



Bills Digest
No. 112 2000–01

Occupational Health and Safety (Commonwealth
Employment) Amendment Bill 2000

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INFORMATION AND RESEARCH SERVICES

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No. 112 2000–01

Occupational Health and Safety (Commonwealth
Employment) Amendment Bill 2000

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Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2000

Date Introduced: 7 December 2000.

House: House of Representatives

Portfolio: Employment, Workplace Relations and Small Business

Commencement: 28 days after Royal Assent, except for item 77 of Schedule 1.¹

Purpose

To amend the *Occupational Health and Safety (Commonwealth Employment) Act 1991* to:

- increase flexibility in the design and implementation of workplace safety arrangements
- increase flexibility in the application of civil and criminal remedies for breaches, and
- increase freedom of association in negotiations and monitoring arrangements

Background

The *Explanatory Memorandum* to the present Bill indicates that the proposed measures are essentially designed to increase the emphasis on self-regulation and cost reduction in the operation of occupational health and safety law at the Commonwealth level. It states that the Commonwealth has adopted an approach to this area which is 'more effectively self-regulating at the enterprise level' consistent with the approach taken in 'all Australian jurisdictions and in most comparable jurisdictions internationally'.² It also states that the purpose of occupational health and safety law, in conjunction with worker's compensation law, is 'to limit the human and financial cost of injury and illness in the workplace'.³ The following background brief discusses 'self-regulation' and 'costs' in the context of this Bill.

The OHS Act

The *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS Act) was introduced as a pro-active measure to curb occupational injuries and diseases suffered by Commonwealth employees. For nearly two decades the *Compensation (Commonwealth Government Employees) Act 1971* (now *Safety, Rehabilitation and Compensation Act*

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1988 (the SRC Act) had provided a compensation and benefits regime. However, the incidence of occupational death, injury and disease was considered to be 'unacceptably high'.⁴ In the words of the then Labor Government, the SRC Act was designed to 'minimise the human and financial costs of work related injury and disease while ... providing adequate compensation and support for long term incapacitated employees'. The OHS Act was designed to complement this with 'mechanisms for reducing occupational injury and disease that give rise to these unacceptable human and economic costs'.⁵

In essence, the OHS Act codifies and prescribes the duties of employers, employees and other persons in relation to the occupational health and safety of employees. It provides for workplace health and safety monitoring through a system of designated work groups, health and safety committees and health and safety representatives.⁶ In all of these areas, unions have a consultative and an active role under the OHS Act.

A Brief History of the Act

The OHS Act, and much of the State and Territory legislation, derives from the 'Factory Acts' and 'Shop Acts' imported from Britain toward the end of last century. Australian OHS law was revolutionised in the 1970s following a United Kingdom Parliamentary Inquiry on health and safety at work. The inquiry was commissioned following perceptions of poor safety practices and records in key British industries. The Report of the Committee of Inquiry on Occupational Health and Safety in 1972 came to be known as the *Robens Committee Report*.⁷ Legislation adopting its recommendations was passed in the United Kingdom in 1974. Australian States followed the legislative trend in the 1980s.

The *Robens Committee Report* observed that the infrequency and often long latency of workplace injuries meant that individuals did not have sufficient personal experience of injuries to prompt a significant awareness of occupational health and safety. It concluded that 'if individual experience is not in the normal course conducive to safety awareness, then safety awareness must be deliberately fostered by as many specific methods as can be devised'.⁸ The corollary was that it did not put much store in the power of sanctions as a means to prompt employers to take appropriate action to ensure a safe workplace.

What distinguishes the *Robens Committee's* approach is the role of self-regulation of safety in the varied enterprises across industries. The problem of health and safety, it said 'could not be overcome so long as people were encouraged to think that safety and health at work could be ensured by an ever expanding body of legal regulations enforced by an ever increasing army of inspectors'.⁹ It concluded that occupational health and safety could be realised if government, management and employees were jointly responsible.

Underpinning self-regulation was statutory recognition of joint consultative practices as the basis of the new approach:

Health and safety is foremost a matter of efficient management. But it is not a management prerogative ... real progress is impossible without the co-operation and

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commitment of all employees ... employees must be able to participate fully in the making and monitoring of arrangements for safety and health at work.

There should be a statutory duty on every employer to consult with his employees or their representatives at the workplace on measures for promoting safety and health at work, and to provide arrangements for the participation of employees in the development of such measures.¹⁰

It is important to note that freedom of association principles were the cornerstone of the *Robens Committee's* approach, recognising as it did the unique role of the representatives of employees (unions). Following the enunciation of the principles of joint consultation, and recognising the diversity of work practices and procedures, the formulation of a *systems approach* to managing safety in a particular enterprise has become the norm.

The approach of the *Robens Committee* was reinforced by reviews in Australia. The Commission of Inquiry into Occupational Health and Safety (the *Williams Report*) in New South Wales in 1981 focused on cooperation and workforce participation. The *Williams Report* recommended statutory codification of employer and employee duties and cooperative self-regulation, via the establishment of workplace committees and health and safety representatives. It also recommended strengthening of the penalties.¹¹ It is perhaps significant that the *Williams Report* endorsed but did not require unions to be involved in the selection of health and safety representatives. Rather, it favoured the principle that a representative 'should be elected by his fellow employees, whether they be union members or not'. Ultimately, it was the specific health and safety knowledge and expertise of the candidate that counted, and not his or her union membership.¹²

A report of a Select Committee of the South Australian House of Assembly in 1972¹³ took a similar approach to the *Robens Review* (and the *Williams Report*).¹⁴ Similar ground was also covered by a report of the Occupational Safety, Health and Welfare Steering Committee to the South Australian Ministers of Labour and Health in 1984.¹⁵ Perhaps significantly, this report was distinguished by the pre-eminent role it gave to unions.¹⁶

Traditionally, the Commonwealth left responsibility for occupational health and safety to the States and Territories. However, expanded views regarding the constitutional powers of the Commonwealth, and a report by the (Interim) National Occupational Health and Safety Commission,¹⁷ led to the development of the regime contained in the OHS Act. To a large extent, the themes in the earlier reports were translated into the OHS Act.

This Bill

As indicated, this Bill has three broad purposes. First, it is intended to increase flexibility in workplace safety arrangements. The *Explanatory Memorandum* states that the current provisions which prescribe the employer's duty of care are 'oriented towards process rather than outcomes' and restrict their ability 'to design safety management arrangements in consultation with their employees, which take account of the circumstances of the organisation'.¹⁸ This prescriptive approach is apparently in contrast to the approach taken

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in the States and Territories and in most international jurisdictions.¹⁹ It is also apparently in conflict with the increasing outsourcing of government functions to Government Business Enterprises (GBEs). The *Explanatory Memorandum* suggests that a 'no change' option 'would maintain a level of prescription in the OHS Act which requires review in the context of the more commercial environment in which GBEs are now operating'.²⁰

Second, it is designed to increase the strength and variety of compliance measures. The *Explanatory Memorandum* states that the level of penalties under the OHS Act 'is the second lowest of any Australian jurisdiction'.²¹ Moreover, since the introduction of the OHS Act there have been few investigations of incidents and even fewer prosecutions.²² In this context the Government argues that a less prescriptive approach to defining employer duties requires a more effective compliance regime. This means an increase in the level of the penalties and a more flexible use of civil and criminal sanctions. At the same time, there is an argument for more flexibility in the application of sanctions to different circumstances. The Government suggests: '[i]mproved outcomes can also be achieved by encouraging employers and employees and others with responsibilities under occupational health and safety laws to voluntarily comply with their statutory obligations'.²³

Third, it is designed to increase freedom of association, 'recognising the primacy of direct employer and employee relationships',²⁴ and maintaining consistency with the 'freedom of association principles enshrined in the *Workplace Relations Act 1996*'.²⁵

State of Play

Comparative Performance Monitoring

For some time, emphasis has been placed on performance monitoring of compensation schemes among the Commonwealth and State and Territory jurisdictions. To some extent statistics on these schemes reflects the performance of the underlying occupational health and safety regimes of each jurisdiction. For statistics on the performance of the various compensation schemes, readers' attention is drawn to the Bills Digest of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000.

Commonwealth may be a Leader

Arguably, the Commonwealth is a leader in terms of occupational health and safety. The traditional occupational health and safety performance measures have been injury and fatality incident rates, time lost from injuries and workers' compensation costs. In at least two of these areas, the Commonwealth seems to be the most successful jurisdiction.

Since 1993 there have been a number of reports on the comparative performance of all jurisdictions on issues of workers' compensation and occupational health and safety. These reports are briefly discussed in the Bills Digest of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000. These reports, and figures from the National Data Set for Compensation-based Statistics (NDS), suggest that the incidence of occupational injuries across Australia is falling. Moreover, they suggest that

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the incidence in the Commonwealth is the lowest for any jurisdiction in Australia. These trends also seem to be reflected in figures for new claims produced by Comcare. It is difficult to make comparisons among jurisdictions in relation to compensation costs.²⁶ However, figures produced by Heads of Workers' Compensation Australia indicate that the premium rates for the Commonwealth are the lowest among all jurisdictions.

Illustrative figures and detailed statistics are provided in the Bills Digest of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000.

Measurement Limitations

While the Commonwealth may lead the States and Territories in terms of lost time injury frequency rates, workers' compensation costs and injury and fatality incident rates, these measures, because they focus on outcomes rather than processes, may be inadequate. [This criticism is worth noting given the emphasis in the *Explanatory Memorandum* on 'outcomes' rather than 'processes' in terms of the prescription of employer duties.] Ordinarily, injuries (and fatalities) are unlikely and random, representing a small proportion of a larger number of dangerous occurrences at a workplace. The measures are also subject to under or over reporting, they measure the actual severity of injuries rather than the potential seriousness of accidents and they do not necessarily capture ailments which have a longer latency and a less visible connection with work.²⁷ Moreover, the absence of injuries and fatalities may not reflect the adequacy of health and safety policies and processes at a workplace. And, even if there was a relationship with *past* policies, etc., such measures may not reflect the adequacy of *existing* or *proposed* policies, etc.

As a result, there has been interest in 'process' or 'positive' performance measures which focus on the actual management of occupational health and safety in a workplace.²⁸ These might take account of the policies, strategies and processes themselves, compliance levels, training levels, and the number of health and safety audits, complaints, investigations, etc.

Nexus with Workers' Compensation

Also, while the Commonwealth may be a leader in terms of the outcome measures identified above, it may not be performing well enough to ensure the sustainability of the compensation regime under the SRC Act. A number of factors suggest that there may be a growing disparity between the cost of compensation and administration and the value of the premium pool under that Act. In 1990 total Commonwealth expenditure on workers' compensation was estimated to be \$240m for 1989–90.²⁹ In the same period, total workers' compensation costs reported by Comcare was \$138m.³⁰ In 1999–2000 that figure was \$183.6m.³¹ Clearly, since 1989–90 workers' compensation costs have risen, but they have been fairly stable since 1991–92. However, over the same period, the premium rate and the premium pool have declined.³²

As above, illustrative figures and detailed statistics are provided in the Bills Digest of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000.

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Best Practice

Even if current performance measures represent best practice among existing regimes, they do not necessarily reflect absolute best practice. Compensation costs may still be considered 'unacceptably high' and each regime may be capable of improvement.

In 1993 the Productivity Commission produced a major report on these issues. *Workers' compensation in Australia* canvassed workers' compensation arrangements across all jurisdictions and their relationship with prevention incentives and practices.³³ In 1995 the Productivity Commission produced a second report on related issues. *Work, Health and Safety* covered similar ground but focused more heavily on preventative measures.³⁴ Significantly, *Work, Health and Safety* identified a number of issues that had been canvassed by the *Robens Report* but had not been fully addressed across Australia. It recommended increasing the variety and deterrent effect of sanctions and greater use of ('experience-related') premiums under the compensation scheme as a prevention incentive.

Observation

Perhaps it could be argued that the incidence rate of injuries in the Commonwealth is still 'unacceptably high' and that prevention is better than compensation and rehabilitation. However, at least part of the motivation behind this Bill would also seem to be the need to address the costs of compensation and the potential limitations of outcome measures. As the Productivity Commission noted in 1993, '[t]he costs of work-related injury and illness are significantly influenced by the extent and effectiveness of preventive measures'.³⁵ Thus, in 1997 the Workplace Relations Minister's Council endorsed 'the reduction of the incidence, severity and cost of workplace injury and disease' as the 'high level objective' for reform of occupational health and safety and workers' compensation programs.³⁶

Main Provisions

Registered Unions, Involved Unions and Representative Associations

Items 9–14 replace definitions relating to 'registered unions' and 'involved unions' with definitions relating to 'representative associations'. A 'registered union' is an organisation registered under the *Industrial Relations Act 1988* (repealed) or declared under regulations to the OHS Act. Among other things, to be registered, the organisation must have existed for the purpose of 'furthering or protecting the interests of its members'.³⁷ A 'representative association' is an association of employees with a principle purpose to protect and promote the industrial interests of its members (**proposed subsections 5(2A) and 5(2B)**).

Item 13 defines a 'workplace association representative' as an employee *at a workplace* who is authorised by a representative association to represent it *in that workplace*.

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Occupational Health and Safety

The OHS Act imposes a number of duties on employers, employees, manufacturers and suppliers of plant and substances and persons installing plant in a workplace. One of the key duties is the duty on the employer to develop an occupational health and safety policy.

Safety Management Arrangements

Currently, an employer is required to develop, in consultation with any involved unions, an occupational health and safety policy that will enable effective co-operation between the employer and employees in promoting and developing health, safety and welfare measures, and provide adequate review mechanisms of those measures.³⁸ The policy must also provide for an agreement to be made between the employer, employees and involved unions regarding continuing consultation on occupational health and safety matters.³⁹

Item 27 redrafts these provisions in the context of flexible workplace safety arrangements and the movement away from unions under the freedom of association principles. An employer is required to develop, in consultation with *employees*, 'safety management arrangements' that meet criteria similar to, but more explicit than, the above criteria. Key changes in the criteria include a requirement that variation mechanisms provide for consultation with employees and that there be a dispute resolution mechanism.

Item 30 provides that in developing 'safety management arrangements', an employer must have regard to advice given by the Safety, Rehabilitation and Compensation Commission. It also provides that individual employees may be involved in consultations or may choose to be represented by another employee at the workplace or, if there is no workplace representative, an employee or authorised member of the representative association.

Where a representative association receives a request by an employee or employees to become involved in consultations, it may apply for a certificate from the CEO of Comcare which provides evidence to the relevant employer regarding its right to become involved.

Among other things, the safety management arrangements must, where relevant, include provision for establishment and operation of the health and safety committee (**item 27**).

Installers of Plant

Currently contractors or other persons who erect or install any plant in a workplace must take all reasonably practicable steps to ensure that the installation process and the plant itself is not unsafe and does not constitute a health risk to employees who use the plant.

Item 39 extends this duty of care to all employees at the relevant workplace.

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Workplace Arrangements

Health and Safety Representatives and Committees

The OHS Act provides for the establishment of 'designated work groups' and selection of 'health and safety representatives' to assist in relation to health and safety at the workplace. 'Designated work groups' are the basic work units of the workplace arrangements and form the pools within a workplace from which 'health and safety representatives' are selected.

Broadly, health and safety representatives have powers to inspect the workplace, investigate employee complaints, and make requests regarding formal investigations. Representatives have the power to issue 'provisional improvement notices' where they reasonably believe that a contravention has occurred or is likely to occur and they are unable to agree with work supervisor on appropriate remedial action.⁴⁰ The person responsible for the contravention must ensure that they and others comply with the notice.

Representatives may also engage supervisors in a consultation and/or investigative process, or give directions to staff where a supervisor is unavailable, where they reasonably believe that an immediate threat exists to the health and safety of employees.⁴¹

Establishment and Variation of Designated Work Groups

Currently an involved union, or employee, may request an employer to establish or vary 'designated work groups'.⁴² The employer must consult with the involved union, or employee, within 14 days and must act in accordance with the outcome of the consultations within a further 14 days. The employer may also, unilaterally, enter into consultations with involved union, or employee, to vary 'designated work groups'.

Item 43 redrafts these provisions in the context of flexible workplace safety arrangements and the movement away from unions under the freedom of association principles. Thus, requests may only be made by employees. Representative associations are not involved except in relation to variations and only at the request of an employee in the work group.

Item 44 incorporates the consultation provisions relating to the development of safety management arrangements (**item 30** above). Thus, individual employees may be involved in consultations or may choose to be represented by another employee at the workplace or, if there is no workplace representative, an employee or authorised member of the representative association. The representative association may also apply for a certificate.

Selection of Health and Safety Representatives

Currently, a health and safety representative is selected on the basis of unanimous agreement or an election among members of the designated work group. Ordinarily, elections are conducted by an involved union and the process is governed by regulations.⁴³ Despite this coverage, there is no requirement to conduct elections where a vacancy arises.

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A health and safety representative will hold office for two years, or such other period as is specified in the safety management arrangements (**item 47**). The term will end if the membership of the designated work group changes as a result of a variation (**item 58**).

Item 46 inserts a **proposed section 25A**. It provides that where a vacancy arises, and a representative has not been selected within a reasonable period by unanimous agreement, an employer must invite nominations from the designated work group. If the employer does not invite nominations, it may be directed to do so by the Commission. Consistent with the above principles, elections are not conducted by unions but by the employer. Casual vacancies are provided for in **proposed section 26A** which is inserted by **item 47**.

Whereas elections are currently governed in regulations to the OHS Act, elections will be governed by directions issued by the Commission (**proposed subsection 25A(7)**). Accordingly, the power to make such regulations is removed (**item 156**).

Health and Safety Committees

Currently, a health and safety committee must be established for employees *at a particular workplace* if the number of employees *at the workplace* is normally not less than 50.⁴⁴

Item 62 changes this requirement. An employer must establish a health and safety committee if the *total* number of employees *across all workplaces* is not less than 50. An employer must establish a committee for employees within a given State or Territory if the number of employees within the State or Territory is not less than 50 *and* a reasonable request has been made in writing by a health and safety representative.

In one sense the requirement is strengthened. Currently, if an employer has a number of workplaces, each of which has less than 50 employees, the employer is not required to establish a health and safety committee. Under the Bill the employer would be required to establish one committee if the total number of employees was more than 50 *and* another committee if the number of employees in a given State or Territory was more than 50.⁴⁵

In another sense, the requirement is relaxed. If there were multiple workplaces, each with more than 50 employees, the employer would only be required to establish one committee. (Nothing would stop the employer from establishing health and safety committees in relation to particular undertakings or other committees which have multiple functions, including occupational health and safety issues.)

Advice, Investigations and Inquiries

In addition to the workplace arrangements, the OHS Act establishes a more formal regulatory system involving the Commission and Comare. There is provision for advice, pre-emptive and responsive investigations and, where public interest requires, inquiries.

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Advice

The Commission is currently required to provide advice to employers, employees and contractors 'either on its own initiative or on request'.⁴⁶ **Item 19** removes these words apparently, as the *Explanatory Memorandum* notes, 'so that the Commission is no longer required to provide information on request, but may still do so on its own initiative'.⁴⁷ Moreover, the practical effect is apparently that 'in future Comcare will respond to requests for information or advice from department[s] or statutory authorities'.⁴⁸ The corollary is that Comcare will be required to provide advice to employers, employees and contractors 'either on its own initiative or on request' (**proposed section 38A**).

Essentially, the role of providing advice is transferred from the Commission to Comcare.

Investigations

Investigations may be conducted by appointed investigators, either staff of Comcare or other persons with knowledge and experience in occupational health and safety matters.⁴⁹ Broadly, staff investigators may conduct investigations at any time, whereas non-staff investigators may only conduct investigations under directions from the Commission.⁵⁰

Investigators have wide powers including the power to enter workplaces, require assistance and information, take possession of plant and substances and to give directions and issue notices. They may give written directions that workplaces not be disturbed, in order to prevent immediate threats or to allow inspection.⁵¹ They may issue 'prohibition notices' to prohibit or control activity in relation to a workplace, plant or substance or procedure in order to remove an immediate threat.⁵² They may also issue 'improvement notices' along similar lines to the 'provisional improvement notices' discussed above.⁵³ There are various penalties for failure to comply with directions and notices, etc.

Various decisions and actions by investigators are subject to review by the 'reviewing authority'.⁵⁴ Appeals may be made by various parties including involved unions either generally or on behalf of an affected employee where there is no designated work group.⁵⁵

Items 79–83 clarify some of the powers and obligations of investigators over directions.

Item 84 inserts **proposed section 45A** which allows an investigator to give oral directions that workplaces not be disturbed, to prevent immediate threats or to allow inspection. Oral directions may be given where there is insufficient time to make a written direction and may only last for a maximum of 48 hours.

Items 85–99 clarify some of the powers and obligations of investigators over notices.

Items 104–107 redrafts the provisions relating to standing to appeal in the context of the movement away from unions under the freedom of association principles. A representative association has standing to appeal decisions but only where it is requested by an employee, within the relevant designated work group, who is affected by the decision.

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Inquiries and Reports

All investigations are subject to reporting requirements and are liable to form the basis of a public inquiry,⁵⁶ except those involving Government Business Enterprises (GBEs).⁵⁷

Item 109 extends the reporting requirements to investigations involving GBEs.

Currently, in certain circumstances (including where an employee is killed or seriously injured during an accident, or could have been killed or seriously injured)⁵⁸ the employer must provide a notice and a report of the incident to the Commission.⁵⁹ Notice may be given by telephone to the relevant State Manager of Comcare. Reports must be made within a specified period after an accident. This period ranges from 2 hours (where the accident causes death) to 24 hours (for example where the accident causes serious injury). Reports must contain prescribed information on the accident, including 'a description of the part of the workplace where the accident happened' and 'any action that the employer has taken, or proposes to take, to prevent recurrence of an accident of the same kind'.⁶⁰

Items 124 and **125** remove the current requirement to provide a report to the Commission.

It is unclear why the requirement to report incidents is being removed. It might be argued that the requirement to provide a report is unnecessary, given the requirement to provide a notice and the ability of the Commission to conduct its own investigations. It might also be argued that such information, given that it might be gathered and reported over a short period, could be highly prejudicial to the employer in any subsequent legal proceedings.

Against these considerations a number of observations might be made. First, it might be beneficial to maintain the legislative requirement which ensures an instant notification requirement followed by a more considered and detailed reporting requirement. Second, the reporting obligations can be and have been relaxed without removing the legislative requirement.⁶¹ Third, employees are largely barred from taking legal action against the Commonwealth or a Commonwealth authority for most injuries on the basis that compensation is available under the *Safety, Rehabilitation and Compensation Act 1991*.

Enforcement

As indicated above, one of the key objectives of this Bill is to increase flexibility in the application of civil and criminal remedies for contravention of the OHS Act. The Second Reading Speech notes the low numbers of prosecutions under the OHS Act: of 1248 investigations between 1992 and 2000, 9 prosecutions have been commenced of which 8 were successful. The Productivity Commission, in *Work, Health and Safety*, estimated that, on average, a workplace had a 22 per cent chance of being inspected and a 6.1 per cent chance of receiving a penalty for breach of occupational health and safety law.⁶² The Commission recommended that a wider range of sanctions be considered.⁶³

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Breaches and Contraventions

Item 161 inserts **proposed Schedule 2** which deals with civil proceedings and criminal prosecutions.

In the civil domain, where certain statutory duties or requirements are breached, proceedings may be brought by an investigator or Comcare before certain superior courts⁶⁴ for a 'declaration of contravention' (**proposed clause 2**). The court may order the person to pay a 'pecuniary penalty' which constitutes a debt to the Commonwealth (**proposed clause 4**). The court may also relieve a person from liability if the person has acted honestly and, having regard to the circumstances, ought to be excused (**proposed clause 13**).

In the criminal domain, where certain statutory duties or requirements are breached, a prosecution may be instigated by an investigator or Comcare, or, in certain circumstances, a health and safety representative or representative association (**item 144**). Criminal liability is reserved for intentional breaches (**proposed clause 17**) and for negligent or reckless breaches which result in death or serious bodily harm (**proposed clause 16**).

Tables 3.1 and 3.2 in the Appendix illustrate these civil and criminal provisions.

Injunctions, Remedial Orders and Enforceable Undertakings

Item 147 provides for injunctions and remedial orders.

Proposed section 77A provides for injunctions where a person has breached, is breaching or proposes to breach the OHS Act or regulations. An investigator or Comcare may apply for an injunction prohibiting a person from acting in a way that would constitute a breach, or mandating a person to act in a way where a refusal to act would constitute a breach. A court may also grant an interim injunction on these bases before deciding an application.

Proposed section 77B provides for remedial orders where a court has made a 'declaration of contravention' or has convicted a person of an offence under **proposed Schedule 2**. Where the court considers that a person could fully or partly remedy a state of affairs that arose as a result of their conduct, the court may order a person to take 'any steps' that it considers are 'necessary and appropriate' to achieve that result. It may also make certain remedial orders in respect of prejudicial conduct by employers in relation to witnesses and employees as a result of their role in complaints, investigations and inquiries.⁶⁵

As indicated **proposed Schedule 2** deals with 'declarations of contravention'. As an alternative to pursuing a declaration, Comcare may accept an enforceable undertaking relating to the fulfilment of obligations under the OHS Act (**proposed clause 14**).

Commonwealth, GBEs and Employees

Currently, the penalties in the OHS Act apply to Government Business Enterprises (GBEs) but not to Commonwealth departments, Commonwealth authorities or their employees.⁶⁶ The indemnity for departments and authorities is continued in relation to contraventions

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and breaches under the new provisions. But, an *employee* of a department or authority is liable for a contravention or breach of the Act (**proposed subsections 11(2) and 11(3)**). (Also, departments and authorities may be subject to the new provisions regarding enforceable undertakings, injunctions or remedial orders which are discussed below.)

Miscellaneous

Health and Safety Matters in Annual Reports

Commonwealth Departments and authorities⁶⁷ are required to include within their Annual Reports details of various health and safety matters, including agreements relating to health and safety, measures taken during the year regarding health and safety and statistics on accidents or dangerous occurrences during the year.

Items 135–139 amend these reporting requirements. One key amendment is that, instead of reporting on measures taken, agencies are required to report on 'initiatives' in a given year and 'outcomes' of these 'initiatives' or 'previous initiatives' of past years. Arguably, not only does this approach focus attention on outcomes, identified separately from the underlying measures or initiatives, it also focuses attention on the new measures taken in any given year, identified separately from any old measures undertaken in previous years. In a sense, it avoids 'recycling' of measures from one reporting period to another.

Concluding Comments

Costs Motivation for OHS

Notwithstanding the argument that compensation costs are 'unacceptably high' and that every occupational health and safety regime is capable of improvement, an argument has still been made that there is no need to make significant changes to the OHS Act. As with the amendments proposed in the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000, the Commonwealth Public Sector Union has argued:

Overall the performance of the Commonwealth workers' compensation and occupational health and safety arrangements is one of below average cost and improving results. There is no case based on these results for reducing benefits or undertaking radical changes to OHS arrangements at employer or workplace levels.⁶⁸

Role of the Commission v Comcare

The OHS Act is regulated by the Safety, Rehabilitation and Compensation Commission and Comcare. Each organisation has a distinct role.

Broadly the Commission is responsible for:

- overall management of enforcement measures

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- providing occupational health and safety advice
- collecting, interpreting and reporting on health and safety information
- formulating health and safety policies and strategies, and
- providing advice to the Minister.⁶⁹

Among other things, Comcare is responsible for:

- appointment of investigators⁷⁰
- conduct of staff investigations⁷¹
- instigation of criminal prosecutions,⁷² and
- other matters in accordance with directions by the Minister.⁷³

Generally, the Bill reduces the functions of the Commission⁷⁴ and expands the functions of Comcare. The following table illustrates the additional functions given to Comcare. This approach seems to be consistent with the functional integration of occupational health and safety with workers compensation recommended by the Productivity Commission.⁷⁵

Table 1: Additional Functions Given to Comcare

Item	Section	Function	Change
48	28(1)(a)(ii)	requests to the Commission by health and safety representatives	add Comcare
54	29(8) & (9)	follow up requests to the Commission in response to provisional improvement notices	substitute Comcare
63	37(3)	emergency requests to the Commission in response to stalemate over the need for directions by supervisors	substitute Comcare
68	41(2)	directions by the Commission to investigators who are not staff of Comcare	add Comcare
69,70	41(3)	directions regarding investigation of Commonwealth Departments or Authorities	add Comcare

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Role of the Union

There is a strong movement away from unions under the freedom of association principles. The general theme is that 'representative associations' are only permitted to become involved in occupational health and safety matters where employees specifically request and/or where there is no designated work group. The table below indicates the areas in which the role of these organisations is changed.

Table 2: Changes in the Role(s) of Unions

<i>Item</i>	<i>Section</i>	<i>Function</i>	<i>Change</i>
9-14	5	definition of 'registered union' and 'involved union'	removed
27	16	consultation regarding safety management arrangements	if requested <i>and there is no representative</i>
43	24	requests and subsequent consultations to establish or vary designated work group	if requested <i>and only for consultation</i>
46	25A	conduct of elections of health and safety representative	removed
59	31(2)-(4)	requirement to give notice regarding resignation of health and safety representative	removed
60	32(1)	application to disqualify health and safety representative	if requested
72	41(5)	request to an investigator or the Commission to investigate a workplace	if requested
104-107	48(1)(k) & (m)	standing to appeal a decision of an investigator regarding a prohibition notice, etc.	if requested <i>by affected employee</i>
144	77(1) & (2)	power to instigate prosecutions for certain breaches	if requested

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Appendix

Table 3.1: Civil Proceedings

<i>Section</i>	<i>Duties/Requirements</i>	<i>Civil</i> <i>Max. penalty units⁷⁶ individual/body</i> <i>corporate</i>	<i>Criminal</i> <i>Max. penalty units individual/ body</i> <i>corporate</i> <i>and/or Max. imprisonment⁷⁷</i>
16(1)	duties of employers to employees	2,200	4,500
17	duties of employers to 3 rd parties	2,200	4,500
18(1) or (2)	duties of manufacturers in relation to plant and substances	440/2,200	900/4,500
19(1)	duties of suppliers in relation to plant and substances	440/2,200	900/4,500
20(1)	duties of persons erecting or installing plant	440/2,200	900/4,500
21(1)	duties of employees	90	180
43(2)	requirement to provide assistance or information	30	30 &/or 6m
45(5) & 45A(3)	requirement to observe direction	250	500
46(4)	requirement to ensure that prohibition notice is complied with	250	500
47(6)	requirement to comply with improvement notice	10 per day	900
64	requirement not to prejudice witnesses in employment	30	n/a
73	requirement not to levy employees	250	n/a
76	requirement not to dismiss employees on certain grounds	250	n/a
50	requirement not to tamper with notice	n/a	30 &/or 6m
54(1)	requirement to give information or produce documents	n/a	30 &/or 6m
72	interference, etc with equipment, etc	n/a	30 &/or 6m
57	failure of witness to attend	n/a	30 &/or 6m
59	refusal to be sworn or to answer questions	n/a	30 &/or 6m
61	contempt of commission	n/a	30 &/or 6m

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Endnotes

- 1 This amendment is not discussed in this Digest. It relates to the obligation to provide information in connection with an investigation. Its commencement is conditional upon the commencement of a provision in the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. Thus, if the latter provision has not commenced, then item 77 does not commence.
- 2 *Explanatory Memorandum*, p. iv.
- 3 Ibid.
- 4 The Hon. Ralph Willis, MP, Occupational Health and Safety (Commonwealth Employment) Bill 1990, [Second Reading Speech](#), House of Representatives, *Debates*, 18 October 1990, p. 3210.
- 5 Ibid.
- 6 An overview of the original OHS Act is provided by the [Bills Digest](#) to the Occupational Health and Safety (Commonwealth Employment) Bill 1990 available at www.aph.gov.au.
- 7 *Report of the Committee on Safety and Health at Work 1970-1972*, HMSO, London, 1972.
- 8 Ibid, p. 1.
- 9 Ibid, para 59.
- 10 Ibid, para 70.
- 11 Report of Commission of Inquiry into Occupational Health and Safety, 1981. See generally the discussion in Adrian Brooks, *Occupational Health and Safety Law in Australia*, 4th Ed., CCH, North Ryde, Chapter 9.
- 12 Williams Report, p. 54.
- 13 South Australia Legislative Assembly, *Parliamentary Papers*, 1972, Vol xx.
- 14 See generally the discussion in Adrian Brooks, *Occupational Health and Safety Law in Australia*, 4th Ed., CCH, North Ryde, Chapter 16.
- 15 Occupational Health, Safety and Welfare Steering Committee, *The Protection of Workers' Health and Safety*, Volume 1, May 1984.
- 16 See generally Brooks, op cit, pp. 706-707.
- 17 Interim National Occupational Health and Safety Commission, *Report*, Canberra, May 1984.
- 18 *Explanatory Memorandum*, p. iv.
- 19 *Explanatory Memorandum*, p. iv.
- 20 *Explanatory Memorandum*, p. x.
- 21 *Explanatory Memorandum*, p. v.

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- 22 Second Reading Speech.
- 23 Second Reading Speech.
- 24 *Explanatory Memorandum*, p. i.
- 25 *Explanatory Memorandum*, p. iv.
- 26 First, inconsistencies in payments data may reflect factors other than performance. For example, there may be differences in legislative schemes, in terms of the structure and duration of compensation entitlements and the level of market subsidy for health care costs. Second, payments data may not represent total workers' compensation costs. For example, the total amount of payments reported in a given year does not necessarily reflect the cost of payments recently made or payments to be made in relation to claims lodged during a year: Worksafe Australia, *Compendium of Workers' Compensation Statistics, Australia 1992-93*, August 1995 at <http://www.worksafe.gov.au/pdf/compendium92-93.pdf>, p. xix.
- 27 National Occupational Health and Safety Commission, 'OHS Performance Measurement in the Construction Industry: Development of Positive Performance Indicators', December 1999 at http://www.worksafe.gov.au/pdf/opmconppi_report.pdf, pp. 2–3.
- 28 Ibid.
- 29 The Hon. Ralph Willis, MP, Occupational Health and Safety (Commonwealth Employment) Bill 1990, [Second Reading Speech](#), House of Representatives, *Debates*, 18 October 1990, p. 3210.
- 30 Comcare, *Annual Report 1997-98*, p. 78. The discrepancy between these figures may be the result of many factors. Without knowing how the first figure was derived, it may be inflated by including indirect costs such as costs imposed on employers in having to hire replacement workers, having equipment idle, etc. The ratio of direct to indirect costs, including costs incurred by employees and employers, may be around 1:1 or as high as 1:8: Productivity Commission, 'Economic Significance of Workers' Compensation Arrangements in Australia', in *Workers' compensation in Australia*, [Report No. 36](#), 1993, at <http://www.pc.gov.au/inquiry/36worker/appa.pdf>, pp. A8–A13.
- 31 Comcare, *Annual Report 1999-2000*, p. 23.
- 32 These issues are discussed more fully in the Bills Digest of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000, [Bills Digest No. 111 2000-01](#).
- 33 Productivity Commission, *Workers' compensation in Australia*, [Report No. 36](#), 1993
- 34 Productivity Commission, *Work, Health and Safety*, [Report No. 47](#), 1995.
- 35 Productivity Commission, *Workers' compensation in Australia*, [Report No. 36](#), 1993, Chapter 3: Prevention at <http://www.pc.gov.au/inquiry/36worker/ch03.pdf>.
- 36 Workplace Relations Minister's Council, *Comparative Performance Monitoring: The Second Report into Australian and New Zealand Occupational Health and Safety and Workers' Compensation Programs*, April 2000, [Foreword](#).
- 37 Sections 188 and 189.
- 38 Paragraph 16(2)(d).

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- 39 Subsection 16(3).
- 40 Section 29.
- 41 Section 37.
- 42 Section 24.
- 43 Occupational Health and Safety (Commonwealth Employment) Regulations 1991, Statutory Rules 1991 No. 266 as amended.
- 44 Section 34.
- 45 That is, the employer would have to establish the State or Territory committee if a health and safety representative makes a reasonable request.
- 46 Paragraph 12(1)(b).
- 47 *Explanatory Memorandum*, p. 4.
- 48 Ibid.
- 49 Section 40.
- 50 Section 41.
- 51 Section 45.
- 52 Section 46
- 53 Section 47.
- 54 The Australian Industrial Relations Commission established under section 8 of the *Workplace Relations Act 1996*.
- 55 Paragraphs 48(1)(k) and (m).
- 56 Division 3 of Part 4 – Advice, Investigations and Inquiries.
- 57 Section 52.
- 58 Occupational Health and Safety (Commonwealth Employment) Regulations 1991, Statutory Rules 1991, regulation 3 definition of 'dangerous occurrence' for the purposes of section 68.
- 59 Section 68.
- 60 Occupational Health and Safety (Commonwealth Employment) Regulations 1991, Statutory Rules 1991, regulation 37E.
- 61 This is because the actual obligations are contained in the regulations rather than the Act. Amendments to the regulations in January 1999 have already significantly reduced the reporting obligations under section 68. On its website, Comcare described the changes as follows: '[t]he content of a report to Comcare has been reduced considerably and now only requires one item in addition to that for notification: action that the employer has taken or proposes to take, to prevent recurrence of an accident of the same kind': 'Changes to the Occupational Health and Safety (Commonwealth Employment) Regulations' at <http://www.comcare.gov.au/publications/factsheets/fs-fs23.html>.

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- 62 See Table 7.2 in Productivity Commission, *Work, Health and Safety*, [Report No. 47](#), 1995, p. 104.
- 63 *Ibid*, recommendation 19, p. 126.
- 64 That is, the Federal Court of Australia or Supreme Courts of States and Territories.
- 65 See sections 64 and 76.
- 66 Section 11.
- 67 To the extent they are required to prepare an Annual Report and table it before both Houses of Parliament.
- 68 Community and Public Sector Union, Australian Government OHS and Workers Compensation Legislation, February 2001, at <http://www.cpsu.org/ohs/ohs230201.pdf>.
- 69 Section 12.
- 70 Section 40.
- 71 Section 41.
- 72 Section 77.
- 73 Section 12A.
- 74 Except in relation to the new role of the Commission in relation to safety management arrangements and election of health and safety representatives.
- 75 Productivity Commission, *Workers' compensation in Australia*, [Report No. 36](#), 1993, Chapter 3: Prevention at <http://www.pc.gov.au/inquiry/36worker/ch03.pdf>, pp. 82–84.
- 76 One penalty unit is currently \$110: *Crimes Act 1914*, s 4AA.
- 77 Note:
- In the light section:
 - the physical element involves death or serious bodily harm, and
 - the mental element involves negligence or recklessness as to that result;
 - In the dark section, the mental element involves an intentional breach.

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