

Tabled by DEEWR
10 Aug 2011.

MODEL WORK HEALTH AND SAFETY BILL - JURISDICTIONAL NOTES

Section	Jurisdictional note	Commonwealth WHS Bill
1	<p>Appropriate local provisions to be inserted. However, a uniform form of citation is suggested, for example, the <i>Work Health and Safety Act 2010</i>.</p> <p>In Victoria a purpose provision will be used in place of the citation provision.</p>	Commonwealth Bill cited as the Work Health and Safety Act 2011, consistent with other State and Territory Bills.
2	Appropriate local provisions to be inserted with a view to commencing the model provisions on the same date in each jurisdiction.	Commencement date of 1/1/12 included in Bill.
3(1)	The words in brackets are optional for jurisdictions. They may only be included if the relevant provisions of Schedule 1 are included.	Optional words not included as Schedule 1 does not contain additional provisions.
3(2)	The words in brackets are optional for jurisdictions. They may only be included if the relevant provisions of Schedule 1 are included.	See comment on 3(1).
4 <i>authorising authority</i>	Each jurisdiction will need to specify the court or tribunal or body to be the authorising authority for that jurisdiction. If the term regulator or designated court or tribunal or both is to be used in Part 7 instead of authorising authority, this definition is to be deleted.	Fair Work Australia will be the authorising authority in the Commonwealth jurisdiction.
4 <i>corresponding WHS law</i>	<p>Each jurisdiction will specify the Acts that are to be corresponding Acts and may include a power to prescribe corresponding Acts by regulation.</p> <p>A jurisdiction may extend the operation of a provision that applies to a corresponding WHS law to specified laws of the jurisdiction. This should be dealt with separately in the provision or regulations under the provision.</p> <p>This term is used in the definition of corresponding regulator in clause 4, and in sections 85, 90, 113, 138, 156 and 271 and item 7.2 of Schedule 3 to refer to training and other requirements, eligibility criteria, appointments, authorisations and information-sharing under corresponding WHS laws.</p>	<p>'Corresponding WHS law' is defined to mean the model Act equivalent in each jurisdiction or an Act prescribed by the Regulations. The reference to an Act prescribed has been included as it may be necessary to include additional state Acts within the definition.</p> <p>'Corresponding Regulator' defined to mean the regulator under a corresponding WHS law.</p>

Proposed Changes
 10 Aug 2011

Section	Jurisdictional note	Commonwealth WHS Bill
4 court	Each jurisdiction will specify the relevant court or courts for the Act or specified provisions of the Act.	<p>“court” is defined to mean:</p> <ul style="list-style-type: none"> • The Federal Court of Australia • The Federal Magistrates Court • The Supreme Court of a State or the ACT or NT; and • A court of a state or territory prescribed by the Regulations <p>The Commonwealth has undertaken to confer jurisdiction on state courts in a manner that is consistent with the states and it may be necessary to prescribe additional courts, such as state magistrates courts.</p>
4 local authority	Each jurisdiction will determine the local authorities for its jurisdiction.	<p>Is defined to mean a local authority under a corresponding state or territory WHS law.</p>
4 medical treatment	Each jurisdiction will specify the relevant registration Act which will be the Health Practitioner Regulation National Law of that jurisdiction.	<p>Is defined to mean medical treatment by a medical practitioner registered or licensed under a State or Territory law that provides for the registration or licensing of medical practitioners.</p>
4 public authority	Each jurisdiction will determine the public authorities for its jurisdiction.	<p>Is defined to mean:</p> <p>(a) 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), but does not include a body corporate prescribed by the regulations to be a body corporate to which this Act does not apply; and</p> <p>(b) a Commonwealth company within the meaning of the <i>Commonwealth Authorities and Companies Act 1997</i>, other than a Commonwealth company prescribed by the regulations to be a Commonwealth company to which this Act does not apply; and</p> <p>(c) a body corporate prescribed by the regulations to be a public authority for the purposes of this Act.</p>
4 regulator	Each jurisdiction will specify the relevant regulator for its jurisdiction, for example WorkSafe Victoria.	<p>Comcare will be the Regulator in the Commonwealth jurisdiction.</p>
4 this Act	Some jurisdictions may need to disapply the meaning of this term in their Interpretation Acts.	<p>The Commonwealth has not adjusted the model provision</p>
4 WHS Permit		<p>Definition of “WHS entry permit” expanded to “a WHS entry permit issued under Part 7 or the equivalent Part of a corresponding WHS law”. This will allow for mutual recognition of State permits for workplaces that are covered by Commonwealth and State WHS laws.</p>

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7	<p>A jurisdiction may amend section 7(1) to add additional classes of persons to the list of "workers". For example, the Commonwealth may add members of the defence forces and cadets. Statutory office holders and members of statutory or public authorities could also be added.</p> <p>Jurisdictions may also specify classes of persons who are to be taken to be carrying out work for a business or undertaking and persons who are to be taken to be the employer of specified classes of persons. For example the classes of persons specified by a jurisdiction may include police officers, defence force members and cadets (in the case of the Commonwealth), statutory office holders and members of statutory or public authorities.</p> <p>Each jurisdiction may vary section 7(2)(b) as necessary for consistency with jurisdictional police laws (for example, to limit the application of section 7(2)(b) in jurisdictions where police are taken always to be on duty).</p>	<p>The Commonwealth Bill extends the definition to include groups of persons currently deemed to be employees for the purpose of the current OHS Act, who will not otherwise be included within the definition of worker such as members of the Australian Defence Force and Commonwealth statutory office holders.</p>
9	<p>Jurisdictions may have to disapply the provisions of their Interpretations Acts relating to examples and notes.</p> <p>Jurisdictions may use a different style to identify examples and notes from that in the model Bill.</p>	<p>No change made from the Model Act</p>
10	<p>Each jurisdiction will, if necessary, enact a provision to ensure that the Crown in right of the jurisdiction and also in all its other capacities is bound by the model provisions. For example, the Australian Capital Territory can omit this provision because of the effect of section 121 of its <i>Legislation Act 2001</i>.</p> <p>Some jurisdictions may need to refer to the State rather than the Crown throughout the Bill.</p>	<p>References to the Crown have been replaced with references to the Commonwealth throughout the Bill.</p>
11	<p>Each jurisdiction may insert a local provision relating to extraterritorial application including the extraterritorial reach of offences.</p>	<p>Clause 12F(3) provides for extra territorial application of offences in the Bill, consistent with WRMC's decision that the Model Act should provide for its extra territorial application for activities conducted overseas, eg. Australian embassies.</p>

Section	Jurisdictional note	Commonwealth WHS Bill
12	<p>Each jurisdiction may insert local provisions to establish the relationship between the model provisions and other Acts in the jurisdiction. The Commonwealth will need to deal with the operation of Commonwealth and State and Territory laws, see for example section 4 of the <i>Occupational Health and Safety Act 1991</i> of the Commonwealth.</p> <p>The Commonwealth may need to draft provisions to deal with matters relating to national security, defence and federal police operation, see for example sections 6 to 8 of the <i>Occupational Health and Safety Act 1991</i> of the Commonwealth.</p>	<p>Clauses 12 sets out the scope of the Commonwealth Bill and deals with interaction with state laws.</p> <p>Clause 12A deals with the interaction with other Commonwealth laws dealing with occupational health and safety.</p> <p>Clause 12B requires duty holders to consult with a person who has the same duty under a corresponding state or territory WHS law.</p> <p>See clauses 12C – 12E</p>
38	<p>A jurisdiction may remove this reporting requirement to the extent that similar reporting arrangements exist under local laws.</p>	<p>The Commonwealth has included the model provision</p>
65 (and sections 112, 114, 215, 220, 236 and Schedule 3)	<p>Jurisdictions will designate the relevant courts and tribunals and specify the relevant jurisdiction in relation to any matter conferred on a court or tribunal under any provision of the Model Bill or the regulations and make any necessary consequential amendments including the amendment or addition of definitions.</p>	<p>Functions under clauses 65, 112, 114, 215, 220 & 236 are judicial functions and are required to be exercised by a court.</p>
103	<p>Each jurisdiction may need to make appropriate amendments to this provision to ensure it conforms to local legislation.</p>	<p>The Commonwealth has included the model provision</p>
108	<p>Jurisdictions may need to include their own definitions of emergency services worker.</p>	<p>Emergency services worker is defined to mean:</p> <ul style="list-style-type: none"> (a) a member of 1 of the following: <ul style="list-style-type: none"> (i) a police force or service; (ii) a fire service; (iii) an ambulance service; (iv) a coast guard service, rescue service or emergency service; (v) any other organisation prescribed by the regulations for the purposes of this subparagraph; or (b) a member of the Defence Force who is engaged civil emergency or disaster relief operations; or (c) a person who is an emergency services worker under a corresponding WHS law.

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110	<p>A jurisdiction may omit subsection (1)(c) and substitute the following for subsection (2):</p> <p>"(2) If it is alleged that the discriminatory conduct was engaged in for a prohibited reason, that reason is presumed to be the dominant reason for that conduct unless the accused proves on the balance of probabilities, that the reason was not the dominant reason for the conduct."</p>	The Commonwealth has adopted the model provision
Part 7 (and sections 138 and 142)	<p>A jurisdiction may use regulator rather than authorising authority for some or all of the provisions of Part 7 and make any necessary consequential changes. This will be necessary for jurisdictions where the regulator performs some or all of the functions of the authorising authority.</p>	Power to deal with disputes under Part 7 conferred on Fair Work Australia
116 (and sections 124, 131, 133, 137, 138 and 150)	<p>A State or Territory may insert its relevant industrial law. The Commonwealth may omit this definition and omit references to relevant State or Territory industrial law where they appear in sections 124, 131, 133, 137, 138 and 150.</p>	References to relevant State or Territory industrial law omitted
119	<p>The Commonwealth may need to provide that 24 hours notice may be required to enter workplaces associated with national security, defence and federal police operations.</p>	See general provisions in clauses 12C-12E
152	<p>Jurisdictions may add to the list of functions.</p>	No additional functions have been listed
154	<p>A jurisdiction may specify local delegation requirements and the persons to whom a delegation may be made and may rely on its standard delegation provisions.</p>	Delegation power limited to specified classes of person, consistent with Commonwealth policy.
156	<p>A jurisdiction will need to include local provisions to ensure that appropriate arrangements are made for the appointment as an inspector of a person who is an inspector under a corresponding WHS law. A jurisdiction may need to include local provisions to ensure that the dual appointments are made in a manner consistent with any applicable public service laws. For example, section 51 of the <i>Occupational Health and Safety Act 1991</i> of the Commonwealth.</p> <p>A jurisdiction may replace the term public servant with the corresponding or appropriate term used in the jurisdiction.</p>	Consistent with existing arrangements under the OHS Act, the Commonwealth Bill limits the class of persons who may be appointed as an inspector under 156(a) to members of the staff of Comcare.

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157	Jurisdictions may need to specify local provisions for identity cards.	No locally specific provisions required.
160	A jurisdiction may omit paragraph (f) if this matter is dealt with in other laws of the jurisdiction.	Paragraph (f) of model Bill omitted. Inspector's given function of monitoring compliance with the WHS Act.
165	A jurisdiction may omit the words "without paying for it" in subsection (1)(e).	Words omitted
Part 9, Division 3, Subdivision 2	A jurisdiction will need to make appropriate adjustments to the search warrant provisions to enable them to operate in its jurisdiction.	No adjustments made to model provisions
172	A jurisdiction may adjust this provision as necessary to accord with the legal or legislative or human rights principles applying in its jurisdiction.	Provision adjusted to provide for 'derivative immunity'. Commonwealth Bill does not draw a distinction between the harm that may flow from incriminating evidence obtained directly and incriminating evidence derived from it.
179	The Commonwealth will need to adjust this provision for its jurisdiction.	References to 'State' changed to 'the Commonwealth'
184 (and sections 179, 220, 262, 270 and 274)	Jurisdictions will need to replace "State" with "Territory" or "the Commonwealth" as is relevant to the jurisdiction. A jurisdiction may include an alternative provision that deals with compensation for acquisition of property under this Act.	As above The references to "a court of competent jurisdiction" in clause 179(8), 184(2)(a) and 236(5) amended to "a court" (which is defined to include federal courts as well as State Courts). This is to ensure consistent jurisdiction across the Commonwealth's Bill. The Federal Magistrates Court is not captured as a court of competition jurisdiction due to the Commonwealth's Judiciary Act. As such, while the Federal Magistrates Court could exercise jurisdiction in relation to other matters, in those clauses it would not be able to exercise jurisdiction in relation to debt or compensation.
185	A jurisdiction may amend section 185 to align it with its human rights charter or other legislative protocols. A jurisdiction may amend or remove the offence in subsection (4) if this is inconsistent with the powers of police in that jurisdiction.	No change to model provision
187	A jurisdiction may omit this provision if this matter is dealt with in other laws of its jurisdiction.	Provision omitted

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189	A jurisdiction which has a Criminal Code may displace the default element of intention that applies in that jurisdiction by stating that recklessness will apply.	'Recklessness' applied as the fault element for the offence.
223	<p>A jurisdiction may provide for the following decisions to be reviewable decisions where the regulator is the authorising authority:</p> <ul style="list-style-type: none"> (a) a decision under section 134 to refuse to issue a WHS permit; (b) a decision under section 140 to revoke, suspend or take other action in relation to a WHS entry permit. <p>The eligible persons in relation to the reviewable decision would be:</p> <ul style="list-style-type: none"> (a) the relevant union; (b) the person for whom the entry permit is sought, in relation to section 134; (c) the WHS permit holder, in relation to section 140. 	These additional provisions are not necessary in Commonwealth jurisdiction.
229	<p>Each jurisdiction must specify the appropriate external review body.</p> <p>A jurisdiction may provide for the nature and scope of the external review and the powers that may be exercised by the external review body in relation to an external review if this is not provided for in other laws. An external review is intended to be a merits review and the external review body is to be able to affirm or overturn the decision reviewed or to substitute its own decision for that decision.</p> <p>An external review body is intended to be able to stay the decision that is the subject of the external review pending the decision on the external review.</p>	Fair Work Australia is the external review body and may confirm or vary the decision, or set aside the decision and make a decision in substitution for the decision set aside.
230	<p>In relation to section 230(1), a jurisdiction may add other public officials who hold a relevant public office or administer this Act to bring proceedings for an offence against this Act, with the written authorisation of the regulator.</p> <p>In relation to section 230(4), amendments may be necessary in some jurisdictions to ensure that this provision does not conflict with arrangements under other legislation in that jurisdiction.</p> <p>A jurisdiction may confer jurisdiction on courts to hear prosecutions and appeals in relation to offences under this Act.</p>	No change has been to model provision

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231	A jurisdiction may amend subsections (2), (3), (4), (5) and (6) to reflect the role of the Director of Public Prosecutions in that jurisdiction or omit the provisions if they are inconsistent with prosecutorial policy and practice in that jurisdiction.	This provision has been adjusted to reflect prosecution practice in the Commonwealth jurisdiction.
232	A jurisdiction may specify other types of official inquiries for the purposes of subsection (1)(b), as appropriate to that jurisdiction.	Clause 232 provides for proceedings to be brought within 1 year after a coronial inquest or official inquiry has ended. Official inquiry defined in 232(3).
243	Jurisdictions must enact provisions as necessary to: <ul style="list-style-type: none"> • enable an infringement scheme to be established in relation to this Act; and • prescribe the offences for which infringement notices may be issued consistent with the model regulations. 	See clauses 243-243E
244	A jurisdiction may omit this section if the relevant laws of the jurisdiction already provide for this.	Provision omitted. Corporate criminal responsibility is dealt with in Part 2.5 of the <i>Criminal Code</i> .
245	A jurisdiction may need to adjust this section in relation to its jurisdiction.	References to the 'Crown' replaced with references to the 'Commonwealth'
246	A jurisdiction may need to adjust this section in relation to its jurisdiction	As above
262		In clause 262(b) the Commonwealth needs to allow " the regulator" to enforce the order, rather than "the Commonwealth". The Commonwealth intends that Comcare will enforce the order. As Comcare is constituted as a public authority, it does not fall within the definition of "the Commonwealth" in the Commonwealth's Bill.
268	The Commonwealth may rely on the provisions of the Criminal Code in place of this offence.	Provision omitted. Part 7.4 of the <i>Criminal Code</i> contains offences dealing with false and misleading information.
274	Jurisdictions may need to adjust the references to the Government Gazette as relevant to the jurisdiction.	An approved code of practice is a legislative instrument within the meaning of the <i>Legislative Instruments Act 2003</i> and as such will be required to be registered on the Federal Register of Legislative Instruments and will commence in accordance with the provisions of that Act.

Section	Jurisdictional note	Commonwealth WHS Bill
276	<p>Jurisdictions may replace Governor in Council with the appropriate term for that jurisdiction.</p> <p>A jurisdiction can include a provision clarifying that the regulation-making powers do not limit the powers already provided in their interpretation legislation.</p>	<p>References to 'Governor in Council' replaced with references to 'Governor General'.</p>
Schedule 1	<p>This Schedule is optional for jurisdictions. A jurisdiction may choose to regulate high risk plant or dangerous goods or both.</p>	<p>Additional provisions not included in Schedule 1.</p>
Schedule 2	<p>A jurisdiction may use this Schedule to establish the regulator and to provide for local consultation arrangements and for local arrangements for the collection of money and the provision of data.</p>	<p>Schedule 2 deals with local governance and reporting arrangements, including the functions of the Safety Rehabilitation and Compensation Commission.</p>

Section	Jurisdictional note	Commonwealth WHS Bill
Additional jurisdictional notes	<p>The Commonwealth will make appropriate amendments to set out the intended area of coverage of the Model Bill. The existing Commonwealth Act applies to Commonwealth departments and agencies, Commonwealth authorities and certain licensees and their employees and contractors.</p> <p>Jurisdictions will use numbering that is harmonised with the Model Bill. Some jurisdictions may need to omit or add provisions to give effect to jurisdictional notes. If a provision is omitted, the jurisdiction will leave a gap in the numbering. If a provision is added an alphanumeric number will be used. eg 29A, 29B.</p> <p>The Commonwealth or any other jurisdiction may specify, where necessary, whether a provision of the Model Bill is legislative or non-legislative in character.</p> <p>A jurisdiction will adjust the penalty provisions in the Model Bill to fit the manner of creating offences in its jurisdiction e.g. use of "penalty" rather than "maximum penalty".</p> <p>Jurisdictions may include subsections (or include a general statement provision in the Bill) clarifying where all or part of an offence attracts strict liability or absolute liability.</p> <p>A jurisdiction may need to make adjustments to accommodate the procedures and rules in its jurisdiction for bringing proceedings in relation to unincorporated associations and partnerships.</p> <p>Jurisdictions will designate the relevant courts and tribunals and specify the relevant jurisdiction in relation to any matter conferred on a court or tribunal under any provision of the Model Bill and make any necessary consequential amendments including the amendment or addition of definitions.</p>	<p>See clause 12</p> <p>See clause 273B</p> <p>References to 'maximum penalty' replaced with 'penalty'</p> <p>See clause 12F</p> <p>See clause 273A</p>

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	<p>The Commonwealth may disapply section 4AB of the <i>Crimes Act 1914</i> of the Commonwealth to ensure uniformity with the monetary penalties in this Act.</p> <p>The Commonwealth may disapply section 4K of the <i>Crimes Act 1914</i> of the Commonwealth in relation to offences under sections 75 and 149.</p> <p>The Commonwealth and any other jurisdiction may include provisions in Division 3 of Part 9 to deal with the operation and seizure of electronic equipment during an entry and search of a place.</p> <p>The Commonwealth may define Fair Work Australia as a relevant tribunal or the purposes of this Act.</p>	<p>See clause 12F</p> <p>See clause 75(1A)</p> <p>See clauses 165A & 165B</p> <p>See clause 229</p>

