

2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SAFE WORK AUSTRALIA BILL**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations,  
the Honourable Julia Gillard MP)



## SAFE WORK AUSTRALIA BILL 2008

### OUTLINE

The purpose of the Safe Work Australia Bill 2008 (the Bill) is to establish Safe Work Australia (SWA) as an independent Commonwealth statutory body to improve occupational health and safety (OHS) outcomes and workers' compensation arrangements in Australia.

SWA will be an inclusive, tripartite body representing the interests of the Commonwealth, the States and Territories as well as workers and employers in Australia. SWA will be a reform-focused body with the power to make recommendations directly to the Workplace Relations Ministers' Council (WRMC).

The Bill will play a pivotal role in realising the Government's commitment to work cooperatively with State and Territory Governments to improve OHS outcomes and workers' compensation arrangements in Australia by empowering SWA to:

- develop national policy in respect of OHS and workers' compensation
- prepare model OHS legislation and model OHS codes of practice for approval by WRMC and adoption by the Commonwealth, the States and Territories
- develop a compliance and enforcement policy to ensure that a nationally consistent approach is taken to compliance and enforcement
- develop proposals relating to the harmonisation of workers' compensation arrangements across all jurisdictions and proposals for national workers' compensation arrangements for employers with workers in more than one jurisdiction
- build expertise across OHS laws and workers' compensation schemes that will be readily accessible across jurisdictions and industries and will reduce the complexity and costs for businesses, including businesses that operate across state boundaries
- undertake data collection and research and publish findings to ensure that all jurisdictions and industries have access to up to date and industry specific information that will enable employers and workers to adopt practices that will reduce instances of risk and injury in workplaces across Australia.

The Bill will also create and maintain mechanisms for review and revision of the effectiveness of SWA in performing its functions. This will ensure that the body is active and operating efficiently and responsively in meeting its strategic and operational goals.

SWA will replace the Australian Safety and Compensation Council (ASCC) which was set up administratively by the previous government as an advisory council. In contrast to the ASCC, SWA will be funded by both the Commonwealth and the States and Territories and provide a central role in OHS and workers' compensation reform.

## **FINANCIAL IMPACT STATEMENT**

States and Territories have agreed to an arrangement whereby the Commonwealth will fund 50 per cent of the budget of SWA while States and Territories, together, will fund the remaining 50 per cent. The Commonwealth and States and Territories have agreed to this funding arrangement on the basis that SWA would have an initial budget of \$17 million which would – as a minimum - be subject to indexation by the CPI for subsequent years. Details of the funding arrangements are set out in the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* made between the Commonwealth and all States and Territories on 3 July 2008.

The resulting cost to the Commonwealth would be an initial minimum of \$8.5 million and subject to indexation by the CPI as a minimum in following years. This amount is less than the amount outlaid for the running of the ASCC.

## NOTES ON CLAUSES

### PART 1 – PRELIMINARY

#### Clause 1 – Short title

1. This clause provides for the Bill, when passed, to be cited as the *Safe Work Australia Act 2008*.

#### Clause 2 – Commencement

2. This clause specifies when the various provisions of the proposed Act are to commence. Item 1 of subsection 2(1) will provide that sections 1 and 2 and anything in the Act not covered by the table in clause 2 will commence on Royal Assent. Item 2 of subsection 2(1) will provide that sections 3 to 73 will commence on proclamation. If these do not commence within six months of the Act receiving Royal Assent they will come into operation at the end of that six month period.
3. This clause contains a note specifying that the dates for commencement of the various provisions of the proposed Act specified in Item 1 will not be expanded to deal with provisions inserted in this Act after assent. The dates specified in Item 1 relate only to the provisions of the proposed Act as originally passed by both Houses of the Parliament and assented to.

#### Clause 3 – What this Act is about

4. This clause provides a brief outline of matters dealt with by the proposed Act. This overview provides that the objectives of establishing SWA are to improve occupational health and safety outcomes and workers' compensation arrangements in Australia. The overview also outlines the membership and functions of SWA as well as the respective roles of the Ministerial Council and the Chief Executive Officer (CEO).

#### Clause 4 – Definitions

5. This clause defines certain terms used in the proposed Act.

Significant terms include:

*Intergovernmental Agreement (IGA)* which refers to the agreement developed between the Commonwealth, the States and the Territories for Regulatory and Operational Reform in OHS, as amended from time to time; and

*Ministerial Council* which refers to the Workplace Relations Ministers' Council.

The terms *member* and *voting member* are defined separately in this clause. All members except the CEO will be voting members.

## **PART 2 – ESTABLISHMENT AND FUNCTIONS OF SAFE WORK AUSTRALIA**

### **Clause 5 – Establishment**

6. This clause provides for the establishment of SWA.

### **Clause 6 – Functions**

7. The functions of SWA are set out in this clause.

#### **Item 1**

One of SWA's primary functions will be to develop national policy relating to OHS and workers' compensation. National policy developed by SWA will be used to drive harmonisation initiatives, such as: the adoption and implementation of model OHS legislation and consistent enforcement and compliance strategies; and the harmonisation of workers' compensation arrangements across the Commonwealth, the States and the Territories.

#### **Item 2 & 3**

SWA will be required to prepare a model Act, model Regulations and model codes of practice relating to OHS, for adoption nationally. The Ministerial Council will have responsibility for approving the model legislation and model codes of practice. Where the Ministerial Council refuses to approve the model legislation, or where the Ministerial Council agrees to an amendment proposed by any Party to the IGA, SWA will need to revise the model legislation in a form that is likely to be approved by the Ministerial Council. Approval by the Ministerial Council will help ensure that the model legislation is adopted by all jurisdictions and that it remains nationally uniform over time.

#### **Item 4**

SWA will also be empowered to prepare (and revise where necessary) other material relating to OHS not covered by items 2 and 3.

#### **Item 5**

SWA will be required to develop a policy dealing with compliance and enforcement of the Australian laws that adopt the approved model OHS legislation. The purpose of this policy is to ensure that a nationally consistent approach is taken to compliance and enforcement of the Australian laws that adopt the approved model OHS legislation.

#### **Item 6**

SWA will be required to monitor the adoption by the Commonwealth, the States and Territories of the approved model OHS legislation, approved model OHS codes of practice and the implementation of the approved OHS compliance and enforcement policy, and report to the Ministerial Council (see item 12).

#### **Items 7 & 8**

SWA will be empowered to collect, analyse and publish data or other information and to conduct and publish research relating to OHS and workers' compensation. This will ensure that SWA has up to date, relevant and industry specific information in which to inform the development or evaluation of policies in relation to those matters. It will also

ensure that information is available to jurisdictions, industries or other groups who wish to use the information to benchmark or improve their OHS performance.

**Item 9**

SWA will be required to continue the work of its predecessors, the ASCC and the National Occupational Health and Safety Commission (NOHSC), in relation to the National OHS Strategy 2002-2012 as amended from time to time. SWA will be required to revise and further develop the National OHS Strategy 2002-2012. Each year SWA will report to the Ministerial Council on the National OHS Strategy.

**Item 10**

SWA will be empowered to develop and promote national strategies to raise awareness of OHS and workers' compensation.

**Item 11**

In addition to its OHS functions, SWA will also be required to develop proposals relating to the harmonisation of workers' compensation arrangements across the Commonwealth, the States and the Territories and proposals relating to national workers' compensation arrangements for employers with workers in more than one jurisdiction.

**Item 12**

SWA will be required to advise the Ministerial Council on matters relating to OHS or workers' compensation.

**Item 13**

SWA will be empowered to liaise with other countries or international organisations on matters relating to OHS or workers' compensation.

**Item 14**

This item allows for other functions to be conferred on SWA by or under the proposed Act or any other law of the Commonwealth. For example, additional functions may be conferred by regulations made under the proposed Act.

**Clause 7 – Performance of functions**

8. This clause requires SWA to perform its functions in accordance with its strategic and operational plans and permits SWA to consult with governments, government bodies, representatives of workers and employers and other interested people, bodies and organisations.

**Clause 8 – Immunities and privileges**

9. SWA will form part of the Commonwealth. This clause provides for SWA to have the privileges and immunities of the Crown in the right of the Commonwealth. This ensures that SWA falls within the 'shield of the Crown'. The effect of this clause is to ensure that SWA is not liable for an offence for which the Commonwealth could not be prosecuted.

## **PART 3 – MEMBERSHIP OF SAFE WORK AUSTRALIA**

### **Division 1 – What this Part is about**

#### **Clause 9 – What this Part is about**

10. This clause provides a brief outline of Part 3 which deals with SWA's membership.
- Division 2 deals with the constitution of SWA and the appointment of members other than the CEO. Provisions relating to the appointment of the CEO are contained in Part 6.
  - Division 3 deals with the terms and conditions on which members (other than the CEO) are appointed.

### **Division 2 – Membership and appointment**

#### **Clause 10 – Membership of Safe Work Australia**

11. Clause 10 provides for the membership of SWA. Like its predecessors, ASCC and NOHSC, SWA will have tripartite membership. SWA will consist of representatives of the Commonwealth, State and Territory Governments as well as members who represent the interests of workers and employers in Australia. SWA will be a representative rather than an expert body. The importance of having a representative body is also reflected in this clause by the stipulation that SWA needs to have at least two-thirds of its voting membership in place in order to perform its functions.

#### **Clause 11 – Appointment of the Chair**

12. This clause permits the Minister, in consultation with the Ministerial Council, to appoint a Chair. The period of appointment of the Chair is dealt with in clause 17, and is for up to three years on a part time basis.
13. The Chair is eligible for reappointment as provided for under the generic provisions dealing with reappointment contained in subsection 33(4A) of the *Acts Interpretation Act 1901*. The note alerts the reader to the fact that the Chair may be reappointed, and that there is no requirement to contain a specific provision dealing with re-appoint in the clause.

#### **Clause 12 – Appointment of acting Chair**

14. This clause permits the Minister, in consultation with the Ministerial Council, to appoint an acting Chair when there is no Chair or if the Chair is absent from duty, overseas or unable to perform his or her duties.
15. The note alerts the reader to section 33A of the *Acts Interpretation Act 1901*. This section provides that where an Act confers a power to make appointments to an office, that power shall, unless the contrary intention appears, include a power to appoint a person to act in the office. The section also provides that the maximum term of the acting appointment is 12 months.



16. This clause also provides that the actions of an acting Chair would not be invalid merely because of technical or other grounds relating to the person's appointment. This will provide certainty and stability and will ensure that an acting Chair is accountable for his or her actions.

### **Clause 13 – Appointment of the Commonwealth representative**

17. This clause permits the Minister to appoint a voting member to represent the Commonwealth.
18. The note alerts the reader to the fact that the Commonwealth's representative may be reappointed as provided for under the generic provisions dealing with reappointment contained in subsection 33(4A) of the *Acts Interpretation Act 1901*. Accordingly, there is no requirement to have a specific provision dealing with reappointment in the clause.

### **Clause 14 – Appointment of each State and Territory representative**

19. This clause permits the Minister to appoint a person nominated by a State or a Territory to be a voting member of SWA to represent that State or Territory. The Minister is not required to appoint a particular person nominated by a State or Territory. However, if the Minister decides not to appoint a particular person nominated by a State or Territory, the State or Territory may nominate another person.
20. The note alerts the reader to the fact that the representatives of the States and Territories may be reappointed as provided for under the generic provisions dealing with reappointment contained in subsection 33(4A) of the *Acts Interpretation Act 1901*. Accordingly, there is no requirement to have a specific provision dealing with reappointment in the clause.

### **Clause 15 – Appointment of workers' representatives**

21. This clause permits the Minister to appoint a person to SWA who represents workers in Australia. A person can only be nominated by a body authorised by the Minister. An authorised body is one the Minister considers represents the interests of workers in Australia.
22. If the Minister decides not to appoint a person nominated by an authorised body, another person may be nominated for that appointment by the same or another authorised body. The Minister is not restricted in the number of times he or she may decline a nomination.
23. The note alerts the reader to the fact that the workers' representatives may be reappointed as provided for under the generic provisions dealing with reappointment contained in subsection 33(4A) of the *Acts Interpretation Act 1901*. Accordingly, there is no requirement to have a specific provision dealing with reappointment in the clause.

### **Clause 16 – Appointment of employers’ representatives**

24. This clause permits the Minister to appoint a person to SWA who represents employers in Australia. A person can only be nominated by a body authorised by the Minister. An authorised body is one the Minister considers represents the interests of employers in Australia.
25. If the Minister decides not to appoint a person nominated by an authorised body, another person may be nominated for that appointment by the same or another authorised body. The Minister is not restricted in the number of times he or she may decline a nomination.
26. The note alerts the reader to the fact that the employers’ representatives may be reappointed as provided for under the generic provisions dealing with reappointment contained in subsection 33(4A) of the *Acts Interpretation Act 1901*. Accordingly, there is no requirement to have a specific provision dealing with reappointment in the clause.

### **Division 3 – Terms and conditions of voting members**

27. This Division deals with the terms and conditions of voting members.
  - Subdivision A deals with terms and conditions that apply to all voting members
  - Subdivision B deals with terms and conditions that apply only to the Chair
  - Subdivision C deals with terms and conditions that apply only to voting members other than the Chair.

### **Subdivision A – Terms and conditions that apply to all voting members**

#### **Clause 17 – Basis and period of appointment of all voting members**

28. This clause provides that a voting member holds office for up to three years on a part time basis.
29. Voting members are eligible for reappointment. Generic provisions dealing with reappointment are contained in subsection 33(4A) of the *Acts Interpretation Act 1901*.

#### **Clause 18 – Disclosure of interests to the Minister**

30. This clause requires a voting member to disclose any pecuniary or other interests that the member has or acquires that conflict or could conflict with the proper performance of the member’s functions. Failure to do so may result in the termination of the appointment (see clause 20).

#### **Clause 19 – Resignation of voting members**

31. This clause permits a voting member to resign from his or her appointment. The resignation takes effect when it is received by the Minister or, if the resignation specifies a later date, that later date.

## **Clause 20 – Termination of appointment of voting members**

32. This clause specifies the circumstances in which the Minister may terminate a voting members' appointment.
33. Subclause 20(1) provides that the Minister may terminate a voting member's appointment where the member misbehaves or where the member is unable to perform the duties of his or her office because of physical or mental incapacity.
34. Subclause 20(2) permits the Minister to terminate a voting member's appointment for bankruptcy, unapproved absenteeism or a failure to disclose interests to the Minister or SWA.
35. Subclause 20(3) requires the Minister to terminate the appointment of a voting member where the body that nominated that member requests the Minister in writing to terminate that appointment.

## **Subdivision B – Terms and conditions that apply only to the Chair**

### **Clause 21 – Remuneration of the Chair**

36. This clause deals with arrangements for payment of the Chair's remuneration. As a non-representative member of SWA, the Chair is the only voting member of SWA for whom independent remuneration arrangements will be provided. Other voting members of SWA will not be remunerated under the Act or the *Remuneration Tribunal Act 1973* (see clause 25).
37. This clause provides that the Chair will be paid remuneration determined by the Remuneration Tribunal or if there is no such determination, then the Chair is to be paid such remuneration that is prescribed by the regulations. But this clause is subject to the *Remuneration Tribunal Act 1973*.
38. Under the *Remuneration Tribunal Act 1973* the Remuneration Tribunal can determine:
  - remuneration (which includes annual allowances but not travelling allowances), and extends to remuneration payable on other than an annual basis (e.g. daily sitting fees); and
  - any matter that is significantly related to remuneration. This power has been taken to extend to allowances such as travelling allowances (but not annual allowances).
39. The Remuneration Tribunal is not obliged to make such determinations, which is why subclause 21(2) allows for the prescribing of allowances in regulations.
40. If the Tribunal does determine allowances of the kinds covered by subclause 21(2), subclause 21(3) will ensure that the Tribunal's determination prevails over any regulations made for the purpose of subclause 21(2).

**Clause 22 – Leave of absence of the Chair**

41. This clause provides that the Chair may be granted leave on terms and conditions as determined by the Minister. The Remuneration Tribunal does not determine leave entitlements for part-time appointees.

**Clause 23 – Other terms and conditions of the Chair**

42. This clause permits the Minister to determine the terms and conditions of the Chair's office that are not otherwise provided for in the proposed Act.

**Subdivision C – Terms and conditions etc. that apply only to other voting members**

**Clause 24 – Leave of absence of other voting members**

43. This clause permits the Chair to grant leave to any other voting member.

**Clause 25 – Application of the Remuneration Tribunal Act**

44. This clause provides that the office of a voting member, other than the Chair, is not a public office within the meaning of the *Remuneration Tribunal Act 1973*. This ensures that the Remuneration Tribunal cannot determine remuneration and other terms and conditions of the representative members of SWA. Representative members will be remunerated by the governments or bodies which they represent.

## **PART 4 – PLANNING BY SAFE WORK AUSTRALIA**

### **Division 1 – What this Part is about**

#### **Clause 26**

45. This clause provides a brief outline of Part 4 which deals with SWA's strategic and operational plans. The strategic and operational plans are the primary mechanism by which the Ministerial Council can direct and oversight the work of SWA.
- Division 2 deals with the preparation and approval of SWA's 3 year strategic plan
  - Division 3 deals with the preparation and approval of SWA's annual operational plan
  - Division 4 deals with the alteration of SWA's strategic and operational plans.

### **Division 2 – Strategic plan of Safe Work Australia**

#### **Clause 27 – Safe Work Australia to prepare a draft strategic plan**

46. This clause requires SWA to prepare and deliver a draft strategic plan to the Ministerial Council at least once every three years that covers the next three years. This draft will deal only with the outcomes to be achieved by SWA and the strategies that are to be followed by SWA in achieving those outcomes. The draft strategic plan will not deal with the allocation of resources for the performance of SWA's functions as these are matters for the CEO and required to be performed in accordance with the Commonwealth's financial management framework.
47. The Safe Work Australia (Consequential and Transitional Provisions) Bill will contain special provisions in relation to SWA's first strategic plan.

#### **Clause 28 – Approval of draft strategic plan**

48. This clause sets out the arrangements for approval of the draft plan by the Ministerial Council. The clause makes clear that the Ministerial Council must either approve or refuse the draft plan. Where the Ministerial Council refuses to approve the plan, the Ministerial Council is required to direct SWA to make specified alterations to the plan and to provide the Ministerial Council with the altered plan within the period specified in the direction. However, any such direction may only specify an alteration to the draft plan in relation to outcomes and strategies. The Ministerial Council cannot direct SWA in relation to the allocation of SWA's resources. The allocation of resources is a management issue for SWA's CEO and required to be performed in accordance with the Commonwealth's financial management framework.
49. SWA is required to comply with any direction from the Ministerial Council. The Ministerial Council is required to approve a draft plan that has been altered in accordance with its directions. Where the draft plan has not been altered in accordance with a direction from the Ministerial Council, the Ministerial Council may refuse to approve the altered draft plan.
50. Once approved by the Ministerial Council, the draft plan becomes SWA's plan for the three year period it covers. SWA must publish its strategic plan. However, the form and method of publication is a matter for SWA.

51. This clause contains notes that refer to section 69 which provides that approvals, refusals or directions of the Ministerial Council are given by resolution of the Council.
52. This clause also provides that any written direction, approval or a refusal of the Ministerial Council is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (LI Act). This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the LI Act.

### **Division 3 – Operational plan of Safe Work Australia**

#### **Clause 29 – Safe Work Australia to prepare a draft operational plan**

53. This clause requires SWA to prepare and provide to the Ministerial Council a draft operational plan before the start of each financial year. The draft must not be inconsistent with SWA's strategic plan and must only deal with the activities that are to be undertaken by SWA in performing its functions during the financial year and SWA's total amount of expenditure for the financial year. The draft plan must not deal with the allocation of resources for the performance of SWA's functions or be inconsistent with the strategic plan.
54. The Safe Work Australia (Consequential and Transitional Provisions) Bill will contain special provisions in relation to SWA's first operational plan.

#### **Clause 30 – Approval of draft operational plan**

55. This clause sets out the arrangements for approval of the draft operational plan by the Ministerial Council. The clause makes clear that the Ministerial Council must either approve or refuse the draft plan. Where it refuses to approve the plan, the Ministerial Council is required to direct SWA to make specified alterations to the plan and to provide the Ministerial Council with the altered plan within the period specified in the direction.
56. Directions by the Ministerial Council must not be inconsistent with SWA's strategic plan and can only relate to the activities to be undertaken by SWA in that financial year and SWA's total amount of expenditure for that year. As is the case with the strategic plan, the Ministerial Council cannot direct SWA in relation to the allocation of SWA's resources. The allocation of resources is a management issue for SWA's CEO and required to be performed in accordance with the Commonwealth's financial management framework.
57. SWA is required to comply with any direction from the Ministerial Council. The Ministerial Council is required to approve a draft plan that has been altered in accordance with its directions. Where the draft plan has not been altered in accordance with the direction from the Ministerial Council, the Ministerial Council may refuse to approve the altered draft plan.
58. Once approved by the Ministerial Council, the draft plan or altered draft plan, becomes SWA's operational plan for the financial year it covers. SWA must publish its operational plan. However, the form and method of publication is a matter for SWA.

59. This clause contains notes that refer to section 69 which provides that approvals, refusals or directions of the Ministerial Council are given by resolution of the Council.
60. This clause also provides that any written direction, approval or refusal of the Ministerial Council is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (LI Act). This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the LI Act.

#### **Division 4 – Ministerial Council’s directions to alter strategic or operational plans**

##### **Clause 31 – Ministerial Council’s directions to alter strategic plan**

61. This clause provides that the Ministerial Council may direct SWA to make specified alterations to its strategic plan and to give the altered plan to the Council within the period specified in the direction.
62. In keeping with clause 28, the Ministerial Council’s directions to amend the plan may only specify an alteration to the plan about the outcomes to be achieved by SWA or the strategies to be followed by SWA in achieving those outcomes. The direction must not be inconsistent with SWA’s strategic plan and must not specify an alteration dealing with the allocation of resources. The allocation of resources is a management issue for SWA’s CEO and required to be performed in accordance with the Commonwealth’s financial management framework.
63. SWA is required to comply with any direction from the Ministerial Council.
64. This clause requires the Ministerial Council to approve the alterations to the plan if the plan as altered is given to the Ministerial Council and the alterations are in accordance with the direction. The Ministerial Council may refuse to approve the alterations where the alterations to the plan are not in accordance with the direction.
65. Once the alterations are approved, the plan as altered becomes SWA’s strategic plan for the 3 year period it covers. SWA will be required to publish its altered strategic plan in any form and manner it considers appropriate.
66. This clause contains notes that refer to section 69 which provides that approvals, refusals or directions of the Ministerial Council are given by resolution of the Council.
67. This clause also provides that any written direction or approval of the Ministerial Council is not a legislative instrument within the meaning of section 5 the *Legislative Instruments Act 2003* (LI Act). This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the LI Act.

##### **Clause 32 – Ministerial Council’s directions to alter operational plan**

68. This clause provides that, the Ministerial Council may direct SWA to make specified alterations to its operational plan for a financial year and to give the altered plan to the Council within the period specified in the direction.

69. In keeping with clause 30, the Ministerial Council's directions to amend the operational plan may only specify an alteration to the plan about the activities that are to be undertaken by SWA in performing its functions during the year or SWA's total amount of expenditure for the year. The direction must not specify an alteration dealing with the allocation of resources. The allocation of resources is a management issue for SWA's CEO and required to be performed in accordance with the Commonwealth's financial management framework.
70. SWA is required to comply with any direction from the Ministerial Council.
71. This clause requires the Ministerial Council to approve the alterations to the operational plan if the plan, as altered, is given to the Ministerial Council and the alterations are in accordance with the direction. The Ministerial Council may refuse to approve the alterations where the alterations to the operational plan are not in accordance with the direction.
72. Once the alterations are approved, the plan, as altered, becomes SWA's operational plan for the financial year period it covers. SWA will be required to publish its altered operational plan in any form and manner it considers appropriate.
73. This clause contains notes that refer to section 69 which provides that approvals, refusals or directions of the Ministerial Council are given by resolution of the Council.
74. This clause also provides that any written direction or approval of the Ministerial Council is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (LI Act). This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the LI Act.



## **PART 5 – DECISION-MAKING BY SAFE WORK AUSTRALIA**

### **Division 1 – What this Part is about**

#### **Clause 33 – What this Part is about**

75. This clause provides a brief outline of Part 5 which deals with how SWA makes decisions.
- Division 2 deals with how SWA makes decisions at meetings. It contains general rules on how the meetings are to be run and special rules that apply for decisions relating to the model legislation and model codes of practice
  - Division 3 deals with how SWA can make decisions without meeting.

### **Division 2 – Meetings of Safe Work Australia**

#### **Clause 34 – Holding of meetings**

76. This clause provides that SWA is to hold such meetings as are necessary for the performance of its functions. The Chair may convene a meeting at any time but must convene at least 3 meetings in each financial year.
77. The Safe Work Australia (Consequential and Transitional Provisions) Bill will contain special provisions in relation to meetings of SWA in its first year of operations.

#### **Clause 35 – Presiding at meetings**

78. This clause provides for the Chair to preside at all meetings at which he or she is present. But if he or she is not present the voting member nominated by the Commonwealth is to preside. Where both the Chair and Commonwealth representative are absent, the other voting members present must appoint one of themselves to preside.

#### **Clause 36 – Substitution of voting members at meetings**

79. This clause permits a voting member (other than the Chair) who is unable to attend a meeting to authorise another person to be a substitute for the member at a meeting. However, a voting member must seek the Chair's prior agreement, in writing, to the substitution and the Chair must agree, in writing, to the substitution. Upon agreement, the substitute is to be treated, for the purposes of that meeting, as if he or she were the member.
80. This clause provides for flexibility in circumstances where voting members may be unable to attend meetings. This flexibility is important in view of the voting rules contained in clause 38.

#### **Clause 37 – Quorum at meetings**

81. This clause sets out the quorum rules for meetings of SWA. Except when SWA is considering model OHS legislation or model OHS codes of practice, a quorum is constituted by a majority of the voting members present at a meeting of SWA. This requirement is subject to an exception in the situation where a voting member discloses a

conflict of interest in relation to a particular matter, is prevented by operation of clause 40 from participating in the deliberations or decisions of SWA and subsequently leaves the meeting. In this situation subclause 37(2) permits the remaining voting members at the meeting to constitute a quorum for the purpose of any deliberation or decision at that meeting in relation to that matter.

82. However, different quorum requirements apply when SWA is considering model OHS legislation or model OHS codes of practice. Any decisions concerning model OHS legislation or model OHS codes of practice must be made by an absolute majority of all the voting members representing the Commonwealth, States and Territories – see subclause 38(2). Accordingly, subclause 37(3) makes it clear that when considering model OHS legislation or model codes of practice, the quorum requirements must include a majority of the voting members representing the Commonwealth, States and Territories.
83. This clause includes a note that the voting members referred to in paragraphs 10(1)(b) and (c) represent the Commonwealth, the States and the Territories.

#### **Clause 38 – Decisions at meetings etc**

84. This clause provides for a two-thirds majority of the votes of the voting members present and voting to determine a question at a meeting other than a question relating to the model OHS legislation or model OHS codes of practice.
85. However, any decisions concerning model OHS legislation and model OHS codes of practice must be made by an absolute majority of all the voting members representing the Commonwealth, States and Territories.
86. This clause includes a note that the voting members referred to in paragraphs 10(1)(b) and (c) represent the Commonwealth, the States and the Territories.

#### **Clause 39 – Conduct of meetings**

87. This clause permits SWA to regulate proceedings at its meetings as it considers appropriate, subject to any requirements contained in the proposed Act, such as the quorum requirements provided for in clause 37 or the voting requirements contained in clause 38. As indicated in the note, section 33B of the *Acts Interpretation Act 1901* provides for participation in meetings by telephone etc.

#### **Clause 40 – Disclosure of interests to Safe Work Australia**

88. This clause requires all members (including the CEO and substitute members) to disclose any pecuniary or other interest in matters under consideration by SWA. The member must disclose their interest as soon as possible after the relevant facts have come to the member's knowledge. The member must disclose the interest to a meeting of SWA and the disclosure must be recorded in the minutes.

89. Unless SWA decides otherwise, the member must not be present during any deliberation by SWA on the matter and must not take part in any decision on the matter. In addition, the member must not be present during any discussions concerning the question of whether he or she should be allowed to attend the meeting where the matter he or she has an interest in will be discussed.
90. However, this requirement does not apply to any decision with respect to the model OHS legislation or model OHS codes of practice. This ensures that the requirements of an absolute majority of the Commonwealth, States and Territories – as provided for by subclause 38(2) – are not undermined by ‘conflicting out’ those members.

#### **Clause 41 – Minutes**

91. Clause 41 requires SWA to keep minutes of its meetings.

#### **Division 3 – Decisions without meetings**

##### **Clause 42 – Decisions without meetings**

92. This clause provides that SWA may agree that it may make decisions without holding a meeting. If SWA decides to make decisions without holding a meeting, it must determine the method by which voting members are to communicate their agreement with the proposed decisions.
93. For such decisions to be effective, a two-thirds majority of the voting members must indicate their agreement with the proposed decision and that agreement must be indicated in accordance with the method previously agreed by SWA. Also, all voting members must have been informed of the proposed decision or reasonable efforts must have been made to inform all the voting members of the proposed decision.
94. Subclause 42(2) imposes an additional requirement for decisions relating to the model OHS legislation or model OHS codes of practice. A majority of the votes of all voting members who represent the Commonwealth, States and Territories must indicate their agreement with the decision for the decision to be effective.
95. Subclause 42(4) provides that a voting member is not entitled to vote on the matter if he or she would not have been entitled to vote on the matter at a meeting. This ensures that the requirements of clause 40 apply when matters are being considered by SWA without meeting.
96. SWA is also required to keep a record of any decision made without a meeting.

## **PART 6 – THE CEO, STAFF AND COMMITTEES OF SAFE WORK AUSTRALIA, AND OTHERS ASSISTING**

### **Division 1 – What this Part is about**

#### **Clause 43 – What this Part is about**

97. This clause provides a brief outline of Part 6 which deals with SWA's CEO, its staff, its committees and others who assist it to perform its functions.
- Division 2 sets out the CEO's functions and terms and conditions of appointment
  - Division 3 contains provisions about SWA's staff, its committees and others. These provisions make it clear that the Commonwealth, States and Territories can make people available to assist SWA to perform its functions.

### **Division 2 – The CEO of Safe Work Australia**

#### **Subdivision A – Functions of the CEO**

#### **Clause 44 – The CEO**

98. This clause specifies that there is to be a CEO of SWA.

#### **Clause 45 – Functions of the CEO**

99. This clause sets out the functions of the CEO. The CEO will be responsible for managing the day-to-day administration of SWA and assisting SWA in the performance of its functions.
100. The CEO will be required to perform his or her functions in accordance with SWA's strategic and operational plans except where:
- to do so would be inconsistent with a direction given by the Minister under clause 46 or the CEO's responsibilities under the *Financial Management and Accountability Act 1997*; or
  - the plans relate to the CEO's exercise of powers under the *Public Service Act 1999* in relation to SWA.
101. The CEO will be subject to the direction from both the Minister (clause 46) and SWA (clause 48).

#### **Clause 46 – Directions from the Minister**

102. This clause permits the Minister to give general directions to the CEO about the performance of the CEO's functions and to direct the provision of a report or advice on a matter relating to SWA's functions. The CEO is required to comply with any such direction. This provision is consistent with SWA being established as a Commonwealth statutory authority for which the Minister will be responsible to the Commonwealth Parliament. However, the CEO is not required to comply with any such direction to the extent that the direction relates to the CEO's exercise of powers under the *Public Service Act 1999* in relation to SWA.

103. For the sake of transparency, the clause provides that the written directions given by the Minister are legislative instruments for the purposes of the *Legislative Instruments Act 2003*. This provision has substantive operation as such directions would not ordinarily be legislative instruments. The effect of this provision is that any such directions will be required to be lodged on the Federal Register of Legislative Instruments and tabled in Parliament. However, as explained in the two notes, the directions will not be subject to disallowance or the sunset provisions of the *Legislative Instruments Act 2003*.

#### **Clause 47 – CEO to keep the Minister informed**

104. This clause requires the CEO to keep the Minister informed of SWA's progress in the performance of its functions.

#### **Clause 48 – Directions from SWA**

105. This clause permits SWA to direct the CEO about the performance of the CEO's functions in assisting SWA and to provide a report or advice on a matter relating to SWA's functions. The CEO is required to comply with any such direction except where:
- the direction is inconsistent with SWA's strategic or operational plans;
  - the direction deals with the allocation of resources for the performance of SWA's functions. These are matters for the CEO and required to be performed in accordance with the Commonwealth's financial management framework;
  - the direction relates to the CEO's performance of functions or exercise of powers under the *Public Service Act 1999* in relation to SWA; or
  - to do so would be inconsistent with a direction of the Minister under clause 46 or with the CEO's performance of functions or exercise of powers under the *Financial Management and Accountability Act 1997* in relation to SWA.
106. Subclause 48(4) provides that any written direction from SWA is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the *Legislative Instruments Act 2003*.

#### **Clause 49 – CEO to keep SWA informed**

107. This clause requires the CEO to keep SWA informed of progress on its operational plan.

#### **Subdivision B – Appointment of the CEO**

##### **Clause 50 – Appointment of CEO**

108. This clause provides that the CEO is to be appointed by the Minister on a full-time basis for up to 5 years.
109. The note alerts the reader to the fact that the CEO may be reappointed as provided for under the generic provisions dealing with reappointment contained in subsection 33(4A) of the *Acts Interpretation Act 1901*. Accordingly, there is no requirement to have a specific provision dealing with reappointment in the clause.

### **Clause 51 – Appointment of Acting CEO**

110. This clause permits the Minister to appoint a person to act as the CEO, when there is no CEO or if the CEO is absent from duty or overseas or unable to perform his or her duties. This clause also provides that anything done by a person acting as the CEO would not be invalid merely because of technical or other grounds relating to the person's appointment.
111. The note alerts the reader to section 33A of the *Acts Interpretation Act 1901*. This section provides that where an Act confers a power to make appointments to an office, that power shall, unless the contrary intention appears, include a power to appoint a person to act in the office. The section also provides that the maximum term of the acting appointment is 12 months.

### **Subdivision C – Terms and conditions of the CEO**

#### **Clause 52 – Remuneration of the CEO**

112. This clause deals with arrangements for the CEO's remuneration. This clause provides that the CEO will be paid remuneration as determined by the Remuneration Tribunal or, if there is no such determination, the CEO is to be paid such remuneration that is prescribed by the regulations. But this clause is subject to the *Remuneration Tribunal Act 1973*.
113. Under the *Remuneration Tribunal Act 1973* the Remuneration Tribunal can determine:
- remuneration (which includes annual allowances but not travelling allowances), and extends to remuneration payable on other than an annual basis (e.g. daily sitting fees); and
  - any matter that is significantly related to remuneration. This power has been taken to extend to allowances such as travelling allowances (but not annual allowances).
114. The Remuneration Tribunal is not obliged to make such determinations, which is why subclause 52(2) allows for the prescribing of allowances in regulations.
115. If the Tribunal does determine allowances of the kinds covered by subclause 52(2), subclause 52(3) will ensure that the Tribunal's determination prevails over any regulations made for the purpose of subclause 52(2).

#### **Clause 53 – Leave of Absence of the CEO**

116. This clause provides that the CEO will have recreation leave entitlements as determined by the Remuneration Tribunal. The clause also permits the Minister to grant leave of absence, other than recreation leave, to the CEO on terms and conditions determined by the Minister. The Remuneration Tribunal does not determine other leave entitlements.

### **Clause 54 – Other employment of the CEO**

117. This clause requires the CEO not to engage in paid employment outside the duties of his or her office without the Minister's consent. This is to ensure that any such employment does not compromise the performance of his or her full time duties. The CEO's appointment may be terminated if he or she engages in paid employment outside the duties of his or her office without the Minister's approval (see clause 57).

### **Clause 55 – Disclosure of interests to the Minister**

118. This clause requires the CEO to give written notice to the Minister of any pecuniary or other interest that conflict or could conflict with the performance of the CEO's functions. Failure to do so may result in the termination of the CEO's appointment (see clause 57).

### **Clause 56 – Resignation of the CEO**

119. This clause provides that a CEO may resign his or her appointment by writing to the Minister. The resignation takes effect when it is received by the Minister or, if the resignation specifies a later date, that later date.

### **Clause 57 – Termination of appointment of the CEO**

120. This clause specifies the circumstances in which the Minister may terminate the CEO's appointment.
121. Subclause 57(1) provides that the Minister may terminate the CEO's appointment for misbehaviour or where the CEO is unable to perform the duties of his or her office because of physical or mental incapacity.
122. Subclause 57(2) permits the Minister to terminate the CEO's appointment for bankruptcy, unapproved absenteeism, engagement in unauthorised outside employment or a failure to disclose interests to the Minister or SWA.
123. The Minister may also terminate the appointment of the CEO on the basis of unsatisfactory performance.

### **Clause 58 – Other terms and conditions of the CEO**

124. This clause provides for the Minister to determine the terms and conditions of the CEO that are not otherwise provided for in the proposed Act.

## **Division 3 – Staff and committees of Safe Work Australia, and others assisting it**

### **Subdivision A – Staff of Safe Work Australia**

#### **Clause 59 – Staff of Safe Work Australia**

125. This clause provides that the staff of SWA must be engaged under the *Public Service Act 1999*.

126. Those staff and the CEO constitute a Statutory Agency for the purposes of the *Public Service Act 1999* and the CEO is the head of that Statutory Agency.

### **Subdivision B – Committees of Safe Work Australia**

#### **Clause 60 – Committees of Safe Work Australia**

127. This clause provides that SWA may constitute committees comprising members and/or other persons to assist it. SWA decides the procedures under which a committee is to operate. A Committee must provide SWA with such reports, documents and information in relation to the Committee's functions as the Chair requests.
128. The terms and conditions of committee members have not been expressly provided for in this clause but will be set by the CEO, as the CEO will be responsible for managing SWA's resources. It is anticipated that, where necessary, committee operations will be funded from the SWA Special Account. Subclause 66(2) permits payments from the SWA Special Account for such purposes.

### **Subdivision C – Others assisting Safe Work Australia**

#### **Clause 61 – Persons assisting Safe Work Australia**

129. This clause allows for the Commonwealth, States and Territories to make people available to assist SWA. It provides that SWA may be assisted by employees of Agencies within the meaning of the *Public Service Act 1999* or by officers and employees of a State or Territory or by officers and employees of authorities of the Commonwealth, a State or Territory.

#### **Clause 62 – Consultants**

130. This clause allows the CEO, on behalf of the Commonwealth, to engage consultants to assist in the performance of SWA's functions.



## **PART 7 – THE SAFE WORK AUSTRALIA SPECIAL ACCOUNT**

### **Clause 63 – What this Part is about**

131. This clause provides a brief outline of Part 7 which deals with the funding of SWA.

### **Clause 64 – The Safe Work Australia Special Account**

132. This clause sets up a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.
133. Special Accounts provide a mechanism for recording moneys set aside for a particular purpose – in this case, contributions made by the Commonwealth, the States and the Territories pursuant to the provisions of the IGA. Under the *Financial Management and Accountability Act 1997*, the money will remain in the Consolidated Revenue Fund (CRF) until it is spent. Section 21 of that Act allows amounts to be paid out of the CRF and debited to a Special Account established by another Act. Subsection 21(1) provides a standing appropriation of the CRF to enable payments to be made for the purposes of a Special Account.

### **Clause 65 – Credits to the Account**

134. Amounts must be credited to the account from money paid by States or Territories to the Commonwealth in accordance with the IGA, and money that the Commonwealth agrees to allocate in accordance with the IGA. The account may also be credited with any other amounts that are paid by a State or Territory to the Commonwealth or allocated by the Commonwealth for the purposes of SWA's functions. Gifts or other bequests may be made also for the purposes of the Account.
135. The note to this clause provides that an Appropriation Act may contain a provision to the effect that if any of the purposes of the Special Account is a purpose that is covered by an item in the Appropriation Act, whether or not the item expressly refers to the Special Account, then amounts may be debited against the appropriation for that item and credited to that Special Account.

### **Clause 66 –Purposes of the Account**

136. Clause 66 provides that the funds in the Account may be expended for the payment or discharge of the costs, expenses and other obligations incurred by the Commonwealth in the performance of SWA's functions, in payment of any remuneration and allowances payable to any person under this Act and meeting the expenses of administering the Account.

## **PART 8 – MISCELLANEOUS**

### **Clause 67 – Delegation by Safe Work Australia**

137. This clause permits SWA to delegate any or all of its functions or powers under the proposed Act to a member and an SES, or acting SES, employee of the staff of SWA.

### **Clause 68 – Delegation by the CEO of Safe Work Australia**

138. This clause permits the CEO to delegate any or all of his or her functions or powers under the proposed Act to an SES, or acting SES, employee of the staff of SWA.

### **Clause 69 – How Ministerial Council is to give directions etc.**

139. This clause provides for the manner in which the Ministerial Council may give a direction, an approval or a refusal for the purposes of a provision of the proposed Act. The Ministerial Council may do so by resolution of the Ministerial Council passed in accordance with the procedures determined by the Ministerial Council.

### **Clause 70 – Annual Report**

140. This clause requires the CEO to prepare and give the Minister, SWA and the Ministerial Council an annual report at the end of each financial year on SWA's operations during that year. The report must include financial statements as required by section 49 of the *Financial Management and Accountability Act 1997* and an audit report on those statements under section 57 of that FMA.

### **Clause 71 – Intergovernmental Agreement to be available on the Internet**

141. This clause requires the Minister to ensure that a copy of the Intergovernmental Agreement is available on the Department of Education, Employment and Workplace Relations website.

### **Clause 72 – Review of Safe Work Australia's role and functions**

142. This clause requires the Minister to arrange a review of SWA's ongoing role and functions to be conducted six years after the commencement of this clause and to be completed within 6 months. A written report must be prepared and a copy laid before each House of Parliament within 15 sitting days after the Minister receives the report.

### **Clause 73 – Regulations**

143. This clause enables the Governor-General to make regulations prescribing matters required or permitted by this proposed Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act.