

**SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
COMMITTEE**

**INQUIRY INTO THE WORK HEALTH AND SAFETY BILL 2011 AND THE
WORK HEALTH AND SAFETY (TRANSITIONAL AND CONSEQUENTIAL
PROVISIONS) BILL 2011**

**SUBMISSION FROM THE DEPARTMENT OF EDUCATION, EMPLOYMENT
AND WORKPLACE RELATIONS**

28 JULY 2011

Summary of the submission

The Department of Education, Employment and Workplace Relations welcomes the opportunity to make a written submission to the Senate Committee Inquiry into the Commonwealth Work Health and Safety Bill 2011 and Work Health and Safety (Transitional and Consequential Provisions) Bill 2011. Both Bills were introduced into the House of Representatives on 6 July 2011.

The Commonwealth Bill implements the model Work Health and Safety Act, agreed by Workplace Relations Ministers' Council (WRMC) in December 2009, in the Commonwealth jurisdiction.

The introduction of this Bill is the result of an extensive consultation process as part of the independent National Review into Model Occupational Health and Safety (OHS) laws, and comprehensive consultation on an exposure draft of the model Act was undertaken by Safe Work Australia. The model Act was drafted under the direction and instruction of Safe Work Australia by the Parliamentary Counsel's Committee (PCC) in accordance with the PCC's *Protocol on Drafting National Uniform Legislation Third Edition: July 2008*.

In terms of the National Review, broad consultations were undertaken which included regulators, unions, employer organisations, industry representatives, legal professionals, academics and health and safety professionals. In formulating its recommendations for WRMC, the Review Panel gave close attention to the views of all interested stakeholders. The Review Panel identified areas of best practice, common practice and inconsistency in legislation, and considered how model legislation could be adopted without compromising safety standards. WRMC considered and responded to the recommendations of the National Review Panel and decided on the optimal structure and content of the model OHS Act to be adopted by the Commonwealth, state and territory governments.

The consultation, legislative drafting process and decision process for the model Act, model regulations and model codes of practice has been overseen and agreed to by WRMC as part of the Council of Australian Government's (COAG) agreement under the *Intergovernmental Agreement for Regulatory and Operational Reform in OHS* (IGA). The IGA commits all states and territories and the Commonwealth to the adoption of harmonised work health and safety laws by the end of 2011.

The Commonwealth Bill implements a key reform by COAG and brings Australia one step closer to having a nationally harmonised system of work health and safety laws by 2012.

Section 1 – Overview and Purpose of the Bills

Purpose of the Work Health and Safety Bill 2011

1.1 The Work Health and Safety (WHS) Bill 2011 (the Commonwealth Bill) will implement the model Work Health and Safety Act (the model Act) within the Commonwealth jurisdiction forming part of a system of nationally harmonised work health and safety laws. The model Act was endorsed by the Workplace Relations Ministers' Council (WRMC) in December 2009.

1.2 The Bill was introduced into the House of Representatives on 6 July 2011.

1.3 The Commonwealth Bill will apply to businesses and undertakings conducted by the Commonwealth, public authorities and, for a transitional period, non-Commonwealth licensees. This submission focuses on the Commonwealth Bill.

1.4 The Commonwealth Bill implements the model Act in the Commonwealth jurisdiction, contributing to a harmonised set of laws to be implemented across Australia by the end of 2011.

Purpose of the Work Health and Safety (Transitional and Consequential Provisions Bill) 2011

1.5 The Work Health and Safety (Transitional and Consequential Provisions Bill) will provide for the transition from the existing Commonwealth *Occupational Health and Safety Act 1991*, including making necessary consequential amendments to the *Safety, Rehabilitation and Compensation Act 1988* and *Social Security Act 1991*.

1.6 This Bill was also introduced into the House of Representatives on 6 July 2011.

Section 2 – Background, consultation and development of the model Work Health and Safety (WHS) Act (the model Act) and the Commonwealth Bill

2.1 The Government came to office in 2007 with a commitment to work in partnership with the states and territories to harmonise OHS laws.

2.2 In February 2008, the WRMC agreed that the use of model legislation was the most effective way to achieve harmonisation of OHS laws.¹

2.3 In April 2008, the Australian Government appointed an independent expert panel to conduct a National Review into Model OHS Laws (National Review). The Review Panel was asked to examine current OHS legislation across all jurisdictions for the purpose of making recommendations to WRMC on the optimal structure and content of a model OHS Act that could be adopted in all jurisdictions.

¹ Communique from Australian, State, Territory and New Zealand WRMC, February 2008

The terms of reference and membership of the National Review into Model OHS Laws can be found at:
http://www.deewr.gov.au/Ministers/Gillard/Media/Releases/Pages/Article_081022_150228.aspx

Intergovernmental Agreement

2.4 In July 2008, the Council of Australian Governments' (COAG) signed the *Inter-Governmental Agreement for Regulatory and Operational Reform in OHS (IGA)*. The IGA commits all states and territories and the Commonwealth to the adoption, by the end of 2011, of uniform laws (comprising the model Act, supported by model regulations and model codes of practice), complemented by a nationally consistent approach to compliance and enforcement.

2.5 The IGA set out four key steps in the harmonisation process:

- The establishment of an independent national body to drive reform of OHS and workers' compensation, which is jointly funded by all governments. This independent body is Safe Work Australia.
- Supporting the National Review of OHS to inform the development of model laws, by making recommendations on the optimal structure and content of a model OHS Act that can be adopted in each jurisdiction.
- The development of a model Act, supplemented by model regulations and model codes of practice, and complemented by a nationally consistent approach to compliance and enforcement.
- The requirement that each jurisdiction enact or otherwise give effect to their own laws that mirror the model laws, as far as possible, by the end of 2011.²

2.6 Under the IGA, a key role for WRMC is to make decisions about the model Act, model regulations and model codes of practice.

COAG National Partnership Agreement to Deliver a Seamless National Economy

2.7 Harmonisation of OHS is also a key reform under COAG's *National Partnership Agreement to Deliver a Seamless National Economy* (National Partnership), agreed in November 2008. Each party to the National Partnership acknowledged that it has a mutual interest in the creation of a seamless national economy and agreed to work together to achieve this objective. Clause 21(a) of the National Partnership commits States and Territories to implement a coordinated national approach to uniform OHS laws.³

² *Inter-Governmental Agreement for Regulatory and Operational Reform in OHS (IGA)*, July 2008

³ National Partnership Agreement to Deliver a Seamless National Economy, 2008

Establishment of Safe Work Australia

2.8 Fulfilling a commitment made in the IGA, the Australian Government established a new body, Safe Work Australia, to drive national policy development in OHS and workers' compensation. A key priority of Safe Work Australia was to develop model work health and safety laws for adoption by each jurisdiction.

2.9 Safe Work Australia is jointly funded by the Commonwealth, states and territories. The IGA provides for the Commonwealth to contribute 50 per cent, and the states and territories together to contribute 50 per cent with each state or territory's contribution to be proportional to its population.⁴

2.10 Safe Work Australia comprises representatives of the Commonwealth, states and territories, two employer representatives (one each nominated by the Australian Industry Group and the Australian Chamber of Commerce and Industry) and two employee representatives (nominated by the Australian Council of Trade Unions).

2.11 Safe Work Australia members are supported by a Commonwealth statutory agency in the Education, Employment and Workplace Relations portfolio.

Consultation process for the National OHS Review and development of the model Act

2.12 In examining work health and safety laws in each state, territory and the Commonwealth and advising WRMC on the optimal structure and content of a model OHS Act, the National OHS Review Panel conducted extensive consultations.

2.13 There were over 80 meetings with the Review Panel, where more than 260 individuals representing over 100 organisations, including regulators, unions, employer organisations, industry representatives, legal professionals, academics and health and safety professionals provided input and advice. The review received 243 written submissions in response to an issues paper released for public comment in May 2008.

2.14 In formulating its recommendations for WRMC, the Review Panel gave close attention to the views of all interested stakeholders. The Review Panel identified areas of best practice, common practice and inconsistency in legislation, and considered how model legislation could be adopted without compromising safety standards.

2.15 In October 2008, the first report of the National Review into model OHS laws was completed in accordance with the Review's terms of reference. It made recommendations on:

⁴ *Inter-Governmental Agreement for Regulatory and Operational Reform in OHS (IGA)*, July 2008

- duties of care, including the identification of duty holders and the scope and limits of duties; and
- the nature and structure of offences, including defences.

2.16 The second report, which was completed in January 2009, made recommendations on the following:

- scope and coverage, including definitions;
- workplace-based consultation, participation and representation provisions, including the appointment, powers and functions of health and safety representatives and committees;
- enforcement and compliance, including the role and powers of work health and safety inspectors, and the application of enforcement tools including codes of practice;
- regulation making powers and administrative processes, including mechanisms for improving cross-jurisdictional co-operation and dispute resolution;
- permits and licensing arrangements for those engaged in high risk work and the use of certain plant and hazardous substances;
- the role of work health and safety regulatory agencies in providing education, advice and assistance to duty holders; and
- other matters the National Review panel identified as being important to health and safety that should be addressed in the model Act.

2.17 In May 2009 WRMC responded to the recommendations of the Review Panel. WRMC noted that in formulating recommendations, the Review Panel had regard to the views of all interested stakeholders expressed through submissions to the Review and during stakeholder consultations conducted by the Panel.⁵ In taking into account the Review Panel's 232 recommendations, WRMC was guided by the opinions of the expert Panel as well as jurisdictional views.⁶ WRMC's responses to recommendations made by the Review Panel formed the basis for the model Act.

2.18 On 25 September 2009, WRMC agreed to the release of the endorsed exposure draft of the model Act and first stage model regulations by Safe Work Australia for a six week public comment period. The first stage regulations included key administrative regulations dealing with matters such as health and safety representatives, incident notification and notice requirements for authorised entry. Accompanying the exposure draft of the model Act and regulations was a Regulation Impact Statement for consultation and draft discussion paper to assist in obtaining

⁵ Communique from Australian, State, Territory and New Zealand WRMC, May 2009 can be found at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Pages/Communiqués.aspx>

⁶ Communique from Australian, State, Territory and New Zealand WRMC, May 2009 can be found at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Pages/Communiqués.aspx>

constructive public comments. Four hundred and eighty submissions were received on the exposure draft of the model Act, and these informed amendments to the exposure draft.

2.19 In December 2009, after incorporating a number of amendments proposed as a result of consideration by Safe Work Australia, input from the PCC and the public consultation process, WRMC endorsed the amended model Act which became the agreed model Act.

Drafting the model Work Health and Safety Act (the model Act)

2.20 As agreed by WRMC, the model Act was drafted under the direction and instruction of Safe Work Australia by the Parliamentary Counsel's Committee (PCC), a committee representing the drafting offices in Australia and New Zealand. The Office of Chief Parliamentary Counsel in Victoria was assigned the primary drafting role on behalf of the PCC. All members of the PCC reviewed the model Act prior to submission to WRMC for approval.

2.21 The model Act was drafted in accordance with the PCC's *Protocol on Drafting National Uniform Legislation Third Edition: July 2008*. The Protocol is designed to promote consistency in national uniform legislation and defines national model legislation to be "legislation that is drafted as model legislation and that is enacted in participating jurisdictions (with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law)".

2.22 The model Act and regulations have been drafted in a way that allows them to be enacted or 'mirrored' in all jurisdictions. Jurisdictional notes have only been included in a number of areas to explain the kinds of modifications that can be made by jurisdictions to ensure the workability of the model provisions in their jurisdiction without adversely affecting harmonisation of work health and safety laws across Australia.

2.23 Clause 5.1.8 in the IGA provides "the adoption and implementation of model OHS legislation requires each jurisdiction to enact or otherwise give effect to their own laws that mirror the model laws as far as possible having regard to the drafting protocols in each jurisdiction".⁷

2.24 Jurisdictional notes are most commonly used to allow jurisdictions to insert the correct names of bodies – including the names of the regulator, courts or tribunals and deal with the interaction with general laws such as criminal and administrative review laws.

2.25 The jurisdictional notes address issues of terminology, drafting protocols and areas of the model OHS Act that intersect with non-OHS laws. The jurisdictional notes do not change the overall rights and obligations of all workplace parties under

⁷ *Inter-Governmental Agreement for Regulatory and Operational Reform in OHS (IGA)*, July 2008

the model OHS Act which will be the same in all jurisdictions and they do not change the substance or application of the laws across the jurisdictions. In some instances, location variations are required to achieve uniformity in the policy outcome. For example, a particular term may have different meaning across the jurisdictions.

2.26 Jurisdictional notes have also been used to:

- Remove duplication of the model Act and regulations with local laws;
- Clarify interaction of the model Act and regulations and local laws and the work health and safety laws of other jurisdictions;
- Establish appropriate institutional arrangements to administer the model Act and regulations;
- Accommodate circumstances that are unique to a particular jurisdiction, for example, Commonwealth's responsibilities in relation to defence; and
- Accommodate local drafting protocols.

Development and consultation – Commonwealth Bill

2.27 On 26 May 2011, the Department of Education, Employment and Workplace Relations released an exposure draft of the Commonwealth Bill intended to implement the agreed model Act to jurisdictional stakeholders for a three week consultation period.

2.28 The following organisations were invited to comment on the Commonwealth Bill:

- Commonwealth departments and agencies, public authorities and Commonwealth corporations covered by the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*.
- Non-Commonwealth licensees for the purposes of the OHS Act.
- Members of the Safety, Rehabilitation and Compensation Commission.
- The Australian Council of Trade Unions.

2.29 In response, 29 submissions were received from Commonwealth departments and agencies, non-Commonwealth licensees, unions, the Australian Council of Trade Unions, and the Safety, Rehabilitation and Compensation Commission.

2.30 These submissions were taken into account in finalising the specific provisions in the Bill included to facilitate enactment of the model Act in the Commonwealth jurisdiction. These specific provisions have been included in accordance with the jurisdictional notes for the model Act.

Section 3 – Key provisions in the Commonwealth Work Health and Safety Bill (the Commonwealth Bill)

3.1 This section of the submission discusses the key provisions of the Commonwealth Bill. These key provisions have been drafted to mirror the provisions of the agreed model Act endorsed by WRMC.

3.2 The aim of the Commonwealth Bill, in line with provisions contained in the model Act, is to secure the health and safety of workers and workplaces through the elimination or minimisation of risks, fair and effective representation, consultation, cooperation and issue resolution. All workplace parties will be encouraged to play a constructive role, in providing advice, information, education and training, and effective and appropriate compliance and enforcement measures. The key features and provisions of the Bill are covered in more detail as part of this section of the submission.

3.3 In line with the model Act the key features of the Commonwealth Bill are:

- Duties of care
- Workplace consultation, participation, and representation
- Discriminatory, coercive and misleading conduct
- Workplace entry by WHS entry permit holders
- Securing compliance
- Enforcement measures
- Review of decisions
- Legal proceedings

Duties of Care (Part 2 of the Commonwealth Bill)

3.4 The primary duty of care under the Commonwealth Bill extends beyond traditional employment relationships: the primary duty holder is a “person conducting a business or undertaking” (PCBU), and the duties owed to “workers”, which is a broadly defined concept. This terminology aims to capture new and evolving work arrangements and business structures beyond the traditional employer and employee relationship.

3.5 The term ‘worker’ (as defined in the model Act) will now include employees, contractors, employees of contractors, sub-contractors, labour hire workers, apprentices, trainees, a student undertaking work experience, and volunteers.

3.6 There are also specific duties imposed on other persons who influence the way work is carried out as well as duties for persons who design, manufacture, import and supply plant structures and substances.

3.7 The Bill also broadens the duty of care provisions beyond the traditional employer/employee relationship so that all persons who conduct a business or

undertaking owe a duty of care to all persons who may be put at risk from the conduct of a business or undertaking.

3.8 There is also a positive duty on an officer to exercise due diligence to ensure that the entity of which they are an officer complies with its duties and obligations.

Penalties for work health and safety offences

3.9 The National Review noted that there was considerable disparity in the maximum fines and periods of imprisonment that can be imposed under the various Australian OHS Acts for breaches of duty of care.⁸

3.10 The model Act created a number of statutory criminal offences relating to work health and safety, and provides that these breaches are criminal offences to reflect the seriousness of breaches of duty of care obligations. The Commonwealth Bill in line with the model Act provides for significant penalties, as well as imprisonment of up to five years for the most serious breaches, except in relation to the right of entry offences which are civil penalties, to ensure consistency with the *Fair Work Act (2009)*.

3.11 The Commonwealth Bill, in line with the model Act, provides the following substantial penalties for breaches of work health and safety duties:

- Category 1 – for reckless conduct that exposes an individual to a risk of death or serious injury or illness and is engaged in without reasonable excuse (up to \$3 million for bodies corporate, up to \$600,000 or 5 years imprisonment for individuals conducting a business or undertaking or for officers, and up to \$300,000 or 5 years imprisonment for other individuals).
- Category 2 – failure to comply with a health and safety duty and exposing an individual to a risk of death or serious injury or illness (up to \$1.5 million for bodies corporate, up to \$300,000 for individuals conducting a business or undertaking or for officers, and up to \$150,000 for other individuals).
- Category 3 – failure to comply with a health and safety duty (up to \$500,000 for bodies corporate, up to \$100,000 for individuals conducting a business or undertaking or for officers, and up to \$50,000 for other individuals).

Workplace Consultation, Participation, and Representation (Part 5 of the Commonwealth Bill)

3.12 Requirements for facilitating consultation and participation recognise the importance of health and safety outcomes in the workplace and are in line with provisions in the model Act. The Bill provides a specific obligation on duty holders to consult with other concurrent duty holders, something which has not been

⁸ National Review into Model Occupational Health and Safety Laws, First Report, October 2008

specifically covered in existing OHS Acts in Australia, and also provides for flexibility in consultation arrangements to accommodate the atypical employment relationships that will be covered and reflect the significance of work, health and safety issues.⁹

3.13 The Commonwealth Bill provides that consultation requires:

- the sharing of relevant information about the matter with workers;
- that workers be given a reasonable opportunity to express their views, to raise work health and safety issues in relation to the matter and contribute to the resolution of the matter;
- that the views of workers are taken into account by the person conducting the business or undertaking; and
- that the persons consulted are advised of the outcome of the consultations in a timely manner.

3.14 The Commonwealth Bill also maintains existing provisions for workers to elect Health and Safety Representatives (HSRs) to represent them in health and safety matters and provides for the following¹⁰:

- That a PCBU has clear obligations to facilitate the HSRs' exercise of their functions. These obligations include a requirement to consult with HSRs on work health and safety matters and allowing access to information relating to work health and safety hazards at the workplace and the health and safety of workers.
- HSRs with the power to issue Provisional Improvement Notices and direct the cessation of unsafe work. These combined powers are only presently available in three jurisdictions. The Bill also extends the right to cease unsafe work to workers.
- Confers powers on authorised representatives of unions to enter workplaces for OHS purposes.

Discriminatory, Coercive and Misleading Conduct (Part 6 of the Commonwealth Bill)

3.15 Discriminatory, coercive and misleading conduct in relation to work health and safety provisions in the Commonwealth Bill complement the remedies contained in other Federal and State laws that deal with discrimination including those in Chapter 3 of the Fair Work Act, and are in line with those agreed by WRMC for the model Act.

3.16 In the event of discriminatory, coercive and misleading conduct there are both civil and criminal provisions to deter from such conduct. These provisions are intended to encourage engagement in work health and safety activities and the proper exercise of roles and powers under the Commonwealth Bill by providing

⁹ 12B, Part 5 Divisions 1 and 2, Work Health and Safety Bill 2011

¹⁰ Part 5, Divisions 3 and 4, Work Health and Safety Bill 2011

protection for those engaged in such roles and activities from being subject to discrimination or coercion.¹¹

Workplace entry by WHS entry permit holders (Part 7 Commonwealth Bill)

3.17 The National Review considered the issue of workplace entry by authorised union officials who are WHS entry permit holders, and found that the majority of current Australian OHS Acts confer powers on authorised representatives of unions to enter workplaces.¹²

3.18 Right of entry also exists under industrial laws (for example there are provisions in the Fair Work Act that cover right of entry). For this reason there were a number of submissions from employer organisations that opposed the inclusion of right of entry provisions in the model legislation because it is provided for under existing industrial laws.¹³ The Review Panel considered this issue noting that right of entry would “contribute in a positive manner to OHS compliance at a workplace level. We propose that the system of right of entry under the model Act be subject to safeguards to ensure that it is carried out in an effective and fair manner”.¹⁴

3.19 In May 2009, WRMC agreed with this recommendation noting that any provisions around right of entry should be consistent with the Fair Work Act.¹⁵

3.20 The Commonwealth Bill, in line with the model Act, reflects the recommendation made by the National Review and agreed by WRMC, that authorised union officials be provided with a right of entry, for specific reasons, to workplaces where there are ‘relevant workers’. It also sets out requirements of WHS entry permit holders who are exercising or proposing to exercise a right of entry and describes conduct that must not be engaged in by WHS entry permit holders or other persons at a workplace in relation to WHS entry permit holders.

3.21 The Commonwealth Bill mirrors provisions in the model Act providing that a union may enter a workplace where there is a suspected contravention of the legislation to consult and advise workers. Where there is a suspected contravention of provisions under the model Act, a WHS entry permit holder (permit holder) is not required to give prior notice when entering a workplace. However, as soon as reasonably practicable after entering the workplace an permit holder must give notice of the entry and the suspected contravention to the person conducting the business or undertaking, and the person with management or control of the workplace unless it would defeat the purpose of the entry to the workplace or it would unreasonably delay the WHS entry permit holder in an urgent case.

¹¹ Part 6, Work Health and Safety Bill 2011

¹² National Review into Model Occupational Health and Safety Laws, Second Report, January 2009

¹³ National Review into Model Occupational Health and Safety Laws, Second Report, January 2009

¹⁴ National Review into Model Occupational Health and Safety Laws, Second Report, January 2009

¹⁵ Communique from Australian, State, Territory and New Zealand WRMC, May 2009 can be found at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Pages/Communiques.aspx>

3.22 When exercising a right of entry at a workplace to enquire into a suspected contravention of the Commonwealth Bill, a permit holder may:

- inspect any work system, plant, substance, structure, or other thing relevant to the suspected contravention;
- consult with the relevant workers in relation to the suspected contravention
- consult with the relevant person conducting the business or undertaking about the suspected contravention;
- inspect and make copies of any record or document that is directly relevant to the suspected contravention and is kept at the workplace or is accessible from a computer that is kept at the workplace, although to inspect an employee record or a record not held by the person conducting the business or undertaking the permit holder must provide at least 24 hours notice; and
- warn any person whom the entry permit holder reasonably believes to be exposed to a serious health and safety risk emanating from an immediate or imminent exposure to a hazard arising from the suspected contravention, of that risk.

3.23 When exercising right of entry a WHS permit holder must at all times have their WHS entry permit and identification available for inspection.

3.24 In line with the model Act the Commonwealth Bill outlines what actions and conduct are prohibited, providing safeguards for right of entry. These include:

- A person must not unreasonably refuse or delay entry to a workplace that the work health and safety entry permit holder is entitled to enter under the Commonwealth Bill.
- A person must not intentionally or unreasonably hinder or obstruct a permit holder who is exercising a right of entry or any other right conferred on them under the Commonwealth Bill. This would cover behaviour such as making repeated and excessive requests that a permit holder show his or her entry permit or failing to provide access to records that the permit holder is entitled to inspect.
- A WHS permit holder must not intentionally or unreasonably delay, hinder or obstruct any person, or disrupt any work, while at a workplace exercising or seeking to exercise a right of entry, or otherwise act in an improper manner.
- Conduct by a WHS permit holder that would hinder or obstruct a person includes action that intentionally prevents or significantly disrupts a worker from carrying out their normal duties.
- A person must not represent themselves as a permit holder when they do not hold a valid entry permit.

Securing compliance (Parts 8 and 9 of the Commonwealth Bill)

3.25 The National Review recommended strengthening compliance provisions for work health and safety breaches, and to provide regulators with strong and wide-ranging investigatory powers.

3.26 The Commonwealth Bill in line with the model Act establishes a carefully integrated and progressive set of compliance measures, which range from the provision by the regulator of information, advice, education and training to enforcing compliance. This is to ensure that compliance interventions by the regulator are appropriate to the circumstances of the particular hazards, risks, and the acts or omissions by duty holders.

3.27 The Review Panel considered that the 'right to silence' can limit information available to inspectors and may compromise the ability of the inspector to ensure ongoing health and safety protection or to prove a breach of the Act or the regulations.¹⁶ WRMC agreed in principle with the Review Panel's recommendations but strengthened this recommendation including robust powers of inquiry by inspectors, consolidating provisions for questioning, and the power for the regulator to access documents.¹⁷

3.28 The Commonwealth Bill mirrors the model Act ensuring the strongest powers to compel the provision of information currently available to regulators for securing ongoing work health and safety, and that the rights of persons under the criminal law are appropriately protected. The Bill achieves this balance by abrogating the privilege to 'right to silence' for individuals under questioning by work health and safety inspectors but provides that while an individual will be compelled to provide information when asked, they will not be prosecuted as a result of providing this information.

Enforcement measures (Parts 10 and 11 of the Commonwealth Bill)

3.29 The Commonwealth Bill adopts the model Act's graduated enforcement framework including provisions allowing a regulator to accept enforceable undertakings. Many of the graduated enforcement options are only available to the regulator (infringement notices, improvement and prohibition notices, enforceable undertakings) because judgements about how and when to exercise these powers require considerable regulatory and investigatory skill.

Review of decisions (Part 12 of the Commonwealth Bill)

3.30 To ensure fair and consistent review of decisions under the Commonwealth Bill, and in line with the model Act there will be both internal and external review in relation to certain decisions made by inspectors and Comcare as the regulator.

3.31 The scope of the external review in the Commonwealth Bill is substantially similar to that currently in the *Occupational Health and Safety Act 1991*. The main difference is that the Commonwealth Bill provides for a mandatory internal review mechanism in respect of reviewable decisions made by inspectors, thereby providing

¹⁶ The National Review into Model occupational Health and Safety Laws, January 2009

¹⁷ Communique from Australian, State, Territory and New Zealand WRMC, May 2009 can be found at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Pages/Communiques.aspx>

fairness and consistency. Under the OHS Act employers and other persons affected by an inspector's decision may appeal the decision to Fair Work Australia. There is no provision for internal review.

Legal proceedings (Part 13 of the Commonwealth Bill)

3.32 Consistent with the model Act, this part of the Commonwealth Bill deals with a range of legal issues including prosecutions, sentencing, infringement notices and civil penalty proceedings. Key issues raised during the National Review and considered by WRMC are covered in this section in more detail.

Standing to bring proceedings for offences

3.33 The National Review gave careful consideration to the issue of who should have standing to bring proceedings for offences under the model Act.

3.34 The National Review recommended that the right to initiate prosecutions for OHS breaches should be limited to the Crown so that the resources, expertise and accountability of the Crown are always applied to prosecution decisions and proceedings.¹⁸ The Review Panel noted that this approach must also be seen in the context of the stronger functions, powers and protections for workers' representatives that they also recommended.

3.35 The Review Panel's recommendation was accompanied by strong safeguards:

- the process for deciding whether to prosecute should be transparent and in line with clear, publicly available prosecution guidelines;
- as a safeguard against regulator mistake or inactivity, the panel also recommended that regulators' decisions about not taking prosecution action be reviewable by the Director of Public Prosecutions on request by any person.¹⁹

3.36 WRMC agreed in principle with the Review Panel's recommendations²⁰. The model Act approved by WRMC provides that prosecutions may only be brought by the regulator, an inspector with the written authorisation of the regulator, or the Director of Public Prosecutions (DPP). The Commonwealth Bill aligns with the provisions in the model Act allowing for the review by the DPP of a regulator's decision not to prosecute a serious offence, on application by any person.

¹⁸ National Review into Model Occupational Health and Safety Laws, Second Report, January 2009

¹⁹ National Review into Model Occupational Health and Safety Laws, Second Report, January 2009

²⁰ Communique from Australian, State, Territory and New Zealand WRMC, May 2009 can be found at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Pages/Communiques.aspx>

Burden of proof for Duty of Care offences

3.37 Under the Commonwealth Bill and mirroring the model Act the burden of proof for work health and safety offences will rest with the prosecutor. This approach reflects that all duty of care offences will be criminal offences and is consistent with the generally accepted principle that in a criminal prosecution the onus of proof beyond reasonable doubt normally rests with the prosecution.

3.38 In recommending that the prosecution should bear the onus of proof the National Review Panel commented that reverse onus of proof does not normally apply where there are heavy penalties or imprisonment. The Review Panel rejected the view that it is simply too difficult for regulators to prove what was reasonably practicable in a particular case in light of the investigatory powers of regulators—so could not justify departing from the fundamental principles of criminal law by reversing the onus of proof.²¹

3.39 In reaching their conclusion the Review Panel took into account the fact that they were recommending substantial increases in the size and range of penalties and that regulators' should have strong and wide-ranging investigatory powers.²²

3.40 WRMC agreed with the Review Panel's recommendation and decided that the burden of proof for work health and safety offences should reside with the prosecutor.²³

Section 4 – Key Commonwealth Bill jurisdiction-specific provisions

4.1 This section of the submission outlines provisions within the Commonwealth Bill (drafted in accordance with relevant jurisdictional notes) specifically tailored to allow the work health and safety laws to effectively operate in the Commonwealth jurisdiction.

Overview of coverage of Commonwealth legislation

4.2 The Commonwealth Bill includes specific provisions to deal with the following matters:

- who the Commonwealth Bill applies to;
- where the Commonwealth Bill will apply;
- how the Commonwealth Bill interacts with State/Territory WHS laws; and
- which institutions will administer and enforce the Commonwealth Bill.

²¹ National Review into Model Occupational Health and Safety Laws, First Report, October 2008

²² National Review into Model Occupational Health and Safety Laws, First Report, October 2008

²³ Communique from Australian, State, Territory and New Zealand WRMC, May 2009 can be found at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Pages/Communiques.aspx>

Who will the Commonwealth Bill apply to?

4.3 The Commonwealth Bill will apply to businesses and undertakings conducted by the Commonwealth, a public authority and (for a transitional period) non-Commonwealth licensees.

Application to the Commonwealth (clause 12)

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

Duties of care (Part 1, Division 3)

4.5 As well as the generic definition of 'worker' contained in the model Act, under the Commonwealth Bill the definition of 'worker' includes other persons currently deemed to be employees of the Commonwealth for the purposes of the *Occupational Health and Safety Act 1991*, namely:

- Members of the Australian Defence Force;
- A holder of a Commonwealth statutory office (or acting office holder);
- A person who constitutes a Commonwealth public authority (eg the Australian Government Solicitor, CEO of Comcare and the Director of National Parks);
- Members or deputy members of a Commonwealth public authority;
- Persons that engage in activities or perform acts at the request or direction of, or for the benefit of, the Commonwealth who are declared by the Minister to be workers for OHS purposes.²⁴

Duties of an officer

4.6 In the context of the Commonwealth, an officer is a person who makes or participates in making decisions that affect the whole, or a substantial part of a business or undertaking of the Commonwealth (ie the government agency or department).²⁵

Imputing conduct of officers and agents to the Commonwealth (clauses 245 and 246)

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

²⁴ Section 7, Work Health and Safety Bill 2011

²⁵ Sections 247 and 252, Work Health and Safety Bill 2011

Responsible agency provisions

4.8 The Commonwealth Bill allows certain notices that would otherwise be required to be served on the Commonwealth (as the PCBU) to be served on the responsible agency within the Commonwealth.

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

4.10 The 'responsible agency' will generally be the agency in which the conduct occurred, or the agency with control over the activity or workplace.

Application to 'Public Authorities'

4.11 The Commonwealth Bill will apply to businesses or undertakings conducted by a public authority. Where the Bill imposes a duty on a PCBU the duty holder will be the public authority. The Commonwealth Bill will apply to businesses and undertakings of these authorities (see clause 12).

4.12 The term 'public authority' is defined to mean (see clause 14):

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

4.13 The Commonwealth Bill will provide that (see clauses 250 and 251):

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

Application to 'Non-Commonwealth Licensees'

4.14 The Commonwealth Bill will apply to businesses or undertakings conducted by a non-Commonwealth licensee who was covered by the OHS Act immediately prior to its repeal for a transitional period. Where the Bill imposes a duty on a PCBU the duty holder will be the non-Commonwealth licensee (see clause 12).

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

4.16 The timing and manner of the transfer is subject to further consideration and decision. Non-Commonwealth licensees will still be entitled to remain under the Commonwealth's workers' compensation scheme (*Safety, Rehabilitation and Compensation Act 1980* (SRC Act)) even though they have left the Commonwealth's work health and safety jurisdiction.

Application of the Commonwealth Bill to persons outside of Australia

4.17 The Commonwealth Bill will apply to businesses or undertakings conducted by the Commonwealth, Commonwealth 'public authorities' and non-Commonwealth licensees; their workers; and workplaces wherever they happen to be (clause 12F).

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

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

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

Application of the Bill to defence, national security and police operations

4.20 The Commonwealth Bill will contain provisions to ensure that the legislation does not prejudice national security, defence or certain operations of the Australian Federal Police. The Director-General of Security and the Chief of the Defence Force will be able to disapply specified provisions of the Commonwealth Bill (clauses 12C, 12D, and 12E).

4.21 These provisions replicate existing arrangements under the OHS Act subject to the following changes:

- The agreement of the Minister responsible for the Work Health and Safety Act will be required before the Director General of Security or the Chief of the Defence Force may make a declaration to disapply specified provisions of the Act.
- There is also a provision that means that the Bill will not apply where compliance would be prejudicial to an existing or future operation of the Australian Federal Police (AFP). The operations that would be covered would be 'existing or future covert operations' and 'international operations', where knowledge of the operation would be likely to reduce the effectiveness of the operation or expose a person to danger of physical harm. These changes have been made following an independent review commissioned by the AFP into the scope of the existing provisions.
- A declaration made by the Director-General of Security disapplying specified provisions of the Act will no longer be subject to tabling before Parliament or disallowance. This change has been made on the basis that these requirements could have national security implications, particularly in circumstances where the Director-General is seeking to implement modifications to the Work Health and Safety Act. While these declarations will not be subject to registration or parliamentary scrutiny, the Director-General will be required to obtain the approval of the Minister responsible for work health and safety before making a declaration.

Relationship with State and Territory work health and safety laws

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

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

4.24 The Commonwealth Bill will require duty holders to consult with other duty holders, including duty holders under a corresponding State or Territory WHS law, and will allow information sharing between regulators. The Commonwealth Bill will

also recognise right of entry permits granted under State or Territory WHS laws (clause 12).

Institutional arrangements

The Regulator

4.25 Under the model Act each jurisdiction is required to identify the regulator for the purpose of the legislation. The regulator in the Commonwealth jurisdiction will be Comcare. Comcare is already a regulator under the current OHS Act and therefore it is administratively convenient for Comcare to take over the expanded role as the regulator under the Commonwealth Bill (clause 4).

4.26 Comcare will operate under the oversight of the Safety, Rehabilitation and Compensation Commission (the SRCC). The SRC will continue to have responsibility for preparing and issuing to the CEO of Comcare general policy guidelines in relation to the Commonwealth Bill and the determination by Comcare of regulatory contributions. Additional functions conferred on Comcare can be found at Part 2 of Schedule 2.

Local consultation arrangements

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

4.28 In addition to its oversight and advisory functions, the SRCC will be a forum for consultation between Comcare and persons conducting a business or undertaking, workers and the bodies that represent them (see Part 2 of Schedule 2).

The authorising authority

4.29 Each jurisdiction is required to identify an 'authorising authority' to issue WHS entry permits under the model Act and to resolve disputes about the exercise or purported exercise by a WHS permit holder of entry under the model Act. Fair Work Australia will perform this role under the Commonwealth Bill. Clause 4 of the Commonwealth Bill determines the authorising authority to mean Fair Work Australia.

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

4.31 The Commonwealth Bill also provides for the recognition of WHS entry permits issued by other jurisdictions under corresponding WHS laws, or recognised by those laws under transitional arrangements (clause 4). This will avoid the need for the holder of a WHS entry permit under a corresponding State or Territory WHS law to reapply for a WHS entry permit under the Commonwealth Act.

The external review body

4.32 Each jurisdiction is required to identify an 'external review' body to review the decisions of the regulator, including decisions made following internal review. Fair Work Australia will perform this role under the Commonwealth Bill. Clause 4 of the Commonwealth Bill determines the external review body to mean Fair Work Australia.

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

Offences in the Commonwealth Bill

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

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

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

4.37 The civil sanctions provided for breaches of the OHS Act are no longer required, as the Commonwealth will no longer be immune from criminal liability.

While the Commonwealth has always been bound by the OHS Act, the Commonwealth and Commonwealth authorities have not previously been liable to be prosecuted for an offence or to pay a fine or penalty for an offence. The National Review recognised that it is now widely accepted that the Crown should not be exempt from operation of the offence provisions of OHS legislation.

4.38 At [Attachment A](#) is a summary of significant changes to work health and safety legislation when comparing the Commonwealth Bill with the current OHS Act.

Part 5 – Conclusion

5.1 The Commonwealth Bill enacts provisions in the model Act that have been subject to a comprehensive consultation process, and have been agreed by WRMC. The Commonwealth Bill and the Work Health and Safety (Transitional and Consequential Provisions) Bill 2011 represents the Commonwealth's commitment to implement nationally harmonised work health and safety laws across Australia, where by the end of 2011 the Commonwealth, states and territories have agreed to replace nine different sets of legislation with the enactment of the model Act in each jurisdiction.

5.2 The enactment of the model Bill within the Commonwealth, states and territories will allow organisations to operate under the one set of laws regardless of the number of jurisdictions in which they operate and remove duplication required to comply with regulatory differences across multiple jurisdictions. The Decision Regulation Impact Statement for a model OHS Act undertaken by Access Economics for Safe Work Australia, estimated that the national benefits of harmonising work health and safety laws will be \$181 million per annum.²⁶

5.3 The model legislation will provide enhanced safety protection for workers which are simple and easy to understand. The same rights and protection will be afforded to workers regardless of where their work is carried out. The duties contained in the model legislation will ensure that all workers are provided with protections while at work, whether they are employees, contractors or labour-hire workers, outworkers, apprentices, trainees, work experience students and volunteers through the expanded definition of worker supported by a strengthened compliance and enforcement regime.

²⁶ Access Economics, Decision Regulation Impact Statement for a Model Occupational Health and Safety Act, December 2009.