

# Australian resources industry workplace update

FEBRUARY 2018



# Foreword

**2017 saw a wide range of developments that will have an ongoing impact on employers in the mining and resources industries.**

In this update, we look back on these changes, spanning changes to redundancy entitlements under the Black Coal Mining Industry Award 2010 and dealing with redundancy situations in Fair Work Commission proceedings, labour hire industry regulation, secondary boycotts, enterprise bargaining and the use of social media, the status of R&R leave when notice of termination of employment is given, safety developments (including black lung) and the growth in use of enforceable undertakings, and other legislative developments relating to FIFO workers and vulnerable workers in your supply chain.

Each of these developments will be significant for employers in the mining and resources industries over the coming year. We hope you find this update useful in managing these developments.

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# Redundancy developments in the resources industry

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2017 saw a number of interesting redundancy decisions in the resources sector.

One decision deals with the setting of safety net redundancy entitlements in modern awards.

The other three discuss particular redundancy situations in the usual context of unfair dismissal applications. They illustrate the difficulty employers face in knowing precisely what is required of them when alternative courses such as job swaps, salary reductions and redeployment are available.

## REDUNDANCY AND THE MODERN AWARD OBJECTIVE

In [\*CFMEU v Anglo American Metallurgical Coal Pty Ltd\* \[2017\] FCAFC 123](#), a Full Court of the Federal Court upheld the Fair Work Commission's decision to vary the *Black Coal Mining Industry Award 2010* by capping redundancy payments. The cap applied a maximum of two weeks' pay in respect of "severance pay" for each year of employment, up to a maximum of 15 years, with one week's pay in respect of "retrenchment" for each year of employment remaining uncapped. The variation replaced an earlier age-based limitation on severance pay that was linked to a retirement age of 60. This cap had been removed in an earlier decision of the FWC on the basis that it was unlawfully discriminatory.

The CFMEU, APESMA and the AMWU brought the application in the Court against the FWC's decision to introduce a service based cap, and argued that the FWC had failed to consider whether a cap was necessary to achieve the modern awards objective. The unions also argued that the bench took into account an irrelevant consideration about the earlier abolition of the 60 years of age redundancy cap.

The Full Court rejected all of the unions' arguments. It held that the FWC's statutory task was not to consider whether the unamended clause met the modern awards objective, but to consider whether the amended clause met the objective. See also [Four yearly review of \*Black Coal Mining Industry Award 2010\*](#).

## REDUNDANCY AND JOB SWAPS

In *Skinner v Asciano Services Pty Ltd* [2017] FWCFB 574, a Full Bench of the FWC allowed an appeal against a decision dismissing seven employees' unfair dismissal applications. The employees argued that their employer failed to comply with its redeployment obligations under the *Fair Work Act 2009* (Cth) by not considering a voluntary job swap.

The employer had advised the train driver employees of vacant positions and opportunities to transfer to other sites, and invited each employee to express interest in other roles. The employer maintained that the employees either showed no interest in the available positions, were unsuccessful in applying for them, or declined offers of redeployment.

At first instance, the FWC was satisfied that there was a genuine redundancy in each case, and that the employer had fulfilled its redeployment obligations. On appeal, a Full Bench determined that the employer should have considered voluntary job swaps and that, by failing to do so, it had not met the requirements in s 389(2) of the FW Act.

The Full Bench recognised that there is no general obligation for an employer to implement a process by which redundant employees can swap with other employees who wish to volunteer for redundancy. However, it also noted that the employer had previously allowed job swaps in similar circumstances, and had even suggested job swaps as an option to mitigate the effect of the redundancies. It also considered that due to the proximity of the job swap opportunities at nearby depots, the costs of transferring employees would not be significant, and that a number of employees were performing the same or substantially the same role meaning that allowing a swap would not place onerous training requirements on the employer.

This case indicates that prior conduct of an employer and expectations arising from that conduct can be relevant in assessing what approaches might reasonably be expected in relation to redeployment and job swaps.

## REDUNDANCY AND SALARY REDUCTIONS

In *Mallard v Parabellum International Pty Ltd* [2017] FWC 2531, the FWC found there was no genuine redundancy and so dismissed an employer's jurisdictional argument against claims of unfair dismissal.

Four employees claimed that they had been unfairly dismissed by their employer, a company providing emergency response services on a major natural gas project in Western Australia. Each applicant was employed in the position of an Emergency Services Officer.

As a result of a client reducing its contract prices, the employer decided to reduce the salaries of its workforce. Each of the four employees was offered a salary reduction of around 13%, the offer being refused in each case. Each employee was dismissed.

In response to the unfair dismissal claims, the employer argued that the employees were genuinely redundant. The argument rested on a wide view that the term "job" in the FW Act must be read to include the remuneration of the particular job.

The FWC confirmed that a job is made up of its functions, duties and responsibilities, and the remuneration is the value placed on performing that job by the employer. A job was redundant when the functions, duties and responsibilities formally attached to the job are determined by the employer to be superfluous to the current needs and purposes of the employer. The FWC accordingly considered that a significant variation of the remuneration to be paid either by way of a salary increase or decrease, does not equate to the employer no longer requiring "the job" to be performed.

The FWC found that the number of Emergency Services Officers had not reduced, nor had the roles been altered such that the functions, duties or responsibilities no longer reflected the roles occupied by the employees. So, the FWC decided there was no genuine redundancy as defined in the FW Act.

## REDUNDANCY AND REDEPLOYMENT PROCESS MATTERS

In *Deborah Hallam v Sodexo Remote Sites Australia Pty Ltd* [2017] FWC 4105, the FWC found that an employer's dismissal of a relief project manager following a decision to overhaul the system of relief pools involved genuine redundancy. In particular, the project manager lacked the skills or qualifications to fill other available positions. The FWC accordingly dismissed the application.

However, the Commissioner commented on the company's redeployment process, regarding it as deficient.

The Commissioner considered that the company should have engaged in consultation at an earlier time, quarantined some positions to which people could be redeployed, and extended the length of the redeployment period.

The Commissioner also commented that the project manager had to navigate her own way through the process because the company had provided her with inadequate information, noting that because the company was part of a multinational group, the Commissioner needed to apply "heightened scrutiny" to its procedures.

These observations give an indication of the higher level of practical employer assistance needed when redeployment considerations arise as an issue.

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# Labour hire industry regulation

*What it means for labour hire agencies and host companies*

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Obligations on labour hire providers increased in 2017 with the introduction of labour hire licensing laws. Further, the Fair Work Commission clarified that labour hire providers must themselves properly investigate allegations against a labour hire worker by a host company, and not simply rely on the host company's investigation.

## LABOUR HIRE LICENSING LEGISLATIVE REFORMS

Regulation of the labour hire industry saw significant reform in 2017 with the introduction of mandatory labour hire licensing schemes in Queensland and South Australia, and the introduction of a Bill in Victoria. The State-based reforms have been introduced in the absence of a uniform national scheme, notwithstanding calls for national reform, including from a number of State governments.

Queensland was the first State to introduce a mandatory licensing scheme to the labour hire industry when it passed the *Labour Hire Licensing Act 2017* (Qld). The Queensland Act will commence on 16 April 2018. The South Australian Parliament has passed the *Labour Hire Licensing Act 2017* (SA) and the statute is awaiting assent. Victoria has introduced the *Labour Hire Licensing Bill 2017* (Vic) to Parliament, and the Bill has been read a second time in the lower house.

In each jurisdiction, the legislation may apply extraterritorially. This means that a business that uses or supplies labour hire services with some connection to Queensland, South Australia or Victoria needs to understand its obligations under each scheme.

The three schemes are fundamentally similar. Each scheme prohibits the provision of labour hire services by an unlicensed person (including a company). Similarly, a person is prohibited from obtaining labour hire services from an unlicensed provider.

The schemes differ as follows:

	QUEENSLAND	SOUTH AUSTRALIA	VICTORIA
<b>Maximum licence length</b>	Up to one year	Indefinite	Up to three years
<b>Maximum penalty for providing labour hire services without a licence or entering into an arrangement with an unlicensed provider</b>	For an individual: 1,034 penalty units (\$130,439.10) or 3 years' imprisonment  For a corporation: 3,000 penalty units (\$378,450)	For an individual: \$140,000  For a body corporate: \$400,000	For an individual: \$126,856  For a company: \$507,424
<b>Relevant factors for the 'fit and proper person' test</b>	The person's character, history of compliance with relevant laws and prior convictions. Regard may also be had to any other matters which are considered relevant to whether a person is fit and proper to provide labour hire services	The reputation, honesty and integrity of the person, demonstrated compliance with relevant laws, and whether the business knowledge held by the person (or directors in the case of a body corporate) is sufficient for the purpose of properly directing the business. A person is deemed to not be fit and proper in certain circumstances, including where the person has been found guilty or convicted of a prescribed offence	A person is presumed to be fit and proper, unless certain criteria is fulfilled, for example if the person has been found guilty of certain criminal offences
<b>Bases to object</b>	No express provision.  An interested person may apply for a review of a decision to grant or suspend a licence, or in relation to the conditions attaching to a licence	A designated entity may object to an application for a licence on certain grounds, eg where the applicant is not fit and proper	An interested person may object to an application for a licence on the basis that a person is not fit and proper
<b>Reporting period</b>	6 monthly	12 monthly	12 monthly

In each instance, the legislation will apply widely due to broad definitions of “labour hire provider”. For example, in Queensland a person is a labour hire provider if “in the course of carrying on a business, the person supplies, to another person, a worker to do work”. Businesses that historically would not have regarded themselves as engaged in labour hire should carefully consider whether they may be caught by the definitions, particularly in relation to employee secondment arrangements.

Any business that engages labour hire providers will need to implement processes to ensure compliance with the new schemes. This should include:

- requiring any existing provider to demonstrate that it is appropriately licensed;
- amending contracts with any such provider to include reporting obligations with respect to the maintenance of such licences; and
- to deal with the consequences of a provider losing its licence.

## OBLIGATION ON LABOUR HIRE PROVIDER TO INVESTIGATE ALLEGATIONS AGAINST ITS WORKERS

In *Tasmanian Ports Corporation Pty Ltd t/a Tasports v Gee* [2017] FWCFB 1714, a Full Bench of the Fair Work Commission confirmed that the decision of a host company to remove a labour hire employee from its site does not necessarily provide a valid reason for the labour hire employer to dismiss the employee.

A ship loader was accused of misconduct by the host company, which subsequently advised the labour hire provider that it had revoked the employee’s access to its sites with immediate effect. The labour hire employer accepted the host company’s decision without reviewing the host company’s investigation of the alleged misconduct, or conducting its own investigation. The labour hire employer then dismissed the employee on the basis that, as he could not perform work for the host company, he could not perform the “inherent requirements” of his role.

The Full Bench upheld the first instance decision which found that the employee had been unfairly dismissed. The Full Bench reiterated that a labour hire employer must make its own assessment of the allegations against its employee. If the labour hire employer is not satisfied that the employee has engaged in misconduct, the subsequent courses of action available to it will depend on the terms of its agreement with the host company. For example, the terms may give the host company discretion to remove the employee from its premises notwithstanding the labour hire employer’s view.

The Full Bench rejected the labour hire employer’s argument that such circumstances automatically provide a valid reason to dismiss the employee on the basis of his or her capacity to perform the role (being a criterion for the FWC to consider in an unfair dismissal claim). It emphasised that whether there is a valid reason for a dismissal will depend upon all of the circumstances.

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# Four yearly review of *Black Coal Mining Industry Award 2010*

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In 2018, the four yearly review of modern awards is entering into its fourth year, with matters in relation to the *Black Coal Mining Industry Award 2010* still before the FWC. Although the second four yearly review was due to commence on 1 January 2018, the FWC has confirmed that the Second Review will not commence at least until the matters in the current review are finalised. This is unlikely to be before the second half of 2018.

One of the most significant matters in the current four yearly review concerned the application of the Coal Mining Industry Employer Group for a variation of the Award to provide a cap on redundancy pay. The Award at that time provided for an uncapped benefit of three weeks' pay per year of service (two weeks per year of service attributed to retrenchment pay, and one week per year of service attributed to severance pay).

After a hearing in early November 2016, a Full Bench of the FWC handed down its decision in January 2017 ([\[2017\] FWCFB 584](#)) placing a cap of 15 years (or 30 weeks' payment) on the retrenchment component of the payment. The severance component of the redundancy pay remained uncapped. The variation to the payment came into force on 20 March 2017 and also included a grandfathering arrangement ([see also Redundancy and the Modern Award Objective.](#))

The CFMEU, APESMA and AMWU sought judicial review of the FWC's decision. However, the challenge was ultimately unsuccessful ([Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd \[2017\] FCAFC 123](#)).

In respect of other matters before the FWC, the CMIEG brought two other applications in 2017:

- An application to vary the accident pay clause of the Award to reduce the maximum benefit to a period of 52 weeks' pay in line with other awards. There was a hearing before a Full Bench in October and November 2017. The decision is still pending.
- An application to vary the annual leave clause of the Award, that arose out of the general review of annual leave provisions in modern awards, in order to clarify the ability of employers to direct employees to take annual leave during a shut down. The FWC handed down its decision in October 2017 clarifying that employers can direct employees to take paid annual leave during a shutdown, but deciding that there ought not be an ability to direct an employee to take unpaid leave. The determination varying the Award to clarify the position came into effect on 17 November 2017.

The Award was also varied more generally to provide measures to deal with excessive annual leave, by virtue of a Determination handed down on 23 November 2017, with some variations coming into effect on 1 December 2017 and others on 1 December 2018 (see [PR597971](#)).

Other pending matters before the FWC that affect the Award include claims by unions for family friendly work arrangements, plain language drafting of the Award, and clarification of the operation of penalty allowances and whether they are cumulative.

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# Secondary boycotts

*Orders granted to prevent protected industrial action by employees of contractor*

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When a mine owner adopts a contracting out model for the operation of its mine, it is, to an extent, limited in its ability to ensure a consistent supply of labour. One important step a mine owner can take is to ensure that a contractor has in place an in-term enterprise agreement for the duration of its mining contract. However, this is not always possible. In such circumstances any enterprise bargaining by the contractor can present a threat to the continued supply of labour to the mine given the risk of protected industrial action.

A recent decision of the Federal Court demonstrates that there are options which may be available to mine operators to protect their position and to try and ensure the continued operation of the mine.

A coal mine was, in November 2017, operated by a contractor mining company. The contractor's contract expired on 30 November 2017, however the enterprise agreement covering the contractor's workforce passed its nominal expiry date on 19 June 2017.

In August 2017 the CFMEU successfully sought a protected action ballot order (PABO) as part of its enterprise bargaining with the contractor. The contractor opposed the PABO. One reason for this was that the CFMEU's reasons for the PABO included a desire to put pressure on a third party (the mine owner), in relation to the future employment of the contractor's employees post the termination of the contractor's contract. In granting the PABO, the FWC rejected the contractor's contention that this was the CFMEU's sole motivation, finding that the CFMEU was also genuinely trying to reach an agreement.

The CFMEU subsequently issued notices of an intention by the contractor's employees to take protected industrial action in accordance with the *Fair Work Act 2009* (Cth). The mine owner then filed an application for interlocutory relief in the Federal Court to stop the contractor's employees from commencing industrial action.

The mine owner sought a declaration that the proposed industrial action was not protected action within the meaning of the FW Act and orders to prevent a secondary boycott in breach of the *Competition and Consumer Act 2010* (Cth) (or damages in the alternative).

The mine owner contended that the proposed industrial action:

- was not "protected", because its sole (or at least dominant) purpose was to put pressure on a third party (the mine owner) and did not relate to a proposed enterprise agreement with the contractor; and
- would amount to an unlawful secondary boycott, in that its purpose was to hinder or prevent the international supply of coal and/or the mine owner engaging in trade or commerce involving the movement of coal outside Australia.

The Federal Court issued an interlocutory injunction as sought by the mine owner. This had the practical effect of preventing any industrial action prior to the expiry of the contractor's contract at the mine. Subsequently, the CFMEU gave an undertaking that no industrial action would occur and on that basis the mine owner discontinued its application. A new agreement between the contractor and the CFMEU was entered into almost immediately.

The case highlights the importance of mine operators considering creative options to protect their interests. These options include the availability of competition law protections against secondary boycotts, including in circumstances where other challenges to industrial action may have failed.

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## Good faith bargaining in the Fair Work Commission

*Employer's ability to take steps to protect its business*

In November 2016, the FWC dismissed the CFMEU's application for a bargaining order against an employer, finding that the employer had not acted unfairly or capriciously in deciding to dismiss employees as a result of a decision it took to protect its business from economic loss caused by industrial action ([Construction, Forestry, Mining and Energy Union v Anglo Coal \(Capcoal Management\) Pty Ltd T/A Capcoal \[2016\] FWC 8847](#)).

The FWC found that the good faith bargaining requirements (in particular ss 228(1)(e) and 231(2)(c) or (d) of the *Fair Work Act 2009* (Cth)) do not operate, unless and until the FWC is positively satisfied that a bargaining representative is not acting in accordance with the good faith bargaining requirements.

In reaching its conclusion the FWC found that:

- there was a causal connection between employees who were CFMEU members taking protected industrial action, and the employer's decision to park up a shovel which caused a surplus of employees
- the surplus of employees was resolved by the employer making some positions redundant
- although the industrial action contributed to the employer's decision to engage other mining methods, resulting in less need for personnel, this was a clear and methodical decision. This was supported by substantial evidence representing significant operational and financial reasons such as a saving of over \$40 million
- it was not unfair or capricious for an employer suffering loss and damage as a result of employees taking protected industrial action to decide, on legitimate business grounds, to restructure its business to manage or offset that loss or damage; and
- this meant that the employer had not acted unfairly or capriciously in dismissing employees and did not fail to meet the good faith bargaining obligations.

This decision was unsuccessfully appealed by the CFMEU to the Full Bench of the FWC ([CFMEU v Anglo Coal \(Capcoal Management\) Pty Ltd T/A Capcoal \[2017\] FWCFB 317](#)). On appeal the Full Bench found that the employer, in deciding to park up the shovel, was motivated by and acted in accordance with legitimate business concerns and its actions were not capricious or unfair in the particular circumstances.

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## The rise in the use of #socialmedia in #enterprisebargaining

There is no question that social media is a powerful tool. What is now becoming increasingly clear is that it can be a tool in enterprise bargaining, with unions now frequently using social media to garner support for their position, and to cheaply and easily reach a wider audience. Similarly, social media also presents an opportunity for employers, particularly in the mining and resources industries, to directly engage with their workforce.

However, the use of social media in enterprise bargaining remains subject to legal parameters, including the *Fair Work Act 2009* (Cth).

The use of social media in an enterprise bargaining dispute was most visible, and highly publicised, in the AMWU's #streetsfreesummer campaign. After Streets made an application to the Fair Work Commission to terminate its enterprise agreement, the AMWU launched a national boycott of Streets' products. The union's social media campaign included emails, Facebook announcements and Twitter posts. It gained significant traction, reaching a national audience.

The use of social media, as well as its reach and potential effectiveness, were also evident in the dispute at the Webb Dock terminal in late 2017. There, a picket line continued despite the Victorian Supreme Court ordering that it come to an end. The continued presence of the picket was, at least in part, attributable to a large social media campaign providing information in relation to the protest.

There are, however, limitations imposed by the FW Act which bargaining parties need to be aware of. The FW Act prohibits a person from knowingly or recklessly making false or misleading representations about workplace rights, or exercise of those rights, by another person.

Further, the FWC has found that misleading information disseminated during bargaining is capable of being the subject of bargaining orders. In 2016, the FWC found that "bargaining updates", published by the NTEU on its website and on Facebook, were misleading and undermined collective bargaining.

More recently, Murdoch University commenced proceedings in the Federal Court alleging that, among other things, NTEU social media posts and campaign materials amounted to coercive conduct in contravention of the FW Act.

While these recent examples highlight the increasing use of social media in bargaining campaigns, they also confirm that there are legal parameters concerning the dissemination of material on social media. Employers should:

- review campaign materials produced by unions and bargaining representatives to ensure it is accurate and consistent with good faith bargaining obligations
- be prepared to respond to union social media campaigns
- consider innovative options for utilising social media to communicate with workers and other stakeholders; and
- always ensure information they disseminate via social media is factually correct and not misleading.

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## Remote workers’ “weekend”

*Can be included in a termination notice period*

In a decision of particular significance for the mining and resources industries, the Federal Circuit Court in [Short v CBI Constructors Pty Ltd \[2017\] FCCA 2442](#) has confirmed that a notice period could run concurrently with Rest and Recreation Leave provided under an enterprise agreement.

In this case, the employee had worked on a remote construction project. Under the relevant enterprise agreement, he was entitled to 10 days R&R leave following 23 days’ consecutive work. His employment was terminated at the end of a 23 day work cycle and he was paid in lieu of notice for a period of 2 weeks as per the *Fair Work Act 2009* (Cth).



An issue arose as to whether the notice period to which the employee was entitled could run concurrently with his 10 days' R&R leave. The employee unsuccessfully argued that the notice period could not run concurrently because he would then be deprived of his leave entitlement. The Court, instead, accepted the employer's view that the R&R leave was part of the employee's entire work cycle, being "analogous to the weekend for the weekday workforce", and that no entitlement was lost.

The Federal Circuit Court distinguished R&R leave from other types of leave, in that:

- it cannot be postponed or paid out upon termination like annual leave
- it is unpaid and must be taken at a certain time off-site to enable recuperation
- the entitlement to take R&R leave in advance is limited; and
- certain paid leave could be taken concurrently with R&R leave.

The Court stated that the roster arrangement "is of significant practicality and utility given the fly-in and fly-out arrangements in the geography of the project". The Court held that:

- "nothing in the plain text" of the notice of termination provisions of the FW Act prevents notice of termination from including a period in which an employee is not working such as the period of R&R leave; and
- other authorities "do not support a universal proposition that notice of termination cannot be given concurrently with any period of leave".

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## Safety law developments in 2017



2017 saw a range of safety law developments across Queensland, Western Australia and NSW, many of which will continue into 2018.

## QUEENSLAND

### INDUSTRIAL MANSLAUGHTER

In October 2017, the Queensland Parliament amended the [\*Work Health and Safety Act 2011 \(Qld\)\*](#) to add new industrial manslaughter offences. The crime of industrial manslaughter applies to a “person conducting a business or undertaking” (PCBU), which includes a corporation, and to all “senior officers” of PCBUs. For corporate PCBUs, a senior officer is defined broadly (more broadly than an “officer” under the Qld WHS Act) as an individual who is concerned with, or who takes part in, the corporation’s management.

Industrial manslaughter occurs where the PCBU or a senior officer is negligent in causing the death of a worker. The maximum penalty is \$10 million for a body corporate and 20 years’ imprisonment for a senior officer. While industrial manslaughter does not currently apply in the mining industry, the offence is expected to be inserted into Queensland mining safety laws in 2018, following consultation with industry. The offence may also be incorporated into the harmonised WHS laws in the other mining States, and applied to the mining industry in those States, depending on the outcome of Safe Work Australia’s review of the model WHS laws later this year.

While there have been no similar changes in NSW, investigations have been carried out into mining incidents where specific questions have been asked about directors and what they have done to satisfy their due diligence duties under the [\*Work Health and Safety Act 2011 \(NSW\)\*](#).

Section 27 of the NSW WHS Act and the Qld WHS Act requires an officer of a PCBU to exercise due diligence to ensure that the PCBU complies with its duties under the relevant Act. There are also obligations on the officers of body corporates in WA. Additionally, both the NSW WHS Act and the Qld WHS Act contain a very significant offence regarding reckless conduct (including by corporations and officers) that exposes an individual to a risk of death or serious injury or illness. This reckless conduct offence has a maximum penalty of \$3 million for a body corporate and 5 years’ imprisonment for officers.

In all of the mining States it is essential for officers to stay alert and to review their due diligence systems because the regulators may ask to see them during their incident investigations.

## PROPOSED CHANGES TO QUEENSLAND'S MINING SAFETY LAWS

In September 2017, the *Mines Legislation (Resources Safety) Amendment Bill 2017* was introduced into the Queensland Parliament. The Bill proposed to make significant amendments to the *Coal Mining Safety and Health Act 1999 (Qld)* and the *Mining and Quarrying Safety and Health Act 1999 (Qld)* (Acts). While the Bill subsequently lapsed as a result of the calling of the Queensland State Election in late 2017, with the return of the Queensland Labor Government there is every chance it will be re-introduced to the Queensland Parliament in 2018.

The Bill included these proposed amendments to the Acts:

- An increase in the maximum penalties under the Acts:
  - from \$1,261,500 to \$3,784,500 for a corporation
  - from \$252,300 or 3 years' imprisonment for an individual (including officers) to \$756,900 and 3 years' imprisonment for officers, and \$378,450 and 3 years' imprisonment for other individuals.
- A new civil penalty regime that would apply to corporations only. The maximum civil penalty notice that could be imposed would be \$126,150. A civil penalty notice could be issued even where a prosecution for an offence for the same breach has failed. Civil penalty notices would be issued by the chief executive of the Queensland Department of Natural Resources and Mines. There would be an opportunity to make a written submission before a civil penalty notice is finalised and limited rights of appeal would exist.
- Power for the chief executive of the Department of Natural Resources and Mines to suspend a person's certificate of competency or a site senior executive's qualification if the person has contravened a safety and health obligation or committed an offence against a corresponding law.
- An expansion of the safety and health obligations on contractors, service providers, manufacturers, importers and suppliers. It is also proposed that there would be additional detail inserted in the Acts regarding the process that must be followed when incorporating a contractor's or a service provider's safety system into the single safety and health management system for the mine.

- A new "officers" duty would be inserted, consistent with the obligation to proactively exercise due diligence already contained in the WHS Act. The definition of "officer" used in the WHS Act (which refers to the *Corporations Act 2001 (Cth)*) would be used.
- The imposition of additional requirements about the competency and appointment of ventilation officers for underground mines, who is responsible in their absence and what the ventilation officer is responsible for.

## WESTERN AUSTRALIA

In October 2017 the WA Government introduced legislation to amend the *Mines Safety and Inspection Act 1994 (WA)* and *Occupational Safety and Health Act 1984 (WA)* to substantially increase the penalties for offences in line with harmonised WHS legislation that applies elsewhere in Australia (other than Victoria), plus inflation. The WA Parliament was prorogued before the legislation passed through the Legislative Council. The Bills will need to be re-introduced to Parliament. The proposed legislation is summarised in our [Safety Matters Alert](#).

The WA Government has also established a Ministerial Advisory Panel that is currently preparing a Work Health and Safety Bill to cover both general industries and resources (mining, petroleum and pipelines). This Bill is to be based on the model WHS Act with relevant industry regulations. The Government does not expect to introduce a Bill to Parliament until mid-2019. The model WHS Act contains some significant differences to the current WA laws, including obligations of due diligence for officers.

## NEW SOUTH WALES

The NSW Department of Planning and Environment (Resources Regulator), in consultation with the Mine Safety Advisory Council and industry participants, has over the past 18 months been rolling out an [Incident Prevention Strategy \(IPS\)](#). The IPS follows [recommendations from the Mine Safety Advisory Council Fatality Review](#) and the [NSW Government's Quality Regulatory Services Initiative](#).

Under the IPS, the Resources Regulator has commenced conducting:

- a targeted assessment program (known as TAP) under which inspectors attend at a mine site and assess how effective an operation is when it comes to controlling a targeted critical risk (described as a proactive approach); and
- a targeted intervention program (known as TIP) under which inspectors will focus on the effectiveness of a mine's controls for critical risks based on, for example, a series of events or a single significant incident such as a fatality, or a change in operational risk profile (described as a responsive approach).

The IPS generally involve three inspectors attending a mine site for three days and covering three disciplines (mining, electrical and mechanical).

A stated purpose of the IPS is to promote the open and transparent sharing of information throughout the industry and to improve hazard identification and risk management. The Resources Regulator also says that the IPS does not mean any change to its enforcement policy and that the Regulator "... will take enforcement action where necessary and appropriate".

It is important that proper protocols are put in place for personnel who may be required to answer questions, or produce documents or information, so that their (and the company's) legal position is protected. This is important because the Resources Regulator's IPS document does not rule out using information it obtains for enforcement purposes.

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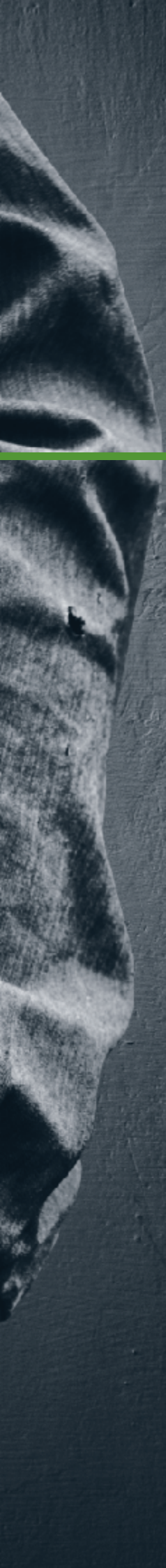


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## Enforceable undertakings under WHS legislation



Regulators in non-mining industries have for some time now accepted, where considered appropriate, enforceable undertakings as a means by which valuable contributions can be made to WHS, in lieu of pursuing prosecution action. For businesses in the mining and resources industries, it may be worth considering the option of an EU, and its availability. It could be a positive alternative to pursue where an incident has occurred and has been investigated by the relevant regulator.

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An EU can be an attractive proposition for a business. If an EU proposal is accepted, a business can protect and enhance its reputation, and avoid a WHS prosecution, costs of litigation, and potentially, a criminal conviction.

While each business will need to consider the particular WHS legislation and regulator policies in the jurisdiction concerned, there are a number of general issues likely to arise when considering an EU wherever available in the relevant jurisdiction.

## WHAT IS AN EU?

In NSW, the regulator for mines is the head of the Department of Planning and Environment, often referred to as the Resources Regulator.

Where an incident occurs at a mine, the Resources Regulator may investigate the incident, and, if it considers that there has been a breach of the WHS Act, it may commence proceedings against a business (or an officer or a worker).

Alternatively, the Resources Regulator may accept an EU given by a business. An EU is a written, binding commitment by a business to “implement initiatives designed to deliver tangible benefits for the industry and broader community”. An EU proposal does not amount to an admission of guilt by a business.

However, an EU cannot be accepted for an alleged contravention of a category 1 offence (ie, where it is alleged a person is reckless as to risk of death or serious injury or illness). Further restrictions apply in Queensland (including category 2 offences, being a contravention exposing an individual to a risk of death or serious injury or illness, and industrial manslaughter offences).

The business must comply with the EU once it is accepted by the regulator. A failure to comply with an accepted EU may result in a maximum penalty of \$250,000 for a business and \$50,000 for an individual.

However, once an EU is in effect, no proceedings may be brought against a person in relation to the alleged contravention of the WHS Act with which the EU is concerned. If proceedings already have been brought, the Resources Regulator must take all reasonable steps to have the proceedings discontinued as soon as possible.

## APPROACH OF THE RESOURCES REGULATOR

In determining whether an EU will be accepted, the proposer must demonstrate to the satisfaction of the Resources Regulator that the EU will be the most effective and appropriate regulatory outcome.

In making this assessment, the Resources Regulator will take into account the nature of the alleged contravention, any impacts of the alleged contravention on any worker, the industry, the community, and the compliance history of the company or individual involved. A proposal for an EU needs to include details about strategies that will deliver benefits to workers, industry and the community. It will also need to highlight how these benefits will be linked to the EU.

If the matter involves a fatality or very serious injury, the Resources Regulator is unlikely to accept that an EU is more appropriate than pursuing a prosecution action, unless exceptional circumstances can be shown.

The Resources Regulator provides a pre-proposal advisory service which aims to explain the proposal and submission process, the factors considered when evaluating the proposal and the negotiation and acceptance process that will be followed. This service may be a useful forum in which to obtain initial feedback and guidance as to the thinking of the Resources Regulator, particularly where a fatality or very serious injury is involved.

The Resources Regulator also is likely to ask that its costs be paid as part of any agreement to enter into an EU, being:

- costs of conducting the investigation into the incident giving rise to the alleged contravention; and
- any legal costs it has incurred in commencing a prosecution action (which may be significant and so may make defending a prosecution a more commercial approach than an EU).

## INFORMATION TO BE INCLUDED IN AN EU

In addition to the information and details already referred to, and information about the parties, incident and contravention, an [EU proposal](#) is to include information such as:

- an acknowledgement that the Resources Regulator has alleged a contravention has occurred
- details of any injury or harm that arose from the alleged contravention
- details of any notices issued that relate to the alleged contravention
- details of the type of workers' compensation provided (if applicable)
- the support provided, and proposed to be provided, to the injured individual(s) to overcome the injury/illness
- any consultation undertaken within the workplace regarding the proposal of an EU
- any rectifications made as a result of the alleged contravention
- a commitment that the behaviour that led to the alleged contravention has ceased and will not recur
- a commitment to the ongoing effective management of WHS risks
- a commitment to disseminate information about the EU to workers, and other relevant parties (which may include WHS representatives, and in the annual report (if applicable)); and
- a commitment to participate constructively in all compliance monitoring activities of the EU.

## EXAMPLES OF ENFORCEABLE UNDERTAKINGS

Examples of EUs that have been accepted by the Resources Regulator include:

INCIDENT	EU PROJECT
Worker died from pulmonary thrombi-embolism caused when he fractured his foot while operating a mobile bolting machine	<ul style="list-style-type: none"> <li>Resources Regulator's databases of bolting incidents reviewed to identify key areas of safety concern</li> <li>Evaluation tool developed and applied to a sample of bolting equipment and practices in 35 NSW underground coal operations</li> <li>Industry baseline of data prepared and reports about this provided to Resources Regulator and participating operations</li> </ul>
Truck driver delivering steel mesh at an underground coal mine was crushed by mesh that fell from the unloading machine.	<ul style="list-style-type: none"> <li>Current industry practices, risk assessments and safe work procedures about packaging, despatch, transport and unloading of mesh reviewed</li> <li>Consultation with participating companies, then developed a risk based tool for mesh work</li> <li>Developed a process so that standard safe systems of work could be produced by mesh suppliers, transport companies and mines for mesh work</li> <li>Outcomes of the project were communicated to NSW mines, mesh suppliers and transport companies</li> </ul>
Worker injured falling from an access ladder (with an automatic raise function) outside a grader machine cabin at an open cut mine while cleaning the cabin windows.	<ul style="list-style-type: none"> <li>Developed and delivered a project targeted at school leavers (age 15 to 18) in the local areas about skills for a successful, safe and healthy transition into industries such as mining, construction and manufacturing</li> <li>Included life skills to help them make positive choices by use of technology including a virtual reality short film, development of virtual reality scenarios, production of face to face workshop and content, and development of a mobile application to support the project outcomes</li> </ul>

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## Black lung update

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Coal Workers' Pneumoconiosis , or black lung disease, is a coal mine disease caused by cumulative, long-term inhalation of very fine, airborne respirable coal dust. Since 2015, there have been at least 22 confirmed cases of CWP reported in Queensland and three cases in NSW.

In September 2016, the Queensland Parliament established a six member bi-partisan CWP Select Committee to investigate the re-identification of CWP in Queensland. The findings and 68 recommendations of the CWP Select Committee were published in a report dated 29 May 2017 ([CWP Report No. 2](#)).

These proposed reforms were in addition to reforms proposed by an earlier [Monash University Review](#) commissioned by the Queensland Government, which focussed on health and medical systems for the early detection of CWP. All of the Monash University Review reforms were accepted by the Queensland Government and most have been implemented. The Queensland Government has also implemented other reforms including reforming requirements for dust monitoring and the reporting of dust exceedances, and introducing new recognised standards for dust.

## GOVERNMENT'S RESPONSE TO THE CWP REPORT NO. 2

In September 2017, the Queensland Government published its response ([Response](#)) to the CWP Report No. 2.

The Response concluded that the Government supports, either absolutely or in principle (subject to further consultation or investigation), all the recommendations made in the CWP Report No. 2, including:

- To establish an independent Mine Safety and Health Authority (Authority) responsible for ensuring the safety and health of mining and resource industry workers in Queensland. The Authority should be governed by a Board of Directors (that includes the Commissioner of Mine Safety and Health (Commissioner), industry and union representatives, and others) (Board). The Response indicates that further consideration needs to be given to whether the Authority and the regulator should be funded by a dedicated proportion of coal and mineral royalties paid to the Queensland Government, in lieu of the existing health and safety fee funding model.
- To establish a new regulator within the Authority (independent from the Queensland Department of Natural Resources and Mines), to be responsible for all resources industries, including mining, petroleum and gas and explosives. However, the Response states that the new regulator must be free from the direction of Parliament, the Minister for Natural Resources, Mines and Energy (Minister) or any other entity "in exercising its operational or regulatory functions". The regulator would otherwise be accountable to the Minister, and perhaps also a parliamentary committee. The new regulator should not be subject to the Board "in its operational decision making", as a governance model that places a Board above the senior officer of the regulator "could give rise to undue interference in the exercise of regulatory functions".
- The Commissioner should have an express power to direct the inspectorate (including the chief inspector) in relation to the investigation of possible offences.
- The new Authority and regulator be based in Mackay. However, the Response indicates that a business case demonstrating the sustainability of this arrangement is first required. Concerns with this recommendation are raised in the Response on the bases that existing public servants' rights and interests need to be respected, that there may be difficulties attracting and retaining staff with the appropriate skills and experience, and that concentrating staff in one regional area may disadvantage other regional areas.
- The reduction of coal dust exposure limits to 1.5mg/m<sup>3</sup> and silica limits to 0.05mg/m<sup>3</sup> calculated under AS 2985. However, the Response tempers this with the comment that any new limit should be based on scientific evidence. Support is given to the review of exposure limits currently being undertaken by Safe Work Australia. The Response expresses concern about the recommendation to require the Commissioner's approval for mine dust abatement plans, as this risks shifting accountability for hazard management to the regulator.
- Increasing the proportion of unannounced inspections from the Mines Inspectorate. However, the Response suggests the proposal to increase the proportion of unannounced inspections to at least 50% needs further consideration and a better understanding of the evidence base for this particular level.
- The need for Industry Safety and Health Representatives to give reasonable notice of inspections is removed. However, the Response says that further consultation about this is required.
- Health assessments are expanded as follows (although it is acknowledged in the Response that further consideration and consultation is required):
  - the removal of the current exception for "low risk" workers
  - the expansion of health assessment to all coal industry workers, including rail and port workers; and
  - requiring at least three yearly health assessment intervals for underground miners and at least six yearly intervals for other coal workers.

The Response also states the Queensland Government will invest up to \$21 million over two years to deliver on the recommendations of the CWP Report No. 2.

In October 2017, the CWP Select Committee published a further report called [A Mine Safety and Health Authority for Queensland: A further response](#). In this further report the CWP Select Committee expressed some frustration at the Queensland Government's Response, noting that it in fact provides unqualified support for only 14 of its 68 recommendations and stating that the CWP Select Committee considers the proposals outlined in the Response will be insufficient to adequately protect health and wellbeing in Queensland mines and quarries.

## ORDI REPORT

In September 2017 the CWP Select Committee published a further report – [Inquiry into Occupational Respirable Dust Issues](#) (ORDI Report). The ORDI Report was the result of extended terms of reference given to the CWP Select Committee in relation to workplace dust issues for coal port workers, coal rail workers, coal-fired power station workers and other workers. It culminated in five further recommendations.

Key recommendations included the development of a code of practice on the management of respirable dust hazards in coal-fired power stations, and that the *Guideline for Management of Respirable Crystalline Silica in Queensland Mineral Mines and Quarries* be amended to require that all exposure monitoring data is reported to the Mines Inspectorate. The Queensland Government tabled an [interim response to the ORDI Report](#) on 15 December 2017, which effectively stated that the further recommendations are still being considered.

## WORKERS' COMPENSATION CLAIMS

The number of compensation claims relating to CWP has not been as significant as first anticipated. The claims that have been made have been medically complex and there is often a lack of consensus amongst the medical practitioners as to diagnosis and prognosis. WorkCover Queensland has generally focussed on returning the affected coal mine workers to work, albeit outside of the industry in the majority of cases.

On 23 August 2017, the Queensland Parliament passed the [Workers' Compensation and Rehabilitation \(Coal Workers' Pneumoconiosis\) and Other Legislation Amendment Act 2017](#) (Qld). This provides stronger workers' compensation protections for current, retired and former coal mine workers, including:

- the introduction of a free medical examination for retired or former coal workers who left the industry prior to 1 January 2017
- ensuring that workers can re-open their workers' compensation claim and access further entitlements if workers with CWP or other types of pneumoconiosis experience disease progression; and
- the introduction of additional lump sum compensation for workers with pneumoconiosis, even where they are not suffering any permanent impairment or incapacity to work.

## NEW SOUTH WALES

In New South Wales, there were three cases of dust disease detected in 2017 – with two cases of mixed dust pneumoconiosis and one of simple silicosis. The Major Investigations Unit of the NSW Resources Regulator is undertaking investigations into each case to determine whether there may have been any breaches of WHS laws in respect of each case.

NSW has long standing arrangements in place through the industry body, Coal Services, for pre-placement and periodic health assessments and dust monitoring, as well as specific regulation concerning health monitoring, ventilation and air-borne dust under the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW).

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## Other legislative developments

*Prohibition on 100% FIFO and vulnerable workers in your supply chain*

## PROHIBITION ON 100% FIFO

The Queensland Government passed the [\*Strong and Sustainable Resource Communities Act 2017 \(Qld\)\*](#) (SSRC Act) on 31 August 2017. The majority of the provisions do not come into effect until 30 March 2018. The objects of the SSRC Act include ensuring that residents of communities in the vicinity of large resource projects benefit from the construction and operation of those projects. For example, by requiring owners of, or proponents for, large resources projects to employ people from nearby regional communities.

Consistent with those objectives, the SSRC Act prohibits large resource projects in Queensland that have a nearby regional community from using a 100 per cent fly-in, fly-out workforce. This prohibition applies both to existing and future large resource projects with a nearby regional community. Existing resource projects with 100% FIFO workforces could be affected. However, the SSRC Act provides for a six month transition period (calculated from the day that the Coordinator-General publishes the name of the large resource project) to allow existing large resource projects time to consider their arrangements and make any adjustments in order to comply with the new prohibition.

A resource project will be a large resource project if it is a resource project:

- for which an Environmental Impact Statement under the *Environmental Protection Act 1994 (Qld)* or the *State Development and Public Works Organisation Act 1971 (Qld)* is required, or
- that holds a site-specific environmental authority under the *Environmental Protection Act 1994 (Qld)*, and
- has or is projected to have a workforce of 100 or more workers (or a smaller workforce decided and notified in writing by the Coordinator-General to the owner of the project).

A “nearby regional community” is a town within a 125 kilometre radius of the main access to the project with a population of more than 200 people (or a greater radius or smaller population decided and notified in writing by the Coordinator-General).

The SSRC Act also creates an offence, with a maximum penalty of \$50,460 for an individual and \$252,300 for a corporation, for advertising positions for workers for a large resource project (whether in respect of an existing or future project) in a way that either prohibits residents of a nearby regional community from applying for the positions, or otherwise states in any way in a document that residents of a nearby regional community are not eligible to be workers on the project. However, this provision only applies to future recruitment activities and is not retrospective.

## SUPPLY CHAIN DEVELOPMENTS

On 14 September 2017, the [\*Fair Work Amendment \(Protecting Vulnerable Workers\) Act 2017 \(Cth\)\*](#) received assent. This followed significant media attention in 2016 into the exploitation of temporary work visa holders and other vulnerable workers. (See our related article – [My brother's keeper: Franchisor and parent company liability reforms after Vulnerable Workers Bill passes](#)).

Amongst other things, the Vulnerable Workers Act amended the *Fair Work Act 2009 (Cth)* to introduce new civil penalties for ‘serious contraventions’ of the FW Act, which are ten times higher than for other contraventions (up to \$630,000 for a corporation and \$126,000 for individuals).

It remains important for employers to be vigilant in ensuring compliance with the FW Act, especially in relation to the risk of underpayments or arrangements that could be construed as amounting to sham contracting.

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