Mine Safety and Health's response to the Department of Justice and Attorney-General (DJAG) Review of the *Right to Information Act 2009* and Chapter 3 of the *Information Privacy Act 2009*

Background

DJAG's review of the *Right to Information Act 2009* (RTIA) includes (on page 28) a discussion about mining safety information. It covers the issue of confidential complaints and information, but does not refer to the impact of the RTIA on mine safety prosecutions.

The Ombudsman's review of the mines inspectorate highlighted the importance of promoting and publicising a system of confidential complaints and incident reporting and the safety benefits that can result. The Ombudsman noted how the aviation industry worldwide has increasingly moved to a more confidential system of incident and "near miss" reporting. The Ombudsman recommended that the mining industry follow the example of the aviation industry, including more effectively promoting confidential reporting to produce further improvements in safety.

The mines inspectorate agreed to implement the Ombudsman's recommendation but development of the confidential system has been thwarted since media reports in mid 2012 highlighted the vulnerability of mine safety information thought to be confidential.

The DJAG discussion paper refers to one of these media reports, that is, a front page Mackay Mercury article on 28 June 2012 (**appendix 1**) which reported that the Department of Natural Resources and Mines (DNRM) Right to Information officers were considering releasing documents which could compromise the confidential complaints system being implemented by the Mines Inspectorate. There were also associated media reports including one on 9 July 2012 which is also included in **appendix 1**.

It is untenable to try to further develop, publicise and promote a confidential complaints system as recommended by the Ombudsman, in these circumstances. Every claim of confidentiality has to be defended on a case by case basis. This can be difficult and the outcome uncertain, under the current RTIA, as the RTIA requires that the grounds on which access to information may be refused should be interpreted narrowly, and on external review, it enables little weight to be given to factors favouring non-disclosure.

Unless the RTIA is amended to provide greater protection for mine safety confidential complaints, the Mines Inspectorate will not be able to further develop and promote a confidential system and will be failing to implement the recommendations of the Ombudsman.

The impact of the RTIA on mine safety prosecutions is greater than the potential impact on other prosecution regimes and this also needs to be addressed.

Consultation to date with DJAG about the confidentiality and prosecutions issues

There are two public consultation papers by the respective Departments that have included the mine safety confidentiality issue.

DJAG have provided some reasoning in relation to their position about confidentiality. The DJAG paper suggests that workers across various industries regularly make confidential complaints and that the RTIA already has provisions to protect this information. DJAG however, suggest that adding an additional factor favouring non-disclosure related to mining safety could be added to provide additional protection. The DJAG paper asks: *"Are the provisions in the RTIA sufficient to deal with access applications for information relating to mine safety in Queensland?"*

Although many Departments may allow complaints to be made anonymously or supposedly "confidentially" very few seek to guarantee to the greatest extent possible, the confidentiality of the information. For example, the general WHS jurisdiction is not attempting to implement a robust confidential complaint system. The Workplace Health and Safety Queensland (WHSQ) Complaints Service Charter on WHSQ's website asks that where reasonably practicable, constructive steps should be taken to resolve issues at the workplace before raising them with WHSQ, and notes that requests that identities not be disclosed will be respected, but identity may become apparent due to the nature of enquiries WHSQ make etc From the WHSQ example, there does not appear to be the same policy objective to establish a very robust confidential complaints system, as there is for the mining industry.

At Director-General level, in May 2013 DNRM advised DJAG that DNRM does not consider that the DJAG proposal would be sufficient and that additional protection, similar to the level provided for confidential complaints and incident reporting in the aviation sector is required. This policy objective is in accordance with recommendations by the Ombudsman that *"the Mines Inspectorate take steps to publicise the existence of its system of confidential complaint and incident reporting and promote its use, and publish information on how information received via the system will be handled."*

The DNRM Consultation Regulatory Impact Statement for Queensland's Mine Safety Framework (on pages 110 to 114) includes a proposal to strengthen the confidentiality of the Inspectorate's mining safety complaints system to be more similar to the aviation industry. The Mines Inspectorate proposes that its current confidential complaint system be further developed so that it can be promoted and implemented in a very similar way to that of the aviation regulator's confidential system.

The full text of relevant paragraphs from each Department's consultation document is pasted in **appendix 2**.

DNRM completed research in October 2012 (**appendix 3**) that had been requested by DJAG officers to allay their concerns about there being a flow on effect to other industries if they support amendments to the RTIA for mining safety, including how any amendments for mine safety would compare to the RTIA applying to policing.

DJAG officers have not replied to the points included in the research other than in very general terms during meetings. For example, in relation to the impact of the RTIA on mine safety prosecutions some of the DJAG officers suggested that other prosecution regimes are similarly affected by the RTIA, and that it is acceptable that the RTIA can release information during prosecutions that would not be released through disclosure. The RTIA also enables the discretion of the Commissioner for Mine Safety and Health to prosecute to be examined.

DJAG officers have pointed to the fact that the confidential information referred to in the front page Mackay Mercury report was not ultimately released. DNRM was required to argue a number of substantial points related to: what is confidential information; when has the privilege against self-incrimination been abrogated; and raise a range of reasons as to why release would be against the public interest, as well as referencing the Ombudsman's recommendations about confidentiality being in the public interest, to attempt to ensure that the information would not be released.

This followed an initial letter from the Office of the Information Commissioner (OIC) suggesting that confidentiality did not attach to the interview. The case concluded earlier this year because the applicant did not submit any further arguments against the preliminary view of the OIC. DNRM has not been provided with a copy of the OIC preliminary view and it seems that the department is not entitled to a copy of the preliminary view. DNRM is not aware of the reasoning behind the preliminary view in relation to the public interest or any other considerations.

Consequently, this case has not established a precedent DNRM can raise to attempt to safeguard against any future releases of confidential information, in the same or similar circumstances. There will also be many confidential circumstances that are not similar to the facts of this case.

The DJAG proposal is not sufficient to build additional confidence in the mining safety confidential complaint system

To support the suggestion that workers across various industries regularly make confidential complaints and that the RTIA already has provisions to protect this information, the DJAG paper refers for example, to section 10(1) of schedule 3 of the RTIA which states that: *"Information is exempt information if its disclosure could reasonably be expected to: ….(b) enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained."*

However, the DJAG paper does not note that in the next subsection of the RTIA, section 10(2)(d) says that the information is not exempt if it consists of "*a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to misconduct under the Crime and Misconduct Act 2001).*

Therefore, it is not helpful other than to agencies enforcing criminal or misconduct law. Also section 10(1) of schedule 3 of the RTIA requires that arguments be mounted on a case by case basis about whether the information could reasonably be

expected to reveal the identity of the source for it to be exempt. This will very likely require substantial argument in most cases and significant judgement calls, for example, about whether dates and times and location of the issue and other facts, if released could identity the source of the information.

The newspaper articles in **appendix 1** reported that confidentiality can be questioned and that RTI officers may ultimately decide whether information is released on the basis of public interest considerations.

The "public interest" entails the balancing of often numerous factors for or against, and is often the prevailing approach to deciding if information should be released, if that information does not fall into a more secure category under the RTIA.

The more secure categories of information are included in schedules 1 and 2 of the RTIA although there is some security for some of the information included in schedule 3 provided it is not subject to case by case arguments about its characterisation, or whether the information would be reasonably expected to lead to a particular adverse outcome, as are some categories of information in schedule 3. For example, schedule 3(10)(5) provides that information is exempt "if it consists of information obtained, used or prepared" by Crime Stoppers or by particular parts of the Queensland Police Service. This is relatively clear cut and unarguable about the information that falls into the category of this exemption for Crime Stoppers.

Crime Stoppers enables members of the community to provide if required, anonymous, confidential information about criminal activity which is passed on to the police for investigation.

The DJAG consultation paper also supports this point, starting at page 23 where it is acknowledged that access to documents may be refused because the RTIA does not apply to the documents sought or to the entity applied to or particular functions of the entity under schedules 1 or 2 and that this in general "provides greater certainty" than other provisions which require information to be characterised as exempt information or the public interest to be determined based upon a range of possible factors. If the information is not successfully characterised as exempt information, whether it is released is determined by whether its disclosure would be contrary to the public interest.

At page 24, the DJAG consultation paper notes that exempt information as set out in schedule 3 may require establishing whether information falls into the category. Some are easy to identify (eg information created for consideration by Cabinet) , whereas others require an assessment of the likely harm of disclosure, whilst information subject to legal professional privilege and confidential information require the application of common law tests based on extensive amounts of caselaw.

Confidential information may be provided in a variety of contexts and in some cases it may be the content of the information for which the confidentiality is needed rather than the existence or identity of a confidential source. This was the case, in the case the subject of the newspaper reports. Also, in the case the subject of the newspaper reports, the confidential information was provided during an interview and was recorded in a report of interview, as part of routine law inspection or investigation.

The provision referred to in the DJAG paper was of no use for these two reasons in making the confidential information exempt from release.

The confidentiality was questioned on the basis of legal tests, whether there was abrogation of the privilege against self-incrimination and the public interest. The Office of the Information Commissioner would have probably next weighed up a host of factors favouring release against a host of factors not favouring release to decide what was in the public interest, if the applicant did not stop arguing for disclosure following much legal argument in relation to the other considerations.

If another factor is added against release as suggested by DJAG, this may or may not have assisted in this case. Adding another factor against release may or may not assist on a case by case basis, but probably would not assist in most cases, as section 47(2)(a) of the RTIA requires that the grounds for refusing access to information be interpreted narrowly. Also section 49 of the RTIA does not allow that particular substantial weight be given to any particular factors for or against the public interest. In fact section 49(4) states that factors that could reasonably be expected to cause a public interest harm favouring non-disclosure, does not of itself mean on balance, disclosure of the information would be contrary to the public interest.

The option to add another factor to be weighed up favouring non-disclosure in schedule 4 against all the factors favouring disclosure which is proposed by DJAG is an inferior option, and will add to the amount of legal argument, but not ultimately provide greater security in all cases or in many cases. There would still be case by case arguments as to why particular documents should not be released.

The current DJAG proposal would not provide mine safety and health with a similar level of protection from release of confidential information as exists for confidential complaints in the aviation sector.

How is confidentiality of safety information protected in the aviation system?

Under the Commonwealth *Transport Safety Investigation Act 2003* (TSIA) there are a number of provisions that protect the confidentiality of safety information obtained by Australian Transport Safety Bureau (ATSB) investigators in the aviation, marine and rail transport modes within the Australian Government's constitutional jurisdiction.

A significant amount of information gathered by the ATSB during the course of its investigations is defined as "restricted information" under section 3 of the TSIA. Restricted information is defined as:

> ***restricted information*** means any of the following (but does not include OBR information):
>
> (a) all statements (whether oral or in writing) obtained from persons by a Commissioner, staff member or consultant in the course of an investigation (including any record of such a statement);
>
> (b) all information recorded by a Commissioner, staff member or consultant in the course of an investigation;

(c) all communications with a person involved in the operation of a transport vehicle that is or was the subject of an investigation;

(d) medical or private information regarding persons (including deceased persons) involved in a transport safety matter that is being or has been investigated;

(e) in relation to a transport vehicle that is or was the subject of an investigation—information recorded for the purposes of monitoring or directing the progress of the vehicle from one place to another or information recorded in relation to the operation of the vehicle;

(f) records of the analysis of information or evidential material acquired in the course of an investigation (including opinions expressed by a person in that analysis);

(g) information that is contained in a document that is produced to the ATSB under paragraph 32(1)(b);

(h) information that is contained in a document that is produced to the Chief Commissioner under paragraph 36(3)(a) or (4)(a);

(i) information contained in a report made under a voluntary reporting scheme;

(j) information obtained or generated by the ATSB in the course of considering a report made under a voluntary reporting scheme;

(k) records of the analysis of information contained in a report made under a voluntary reporting scheme (including opinions expressed by a person in that analysis).

Under subsections 60 (1), (2) and (3) of the TSIA staff members (as defined by section 3 of the Act and covering the classes of persons working for the ATSB), Commissioners, Consultants and persons given access under section 62, are prohibited from copying or disclosing restricted information.

Those subsections are included among the list of 'secrecy provisions' in schedule 3 for the purposes of section 38 of the Commonwealth *Freedom of Information Act 1982* (FOI Act) and access to such information is exempt from release under section 38(1)(b)(i) of the FOI Act. The combined effect of the provisions is that the FOI Act clearly does not apply to a large amount of investigative information of the ATSB and the investigative functions of the ATSB are not subject to the Commonwealth FOI Act. A high degree of certainty about confidentiality is therefore, provided.

The DJAG paper also asks the relevant question at page 23: *Do the categories of excluded documents and entities satisfactorily reflect the types of documents and entities which should not be subject to the RTIA?*

DNRM asserts that it does not. DNRM proposes that documents and functions to which the RTIA does not apply should also include documents received or created by the Mines Inspectorate through their confidential complaints system, or in conducting their auditing or investigative functions or analysis/deliberations including where relevant possible regulatory responses (including prosecutions). This would be a similar exclusion to that provided for the ATSB and for a considerable list of agencies in New South Wales in relation to their complaint handling, investigative, auditing and reporting functions.

The impact of the RTIA on mine safety prosecutions

DJAG has generally suggested that other prosecution regimes are similarly affected under the RTIA as is the mining safety prosecution regime. This is similarly the case with DNRM's other safety regimes applying to petroleum and gas and explosives, but does not seem to be the case for other prosecution regimes.

Police prosecutions seem to be significantly shielded by an array of provisions in the RTIA as are many police investigations and functions.

Police can arrest at a very early stage based upon a "reasonable suspicion". Once a suspect is arrested by the police, documentation is then largely protected by legal professional privilege. The policing regime can involve little or no deliberative processes prior to arresting a suspect and this contributes to protection of information through legal professional privilege.

In contrast, a mining safety prosecution is conducted only after considerable deliberation about the strength of the evidence. The statutory roles of inspectors and investigation officers significantly limit the investigation and compliance related information that can be protected by legal professional privilege. The information may consequently become subject to public interest arguments as demonstrated in the case of *North Goonyella Coal Mines Pty Ltd and Millard* (26 June 2012) and released which can potentially add to prosecution difficulties and costs.

The RTIA also currently enables questioning about the discretion of the Commissioner for Mine Safety and Health to prosecute by potentially giving access to some of the working documents or parts of these documents behind this discretion.

The decision of *North Goonyella Coal Mines Pty Ltd and Millard* (26 June 2012), was about access to information about an investigation and deliberations leading up to the decision to prosecute. This decision has set a precedent that it is in the public interest that defendants may gain information through the RTIA that could potentially detract from the effectiveness of a prosecution. The department submitted that the information related to departmental deliberations and the decision to prosecute and did not concern any issues relevant to the trial. The department also submitted that the disclosure of the information could result in the defence raising issues during the trial in an effort to "embark upon an investigation by way of cross examination of prosecution witnesses…in an attempt to sidetrack the prosecution." Since this decision there has been less documented and open communication between investigators, inspectors and other members of the prosecutions team. It has inhibited frankness and candour in communications among those officers involved in prosecutions.

Instead of release under the RTIA, currently under the *Coal Mining Safety and Health Act 1999* (CMSHA) and the *Mining and Quarrying Safety and Health Act 1999* (MQSHA) there can be a proactive release of quality and timely information about incidents and investigations and prosecutions under the public statements and disclosure of information provisions of the CMSHA (sections 275AC-A) or MQSHA equivalent sections (sections 254-255). These provisions enable the DNRM to ensure that the information being released into the public domain about mine safety and

health is accurate and quality assured, and is in the appropriate or full context to minimise the potential for misunderstandings.

Mine Safety regulator colleagues in New South Wales have confirmed that an application was received for information about one of their mining safety prosecutions but it was successfully defended and did not impact on their prosecution.

The New South Wales *Government Information (Public Access) Act 2009* excludes a considerable amount of information of particular agencies in its schedule 2 so that an access application about the information can not be made. Schedule 2 is pasted below and explicitly includes the prosecuting functions of the office of the Director of Public Prosecutions, with the majority of the remaining exclusions related to complaints handling and investigative information of a range of agencies.

Schedule 2 Excluded information of particular agencies

Note. Information that relates to a function specified in this Schedule in relation to an agency specified in this Schedule is ***excluded information*** of the agency. Under Schedule 1 it is to be conclusively presumed that there is an overriding public interest against disclosure of excluded information of an agency (unless the agency consents to disclosure). Section 43 prevents an access application from being made to an agency for excluded information of the agency.

1 Judicial and prosecutorial information

A court—judicial functions.

The office of Director of Public Prosecutions—prosecuting functions.

2 Complaints handling and investigative information

The office of Auditor-General—investigative, audit and reporting functions.

The Independent Commission Against Corruption—corruption prevention, complaint handling, investigative and reporting functions.

The office of Inspector of the Independent Commission Against Corruption—operational auditing, complaint handling, investigative and reporting functions.

The Judicial Commission of New South Wales (including the Conduct Division)—complaint handling, investigative and reporting functions.

The office of Ombudsman—complaint handling, investigative and reporting functions (including any functions of the Ombudsman under the *Community Services(Complaints, Reviews and Monitoring) Act 1993*).

The office of Information Commissioner—review, complaint handling, investigative and reporting functions.

The office of Legal Services Commissioner—complaint handling, investigative, review and reporting functions.

The Health Care Complaints Commission—complaint handling, investigative, complaints resolution and reporting functions (including any functions exercised by the Health Conciliation Registry and any function concerning the provision of information to a registration authority or a professional council (within the meaning of the *Health Care Complaints Act 1993*) relating to a particular complaint).

The Child Death Review Team—all functions.

The Police Integrity Commission—corruption prevention, complaint handling, investigative and reporting functions.

The office of Inspector of the Police Integrity Commission—operational auditing, complaint handling, investigative and reporting functions.

The office of Privacy Commissioner—complaint handling, investigative and reporting functions.

The New South Wales Crime Commission—investigative and reporting functions.

The President of the Anti-Discrimination Board—complaint handling, investigative and reporting functions in relation to a complaint that is in the course of being dealt with by the President.

The Department of Local Government (including the Director-General and other Departmental representatives)—complaint handling and investigative functions conferred by or under any Act on that Department.

The Domestic Violence Death Review Team—all functions.

The DNA Review Panel—all functions other than functions under section 91 (1) (d) of the *Crimes (Appeal and Review) Act 2001*.

The office of the Inspector of Custodial Services—operational auditing, review, inspection, investigative and reporting functions.

The office of Small Business Commissioner—complaint handling, dispute resolution, investigative and reporting functions.

3 Competitive and market sensitive information

The Treasury Corporation—borrowing, investment and liability and asset management functions.

The SAS Trustee Corporation—investment functions.

Any body or office that exercises functions under the *National Electricity (NSW) Law* (including functions under the *National Electricity Code* referred to in that Law) on behalf of National Electricity Market Management Company Limited (ACN 072 010 327) (NEMMCO) or any successor to NEMMCO—those functions.

The Corporation constituted under the *Superannuation Administration Authority Corporatisation Act 1999*—functions exercised in the provision of superannuation scheme administration services, and related services, in respect of any superannuation scheme that is not a State public sector superannuation scheme.

The Workers Compensation Nominal Insurer established under the *Workers Compensation Act 1987*—functions relating to the issuing of policies of insurance

Third party consultation

Third party consultation is included as a topic in the DJAG paper at page 20. At page 28, DJAG suggests the DNRM considered releasing information the subject of the front page newspaper article. This was never the position of the Mines Inspectorate and the initial suggestion that the department would release the information was due to an administrative, paperwork human error within the RTI unit, as a box had not been ticked by the Mines Inspectorate about the nature of the information. Further, the inspector best placed to characterise the nature of the information was on annual leave at the time and could not be consulted about the proposal to release it.

If there had not been third party consultation and objection to release because the information was confidential, the information may have been released by the RTIA unit prior to consultation with relevant mines inspectors and prior to internal review. This highlights the essential safeguard that third party consultation can provide against human error and enables individuals who may be detrimentally affected by the release of the information to express the extent of their personal concerns.

Third party consultation also enables any third parties who for example have provided commercial in confidence information to the mines, petroleum and gas or explosives inspectorates to express the extent of any objections they have to release of the information through the RTIA. The Mining and Coal Seam Gas technical working group progressing proposals in the Mining and Coal Seam Gas Industries' White Paper, "A New Approach to Overlapping Tenure in Queensland" recently expressed concern that information provided to the inspectorates may be released through the RTIA and be prejudicial to the parties' commercial interests.

Page 20 from the DJAG paper discusses the issue as follows:

> "Consultation
>
> Agencies and Ministers must consult with third parties (individuals, corporations and government) where they are considering releasing information and disclosure of the information may reasonably be expected to be of concern to the third party. This ensures individuals and others can provide their views to the agency making the decision on access.
>
> Under the repealed FOI Act, the obligation to consult with third parties only arose where disclosure of the information could reasonably be expected to be of substantial concern to a third party. The lower threshold in the RTI Act and IP Act has resulted in a significant increase in the number of third party consultations (including with other agencies). This creates an administrative burden for the decision-making agency, the agency being consulted, consulted parties and the OIC.
>
> *6.13 Should the threshold for third party consultations be reconsidered?*

DNRM submit that based upon the above examples, the current lower threshold for third party consultation should be maintained.

Appendix 1

Copies of media reports

Daily Mercury, Mackay QLD
28 Jun 2012, by Owen Jacques Apn Newsdesk
News@Dailymercurycomau
General News, page 1 - 381.86 cm²
Regional - circulation 13,812 (MTWTFS-)

ID 151911654

MINING SAFETY FEARS REVEALED

EXCLUSIVE: ROW OVER STATE GOVERNMENT PLAN TO DIVULGE CONFIDENTIAL DISCUSSIONS ON SAFETY BREACHES P7

Row over revealing mine talks

Owen Jacques
APN NEWSDESK
news@dailymercury.com.au

THE State Government plans to release a confidential conversation between safety inspectors to mining giant BHP Billiton, in a move that risks discouraging workers from reporting safety concerns.

APN has viewed correspondence between the Department of Mines and the union inspector, telling him it would release the private conversation after receiving a Right to Information (RTI) request.

The union industry safety and health representative was interviewed by the department's principal investigator and the chief inspector of coal mines on March 15, 2010.

It related to a complaint from BHP Billiton Mitsubishi Alliance (BMA) about orders given by a colleague.

On June 4, the government sent a letter to say an 11-page interview transcript would be released unless the union inspector objected.

Department of Mines said it was not convinced the interview was confidential. The document has "In Confidence" written in bold on its title page, with "Released Under RTI" above it.

The Construction Forestry Mining and Energy Union (CFMEU) is now seeking legal advice.

CFMEU district vice president Stephen Smyth said workers needed to know safety complaints and discussions would be kept confidential.

"Anything that's done between a union safety representative and the mines department is done in a way to protect themselves and other coal miners," Mr Smyth said.

"That protection should be there for miners to raise things and do it without the fear of reprisal. This would drive safety underground – it can have a detrimental effect on safety generally."

By law, all workers are bound to report any safety concerns to management, but Mr Smyth said contract workers were sometimes reluctant because they did not want to risk their jobs.

Even with Queensland's exemplary mine safety record, 11 workers have been killed on coal mine sites since 2000, in an industry employing tens of thousands.

A Department of Mines spokesman said the matter was under appeal and had not been released but the ultimate decision rested on the RTI officer. Once all sides were consulted, the officer would decide whether to release the interview "based on the public interest considerations".

BMA declined to comment.

Daily Mercury, Mackay QLD
09 Jul 2012, by Owen Jacques Apn Newsdesk
Owenjacques@Apncomau

General News, page 10 - 292.08 cm²
Regional - circulation 13,812 (MTWTFS-)

ID 153307880

back

WORKPLACE SAFETY: RIGHT TO INFORMATION LAW

Mining 'dobbers' face exposure

Owen Jacques
APN NEWSDESK
owen.jacques@apn.com.au

ANY mine industry worker anonymously passing on concerns to mine safety workers could have their details read by bosses using Queensland Right to Information laws.

The laws – created to encourage transparency in government – can be used by mining companies to access anything fed into the state government system.

Names are deleted, but the coal mining union warned specific times, dates, and whereabouts of the issue could pinpoint who was making the complaint.

Many of these concerns were raised with the company directly, but if a worker felt unsure about their job security – sometimes an issue for a contractor or temporary worker – they could find themselves unwillingly identified.

Queensland is considered to have the safest mining industry in the world, but a death at a quarry site near Moranbah has prompted scrutiny to ensure mine and quarry safety is kept strong.

University of Queensland mine safety expert Professor David Cliff said anonymous reporting was never ideal but was something "that needs to be protected undoubtedly".

He said workers should always report incidents directly to the company if they could, so they can be aware of them and take action. But if reporting in confidence was necessary, he said it needed to be preserved.

"If it was perceived by the worker that anonymity would be penalised or cause a negative impact on them, making a comment in confidence to any person would become less likely," Prof Cliff said.

"If they make a comment to the (union safety representative) and that goes to a mines inspector, it means they might not tell the representative either."

A spokesman for the Department of Mines said the RTI legislation was designed to release information unless it was in breach of the public interest.

"The delegated RTI officer will then make an independent decision regarding access to the subject documents based upon the public interest considerations," he said.

Appendix 2

Extract from the DJAG paper page 28 Mining safety information

The Department of Natural Resources and Mines (NRM) holds a range of information concerning mine safety. A media report recently indicated that NRM was considering disclosing documents containing a transcript of a conversation between a mining safety inspector and a union official. The report suggested that releasing the documents sought under RTI would compromise the safety of mine workers, because workers would feel unable to make complaints about unsafe working conditions if they could not do so in a confidential manner. No documents had been released at the time the media report was published.

Workers in other industries regularly make confidential complaints to Government about workplace issues. Applications for this information are regularly made under the RTI Act, which already has provisions to protect this information. For example, section 10 of Schedule 3 of the RTI Act states that

Information is exempt information if its disclosure could reasonably be expected to: (b) enable the existence or identity of a confidential source of information, in relation to theenforcement or administration of the law, to be ascertained.

However, it could be argued that adding a factor favouring non-disclosure to Schedule 4 of the RTI Act – for example, that disclosure of the information could reasonably be expected to affect safety in the mining industry in Queensland – would provide additional security.

7.9 Are provisions in the RTI Act sufficient to deal with access applications for information relating to mining safety in Queensland?

Extract from the DNRM's RIS - Ombudsman's recommendations about a confidential complaints system

Confidentiality of complaints

DNRM's website currently publicises its complaints system in the following way:

'Complaints about safety and health at mines

The Queensland mine safety laws allow mine workers or their representatives to make confidential complaints about safety and health matters to the Mines Inspectorate. These complaints must be investigated and the name of the person making the complaint must not be revealed. Legislation relating to complaints is section 254 of the Mining and Quarrying Safety and Health Act 1999 and section 275 of the Coal Mining Safety and Health Act 1999.

A person wishing to make a complaint about an alleged contravention of the legislation or a thing or practice at a mine that could be dangerous, should

contact an inspector by telephone or in writing. The complaint will be logged on the Mines Inspectorate complaints database and will be investigated by an officer of the Mines Inspectorate. This investigation may involve a visit to the particular mine where the allegation took place.

When the investigation is complete, the person making the complaint will be advised of the results of the investigation.

Before a person makes a complaint to the Mines Inspectorate, the person should bring the issue to the attention of the person's supervisor or site senior executive. This can be done personally or through a site safety and health representative.'

The Queensland mining industry has a mature safety culture. Workers are required under the legislation to pass on any information they have to protect themselves and others from the risk of injury or illness.

The Mines Inspectorate very strongly supports a complaint system as it has brought very concerning and legitimate safety and health issues to their attention and they have not found the system to have been abused in any way.

Based on the success of the current system in contributing to mining safety and health and the realisation that this system can be further consolidated, the Mines Inspectorate now proposes to more clearly develop and promote a confidential system of complaints closely based on the approach developed and implemented for the aviation industry. This will assist in further developing the safety and health maturity of the mining industry, to the heightened level of safety and health maturity of the aviation industry.

The Mines Inspectorate's proposal to further develop and promote a confidential system of complaints is also directly based on the following policy discussion and recommendation of the Ombudsman.

Comments by the Ombudsman

The Ombudsman has recommended that the Mines Inspectorate

'take steps to publicise the existence of its system of confidential complaint and incident reporting and promote its use, and publish information on how information received via the system will be handled.'

The Ombudsman's Review of the Regulation of Mine Safety June 2008 devoted chapter 8 to incident reporting and complaints about mine safety and suggested building additional confidence around complaints handling including confidential complaints and to publicise the availability of the confidential system.

Some of the relevant analysis by the Ombudsman's Review started at page 66 as follows:

'Although the QMI[1] conducts regular audits and inspections, as well as post-incident investigations, it also receives numerous complaints each year relating to alleged breaches of mine safety practices, or general concerns about safety at particular mines……

[1] Queensland Mines Inspectorate

It also appears that many safety-related complaints are made to the relevant union (CFMEU or AWU [Australian Workers Union]*), which may deal with the matter. Where this happens the matter will not necessarily come to the QMI's attention.*

Those making complaints (most often mine workers) are usually better placed than inspectors to know what is actually happening at mine sites when 'no one's watching'. Complaints therefore form an important source of information for any safety regulator…

Safety is built on a foundation of open and full exchange of information about problems, incidents and concerns. In an ideal world, workers and employers would report all serious incidents, near-misses and other safety concerns to the health and safety regulator simply because it is the 'right thing to do', and because it would enable the regulator to:

- *take action, or ensure action is taken by the employer, to address the concerns*

or

- *bring the problem (and any solution) to the notice of the industry as a whole.*

However, this is unlikely to happen in an industry where any stoppage in operations can seriously jeopardise production targets and profits and lead to job losses. In such an environment, an employee or contractor who reports safety concerns to the regulator is likely to be seen by the operator (and even by other employees or contractors) as a trouble-maker and may become the subject of reprisals.

Moreover, there is the simple fact that people do not like to admit mistakes. Human reactions to making mistakes take various forms, but frank confession does not usually come high on the list.

One method of encouraging workers and others to report concerns about mine safety is to establish a confidential safety reporting system similar to that used by aviation regulators. The aviation industry worldwide has increasingly moved to a more confidential system of incident and 'near-miss' reporting, which is not the case in mining and other industries. For example, in respect of the UK aviation industry, Faith comments on:

> *… the astonishing openness of the way near misses are reported through what is called the Airprox System. It is entirely up to the pilots to decide when, as the official definition goes, 'the safety of the aircraft was or may have been compromised'. Any such incidents are obviously investigated thoroughly and independently of the airlines, and the results published …*
> *Looking at the records over the past decade what is surprising is that the number of cases has actually gone down … [yet] … traffic has increased … [and] there has been an increasing readiness … to report these problems …127*

> *Similarly, the background to the USA equivalent, ASRS (Aviation Safety Reporting System) is described as follows:*
>
> *It took [an aircraft crash in the USA] because the pilot misread the distance measuring equipment to bring out into the open five pilots who admitted that they too had experienced similar incidents but had been too embarrassed to report the problem. They had assumed, wrongly, that it was they and not the equipment that had been at fault.*

This sort of revelation, and the fact that pilots often dared not report incidents involving them or other pilots, dared not complain of stress, of fatigue, of bad maintenance, of unreasonable demands imposed by their employers, resulted in a new reporting system for untoward incidents.

In Australia, the ATSB's[2] Aviation Confidential Reporting Scheme (REPCON) became operational in January 2007. It is described as:

- *a voluntary confidential reporting scheme for aviation [which] allows any person who has an aviation safety concern to report it to the ATSB confidentially.*

Protection of the reporter's identity is a primary element of the scheme.

The matters excluded from the scheme are:

- *unlawful interference with aircraft*
- *conduct representing a serious and imminent threat to a person's life or health*
- *industrial relations issues*
- *conduct which would constitute an offence punishable by more than two years' imprisonment.*

Reports received through REPCON are de-identified and, if necessary, investigated. Information briefs and alert bulletins can be issued to the operator concerned and, presumably, to a wider audience, if deemed appropriate.

The ATSB has recently launched a new incident information reporting system called SIIMS (Safety Investigation Information Management System). This is an 'occurrence database' and is designed to collect data on approximately 7000 'aviation occurrences' each year for a safety benefit. Notifications can be made confidentially, and this is seen as a key benefit of the system.

A system of blame-free or confidential incident reporting will never be perfect. There may be considerable cynicism at the outset about its effectiveness and, in smaller operations, individuals may still be afraid to report on the basis that 'everyone will work out who it was, anyway'.

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[2] Australian Transport Safety Bureau

To be accepted by industry, any such program must be seen to produce improvements in safety. At the operator level, the decision whether to report a problem affecting their own operation is likely to run into the dilemma described in the following terms by Hopkins:

… companies face a dilemma with respect to information about safety problems. Should they seek out such information and attempt to learn from it, or should they suppress this information in order to be able to plead ignorance if something goes wrong? Should they be as open as possible, disclosing whatever information is available and accepting the legal consequences, or should they limit the availability of this information as much as possible in order to be able to deny responsibility?

In the USA, the federal mine safety regulator, the Mine Safety and Health Administration (MSHA), runs a confidential telephone hot line for complaints about hazardous conditions. Complaints can be made anonymously.

The QMI advised us that it does, in fact, have such a system. Mine workers or others with safety concerns can contact the QMI and the details of the complaint are recorded on the Inspectorate's database in such a way that only the inspector to whom the complaint was made has access to the complainant's personal details.

However, our review of the publicly available information sources of the DME, including its website, indicates that the system is not well publicised or promoted. Greater promotion of this avenue for mine safety incident reporting is likely to give the QMI a more detailed picture of where problems are occurring, and bring to its attention specific matters which have not been revealed during inspections.

What is proposed?

The Mines Inspectorate proposes that the current complaints system be further developed so that it can be promoted and implemented in a very similar way to the aviation industry's confidential reporting system.

Appendix 3

Research completed at DJAG's request and provided to DJAG in October 2012

Proposed RTIA amendments - points for further consultations with DJAG

Background

Mine Safety and Health (M S&H) has 2 categories of concern (based on 2 recent, separate RTIA applications):

- documents in relation to confidential matters or complaints, and

- Compliance Review Committee (CRC) documents produced following investigations.

However, the associated documents can overlap with confidential complaints potentially forming a reason (or one of the reasons) for an investigation, and the production of CRC documents etc.

In relation to potential CRC deliberations, relevant documents reviewed can include and be described as:

- nature and cause reports under general and specific legislative powers (in the case of a fatality they are usually provided to the coroner);
- investigator reports about relevant facts, interviews of witnesses etc which may or may not contain recommendations to prosecute;
- documents from other officers in relation to the above;
- Chief Inspector and inspector recommendations to prosecute under specific legislative powers;
- Compliance reports compiled according to the Department's public compliance policies and which may include a review of the facts and an assessment of compliance with safety and health requirements under the Act and Regulations. (This may be the first systematic review at a senior level of all of the above types of documents collectively.)

Discussions between M S&H and DJAG acknowledged there are 2 options:

- The RTIA will not apply to the mine safety and health documents and functions related to complaints, investigations and compliance options through inclusion in schedule 1 or 2 of the RTIA – relatively clear, certain and unarguable (Mine Safety and Health DNRM preferred – amendments required to the RTIA); or
- Continue on a case by case basis to argue particular documents are exempt under schedule 3 and/or the disclosure would on balance be contrary to the public interest. In which case, certainty is difficult to provide. (DJAG preferred – maintain status quo)

The following points are presented in response to DJAG's earlier comments and queries and to provide further explanation of the reasons for the proposed amendments.

Main issues

Main issues in relation to confidential matters or complaints

The main issue in relation to confidential matters or complaints is ensuring certainty about preserving confidentiality or as near as possible, certainty. Confidentiality in relation to mine safety and health complaints must be protected or guaranteed as far as possible when confidentiality is requested and expected.

The current case by case approach to deciding whether a particular document satisfies the legal elements of the test of breach of confidence or is not to be released for some other reason (eg the information was provided following an inspector requiring the information ie under compulsion), and where internal Departmental decisions can be appealed through external review and beyond, does not ensure the integrity of a confidential complaints system (the value of which was strongly promoted through the Ombudsman's Review – please see extract in the *appendix*).

A robust confidential complaint system can not be guaranteed to the extent required to fully implement the Ombudsman's recommendation, if release may potentially occur through error (eg not ticking a box on a form leading to an initial decision to release) or may occur through the unpredictable outcome of legal argument, in relation to whether or not particular information forms exempt confidential information under the RTIA.

The policy objective of establishing a high level of trust and confidence in a confidential complaints system is more likely to be achieved and maintained over time if the RTIA is amended so that it does not apply to the documents created or received by the Mines Inspectorate and Commissioner under the CMSHA or MQSHA, in carrying out their functions of responding to or investigating safety and health complaints, incidents or accidents or alleged breaches of the Act and analysing possible regulatory responses.

Main issues in relation to investigation and compliance reports

The main issues in relation to investigation and compliance reports and any recommendations of the CRC to prosecute are the potential timing of the release of the information which may affect prospective prosecutions or prosecutions on foot. There are also earlier deliberative process concerns including releasing changing drafts of documents which may include drafts containing inaccuracies about safety and health matters. Confidentiality issues may or may not also be part of the concerns as this will depend on the particular case.

Mine Safety and Health (M S&H) can instead release accurate, quality and timely information about investigations or prosecutions under the public statements and disclosure of information provisions of the CMSHA (sections 275AC-A) or MQSHA equivalent sections (sections 254-255). These provisions enable M S&H to ensure that the information being released into the public domain is accurate and quality assured and in the appropriate or full context to minimise the potential for misunderstandings.

This is consistent with the preamble of the RTIA, acknowledging that the RTIA may not be the only way to release information. The preamble of the RTIA at 1(h) acknowledges that right to information legislation is only 1 of a number of measures that should be adopted to increase the flow of information to the community.

M S&H acknowledges that access to information has been described as the "oxygen of democracy" and that RTI laws require public authorities to publish information proactively.

However, in some cases, the RTIA does not apply as the mechanism for the release of information. Schedule 1 and 2 of the RTIA confirm the documents and particular functions of some agencies to which the RTIA does not apply. The RTIA also allows for some special confidentiality provisions in other Acts listed in schedule 3 section 12, to be exempt from the RTIA.

The CMSHA (sections 275AC-A) and the MQSHA (sections 254-255) explicitly authorise public statements about certain matters including the commission of offences and the persons who commit them, investigations, and actions taken by inspectors to enforce the Acts. The difference is that under these provisions, the Department is able to ensure the information released is accurate and in sufficient context to inform the public to an appropriate quality, and at a time and in a way that will not adversely impact on prosecutions.

The release of information framework under the CMSHA and MQSHA is the appropriate framework for the proactive release of information about actions taken by M S&H (eg general safety alerts), and information about more specific completed investigations and prosecutions. The information released about regulatory outcomes under this framework essentially "speaks for itself" about the rigour and outcomes of the regulatory activities of M S&H.

In comparison, the framework provided by the RTIA can result in piecemeal and potentially inaccurate or out of context information being released. It may also be released at a time that may add to prosecution costs to the State.

Moreover, the information released through the RTIA does not provide a clear picture of the discretion to prosecute, nor necessarily late stage deliberations about whether to prosecute nor whether M S&H have followed the relevant version of a policy document at the time. This is often due to some of the information being withheld due to other considerations such as the information being a coronial document or the information was given under compulsion.

In the specific case of mine safety and health, the proactive release of information in relation to investigations and prosecutions should be solely implemented through the release of information framework under the CMSHA and the MQSHA.

Further details supporting the Mine Safety and Health preferred option of amendment of the RTIA

Similarities to other existing exclusions in schedule 1 or 2 to which the RTIA does not apply

Confidentiality

Amending the RTIA so that it does not apply to mining safety and health complaints, investigations and compliance documents etc would probably be for similar policy reasons to some of the existing examples of particular documents and particular functions of particular agencies in schedule 1 or 2 of the RTIA where the RTIA does not apply.

There are examples in schedules 1 and 2 where the RTIA does not apply to particular confidential documents or particular functions including commercially sensitive documents or functions. These examples include: a document created or received by the Workers' Compensation Regulatory Authority in carrying out its functions of monitoring the financial performance of self-insurers; particular documents under the *Biodiscovery Act 2004;* confidential commercial information within the meaning of the *Gene Technology Act 2001;* and to the functions of a list of Government owned corporations except their functions relating to community service obligations.

Presumably the "confidential" documents or functions require a greater guarantee or assurance that there will be no breach of confidence than provided for under schedule 3 where an exemption will apply only if it is established in the particular case that release would be a breach of confidence (ie the case by case basis).

Similarly, the highest possible guarantee and assurance is required for Mine Safety and Health to fully implement the recommendations of the Ombudsman's report.

<u>Investigations which may or may not involve confidential matters</u>
Some safety and health investigation type situations where the RTIA does not apply (under schedule 1 or 2) include root cause analysis documents of a reportable event under the *Hospital and Health Boards Act 2011* and *Ambulance Service Act 1991.*

The RTIA does not apply due to the importance of determining factors contributing to a reportable event and encouraging the reporting and acknowledging of errors, without concern that this information will be more widely released or released at any time under the RTIA etc. This could encourage confidential reporting and ensure confidentiality and would also ensure that the information was not released according to the provisions of the RTIA, during any litigation for negligence or prosecutions.

Other schedule 1 examples to which the RTIA does not apply include a document of an agency that is a coronial document (the definition in the *Coroners Act 2003* includes the example of a report from a police officer helping a coroner about the investigation into the reportable death) where the document relates to the death being investigated by the coroner.

In cases of fatalities, nature and cause reports under the CMSHA and MQSHA are usually provided to a coroner and would not be disclosed under the RTIA if they are provided to a coroner.

Schedule 2 part 2 examples in relation to the RTIA not applying to particular types of sensitive investigations and complaints include:

> 10 the adult guardian under the *Guardianship and Administration Act 2000* in relation to an investigation or audit under that Act
>
> 11 the Health Rights Commissioner in relation to the conciliation of health service complaints under the repealed *Health Rights Commission Act 1991*, part 6
>
> 12 the Health Quality and Complaints Commission in relation to the conciliation of health service complaints under—
> (a) the repealed *Health Rights Commission Act 1991*, part 6; or
> (b) the *Health Quality and Complaints Commission Act 2006*, chapter 6

The RTIA also allows there to be some special confidentiality provisions within other Qld Acts that ensure that sensitive information is protected according to the provisions of those Acts rather than the RTIA. Schedule 3 section 12 of the RTIA enables disclosure to be prohibited by another Act listed in subsection 1. These are the only provisions in other Acts that may overrule the RTIA in relation to prohibiting the disclosure of information. Included in this list is the *Transport (Rail Safety) Act 2010, part 9, division 2.*

Transport (Rail Safety) Act 2010, part 9, division 2 prohibits the recording and disclosure of restricted information except in certain circumstances. The restricted information includes statements obtained and information recorded from investigations and inquiries and information relating to rolling stock that is or was the subject of an investigation or inquiry.

These are all surer safeguards of confidentiality than arguing on a case by case basis through internal and possibly external review stages and beyond, that the information is exempt information as its disclosure could be reasonably expected to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained (RTIA schedule 3, section 10(1)(e)) or that the information is exempt as its disclosure would found an action for breach of confidence (RTIA schedule 3, section 8).

The mining safety proposed amendments would be sufficiently distinct based on the characteristics of the mining industry or the regulation of the mining industry or sufficiently narrow and limited, so as to be unlikely to have flow on effects to general WHS and the criminal justice system

The M S&H policy objectives of fully establishing and maintaining a confidential complaint system and a proactive, accurate and targeted statutory based release of information regime, distinguishes it from the general WHS jurisdiction and the criminal justice system.

M S&H is also distinct in having a relatively structured statutory approach to inspectors /investigation officers having statutory functions to provide particular inspector or investigator reports and make recommendations about prosecutions. This creates a series of deliberative processes and circumstances that differ from the other 2 jurisdictions.

In relation to the general WHS jurisdiction

The general WHS jurisdiction is not attempting to implement a robust confidential complaint system pursuant to an Ombudsman's report, as is M S&H.

There is not already the same well developed confidential complaints system in the general WHS jurisdiction as there is in the M S&H jurisdiction.

The WHSQ Complaints Service Charter on WHSQ's website asks that where reasonably practicable, constructive steps should be taken to resolve issues at the workplace before raising them with WHSQ, and notes that requests that identities not be disclosed will be respected, but identity may become apparent due to the nature of enquiries WHSQ make etc

There does not appear to be the same policy objective to establish a very robust confidential complaints system as there is for the mining industry.

Confidential complaints have made an important contribution to alerting the Mines Inspectorate to serious safety and health issues. A degree of confidence had already been built in the M S&H confidential complaints system and the same developments in establishing and wanting to safeguard a confidential system are not evident in the general WHS jurisdiction.

If there is not robustly maintained confidentiality, confidential sources of information will dry up. There have not been any vexatious confidential complaints and the system has proven to be very important in bringing serious safety and health issues to the attention of the Mines Inspectorate (consistent with the views and recommendations of the Ombudsman's Report). If it is dealt with on a case by case basis under the RTIA this will potentially significantly erode confidence in the existing mine safety and health confidential complaint system.

Unlike many general workplaces, mines especially coal mines have a number of principal hazards that can injure or kill numerous workers in the one incident. Even though the same may be said for some other workplaces that come under the general *Workplace Health and Safety Act 2011* (WHS Act), these other industries such as major hazard facilities located within communities rather than at mines, are not the same cohesive industry as the mining industry.

Many mining communities tend to be comparatively self-contained and many individuals in the relatively small mining industry working in similar mines are known

to each other. This is quite different to many general places of work where any other higher risk industries are generally less cohesive. In the mining industry there is movement of personnel across companies and industrial coverage is dominated by a few unions. Fly in/fly out workers and mining camps add to the information exchange grapevine.

There are also differences in relation to statutory release of information under the respective safety and health legislation. The general WHS jurisdiction's WHS Act is based on the Model Workplace Health and Safety Act which does not have the same provisions encouraging and enabling the proactive release of information under its framework. Exhaustive consultations during the development of the Model WHS Act did not consider that this should be a feature of the general WHS jurisdiction.

In contrast, the current release of information provisions in the CMSHA and MQSHA have been a template for additional mining safety and health release of information provisions for the large mining States of Queensland, Western Australia and New South Wales as part of the National Mine Safety Framework reform. They allow for release of information based on quality assurance and at the appropriate time.

There are other differences, including that the WHS Act 2011 does not specifically provide for nature and cause reports or for inspectors to recommend prosecutions to the Commissioner or for the release of information about specific investigations and actions taken by inspectors.

The mining jurisdiction also has reporting of high potential incidents. High potential incidents are near misses and are defined as an occurrence, whether or not people were present, which did or had the potential to result in either a fatality or a person receiving a permanent incapacity. Under the Queensland mine safety legislation high potential incidents (HPI) are to be investigated and analysed, using an acceptable methodology, and reported to the regulator. A summary of the incident and the circumstances is disseminated to the industry.

This 'no blame' reporting has been strongly encouraged by the mine safety regulator. The dissemination of HPI information by the regulator is welcomed by the industry and its workforce. DNRM is enthusiastic about embracing the 'push' model through proactive and regular release of information about HPI safety incidents. A leading indicator of the effectiveness of safety management is the actions taken to prevent future incidents and there is ample evidence available to inspectors that mining operations are responding positively to prevent recurrences of incidents.

In relation to investigations, WHSQ are implementing SafeWork Australia's National Compliance and Enforcement Policy which differs in some ways from the Compliance Policy Documents currently on the DNRM website which detail the Compliance Review Committee and other more specific information.

WHSQ does not publicise a similar Compliance Review Committee process and does not publish similar compliance implementation details to Mines S&H about compliance review processes.

In relation to the criminal justice system

Under schedule 3 section 10(5) exempt information includes information obtained, used or prepared by Crime Stoppers Qld Ltd. The information remains exempt, except where the information is about the applicant, but in this case it is exempt until the investigation is finalised and the right to the information would also be subject to other applicable limitations in the RTIA. This appears to cover both anonymous information as well as information generally.

The Crime Stoppers Queensland website hosts an Anonymous Crime Information Reporting Section and refers to featured crime information which may have recently happened or for which their Partners the Queensland Police Service are seeking additional assistance from the Queensland public.

The RTIA therefore, already enables Crime Stoppers Queensland to have an anonymous reporting system with a relatively high level of assurance of confidentiality through the specific provisions relating to it within the Act.

There are also specific carve outs for some parts of the police service in particular contexts in schedule 1 and 3 of the RTIA.

Further the police already receive different treatment in relation to a report prepared in the course of a routine law enforcement inspection or investigation, as a criminal law report can arguably be exempt from disclosure under schedule 3 section 10(2)(d) of the RTIA whilst this same exemption is not extended to routine law enforcement inspection or investigation by an agency whose functions include enforcing the law (other than if enforcing the law relating to misconduct under the *Crime and Misconduct Act 2011).*

Routine Police inspections or investigations are already receiving some specific, and different treatment to other law enforcement inspections or investigations by other agencies.

In the recent case of *Nash and the Qld Police Service, Qld Information Commissioner, 18 Sept 2012,* at paragraph 73 it was noted that, *"While I consider that, in general, individuals who make complaints or provide witness statements to QPS would expect that their statements might be disclosed to the person to whom it relates through appropriate prosecution and investigation processes, they would not have an expectation that it would be disclosed in other circumstances (such as in response to a RTI application).*

Mining inspections or investigations and the subsequent compliance related documents often follow serious safety or health incidents rather than being routine.

Under the general WHS jurisdiction there is no provision in the WHS Act to specifically conduct investigations following serious accidents or high potential incidents.

However, for mine safety and health, inspection or investigation documents would only be exempt from disclosure under the RTIA for reasons that may also apply for the general WHS jurisdiction and criminal justice system such as the information was provided under compulsion, the information is subject to legal professional privilege or the information is a coronial document or the information is arguably on a case by case basis confidential under schedule 3. Under all 3 regimes, inspection or investigation documents would also be released under disclosure rules during any prosecution. However, in comparison, the police already have additional carve outs applying to the criminal justice system.

Different enforcement contexts and compliance related documents

Mine safety and health also has a significantly different enforcement context to the other 2 regimes with a Mine Safety and Health Commissioner. A proceeding for an offence is started by complaint of the Commissioner. A structured Inspectorate hierarchy with a range of inspectors culminating in the relevant Chief Inspector having a statutory function to make recommendations in relation to prosecutions or other enforcement options is also different to the other 2 jurisdictions.

M S&H also has a more structured statutory approach to inspectors and investigation officers having functions to provide particular inspector or investigator statutory reports.

Within M S&H, this creates a significant deliberative process and range of deliberative process documents unlikely to be generated in the same inclusive manner (that may also involve external representatives), compared to documents created in the other 2 jurisdictions.

When an incident happens at a mine those involved are not generally in dispute but the circumstances and any breach of the legislation may be. This is different to a police crime investigation where in many cases, until arrest the police are trying to compile evidence/find/identify who committed a crime etc and a RTIA application is far less likely in most scenarios involving crimes under the Criminal Code and during many criminal prosecutions.

Overall, the exclusions sought are sufficiently mining industry specific and mining policy specific and would not provide a precedent for flow on to the general WHS or the criminal justice police jurisdictions as well as they have different policy approaches and/or mostly have significantly different contexts. The police already have some specific provisions under the RTIA applying to some of their documents and functions.

Even a successful appeal of the North Goonyella case would not have addressed all of the policy issues.

The *North Goonyella* external review decision

The *North Goonyella* external review decision by the Information Commissioner dated 26 June 2012, set aside the Department's internal review decision to refuse access to investigation and compliance related information, finding that the information does not comprise exempt information, and would not on balance be contrary to the public interest if disclosed.

The Information Commissioner noted that prosecution proceedings had commenced. Therefore, the Information Commissioner considered that the timing in this RTIA case diminished the public interest against disclosure of information forming a deliberative process, as the deliberation stage had passed, with a prosecution on foot.

In the *North Goonyella* case, the CRC and compliance related information included investigation reports, presentations and associated correspondence, recommendations, and a meeting summary or minutes.

The Department argued that disclosure should not occur as it could be reasonably expected to prejudice a person's fair trial or the impartial adjudication of a case, noting that this prejudice can also relate to the prosecution's case (as it did in the *North Goonyella* case) rather than to the defence. The Department argued that the information was not relevant to the elements of the offence and if disclosed the defence may raise it during the trial in an effort to *"embark upon an investigation by way of cross examination of prosecution witnesses….in an attempt to sidetrack the prosecution."* The Information Commissioner gave little weight to the Department's concerns.

An appeal of the North Goonyella decision would not have addressed the broader policy issues regarding the compliance review committee compliance documents and how schedule 3 of the RTIA applies nor confidential complaints which was not an aspect of this particular case.

It is arguable that early drafts of inspector and investigator reports are within early deliberative processes of government and that the compliance review committee documents could also be so in some cases.

Even if in a particular case, the compliance related information may arguably form an early deliberative process, under the RTIA this is unlikely to be a sufficient factor alone or even combined with other factors in most cases, to counterbalance the way the RTIA has a long list of other pro-disclosure factors and a stated overall pro-disclosure focus.

In the *North Goonyella* external review decision the Information Commissioner afforded little weight to particular factors such as the preliminary nature of deliberations, as the assignment of weight to relevant matters is a matter for the decision-maker. This is so, as the RTIA does not provide guidance about weighting particular factors (*Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24).*

However, it is necessary to assign considerable weight to this factor in the mines safety and health context. Mine safety and health is highly technical and can be highly complex. Investigations heavily involve technical mining and investigative experts.

It is a significant concern if the RTIA consequently, is potentially discouraging early and ongoing open discussion and suggestions between officers within Government and any external representatives included in the CRC, in relation to any types of queries and concerns related to investigations and prosecutions.

These very concerns were also noted in *Haneef and Department of Immigration and Citizenship (2008) AATA 587* in relation to internal working documents and the deliberative or "thinking processes" involved in the functions of a government agency. The Government Department argued that there would be adverse effects on advisors, investigators and officers deterring full and open advice to decision makers during deliberations, if they knew or feared such advice would be disclosed to the public as a matter of course.

The Haneef decision noted that disclosure of early deliberations can stifle dispassionate analysis of the facts of an investigation.

In the Haneef case, some of the documents gathered information and expressed preliminary opinions about the importance of the information and were compiled some time before the eventual decision by the Minister. The information was for the purpose of formulating at some future stage recommendations and options to be presented to the Minister. In this particular *Haneef* application the information was characterised as *"a very preliminary piece of consideration, operating not as the culmination of research and consideration, but as the starting point of such."*

Due to the preliminary nature it was contrary to the public interest to disclose it. The Commonwealth FOI Act also enabled considerations of misunderstanding of the document by the public to be taken into account, whilst the Qld RTIA classes this issue as irrelevant.

Against this and other arguments it was noted that the purpose of the FOI Act is to make information as far as possible available to the public, and to limit exceptions to the protection of essential public interests.

However, the RTIA applies in such a way to M S&H compliance related documents that it can result in piecemeal deliberative process information and piecemeal context and possibly incorrect early version information being released.

Also there is no possibility of a case by case approach (policy option preferred by DJAG) to whether the information forms an early deliberative process which also includes whether the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document.

The Qld RTIA appears to be stricter or more pro-release of piecemeal information than other right to information legislation (eg the Commonwealth) by ruling out any weight being given to preliminary information being more readily misunderstood by the public and mischaracterised by those unacquainted with the full details. (schedule 4 part 1 re irrelevant information). This provides limited or no scope to not disclose any information that is arguably preliminary deliberative process information.

Under schedule 4 Part 1 section 2, it is irrelevant that disclosure of information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document. Under section 3, it is also irrelevant that disclosure of the information could reasonably be expected to result in mischievous conduct by the applicant.

However, misinterpreting and misunderstanding a document and the quality of a document is a legitimate concern in a mine safety and health context, as is mischievous conduct potentially leading to a waste of government funds through complications to prosecution processes**.**

In summary, in relation to deliberative processes, there is the general concern about the RTIA applying at any stage and resulting in the potentially, untimely release of information which may be at variable stages of finalisation and deliberation and therefore of variable quality (eg earlier flawed drafts of investigation reports).

Therefore, release of information under the RTIA based on RTIA applications for information, rather than in a more quality assured and deliberate manner, may adversely impact on the processes of government in relation to investigations, co-ordinated deliberations and prosecutions.

This may be to the detriment of the investigation process or to the Department's expense (eg with prosecutions potentially side-tracked, confused or lengthened in terms of legal argument and costs) when much of this information when finalised and quality assured would or could mostly be appropriately released at other appropriate times (eg. through disclosure obligations if a prosecution is to occur, or through an orderly process of release of information based on the release of information provisions within the CMSHA itself (section 275AC), at the finalisation of the investigation or the prosecution).

Also, at a very early stage of investigation, the Chief Inspector can actively release information to alert and put industry on notice that an incident has occurred and

that any reoccurrence should be prevented based on findings at the time (eg through safety alerts).

In relation to investigations, a potential RTIA application at any time may generally deter investigators raising queries or issues in the early deliberative process.

If open discussion is adversely affected, there will potentially in some cases be a significant waste of scarce public funds. For example, this could occur if any ill-advised prosecutions are commenced due to doubts by inspectors or investigators not having been confidently and openly raised in the early investigative or deliberative phases, due to fear of cross-examination during any subsequent prosecution about any earlier deliberations.

If M S&H is required to release early and in some cases incorrect investigation reports under the RTIA, there is also the related concern that incorrect information about a safety and health issue may be publicly released. Rather than promoting safety and health, if early incorrect information is circulated, it may prejudice safety and health through the release of incorrect information.

The North Goonyella decision also assumed that the Review Committee documents would reveal the background or contextual information that informed the decision to prosecute whilst continuing to make the point that it would not reveal the Commissioner's decision (eg paragraph 45). It may not always do so, as the Commissioner may have been influenced by other background information.

In the context of a mine safety and health prosecution or possible prosecution, there is no policy justification for the RTIA providing greater access to information than the *Judicial Review Act 1991* or under the common law obligations of disclosure during a prosecution by enabling the release of piecemeal deliberative process information about recommendations to prosecute. The general WHS jurisdiction does not have the same statutory based deliberative process where inspectors have the specific function of recommending prosecutions nor the same detailed public policy document about it.

The prosecutorial function of the Attorney-General and the DPP or the exercise of the discretion to prosecute is an unexaminable discretion within the criminal justice process. Similarly, the discretion of the Commissioner to prosecute under the CMSHA or the MQSHA should be similarly unexaminable both in relation to decision to prosecute and deliberative processes that may have influenced the exercise of the discretion.

The above concerns about the application of the RTIA has led to proposals to amend the RTIA so that it does not apply to documents in relation to complaints received, and that following any complaints, incidents or accidents, it does not apply to any inspections or investigations or deliberative processes conducted in relation to possible compliance or enforcement actions (including prosecutions), under the CMSHA and MQSHA.

The amendments to the RTIA will be aimed at ensuring greater confidence in a confidential complaints system and that future prosecutions will be able to be conducted without investigators or inspectors possibly being required to address allegations about reasoning, alternate compliance options to prosecution and recommendations to prosecute (which are beyond the relevant issues of the prosecution) during prosecutions, or without the defence being possibly able to detract from the prosecution, by raising irrelevant matters based on information obtained under the RTIA.

In a mine safety and health context, it is in the public interest that the deliberative processes of government are not adversely impacted. The results of prosecution and enforcement action will speak for itself. Indeed the Commissioner for Mine Safety and Health provides an Annual Report to the Minister on the performance of the Department in regulating mine safety under section 73E CMSHA and the Minister must table a copy of the report in the Legislative Assembly.

There can be a proactive release of quality and timely information about actions by the inspectorate under the CMSHA and MQSHA. It is also in the overriding interest of mine safety and health that a robust confidential complaints system is more clearly established and maintained.

APPENDIX - Ombudsman's Review

The Ombudsman's Review of the Regulation of Mine Safety June 2008 devoted chapter 8 to incident reporting and complaints about mine safety and suggested building additional confidence around complaints handling including confidential complaints and to publicise the availability of the confidential system.

Some of the relevant analysis by the Ombudsman's Review started at page 66 as follows: *"Although the QMI conducts regular audits and inspections, as well as post-incident investigations, it also receives numerous complaints each year relating to alleged breaches of mine safety practices, or general concerns about safety at particular mines.…..*

It also appears that many safety-related complaints are made to the relevant union (CFMEU or AWU), which may deal with the matter. Where this happens the matter will not necessarily come to the QMI's attention.

Those making complaints (most often mine workers) are usually better placed than inspectors to know what is actually happening at mine sites when 'no one's watching'. Complaints therefore form an important source of information for any safety regulator…..

Safety is built on a foundation of open and full exchange of information about problems, incidents and concerns. In an ideal world, workers and employers would report all serious incidents, near-misses and other safety concerns to the health and safety regulator simply because it is the 'right thing to do', and because it would

enable the regulator to:
• take action, or ensure action is taken by the employer, to address the concerns;or
• bring the problem (and any solution) to the notice of the industry as a whole.

However, this is unlikely to happen in an industry where any stoppage in operations can seriously jeopardise production targets and profits and lead to job losses. In such an environment, an employee or contractor who reports safety concerns to the regulator is likely to be seen by the operator (and even by other employees or contractors) as a trouble-maker and may become the subject of reprisals.

Moreover, there is the simple fact that people do not like to admit mistakes: Human reactions to making mistakes take various forms, but frank confession does not usually come high on the list.

One method of encouraging workers and others to report concerns about mine safety is to establish a confidential safety reporting system similar to that used by aviation regulators. The aviation industry worldwide has increasingly moved to a more confidential system of incident and 'near-miss' reporting, which is not the case in mining and other industries. For example, in respect of the UK aviation industry, Faith comments on:

> *… the astonishing openness of the way near misses are reported through what is called the Airprox System. It is entirely up to the pilots to decide when, as the official definition goes, 'the safety of the aircraft was or may have been compromised'. Any such incidents are obviously investigated thoroughly and independently of the airlines, and the results published …*
> *Looking at the records over the past decade what is surprising is that the number of cases has actually gone down … [yet] … traffic has increased … [and] there has been an increasing readiness … to report these problems …127*
> *Similarly, the background to the USA equivalent, ASRS (Aviation Safety Reporting System) is described as follows:*
> *It took [an aircraft crash in the US] because the pilot misread the distance measuring equipment to bring out into the open five pilots who admitted that they too had experienced similar incidents but had been too embarrassed to report the problem. They had assumed, wrongly, that it was they and not the equipment that had been at fault.*

This sort of revelation, and the fact that pilots often dared not report incidents involving them or other pilots, dared not complain of stress, of fatigue, of bad maintenance, of unreasonable demands imposed by their employers, resulted in a new reporting system for untoward incidents.

In Australia, the ATSB's Aviation Confidential Reporting Scheme (REPCON) became operational in January 2007. It is described as: a voluntary confidential reporting scheme for aviation [which] allows any person who has an aviation safety concern to report it to the ATSB confidentially. Protection of the reporter's identity is a primary element of the scheme.

The matters excluded from the scheme are:
• unlawful interference with aircraft;

• conduct representing a serious and imminent threat to a person's life or health;
• industrial relations issues; and
• conduct which would constitute an offence punishable by more than two years' imprisonment.

Reports received through REPCON are de-identified and, if necessary, investigated. Information briefs and alert bulletins can be issued to the operator concerned and, presumably, to a wider audience, if deemed appropriate.

The ATSB has recently launched a new incident information reporting system called SIIMS (Safety Investigation Information Management System). This is an 'occurrence database' and is designed to collect data on approximately 7000 'aviation occurrences' each year for a safety benefit. Notifications can be made confidentially, and this is seen as a key benefit of the system.

A system of blame-free or confidential incident reporting will never be perfect. There may be considerable cynicism at the outset about its effectiveness and, in smaller operations, individuals may still be afraid to report on the basis that 'everyone will work out who it was, anyway'.

To be accepted by industry, any such program must be seen to produce improvements in safety. At the operator level, the decision whether to report a problem affecting their own operation is likely to run into the dilemma described in the following terms by Hopkins:
… companies face a dilemma with respect to information about safety problems. Should they seek out such information and attempt to learn from it, or should they suppress this information in order to be able to plead ignorance if something goes wrong? Should they be as open as possible, disclosing whatever information is available and accepting the legal consequences, or should they limit the availability of this information as much as possible in order to be able to deny responsibility?

In the USA, the federal mine safety regulator, the Mine Safety and Health Administration (MSHA), runs a confidential telephone hot line for complaints about hazardous conditions. Complaints can be made anonymously.

The QMI advised us that it does, in fact, have such a system. Mine workers or others with safety concerns can contact the QMI and the details of the complaint are recorded on the Inspectorate's database in such a way that only the inspector to whom the complaint was made has access to the complainant's personal details.

However, our review of the publicly available information sources of the DME, including its website, indicates that the system is not well publicised or promoted. Greater promotion of this avenue for mine safety incident reporting is likely to give the QMI a more detailed picture of where problems are occurring, and bring to its attention specific matters which have not been revealed during inspections.

<u>Recommendation 15</u>
That the DME take steps to publicise the existence of its system of confidential

complaint and incident reporting and promote its use, and publish information on how information received via the system will be handled.

DME response
DME agreed, indicating that further changes to clarify complaints mechanisms for mine safety legislation matters will be published on the internet.