

# Work Health and Safety and Other Legislation Amendment Bill 2014

## Explanatory Notes

### Short title

The short title of the Bill is the *Work Health and Safety and Other Legislation Amendment Bill 2014*.

### Policy objectives and the reasons for them

The Bill implements the findings of the Queensland Government's review of national model Work Health and Safety (WHS) laws which commenced in Queensland on 1 January 2012. The review considered the impact of the WHS laws on business, including unanticipated or inequitable compliance costs.

The construction industry raised concerns about the misuse of right of entry powers by union officials, inconsistency with entry notification requirements in other legislation and the subsequent complexity and disruption this creates for business.

These concerns are confirmed by the number of complaints received by the WHS regulator for right of entry disputes. Between 2011-2012 and 2012-13, WHS inspectors responded to 57 right of entry disputes at construction workplaces. Most disputes related to entry without prior notice to inquire into a suspected contravention of the *Work Health and Safety Act 2011* (WHS Act). Inspectors reported that notices were issued on occasions, but that overall none of the issues identified were considered to be an immediate or imminent risk to workers or others at the workplace.

Misuse of right of entry powers by union officials in the construction industry continues, and is evidenced by recent court cases including 'Director, Fair Work Building Industry Inspectorate v Myles & Ors [2013] FCCA 2229' from 20 December 2013. In this case the Federal Circuit Court of Australia is yet to determine civil penalties to impose on three union officials who breached right of entry laws. The circumstances surrounded conduct by union organisers exercising right of entry and intentionally hindering and obstructing work at a Brisbane CBD construction site in February 2013. In addition, a construction union is facing indefinite suspension of its rights to enter at least four major building sites after the Fair Work Commission ([2013] FWC 10168) found that officials – at the union's direction - engaged in "serious, deliberate and sustained misuse of entry rights" at several South Australian projects late last year.

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Business representatives also raised concerns about the cumulative compliance costs associated with red tape and advocated reducing the burden where this could be achieved without reducing safety standards. This is consistent with the Queensland Government's goal of reducing the red tape and regulatory burden for business. The Bill proposes a number of amendments to address these concerns raised during the review.

The review also considered a range of national model codes of practice that could be adopted in Queensland. While there is general support for harmonised model WHS laws and codes, stakeholders considered there is a need for some scope to vary the model codes where they can be made more relevant for circumstances in Queensland. The Act does not currently permit this flexibility.

The Bill also makes a technical amendment to the *Electrical Safety Act 2002* to provide that the maximum penalty for offences in the *Electrical Safety Regulation 2002* can be no more than 300 penalty units, replacing the current maximum of 40 penalty units. This will ensure the *Electrical Safety Act 2002* is consistent with the maximum penalty for regulations made under the *Work Health and Safety Act 2011* and that nationally consistent penalties can apply to offences in the *Electrical Safety Regulation 2002*.

## **Achievement of policy objective**

The Bill will amend the legislation to:

- require at least 24 hours notice by WHS entry permit holders before they can enter a workplace to inquire into a suspected contravention to align with the other entry notification periods in the WHS Act and the *Fair Work Act 2009*;
- increase penalties for non-compliance with WHS entry permit conditions and introduce penalties for failure to comply with the entry notification requirements;
- require at least 24 hours notice before any person assisting a health and safety representative can have access to the workplace;
- remove the power of health and safety representatives to direct workers to cease unsafe work;
- remove the requirement under the WHS Act for a person conducting a business or undertaking to provide a list of health and safety representatives to the WHS regulator;
- allow for codes of practice adopted in Queensland to be varied or revoked without requiring national consultation as required by the WHS Act, and
- increase the maximum penalty that can be prescribed for offences in the *Electrical Safety Regulation 2002* to 300 penalty units.

## **Alternative ways of achieving policy objective**

The policy objectives can only be achieved by legislative amendment.

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## Estimated cost for government implementation

The amendments involve no cost to government but are expected to achieve benefits for business, particularly in the construction industry, by minimising disruption at workplaces when WHS entry permit holders misuse their powers of entry under the Act.

## Consistency with fundamental legislative principles

In general, the Bill balances individual rights against the rights and liberties of persons, particularly workers, directly affected by safety standards in the workplace.

### *Removal of power of health and safety representative to direct workers to cease unsafe work*

The Office of the Queensland Parliamentary Counsel (OQPC) notes that removing the power of health and safety representatives to direct workers to cease unsafe work removes an existing protection for individual workers. While individual workers will retain a statutory right to cease unsafe work this might not sufficiently protect some workers, for example, those from a non-English speaking background.

**Response:** There is a range of mechanisms in the Act designed to ensure the safety concerns of individual workers are identified and addressed. There is a duty on persons conducting a business or undertaking to consult with workers on health and safety matters and a mandatory issue resolution process. Additionally, workers may raise issues with the health and safety representative for their work group and seek their participation in any interview regarding health and safety concerns with the person conducting the business or undertaking. In any case, safety concerns can be raised directly with the WHS regulator or an inspector anonymously at any time.

### *Requirement for entry permit holders to give notice of proposed entry to workplace to investigate suspected contravention*

OQPC notes that the requirement for WHS permit holders to provide at least 24 hours notice of entry for suspected contraventions may diminish an existing protection for workers by removing the ‘surprise’ element.

**Response:** There are mechanisms in the Act designed to ensure the safety concerns of workers are identified and addressed. There is a duty on persons conducting a business or undertaking to consult with workers on health and safety matters and a mandatory requirement to follow an issue resolution process. Additionally, health and safety concerns can be raised with health and safety representatives, who have particular powers and functions under the Act. The requirement for 24 hours notice of entry allows time for safety concerns to be addressed through these mechanisms prior to entry by a WHS permit holder. Under the now repealed *Workplace Health and Safety Act 1995* (WHS Act 1995), there were provisions allowing immediate entry by a WHS permit holder to investigate suspected contraventions, however the WHS Act 1995 did not include a duty for a person conducting a business or undertaking to consult with workers on health and safety matters or mandate an issue resolution process to be followed. In any case, safety concerns can be raised directly with the WHS regulator anonymously at any time.

***Removal of the requirement for the Minister to consult with the Commonwealth and State and Territory governments and unions and employer organisations before varying or revoking a code of practice***

OQPC notes that the removal of the requirement for the Minister to consult with the Commonwealth and State and Territory governments and unions and employer organisations before varying or revoking a code of practice may reduce the opportunities for workers and employers to participate in decisions on codes of practice.

**Response:** Under the *Intergovernmental Agreement for Reform in Occupational Health and Safety* (IGA), model codes of practice are developed by Safe Work Australia (SWA), a tripartite body comprising representatives of the Commonwealth, State and Territory governments and worker and employer representatives, and it is a requirement under the IGA that SWA consult with interested persons in the development of codes. In Queensland, local tripartite consultation on codes of practice is undertaken with the Work Health and Safety Board and Industry Sector Standing Committees, comprising both employer and worker representatives).

***New offences and increased penalties for existing offences***

OQPC notes the maximum penalty for WHS entry permit holders who contravene a condition of their entry permit has increased from 100 to 200 penalty units, and the new offences for non-compliance with notice requirements under sections 119, 120 and 122 will have a maximum penalty of 200 penalty units.

**Response:** The misuse of union right of entry powers has highlighted the need for more robust enforcement tools to allow the regulator to adequately deal with breaches and to have a deterrent effect against non-compliance. The introduction of new offences and the increase in maximum penalty for an existing offence reflect the seriousness of these offences and the impact abuse of these powers has on a businesses operation. Importantly, the penalties contained in the Bill set maximum limits only and the courts will retain their discretion to impose lesser penalties, depending on the circumstances and mitigating factors.

***Increase in the maximum penalty that may be imposed for an offence against the Electrical Safety Regulation 2013***

OQPC notes the maximum penalty that may be imposed for an offence under the *Electrical Safety Regulation 2013* has increased from 40 to 300 penalty units, and that under the previous Scrutiny of Legislation Committee there was a policy that the maximum penalty for offences in a regulation should generally be limited to 20 penalty units.

**Response:** This amendment corrects a drafting oversight when amendments were made to the *Electrical Safety Act 2002* (ES Act) to harmonise key aspects of the ES Act with the WHS Act. These amendments commenced on 1 January 2014.

This ensures that the ES Act is consistent with the maximum penalty limits for regulations made under the WHS Act and that nationally consistent penalties apply to offences in the ES Regulation.

## **Consultation**

The Attorney-General and Minister for Justice held roundtables on 29 August 2012 and 11 July 2013 to review the operation of the WHS laws and these were attended by representatives of AiGroup, Agforce, Civil Contractors Federation, Australian Workers Union (AWU), Chamber of Commerce and Industry Queensland, Growcom, Housing Industry Association (HIA), Local Government Association of Queensland, Master Builders Queensland, National Retailers Association, Queensland Council of Unions (QCU), the Construction Forestry Mining Energy Union of Queensland, Queensland Farmers Federation, Queensland Law Society, Queensland Trucking Association, Sugar Milling Council, Timber Queensland, Major Contractors' Association and Canegrowers Queensland. Specific working groups with business and union representation were also convened to consider particular aspects of the WHS laws, such as the asbestos regulations.

A range of views were expressed by all stakeholders, which the Government has taken into account in formulating the Bill.

## **Consistency with legislation of other jurisdictions**

Under the *Intergovernmental Agreement for Reform in Occupational Health and Safety*, any party that proposes to amend its legislation so as to materially affect the operation of model WHS legislation is required to submit the proposed amendments to the Select Council on Workplace Relations for consideration. A number of issues raised by Queensland stakeholders have been raised in other jurisdictions. The proposed amendments have been submitted to the Select Council to consider for inclusion in the model WHS laws and referred to Safe Work Australia for further consideration.

## Notes on provisions

### Short title

*Clause 1* sets out the short title of the Bill.

### Commencement

*Clause 2* states that the Act commences on a day to be fixed by proclamation.

### Act amended

*Clause 3* states that Part 2 amends the *Electrical Safety Act 2002*.

### Amendment of s 210 (Regulation-making power)

*Clause 4* amends section 210(3) of the *Electrical Safety Act 2002* so that a regulation may fix a penalty of not more than 300 penalty units for breaches of the regulation.

### Act amended

*Clause 5* states that Part 3 amends the *Work Health and Safety Act 2011*.

### Amendment of s 68 (Powers and functions of health and safety representatives)

*Clause 6* amends the note in section 68(2) to remove the reference to a health and safety representative (HSR) having the power to direct work to cease in certain circumstances.

This clause also inserts new subsections (3A) to (3C) to provide that where a HSR requests the assistance of a person, and the assistant requires access to the workplace to provide the assistance, the HSR must give the person conducting a business or undertaking (PCBU) and the person with management and control of the workplace, notice of the proposed entry by the assistant. The notice must be given at least 24 hours, but no more than 14 days, before the assistant's proposed entry to the workplace. The notice must comply with any regulation for this subsection and be given during normal working hours at that workplace.

### Amendment of s 71 (Exceptions from obligations under s 70(1))

*Clause 7* inserts a new subsection (5A) that provides that a PCBU may refuse to grant access to the workplace to a person assisting a HSR if the HSR has not given the required notice or has not given the information about the person assisting a HSR required under regulation.

### Amendment of s 74 (List of health and safety representatives)

*Clause 8* removes subsection 74(2) so that a PCBU is no longer required to provide the regulator with an up to date list of each HSR and deputy HSR for each work group. They are still required to display an up to date list at the workplace.

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**Amendment of s 82 (Referral of issue to regulator for resolution by inspector)**

*Clause 9* makes a consequential amendment to subsection 82(3)(b) as a result of omitting section 85 so that a HSR can no longer direct a worker in their work group to cease work.

**Amendment of s 83 (Definition of cease work under this division)**

*Clause 10* amends the definition of ‘cease work under this division’ to remove reference to ‘cease work on a direction of a HSR’.

**Omission of s 85 (Health and safety representative may direct that unsafe work cease)**

*Clause 11* omits section 85 so that a HSR can no longer direct a worker in their work group to cease work.

**Amendment of s 86 (Worker to notify if ceases work)**

*Clause 12* is a consequential amendment to section 86 as a result of omitting section 85 so that a HSR can no longer direct a worker in their work group to cease work.

**Replacement of s 119 (Notice of entry)**

*Clause 13* amends section 119 to provide that before entering a workplace to inquire into suspected contraventions a work health and safety (WHS) permit holder must give both the relevant PCBU and the person with management and control of the workplace at least 24 hours but not more than 14 days notice of the entry. The notice must comply with any regulation made for this section.

**Amendment of s 122 (Notice of entry)**

*Clause 14* amends section 122 to require a WHS entry permit holder to give notice to both the relevant PCBU and the person with management and control of the workplace before entering the workplace to consult and advise workers.

**Amendment of s 123 (Contravening WHS entry permit conditions)**

*Clause 15* amends section 123 to increase the maximum penalty from 100 penalty units to 200 penalty units.

**Insertion of new s 143A (WHS permit holder must not fail to give required notice of entry)**

*Clause 16* inserts a new section 143A to prohibit a WHS permit holder from entering a workplace unless they have given the notice required under section 119 or section 120 or section 122. A maximum penalty of 200 penalty units applies.

**Amendment of s 274 (Approved codes of practice)**

*Clause 17* amends section 274 by omitting subsection (2) to allow the Minister to vary and revoke approved codes of practice without the requirement for a process of consultation with the governments of the Commonwealth and each State and territory and unions and employer organisations.

**Insertion of new pt 16, div 4**

*Clause 18* inserts a new Division 4 in Part 16 with transitional provisions for existing directions to cease unsafe work and entry to a workplace to inquire into suspected contraventions under s119 without notice that occurred before commencement of the *Work Health and Safety and Other Legislation Amendment Act 2014*.

**Amendment of sch 2A (Reviewable decisions)**

*Clause 19* makes consequential amendments to the reviewable decisions in Schedule 2A as a result of omitting section 85 so that a HSR can no longer direct a worker in their work group to cease work.

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