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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**Work Health and Safety (Transitional and  
Consequential Provisions) Bill 2011**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of Senator the Hon Chris Evans, Minister for Tertiary Education,  
Skills, Jobs and Workplace Relations,)



## **WORK HEALTH AND SAFETY (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) BILL 2011**

### **OUTLINE**

The Work Health and Safety (Transitional and Consequential Provisions) Bill 2011 (the WHS (T&C) Bill) makes transitional and consequential provisions in relation to the new Commonwealth occupational health and safety (OHS) system set out in the Work Health and Safety Bill 2011 (the WHS Bill).

The WHS Bill will implement the Model Work Health and Safety Bill (the model Bill) within the Commonwealth jurisdiction and form part of a system of nationally harmonised OHS laws.

The Bill:

repeals the *Occupational Health and Safety Act 1991* (the OHS Act);

makes transitional provisions covering a range of matters where action of some kind may have commenced under the OHS Act before it was repealed or where breaches of that Act might have occurred before it was repealed; and

makes consequential amendments to the *Safety, Rehabilitation and Compensation Act 1988* and the *Social Security Act 1991* that arise from the WHS Bill.

### **FINANCIAL IMPACT STATEMENT**

A financial impact statement is provided in relation to the WHS Bill. No financial impact arises from this Bill separate from the impact of the WHS Bill.

### **REGULATION IMPACT STATEMENT**

A regulation impact statement is provided in relation to the WHS Bill. No regulation impact arises from this Bill separate from the impact of the WHS Bill.

## ABBREVIATIONS

The following abbreviations are used in this Explanatory Memorandum:

ADF	Australian Defence Force
Commission	Safety, Rehabilitation and Compensation Commission
HSR	Health and safety representative
OHS	occupational health and safety
OHS Act	<i>Occupational Health and Safety Act 1991</i>
SRC Act	<i>Safety, Rehabilitation and Compensation Act 1988</i>
WHS	Work health and safety
WHS Act	<i>Work Health and Safety Act 2011</i>
WHS Bill	Work Health and Safety Bill 2011
WHS inspector	Inspector appointed under Part 9 of the WHS Bill
WHS (T&C) Act	<i>Work Health and Safety (Transitional and Consequential) Act 2011</i>
WHS (T&C) Bill	Work Health and Safety (Transitional and Consequential) Bill 2011

## NOTES ON CLAUSES

### Part 1 – Preliminary

#### Clause 1 – Short title

This is a formal provision specifying the short title of the Act.

#### Clause 2 – Commencement

This clause specifies when the Act commences.

Whilst the Act itself will commence on the day of Royal Assent, the substantive parts of the Act, sections 3 and 4 and Schedules 1 to 4, will commence at the same time as the *Work Health and Safety Act 2011*, 1 January 2012.

#### Clause 3 – Definitions

This clause contains a number of definitions relevant to this Bill. The main ones being:

**commencing day** means 1 January 2012, which is the date the *Work Health and Safety Act 2011* is expected to commence.

**modifications** include additions, omissions and substitutions

**OHS Act** means the *Occupational Health and Safety Act 1991* and includes any instrument made under that Act.

For the purposes of this Bill, **plant**, **structure**, **substance** and **supply**, have the same meanings as in the OHS Act, where a provision of this Bill continues to apply duties to those items. Otherwise, in relation to duties imposed under the WHS Act, the items have the meanings given in that Act.

**residual operation of OHS Act** has the meaning given by Item 13 of Schedule 2 of this Bill.

**SRC Act** means the *Safety, Rehabilitation and Compensation Act 1988* and includes any instrument made under that Act.

**WHS Act** means the *Work Health and Safety Act 2011* and includes any instrument made under that Act.

#### Clause 4 – Regulations

This clause allows the Governor-General to make regulations to prescribe matters required or permitted by this Bill to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

**Schedule 1 – Repeal of the *Occupational Health and Safety Act 1991***

*Occupational Health and Safety Act 1991*

**Item 1 – The whole of the Act**

Item 1 repeals the OHS Act in its entirety. The OHS Act will be replaced by the *Work Health and Safety Act 2011*.

## **Schedule 2 – Transitional provisions**

Schedule 2 of the Bill includes provisions to deal with the transition from the OHS Act to the WHS Act and are based on principles developed and agreed to by Safe Work Australia as part of a coordinated approach to implementation.

### **Part 1 – Application generally**

#### **Item 1 – Application of OHS Act to certain breaches etc**

Subitem 1(1) provides that the OHS Act continues to apply to a breach, or alleged breach, of that Act which occurred before the day the WHS Act commenced. The relevant provisions in the OHS Act would also apply to any proceedings for breaches of the OHS Act.

In the case of continuing breaches, the OHS Act would not apply to actions or inactions to the extent that they occur on or after the day that the WHS Act commences. For example, if two days after commencement an inspector attends a workplace and discovers an unsafe piece of plant, the WHS Act would apply even though the plant may have been unsafe for 2 months and would have also constituted a breach of the OHS Act.

Subitem 1(2) however, would not apply where subitems 3(2), 4(2), 5(2), and 6(3) apply. These items are explained below and preserve the OHS Act in relation to specific duty holders and certain activities that had commenced prior to the commencement of the WHS Act for a transitional period.

### **Part 2 – Application of duties imposed under WHS Act**

#### **Item 2 – Duties of designers**

Subitem 2(1) provides that, subject to other provisions in the item, the duties imposed on a designer under section 22 of the WHS Act will not apply to design activities if the designer started or completed the design before the day that the WHS Act commenced.

Subitem 2(2) provides for the phasing in of the designer duties. If a designer has the benefit of an exemption because of subitem 2(1), but has not completed the design on the second anniversary of the day the WHS Act commences, then the designer must comply with the duties in the WHS Act.

Subitem 2(3) further limits the exception in subitem 2(1) and provides that where a designer carries out any calculations, analysis, testing, or examination to ensure that a product is safe the duties in paragraph 22(4)(b) of the WHS Act will apply. This means that the designer must provide certain information to any person who is given the design for use and must also provide this information on request from a person who is using, or will use, the design.

#### **Item 3 – Duties of manufacturers**

Item 3 sets out the way that the duties placed on manufacturers in the OHS Act and WHS Act will operate on and after commencement. Subitem 3(1) provides that, subject to other provisions in the item, the duties imposed on a manufacturer under section 23 of the WHS Act will not apply in relation to the manufacture of plant, substances or structures if the

manufacturer started or completed any process associated with the manufacture before the day that the WHS Act commenced.

Subitem 3(2) provides that where a process is exempt from the operation of the WHS Act because it was started (or started and completed) before commencement, the relevant provisions of the OHS Act will apply.

Subitem 3(3) clarifies that if a duty under the OHS Act applies because of subitem 3(2), then the OHS Act will apply in relation to any breach.

Subitem 3(4) provides for the phasing in of all of the new duties in section 23 of the WHS Act. If a manufacturer has the benefit of an exemption because of subitem 3(1), but has not completed the manufacture on the first anniversary of the day the WHS Act commences, then the manufacturer must comply with the duties in the WHS Act.

Subitem 3(5) further limits the exception in subitem 3(1) and provides that where a manufacturer carries out any calculations, analysis, testing, or examination to ensure that a product is safe the duties in 23(4)(b) and 23(5) of the WHS Act apply. This means that the manufacturer must provide certain information to any person who is provided with the product and must also provide this information on request from a person who is using, or will use, the product.

#### **Item 4 – Duties of importers**

Item 4 sets out the way that the duties placed on importers in the OHS Act and WHS Act will operate on and after commencement. The OHS Act deems importers to be manufacturers in certain circumstances and subject to the same duties in section 18 of the OHS Act (see section 18(3)).

Subitem 4(1) provides that, subject to other provisions in the item, the duties imposed on an importer under section 24 of the WHS Act will not apply in relation to the importation of any plant, substance or structure if the importer started or completed any steps in the importation before the day that the WHS Act commenced.

Subitem 4(2) provides that where a process is exempt from the operation of the WHS Act because it was started (or started and completed) before commencement, the relevant provisions of the OHS Act will apply.

Subitem 4(3) clarifies that if the OHS Act applies because of subitem 4(2), then the OHS Act applies in relation to any breach.

Subitem 4(4) provides for the phasing in of all of the importer duties. If an importer has the benefit of an exemption because of subitem 4(1), but has not completed the importation on the first anniversary of the day the WHS Act commences, then the importer must comply with the duties in the WHS Act.

Subitem 4(5) further limits the exception in subitem 4(1) and provides that where an importer carries out any calculations, analysis, testing, or examination to ensure that a product is safe the duties in 24(2)(b) and section 24(5) of the WHS Act will apply. This means that the importer must provide certain information to any person who is provided with the product and must also provide this information on request by a person who is using the product.



### **Item 5 – Duties of suppliers**

Item 5 sets out the way that the duties placed on suppliers in the OHS Act and WHS Act will operate on and after commencement. Subitem 5(1) provides that, subject to other provisions in the item, the duties imposed on a supplier under section 25 of the WHS Act will not apply in relation to the supply of plant, substances or structures if the supplier started (or started and completed) any process associated with the supply before the day that the WHS Act commenced.

Subitem 5(2) provides that where a process is exempt from the operation of the WHS Act because it was started (or started and finished) before the WHS Act commenced, the relevant provisions of the OHS Act will apply. In the case of suppliers and persons deemed to be suppliers under subsection 19(2) of the OHS Act, subitem 5(2) provides that section 19(1) applies. This section provides, in summary, that a supplier must ensure that plant and substances are safe for use, have been appropriately tested, and are accompanied by adequate information.

Subitem 5(3) clarifies that if the OHS Act applies because of subitem 5(2), then the OHS Act applies in relation to any breach.

Subitem 5(4) provides for the phasing in of all of the supplier duties. If a supplier has the benefit of an exemption because of subitem 5(1), but has not completed the supply on the first anniversary of the day the WHS Act commences, then the supplier must comply with the duties in the WHS Act.

Subitem 5(5) further limits the exception in subitem 5(1) and provides that where a supplier carries out any calculations, analysis, testing, or examination to ensure that a product is safe the duties in 25(4)(b) and 25(5) of the WHS Act would apply. This means that the supplier must provide adequate information to any person who is supplied with the product and must also provide this information on request from a person who is using, or will use, the product.

### **Item 6 – Duties of persons who install, construct or commission plant or structures**

Item 6 sets out the way that the duties of persons who install, construct or commission plant or structures in the OHS Act and WHS Act will operate on and after commencement of the WHS Act.

Subitem 6(1) defines 'OHS installer' and 'WHS installer'. WHS installer is defined to include persons who construct and commission plant in order to reflect the wider scope of duties in the WHS Act.

Subitem 6(2) provides that, subject to other provisions in the item, the duties imposed on a WHS installer under section 26 of the WHS Act do not apply in relation to the installation, construction or commissioning of plant or structures if the person started (or started and completed) any process associated with the installation, construction or commissioning before the day that the WHS Act commenced.

Subitem 6(3) provides that where a process is exempt from the operation of the WHS Act because it was started (or started and completed) before commencement of the WHS Act, the duties imposed on OHS installers by section 20(1) of the OHS Act apply. This section of the OHS Act provides, in summary, that an installer must ensure that plant is erected or

installed in a manner that poses no risks to the health and safety of employees at the workplace, and is safe for its intended use.

Subitem 6(4) clarifies that if the OHS Act applies because of subitem 6(3), then the OHS Act applies in relation to any breach.

Subitem 6(5) provides for the phasing in of all of the duties of WHS installers. If a person has the benefit of an exemption because of subitem 6(1), but has not completed the relevant activity on the second anniversary of the day the WHS Act commences, then the person must comply with the duties in the WHS Act.

### **Part 3 – Notifiable incidents etc.**

#### **Item 7 – Notifiable incidents etc.**

Item 7 provides that the incident notification provisions in the WHS Act will apply to a notifiable incident if the relevant person becomes aware of the incident on or after the day the WHS Act commences. For example, if a notifiable incident occurred on the day before the WHS Act commenced but the relevant person only became aware of the incident 3 days later, they would be required to notify Comcare of the incident in accordance with section 38 of the WHS Act.

#### **Item 8 – Accidents and dangerous occurrences**

Item 8 ensures that the relevant provisions in the OHS Act relating to the keeping of records of accidents and occurrences will be preserved. This means that employers will be required to keep these records for the length of time set out in the OHS Act.

### **Part 4 – Work groups, health and safety representatives and health and safety committees**

#### **Item 9 – Work groups, health and safety representatives and health and safety committees continue as such**

Item 9 preserves certain appointments made immediately prior to the repeal of the OHS Act and ensures they will be recognised for the purpose of the WHS Act. Paragraph 9(1)(a) provides for the continuation of a designated work group in operation immediately before the repeal of the OHS Act for the purpose of the WHS Act.

Paragraph 9(1)(b) deems a person appointed as a Health and Safety Representative (HSR) or deputy HSR immediately prior to the repeal of the OHS Act to have been appointed as an HSR under the WHS Act for a period of 3 years from the most recent date of appointment under the OHS Act.

Paragraph 9(1)(c) deems a Health and Safety Committee (HSC) established under the OHS Act to have been established under the WHS Act subject to the adjustments required (if any) set out in subitem 9(4).

Subitem 9(2) provides that processes to establish or vary a designated work group, appoint an HSR, or establish an HSC will be preserved and recognised under the WHS Act. On

commencement of the WHS Act these processes will continue to be subject to the requirements in the OHS Act and related regulations.

Subitem 9(3) provides that if a process to appoint an HSR is not completed within 3 months of the day the WHS Act commences, then the process will not be preserved and a new process must be recommenced under the WHS Act.

Clause 65 of the WHS Bill provides that if there is an HSR at a workplace, that HSR must be a member of the HSC, if he or she consents. Subitem 9(4) deems the HSR to also be appointed to an HSC that is preserved by subitem (1)(c) to ensure that it is consistent with the requirements in the WHS Act.

Subitem 9(5) clarifies that subitem 9(4) does not prevent parties from making any changes to a HSC that are permitted by the WHS Act.

### **Item 10 – Training**

This item provides that a person who has completed a course of HSR training accredited by the Commission for the purpose of section 27 of the OHS Act will be taken to have completed an approved course of training under the WHS Act as required by sections 86(6) or 90(4) of the WHS Act for 12 months following commencement of the WHS Act.

This means that a person who continues to be appointed as a HSR upon the commencement of the WHS Act will continue to have the power to issue an improvement notice or to direct that work cease, albeit under sections 86 and 90 of the WHS Act.

Subitem 10(2) provides that subitem 10(1) will cease to apply 12 months after the WHS Act commences. After this time, a HSR will need to have completed an approved course of training under the WHS Act before exercising powers and functions under sections 86 and 90 of the WHS Act.

### **Item 11 – Provisional improvement notices**

Item 11 provides that a provisional improvement notice that is in effect on the day the WHS Act commences will be preserved. The OHS Act will continue to apply in relation to the procedural aspects of the notices, and also in relation to any parts of the OHS Act that the notice concerns. For example, if a person wanted to appeal a notice, the procedures in the OHS Act would apply. If the notice concerned compliance with the general duty in section 16 of the OHS Act, then that section would also continue to apply.

### **Item 12 – Disqualification**

Item 12 deems a person who is disqualified from being an HSR under the OHS Act to also be disqualified from being an HSR under the WHS Act. Subitem 12(2) provides that the period of disqualification is the period of disqualification outstanding on the day the WHS Act commences, which may be a set period or indefinitely.

Subitem 12(3) provides that if an application is made to disqualify an HSR under the WHS Act then any improper performance of their powers, or misuse of information acquired in the course of their role under the OHS Act should be a relevant factor.

Subitem 12(4) clarifies that the item applies to a deputy HSR in the same way that it applies to an HSR.

## **Part 5 – Comcare and inspectors**

### **Item 13 – Residual operation of OHS Act**

This item defines ‘residual operation of the OHS Act’ for the purposes of this Part.

### **Item 14 – Appointment**

Subitem 14(1) provides that a person who, on commencement of the WHS Act, holds office as an investigator under the OHS Act and is a member of the staff of Comcare, is taken to have been appointed as an inspector under the WHS Act.

Subitem 14(2) deems an identity card issued to an inspector under the OHS Act that is valid immediately prior to commencement of the WHS Act to be an identity card given by the Regulator under the WHS Act.

### **Item 15 – Use of WHS functions and powers to enforce OHS Act**

Subitems 15(1), (2) and (3) enable inspectors appointed (or deemed to be appointed) under the WHS Act to exercise their powers and functions under the WHS Act in relation to the residual operation of the OHS Act.

Inspectors will be able to exercise their functions and powers under the WHS Act in relation to actions or failures that occurred before the commencement of the WHS Act when investigating matters after commencement of the WHS Act, whether or not the investigation commenced prior to the commencement of the WHS Act.

For example an inspector will be able to enter premises for the purpose of investigating a matter relating to the residual operation of the OHS Act in accordance with Division 3 of Part 9 of the WHS Act.

Subitem 15(4) further provides that any action taken or information that is acquired through the exercise of functions or powers under the WHS Act may be used for the purposes of the OHS Act. This would, for example, permit the use of information acquired during an interview as evidence in a prosecution of a breach of the OHS Act.

Subitem 15(5) provides, for the avoidance of doubt, that inspectors are also able to exercise compliance powers for the purposes of the item.

Subitem 15(6) clarifies that nothing in the item affects or limits any action that may be taken in relation to the residual operation of the OHS Act.

### **Item 16 – WHS inspectors may exercise functions and powers under OHS Act**

Item 16 provides that inspectors may also exercise the functions and powers of an investigator under the OHS Act in relation to the residual operation of the OHS Act.

### **Item 17 – Comcare may use powers of investigation under WHS Act for OHS Act**

Subitems 17(1), (2) and (3) enable Comcare to exercise the power to obtain information under section 155 of the WHS Act for the purpose of investigating matters relating to the residual operation of the OHS Act.

Comcare will be able to obtain information in relation to actions or failures that occurred before the commencement of the WHS Act when investigating matters after commencement

of the WHS Act, whether or not the investigation began prior to the commencement of the WHS Act.

Subitem 17(4) further provides that any action taken or information that is acquired through the exercise of functions or powers under the WHS Act may be used for the purposes of the OHS Act. This would, for example, permit information acquired on Comcare's request under section 155 to be used as evidence in a prosecution of a breach of the OHS Act.

Subitem 17(5) clarifies that nothing in the item affects or limits any action that may be taken in relation to the residual operation of the OHS Act.

## **Part 6 – Enforcement measures**

### **Item 18 – Prohibition notices**

### **Item 19 – Improvement notices**

These items provide that a prohibition notice or improvement notice that was in effect on the day the WHS Act commenced will be preserved. The OHS Act will continue to apply in relation to the procedural aspects of the notices, and also in relation to any parts of the OHS Act that the notice concerns. For example, if a person wanted to appeal a notice, the procedures in the OHS Act would apply. If the notice concerned compliance with the general duty in section 16 of the OHS Act, then that section would also continue to apply.

### **Item 20 – Undertakings**

Item 20 preserves undertakings entered into under clause 16 of Schedule 2 of the OHS Act for 'a transitional period'.

Subitem 20(1) provides that the item applies to undertakings entered into under item 16 of schedule 2 to the OHS Act.

Subitem 20(2) provides that the OHS Act continues to apply to undertakings during a 'transitional period'. Subitem 20(3) defines the transitional period for the undertaking as beginning at the start of the day the WHS Act commences and ending:

- 2 years later; or
- when the undertaking is revoked or ceases to be in force if this happens earlier.

## **Part 7 – Other matters**

### **Item 21 – Authorisations**

Item 21 preserves any registration, licence, permit, accreditation or other form of authorisation under the OHS Act that is prescribed in the Regulations. A preserved authorisation will be recognised as an authorisation under the WHS Act.

### **Item 22 – Exemptions**

Item 22 preserves any exemption under the OHS Act that is prescribed in the Regulations. A preserved exemption will be recognised as an exemption under the WHS Act.

### **Item 23 – Codes of practice**

Item 23 deals with the preservation of the *Occupational Health and Safety Code of Practice 2008* (OHS code of practice) for a transitional period. To assist the harmonisation of WHS laws, SWA will develop a number of model codes of practice to support key duties under the model WHS Act and Regulations. While many of these codes will be in place on commencement of the new WHS law on 1 January 2012, a number of 'second stage' codes will be finalised after commencement. The codes will ultimately replace the OHS code of practice; however, to avoid gaps, parts of the code will need to be preserved for a transitional period.

This item preserves those parts of the OHS code of practice that are prescribed in the regulations for a transitional period of up to 2 years.

### **Item 24 – Annual reports**

Subitem 24(1) provides that despite the repeal of the OHS Act, sections 74, 75 and 75A of the OHS Act continue to apply in relation to the financial year beginning on 1 July 2011. These sections require certain matters to be included in the annual reports of Commonwealth bodies, the Safety, Rehabilitation and Compensation Commission, and Comcare.

Subitem 24(2) limits this requirement and provides that the information in the reports need only relate to the period beginning on 1 July 2011 and ending on 31 December 2011. This means that reports are not required to include statistics in relation to the second six months of the financial year beginning on 1 July 2011.

## **Schedule 3 – Safety, Rehabilitation and Compensation Act 1988**

### **Part 1 – Consequential amendments**

#### **Item 1 – Subparagraph 69(ef)(ii)**

This item is consequential on the commencement of the *Work Health and Safety Act 2011* (WHS Act) and the *Work Health and Safety (Transitional and Consequential provisions) Act 2011*. Section 69 of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) sets out a number of functions given to Comcare. Item 1 expands subparagraph 69(ef)(ii) to provide that Comcare may apply regulatory contributions, application and licence fees together with interest earned on those contributions in meeting the costs incurred by the Commission and Comcare in carrying out their respective functions under the new WHS Act and the *Work Health and Safety (Transitional and Consequential provisions) Act 2011* (the Transitional Act) as well as the OHS Act which will continue to have residual operation as a result of item 1 of Schedule 2.

#### **Item 2 – Section 69 (note)**

This item is consequential on the repeal of the OHS Act and commencement of the WHS Act. It will omit the reference to the OHS Act in the note at the end of section 69 and replace it with a reference to the new WHS Act.

#### **Item 3 – Subsection 73(1)**

Section 73 of the SRC Act provides the Minister with the power to give written directions to Comcare with respect to the performance of its functions or exercise of its powers. Section 12A of the OHS Act contains a similar provision, but with the repealing of that Act it is convenient to have all the Minister's powers to give directions to Comcare located in the one provision of the SRC Act. Accordingly, item 3 amends subsection 73(1) by inserting a reference to the WHS Act.

#### **Item 4 – Subsection 73A(3)**

This amendment is consequential to the repeal of the OHS Act and the commencement of the WHS Act.

Under section 12A of the OHS Act, the Minister may give directions to Comcare. As the OHS Act is being repealed, item 4 omits the reference to provisions of the OHS Act.

#### **Item 5 – Section 73B**

Item 5 clarifies that Comcare's power to delegate its functions and powers under section 73B does not extend to its functions and powers under the new WHS Act. Clause 154 of the WHS Act enables Comcare to delegate its powers and functions under that Act.

#### **Item 6 – Section 73B (note)**

#### **Item 7 – At the end of section 73B**

Item 7 adds a new 'Note 2' to aid readers of the SRC Act by advising them that the delegation of Comcare's functions and powers under the WHS Act are dealt with in section 154 of that Act.

Item 6 adds a number '1' to the current note as a consequence of the second 'note' being added by item 7.

**Item 8 – At the end of section 89B**

Section 89B of the SRC Act sets out the Safety, Rehabilitation and Compensation Commission's (the Commission) functions under that Act. Item 8 adds a new note as an aid to readers, advising them that additional functions are conferred on the Commission by the WHS Act.

**Item 9 – Subsection 89D(1)**

This is a consequential amendment to the repeal of the OHS Act and the commencement of the WHS Act.

Subsection 89D(1) of the SRC Act provides the Minister with the power to give written directions to the Commission with respect to the performance of its functions or the exercise of its powers. A similar provision is contained in subsection 12(2) of the OHS Act, but as that Act is being repealed, item 9 inserts a reference to the WHS Act in subsection 89D(1), so that the Minister's power to give directions to the Commission on OHS matters would be retained.

**Item 10 – Paragraph 89E(1)(b)**

**Item 11 – Paragraph 89E(1)(c)**

Items 10 and 11 amend the composition of the membership of the Commission.

The current composition of the Commission comprises:

- 2 employee representatives nominated by the ACTU
- 3 employer representatives representing the Commonwealth and Commonwealth authorities, licensees and ACT public sector employers
- 1 member who represents the members and former members of the Defence Force
- 2 'experts'
- An independent Chairperson
- the CEO of Comcare
- the CEO of SWA

Item 10 provides for the CEO of Comcare to no longer be a member of the Commission.

Item 11 provides for an additional employee representative nominated by the ACTU to be appointed as a member of the Commission.

**Item 12 – Subsection 89R(1)**

**Item 13 – After subsection 89R(1)**

Item 12 amends subsection 89R(1) by adding a reference to new subsection 89R(1A). The current subsection 89R(1) provides that the Commission may delegate to the CEO of Comcare or any of its members all or any of its functions or powers.



Item 13 would insert a new subsection 89R(1A), which would qualify subsection 89R(1) by providing that the Commission must not delegate to the CEO of Comcare any of its functions or powers under the WHS Act. This is because under the WHS Act, the Commission has a role separate from that of Comcare, and accordingly, it would not be appropriate for any of the Commission's functions or powers to be delegated to Comcare.

**Item 14 – Subsection 91(3)**

This is a minor technical amendment that updates the language of the subsection by omitting “shall” and substituting “must”. No change is made to the meaning of the subsection by this proposed amendment.

**Item 15 – Paragraph 91(3)(a)**

This is a consequential amendment to the commencement of the WHS Act.

Subsection 91(3) of the SRC Act sets out how the money of Comcare may be applied. Paragraph 91(3)(a) provides that the money may be applied towards the costs incurred by Comcare in relation to a number of Acts including the OHS Act. Item 15 updates the paragraph by adding references to the WHS Act and the Transitional Act.

**Item 16 – Section 96**

This is a consequential amendment to the repeal of the OHS Act and the commencement of the WHS Act. Item 16 will extend the meaning of ‘Commonwealth authority’ for the purposes of the provisions in relation to regulatory contributions to include a body that would not otherwise be a Commonwealth authority for the purposes of the SRC Act if it is a public authority for the purposes of the WHS Act.

This amendment is required to ensure that all public authorities covered by the WHS Act are liable to pay a regulatory contribution to meet the costs incurred by Comcare and the Commission in exercising their powers and functions under the WHS Act.

**Item 17 – Paragraph 97D(2)(d)**

This is a consequential amendment to the commencement of the WHS Act.

Section 97D of the SRC Act provides for Comcare to make determinations in relation to the OHS regulatory contribution to be paid by premium paying employers. These determinations are made subject to any guidelines issued by the Commission. Paragraph 97D(2)(d) provides that the regulatory contribution to be paid includes the estimated cost incurred by the Commission and Comcare in carrying out their respective functions under the OHS Act.

Item 17 amends the paragraph to include references to the WHS Act and the Transitional Act.

**Item 17A – After subsection 104(2)**

Item 17A inserts a new subsection (2A) into section 104 of the SRC Act. The new subsection provides that the Commission must not grant a licence to an applicant where, because of the past conduct of the applicant in complying with laws or meeting obligations in relation to OHS, rehabilitation or claims management it is unlikely, if licensed, to meet the standards set by the Commission.

**Item 18 – Paragraph 104A(2)(b)**

This is a consequential amendment to the commencement of the WHS Act.

Section 104A of the SRC Act provides that a licensee under the SRC Act is liable to pay a licence fee and the Commission is to estimate the licence fee based on certain matters. Paragraph 104A(2)(b) currently provides that in the case of a licensee covered by the OHS Act, part of the fee is to cover the cost of carrying out the Commission's and Comcare's functions under the OHS Act.

Item 18 repeals the current paragraph and substitutes a new paragraph which provides that part of the cost of the licence includes the cost incurred, if any, by the Commission and Comcare in carrying out their functions under the OHS Act, WHS Act and the Transitional Act.

#### **Item 19 – Subsection 150(2)**

This is a consequential amendment to the commencement of the WHS Act.

Section 150 of the SRC Act provides, in part, that the Commission may make general policy guidelines and the Military Rehabilitation and Compensation Commission (MRCC) must comply with those guidelines.

Item 19 repeals the current paragraph and substitutes a new paragraph which would qualify the Commission's power to make guidelines by providing that those guidelines must not be inconsistent with any directions made by the Minister under section 149 to the MRCC or with any directions given to Comcare under section 73 of the SRC Act in relation to the WHS Act. See also item 3 which deals with the Minister's powers to give directions under section 73.

#### **Item 20 – Paragraph 158(2)(b)**

This is an amendment consequential to the repeal of the OHS Act and the commencement of the WHS Act. Item 20 omits the reference to the OHS Act and substitutes references to the WHS Act and the WHS (T&C) Bill.

#### **Item 21 – Application of items**

Item 21 provides that the amendments made by items 17, 18 and 20 not only have application to the financial year starting on 1 July 2011 but also on going application to future financial years. Items 17 and 20 relate to regulatory contributions and item 18 relates to licence fees.

#### **Item 22 – Application of items**

This item provides that all the other amendments in this Part apply on and from 1 July 2011.

### **Part 2 – Transitional provisions relating to regulatory contributions and licence fees**

This part includes transitional provisions relating to determinations made by Comcare of the amount of regulatory contributions and licence fees for the 2011/2012 financial year.

The determinations made by Comcare for the 2011/2012 financial year will have been made prior to the commencement of the WHS Act on 1 January 2012 and will be based on the costs incurred by the Commission and Comcare in carrying out their respective functions under the OHS Act for the entire financial year.

These provisions would enable Comcare to issue, following enactment of the provision, a revised estimate for the 2011/2012 financial year which takes into account what would be the altered state of the law from 1 January 2012.

**Item 23 – Variation of determination of regulatory contribution**

Division 4A of the SRC Act deals with premiums and regulatory contributions. Section 97E of the SRC Act provides, in part, that the Commission may issue guidelines to Comcare in relation to regulatory contributions (subsection 97E(2)). Subsection 97M(1) provides that Comcare may vary the regulatory contribution payable by an entity or authority.

Subitem 23(1) provides that Comcare may vary a determined regulatory contribution for the 2011-12 financial year in order that the regulatory contribution not only include the estimated cost, for each entity and authority, of the Commission and Comcare carrying out their functions under the OHS Act but also the WHS Act and the WHS (T&C) Act.

Current subsection 97M(1) of the SRC Act provides that a variation to a regulatory contribution may be made by Comcare if, and only if, certain factors apply. Subitem 23(2) has the effect of excluding subsection 97M(1) by providing that item 23 applies despite what subsection 97M(1) says.

Subitem 23(3) makes clear that the remaining parts of section 97M apply to a variation under this item, in the same way that they apply to a normal variation.

**Item 24 – Variation of licence fee**

Current section 104A of the SRC Act provides that a licence holder under the Act is required to pay a licence fee. Part of the licence fee goes towards the cost of the Commission and Comcare in carrying out their functions under the OHS Act, in relation to the licence holder.

Item 24(1) provides that Comcare may vary a licence fee for the 2011-12 financial year so that the fee not only includes the estimated cost to the Commission and Comcare of carrying out their functions under the OHS Act but also the WHS Act and the WHS (T&C) Act.

Subitem 24(2) provides that if the variation to a licence fee is a variation that increases the fee, that increased amount is payable to Comcare.

Subitem 24(3) makes clear that this item does not prohibit Comcare from varying a licence fee for another reason.

**Item 25 – Variation of determination of regulatory contribution by Defence Department**

This item deals with the ability of Comcare to vary a regulatory contribution for the 2011-12 financial year, for Australian Defence Force personnel (the ADF). Any variation to the regulatory contribution covering civilian employees of the Department of Defence is covered by item 21.

Section 158 of the SRC Act provides that Comcare must determine the regulatory contribution to be paid by the Department of Defence 'in relation to employees engaged in defence service' (the ADF).

Subitem 23(1) provides that Comcare may vary a determined regulatory contribution for the 2011-12 financial year so that the regulatory contribution not only includes the estimated cost of the Commission and Comcare in carrying out their functions under the OHS Act but also the WHS Act and the WHS (T&C) Act.

Current subsection 97M(1) of the SRC Act provides that a variation to a regulatory contribution may be made by Comcare if, and only if, certain factors apply. Subitem 23(2) has the effect of excluding subsection 97M(1) by providing that item 23 applies despite what subsection 97M(1) says.

Subitem 23(3) makes clear that the remaining parts of section 97M apply to a variation under this item, in the same way that they apply to a normal variation.

Current section 159 of the SRC Act provides that sections 97 to 97P of that Act apply to the Department of Defence in relation to ADF personnel but only so far as they relate to determinations under section 158. The references to section 159 in this item make clear that this item does not modify the application of that section.

**Schedule 4 – Other consequential amendments**

*Social Security Act 1991*

**Item 1 – Paragraph 120(a)**

**Item 2 – Paragraphs 501D(4)(a), 544B(8)(a), 631C(a) and 745L(a)**

**Item 3 – Paragraph 1188BB(a)**

These amendments are consequential to the repeal of the OHS Act and the commencement of the WHS Act.

All these paragraphs of the *Social Security Act 1991* currently exclude a relevant person from being taken to be an ‘employee’ of the Commonwealth for the purposes of the OHS Act.

These items repeal the relevant paragraphs in the *Social Security Act 1991* and make it clear that a person will not be taken to be a worker carrying out work for the Commonwealth, or an employee of the Commonwealth for the purpose of the new WHS Act.