Freehills

Planes, trains & roads: developments in transport safety laws impact Queensland mines safety management

1 The context of transport safety reforms

1.1 National transport safety harmonisation

In 2008 COAG agreed to implement regulation and competition reforms under the National Partnership Agreement to Deliver a Seamless National Economy. A subset of those reforms is the intent to improve the efficiency of transport regulation.

In August 2011 COAG agreed on three intergovernmental agreements for heavy vehicles, rail and maritime safety reform. These changes introduce microeconomic reform through the establishment of national standards and the reduction in the number of regulators. National transport regulators are intended to be in place for heavy vehicles, rail and maritime safety by January 2013.

Recently we have seen legislation to implement these reforms introduced to parliament. Now businesses must prepare to respond to the reforms. Mining operators must be aware of these laws and ensure appropriate management systems are in place for both mining and transport activities and the interface between them. These changes are critical both for corporations and for their executive officers who take on significant personal liability under the new regimes.

In this paper we overview the heavy vehicle and rail reforms which are most likely to impact directly on Queensland mining operators utilising rail and road transport. We also compare the status of aviation safety laws. Maritime reform will be the subject of a separate Freehills review.

1.2 Relationship to work health and safety harmonisation for mines

Reforms in the transport safety arena must be viewed in light of their related context of the harmonisation of work health and safety laws for the mining industry. The outcome of these reforms will be very important for those tasked with review of the transport safety reforms as the boundaries of the relevant regulatory regimes will need to be identified and managed and any different standards in duties and obligations accounted for.

The interplay between transport and mining legislation has always been difficult to manage in a regulatory sense. For example, under the current Queensland mines safety legislation, 'transporting product' is an exclusion from the scope of defined mining operations, meaning that mines safety laws do not regulate transport activities directly.[1] However, transport activities, even offsite, are regulated by the mining regime to the extent that they have the potential to impact upon mining operations and persons at mines[2]. Further, activities of mining operators which impact upon transport safety, such as the loading of transport vehicles (coal trains, airplanes, trucks) can be subject to obligations under transport safety laws.[3] This interplay is often misunderstood, but in reality is only part of a larger regulatory trend to place a greater emphasis on effective

[1] See for example *Coal Mining Safety and Health Act 1999* s 10 (2) b).

[2] See for example *Coal Mining Safety and Health Act 1999* s 5 (b) and s.39 (1).

[3] See for example *Transport Operations (Rail Safety) Act* s.22 1)b) and s.24.

interface management between concurrently regulated activities. Consultation, cooperation and coordination between all duty holders under each regime will increase in importance going forward.

The Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety has now been implemented in Queensland in most non-mining sectors through the *Work Health and Safety Act 2011 (Qld).* However, mining operators in Queensland are awaiting news of the fate of COAG's ambitious National Mine Safety Framework (NMSF) following a recent review by the Queensland mine safety regulator. The intent was to have implemented a nationally consistent mine safety regime in all states by December 2012, however this now appears unlikely to play out to deliver true national consistency. In Queensland, the government recently called for feedback on its preferred approach, which is not to implement the reforms through the harmonised WHS regime, but instead to augment the existing Queensland mine safety legislation. The view of the regulator (DNRM) was set out in its discussion paper.

The national plan was to have a set of core mine safety regulations to be implemented together with harmonised work health and safety laws in each jurisdiction. The major mining states of Queensland, New South Wales and Western Australia also agreed to develop additional non-core regulations for their specialised jurisdictions. However, the draft 'Model Work Health and Safety Regulations Ch 9 - Mines' containing the core provisions which were published over a year ago, now are most likely to inform, rather than form the relevant law in Queensland.

The relevant codes of practice which will supplement the regulations are as follows: Work Health and Safety Management Systems, Managing Naturally Occurring Radioactive Materials, Strata Control in Underground Coal Mines, Roads and Other Vehicles Operating Areas, Inundation and Inrush Hazard Management, Emergency Response at Australian Mines, The Mine Record, Survey and Drafting Directions for Mine Surveyors, Mine Closure, Ground Control for Underground Mines, Health Monitoring in Mining, Ventilation of Underground Mines, Ground Control in Open Pit Mines, Underground Winding Systems.

There are some practical differences between the national harmonised reform proposal and the Queensland regulator preferred approach. Although both are risk based, Queensland prefers to maintain its clear requirement for a vertical control system allowing only for one safety management system to operate at any particular mine site. In practice, this is an area in which the Queensland mine safety regulator has been routinely insistent, refusing to allow even very diverse operations at the one mine to be separately managed.

The concept of the standard of care is also under scrutiny. The harmonised legislation references a duty of care that applies to ensure risks are reduced 'so far as reasonably practicable'. However, the current Queensland mine safety legislation includes a duty of care that applies to require risks to be reduced to 'within acceptable limits and as low as reasonably achievable' which takes into account the management systems in place in the operation. Although this largely semantic difference has not stopped Queensland passing harmonisation reforms directed to reasonable practicability in other risk areas where there is a concurrent requirement for a regulated safety management system (specifically electrical safety) it has been relied upon as an issue by the mine safety regulator.

Another key aspect relied upon is the pro-active requirements for review of the system including a specific ability of the regulator to require the appointment of an independent engineer.

Duties of workers are also under review. The Queensland regulator believes that the duties of workers (who are not officers) under the harmonised laws are arguably weaker than those under the current Queensland mine safety legislation. This is unlikely to be supported by future judicial interpretation of the provisions in the harmonised legislation which are broadly stated to require workers to take reasonable care to protect the safety of others, and again it seems semantics are being elevated.

In addition, the Queensland regulator is not prepared to abandon the position of SSE as an individual holding personal obligations for implementation of the safety management system. And the regulator has also demonstrated its willingness to take enforcement action for breach of these duties, see for example the prosecutions in *Daniel Joseph Hunt v Broadlea Coal Management Pty Ltd and Daniel Joseph Hunt v Darren Carpenter*, Industrial Court of Queensland, 30 November 2011. This regime is more specific than the otherwise broad officers' duties contained in the harmonised laws, and individual SSE's will continue with existing obligations, protected by their diligence combined with whatever indemnities they have negotiated with their employer. Further, the status of the executive officer provisions in the mining legislation which are much more onerous than those in the proposed national reforms[4] remains in doubt, and officers may continue to be deemed liable unless they establish a defence unless reforms proceed in this area.

Ultimately, the Queensland regulator has stated that it is committed to the approach of introducing the mining changes by December 2012, however the detail of the amendments including content of the core and non-core regulations plus finalised codes of practice remains to be seen. For mining operators, once the detail is known, it will then be possible to identify the boundaries of the mining and transport regimes and to assess what systems are required in practice to manage each regime and their interface to reduce risk and limit legal exposure.

2 National Heavy Vehicle Legislation

2.1 National heavy vehicle harmonisation

Introduced into Queensland Parliament on 15 November 2011, the Heavy Vehicle National Law Bill 2012 was designed to be the first step to finally achieving regulatory harmonisation for heavy vehicles. Unfortunately, the planned 1 January 2013 commencement date may have been frustrated by the calling of the Queensland state elections in March 2012, which prevented the Bill from being enacted. Nevertheless, the Bill was reintroduced on 31 July 2012 as the *Heavy Vehicle National Legislation Bill 2012* and the Bill's creators – the National Transport Commission (**NTC**) and the Standing Council on Transport and Industry (**SCOTI**) – remain confident that it will be enacted in time for a 1 January 2013 commencement.

The Bill will be enacted in Queensland which will be its 'host' state. Scheduled to this Bill is the Heavy Vehicle Model law (**HV Model law**). Once enacted in Queensland, other states and territories intend to enact similar legislation referring to the HV Model law thereby achieving national harmonisation. Although the HV Model law is designed to be adopted wholly as-is, individual states nevertheless retain the ability to tailor these laws to suit their specific needs by enacting specific provisions in their own state legislation. It is expected, however, that any changes made will be minimal and only as necessary to suit incidental state differences.[5]

Central to the HV Model law is the creation of a national regulator – the National Heavy Vehicle Regulator (**NHVR**) – which will be based in Brisbane and enjoy national reach through the offices of existing state agencies. The NHVR will oversee both the administrative and enforcement side of the HV Model law.

The good news for regular users of the road transport industry in Queensland is that many of the duties found in the HV Model law already exist in some form in Queensland law. This means that little substantive change may be needed to meet compliance once the new regulations go live on 1 January 2013 (assuming existing systems are already compliant which may or may not be the case). However, the emphasis on compliance is

[4] See for example *Coal Mining Safety and Health Act 1999* s. 262

[5] See generally *Heavy Vehicle National Law Bill 2012* (Qld) sch, pt 4.

also likely to be raised in profile with the impact of the new National Regulator based in Queensland, and the need to ensure that current systems and training are effective should not be understated.

2.2 Heavy Vehicle Safety

Chapter 3 of the HV Model law relates to heavy vehicle standards and safety. At the core of this chapter is the prohibition on using, or permitting to be used, vehicles which are either non-standard compliant,[6] have unauthorised modifications[7] or are otherwise unsafe for use on the road.[8] In Queensland this prohibition is not new – it already exists in a similar form in the *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010*.[9] The drafting of the duties appear slightly broader in scope under the HV Model law in that it does not specifically state each and every instance which will constitute a breach, leaving it to the regulator or a court to determine what is an 'unsafe' vehicle. Fundamental to this chapter will be the publication of vehicle standards by the NHVR. The NHVR will also centralise vehicle inspections and the modification authorisation process. This will apply to all vehicles in Australia over 4.5 tonnes.

Another key point of distinction between the HV Model law and current regulations in Queensland is the defence available to persons charged. The defence under the HV Model law, the 'reasonable steps' defence,[10] requires demonstration of two things:

(a) That the person charged did not know, and could not reasonably be expected to have known, about the contravention; and

(b) That the person charged took all reasonable steps to prevent the contravention, or that there were no steps the person could have reasonably taken to prevent the contravention.

This seems to carry a higher threshold than the current 'reasonable excuse' defence which is written into the majority of current road transport regulations. The defence under the HV Model law is more prescriptive, setting out in detail the two limbs that must be proven. First is demonstration of ignorance to the contravention, and second is demonstration that due diligence has been exercised. In contrast, the existing 'reasonable excuses' defence does not require anything more other than an excuse that is reasonable given the circumstances, a much broader target to hit.

Mining operators will need to ensure that their systems deal with both scenarios of active knowledge and a method by which due diligence in systems compliance can be demonstrated.

2.3 Speeding and driver fatigue management

Chapters 5 and 6 of the HV Model law attach liability to the behaviour of certain persons when that behaviour causes a driver, whether directly or indirectly, to either exceed the speed limit[11] or drive whilst impaired by fatigue,[12] or in breach of their work / rest

[6] ibid sch, s 47(1).

[7] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 69(2).

[8] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 72(1).

[9] See generally *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010* (Qld) pt 2.

[10] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 47(1).

[11] *Heavy Vehicle National Law Bill 2012* (Qld) sch, ss 174 to 179.

[12] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 199(1).

obligations[13] (**fatigue management obligations**). Note that fatigue management duties only apply to vehicles with a gross vehicle mass of over 12 tonnes.[14]

Queensland regulations already prescribe duties with respect to driver speeding and fatigue management (see the *Transport Operations (Road Use Management) Act 1995* and the *Transport Operations (Road Use Management – Fatigue Management) Regulation 2008* respectively) and so these duties will not come as a surprise. However the increasing focus on enforcement means that the stakes are likely to be raised.

Common aspects to obligations under chapters 5 and 6 are:

1 **Chain of Responsibility (COR):** All COR participants owe duties towards the driver to some degree. Some participants will owe more duties than others. COR participants include the driver's employer, prime contractor or operator; the scheduler and loading manager; consignor and consignee and, in the case of fatigue management obligations, vehicle loaders and unloaders.[15]

2 **Reasonable steps to ensure compliance:** All COR participants owe a duty to take all reasonable steps to ensure that they do not cause the driver to exceed the speed limit or contravene their fatigue management obligations.

3 **Reasonable steps defence:** Persons charged may raise the 'reasonable steps' defence (see above).

4 **Prohibited requests and contracts**: No person may request or require a driver to exceed the speed limit or drive in breach of their fatigue management obligations. No person may enter into a contract that will have the effect of causing either of these breaches.[16]

5 **Extended liability:** If the driver of a heavy vehicle commits a speeding offence, liability will be deemed upon the driver's employer or prime contractor and the operator of the vehicle for the same offence. If the driver commits a fatigue related offence,[17] the driver's employer or prime contractor and the operator and scheduler of the vehicle will be deemed liable for that same offence.[18]

As mentioned, COR participants have differing levels of duties depending on the nature of their role. While employers, prime contractors and operators obviously hold a number of duties, it is the consignors and consignees of goods that have particularly onerous and sometimes unexpected duties. Consignors are broadly defined in the HV Model law as follows:

(a) any person who is identified on the transport documents as such; or if there is no such person

(b) the person who engaged the transport service; or if there is no such person

(c) the person who had control of the goods immediately prior to pickup; or if there is no such person

(d) the person who loaded the vehicle; or if there is no such person

(e) the person who imported the goods; or if there is no such person

(f) the person who owns or controls the vehicle and arranged for the transport of goods.[19]

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[13] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 200(1)(b).

[14] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 7.

[15] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 184.

[16] *Heavy Vehicle National Law Bill 2012* (Qld) sch, ss 184, 186, 210, 211.

[17] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 189.

[18] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 285.

[19] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 5.

Consignees are defined as persons named on the consignment documents as the receiver of goods, who actually receives the goods.[20]

In light of these definitions it is difficult to imagine who would *not* fall within these two categories. The breadth of these definitions may be matched by the depth of the duties respectively owed. Duties common to consignors and consignees include taking all reasonable steps to ensure that terms of consignment do not encourage or incentivise a breach[21] and making reasonable enquiries to satisfy themselves that the driver's employer, prime contractor or operator is compliant with fatigue management obligations under the HV Model law.[22] They must also refrain from making demands or requests which cause another COR participant to cause a breach.[23] Consignors must not provide false or misleading information in container transport documentation.[24] Consignees must not cause a vehicle to transport overweight, oversized or incorrectly loaded goods, whether knowingly or recklessly.[25] Consignors and consignees can potentially find liability under a number of other regulations within the HV Model law – the above mentioned are but a sample.

In addition to the general duty on COR participants in point 2 above, employers, prime contractors and operators, must also make reasonable inquiries to satisfy themselves that each and every scheduler involved in a delivery is complying with their obligations under the HV Model law.[26] Schedulers are duty-bound to ensure that delivery schedules take into account (and make accommodation for) all applicable speed limits over the course of the journey, all driver work / rest obligations and all known traffic conditions.[27]

Loading managers also owe a further duty to take all reasonable steps to let a driver rest when vehicle loading will be delayed for more than 30 minutes, or if loading start / stop time cannot be determined.[28] Even loading dock workers owe a duty to ensure that their activities do not cause the driver to contravene their fatigue management obligations.[29]

2.4 Officers' duties

Where a corporation commits an offence, section 576 of the HV Model law has the effect of deeming the corporation's executive officers (all those who are concerned in or take part in the management of it)[30] to have committed an offence. A prosecution can be launched against an officer whether or not the corporation is also proceeded against. The liability of an executive officer is subject to a potential defence as follows:

> *'…it is a defence for an executive officer to prove—*
>
> *(a) if the officer was in a position to influence the conduct of the corporation in relation to the offence, the officer exercised reasonable diligence to ensure the corporation complied with the provision; or*
>
> *(b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.'*

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[20] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 5.

[21] *Heavy Vehicle National Law Bill 2012* (Qld) sch, ss 182, 205.

[22] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 206.

[23] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 185, 210.

[24] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 158.

[25] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 165.

[26] *Heavy Vehicle National Law Bill 2012* (Qld) sch, ss 175, 176, 201, 202.

[27] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 178, 204.

[28] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 209.

[29] *Heavy Vehicle National Law Bill 2012* (Qld) sch, ss 197, 199(1).

[30] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 5.

These provisions are reminiscent of the officer liability provisions that were repealed in the work health and safety arena (although not the Queensland mining arena) following the 2011 harmonisation reforms and are unlikely to be welcomed by individuals holding relevant senior roles.

2.5 Enforcement

The NHVR will enforce these duties through their appointed authorised officers. All Queensland police officers are declared authorised officers by the Bill.[31] This means that as of 1 January 2013 Queensland officers will enjoy a number of extra powers, including the power to: enter and search property; seize evidence; including vehicles; issue compliance, improvement and other notices; compel the production of documents, requiring reasonable help and the power to compel fatigued drivers to rest.[32]

The new regulatory powers are likely to lead to increased enforcement. The heavy vehicle laws are already occasionally enforced in Queensland, for example a Brisbane trucking company Harker Transport Services Ltd and its workers were found guilty of breaching the chain of responsibility laws which led to a double fatality and a resulting fine of around $40,000.

Under the new regime penalties are moderate range from around maximums of $2,000 up to $20,000 (with fines multiplied by 5 times for corporate offenders). However, with significant teeth are the commercial benefits penalty orders, with a maximum of three times the amount estimated by the Court to be the gross commercial benefit received or receivable by the offender / associate. Commercial benefits are defined to include benefits of any kind.

Decisions of authorised officers[33] and road managers[34] are internally reviewable by the NHVR. Decisions of the NHVR are subject to appeal to the Queensland Civil and Administrative Tribunal.[35] It is not yet known whether appeals from QCAT decisions will be heard internally by the QCAT review tribunal, or if it will be heard by another court.

2.6 Road Safety Remuneration System

It is worth also mentioning the changes to road safety remuneration, as mining operators may be affected by these also. The *Road Safety Remuneration Act 2012* (Cth) commenced operation on 1 July 2012. This Act set up the Road Safety Remuneration System, which is designed to improve safety in the road transport industry by removing economic incentives for unsafe practices.

The Road Safety Remuneration System involves the Road Safety Remuneration Tribunal having the power to set pay and conditions for road transport drivers by making orders.[36] RSR Tribunal members have the power to make orders if they consider that the pay arrangements encourage unsafe practices, for example where bonuses are provided to those that deliver goods within a time that does not provide adequate rest time.[37] In such cases the RSR Tribunal can order that a different pay structure be used, one which does not provide an incentive to speed, drive whilst fatigued or take drugs whilst driving.[38] The RSR Tribunal also has the power to make Road Transport Collective Agreements, which

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[31] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 13.

[32] See generally *Heavy Vehicle National Law Bill 2012* (Qld) sch, ch 9.

[33] *Heavy Vehicle National Law Bill 2012 sch,* s 582.

[34] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 584.

[35] *Heavy Vehicle National Law Bill 2012* (Qld) sch, s 588. Note that there will be a 28 day time limit for filing of appeals.

[36] *Road Safety Remuneration Act 2012* (Cth) pt 2 div 4.

[37] *Road Safety Remuneration Act 2012* (Cth) s 27(1).

[38] *Road Safety Remuneration Act 2012* (Cth) s 3.

are similar to remuneration orders but cover independent contractor-drivers when they perform a specific activity for a particular hirer.[39]

The RSR Tribunal's powers cover relationships between drivers and their employers, hirers and independent contractors as well as participants in the supply chain. The 'participants in the supply chain' are:[40]

(a) consignors;

(b) consignees;

(c) intermediaries (parties to the contract for the carriage of goods); and

(d) operators and loading / unloading facilities.

The involvement of supply chain participants is crucial to the objects of the Road Safety Remuneration System because of their influence in the road transport industry, such as with loading and unloading times and service level expectations. As well as being bound by RSR Tribunal orders,[41] supply chain participants may also have disputes with employers or hirers of drivers about the effect of their operations on the ability to remove incentives to work in an unsafe matter.[42] The disputes can be mediated or conciliated by the RSR Tribunal upon application by the driver and their employer or hirer.[43] Disputes will only be arbitrated by agreement.[44]

3 National Rail Safety Legislation

3.1 National rail safety harmonisation

Earlier this year the South Australian Parliament enacted the Rail Safety National Law (South Australia) Act 2012 (**Rail Model law**). Another product of the NTC and SCOTI, the Rail Model Law is designed to harmonise rail safety regulations across Australia. The Act will also establish a new national regulator – the National Rail Safety Regulator (**NRSR**) – which will be based in South Australia.

Because it has been fully enacted it will now be up to the remaining states and territories to enact their own legislation to give effect to the harmonisation, however at the time of writing no other jurisdiction has introduced a bill for enactment.

Although the Rail Model law appears to have general application to railways, it remains to be seen whether the Queensland enactment will provide any concession or exemption to mining railways. As drafted, the Rail Model law's only exceptions are railways which are used wholly or chiefly in underground mining operations.[45] Other railways are also excluded but those exclusions are not relevant to this paper.[46] This paper is written on the basis that the Rail Model law will be enacted as-is, and a brief overview of the safety regulations will follow. However, it is very likely that specific definitional boundaries will require modification when implemented in Queensland.

The rail safety duties under the Rail Model Law fall upon 5 groups of duty holders split across 4 organisational levels. At the operational level there are the Rail Transport

[39] *Road Safety Remuneration Act 2012* (Cth) pt 3.

[40] *Road Safety Remuneration Act 2012* (Cth) s 9.

[41] *Road Safety Remuneration Act 2012* (Cth) s 19(3)(c).

[42] *Road Safety Remuneration Act 2012* (Cth) s 43.

[43] *Road Safety Remuneration Act 2012* (Cth) s 44.

[44] *Road Safety Remuneration Act 2012* (Cth) sub-s 44(1)(c).

[45] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 7(1)(a).

[46] Ibid sch, s 7.

Operators (**RTO**), who own and/or operate rail transport infrastructure or rolling stock. At the worker level there are the rail safety workers and freight loaders. Upstream there are the designers, manufacturers, suppliers and installers of rail infrastructure, rolling stock or other related equipment (**upstream duty holders**). Finally at the corporate level there are also officer's duties.

3.2 The current context

The current legislative boundaries between mining and rail regulation is legally difficult to conceptualise but in practice fairly easy to apply. The Transport (Rail Safety) Act 2010 (**TRSA**) applies to railways in general, but does not apply to railways that are used exclusively for mining operations.[47] This means that the TRSA potentially applies to many railways at mining operations such as railways used to transport coal or ore to port.

For most railways, the *Work Health and Safety Act 2011* (**WHSA**) applies together with the TRSA. However, the WHSA does not cover mining operations under the various Queensland mining safety Acts[48] meaning that for railways at mines sometimes the TRSA duties and the relevant mining safety Acts will apply concurrently. However as the relevant mines safety Acts exclude 'transport of product' from the definition of 'mining operations'[49] once the activitiy at the railway is classified as transport activity for product then the WHSA will apply. Specifically the scope of the transport exclusions in the *Coal Mining Safety and Health Act 1999* (**CMHSA**) and the *Mining and Quarrying Safety and Health Act 1999* (**MQSHA**) from the definitions of on-site activities[50] and operations[51] respectively mean that for loading facilities sometimes the MQSHA or the CMSHA can apply together with the rail safety duties however once the process of transport commences the WHSA and the TRSA will apply. Functional assessment of plant and activities is required to decide how certain operations are regulated.

It will be necessary to see both the Queensland draft of the national rail model legislation and the Queensland proposed amendments to the mine safety laws in light of the harmonisation regime before the actual boundaries proposed under the new regime can be clearly understood. However it is likely that the duties of those involved in the loading of freight will be clearly conceptualised to be expressly covered by the rail laws.

3.3 Rail Transport Operators

RTO's are broadly divided into two categories, rail infrastructure managers and rolling stock operators.[52] To explain:

(a) rail infrastructure managers are persons who have effective control of railway infrastructure (including railway tracks, service roads, signalling systems, signage, power supplies, depots, plant, machinery etc);[53] and

(b) rolling stock operators are persons who have effective control and management of the movement of rolling stock, but does not include mere drivers and signal operators.[54]

Transport Rail Safety Act 2010 (Qld) s5.

[48] *Work Health and Safety Act 2011* sch 1, s 2.

[49] See for example *Coal Mining Safety and Health Act 1999 (Qld)* s. 10 (2)b).

[50] *Coal Mining Safety and Health Act 1999* (Qld) s 10.

[51] *Mining and Quarrying Safety and Health Act 1999* (Qld) s 10.

Rail Safety National Law (South Australia) Act 2012 (SA) sch, s 4.

[53] *Rail Safety National Law (South Australia) Act 2012* (SA), sch, s 4.

[54] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 4.

Some mining operators are accredited RTO's under the current regulations and will continue to owe duties under the new laws. Some may require accreditation going forward.

RTO duties under the Rail Model Law are similar to those already in the TRSA. They must:

(a) provide safe systems of work;

(b) ensure fitness and competence of rail safety workers;

(c) prevent drug, alcohol and fatigue impaired rail safety workers from working;

(d) provide adequate safety facilities; and

(e) provide adequate information and training for safe rail operation.[55]

However, the specific duties for infrastructure managers are more prescriptive. They must ensure, as far as is reasonably practicable:

(a) provision and maintenance of safe rail infrastructure;

(b) design, construction and other works are carried out in such a way as to ensure safe rail operations;

(c) provision of safe systems and procedures for safe rail operations; and

(d) communication systems and procedures are established.[56]

Rolling stock operators now must ensure, as far as is reasonably practicable:

(a) provision and maintenance of safe rolling stock;

(b) design, construction and other works on rolling stock is performed in a way that ensures safety;

(c) compliance with rules and procedures for scheduling, control and monitoring of rolling stock;

(d) maintenance of equipment, procedures and systems so as to minimise risk to safety;

(e) arrangements are in place to ensure safe use, operation and maintenance of rolling stock; and

(f) communication systems and procedures are established and maintained so as to ensure safety of operator's railway operations.[57]

A new duty for the Rail Model law is the duty on freight loaders and unloaders to ensure, as far as reasonably possible, that they load and unload freight in a way so as to ensure the safe operation of rolling stock.[58]

3.4 Worker's duties

Duties on rail safety workers under the Rail Model law are common to the TRSA. Broadly speaking, they hold three kinds of duties:

(1) duty to take reasonable care for their own safety as well as safety of others;[59]

(2) duty to refrain from either intentionally or recklessly interfering with, or misusing, anything given to them by the RTO in the interests of safety;[60] and

[55] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, sub-ss 52(2)(a) – (f).

[56] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, sub-ss 52(3)(a) – (d).

[57] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, sub-ss 52(4)(a) – (f).

[58] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 54.

[59] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 56(1).

(3) duty to not wilfully or recklessly place the safety of any other person in the vicinity of a railway at risk.[61]

As with the TRSA, whether or not a person is a rail safety worker will depend on the work that they are performing. Eligible rail safety work is broadly defined by the Rail Model law and includes driving, despatching or controlling rolling stock and maintenance work or any other work involving rolling stock. Rail safety work also includes work involving the design, installation, inspection or maintenance of rail signals and other infrastructure.[62]

Similar to the HV Model law, worker's duties are relevant because of deeming provisions which can impute liability upon corporations and officers. This will be explored in more detail below.

3.5 Upstream duties

Similar to the WHS legislation, designers, manufacturers, suppliers and installers of rail infrastructure or rolling stock owe a variety of duties. These duties include ensuring as far as reasonably practicable that the thing they are designing, making etc. is safe for its intended use and has undergone adequate safety testing.[63] They must also make available information about the thing so as to ensure its safe operation or maintenance, including the results of any safety testing performed. RTOs who actively fabricate their own replacement or maintenance parts should take careful note of these duties.

3.6 Officers' duties

At the corporate level, company officers owe a duty to exercise due diligence to ensure that every duty holder under the Rail Model law are compliant with their safety obligations.[64]

Examples of due diligence include:

(a) staying up-to-date with rail safety knowledge;

(b) understanding the nature of railway operations;

(c) ensuring they have and use adequate resources and processes for the elimination or minimisation of safety risks;

(d) ensuring that they have adequate incident notification and response procedures;

(e) ensuring that they have adequate processes for complying with safety duties; and

(f) ensuring that they test and verify these processes from time to time.[65]

Company officers are defined by the Rail Model law to align with the definition of officer in the Corporations Act, in the same way as has been applied for the national harmonised WHS regime.[66]

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[60] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 56(2).

[61] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 56(3).

[62] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 8.

[63] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 53.

[64] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 55(1).

[65] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 55(3).

[66] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 4.

3.7 Expanded role of the Australian Transport Safety Bureau

On a final note, under another proposed piece of legislation the Australian Transport Safety Bureau (**ATSB**) will be appointed as a participating national rail safety investigator. The ATSB already has jurisdictional standing to conduct certain interstate rail investigations under the *Transport Safety Investigation Act 2003* (Cth) and has been investigating rail incidents since 1 July 2003. What will change however will be the ATSB's rail investigative reach. At present the ATSB only investigates incidents occurring along the Perth to Brisbane and Adelaide to Darwin tracks. The amendments will allow the ATSB to conduct investigations nationwide, complementing the national reach of the Rail Model law.

3.8 Enforcement

The Rail Model Law will be enforced by the National Rail Safety Regulator and its authorised officers.

The Rail Model Law provides for three categories of breaches, depending on the level of risk involved.[67] The first, most serious category carries a maximum penalty of up to $300,000 fine and/or up to 5 years imprisonment for individuals, and up to $3M for corporations. Category 1 breaches occur when a duty holder either intentionally or recklessly breaches their safety duty which then exposes a person to whom the duty is owed to risk of death, serious injury or illness.[68]

Category 2 breaches involve contraventions of safety duties which exposes another person to a risk of death, serious injury or illness. The difference in this category is the absence of intention or recklessness, and the person exposed to the risk is not a person to whom the duty is directly owed. Maximum penalties for category 2 breaches are $150,000 for individuals and $1.5M for corporations.[69]

The least serious category, category 3, involves contraventions which do not pose a safety risk to anyone. They carry a maximum penalty of $50,000 for individuals and $500,000 for corporations.[70]

These 3 category of contraventions, measured against exposure to risk, are similar to that found in WHS legislation and any legal principles and precedents that develop should have common application.

The enforcement of the rail safety legislation is likely to be an improvement in practice under the proposed new regime as under the current law. Although there have been relevant prosecutions in other states[71], there are no known prosecutions which have been brought in Queensland under the TRSA following incidents. In the New South Wales Patrick case example, two transport operators were fined $137,000 after four wagons being shunted ran over a siding stop block, derailed, crossed a public road and impacted the driveway of a private residence.

By contrast, rail related prosecutions under the WHSA in Queensland have led to significant fines. The example of the QR prosecution is keen in recent memory. Industrial Magistrate Ross Risson ordered the defendant pay a penalty of $650 000 as well as investigation, professional and court costs totalling $130 065.40. There in 2007 two QR Limited track workers sustained fatal injuries when they were reversed over by an 'on track vehicle' weighing 96 tonnes. The workers were employed as track side workers

[67] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, pt 3 sub-div 3.

[68] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 58.

[69] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 59.

[70] *Rail Safety National Law (South Australia) Act 2012* (SA) sch, s 60.

[71] See for example Independent Transport Safety Regulator v Patrick Portlink Pty Ltd t/as Patrick Portlink [2011] NSWIRComm 155 (23 November 2011)

(systems maintainers) by QR Limited. The court found the defendant held obligations under Section 28 of the *Workplace Health and Safety Act 1995* being a person in control of a business or undertaking.

The investigation findings presented to the court revealed:

- The defendant provided limited cooperation with investigating authorities.
- Remedial measures were not promptly taken by the defendant.
- Only the lowest order control measures were implemented by the defendant.
- The defendant was on notice of deficiencies in its systems and practices through audits.
- The plant that killed the workers was driven from the rear, without clear line of sight, and this was done for years.
- The broad systemic nature of the failings and the institutional dysfunction not only lead to two deaths but exposed others to the risk of death and injury.
- The inappropriateness of the lowest order of control measure (no authority required/personal vigilance) being used.

There have also been other very relevant case examples which have not yet progressed to Court. The example of the Queensland Transport Moranbah investigation report (8 July 2010) (PDF, 3.44 MB) into the fatal incident at Moranbah where a mine worker was killed at a rail crossing is a publicly published example of a significant risk with learnings for all mine operators and rail transport operators of the importance of interface risks.

4 Civil Aviation Safety Legislation

4.1 Civil aviation legislation

The importance of civil aviation safety laws continues to rise with the increased use of fly-in, fly-out (**FIFO**) roster arrangements. Unlike rail, heavy vehicle, mining and general health and safety, the Commonwealth is principally responsible for civil aviation safety. The *Civil Aviation Act 1988* (Cth) and its regulations, particularly the *Civil Aviation Safety Regulations 1998* (Cth) (**CAS legislation**), provide the requirements for ensuring the safety of air operations in Australia.

Civil aviation safety regulations will be particularly relevant for those mining operations that:

(a) operate aircraft, eg for aerial surveying; and

(b) operate an aerodrome, eg for FIFO workers.

4.2 Operating aircraft

An Air Operator's Certificate (**AOC**)[72] is required for commercial aviation purposes,[73] including:

(a) aerial surveying;

(b) aerial spotting;

(c) aerial photography; and

[72] *Civil Aviation Act 1988* (Cth) s 27

[73] *Civil Aviation Regulations 1988* (Cth) s 206.

(d) carriage of goods for trading purposes.

The AOC is in addition to the requirement to not fly unregistered aircraft or to fly aircraft in contravention of safety requirements.[74] Owners, operators, hirers and pilots face 2 years imprisonment if they operate or permit the aircraft to be operated if the operation of the aircraft results in a contravention of Part III (excluding sections 20A(1) and 23(1)).[75] If the aircraft is operated in a reckless way that could endanger the life of another person, the maximum penalty is increased to 5 years imprisonment.[76] Further, the maximum penalty rises to 7 years imprisonment for the unauthorised carrying of dangerous goods.[77]

The CAS legislation also imposes a wide range of requirements regarding the airworthiness of the aircraft and the qualifications of the crew.

4.3 Operating aerodromes

Part 139 of the *Civil Aviation Safety Regulations 1998* imposes obligations specific to aerodromes. If an aerodrome is suitable for use by aircraft having a maximum capacity of 30 passengers or 3,400kg of cargo and is available for charter or regular public transport, the aerodrome must be certified.[78] The operator of the certified aerodrome must maintain a manual that includes certain prescribed information, such as the location of the aerodrome and its standard operating procedures.[79] The general duty for the aerodrome operator is to ensure that the aerodrome is operated and maintained with a reasonable degree of care and diligence.[80]

If the aerodrome does not need to be certified the operator may register the aerodrome with CASA.[81] The manual of standards for certified aerodromes will apply to registered aerodromes regarding:[82]

(a) physical characteristics of the movement area;

(b) obstacle limitation surfaces;

(c) aerodrome markings;

(d) lighting;

(e) wind direction indicators;

(f) signal circle and ground signals; and

(g) any other standards set out in the manual of standards that are applicable to registered aerodromes.

Unless CASA has provided approval, operators of aerodromes (whether registered or certified) must not operate, or permit to be operated, at the aerodrome an air/ground radio service that is not a certified air/ground radio service.[83]

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[74] *Civil Aviation Act 1988* (Cth) s 20AB.

[75] *Civil Aviation Act 1988* (Cth) sub-s 29(1).

[76] *Civil Aviation Act 1988* (Cth) sub-s 29(3).

[77] *Civil Aviation Act 1988* (Cth) sub-s 29(5).

[78] *Civil Aviation Safety Regulations 1998* (Cth) s 139.040.

[79] *Civil Aviation Safety Regulations 1998* (Cth) div 139.B.2.

[80] *Civil Aviation Safety Regulations 1998* (Cth) s 139.120.

[81] *Civil Aviation Safety Regulations 1998* (Cth) s 139.260.

[82] *Civil Aviation Safety Regulations 1998* (Cth) s 139.295.

[83] *Civil Aviation Safety Regulations 1998* (Cth) s 139.390.

4.4 Enforcement

The CAS legislation is administered by the Civil Aviation Safety Authority (**CASA**). CASA possesses a wide variety of enforcement tools ranging from administrative action (eg suspending licences) to commencing prosecutions. The action taken by CASA will depend on the provision allegedly breached and the perceived threat to the safety of aviation operations. Enforcement action includes:

(a) entering into (and monitoring) enforceable voluntary undertakings;[84]

(b) taking administrative action (varying, suspending or cancelling AOC, instruments, approvals and licences);[85]

(c) issuing infringement notices (fines);[86]

(d) issuing demerit points;[87] and

(e) initiating a criminal prosecution (which is handled by the Commonwealth Director of Public Prosecutions).[88]

For the operators of aerodromes, if CASA has reason to believe that the operator (and holder of the certificate to operate) has engaged in, is engaging in, or is likely to engage in conduct which constitutes, contributes to, or results in a serious and imminent risk to air safety, then the certification of the aerodrome can be cancelled.[89] If this occurs, the aerodrome operator would be unable to bring in or send home FIFO workers from the aerodrome. Circumstances where CASA may consider cancelling or suspending the certificate of an aerodrome operator include where there is a failure to properly maintain the runway or there is a serious deficiency with the radio equipment.[90]

4.5 Interface between work health and safety and aviation laws

With aviation safety regulation being a matter for the Commonwealth and other kinds of work health and safety remaining a state matter (even post harmonisation), there is scope for the two laws to overlap. The interface needs to be understood by operators.

A relevant case is in a 2004 helicopter crash in which the pilot and the passenger were killed. In 2011 the Full Bench of the Federal Court considered the jurisdictional overlap in *Heli-Aust v Cahill and Another*[91] (**Heli-Aust**). State OHS laws were held to be inoperable under the constitution as the federal aviation laws prevailed. The Full Bench unanimously agreed with Heli-Aust, finding that the CAS legislation did in fact evince Parliament's intention to cover the field – that is, 'safety of air navigation' and 'safety of air operations in Australia.'[92] However, the OHS Act, the Full Bench reasoned, applied to premises and aircraft were expressly included within that definition so remain applicable where there is no inconsistency.

For mining operators this means that activities that have the potential to directly impact on the safety of air operations are likely to be regulated by the Commonwealth aviation safety laws, however other activities, even if interfacing with aircraft may remain covered by the state WHS regimes.

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[84] *Civil Aviation Act 1988* (Cth) pt III div 3B.

[85] See for example *Civil Aviation Regulations 1988* (Cth) s 265.

[86] *Civil Aviation Regulations 1988* (Cth) s 296A.

[87] *Civil Aviation Act 1988* (Cth) pt III div 3D.

[88] *Civil Aviation Regulations 1988* (Cth) s 296.

[89] *Civil Aviation Safety Regulations 1998* (Cth) s 139.070.

[90] *Civil Aviation Safety Regulations 1998* (Cth) div 139.F.3.

[91] [2011] FCAFC 62

[92] Ibid at 67.

Those who operate, work with or deal with aircraft operations should take note of this decision as it provides some guidance as to which is the relevant law for a particular activity. Best practice would suggest compliance with both state and federal laws but in reality this is not cost effective. Following this decision, aircraft and aerodrome operators should reassess their practices to determine which of their activities fall under the scope of the CAS legislation and those which fall under applicable state safety legislation. Activities which potentially fall within either should be considered and managed at a risk management level.

5 Next steps for business

As with any legislative reforms, mining operators must implement a legal compliance approach consistent with Australian Standard 3806. This must cover commitment to achieving compliance, implementation of a compliance program, monitoring and measuring of compliance, as well as continual improvement.

The initiation of a compliance program must involve the review of existing and proposed operations to identify the existence of relevant transport activities and / or the interface with any transport activities. Then, a gap analysis of existing systems to the proposed reforms must be considered and any changes to systems made including via appropriate consultation, coordination and cooperation with stakeholders and concurrent duty holders.

Mining operators can look forward to the ongoing deregulation of safety requirements through increasing national harmonisation and the Commonwealth government has reasoned that the reform of transport when combined with other regulatory reduction is likely to increase GDP by around 2%. However in return, the simplification process requires attention and is resource intensive and the importance of compliance cannot be understated in light of the new enforcement regimes including significant corporate and officers' duties.

6 Further information

For further information please contact Harold Downes or Fiona Austin at Freehills.

Harold Downes

Partner, Brisbane

Direct +61 7 3258 6590

Fax +61 7 3258 6444

harold.downes@freehills.com

Fiona Austin

Special Counsel, Brisbane

Direct +61 7 3258 6490

Mobile +61 427 237 044

Fax +61 7 3258 6444

fiona.austin@freehills.com