



Safe Work Australia Bill 2008

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Law and Bills Digest Section

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Safe Work Australia Bill 2008

Date introduced: 4 September 2008

House: House of Representatives

Portfolio: Education, Employment and Workplace Relations

Commencement: Sections 1 and 3, on the day of the Royal Assent; all other provisions, on a day to be fixed by Proclamation but no later than six months after the date of the Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to establish Safe Work Australia as an independent Commonwealth statutory body to improve occupational health and safety outcomes and workers' compensation arrangements in Australia.

Background

Replacement of the Australian Safety and Compensation Council

The [Australian Safety and Compensation Council](#) (ASCC) was established by the former Government to advise on the development of policies relating to occupational health and safety and workers' compensation matters. The ASCC is an advisory body which represents the interests of governments, employers and employees.¹

At the meeting of the [Workplace Relations Ministers' Council](#) in Brisbane on 23 May 2008 all of the ministers agreed to replace the ASCC with a body which will have tripartite government, employer and employee representation and will be jointly funded by the Commonwealth, states and territories. That body is Safe Work Australia (SWA) which is established by this Bill.

Little has been reported about the rationale for abolishing the ASCC and replacing it with SWA except that it is part of the Government's commitment to co-operation and

1. Section 3 *Australian Workplace Safety Standards Act 2005*.

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collaboration between the Commonwealth and the States and Territories in relation to the health and safety of Australian workers.²

Review of Occupational Health and Safety Laws

On 4 April 2008, the Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, announced a national review into model Occupational Health and Safety (OHS) Laws.³

The three person panel is asked to [review OHS legislation](#) in each State, Territory and Commonwealth jurisdiction for the purpose of making recommendations on the optimal structure and content of a model OHS Act that is capable of being adopted in all jurisdictions.

The review will prioritise the division of liability between employers and employees, the nature of safety offences and defences to safety breaches. It will make recommendations to state and federal workplace relations ministers by October 31. A later report, due by January 30, 2009, will cover other areas including compliance and education programs, inspectors' access to worksites and permits for hazardous work. The reports will form the basis of the model workplace safety laws, which the Council of Australian Governments has agreed to produce within five years.⁴

When the report is handed down, SWA will be responsible for developing national policy relating to OHS and workers' compensation, and preparing model OHS legislation, model regulations, model codes of practice based on the findings and recommendations of the review report.

Committee consideration

At its meeting of 4 September 2008, the Selection of Bills Committee resolved not to refer the bill to a committee for formal inquiry.⁵

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2. Hon. Julia Gillard, Minister for Education, Minister for Employment and Workplace Relations and Minister for Social Inclusion 'Second reading speech: Safe Work Australia Bill 2008', *House Hansard*, 4 September, 2008, p. 1.
 3. The Hon. Julia Gillard, 'Gillard launches National OHS Review', media release, Canberra, 4 April 2008.
 4. Steven Scott, 'Panel to move on workplace laws', *Australian Financial Review*, 5 April, 2008, p. 6.
 5. Selection of Bills Committee, Report No. 10 of 2008, 4 September 2008.

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Financial implications

The [Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety](#) (the Intergovernmental Agreement) made between the Commonwealth and all States and Territories on 3 July 2008 states that the Commonwealth will fund 50 per cent of the budget of Safe Work Australia while the States and Territories, together, will fund the remaining 50 per cent.⁶

In addition, the Agreement specifies that for 2008-09, SWA will have an initial budget of \$17 million, pro-rated to the date of its establishment and subject to indexation by the CPI as a minimum each year.⁷

The annual cost to the Commonwealth would, therefore, be an initial minimum of \$8.5 million which would be subject to indexation by the consumer price index as a minimum in the following years. The Explanatory Memorandum states that this is less than the cost to the Commonwealth for the running of the ASCC.⁸

Main provisions

Part 1 - Preliminary

Part 1 of the Bill contains a general statement about the purpose and intention of the Act, and relevant definitions.

Part 2 – Establishment and functions of Safe Work Australia

Clause 6 sets out in table-form the proposed functions of SWA including, but not limited to:

- develop national policy relating to OHS and workers' compensation
- prepare model OHS legislation, model regulations, model codes of practice and other material relating to OHS
- develop a policy, for approval by the Ministerial Council, dealing with the compliance and enforcement of the Australian laws that adopt the approved model OHS legislation
- monitor the adoption of model OHS legislation, model regulations, model codes of practice by the Commonwealth, States and Territories

6. 'Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety', 3 July 2008, paragraph 4.1.2(a).

7. *ibid.*, paragraph 4.1.2.(b)

8. Explanatory Memorandum, p. ii.

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- develop proposals for harmonising workers' compensation arrangements across the Commonwealth, States and Territories and national workers' compensation arrangements for employers with workers in more than one of those jurisdictions
- advise the Ministerial Council on matters relating to OHS or workers' compensation, and
- such other functions that are conferred on it by any other Commonwealth Act.⁹

Part 3 – Membership of Safe Work Australia

Clause 10 provides that Safe Work Australia will have 15 members as follows:

- the Chair
- 1 member who represents the Commonwealth
- 8 members, each of whom represents a different State or Territory
- 2 members who represent the interests of workers
- 2 members who represent the interests of employers and
- the CEO.

Subclause 10(2) provides that SWA may not perform its functions if more than one third of those offices are vacant.

Clause 11 provides that the Minister¹⁰ must appoint a person to be the Chair in consultation with the Ministerial Council.¹¹ That appointment must be in writing.

The Minister must also, by written instrument:

- appoint the person who will be the Commonwealth representative on SWA: **clause 13**

9. In particular, see Clause 2 of Schedule 3 of *the Safe Work Australia (Consequential and Transitional Provisions) Bill 2008* which confers on Safe Work Australia the function of declaring national standards and codes of practice relating to occupational health and safety matters until 1 January 2011.

10. In accordance with section 19A of the *Acts Interpretation Act 1901* a reference to 'the Minister' is a reference to the Minister for Education, Employment and Workplace Relations.

11. **Clause 4** defines the term 'Ministerial Council' as the council of Commonwealth, State and Territory Ministers that:

- is known as the Workplace Relations Ministers' Council on the day on which the definition commences and
- is constituted so that it consists of no more than one Minister representing each of the Commonwealth, the States and the Territories when dealing with matters with which this Act is concerned.

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- appoint the persons who will be the State or Territory representatives, based on nominations from the States and Territories: **clause 14**
- appoint the persons who will be the workers' representatives, based on nominations by an 'authorised body'¹² : **clause 15** and
- appoint the persons who will be the employers' representatives, based on nominations by an 'authorised body'¹³ : **clause 16**.

However, in the case of both the workers' representative and the employers' representative, where the Minister does not agree to appoint the nominated person, an authorised body (which may or may not be the same authorised body) may nominate another person: **subclauses 15(3) and 16(3)** respectively.

The Bill does not contain any eligibility requirements for membership of SWA, for example, that the Minister should have regard to whether nominees have relevant qualifications or a background in OHS and workers' compensation matters.

Clause 17 provides that voting members hold office on a part-time basis, for the period specified in their instrument of appointment which must be no longer than three years.¹⁴ A 'voting member' is defined in **clause 4** to be a member other than the CEO.

Appointments of voting members will end either:

- by resignation: **clause 19** or
- on termination by the Minister for the following reasons:
 - misbehaviour¹⁵
 - inability to perform their duties because of physical or mental incapacity
 - bankruptcy (or similar)
 - absence, except on leave of absence¹⁶ from three consecutive meeting of SWA or

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12. **Subclause 15(4)** provides that the Minister may authorise a body for the purpose of this section.
 13. **Subclause 16(4)** provides that the Minister may authorise a body for the purpose of this section.
 14. Nothing in the Bill prevents the Minister from re-appointing a person as a member of SWA and nothing in the Bill limits any period of cumulative appointments. The note specifically states that subsection 33(4) of the *Acts Interpretation Act 1901* applies so that a reference to 'appointment' includes 're-appointment'.
 15. Nothing in the Bill defines the conduct which would be construed as 'misbehaviour' and the Bill does not require that the misbehaviour be 'proven'.
 16. **Clause 24** provides that this can be granted by the Chair to any other voting member.

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- failure, without reasonable excuse, to provide disclosure of interests as required by clauses 18 and 40: **clause 20**

In addition the Minister *must* terminate the appointment of a member who represents a State or Territory, workers or employers if the body which nominated the person requests the Minister to do so in writing: **subclause 20(3)**.

According to **clause 21** the Chair is to be paid subject to a determination by the Remuneration Tribunal. However, if there is no such determination, then the Chair is to be paid the remuneration that is prescribed by regulations. The Bill is silent about the manner in which the remuneration would be calculated in these circumstances. However, regulations are put before the Parliament and are subject to disallowance.

Clause 25 provides that the office of a voting member is not a public office within the meaning of the *Remuneration Tribunal Act 1973*. Whilst this makes clear that the Remuneration Tribunal will not set the remuneration of these members, the Bill is silent as to what the mechanism will be. However, the Explanatory Memorandum states the representative members will be remunerated by the governments or bodies which they represent.¹⁷

Part 4 – Planning by Safe Work Australia

Clauses 27 and 28 are about SWA's strategic plan. **Clause 27** requires SWA to prepare draft strategic plans once every three years for the next three years. That plan is to deal *only* with planned outcomes and the strategies for achieving those outcomes.¹⁸

The draft strategic plan is to be given to the Ministerial Council which can approve or refuse the draft plan. Where the Ministerial Council refuses the draft plan, it must direct SWA to make specified changes to the plan within a specified time. In that case, SWA must comply with the directions: **subclause 28(4)**. The Ministerial Council must approve the altered draft plan when the alterations are made in accordance with directions: **subclause 28(5)**. When the strategic plan is approved it is to be published in the way that SWA considers appropriate: **subclause 28(7)**.

For the avoidance of doubt **subclause 28(8)** provides that a direction, approval or refusal by the Ministerial Council in relation to the strategic plan is not a legislative instrument.¹⁹

17. Explanatory Memorandum, paragraph 44, p. 8.

18. **Item 5(1) of Schedule 3** of the Safe Work Australia (Consequential and Transitional Provisions) Bill 2008 provides that the first draft strategic plan is to be prepared as soon as practicable after the commencement of clause 27.

19. The *Legislative Instruments Act 2003* defines a 'legislative instrument' as an instrument of a legislative character that is, or was, made under a delegation of power from Parliament'. An

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Clauses 29 and 30 are about SWA's operational plan. **Clause 29** requires SWA to prepare a draft operational plan each financial year and give it to the Ministerial Council.²⁰ The draft plan must deal with the activities which SWA proposes to undertake and its total amount of expenditure for the financial year: **subclause 29(2)**.

As with the strategic plan, the Ministerial Council:

- must approve or refuse the plan: **subclause 30(1)**
- must direct SWA to make specified changes within a specified time where the plan is refused: **subclause 30(2)**, and
- approve the plan when the specified alterations are made: **subclause 30(5)**.

Once the operational plan is approved it is to be published in the way that SWA considers appropriate: **subclause 30(7)**.

Clauses 31 and 32 empower the Ministerial Council to direct SWA to amend either the strategic plan or the operational plan respectively in accordance with clauses 27-30.

Part 5 – Decision making by Safe Work Australia

Clauses 34-39 set the rules about meetings of SWA, in particular:

- meetings are to be convened by the Chair and must be held at least three times in each financial year: **clause 34**
- if the Chair is not present at the meeting, the voting member representing the Commonwealth is to preside: **clause 35**
- where a voting member is unable to attend a meeting, they may request, in writing, that the Chair approve a substitute in their place: **clause 36**. However the Chair does not have to agree to this request.

According to **subclause 37(1)** a majority of the voting members constitutes a quorum. However, **subclause 37(3)** provides an exception where the matter for deliberation or decision relates to the model OHS legislation, or model OHS codes of practice. In that case there will not be a quorum unless a majority of all of the voting members who represent the Commonwealth, States and Territories are present.

instrument has a legislative character if it determines or alters the content of the law rather than applying the law in a particular case.

20. **Item 5(2) of Schedule 3** of the Safe Work Australia (Consequential and Transitional Provisions) Bill 2008 provides that the first draft operational plan is to be prepared as soon as practicable after the commencement of clause 29.

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A question is decided by a two-thirds majority of the votes of the voting members present and voting: **subclause 38(1)**. However **subclause 38(2)** provides an exception where the matter for deliberation or decision relates to the model OHS legislation, or model OHS codes of practice. In that circumstance, the question is decided by:

- a two-thirds majority of the votes of the voting members present and voting, **and**
- a majority of the votes of all of the voting members who represent the Commonwealth, States and Territories.

Clause 40 provides that a member who has an interest, pecuniary or otherwise, in a matter being considered by SWA must disclose the nature of the interest to the meeting. In that case, **subclause 40(4)** provides that the member must not be present during deliberations on the matter and must not take part in any decision on the matter.

The requirement that a member who has a ‘conflict of interest’ must not be present during deliberations on the matter over which the conflict arises and must not take part in any decision on such matters *does not apply* if the matter relates to the model OHS legislation or model OHS codes of practice, or if SWA decides the member may be present or take part: **subclause 40(5)**.

According to the Explanatory Memorandum, this is to ensure that the requirements of an absolute majority of the Commonwealth, States and Territories, as provided for in subclause 38(2) is not undermined.²¹

Subclause 42(1) provides a mechanism for making *general decisions* without a meeting. A decision will be deemed to have been made at a meeting provided that:

- a two-thirds majority of the voting members entitled to vote on the proposed decision indicate agreement with the decision and
- all the voting members were informed of the proposed decision, or *reasonable efforts* were made to inform all the voting members of the proposed decision.

The Bill does not define what amounts to ‘reasonable efforts’.

Subclause 42(2) provides a mechanism for making *decisions about model OHS legislation or model OHS codes of practice* without a meeting. A decision will be deemed to have been made at a meeting provided that agreement is indicated by:

- a two-thirds majority of the voting members entitled to vote on the proposed decision **and**
- a majority of the votes of all the voting members who represent the Commonwealth, States and Territories

21. Explanatory Memorandum, paragraph 90, p. 15.

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All the voting members must have been informed of the proposed decision, or *reasonable efforts* were made to inform all the voting members of the proposed decision: **proposed paragraph 42(2)(c)**.

In addition **subclause 42(3)** provides that decisions can be made without a meeting under the circumstances set out in subclause 42(1) and (2) only if SWA has determined the nature of decisions that can be made without a meeting and the manner in which voting members are to indicate their agreement.

Part 6 – The CEO, Staff and Committees

Clauses 44-58 are about the CEO of SWA. The functions of the CEO are to manage the administration of SWA and assist SWA in the performance of its functions. The CEO must perform the functions in accordance with SWA’s strategic plan and operational plan: **clause 45**.

According to **clause 46** the Minister may, by legislative instrument, give written directions of a general nature to the CEO about the performance of the CEO’s functions and requiring the provision of a report or advice about SWA’s functions.²² In that case the CEO must comply with the direction that has been given. The CEO must keep the Minister informed of SWA’s progress in the performance of its functions: **clause 47**.

Similarly, SWA may given written directions to the CEO about the performance of the CEO’s functions and requiring the provision of a report or advice about SWA’s functions. In that case the CEO must comply with the direction that has been given: **clause 48**. However, the CEP is not required to comply with such directions in certain circumstances, for example, where they are inconsistent with clause 46 Ministerial directions. The CEO must keep SWA informed about the progress of its operational plan: **clause 49**.

Under **clause 50** the Minister appoints the CEO by written instrument. The CEO holds office on a full time basis. The period of appointment is not more than five years.

Clause 52 provides that the CEO is to be paid the remuneration which is determined by the Remuneration Tribunal, unless no such determination is in operation. In that case the remuneration will be prescribed in regulations.

Appointment of the CEO will end either:

- by resignation: **clause 56** or

22. According to section 44 of the *Legislative Instruments Act 2003* the legislative instrument will not be a disallowable instrument because the enabling legislation for the instrument (that is, the *Safe Work Australia Act 2008*), facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States.

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- on termination by the Minister for the following reasons:
 - misbehaviour²³
 - inability to perform their duties because of physical or mental incapacity
 - bankruptcy (or similar)
 - absence, except on leave of absence²⁴ for 14 consecutive days or for 28 days in any 12 months or
 - the CEO engages, except with the Minister’s approval, in paid employment outside the duties of their office²⁵ or
 - failure, without reasonable excuse to provide disclosure of interests as required by clauses 40 and 55: **clause 57**.

In addition the Minister may terminate the appointment of the CEO if the Minister is of the opinion that the performance of the CEO has been unsatisfactory: **subclause 57(3)**.

Clause 59 provides that staff of SWA are to be engaged under the *Public Service Act 1999*. In particular, **subclause 59(2)** provides that, for the purposes of the *Public Service Act 1999*, the CEO and the staff of Safe Work Australia together constitute a Statutory Agency. **Clauses 60-62** respectively provide that SWA may do the following in the performance of its functions:

- constitute committees
- be assisted by officers and employees of Agencies, a State or Territory or an authority of the Commonwealth, State or Territory
- engage consultants on behalf of the Commonwealth.

Part 7 – The Special Account

This part sets up the SWA Special Account (the Account) in accordance with the *Financial Management and Accountability Act 1997*: **clause 64**.

The Account will be credited with the following:

- amounts paid by the States and Territories in accordance with the Intergovernmental Agreement

23. See the previous comments in footnote 11.

24. **Clause 24** provides that this can be granted by the Chair to any other voting member.

25. **Clause 54** provides that the CEO must not engage in paid employment outside the duties of his or her office without the Minister’s approval.

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- amounts paid by the Commonwealth in accordance with the Intergovernmental Agreement
- any other amounts paid by the States and Territories for the performance of SWA's functions
- any other amounts the Commonwealth agrees to allocate for the performance of SWA's functions and
- the amount of any gifts given or bequests made for the purposes of the Account: **clause 65.**

Clause 66 sets out the costs and expenses that can be paid from the Account.

Part 8 - Miscellaneous

Part 8 contains miscellaneous provisions. In particular **clause 70** requires the CEO to prepare and give to the Minister, to SWA and to the Ministerial Council a report on SWA's operations during each financial year.

Clause 72 requires the Minister to conduct a review of SWA's ongoing role and functions. The review is to be conducted six years after the commencement of this section of the Bill and must be completed within six months. A report about the review must be tabled within 15 sitting days of its receipt by the Minister.

Clause 73 provides for the making of regulations which are necessary and convenient for carrying out or giving effect to the Safe Work Australia Act 2008.

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