

KEY DIFFERENCES BETWEEN CURRENT COMMONWEALTH OCCUPATIONAL HEALTH AND SAFETY LEGISLATION AND THE COMMONWEALTH WORK HEALTH AND SAFETY BILL (CTH WHS ACT)

SUBJECT	CURRENT ARRANGEMENTS UNDER THE <i>OCCUPATIONAL HEALTH AND SAFETY ACT 1991</i> (CTH) (OHS ACT 1991)	COMMONWEALTH WORK HEALTH AND SAFETY BILL
Primary duty holder	<p>The OHS Act 1991 assigns the primary duty of care to employers, qualified by what is reasonably practicable.</p> <p>‘Employer’ is defined to mean the Commonwealth, Commonwealth authorities, and non-Commonwealth licensees.</p>	<p>The Cth WHS Bill assigns the primary duty of care to a person conducting a business or undertaking, qualified by what is reasonably practicable.</p> <p>The Bill will apply to businesses and undertakings of the Commonwealth, Commonwealth public authorities and non-Commonwealth licensees.</p>
Definition of worker	<p>Duties are owed to employees of the employer, and in some circumstances contractors.</p> <p>Under the current OHS Act the following persons are also deemed to be employees of the Commonwealth:</p> <ul style="list-style-type: none"> • Members of the Australian Federal Police; • 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; • Persons that engage in activities or 	<p>The Cth WHS Bill extends coverage to all person who carry out work in any capacity for a person conducting a business or undertaking, including contractors, subcontractor and volunteers.</p> <p>The definition of ‘worker’ will also be extended to include other persons who are currently deemed to be employees of the Commonwealth, namely:</p> <ul style="list-style-type: none"> • Members of the Australian Federal Police; • 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; • Members or deputy members of a Commonwealth public authority; and • Persons that engage in activities or perform acts at

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	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 the purposes of the Act.	the request or direction of, or for the benefit of, the Commonwealth who are declared by the Minister to be workers for the purposes of the Act.
Duties on officers	The OHS Act 1991 does not place a specific duty on officers, nor does it use the term 'officer'.	<p>The Cth WHS Bill places a positive duty on officers to exercise due diligence (concept has been defined) to ensure compliance with the Cth WHS Bill.</p> <p>In the case of the Crown, a public authority or local authority, the Cth WHS Bill defines 'officer' to mean a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the Commonwealth or authority but does not include a Commonwealth Minister.</p>
Act not to prejudice national security, defence and certain police operations	The OHS Act 1991 contains provisions dealing with matters relating to national security, defence and Australian Federal Police Operations. The Director-General of Security and the Chief of the Defence Force may make a declaration disapplying specified provisions of the OHS Act after consulting with the Minister.	<p>The current provisions of the OHS Act 1991 are replicated in the Cth WHS Bill subject to the following changes:</p> <ul style="list-style-type: none"> the agreement of the Minister responsible for the Cth WHS Bill 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; and the provision relating to the Bill's application to federal police operation has been recast.
Application of the draft WHS Act to persons outside Australia	The OHS Act 1991 extends to all the external Territories and (other than Parts 3 and 4, which relate to workplace arrangements and advice, investigations and inquiries) extraterritorially.	<p>The Cth WHS Bill will apply to business or undertakings conducted by the Commonwealth, Commonwealth 'public authorities' and non-Commonwealth licensees; their workers; and workplaces wherever they happen to be.</p> <p>Section 15.1 of the Criminal Code will apply to an offence under the Cth WHS Bill. As a result, the Act will apply to conduct constituting an alleged offence that occurs wholly outside Australia if:</p>

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		<ul style="list-style-type: none"> • The result of the conduct occurs wholly or partly in Australia; or • At the time of the alleged offence, the person is an Australia citizen or body corporate incorporated in Australia.
Duties on designers	The OHS Act 1991 does not place duties of care on designers.	The Cth WHS Bill places a duty on designers of plant, substances and structures consistent with the principle that duties of care should be imposed on those who are materially involved in or materially affect the performance of work. This new duty will be phased in over the 2 years of the new WHS laws.
Breaches of the Act	The OHS Act 1991 provides for both civil and criminal penalties.	<p>Breaches of duty of care will be criminal offences. Breaches of the right of entry provisions in Part 7 of the Act will be subject to civil remedies, consistent with the Fair Work Act.</p> <p>A person may initiate civil proceedings where they have been discriminated against for a prohibited reason under s 112 of the Act. There are also criminal penalties for discrimination provisions in the Cth Bill.</p>
Penalties – duty of care breaches	<p>The OHS Act 1991 provides for a maximum penalty of \$495,000 (criminal) and \$242,000 (civil) for an employer.</p> <p>There are no provisions for imprisonment for a natural person for duty of care breaches.</p>	For the most serious breaches, the Cth WHS Bill provides for a maximum fine for a corporation of \$3 million, \$600,000 for an individual as well as imprisonment of up to five years.
Infringement notices	No provision exists under the OHS Act 1991	The Cth WHS Bill establishes an infringement notice

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	for infringement notices (on-the-spot fines).	scheme for minor offences.
Sentencing options	Provides for the imposition of pecuniary penalties and up to 6 months imprisonment for criminal offences. Civil penalties as well as mandatory, prohibitory and interim injunctions; and remedial orders.	In addition to fines and custodial sentences, the Cth WHS Bill provides for remedial orders, adverse publicity orders, training orders, injunctions, orders for restoration, work health and safety project orders, and the release of an offender under terms of a court-ordered WHS undertaking.
Crown immunity	The OHS Act 1991 provides immunity for the Crown from criminal prosecution.	Crown immunity is not provided for in the Cth WHS Bill.
Consultation	The OHS Act 1991 places a duty on employers to develop, in consultation with employees, written health and safety management arrangements. While the Act provides guidance as to what these arrangements may include there is significant flexibility in relation to the content of the arrangements.	Health and safety management arrangements are not featured in the new WHS laws. The Cth WHS Bill places a duty on a person conducting a business or undertaking to consult, as far as is reasonably practicable, with workers (as broadly defined). The requirement to consult is broader than what currently applies under Commonwealth arrangements as the duty is not limited to consultation with employees. The Cth WHS Bill also prescribes what is required for consultation purposes and when it is required. The Cth WHS Bill also places a duty on the person conducting a business or undertaking to consult, as far as is reasonably practicable, with any person who holds a duty in relation to the same matter.

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Establishment of work groups	The OHS Act 1991 provides that a designated work group is only comprised of employees of an employer.	<p>The Cth WHS Bill provides that a work group may be determined for workers engaged in two or more businesses or undertakings.</p> <p>For example, there could be one work group to represent workers of different government agencies or departments housed in the same building.</p> <p>The Cth WHS Bill will also, due to the definition of 'worker', permit workers other than 'employees' such as contractors and labour hire workers to be members of a work group.</p>
Power to issue Provisional Improvement Notices (PINs) and direct that unsafe work cease	<p>The OHS Act 1991 provides HSRs with the power to issue Provisional Improvement Notices and direct the cessation of unsafe work in certain circumstances.</p> <p>While HSRs must be trained, they are able to exercise these powers prior to training being undertaken.</p>	The Cth WHS Bill will provide HSRs with the power to issue Provisional Improvement Notices and direct the cessation of unsafe work in certain circumstances but only after the HSR has completed relevant training.
Cessation of unsafe work	The OHS Act 1991 prescribes that HSRs may direct that unsafe work cease in certain circumstances.	The Cth WHS Bill provides for HSRs may direct that unsafe work ceases in certain circumstances and also provides workers with the right to cease unsafe work in certain circumstances on their own initiative.

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Issue resolution	<p>The OHS Act 1991 provides that a dispute resolution mechanism be provided for in written health and safety management arrangements to deal with disputes arising in the course of consultations held under the Act between the employer and employees.</p> <p>The Act does not provide a general issue resolution role for an investigator.</p>	<p>The Cth WHS Bill provides that parties to an OHS issue must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with an agreed procedure or, if there is no agreed procedure, the default procedure prescribed in the regulations.</p> <p>The Cth WHS Bill provides that where an issue cannot be resolved after reasonable efforts have been taken, the issue can be referred to the regulator to arrange for an inspector to attend the workplace to assist in resolving the issue.</p>
Union right of entry	<p>The OHS Act 1991 does not confer powers on authorised representatives of unions to enter workplaces for OHS purposes.</p>	<p>The Cth WHS Bill confers powers on authorised representatives of unions (WHS permit holders) to enter workplaces for OHS purposes.</p> <p>The Act provides for a Commonwealth permit scheme that will be administered by Fair Work Australia.</p>
Inspector powers	<p>The OHS Act 1991 uses the term ‘investigator’ rather than ‘inspector’.</p> <p>The Act confers a number of functions and powers on investigators but these may generally only be exercised when an investigation has commenced.</p>	<p>An enhanced range of functions and powers are conferred on inspectors by the Cwth WHS Bill.</p>
Internal review of statutory notices	<p>The OHS Act 1991 provides not statutory right to seek an internal review of a decision made under the Act. An application may be made to Fair Work Australia for external review of a</p>	<p>The Cth WHS Bill provides for a two-stage review process of certain decisions (for example, the issue of statutory notices by an investigator), starting with internal review, followed by external review.</p>

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	decision.	
External review body	Fair Work Australia is currently the reviewing authority under the OHS Act. Fair Work Australia is empowered to deal with disagreements about the establishment of designated work groups and to determine appeals from decisions of investigators.	The scope of external review in the Cth WHS Bill is substantially similar to that currently under the OHS Act. The main difference is that the WHS Bill provides for a mandatory internal review mechanism in respect of reviewable decisions made by inspectors. Decisions of inspectors will be reviewed internally by Comcare in the first instance and subject to external review by Fair Work Australia.
Notification	<p>Under the OHS Act 1991, an employer is obliged to notify accidents that causes death, serious personal injury or incapacity.</p> <p>Employers are also obliged to notify Comcare of dangerous occurrences that occur at a workplace.</p> <p>The timeframes for notification and obligation to preserve a site are provided for in the regulations.</p>	<p>The Cth WHS Bill requires a person who conducts a business or undertaking to notify incidents involving the death of a person, a serious injury or illness of a person and a dangerous incident.</p> <p>Serious injury or illness and dangerous incidents are defined.</p> <p>A notification must be made immediately after becoming aware that a notifiable incident has occurred.</p> <p>The Cth WHS Bill includes duty to preserve the site of an accident.</p>
The Regulator	Under the OHS Act 1991, occupational health and safety regulation is the joint responsibility of Comcare and the Safety, Rehabilitation and Compensation Commission (SRCC).	Under the Cth WHS Bill the regulator in the Commonwealth jurisdiction will be Comcare. Comcare will operate under the oversight of the SRCC.