

CONSULTATION PAPER

COMMONWEALTH WORK HEALTH AND SAFETY BILL 2011

26 May 2011

Introduction

The purpose of this paper is to advise stakeholders on certain provisions proposed to be included in the Commonwealth Work Health and Safety (WHS) Bill and to seek their views on the workability of those provisions.

The Commonwealth WHS Bill (referred to in this paper as the Commonwealth Bill) will implement the model WHS Bill (referred to in this paper as the model Bill) within the Commonwealth jurisdiction.

This paper does not seek comments on the model Bill itself. The model Bill was the subject of extensive public consultations in late 2009 and its provisions agreed by the Workplace Relations Ministers' Council (WRMC) on 11 December 2009. It only seeks comments on the Commonwealth specific provisions contained in the Commonwealth Bill.

The Commonwealth specific provisions have been highlighted in the Commonwealth Bill. They are based on jurisdictional notes found in the Appendix to the model Bill. Jurisdictional notes have been used in the model Bill to explain how jurisdictional specific provisions may be substituted for model provisions to achieve consistency with other laws and processes operating within the jurisdiction. They are intended to facilitate enactment of model legislation without affecting harmonisation. Jurisdictions are unable to alter the model Bill other than in accordance with agreed jurisdictional notes.

Comments received during the consultation period on the Commonwealth Bill will be reviewed by the Department and any necessary amendments made to the Bill prior to introduction into the Commonwealth Parliament.

Views Invited

Comments and queries on the Commonwealth Bill should be sent by **17 June 2011** to:

CthWHSConsultations@deewr.gov.au

Further information about the Commonwealth's transition to the new WHS laws can be found at:

<http://www.comcare.gov.au/WHS>

Abbreviations

The following abbreviations are used in this paper:

CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
COAG	Council of Australian Governments
FMA Act	<i>Financial Management and Accountability Act 1997</i>
IGA	<i>Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety</i>
OHS	occupational health and safety
OHS Act	<i>Occupational Health and Safety Act 1991</i>
PCBU	person conducting a business or undertaking
SRC Act	<i>Safety Rehabilitation and Compensation Act 1988</i>
SRCC	Safety Rehabilitation and Compensation Commission
T&C Bill	Transitional and Consequential Amendments Bill
WHS	work health and safety
WRMC	Workplace Relations Ministers' Council

Background

The importance of harmonised OHS laws has long been recognised as a critical area of regulatory reform. Achieving nationally uniform OHS laws is a key priority of the Council of Australian Governments' (COAG) national reform agenda, which aims to reduce regulatory burdens and create a seamless national economy.

In February 2008, WRMC agreed that the use of model legislation is the most effective way to achieve harmonisation of OHS laws. The Commonwealth and each of the States and Territories have subsequently signed the Intergovernmental Agreement for Regulatory and Operational Reform in OHS (the IGA) which commits jurisdictions to implement the model laws by December 2011.

The model legislation comprises the model Bill, model WHS Regulations and model codes of practice. The model legislation will be underpinned by a national enforcement policy.

The model Bill is intended to be 'mirrored' in all jurisdictions subject to any local variations that are authorised by jurisdictional notes in the Appendix to the model Bill. Separate Bills will be introduced into each jurisdiction's parliament to give effect to the model Bill. The purpose of this consultation paper is to outline the jurisdiction specific provisions included in the Commonwealth Bill.

Further information about the development of the model WHS legislation can be found on the Safe Work Australia website: www.safeworkaustralia.gov.au

The Model WHS Bill

Safe Work Australia has produced a summary of the key provisions in the model Bill which is available at:

<http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/SummaryoftheModelWorkHealthandSafetyAct.aspx>

Key differences between current Commonwealth OHS arrangements and the model Bill are summarised in the attached document:

http://www.comcare.gov.au/_data/assets/pdf_file/0006/69018/00860_PH_OHS_Act_vs_WHS_Act_v2.pdf

Who will the Commonwealth WHS Bill apply to?

Clause 12 sets out the scope of the Commonwealth Bill and provides that the Bill will apply to businesses and undertakings conducted by the Commonwealth, a public authority or non-Commonwealth licensee.

Application to the Commonwealth

The Commonwealth Bill will apply to businesses or undertakings conducted by the Commonwealth. All activity by the Commonwealth (other than the administration of the Northern Territory, the Australian Capital Territory and Norfolk Island) will fall within the meaning of the term 'business or undertakings'. Where the Commonwealth Bill imposes a duty on a person conducting a business or undertaking the duty holder will be the Commonwealth.

The Commonwealth will be defined to include an Agency within the meaning of the *Financial Management and Accountability Act 1997* (the FMA Act) other than a public authority.

Imputing conduct of officers and agents to the Commonwealth

Because the Commonwealth is an entity that may only act and make decisions through individuals, subclause 245(2) of the Commonwealth Bill provides that conduct engaged in on behalf of the Commonwealth by an employee, agent or officer of the Commonwealth is also engaged in by the Commonwealth.

This includes the conduct of persons deemed to be employees of an undertaking of the Commonwealth by clause 7 of the Commonwealth Bill, for example Australian Federal Police officers.

Officers of the Commonwealth

An officer of the Commonwealth is a person who makes, or participates in making, decisions that affect the whole or a substantial part, of the business or undertaking of the Commonwealth.

Responsible agency provisions

Subclause 248(1) allows certain notices that would otherwise be required to be served on the Commonwealth (as the PCBU) to be served on the responsible agency within the Commonwealth.

Where an infringement notice is to be served on, or a prosecution brought against the Commonwealth, the responsible agency may also be specified in the infringement notice or document initiating the proceedings (see subclauses 248(2) and (3)).

The term 'responsible agency' is defined in subclause 248(6), but will generally be the agency in which the conduct occurred, or the agency with control over the activity or workplace.

These provisions are a departure from the more prescriptive provisions of the *Occupational Health and Safety Act 1991* (the OHS Act) which provide that duties imposed on the Commonwealth as an employer shall be performed by the relevant employing authority, generally the Agency Head or principal officer of the Commonwealth entity.

Application to 'Public Authorities'

The Commonwealth Bill will apply to businesses or undertakings conducted by a public authority. Where the Bill imposes a duty on a person conducting a business or undertaking the duty holder will be the public authority.

The term 'public authority' is defined in clause 4 to mean:

- A body corporate established for a public purpose by or under a law of the Commonwealth or a law of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island);
- A Commonwealth company within the meaning of the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) other than a Commonwealth company prescribed by the regulations to be a Commonwealth company to which this Act does not apply; and
- A body corporate prescribed by the regulations to be a public authority for the purposes of the Act.

The Commonwealth Bill will apply to businesses and undertakings of these authorities.

The Commonwealth Bill will provide that:

- Proceedings may be instituted under the Act against a public authority in its own name; and
- Any conduct engaged in or on behalf of a public authority by an employee, agent or officer of the public authority acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the public authority.

An officer of a public authority is a person who makes, or participates in making, decisions that affect the whole or a substantial part, of the business or undertaking of the public authority.

Defining Commonwealth companies by reference to the CAC Act is a departure from the current OHS Act which uses an ownership test coupled with Ministerial declarations. The new approach is simpler and is intended to clarify the application of the Act. The primary definition will be supplemented by the ability to explicitly prescribe bodies 'in' or 'out' of the application of the Act by Regulation should this be considered appropriate.

Agencies covered by the FMA Act who are bodies corporate with a separate legal personality from the Commonwealth will be treated as public authorities.

Some bodies corporate who are currently regulated by the Commonwealth under the OHS Act may not be covered by the new definition of 'public authority', for example the Australian Submarine Corporation and subsidiaries of public authorities, such as, Post Logistics and Australian Air Express. If these bodies corporate are to be covered, they will need to be prescribed.

Application to ‘Non-Commonwealth Licensees’

The Commonwealth Bill will apply to businesses or undertakings conducted by a non-Commonwealth licensee for a transitional period. Where the Bill imposes a duty on a person conducting a business or undertaking the duty holder will be the non-Commonwealth licensee.

The Australian Government has indicated its intention to support the transfer of OHS coverage of non-Commonwealth licensees to state and territory jurisdictions following the implementation of uniform OHS laws in all jurisdictions.

The timing and manner of the transfer is subject to further consideration and decision.

Extended definition of ‘worker’ – persons deemed to be employees of an undertaking of the Commonwealth

The model Bill has been drafted to extend coverage of the model laws to all persons who carry out work in any capacity for a person conducting a business or undertaking. The model laws adopt the term ‘worker’, in place of ‘employee’, which is currently used in the OHS Act, in recognition of the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers. ‘Worker’ is defined broadly in clause 7 of the model Bill to include employees, contractors, sub-contractors, labour hire staff, apprentices, trainees and volunteers. The model Bill deems police officers to be workers for the purposes of the Act because police officers are not traditionally recognised as employees, but rather as independent office holders.

The Commonwealth Bill further extends the definition of ‘worker’ to include other persons who are currently deemed to be employees of the Commonwealth for the purpose of the OHS Act, namely:

- Members of the Australian Defence Force;
- A holder of a Commonwealth statutory office (or acting office holder);
- A person who constitutes a Commonwealth public authority (eg the Australian Government Solicitor, CEO of Comcare and the Director of National Parks);
- Members or deputy members of a Commonwealth public authority;
- Persons that engage in activities or perform acts at the request or direction of, or for the benefit of, the Commonwealth who are declared by the Minister to be workers for the purposes of the Act.

The Commonwealth Bill will continue to deem these persons to be employees of the Commonwealth for the purpose of OHS Regulation, and ‘at work’ when performing their respective functions.

Application of the Commonwealth WHS Bill to persons outside of Australia

The Commonwealth Bill will apply to businesses or undertakings conducted by the Commonwealth, Commonwealth 'public authorities' and non-Commonwealth licensees; their workers; and workplaces wherever they happen to be.

Section 15.1 of the Criminal Code will apply to an offence under the Commonwealth Bill. As a result, the Act will apply to conduct constituting an alleged offence that occurs wholly outside Australia if:

- The result of the conduct occurs wholly or partly in Australia; or
- At the time of the alleged offence, the person is an Australian citizen or body corporate incorporated in Australia.

Locally engaged staff who are not Australian citizens will not be subject to criminal liability under the extended geographical application of offences. However, the Commonwealth, public authorities and non-Commonwealth licensees will owe the same duties of care to these workers as they do to workers within Australia, although what may be 'reasonably practicable' may differ.

Exclusions – Act not to prejudice national security, defence and certain police operations

The Commonwealth Bill contains provisions dealing with matters relating to national security, defence and Australian Federal Police operations. These provisions replicate sections 6-8 of the OHS Act subject to the following change: the agreement of the Minister responsible for the WHS Act will be required before the Director-General of Security or the Chief of the Defence Force may make a declaration to disapply specific provisions of the Act.

How will the Commonwealth WHS Bill apply?

Relationship with State and Territory WHS laws

The Commonwealth Bill will impose duties of care and other obligations on the Commonwealth, public authorities and non-Commonwealth licensees. Duplicate obligations would not arise under State or Territory WHS laws.

Under the model Bill a worker may be owed duties of care by more than one person or PCBU, for example, where a worker is an employee of one PCBU and a contractor of another PCBU. The Commonwealth Bill will not preclude duties being owed by the Commonwealth to workers who are also owed duties under applicable State or Territory WHS laws. For example, a worker who is employed by a PCBU who is subject to State or Territory WHS laws may also be contracted by the Commonwealth, a public authority or a non-Commonwealth licensee. Similarly, the Commonwealth Bill will not preclude duties being owed by a State or Territory PCBU to a worker as defined in the

Commonwealth Bill, for example, a worker employed by the Commonwealth, a public authority or a non-Commonwealth licensee who is contracted by a State or Territory PCBU.

The Commonwealth Bill will require duty holders to consult with other duty holders, including duty holders under a corresponding State or Territory WHS law, and will allow information sharing between regulators. The Commonwealth Bill will also recognise right of entry permits granted under State or Territory WHS laws.

Interaction with other Commonwealth OHS laws

To avoid regulatory overlap, the Commonwealth Bill will not apply in circumstances where the *Offshore Petroleum Greenhouse Gas Storage Act 2006* or the *Occupational Health and Safety (Maritime Industry) Act 1993* apply.

Institutional arrangements

The Regulator

Each jurisdiction is required to identify the regulator for the purpose of the legislation. The regulator in the Commonwealth jurisdiction will be Comcare. Comcare will operate under the oversight of the Safety, Rehabilitation and Compensation Commission (the SRCC).

This is a departure from the current situation where OHS regulation is the joint responsibility of Comcare and the SRCC.

Although day to day regulatory functions will be transferred to Comcare, the SRCC will have an important role in overseeing the activities of Comcare. Its functions under the SRC Act will not change. The SRCC will continue to have responsibility for:

- preparing and issuing to the CEO of Comcare general policy guidelines in relation to the WHS Act and the determination by Comcare of regulatory contributions; and
- ensuring that, as far as practicable, there is equity of outcomes resulting from administrative practices and procedures used by Comcare and a licensee.

In addition, the SRCC will have the following advisory functions:

- advising the Minister on the administration of the Act;
- advising and making recommendations to the Minister on the most effective means of giving effect to the objects of the Act; and
- enquiring into and making recommendations to the Minister on any work health and safety matters referred to it by the Minister.

Local consultation arrangements

The model Bill enables jurisdictions to establish local consultation arrangements. The Commonwealth Bill confers this function on the SRCC.

In addition to its oversight and advisory functions, the SRCC will be a forum for consultation between Comcare and persons conducting a business or undertaking, workers and the bodies that represent them.

Having regard to its revised role, comments are sought on the appropriate membership and composition of the SRCC.

The authorising authority

Each jurisdiction is required to identify an 'authorising authority' to issue WHS entry permits under Part 7 of the model Bill and to resolve disputes about the exercise or purported exercise by a WHS permit holder of entry under the model Bill. It is proposed that Fair Work Australia will perform this role under the Commonwealth Bill.

The OHS Act currently does not confer powers on authorised representatives of unions to enter workplaces for OHS purposes. However, the provisions in relation to right of entry in the model Bill have been closely modelled on the right of entry provisions in the *Fair Work Act 2009* (FW Act). As the right of entry provisions in the FW Act and the model Bill are so closely aligned, Fair Work Australia's current expertise and operations lend themselves to performing the functions of an authorising authority under the Commonwealth Bill.

The Commonwealth Bill also provides for the recognition of WHS entry permits issued by other jurisdictions under corresponding WHS laws, or recognised by those laws under transitional arrangements. This will avoid the need for the holder of a WHS entry permit under a corresponding State or Territory WHS law to reapply for a WHS entry permit under the Commonwealth Act.

The external review body

Each jurisdiction is required to identify an 'external review' body to review the decisions of the regulator, including decisions made following internal review. Fair Work Australia will perform this role under the Commonwealth Bill.

Fair Work Australia is currently the reviewing authority under the OHS Act. As such, Fair Work Australia is empowered to deal with disagreements about the establishment of designated work groups and to determine appeals from decisions of investigators. This review function is replicated in clause 228 of the model Bill. The scope of the external review in the model Bill is substantially similar to that currently in the OHS Act. The main difference is that the model Bill provides for a mandatory internal review mechanism in respect of reviewable decisions made by inspectors. Under the Commonwealth Bill, decisions of inspectors will be reviewed by Comcare in the first instance subject to external review by Fair Work Australia.

Offences in the WHS Bill

With the exception of Part 7, breaches of the model Bill are criminal offences. The offences, like all other provisions in the model Bill, have been drafted in non-jurisdictional specific terms and do not expressly specify whether strict or absolute liability is intended to apply to the offence. Nor do they reflect the Commonwealth's general drafting practice of including each physical element of the offence in a separate paragraph.

In jurisdictions where the Model Criminal Code applies (ie. the Commonwealth, ACT and NT) it is necessary to include a general statement specifying that strict liability applies to avoid the fault elements in the Criminal Code (of intention or recklessness) automatically applying (see clause 12D). Other jurisdictions have also included similar statements in their Bill to provide clarity and to assist with uniformity.

Civil penalties apply to contraventions of the right of entry provisions in Part 7 of the model Bill, so as to be consistent with the right of entry provisions in the FW Act.

The civil sanctions provided for breaches of the OHS Act are no longer required, as the Commonwealth will no longer be immune from criminal liability. While the Commonwealth has always be bound by the OHS Act, the Commonwealth and Commonwealth authorities have not previously been liable to be prosecuted for an offence or to pay a fine or penalty for an offence. The National Review into OHS laws recognised that it is now widely accepted that the Crown should not be exempt from operation of the offence provisions of OHS legislation.