



Government  
of South Australia

SafeWork SA

**SAFEWORK SA SUBMISSION TO THE  
COMMONWEALTH GOVERNMENT SENATE  
STANDING COMMITTEE ON EDUCATION,  
EMPLOYMENT AND WORKPLACE RELATIONS  
COMMITTEE'S INQUIRY INTO THE *WORK HEALTH  
AND SAFETY BILL 2011* AND THE *WORK HEALTH  
AND SAFETY (TRANSITIONAL AND  
CONSEQUENTIAL PROVISIONS) BILL 2011***

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## Introduction

SafeWork SA is pleased to provide a submission to the Senate Standing Committee on Education, Employment and Workplace Relations Committee's (the Committee) Inquiry into the *Work Health and Safety Bill 2011* (the Commonwealth Bill) and the *Work Health and Safety (Transitional and Consequential Provisions) Bill 2011* (the Transitional Bill).

The legislation that is the subject of this inquiry has been developed through an extensive process of national tripartite consultation, following a detailed, expert review of Australia's occupational health and safety (OHS) laws by OHS experts. The Commonwealth Bill meets the Commonwealth's commitment to enact model legislation as part of the process of the national harmonisation of OHS laws across Australia.

Harmonisation will create benefits for businesses and workers, through the creation of a national system of laws and regulations that will reduce duplication between jurisdictions.

Since 2006, the Commonwealth, states and territories have been engaged in the current process of harmonising OHS laws across Australian jurisdictions. The process was initiated by the Council of Australian Governments (COAG), and conducted through the former Australian Safety and Compensation Council (the ASCC).

On 1 February 2008, the former Workplace Relations Ministers' Council (the WRMC), now the Select Council on Workplace Relations, agreed to a proposal by the Commonwealth to achieve national OHS harmonisation through the development of model work health and safety (WHS) legislation.

On 3 July 2008, the COAG Intergovernmental Agreement for Regulatory Reform in Occupational Health and Safety (the IGA) was signed by the Commonwealth and all other states and territories. The main objective of the IGA was the development of a nationally uniform WHS legislative framework, to be achieved by:

- the creation of a national, tripartite and independent WHS body to replace the ASCC [now established and called Safe Work Australia (SWA)];
- the tripartite development by SWA of national model WHS legislation, regulations and codes of practice; and
- the adoption of national model WHS legislation and regulations by the Commonwealth, and each state and territory jurisdiction.

On 25 September 2009, the WRMC approved the release of the national WHS legislation, called the Model Work Health and Safety Act (the Model Act). Through the comprehensive public consultation process, a total of 480 submissions were received from stakeholders, including business groups, employer associations, unions and WHS experts.

South Australia contributed to the public consultation process through the SafeWork SA Advisory Committee, a tripartite body with representation from union, employer and business groups.

On 11 December 2009, the WRMC agreed to adopt a revised version of the Model Act, following public comment and subject to the rectification of any anomalies by SWA. The WRMC resolved that the model WHS laws would come into effect in each jurisdiction effective from 1 January 2012.

The Model Act contained a number of Jurisdictional Notes, which allowed separate jurisdictions to develop specific provisions to allow the Model Act to operate in a specific jurisdiction. These provisions relate largely to procedural, consultative and judicial arrangements.

The Department of Education, Employment and Workplace Relations (DEEWR) invited comment from stakeholders on the exposure draft of the Commonwealth Bill by 17 June 2011. SafeWork SA provided comment, and indicated that the Commonwealth Bill was consistent with the commitment of the Commonwealth to enact the Model Act, and gave its support to the Commonwealth Bill. The Commonwealth-specific provisions of the Commonwealth Bill were consistent with that contemplated in the Jurisdictional Notes. SafeWork SA wishes to take this opportunity to reiterate that support, and also to indicate support for the Transitional Bill, which provides the machinery necessary for the Commonwealth to transition to the new laws.

Given that this legislation has been developed through a comprehensive, tripartite and cross-jurisdictional consultation process, SafeWork SA wishes to emphasise the importance to the project of national OHS harmonisation that all jurisdictions, including the Commonwealth, enact the Model Act in the form endorsed by the WRMC.

The following is a summary of the Commonwealth-specific provisions present in the Commonwealth Bill, with an accompanying explanation of SafeWork SA's support.

#### Application of the *Work Health and Safety Bill 2011*

SafeWork SA notes and supports the provisions of clause 12 of the Commonwealth Bill, which ensure that the Bill applies to businesses or undertakings conducted by the Commonwealth or an officer of the Commonwealth; and a public authority of the Commonwealth, or an officer of such an authority.

In relation to public authorities of the Commonwealth, SafeWork SA supports the definition adopted in clause 4 of the Commonwealth Bill. SafeWork SA further supports the provisions adopted in clauses 251 and 252 of the Commonwealth Bill relating to officers of such a public authority.

Furthermore, SafeWork SA supports the machinery adopted in the Commonwealth Bill relating to the definition of the Commonwealth (clause 4), officers of the Commonwealth (clauses 245 and 247) and responsible agencies of the Commonwealth (clause 248).

Finally, SafeWork SA notes and supports the reference to section 15.1 of the Criminal Code in clause 12F of the Commonwealth Bill, which has the effect of extending the operation of the Bill to an alleged offence that occurs outside of Australia, subject to certain conditions.

These provisions are consistent with the requirements for the Commonwealth Bill foreshadowed by the Jurisdictional Notes.

#### Non-Commonwealth Licensees

SafeWork SA notes the inclusion of the provision relating to non-Commonwealth licensees in clause 12 of the Commonwealth Bill.

SafeWork SA supports the transfer of non-Commonwealth licensees from the jurisdiction of the Commonwealth Bill to coverage by the state and territory jurisdictions, following an appropriate transition period.

The position in the Commonwealth Bill is consistent with the position adopted by South Australia in its submission to the Review of Self-insurance arrangements under the Comcare Scheme <sup>1</sup>.

In its submission, South Australia contended that:

- the extension of Comcare to the private sector had added yet another jurisdiction to the landscape, introduced further complexity, and fragmented the development of standards, education and enforcement efforts;
- South Australia did not support any expansion of the existing scheme and further contended that the objectives of harmonised OHS and workers compensation laws should be pursued by the WRMC; and
- those non-Commonwealth licensees that have moved into the Comcare scheme since 2003 should be returned to the state and territory OHS jurisdictions, in order to remove the ambiguity created by the current arrangements.

SafeWork SA supports these provisions of the Commonwealth Bill.

#### Definition of worker

SafeWork SA notes the expansion of the definition of 'worker' contained in clause 7 of the Commonwealth Bill, particularly concerning the Australian Defence Force and the Australian Federal Police (AFP).

SafeWork SA supports the inclusion of this expanded definition, and indicates its view that these inclusions are consistent with the foreshadowed Commonwealth additions to section 7 in the Jurisdictional Notes (as revised by SWA on 5 April 2011).

#### Exclusions relating to national security, national defence and police operations

SafeWork SA notes the inclusion in the Commonwealth Bill of clauses 12C, D and E relating to national security and national defence considerations, or AFP operations.

#### Relationship to state and territory work health and safety laws

Clause 12 of the Commonwealth Bill imposes duties on the Commonwealth, Commonwealth public authorities and non-Commonwealth licensees in such a way that those entities would not also hold duties in a state or territory jurisdiction.

SafeWork SA appreciates the complex interrelationships of businesses across jurisdictions, and understands that the Commonwealth Bill may impose duties on workers who are also owed duties by a person conducting a business or undertaking (PCBU) in a state or territory jurisdiction. SafeWork SA notes that the Commonwealth Bill does not preclude this from occurring, and notes that clause 12(9) of the Bill provides that a corresponding WHS law, as defined, may also apply to a worker or a workplace.

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<sup>1</sup> Submission by the Government of South Australia to the Review of Self-insurance Arrangements under the Comcare Scheme at <http://www.deewr.gov.au/WorkplaceRelations/Policies/ComcareReview/Pages/publishedsubs.aspx>

SafeWork SA is supportive of this outcome, and further, supports the provisions contained in clause 12B that require duty-holders across jurisdictions to consult. The provisions are consistent with the Jurisdictional Notes.

### Commonwealth regulator

SafeWork SA notes and supports the establishment of Comcare as the regulator in the Commonwealth Bill. SafeWork SA indicates its view of the importance of the Safety, Rehabilitation and Compensation Commission (SRCC) as an oversight agency in the operations of Comcare. Given the representative composition of the SRCC, it is appropriate that the SRCC maintain its role of providing advice to the Commonwealth Minister concerning the Commonwealth jurisdiction, and overseeing the work of Comcare as the Commonwealth jurisdiction regulator.

It is important to note the ongoing role of SWA as a tripartite, representative forum with the capacity to provide representative advice to the Commonwealth Minister and relevant ministerial council or forum on the operation of the nationally harmonised OHS system across jurisdictions.

SafeWork SA takes this opportunity to express concerns concerning the demotion of the WRMC to a time limited council.

### Commonwealth authorising authority

SafeWork SA notes and supports the establishment of Fair Work Australia (FWA) as the authorising authority for the issuing of WHS entry permits under Part 7 of the Commonwealth Bill. This decision is consistent with the Jurisdictional Notes in this regard. SafeWork SA agrees with the Commonwealth's view that "Fair Work Australia's current expertise and operations lend themselves to performing the functions of an authorising authority under the Commonwealth Bill".

The use of FWA as the authorising authority is consistent with SafeWork SA's decision to empower the Industrial Relations Commission of South Australia as the authorising authority in this State.

Additionally, SafeWork SA expresses its support for the provision of clause 4 of the Commonwealth Bill that provides for recognition of WHS entry permits issued by other jurisdictions under a corresponding WHS law, as defined.

### Local consultation arrangements

SafeWork SA notes and supports the Commonwealth's intention to maintain the SRCC as the forum for local consultation arrangements.

Given the limited application of the Commonwealth Bill to the Commonwealth or its agencies **as a PCBU**, SafeWork SA's view is that the composition of the SRCC as it currently stands is appropriate. This is especially the case given the transfer of non-Commonwealth licensees to the state and territory WHS jurisdictions, and the establishment of SWA as a tripartite, representative forum for monitoring and maintenance of the nationally harmonised WHS system.

## External review body

SafeWork SA notes and supports the establishment of FWA as the external review body for decisions of the regulator, under clause 229 of the Commonwealth Bill. This decision is consistent with the Jurisdictional Notes in this regard.

SafeWork SA shares the Commonwealth's view that FWA's expertise in the area of workplace relations, and the management of workplace disputes, positions it as the appropriate organisation to manage external reviews of decisions of the regulator.

## Offences

SafeWork SA notes that the Commonwealth is a criminal code jurisdiction, like a number of other jurisdictions. SafeWork SA understands that these jurisdictions are required to include a general statement in their bills specifying that strict liability applies to avoid the fault elements in the Criminal Code automatically applying. The Jurisdictional Notes foreshadowed the inclusion of such a provision in jurisdictions where the Model Criminal Code applies.

SafeWork SA therefore supports the inclusion of clause 12F in the Commonwealth Bill.

## Infringement Scheme

SafeWork SA notes that the Commonwealth has drafted provisions to enable ComCare to implement an infringement scheme in *Part 13, Division 3 - Infringement notices* clauses 243 – 243E of the Commonwealth Bill. This is consistent with the Jurisdictional Note in this regard.

## Conclusion

The Commonwealth Bill and the Transitional Bill are consistent with the Commonwealth's commitment to enact the Model Act. The content of the Commonwealth Bill is consistent with the Model Act and Jurisdictional Notes as settled by SWA, and endorsed by the WRMC.

SafeWork SA commends the Bills to the Committee as an important step in ensuring harmonisation across jurisdictions.

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