Work Health and Saftey and other Legislation Amendment Bill 2023

Submission No: 6

Submitted by: Queensland Council of Unions

Publication: Making the submission and your name public

Attachments:

Submitter Comments:

Queensland Unions

Submission to the

Education, Employment and Training Committee

Work Health and Safety and Other Legislation Amendment Bill 2023

10 January 2024

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Table of Contents

Introduction

Queensland Unions is the peak council of unions in Queensland representing around 400,000 workers. Queensland Unions have been representing the voices of workers since 1885 and advocating for their industrial, social, and political rights since that time.

Work health and safety is a fundamental right for all workers, and all workers and their families should expect to go to and return from work every day safely.

The primary object of Australian model work health and safety laws, including the Queensland work health and safety legislative framework is to secure the health and safety of workers and workplaces by –

- protecting workers and other persons against harm to their health, safety, and welfare
- providing for fair and effective workplace representation, consultation, cooperation, and issue resolution in relation to work health and safety
- 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
- promoting the provision of advice, information, education, and training in relation to work health and safety
- securing compliance with this Act through effective and appropriate compliance and enforcement measures
- ensuring appropriate scrutiny and review of actions by persons exercising powers and performing functions under this Act
- providing a framework for continuous improvement and progressively higher standards of work health and safety, and
- 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

Importantly, in protecting workers and others against harm to their health and safety, the legislative framework provides that 'regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from particular types of substances or plant as is reasonably practicable'.

Consistent with the Terms of Reference for the Independent Review of the Work Health and Safety Act 2011 (Qld) (the Independent Review), the QCU made submissions to the Independent Review, in particular advocating for strengthening the framework supporting health and safety representatives, worker representation rights, and the WHS issue and dispute resolution processes.

The QCU welcomes and supports the changes outlined in the Work Health and Safety and Other Legislation Amendment Bill 2023 (Qld) (the Bill) which are consistent with the terms of reference of the Independent Review and also with the objectives of the existing WHS legislative framework. This Bill will ensure that Queensland's work health and safety laws continue to be nation leading, and place workers' safety at their heart.

HSR Support Service Survey

The Queensland Council of Unions established a Health and Safety Representatives Support Service (HSR SS) in early 2019 which now provides support to over 1,200 Health and Safety Representatives (HSRs) statewide.

In October 2022, the HSR SS conducted a survey of Health and Safety Representatives (HSRs) with respect to their role under the *Work Health and Safety Act 2011* (Qld) (WHS Act). Key findings from this survey are highlighted below.

Seventy-five per cent of HSRs surveyed had been in their role for less than two years, with the remainder in their role between 2 to 3 years, or longer.

Three quarters of HSRs had completed their initial five days training within 3 months of being elected. The remainder, however, completed their training within a timeframe of between ten months to two years. Disappointingly, some HSRs commented that their site did not train HSRs.

Fifty-five per cent of HSRs responded that they were required to attend the training provider of the employer's choice.

Almost fifty per cent of those surveyed had not been a HSR for 3 years when refresher training is currently available. However, of the remaining HSRs who would otherwise have been expected to have attended refresher training, only forty per cent had attended.

Ninety per cent of HSRs who had participated in the training said the training was very relevant or relevant to their role. The remaining 10 per cent said the focus needed to better reflect their own industry or employment experiences, while others said that other HSRs at their own workplaces had received no training.

Some HSRs indicated that they were either currently completing vocational work health and safety training such as the Certificate IV or Diploma of Work Health and Safety, whereas others indicated they would prefer more industry based training or training with a focus on specific Codes of Practice relevant to their workplaces and roles.

Fifty-five per cent of respondents indicated they did not receive adequate time off from their normal duties to perform their role.

Almost ninety per cent of HSRs said they were advised by a PCBU of a workplace incident. However, only 36 per cent said their employer advised them when the inspectorate was in attendance in their workplace, and only 32 per cent were advised if a compliance notice was issued at the workplace.

Finally, only thirty per cent said they had a formal agreed written procedure for issue resolution in their workplace, another 30 per cent said they did not, and the remainder 40 per cent were unsure.

These findings indicate a need to improve the issue and dispute resolution processes to ensure training is undertaken within the time required to assist HSRs to perform their role effectively. Consideration should also be given to expanding the nature and type of training provided, and to ensure that PCBUs and HSRs are better informed of the role of HSRs, including their right to have adequate time off from their normal duties to perform their role effectively.

It is also clear that PCBU's should be required to provide notice about the attendance of inspectors at a workplace and to provide HSRs with copies of compliance notices relevant to their work group area.

The results of this survey helped inform the QCU submissions to the Independent Review and included –

- enabling the HSR to choose their own training provider

- reviewing the current curriculum to include a more practical focus on performing the role of HSRs after training
- conducting refresher training every year
- providing additional training and development opportunities
- allowing appropriate time off and resources for HSRs to perform the role
- amending the PCBU obligations to require a PCBU to notify a HSR when a compliance notice has been issued
- amending an inspector's obligations to require them to notify a HSR when they are in attendance at the workplace
- requiring inspectors to undertake an audit of PCBUs and HSRs while at workplaces using a standard audit reporting tool, e.g., up to date lists of HSRs, training compliance, resources for HSRs, PCBU obligations to HSRs
- strengthening the issue resolution procedure and dispute resolution procedures
- providing more guidance materials for inspectors around HSRs and PCBU obligations

Health and Safety Representatives

Positive Duty

HSRs play an integral role under the framework of the WHS Act to represent the views of workers in their work group around work health and safety (WHS) matters. In order to do this effectively, workers need to be informed about their rights to ensure compliance of the PCBU and workplace with the WHS Act, Regulations and Codes of Practice.

A more recent phenomenon in work related laws (such as in the *Fair Work Act 2009* (Cth) and in discrimination laws), has been the adoption of positive duties or obligations for employers to proactively engage with workers around risk-based areas such as sexual or sex-based harassment or other forms of discrimination. Positive duties are also consistent with the preventative approach to health and safety matters inherent within the WHS Act.

These approaches help ensure that statutory frameworks do not simply become a complaints-based system where workers or others are required to make a complaint after obligations on employers or others to take preventative measures have failed. Positive duties are the reverse, by requiring employers or PCBUs in this case, to proactively engage with workers about their rights to be represented by HSRs and assist in the processes of implementing preventative approaches to WHS within the workplace.

The QCU supports the introduction of clause 16 of the Bill which will provide that a PCBU has a 'positive duty' to advise workers about their right to request the election of HSRs, the formation of work groups, the processes to do so, and about the powers and functions of HSRs. This advice must be provided as soon as reasonably practicable after a term of office for a HSR ends, when a HSR ceases to hold officer, or otherwise, every year.

Negotiation of Work Groups

The WHS Act currently provides that a worker may request the negotiation of work groups for a business or undertaking to facilitate the representation of workers by one or more HSRs, and that the composition of work groups is to be determined by negotiations between the PCBU and the workers who will form the work group, or their representatives.

However, the experiences of many HSRs as reflected through affiliate engagement and the HSR SS is that these negotiations are often thwarted at the workplace level because there is no final arbiter. In some cases, negotiations have gone on for over two years with no agreed resolution, meaning that the WHS standards at these workplaces and organisations have often not improved in that time.

Clause 20 of the Bill amends the WHS Act to require that the negotiations must be undertaken between the PCBU, the workers who are proposed to form the work group or their representatives, and a relevant union, where the union makes a request to do so in writing to the PCBU.

Clause 21 of the Bill also inserts new timeframes around the negotiation processes to overcome the difficulties with long and protracted negotiations that have occurred across a number of different industry sectors. These timeframes require that if the parties have failed to reach agreement on work groups after 14 days of making a request to negotiate work groups, then any party to the negotiations may now ask the regulator to appoint an inspector to attempt to resolve the matter.

Finally, clause 21 of the Bill amends the Act to provide that where an inspector reasonably believes the parties are unable to resolve the matter within 7 days after their appointment, the inspector must decide the matters. And if any party is not satisfied with a decision of an inspector on work group composition, they may apply to the Queensland Industrial Relations Commission (the Commission) to determine the matter.

This effectively returns these processes to the former *Workplace Health and Safety Act 1995* (Qld) which recognised that an employer must not exclude a union from the negotiations and also empowered the Commission to resolve disputes by determining the outcome.

In doing so, it will provide greater protection for workers by ensuring that negotiations for work groups are conducted in a fair manner and take into account the nature and type of work that is undertaken for the particular business or undertaking when determining the composition of work groups, with an ability to refer the matter for determination to an inspector and/or review and resolution before the Commission.

These provisions will mean that parties must actively engage in the negotiations in good faith to resolve the composition of work groups and help to facilitate the election processes for HSRs.

Powers and functions of HSRs

The purpose of HSRs is to represent workers in their work group on WHS matters affecting the workers, to monitor measures taken by the PCBU to comply with the Act, to investigate complaints relating to WHS, and to inquire into any risks to WHS of workers in their work group.

To assist HSRs perform their role under the WHS Act, the Act proscribes specific powers and functions for HSRs, including being able to inspect a workplace, accompany inspectors while at the workplace, be present at interviews (with workers consent), request the establishment of a Health and Safety (HS) Committee, and receive information concerning the WHS of workers in their work group.

The WHS Act also contains corresponding obligations for a PCBU to ensure that PCBUs or their representatives are required to consult with HSRs on WHS matters that affect workers in their work group, confer with HSRs to ensure the health and safety of workers, and allow HSRs access to information relating to hazards and their risks, and the health and safety of workers in their work group. PCBUs are also obligated to provide resources, facilities, and assistance to HSRs, and allow them to spend the time reasonably necessary to exercise their powers and functions.

However, while a PCBU has a number of obligations towards HSRs, the experiences of HSRs indicates that many are not for instance, notified of when an inspector is at the site, when compliance notices are issued, nor even informed about a notifiable incident such as a serious injury or dangerous occurrence within their own work group area.

To rectify these matters, clause 24 of the Bill amends the WHS Act to ensure that HSRs will now have a right to accompany a WHS entry permit holder while at the workplace, and to request and receive information about the WHS of workers.

Clause 25 also provides that a PCBU must now inform a HSR about a notice and the entry of a WHS entry permit holder or an inspector to the workplace, provide copies of relevant notices to the HSR (entry notices and compliance notices), and notify a HSR about notifiable incidents in their workplace/work group.

A PCBU must also permit a HSR to accompany a WHS entry permit holder or inspector while at the workplace, and also pay the HSR the amount (including any overtime, penalties, or allowances), they would otherwise receive when performing their normal duties during the same period.

Provisional Improvement Notices

Section 90 of the WHS Act provides that where a HSR reasonably believes that a person is contravening a provision of the WHS Act or has contravened in circumstances that make it likely the contravention will continue, the HSR may issue a written Provisional Improvement Notice (a PIN) to a person requiring them to remedy or prevent the contravention recurring.

A PIN must provide a day – at least 8 days from the date of issuing the PIN, in which the person is required to remedy the contravention or likely contravention. A person or a PCBU (where the person is a worker to whom a PIN is issued) may ask the regulator to appoint an inspector to review the PIN within 7 days of it being issued.

The Independent Review found that these timeframes were in some cases elongating disputes between HSRs and the PCBU about compliance with the WHS Act, and therefore reducing the time to comply. It also considered that an earlier ability of a PCBU or person to notify the regulator to review a PIN should help focus the parties on resolving the WHS issue at hand.

Clauses 34 and 36 of the Bill therefore provide that a PIN must now provide a day for compliance – at least 4 days from the date of issue, rather than 8 days; and that a person or PCBU may ask the regulator to review a PIN within 3 days of it being issued, rather than 7 days. Importantly, the HSR and PCBU or person to whom the notice was issued may agree to an extension of time.

Health and Safety Representatives Training

Section 72(1) of the WHS Act provides that a PCBU has an obligation to ensure, so far as is reasonably practicable, that a HSR for that business or undertaking has undertaken the prescribed training. Prescribed training is outlined in section 21 of the WHS Regulation and requires a HSR to complete a 5-day initial HSR training course within 3 months of the date of election, and 1 day's refresher HSR training every year. There is no proviso that allows a HSR to select the training provider of their choice.

The experience of many HSRS has also been to be directed to attend training at a provider nominated by the PCBU, in many cases where that provider also provides training for managers and supervisors in WHS. The survey results for the HSR SS also indicated that not all HSRs have been able to undertake the prescribed HSR training required for them to gain the skills and knowledge to perform their role, but also as a prerequisite to issue a PIN or a cease work notice.

The Review of the model Work Health and Safety laws 'Final Report' (the Boland Review),[1] found that choice of training provider is a necessary feature to encourage the independence of HSRs.[2] As a result the model WHS Act was amended in 2022 to include this provision, which has been adopted in every other Australian WHS jurisdiction.

Section 72(2) of the WHS Act also provides that a PCBU has an obligation to allow a HSR time off to attend prescribed HSR training on the pay they would otherwise be entitled to receive and pay for the training and reasonable costs associated with attending the training.

The HSR SS also deals with many complaints from HSRs where the PCBU has paid them incorrectly for the time spent at training or for the associated expenses. This issue occurs in particular for part time employees who are required to attend the 5 days prescribed training, or shift workers who attend the training on a Monday to Friday during normal hours of work, or to part time shift workers whose payment would otherwise be different to the hours of attendance at training.

To address this issue, Recommendation 4D from the Review is to amend the WHS Act to reflect that HSRs are entitled to receive payment of the usual remuneration they would have received if they had been at work instead.

Clause 27 of the Bill will therefore clarify the payment arrangements for a HSR when attending training to account for part time and shift work arrangements and ensure that HSRs are not disadvantaged in their pay by attending training required to perform their role.

Issue & Dispute Resolution

An integral part of the WHS legislative framework are the issue and dispute resolution processes for work health and safety matters.

Currently, a PCBU or their representative, a HSR on behalf of workers in a work group, or a representative of workers where there is no HSR, may be parties to resolving a WHS issue in a workplace. A representative of a worker(s) who is not a HSR is also entitled to enter the workplace to attend discussions to help resolve the issue.

The Act does not provide clarity about the status f unions who are more often than not parties to a WHS issue and dispute.

The Independent Review found that there would be a substantial benefit in unions being party to a WHS dispute in their own right which would prevent any argument about whether there was a specific request by a worker or not. It is also noted that many workers are reluctant to formally advise their employer of a request to involve a union in a matter because it may place them at risk in their employment.

The Independent Review also found that there had been an increase in a number of associations who purported to represent the interests of workers but were not regulated by the WHS Act or other industrial laws, and that there were inconsistencies and ambiguity in the drafting of the WHS Act with respect to the definition of a union and representative across relevant parts of the Act.[3]

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[1] Safe Work Australia (December 2018) *Review of the model Work Health and Safety laws* Final Report (the 'Boland Review').
[2] Boland Review p 71.
[3] Review of the Work Health and Safety Act 2011 Final Report December 2022 (the 'Independent Review') pp 88-89.

The Bill therefore amends the issue resolution process to provide that a party to a WHS issue can be a PCBU or their representative, a HSR or a suitable entity representing the workers, or a relevant union who notifies the PCBU they wish to be party to the issue.

Importantly, clause 31 of the Bill also requires that the PCBU must allow all the parties to the issue to enter and remain at the workplace for the purpose of attending discussions with a view to resolving the issue. This amendment is consistent with other changes in the Bill for a WHS entry permit holder to enter a workplace and also to remain at that workplace to fulfil the purpose of their entry.

The Queensland Court of Appeal has already determined that a statutory right to enter a workplace also confers a right to remain at the workplace for as long as necessary for the purpose of the entry, in relation to Part 7 of the WHS Act.[4] This matter was also addressed through previous amendments to section 11(3) of the *Summary Offences Act 2005* (Qld) in 2020 in relation to exclusions from trespass for authorised officers (including WHS entry permit holders).

Those amendments clarified that that Act does not prevent an authorised industrial officer entering, **or remaining in**, a workplace in accordance with the terms of the person's appointment as an authorised industrial officer **(emphasis added).** An authorised officer includes among other persons, a WHS entry permit holder under the *Work Health and Safety Act 2011*.[5]

Similarly, clause 45 amends section 118 of the WHS Act to also clarify that a WHS entry permit holder has a right to remain at the workplace for the time necessary to achieve the purpose of the entry (in relation to a suspected contravention of the WHS Act or the *Electrical Safety Act*).

In addition to the changes to issue resolution, the Bill also makes changes to the processes to access the Commission with respect to disputes about WHS matters, and the scope of its jurisdiction.

In 2017, the WHS Act was amended to include the new Division 7A 'Dispute Resolution' which permitted a party to a WHS dispute to apply to the Commission where particular WHS matters remain unresolved at least 24 hours after the regulator has been asked to appoint an inspector to assist in resolving the matter.

Section 102A of the WHS Act outlines the type of WHS matters the Commission can currently conciliate or arbitrate on, which includes disputes relating to WHS issue resolution, access to information by a HSR, a request by a HSR for an assistant, and a cease work direction.

To deal with WHS disputes, the Commission was given powers to conciliate, mediate or arbitrate on these restricted WHS matters, as well as powers to review a compliance decision made by an inspector (confirming or varying a decision, setting it aside and substituting it with another decision, or setting aside and returning a compliance notice to an inspector with directions the Commission considers appropriate).

The requirement to notify the regulator to appoint an inspector before being able to access the Commission's dispute resolution powers has created a level of ambiguity between the role of the inspectorate and the jurisdiction of the Commission on WHS disputes and has in some cases extended the time for resolving a dispute well beyond the 24 hours. This has led to deleterious effects when dealing with serious risks to WHS. The Review also considered that this duality between the two roles has created a waste of resources for both bodies.

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[4] *Seiffert & Ors v Commissioner of Police* [2021] QCA 170 (*Seiffert*).
[5] *WHS Act* Schedule 2 (definition of 'authorised industrial officer').

Clause 37 therefore extends the types of WHS matters that can form part of a dispute to also include disputes about the determination of work groups, notices or information to be provided to a HSR, requests to access training for HSRs, and disputes about the constitution of a health and safety committee. Finally, clauses 39 and 40 of the Bill also remove the requirement of the 24 hour gateway to access the Commission if a party so chooses, and clarifies that if a matter is remitted to the Commission, then a party to the dispute cannot also ask the regulator to appoint an inspector to assist in resolving the dispute, or if an inspector has already been appointed, then the inspector must make no further attempt to assist to resolve the issue.

Cease Work Directions

Section 85 of the WHS Act provides that a HSR may direct a worker to cease work if they have a reasonable concern that to carry out work would expose a worker to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard. Cease work notices must not be given unless the HSR has first consulted with the PCBU, and unless the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction.

The Independent Review found that some of the difficulties encountered in exercising this existing direction is that workers who are given such a direction by their HSR are often unaware of their rights and whether any of the statutory pre-conditions or consultation requirements with the PCBU have been complied with. Many workers also face the real prospect of a counter direction from the PCBU or their representative, causing both confusion and concern.[6]

The Independent Review therefore recommended an additional power for a HSR to make a written cease work direction to the PCBU, which obliges the PCBU to cease work that is the subject of the direction, until such time as the issue is resolved or the direction is set aside in accordance with the dispute resolution process.

Clause 32 in the Bill therefore introduces a new provision where a HSR may now also issue a written notice to the PCBU to cease work if they have a reasonable concern to carry out work would expose a worker to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

If issued with such a notice, the PCBU must direct a worker(s) to cease work or not start work to the extent it relates to the matter. The direction remains effective until the notice is either withdrawn in writing by the HSR, the issue is resolved with the assistance of an inspector, an inspector issues a prohibition notice, or the Commission deals with the matter as a dispute.

It should be noted that a cease work direction cannot be issued unless a HSR has undertaken the prescribed 5-day initial HSR training. A cease work direction and the new cease work direction to a PCBU can also be subject to the dispute resolution process to the Commission. There are also further protections to prevent potential improper misuse of this power through the disqualification process for HSRs.

Discriminatory Conduct

Section 105 of the WHS Act provides that a person must not engage in discriminatory conduct against workers, a HSR, WHS officers or Health and Safety Committee members by generally dismissing them, terminating a contract for services, placing a worker to their detriment in their terms of engagement, or altering a position of a worker to their detriment.

Civil proceedings are to be taken in the Magistrate's Court by the WHS Prosecutor.

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[6] Independent Review p 51.

The Bill makes a number of key changes. First, discriminatory conduct now also includes treating a worker less favourably than other workers of the person.

This amendment is consistent with the similar general protections contained in both section 282 of the *Industrial Relations Act 2016* (Qld) and section 342 of the *Fair Work Act 2009* (Cth) which prohibits an employer/person from taking adverse action that may discriminate between the employee and other employees of the employer.

Discrimination is also unlawful under the *Anti Discrimination Act 1991* (Qld), where a person is prohibited from either directly or indirectly discriminating against a person because of a protected attribute such as trade union activity, by treating them less favourably than another person without the same attribute in the same, or similar circumstances. This is known as the comparator test.

The QCU supports the use of the phrase 'treating a worker less favourably' in the WHS Act rather than 'discriminates between an employee and other employees' as it better reflects the intent of contemporary discrimination law by requiring the use of a comparator. It is also consistent with the October 2022 amendments to the general protection provisions in the *Industrial Relations Act 2016* (Qld), which also include the use of a comparator.

The second amendment is in relation to civil proceedings for a contravention of Part 6 of the WHS Act. Currently, civil proceedings may be initiated by a person affected by a contravention or their representative in the Magistrate's Court. Clause 43 of the Bill amends this to clarify who is a representative, and to transfer the jurisdiction for civil proceedings to the Queensland Industrial Relations Commission.

The QCU supports this amendment as it means civil proceedings may now be commenced in a low-cost industrial tribunal that deals with employment related matters as opposed to the more generalist Magistrate's Court jurisdiction, and also as the discriminatory conduct provisions in the WHS Act are also consistent with that of the general protections in the *Industrial Relations Act.*

WHS Entry Permit Holders

Term of Reference 1(b) of the Independent Review provided that the Reviewers were to consider the effectiveness of how workers are appropriately represented and assisted in the workplace on health and safety matters in the context of achieving the objects of the WHS Act.

The relevant objects of the WHS Act include –

> (b) providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to work health and safety;
>
> (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;
>
> (d) promoting the provision of advice, information, education and training in relation to work health and safety;
>
> (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.[7]

The WHS Act currently provides that WHS entry permit holders have a right to enter a workplace to investigate suspected contraventions of the WHS Act or the *Electrical Safety Act*,

[7] *WHS Act* s 3(1).

to inspect employee records or other relevant information, or to consult on WHS matters with, and provide advice on those matters to, relevant workers.[8]

A WHS EPH is required to provide 24 hours' notice of their entry to investigate a suspected contravention. However, on attendance at the workplace, there is ambiguity in the WHS Act as to whether there is a requirement to then provide a further 24 hours' notice to access records relevant to the suspected contravention or to hold discussions with workers about the suspected contravention.

Clause 46 of the Bill clarifies that there are no further requirements for a WHS entry permit holder to provide additional notice where the person has already given notice and is at a workplace to investigate a suspected contravention.

The Review also found that many WHS EPH's were often delayed or obstructed in the purpose of their entry by unreasonable WHS requirements, noting that section 128 of the WHS Act requires that a WHS EPH must comply with a reasonable request by a relevant PCBU or the person with management or control of the workplace to comply with any WHS requirement that applies to the workplace.

To address this issue, clause 47 of the Bill clarifies that a request to comply with a WHS requirement is considered to not be reasonable if the specific request would unduly or unreasonably prevent or hinder the WHS EPH from carrying out their powers and functions.

Clause 46 of the Bill also provides that providing a notice of entry is not a pre-condition to entry and that any defects or invalidity in the notice issued does not affect the validity of an entry notice.

Finally, clause 46 of the Bill also clarifies that when exercising a right of entry, a WHS EPH may also remain at the workplace for the time necessary to achieve the purposes of the entry. This matter was outlined previously and is consistent with the *Seiffert* decision which held that Part 7 of the WHS Act conferred a right to enter **and remain** for so long as was necessary to investigate the suspected contravention which was the subject of the entry **(emphasis added).**

Representation of Workers

Term of Reference 1(b) of the Independent Review involved consideration of whether the effective representation of workers was consistent with the objects of the Act, that is that 'workers are appropriately represented and assisted in the workplace for the purpose of health and safety matters'. Relevant objects 3(1)(c) and (f) are outlined below -

> (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;
>
> (f) ensuring appropriate scrutiny and review of actions by persons exercising powers and performing functions under this Act.

There are a number of areas within the WHS Act that provide for the representation of workers. First, through internal representation of elected health and safety representatives and deputy health and safety representatives of workers in relevant work groups.

Second, through external representation of workers –

a) to ensure consultation over WHS matters affecting workers;
b) to provide assistance to Health and Safety Reps in carrying out their functions;
c) to represent workers and Health and Safety Reps through the issue resolution process;

[8] Ibid ss 117, 120, 121.

d) to assist in the investigation into suspected contraventions of the Act and holding discussions with workers about WHS matters by WHS Entry Permit Holders; and
e) to assist workers in representing their interests through the dispute resolution mechanisms in the WHS Act over WHS disputed matters.

The Independent Review found that there were inconsistencies and ambiguities contained in different parts of the WHS Act on these matters and made recommendations to clarify who was able to represent workers, and also to ensure consistency about representation issues with the recent legislative amendments to the *Industrial Relations Act 2016* (Qld).

The WHS Act currently requires a PCBU to consult, so far as is reasonably practicable with workers with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety, and that consultation must involve a HSR where one exists. Clause 18 of the Bill amends the existing duty to consult with workers to also include consultation with a relevant union.

The WHS Act also provides that a HSR or a worker may request a representative to assist them either as part of the HSR's role or as part of issue resolution. In both instances, this provides the 'representative' with a 'right' to attend a workplace.

Industrial and work health and safety laws have traditionally provided for a 'right' to enter a workplace contingent upon the person having a qualified permit which can have conditions attached to it such as mandatory pre-requisite training, and/or the permit may be revoked, or civil penalties applied if it is misused.

The *Summary Offences Act* 2005 (Qld) which contains provisions relating to trespass also provides some exclusions to trespass on a person's business premises i.e., a person must not unlawfully enter, or remain in, a place used as a yard for, or a place used for, a business purpose,[9] except if the entry or remaining at the business premises is by an authorised industrial officer exercising their rights in accordance with the terms of their appointment. Note that a breach of this provision attracts a maximum penalty of 20 units (currently $3,096) or 1 year's imprisonment.

The right to enter into a workplace premises is also recognised in Part 7 of the WHS Act 'Workplace entry by WHS entry permit holders'. This right to hold an entry permit has a range of statutory conditions imposed on the holder, including requirements to notify and make the permit available for inspection, WHS requirements, requirements not to enter into residential parts of a premise, times at which the permit may be exercised, privacy conditions and the like.

The WHS Act also provides for circumstances where a permit may be revoked and/or have conditions imposed on it. Civil penalties for a breach of a permit right attract a civil penalty of up to 100 penalty units ($15,480).

The changes in the Bill therefore tighten who can be a representative and place important protections for businesses around rights of individuals to enter a workplace by ensuring that a representative is either an internal representative i.e., a HSR who is elected by workers in their work group, or if an external entity, is a suitable entity authorised by a worker to represent the worker.

A suitable entity is defined as a relevant union for a worker or another entity that is not an excluded entity.[10]

An excluded entity includes unions that do not have eligibility to enroll a worker as a member and whose rules to not entitle them to represent the worker's industrial interests, a non-

[9] *Summary Offences Act 2005* (Qld) s 11(2).
[10] Clause 45A Definitions for part.

registered organisation under the relevant *Fair Work Act* or *Industrial Relations Act*, or individuals or agents of either purporting to represent an excluded body.

These provisions also apply to WHS disputes before the Commission.

These changes are consistent with the objects of the Act, in particular section 3(1)(c) and (f) through encouraging registered unions to take a constructive role within the confines of their eligibility rules, ensuring that representation of workers and access rights to workplaces are protected to balance the interests of both workers and employers, and to ensure that access rights to workplaces are continued to be provided with the appropriate scrutiny and review when exercising 'rights' to enter workplaces for the purpose of representing workers.

Reckless Conduct Category 1 Offence

There are two other major changes in the Bill.

Section 31 of the WHS Act provides that a Category 1 offence is currently committed where a person has a duty; the person engages without reasonable excuse, in conduct that exposes an individual to whom that duty is owed, to a risk of death or serious injury; and the person was reckless as to that risk.

Clause 16 of the Bill amends a Category 1 offence to also include conduct that is not only reckless conduct but is also negligent conduct. This amendment reflects a recommendation of the Boland Review which found that –

> '…the highest penalties under s 31 of the model WHS Act (Category 1 offence) should be applied in cases where very high culpability can be shown involving gross negligence.
>
> Currently, s 31 of the model WHS Act specifically references the fault element of 'recklessness' but not 'gross negligence'. Introducing 'gross negligence' as a fault element of the Category 1 offence will maintain the risk-based approach and will add that extra deterrent into the model WHS offence framework…
>
> This change to the model WHS Act will assist prosecutors to secure convictions for the most egregious breaches of duties (and) … will assist in addressing community concerns that many PCBUs accused of serious WHS breaches are escaping punishment because the bar for conviction is set too high'.[11]

Contracts of Insurance

The second change is contained in clause 13 of the Bill which makes it an offence for a person to enter into a contract of insurance or other indemnity arrangements to indemnity a person against a monetary penalty under the WHS Act, attracting a maximum penalty of 500 units. This provision also voids any contract of insurance, other arrangement, or an indemnity to the extent it would purport to insure or indemnity a person for a monetary liability under the Act.

This was a further matter that arose in the Boland Review which considered the current insurance policies available which protect the insured company and its directors, principals, partners, and employees for their liability to pay fines which may arise out of wrongful breaches of legislation, including the WHS Act.[12]

One of the key objects of the WHS Act is to ensure compliance with the statutory framework. Compliance should also include ensuring that monetary penalties act as an effective deterrent and that they are not nullified by being paid through insurance coverage or another indemnity

[11] Boland Review p 122.
[12] Ibid p 136.

arrangement for duty holders to avoid their duties and obligations to workers and other persons' health and safety.

Both changes have had extensive consultation and engagement among government, employers and unions through Safe Work Australia and are supported.

Other Legislative Changes from the Independent Review

There remain a number of recommendations from the Independent Review to be addressed that are not contained in this Bill. These include –

Recommendation 3D	That the Minister consider amending section 68 of the WHS Act to clarify that HSRs are permitted to take photographs, make videos, and take measurements and/or samples in the performance of their role.
Recommendation 11C	That the Minister consider amending section 118 of the WHS Act to provide that WHS entry permit holders may take photographs, take videos, or make measurements and/or samples while at the premises.
Recommendation 21	That the Minister consider elevating the hierarchy of controls from Part 3.1 of the WHS Regulation to the WHS Act.
Recommendation 22A	That the Minister consider amending the definition of 'serious injury' to refer to where an employee has been absent from work for four consecutive days, or a more beneficial definition if one is identified through the considerations of incident notification that are occurring nationally in response to the Boland Review

The QCU is continuing to engage with the Office of Industrial Relations to ensure that Recommendations 3D, 11C and 21, as accepted in principle by the Government, are drafted and incorporated in a further Amendment Bill to the WHS Act in 2024. In addition, the QCU is aware that as result of the Boland Review, Safe Work Australia are currently overseeing a substantial review of incident notification provisions in the model WHS Act and is expected to release a detailed report in the first half of 2024 with recommendations for change among all WHS jurisdictions. The QCU looks forward to the finalisation of this review to ensure that the Queensland legislation is updated to provide for a more modern and expansive approach to incident notification that addresses both physical and psychosocial hazards and injuries, and with an expectation that there will be amendment legislation to this Parliament in the first half of 2024 on those matters.

In conclusion, the QCU commends the Bill to the Committee.