention

Under section 119 of the WHS Act, a WHS entry permit holder must, as soon as is reasonably practicable after entering a workplace to inquire into a suspected contravention, give notice of the entry, and the suspected contravention, to the relevant PCBU and the person with management or control of the workplace. However, the requirement to give notice does not apply if giving notice would defeat the purpose of the entry to the workplace or unreasonably delay the WHS entry permit holder in an urgent case.

During the WHS Act Review, it was raised that disputation is occurring between PCBUs and WHS entry permit holders over providing notice of entry under section 119 of the WHS Act. Disputes often relate to the adequacy of the notice (e.g. minor errors) or whether entry can occur before notice is provided.

Section 119 of the WHS Act already provides that notice is not required to be given until after a WHS entry permit holder has entered. However, as recommended by the WHS Act Review, the Bill amends section 119 to further clarify that the provision of an entry notice is not a pre-condition to entry and that any formal defect or irregularity in the notice (e.g. incorrect spelling of the name of the entry permit holder or PCBU that are otherwise sufficiently identified) does not affect the validity of an entry to inquire into a suspected contravention.

WHS entry permit holders complying with WHS requirements requested by PCBUs

Under section 128 of the WHS Act, a WHS entry permit holder must comply with any reasonable request by a PCBU to comply with a WHS requirement that applies to the workplace or any other legislated requirement that applies to that type of workplace.

The WHS Act Review observed concerns that section 128 lacks clarity, has led to divergent views about what is considered a 'reasonable' request and is being used to frustrate entry by WHS entry permit holders.

As recommended by the WHS Act Review, the Bill amends section 128 to clarify that a request to comply with a WHS requirement is not reasonable if complying would unduly delay or unreasonably hinder or obstruct the WHS entry permit holder exercising a right of entry to the workplace, for example, requiring off-site induction at a location far from where entry is sought or excessive or unnecessary usage of exclusion zones.

WHS civil penalty provisions

Where the words 'WHS civil penalty provision' appear in a provision of the WHS Act in conjunction with a monetary penalty, the provision is a WHS civil penalty provision. This means any penalty for a contravention is imposed on a civil, rather than criminal, basis.

WHS civil penalty provisions are mainly found in Part 7 of the WHS Act, which sets out the framework for workplace entry by WHS entry permit holders. Proceedings for a contravention of a WHS civil penalty provision may only be brought by the WHS Prosecutor, with proceedings conducted in the Magistrates Court.

During the WHS Act Review, concerns were raised about who can take action for breaches of WHS civil penalty provisions. Stakeholders raised the issue that while a union or WHS entry permit holder can bring a dispute about right of entry under section 142(4)(b) of the WHS Act, they are unable to bring a matter that a PCBU or other person has obstructed, delayed or hindered access to a workplace by a WHS entry permit holder under Part 7 of the WHS Act. Stakeholders argued this is inconsistent with the *Fair Work Act 2009* (FW Act) where a person affected by a contravention, including a registered union, has standing to bring an application for a civil penalty.

The reviewers noted that WHS entry permit holders who are officials of federal unions and occupiers who are covered by the FW Act are able to bring proceedings for contraventions of sections 500 to 502 of the FW Act, which are effectively the same provisions as sections 144 to 147 of the WHS Act, in either the Federal Circuit Court of Australia or the Federal Court of Australia. On that basis, the reviewers considered there is no longer any utility in the restriction on standing to commence proceedings for contraventions of sections 144 to 147 of the WHS Act.

The reviewers also considered that as the QIRC deals with all matters concerning right of entry disputes under the WHS Act and the IR Act, and has a civil penalty jurisdiction, it is appropriate for those proceedings to be brought in the QIRC rather than the Magistrates Court.

The Bill implements the WHS Act Review's recommendations by:

- moving jurisdiction for WHS civil penalty matters from the Magistrates Court to the QIRC
- allowing a relevant union under Part 7 (Workplace entry by WHS entry permit holders), a WHS entry permit holder, or a person who is affected by the contravention or alleged contravention, to seek orders from the QIRC in relation to the following WHS civil penalty provisions:

    - section 126 (When right may be exercised)
    - section 144(1) (Person must not refuse or delay entry of WHS entry permit holder)
    - section 145 (Person must not hinder or obstruct WHS entry permit holder)
    - section 146 (WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace)
    - section 147(1) (Misrepresentations about things authorised by this part).

The WHS Prosecutor also continues to be able to apply for an order in relation to any WHS civil penalty provision.

<u>Enabling relevant unions to be a party principal to issue resolution matters</u>

The WHS Act Review examined the effectiveness of the issue and dispute resolution processes in the WHS Act and found there is a substantial benefit in relevant unions being a party in their own right to issues which arise under the WHS Act that affect workers they are eligible to represent.

Similar to the perceived barriers to workers requesting representation from relevant unions for work group negotiations, the WHS Act Review found it is understandable that workers may be reticent to identify themselves as either a member of a union or the person who asked for representation by a union to assist in resolving a work health and safety issue under Part 5,

Division 5 (Issue resolution) of the WHS Act. Perceived barriers included fear of reprisal from employers.

As recommended by the WHS Act Review, the Bill establishes that a *relevant union* has party principal status in relation to participating in the resolution of WHS issues under Part 5, Division 5 (Issue resolution) . In practice, this means relevant unions will have a right to be party to resolution of a WHS issue where it involves workers the union is eligible to represent, and a formal request from a worker for union representation will no longer be required (although this is still permitted). Relevant unions will need to advise the PCBU in writing if they want to participate in resolving the issue as a party. This ensures adequate notice that the relevant union wants to participate and enables relevant unions to select the WHS issues in which they would like to be involved. The Bill also clarifies representation rights for issue resolution in relation to workers in a work group where an HSR is yet to be elected.

The Bill also amends section 81 (Resolution of health and safety issues) to clarify that the PCBU must allow all the parties to a WHS issue to enter and remain at the workplace for the purpose of attending discussions with a view to resolving the issue. This aligns with the amendment to section 118 (Rights that may be exercised while at workplace) to clarify a WHS entry permit holder may remain on site for the time necessary to achieve the purpose of the entry to inquire into a suspected contravention.

Entities that may represent workers on WHS issues

The WHS Act Review considered concerns raised by stakeholders about who can be a 'representative', 'union' and 'relevant union', noting there are various circumstances under the WHS Act which permit representation and assistance for workers, and clarity is required to ensure effective and transparent representation.

The reviewers noted the *Five-year Review of Queensland's Industrial Relations Act 2016 Final Report* (2021) found there had been an increase in the number of associations and other bodies corporate purporting to act on behalf of employees but who are not registered under the FW(RO) Act or the IR Act. It was also noted that these entities are not subject to the regulation contained in either the FW(RO) Act or the IR Act. For the reasons explained in the review of the IR Act, including the need to ensure the primacy of registered employee and employer organisations and their representation rights are clear, the WHS Act Review also concluded that the existence of such unregulated bodies purporting to represent employees is undesirable.

To address this issue, the WHS Act Review proposed that the definitions of 'union', 'representative', and any other circumstances where a person is granted the right to assist or represent a worker (including an HSR), be amended to make it clear that if a worker's representative is a 'union' it must be a registered union under the FW(RO) Act or the IR Act. The purpose of these amendments is to ensure that unions who seek to exercise representation rights under the WHS Act are those organisations which fulfil the stringent governance and accountability requirements under the FW(RO) Act or the IR Act.

To achieve this, the Bill includes the new terms *suitable entity* and *excluded entity* which are defined in new sections 45A (Definitions for part) and 45B (Meaning of excluded entity). A *suitable entity*, for representing or assisting a worker or HSR for a worker means a *relevant union* for the worker, or another entity authorised by the worker to represent or assist the worker, for example, a technical expert (e.g. an engineer) providing it is not an *excluded entity.*

A *relevant union*, for a worker (whether the worker is an HSR or another worker), means a union of which the worker is a member or is eligible to be a member, and whose rules entitle the union to represent the worker's industrial interests.

The Bill specifically excludes the following entities from assisting or representing a worker or the HSR for a worker in relation to WHS issues:

- an entity, other than a union, that is an association of employees or independent contractors (or both);
- another entity, other than a union or association of employees, that represents or purports to represent the industrial interest of the worker or representative;
- an entity that demands or receives a fee from another excluded body for representing or purporting to represent the industrial interests of the worker or representative;
- individuals connected with excluded bodies, (e.g. an employee or agent); and
- a union that is not a relevant union for the worker;

The definition for *union* is amended to mean an employee organisation registered under the FW(RO) Act (Cwlth) or the IR Act. Excluding associations of employees or independent contractors which are not registered unions under the FW(RO) Act (Cwlth) or the IR Act is consistent with 2022 amendments to the IR Act.

Streamlining resolution of disputes about work health and safety

Part 5, Division 7A (Work health and safety disputes) of the WHS Act sets out dispute resolution provisions intended to facilitate the timely resolution of WHS disputes. The current dispute resolution process only applies where a party to a WHS matter has requested an inspector assist in resolving the matter. Where a dispute remains unresolved at least 24 hours after the regulator has been asked to appoint an inspector to assist with resolving a dispute, a party to the dispute may give the QIRC notice of the dispute, enabling it to be resolved in that jurisdiction. The WHS Act Review observed a degree of confusion about the operation of the dispute resolution process. The reviewers also observed the nature of disputes is varied, with some more suited to being resolved through inspectors providing expert advice and using their compliance powers and other matters being more suited to a hearing and resolution in the QIRC.

The reviewers determined, having regard to the various types of disputes which may arise, the parties to a dispute should be at liberty to choose the dispute resolution pathway which they consider is most apt. In some circumstances, one of the parties will consider that an inspector ought to be appointed as the dispute could be resolved by the exercise of compliance powers. Similarly, a party may consider that the QIRC is better suited to addressing a structural, longstanding dispute or a complex matter requiring specialised expertise.

Consequently, the WHS Act Review recommended amending the WHS Act to remove the requirement that parties must first seek to have an inspector appointed to resolve a WHS dispute before notifying a dispute to the QIRC. The exceptions to this are disputes in relation to work groups or the constitution of a health and safety committee where the WHS Act review recommended that an inspector appointed to assist the parties in reaching an agreement on those particular matters must make a decision within 7 days of being appointed.

The Bill amends Part 5, Division 7A (Work health and safety disputes) to identify which disputes can go directly to the QIRC whether or not an inspector has first been appointed to assist in resolving the matter, and which matters require an inspector's decision first. Streamlining and simplifying the dispute resolution process is intended to make the process clearer for parties and ensure that where matters are complex and require specialised expertise and skill to resolve, they can be referred in a timely manner for resolution in the QIRC.

External review costs

The WHS Act Review recommended an amendment to the WHS Act to provide that, for external reviews by the QIRC under section 229(3), costs follow the event and only orders for 'costs of the hearing' are to be made. Costs of the hearing are only intended to capture costs for appearances of solicitors and barristers at the hearing and fees for witness appearances. Each party must otherwise bear their own costs in relation to an application. No other order for costs in relation to the application can made by the QIRC. The purpose of this is to incentivise parties to settle matters before a hearing, and remove time and costs associated with applications for costs. It is also intended to increase accessibility for external reviews, particularly for financially limited PCBUs, as the financial risk of seeking external review will be reduced.

These amendments are reflective of costs awarded under the *Workers' Compensation and Rehabilitation Act 2003* where costs can be awarded for the hearing, and do not capture costs such as interlocutory applications or preparation for a hearing.

The IR Act otherwise applies for the purpose of scale and enforcement of costs. The Bill inserts a new provision to implement the WHS Act Review's recommendation regarding external review costs.

Codes of practice – removing automatic five-year expiry and introducing a review at least every five years

In 2017, section 274 (Approved codes of practice) of the WHS Act was amended to provide that codes of practice expire automatically after five years. This amendment implemented a recommendation from the Best Practice Review of Workplace Health and Safety Queensland which found there should be a regular review of codes of practice given their enforceability under the WHS Act.

On introduction of the Bill, there are 45 approved codes under the WHS Act, with 21 codes giving effect to national model codes of practice developed by Safe Work Australia.

The WHS Act Review found there should be greater flexibility regarding the timeframe for reviewing codes:

- to ensure amendments reflecting changes in technology and work practices can be made at any time; and
- to allow for alignment with the national review process for the 21 national model codes adopted under the WHS Act. The national codes are generally subject to a five-year review process through Safe Work Australia and the timing of the national review process does not always align with the expiry date of the Queensland code of practice.

The WHS Act Review recommended that the automatic expiry of codes of practice after five years be removed and replaced by a requirement to ensure that codes are reviewed at least every five years with the level of review to be determined by the Office of Industrial Relations. The Bill removes the five-year automatic expiry of codes approved under the WHS Act and provides for the Minister to ensure codes are reviewed at least every five years.

High risk plant in non-workplace areas

Schedule 1, Part 1 (Dangerous goods and high-risk plant) of the WHS Act allows for the Act to apply to certain 'high risk plant' operating at places other than workplaces (e.g. a lift in a high-rise apartment building). The definition of high risk plant relates only to Schedule 1, Part 1 of the WHS Act and Chapter 12 (Public health and safety – Schedule 1, Part 1 of Act) of the WHS Regulation.

The WHS Act Review noted inconsistencies between different types of plant defined in the WHS Regulation and definitions in Schedule 1, Part 1 of the WHS Act. The WHS Act Review also found that inconsistencies and confusion could be resolved by adopting the approach in the model WHS Act which prescribes high risk plant by regulation. This approach has also been adopted by other jurisdictions.

The Bill amends the WHS Act to enable *high risk plant* to be prescribed by regulation. Prescribing certain types of high risk plant in the WHS Regulation provides greater flexibility and ensures outdated or inconsistent definitions can be amended more easily from time to time.

The Bill omits the definition of 'cooling tower', which is an item of high risk plant in Schedule 1. There is a consequential amendment to the *Public Health Act 2005* (PH Act) to insert the definition of 'cooling tower' in the PH Act as it will no longer be able to refer to this definition in the WHS Act.

Industry sector standing committees

Schedule 2 (The regulatory and local tripartite consultation arrangements and other local arrangements) of the WHS Act establishes industry consultative arrangements through the Work Health and Safety Board (WHS Board) and industry sector standing committees. Industry sector standing committees give advice and make recommendations to the WHS Board about work health and safety in the industry sector for which the committee is established.

The six industry sector standing committees currently established under the WHS Act are the:

- 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; and
- transport and storage sector standing committee.

The WHS Act also allows for the Minister to establish industry sector standing committees by gazette notice.

The WHS Act Review found that naming conventions and composition for the industry sector standing committees had become outdated and greater flexibility is needed to address high priority sectors and emerging issues.

The Bill removes the limitation in Schedule 2, section 14 which prescribes the committees by name and allows the Minister to establish industry sector standing committees by gazette notice. However, no more than ten industry sector standing committees may exist at any particular time. This approach provides greater flexibility for the Minister to establish industry sector standing committees with relevant scope and coverage.

Re-naming the Affected Persons Committee

In 2017, the WHS Act was amended to establish the Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee, less formally referred to as the 'affected persons committee'. The primary function of the committee is to give advice and make recommendations to the Minister about the information and support needs of people affected by a workplace incident that involves death or a serious injury or illness.

The WHS Act Review acknowledged the committee's views that its name in the WHS Act is not commonly used and to enhance consistency and public use, it would be preferable to amend the committee's name. The Bill re-names this advisory body as the Consultative Committee for Work-related Fatalities and Serious Incidents, and less formally, as the 'Consultative Committee'.

Boland Review amendments

The Bill implements the following nine recommendations from the Boland Review.

Negligence as a fault element in the Category 1 offence

The Boland Review found that the threshold of reckless conduct is contributing to a low number of successful Category 1 prosecutions across WHS jurisdictions and recommended an alternative fault element of gross negligence, or equivalent, be included in the Category 1 offence in the model WHS Act.

The Bill amends section 31 of the WHS Act, to include 'negligence' as a fault element in the Category 1 offence.

Category 1 offences will involve conduct where the fault element is negligence or recklessness 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 either the fault element of negligence or recklessness in addition to proving the physical elements of the offence.

Providing an alternative fault element of negligence is intended to lower the threshold for conviction for Category 1 offences. Unlike recklessness, the fault element of negligence does not require the prosecution to prove that the offender had a subjective awareness that their conduct posed a substantial risk of death or serious injury or illness and continued on with their conduct regardless.

The use of 'negligence' as the fault element is consistent with the industrial manslaughter offence in the WHS Act and means that the existing standard of criminal negligence will apply to both offences.

The intention is that Category 1 offences will address the most serious breaches where there was a high level of risk of death or serious harm and the duty holder was reckless or negligent in their conduct. Category 2 offences involve less culpability as there is no fault element and apply in circumstances where there was high level of risk of death or serious harm from a failure to comply with a WHS duty owed.

The amendment is mirrored in section 21 of the SRWA Act 2011.

Health and safety representative choice of training course

The Boland Review found the choice of HSR training course can be an area of contention between PCBUs and HSRs and recommended amending the model WHS Act to make it clear the HSR is entitled to choose the training course without consulting with the PCBU. The WHS Act Review endorsed this Boland recommendation.

The Bill amends section 72 (Obligation to train health and safety representatives) to give effect to this recommendation. This will ensure that HSRs are able to undertake the required training without delay. Where there is no agreement between HSRs and PCBUs on time off and reasonable costs for the HSR training, either party can ask the regulator to appoint an inspector who can assist in resolving the matter. Alternatively, parties can apply to have the matter resolved by the QIRC.

Prohibiting insurance to cover WHS fines

The Boland Review found the deterrent effect of the model WHS laws is reduced if companies can take out insurance or enter into an indemnity arrangement to protect themselves and their officers from liability to pay penalties for non-compliance with the WHS laws. Consequently, the Boland Review recommended including a new offence in the model WHS Act that prohibits providing, entering into, or taking the benefit of insurance or indemnities for WHS fines. The 2017 Best Practice Review of Workplace Health and Safety Queensland also recommended the WHS Act be amended to expressly prohibit insurance contracts to cover the cost of WHS fines.

The Bill introduces a new offence in 272A (Insurance or other indemnity against penalties) that prohibits a person from:

- entering into a contract of insurance or other arrangement that purports to insure or indemnify a person for a liability for all or part of a monetary penalty under the WHS Act; or
- providing a contract of insurance or an indemnity for a liability for all or part of a monetary penalty under the WHS Act; or
- taking the benefit of a contract of insurance or other arrangement, or an indemnity, that purports to insure or indemnify a person for all or part of a monetary penalty under the WHS Act.

Under the new offence, it is a defence if the person can show they had a reasonable excuse for entering the contract or arrangement, providing the insurance or indemnity, or taking the benefit of the contract, arrangement or indemnity. For example, a reasonable excuse may be that the person entered the insurance contract based on negligent legal advice that led them to reasonably believe the contract did not cover monetary penalties under the Act. This is consistent with other provisions in the WHS Act where reasonable excuse is a defence, for example, sections 185(5) and 200(2) of the WHS Act. The evidential burden is on the accused to demonstrate they had a reasonable excuseas the defendant is the only person who will be able to provide evidence of any reasonable excuse for refusing or failing to meet the requirement.

New section 272B (Officer may be taken to have committed offence against s272A) provides for the liability of an officer of a body corporate where they are involved in the commission of the offence by the body corporate. This is intended to target the conduct that results in the body corporate committing the offence, and to act as a deterrent, as fines imposed on corporations may be less effective as they may be absorbed as part of the costs of doing business.

New section 272B is a deemed liability provision which achieves the same outcome as section 272B in the model WHS Act but has been drafted to be consistent with these types of provisions across the Queensland statute book. The officer will only be liable if they authorised or permitted the conduct or were knowingly concerned in the offence committed by the body corporate. This means the prosecution will need to prove that the person was involved in the conduct and had knowledge of the elements of the offence.

The maximum penalty for the offence is 500 penalty units. This is proportionate with other serious offences in the WHS Act to reflect that the effectiveness of monetary penalties as a deterrent, under the WHS Act, is significantly undermined if duty holders can use insurance arrangements to cover them. The Bill mirrors the offence in new sections 42A and 42B the SRWA Act, with the same penalty to apply.

Requesting prosecutions and progress of investigations

The Boland Review found the 12-month timeframe for a person to request the WHS regulator bring a prosecution, where they reasonably consider a Category 1 or 2 offence has occurred, can lapse before an investigation is complete and a decision on whether to prosecute has been made. In Queensland the independent WHS Prosecutor makes a decision on whether to prosecute, not the WHS regulator. The Bill implements recommendation 24 of the Boland Review by amending section 231 of the WHS Act to:

- extend the 12-month timeframe, to 18 months, after an act or omission, for a person to request the WHS Prosecutor bring a prosecution for a Category 1 or 2 offence;
- provide that a request can be made within six months of coronial report, or a coronial inquiry or inquest ending; and
- require the regulator to provide written updates on investigations every three months, to a person who has made a request, until a decision is made on whether a prosecution will be brought.

Other Boland Review recommendations

The Bill implements five other recommendations of the Boland Review that are minor technical amendments to improve the operation of the WHS Act and provide consistency with the model WHS Act:

- amendments are made to section 155 (Powers of regulator to obtain information) to clarify that the regulator's power to obtain information under that section has extraterritorial application and information relevant to the investigation of a breach of the WHS Act can be obtained from other jurisdictions.
- a new section 271A (Additional ways that regulator may use and share information) is inserted to clarify the circumstances when the regulator can share information with other persons, including corresponding regulators in other jurisdictions. This is to clarify that disclosure of information between regulators is permitted to facilitate cross-jurisdictional investigations.
- amendments are made to section 155 (Powers of regulator to obtain information) and section 171 (Power to require production of documents and answers to questions), to align the process for issuing and serving notices under these provisions with section 209 (Issue and giving of notice) and ensure consistency across the WHS Act.
- amendments are made to section 171 (Power to require production of documents and answers to questions) to allow persons to answer questions by audio or audio-visual link, rather than attending in person before the inspector.
- an amendment is made to section 52 (Negotiations for agreement for work group) to provide that a work group is determined by negotiation and agreement between the PCBU and workers who are 'proposed' to form the work group.

Alternative ways of achieving policy objectives

There are no alternative ways to achieve the policy objectives other than by legislative amendment.

Estimated cost for government implementation

While there will be costs for government implementation of the Bill, these costs are not expected to be substantial and will be met from existing resources. Any funding required beyond existing agencies resources will be subject to normal budget processes.

Consistency with fundamental legislative principles

The Bill has been drafted with regard for fundamental legislative principles (FLPs) under the *Legislative Standards Act 1992* (LS Act).

Consideration has been given to achieving a balance between individual rights and liberties, and regard for the principle that workers and other persons should be given the highest level of protection, as is reasonably practicable, against harm to their health, safety and welfare from hazards and risks arising from work (section 3, WHS Act). Provisions which potentially infringe FLPs are set out below.

No internal review for inspector decisions regarding formation of work groups and health and safety committees

The Bill removes the internal review stage for inspector decisions in relation to work group negotiations and the constitution of health and safety committees and enables a party to proceed to the QIRC for review of the decision. This potentially infringes the FLP in relation to whether legislation makes rights and liberties, or obligations dependent on administrative power only if subject to appropriate review (s.4(3)(a) LS Act).

Section 54 (Failure of negotiations) addresses a failure of negotiations in relation to work groups for HSRs. Parties to the negotiations may ask the regulator to appoint an inspector to assist the parties with negotiations. If an inspector reasonably believes the parties are unlikely to determine the matter or reach an agreement within seven days, the inspector must make a decision about the formation or composition of work groups. Similarly, section 76 (Constitution of committee) provides that an inspector may be appointed to do the same in relation to the formation and constitution of a health and safety committee. The Bill amends Schedule 2A (Reviewable decisions) to remove an inspector's decisions about these matters from internal review. Instead, a review of the inspector's decision can be sought by a party directly with the QIRC.

The WHS Act Review Report observed that while it is often desirable for an administrative decision be subject to internal review, this must be balanced against the rights of workers to be safe at work, and the desirability of an internal review step does not outweigh the need for such disputes to be resolved expeditiously. In reaching this conclusion, the reviewers relied on evidence provided by stakeholders where the existing process led to lengthy and ongoing delays in the dispute being resolved, and instances where the dispute remained unresolved following completion of work at the worksite. Consequently, the amendments are considered to be justified as they will implement a more simplified dispute resolution process where disputes are attempted to be resolved at the workplace in the first instance, or if not, can proceed directly to the QIRC to expedite resolution. This maintains an avenue for these types of decisions to be reviewed without a protracted dispute endangering the safety of workers.

Entry permit holder able to remain on site for the purpose of inquiring into suspected contravention

The Bill amends section 118 (Rights that may be exercised while at workplace) to clarify that a WHS entry permit holder may remain on site during usual business hours for the time necessary to achieve the purpose of the entry to inquire into the suspected contravention. This clarification may have an impact on a PCBU's right to conduct business in the way in which the person involved considers appropriate, without interference.

The amendment to section 118 is aligned with amendments made to the *Summary Offences Act 2005* (SO Act) in 2020 to ensure that exceptions to trespass extend to remaining on, as well as entering, a workplace and to include a WHS entry permit holder as an 'authorised industrial officer' in the relevant provisions of the SO Act. The potential impact of the amendment to section 118 on a PCBU is minimised by the requirement for the WHS entry permit holder to remain at the workplace only during usual business hours and in the work area relevant to the suspected contravention. The amendment is considered justified when balanced against the risk to workers that may arise if a WHS entry permit holder is not able to perform their role of

inquiring into the suspected contravention and consulting with workers and the PCBU about the suspected contravention.

Clarifying parties can enter and remain at a workplace to resolve a WHS issue

The Bill amends section 81 (Resolution of health and safety issues) in subsection (3) to clarify that a PCBU must allow all the parties to a WHS issue to enter and remain at the workplace for the purpose of attending discussions with the view to resolving the issue. This clarification may have an impact on a PCBU's right to conduct business in the way in which the person involved considers appropriate, without interference.

The amendment to section 81(3) is consistent with the rationale for amending section 118 to clarify a WHS entry permit holder may remain on site for the time necessary to achieve the purpose of the entry. This aligns with a key theme of the WHS Act Review that areas of disputation under the WHS Act should be minimised and enable relevant parties to focus on ensuring the health and safety of workers.

The potential impact of the amendment to section 81(3) on a PCBU is minimised by the requirement in section 81(2) that parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed under a regulation. Section 23 (Default procedure) in the WHS Regulation provides the default procedure for issue resolution and sets out how a party may commence issue resolution and the matters that must be considered by the parties in attempting to resolve the issue. The amendment is considered justified when balanced against the need to facilitate timely resolution of WHS issues to ensure the safety of workers.

Excluding certain entities/persons from representing workers in relation to WHS issues

The Bill amends the definitions of *union, representatives* in relation to workers and *relevant union* and introduces the terms *suitable entity* and *excluded entity* to clarify who is entitled to represent or assist workers, including HSRs, under the WHS Act.

The WHS Act Review found that registered unions, with well-established eligibility rules, have a recognised interest in regulating the performance of the way in which work is performed within their area of coverage. The amendments in the Bill provide clarity around which types of entities have and do not have representational rights. This is consistent with the approach taken in the *Industrial Relations and Other Legislation Amendment Act 2022* and the long-standing operation of the industrial relations system in Queensland which includes statutory representative rights, obligations and standing for registered organisations. Organisations registered under the IR Act or the FW(RO) Act are subject to consistent regulatory oversight and accountability, including rigorous reporting requirements to ensure that these organisations are transparent in their dealings, accountable to members and demonstrate good governance practices.

The Bill allows for workers to continue to authorise other representatives providing they are not an *excluded entity*, such as a technical expert (e.g. an engineer).

The Bill does not restrict an individual's freedom to join an excluded entity, though it does seek to make clear that such entities, or their employees or agents, cannot lawfully represent

their members under the WHS Act. This reduces the risk of employees being misled or confused about the ability of an entity to represent a person, or the entity's standing under the WHS Act. In light of the above, the amendments are considered to be reasonable and justified to ensure workers benefit from the protection and assurance provided through being appropriately represented under the WHS Act.

Cease work notice given to persons conducting a business or undertaking requiring compliance without any opportunity to consider the risk

The Bill amends section 85 (Health and safety representative may direct that unsafe work cease) to enable an HSR to issue a written cease work notice to a PCBU. Apart from instances where the risk is so serious and immediate or imminent that it is not reasonable to consult first, the HSR is obliged to consult with the PCBU and attempt to resolve the matter. If unresolved, the HSR can give a written cease work notice to the PCBU, who must comply with the notice and direct workers to cease or not commence the work. The requirement for the HSR to give the cease work notice to the PCBU assists workers as they will not be put in a position where they could receive conflicting directions from the HSR and PCBU about ceasing unsafe work. This is also intended to minimise the potential for workers to be regarded as having inadvertently taken unlawful industrial action.

The requirement for a PCBU to direct workers to cease work when given a cease work notice by an HSR places a restriction on the conduct of ordinary activities. The person's ability to conduct their business is restricted to the extent they may not agree with the direction given in the notice which is evidenced by the failure to resolve the matter under Part 5, Division 5. However, this restriction is balanced by the requirement for the notice to be in writing and statutory preconditions requiring consultation and an attempt to resolve the matter prior to issuing the notice. In addition, an HSR must have undertaken the relevant HSR training before they can issue a cease work notice to the PCBU. Further, there are avenues to facilitate resolution of a dispute in relation to a cease work notice after the notice is issued, including being able to seek the assistance of an inspector or immediately make an application to the QIRC to determine the matter. The amendment provides clarity on when the cease work direction remains effective until, for example, if an inspector issues a prohibition notice in relation to the issue, or the QIRC deals with or decides the issue.

The amendments are justified as they ensure unsafe work can cease in circumstances involving the most serious and immediate risk to workers while balancing this with a structured process for resolving risk before it escalates into a cease work direction. The amendments are also balanced by ensuring disputes regarding cease work directions can be resolved quickly if required.

Prohibition on providing, entering or benefiting from a contract of insurance covering a person for liability for a monetary penalty under the WHS Act and SRWA Act

New section 272A (Insurance or other indemnity against penalties) provides that a person must not, without reasonable excuse, enter into insurance contracts or other arrangements to cover all or part of a liability for a monetary penalty under the WHS Act. Further, a person must not take the benefit of such an arrangement. In addition, a person must not provide insurance or a grant of indemnity for liability for a monetary penalty under the WHS Act. A complementary amendment to introduce the same offence is included as new section 42A in the SRWA Act.

The introduction of the new offence infringes FLPs because it limits the rights and liberties of individuals in the way business is conducted and to the extent that it infringes freedom to engage in ordinary activities. However, the new offence is considered justifiable as the deterrent effect of penalties imposed under the WHS and SRWA legislation is significantly undermined if insurance or other arrangements can be used to pay the fines.

Under the new offence, it is a defence if the person can show they had a reasonable excuse for entering the contract or arrangement, providing the insurance or indemnity, or taking the benefit of the contract, arrangement or indemnity. The evidential burden is on the accused to demonstrate they had a reasonable excuse. This potentially infringes the FLP that legislation should not reverse the onus of proof in criminal proceedings without adequate justification. In the case of this offence, it is justified because the defendant is the only person who will be able to provide evidence of any reasonable excuse relating to the offence. For example, a reasonable excuse may be that the person entered the insurance contract based on negligent legal advice that led them to reasonably believe the contract did not cover monetary penalties under the Act. This would not be known to the prosecution. This is consistent with other provisions in the WHS Act where reasonable excuse is a defence, for example sections 185(5) and 200(2) of the WHS Act.

Under new section 272B WHS Act and 42B SRWA Act, the extension of liability to officers, knowingly concerned in the offence committed by the body corporate, recognises that fines imposed on corporations may be less effective as they may be absorbed as part of the costs of doing business. This deemed liability provision achieves the same outcome as section 272B in the model WHS Act but has been drafted to be consistent with similar provisions in other Queensland Acts. New section 272B/42B will only be relevant where the elements in sections 272A/42A concerning the officer's own role in the body corporate's conduct constituting the offence are established (i.e., they authorised or permitted the conduct or were directly or indirectly knowingly concerned in the conduct). Sections 272B/42B do not create a separate offence for officers or involve reversal of onus. Rather, this clarifies the circumstances in which an officer is, in effect, a party to an offence committed by a body corporate, and able to be prosecuted in their own right. New sections 272B/42B supplement provisions of Chapter 2 of the Criminal Code which deal with parties to offences.

While new sections 272A and 272B of the WHS Act and sections 42A and 42B of the SRWA Act operate prospectively, they may engage an FLP in relation to retrospectivity (section 4(3)(g), LS Act). In particular, these provisions could affect the reasonable expectation a person held about conducting their affairs on the basis of the law as it is known. That is, where persons have engaged in particular conduct and been found to be liable to pay a monetary penalty under the Act, the person is likely to have done so in the reasonable expectation that they were covered by any insurance contract or other arrangement that they had entered into.

To address this, the Bill includes transitional provisions in both the WHS Act and SRWA Act to defer the application of the new offences, thereby providing sufficient notice of the new offences and mitigating against adverse impacts on persons covered by insurance arrangements before commencement. The prohibition on entering a contract of insurance or providing insurance will not have effect until 6 months after commencement. The prohibition on taking the benefit of a contract of insurance does not have effect until 18 months after commencement.

Information sharing among regulators

Section 271 (Confidentiality of information) in the WHS Act provides that a person who obtains information or gains access to a document in exercising any power or function under the Act must not disclose the information, give access to the document or use the information or document for any purpose. Section 41(Confidentiality of information) of the SRWA Act serves the same purpose. There are exceptions set out in sections 271 and 41 which permit disclosure of information, giving access to a document or use of information or a document.

The Bill inserts a new section 271A (Additional ways that regulator may use and share information) to clarify the circumstances in which the WHS Regulator can share information with other persons, including corresponding regulators in other jurisdictions. The Bill also amends 41(3)(c)(ii) of the SRWA Act to allow a 'law' generally to be prescribed by regulation. This will permit a Commonwealth law to be prescribed by regulation under section 43(3)(c)(ii) of the SRWA Act. Similarly, new section 271A(3)(b) of the WHS Act refers to 'another Act or law prescribed by regulation' which will also permit a Commonwealth law to be prescribed.

This potentially infringes the FLP in relation to the rights and liberties of individuals, including the right to privacy as there is no limitation on the ability to prescribe other Acts by regulation. The Bill is essentially restructuring an existing provision (section 271, Confidentiality of information) and setting out the circumstances when information can be shared with a corresponding regulator in a separate provision (section 271A). This is to clarify that disclosure of information between regulators is permitted to facilitate cross-jurisdictional investigations.

The circumstances where information can be shared are limited to the same circumstances that exist currently which are directed at supporting compliance with the WHS Act, corresponding WHS laws, other prescribed Acts and to prevent a serious risk to public health and safety. The additional amendment to enable Commonwealth laws to be prescribed by regulation either under the WHS Act or SRWA Act ensures that the regulator can disclose, give access or use information where the regulator reasonably believes the disclosure, access or use is necessary for the administration or enforcement of a Commonwealth law prescribed by regulation. Any future amendments to the WHS Regulation or *Safety in Recreational Water Activities Regulation 2011* to prescribe additional Acts by regulation would need to be appropriately justified, including the extent to which those Acts have safeguards to protect personal information.

New offences and proportionate penalties

The Bill includes new offences which have penalties that are proportionate and relevant to the actions to which they apply, considering comparable existing offences, including those already within the Act.

The Bill includes new section 50A (Prohibition of hindering etc. request for election of health and safety representative). The maximum penalty is 200 penalty units, which aligns with similar types of offences in section 105 (Protection of site safety and health representatives performing functions), *Coal Mining Safety and Health Act 1999* and section 97 (Protection of site safety and health representatives performing functions) of the *Mining and Quarrying Safety and Health Act 1999.*

The Bill includes new section 62A (Prohibition of hindering etc. election of health and safety representative). The maximum penalty is 200 penalty units, consistent with the proposed new section 50A.

The Bill includes new section 42A in the SRWA Act and new section 272A in the WHS Act to prohibit contracts of insurance or other arrangements for the purposes of covering monetary penalties imposed under the respective Acts. The maximum penalty of 500 penalty units is proportionate, being equivalent to other serious offences in the WHS Act (e.g. non-compliance with an improvement notice), and is consistent with similar offences in other WHS jurisdictions.

Consultation

WHS Act Review

In August 2022, the Minister for Education, Minister for Industrial Relations and Minister for Racing announced an independent review of the WHS Act. The WHS Act Review was informed by public and targeted consultation with interested parties. This included employer and industry groups, registered unions and employer organisations, academics and the QIRC. Consultation occurred between August and November 2022. A total of 51 submissions were received. Subsequently, face-to-face meetings between the reviewers and key interested parties were held to discuss the submissions before the WHS Act Review Report was delivered to the government.

Boland Review

In 2018, a Discussion Paper was released by Safe Work Australia for an eight-week period inviting comment on the Boland Review recommendations. Public consultations sessions were held in each capital city and Cairns with businesses, workers, unions, legal practitioners, academics and community organisations. In total, 136 submissions were received.

In 2019, a Consultation Regulation Impact Statement was released by Safe Work Australia. In the six-week public comment period, 102 submissions were received providing feedback on the Boland Review recommendations and alternative options.

Specifically, the 2017 Best Practice Review of Workplace Health and Safety Queensland (Best Practice Review) informed the Boland Review recommendation regarding prohibitions on insurance contracts for WHS fines. Similarly, the Best Practice Review recommendation was informed by extensive consultation with worker, employer and industry representatives with the insurance prohibition strongly supported by union representatives.

Development of the Bill

Further targeted consultation was undertaken during the drafting of the Bill with key stakeholders from registered unions and employer organisations, industry and government bodies. Feedback received has been incorporated into the final draft of the Bill where appropriate.

Organisations which participated in consultation for the Bill include the Queensland Council of Unions, Queensland Nurses and Midwives' Union, Australian Workers' Union, Shop Distributive and Allied Employees' Association, the Building Trade Group Unions (which includes the Construction, Forestry, Mining and Energy Union, the Electrical Trades Union, the Plumbing and Pipe Trades Employees Union, and the Australian Manufacturing Workers' Union), Master Builders Queensland, Business Chamber Queensland, and the Local Government Association of Queensland.

Government agencies which participated in consultation for the Bill include the Department of the Premier and Cabinet, Queensland Treasury, Department of Justice and Attorney-General, Department of Health, Department of Youth Justice, Employment, Small Business and Training, Department of Transport and Main Roads and Queensland Corrective Services. The QIRC and Magistrates Court were consulted regarding transferring proceedings for certain matters to the QIRC. The WHS Prosecutor was consulted regarding amendments to proceedings and offences in the Bill. The Office of the National Rail Safety Regulator was consulted in relation to the amendment to address inconsistency with the *Rail Safety National Law (Queensland).*

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland. The Bill's consistency with comparable reforms introduced by other jurisdictions is discussed below.

Boland Review and Model WHS laws

National model WHS laws have been adopted by all jurisdictions except for Victoria. Amendments to the model WHS Act are developed through Safe Work Australia and considered for approval by WHS Ministers. Governments in each jurisdiction are responsible for considering and giving effect to amendments to the model WHS Act in their jurisdiction.

New South Wales, the Australian Capital Territory and the Commonwealth have amended their WHS Acts to give effect to recommendations from the Boland Review. At present, South Australia and Tasmania have not amended their WHS Acts to give effect to recommendations from the Boland Review, and Western Australia has partially implemented the recommendations.

Notes on provisions

Part 1 Preliminary

Clause 1 sets out the short title of the Act which will be the *Work Health and Safety and Other Legislation Amendment Act 2023.*

Clause 2 provides for particular provisions in the Bill to commence on proclamation.

Part 2 Amendment of Safety in Recreational Water Activities Act 2011

Clause 3 provides that Part 2 of the Bill amends the *Safety in Recreational Water Activities Act 2011* (SRWA Act). The amendments to the SRWA Act are complementary amendments to ensure consistency with equivalent provisions in the WHS Act as amended by the Bill.

Clause 4 inserts new sections 42A (Insurance or other indemnity against penalties) and 42B (Officer may be taken to have committed offence against s42A). New section 42A makes it an offence for a person, without a reasonable excuse, to:

- enter into a contract of insurance or other arrangement that purports to insure or indemnify a person for a liability for all, or part of, a monetary penalty under the SRWA Act;
- provide a contract of insurance or an indemnity for a liability for all or part of a monetary penalty under the SRWA Act; or
- take the benefit of any of these arrangements that purport to insure or indemnify a person for a liability for all, or part of, a monetary penalty under the SRWA Act.

The maximum penalty for this new offence is 500 penalty units.

New section 42B provides for the liability of an officer of a body corporate where they are involved in the commission of the offence by the body corporate. New section 42B is a deemed liability provision under which the officer will only be liable if they authorised or permitted the conduct or were knowingly concerned in the offence committed by the body corporate. Fundamental legislative principles relating to new sections 42A and 42B are addressed in these explanatory notes.

Clause 5 amends the heading for Part 6 of the SRWA Act to ‘Transitional provisions for Act No. 19 of 2011’, as a consequence of a new Part 7 with transitional provisions for new section 42A.

Clause 6 inserts a new Part 7 (Transitional provision for Work Health and Safety and Other Legislation Amendment Act 2023) to include a transitional provision that defers the application of new section 42A (Insurance or other indemnity against penalties). The transitional provision, new section 54 (Application of new section 42A), provides that:

- new section 42A(1)(a) and (b) applies in relation to a contract of insurance or other arrangement entered into, or an indemnity provided, six months after commencement of section 42A;
- section 42A(1)(c) applies to a person 18 months after commencement of section 42A; and
- section 42A(3) applies in relation to a contract of insurance or other arrangement entered into, or an indemnity provided, after commencement of section 42A.

The transitional provisions address the FLP issue of retrospectivity to mitigate against adverse impacts on persons with insurance arrangements in place before commencement.

Clause 7 amends the definition of *officer* in Schedule 2 (Dictionary) of the SRWA Act to reflect changes to the *Corporations Act 2001* (Cwlth) that moved the definition of officer from section 9 to section 9AD in that Act.

Clause 8 amends the heading for section 21 to 'Negligent or reckless conduct – category 1' and inserts negligence as a fault element for the Category 1 offence. This amendment complements the Category 1 offence amendment made in clause 16 to section 31 of the WHS Act.

Providing an alternative fault element of negligence is intended to lower the threshold for conviction for Category 1 offences. Unlike reckless conduct, the fault element of negligence does not require the prosecution to prove the offender had a subjective awareness that their conduct posed a substantial risk of death or serious injury or illness and engaged in such conduct regardless.

The intention is that Category 1 offences will address the most serious breaches where there is a high level of risk of serious harm and the duty holder was reckless or negligent in their conduct. That is, Category 1 offences involve conduct where the fault element is negligence or recklessness 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 either the fault element of negligence or recklessness in addition to proving the physical elements of the offence. This is distinct from Category 2 offences which involve less culpability than Category 1 offences, as there is no fault element. Category 2 offences are committed if a person is required to comply with a health and safety duty (first element) and the person fails to comply with the health and safety duty (second element) and 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 (third element).

Clause 9 makes a consequential amendment to section 32 (The regulator) as a result of new section 155A (Power of regulator to give particular information to particular persons) for the WHS Act – see clause 52.

Clause 10 makes consequential amendments to section 35 (Review of decisions) as a result of amendments to the provisions referred to in section 35(1) of the SRWA Act and Schedule 2A (Reviewable decisions) of the WHS Act.

Clause 11 amends section 41 (Confidentiality of information) to enable Commonwealth laws to be prescribed under a regulation under section 41(3)(c)(ii).

Part 3 Amendment of Work Health and Safety Act 2011

Clause 12 provides that Part 3 of the Bill amends the WHS Act.

Clause 13 inserts new sections 272A (Insurance or other indemnity against penalties) and 272B (Officer may be taken to have committed offence against s272A). New section 272A makes it an offence for a person, without a reasonable excuse, to:

- enter into a contract of insurance or other arrangement that purports to insure or indemnify a person for a liability for all, or part of, a monetary penalty under the WHS Act;
- provide a contract of insurance or an indemnity for a liability for all or part of a monetary penalty under the WHS Act
- take the benefit of any of these arrangements that purport to insure or indemnify a person for a liability for all, or part of, a monetary penalty under the WHS Act.

The maximum penalty for this new offence is 500 penalty units.

New section 272B provides for the liability of an officer of a body corporate where they are involved in the commission of the offence by the body corporate. New section 272B is a deemed liability provision under which the officer will only be liable if they authorised or permitted the conduct or were knowingly concerned in the offence committed by the body corporate. Fundamental legislative principles relating to new sections 272A and 272B are addressed in these explanatory notes.

Clause 14 inserts a new Division 8 in Part 16 of the WHS Act that sets out the transitional provisions associated with the Work Health and Safety and Other Legislation Amendment Act 2023.

New section 326 (Application of new s272A) is a transitional provision to defer the application of new section 272A (Insurance or other indemnity against penalties). New section 326 provides that:

- new section 272A(1)(a) and (b) applies in relation to a contract of insurance or other arrangement entered into, or an indemnity provided, six months after commencement of section 272A;
- section 272A(1)(c) applies to a person 18 months after commencement of section 272A; and
- section 272A(3) applies in relation to a contract of insurance or other arrangement entered into, or an indemnity provided, after commencement of section 272A.

The transitional provision addresses the FLP issue of retrospectivity to mitigate against adverse impacts on persons with insurance arrangements in place before commencement.

Clause 15 omits Schedule 1, Part 2, Division 3, which had been amended in 2017 to refer to the Rail Safety National Law (Queensland). Omission of Schedule 1, Part, Division 3 enables the WHS Act to apply concurrently with the Rail Safety National Law (Queensland).

Clause 16 amends the heading for section 31 to 'Negligent or reckless conduct – category 1' and inserts negligence as a fault element for the Category 1 offence.

Providing an alternative fault element of negligence is intended to lower the threshold for conviction for Category 1 offences. Unlike reckless conduct, the fault element of negligence does not require the prosecution to prove the offender had a subjective awareness that their conduct posed a substantial risk of death or serious injury or illness and engaged in such conduct regardless.

The intention is that Category 1 offences will address the most serious breaches where there is a high level of risk of serious harm and the duty holder was reckless or negligent in their conduct. That is, Category 1 offences involve conduct where the fault element is negligence or recklessness 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 either the fault element of negligence or recklessness in addition to proving the physical elements of the offence. This is distinct from Category 2 offences which involve less culpability than Category 1 offences, as there is no fault element. Category 2 offences are committed if a person is required to comply with a health and safety duty (first element) and the person fails to comply with the health and safety duty (second element) and 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 (third element).

Clause 17 inserts a new Division 1AA (Preliminary) in Part 5 (Consultation, representation and participation) to include definitions for terms used in Part 5. While these terms are mainly used in Part 5, they are also included in Schedule 5 (Dictionary) to indicate the definitions in Part 5 are applicable elsewhere in the WHS Act.

New section 45A (Definitions for part) inserts the following definitions:

Relevant union, for a worker, whether the worker is an HSR or another worker, means a union–

(a) of which the worker is a member or is eligible to be a member; and
(b) whose rules entitle the union to represent the worker's industrial interests.

Representative, in relation to a worker, means –

(a) the HSR for the worker; or
(b) a suitable entity for representing the worker that is authorised by the worker to represent the worker.

Suitable entity, for representing or assisting a worker or the HSR for a worker, means –

(a) a relevant union for the worker; or
(b) another entity, that (i) is authorised by the worker or representative to represent or assist the worker or representative; but (ii) is not an excluded entity for representing or assisting the worker or representative.

New section 45B inserts the definition for *excluded entity*.

Clause 18 amends section 48 (Nature of consultation) to introduce a requirement for the PCBU to consult with a worker's *representative* if requested by one or more workers. Where consultation involves a representative and the parties agree that consultation is to be carried out at the workplace, the PCBU must carry out the consultation only at the time and place agreed to by the parties. The amendment also clarifies that the PCBU is not required to allow the representative to have access to personal or medical information concerning a worker without the worker's consent unless the information is in a form that does not identify the

worker and could not reasonably be expected to lead to the identification of the worker. Further, the PCBU is not required to allow a representative to have access to *confidential commercial information*.

Clause 19 inserts new sections 50A (Prohibition of hindering etc, request for election of health and safety representative) and 50B (Invitation to request election of health and safety representatives).

New section 50A prohibits a PCBU from intentionally hindering, preventing or discouraging a worker from making a request under section 50 to facilitate the conduct of an election for one or more HSR. The maximum penalty for this offence is 200 penalty units.

New section 50B requires the PCBU, at certain times, to provide written notification to workers who work for the business or undertaking about the following matters:

- that they may request the election of one or more HSRs;
- the process for determining work groups and electing HSRs;
- who may represent the workers in negotiations under section 52; and
- the functions and powers of an HSR.

In addition, the PCBU must invite workers to ask the PCBU to facilitate an election under section 50.

Clause 20 amends section 52 (Negotiations for agreement for work group) to clarify the parties to negotiations about work groups, the timeframes for negotiations and to establish that a *relevant union* has party principal status in circumstances where the relevant union has indicated in writing to the PCBU that they want to be involved. See clause 17 for the definition of *relevant union* for a worker.

The amendment to section 52(1)(b) clarifies the PCBU must negotiate with the workers who are proposed to form the work group or their representatives.

Section 52(1)(c) provides for a relevant union to be a party to the negotiations and agreement if they give written notice to the PCBU that they want to be a party.

Rather than being required to commence negotiations within 14 days, the amendment to section 52(2) requires the PCBU to take all reasonable steps to complete the negotiations within 14 days after a request for election of one or more HSRs is made under section 50.

New sections 52(4A) and (4B) provide for the relevant union to become a party to negotiations concerning a variation of an agreement where the negotiations are started by the parties and the relevant union was not previously a party. The relevant union may become a party by notifying the PCBU in writing. If the relevant union was not a party to the original agreement, the relevant union may only become a party to negotiations if the original parties to the agreement first seek to negotiate a variation to the agreement. They may not initiate a variation of an agreement.

Section 52(5) is amended to provide that a PCBU must not exclude the relevant union from negotiations if they have become a party to the negotiations under subsection (1)(c) or (4B), in addition to the existing requirement that a worker's representative must not be excluded.

Section 52(5A) and (5B) provide that if a worker's representative or a relevant union are a party to negotiations, and the parties agree negotiations are to be carried out the workplace, the parties must agree on when and where in the workplace the negotiations are to take place.

Section 52(5C) enables the parties to agree to extend the period for the negotiations.

Clause 21 replaces section 54 (Failure of negotiations) and provides that parties to failed negotiations may ask the regulator to appoint an inspector to assist. The amendment further includes what constitutes a failure of negotiations, how the inspector must attempt to assist the parties, and the relevant time frame. Section 54(7) clarifies that an inspector's decision is not considered invalid because of non-compliance with section 54(3), (4) or (5), for example, that an inspector took nine days to make a decision rather than seven days.

Clause 22 amends section 61 (Procedure for election of health and safety representatives) to clarify which entities or persons may assist workers in conducting an election for an HSR. Section 61(3) is amended to replace 'union or other person or organisation' with a *suitable entity*. See clause 17 for the definition of the new term *suitable entity*.

Clause 23 inserts new section 62A (Prohibition of hindering etc. election of health and safety representative). New section 62A provides that a PCBU must not intentionally hinder, prevent or discourage:

- the election of an HSR or deputy HSR under Subdivision 4 (Election of health and safety representatives; or
- the person conducting the election from following the procedures mentioned in section 62(2).

New section 62A is intended to prohibit interference with any aspect of the election process, including nomination of workers for election and any other procedures provided under the WHS Regulation. The maximum penalty for this offence is 200 penalty units.

Clause 24 amends section 68 (Powers and functions of health and safety representatives) to clarify the powers of HSRs.

New section 68(2)(aa) entitles the HSR to accompany a WHS entry permit holder when the entry permit holder's reason for entry relates to the HSR's work group or a part of the workplace where a worker in the work group works.

An amendment to section 68(2)(f) clarifies that the HSR is entitled to request, as well as receive, information concerning the work health and safety of workers in the work group.

Section 68(2)(g) is also amended to clarify who the HSR may request assistance from, whenever necessary., by replacing 'any person' with 'a *suitable entity* for the health and safety representative*'*. See clause 17 for the definition of the new term *suitable entity*.

Clause 25 amends section 70 (General obligations of person conducting business or undertaking) to provide additional obligations for the PCBU in relation to HSRs.

The amendment to section 70(1)(c) clarifies that a PCBU must allow an HSR to have access to information, including the information an HSR is permitted to request under section 68(2)(f).

New section 70(1)(ca) applies if a PCBU becomes aware of a notice of entry under Part 7 (Workplace entry by WHS entry permit holders) or a notice issued under Part 10 (Enforcement measures) relating to the work group being given, and the PCBU has not been provided a copy of the notice. In these circumstances, the PCBU must inform an HSR for the work group about the relevant notice as soon as reasonably practicable after becoming aware of the notice being given.

If the PCBU is given a relevant notice, new section 70(1)(cb) requires the PCBU to give a copy of the notice to an HSR for a work group as soon as reasonably practicable.

New section 70(1)(cc) requires a PCBU to provide certain information to an HSR for a work group if a notifiable incident arising out of the conduct of the business or undertaking occurs. The PCBU must provide a copy of either the written notice provided to the regulator under section 38, as soon as practicable after it is given, or the information received from the regulator under section 38(6) as soon as practicable after it is received.

New section 70(1)(ga) requires a PCBU to inform an HSR for a work group as soon as possible after a WHS entry permit holder or an inspector has entered the workplace for a purpose relevant to the HSR's work group or a part of the workplace where a worker in the work group works. Section 70(1)(h) requires a PCBU to permit the HSR to accompany the WHS entry permit holder or inspector within the relevant part of the workplace.

Section 70(1)(g) is amended to clarify which entities or persons may assist an HSR by replacing 'person' with '*suitable entity'.* Under the amendment to section 70(1)(g), a PCBU must allow a suitable entity assisting an HSR for the work group to have access to the workplace if that is necessary to enable the assistance to be provided, unless an exception in section 71 applies, for example, the PCBU may refuse to grant access on reasonable grounds. See clause 17 for the definition of the new term *suitable entity*.

Section 70(3) is amended to clarify that the PCBU must pay an HSR exercising their powers or functions under the WHS Act the amount, including any overtime, penalties or allowances, the HSR would be entitled to receive if they were performing their normal duties during the same period.

Clause 26 amends section 71 (Exceptions from obligations under s70(1)) to insert new sections 71(8) and (9) which align disputes about provision of information to HSRs with the process for other matters that can be referred to the QIRC under Part 5, Division 7A of the WHS Act. The regulator can be asked to appoint an inspector to assist resolve the matter. However, amendments to Part 5, Division 7A (Work health and safety disputes) also enable parties to go directly to the QIRC for disputes relating to the provision of information to HSRs if they prefer, without involving an inspector – see clause 38.

The amendment to section 71(3) corrects an error, and the amendment to omit existing section 71(8) is a consequence of the relocation of the definition of *confidential commercial information* to Schedule 5 (Dictionary).

Clause 27 amends section 72 (Obligation to train health and safety representatives) to provide that a PCBU must allow an HSR to choose the training course. The PCBU must allow the HSR to attend the training and must pay them for the time they are attending the training.

Sections 72(2)(a) and 72(4) are also amended to clarify what is meant in relation to an HSR receiving pay when attending the training.

Section 72(4)(a) provides that if the HSR usually works for the person on a day they attend training they must be paid the amount, including any overtime, penalties or allowances, they would otherwise be entitled to receive if they performed their normal duties. For example, if on a day the HSR attends training they usually work a night shift but they attend the training during normal business hours, they are to be paid their usual pay including any overtime, penalties or allowances as if they had worked the night shift.

Section 72(4)(b) provides that if the HSR usually works for the person on a weekend day but attends training on a week day instead of working on the weekend day, they must be paid their usual pay including any overtime, penalties or allowances as if they had worked the weekend day.

Section 72(4)(c) provides that if sections 72(4)(a) and (b) do not apply to a day the HSR attends training they must be paid the amount they would be entitled to receive if they performed their normal duties for the hours they attended training on that day. For example, if the HSR normally works only four hours but attends training for eight hours they must be paid as if they performed their normal duties for the additional four hours. However, the person is not required to pay them overtime, penalties and allowances for the additional four hours.

The term relevant day is used to refer to a day the HSR attends training.

The amendments are intended to ensure that a person does not receive less pay, than they would normally be entitled to, for the period of days that they attend training. The amendments are also intended to ensure that if a person normally works part-time but is required to work additional hours to attend the training, they are to be paid for any additional hours. Entitlements for any additional hours worked as a result of attending the training would not include any overtime, penalties or allowances.

Section 72(5) provides that if the PCBU and HSR cannot reach agreement on allowing the HSR to choose the training (72(2)(aa)), to attend the training (72(2)(a)), or payment of the training fees and reasonable costs (72(2)(b)) and pay entitlements while attending training (72(4)(a),(b) or (c)), either party may ask the regulator to appoint an inspector to assist in resolving the matter. However, amendments to Part 5, Division 7A also enable parties to go directly to the QIRC for disputes relating to HSR training matters if they prefer, without involving an inspector – see clause 38.

Clause 28 amends section 75 (Health and safety committees) to reduce the timeframe for establishing a health and safety committee so that it must occur as soon as practicable but not later than 28 days.

Clause 29 amends section 76 (Constitution of committee) to address circumstances where a party considers it unlikely the parties will reach agreement, within the required period, to establish a health and safety committee.

Section 76(5) allows a party to ask the regulator to appoint an inspector to attempt to assist the parties to reach agreement about the constitution of a health and safety committee. Under new section 76(6A) and (6B), if the inspector reasonably believes the parties are unlikely to reach agreement within seven days of the inspector being appointed, the inspector must decide the constitution of the committee or decide that a committee should not be established. New section 76(8) clarifies that an inspector's decision or purported decision is not considered invalid because of non-compliance with section 76(6), (6A) or (6B), for example, that an inspector took nine days to make a decision rather than seven days. Following an inspector's decision, a party seeking a review of the decision may proceed to the QIRC through the dispute resolution process provided in Part 5, Division 7A of the WHS Act – see clause 38.

Clause 30 amends section 80 (Parties to an issue) to clarify who can be the parties to an issue which is to be addressed under Part 5, Division 5 (Issue Resolution). Section 80(1) is amended to include:

- an HSR or a *suitable entity* representing the HSR (when the worker or workers affected by the issue are in a work group for which an HSR has been elected)
- a *relevant union* for a worker affected by issue, if the relevant union notifies the PCBU in writing that it wants to be a party to the issue.

In addition, section 80(1) is amended to clarify representation rights in relation to workers in a work group where an HSR is yet to be elected. In this circumstance, the worker or workers or a *suitable entity* representing the worker or workers is a party to the issue. See clause 17 for the definition of the term *relevant union* (for a worker) and the new term *suitable entity*.

Clause 31 amends section 81 (Resolution of health and safety issues) in subsection (3) to clarify that the PCBU must allow all the parties to the WHS issue to enter and remain at the workplace for the purpose of attending discussions with a view to resolving the issue.

Clause 32 amends section 85 (Health and safety representative may direct that unsafe work cease) to provide for the HSR to issue a written notice (cease work notice) to the PCBU requiring them to direct 1 or more workers to cease unsafe work, if consultation has failed to resolve the issue. The PCBU must direct the relevant workers to cease, or not start, work to the extent it relates to the matter referred to in the notice. Section 85 retains the existing power for an HSR to direct workers in the work group they represent to cease without first consulting with the PCBU or attempting to resolve the issue if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction. The HSR must display any cease work notice in a prominent place to ensure all relevant workers are aware the cease work direction is in effect and that the statutory preconditions have been satisfied. A cease work direction remains in effect until resolved, or an inspector issues a prohibition notice or the QIRC decides or deals with the dispute.

Clause 33 inserts a new section 85A (Contents of cease work notice) which sets out the content requirements of a cease work notice. This arises from the amendment to section 85 which introduces the requirement for the PCBU to direct the relevant workers to cease or not commence unsafe work. The cease work notice will outline the details of the immediate or imminent hazard that presents the serious risk to worker health and safety, the unsafe work and the relevant workers. The cease work notice will provide the details necessary for the PCBU to rectify the issue, clarify what work must not be undertaken and indicate the statutory pre-

conditions have been fulfilled by the HSR, giving assurance to workers that they will not be undertaking unlawful industrial action.

Clause 34 amends section 92 (Contents of provisional improvement notice) to reduce the timeframe for compliance with a provisional improvement notice from 8 days to 4 days.

Clause 35 amends section 94 (Minor changes to provisional improvement notice) to allow an HSR to change the day by which a contravention is to be remedied with the agreement of the person to whom the notice was issued or if the notice was issued to a worker, the PCBU at the workplace where the worker carries out work.

Clause 36 amends section 100 (Request for review of provisional improvement notice) to reduce the timeframe for requesting review of a provisional improvement notice from 7 days to 3 days. This aligns with the reduced timeframe for compliance provided by the amendment to section 92.

Clause 37 amends section 102A (Definitions for division) to amend the definition of *WHS matter* and *dispute* and inserts new definitions for *work group determination matter*, *work group variation matter* and *health and safety committee matter* for the purpose of Part 5, Division 7A (Work health and safety disputes).

The amendment to the definition of *WHS matter* expands the categories of matters relevant to the dispute process to capture new provisions relating to negotiations for work groups, the giving of notices or information to HSRs, HSR training entitlements and the constitution of health and safety committees.

The amendment to the definition of *dispute* clarifies that a *relevant union* and *representative* for a worker affected by the WHS matter can be party to a dispute about a WHS matter.

The definition of *relevant union* has been moved from section 102A and is included in new section 45A and Schedule 5 (Dictionary).

Clause 38 inserts a new section 102AA (Application of division) which provides for the application of Part 5, Division 7A (Disputes about WHS matters). New section 102AA brings WHS matters into the dispute resolution process in the division as follows:

- where there is a dispute about a work group determination matter, a work group variation matter or a health and safety committee matter, the division applies if an inspector has been appointed to assist the parties to reach an agreement and the inspector has made a decision under section 54(5)(a) or (b) or 76(6B).
- for a dispute about any other WHS matter, the division applies whether or not an inspector has been appointed to assist in resolving the dispute.

Clause 39 amends section 102B (Notice of dispute may be given to commission) by omitting section 102B(1). This removes the requirement for the dispute to remain unresolved for at least 24 hours after a party has asked the regulator to appoint an inspector to assist before giving the industrial registrar written notice of the dispute.

Section 102B(2), which provides that a party to the dispute may give the industrial registrar written notice of the dispute, is renumbered to become section 102B(1).

Section 102B(3) sets out what must be stated in a notice to the industrial registrar about a dispute. The amendment to section 102B(3)(d) requires that if an inspector has been appointed to assist in the dispute, the notice must state whether a decision made by the inspector to exercise, or not to exercise, compliance powers under Part 10 (Enforcement measures) is subject to review under Part 12 (Review of decisions). This provision is also renumbered to become section 102B(2).

Section 102B(5) is amended to allow a relevant union for a worker affected by the WHS matter to notify the industrial registrar in writing that they want to participate in the resolution of the dispute in circumstances where they were not named as a party to the dispute in the notice given to the registrar. This provision is renumbered to become section 102B(4). Section 102B(6) is amended, consequential to the renumbering of 102B(5) to 102B(4), and becomes section 102B(5).

Clause 40 inserts a new section 102BA (Effect of notice of dispute on involvement of inspector) which clarifies the involvement of an inspector in disputes about the WHS matters in section 102AA(b) when notice of the dispute has been given to the industrial registrar. Section 102BA(2) provides that a request for inspector assistance cannot be made or granted by the regulator if notice of the dispute has been given to the industrial registrar.

Section 102BA(3) clarifies that an inspector already appointed to assist must not take any further action after notice about the dispute has been given to the industrial registrar. However section 102BA(4) enables the QIRC to refer the matter back to an inspector, for example, to apply directions mentioned in section 102D(2)(a)(iii)).

Clause 41 amends section 102D (Review of particular decisions made by inspector) to specify the decisions that are subject to review by the QIRC in dealing with a dispute. Section 102D(1)) enables the QIRC to review:

- an inspector's decision made under particular provisions (section 54(5) relating to work group negotiations or section 76(6B) relating to the constitution of health and safety committees). These decisions made by an inspector are not subject to internal review and disputes about these matters can be notified to the QIRC;
- an inspector's decision to exercise or not exercise compliance powers under Part 10 (Enforcement measures) to assist in resolving the dispute.

In addition, section 102D(2A) provides that the QIRC must not make an order under this division staying the operation of an inspector's decision. This ensures the inspector's original decision stands while the matter is being considered by the QIRC.

Clause 42 amends section 105 (What is discriminatory conduct) to include a new category of discriminatory conduct. The new category captures circumstances where a person engages in discriminatory conduct if the person treats a worker less favourably than other workers of the person. The section more closely reflects the IR Act, which similarly captures situations in which an employer discriminates between the employee and other employees of the employer.

Clause 43 amends section 112 (Civil proceedings in relation to engaging in or inducing discriminatory or coercive conduct) to change the jurisdiction of matters from the Magistrates Court to the QIRC. This change recognises that the QIRC is a specialist employment tribunal

with existing jurisdiction for allegations that a person has taken action against another person because they have exercised a protected attribute. It also clarifies the following persons may apply to the QIRC for an order under the section 112:

- the person affected by the contravention;
- if a worker is affected by contravention – a *suitable entity* representing the worker (see clause 17); and
- if a person is affected by the contravention other than as a worker – someone who is authorised as a representative by the person.

Clause 44 makes consequential amendments to section 114 (General provisions relating to orders) as a result of the amendment in section 112 to establish jurisdiction of the QIRC.

Clause 45 amends section 118 (Rights that may be exercised while at workplace) to insert new section 118(1)(f) to clarify the WHS entry permit holder may remain at the workplace (during usual working hours at the workplace) for the time necessary to achieve the purpose of the entry.

Clause 46 amends section 119 (Notice of entry) to clarify that a WHS entry permit holder may enter a workplace prior to giving the notice and that any formal defect or irregularity does not invalidate the notice (e.g. incorrect spelling of the name of the entry permit holder or PCBU that are otherwise sufficiently identified). In addition, new section 119(4) provides that when a WHS entry permit holder has given a notice of entry under section 119 in relation to a suspected contravention and still remains at the workplace, the WHS entry permit holder is not required to give an additional notice or notices under sections 120 and 122 (which require at least 24 hours' notice) to view relevant employee records or other documents held or accessible at the workplace, or to consult relevant workers in their inquiry into that suspected contravention.

Clause 47 amends section 128 (Work health and safety requirements) to clarify that a 'reasonable request' made by a PCBU of a WHS entry permit holder under section 128(1)(a) to comply with a work health and safety requirement is not reasonable if complying with the request would unduly delay or unreasonably prevent or hinder the WHS entry permit holder exercising a right of entry to a workplace under Part 7, Division 2 or 3. For example, requiring off-site induction at a location far from where entry is sought or excessive or unnecessary usage of exclusion zones.

Clause 48 amends section 137 (Expiry of WHS entry permit) as a consequence of the amendment to the definition of a *union* which excludes associations that are not registered employee organisations under the FW(RO) Act or Chapter 12 of the IR Act and removes the words '*or taken to be registered*' in paragraph (a) to avoid any confusion in relation to those excluded associations – see clause 71.

Clause 49 amends section 148 (Unauthorised use or disclosure of information or documents) to clarify requirements relating to disclosure or use of information obtained under Part 7, Division 2. The amendment clarifies the provision relates to inquiries into a suspected contravention of the ES Act as well as the WHS Act. Section 148(a)(ii) is amended to clarify a person may disclose or use information or a document obtained under Division 2 if the person reasonably believes it is necessary to lessen or prevent a serious threat to public health or safety,

whether in relation to the suspected contravention or generally. This is intended to allow use or disclosure of information or a document for public awareness or education. A new note is inserted clarifying that the use and disclosure of personal information obtained under division 2 is also subject to the *Privacy Act 1988* (Cwlth).

Clause 50 amends section 150 (Union to provide information to industrial registrar) as a consequence of the amendment to the definition of a *union* which excludes associations that are not registered employee organisations under the FW(RO) Act or Chapter 12 of the IR Act and removes the words '*or taken to be registered*' in paragraph (a) to avoid any confusion in relation to those excluded associations – see clause 71.

Clause 51 amends section 155 (Powers of regulator to obtain information) to insert a new section 155(2A) that provides that a notice issued under section 155 may be issued in the same way as provided for in section 209 (Issue and giving of notice). This, together with an equivalent amendment to section 171, in clause 53, ensures consistency in the way notices can be issued under the WHS Act.

An amendment is made to section 155(3)(b) to clarify that the statement in the notice that a failure to comply with a requirement is an offence is to include 'without a reasonable excuse'.

New section 155(8) clarifies that the regulator's power to obtain information under section 155 has extraterritorial application. This is to make it clear that section 155 notices can be issued by a regulator in one jurisdiction to a person in another jurisdiction within Australia.

Clause 52 inserts a new section 155A (Power of regulator to give particular information to particular persons) to provide that the regulator can, on request, give information contained in improvement, prohibition and non-disturbance notices (a relevant notice) to health and safety representatives (HSRs) for a worker for the workplace to which the relevant notice relates; and WHS entry permit holders representing a relevant union for a relevant worker for the workplace to which the relevant notice relates. New section 155A(2) provides that the information must not include any personal information or *confidential commercial information*. The amendment supports HSRs and WHS entry permit holders in carrying out their functions under the WHS Act while protecting personal information and confidential commercial information that may be contained within a notice. To remove any doubt, section 271 (Confidentiality of information) is amended to clarify that section 271 applies if an HSR or WHS entry permit holder obtains information under new section 155A.

Clause 53 amends section 171 (Power to require production of documents and answers to questions) to insert new section 171(2B) to provide the ability for persons to answer questions by audio or audio-visual link, rather than attending in person before the inspector. The inspector must agree with the request if it is reasonable. New section 171(2C) provides that if a person has been required to attend by audio-visual link they may ask to attend in person and the inspector must agree if the request is reasonable.

New section 171(2E) provides that a notice issued under section 171 may be issued in the same way as provided for in section 209 (Issue and giving of notice). This, together with an equivalent amendment to section 155, see clause 51, ensures consistency in the way notices can be issued under the WHS Act.

Other amendments restructure existing requirements in section 171, relating to notices that may be given by an inspector who has entered the workplace, or another inspector, within 30 days of the inspector's entry, into section 171(1), (2A) and (2D) to be consistent with section 171 of the model WHS Act and without changing the intent of the provision.

Clause 54 amends section 173 (Warning to be given) to make consequential amendments, as a result of new section 171(2A), to set out what must be included in a written notice issued under section 171(2A).

Clause 55 inserts a new section 229EA (Costs of review) in relation to orders for the costs of reviews at the QIRC. New section 229EA(1) provides that the QIRC may, following a hearing of an application for a review, order that a person pay the costs of the hearing. Costs that can be awarded under this provision include appearance fees for barristers, solicitors, and witnesses. The person must otherwise bear their own costs in relation to the application. New section 229EA(3) specifies that no other order for costs can be made in relation to the application. New section 229EA is intended to incentivise parties to settle matters before the hearing. New section 229EA(4) provides that the IR Act otherwise applies.

Clause 56 amends section 230 (Prosecutions) to provide that the WHS Prosecutor can authorise an appropriately qualified member of their staff to bring proceedings under the Act. This is intended to enhance the operation of the Office of the WHS Prosecutor.

Clause 57 amends section 231 (Procedure if prosecution not brought) to extend the time for a person to request (the applicant) a Category 1 or 2 prosecution be brought from 12 months to not more than 18 months after an act or omission. The amendment also provides that a person may request a Category 1 or 2 prosecution be brought within 6 months of a coronial report being made or a coronial inquiry or inquest ending. The existing requirement that a person can only request an industrial manslaughter prosecution be brought, if it is at least six months since the act or omission, remains.

It is possible that the period of 6 months from the date of the coronial report/inquiry and the period of 18 months from the date of the occurrence could overlap. In this situation whichever provision gives the longest period in which the person can request a prosecution should apply.

New section 231(2A)(a) requires the regulator to provide the applicant making the request for a prosecution with an update on the investigation in writing, at least every three months, until the investigation is complete. New section 231(2A)(b) requires the WHS Prosecutor, when the investigation is complete, to:

- advise the applicant whether a prosecution will be brought or give reasons a prosecution will not be brought; and
- advise the person who the applicant believes committed the offence about the request and whether a prosecution will be brought or the reasons it will not be brought.

These amendments are intended to better align the timeframe for Category 1 and 2 prosecution requests with the time it takes the regulator to complete an investigation. This is intended to avoid, as much as possible, the situation where a person is required to make a decision to request a prosecution before the investigation has been completed. The requirement to provide three monthly written updates is intended to improve accountability for the progress of investigations.

Clause 58 amends section 255 (Proceedings for contravention of WHS civil penalty provision) to provide that an application for an order in relation to a contravention, or alleged contravention, of a WHS civil penalty provision can be made to the QIRC, rather than the Magistrates Court. Additional amendments are made in section 255(2) and (3) to ensure consistency of terminology.

Clauses 59 and *60* make consequential amendments to section 258 (Civil proceeding rules and procedure to apply) and section 259 (Proceeding for a contravention of a WHS civil penalty provision) to reflect jurisdiction of the QIRC.

Clause 61 replaces section 260 (Who may apply for order in relation to contravention of WHS civil penalty provision) to clarify who may apply for an order in relation to a contravention of a WHS civil penalty provision. Consistent with existing section 260, new section 260(1) provides that the WHS Prosecutor may apply to the QIRC for an order in relation to a contravention or alleged contravention of any WHS civil penalty provision. New section 260(4) provides the following parties have standing to apply to the QIRC for an order in relation to the WHS civil penalty provisions mentioned in new section 260(3):

- a relevant union under Part 7 (Workplace entry by WHS entry permit holders)
- a WHS entry permit holder
- a person who is affected by the contravention or alleged contravention.

New section 260(2) is inserted to provide that the WHS Prosecutor can authorise an appropriately qualified member of their staff to bring proceedings under the Act.

This clause also replaces section 261 (Limitation period for application in relation to contravention of WHS civil penalty provision) as a consequence of the amendment to section 260 to reflect that additional parties under section 260 may seek an order. The 2-year limitation period remains the same.

Clauses 62 and *63* make consequential amendments to section 262 (Recovery of a monetary penalty) and section 263 (Civil double jeopardy) to reflect jurisdiction of the QIRC.

Clause 64 amends section 271 (Confidentiality of information) to omit certain circumstances that provide for the regulator, or a person authorised by the regulator to disclose, access or use information as these circumstances are now set out in new section 271A. A new note is inserted clarifying that the use and disclosure of personal information is also subject to the *Privacy Act 1988* (Cwlth).

Clause 65 inserts a new section 271A (Additional ways that regulator may use and share information) to clarify the circumstances in which the regulator or a person authorised by the regulator may use or disclose information obtained under the Act. This is intended to make clear the circumstances when disclosure of information between regulators is permitted to facilitate cross-jurisdictional investigations. New section 271A(3)(b) includes a reference to ‘another Act or law’ to enable Commonwealth laws to be prescribed by regulation for the purpose of new section 271A(3)(b).

Clause 66 amends section 274 (Approved codes of practice) to remove section 274(4C) which provides that a code of practice expires 5 years after being approved. New section 274(7) requires the Minister to ensure a code of practice is reviewed at least every 5 years.

Clause 67 inserts a new Part 16, Division 8, Subdivision 2 (Provisions commencing by proclamation).

This clause inserts new sections 327-340 which provide transitional provisions for amendments in the Bill commencing by proclamation.

New section 327 (Definitions for subdivision) provides definitions for terms used in new Part 16, Division 8, Subdivision 2 (Provisions commencing by proclamation).

New section 328 (Existing procedures for consultation) applies to circumstances where a PCBU has been consulting with workers and the parties have agreed to procedures for consultation before commencement.

If the PCBU started to consult with workers under section 47(1) and the parties had agreed to procedures for the consultation under section 47(2), section 48 as in force immediately before the commencement continues to apply in relation to the consultation.

New section 329 (Existing work group negotiations) applies to circumstances where negotiations to determine a work group or vary an agreement concerning the determination of a work group have started but not resulted in a determination or the agreement being varied before commencement. From the commencement, a relevant union may not become a party to the negotiations under new section 52(1)(c) or (4B) and former section 52(2) and (5) continue to apply in relation to these negotiations.

New section 330 (Health and safety representatives to be given particular notices) provides that new section 70 (General obligations of a person conducting business or undertaking) and new Part 5, Division 7A (Work health and safety disputes) apply only in relation to a notice given by an inspector or a notice of entry given by a WHS entry permit holder after the commencement.

New section 70 (General obligations of a person conducting business or undertaking) and new Part 5, Division 7A (Work health and safety disputes) apply only in relation to notifiable incidents if, after commencement, at least one of the following has happened:

- the PCBU has given a written notice to the regulator of a notifiable incident;
- the regulator has given the PCBU details of the information received about a notifiable incident; or
- the regulator has given the PCBU an acknowledgement of receipt of a notifiable incident.

New section 331 (Period for establishing health and safety committee) applies if a request was made to establish a HSC under section 75 prior to the commencement and the two month establishment period that applied has not finished and a HSC has not been established. The two month establishment period for the HSC continues to apply.

New section 332 (Resolution of existing issue relating to work health and safety) applies if an issue arose and has not been resolved or settled immediately before commencement. From the

commencement, a relevant union may not become a party to the dispute under new section 80(1)(e).

New section 333 (Existing directions to cease unsafe work) clarifies that for any cease work direction given by an HSR before commencement, the former section 85 continues to apply.

New section 334 (Time for compliance with provisional improvement notices) applies if a PIN was issued before the commencement and has not been cancelled.

The requirements in relation to what must be included in the PIN, that an HSR may make minor amendments to the notice and the review and stay of the operation of a notice as set out in sections 92, 94 and 100 in place prior to commencement, still apply.

New section 335 (Existing proceedings in relation to discriminatory or coercive conduct) applies if a civil proceeding in relation to discriminatory or coercive conduct has started but not been decided before the commencement, under section 112 as in force from time to time. The Magistrates Court may continue to hear, and decide, the proceedings.

New section 336 (Application of s 229EA) clarifies that new section 229EA (Costs of review) applies to applications for review filed after the commencement.

New section 337 (Existing proceedings in relation to WHS civil penalty provisions) provides that WHS civil penalty proceedings started but not decided before commencement, under Part 13, Division 7, as in force from time to time, can continue to be heard and decided in the Magistrates Court under former Part 13, Division 7.

New section 338 (Application of new s274) applies to circumstances where a code of practice was approved by the Minister after 23 October 2017 and the code has not expired immediately before commencement.

New section 274 requiring the Minister to ensure the code is reviewed at least every five years applies and the code does not expire. A review of the code carried out by the Minister before the commencement meets the requirement for a review under new section 274.

New section 339 (Existing industry sector standing committees) provides that industry sector standing committees that were established under the former schedule 2, section 14 remain established on commencement of the new Schedule 2, section 14.

New section 340 (Change in committee name) clarifies that the effect of new section 23B in Schedule 2 is to rename the Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee (the affected persons committee) as the Consultative Committee for Work-related Fatalities and Serious Incidents – see clause 69. It does not establish a new committee.

From commencement any reference, in context, to the Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee or the affected persons committee will be taken to be a reference to the Consultative Committee for Work-related Fatalities and Serious Incidents.

Clause 68 amends Schedule 1 (Application of Act), Part 1, section 1(6) to insert a new definition for 'high risk plant' which enables high risk plant to be prescribed by regulation. Definitions for existing terms related to high risk plant are omitted as they are no longer required for this purpose in the WHS Act.

Clause 69 amends Schedule 2 (The regulator and local tripartite consultation arrangements and other local arrangements) in relation to two matters. Section 14 (Industry sector standing committees) is replaced with a new provision that enables the Minister to, by gazette notice, establish industry sector standing committees. No more than 10 industry sector standing committee may exist at any particular time. Section 14 is intended to provide more flexibility for the Minister to determine the number, size and name of these committees to ensure high priority industry sector industries are appropriately represented.

This clause also amends section 23B (Establishment) in Schedule 2 to re-name the Persons Affected by Work-related Fatalities and Serious Incidents Consultative Committee as the Consultative Committee for Work-related Fatalities and Serious Incidents. Less formally, this body will be known as the *consultative committee* rather than the affected persons committee. Consequential amendments are made to section 23A (Definitions for part).

Clause 70 amends Schedule 2A (Reviewable decisions) to omit items 1 and 3. This is a consequence of amendments to section 54 (Failure of negotiations) and 76 (Constitution of committee) which enable disputes about these matters to proceed to the QIRC following the inspector having made a decision under those provisions.

Clause 71 amends Schedule 5 (Dictionary) as follows:

affected persons committee is omitted as the term is no longer used in the WHS Act, having been replaced by *consultative committee*.

cease work notice is inserted to refer to a term used in Part 5 (Consultation, representation and participation), with the term explained in section 85 (Health and safety representative may direct that unsafe work cease) and the contents of a *cease work notice* outlined in section 85A (Contents of cease work notice).

confidential commercial information is inserted due to being relocated from section 71(8) (Exceptions from obligations under s70(1)) as a result of it now also being mentioned in new section 48(6)(b) (Nature of consultation).

consultative committee is inserted to replace the term 'affected persons committee' used in Schedule 2 (The regulator and local tripartite consultation arrangements and other local arrangements).

corresponding WHS law is amended to include a reference to Commonwealth laws.

corresponding regulator is amended to replace the term 'corresponding law' with *corresponding WHS law* to ensure consistency with the definition of 'corresponding regulator' in the model Work Health and Safety Act.

excluded entity is a new term to clarify which entities are not entitled to represent or assist a worker or the HSR for a worker in provisions of the Act which refer to a *suitable entity*. The

new term is introduced in new section 45A (Definitions for part) and defined in new section 45B (Meaning of excluded entity).

health and safety committee matter is a new term used in Part 5, Division 7A (Work health and safety disputes), with the term explained in section 102A (Definitions for division).

officer is amended to reflect changes to the *Corporations Act 2001* (Cwlth) that moved the definition of officer from section 9 to section 9AD in that Act.

relevant union is replaced with a new definition. For Part 7 (Workplace entry by WHS entry permit holders), the definition of *relevant union* in section 116 remains the same. For other references in the Act to a *relevant union* for a worker, the definition is provided in new section 45A (Definitions for part).

representative, in relation to a worker, is replaced with a new definition which is provided in new section 45A (Definitions for part).

suitable entity for representing or assisting a worker or the health and safety representative for a worker is a new term introduced in Part 5 (Consultation, representation and participation) . Although the definition for *suitable entity* is provided in new section 45A it is also used in, and applicable to, section 112 (Civil proceedings in relation to engaging in or inducing discriminatory or coercive conduct).

union is replaced with a new definition to mean only employee organisations registered under the FW(RO) Act or the IR Act, chapter 12. The replacement definition of *union* omits paragraph (c) 'Associations of employees or independent contractors, or both, that is registered or recognised as such an association (however described) under a State or Territory industrial law*',* and the words 'or taken to be registered' in paragraph (a) from the existing definition.

work group determination matter is inserted to refer to a new term used in Part 5, Division 7A (Work health and safety disputes), with the term explained in section 102A (Definitions for division).

work group variation matter is inserted to refer to a new term used in Part 5, Division 7A (Work health and safety disputes), with the term explained in section 102A (Definitions for division).

Part 4 Legislation amended

Clause 72 provides that Schedule 1 of the Bill amends legislation referred to in the schedule.

Schedule 1 Other amendments

Public Health Act 2005

Item 1 amends the definition of 'cooling tower' in section 61A the *Public Health Act 2005*. This is a consequential amendment arising from clause 68 and the amendments to Schedule 1 (Application of Act) in relation to 'high risk plant'.

Work Health and Safety Act 2011

Item 1 rectifies a minor typographical error in section 47 (Duty to consult workers).

Item 2 makes a minor amendment to the heading for Part 8 (The regulator), Division 2 as a consequence of new section 155A (Power of regulator to give particular information to particular persons).

Item 3, to provide consistency, replaces references to 'civil penalty provision' with ‘WHS civil penalty provision’ in section 256(2).

Item 4, to provide consistency, replaces the reference to ‘civil penalty provision’ with ‘WHS civil penalty provision’ in the heading for section 257.

Item 5 replaces the heading for Schedule 2, Part 2A to reflect the change in name to the *consultative committee* provided for in the Bill.

Item 6 replaces all references in Schedule 2 (The regulator and local tripartite consultation arrangements and other local arrangements) to the ‘affected persons committee’ with *consultative committee* to reflect the name change provided for in the Bill.