



# **Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Act 2004**

No. 122, 2004

**An Act to amend the *Occupational Health and  
Safety (Commonwealth Employment) Act 1991*, and  
for related purposes**

Note: An electronic version of this Act is available in SCALEplus  
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)



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**An Act to amend the *Occupational Health and  
Safety (Commonwealth Employment) Act 1991*, and  
for related purposes**

*[Assented to 16 August 2004]*

**The Parliament of Australia enacts:**

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## 1 Short title

This Act may be cited as the *Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Act 2004*.

## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	16 August 2004
2. Schedule 1	The 28th day after the day on which this Act receives the Royal Assent	13 September 2004

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table is for additional information that is not part of this Act. This information may be included in any published version of this Act.

## 3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Amendment of the Occupational Health and Safety (Commonwealth Employment) Act 1991**

### **Part 1—Amendments**

#### **1 At the end of section 3**

Add:

- ; and (f) to encourage and assist employers, employees and other persons on whom obligations are imposed under the Act to observe those obligations; and
- (g) to provide for effective remedies if obligations are not met, through the use of civil remedies and, in serious cases, criminal sanctions.

#### **2 Subsection 5(1) (definition of *annual report of the Commission*)**

Omit “*Commonwealth Employees’ Rehabilitation and Compensation Act 1988*”, substitute “*Safety, Rehabilitation and Compensation Act 1988*”.

#### **4 Subsection 5(1) (definition of *Comcare*)**

Omit “*Commonwealth Employees’ Rehabilitation and Compensation Act 1988*”, substitute “*Safety, Rehabilitation and Compensation Act 1988*”.

#### **5 Subsection 5(1) (definition of *Commission*)**

Omit “Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees”, substitute “Safety, Rehabilitation and Compensation Commission”.

#### **6 Subsection 5(1) (definition of *Commission*)**

Omit “*Commonwealth Employees’ Rehabilitation and Compensation Act 1988*”, substitute “*Safety, Rehabilitation and Compensation Act 1988*”.

#### **7 Subsection 5(1) (definition of *contractor*)**

Repeal the definition, substitute:

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**contractor** means:

- (a) a natural person, other than a person who is employed by the Commonwealth or by a Commonwealth authority, who performs work on Commonwealth premises in connection with a contract between:

- (i) the Commonwealth; and  
(ii) that person or another person (whether a natural person or not);

which is in connection with an undertaking being carried on by the Commonwealth; or

- (b) a natural person, other than a person who is employed by the Commonwealth or by a Commonwealth authority, who performs work on Commonwealth premises in connection with a contract between:

- (i) a Commonwealth authority; and  
(ii) that person or another person (whether a natural person or not);

which is in connection with an undertaking being carried on by the authority mentioned in subparagraph (i); or

- (c) in section 14—a natural person as described in paragraph (a) or (b) and also includes a body corporate, other than a Commonwealth authority, that performs work on Commonwealth premises in connection with a contract between:

- (i) the Commonwealth or a Commonwealth authority; and  
(ii) that body corporate or another person (whether a natural person or not);

which is in connection with an undertaking being carried on by the Commonwealth or the authority mentioned in subparagraph (i).

### **9 Subsection 5(1) (subparagraph (a)(i) of the definition of *Government business enterprise*)**

Omit “the Schedule”, substitute “Schedule 1”.

### **10 Subsection 5(1)**

Insert:

***involved***: a person is involved in a breach of a provision if, and only if, the person has:

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- (a) aided, abetted, counselled or procured the breach; or
- (b) has induced, whether by threats or promises or otherwise, the breach; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the breach; or
- (d) has conspired with others to effect the breach.

**15 Subsection 5(3A)**

Omit “*Commonwealth Employees’ Rehabilitation and Compensation Act 1988*”, substitute “*Safety, Rehabilitation and Compensation Act 1988*”.

**16 Subsection 5(6)**

Omit “contravention” (wherever occurring), substitute “breach”.

**17 Subsections 11(2) and (3)**

Repeal the subsections, substitute:

- (2) Nothing in this Act has the effect of making the Commonwealth or a Commonwealth authority (other than a Government business enterprise):
    - (a) liable to be prosecuted for an offence; or
    - (b) liable to pay any fine or penalty under the Act or the regulations, other than as mentioned in subsection (3).
  - (3) Subsection (2) does not prevent the Commonwealth or a Commonwealth authority from being:
    - (a) subject to proceedings for a contravention of subclause 2(1) of Schedule 2; or
    - (b) liable to pay a pecuniary penalty under subclause 4(1) of Schedule 2.
- Note: A court may also grant an injunction under clause 14 of Schedule 2, make remedial orders under clause 15 of Schedule 2 or enforce undertakings under clause 16 of Schedule 2.
- (4) Subsection (2) does not prevent the following:
    - (a) a person who is employed by the Commonwealth;
    - (b) a person who is employed by a Commonwealth authority (including a Government business enterprise);
    - (c) a Government business enterprise;

from being:

- (d) subject to proceedings for a contravention of subclause 2(1) of Schedule 2; or
- (e) liable to be prosecuted for an offence; or
- (f) liable to pay any fine or penalty under the Act or the regulations.

**18 Subsection 12(1)**

Omit “*Commonwealth Employees’ Rehabilitation and Compensation Act 1988*”, substitute “*Safety, Rehabilitation and Compensation Act 1988*”.

**22 At the end of subsection 14(1)**

Add:

Note: For the meaning of *contractor*, see subsection 5(1).

**23 Subsection 16(1) (penalty)**

Repeal the penalty.

**24 At the end of subsection 16(1)**

Add:

Note: An employer who breaches subsection (1) may be subject to civil action or a criminal prosecution (see Schedule 2).

**25 Subsection 16(2)**

Omit “contravenes”, substitute “breaches”.

**28 Subsection 16(5)**

Omit “contravenes”, substitute “breaches”.

**30 Section 17 (penalty)**

Repeal the penalty.

**31 At the end of section 17**

Add:

Note: An employer who breaches section 17 may be subject to civil action or a criminal prosecution (see Schedule 2).

**32 Subsection 18(1) (penalty)**

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Repeal the penalty.

**33 At the end of subsection 18(1)**

Add:

Note: A manufacturer who breaches subsection (1) may be subject to civil action or a criminal prosecution (see Schedule 2).

**34 Subsection 18(2) (penalty)**

Repeal the penalty.

**35 At the end of subsection 18(2)**

Add:

Note: A manufacturer who breaches subsection (2) may be subject to civil action or a criminal prosecution (see Schedule 2).

**36 Subsection 19(1) (penalty)**

Repeal the penalty.

**37 At the end of subsection 19(1)**

Add:

Note: A supplier who breaches subsection (1) may be subject to civil action or a criminal prosecution (see Schedule 2).

**38 Subsection 20(1) (penalty)**

Repeal the penalty.

**38A At the end of subsection 20(1)**

Add:

Note: A person who breaches subsection (1) may be subject to civil action or a criminal prosecution (see Schedule 2).

**39 Subsection 21(1) (penalty)**

Repeal the penalty.

**40 At the end of subsection 21(1)**

Add:

Note: An employee who breaches subsection (1) may be subject to civil action or a criminal prosecution (see Schedule 2).

**47 Subparagraph 28(1)(a)(ii)**

Omit “or to”, substitute “, to Comcare or to”.

**48 Section 29**

Omit “contravening” (wherever occurring), substitute “breaching”.

**49 Paragraph 29(1)(b)**

Omit “contravened”, substitute “breached”.

**50 Section 29**

Omit “contravene” (wherever occurring), substitute “breach”.

**51 Section 29**

Omit “contravention” (wherever occurring), substitute “breach”.

**52 After subsection 29(3)**

Insert:

- (3A) The notice has effect as soon as it is given to a person in accordance with subsection (2) or (3).

**54 Subsection 29(9)**

Omit “Upon the request being made”, substitute “When a request is made under subsection (8)”.

**55 After subsection 29(9)**

Insert:

- (9A) The health and safety representative may request Comcare or an investigator to investigate a matter that is the subject of a notice if:
- (a) the responsible person has not complied with the notice within the period specified in the notice (including any extensions); and
  - (b) an investigation has not been requested under subsection (8).

**56 Subsection 29(10)**

After “a request” insert “(under subsection (8) or (9A))”.

**64 Paragraph 41(1)(b)**

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Omit “contravention” (wherever occurring), substitute “breach”.

**66 Paragraph 41(2)(b)**

Omit “contravention” (wherever occurring), substitute “breach”.

**72 Subsection 43(1)**

Omit “produce any documents requested by the investigator”, substitute “give to the investigator any documents requested by the investigator or copies of such documents”.

**73 Subsection 43(2)**

Repeal the subsection (including the penalty), substitute:

- (2) A person must comply with a requirement made of the person under subsection (1).

Note: A person who breaches subsection (2) may be subject to civil action or a criminal prosecution (see Schedule 2).

**74 Subsection 43(3)**

Repeal the subsection (including the note).

**75 Subsection 45(1)**

After “person who is”, insert “, or who may reasonably be presumed to be,”.

**76 Paragraph 45(3)(b)**

Omit “located.”, substitute “located;”.

**77 At the end of subsection 45(3)**

Add:  
until the direction has expired, been revoked or been varied.

**78 Subsection 45(5) (penalty)**

Repeal the penalty.

**79 At the end of subsection 45(5)**

Add:  
Note: An employer who breaches subsection (5) may be subject to civil action or a criminal prosecution (see Schedule 2).

## **80 At the end of section 45**

Add:

- (7) An investigator may revoke or vary a direction given under this section by giving a written notice to that effect to the person who is, or who may reasonably be presumed to be, for the time being in charge of operations at the workplace.
- (8) If a direction is varied:
  - (a) a copy of the text of the original direction and any variations to it must be included in the notice; and
  - (b) the person to whom the written notice is given must cause that notice to be displayed in a prominent place at the workplace:
    - (i) that is, or a specified part of which is, under the notice, to be left undisturbed; or
    - (ii) at which the plant, substance or thing that is, under the notice, to be left undisturbed, is located;until the direction has expired, been revoked or been varied; and
  - (c) the investigator must take all reasonable steps to notify people who were notified of the giving of the direction under subsection (1) of the variation of the direction and the terms of the varied direction.

## **81 After section 45**

Insert:

### **45A Power to direct orally that workplace etc. not be disturbed**

- (1) An investigator may orally direct the person who is, or who may reasonably be presumed to be, for the time being in charge of operations at the workplace to ensure that a workplace, a part of a workplace, plant, a substance or a thing not be disturbed for a specified period if the investigator:
  - (a) considers on reasonable grounds that it is necessary to give the oral direction in order to:
    - (i) remove an immediate threat to the health or safety of any person; or

- (ii) allow the inspection, examination or taking of measurements of, or conducting of tests concerning, a workplace or any plant, substance or thing at a workplace; and
  - (b) considers on reasonable grounds that there is not adequate time available to make a direction by written notice under section 45.
- (2) The specified period:
  - (a) must be no longer than the period that the investigator considers on reasonable grounds is necessary in order to remove the threat or to allow the inspection, examination, measuring or testing to take place; and
  - (b) must end no later than 48 hours after the direction is given.
- (3) An employer who has control over the workplace, plant, substance or thing to which the direction relates, and whose employees use the workplace, plant, substance or thing in the performance of work for the employer, must ensure the direction is complied with.

Note: If an employer breaches subsection (3), the employer may be subject to civil action or a criminal prosecution (see Schedule 2).
- (4) The oral direction ceases to have effect at the earliest of the following times:
  - (a) the time when the specified period under subsection (2) ends;
  - (b) the time when the oral direction is revoked under subsection (5);
  - (c) the time when a direction under section 45 is given if that direction is made for the purposes of the same investigation and in respect of:
    - (i) the same workplace, part of a workplace, plant, substance or thing; and
    - (ii) the same threat, inspection, examination, measuring or testing;as the oral direction.
- (5) The direction may be revoked by informing the person who is for the time being in charge of operations at the workplace that the direction is revoked.

- (6) The direction cannot be renewed or varied and no other direction under this section may be made for the purposes of the same investigation and in respect of:
- (a) the same workplace, part of a workplace, plant, substance or thing; and
  - (b) the same threat, inspection, examination, measuring or testing;
- as the first-mentioned direction.

Note: The heading to section 45 is altered by inserting “**in writing**” after “**direct**”.

**82 At the end of subsection 46(3)**

Add:

- ; and (c) specify a period for compliance with the notice that the investigator considers on reasonable grounds is sufficient to enable compliance.

**83 Subsection 46(4) (penalty)**

Repeal the penalty.

**84 At the end of subsection 46(4)**

Add:

Note: An employer who breaches subsection (4) may be subject to civil action or a criminal prosecution (see Schedule 2).

**85 Subsection 46(6)**

Repeal the subsection, substitute:

- (6) The notice ceases to have effect when:
- (a) an investigator notifies the employer that the investigator considers that the employer has taken adequate action to remove the threat to health or safety that caused the notice to be issued; or
  - (b) the notice is revoked under subsection (11).

**86 Paragraph 46(9)(b)**

After “displayed”, insert “, until the notice has expired, been revoked or been varied,”.

**87 At the end of section 46**

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Add:

- (11) An investigator may revoke or vary a notice (the *original notice*) given under this section by giving a written notice (the *new notice*) to that effect to the person who is, or who may be presumed on reasonable grounds to be, for the time being in charge of the activity in respect of which the original notice was issued.
- (12) If the original notice is varied:
- (a) the new notice must set out the text of the original notice and the variations to it; and
  - (b) the text of the new notice must specify a period for compliance with the new notice that the investigator considers on reasonable grounds is sufficient to enable compliance; and
  - (c) the employer must cause a copy of the new notice to be displayed, until the new notice has expired, been revoked or been varied, in a prominent place at or near each workplace at which work affected by the notice is being performed; and
  - (d) the investigator and employer must take all reasonable steps to give a copy of the new notice to each person to whom they gave copies of the original notice.

**88 Section 47**

Omit “contravening” (wherever occurring), substitute “breaching”.

**89 Paragraph 47(1)(b)**

Omit “contravened”, substitute “breached”.

**90 Section 47**

Omit “contravene” (wherever occurring), substitute “breach”.

**91 After subsection 47(2)**

Insert:

- (2A) The notice has effect as soon as it is given to a person under subsection (1) or (2).

**92 Section 47**

Omit “contravention” (wherever occurring), substitute “breach”.

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**93 Subsection 47(6) (penalty)**

Repeal the penalty.

**94 At the end of subsection 47(6)**

Add:

Note: A responsible person who breaches subsection (6) may be subject to civil action or a criminal prosecution (see Schedule 2).

**95 Paragraph 47(8)(b)**

After “displayed”, insert “, until the notice has expired, been revoked or been varied,”.

**96 At the end of section 47**

Add:

- (10) An investigator may revoke or vary a notice (the *original notice*) given under this section by giving a written notice (the *new notice*) to that effect to the person who is, or who may reasonably be presumed to be, for the time being in charge of the activity in respect of which the original notice was issued.
- (11) If the original notice is varied:
  - (a) the new notice must set out the text of the original notice and the variations to it; and
  - (b) the text of the new notice must specify a period that the investigator considers is reasonable, within which the employer must comply with the new notice; and
  - (c) the employer must cause a copy of the new notice to be displayed, until the new notice has expired, been revoked or been varied, in a prominent place at or near each workplace at which work affected by the new notice is being performed; and
  - (d) the investigator and employer must take all reasonable steps to give a copy of the new notice to each person to whom they gave copies of the original notice.

**97 After paragraph 48(1)(c)**

Insert:

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(ca) decides, under section 45, to revoke or vary a direction that a workplace, a part of a workplace, plant, a substance or a thing not be disturbed; or

**98 Before paragraph 48(1)(d)**

Insert:

(cb) decides, under section 45A, to direct that a workplace, a part of a workplace, plant, a substance or a thing not be disturbed; or

**99 After paragraph 48(1)(d)**

Insert:

(da) decides, under section 46, to revoke or vary a prohibition notice; or

**100 After paragraph 48(1)(f)**

Insert:

or (fa) decides, under section 47, to revoke or vary an improvement notice;

**105 Subsection 50(1) (penalty)**

Repeal the penalty.

**105A At the end of subsection 50(1)**

Add:

Note: A person who breaches section 50 may be subject to a criminal prosecution (see Schedule 2).

**105B Subsection 50(2)**

Repeal the subsection (including the note).

**106 Section 52**

After “Division”, insert “(other than section 53)”.

**107 Subsection 54(2)**

Repeal the subsection (including the penalty), substitute:

(2) A person must comply with a requirement under subsection (1).

Note: A person who breaches subsection (1) may be subject to a criminal prosecution (see Schedule 2).

**108 Subsection 54(3)**

Repeal the subsection (including the note).

**109 Subsection 57(1) (penalty)**

Repeal the penalty.

**110 At the end of subsection 57(1)**

Add:

Note: A person who breaches section 57 may be subject to a criminal prosecution (see Schedule 2).

**111 Subsections 57(2) and (3)**

Repeal the subsections (including the notes).

**112 Section 59**

Omit “refuse or” (wherever occurring).

Note: The heading to section 59 is altered by omitting “**Refusal**” and substituting “**Failure**”.

**113 Subsection 59(1) (penalty)**

Repeal the penalty.

**114 At the end of subsection 59(1)**

Note: A person who breaches section 59 may be subject to a criminal prosecution (see Schedule 2).

**115 Subsection 59(2)**

Repeal the subsection (including the note).

**116 Section 61 (penalty)**

Repeal the penalty.

**117 At the end of section 61**

Add:

Note: A person who breaches section 61 may be subject to a criminal prosecution (see Schedule 2).

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**118 Section 64 (penalty)**

Repeal the penalty.

**119 At the end of section 64**

Add:

Note: A person who breaches section 64 may be subject to a civil action (see Schedule 2).

**120 Paragraph 66(1)(a)**

After “section 45”, insert “or 45A”.

**121 Section 67**

Omit “*Commonwealth Employees’ Rehabilitation and Compensation Act 1988*”, substitute “*Safety, Rehabilitation and Compensation Act 1988*”.

**125 Section 71**

Omit “contravened”, substitute “breached”.

**126 Section 71**

Omit “contravention” (wherever occurring), substitute “breach”.

**127 Section 72 (penalty)**

Repeal the penalty.

**128 At the end of section 72**

Add:

Note: A person who breaches section 72 may be subject to a criminal prosecution (see Schedule 2).

**129 Subsection 72(2)**

Repeal the subsection, including the note.

**130 Section 73 (penalty)**

Repeal the penalty.

**131 At the end of section 73**

Add:

Note: An employer who breaches section 73 may be subject to civil action (see Schedule 2).

**137 Subparagraph 75(c)(iii)**

Omit “section 45”, substitute “sections 45 and 45A”.

**138 Subsection 76(1) (penalty)**

Repeal the penalty.

**139 At the end of subsection 76(1)**

Add:

Note: An employer who breaches this section may be subject to civil action (see Schedule 2).

**140 Subsection 76(2)**

Repeal the subsection.

**141 Section 77**

Omit “an offence against” (wherever occurring), substitute “a breach of”.

Note: The heading to section 77 is altered by omitting “**prosecutions**” and substituting “**proceedings**”.

**144 Subsection 78(1)**

Omit “an offence against”, substitute “a breach of”.

**145 Subsection 78(2)**

Omit “a prosecution for an offence against”, substitute “proceedings for a breach of”.

**146 Subsection 78(3)**

Omit “an offence against”, substitute “a breach of”.

**147 Subsection 78(4)**

Omit “a prosecution for an offence against”, substitute “proceedings for a breach of”.

**148 Section 79**

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After “civil proceedings” (wherever occurring), insert “(other than proceedings under Part 1 of Schedule 2)”.

**149 Paragraph 79(a)**

Omit “contravention”, substitute “breach”.

**150 Section 80**

Omit “contravention” (wherever occurring), substitute “breach”.

Note: The heading to section 80 is altered by omitting “**contravention**” and substituting “**breach**”.

**151 Subsection 80(2)**

Omit “contravenes”, substitute “breaches”.

**154 Paragraph 82(1)(h)**

Repeal the paragraph, substitute:

- (h) civil or criminal penalties, for a breach of the regulations, not exceeding:
  - (i) 50 penalty units for an individual; or
  - (ii) 250 penalty units for a body corporate.

**155 Schedule (heading)**

Repeal the heading (including the note), substitute:

**Schedule 1—Government business enterprises**

Note: See section 5 (definition of *Government business enterprise*).

**158 At the end of the Act**

Add:

## **Schedule 2—Civil proceedings and criminal prosecutions in respect of breaches of the Act**

### **Part 1—Civil proceedings**

#### **1 Courts that may exercise jurisdiction under this Part**

The only courts that may exercise jurisdiction under this Part are the Federal Court of Australia and the Supreme Court of each State or Territory.

#### **2 Declarations of contravention**

- (1) If a court considers that a person has breached one of the following provisions, or was involved in such a breach, it must make a declaration that the person has contravened this subclause:
  - (a) subsection 16(1) (duties of employers in relation to their employees etc.);
  - (b) section 17 (duty of employers in relation to third parties);
  - (c) subsection 18(1) or 18(2) (duties of manufacturers in relation to plant and substances);
  - (d) subsection 19(1) (duties of suppliers in relation to plant and substances);
  - (e) subsection 20(1) (duties of person erecting or installing plant in a workplace);
  - (f) subsection 21(1) (duties of employees in relation to occupational health and safety);
  - (g) subsection 43(2) (requirement to provide assistance and information);
  - (h) subsection 45(5) (requirement to ensure compliance with direction that workplace etc. not be disturbed);
  - (i) subsection 45A(3) (requirement to ensure compliance with oral direction that workplace etc. not be disturbed);
  - (j) subsection 46(4) (requirement to ensure that prohibition notice complied with);



- (k) subsection 47(6) (requirement to comply with improvement notice);
- (l) section 64 (requirement not to prejudice witnesses in employment);
- (m) section 73 (requirement not to levy employees etc.);
- (n) section 76 (requirement not to dismiss etc. employees on certain grounds).

Note: Once a declaration has been made, the court can make a pecuniary penalty order (see clause 3).

- (2) In proceedings for a declaration of contravention under subclause (1) in relation to a breach of section 76, if all the relevant facts and circumstances, other than the reason for an action, are proved, it lies on the person who allegedly breached that section to establish that the action was not taken for that reason.
- (3) A declaration of contravention made under subclause (1) must specify the following:
  - (a) the court that made the declaration;
  - (b) that the subclause was contravened;
  - (c) any provision listed in that subclause that the person who contravened it breached or was involved in breaching;
  - (d) the person who contravened that subclause;
  - (e) the conduct that constituted the contravention;
  - (f) the Commonwealth Entity or Commonwealth authority to which the conduct related.

### **3 Declaration of contravention is conclusive evidence**

A declaration of contravention is conclusive evidence of the matters referred to in subclause 2(3).

### **4 Pecuniary penalty orders**

- (1) If a court has declared, under subclause 2(1), a contravention of that subclause by a person because the person breached, or was involved in the breach of, a provision listed in that subclause, the court may order the person to pay the Commonwealth a pecuniary penalty.

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- (2) The pecuniary penalty must not exceed the amount stated in the table to be the maximum penalty in relation to the provision concerned.

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**Maximum penalty for breach of provisions listed in subclause 2(1)**

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<b>Item</b>	<b>Provision the person breached, or was involved in the breach of:</b>	<b>Maximum penalty:</b>
1	subsection 16(1) (duties of employers in relation to their employees etc.)	2,200 penalty units
2	section 17 (duty of employers in relation to third parties)	2,200 penalty units
3	subsection 18(1) (duties of manufacturers in relation to plant and substances)	440 penalty units for a natural person 2,200 penalty units for a body corporate
4	subsection 18(2) (duties of manufacturers in relation to plant and substances)	440 penalty units for a natural person 2,200 penalty units for a body corporate
5	subsection 19(1) (duties of suppliers in relation to plant and substances)	440 penalty units for a natural person 2,200 penalty units for a body corporate
6	subsection 20(1) (duties of person erecting or installing plant in a workplace)	440 penalty units for a natural person 2,200 penalty units for a body corporate
7	subsection 21(1) (duties of employees in relation to occupational health and safety)	90 penalty units
8	subsection 43(2) (requirement to provide assistance and information)	30 penalty units
9	subsection 45(5) (requirement to ensure compliance with direction that workplace etc. not be disturbed)	250 penalty units
10	subsection 45A(3) (requirement to ensure compliance with oral direction that workplace etc. not be disturbed)	250 penalty units

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**Maximum penalty for breach of provisions listed in subclause 2(1)**

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<b>Item</b>	<b>Provision the person breached, or was involved in the breach of:</b>	<b>Maximum penalty:</b>
11	subsection 46(4) (requirement to ensure that prohibition notice complied with)	250 penalty units
12	subsection 47(6) (requirement to comply with improvement notice)	10 penalty units for each day on which a person breaches subsection 47(6)
13	section 64 (requirement not to prejudice witnesses in employment)	30 penalty units
14	section 73 (requirement not to levy employees etc.)	250 penalty units
15	section 76 (requirement not to dismiss etc. employees on certain grounds)	250 penalty units

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(3) The penalty is a civil debt payable to the Commonwealth. Comcare may enforce the order as if it were an order made in civil proceedings against the person to recover a debt owed by the person. The debt arising from the order is taken to be a judgment debt.

(4) In spite of the provisions of any other law, if a penalty is imposed under this clause, a court must not direct that a person serve a sentence of imprisonment in default of the payment of the penalty.

## **5 Who may apply for a declaration or order?**

### *Application by Comcare or investigator*

(1) Comcare or an investigator may apply for a declaration of contravention or a pecuniary penalty order.

### *No-one else may apply*

(2) No person may apply for a declaration of contravention or a pecuniary penalty order unless permitted by this clause.

(3) Subclause (2) does not exclude the operation of the *Director of Public Prosecutions Act 1983*.

## **6 Time limit for application for a declaration or order**

Proceedings for a declaration of contravention or a pecuniary penalty order cannot be started more than 6 years after the alleged breach on which the proceedings are based.

## **7 Conduct constituting a breach of 2 or more provisions listed in subclause 2(1)**

Proceedings may be instituted under this Act against a person in relation to one or more contraventions of subclause 2(1). However, the person is not liable to more than one pecuniary penalty under this clause in respect of the same conduct.

## **8 Civil evidence and procedure rules for declarations of contravention etc.**

The court must apply the rules of evidence and procedure for civil matters in proceedings for:

- (a) a declaration of contravention; or
- (b) a pecuniary penalty order.

## **9 Civil proceedings after criminal proceedings**

A court must not make a declaration of contravention or a pecuniary penalty order against a person for a contravention if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

## **10 Criminal proceedings during civil proceedings**

- (1) Proceedings for a declaration of contravention or a pecuniary penalty order against a person are stayed if:
    - (a) criminal proceedings are started or have already been started against the person for an offence; and
    - (b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.
  - (2) The proceedings for the declaration or order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the declaration or order are dismissed.
-

## **11 Criminal proceedings after civil proceedings**

Criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of subclause 2(1), regardless of whether:

- (a) a declaration of contravention has been made against the person; or
- (b) a pecuniary penalty order has been made against the person.

## **12 Evidence given in proceedings for penalty not admissible in criminal proceedings**

Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:

- (a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a breach of a provision listed in subclause 2(1) (whether or not the order was made); and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

## **13 Relief from liability for contravention of subclause 2(1)**

- (1) In this clause:

*civil penalty proceedings*:

- (a) means proceedings for a contravention of subclause 2(1); and
- (b) does not include proceedings for an offence.

- (2) If:

- (a) civil penalty proceedings are brought against a person; and
- (b) in the proceedings, it appears to the court that the person has, or may have, contravened subclause 2(1) but that:
  - (i) the person has acted honestly; and
  - (ii) having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention;

the court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.

- (3) If a person considers that civil penalty proceedings will or may be begun against them, they may apply to the court for relief.
- (4) On an application under subclause (3), the court may grant relief under subclause (2) as if the civil penalty proceedings had been begun in the court.
- (5) For the purposes of applying subclause (2) to a case tried by a judge with a jury:
  - (a) a reference in that subclause to the court is a reference to the judge; and
  - (b) the relief that may be granted includes withdrawing the case in whole or in part from the jury and directing judgment to be entered for the defendant on such terms as to costs as the judge considers appropriate.

## **14 Injunctions**

### *Applications for injunctions*

- (1) Comcare or an investigator (the ***applicant***) may apply to a court for an injunction if another person (the ***relevant person***) has breached, is breaching, or proposes to breach this Act or the regulations.

### *Prohibitory injunctions*

- (2) The court may grant an injunction restraining the relevant person from breaching this Act or the regulations:
  - (a) whether or not it appears to the court that the relevant person intends to breach the Act or the regulations again, or to continue to breach the Act or the regulations; and
  - (b) whether or not the body has previously breached the Act or regulations;if the body has breached, is breaching, or proposes to breach this Act or the regulations.

*Additional orders with prohibitory injunctions*

- (3) The court may make an order requiring the relevant person to do something if:
- (a) the court grants an injunction restraining the relevant person from engaging in actionable conduct; and
  - (b) in the court's opinion it is desirable to make the order.

*Mandatory injunctions*

- (4) The court may grant an injunction requiring the relevant person to do an act:
- (a) whether or not it appears to the court that the relevant person intends to refuse or fail again, or to continue to refuse or fail, to do the act or thing; and
  - (b) whether or not the relevant person has previously refused or failed to do the act or thing;
- if the relevant person has refused or failed, or is refusing or failing, or is proposing to refuse or fail to do an act, and the refusal or failure did, does or would constitute a breach of the Act or the regulations.

*Interim injunctions*

- (5) The court may grant an interim injunction:
- (a) restraining the relevant person from engaging in conduct; or
  - (b) requiring the relevant person to do an act;
- before deciding an application for an injunction under this section.

*Discharge of injunctions*

- (6) The court may discharge, or vary, an injunction if an application for it to do so is made.

*No undertakings as to damages*

- (7) The court must not require the applicant to give an undertaking as to damages as a condition of granting an interim injunction.

*Powers conferred in addition to other powers of the court*

- (8) The powers conferred on the court by this section are in addition to (and do not limit) any other powers of the court.
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## **15 Remedial orders**

(1) If:

- (a) a court makes a declaration under clause 2 of this Schedule or convicts a person of an offence against this Act or the regulations; and
- (b) it appears to the court that the person could fully or partly remedy a state of affairs that arose as a direct or indirect result of the conduct that was the subject of the declaration or offence; and
- (c) the court has been requested to make an order under this subsection; and
- (d) the court has considered any relevant material given to it by Comcare;

then the court may order the person to take any steps that it considers are necessary and appropriate to rectify the state of affairs and that are within the person's power to take.

(2) If:

- (a) an employer has breached section 64 or 76 in respect of an employee; and
- (b) a court has made a declaration under clause 2 of this Schedule relating to that breach; and
- (c) the court has been requested to make an order under this subsection; and
- (d) the court has considered any relevant material given to it by Comcare;

then, if the court considers it appropriate, the court may make any of the following orders:

- (e) an order requiring the employer to reinstate the employee or former employee;
- (f) an order requiring the employer to pay the employee or former employee compensation of such amount as the court considers appropriate;
- (g) an order requiring the employer not to carry out a threat made by the employer, or not to make any further threat;
- (h) injunctions (including interim injunctions), and any other orders, that the court considers necessary to stop the conduct or remedy its effects.



*Consequential orders*

- (3) If a court makes an order under this section, it may also make any other consequential orders (including orders as to costs) that it considers appropriate.

## **16 Undertakings**

- (1) Comcare may accept a written undertaking relating to the fulfilment of an obligation under this Act, if the undertaking is given in writing to Comcare by a person who is required to fulfil the obligation.
- (2) The person must not withdraw or vary the undertaking without the written consent of Comcare.
- (3) If proceedings relating to whether a declaration should be made against a person under clause 2 have commenced, the court may adjourn the proceedings if Comcare requests the court to do so on the grounds that Comcare considers that an appropriate written undertaking by the person under subclause (1) is in force.
- (4) If the court considers that a person has breached a term of an undertaking, or that the person has withdrawn or varied the undertaking without the written consent of Comcare, the court may, if it thinks fit:
  - (a) revive any proceedings adjourned under subclause (3); or
  - (b) make an order directing the person to comply with the term (regardless of whether the person has withdrawn or varied the undertaking) and any consequential orders it considers appropriate.
- (5) Comcare or an investigator may apply to a court for an order under paragraph (4)(b) if the person has breached, is breaching, or proposes to breach the undertaking.

## **Part 2—Criminal prosecutions**

### **17 Criminal jurisdiction not conferred on Federal Court**

This Part does not confer any criminal jurisdiction on the Federal Court of Australia.

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## **18 Offences resulting in death or serious bodily harm**

- (1) A person commits an offence if:
- (a) the person breaches one of the following provisions:
    - (i) subsection 16(1) (duties of employers in relation to their employees etc.);
    - (ii) section 17 (duty of employers in relation to third parties);
    - (iii) subsection 18(1) or 18(2) (duties of manufacturers in relation to plant and substances);
    - (iv) subsection 19(1) (duties of suppliers in relation to plant and substances);
    - (v) subsection 20(1) (duties of person erecting or installing plant in a workplace);
    - (vi) subsection 21(1) (duties of employees in relation to occupational health and safety);
    - (vii) subsection 43(2) (requirement to provide assistance and information);
    - (viii) subsection 45(5) (requirement to ensure compliance with direction that workplace etc. not be disturbed);
    - (ix) subsection 45A(3) (requirement to ensure compliance with oral direction that workplace etc. not be disturbed);
    - (x) subsection 46(4) (requirement to ensure that prohibition notice complied with);
    - (xi) subsection 47(6) (requirement to comply with improvement notice);
    - (xii) section 50 (requirement not to tamper with notices);
    - (xiii) section 72 (interference etc. with equipment etc.); and
  - (b) the breach causes death or serious bodily harm; and
  - (c) the person either:
    - (i) was negligent as to whether that breach would cause death or serious bodily harm; or
    - (ii) was reckless as to whether that breach would cause death or serious bodily harm.

Note 1: If a person commits an offence under this subclause, the maximum penalty in relation to the offence is set out in clause 21.

Note 2: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

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- (2) Paragraphs (1)(a)(vii), (xii) and (xiii) do not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subclause (2) (see subsection 13.3(3) of the *Criminal Code*).

## **19 Offences exposing employees to a substantial risk of death or serious bodily harm**

An employer commits an offence if:

- (a) the employer breaches subsection 16(1) (duties of employers in relation to their employees etc.); and
- (b) the breach exposes an employee to a substantial risk of death or serious bodily harm; and
- (c) the employer:
  - (i) was negligent as to whether that breach would expose an employee to a substantial risk of death or serious bodily harm; or
  - (ii) was reckless as to whether that breach would expose an employee to a substantial risk of death or serious bodily harm.

Note 1: If a person commits an offence under this subclause, the maximum penalty in relation to the offence is set out in clause 21.

Note 2: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

## **20 Other offences**

- (1) A person commits an offence if the person intentionally breaches one of the following provisions:
- (a) subsection 54(1) (requirement to give information or produce documents);
  - (b) section 57 (failure of witness to attend);
  - (c) section 59 (refusal to be sworn or to answer questions);
  - (d) section 61 (contempt of Commission).

Note 1: If a person commits an offence under this subclause, the maximum penalty in relation to the offence is set out in clause 21.

Note 2: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) Paragraphs (1)(a) to (c) do not apply if the person has a reasonable excuse.
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**Schedule 1** Amendment of the Occupational Health and Safety (Commonwealth Employment) Act 1991

**Part 1** Amendments

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Note: A defendant bears an evidential burden in relation to the matter in subclause (2) (see subsection 13.3(3) of the *Criminal Code*).

**21 Maximum penalties**

- (1) An offence against clause 18, 19 or 20 relating to the breach of a provision is punishable on conviction by a penalty not exceeding the maximum penalty stated in the table in relation to the provision breached.

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**Maximum penalty for offences resulting from breach of provisions listed in clause 18, 19 or 20**

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<b>Item</b>	<b>Provision that was breached:</b>	<b>Maximum penalty:</b>
1	subsection 16(1) (duties of employers in relation to their employees etc.)	where the offence is an offence against clause 18—4,500 penalty units
2	subsection 16(1) (duties of employers in relation to their employees etc.)	where the offence is an offence against clause 19—3,000 penalty units
3	section 17 (duty of employers in relation to third parties)	4,500 penalty units
4	subsection 18(1) (duties of manufacturers in relation to plant and substances)	900 penalty units for a natural person 4,500 penalty units for a body corporate
5	subsection 18(2) (duties of manufacturers in relation to plant and substances)	900 penalty units for a natural person 4,500 penalty units for a body corporate
6	subsection 19(1) (duties of suppliers in relation to plant and substances)	900 penalty units for a natural person 4,500 penalty units for a body corporate
7	subsection 20(1) (duties of person erecting or installing plant in a workplace)	900 penalty units for a natural person 4,500 penalty units for a body corporate
8	subsection 21(1) (duties of employees in relation to occupational health and safety)	180 penalty units
9	subsection 43(2) (requirement to provide assistance and information)	30 penalty units, 6 months imprisonment, or both

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**Maximum penalty for offences resulting from breach of provisions listed in clause 18, 19 or 20**

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<b>Item</b>	<b>Provision that was breached:</b>	<b>Maximum penalty:</b>
10	subsection 45(5) (requirement to ensure compliance with direction that workplace etc. not be disturbed)	500 penalty units
11	Subsection 45A(3) (requirement to ensure compliance with oral direction that workplace etc. not be disturbed)	500 penalty units
12	subsection 46(4) (requirement to ensure that prohibition notice complied with)	500 penalty units
13	subsection 47(6) (requirement to comply with improvement notice)	900 penalty units (and see subclause (2))
14	section 50 (requirement not to tamper with notices)	30 penalty units, 6 months imprisonment, or both
15	subsection 54(1) (requirement to give information or produce documents)	30 penalty units, 6 months imprisonment, or both
16	section 57 (failure of witness to attend)	30 penalty units, 6 months imprisonment, or both
17	section 59 (refusal to be sworn or to answer questions)	30 penalty units, 6 months imprisonment, or both
18	section 61 (contempt of Commission)	30 penalty units, 6 months imprisonment, or both
19	section 72 (interference etc. with equipment etc.)	30 penalty units, 6 months imprisonment, or both

- (2) Section 4K of the *Crimes Act 1914* does not apply to a contravention of clause 18 in respect of a breach of subsection 47(6).
- (3) In spite of the provisions of any other law, if a fine is imposed under this clause, a court must not direct that a person serve a sentence of imprisonment in default of the payment of the fine.

## **Part 2—Transitional, application and saving provisions**

### **170 Time of effect of notices**

The amendments made by items 52 and 91 apply in relation to notices issued on or after the commencement of those items.

### **171 Reports of investigation**

The amendment made by item 106 applies in relation to an investigation begun on or after the commencement of that item.

### **174 Regulations prescribing penalties**

Regulations that were:

- (a) made under paragraph 82(1)(h) of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*; and
- (b) in force immediately before the substitution of that paragraph by item 154;

continue in force as if they had been made under that paragraph as substituted by that item.

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[*Minister's second reading speech made in—  
House of Representatives on 26 June 2002  
Senate on 30 March 2004*]

(149/02)

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