

# **Work Health and Safety and Other Legislation Amendment Bill 2015**

**Report No. 5, 55<sup>th</sup> Parliament**  
**Finance and Administration Committee**  
July 2015



## Finance and Administration Committee

<b>Chair</b>	Ms Di Farmer MP, Member for Bulimba
<b>Deputy Chair</b>	Mr Michael Crandon MP, Member for Coomera
<b>Members</b>	Miss Verity Barton MP, Member for Broadwater Mr Craig Crawford MP, Member for Barron River Mr Duncan Pegg MP, Member for Stretton Mr Pat Weir MP, Member for Condamine Mr Mark Boothman MP, Member for Albert (substitute for Mr Crandon from 30 June 2015 to 12 July 2015) Ms Jennifer Howard MP, Member for Ipswich (substitute for Mr Pegg on 6 July 2015)
<b>Staff</b>	Ms Deborah Jeffrey, Research Director Dr Maggie Lilith, Principal Research Officer Ms Louise Johnson, Executive Assistant
<b>Technical Scrutiny Secretariat</b>	Ms Renée Easten, Research Director Mr Michael Gorringe, Principal Research Officer Ms Kellie Moule, Principal Research Officer Ms Tamara Vitale, Executive Assistant
<b>Contact details</b>	Finance and Administration Committee Parliament House George Street Brisbane Qld 4000
<b>Telephone</b>	+61 7 3406 7576
<b>Fax</b>	+61 7 3406 7500
<b>Email</b>	<a href="mailto:fac@parliament.qld.gov.au">fac@parliament.qld.gov.au</a>
<b>Web</b>	<a href="http://www.parliament.qld.gov.au/fac">www.parliament.qld.gov.au/fac</a>

### Acknowledgements

The Committee thanks those who briefed the Committee, made submissions, gave evidence and participated in its inquiry. In particular the Committee acknowledges the assistance provided by the Department of Justice and Attorney-General.

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## Abbreviations

ACCI	Australian Chamber of Commerce and Industry
ALA	Australian Lawyers Alliance
AMMA	Australian Mines and Metals Association
AMWU	Australian Manufacturing Workers' Union
ASMC	Australian Sugar Milling Council
Australian Strategy	Australian Work Health and Safety Strategy 2012–2022
BSCA	Building Service Contractors Association
CCF	Civil Contractors Federation
CCIQ	Chamber of Commerce and Industry Queensland
CFMEU	Construction, Forestry, Mining and Energy Industrial Union of Employees, Qld
CLA	Committee of the Legislative Assembly
COAG	Council of Australian Governments
ETU	Electrical Trades Union
FAC	Finance and Administration Committee
FLP	Fundamental Legislative Principles under the <i>Legislative Standards Act 1992</i>
HIA	Housing Industry Association
IEUA -QNT	Independent Education Union of Australia, Queensland and Northern Territory
IGA	Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety
LGAQ	Local Government Association of Queensland
MEA	Master Electricians Australia
Master Builders	Master Builders Association Queensland
MPA	Master Painters Australia
MPAQ	Master Plumbers Association Queensland
NECA	National Electrical and Communications Association
OFSWQ	Office of Fair and Safe Work Queensland
OHS	Occupational Health and Safety

OQPC	Office of the Queensland Parliamentary Counsel
QBCC	Queensland Building and Construction Commission
QCU	Queensland Council of Unions
QFF	Queensland Farmers' Federation
QLS	Queensland Law Society
QMCA	Queensland Major Contractors Association
QNU	Queensland Nurses' Union
QTIC	Queensland Tourism Industry Council
QTU	Queensland Teachers' Union of Employees
UFUQ	United Firefighters Union of Australia, Union of Employees, Queensland
WHS	Work Health and Safety

## Glossary

Acts	All Acts referred to in this report refer to Queensland Acts unless otherwise specified
the Bill	<i>Work Health and Safety and Other Legislation Amendment Bill 2015</i>
the department	Department of Justice and Attorney-General
OFSWQ	Office of Fair and Safe Work Queensland is a division within the Department of Justice and Attorney-General

## Chair's Foreword

This report presents a summary of the Committee's examination of *Work Health and Safety and Other Legislation Amendment Bill 2015*.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, whether it has sufficient regard to rights and liberties of individuals and to the institution of Parliament.

The public examination process allows the Parliament to hear views from the public and stakeholders, which should make for better policy and legislation in Queensland.

The Bill amends the *Electrical Safety Act 2002* and the *Work Health and Safety Act 2011*. The policy objectives of the Bill are to give effect to the Government's election commitments as part of the *Improving safety for Queenslanders at work* policy.

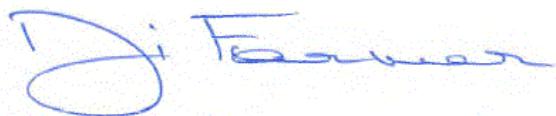
The Committee received 32 submissions and spoke with numerous stakeholders during the course of its inquiry.

After discussion, consideration and negotiation, it became apparent that the Committee would be unable to agree on all aspects of the Bill. However, it was able to agree on the contents of the report, which contains details of the evidence provided to the Committee and the views of both government and non-government Members, for consideration by the Parliament during the second reading debate.

The Committee was able to agree on some aspects of the Bill, which resulted in one recommendation to government. The Committee comments sections included in the report, also detail other issues raised by Members, but on which the Committee was unable to reach agreement, that the Minister may wish to contemplate when considering the final response to the report.

On behalf of the Committee, I would like to thank those who took the time to provide submissions, who met with the Committee and provided additional information during the course of this inquiry. The Committee very much appreciates this assistance. I would also like to thank the departmental officers for their cooperation in providing information to the Committee on a timely basis.

Finally, I would like to thank the other Members of the Committee, including the Members who acted as substitute Members, for both their active participation and their determination to critically address all the issues raised in the Bill.



Di Farmer MP  
Chair

July 2015

## **Recommendations**

Standing Order 132 states that a portfolio committee report on a bill is to indicate the Committee's determinations on:

- whether to recommend that the Bill be passed
- any recommended amendments
- the application of fundamental legislative principles and compliance with the requirements for explanatory notes.

The Committee has made the following recommendations:

### **Recommendation 1**

**24**

The Committee recommends that the Department of Justice and Attorney-General work to improve ease of access and reporting systems for employers, including self-insured employers, and develop education and communication strategies to ensure employers are both aware of the requirements and the reasons for them.



## 1 Introduction

### 1.1 Role of the Committee

The Finance and Administration Committee (the Committee) is a portfolio committee established by the *Parliament of Queensland Act 2001* and the Standing Orders of the Legislative Assembly on 27 March 2015.<sup>1</sup> The Committee's primary areas of responsibility are:

- Premier, Cabinet and the Arts; and
- Treasury, Employment, Industrial Relations, Aboriginal and Torres Strait Islander Partnerships.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio area to consider –

- a) the policy to be given effect by the legislation;
- b) the application of fundamental legislative principles to the legislation; and
- c) for subordinate legislation – its lawfulness.

Standing Order 132(1) provides that the Committee shall:

- a) determine whether to recommend that the Bill be passed;
- b) may recommend amendments to the Bill; and
- c) consider the application of fundamental legislative principles contained in Part 2 of the *Legislative Standards Act 1992* to the Bill and compliance with Part 4 of the *Legislative Standards Act 1992* regarding explanatory notes.

Standing Order 132(2) provides that a report by a portfolio committee on a Bill is to indicate the Committee's determinations on the matters set out in Standing Order 132(1).

Standing Order 133 provides that a portfolio committee to which a bill is referred may examine the Bill by any of the following methods:

- a) calling for and receiving submissions about a bill;
- b) holding hearings and taking evidence from witnesses;
- c) engaging expert or technical assistance and advice; and
- d) seeking the opinion of other committees in accordance with Standing Order 135.

### 1.2 Referral

The Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships introduced the *Work Health and Safety and Other Legislation Amendment Bill 2015* (the Bill) to the Legislative Assembly on 7 May 2015. The Bill was referred to the Committee. The Legislative Assembly agreed to a motion requiring the Committee to report to the Legislative Assembly by Monday 6 July 2015.

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<sup>1</sup> *Parliament of Queensland Act 2001*, s88 and Standing Order 194

### 1.3 Committee Process

The Committee's consideration of the Bill included calling for public submissions, two public departmental briefings and a public hearing. The Committee also sought additional written advice from the department and stakeholders.

The Committee considered expert advice on the Bill's conformance with fundamental legislative principles (FLP) listed in Section 4 of the *Legislative Standards Act 1992*.

### 1.4 Submissions

The Committee advertised its inquiry into the Bill on its webpage on 7 May 2015. The Committee also wrote to stakeholder groups inviting written submissions on the Bill.

The closing date for submissions was Tuesday 9 June 2015. The Committee received 32 submissions. A list of those who made submissions is contained in Appendix A. Copies of the submissions are published on the Committee's website and are available from the Committee secretariat.

### 1.5 Public departmental briefing

The Committee held a public departmental briefing on the Bill with officers from Department of Justice and Attorney-General (DJAG) on Wednesday 3 June 2015. A list of officers who gave evidence at the public departmental briefing is contained in Appendix B. A transcript of the briefing has been published on the Committee's website and is available from the committee secretariat. The Committee also sought additional written information from the department subsequent to the briefing.

The Committee held a subsequent public departmental briefing with officers from DJAG on Monday 22 June 2015. A list of officers who gave evidence at the briefing is also included in Appendix B. A transcript of the briefing has been published on the Committee's website and is available from the committee secretariat.

### 1.6 Public hearing

On Monday 15 June 2015, the Committee held a public hearing on the Bill with representatives from organisations which provided submissions. A list of representatives who gave evidence at the hearing is contained in Appendix C. A transcript of the briefing has been published on the Committee's website and is available from the committee secretariat. The Committee also sought additional written information from stakeholders subsequent to the hearing.

### 1.7 Policy objectives: Work Health and Safety and Other Legislation Amendment Bill 2015

The Bill introduces amendments to the following two Acts:

- *Electrical Safety Act 2002*
- *Work Health and Safety Act 2011*

The explanatory notes outlined that the amendments are to give effect to the Government's election commitments as part of the *Improving safety for Queenslanders at work* policy. The purpose of the Bill is to restore elements of the *Work Health and Safety Act 2011* (WHS Act) that were changed following a review of the model work health and safety (WHS) laws in 2012. The explanatory notes outlined that the amendments are intended to:

- restore right of entry powers allowing WHS entry permit holders to gain immediate access to a workplace to inquire into a suspected contravention of the WHS Act; which removes the requirements to provide at least 24 hours' notice of entry;

- empower trained health and safety representatives (HSR) to direct workers to cease unsafe work. This will restore consistency with the model WHS laws.<sup>2</sup>

The explanatory notes state that the Bill seeks to amend the legislation to:

- allow WHS entry permit holders to enter a workplace immediately if they suspect a contravention has occurred and provide notice of entry as soon as is reasonably practicable afterwards, removing the requirement to provide at least 24 hours' notice of entry;
- reinstate the power for a trained HSR to direct a worker in their work group to cease work if they have a reasonable concern that to carry out the work would expose the worker to a serious risk to their health and safety, emanating from an immediate or imminent exposure to a hazard. This will restore consistency with the model WHS laws;
- allow HSRs to request the assistance of any person, removing the requirement for at least 24 hours' notice if the assistant requires access the workplace;
- remove the penalty for failing to provide notice of entry to inquire into a suspected contravention of the WHS Act, consult and advise workers and make copies of documents relevant to a suspected contravention. This penalty does not exist in the model WHS laws;
- decrease the maximum penalty for contravening WHS entry permit conditions from 200 penalty units to 100 penalty units, to restore consistency with the model WHS laws;
- amend current incident notification requirements to include an additional requirement for employers to notify the regulator when a worker is absent for more than four days due to a workplace injury; and
- improve electrical safety by re-instating the Electrical Safety Commissioner, Electrical Safety Education Committee, Electrical Equipment Committee which were abolished in 2012.<sup>3</sup>

### 1.8 Outcome of Committee deliberations

Standing Order 132(1)(a) requires that the Committee examine the Bill and determine whether to recommend that the Bill be passed. During its consideration of the Bill it became apparent that the Committee would be unable to reach agreement on some issues of the Bill.

The government Members accepted the Bill should be passed. The non-government Members considered that significant amendments would be required before they could support the Bill. The reasons for this are included in the relevant sections of this report.

## 2 Examination of the *Work Health and Safety and Other Legislation Amendment Bill 2015 – Preliminary*

### 2.1 History of WHS Act

The WHS Act commenced on 1 January 2012. The objects of the Act, as defined in section 3, are to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by:

- (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant; and

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<sup>2</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 1

<sup>3</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 1-2

- (b) providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to work health and safety; and
- (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
- (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
- (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
- (f) ensuring appropriate scrutiny and review of actions by persons exercising powers and performing functions under this Act; and
- (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
- (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in Queensland.

The development of consistent work health and safety regulation began in the mid-1980s, which led to the development of National Standards and National Codes of Practice in a number of key areas. However, National Standards did not have legal status and were not enforceable unless a jurisdiction adopted the provisions of the National Standard into their occupational health and safety (OHS) regulations. The consistency between jurisdictions varied because there was no binding agreement nationally. This lack of national consistency led to two major reviews – the Industry Commission in 1995 and the Productivity Commission in 2004. The importance of harmonised OHS laws was also recognised by the Council of Australian Governments (COAG) as part of its National Reform Agenda.<sup>4</sup>

In July 2008, the COAG signed the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA), which sets out the principles and processes for cooperation between the Commonwealth, states and territories to implement model legislation. The IGA recommended a National Review into Model Occupational Health and Safety Laws be conducted to make recommendations on the optimal structure and content of a model OHS Act that was capable of being adopted in all jurisdictions.<sup>5</sup>

The National OHS Review was conducted by a panel of three independent experts, who consulted with more than 260 individuals and representatives from over 100 organisations across Australia. The panel received 243 written submissions. The National OHS review panel then made 232 recommendations to the Workplace Relations Ministers' Council (WRMC).<sup>6</sup>

The first draft of the model WHS Act was based on the decisions of the WRMC in relation to the national review findings. The first draft was released for public comment for six weeks in September 2009. The 480 submissions received during this period informed many of the amendments to the first draft. The submissions were received from individuals, unions, businesses, industry associations, governments, academics and community organisations. The WRMC endorsed the model WHS Act in December 2009, allowing Safe Work Australia to make further technical and drafting amendments to ensure its workability. The model WHS Act was finalised in June 2011.<sup>7</sup>

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<sup>4</sup> Safe work Australia, [Model Work health and Safety Act](#) [Accessed 23 June 2015]

<sup>5</sup> Safe work Australia, [Model Work health and Safety Act](#) [Accessed 23 June 2015]

<sup>6</sup> Safe work Australia, [Model Work health and Safety Act](#) [Accessed 23 June 2015]

<sup>7</sup> Safe work Australia, [Model Work health and Safety Act](#) [Accessed 16 June 2015]

The model WHS Act forms the basis of the WHS Acts across all Australian jurisdictions to harmonise WHS law. The model WHS Act is the result of a comprehensive national review into work health and safety laws across Australia, incorporating a national consultative process. The department stated:

*The model laws went through an extensive process of development at national level. They followed a review by Robin Stewart-Crompton, who is the former CEO of the National Occupational Health and Safety Commission, and Barry Sherriff, who was a partner at Norton Rose, an international legal firm. Following their report to the then Commonwealth government there were agreements with states and territories to develop national model laws. There was extensive consultation, both through the review process by Stewart-Crompton and Sherriff and subsequently by states and territories and the Commonwealth.<sup>8</sup>*

The model Work Health and Safety (WHS) regulations were developed from a three-staged process under the Intergovernmental Agreement for Regulatory and Operational reform in OHS.<sup>9</sup> The department advised that extensive consultation was undertaken during the drafting of the model WHS regulations and Codes of Practice. A total of 1343 submissions were received during the public comment period.<sup>10</sup> The model WHS Regulations were finalised in November 2011.<sup>11</sup>

In May 2011, the *Work Health and Safety Bill 2011* was introduced by the then Minister for Education and Industrial Relations, Hon Cameron Dick MP. He stated:

*The introduction of the Work Health and Safety Bill marks an historic moment in the history of work health and safety legislation, both in Queensland and Australia. Two years after the Council of Australian Governments agreed to the reform of work health and safety laws, the Bill before the House provides for work health and safety legislation that will form part of a system of nationally consistent laws. Importantly, these changes will not see any reduction in health and safety standards, including the current Queensland standards for electrical safety, dangerous goods, hazardous chemicals and major hazard facilities.*

*The Bill will put an end to the disparate and inconsistent health and safety laws across jurisdictions and cut red tape and barriers to productivity gains. It will assist in making Queensland and Australian workplaces safer, and provide certainty and consistency for employers and workers. The Bill will save the Queensland economy more than \$30 million a year.*

*Harmonised laws will make it easier for business to operate over state boundaries, while giving workers greater input into how their workplaces operate with regards to safety. The cost of enforcing compliance with workplace health and safety laws will also be cut for government.*

*Currently, all states and territories have responsibility for making and enforcing their own health and safety laws. These multiple OHS regimes can result in workers and others being exposed to inconsistent safety standards across jurisdictions and industry sectors, cause confusion, complexity and duplication for businesses and lead to duplication and inefficiencies for governments in the provision of policy, regulatory and support services. The changes to occupational health and safety legislation will most definitely not be at the expense of the safety of Australian workers.<sup>12</sup>*

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<sup>8</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 2

<sup>9</sup> Safe work Australia, [Model Work health and Safety Regulations](#) [Accessed 16 June 2015]

<sup>10</sup> Correspondence to FAC from DJAG dated 12 June 2015: Question on Notice, Appendix 1

<sup>11</sup> Safe work Australia, [Model Work health and Safety Regulations](#) [Accessed 16 June 2015]

<sup>12</sup> Queensland Legislative Assembly, Hon CR Dick MP, Minister for Education and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 10 May 2011: 1282

The legislation commenced on 1 January 2012.

In April 2012, the then government commenced a review of the laws to consider their impact on business. In particular, the review was to identify any aspects of the laws that were considered to be unworkable or had unintended consequences, including any anticipated or inequitable compliance or cost burdens.<sup>13</sup>

On 13 February 2014, the then Attorney-General and Minister for Justice, the Hon Jarrod Bleijie MP, introduced the *Work Health and Safety and Other Legislation Amendment Bill 2014*. The Bill was referred to the Finance and Administration Committee (54<sup>th</sup> Parliament).

The objectives of that Bill were:

- to implement the findings from the Queensland Government's review of national model Work Health and Safety (WHS) laws which commenced in Queensland on 1 January 2012.
- amend the *Electrical Safety Act 2002* and the *Work Health and Safety Act 2011* (WHS Act) 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.<sup>14</sup>

The Bill was considered by the Committee who tabled its report<sup>15</sup> on 25 March 2014. The Committee made 15 recommendations. The government supported nine recommendations, partially supported three recommendations and did not support three recommendations. The Parliament passed the legislation on 3 April 2014.

## 2.2 Alternative ways of achieving policy objectives

The explanatory notes indicate that the policy objectives could only be achieved by legislative amendment.<sup>16</sup>

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<sup>13</sup> Mr Goldsbrough, Departmental Briefing Transcript – FAC (54<sup>th</sup> Parliament), 5 March 2014: 2

<sup>14</sup> FAC (54<sup>th</sup> Parliament), *Report No 39 – Work Health and Safety and Other Legislation Amendment Bill 2014*, March 2014: 2-3

<sup>15</sup> FAC (54<sup>th</sup> Parliament), *Report No 39 – Work Health and Safety and Other Legislation Amendment Bill 2014*, March 2014

<sup>16</sup> Safe work Australia, *Model Work Health and Safety Regulations* [Accessed 16 June 2015]

### 2.3 Stakeholder consultation

The explanatory notes outline that no formal consultation had been undertaken as the proposals in the WHS Bill were announced as part of the Government's pre-election commitments in the *Improving safety for Queenslanders at work* campaign.<sup>17</sup>

The department explained that:

*What we mean by 'formal consultation' is where maybe we have a discussion paper or we have a process and will go out and we often see public comment, which we did when the national model laws were developed. There were extensive submissions—in excess of 100 submissions nationally—on different aspects of the laws. By saying that there was no formal consultation we are saying that we did not go out to a broad range of people. We spoke to key stakeholders that we engage with generally, on health and safety matters in this case, given that between 2009 and 2011 there had been extensive consultation on these provisions.<sup>18</sup>*

The department advised that consultation on the proposed amendments to the Electrical Safety Act was undertaken with the Master Electricians Australia (MEA), the National Electrical and Communications Association Queensland (NECA), the Electrical Trades Union (ETU) and the chairpersons of both the Electrical Safety Board and the Electrical Licensing Committee.<sup>19</sup>

The department also iterated that in relation with the proposed amendments to the Work Health and Safety Act, consultation occurred with representatives of both employers and workers including following groups:

- Master Builders Association of Queensland (Master Builders);
- Chamber of Commerce and Industry (CCIQ);
- Construction, Forestry, Mining and Energy Union (CFMEU);
- ETU;
- NECA;
- MEA;
- Queensland Farmers' Federation (QFF); and
- Australian Lawyers Alliance (ALA).<sup>20</sup>

The Independent Education Union Queensland and Northern Territory Branch (IEUA-QNT), United Voice and the United Firefighters Union Queensland (UFUQ) confirmed that they were not consulted.<sup>21,22,23</sup> The Queensland Nurses' Union (QNU) advised that they are affiliated with the QCU and the QNU's position would have been conveyed through QCU.<sup>24</sup>

The Committee asked the department to clarify what type of consultation was held with the stakeholders. The department stated that it was face-to-face meeting with each of the groups to discuss all of the proposed amendments.<sup>25</sup>

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<sup>17</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 5

<sup>18</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 3

<sup>19</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 2

<sup>20</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 2

<sup>21</sup> Correspondence to FAC from IEU-QNT dated 22 June 2015: 1

<sup>22</sup> Correspondence to FAC from United Voice dated 22 June 2015: 2

<sup>23</sup> Correspondence to FAC from UFUQ dated 23 June 2015: 1

<sup>24</sup> Correspondence to FAC from QNU dated 23 June 2015: 4

<sup>25</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 3

The Committee sought further detailed information on the consultation process and the feedback from those stakeholders. The department advised that they met with the following stakeholders, all of which were face-to-face with exception of the Chair, Electrical Licensing Committee which was by teleconference<sup>26</sup>:

Group	Date	Type of consultation
Australian Workers' Union (AWU)	29 April 2015	Face to face meeting
Chair, Electrical Licensing Committee	5 May 2015	Teleconference meeting
Chair, Electrical Safety Board	5 May 2015	Face to face meeting
CCIQ	19 May 2015	Face to face meeting
CFMEU	22 April 2015	Face to face meeting
ETU	27 April 2015	Face to face meeting
Master Builders	5 May 2015	Face to face meeting
MEA	7 May 2015	Face to face meeting
NECA	8 May 2015	Face to face meeting
QCU	8 May 2015	Face to face meeting
Shop Distributive and Allied Employees' Association (SDA)	30 April 2015	Face to face meeting
Work Health and Safety Board	21 May 2015	Face to face meeting

The department explained that the MEA and the NECA did not support the proposed amendments. The CCIQ had concerns over the potential regulatory burden in relation to the additional incident notification requirement and the requirements and the Master Builders noted the amendments but raised concerns over potential misuse of the WHS entry permit provisions. The remaining stakeholders supported the proposed amendments.<sup>27</sup>

The department also re-iterated that there were extensive consultation processes undertaken during the development of the model WHS laws.<sup>28</sup>

#### 2.4 Estimated cost of government implementation

The explanatory notes state that there are no significant financial impacts arising from the proposed amendments. The explanatory notes outline that the amendments to the powers of HSRs to direct workers to cease unsafe work and WHS entry permit holders at clauses 21 and 23 are not likely to increase costs as existing WHS Act provisions already allow for right of entry by permit holders and for individual workers to cease unsafe work.<sup>29</sup>

The explanatory notes state that the incident notification amendments contained in clause 16 may add to the burden for business. However, these are not likely to have a significant financial impact as businesses should already have systems in place to record and notify work-related injuries.<sup>30</sup>

<sup>26</sup> Correspondence to FAC from DJAG dated 12 June 2015: Question on Notice, 6-7

<sup>27</sup> Correspondence to FAC from DJAG dated 12 June 2015: Question on Notice, 1

<sup>28</sup> Correspondence to FAC from DJAG dated 12 June 2015: Question on Notice, 1

<sup>29</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015: 2*

<sup>30</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015: 2*

The Committee asked the department to clarify whether indicative costings had been undertaken in regards to financial impacts on businesses. The department explained:

*The Office of Fair and Safe Work Queensland has been working for some time to reduce the burden on employers in a broad range of notification areas. We have now established a one-stop-shop website with WorkCover Queensland for the Electrical Safety Office, Workplace Health and Safety Queensland and WorkCover Queensland. The intention is that people are able to notify directly.*

*On the notification process available now, they can elect to notify both Workplace Health and Safety Queensland and WorkCover Queensland of an incident on the one form. At this stage that is only relatively new and the uptake has not been great, so we are intending to promote that quite extensively with these provisions coming in. That will be part of the implementation strategy. Because that is unknown in terms of the uptake rate of people doing the notifications online, we have not costed it, per se. Certainly if you look at the number of employers who are now using the one-stop shop, in excess of 50 per cent of employers in Queensland now engage WorkCover, pay premiums, notify through those processes, but we have not specifically costed that, no.<sup>31</sup>*

The explanatory notes stipulate that the amendments in Part 2 to reinstate the Commissioner for Electrical Safety and re-establish the Electrical Safety Education Committee and the Electrical Equipment Committee do not have significant costs impacts and will be met within existing departmental resources.<sup>32</sup>

The Committee sought further clarification on the costs to the department in relation to the reinstatement of the commissioner for electrical safety. The department explained that the Electrical Safety Office is not funded through consolidated fund funding. The department stated:

*...the revenue comes from the electrical industry and that the costs of the commission would be borne from that revenue source.<sup>33</sup>*

However, they noted that the actual costs will depend on the level and stature of the person appointed and advised that as no additional charges will be put on the electrical industry, any costs will be met from within their internal budget.<sup>34</sup>

## 2.5 Consistency with legislation of other jurisdictions

The explanatory notes outline that the WHS Act adopts the nationally agreed model WHS laws which provide a nationally consistent framework for the health and safety of workers and workplaces. The explanatory notes also stipulate that the Bill will realign the majority of the Queensland WHS Act with the current model WHS laws.<sup>35</sup>

However, the amendment to include an additional requirement for employers to notify the regulator when a worker is absent for more than four days due to a workplace injury will be different from other harmonised jurisdictions.<sup>36</sup> The department explained that the industry mix in each state and territory differs, which results in each state having some areas within the WHS laws that do not align with the national model laws. The department stated that in the case of the four days notification requirement, the collection of the data allows for the department to better understand injury rates and implement interventions together with employers and workers.<sup>37</sup>

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<sup>31</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 4

<sup>32</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 2

<sup>33</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 4

<sup>34</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 4

<sup>35</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 2

<sup>36</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 2

<sup>37</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 5

The Committee sought clarification regarding the reasons for the differences between the jurisdictions. The department advised:

*We will always talk to our national colleagues in developing codes of practice, but the industry mix in each state and territory differs slightly and sometimes people need to do things for the nature of their industry. To give an example of that, when we were looking at the forestry code of practice there was considerable debate around the country. The big issue, for example, in Victoria was where they were doing a lot of logging in the steep alpine areas and they had particular risks that they wanted covered off. In Queensland, some of the big problems were dealing with vines growing through the trees and how to manage that, vegetation management on bush tracks and so on. There are some natural differences based on the nature of industry mix. That difference says, 'Alright, we can go off and do our own thing but we will consult at state level and we will talk to you if necessary, but we are not reinstating the legislative requirement to do so'.<sup>38</sup>*

The department further advised that in relation to the consistency with the model work health and safety laws that:

*There are a number of matters that have been considered by the ministers and also by Safe Work Australia. A number of those related to proposed amendments that emanated from Queensland. Those matters are still being considered. I do not think they have been resolved.<sup>39</sup>*

*There are three matters. In terms of the union right of entry for 24 hours, back in 2014 there was national agreement on that matter. In terms of the health and safety representative assistant that they can invite into the workplace, the current legislation in Queensland requires 24 hours notice. That was also agreed nationally by ministers. While it has been agreed nationally by ministers, again, it is up to the individual parliaments whether those changes will get passed in the state based legislation, and no other states have made those movements as yet.<sup>40</sup>*

## **2.6 Commencement**

The Bill does not specify a commencement date.

## **3 Examination of the Work Health and Safety and Other Legislation Amendment Bill 2015 – Amendment of Electrical Safety Act 2002**

The Bill amends the *Electrical Safety Act 2002* and the *Work Health and Safety Act 2011*.

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<sup>38</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 5

<sup>39</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing Transcript 3 June 2015: 7

<sup>40</sup> Mr Bick, DJAG, Public Departmental Briefing Transcript 3 June 2015: 7

### 3.1 Clause 4 – Amendment of section 5 (how purpose of Act is to be achieved)

Clause 4 amends the Act to omit existing section 5(e) and insert new section 5(e). Existing section 5 is as follows:

#### **5 How purpose of Act is to be achieved**

The purpose of this Act is to be achieved in the following ways -

- (a) imposing duties on persons who may affect the electrical safety of others by their acts or omissions;
- (b) establishing benchmarks for industry and the community generally through -
  - (i) making regulations, ministerial notices and codes of practice about achieving electrical safety; and
  - (ii) introducing safety management systems for particular electricity entities;
- (c) providing for the safety of all persons through licensing and discipline of persons who perform electrical work;
- (d) providing for protection for consumers against failures of persons who perform electrical work to properly perform and complete the work;
- (e) establishing the Electrical Safety Board and its committees to -
  - (i) advise the Minister on electrical safety matters; and
  - (ii) allow industry and the community to participate in developing strategies for improving electrical safety; and
  - (iii) participate in developing requirements for the licensing and discipline of persons who perform electrical work.

The proposed new section 5(e) re-establishes the role of a Commissioner for Electrical Safety and specific committees to promote community awareness about electrical safety (Electrical Safety Education Committee) and participate in developing requirements for the electrical safety of electrical equipment (Electrical Equipment Committee).<sup>41</sup>

New sections 5(e) and 5 (f) are as follows:

#### **5 How purpose of Act is to be achieved**

- (e) providing for the appointment of a commissioner for electrical safety to advise the Minister on electrical safety matters and to manage the activities of the Electrical Safety Board and its committees;.
- (f) establishing the Electrical Safety Board and its committees to -
  - (i) allow industry and the community to participate in developing strategies for improving electrical safety; and
  - (ii) participate in developing requirements for the licensing and discipline of persons who perform electrical work; and
  - (iii) promote community awareness about electrical safety; and
  - (iv) participate in developing requirements for the electrical safety of electrical equipment.

The Committee received some submissions that highlighted their concerns about the re-establishment of a Commissioner for Electrical Safety or the Electrical Safety Education Committee and the Electrical Equipment Committee. The Civil Contractors Federation (CCF) considers that the amendments create unnecessary bureaucracy.<sup>42</sup> The Australian Sugar Milling Council (ASMC) stated that they are not convinced that the amendments would provide direct and immediate improvement in workplace safety. They submitted that there is a risk of adding cost and complexity to the working environment.<sup>43</sup> The department explained that the reintroduction of the Electrical Safety Commissioner and the relevant Committees will restore important consultative mechanisms, through which the Minister can receive advice on electrical safety matters.<sup>44</sup>

<sup>41</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 6

<sup>42</sup> Civil Contractors Federation, Submission 6: 6

<sup>43</sup> Australian Sugar Milling Council, Submission 19: 2

<sup>44</sup> Correspondence to FAC from DJAG dated 12 June 2015: 15

The department also advised that consultation with stakeholders through statutory committees is vital to the department's role as regulator for electrical safety. The department stated:

*The previous commissioner played an important role in representing the department, was well respected in the electrical industry and was seen as an independent advocate for electrical safety. A key role of the Commissioner is one of leadership with both the electrical safety committees and the broader community in the area of public safety. This improvement in electrical safety could not have been achieved through compliance and enforcement by the department alone and can be directly attributed to the work of the commissioner and committee such as the two proposed to be re-established.*<sup>45</sup>

The ETU submitted that they were actively involved in the review of electrical safety legislation in 2001. The ETU considered that the active involvement of the electricity industry through the creation of the Electrical Safety Board and various Committees led to a decrease in the number of electrical incidents and the number of fatalities in the industry.<sup>46</sup>

The ETU outlined their concerns with the 2012 changes and stated:

*By removing the position of Commissioner for Electrical Safety and abolishing the various standing committees the government's response to safety in the electricity industry became more reactive than proactive.*<sup>47</sup>

The ETU also suggested the removal of the two Committees and the restructure of the Electrical Safety board reduced the independence of the statutory office. They stated that the abolition of the position of the Commissioner left a communication void between the board and the Electrical Safety Office.<sup>48</sup>

The ALA advised that they welcome the re-establishment of the role of the Commissioner for Electrical Safety, and the Electrical Safety education committee and the Electrical Equipment Committee.<sup>49</sup> The IEUA-QNT also submitted their support for the reinstatement of the role of Commissioner for Electrical Safety, and their role as chairperson of the Electrical Safety Board.<sup>50</sup>

The QFF emphasised that the rural community has a strong record in maintaining good practices in electrical safety. The QFF supports the reinstatement of the Commissioner and the Committees but notes that the *Electrical Safety Code of Practice – Electrical Equipment Rural Industry* (the Code) already provides a practical basis for rural electrical safety. The QFF submitted that they would like to see the Code unchanged in its current form.<sup>51</sup> The MEA's submission also outlined their support for the re-instatement of an Electrical Safety Commissioner, Electrical Safety Education Committee, and Electrical Equipment Committee.<sup>52</sup>

### 3.2 Committee comments

The Committee notes that the majority of stakeholders either supported the changes to the Electrical Safety Act or did not comment on this aspect of the Bill. However, the Committee also understands that there are some stakeholders who have submitted that the amendment will only add cost and complexity to the working environment.

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<sup>45</sup> Correspondence to FAC from DJAG dated 12 June 2015: 40

<sup>46</sup> Electrical Trades Union, Submission 16: 3 & 4

<sup>47</sup> Electrical Trades Union, Submission 16: 4

<sup>48</sup> Correspondence to FAC from Electrical Trades Union dated 23 June 2015: 1

<sup>49</sup> Australian Lawyers Alliance, Submission 4: 6

<sup>50</sup> Independent Education Union Queensland and Northern Territory Branch, Submission 14: 1

<sup>51</sup> Queensland Farmers Federation, Submission 21: 2

<sup>52</sup> Master Electricians Australia, Submission 32: 4

The Committee is satisfied with the proposed amendments to re-establish the role of a Commissioner for Electrical Safety and the Electrical Safety Education Committee.

The government Members noted the comments of the department about the importance of the role of the Electrical Safety Commissioner and the relevant statutory committees, particularly with the improvement achieved during the term of the previous Electrical Commissioner.

### 3.3 Clause 5 – Insertion of new part 6

Clause 5 provides for the reinstatement and the appointment of a Commissioner for Electrical Safety by the Governor in Council. The explanatory notes outline that the Commissioner will resume the key role of managing the activities of the Electrical Safety Board and its committees and providing independent advice to the Minister on electrical safety matters.<sup>53</sup>

Proposed part 6 (sections 68 to 74) is as follows:

#### **Part 6 Commissioner for electrical safety**

##### **68 Appointment of commissioner**

- (1) There is to be a commissioner for electrical safety.
- (2) The commissioner is to be appointed by the Governor in Council by gazette notice.
- (3) The commissioner is to be appointed under this Act, and not under the Public Service Act 2008.
- (4) The commissioner's term of appointment is the term, not longer than 5 years, stated in the gazette notice appointing the commissioner.
- (5) Subsection (4) does not prevent the commissioner from being reappointed.

##### **69 Eligibility for appointment**

To be appointed as commissioner, a person must have -

- (a) an electrical trade or qualification; and
- (b) professional experience in electrical safety.

##### **70 Terms and conditions of appointment**

- (1) The commissioner is entitled to be paid the salary and allowances decided by the Governor in Council.
- (2) The Governor in Council may set conditions of employment to apply to the person.
- (3) The conditions of employment must, to the greatest extent practicable, be equivalent to the conditions of employment for a person appointed at a comparable level under the *Public Service Act 2008*.
- (4) The commissioner must, as soon as practicable after being appointed under section 68(2), enter into a written contract of employment with the regulator.
- (5) The contract must include any conditions of employment set by the Governor in Council.

##### **71 Commissioner's functions**

The functions of the commissioner are -

- (a) to manage the activities of the board, having regard to its objectives, strategies and policies, and to ensure its efficient operation; and (b) to manage the activities of each committee, having regard to its objectives, strategies and policies, and to ensure each committee's efficient operation; and
- (c) to fulfil the roles of chairperson of the board and chairperson of the Electrical Licensing Committee; and
- (d) to advise the Minister on electrical safety matters generally; and
- (e) to advise the Minister on proposed codes of practice after appropriate board and committee consideration and endorsement; and
- (f) to perform any other functions given to the commissioner under this Act.

##### **72 Commissioner's powers**

The commissioner has the powers necessary or convenient to carry out the commissioner's functions.

<sup>53</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 6

**73 End of appointment**

The commissioner's appointment ends if -

- (a) the commissioner resigns by signed notice of resignation given to the Minister; or
- (b) the commissioner's employment under the contract of employment ends.

**74 Acting commissioner**

- (1) The Minister may appoint a person to act in the office of commissioner during -
  - (a) any vacancy, or all vacancies, in the office; or
  - (b) any period, or all periods, when the commissioner is absent from duty, or can not, for another reason, perform the functions of the office.
- (2) A person can not be appointed to act as the commissioner unless the person would be eligible for appointment as the commissioner.
- (3) An appointment under subsection (1) is for the term, and on the conditions, decided by the Minister, and the Minister may end the appointment at any time in accordance with the conditions.

**3.4 Clause 6 – Amendment of section 77 (Composition of board)**

The explanatory notes state that clause 6 amends section 77 to remove the position of chairperson, as a member of the Electrical Safety Board appointed by the Minister, and reinstates the commissioner as the chairperson of the Electrical Safety Board.<sup>54</sup>

**3.5 Clause 7 – Amendment of section 86 (Establishment of board committees)**

The explanatory notes outline that clause 7 amends section 86 to allow for the re-establishment of the Electrical Safety Education Committee and the Electrical Equipment Committee.<sup>55</sup>

**3.6 Clause 8 – Amendment of section 89 (Composition of licensing committee)**

The explanatory notes stipulate that clause 8 allows for the amendment in section 89 to reinstate the commissioner as the chairperson of the electrical licence committee.<sup>56</sup>

**3.7 Clause 9 – Insertion of new part 8, divisions 2A and 2B**

The explanatory notes state that clause 9 provides for the re-establishment of the electrical safety education committee to provide advice and make recommendations to the Electrical Safety Board about the promotion of electrical safety in workplaces and the broader community.<sup>57</sup>

Proposed new section 91 (Division 2A) provides for the ways the electrical safety education committee may discharge its functions and proposed new section 92 provides for the composition of the committee.<sup>58</sup>

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<sup>54</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 6

<sup>55</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 6

<sup>56</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 7

<sup>57</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 7

<sup>58</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 7

Proposed new Division 2A is as follows:

**Division 2A Electrical Safety Education Committee**

**90 Establishment**

The Electrical Safety Education Committee is established.

**91 Function of safety education committee**

- (1) The function of the safety education committee is to give advice and make recommendations to the board about the promotion of electrical safety in workplaces and in the broader community.
- (2) Without limiting subsection (1), the safety education committee may perform its function by –
  - (a) recommending to the board strategies and marketing campaigns in relation to electrical safety; and
  - (b) recommending to the board information and education strategies for electrical safety; and
  - (c) advising on issues the board refers to it; and
  - (d) examining the appropriateness of, and the need for, marketing campaigns and promotional programs; and
  - (e) making recommendations to the board about the establishment of working parties to deal with particular electrical safety issues.
- (3) The regulator must give the safety education committee the necessary administrative and other support to enable the committee to perform its function efficiently and effectively.

**92 Composition of safety education committee**

- (1) The safety education committee consists of the following members -
  - (a) 1 member appointed by the Minister to be chairperson of the committee;
  - (b) at least 6 other members appointed by the Minister.
- (2) In choosing the members of the committee, the Minister must –
  - (a) consider each proposed member's practical experience and competence in the promotion and marketing of electrical safety; and
  - (b) seek to appoint both men and women as members.

The explanatory notes stipulate that clause 9 also reinstates the Electrical Equipment Committee to provide advice and make recommendations to the Electrical Safety Board about the safety of electrical equipment.<sup>59</sup>

Proposed new section 94 (Division 2B) provides ways the Electrical Equipment Committee may discharge its functions and proposed new section 95 provides for the composition of the committee.<sup>60</sup> Proposed new Division 2B is as follows:

**Division 2B Electrical Equipment Committee**

**93 Establishment**

The Electrical Equipment Committee is established.

**94 Functions of equipment committee**

- (1) The primary function of the equipment committee is to give advice and make recommendations to the board about the safety of electrical equipment.
- (2) It is also a function of the equipment committee to give advice and make recommendations to the board about the energy efficiency and performance of electrical equipment.
- (3) Without limiting subsections (1) and (2), the equipment committee may perform its functions by -
  - (a) investigating and reporting on issues the board refers to it about the safety of electrical equipment; and
  - (b) advising on other issues the board refers to it; and
  - (c) advising on strategies to improve the safety of electrical equipment; and
  - (d) advising on safety standards for electrical equipment; and
  - (e) advising on certificates for electrical equipment and the suitability of electrical equipment for connection to electricity; and

<sup>59</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 7

<sup>60</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 7

- (f) advising on the approval, hire, sale and use of electrical equipment; and
  - (g) advising on actions the regulator might take about unsafe electrical equipment.
- (4) The regulator must give the equipment committee the necessary administrative and other support to enable the committee to perform its functions efficiently and effectively.

**95 Composition of equipment committee**

- (1) The equipment committee consists of the following members -
- (a) 1 member appointed by the Minister to be chairperson of the committee;
  - (b) at least 6 other members appointed by the Minister.
- (2) In choosing the members of the committee, the Minister must -
- (a) consider each proposed member's practical experience and competence in relation to electrical equipment; and
  - (b) seek to appoint both men and women as members.

**3.8 Clause 10 – Amendment of section 98 (Composition of advisory committee)**

The explanatory notes state that clause 10 amends section 98 to provide that the reinstated commissioner is not precluded from being appointed as a member of an advisory committee.<sup>61</sup>

**3.9 Clause 11 – Amendment of section 99 (Conditions of appointment to board committee)**

The explanatory notes outline that clause 11 amends section 99 to allow for the commissioner to be paid remuneration and allowances as an appointed member of an advisory committee.<sup>62</sup>

**3.10 Clause 12 – Amendment of section 184 (Certificate about action on electrical licence)**

The explanatory notes state that clause 12 amends section 184 to reflect the commissioner's reinstated role as chairperson of the licensing committee.<sup>63</sup>

**3.11 Clause 13 – Insertion of new part 22**

The explanatory notes outline that clause 13 inserts a new Part 22 to provide transitional arrangements which clarify that current chairpersons of the Electrical Safety Board and Electrical Licensing Committee will hold office until an Electrical Safety Commissioner is appointed.<sup>64</sup>

Proposed new part 22 is as follows:

**Part 22 Transitional provision for Work Health and Safety and Other Legislation Amendment Act 2015**

**256 Current chairpersons to hold office until commissioner is appointed**

- (1) This section applies if, on the commencement, there is no commissioner holding office.
- (2) The chairperson of the board holding office immediately before the commencement continues to hold office as chairperson of the board until the commissioner's term of appointment starts.
- (3) The chairperson of the licensing committee holding office immediately before the commencement continues to hold office until the commissioner's term of appointment starts.

**3.12 Clause 14 – Amendment of schedule 2 (Dictionary)**

The explanatory notes stipulate that clause 14 provides for the amendment to the definition of board committee to include the reinstated safety education committee and equipment committee, and reinserts the definitions of equipment committee and safety education committee.<sup>65</sup>

<sup>61</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015: 7*

<sup>62</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015: 7*

<sup>63</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015: 7*

<sup>64</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015: 7*

<sup>65</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015: 7*

## 4 Examination of the Work Health and Safety and Other Legislation Amendment Bill 2015 – Amendment of Work Health and Safety Act 2011

### 4.1 Clause 15 – Act amended

Clause 15 amends the *Work Health and Safety Act 2011*.<sup>66</sup>

### 4.2 Clause 16 – Replacement of section 36 (what is a serious injury or illness)

The explanatory notes state that section 36 of the Act will be replaced and the definition of ‘serious injury or illness’ amended to include an additional requirement to notify the regulator of an injury or illness causing a person to be absent from the person’s voluntary or paid employment for more than four days.<sup>67</sup>

Proposed new section 36 of the Act is as follows:

#### **36 What is a serious injury or illness**

In this part, serious injury or illness of a person means an injury or illness -

- (a) requiring the person to have immediate treatment as an in-patient in a hospital; or
  - (b) requiring the person to have immediate treatment for -
    - (i) the amputation of any part of the person’s body; or
    - (ii) a serious head injury; or
    - (iii) a serious eye injury; or
    - (iv) a serious burn; or
    - (v) the separation of the person’s skin from an underlying tissue (for example, degloving or scalping); or
    - (vi) a spinal injury; or
    - (vii) the loss of a bodily function; or
    - (viii) serious lacerations; or
  - (c) requiring the person to have medical treatment within 48 hours of exposure to a substance; or
  - (d) causing the person to be absent from the person’s voluntary or paid employment for more than 4 days;
- and includes any other injury or illness prescribed under a regulation but does not include an illness or injury of a prescribed kind.

The Australian Work Health and Safety Strategy 2012–2022 (Australian Strategy) follows the National OHS Strategy 2002–12. Safe Work Australia released the Australian Strategy in June 2012 following consultation with work health and safety experts and the wider community about what was needed to improve work health and safety. The Australian Strategy was formally endorsed by all workplace relations ministers, the Australian Council of Trade Unions (ACTU) and Ai Group and launched in October 2012.<sup>68</sup>

The Australian Strategy includes national targets to:

- reduce the number of worker fatalities by at least 20 per cent
- reduce the incidence rate of claims resulting in one or more weeks off work by at least 30 per cent, and
- reduce the incidence rate of claims for musculoskeletal disorders resulting in one or more weeks off work by at least 30 per cent.<sup>69</sup>

<sup>66</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 8

<sup>67</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 8

<sup>68</sup> Safe Work Australia, Australian Strategy, [Australian Strategy](#) [Accessed 3 July 2015]

<sup>69</sup> Safe Work Australia, *Australian Work Health and Safety Strategy 2012–2022*, October 2012: 7

The department advised that the WHSQ and the Electrical Safety Office conduct their activities based on the evidence obtained from this type of statistical information and detailed information is now collected.<sup>70</sup> They emphasised that the additional data collection will assist in developing interventions to reduce these types of work-related incidents. The department also explained that the information may help Queensland achieve its milestone under the Australian Strategy of a 30 per cent reduction of musculoskeletal disorders.<sup>71</sup>

The department advised that the data derived from this information will:

*...provide the regulator with increased intelligence around work related injuries and in particular musculoskeletal disorders—in particular, those sorts of issues where a person may be at work for a couple of days and then go off for a couple, go back to work and so on. Musculoskeletal injuries are one of our largest injury types in Queensland at the moment. It is a key priority under the Australian Work Health and Safety Strategy.*<sup>72</sup>

The Committee noted that several submitters had expressed concerns about clause 16 and proposed new section 36 of the Act. The Ai Group does not support the additional reporting requirements. They submitted that the amendments will:

- *create unnecessary regulatory burden and potential unintended breaches of section 39 in circumstances that do not warrant immediate notification and/or non-disturbance of the site; and*
- *establish duplicating of reporting, without clear benefits, when employers are already required to submit workers' compensation claims to WorkCover Queensland within 8 days of an employer receiving a claim.*<sup>73</sup>

The CCF considered that the inclusion of “an injury or illness” in the definition of serious injury or illness is unjustified and unwarranted. The CCF concurred and stated that the proposed new requirement:

*...could place an unnecessary burden on an employer where normally such an absence would not have been regarded as a serious injury or illness.*<sup>74</sup>

They also advised that the amendment:

- *denigrates the intent of the original legislator to clarify and/or define a serious injury or illness; and*
- *all the other subsections of Section 36 deals with obviously serious ailments whilst the inclusion of subsection(d) could be “harmless”. For example an employee absent due an influenza infection for more than four days.*<sup>75</sup>

The department clarified that the additional requirement is strictly related to workplace related notifiable incidents. The department provided an example as follows:

*For example, a case of Q fever where someone works in an abattoir or on a cattle property, yes, that is notifiable but someone coming down with a common cold or whatever that is not notifiable.*<sup>76</sup>

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<sup>70</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 3 June 2015: 5

<sup>71</sup> Correspondence to FAC from DJAG dated 12 June 2015: 6

<sup>72</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 3 June 2015: 2

<sup>73</sup> Ai Group, Submission 2: 3

<sup>74</sup> Civil Contractors Federation, Submission 6: 4

<sup>75</sup> Civil Contractors Federation, Submission 6: 4

<sup>76</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 2

It should be noted that under section 38, a PCBU is only required to notify the regulator after becoming aware that a notifiable incident arising out of the conduct of the business or undertaking has occurred. Section 36 specifies that a notifiable incident means the death of a person; or a serious injury or illness of a person; or a dangerous incident.

The QFF shared CCF's concerns regarding the regulatory burden the amendment may impose. The QFF noted that it may have:

*...unintended consequences of making employers more likely to encourage employees back to work in order to avoid filling out the additional reporting paperwork.<sup>77</sup>*

The Queensland Tourism Industry Council (QTIC) also submitted that the amendments will create additional red-tape for small businesses because of the shortened reporting timeframes and jurisdictional difference between Queensland and other states and territories.<sup>78</sup>

The CCIQ agreed and stated:

*In our view, and a key principle that we would ask the committee to understand, there are only a limited number of hours in each week for a small business. If we ask that business to devote time to proving that they are compliant—things such as notifying the department when they already notify WorkCover—that is one less hour available to actually focus on those initiatives that genuinely improve or lessen the chance of an accident occurring in the workplace. There is an opportunity cost.<sup>79</sup>*

The department acknowledged that the amendment may impose an additional notification requirement on businesses.<sup>80</sup> The department advised that based on their estimates, the proposed notification requirements will result in an extra 1,800 to 2,000 claims to be reported a year.<sup>81</sup> However they stated that it is unlikely to make any significant impact as employers should already have systems in place to notify work-related injuries.<sup>82</sup> The department also explained that employers have the option of lodging a claim through and notifying an incident at the same time either online or over the phone through the One Stop Shop.<sup>83</sup> They also advised that many businesses, particularly those in regional areas, generally have an online capability. They stated that the WorkCover Queensland 'notify of an incident' website provides employers with different options such as 'notifying an incident', 'lodging a claim' or both.<sup>84</sup>

The Housing Industry Association (HIA) submitted that the Bill does not provide any rationale for the notification of workplace injuries that result in a worker being off work for more than four days and what the regulator is expected to do once the notice has been received.<sup>85</sup>

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<sup>77</sup> Queensland Farmer Federation, Submission 21: 2

<sup>78</sup> Queensland Tourism Industry Council, Submission 28: 2

<sup>79</sup> Mr Behrens, CCIQ, Public Hearing Transcript 15 June 2015: 5

<sup>80</sup> Correspondence to FAC from DJAG dated 12 June 2015: 6

<sup>81</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 10

<sup>82</sup> Correspondence to FAC from DJAG dated 12 June 2015: 6

<sup>83</sup> Correspondence to FAC from DJAG dated 12 June 2015: 17

<sup>84</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 8

<sup>85</sup> Housing Industry Association, Submission 7: 2

The ALA supported the need to develop a sound database. They stated:

*I think the end game is to ensure that the regulator has the right statistical basis upon which to allocate resources and to apply that mix of carrot and stick, which is OH&S education and enforcement. Without the right database it is very difficult to do that. There could be a very practical solution to this that the notification—I accept the concerns that have been raised that duplication is undesirable. If that can be remedied through some measures, I am sure the department will be able to come up with something, but one form instead of two; that would be advantageous, I think.<sup>86</sup>*

The HIA noted that the information is already collected by WorkCover Queensland and therefore it would create a further impost and unnecessary red tape burden for employers.<sup>87</sup> The Australian Chamber of Commerce and Industry (ACCI) also submitted that other mechanisms such as workers compensation claims could be used to gain regulator data. The ACCI stated that evidence should be provided to show that this additional record keeping requirement would provide a needed safety outcome.<sup>88</sup>

The CCIQ agreed with ACCI and stated:

*Forcing employers to notify the regulator when a worker is absent for more than four days due to a workplace injury is directly at odds with the former Labor government's policy actions in this space. Indeed, section 36(d) was previously removed by the former minister for industrial relations, the Hon. Cameron Dick MP, due to red-tape implications of having to report information that was already collected by WorkCover and also that the requirement had no benefit to improved safety performance within business.<sup>89</sup>*

In response to suggestions that the data is already being collected by WorkCover, the department explained that because of privacy concerns, data collected by WorkCover cannot be shared.<sup>90</sup> They advised that they receive data from different sources including the electrical safety regulator, work health and safety regulator, the Workers' Compensation Regulator and all self-insurers. The data obtained is aggregated and is on a holistic level.<sup>91</sup>

The department explained that:

*...the current incident notification requirements do not account for a number of injury types such as serious work-related musculoskeletal disorders and mental disorders that also result in absence from work.<sup>92</sup>*

The department advised that the four-day notification would be beneficial in designing strategies and targeting initiatives around sectors of employers.<sup>93</sup> They stated:

*It allows us to then also target those employees who are consistently having time off. That targeting may be education and awareness campaigns or whatever. It is another dataset that will assist us in targeting our activities.<sup>94</sup>*

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<sup>86</sup> Mr Hodgson, ALA, Public Hearing Transcript 15 June 2015: 6

<sup>87</sup> Housing Industry Association, Submission 7: 2

<sup>88</sup> Australian Chamber of Commerce and Industry, Submission 11: 4

<sup>89</sup> Mr Behrens, CCIQ, Public Hearing Transcript 15 June 2015: 3

<sup>90</sup> Correspondence to FAC from DJAG dated 12 June 2015: 17

<sup>91</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 8

<sup>92</sup> Correspondence to FAC from DJAG dated 12 June 2015: 6

<sup>93</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 8

<sup>94</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 8

The QNU supports the amendment stating that their industry and continual demands of their work places them at high risk of musculoskeletal disorders and diseases. They explained:

*In our view, the current regulation around the reporting of injuries would rarely require a Health sector employer to report despite nurses and midwives sustaining significant injuries that can result in them not returning to work. As a consequence the inspectorate may be unaware of injury trends and problems within the health and community sector.<sup>95</sup>*

The ACCI acknowledged that trends of musculoskeletal disorders are certainly issues for the person conducting a business or undertaking (PCBU). However, the ACCI suggested that a four-day absence should not in itself be a trigger for notification as there are many other injuries such as a workplace tea kettle burn that would not warrant regulator action. The ACCI also highlighted that a workplace tendon injury should initiate an internal review and investigation but this should not require notification.<sup>96</sup>

The QTIC highlighted that this amendment will result in Queensland being different to other harmonised jurisdictions. The QTIC recommended that a more risk-based approach be undertaken.<sup>97</sup> They submitted that this means that the proposed amendments should allow for an extended reporting period for small businesses and businesses whose occupations are not deemed as high risk e.g. office jobs.<sup>98</sup>

The QTIC also iterated their concern that the department does not really take into account the difficulties faced by small business in ensuring that they remain abreast of legislative changes. They advised:

*The issue we have is the complexity and layers of communication that exists for small business. As Nick was just outlining particularly well, for small business where they have differing demands our operators are absolutely committed to ensuring they do the right thing. That is absolutely what they need to do. Where the issues come unstuck is as laws change and regulations change very frequently there has been a shift by government to move to websites as being a source of information, assuming that operators will actually know where to find things on a website let alone have time to take that away.*

*There is becoming an increasing reliance on third party bodies like the associations that sit here today to take up a far greater percentage of education awareness programs on behalf of government in order to ensure that our operators understand. I can only absolutely reinforce that we receive this comment every day. We have 22 sector associations that we support and are the peak body to in addition to 3,000 direct individual businesses. One of their greatest concerns is that they absolutely see the need to do that but they are asking government to, in fact, do what they are asking government to do which is streamline. They can see the common sense and they are very prepared to give and ask of their consumers to share information for that purpose. I can only reinforce that it is a critical concern for small business.<sup>99</sup>*

The department acknowledged that the four-day notification will result in Queensland being different to the national harmonised laws.<sup>100</sup> The department also stated that subject to the Bill being passed, the other states and territories may be informed about the changes and the reasons for the change.<sup>101</sup>

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<sup>95</sup> Queensland Nurses' Union, Submission 3: 6

<sup>96</sup> Correspondence to FAC from ACCI dated 23 June 2015: 2

<sup>97</sup> Queensland Tourism Industry Council, Submission 28: 2

<sup>98</sup> Correspondence to FAC from Queensland Tourism Industry Council dated 22 June 2015: 2

<sup>99</sup> Ms Harrington, QTIC, Public Hearing Transcript, 15 June 2015: 6

<sup>100</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 6

<sup>101</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 7

The City of Gold Coast submitted that the notification requirement would significantly increase the number of incidents reported to the regulator and will come as a cost to the organisation. They highlighted that their number of notifiable incidents under the current requirements from 1 June 2014 and 31 May 2015 is four, but the number would increase to 29 under proposed requirements. They emphasised that this is a 725 per cent increase.<sup>102</sup>

The department advised that there are over 20 self-insurers and around 150,000 premium paying insurers with WorkCover Queensland.<sup>103</sup> The department acknowledged that for self-insurers, such as the City of Gold Coast, the dual reporting arrangement with WorkCover does not apply, but there will be a requirement for them to report to the department directly.<sup>104</sup> The department committed to investigating options for self-insurers to lodge online their four-day notifications.<sup>105</sup> The department further stated that changes are already under way to allow for notifiable incidents to be done through a portal from the workers' compensation regulator's system for self-insurers.<sup>106</sup>

The IEUA-QNT advised that the seriousness of an injury is not something that can always be quantified by the period of absence, particularly as many acute injuries can be serious but may not require an absence of four or more days. The IEUA-QNT suggested that a more effective and less burdensome approach such as electronic lodgement of incident reports could be undertaken.<sup>107</sup>

They advised the Committee that:

*...one of the things that we are sort of framing in that is that one of the more significant forms of injury that we see in our industry is actually psychological injury. So it is a combination of workload intensification and—if anyone has ever taught, and most of us have, it is a very high-intensity job. So sometimes a worker may take a day off to just get a little bit of space and regain the control that they need to teach effectively, but if they accumulate over time those days can actually be a symptom of a greater psychological injury, so you could be heading towards depression or anxiety disorders or something along those lines. I am not sure that we have a direct answer to what would be an appropriate period of time—that is, whether or not we actually believe that you could specify four days, six days, a week, two days. It would be more, I think, the tracking across time, and that is why in our response to that point in our submission we also talk about the recommendation to make use of some of the technological advances perhaps to keep track of days off, compensation claims, injuries and maybe build up a bigger picture across time.<sup>108</sup>*

The department explained that the Office of Fair and Safe Work Queensland (OFSWQ) has significantly streamlined the incident notification process by combining incident notification forms with workers' compensation claim forms.<sup>109</sup> The department also advised that they are presently examining the website to make it clearer in terms of workplace health and safety and electrical safety.<sup>110</sup>

### 4.3 Committee comments

The Committee wishes to acknowledge the improvement in work place safety statistics that has occurred in recent times. The Committee wishes to commend the work undertaken by the department in this regard, as well as the efforts of both employees and employers in achieving this improvement.

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<sup>102</sup> City of Gold Coast, Submission 8

<sup>103</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 10

<sup>104</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 9

<sup>105</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 11

<sup>106</sup> Correspondence to FAC from DJAG dated 25 June 2015: 4

<sup>107</sup> Independent Education Union Australia, Queensland and Northern Territory Branch, Submission 14: 2

<sup>108</sup> Ms Schmidt, IEUA-QNT, Public Hearing transcript 15 June 2015: 35

<sup>109</sup> Correspondence to FAC from DJAG dated 12 June 2015: 27

<sup>110</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 10

The Committee notes that Australian Strategy includes national targets to reduce the incidence rate of claims for musculoskeletal disorders resulting in one or more weeks off work by at least 30 per cent.

The non-government Members of the Committee are concerned about the impact and burden of the additional notification requirements and the change in definition of serious injury. In their submissions, the ACCI, the CCIQ, City of Gold Coast, QTIC and others expressed serious concern about the time and cost burden of the additional red tape created by the requirement to notify of a serious injury or illness within four days. Indeed, former Minister for Industrial Relations, the Hon Cameron Dick MP, previously removed proposed section 36(d) due to red tape implications and the requirement having no benefit to improved safety performance within business.

Further, the non-government Members are concerned with the expansion of the definition of serious injury or illness. Many submitters echo this concern. The department responded to the concerns of submitters in its oral evidence before the Committee; however, there appears to be an unintended consequence because of a drafting error.

The department indicated in its evidence before the Committee that WorkCover is not able to share the data it collects. Given they receive data from other sources, the non-government Members of the Committee urge the government to consider whether WorkCover could share data with the department to reduce the regulatory burden on employers.

The government Members acknowledge that some employers and self-insurers may have additional reporting requirements imposed on them, and that the department should implement measures to address these concerns. However the government Members consider that the additional information will not cause significant impost on the majority of employers. The government Members consider that the additional information that will be available to the department will allow for further targeted programs to be implemented which will be of benefit to both employers and employees in the long term, and will assist in the development of programs aimed at attaining national targets on reducing claims and injuries. The government Members consider that employers may be more willing to provide this information if they can understand the benefits that will be gained from making the information available.

The government Members noted the comments by the HIA that the Bill does not provide any rationale for the notification of workplace injuries that result in a worker being off work for more than four days. The government Members consider the department has legitimate reasons for seeking this information and recommends that this information be provided in the explanatory notes.

The Government Members noted the department's advice that it will work with self-insurers to ensure that the process of notification is streamlined. The Committee also noted the department's advice that it will endeavour to make the electronic reporting systems more user-friendly and will work to conduct further education programs for their One Stop Shop.

Government Members noted the advice from the department that the proposed amendments may result in up to 2,000 further notifications across all industries, across the state.

The government Members consider that the department needs to recognise the comments made by stakeholders, including the QTIC and the QFF, regarding the communication difficulties faced by its stakeholders and develop its strategies to address these accordingly.

**Recommendation 1**

The Committee recommends that the Department of Justice and Attorney-General work to improve ease of access and reporting systems for employers, including self-insured employers, and develop education and communication strategies to ensure employers are both aware of the requirements and the reasons for them.

**4.4 Clause 17 – Amendment of section 68 (Powers and functions of health and safety representatives)**

Existing section 68 contains the powers and functions of HSRs. Existing section 68 is as follows:

**68 Powers and functions of health and safety representatives**

- (1) The powers and functions of a health and safety representative for a work group are—
  - (a) to represent the workers in the work group in matters relating to work health and safety; and
  - (b) to monitor the measures taken by the person conducting the relevant business or undertaking or that person's representative in compliance with this Act in relation to workers in the work group; and
  - (c) to investigate complaints from members of the work group relating to work health and safety; and
  - (d) to inquire into anything that appears to be a risk to the health or safety of workers in the work group, arising from the conduct of the business or undertaking.
- (2) In exercising a power or performing a function, the health and safety representative may—
  - (a) inspect the workplace or any part of the workplace at which a worker in the work group works—
    - (i) at any time after giving reasonable notice to the person conducting the business or undertaking at that workplace; and
    - (ii) at any time, without notice, in the event of an incident, or any situation involving a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; and
  - (b) accompany an inspector during an inspection of the workplace or part of the workplace at which a worker in the work group works; and
  - (c) with the consent of a worker that the health and safety representative represents, be present at an interview concerning work health and safety between the worker and—
    - (i) an inspector; or
    - (ii) the person conducting the business or undertaking at that workplace or the person's representative; and
  - (d) with the consent of 1 or more workers that the health and safety representative represents, be present at an interview concerning work health and safety between a group of workers, which includes the workers who gave the consent, and—
    - (i) an inspector; or
    - (ii) the person conducting the business or undertaking at that workplace or the person's representative; and
  - (e) request the establishment of a health and safety committee; and
  - (f) receive information concerning the work health and safety of workers in the work group; and
  - (g) whenever necessary, request the assistance of any person.

*Note—*  
A health and safety representative also has a power under division 7 to issue provisional improvement notices.
- (3) Despite subsection (2)(f), a health and safety representative is not entitled to have access to any personal or medical information concerning a worker without the worker's consent unless the information is in a form that—
  - (a) does not identify the worker; and
  - (b) could not reasonably be expected to lead to the identification of the worker.

- (3A) Subsection (3B) applies if—
- (a) a health and safety representative requests the assistance of a person (the **assistant**) under subsection (2)(g); and
  - (b) the assistant requires access to the workplace to assist the health and safety representative.
- (3B) The health and safety representative must give notice of the assistant's proposed entry to—
- (a) the person conducting the business or undertaking at the workplace; and
  - (b) the person with management or control of the workplace.
- (3C) A notice given under subsection (3B) must—
- (a) comply with a regulation made for this subsection; and
  - (b) be given to the persons mentioned in subsection (3B)(a) and (b)—
    - (i) during the usual working hours at the workplace; and
    - (ii) at least 24 hours, but not more than 14 days, before the assistant's entry.
- (4) Nothing in this Act imposes or is taken to impose a duty on a health and safety representative in that capacity.

Clause 17 proposes to amend section 68 in two ways. It reinserts provisions that an HSR has the power to direct work to cease in certain circumstances in section 68(2) and it removes the 24 hour notice requirement that if an HSR requires the assistance under section 68 (2)(g) by omitting subsections 68(3A) to (3C).

The explanatory notes outline consequential amendments to the note in section 68(2) will be made to include the reference to health and safety representatives having the power to direct work to cease in certain circumstances.<sup>111</sup>

The department advised that the proposed amendment will align Queensland with the model legislation.<sup>112</sup>

The QCU submission identifies that the capacity of HSRs to stop a dangerous process is fundamentally important to protecting workers and assists an employer in their primary obligations under the Act. They noted that HSRs receive mandatory training in relation to their role and as such are able to identify risks far better than someone who has not undertaken training and trained HSRs will look for solutions higher up the hierarchy of control and a much higher degree of confidence will come with effective training.<sup>113</sup>

QCU advised the Committee that very young people and people from non-English-speaking backgrounds are less likely to be able to adequately identify potential hazards. They advised:

*The justification for the removal of the capacity of HSRs to cease unsafe work was that workers have a common law right to cease work. Where that argument falls down is that someone, particularly someone from one of those groups that I just described, is not going to have the same understanding of workplace health and safety legislation, your rights with respect to that legislation, the capacity to identify hazards and, perhaps most importantly, the ability to recognise the way in which hazards are avoided.*<sup>114</sup>

The Master Plumbers Association Queensland (MPAQ) queried the qualifications or training of the 'assistant' being called in and consider that anybody or any union official can come onto a site to investigate a safety issue despite not necessarily having any qualifications to investigate the issue.<sup>115</sup>

<sup>111</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 8

<sup>112</sup> Mr Bick, DJAG, Public Departmental Briefing 22 June 2015: 6

<sup>113</sup> QCU Submission No 18: 3

<sup>114</sup> Mr Martin, QCU, Public Hearing 15 Jun3 2015: 27

<sup>115</sup> Mr Bryant, MPAQ, Public Hearing 15 June 2015: 15

The MPAQ stated:

*MPAQ speaks from experience from being on site, standing on sites with contractors (members), and as such we are very well briefed and informed that there are occasions that the cover of WH&S is used to facilitate industrial action.*<sup>116</sup>

The Master Builders also expressed their objections to this amendment as they are concerned that it:

*...allows a worker to ring anybody to come onto a site to satisfy a health and safety query.*<sup>117</sup>

The AMMA also expressed similar views and does not support the removal of the 24-hour notice requirement for persons to enter workplaces to assist. They explained that this amendment:

*...would have the effect of allowing union officials (noting that assistance can be provided by "any person") the ability to enter sites to hold discussions with workers under the guise of assisting an HSR with no requirement to give notice.*<sup>118</sup>

The MEA outlines that it is often the case where the 'person assisting' is a reference to a union organiser. The MEA notes that there are no measures in the proposed provisions requiring these 'persons assisting' to limit the focus of their presence on site to the matter for which they have been requested to attend.<sup>119</sup> The MEA also considers that there are no penalties for a person assisting who oversteps their duty and suggest:

*Where the involvement of a person assisting results in an HSR ceasing work the 'person assisting' should be subject to penalty measures equal to an HSR. In addition, a person assisting should be exposed to civil remedies.*<sup>120</sup>

The UFUQ advised that their members sometimes require immediate assistance from someone with specialist knowledge when they attend a work place emergency.<sup>121</sup> They advised that their front-line firefighters are assessing and responding to risks every day and their fire communication officers are working with them to manage and control those risks. The UFUQ stated that their members are also particularly aware that there must be an assessment of whether there are any further hazards associated in order to control of those risks.<sup>122</sup>

The UFUQ advised that their members will:

*...hopefully be better placed if they were able to call in the assistance of a union representative who had some specialist knowledge in health and safety in the hope that our requirement to attend the site would be reduced or removed.*<sup>123</sup>

The Committee asked the department to clarify the roles, rights and responsibilities of the 'assistant'. The department advised that the:

*...assistance provisions relate to where someone just wants some information on how something works, and it might be a precursor to an issue that needs resolution in the workplace.*<sup>124</sup>

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<sup>116</sup> Master Plumbers Association Queensland, Submission 27: 2

<sup>117</sup> Mr Crittall, Master Builders, Public Hearing 15 June 2015: 19

<sup>118</sup> Australian Mines and Metals Association, Submission 29: 3

<sup>119</sup> Master Electricians Australia, Submission 32: 8

<sup>120</sup> Master Electricians Australia, Submission 32: 8

<sup>121</sup> Mr Cooke, UFUQ, Public Hearing 15 June 2015: 27-28

<sup>122</sup> Mr Cooke, UFUQ, Public Hearing 15 June 2015: 23

<sup>123</sup> Mr Cooke, UFUQ, Public Hearing 15 June 2015: 27-28

<sup>124</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 3

The department stated:

*An example of that might be a chemical plant where you have a lot of manufacturing workers and they might just want some advice from a chemist or a chemical engineer on the compounds they are storing and how they are storing them because they are unsure. They are the sorts of circumstances where an assistant would be used. Usually it is someone with some knowledge or information related to the matter.*<sup>125</sup>

The department also advised that under the current legislation, another individual can be brought into a workplace without the requirement for the 24 hours' notice only for resolution of work health and safety issues under section 81 of the Act.<sup>126</sup>

Section 81 is as follows

**81 Resolution of health and safety issues**

- (1) This section applies if a matter about work health and safety arises at a workplace or from the conduct of a business or undertaking and the matter is not resolved after discussion between the parties to the issue.
- (2) The 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.
- (3) A representative of a party to an issue may enter the workplace for the purpose of attending discussions with a view to resolving the issue.

The department also referred to a submission to the National OHS review which emphasised that HSRs are not always found in all workplaces, resulting in the adoption of other approaches to ensure that workers' interest in OHS are protected. They outlined:

*The model Act should ensure that the exercise of the right of entry is not hindered by an overly technical approach to particularising the alleged contravention which is to be investigated (see Appeal by Australian Municipal, Administrative, Clerical and Services Union (C2007/3800), AIRC Full Bench, 8 February 2008) which held that employers can refuse the union representatives entry to a workplace if the representative cannot provide unambiguous proof of the existence of reasonable grounds for suspecting a breach of the OHS Act.*<sup>127</sup>

The department explained that they have not seen any abuse of the 'assistant' provisions prior to the 24 hours' notice being introduced.<sup>128</sup> The department also advised that section 71 of the Act still provides that PCBUs can refuse entry of an HSR's assistant on reasonable grounds. These reasonable grounds include where the assistant is actually a WHS entry permit holder and they have had their permit revoked or suspended or where they have acted in a way that is inappropriate. The department emphasised that there are various mechanisms in the legislation where the assistant can have their entry refused by the business as a safeguard.<sup>129</sup>

#### **4.5 Clause 18 – Amendment of section 71 (exceptions from obligations under s 70(1))**

The explanatory notes state that clause 18 omits sections 71(5A) so that a person conducting a business or undertaking is no longer permitted to refuse to grant access to a workplace to a person assisting an HSR if the HSR has not given the required notice.<sup>130</sup>

<sup>125</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 4

<sup>126</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 4

<sup>127</sup> Correspondence to FAC from DJAG dated 25 June 2015: 5

<sup>128</sup> Mr Goldsbrough, DJAG, Public Departmental Briefing 22 June 2015: 11

<sup>129</sup> Mr Bick, DJAG, Public Departmental Briefing 22 June 2015: 11

<sup>130</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 8

#### 4.6 Committee comments

The Committee comments in relation to the ability for the HSR to direct work to cease are included in section 4.10 of this report.

With regard to the ability of HSRs to request assistance, the Committee considered that there are sufficient safeguards contained within the legislation to prevent abuse of this provision. The Committee is satisfied that the evidence provided by the department indicated that there has not been a history of abuse of these provisions.

#### 4.7 Clause 19 – Amendment of section 82 (Referral of issue to regulator for resolution by inspector)

Clause 19 makes a consequential amendment to subsection 82(3)(b) as a result of reinserting section 85 so that an HSR can direct a worker in their work group to cease work.<sup>131</sup>

#### 4.8 Clause 20 – Replacement of section 83 (Definition of *cease work under this division*)

Clause 20 amends the definition of ‘cease work under this division’ under section 83 to include a reference to ‘cease work on a direction of an HSR’.<sup>132</sup>

#### 4.9 Clause 21 – Insertion of new section 85

The explanatory notes state that clause 21 inserts a new section 85 to establish an HSR’s power to direct that unsafe work cease. In general, this power can only be used to direct workers in the HSR’s own work group, unless the special circumstances in section 69 of the WHS Act apply. An HSR’s deputy could also exercise this power in the circumstances set out in section 67 of the WHS Act.<sup>133</sup>

Proposed new section 85 is as follows:

**85 Health and safety representative may direct that unsafe work cease**

- (1) A health and safety representative may direct a worker who is in a work group represented by the representative to cease work if the representative has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker’s health or safety, emanating from an immediate or imminent exposure to a hazard.
- (2) However, the health and safety representative must not give a worker a direction to cease work unless the matter is not resolved after -
  - (a) consulting about the matter with the person conducting the business or undertaking for whom the workers are carrying out work; and
  - (b) attempting to resolve the matter as an issue under division 5.
- (3) The health and safety representative may direct the worker to cease work without carrying out that consultation or attempting to resolve the matter as an issue under division 5 if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction.
- (4) The health and safety representative must carry out the consultation as soon as practicable after giving a direction under subsection (3).
- (5) The health and safety representative must inform the person conducting the business or undertaking of any direction given by the health and safety representative to workers under this section.
- (6) A health and safety representative can not give a direction under this section unless the representative has -
  - (a) completed initial training prescribed under a regulation mentioned in section 72(1)(b); or
  - (b) previously completed that training when acting as a health and safety representative for another work group; or
  - (c) completed training equivalent to that training under a corresponding WHS law.

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<sup>131</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 8

<sup>132</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 8

<sup>133</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 8

The explanatory notes state that new section 85(1) sets out the circumstances in which an HSR may direct that unsafe work cease. Similar to section 84 of the WHS Act, an HSR may issue the direction under this clause to a work group member if:

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

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

The explanatory notes also state that proposed new section 85(5) requires an HSR to inform the PCBU of any direction to cease work that the HSR has given to workers. New section 85(6) provides that only an appropriately trained HSR may exercise the powers under this provision that is if the HSR has:

- completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU), or
- undertaken equivalent training in another jurisdiction.<sup>134</sup>

The department stated that worker participation, via an elected HSR, is a central feature of Australian reforms in OHS. The department advised that:

*...all States have enacted legislation providing for HSRs, and national support for health and safety training of workers and representatives was established in 1985.*<sup>135</sup>

The Committee queried what is meant by 'special circumstances' in the explanatory notes. The department provided the following example by way of explanation:

*You may have a manufacturing workplace, say a milk production facility, and the general workforce has their own designated work group and elected HSR who can then issue a notice to them. They may well have a maintenance crew in from another contractor working side by side with them over recommissioning a plant or whatever. In that situation the HSR can also direct those people that are also affected by the work to cease work as well even though they are not part of the designated work group. It is special circumstances like that.*<sup>136</sup>

The Committee received some submissions from organisations who expressed concerns about the amendments that grant HSRs the power to direct that work cease. NECA considers that the Workplace Health and Safety Inspectorate is adequately resourced with around 300 inspectors with the power of immediate access to workplaces to undertake these activities. They also advised that reviews by their members of previous stoppages by HSRs on construction sites revealed very few were legitimate. NECA suggested that effective safeguards should be put in place to deter against abuse of the entitlements.<sup>137</sup>

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<sup>134</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 8-9

<sup>135</sup> Correspondence to FAC from DJAG dated 25 June 2015: 7

<sup>136</sup> Mr Goldsbrough, Public Departmental Briefing 22 June 2015: 5

<sup>137</sup> National Electrical and Communications Association, Submission 1: 2

The department explained that the amendments provide for appropriate safeguards in the WHS Act. These allow HSRs to only exercise the power to cease unsafe work if they have a 'reasonable concern' that to carry out the work would expose the worker to a 'serious risk' to their health and safety from an immediate or imminent exposure to a hazard.<sup>138</sup>

The department highlighted that the description of 'serious risk' and 'reasonable concern' were included in the explanatory notes to the *Work Health and Safety Bill 2011* as follows:

*'Serious risk'*

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

*'Reasonable concern'*

*The requirement for the worker to have a 'reasonable concern' is intended to align with equivalent provisions under the Fair Work Act. For this entitlement to apply, it will not be sufficient for a worker to simply assert that their action is based on a reasonable concern about a serious and immediate or imminent risk to his or her safety. A 'reasonable concern' for health or safety can only be a concern which is both reasonably held and which provides a reasonable or rational basis for the worker's action. A concern may be reasonable if it is not fanciful, illogical or irrational. It is not necessary to establish an existing serious health or safety risk to the worker. The question is whether the worker's action was based on a reasonable concern for their health or safety arising from a serious and immediate risk, rather than the existence of such a risk.<sup>139</sup>*

The Committee sought further clarification from the department as to how 'serious injury and disease claims' are defined. The department advised that 'serious injury and disease claims' are those which result in a total absence from work of one working week or more'.<sup>140</sup>

The ACCI considered that the right to cease unsafe work should remain with the individual worker. They noted that the model legislation provides that individual workers have the statutory right to cease work on safety grounds.<sup>141</sup> The CCIQ agreed with the ACCI and argues that:

*...the model legislation, which gives individual workers the statutory right to cease unsafe work practices on safety grounds, should remain the guiding principle in this instance.<sup>142</sup>*

The ASMC concurred with the ACCI in stating that all employees have the ability and responsibility to stop work. The ASMC submitted:

*...this responsibility should never be delegated to an external party or a specifically nominated person, who may not be available when required. The introduction of legislation of this nature creates the risk of confusion and potential of failure to act.<sup>143</sup>*

The ASMC stated that they are concerned that the confusion may add to an existing problem in the case where a worker does not feel they are able to approach their employer about safety issues.

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<sup>138</sup> Correspondence to FAC from DJAG dated 12 June 2015: 5

<sup>139</sup> Explanatory Notes, *Work Health and Safety Bill 2011*: 55

<sup>140</sup> Correspondence to FAC from DJAG dated 25 June 2015: 3

<sup>141</sup> Australian Chamber of Commerce and Industry, Submission 11: 3

<sup>142</sup> Chamber of Commerce and Industry Queensland, Submission 30: 3

<sup>143</sup> Australian Sugar Milling Council, Submission 19: 2

They believe that a different solution is required to address what is occurring in that work environment, rather than creating a stopgap mechanism or different mechanism to fix that problem. The ASMC added that the reliance on one person to direct workers to stop unsafe work or raise safety issues with the employer may result in nothing happening when the person is not present.<sup>144</sup>

The CCIQ considered that Queensland is heading in the right direction but believes that:

*...each and every worker in the workplace has a responsibility to ensure their own safety and that the safety of others is in place.*<sup>145</sup>

The ALA stated that even though workers do have the right to cease unsafe work, they may not be in a position to recognise and prevent each and every safety risk at work. The ALA argued that workers may also be reluctant to raise safety concerns with their employer.<sup>146</sup>

They advised:

*...in many instances workers may not feel comfortable that they can raise safety concerns with their employer and have them acted on appropriately. It is likely that a worker may refuse to comply with a direction of their employer if they fear they could be disciplined or dismissed. If a trained WHS or HRS permit holder however, who is independent of the employee, can make a direction to cease work then it follows that an employee is more likely to cease work and avoid serious injury.*<sup>147</sup>

The department explained that the restoration of HSRs' ability to direct unsafe work to cease acts as a protection for all workers, particularly those who are likely to have more limited awareness and education on safety matters at a workplace.<sup>148</sup>

The ETU outlined that this amendment to allow appropriately trained HSRs to direct work to cease when it is unsafe will be a step towards improving the safety of workers on site.<sup>149</sup>

The CFMEU argued that their organisation places considerable emphasis on providing training for all members but in reality, not everyone can be trained. They state that this is the reason for having HSRs who have specialist knowledge in identifying workplace health and safety hazards.<sup>150</sup>

The CFMEU explained that a previous survey by Rozen revealed that 28 per cent of workers surveyed in a workplace in 2005 said they had been pressured by management to not raise WHS issues.<sup>151</sup> The paper by Rozen also outlined that 25 per cent of workers claimed to have been bullied or intimidated by management because they had raised OHS issues. The paper noted that a similar survey of Victorian HSRs in that year reported similar results.<sup>152</sup>

The CFMEU provided the following case study as an example<sup>153</sup>:

*It is about a young gentleman who was killed on a construction site in Queensland.... He was a young man, 20 years old,.... People at every level, especially those with experience, should speak up. That is what we say, and this is what was said by his father, who was grieving his son's death. The man did not have the awareness. Had he had that awareness, he would have done something about it but he thought everything was fine.*<sup>154</sup>

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<sup>144</sup> Mr Whiting, ASMC, Public Hearing 15 June 2015: 9

<sup>145</sup> Mr Behrens, CCIQ, Public Hearing 15 June 2015: 9

<sup>146</sup> Australian Lawyers Alliance, Submission 4: 3

<sup>147</sup> Australian Lawyers Alliance, Submission 4: 3

<sup>148</sup> Correspondence to FAC from DJAG dated 12 June 2015: 9

<sup>149</sup> Electrical Trades Union of Employees, Submission 16: 5

<sup>150</sup> Mr Borg, CFMEU, Public Hearing 15 June 2015: 27

<sup>151</sup> CFMEU, Submission 12: 8

<sup>152</sup> Rozen, P. 'But it's not safe!: Legal redress for workers who are victimised for raising a safety issue at work. Australian Journal of Labour Law (2013) 26 AJLL 326

<sup>153</sup> Identifying details have omitted for the purpose of sensitivity

<sup>154</sup> Mr Borg, CFMEU, Public Hearing 15 June 2015: 27

The department considered that it will be beneficial for vulnerable workers such as young workers and those from non-English speaking backgrounds who may be too afraid to speak up, if an HSR was present to direct unsafe work to cease.<sup>155</sup>

The MEA considered that there was, however, nothing in the 2014 amendments that prevented an HSR from exercising their right to raise safety concerns to the PCBU; through consultation on the matter or involvement of WorkSafe as required. The MEA believes that the responsibility for the duty of care does not lie with the HSR but the PCBU.<sup>156</sup>

The department outlined that research used for the National Review into the model laws and highlighted that a PCBU is responsible for making decision regarding health and safety. However, the department highlighted that a PCBU may not have a full understanding of the finer detail or subtleties of the work or working conditions. As such, it is important that:

*...the PCBU obtain information from those workers who are most directly involved in the work of the business or undertaking, before making changes or implementing measures which may adversely affect health and safety.*<sup>157</sup>

The ALA argued that there are also employers who do not implement the necessary safety requirements. They stated:

*There are some employers who put safety stickers all over their workplace but do not walk the talk. In some workplaces there are significant financial incentives for management and senior management around lost time injuries—in other words, the absence of those—that can manifest in a culture of pushing things under the carpet, in injuries not being reported, in people being discouraged from taking time off work if there has been an injury, and it can also manifest in circumstances where people feel constrained and worried about their own job security and therefore are less likely to proactively address a workplace health and safety issue.*<sup>158</sup>

The QCU provided a confidential example where a worker had repeatedly raised an unsafe OHS issue with the employer, but no immediate action was taken by the employer. The QCU emphasised that this case highlights the importance of an HSR being able to direct unsafe work to cease.<sup>159</sup> The IEUA-QNT advised that the occasions where HSRs have invoked stop work orders in the non-government education sector are rare. The IEUA-QNT submitted:

*This can be largely attributed to the fact that schools routinely operate as high duty of care environments. As a consequence, most rely on trained health and safety representatives to negotiate health and safety issues with administration. This system is remarkably effective.*<sup>160</sup>

The MEA suggested that consideration be given to what appropriate measures should be put in place to ensure that the HSR's powers are exercised appropriately and the penalties that are applicable to those who misuse their powers.<sup>161</sup>

The department advised that:

*...there has only been one complaint received by the OFSWQ regarding an HSR's use of the power to direct cessation of unsafe work in the more than two years that it was in force in Queensland prior to the amendments to the Act in May 2014.*<sup>162</sup>

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<sup>155</sup> Correspondence to FAC from DJAG dated 12 June 2015: 9

<sup>156</sup> Master Electricians Australia, Submission 32: 6

<sup>157</sup> Correspondence to FAC from DJAG dated 25 June 2015: 5

<sup>158</sup> Mr Hodgson, ALA, Public Hearing 15 June 2015: 9

<sup>159</sup> Confidential letter from QCU 17 June 2015

<sup>160</sup> Correspondence to FAC from IEUA-QNT dated 22 June 2015: 2

<sup>161</sup> Master Electricians Australia, Submission 32: 6

The Queensland Teachers' Union (QTU) is supportive of the amendment for HSRs to direct workers to cease unsafe work. The QTU emphasised that the provision has been used sparingly in the past by HSRs who are QTU members. They considered that it has provided a necessary safety net provision in cases where the Department of Education and Training or TAFE institute did not take the appropriate decision to either cease work in a particular section of the workplace or move the operation of business where there was a suspected contravention of the Act.<sup>163</sup>

Together Queensland supports the reinstatement of WHS measures to allow HSRs to take preventative action in the workplace.<sup>164</sup>

#### **4.10 Committee comments**

The non-government Members of the Committee do not support granting HSRs the ability to direct perceived unsafe work cease. The non-government Members believe individual employees are the most appropriate persons to make a determination about whether or not work should continue and it should remain in their purview. Many submissions echoed this point of view including those from the ACCI, the CCIQ and the ASMC.

Government Members note that if an individual considers they are working in a hazardous situation, he/she may certainly choose to cease work on his/her own volition. However government Members consider that the ability of an HSR to direct that unsafe work cease is an important safety mechanism, particularly where vulnerable groups, such as young people, disabled people, and those from non-English speaking backgrounds, are involved, and/or workers who are new or unfamiliar with their work environment. They also note the judgment of the ALA that some workers may fear that, if they cease work of their own accord, as a result of what they perceive to be a hazardous situation, they may lose their job or be disciplined in some way.

Government Members note the substantial body of evidence which was submitted to the Committee, largely by the Department (upon the Committee's request) that substantiates the importance to workplace safety of involving all workplace parties in the management of work health and safety risks. This includes enabling employees to election their own HSR, allowing those HSRs to inspect workplaces, and enabling them to take action to improve WHS, including by directing that unsafe work cease.

Government Members consider that an HSR who is elected by his/her peers and is therefore trusted and supported by those peers, who will have an established relationship with the PCBU, and who has been trained to identify and assess WHS issues – is more likely to have influence with both his/her peers and with the PCBU, and is going to be best qualified to make a decision about whether a work practice should cease.

For these reasons, government Members support the amendment.

#### **4.11 Clause 22 – Amendment of section 86 (Worker to notify if ceases work)**

Clause 22 is a consequential amendment to section 86 as a result of reinserting section 85 so that an HSR can direct a worker in their work group to cease work.

#### **4.12 Clause 23 – Replacement of section 119 (Notice of entry)**

The explanatory notes state that clause 23 replaces section 119 (Notice of Entry) which sets out the provisions regarding notice after entry by a WHS entry permit holder.<sup>165</sup>

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<sup>162</sup> Correspondence to FAC from DJAG dated 12 June 2015: 9

<sup>163</sup> Queensland Teachers' Union, Submission 25: 3

<sup>164</sup> Together Queensland, Submission 24

<sup>165</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 9

The explanatory notes stipulate that new section 119(1) requires a WHS entry permit holder to provide notice, in accordance with the regulations, to the relevant PCBU and the person with management or control of the workplace as soon as is reasonably practicable after entering a workplace under section 117 of the WHS Act to inquire into a suspected contravention. The contents of the notice must comply with the regulations.<sup>166</sup>

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

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

Proposed new section 119(3) provides that the notice requirements in section 119(1) do not apply to entry to a workplace under section 120 of the WHS Act to inspect or make copies of employee records or records or documents directly relevant to a suspected contravention that are not held by the relevant PCBU.<sup>167</sup>

Proposed new section 119 is as follows:

**119 Notice of entry**

(1) A WHS entry permit holder must, as soon as is reasonably practicable after entering a workplace under this division, give notice of the entry and the suspected contravention, as prescribed by regulation, to -

- (a) the relevant person conducting a business or undertaking; and
- (b) the person with management or control of the workplace.

(2) Subsection (1) does not apply if to give the notice would -

- (a) defeat the purpose of the entry to the workplace; or
- (b) unreasonably delay the WHS entry permit holder in an urgent case.

(3) Subsection (1) does not apply to an entry to a workplace under this division to inspect or make copies of documents mentioned in section 120.

The Committee received several submissions opposing the amendments to section 119 which gives WHS entry permit holders the right to gain immediate access to a workplace for suspected contraventions. NECA highlighted that the disruptions to worksites that occurred previously in 2012 resulted in 'businesses having to capitulate or face bankruptcy in the face of project delays and contractual penalties and delayed milestone payments'.<sup>168</sup>

Submitters who have outlined concerns that this amendment will be open to misuse by union officials to gain access to construction sites for industrial purposes include the Ai Group, CCF, Queensland Major Contractors Association (QMCA), Master Painters Australia (MPA), BSCAA, Master Builders, MPAQ, MEA, CICA, and AMMA.

The CCF explained that the proposed amendment:

*...would allow any WHS permit holder to enter a workplace without the prior knowledge of any business'.<sup>169</sup>*

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<sup>166</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 9

<sup>167</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 9

<sup>168</sup> National Electrical and Communications Association, Submission 1: 2

<sup>169</sup> Civil Contractors Federation, Submission 6: 3

MPAQ submits that the removal of the 24 hour notice requirement will have the likely effect of exacerbating the right of entry provisions for purposes other than intended.<sup>170</sup> Master Builders emphasised that their members have:

*...routinely face unlawful right of entry to building sites by permit holders who simply refuse to follow the rule of law in Queensland.*<sup>171</sup>

They consider that the proposed new section 119(2) seeks to undermine the rights of the PCBU/Occupier. Master Builders submit that the proposed section would provide an 'excuse for failing to give the PCBU any reasons for entry if it doesn't suit the permit holder'.<sup>172</sup>

Master Builders stated:

*The introduction of the 24-hour restriction for entry in line with the Fair Work Act was to set in place an orderly management of safety issues. It was not designed to keep the unions out. It was designed to protect the interests of the occupiers with the interests of the workers so that safety could be managed better. It allowed for entry with 24 hours' notice.*<sup>173</sup>

The Committee sought from stakeholders some examples or cases where witnesses were aware of misuse of the right of entry provisions or where safety issues had warranted the need of WHS permit holders to enter the site under section 119.

Master Builders highlighted that over 90 per cent of the 120 individual cases or disputes on right of entry reported to the OSFWQ over the past 12 months were in the construction sector. Master Builders drew attention to the record which showed that more than half of the investigation involved contested entry where the permit holder has not complied with 24 hour notice or argued that they did not need to.<sup>174</sup>

The CFMEU refuted the claims made by Master Builders about the disputes over right of entry, pointing out a number of factors including (i) evidence, in some instances, of underlying work health and safety issues (ii) in other instances, lack of information, about any underlying work health and safety issues that might have explained entry under WHS legislation (iii) officials in questions having been invited on to the site or not being on site at all (iv) legitimate entry under the current WHS Act.<sup>175</sup>

Master Builders and HIA also provided some examples of worksite disruption by a WHS permit holder. Details of these examples are included in the additional information provided to the Committee which is available from the Committee secretariat and published on the Committee's web page.

Whilst still preferring that the proposed amendments not be passed, Master Builders offered the following compromise solution:

*Master Builders believes there is a compromise solution that better balances and manages the competing interests with respect to WHS entry requirements. The Government should maintain the 24 hours' notice requirement for WHS entry purposes but can provide one exception for immediate entry for WHS permit holders in the event of a "Notifiable Incident" as defined under section 35 of the WHS Act.*

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<sup>170</sup> Master Painters Association, Submission 1: 1

<sup>171</sup> Master Builders, Submission 23: 3

<sup>172</sup> Master Builders, Submission 23: 3

<sup>173</sup> Mr Crittall, Master Builders, Public Hearing 15 June 2015: 12

<sup>174</sup> Correspondence to FAC from DJAG dated 12 June 2015: 45-46

<sup>175</sup> Correspondence to FAC from CFMEU dated 23 June 2015: 6

A “Notifiable incident” is clearly defined in the legislation. A notifiable incident includes “a death of a person, a serious injury or illness of a person or a dangerous incident. A “serious incident” is clearly defined and includes such things as: immediate treatment as an in-patient, an amputation, serious head injury, serious eye injury etc. A “dangerous incident” includes such things as: an uncontrolled escape, spillage or leakage, an uncontrolled implosion, explosion or fire, an electric shock, a fall or release from a height of any plant, substance or thing, the collapse or partial collapse of a structure etc.

PCBUs are currently obligated to notify the regulator immediately after becoming aware that a notifiable incident has occurred. Master Builders contends that all the Government has to do is to amend the current legislation with an exception to the ROE requirement that allows immediate entry for permit holders if a “Notifiable incident” has occurred. If somebody has been seriously injured or a potential exposure has occurred the WHS permit holders can have immediate access to represent their members and ensure everything is being managed effectively. WHS permit holders would have clear boundaries upon which they could access a workplace immediately mirroring the notification requirements applicable to PCBUs. The OFSWQ who receive the initial notification from the PCBU could contact the relevant union as part of managing the notification process.

Allowing an exemption that allows for immediate entry of WHS permit holders in the event of a notifiable incident removes any perception that the PCBU’s are somehow trying to keep the unions away from becoming involved in genuine health and safety issues. The unions could not use this section for immediate entry unless there has been an incident that requires them to assist immediately. All other issues regarding safety can be managed by giving the appropriate and current 24 hours’ notice.<sup>176</sup>

The Crane Industry Council of Australia (CICA) supported the Master Builders’ submission and stated that they strongly opposed the proposal to restore the right of entry power allowing union representatives holding WHS entry permits to gain immediate access to a workplace to inquire into a suspected contravention of the WHS Act.<sup>177</sup>

They stated:

*We endorse Master Builders’ view that health and safety has become simply a bargaining tool by some unions and repeal of the current WHS Right of Entry requirements for permit holders will see a return to a blatant and complete disregard for any rights of the occupier and an abuse of union power without any consequences of those breaches.*<sup>178</sup>

The department explained that the Act and proposed clause 23 does not give a WHS entry permit holder an unconditional right of entry. The department stated:

*In the context of the Fair Work Act 2009, it has been held that a statutory right of entry should not be construed as conferring any greater right than is necessary to achieve the statutory objective and accordingly the common law rights of an occupier are only to be diminished to the extent absolutely necessary to give effect to the right conferred. Courts have stated that permit holders have responsibilities when diminishing the rights of an occupier and the privilege of being able to enter someone else’s premises without notice ‘should be exercised with due acknowledgement of the rights of the occupier’.*<sup>179</sup>

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<sup>176</sup> Master Builders, Submission 23: 13-14

<sup>177</sup> Crane Industry Council of Australia, Submission 31

<sup>178</sup> Crane Industry Council of Australia, Submission 31

<sup>179</sup> Correspondence to FAC from Master Builders dated 23 June 2015: 1

The department also advised that where a PCBU calls in an inspector if there is a dispute over the arrangement under which the right-of-entry holder has access to a workplace, the inspector can make a judgement on whether there is any misuse of the right of entry provision.<sup>180</sup> The department explained that in cases where a WHS entry permit holder has misused their entry powers, the Act provides that the regulator, a PCBU or other person affected by the right of entry can apply to the Queensland Industrial Relations Commission (QIRC) to revoke or suspend the WHS entry holder's permit.<sup>181</sup>

The department also highlighted that court proceedings may also be brought against a person for a contravention of a WHS civil penalty provision (sections 254 to 266 of the WHS Act).<sup>182</sup>

Submitters who support the amendment disagree that clause 23 enables unions to misuse the right of entry provisions. The QNU provided an example where the 24-hour notice provision enabled the employer to make the workplace appear safe, despite their members raising concerns about their exposure to occupational violence resulting in staff injuries at that workplace.<sup>183</sup> The QNU emphasised that they would only use the right of entry provision on issues around workplace violence as they post the greatest risk to their members.<sup>184</sup> The QNU also advised that they have only used immediate right of entry on two occasions since legislation provided this form of entry to a workplace. They stated that their relationship with Queensland Health is of a collaborative nature and they are able to engage with members and management around emergent health and safety issues without the need to invoke a right of entry.<sup>185</sup> The IEUA-QNT advised that there are a number of examples where union officers' access to worksites has prevented serious injury or illness. The IEUA-QNT provided the following examples:

*One example from our files involves a laboratory technician in a secondary school, who made repeated requests to administration to have a malfunctioning chemical fume cupboard (an essential piece of safety equipment located in the Science department) repaired. Administration repeatedly refused this request, on grounds that the repairs were prohibitively expensive. Only when union officials became involved, and pointed out the school's legal obligation to comply with WHS legislation, did the Principal consent to allocation of funds for the repair.*

*A second case study relates to a school Principal who authorised a building extension that used copper chromium arsenate (CCA) treated timber, which was left exposed and unvarnished. CCA-treated timber is a restricted chemical product that is not permitted for use in children's play equipment. Although the school had no elected WHS representative, union members contacted their local organiser when they became concerned about children playing around the building and being exposed to chips and splinters from the CCA-treated wood. When the union organiser contacted the Principal and explained the members' concerns, the Principal agreed to have the untreated wood varnished. In this case, the employer was simply unaware of the risk, until it was pointed out by health and safety representatives, supported by union officials.<sup>186</sup>*

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<sup>180</sup> Mr Goldsbrough, Public Departmental Briefing 22 June 2015: 9

<sup>181</sup> Correspondence to FAC from DJAG dated 12 June 2015: 4

<sup>182</sup> Correspondence to FAC from DJAG dated 22 June 2015: email from Bradley Bick

<sup>183</sup> Queensland Nurses' Union, Submission 3: 5-6

<sup>184</sup> Mr Gilbert, Queensland Nurses' Union, Public Hearing 15 June 2015: 32

<sup>185</sup> Correspondence to FAC from Queensland Nurses' Union dated 23 June 2015: 3

<sup>186</sup> Correspondence to FAC from IEUA-QNT dated 22 June 2015: 2

The CFMEU advised that in regards to the disputes reported to the OSFWQ, the allegation of non-compliance with the notice requirement is recorded but ‘there is an absence of any commentary of the underlying work health and safety issue that might have explained the alleged entry’.<sup>187</sup> They also refute the claims that permit holders were removed from sites by the Queensland Police.<sup>188</sup>

The CFMEU explained that since October 2014, their organisation had begun to compile a log of safety issues reported to their safety hotline. The CFMEU also provided case studies and examples of safety incidents. Details of these examples are included in the additional information provided to the Committee which is available from the Committee secretariat and published on the Committee’s web page.

The QTU submitted that under the current legislation, their officers are prevented from entering schools and TAFE institutes to speak with and assist members in relation to WHS matters within 24 hours of a suspected contravention of the Act. They stated:

*QTU members over many years have indicated their support for having access to QTU officers as soon as possible after a WHS incident. As the QTU stated in its submission to the previous government, when QTU officers have had immediate access to schools and TAFE institutes, this has not been the subject of one complaint by any party. It is also interesting to note that the Department of Education and Training has never indicated or expressed any concern to the QTU about QTU officers having immediate access to schools and TAFE institutes where a WHS incident may have occurred.*<sup>189</sup>

The Committee sought examples of where access to these provisions may have improved work place health and safety. The QCU representative provided the following example:

*The company I work for are very secretive with their health and safety. They prefer to control it than to consult with the worker about it. I have an awesome photo on my phone of a truck that rolled down a cliff not too long ago. As far as we know, the incident did get to work health safety Queensland. It took a little bit of time and it took a bit of prodding and rumours getting around the site and once the whole site found out, the company had to essentially have a meeting with the union officials to get down to the bottom of it. If the situation had been sorted out on the night and the union officials with REO had visited the site on the evening, the cloud would not have been there, the transparency would have been 100 per cent clarity and the issue never would have gone around in circles, basically. To this day we still do not know what the outcome of that investigation was.*<sup>190</sup>

#### 4.13 Committee comments

The Committee was unable to reach agreement with respect to the provisions which allowed immediate access to WHS permit holders. The non-government Members considered that it is appropriate that notice be provided before a WHS permit holder enters a workplace. The non-government Members of the Committee are cognisant that the misuse of right of entry provisions is experienced particularly in the construction and building industry and all employers generally adhere to work health and safety guidelines.

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<sup>187</sup> Correspondence to FAC from CFMEU dated 23 June 2015: 7

<sup>188</sup> Correspondence to FAC from CFMEU dated 23 June 2015: 8

<sup>189</sup> Queensland Teachers’ Union, Submission 25: 3

<sup>190</sup> Mr Thomas, Public Hearing 15 June 2015: 24

The non-government Members of the Committee strongly believe that it is inappropriate that those seeking to enter workplaces for industrial relations or other such purposes that result in disruptions, be allowed to have unfettered access to worksites. The non-government Members consider that the Master Builders proposal regarding a death or serious injury is worthy of strong consideration and engaged in discussions with government Members regarding a compromise; however, such discussions did not elicit a favourable outcome. The non-government Members of the Committee are strongly of the view that immediate access should not be granted to permit holders who cannot prove that their intentions are related to safety issues. The non-government Members of the Committee noted that there have been allegations made by both parties and bore that in mind during their consideration of the issues.

Government Members note the concerns raised by a number of submitters, of alleged misuse by permit holders to gain access to work sites for industrial purposes. Equally, they acknowledge the concerns raised by a number of submitters about alleged work health and safety breaches by employers. On the basis of evidence submitted to the inquiry, government members did not concur with nongovernment members that all employers generally adhere to work health and safety guidelines.

They also note the evidence presented by a number of stakeholders to the Committee that many of the issues raised about alleged breaches – by both employers and union officials - are said to have occurred in the building and construction industry. In examining this evidence, government Members also note the high incidence of serious work health and safety incidents in the building and construction industry.

Government Members also noted that the department has advised that no penalties have been handed down to date and that although six allegations of breach have been before the QIRC for nearly 12 months, these are currently in suspension.

Government Members abhor the misuse of work health and safety regulations by any rogue parties – whether employer, employee or union official – for industrial purposes, and consider that strong penalties should be enforced on any non-compliant parties in order to deter any potential breaches.

Government Members consider that rogue permit holders who choose to flout the rules regarding right of entry provisions will probably continue to do so regardless of whether a notice period is required, citing the breaches which were alleged to have occurred while the 24 hour notice period has been required.

However with regard to this particular amendment, it is the view of government Members that the focus must be on the prevention of serious injury and/or illness and/or possible death; and that the issue of breaches, and the penalties for any breaches, are dealt with in later amendments.

Government Members consider that, although there has been a decline in the numbers of serious incidents over successive years, serious incidents nevertheless continue to occur, and this is not acceptable. They consider that even one serious injury, or one death, is one serious injury or death too many – and that the prevention of these incidents must be the primary consideration of the Committee in examining the amendment. Government Members proposed this position to non-government Members. However non-government Members did not accept the government members' position.

Government Members did not consider that they had been presented with any evidence during the Committee's inquiry which justified an employer needing 24 hours before they could allow a union official to enter a potentially hazardous work situation. Government Members disagreed with non-government Members that the proposed amendment gives union officials unfettered access to work sites, noting that under the amendment proposed union officials are in fact fettered by the reasonable apprehension of a suspected breach.

For all the reasons outlined above, government Members support the amendment.

The non-government Members of the Committee noted that there have been allegations made by both parties and bore that in mind during their consideration of the issues.

#### 4.14 Clause 24 – Amendment of section 123 (Contravening WHS entry permit conditions)

The explanatory notes state that clause 24 amends section 123 to reduce the maximum penalty from 200 penalty units to 100 penalty units.<sup>191</sup>

The department advised that the reduction of the maximum penalty from \$20,000 to \$10,000 will restore the original penalty amount that existed prior to the 2014 amendments. The department also stated that this amendment will bring Queensland back into line with current national model WHS laws.<sup>192</sup>

The MPAQ strongly opposed this clause and suggested that penalties should be increased, rather than decreased. They outlined that decreasing the penalty invariably increases the likelihood of people contravening the permit conditions.<sup>193</sup> The BSCAA questioned the proposal to reduce the fine payable if a union official breaches the requirements of a permit holder.<sup>194</sup> The ACCI emphasised that a breach of a WHS' right of entry should invoke a penalty and there should not be a reduction for an individual who has breached their conditions.<sup>195</sup> The HIA also expressed their opposition to the proposed amendment. They submitted that the penalty for failure to provide notice is a necessary mechanism of redress and discouragement for any abuse of right of entry provisions.<sup>196</sup>

The Committee sought comment on the proposed reduction in penalties. During the Committee's deliberations, the non-government Members highlighted the statements made by the Master Builders in the public hearing where they stated:

*I can hardly contain myself in wanting to tell you how disgraceful it would be to reduce penalties knowing that it is the way in which the CFMEU operates in this state, knowing the level of disruption that you are giving a free ticket to, knowing that the evidence is so compelling and so overwhelming that right-of-entry breaches have become the standard way to get onto projects rather than giving the appropriate notice. Any incentive that encourages that behaviour verges on the irresponsible.<sup>197</sup>*

QNU stated that:

*Our preference as a union is always to work collaboratively with employers to create a safe system of work. That is what our overriding objective is and not to be focusing on penalties either way. In terms of the changes that had actually been made to things like occupational violence—and we do know that there were changes to the legislation to increase penalties for people who had assaulted nurses—even though we welcomed that to a certain extent it is akin to putting the ambulance at the bottom of the cliff rather than a fence at the top of the cliff. So what we really work very hard to do and invest a lot of time and resources in is trying to keep our members' systems of work as safe as possible. That is why it is really important to have a collaborative framework and not to have it as being adversarial. That is why we are very concerned about the shift in the last couple of years that takes it away from being one where we would problem-solve jointly together and we have the ability to get into workplaces to do that and to see what is going on. That is why we see it as better to do that rather than actually trying to fix a problem after the event.<sup>198</sup>*

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<sup>191</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 9

<sup>192</sup> Correspondence to FAC from DJAG dated 12 June 2015: 23, 44, 53

<sup>193</sup> Master Plumbers' Association of Queensland, Submission 27: 3

<sup>194</sup> Building Service Contractors' Association of Australia, Submission 22: 2

<sup>195</sup> Australian Chamber of Commerce and Industry, Submission 11: 4

<sup>196</sup> Housing Industry Association, Submission 7: 2

<sup>197</sup> Mr Crittall, Master Builders, Public Hearing 15 June 2015: 17-18

<sup>198</sup> Ms Mohle, Queensland Nurses' Union, Public Hearing 15 June 2015: 36-37

The IEUA-QNT submitted that the increase introduced in 2014 was essentially arbitrary, therefore they consider a reduction to be appropriate.<sup>199</sup> United Voice stated that the reduction or removal of these provisions.<sup>200</sup> The CFMEU also supported the reduction of the maximum penalty from 200 to 100 penalty units.<sup>201</sup>

The Master Builders suggested that a penalty regime that includes fines, suspension and revocation of permits with additional penalties for hindering and obstruction offences be implemented.<sup>202</sup> They stated:

*You may start off with fines, you then might look into suspensions and you may then look at complete revocation of your permit. You have a pyramid of sanctions so that only the serial offenders are the ones affected. If all the other unions say to your committee, 'We abide by the right-of-entry laws; we don't unduly hinder and obstruct; we don't take unlawful conduct', then at the last end we are saying that at least then enhance the penalties and sanctions for unlawful conduct.*<sup>203</sup>

The Committee asked the department whether an ever-increasing penalty regime was possible. The department explained that the removal of permit where someone has breached their conditions is considered by the Industrial Relations Commission to be a serious breach and an appropriate course of action. The department stated:

*The laws are designed so that where people do commit serious breaches they can immediately lose their right to enter those workplaces.*<sup>204</sup>

The department also outlined that the QIRC has the power to take a right-of-entry permit off a permit holder who breaches their entry conditions. The department explained:

*Where that occurs, that is a significant penalty against an official because in many ways it impacts on their ability to do their job, and that is why we wanted a very significant penalty within the legislation.*<sup>205</sup>

The Committee sought from the department an indicative timeframe for the QIRC's process of making a determination and the status of the right of entry permit while the case is under determination. The department advised that the right of entry permit is not automatically suspended and they would still have the ability to use their entry permit while due process is being shown.<sup>206</sup> The department stated that as none of the six applications made to revoke a WHS entry permit have been finalised at the time of the introduction of the Bill, a timeframe cannot be provided.<sup>207</sup>

#### 4.15 Committee comments

The Committee was unable to reach agreement in regard to the amendments to reduce the penalty units.

The non-government Members of the Committee consider that should the provision to allow for right of entry to a work site be successful during Consideration in Detail it must be coupled with harsher penalties, rather than a reduction for non-compliance or breaches.

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<sup>199</sup> Independent Education Union Australia, Queensland and Northern Territory Branch, Submission 14: 3

<sup>200</sup> United Voice, Submission 15: 3

<sup>201</sup> CFMEU, Submission 12: 10

<sup>202</sup> Master Builders Queensland, Submission 23: 15

<sup>203</sup> Mr Crittall, Master Builders, Public Hearing 15 June 2015: 18

<sup>204</sup> Mr Goldsbrough, Public Departmental Briefing 22 June 2015: 4

<sup>205</sup> Mr Goldsbrough, Public Departmental Briefing 22 June 2015: 4

<sup>206</sup> Mr Goldsbrough, Public Departmental Briefing 22 June 2015: 4

<sup>207</sup> Correspondence to FAC from DJAG dated 25 June 2015: 3

The non-government Members strongly believe that if current penalties are not adequate in deterring those who regularly breach the right of entry provisions then the proposed halving of penalties is an insult to those who suffer the consequences of such a breach.

The non-government Members of the Committee believe penalties for a breach of the right of entry provisions should be significantly increased not halved. During discussions government Members had agreed current fines of 200 penalty units are not a deterrent and indicated they believed the possible loss of permit would be a sufficient deterrent for those who breach the right of entry provisions. The non-government Members, during their consideration of the issues, reflected on the average length of time an application to revoke a permit presently takes and further consider that a suspension of permit could follow from the penalties while an application to revoke a permit was on foot. Cognisant of the length of time current applications take, the non-government Members would urge timely consideration of these matters once before the Commission to ensure the person whose permit would be suspended is afforded procedural fairness and natural justice.

The non-government Members note the government members' arguments of consistency with the model WHS laws; however, highlight there are other areas of the Bill that are inconsistent with the model national laws.

Government Members abhor the misuse of work health and safety regulations by any rogue parties – whether employer, employee or union official, for industrial purposes. Government Members consider that strong and effective penalties should be imposed in all instances, and in a timely manner, where breaches occur.

Government Members note that the imposition of 100 penalty units is consistent with the approach adopted for the contravention of WHS entry permit conditions in other jurisdictions, and accept the amendment as proposed. They also note the importance the building a penalty regime proportionate to the seriousness of the breach.

Although the imposition of 200 penalty units for the contravention of WHS entry permit conditions may seem to be the equivalent of a “big stick” approach, no evidence was presented to the Committee to show that such a penalty is actually effective in deterrence – and that in fact the threat of 200 penalty points was in place when a number of breaches were alleged to have occurred.

It is the view of government Members that deterrence is too critical an issue to become embroiled in subjective perceptions, and that work needs to be done to ensure that any deterrence measures are real and effective. Government Members note anecdotal evidence, for example, which suggests that the revoking of WHS permits would be the most effective deterrent, particularly if it occurred in a timely fashion. They also note other suggestions for deterrence which were put to the Committee, including from the QNU, which emphasized the need for encouraging a collaborative environment in which employer groups, union officials and employees can negotiate on WHS issues to achieve the best outcomes – an environment which they consider was not in place under the current WHS Act.

Government Members strongly recommend that the Minister investigate measures such as these, and others, which are not only seen to be effective deterrents for breaches of the WHS laws, but can also be proven to be so.

#### **4.16 Clause 25 – Omission of section 143A (WHS permit holder must not fail to give required notice of entry)**

Clause 25 omits section 143A so that it is no longer an offence for a WHS entry permit holder to enter a workplace without providing notice under new section 119 or section 120 or section 122 of the WHS Act.<sup>208</sup>

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<sup>208</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 9

The ACCI maintains that the 24 hours' notice of entry provided to PCBU's should not be removed and that a penalty should still apply if the requirement is not met.<sup>209</sup> The department explained the penalty for WHS permit holders failing to give the required notice of entry was not part of the national model WHS laws. They stated that this was only added in 2014 when the requirement for WHS permit holders to provide 24 hours' notice before entering a workplace to investigate a suspected contravention was introduced. The department advised that as the 24 hours' notice is being removed, the penalty for failing to comply with this requirement is also being removed.<sup>210</sup>

#### 4.17 Clause 26 – Insertion of new part 16, division 4

Clause 26 inserts a new Part 16 division 4 which clarifies that the new section 36(d) does not apply to injuries or illnesses sustained before the commencement of section 36(d), even if the injury or illness causes a person to be absent for more than four days after the commencement of section 36(d).<sup>211</sup>

#### 4.18 Clause 27 – Amendment of schedule 2A (Reviewable decisions)

Clause 27 makes consequential amendments to the reviewable decisions in Schedule 2A as a result of reinserting section 85 so that an HSR can direct a worker in their work group to cease work.<sup>212</sup>

## 5 Compliance with *Legislative Standards Act 1992* – Fundamental Legislative Principles

Section 4 of the *Legislative Standards Act 1992* states that fundamental legislative principles (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

The Committee examined the Bill's consistency with FLPs. This section of the report discusses potential breaches of the FLPs identified during the Committee's examination of the Bill and includes any reasons or justifications contained in the explanatory notes and provided by the department.

The explanatory notes state:

*The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.*

This report makes reference to the former Scrutiny of Legislation Committee (SLC). By way of background, two reviews conducted by the Electoral and Administrative Review Commission (EARC) in 1991 and 1992 recommended Queensland replace its then Committee of Subordinate Legislation with a Scrutiny of Legislation Committee with an expanded remit to allow it to review both primary legislation (Bills) and subordinate legislation (regulations and statutory instruments).

The *Legislative Standards Act 1992* saw FLPs enshrined into law and the Committee of Subordinate Legislation then began scrutinising subordinate legislation to ensure there had been sufficient regard given to the newly enacted FLPs.

The *Parliamentary Committees Act 1995* established a new SLC to 'examine all Bills and subordinate legislation to consider the application of FLPs to particular Bills and subordinate legislation, and the lawfulness of particular subordinate legislation'.

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<sup>209</sup> Australian Chamber of Commerce and Industry, Submission 11: 4

<sup>210</sup> Correspondence to FAC from DJAG dated 12 June 2015: 23

<sup>211</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 9

<sup>212</sup> Explanatory Notes, *Work Health and Safety and Other Legislation Amendment Bill 2015*: 9

A review of Queensland's Parliamentary committee system in 2010 led to the abolition of the dedicated SLC in favour of the current system of portfolio-based committees that have operated since mid-2011. Pursuant to section 93 of the *Parliament of Queensland Act 2001* it is now the role of each portfolio committee to consider any FLP issues contained in Bills and subordinate legislation within its portfolio area. The Committees are assisted in this work by a dedicated secretariat which performs a very similar role to the former SLC by examining bills and subordinate legislation for FLP compliance.

The considerable body of work generated by the former SLC and its predecessor Committee regarding FLP issues remains a valuable source of information for the current portfolio committees when considering bills and sub-ordinate legislation. Similarly, the Office of Parliamentary Counsel (OQPC) frequently references the findings of the former SLC in its work *Fundamental Legislative Principles: The OQPC Notebook*, a very detailed and evolving examination of FLP issues.

### **5.1 Rights and liberties – Section 4(2)(a) *Legislative Standards Act 1992* – Does the Bill have sufficient regard to the rights and liberties of individuals?**

Clause 21 inserts a new section 85 into the *Work Health and Safety Act 2011* (the Act) to empower a health and safety representative (HSR) to direct a worker to cease work if the HSR has a reasonable concern that to carry out the work would expose the worker to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard. Generally such a direction cannot be given unless the HSR has first consulted with the person conducting the business or undertaking and attempted to resolve the WHS issue. If however the risk is so serious and immediate or imminent that it is not reasonable to first consult, the HSR may direct the worker to cease working without prior attempts to consult or resolve the matter, and then consult with the owner/manager as soon as practicable *after* the cease work direction has been given.

Consequential amendments also occur to sections 68, 82, 83 and 86 (clauses 17, 19, 20 and 22 respectively) to reflect the s.85 power to give a cease work direction.

The SLC considered the reasonableness and fairness of treatment of individuals as relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

One such consideration was that the consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation. The OQPC Notebook states “the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy”.<sup>213</sup>

The Explanatory Notes addressed the appropriateness of the ‘cease work’ power (pp3-4):

*The power of a trained HSR to direct a worker to cease unsafe work will be qualified in that an HSR must form a reasonable concern that performance of the work would expose the worker to a serious risk to their health and safety emanating from the immediate or imminent exposure to a hazard.*

*The power to direct unsafe work to cease will also be governed by the obligation to consult with a PCBU prior to issuing a direction to cease work. For example, Part 5 Division 5 of the WHS Act requires parties to make a reasonable attempt to resolve an issue, and where this fails, enables the issue to be referred to the regulator. Where it is not reasonable to consult with a PCBU due to imminent safety risk, consultation with a PCBU must occur as soon possible after the direction is issued. A PCBU may also direct a worker to carry out suitable alternative work at the same or another workplace if that work is safe and appropriate for the worker to carry out until the worker can resume normal duties and does not affect the service period of the worker's employment.*

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<sup>213</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, page 120.

*Restoring this provision will also align with the cessation of work provisions contained in the model WHS laws and adopted by other participating jurisdictions.*

A direction to employees to cease work will obviously lessen the productivity and output of the relevant business for the duration of the stop work period. Even a temporary stop work to investigate an allegedly unsafe working environment could mean that production quotas and/or related contractual obligations might not be met. In this sense it can be seen that a direction to employees to cease work will negatively impact (even if temporarily) on the rights of the business owner/manager to secure continued productivity and viability of their business undertaking.

Any detriment to a business owner/manager caused by a temporary cessation of production to investigate an alleged hazard must however be measured against the detriment that might arise if a potentially or actually hazardous workplace situation is allowed to exist. Permitting a dangerous work situation or practice to be continued could result in an employer/owner/manager being morally, ethically and legally responsible for harm or injury occurring to a person or persons in their employ. From a practical viewpoint it is also the case that, should an industrial accident occur, the workplace would likely have to be completely shut down for a considerably longer period, pending an investigation of the cause of the accident. A complete shutdown arising from an industrial accident would obviously have far greater negative implications for the future viability of the business and the continued employment of its workforce, as well as legal liability and reputational damage for a business if its workers were injured because of an unaddressed hazard that was known to the employer.

## **5.2 Committee comments**

The Committee considers that, whatever temporary detriment may arise from a cessation of production while alleged workplace hazards are investigated, on balance, the rights of workers to have a safe working environment should be prioritised over the right of an employer to secure continuous productivity.

## **5.3 Power to enter premises – Section 4(3)(e) *Legislative Standards Act 1992* – Does the Bill confer power to enter premises and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?**

Clause 17 amends section 68 of the *Work Health and Safety Act 2011*, including by omission of subsections 68(3A), (3B) and (3C) which will remove the requirement for health and safety representatives (HSRs) to give 1-14 days' notice that a person assisting the HSR will be entering a workplace.

Reflective of this change, clause 18 omits section 71(5A) of the Act so that a person conducting a business or undertaking will no longer be allowed to refuse to grant access to a workplace to an HSR's assistant because the HSR has not given (the currently required) notice of proposed entry.<sup>214</sup>

Clause 23 replaces section 119 of the Act to allow for notice of entry to be given to the business owner or manager, by a WHS entry permit holder, as soon as is reasonably practicable *after* entering a workplace, unless to give such notice would defeat the purpose of the entry, would unreasonably delay the WHS entry permit holder in an urgent case (ie. an emergency), or where the entry is to inspect or make copies of documents under section 120 (such as employee records directly relevant to a suspected WHS contravention).

This stands in contrast to the current section 119 which requires notice (of a proposed entry and the suspected WHS contravention to be investigated) to be given to the owner/manager of a workplace, 1-14 days *before* the WHS entry permit holder proposes to enter the property.

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<sup>214</sup> Access can still be refused on reasonable grounds under section 71(5)

Clause 25 omits section 143A from the Act so that it is no longer an offence for a WHS entry permit holder to enter a workplace without providing notice under sections 119, 120 or 122 of the Act.

Legislation should typically confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.<sup>215</sup> The OQPC handbook provides that this principle supports a long established rule of common law that protects the property of citizens. Power to enter premises should generally be permitted only with the occupier's consent or under a warrant issued by a judge or magistrate. Strict adherence to the principle may not be required if the premises are business premises operating under a licence or premises of a public authority. The former SLC's chief concern in this context was the range of additional powers that become exercisable after entry without a warrant or consent.<sup>216</sup>

THE OQPC Notebook states:

*FLPs are particularly important when powers of inspectors and similar officials are prescribed in legislation because these powers are very likely to interfere directly with the rights and liberties of individuals.*<sup>217</sup>

Residential premises in particular should not be entered except with consent or under a warrant or in the most exceptional circumstances.<sup>218</sup>

The explanatory notes for the Bill outline the history of these amendments, as follows:

*Before the amendments to the WHS Act under the Work Health and Safety and Other Legislation Amendment Act 2014, the WHS Act contained provisions that allowed:*

- *WHS entry permit holders to gain immediate access to a workplace to inquire into a suspected contravention of the WHS Act and provide notice as soon as is reasonably practicable afterwards; and*
- *an HSR to request the assistance of any person without providing notice.*

*The 2014 amendments introduced minimum 24 hours' notice requirements for both these access provisions. The intention of the Bill is to restore the original elements of the harmonised WHS Act.*

*The Office of Queensland Parliamentary Counsel (OQPC) notes that reinstatement of these provisions is unlikely to be of concern where there are appropriate safeguards and the power relates to entry into business premises and is justifiable for health and safety reasons.*

*Response:*

*WHS entry permit rights may only be exercised in limited circumstances, i.e. in relation to suspected contraventions that relate to, or affect, the health and safety of a worker. There are also a number of governance arrangements around exercising this power, in particular, entry powers can only be exercised during usual working hours, only in the area of the workplace where relevant workers work, and do not extend to entry of any part of a workplace that is used for residential purposes. The proposed amendment is also considered to be in the public interest with the main focus being to promote the health and safety of persons at the workplace.*

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<sup>215</sup> Legislative Standards Act 1992, section 4(3)(e).

<sup>216</sup> Alert Digest 2004/5, page 31, paras. 30-36; Alert Digest 2004/1, pages 7-8, paras 49-54; Alert Digest 2003/11, pages 20-21, paras 14-19; Alert Digest 2003/9, page 4, para. 23 and page 31, paras 21-24; Alert Digest 2003/7, pages 34-35, paras 24-27; cited in Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 45.

<sup>217</sup> Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 45.

<sup>218</sup> Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, page 46.

*The WHS Act clearly defines the functions and powers of an HSR to ensure they can perform this role effectively and reasonably. A person assisting an HSR is limited to providing assistance and they cannot exercise an HSR's functions and powers. If the person assisting the HSR also happens to be a WHS entry permit holder, the governance arrangements in the WHS Act that apply to WHS entry permit holder would be applicable to any action taken by that person as a WHS entry permit holder. Additionally, a person conducting a business or undertaking (PCBU) may refuse to grant an HSR assistant access to the workplace if there are reasonable grounds for doing so.*

#### 5.4 Committee comments

The Committee considers that the reinstatement of the pre-2012 position, such that notice is not required prior to entry when it is considered that there is an emergency WHS situation, is justified in light of the limits on the exercise of the entry powers as outlined above in the explanatory notes.

#### 5.5 Amendment of an Act only by another Act – Section 4(4)(c) *Legislative Standards Act 1992* – Does the Bill allow or authorise the amendment of an Act only by another Act?

Clause 16 replaces section 36 of the *Work Health and Safety Act 2011* with a new section 36 that is essentially the same as its predecessor, albeit it now includes within the definition of *serious injury or illness* an injury or illness that causes a person to be absent from their employment for more than four days.

Of concern regarding fundamental legislative principles, the definition of *serious injury or illness* also includes (under both the existing and proposed section 36) *any other injury or illness prescribed under a regulation*. Essentially therefore clause 16 operates as a Henry VIII clause as it allows the definition of what constitutes a serious injury or illness to be expanded from those items enumerated in section 36 of the Act to also include injuries or illnesses that are subsequently prescribed under a regulation.<sup>219</sup>

A Bill should only authorise the amendment of an Act by another Act.<sup>220</sup> A clause in an Act, which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action is defined as a Henry VIII clause. The former SLC's approach to Henry VIII clauses was that if an Act was purported to be amended by a statutory instrument (other than an Act) in circumstances that were not justified, the SLC would voice its opposition by requesting that Parliament disallow the part of the instrument that breaches the FLP requiring legislation to have sufficient regard for the institution of Parliament.<sup>221</sup> The SLC considered the possible use of Henry VIII clauses in the following limited circumstances:

- To facilitate immediate executive action;
- To facilitate the effective application of innovative legislation;
- To facilitate transitional arrangements; and
- To facilitate the application of national scheme legislation.<sup>222</sup>

The OQPC Notebook explains that the existence of these circumstances does not automatically justify the use of Henry VIII clauses, and, if the Henry VIII clause does not fall within any of the above situations, the SLC classified the clause as 'generally objectionable'.<sup>223</sup>

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<sup>219</sup> As noted above, this aspect of the section (potential for expansion by regulation) is unchanged from the current situation; the only change to the 'new' section 36 is that an injury or illness is defined as serious injury or illness when it causes the person to be absent from their employment for more than four days.

<sup>220</sup> *Legislative Standards Act 1992*, section 4(4)(c).

<sup>221</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, page 159.

<sup>222</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, page 159.

<sup>223</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, page 159; *Alert Digest 2006/10*, page 6, paras 21-24; *Alert Digest 2001/8*, page 28, para 31.

The Explanatory Notes for this Bill acknowledge the Office of Parliamentary Counsel's concern that:

*...this may be regarded as an objectionable Henry VIII clause or delegation of power unless it is for a justifiable use such as to facilitate immediate executive action for health and safety reasons, or to facilitate the application of national schemes of legislation.*

The departmental response to that OQPC concern as given in the explanatory notes is:

*The Bill allows the definition of 'serious injury or illness' to be further extended by subordinate legislation due to the breadth of possible injuries or illnesses. This extension is not intended to amend the provisions in question – they would still be read in the same way and any extension of the definition is limited to the objects of the WHS Act. Complex national legislative schemes, such as the one for work health and safety, needs to be facilitated by strong regulation making powers.*

The Committee asked the department to explain why it was appropriate to allow the definition of 'serious injury and illness' to be extended by subordinate legislation. The department advised:

*...the rationale for it is that it is part of model legislation and sometimes model legislation, because of the complexity of that, requires it to be drafted that way. There could be a number of instances where there is an emerging issue, and I will use legionella as an example. It is not a fantastic example, but there may be a time when there is a heap of problems with air conditioners in Brisbane and we need to make a regulation that we can give pretty much quick effect to for people to notify us of where people are getting legionnaire's disease. That is not a good example, but there could be some sort of infection that comes up that we need to be notified of and that regulatory power allows us to do that in an efficient way.<sup>224</sup>*

## 5.6 Committee comments

Notwithstanding the former SLC's objections to the use of Henry VIII clauses, the Committee considers that the limited scope of the regulation making power as outlined above, in combination with the Assembly's disallowance powers, provide sufficient regard to the institution of Parliament.

## 5.7 Proposed new or amended offence provisions

The following table details the proposed new or amended offence provisions:

Clause	Offence	Proposed maximum penalty
24	Amending s123 – Work Health and Safety Act 2011	24 penalty units

## 5.8 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

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<sup>224</sup> Mr Bick, Public Departmental Briefing 22 June 2015: 12

In respect of consultation, the explanatory notes advise that:

*...there has been no formal consultation as the proposals in the WHS Bill were announced as part of the Government's pre-election commitments in "Improving safety for Queenslanders at work".*

However, the Committee identified that the department had carried out informal consultation. This issue is considered in section 2.3 of this report.

**Appendices**

**Appendix A – List of Submissions**

<b>Sub #</b>	<b>Submitters</b>
1	National Electrical and Communications Association (NECA)
2	The Australian Industry Group (Ai Group)
3	Queensland Nurses' Union (QNU)
4	Australian Lawyers Alliance (ALA)
5	Australian Manufacturing Workers' Union (AMWU)
6	Civil Contractors Federation (CCF)
7	Housing Industry Association (HIA)
8	City of Gold Coast
9	Queensland Major Contractors Association (QMCA)
10	United Firefighters Union of Australia Union of Employees Queensland (UFUQ)
11	Australian Chamber of Commerce and Industry (ACCI)
12	Construction, Forestry, Mining and Energy Industrial Union of Employees, Queensland
13	Edward Gilmour
14	Independent Education Union Queensland and Northern Territory Branch
15	United Voice
16	Electrical Trades Union (ETU)
17	Queensland Law Society (QLS)
18	Queensland Council of Unions (QCU)
19	Australian Sugar Milling Council (ASMC)
20	Master Painters Australia Queensland (MPAQ)
21	Queensland Farmers' Federation (QFF)
22	Building Service Contractors Association of Australia (BSCAA)
23	Master Builders Queensland (Master Builders)
24	Together Queensland
25	Queensland Teachers' Union (QTU)
26	Australian Workers' Union (AWU)
27	Master Plumbers Association Queensland (MPAQ)

28	Queensland Tourism Industry Council (QTIC)
29	Master Electricians Australia (MEA)
30	Chamber of Commerce and Industry (CCIQ)
31	Crane Industry Council of Australia -Queensland Branch (CICA)
32	Australian Mines and Metals Association (AMMA)

**Appendix B – Officers appearing on behalf of the department at the public departmental briefings  
– Wednesday 3 June 2015 and Monday 22 June 2015**

<b>Witnesses</b>
Mr Bradley Bick, Director, Work and Electrical Safety Policy, Office of Fair and Safe Work Queensland, Department of Justice and Attorney-General
Mr Paul Goldsbrough, Senior Director, Policy & Workers' Compensation Services, Office of Fair and Safe Work Queensland, Department of Justice and Attorney-General

**Appendix C – Witnesses appearing at the public hearing – Monday 15 June 2015**

<b>Witnesses – Session 1 – 8:30am to 9:20am</b>
Mr Nick Behrens, General Manager, Advocacy, CCIQ
Ms Lindsay Carroll, Employee Relations Lawyer, AMMA
Ms Kim Harrington, General Manager – Business Strategy/Deputy CEO, QTIC
Mr Rod Hodgson, President, ALA
Ms Lisa Matthews, Senior Workplace Policy Adviser, AMMA
Ms Clare Murray, Chief Executive Officer, QFF
Mr Gary Sansom, QFF
Mr Garry Whiting, Executive Officer, Safety and Employee Relations, ASMC
Ms Kate Whittle, Senior Policy Advisor, CCIQ

<b>Witnesses – Session 2 – 9:30am to 10:20am</b>
Mr Martin Belfield, Manager, Workplace Relations, Master Builders
Mr David Bryant, Human Resources Manager and Membership Services Manager, MPAQ
Mr John Crittall, Director, Construction and Policy, Master Builders
Mr Damian Long, President, CCF
Mr Jason O’Dwyer, Acting Chief Operating Officer, MEA
Mr Craig Pollard, Executive Director, BSCA
Ms Laura Regan, Workplace Services Manager, HIA
Mr Warwick Temby, Executive Director, HIA

<b>Witnesses – Session 3 – 10:30am to 11:20am</b>
Mr Ashley Borg, Senior Industrial Officer, CFMEU
Mr Anthony Cooke, Industrial Officer, UFUQ
Mr John Martin, Research and Policy Officer, QCU
Mr Dermot Peverill, Industrial Officer, United Voice
Mr Brett Thomas, National Union of Workers Member, QCU

<b>Witnesses – Session 4 – 11:30am to 12:00pm</b>
Mr James Gilbert, Health and Safety Officer, QNU
Ms Beth Mohle, State Secretary, QNU
Ms Adele Schmidt, Research Officer, IEUA-QNT
Dr Liz Todhunter, Research and Policy Officer, QNU