



## Safe Work Australia Bill 2008 [No. 2]

**It should be noted that the name of the Bill as introduced on 13 May 2009 is Safe Work Australia Bill 2008. The Bill is identical to Safe Work Australia Bill 2008 which was introduced in the House of Representatives on 4 September 2008 and then laid aside on 4 December 2008.**

**The addition of the reference [No. 2] was made by the Department of the House of Representatives Table Office to indicate that the Bill is introduced for a second time.**

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Law and Bills Digest Section

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## Safe Work Australia Bill 2008 [No. 2]

**Date introduced:** 13 May 2009

**House:** House of Representatives

**Portfolio:** Education, Employment and Workplace Relations

**Commencement:** Sections 3—73 on a day fixed by Proclamation, or six months after the date of Royal Assent, whichever is the earlier; all other provisions on the day of 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

#### History of the Bill

The Safe Work Australia Bill 2008 [No. 1] was introduced into the House of Representatives and read for the first and second times on 4 September 2008.<sup>1</sup> The relevant [Bills Digest](#) contains information about the contents of the Bill.

The Bill was debated in the Senate and a number of amendments were proposed. The amendments which were 'agreed by all the non-government Senators'<sup>2</sup> are effectively summarised by Senator Siewert as:

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1. J 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. 7145.
  2. R Siewert, 'Consideration of House of Representatives Message: Safe Work Australia Bill 2008', Senate, *Debates*, 4 December 2008, p. 8237.

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- insert an objects clause
- increase the number of employer and employee representatives
- remove some ministerial discretion in appointing employer and employee representatives
- remove the ability of the ministerial council to amend Safe Work's operational strategic plans
- remove additional voting rights for government representatives on Safe Work Australia
- remove the power of the minister to direct a CEO contrary to strategic operational plans and the power of the minister to terminate the CEO for unsatisfactory performance
- include an audit committee.<sup>3</sup>

The Senate returned the Bill to the House of Representatives on [14 October 2008](#), [10 November 2008](#) and [4 December 2008](#) requesting consideration of the relevant amendments.

In response to the Message from the Senate of 4 December 2008, the Hon. Julia Gillard stated:

As I have made clear to this parliament on a number of occasions, the composition, operation and, in particular, the membership and voting structure of this new body, Safe Work Australia, were the subject of in-detail negotiations at the Workplace Relations Ministers Council and then at the Council of Australian Governments before the historic COAG deal was signed...

... I have explained time and time again that every bit of unwinding [by way of amendment to the Bill] is an offence against the intergovernmental agreement which will require me to go back to the Workplace Relations Ministers Council and to COAG to see if we can reach agreement again. Despite that explanation, and in clear knowledge of the consequences, the Liberal Party in the Senate has once again moved to amend this legislation in a way that renders it inconsistent with the intergovernmental agreement. Consequently I have taken the extraordinary step of moving that the bill be laid aside.<sup>4</sup>

The Bill was subsequently laid aside in the House of Representatives.

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3. R Siewert, 'Consideration of House of Representatives Message'.
  4. J Gillard (Minister for Education, Minister for Employment and Workplace Relations and Minister for Social Inclusion), 'Consideration of Senate Message: Safe Work Australia Bill 2008, House of Representatives, *Hansard*, 4 December 2008, p. 12687.

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### Subsequent developments by the Workplace Relations Ministers Council

On 5 November 2008 the Workplace Relations Ministers Council (WRMC) met to update Ministers on the progress of legislation to establish Safe Work Australia. At that time,

Ministers highlighted that Senate amendments to the Safe Work Australia Bill 2008 were inconsistent with the historic commitment of all governments to uniform national OHS legislation as reflected in the inter-governmental agreement on OHS reforms signed by the Council of Australian Governments (COAG) in July 2008.<sup>5</sup>

The WA Minister noted that the WA Government supported a number of the amendments passed by the Senate.

The WRMC met again on 12 February 2009. ‘A key outcome from the meeting was a decision to establish Safe Work Australia as an Executive Agency prescribed under the *Financial Management and Accountability Act 1997*.’<sup>6</sup> The Safe Work Australia Council was subsequently established on 31 March 2009.<sup>7</sup> Safe Work Australia is an independent body that will support the Council. <sup>8</sup>Consequently the Australian Safety and Compensation Council was abolished.

It was agreed by the WRMC that the Safe Work Australia Council would commence developing the model OHS Act in order to provide an exposure draft of the Act in August 2009.<sup>9</sup> The framework for the uniform OHS laws was agreed on 18 May 2009.<sup>10</sup>

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5. Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers Council, 5 November 2008 viewed 27 May 2009:  
<http://www.workplace.gov.au/NR/rdonlyres/2DEAB986-3679-4461-89A9-3FACC7CCAAC5/0/WRMC78Communique.pdf>
  6. ACT Occupational Health and Safety Commissioner viewed 27 May 2009:  
<http://www.worksafety.act.gov.au/news/safe-work-australia-be-established>
  7. Safe Work Australia website viewed 27 May 2009:  
<http://www.safeworkaustralia.gov.au/swa/TheCouncil/CouncilMembers/SafeWorkAustraliaCouncil.htm>
  8. Safe Work Australia website viewed 27 May 2009:  
<http://www.safeworkaustralia.gov.au/swa/AboutUs/AboutSafeWorkAustralia/>
  9. Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers Council, 3 April 2009 viewed 27 May 2009:  
<http://www.workplace.gov.au/NR/rdonlyres/25BAEF02-F036-4EFE-B5C0-C98090E56098/0/3April2009.pdf>
  10. Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers Council, 18 May 2009 viewed 27 May 2009:  
<http://www.workplace.gov.au/NR/rdonlyres/CDC4AF38-5ADB-4296-97CB-18C9AEF8BEED/0/18May2009.pdf>

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## Consequences of failure to pass

Section 57 of the *Commonwealth of Australia Constitution Act 1901* (the Constitution) provides that:

- if the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which House will not agree, and
- if after an interval of three months the House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and
- the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously.

In this case the Senate has passed the Safe Work Australia Bill [No. 1] with amendments to which the House of Representatives did not agree.

This current Bill was introduced into the House of Representatives on 13 May 2009 which is an interval of more than three months since the original Bill was laid aside. The current Bill is in identical terms to the original Bill.

Therefore, if the Senate rejects or fails to pass this Bill, or passes it with amendments to which the House of Representatives will not agree, it will be open to the Governor-General to dissolve both the House of Representatives and the Senate, that is, a 'double dissolution'.<sup>11</sup>

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11. For further analysis of section 57 of the Constitution and double dissolutions of the Parliament see K Magarey, *'Alcopops makes the House see double: the proposed law' in section 57 of the Constitution*, Research Paper, no. 32, 2008–09, Parliamentary Library, Canberra, 2009, viewed 26 May 2009, <http://www.aph.gov.au/Library/pubs/rp/2008-09/09rp32.pdf>

The Research Paper canvases the academic argument that the Bill as introduced a second time should occur in the same social, political and legal landscape as existed at the time that the original Bill was introduced, that is, the second Bill must have the same 'contextual identity'. However due to the proximity in time between the laying aside of the original Bill in this case and the introduction of this Bill, that is not an issue which needs to be addressed.

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## Consequences for national OHS policy

Should the current Bill fail to pass it result in a delay in the development of the model OHS Act.

## Main provisions

The following comments about the main provisions of the Bill are in the same terms as those contained in the original [Bills Digest](#).

### 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
- 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.<sup>12</sup>

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12. 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.

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### Part 3 – Membership of Safe Work Australia

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

- the Chair
- one member who represents the Commonwealth
- eight members, each of whom represents a different State or Territory
- two members who represent the interests of workers
- two 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 Minister<sup>13</sup> must appoint a person to be the Chair in consultation with the Ministerial Council.<sup>14</sup> 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**
- 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'<sup>15</sup>: **clause 15** and
- appoint the persons who will be the employers' representatives, based on nominations by an 'authorised body'<sup>16</sup>: **clause 16**.

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13. In accordance with section 19A of the *Acts Interpretation Act 1901* (Cth) a reference to 'the Minister' is a reference to the Minister for Education, Employment and Workplace Relations.
  14. **Clause 4** defines the term 'Ministerial Council' as the council of Commonwealth, State and Territory Ministers that:
    - (a) is known as the Workplace Relations Ministers' Council on the day on which the definition commences and
    - (b) 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.
  15. **Subclause 15(4)** provides that the Minister may authorise a body for the purpose of this section.

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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.<sup>17</sup> 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:
  - misbehaviour<sup>18</sup>
  - inability to perform their duties because of physical or mental incapacity
  - bankruptcy (or similar)
  - absence, except on leave of absence<sup>19</sup> from three consecutive meeting of SWA or
  - 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

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16. **Subclause 16(4)** provides that the Minister may authorise a body for the purpose of this section.
  17. 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'.
  18. Nothing in the Bill defines the conduct which would be construed as 'misbehaviour' and the Bill does not require that the misbehaviour be 'proven'.
  19. **Clause 24** provides that this can be granted by the Chair to any other voting member.

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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.<sup>20</sup>

#### 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.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup> The

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

21. **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.

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

23. **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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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.

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.

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**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.<sup>24</sup>

**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

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.

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

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## 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.<sup>25</sup> 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 give 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 CEO 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
- on termination by the Minister for the following reasons:
  - misbehaviour<sup>26</sup>
  - inability to perform their duties because of physical or mental incapacity
  - bankruptcy (or similar)

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25. 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.

26. Nothing in the Bill defines the conduct which would be construed as 'misbehaviour' and the Bill does not require that the misbehaviour be 'proven'.

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- absence, except on leave of absence<sup>27</sup> 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 office<sup>28</sup> 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
- 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

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

28. **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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- 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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