

MINES SAFETY AND INSPECTION AMENDMENT BILL 2004

EXPLANATORY MEMORANDUM

INTRODUCTION

Review of the *Mines Safety and Inspection Act 1994*

1. The attached *Mines Safety and Inspection Amendment Bill 2004* (the Bill) has been developed with a view to strengthening and improving the existing provisions of the *Mines Safety and Inspection Act 1994* (the MSI Act).

PART 1 - PRELIMINARY

Clauses 1 to 3

10. The proposed Act will be cited as the *Mines Safety and Inspection Amendment Act 2004*.
11. The proposed Act will come into operation on a day fixed by proclamation. Different dates of operation may be set for various provisions.
12. The amendments in Parts 2 to 8, except those in clauses 87 and 94, are to the MSI Act.

PART 2 – AMENDMENTS RELATING TO GENERAL OCCUPATIONAL SAFETY AND HEALTH DUTIES

13. The Bill makes a number of changes to the general duty of care provisions under the MSI Act with a view to overcoming existing limitations, closing the gaps in coverage and clarifying some provisions.

Clause 4

14. The Bill amends the Objects of the Act to include the broader definition of employer and employee under the expanded employment arrangements.

Clauses 5 and 6 – Part 2 Division 2

15. Clauses 5 and 6 establish a new division heading and repeal particular provisions of the employer's duties and contractual relationships, which are re-established in new provisions later in the Bill.

Clause 7 – Section 11A inserted

16. The Bill includes a duty on the manager to inform a person who reports a dangerous situation at the mine of the outcome of the investigation.

Clause 8 – Section 12 amended

Duties of employers and self-employed persons

17. Section 12 of the MSI Act imposes a duty of care on employers and self-employed persons. This section is amended for clarity and confirmation of the extent of the duty.
18. New section 12(1) is a clearer expression of the existing duty at section 12(1)(b) for an employer or self employed person to look after his or her own safety and health. The reworded duty applies only to a self-employed person (ie the reference to employer is removed), given such a duty cannot by its very nature apply to a corporate employer, and an employer who is an individual is by definition under the MSI Act also a self-employed person.
19. New section 12(2) clarifies existing section 12(1)(b) which places a duty on employers and self-employed persons towards persons that are not their employees but who may be adversely affected by the work. Existing section 12(1)(b) may be interpreted either narrowly or more broadly, and the narrow interpretation would exclude application from situations where work has ceased or where the harm arises from an inadequacy in the system of work. The replacement provision makes it very clear that the duty:
- applies to work that has been or is being undertaken; and
 - extends to any hazard arising from or increased by the system of work.

Clause 9 – Sections 12B and 12C inserted

Duties of a corporation that is not an employer

20. These provisions create a new general duty of care owed to non-employees by corporate entities that are not employers but operate for gain or reward. The duties are modelled on those under the new section 12(2).
21. This amendment closes a gap in coverage that arose because the definition of self-employed person, and therefore the duties of a self-employed person at section 12, does not apply to a corporation. With the continued expansion of labour hire arrangements as a means of engaging workers, an increasing number of corporations are no longer employers. While the duties owed to workers engaged under labour hire arrangements are dealt with elsewhere in the Bill, this additional change is required to ensure members of the public or work experience

students or others present at the mine are protected when a business is operated by a corporation that is not an employer.

22. Penalties apply in accordance with the penalty regime introduced later in the Bill.

Clause 10 – Part 2 Divisions 3 and 4

Certain workplace situations to be treated as employment

23. Since its inception, the MSI Act has covered the contractual relationship between an employer and employee. Contract for services (principal/contractor) arrangements have also been recognised under the Act from the outset, however other alternative arrangements are not necessarily covered.
24. The changing nature of Western Australia's workforce has given rise to an increasing number of workers who work under non-traditional arrangements. The Bill introduces new provisions to extend coverage to alternative working arrangements. It also contains replacement provisions dealing with contract work arrangements (ie principals and contractors).
25. With respect to provisions relating to principals and contractors, the existing provisions have proved difficult to understand. In particular, the existing phrase "but for an agreement between him and the contractor to the contrary" has often been misinterpreted to mean that a principal can contract out of his or her responsibilities, when the phrase actually means the opposite. The replacement provisions at proposed section 15A now clearly state that an agreement that attempts to pass on control of matters that come within the principal's duties is void. The remaining provisions of section 15A restate existing provisions relating to contract work. The principal is deemed to be the employer of the contractor and the contractor's employees with respect to matters over which the principal has control.
26. The Bill also introduces provisions to deal specifically with labour hire, a prevalent alternative working relationship where the worker, if employed at all, is employed by the labour hire organisation (the agent), yet works for a host (the client) without having a direct contract with that person. Duties currently applicable to the client are limited to the duty not to harm a non-employee, and if the client is a corporation without any employees, then the corporation escapes any responsibilities at all.
27. The Bill provides that both the agent and the client in a labour hire arrangement have an employer's general duty of care to the worker in relation to matters over which each has control.

28. In addition to provisions relating to contract work arrangements and labour hire, there is a new provision designed to capture any other alternative working relationship where the work is directed and controlled by the duty holder in a manner similar to that under a contract of employment.

Duties of employers to maintain safe residential premises

29. The Bill introduces new provisions requiring an employer to ensure that residential premises provided in connection with work are safe for the employee. The duty applies only in limited circumstances, that is, where the following three conditions apply:
- there is no alternative accommodation available;
 - the accommodation is outside a city or town; and
 - there is no written agreement containing terms that might reasonably be expected to apply to the letting of residential premises (such as a lease).
- does not include residential facilities located on a mining tenement and that comes within the definition of “mining operations” under the MSI Act.
30. The application of the duty extends to land and outbuildings that are intended to be used in connection with the occupation of the premises. This is necessary to provide protection to employees undertaking the sorts of activities that would be expected as part of staying in the premises. For example it might apply to external toilets and laundries, and the pathways between them. Only where there is a clear nexus with the occupation of the premises will the duty extend to land and outbuildings.
31. Importantly, this duty, similar to existing duties in the Act, applies only “so far as practicable”.
32. Penalties will apply in accordance with the penalty regime introduced later in the Bill.
33. This new duty requiring an employer to maintain safe residential premises gives rise to some considerations not present in the case of existing duties. An employee in his or her own time is not subject to the same direction and control of the employer that he or she would be during work time. Further, the duties on an employee under the MSI Act apply only when he or she is “at work”. In recognition of these considerations, the Bill provides a defence in proceedings against an employer in cases of serious injury or death, if the employer proves that the serious injury or death would not have occurred if the employee had taken reasonable care to look after his or her own safety and health at the premises.

Notification of hazard to the principal employer and manager

34. The Bill includes an additional duty on employers and self-employed persons, to inform the person in control of the workplace of any hazards of which the employer/self-employed person becomes aware and which are the responsibility of the principal employer and the manager of the mine to rectify. The duty also applies in relation to the means of access to and egress from the workplace. The duty is limited by practicability.

Clauses 11 to 13

Extended meanings of “employer” and “employee”

35. Clause 11 extends the meanings of “employer” and “employee” to the parties deemed to be employers and employees in sections of the Act dealing with contract work arrangements, labour arrangements in general, and labour hire. These definitions are extended for the purpose of Part 3 of the Act dealing with inspectors and their powers, and are necessary to provide for the enforcement of the provisions of the Act dealing with these arrangements. This clause does not extend the meanings of “employer” and “employee” more generally.
36. As a consequence of the new duty on employers in relation to residential premises, it is necessary to provide for the enforcement of the MSI Act to extend to such residential premises. This has resulted in the need to extend the meaning of “mine” to include residential premises, for the purposes of an inspector’s powers.
37. Clause 13 provides that the definition of employer and employee is extended for the purposes of making regulations.

PART 3 -AMENDMENTS RELATING TO OFFENCES AND PENALTIES

38. This Part gives effect to a new regime of penalties, characterised by:
- significant increases, particularly in relation to corporations;
 - higher penalties for repeat offences; and
 - new offences of causing death or serious harm through “gross negligence”, attracting high penalties including the option of imprisonment.
- In addition a new sentencing option is made available to the courts for certain lesser offences by the introduction of enforceable undertakings.
39. Maximum penalties have been increased in response to community and Government concern that the penalties awarded for breaches of the MSI Act, particularly where such a breach results in death or serious injury, have on a number of occasions failed to reflect the seriousness with which such offences are regarded.

40. The new penalty regime is structured and provides a clear indication to the courts that the penalties should escalate in accordance with the seriousness of the offence.
41. Current penalties under the MSI Act, for a general duty of care breach that has caused death or serious harm, is set at a maximum of \$200,000 for a corporation or \$20,000 for an individual.
42. Where the breach does not cause death or serious harm, the maximum penalty that can be currently awarded against a non-employee is \$100,000.
43. Under the new regime, maximum penalties for a corporation will be set at twice those for an individual who commits the same offence, and the maximum penalty for subsequent offences is set at 1¼ times the maximum for a first offence. This new structure will apply to penalties under the regulations as well as those under the MSI Act.
44. Maximum penalty (for the most serious of the offences, ie a general duty of care breach causing death or serious harm where gross negligence is involved) for a corporation will, under the proposed provisions, increase to \$500,000 with \$625,000 for a second offence
45. Higher monetary penalties have been proposed in all cases where “gross negligence” is an element of the offence (including offences by employees). Where the offender is a natural person (and not an employee), the option of imprisonment is also included. In the case of offences by corporations, individuals may also be pursued where the offence occurs with the consent, connivance or neglect of a director or officer of the corporation under section 100 of the MSI Act, and the imprisonment option may apply to that individual.
46. Where an individual, other than an employee, commits the offence the maximum penalty will be \$250,000 for a first offence and \$312,500 for a subsequent offence, with the possibility of imprisonment in both cases.

Clause 14 – Section 4 amended

47. The definition of serious harm at section 4(4) of the MSI Act is amended by updating the references to the relevant sections of the Act in line with the changes later in the Bill.

Clause 15 – Sections 4A and 4B inserted

Penalty levels defined and meaning of “first offence” and “subsequent offence”

48. The Bill establishes and defines four penalty levels for referencing in offence provisions elsewhere in the Bill.

Penalty Level	Offenders					
	Employees		Individuals as Non-employees (eg employers) -		Corporate Non-employees (eg employers) -	
	First Offence	Subsequent Offence	First Offence	Subsequent Offence	First Offence	Subsequent Offence
Level One (General Penalty)	\$5,000	\$6,250	\$25,000	\$31,250	\$50,000	\$62,500
Level Two (General Duty Breach)			\$100,000	\$125,000	\$200,000	\$250,000
Level Three (General Duty Breach resulting in serious harm or death)			\$200,000	\$250,000	\$400,000	\$500,000
Level Four (General Duty Breach involving gross negligence resulting in serious harm or death)			\$250,000 and imprisonment for two years	\$312,500 and imprisonment for two years	\$500,000	\$625,000

49. In addition, penalties for employees who breach their general duties of care are specified separately, later in the Bill.
50. First and subsequent offences are defined. The Bill is not retrospective in this regard, in that an offence is a subsequent offence (for the purpose of the penalty provisions) only if a previous offence is committed after the amendment Act comes into operation.

Clause 16 – section 15 repealed

51. Existing section 15 (re no double jeopardy) is repealed, and the provisions are reinstated in a more appropriate part of the Act dealing with legal proceedings.

Clause 17 – Part 2 Division 1 inserted

Meaning of gross negligence in relation to certain breaches of this Part

52. “Gross negligence” applies to “general duty of care” breaches in circumstances where the offender:

- knew that the breach would be likely to cause death or serious harm to a person to whom a duty was owed; but
 - disregarded that likelihood;
- and the contravention did in fact cause such death or serious harm.

53. The concept of “gross negligence” is applicable to both individuals and corporations. It applies to all the key duty holders under the Act including employers, employees, self-employed persons, manufacturers, suppliers and persons in control of workplaces.

Clauses 18 to 27

Breaches of the “general duties of care”

54. Clauses 18 to 27 repeal the existing penalties applicable to the “general duties of care” under the Act and replace them with penalties in accordance with the new penalty regime. For the most part, the penalties are stated in terms of penalty levels, defined earlier. The exception is in relation to “general duty of care” breaches by employees which, being unique, are specified in dollar amounts in the relevant clause.

55. The penalties for an employee are:

- \$25,000 for a first offence and \$31,250 for a subsequent offence for a breach involving gross negligence (resulting in serious harm or death);
- \$20,000 for a first offence and \$25,000 for a subsequent offence for a breach resulting in serious harm or death;
- \$10,000 for a first offence and \$12,500 for a subsequent offence for a general duty of care breach (not involving the elements of serious harm or death or gross negligence).

56. Where an offender is charged with a serious offence causing death or serious harm, the provisions allow a court to convict the offender of the lesser offence, involving the same “general duty of care” breach, but without the element of causing death or serious harm.

57. Similarly, where the offender is charged with an offence involving gross negligence, the court may convict on a lesser offence that does not involve gross negligence. In this case the court has two options – the relevant general duty of care breach causing serious harm or death; or the “general duty of care” breach alone, where causation is not proved.

Clauses 28 to 37 – Part 9 Division 1 inserted

Further amendments related to penalties

58. Further clauses are included in the Bill to maintain appropriate structure in the principal Act and make further consequential changes to the penalty regime.

59. The existing daily penalties for continuing offences are amended to reflect the new penalty regime. This results in a new daily penalty for a corporation of twice that of a natural person committing the same offence.
60. The time limit to bring a prosecution has been extended from 2 to 3 years.
61. Clause 32 makes a number of changes to the averment provisions in the MSI Act. The averments simplify court proceedings by allowing certain facts to be taken as proved in the absence of evidence to the contrary.
62. Two new averments have been added. One is that a complaint for an offence against the MSI Act is taken to be authorised under section 96 to institute proceedings, in the absence of evidence to the contrary. The second relates to codes of practice, an Australian Standard, or an Australian/New Zealand Standard. It provides a means of demonstrating to the court that such documents are what they are purported to be, in the absence of evidence to the contrary, without the need, say, to obtain a representative of the publishing body to testify in court.
63. Clause 34 inserts a new vicarious responsibility provision for offences involving gross negligence. It provides that a superior officer, employer or manager of a person who commits an offence, who knowingly, permitted or employed the person to commit the offence or consented, or connived in acts or omissions is vicariously liable for the offence.
64. Existing section 100 is amended to take into account the new offences involving gross negligence. Section 100 currently provides for directors and other officers of a corporation to be brought to account when the corporation is guilty of an offence and that offence is committed with the consent or connivance of, or was attributable to the neglect on the part of the director or other officer. A director will be guilty of the gross negligence element of the offence where he or she knew that the contravention would be likely to cause the death of or serious harm to a person to whom a duty was owed, and disregarded that likelihood. Where these elements are not proved, the court may convict on a lesser charge of a breach of the general duty of care resulting in death or serious harm.
65. Existing section 15 (re no double jeopardy) is repealed, and the provisions are reinstated in a more appropriate part of the Act dealing with legal proceedings.

Clause 38 – Part 9 Division 2 inserted

Undertaking by Offender in Lieu of Payment of Fine

66. The Bill provides for an alternative to a monetary penalty for lesser offences under the Act, as a means of directly improving occupational safety and health. It does this by introducing an enforceable “undertaking” as an additional sentencing option.
67. An undertaking is defined as a written commitment with respect to occupational safety and health, given by a person convicted of an offence under the Act, the undertaking being agreed to in writing by the State Mining Engineer.
68. Under this approach, the court may after having determined a penalty for a breach of the Act, offer the convicted offender the option of choosing between:
 - paying the monetary penalty; or
 - entering into an undertaking with the State Mining Engineer, where the monetary value of that undertaking is roughly equivalent to the level of penalty.
69. An undertaking may provide for an offender to:
 - take specified steps to improve occupational safety and health;
 - take steps to publicise an offence and related details;
 - remedy any consequences of a specified offence; or
 - carry out a specified project or activity for the improvement of occupational safety and health in the community.
70. An undertaking must not provide for the offender to do something that he or she is required by the MSI Act to do, or that could be the subject of a notice.
71. The option of entering into an undertaking applies only with respect to “lesser offences”, that is where there has been no injury, death or harm to a person, and where the offence is against the regulations or a specified provision of the Act to which the general penalty at section 94 applies.
72. A court may not offer the option unless it has reason to believe that it is likely that the State Mining Engineer and the offender can reach agreement on the undertaking.
73. Failure to comply with an undertaking by the due date will be an offence, and if convicted, the offender will be required to pay the original penalty as well as a further penalty for a new offence.
74. The State Mining Engineer may cause an undertaking to be published.

Clause 39 – Section 104 amended

75. Clause 39 amends the penalties applicable under the regulations, in accordance with the new penalty regime, as follows:
- \$5,000 for a first offence and \$6,250 for a subsequent offence for a breach by an employee;
 - \$25,000 for a first offence and \$31,250 for a subsequent offence for a breach by an individual other than an employee;
 - \$50,000 for a first offence and \$62,500 for a subsequent offence for a general duty of care breach by a corporation (not involving the elements of serious harm or death or gross negligence).

PART 4 AMENDMENTS RELATING TO MINE MANAGEMENT

Clauses 40 to 48

76. Amendments make it an offence if when mining operations begin at a mine, the name and address of the principal employer is not notified to the district inspector.
77. Changes in the ownership of a mining operation must be notified to the district inspector. As well, changes to the identity of the principal employer must be notified within a prescribed time.
78. The amendments allow the registered manager to make subordinate appointments at the mine on behalf of the principal employer. Amendments now allow that short-term absences along with details of deputy (relieving) appointments, periods of duty and related matters to be recorded in the mine record book.

PART 5 – AMENDMENTS RELATING TO SAFETY AND HEALTH REPRESENTATIVES AND COMMITTEES

Clauses 49 to 72

Election of Safety and Health Representatives

79. The election of mine safety and health representatives is a fundamental feature of the consultative provisions of the MSI Act. However, the current provisions of the Act dealing with the election of safety and health representatives are highly prescriptive and inflexible and the level of prescription regarding elections is inconsistent with the emphasis on effective workplace consultation and the basic self-regulatory principles that underpin the legislation.
80. The intent of the amendments is to provide increased flexibility under the Act for parties at the mine to agree on representational arrangements that are most suitable for the mine concerned.

81. Existing mechanisms under the MSI Act, where the employer consults with employee delegates regarding the election of safety and health representatives, have been retained.
82. The new provisions enable the consulting parties, if they so wish, to agree to the establishment of a “scheme” which allows for the application of a variety of arrangements that are not currently available under the MSI Act. Where parties disagree on matters relating to an election, there is a mechanism for reference to the State Mining Engineer, in the first instance, and subsequently to the safety and health tribunal, failing resolution.
83. In seeking to address the current inflexibilities, a “scheme” may allow safety and health representatives to be elected to represent employees at one or more mines. Alternatively one or more representatives may be elected for any group of employees of the employer concerned that constitutes a distinct unit of the employer’s workforce.
84. Significantly, a scheme may allow a contractor or employees of a contractor to participate in an election for a safety and health representative as if a contract of employment existed. This allows the consultative arrangements that centre on representatives and committees to apply more widely where there is a significant reliance on contract labour.
85. The consulting parties will also be able to determine how to deal with any casual vacancy for a safety and health representative that may arise.
86. The Bill contains the necessary savings provisions to maintain the status of representatives elected prior to the commencement of the new provisions. It also makes a number of amendments to existing sections to take into account that a safety and health representative may be elected in relation to a work group, or for more than one mine.

Entitlements

87. The Bill also contains some improvements to the existing entitlements under the MSI Act for safety and health representatives. The provisions will allow regulations to provide for payment of course fees, as prescribed by regulations, where safety and health representatives attend prescribed training for which they are entitled to take time of work.
88. The Bill provides for entitlements to also include other associated costs, such as travel and accommodation costs, as prescribed. It is intended that the regulations will cover the detail of these entitlements.
89. A safety and health representative will also be entitled to pay when attending a prescribed course during his or her own time, or time off

work with pay when attending during work time, to attend training, as prescribed. The latter provision already exists, but the former does not.

90. Although most employers do pay costs associated with attending training, or provide recompense to a safety and health representative who attends training in his or her own time, there is no requirement to do so. This leaves open the potential for the safety and health representatives to be disadvantaged, or for no training to be undertaken, where the employer refuses to pay. It is important to the effective operation of the legislation for all safety and health representatives to have access to training, at no disadvantage to themselves.

Clauses 62 to 66

Establishment of Safety and Health Committees

91. The Bill removes existing inflexibilities in the MSI Act, to enable the parties at the mine to determine the safety and health committee arrangements that suit them best.
92. A safety and health committee may be established at the request of an employee or of the employer's own volition. These arrangements remain effectively unchanged.
93. The time frame of 21 days for responding to an employee request remains the same, as does the period of three months in which to establish a committee. However, the latter may be extended by the State Mining Engineer, to take into account any delays that may arise because of difficulties the parties may experience in reaching agreement.
94. The Bill addresses the current prescription within the MSI Act regarding the composition of a safety and health committee. Subject to the constraint that at least half the committee members will need to be safety and health representatives or employees who work at the mine, representing other employees, the Bill enables the employer to consult with employee representatives with a view to reaching agreement on the structure of their committee.
95. A "circuit breaker" is provided, by reference to the State Mining Engineer if agreement cannot be reached. A decision by the State Mining Engineer may be referred to the safety and health tribunal for review.
96. The new provisions will enable a committee to be established for more than one mine. While such a provision currently exists, it is limited to mines where there are safety and health representatives.

97. For the first time, hierarchical committee structures will be recognised under the legislation.
98. A provision has been included enabling the agreement to be varied or the committee to be abolished, where the relevant parties agree, in recognition that it is not appropriate to “lock” mines into arrangements that may not continue to be appropriate to the circumstances.
99. The Bill contains the necessary savings and transitional provisions to maintain the status of existing committees and to bring them under the new provisions.

Clause 67 – Section 68A, 68B, 68C and 68D inserted, and Clause 68

Discrimination against safety and health representatives

100. Safety and health representatives perform a key function under the legislation. They are currently covered by section 69 of the Act, which protects persons from discrimination, for reasons relating to something they have done in the interests of safety and health. However, these provisions do not provide for re-instatement of a dismissed employee or any other means of rectifying or compensating for a wrong done to a person.
101. In order to protect safety and health representatives and to provide an adequate means of redress, the Bill contains provisions that give safety and health representatives who have been disadvantaged the right to seek redress through the new safety and health tribunal. Such a right will exist whether or not prosecution action is taken.
102. The tribunal may order re-instatement, compensation, or both.
103. These new provisions will apply to safety and health representatives only. Clause 68 makes the consequential amendment of removing reference to safety and health representatives from the existing discrimination provisions in sections 69(1)(a) and (b) of the Act.

PART 6 – AMENDMENTS TO PROVIDE FOR IMPROVEMENT NOTICES, PROHIBITION NOTICES AND PROVISIONAL IMPROVEMENT NOTICES

Clauses 73 to 79

Clause 73 – Section 4 amended

104. The definition of improvement notice, prohibition notice and provisional improvement notice is inserted at section 4(1) of the MSI Act with references to the relevant sections of the Act in line with the changes later in the Bill.

Clauses 74 and 75 – Section 22 repealed and Section 23 amended

Clause 76 – Sections 30 and 31 replaced by Divisions 3 and 4

Improvement Notices and Prohibition Notices

105. The Bill provides for issue of improvement notices by an inspector to any person at a mine who is contravening the Act. If the person contravening the Act is not the manager a copy of the notices must be given to the manager and the principal employer.
106. The notice will contain details of the contravention and time before which the person is required to remedy the contravention. There is also a requirement for the notification of compliance.
107. Prohibition notices can be issued by an inspector where a contravention of the Act is occurring at a mine, or any plant, mining practice or hazardous substance at or related to a mine is dangerous or likely to become dangerous so as to constitute a hazard to any person.
108. The issue of a prohibition notice may include directions and require the person to remove the hazard. In the exercise of his powers under the Act the inspector may require work to stop a mine or part of a mine and to remove all person from the mine. The State Mining Engineer has the power the cancel a notice.
109. Prohibition notices can extend to the residential premises occupied by employees.
110. The manager of a mine must cause the improvement notices and prohibition notices to be displayed as well as being attached to the mine record book.
111. There is a general duty on the principal employer and the manager to ensure that the notices are complied with.
112. Notices may be referred for review firstly by the State Mining Engineer and there is scope for a further review by the Tribunal.
113. The Bill contains the necessary savings and transitional provisions for directions given before the commencement of the new provisions.

Provisional Improvement Notices

114. Clause 73 inserts a definition of provisional improvement notices (PINs) in section 4 of the Act (Interpretation).

115. Under the MSI Act, safety and health representatives have a fundamental role in the identification of hazards at the mines and in bringing safety and health concerns to the attention of the employer.
116. The Bill provides for appropriately trained and accredited safety and health representatives to issue provisional improvement notices (PINs) requiring the recipient to address specified safety and health matters at the mine. This applies to the mine or mines for which the safety or health representative was elected, or, where the representative was elected for a group of employees, a mine where a member of the group works.
117. PINs are similar to improvement notices issued by inspectors except that they are provisional and may be issued where the authorised safety and health representative is of the opinion that a breach of the Act or regulations is occurring and is not immediately remedied by the employer.
118. In acknowledgement of the wide-ranging nature of the power and the need to provide protection from inappropriate use, the Bill includes a number of controls on the right to issue PINs, including undertaking appropriate training, to ensure PINs serve their intended function.
119. The provisions of the Bill place the following controls on the power to issue a PIN:
- the power to issue a PIN applies only to a safety and health representative who has completed a prescribed course of training;
 - the safety and health representative may only issue a PIN where he or she has consulted with the person who is to be issued with a PIN;
 - the safety and health representative must, where practicable, consult with another safety and health representative at the mine concerned before issuing a PIN;
 - if a person on whom a PIN is issued disagrees with it, he or she has a right of review by a inspector;
 - misuse of the power to issue a PIN will be dealt with by the existing sanctions in the MSI Act for the misuse of a safety and health representative's powers, and includes the potential for disqualification from being a safety and health representative.
120. Should it be found upon experience that a further control is needed on the power to issue PINs, the Government is prepared to make regulations requiring further consultation.
121. The PINs must be displayed and entered in the mines record book.

PART 7 – AMENDMENTS TO PROVIDE FOR THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL TO DETERMINE CERTAIN MATTERS

Clauses 80 to 87

- 122. The MSI Act currently provides for a number of matters to be referred to a safety and health magistrate for resolution. The Bill provides for the more administrative matters such as the entitlement of an employee to wages and conditions under the stop work provisions and appeals of the State Mining Engineer's decisions, for example in relation to reviews of notices, be dealt with by a specialist safety and health tribunal (the tribunal). Prosecutions will continue to be dealt with by safety and health magistrates.
- 123. The tribunal established under the OSH Act will operate under the auspices of the Western Australian Industrial Relations Commission (WAIRC).
- 124. The Bill makes the necessary amendments to *the Industrial Relations Act 1979*.
- 125. When there is before the WAIRC both an unfair dismissal claim (under the *Industrial Relations Act*) and a matter under the MSI Act, relating to the same employee, employer and circumstances, the provisions also allow an employee to request both matters to be heard by the same Commissioner.
- 126. The Bill contains transitional provisions to deal with matters referred to or determined by a safety and health magistrate before the new arrangements come into effect. Similarly, transitional provisions also apply to appeals of decisions by a safety and health magistrate.

PART 8 – MISCELLANEOUS AMENDMENTS

Clause 88 – Section 4 amended

- 127. This clause introduces new definitions and makes changes to a small number of existing definitions.
- 128. Definitions of “Australian Standard”, “Australian/New Zealand Standard”, and “import” are new and have been introduced in response to an identified need.
- 129. The definition of “apprentice” has been amended to reflect the statutes as they currently stand. The existing definition of “apprentice” refers to the *Industrial Training Act 1975*, however that Act would be repealed if the unproclaimed Part 7 of the *Vocational Education and Training Act 1996*, were to be proclaimed. The amendment ensures the definition of “apprentice” will remain meaningful should such proclamation occur.

- 130. The definition of “trainee” has been included.
- 131. The definition of “supply” has been amended to clarify what is included in its scope.
- 132. Some amendments to the definitions are necessary as a consequence of other changes in the Bill.

Clause 89 - Section 6A inserted

- 133. The Bill provide that the Minister and the Minister administering the *Occupational Safety and Health Act 1984* may, by instrument in writing jointly declare that the MSI Act applies to a specified workplace as if it were a mine.

Clause 90 – Section 21 amended

Amendments to inspectors’ powers and functions and offences related to such

- 134. Clause 90 introduces a new power of an inspector to provide information for the purpose of facilitating compliance with the MSI Act. It gives a legislative basis for existing practices. By recognising this formally in the Act, inspectors are covered by the protections of the Act when fulfilling this important function.
- 135. Clause 90 also removes an inconsistency whereby the “statute of limitations” of the Act is 3 years, yet an inspector has the power to interview a person who the inspector has “reasonable grounds to believe is, or was at any time during the preceding 2 years, an employee who works at a mine”. The bill extends the latter to 3 years.

Clause 91 – Section 102A inserted

Visitors to comply with directions

- 136. This clause introduces a requirement for visitors to comply with directions given by employers and others in authority at mines where such directions are given for safety and health reasons. This provision will assist employers and self-employed persons to enforce requirements implemented in the interests of safety and health, in relation to visitors present at the mine.

Clause 92 – Section 104 amended

Hazard Identification, Risk Assessment and Risk Control

- 137. A key concept in occupational safety and health is that hazards may be addressed by a three-step process of identifying the hazards,

assessing the risk associated with each hazard, and controlling (or reducing) those risks.

138. This clause provides a “head of power” to write new regulations requiring hazard identification, risk assessment and, importantly, risk control or reduction.
139. While regulations currently exist requiring hazard identification and risk assessment, they do not require risk control or risk reduction. Rather, they provide that the duty holder must consider the means by which the risk may be reduced. This is considerably weaker than a requirement to control or reduce risk, and, being process oriented rather than outcome focussed, such regulations are difficult to enforce.
140. This change to the Act will allow more effective regulations to be written.