

Safety Matters Alert

Consultation underway for consolidated resources safety legislation in WA

Work Health and Safety (Resources) Bill 2015 (WA)

WHAT YOU NEED TO KNOW

- Consultation on the proposed *Work Health and Safety (Resources) Bill 2015 (WA)* has commenced, with a stakeholders forum held in Perth on 23 July 2015 and submissions due by Friday, 14 August 2015.
- The WHS Resources Bill will consolidate the safety and cost recovery aspects of current mining, petroleum and major hazard facilities (MHF) legislation, currently spread across seven Acts, into one regime.
- As part of this consolidation, the Department of Mines and Petroleum (DMP) will take over WorkSafe WA's responsibilities for work health and safety at MHFs.
- A mock-up of the WHS Resources Bill was published earlier this month, and is broadly based on the national *Model Work Health and Safety Act*.
- Twenty-one key changes have been identified and are set out in a Consultation Regulatory Impact Statement (Consultation RIS), also published in July 2015.
- The proposed Bill will be taken to parliament in early 2016 and, if passed, the associated regulations will be drafted and released for consultation during 2016, with an aim of implementing the *Work Health and Safety (Resources) Act (WA)* on 1 January 2017.

WHAT YOU NEED TO DO

- Consider the mock-up of the WHS Resources Bill and, if you believe that it may have adverse effects on your business, make a submission. Ashurst can assist with drafting tailored submissions based on the operations and needs of your business.
- Keep up to date on the progress of the WHS Resources Bill. Ashurst can assist with closer monitoring and updates.

The journey so far

In 2008, each of the Australian State and Territory Governments committed to harmonising their work health and safety laws with a national model through the introduction of legislation to be enacted by parliament in each jurisdiction.

In October 2014, the WA Government tabled a 'green' *Work Health and Safety Bill 2014*, which it opened for comment until 30 January 2015.

During 2014, the WA Government also gave consideration to harmonising safety laws in the resources sector. Five options for reforming the structure of mining, petroleum and MHF safety legislation were put forward for consultation. Following consultation, Marsden Jacob (external

consultants) recommended that these safety laws be unified into one Act, with one regulator, being the DMP.

This month, the WA Government released a mock-up of the WHS Resources Bill and is now seeking stakeholder input on its content. A stakeholders forum was held on 23 July 2015, and submissions are due by 5pm WST on Friday, 14 August 2015.

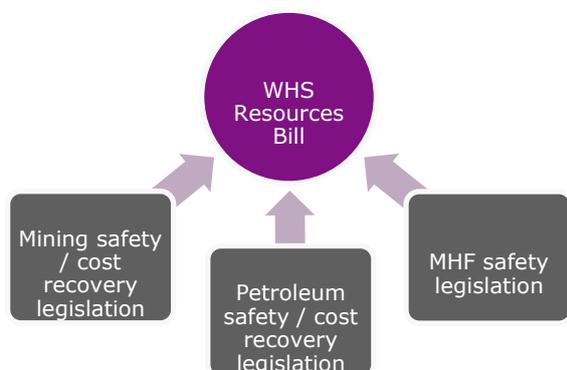
Proposed approach

Consolidation

Currently, safety obligations for WA's resources industry are contained in the following six Acts (and their associated regulations):

- *Mines Safety and Inspection Act 1994*;
- *Petroleum and Geothermal Energy Resources Act 1967*;
- *Petroleum Pipelines Act 1969*;
- *Petroleum (Submerged Lands) Act 1982*;
- *Dangerous Goods Safety Act 2004*; and
- *Occupational Safety and Health Act 1984*.

The WHS Resources Bill will consolidate the safety aspects of these six Acts, plus the cost recovery provisions contained in the *Petroleum and Geothermal Energy Safety Levies Act 2011*. (The cost recovery provisions in the *Mines Safety and Inspection Levy Regulations 2010* will also be consolidated).



As part of this consolidation, the DMP will become the sole regulator for resources safety, and will take over WorkSafe's regulatory responsibilities under the *Occupational Safety and Health Act 1984* for work health and safety at MHFs. While some stakeholders have questioned this transfer of responsibility, the

DMP has said that it is confident in its ability to take on this role.

Unification

The WHS Resources Bill will be based on the national Model WHS Act and the "best elements" of the National Mine Safety Framework.

According to the Consultation RIS, the WHS Resources Bill will only differ substantially from the national Model WHS Act by:

- excluding sections that are not relevant to WA resources operations; and
- including sections that are specific to mining, petroleum and MHFs (including geothermal energy and greenhouse gas storage).

The petroleum provisions of the WHS Resources Bill are also expected to deliver outcomes consistent with the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

Objective for change

In its presentation to stakeholders on 23 July 2015, the DMP acknowledged that "the resources industry increasingly uses a risk-based approach to safety and continues to introduce new technology, so legislation needs to be less prescriptive and more adaptable to change".

Consistent with this acknowledgement, the Consultation RIS provides that the DMP's objective for change is to:

"develop a modern and adaptable regulatory framework that supports the delivery of high standards of safety in an efficient, equitable and consistent manner across mining, petroleum and MHFs. In addition, the regulatory structure seeks to improve:

- health and safety outcomes while balancing regulatory burden; and
- consistency between the industries and with the Commonwealth while recognising sector specific risks and approaches to risk management."

This flexible, outcomes based focus of the WHS Resources Bill means that some of the more detailed or prescriptive sections of the current Acts will not be reflected in the WHS Resources Bill, but instead put in

the associated regulations or guidance material. The regulations will not, however, be drafted until after the WHS Resources Bill has been passed by parliament.

Key changes

To assist stakeholder consultation on the WHS Resources Bill, the DMP has identified 21 key changes from the current regime. These are set out in the Consultation RIS. We set out some of the most significant changes below.

Duty of Care

The primary duty of care will be for a Person Conducting a Business or Undertaking (PCBU) towards all workers (including contractors and labour hire workers) for operations under its control.

Operators, licenses and title holders, however, will have an overall primary duty of care for the entire site, facility or operation.

Mine, petroleum and MHF operators will be designated PCBUs and will have the primary duty of care.

In a mining context, "mine operators" will replace the concept of "principal employer" and, in a petroleum context, all petroleum operators will have to be registered, similar to under the current *Petroleum (Submerged Lands) Act 1982*.

PCBUs that control autonomous or semi-autonomous operations from a remote site (eg an office not located at the resources facility) will also have prescribed duties in relation to workers at the resources facility.

Safety cases and Safety Management Systems

Mining operations will be required to prepare a Safety Management System (SMS), rather than a Project Management Plan (PMP), which is currently required before a mining operation can commence. Unlike a PMP, an SMS will be an "enforceable and living document", and will need to address policies, operating procedures, risk management, emergency planning, change management, worker training, consultation, contractor selection, performance monitoring, auditing, incident investigation and continuous improvement.

MHF and petroleum operations will require a "safety case", rather than an SMS, pipeline management plan or safety report. An exception will apply to diving operations, which will still require an SMS.

Safety cases must include a facility description, SMS and a formal safety/risk assessment outlining the safety studies that have been conducted, as well as the results of those studies and the safety management arrangements that address the findings of the studies.

Safety cases will not be introduced for mines.



Statutory positions

The WHS Resources Bill will provide for a "Site Senior Executive" who will replace the "Registered Manager" in a mining context, or the "operator's representative" in a petroleum and MHF context. The DMP has indicated that this change in terminology may also come with a change in training requirements for those who will become Site Senior Executives.

Other statutory positions similar to those currently listed in the *Mines Safety Inspection Act 1994* will be provided for in the regulations.

Incident notification and investigation

An online incident reporting system will be implemented and all notifiable incidents will need to be reported immediately through this system. Deaths and serious illnesses or injuries will also need to be reported by phone.

Resources facilities operators (including mining, petroleum and MHF operators) will also have a statutory obligation to investigate all notifiable incidents and prepare an investigation report. There is no timeframe specified for the investigation report, and it need only be provided if requested by the DMP.

Limitation period

Proceedings under the WHS Resources Bill must be brought within two years of the offence coming to the notice of the DMP. This varies from current limitation periods, which are three years in a mining context, one year in an MHF context and unlimited in a petroleum context.

Officer's liability

A positive duty will be placed on officers of corporations to exercise due diligence to ensure that the PCBU complies with its duties and obligations under the WHS Resources legislation.

A director or officer may be prosecuted for safety breaches irrespective of whether the PCBU is found guilty of an offence.

Penalties

Penalties will be aligned with the national Model WHS Act.

There will be three categories of offences. Category 1 offences are the most serious, and arise where a duty holder recklessly endangers a person to risk of death or serious injury. Category 2 offences arise where there is a failure to comply with a health and safety

duty or electrical safety duty that exposes a person to risk of death, serious injury or illness. Category 3 offences arise where there is a failure to comply with a health and safety duty or electrical safety duty.

The penalties for each category are as follows:

	Category 1	Category 2	Category 3
Individual (not a PCBU or officer of a PCBU)	\$300,000, 5 years imprisonment or both	\$150,000	\$50,000
Individual (as a PCBU or officer of a PCBU)	\$600,000, 5 years imprisonment or both	\$300,000	\$100,000
Body corporate	\$3,000,000	\$1,500,000	\$500,000

Cost of change

According to the Consultation RIS, employers are expected to incur "low" establishment costs of about \$25 per worker to update work processes and provide training on the new regime. Ongoing costs will be dependent on the substantive requirements of the changes specified in the regulations, but the DMP has said that, broadly speaking, it intends ongoing costs to be similar to current costs.

Where to from here?

While a mock-up of the WHS Resources Bill has been released, the proposed legislation has not yet been drafted, and changes may be made based on stakeholder comments in response to the Consultation RIS.

If you believe that the WHS Resources Bill may have adverse effects on your business, Ashurst can assist with drafting tailored submissions based on the operations and needs of your business.

After the conclusion of the public comment period (which ends on 14 August 2015), submissions received will be considered, and a Decision RIS will be released on 28 September 2015 addressing each of the key changes and recommending a suggested approach forward.

The Decision RIS will be subject to a review by the Regulatory Gatekeeper in October 2015, and considered by the Minister in November 2015.

The WHS Resources Bill will be put to parliament in early 2016.

If the WHS Resources Bill is passed, the associated regulations will be drafted and released for consultation in chapters during 2016, with an aim of implementing the WHS Resources Act and regulations on 1 January 2017.

Key resources

- The mock-up of the WHS Resources Bill can be accessed online at: <http://duqm0dwyjbvv.cloudfront.net/wp-content/uploads/2015/07/Indicative-version-of-the-WHS-Resources-Bill.pdf>
- The Consultation RIS can be accessed online at: <http://duqm0dwyjbvv.cloudfront.net/wp-content/uploads/2015/07/Consultation-RIS-WHS-Resources-Bill.pdf>

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