



OHS and SRC Legislation Amendment Bill 2005

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OHS and SRC Legislation Amendment Bill 2005

Date introduced: 7 December 2006

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The Bill's formal provisions commence on Royal Assent. The bulk of the substantive amendments (items 1-45, Schedule 1) commence on proclamation or, at most, six months after the Act receives Royal Assent.

Purpose

The Bill's purposes include:

- amending the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (OHS(CE) Act) to cover new categories of employers and employees—called non-Commonwealth licensees and employees. The amendments respond to a recommendation made in the Productivity Commission's report on *National Workers' Compensation and Occupational Health and Safety Frameworks*¹
- ensuring that all Commonwealth authorities licensed under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) are covered by the OHS(CE) Act, and
- correcting drafting errors made in 2001 and validating regulatory contribution and licence fees that were paid in error by Commonwealth authorities and licensees.

Background

The SRC Act contains the legislative basis for the Commonwealth Government's workers compensation scheme. It establishes a fully funded premium based system and a licensed self-insurance based system of compensation and rehabilitation for employees injured in the course of their employment. The self-insurance scheme enables Commonwealth authorities and eligible corporations to apply for a licence to self-insure. The Minister then has a discretionary power to declare eligible for a self-insurance licence a corporation that:

- is but will cease to be a Commonwealth authority
- is a former Commonwealth authority, or
- is carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority.

Once a corporation is declared eligible by the Minister, the Safety, Rehabilitation and Compensation Commission (the Commission) can grant a self-licence.² The rationale for

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allowing coverage to be given to former Commonwealth authorities is to ensure continuity of workers' compensation coverage for their employees. In relation to private sector corporations, coverage is designed to promote a 'level playing field' for those corporations in competition with existing and former Commonwealth authorities.³

The OHS(CE) Act is designed to protect the health and safety of Commonwealth employees and employees of Commonwealth statutory authorities and Government Business Enterprises (GBEs). It sets out the duties of employers and employees in relation to occupational health and safety; provides for workplace health and safety monitoring; contains a notification and reporting scheme for dangerous accidents and incidents; establishes a scheme allowing for recovery of costs for administering the Act; and provides civil and criminal penalties for breaches of the Act. While Commonwealth authorities in the process of privatisation, former Commonwealth authorities and eligible private sector corporations can avail themselves of the self-insurance scheme provided by the SRC Act they are not covered by the OHS(CE) Act.

Some of the difficulties that arise from the present situation are set out in the Minister's second reading speech:

At present ... former Commonwealth authorities and licensed private sector corporations operate under the Commonwealth workers compensation regime but are covered by state and territory occupational health and safety legislation in the jurisdiction in which they operate. This makes unnecessary difficulties for many firms to develop a national approach to occupational health and safety and may result in the requirement that they comply with eight separate and quite distinct occupational health and safety jurisdictions.⁴

Among many recommendations made in its 2004 Report, the Productivity Commission recommended that:

... the Australian Government amend the *Occupational Health and Safety (Commonwealth Employment) Act 1991*, to enable those employers who are licensed to self-insure under the Australian Government's workers' compensation scheme to *elect* to be covered by the Australian Government's occupational health and safety legislation. This legislation would be extended to cover those insuring under any future alternative national premium-paying insurance scheme.⁵

The Government has decided instead to provide *mandatory* coverage under the OHS(CE) Act for those non-Commonwealth employers who obtain a self-insurance licence under the SRC Act. The Government's preferred course of action is explained in the Explanatory Memorandum:

The Australian Government considers there is merit in opening up access to the Government's OHS regime to give those firms granted a self-insurance licence under the SRC Act scheme a single set of national OHS rules. The Government's workers compensation and OHS schemes are effectively integrated and there are benefits to

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employers having coverage under both schemes. For these reasons the Government does not support eligible corporations having the choice as proposed by the Productivity Commission.⁶

The Explanatory Memorandum states that five eligible corporations (with a total of about 15,000 employees) are licensed under the SRC Act but not covered by the OHS(CE) Act.⁷ The Productivity Commission reported in 2004 that except for former Commonwealth authorities no private sector corporation had, at that time, been declared eligible for a self-insurance licence. It also reported that a number of private corporations including Sing Tel Optus, Westpac, Manpower Services (Australia) and Skilled Engineering had advised it that they had applied or had investigated the possibility of applying for a self-insurance licence.⁸

Main provisions

Schedule 1—Extending the coverage of the Occupational Health and Safety (Commonwealth Employment) Act 1991

Part 1—Main Amendments

In general, Part 1 amends definitions in the OHS(CE) Act so that the Act extends to non-Commonwealth licensees, their employees and workplaces. It also ensures that all Commonwealth authorities will be covered by the OHS(CE) Act.

Items 1 and 2 of Schedule 1 amend the long and short titles of the OHS(CE) Act to reflect the new coverage proposed by the Bill. The new short title of the Act will be the *Occupational Health and Safety Act 1991*.

Section 3 of the OHS(CE) Act states that the objects of the legislation include securing the health, safety and welfare at work of employees of the Commonwealth and Commonwealth authorities. **Item 3** adds employees of ‘non-Commonwealth licensees’ to this list. ‘Non-Commonwealth licensees’ are eligible corporations that are licensed under the SRC Act (**item 14**).

Item 4 amends the definition of ‘chief executive officer’ in the OHS(CE) Act to include chief executive officers of non-Commonwealth licensees. They are defined as people primarily and directly responsible to the directors of the licensee for the general and overall management of the licensee.

At present, not all Commonwealth authorities covered by the SRC Act are covered by the OHS(CE) Act. **Item 5** extends the definition of ‘Commonwealth authority’ so that all Commonwealth authorities licensed under the SRC Act are covered by the OHS(CE) Act. **Item 13** effects a consequential amendment.

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The term ‘contractor’ is redefined to include the new category of ‘non-Commonwealth licensee contractor’ as well as ‘Commonwealth contractor’ and ‘Commonwealth authority contractor’ and the definitions are restructured (see **items 6, 8, 10, 15 and 25**).

The OHS(CE) Act currently defines ‘employer’ as meaning the Commonwealth or a Commonwealth authority.⁹ The term ‘employer’ is extended to cover ‘non-Commonwealth licensees’ (**item 11**).

The term ‘employee’ is currently defined in the OHS(CE) Act as a person employed by the Commonwealth or a Commonwealth authority.¹⁰ There will now be three categories of employee—a ‘non-Commonwealth licensee employee’, an expression defined as a person employed by a non-Commonwealth licensee under a Commonwealth, State or Territory law or under a contract of service or apprenticeship (**items 16 and 24**). The other categories of employee are ‘Commonwealth employees’ and ‘Commonwealth authority employees’ but the meaning of those terms is unchanged (**items 7, 9, 20 and 22**).

The existing definition of ‘workplace’ in the OHS(CE) Act is Commonwealth premises in which employees or contractors work, other than parts of premises used as private dwellings.¹¹ The existing definition is repealed and replaced by a restructured definition including Commonwealth premises and Commonwealth authority premises and adding ‘non-Commonwealth licensee premises’. Once again, workplaces do not include parts of premises used as private dwellings (**item 18**). ‘Non-Commonwealth licensee premises’ are premises owned and occupied by a non-Commonwealth licensee (**item 17**). Definitions relating to Commonwealth premises and Commonwealth authority premises remain unchanged.

The effect of section 11 of the OHS(CE) Act is that while the Commonwealth and Commonwealth authorities are not subject to criminal prosecution or liable to pay fines and penalties, their employees, GBEs and their employees can be prosecuted and may be liable to pay fines and penalties. **Item 27** makes consequential changes to terminology in paragraphs 11(4)(a) and (b). Instead of the current terminology,¹² section 11 will refer to ‘Commonwealth employees’ and ‘Commonwealth authority employees.’ Its meaning remains unchanged.

Item 28 amends paragraph 12(1)(c) of the OHS(CE) Act to empower the Commission to collect, interpret and report occupational health and safety information in relation to non-Commonwealth licensee employees. Paragraph 12(1)(c) allows this information to be collected in relation to all employees currently covered by the Act.

Section 41 of the OHS(CE) Act enables Comcare to conduct investigations to determine whether the Act is being complied with or has been breached. Comcare can also investigate the occupational health and safety policies and practices of ‘Entities’¹³ and Commonwealth authorities. **Items 33-35** extend investigative powers under the OHS(CE) Act to non-Commonwealth licensees.

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Division 3 of Part 4 of the OHS(CE) Act deals with inquiries and reports. It does not, in general, apply to GBEs. It enables the Commission to hold inquiries, including public inquiries. It also empowers the Commission to summon witnesses, require them to answer questions and report its findings to the Minister. **Item 36** in general exempts non-Commonwealth licensees from Division 3 of Part 4.¹⁴ The Explanatory Memorandum states:

Division 3 has limited effect on Government business enterprises and is not necessary for non-Commonwealth licensees because they are subject to the full range of sanctions and penalties under the Act.¹⁵

Civil penalties, criminal penalties and other sanctions for breaches of the Act are set out in Schedule 2 of the Act. The Schedule 2 regime applies to GBEs and will apply to non-Commonwealth licensees. In contrast, as stated above, neither the Commonwealth nor Commonwealth authorities are subject to criminal prosecution or liable to pay fines and penalties.¹⁶

At present, the SRC Act only allows a licensee to be charged a licence fee on commencement of a licence or on 1 July each year. **Item 40** takes account of the fact non-Commonwealth licensees may have already paid a licence fee for the current period and that the Bill may commence on a day other than a 1 July. It allows an additional regulatory contribution to be levied for the period to the next 1 July.¹⁷

Part 2—Consequential amendments of other Acts

Items 41-50 change references in the SRC Act to reflect the new short title of the OHS(CE) Act.

Items 51-57 make similar changes to references proposed for or contained in the *Social Security Act 1991*.

Schedule 2—Regulatory contributions and licence fees under the Safety, Rehabilitation and Compensation Act 1988

Comcare is a Commonwealth statutory authority responsible for workplace safety, rehabilitation and compensation. It administers the OHS(CE) Act and the SRC Act. It also provides support to the Safety, Rehabilitation and Compensation Commission, the body responsible for regulating workplace, safety, rehabilitation and compensation requirements under the OHS(CE) and SRC Acts.

The passage of the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* (SRCOLA) and different definitions of ‘Commonwealth authority’ in the OHS(CE) Act and SRC Act had an unintended consequence—Commonwealth authorities covered by the OHS(CE) Act cannot be charged a regulatory contribution

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unless they are also covered by the SRC Act. Regulatory contributions are determined by Comcare under section 97D of the SRC Act and are intended to cover the estimated costs of the Commission and Comcare in carrying out their functions under the SRC Act and the OHS(CE) Act.

Item 2 of Schedule 2 enables Comcare to levy a regulatory contribution on all Commonwealth authorities covered by the OHS(CE) Act and thus remedies the situation that has arisen.

The effect of **item 3 of Schedule 2** and **clause 3** of the Bill is that regulatory contribution amendments will commence in a new financial year.

The Explanatory Memorandum explains that at least three Commonwealth authorities not covered by the SRC Act paid regulatory contributions to Comcare for the 2002-03 financial year. It goes on to say that:

The payments were retained by Comcare, as agreed with the authorities, for services to be provided during the 2002-2003 financial year with the understanding that an amendment would be made to the legislation to validate the payments and provide for future payments¹⁸

Item 5 validates relevant determinations and payments.

SRCOLA also inserted new section 104A into the SRC Act. Section 104A deals with licence fees payable to the Commission. The Explanatory Memorandum states that three licensees paid licence fees under section 104A instead of under the pre-SRCOLA provisions. Once again, the payment were retained by Comcare as agreed with the licensees on the understanding that a statutory amendment would validate the payments.¹⁹

Item 6 validates relevant determinations and payments.

Endnotes

1. Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Inquiry Report No. 27, 16 March 2004. At: <http://www.pc.gov.au/inquiry/workerscomp/finalreport/workerscomp.pdf>
2. For a discussion see *ibid*, pp. 109–110.
3. Explanatory Memorandum, p. ii.
4. Kevin Andrews MP, Second reading speech, OHS and SRC Legislation Amendment Bill 2005, House of Representatives, *Hansard*, 7 December 2005, p. 7.
5. Productivity Commission, *op. cit.*, p. XL. Emphasis added.
6. Explanatory Memorandum, p. iv.

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7. *ibid.*, p. iv.
8. Productivity Commission, *op. cit.*, p. 110.
9. Section 5, OHS(CE) Act.
10. Sections 5 and 9, OHS(CE) Act.
11. Section 5, OHS(CE) Act.
12. Paragraphs 11(4)(a) and (b) currently refer to ‘a person who is employed by the Commonwealth’ and ‘a person who is employed by a Commonwealth authority (including a Government business enterprise)’.
13. Section 5 of the OHS(CE) Act defines an ‘Entity’ as a Public Service Act agency, a parliamentary department or a prescribed person or body.
14. The only exception is in relation to section 53 of the OHS(CE) Act. This section requires investigators to give reports of their investigations to the Commission. After receiving the report the Commission must notify the employer of the findings of the report and may ask the employer to report on what action is proposed in response to the report. While the Commission may also report to the Minister, the relevant paragraph in section 53 does not apply to GBEs and will not apply to non-Commonwealth licensees (**item 37**).
15. Explanatory Memorandum, p. 7.
16. See section 11, OHS(CE) Act.
17. See Explanatory Memorandum, p. 7.
18. Explanatory Memorandum, p. 9.
19. *ibid.*, p. 10.

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