Senate
Finance
and
Public Administration
Legislation Committee

Inquiry into

Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002

Submission
by the
Department of Employment
and
Workplace Relations

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TABLE OF CONTENTS

1. Outline of submission 3

2. Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002

Overview **..... 4**

Penalties **.....7**

(a) Voluntary compliance 7
(b) Dual civil and criminal penalty regime 8
(c) Other new remedies 10
(d) Increases in penalty levels 11
(e) Removal of shield of the Crown 13

Employer's duty of care **..... 15**

Workplace Arrangements **..... 20**

(a) Designated workgroups 20
(b) Health and safety representatives 22
(c) Health and safety committees 23
(d) Role of representative unions (s.41 and s.48) 25

Other amendments **..... 26**

(a) Annual reporting requirements 26
(b) Updating the schedule of GBEs 27
(c) Technical amendments 28

1. OUTLINE OF SUBMISSION

This submission discusses the amendments to the *Occupational Health and Safety (Commonwealth Employment) Act 1991* contained in the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002.

2. An overview of the operation of the relevant legislation is provided followed by relevant background to the amendments, and their intended operation.

2. OCCUPATIONAL HEALTH AND SAFETY (COMMONWEALTH EMPLOYMENT) AMENDMENT (EMPLOYEE INVOLVEMENT AND COMPLIANCE) BILL 2002

OVERVIEW

The *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the OHS(CE) Act) establishes the statutory framework for the protection of the health and safety at work of Commonwealth employees in Departments, Statutory Authorities and Government Business Enterprises (GBEs). It complements the compensation and rehabilitation scheme established under the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act).

2. The OHS(CE) Act is typical of Australian occupational health and safety legislation. The operation of the Act relates to Commonwealth employment and Commonwealth workplaces and imposes general duties of care on:

- employers in relation to their employees (s.16);
- employers in relation to third parties (s.17);
- manufacturers in relation to plant and substances (s.18);
- suppliers in relation to plant and substances (s.19);
- persons erecting or installing plant in a workplace (s.20); and
- employees (s.21).

3. The OHS(CE) Act provides for various compliance mechanisms, namely:

- the issuing of provisional improvement notices by health and safety representatives (s.29);
- investigations concerning compliance with the OHS(CE) Act or accidents or dangerous occurrences (s.41);
- the issuing by investigators of prohibition notices (s.46) or improvement notices (s.47);
- the protection of employees who may complain about an occupational health and safety matter, assist an investigation or cease work in accordance with a direction of a health and safety representative (s.76); and
- fines (or terms of imprisonment where appropriate) for breaches of the Act.

4. Only Government Business Enterprises (GBE's), employees of a GBE, or a manufacturer, supplier or installer can be prosecuted under the OHS(CE) Act (see Sections 5,11,16 – 20). Commonwealth departments or authorities which are not GBEs may be the subject of a public enquiry by the Safety, Rehabilitation and Compensation Commission or a report to the Minister, which must be tabled in Parliament if found to be in contravention of the Act. If an employee of such an agency is found to have contravened the Act, the employee may be subject to disciplinary action under the *Public Service Act 1999* or other relevant terms and conditions of employment.

5. As at 30 April 2004, there have been about 77,600 incidents reported and 2,236 investigations conducted under the OHS(CE) Act since 1992. GBEs notified 29,056 of these incidents and were the subject of 775 of the 2,236 investigations. Of the 775 investigations undertaken in GBEs, 420 were investigations into reports of incidents (including serious personal injuries and fatalities). The remaining 335 investigations were undertaken as part of planned or targeted investigation programmes or in response to workplace complaints or disputes concerning provisional improvement notices issued by health and safety representatives.

6. Proceedings for contraventions of the OHS(CE) Act can currently only be undertaken by way of criminal prosecution. For the period July 1991 to the end of April 2004, there have only been 10 prosecutions, of which 8 have been successful and 1 is pending. All prosecutions have involved substantial delays. The quickest prosecution involved 16 months between contravention and finalisation of proceedings. The longest delay was 5 years.

7. There has been no change to the penalty levels since the OHS(CE) Act commenced in 1991 and they have also fallen behind developments in other jurisdictions. They require updating to reflect the seriousness with which breaches of the Act should be treated.

8. The OHS(CE) Act establishes a framework whereby employers and employees can co-operate in addressing health and safety matters in Commonwealth workplaces through the establishment of designated workgroups, the selection of health and safety representatives and the establishment of health and safety committees.

9. The current provisions of the OHS(CE) Act are inconsistent with the Government's workplace relations policy that employers and employees at each workplace should have primary responsibility for deciding matters affecting their relationship. Within appropriate limits, they should be free to do so in the way which they consider most suitable for the circumstances of their workplace. At the same time, employees who belong to unions should be able to be represented by their union if they so choose.

Proposed amendments

10. To address the above issues, the amendments in the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 (the OHS(CE)A(EIC) Bill) are principally focussed on:

- prevention of workplace injury and disease by providing a focus on compliance and outcomes rather than prescriptive processes;

- ensuring that the move to a more flexible approach to the employer's duty of care is balanced by a strong, responsive and effective enforcement regime through the introduction of a wider range of remedies than at present and significantly increasing financial penalties for contravention of the Act; and

- improving employee involvement in occupational health and safety and providing for a more direct relationship between employers and employees about occupational health and safety, thereby enabling the development of arrangements which take account of specific needs at the workplace level.

11. The key amendments relate to penalties, the employer's duty of care and workplace arrangements. There are also some minor or technical amendments to improve the current provisions concerning the issuing of notices and investigations of alleged contraventions of the OHS(CE) Act.

12. The 2003 amendments to the *Petroleum (Submerged Lands) Act 1967* adopted the duty of care and workplace arrangements provisions proposed in the OHS(CE)A(EIC) Bill.

13. The following sections of the submission provide a detailed discussion of the amendments in the OHS(CE)A(EIC) Bill.

PENALTIES

Background and policy rationale

As indicated in the Overview, proceedings for a breach of the OHS(CE) Act can only be taken by way of criminal prosecution. Because of the difficulties inherent in criminal prosecutions, only a small number of prosecutions have been taken. There have been about 77,600 incidents reported under the OHS(CE) Act since 1992, with 2,236 investigations conducted.

2. There have only been 10 prosecutions, of which 8 have been successful. One prosecution is pending. All prosecutions have involved substantial delays. The quickest prosecution involved 16 months between breach and finalisation of proceedings. The longest delay was 5 years.

Proposed Amendments

3. The OHS(CE)A(EIC) Bill (at Item 158) makes significant changes to the penalty provisions in the OHS(CE) Act to ensure that the Act provides a strong, effective and responsive enforcement regime. The aims of the amendments are to:

- provide a greater focus on encouraging voluntary compliance;
- create a dual civil and criminal penalty regime;
- introduce new remedies of injunctions, remedial orders and enforceable undertakings; and
- substantially increase existing penalty levels.

4. All Commonwealth employers will be subject to the full range of civil penalties and remedies.

5. A new additional criminal offence is proposed in the OHS(CE)A(EIC) Bill (Item 158, Schedule 1, clause 19). A GBE who, in breaching its duty of care, negligently or recklessly causes death or serious bodily harm to an employee is liable for a maximum criminal penalty of $495,000 (Item 158, Schedule 1, clause 19 and 21).

(a) Voluntary compliance

Background and policy rationale

Voluntary compliance by employers and others with their obligations under the Act can:

- produce improved health and safety outcomes, particularly by fostering a safety culture in workplaces; and
- achieve faster and more cost effective results than prosecutions.

2. The encouragement of voluntary compliance is therefore an important part of an effective enforcement regime.

3. The OHS(CE) Act already recognises a role for voluntary compliance. For example, a health and safety representative who has reasonable grounds for believing that a person is contravening the Act must consult the person supervising the work in an attempt to reach agreement on rectifying or preventing the contravention (s.29(1) of the OHS(CE) Act). It is only if agreement is not reached within a reasonable time that a provisional improvement notice can be issued.

4. However, while the OHS(CE) Act encourages voluntary compliance, this is not currently expressly stated in the Act.

Proposed amendment

5. Item 1 inserts two new Objects in the Act, first to make specific reference to the need for voluntary compliance and secondly, to indicate the need for an effective enforcement regime if obligations are not complied with. The new objects are:

> *(f) to encourage and assist employers, employees and other persons on whom obligations are imposed under the Act to observe those obligations; and*
>
> *(g) to provide for effective remedies if obligations are not met, through the use of civil remedies and, in serious cases, criminal sanctions.*

6. The OHS(CE)A(EIC) Bill also introduces the new remedy of enforceable undertakings (see Item 158, proposed Schedule 2, clause 16). Comcare is being given the power to accept a written undertaking in relation to an obligation under the OHS(CE) Act. This new remedy will encourage voluntary compliance as it will be available as an alternative to civil proceedings. An undertaking may be accepted whether or not civil proceedings have been commenced. If the undertaking is not complied with, it can be enforced either by court order or by resumption of suspended proceedings.

(b) Dual civil and criminal penalty regime

Background and policy rationale

As indicated above, the existing compliance regime is supported solely by the criminal law. Section 79 of the OHS(CE) Act provides that:

> *Subject to section 80, nothing in this Act:*
>
> *(a) confers a right of action in any civil proceedings in respect of any contravention of a provision of this Act or the regulations; or*
>
> *(b) confers a defence to an action in any civil proceedings or otherwise affects a right of action in any civil proceedings.*

2. The criminal prosecution process is relatively lengthy and time consuming and the highest standard of proof is required. There are various reasons for delays, including protracted investigation processes and delays before the courts. There are also time limits within which prosecutions must be commenced. Section 15B of the *Crimes Act 1914* (the Crimes Act) provides for time limits on the commencement of prosecutions for Commonwealth offences. As these limits apply to the OHS(CE) Act, all prosecutions against individuals must be brought within one year of the alleged offence having been committed. There is only greater time allowed for the prosecution of GBEs where the maximum penalty that could be imposed on the GBE for the offence is more than $16,500 (paragraph 15B(1A)(a) of the Crimes Act).

3. The number of matters dealt with by the courts has been very small. While this might be partly explained by the effect of the present provisions preventing prosecution of the Commonwealth and its authorities and their employees (the "shield of the Crown"), it does seem that the OHS(CE) Act's criminal penalty provisions have had a limited role in enforcing the Act and encouraging compliance with the provisions of the Act.

4. The existence of criminal penalties by themselves also generates a perception that the Act ultimately only provides for mechanisms to punish failures of compliance, rather than encouraging lasting rectification.

Proposed amendments

5. Item 158 introduces a dual regime of enforcement, providing for civil remedies as far as possible while maintaining criminal remedies for the most serious breaches of the OHS(CE) Act. Criminal remedies will be maintained for breaches of the Act which result in death or serious bodily harm, or for offences that are more appropriately dealt with in the criminal justice system eg. s.61 which deals with contempt of the SRC Commission when it is conducting an inquiry.

6. The availability of civil proceedings for other breaches of the OHS(CE) Act should result in faster and more successful outcomes for a number of reasons, in particular because of the need to satisfy the civil standard of proof "on the balance of probabilities" rather than the higher criminal standard of "beyond reasonable doubt".

7. There will also be advantages in terms of speeding up the process of enforcement. Under s.77 of the OHS(CE) Act, Comcare or an investigator has the power to institute proceedings for an offence against the Act. However, in practice, once Comcare or an investigator has formed the view that an offence has been committed, the matter must, under the Commonwealth's prosecution policy, be referred to and dealt with by the Director of Public Prosecutions (DPP). The availability of civil penalties for contraventions would enable Comcare to initiate and conduct proceedings in its own right. The DPP will only need to be involved in the prosecution of serious breaches of the Act.

8. The dual civil/criminal penalty regime is being implemented through the insertion of a new schedule (Schedule 2) in the OHS(CE) Act. This approach is modelled largely on the enforcement approach of the *Commonwealth Authorities and Companies Act 1997* which is in turn modelled on the *Corporations Law* and has been developed in close consultation with the Attorney-General's Department to ensure compliance with current Commonwealth criminal policy.

9. Schedule 2 will provide for civil penalties for contraventions of specified sections of the Act, requiring proof only to the civil standard. Schedule 2 will also specify the provisions where criminal penalties attach and explain the interaction between civil proceedings and criminal prosecutions and the procedures for instigating civil proceedings.

(c) Other new remedies

Background and policy rationale

The existence of monetary penalties alone is not sufficient to ensure compliance with the requirements of the OHS(CE) Act. While monetary penalties can act as punishment and deterrence, other remedies should be available to ensure that health and safety problems are addressed and rectified before employees suffer injury.

Proposed amendment

2. The OHS(CE) Bill introduces new remedies to support the encouragement of voluntary compliance and ensure that effective enforcement measures are available if voluntary compliance is not achieved.

3. As indicated earlier, Comcare is being given the power to accept enforceable undertakings in relation to the fulfilment of obligations under the OHS(CE) Act. While these will be available as an alternative to prosecution, they can be enforced through the courts if there is a failure to comply with the undertaking.

4. Item 158 of Schedule 1 to the Bill also introduces new remedies of injunctions (see clause 14) and remedial orders (see clause 15). These amendments will ensure that all necessary action is taken to address risks and hazards in the workplace and therefore prevent injuries, rather than waiting until an injury occurs and imposing a fine.

5. Comcare or an investigator will be able to apply to a court for an injunction against a person who has breached, is breaching or proposes to breach the OHS(CE) Act or regulations. The court will be able to grant prohibitory, mandatory or interim injunctions restraining persons from performing acts in breach of the Act or its regulations, or requiring persons to perform acts to prevent a breach of the Act or its regulations. In addition, the court, when granting a prohibitory injunction, will be able to make orders requiring a person to do something if the court thinks this is desirable.

6. Courts are also being given the power to make a remedial order (if this is requested during proceedings concerning a contravention of the OHS(CE) Act) to fully or partly remedy a state of affairs where a court has made a declaration of contravention of the OHS(CE) Act, or convicts a person of an offence against the Act or its regulations. The court will be able to make remedial orders if the court thinks that it is appropriate to remedy a state of affairs that arose as a direct or indirect result of the conduct that was the subject of the declaration or offence. In making the orders, the court will have to consider any relevant material given to it by Comcare.

7. Item 158 (clause 15) also introduces new remedies to protect employees where their employers have taken action in breach of s.64 (Witness not to be prejudiced in employment) or s.76 (Employers not to dismiss employees on certain grounds). In these circumstances, courts

will be able to make orders to reinstate the employee, or pay compensation, or to issue orders or injunctions to prevent or remedy conduct threatened to the employee by the employer. The availability of these remedies will enable courts to make meaningful orders addressing a particular situation and will be beneficial for employees. These remedies will be similar to those introduced for breaches of the freedom of association provisions in the *Workplace Relations Act 1996*.

8. Finally, Item 158 contains amendments to ensure that a person will not be directed to serve a term of imprisonment in default of payment of a fine (see proposed Schedule 2, Part 1, clause 4(4) and Part 2 clause 21(3)).

(d) Increases in penalty levels

Background and policy rationale

The penalty levels in the OHS(CE) Act have not changed since the Act commenced in 1992 and are currently out of step with penalty levels in most State and Territory jurisdictions. They are among the lowest in Australia. For example, the maximum penalty for a breach under the Act is $110,000. In New South Wales the maximum penalty for a corporation is $550,000 ($825,000 in the case of a second offence). Victoria is proposing to increase its current maximum penalty from $250,000 to $750,000.

2. The OHS(CE) Bill therefore includes amendments to raise penalty levels so that they are more consistent with community standards.

Proposed amendments

3. Item 158 proposes substantial increases in the maximum penalties currently provided under the OHS(CE) Act. For example, the maximum penalty for breach of the employer's duty of care will be increased from $110,000 to 2200 penalty units (currently $242,000) for a civil breach and 4,500 penalty units (currently $495,000) for a criminal breach.

4. **Table 1** sets out the current and proposed penalty levels for contraventions of the OHS(CE) Act.

Table 1

Current and proposed penalty levels

Section	Description	Current penalty*	Proposed civil penalty Natural person/body corporate	Proposed criminal penalty Natural person/body corporate
16	Duties of employers in relation to their employees	$110,000	2200 penalty units (body corporate)	4500 penalty units (body corporate)
17	Duties of employers in relation to third parties	$110,000	2200 penalty units (body corporate)	4500 penalty units (body corporate)
18	Duties of manufacturers in relation to plant and substances	$22,000	440/2200 penalty units	900/4500 penalty units
19	Duties of suppliers in relation to plant and substances	$22,000	440/2200 penalty units	900/4500 penalty units
20	Duties of persons erecting or installing plant	$22,000	440/2200 penalty units	900/4500 penalty units
21	Duties of employees in relation to OHS	$5,500	90 penalty units	180 penalty units
43(2)	Failure to comply with an investigator's request for assistance	$3,300 or 6 months imprisonment or both	30 penalty units	30 penalty units or 6 months imprisonment or both
45(5)	Failure to comply with a direction not to disturb a workplace	$27,500	250 penalty units	500 penalty units
46(4)	Failure to comply with a prohibition notice	$27,500	250 penalty units	500 penalty units
47(6)	Failure to comply with an improvement notice	$11,000	10 penalty units for each day	900 penalty units
50	Tampering with or removing a notice	$3,300 or 6 months imprisonment or both	N/A	30 penalty units or 6 months imprisonment or both
54	Refusing or failing to give information or provide document to SRC Commission	$1,100	N/A	30 penalty units or 6 months imprisonment or both
57	Failure by witness to appear before the SRC Commission	$3,300 or 6 months imprisonment or both	N/A	30 penalty units or 6 months imprisonment or both
59	Refusal to be sworn or answer questions	$3,300 or 6 months imprisonment or both	N/A	30 penalty units or 6 months imprisonment or both
61	Contempt of SRC Commission	$3,300 or 6 months imprisonment or both	N/A	30 penalty units or 6 months imprisonment or both
64	Prejudicing employee in employment because of appearance at inquiry	$3,300 or 6 months imprisonment or both	As with WR Act (eg power to reinstate etc) 30 penalty units	N/A
72	Wilful or reckless interference with protective equipment or safety device	$3,300 or 6 months imprisonment or both	N/A	30 penalty units or 6 months imprisonment or both
73	Employer not to levy e'ees	$27,500	250 penalty units	N/A
76	Dismissing employee because of complaint etc	$27,500	As with WR Act 250 penalty units	N/A

*reflects the increase in the amount of a penalty unit

(e) Shield of the Crown

Background and policy rationale

Currently, only GBEs and their employees can be prosecuted for offences under the OHS(CE) Act. Subsection 11(2) of the Act provides that neither the Commonwealth, a Commonwealth authority (other than a GBE) nor an employee of the Commonwealth, or a Commonwealth authority (other than a GBE) is liable to be prosecuted under the OHS(CE) Act for an offence.

2. Removing the shield of the Crown for Commonwealth employees would reflect the common law position that officers, servants and agents of the Crown have no immunity from the criminal law and therefore ensure that Commonwealth employees can be held accountable where they have acted wrongfully. It would also bring all Commonwealth and Commonwealth authority employees into line with employees of GBEs and is consistent with the position in most of the States and Territories.

Proposed amendment

3. The OHS(CE)A(EIC) Bill places new sanctions on both Commonwealth employers and employees for breaches of the OHS(CE) Act. Commonwealth employers will be subject to the new remedies of injunctions, remedial orders and enforceable undertakings. Item 17 proposes that Commonwealth employees and Commonwealth authority employees will no longer have the protection of the shield of the Crown and will be liable to prosecution for committing an offence.

4. The provision of legal assistance to employees of Commonwealth Departments is available and provided in accordance with the Legal Services Directions administered by the Attorney-General. The Directions provide that an employee can be indemnified for legal costs where that employee is subject to legal proceedings where the proceedings arise out of an incident which relates to their employment and the employee has acted reasonably and responsibly in the course of their employment. The assistance available could involve payment of legal representation and related costs, damages and legal costs awarded against the employee, a reasonable amount in settlement of proceedings and a fine or penalty imposed on the employee. While the provision of assistance to employees under the Directions is discretionary and must be dealt with on a case by case basis, the assistance they afford could apply to a prosecution under the OHS(CE) Act.

5. Legal assistance to employees of Commonwealth authorities may be available from Comcover which can advance legal costs to employers or directors in appropriate circumstances. Comcover is the Commonwealth managed insurance fund. In deciding on the provisions of assistance, Comcover does have regard to the policy set out in the Legal Services Directions as well as to legal advice and the advice of the authority concerned.

6. The shield of the Crown is not being removed for the Commonwealth itself because this would be inconsistent with Commonwealth criminal policy. It would be inappropriate and financially wasteful for the Commonwealth to prosecute itself and it would be extremely difficult in criminal prosecutions to identify whose actions and intentions constituted the offence. As indicated earlier, however, the Commonwealth as an employer is being made liable to the full range of new civil sanctions for a breach the OHS(CE) Act, including pecuniary penalties [Item 17, ss.11(2) and (3)].

7. The provisions of the OHS(CE) Act under which an employee could be prosecuted, due to the proposed removal of the shield of the Crown are:

(a) duty of care of employees – s.21(1);
(b) requirement to provide assistance and information – s.43(2);
(c) requirement to comply with improvement notice – s.47(6);
(d) requirement not to tamper with notices – s.50;
(e) requirement not to interfere with equipment etc – s.72;
Note: provisions (a)-(e) are only criminal offences where death or serious bodily harm results from the breach of the provision
(f) requirement to give information or produce documents – s.54(1);
(g) failure of witness to attend – s.57;
(h) refusal to be sworn or answer questions – s.59;
(i) contempt of SRC Commission – s.61.

EMPLOYER'S DUTY OF CARE

Background and policy rationale

Section 16 of the OHS(CE) Act requires Commonwealth employers to take all reasonably practicable steps to protect the health and safety at work of their employees and sets out detailed requirements for fulfilling this obligation.

2. While the OHS(CE) Act recognises that improved health and safety outcomes at the workplace cannot be achieved without the involvement of employees, there are problems with some of the current requirements of s.16. This is because they limit the Act's effectiveness by:

- their focus on process rather than outcomes;
- restrictions on the development of safety arrangements which take account of the needs of individual organisations or workplaces; and
- restrictions on the ability of employees to participate in the development of safety arrangements at their workplace.

3. The Bill aims to overcome these problems by enhancing consultation arrangements between employers and employees. Facilitating a more direct relationship between employers and employees supports Object 3(e) of the OHS(CE) Act, namely "to foster a co-operative consultative relationship between employers and employees on the health, safety and welfare of such employees at work" and would assist in achieving improved occupational health and safety outcomes.

4. The amendments have a number of positive aspects for employees:

- employees' rights are being upgraded. The statutory duty of care is owed to them, not to unions. The amendments will ensure that employees will be directly involved in the development of occupational health and safety arrangements specifically focused on their workplaces;
- employees would have the right to be represented by their representative association;
- employees would have access to a wider range of employee associations to represent them than at present; and
- the facilitation of a more direct relationship between employers and employees, the removal of prescriptive requirements and the increased focus on outcomes will assist in achieving safer workplaces by encouraging the development of occupational health and safety arrangements which take account of the particular needs of their workplace.

Proposed amendments

5. The OHS(CE)A(EIC) Bill maintains and strengthens the overarching general duty of care of Commonwealth employers under subsection 16(1) to take all reasonably practicable steps to protect the health and safety at work of their employees.

6. Currently subsection 16(2) sets out certain requirements which an employer must meet in order to comply with the general duty in subsection 16(1), namely:

- to provide a safe working environment and a safe workplace;
- to ensure the safe handling of plant or substances; and
- to provide employees with the information, instruction, training and supervision necessary to enable them to perform their work in a manner that is safe and without risk to their health are retained without change.

7. Paragraph 16(2)(d) and subsection 16(3) however, contain provisions which are oriented towards process rather than outcomes. They restrict the capacity of employers to meet their general duty of care to their employees by developing arrangements which take account of the specific needs of their own organisation. There are also restrictions on the ability of all employees to be fully involved in addressing safety issues at their workplaces.

8. Paragraph 16(2)(d) requires an employer to "develop, in consultation with any involved unions in relation to the employees of the employer, and with such other persons as the employer considers appropriate, a policy, relating to occupational health and safety". The policy must enable effective co-operation between the employer and the employees in promoting and developing measures to ensure the employees' health, safety and welfare at work and provide adequate mechanisms for reviewing the effectiveness of the measures.

9. Subsection 16(3) provides that a policy relating to occupational health and safety of the kind referred to in paragraph 16(2)(d) that is developed in consultation with involved unions must provide for the making of an agreement between the employer and those unions. The agreement must provide appropriate mechanisms for continuing consultation between the employer, the unions and the employees on occupational health and safety matters and such other matters as are agreed between the employer and the unions. Subsection 16(3) does not in fact impose any enforceable requirement that an agreement be made. It only requires that the occupational health and safety policy provide a process for an agreement to be made.

10. The OHS(CE)A(EIC) Bill would remove prescriptive provisions as far as possible and ensure that the primary obligation on employers to consult will be with their employees. Item 26 of the OHS(CE) Amendment Bill therefore proposes replacing paragraph 16(2)(d) with a new obligation on employers to develop safety management arrangements in consultation with their employees that will:

(i) enable effective co-operation between the employer and the employees in promoting and developing measures to ensure the employees' health, safety and welfare at work;

(ii) provide adequate mechanisms for informing the employees about the arrangements;

(iii) provide adequate mechanisms for reviewing the effectiveness of the arrangements;

(iv) provide adequate mechanisms for the variation of the arrangements in consultation with the employees;

(v) provide for a dispute resolution mechanism to deal with disputes arising in the course of consultations held under the Act between the employer and the employees; and

(vi) in the case of an employer who is required to establish a health and safety committee, provide for the manner in which the health and safety committee is to be established and is to operate.

11. The term "safety management arrangements" is being used in the OHS(CE)A(EIC) Bill to describe collectively the elements which could be included in the arrangements. The proposed amendments do not specify any matters which must be included, consistent with the aim of removing prescription from the legislation as far as possible and facilitating the development of appropriate arrangements at the enterprise level. However, to assist employers, Item 27 provides guidance on the matters that could be included, namely:

(a) a written occupational health and safety policy;
(b) risk identification and assessment;
(c) occupational health and safety training; and
(d) the making of agreements between the employer, the employees and their representatives on continuing consultation and other matters.

12. While the requirement in the current subsection 16(3) for an occupational health and safety policy to provide for the making of agreements with involved unions would be removed, its provisions are reflected in the proposed new subsection 16(3) which indicates that employers should consider including occupational health and safety policies and agreements between employers and employees and their representatives when developing safety management arrangements for their workplaces.

13. In developing or varying safety management arrangements, an employer will be required to have regard to any advice of the Safety, Rehabilitation and Compensation Commission (the SRC Commission) on the matter whether the advice has been given to that employer, or to employers generally (see Item 29). This requirement is designed to assist employers when they are developing safety management arrangements, by making them aware of relevant matters which could be appropriate for adoption in their particular workplace to meet their duty of care.

14. While no decision has yet been taken by the SRC Commission as to the elements which will be recommended for inclusion in safety management arrangements, they could include matters such as:

- a written corporate health and safety policy;
- risk identification and assessment arrangements;
- mechanisms for eliminating, controlling or protecting against risks;
- arrangements for providing information about risks;
- arrangements for consultation with employees;
- employee and manager training; and
- monitoring arrangements.

15. These matters are included in State/Territory legislation, as indicated in **Table 2**.

Table 2

Comparison of possible elements to be included in OHS(CE) Act safety management arrangements with State Jurisdictions

Possible Elements of SRCC Advice	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
a written corporate health and safety policy	yes	no	yes	no	yes	No	no	No
risk identification and assessment arrangements	no	yes	yes	yes	yes	Yes	yes	Yes
mechanisms for eliminating, controlling or protecting against risks	yes	yes	yes	yes	yes	Yes	yes	Yes
arrangements for providing information about the risks;	yes	yes	yes	yes	yes	Yes	yes	Yes
arrangements for consultation with employees	yes	yes	yes	yes	yes	Yes	yes	Yes
employee and manager training	yes/no	yes/no	yes/no	yes/no	yes	Yes	yes/no	Yes
monitoring arrangements	yes	yes	yes	yes	yes	Yes	yes	Yes

The following acts were referenced for this table:

ACT: *OCCUPATIONAL HEALTH AND SAFETY ACT 1989*
NSW: *OCCUPATIONAL HEALTH AND SAFETY ACT 2000*
NT: *WORK HEALTH ACT 1986*
QLD: *WORKPLACE HEALTH AND SAFETY ACT 1995*
SA: *OCCUPATIONAL HEALTH, SAFETY AND WELFARE ACT 1986*
TAS: *WORKPLACE HEALTH AND SAFETY ACT 1995*
VIC: *OCCUPATIONAL HEALTH AND SAFETY ACT 1985*
WA: *OCCUPATIONAL SAFETY AND HEALTH ACT 1984*

16. While employers are required to have regard to advice from the SRC Commission concerning safety management arrangements, they are not compelled to adopt the advice if they judge other arrangements to be more appropriate and effective. This is because the responsibility to take all reasonably practicable steps to protect the health and safety of the employer's employees at work ultimately rests on the employer. Final determination of the safety management arrangements can therefore only be a matter for employers as they will be liable if the safety management arrangements are defective. This places a heavy onus on employers to develop safety management arrangements which comply with their primary duty of care towards their employees under the OHS(CE) Act.

17. Employers will be in breach of their duty of care if they fail to take all reasonably practicable steps to develop safety management arrangements in consultation with their employees.

18. While the OHS(CE)A(EIC) encourages employees to directly participate in the development of safety management arrangements, they can be represented in consultations with their employer if they wish (see Item 29). An employee may be represented either by another employee of the employer or an employee representative.

19. 'Employee representative' is defined in the Bill as a registered organisation of employees, or an association of which the employee is a member by virtue of the work the employee performs. If an employee belongs to one or more of these bodies, he or she is free to choose which of these representatives may represent him or her.

20. The OHS(CE)A(EIC) Bill 2002 recognises that some employees may not wish to be identified by their employer as having sought representation in consultations. It therefore includes a provision (see Item 29 – clause 26B) analogous to s.291A of the *Workplace Relations Act 1996*. Section 291A of that Act enables a registrar of the Australian Industrial Registry to issue a certificate concerning representation by an organisation of employees in consultations with an employer about a proposed agreement.

21. The OHS(CE)A(EIC) Bill 2002 gives the Chief Executive Officer of Comcare the power to issue a certificate, on application by an employee representative, that an employee has requested the employee representative to be involved in consultations with the employer when developing or varying safety management arrangements. The certificate must not identify the employee concerned but must identify the employee representative, the employer and the proposed consultations. The Chief Executive Officer of Comcare may delegate this power to the Deputy Chief Executive Officer of Comcare.

22. This provision does not impose any requirement on employees to obtain a certificate from the CEO of Comcare before they can be represented in consultations with their employer. It is purely a mechanism which employees can invoke if they do not wish to be identified as having sought representation.

WORKPLACE ARRANGEMENTS

Background and policy rationale

Part 3 of the OHS(CE) Act establishes a framework whereby employers and employees can co-operate in addressing health and safety matters at the workplace through the establishment of designated workgroups, the selection of health and safety representatives and the establishment of health and safety committees.

2. The OHS(CE)A(EIC) 2002 proposes amendments to the workplace arrangements provisions consistent with the aims of the amendments to the employer's duty of care, namely to:

- improve health and safety outcomes by facilitating a more direct relationship between employers and employees; and

- focus on outcomes rather than prescriptive processes.

3. The OHS(CE)A(EIC) Bill 2002 maintains the mechanisms of designated workgroups, health and safety representatives and health and safety committees. The statutory powers of health and safety representatives are maintained and enhanced in one respect, namely a new power to request an investigation where a provisional improvement notice has been issued but not complied with and an investigation has not been requested. The current statutory functions of health and safety committees are also maintained.

4. The role of "involved unions" is being amended with provisions for direct arrangements between employers and employees on relevant matters. Unions will however, still be able to participate if this is requested by an employee or employees.

(a) Designated workgroups

Background and policy rationale

Section 24 of the OHS(CE) Act provides for the establishment of designated workgroups for the purpose of selecting employee health and safety representatives. Amendments to these provisions are required to facilitate a more direct relationship between employers and employees.

2. Subsection 24(1) provides that a request to an employer to enter into consultations to establish or vary a designated workgroup may be made by an involved union. It is only if there is no involved union in relation to any employee of the employer that an employee has the right under the Act to request his or her employer to establish or vary a designated workgroup.

3. The OHS(CE) Act requires an employer who receives such a request to enter into the consultations. If the request is made by an involved union, the Act currently provides that the consultations are only with any involved unions (subsection 24(2)). If there is no involved union the employer is required to consult the employee who made the request. The OHS(CE) Act currently does not require the employer to consult employees other than the one who made the request.

4. Subsection 24(3) enables the variation of designated workgroups. An employer who believes that designated workgroups should be varied may at any time enter consultations with any involved unions concerning the variation of the designated workgroup. If there is no involved union in relation to any employee, the employer may consult the health and safety representative for the designated workgroup.

Proposed amendments

5. Item 42 replaces subsections 24(1)-(3) with provisions which:

(a) enable any employee to request his or her employer to establish or vary designated workgroups;

(b) enable an employee representative, if requested by an employee, to request the employer to establish or vary designated workgroups;

(c) require the employer to enter into consultations with the employer's employees or the employee representative to establish or vary the designated workgroups within 14 days of receiving such a request; and

(c) enable an employer to enter into consultations about varying designated workgroups with:

(i) the health and safety representative of each designated work group proposed to be varied; and
(ii) if an employee in a designated workgroup proposed to be varied so requests, an employee representative.

6. The remaining provisions in s.24 of the OHS(CE) Act are being retained, namely:

(a) enabling disagreements about the establishment or variation of designated workgroups to be referred to the Australian Industrial Relations Commission (s.24(4));

(b) requiring the employer to establish, or vary if this is justified, the designated workgroups in accordance with the outcome of the consultations within 14 days of completion of the consultations (s.24(5) and (6));

(c) specifying (in s.24(7)):

(i) the matters to be achieved in the consultations, namely ensuring the best and most convenient method of representing and safeguarding the employees' occupational health and safety and ensuring that health and safety representatives will be accessible to each employee in the group; and
(ii) the matters to be considered in the consultations, eg the number of employees and the nature of the work performed.

(d) ensuring that each employee is included in a designated workgroup (s.24(8)); and

(e) enabling all employees to be included in one designated workgroup (s.24(9)).

7. A new provision is being inserted to clarify that consultations concerning the establishment or variation of designated workgroups are consultations to develop safety management arrangements (Item 43). This will ensure that the provisions for consultations on the development of safety management arrangements, such as representation of employees, will apply to consultations on the establishment or variation of designated workgroups. Employees will therefore be able to be represented in consultations on the establishment of designated workgroups by their employee representative if they wish. Item 43 further provides that it will not be sufficient, on its own, for the purposes of developing safety management arrangements, ie to meet the employer's duty of care, for the employer merely to hold consultations on the establishment or variation of designated workgroups.

8. A further provision will require an employer to prepare and keep an up-to-date list of all designated workgroups and ensure that the list is available at all reasonable times for inspection by both investigators and the employees (Item 44). The list must describe the categories of employees included in each designated workgroup.

(b) Health and safety representatives

Background and policy rationale

Health and safety representatives are chosen by employees to represent them and play an important role in assisting the resolution of workplace health and safety issues. They are given specific powers under the OHS(CE) Act to enable them to effectively carry out this role. The amendments in the OHS(CE)A(EIC) Bill remove current restrictions in the OHS(CE) Act which prevent some employees being selected as health and safety representatives.

2. Section 25 of the OHS(CE) Act provides for the selection of health and safety representatives by either:

- the unanimous agreement of all employees in the designated workgroup; or
- by an election.

3. If an election for a health and safety representative is required, and there is an involved union or unions for the designated workgroup, the OHS(CE) Act currently provides that the election must be conducted by an involved union. In this situation, only employees nominated by an involved union are entitled to be candidates in the election.

4. If there is no involved union, a person authorised by the SRC Commission may conduct the election.

5 The OHS(CE)A(EIC) Bill facilitates a more direct role between employers and employees if an election for the position of health and safety representative is required and provides a less prescriptive approach for the election.

Proposed amendments

6. The OHS(CE)A(EIC) Bill removes restrictions on employees becoming health and safety representatives to ensure that all employees are able to take on this role if they wish.

7. Item 45 sets out the steps to be taken by an employer if there is a vacancy in the office of health and safety representative and a person has not been unanimously selected by the other employees in the designated workgroup for the position within a reasonable time. In this situation, the employer must:

(a) invite nominations for the election; and,

(b) if there is more than one candidate, conduct, or arrange for the conduct of, an election at the employer's expense. All employees in the designated workgroup are entitled to vote in the election.

8. Employers will be able to conduct an election in the most efficient way consistent with legislative requirements. The Australian Electoral Commission is available to provide assistance to employers in conducting elections. To protect employees' interests in the conduct of these elections, a new provision has been included in the 2002 Bill. Where the lesser of 100 employees or the majority of employees in the designated workgroup so request, an election must be conducted in accordance with new regulations. Currently there are regulations prescribing the conduct of elections of health and safety representatives where these are carried out by a person authorised by the SRC Commission.

9. Item 46 also provides a role for the SRC Commission in the selection of health and safety representatives to ensure that an election is conducted if required. If the employer has not called for nominations within 6 months after a vacancy occurs, the SRC Commission is being given the power to direct an employer to call for nominations. Employers conducting or arranging for the conduct of an election must also comply with any relevant directions issued by the SRC Commission.

(c) Health and safety committees

Background and policy rationale

Section 34 of the OHS(CE) Act provides for the establishment of health and safety committees. At present, the OHS(CE) Act requires an employer to establish a health and safety committee where:

(a) the number of the employer's employees at the workplace is normally not less than 50;

(b) the employees are included in one or more designated workgroups; and

(e) the employer is requested to establish the committee by:

(i) a health and safety representative; or
(ii) an involved union.

2. The current provisions also contain prescriptive requirements concerning the composition and operation of health and safety committees.

Proposed amendments

3. Item 61 improves the provisions for the establishment of health and safety committees. Currently, an employer is only required to establish a health and safety committee if requested to do so. There will be an absolute requirement on an employer to establish a health and safety committee, i.e. it is not dependent on a request from a health and safety representative or an involved union, if the number of the employer's employees is normally not less than 50. The current criteria for the establishment of a committee is therefore changed from 50 employees in a workplace to 50 employees in the employer's workforce. This will ensure that all employers with a workforce of 50 employees will have a health and safety committee.

4. Additional committees must also be established for a particular workplace if the number of employees in the workplace is not normally less than 50 and either a health and safety representative or a majority of employees in the workplace request the employer in writing to establish a committee.

5. As in the current provisions, the OHS(CE)A(EIC) Bill contains a clause to clarify that the specific legislative requirements do not prevent the establishment of other committees. Employers may establish other committees in consultation with their employees or any other persons.

6. The OHS(CE)A(EIC) Bill adopts a less prescriptive approach to the composition and operation of health and safety committees than the current provisions in the OHS(CE) Act. The safety management arrangements made under proposed paragraph 16(2)(d) will provide for the manner in which the health and safety committee is to be constituted and operate. This is clarified by the requirement in proposed s.34(3) that a health and safety committee must operate in accordance with the safety management arrangements applying to the employer's employees. This is subject to proposed subsection (4) which provides that the number of members of a health and safety committee chosen by the employer must not exceed the number of members chosen by the employees to represent their interests. This provision will safeguard employees' interests and ensure that employers cannot dominate the membership of health and safety committees.

7. These changes will replace existing prescriptive provisions which specify that:

(a) health and safety committees consist of the number of members specified in an agreement between the employer and the involved unions or, if there are no such involved unions, with the employer's employees. If there is no agreement, the committee consists of equal numbers of employer and employee representatives. If there is an agreement, it may specify the persons who shall represent management and provide for the manner in which employer representatives shall be chosen;

(b) health and safety committees must hold meetings at least once every 3 months;

(c) meeting procedures must be the procedure agreed upon by the committee; and

(d) the committee must keep minutes of meetings and retain them for 3 years.

(d) Role of representative unions concerning investigations under s.41 and appeals under s.48

Background and policy rationale

Subsection 41(5) of the OHS(CE) Act currently entitles an involved union to make a request to an investigator or to the SRC Commission that an investigation be conducted at a workplace, being a workplace at which an employee, who is a member of the union, performs work for the employer. *Note: Item 71 of the OHS(CE)A(EIC) Bill proposes that such requests would be made to Comcare or the SRC Commission.*

2. Section 48 of the OHS(CE) Act provides for appeals against decisions of investigators and lists the persons who may make such appeals. This includes involved unions.

Proposed amendments

3. Consistent with the aim of ensuring that the primary focus of the OHS(CE) Act should be on facilitating a more direct relationship between employers and employees:

(a) Item 71 of the OHS(CE)A(EIC) Bill amends subsection 41(5) to provide that a employee representative may, if requested by an employee, request Comcare or the SRC Commission to direct an investigator to conduct an investigation; and

(b) Items 102, 103 and 104 amend s.48 to enable an employee representative to make appeals against decisions of investigators where an employee affected by the decision has requested the representative to make the appeal.

OTHER AMENDMENTS

(a) Annual reporting requirements

Background and policy rationale

Section 74 of the OHS(CE) Act sets out the information concerning occupational health and safety issues which Departments and Commonwealth authorities must include in their annual reports. The aim of this section is to ensure that Commonwealth agencies are accountable for occupational health and safety outcomes by requiring them to report on certain matters to the Parliament. The section requires amendment to ensure that Parliament is made aware of the performance of agencies in respect of occupational health and safety outcomes.

Proposed amendment

2. The OHS(CE)A(EIC) Bill streamlines the current provisions and provides a greater focus on occupational health and safety outcomes.

3. Item 132 deletes the requirement for agencies to include details of the occupational health and safety policy of the agency and replaces it with a requirement that agencies must report details of the safety management arrangements of the agency (proposed paragraph 74(1)(c)).

4. Item 133 requires agencies to report on initiatives (rather than measures) taken during the year to ensure the health, safety and welfare at work of employees and contractors of the agency (proposed paragraph 74(1)(d)).

5. A new requirement is included for agencies to report on "health and safety outcomes (including the impact on injury rates of employees and contractors of the Entity or authority) achieved as a result of initiatives mentioned under paragraph (d) or previous initiatives" (Item 134 - proposed paragraph 74(1)(d)).

6. Unnecessary prescriptive provisions requiring agencies to report details of tests conducted on plant etc in the course of investigations and directions that a workplace not be disturbed, are being repealed. Instead, new paragraph 74(1)(f) requires agencies to report on "any investigations conducted during the year that relate to undertakings carried on by the employer, including details of all notices given to the employer under section 29 (provisional improvement notices), 46 (prohibition notices) or 47 (improvement notices) during the year (Item 135).

7. A new requirement (proposed paragraph 74(1)(g)) is included for agencies to report on such other matters as are required by guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit (Item 136). If the Committee issues guidelines on occupational health and safety matters, annual reports will therefore be required by the OHS(CE) Act to comply with such guidelines.

(b) Updating the Schedule of GBEs

Background and policy rationale

Coverage under the OHS(CE) Act includes coverage of Commonwealth authorities (as defined therein) which are Government Business Enterprises (GBEs). Briefly, a GBE is defined in s.5 of the OHS(CE) Act as a Commonwealth authority which is either specified in the Schedule or is a body corporate under a law of the Commonwealth or a State or Territory in which the Commonwealth has either a controlling interest (subject to certain exceptions) or a substantial interest (also subject to certain exceptions).

2. The Schedule to the OHS(CE) Act therefore only specifies a particular category of Commonwealth authority as a GBE. Other GBEs are automatically covered by the OHS(CE) Act if they fall within one of the other parts of s.5.

3. GBEs and their employees are able to be prosecuted for breaches of the OHS(CE) Act.

4. The Schedule requires updating to reflect changes to Commonwealth entitites. Relevant portfolio Ministers and agencies were consulted about the proposed changes and their agreement to the changes has been obtained.

Proposed amendments

5. Item 156 adds the Australian Government Solicitor (AGS) and the Defence Housing Authority (DHA) to the Schedule.

6. The AGS acquired the status of a Commonwealth authority and GBE within the meaning of s.5 of the OHS(CE) Act on 1 September 1999 and should therefore be included on the Schedule.

7. The DHA was established under s.4 of the *Defence Housing Authority Act 1987* and is recognised as a GBE. The DHA should therefore also be included on the Schedule.

8. Item 157 deletes ANL Limited, Health Insurance Commission, Housing Loans Insurance Corporation, Pipeline Authority and Telstra Corporation Limited from the Schedule.

9. As ANL Limited, Housing Loans Insurance Corporation and Pipeline Authority have now been privatised, they should be deleted from the Schedule.

10. The Health Insurance Commission is no longer a GBE following its restructuring (when it was separated from Medibank Private) and should therefore also be deleted from the Schedule.

11. Telstra Corporation Limited is covered by the OHS(CE) Act as a GBE, and will continue to be so covered, as it falls within the definition of a GBE in subparagraph 5(1) (b) (ie it is a body corporate incorporated under a law of the Commonwealth or a State or Territory, the Commonwealth has a controlling interest and it has not been declared not to be a Commonwealth authority for the purposes of the OHS(CE) Act)). The deletion of Telstra Corporation Limited from the Schedule is therefore a housekeeping exercise and does not remove Telstra Corporation Limited from coverage under the OHS(CE) Act.

(d) Technical amendments

The OHS(CE)A(EI&C) Bill also makes a number of technical amendments to the OHS(CE) Act, including:

(a) updating references to the SRC Commission and the SRC Act (Items 2, 4, 5 and 6).

(b) ensuring that the reference to "contractors" in s.14 includes corporations which are contractors. Currently the OHS(CE) Act only defines a contractor as a natural person (Item 7);

(c) amending s.20 (Duty of a person erecting or installing plant in a workplace) to ensure that a person who erects or installs any plant in a workplace for the use of employees at work must take all reasonably practicable steps not only to ensure that the plant is not erected or installed in such a manner that the plant is unsafe for employees who use the plant or constitutes a risk to their health (the current position) but also that the plant is not erected or installed in such a manner that the process of erection or installation is unsafe for all employees at the workplace or constitutes a risk to their health (Item 38);

(d) an amendment to paragraph 21(2)(a) to reflect that matters may be agreed between employers and employees or their representatives (Item 41) *Note: Item 162 preserves agreements between employers and involved unions which were in force immediately before commencement of the amendment.*

(e) ensuring that a provisional improvement notice is valid as soon as it is given to the person in charge of the activity to which it relates (Item 52);

(f) health and safety representatives are being given the power to request an investigation of an alleged contravention of the OHS(CE) Act where a provisional improvement notice has been issued but not complied with. The OHS(CE) Act is currently silent in regard to instances where the responsible person neither complies with the notice nor requests an investigation (Item 55);

(g) enabling Comcare to exercise some powers currently conferred on the SRC Commission (Items 63, 65, 67, 68, 70 and 71):

- the power to advise employers, employees or contractors, either on its own initiative or on request, on occupational health and safety matters affecting those employers, employees or contractors (the SRC Commission will retain the power to provide such advice, but any requests for advice will be made to Comcare);
- the power to refer persons seeking advice to experts; and
- the power to direct an investigator to conduct an investigation (this will be in addition to power of the SRC Commission to give such directions);

(h) investigators are being given the power to take possession of relevant documents (Item 72);

(i) investigators are being given the power to amend or cancel notices that they have issued (Item 80);

(j) currently, a direction by an investigator not to disturb a workplace can only be given in writing. There may however be situations where there is no possibility of delivering a written notice quickly. The OHS(CE)A(EIC) Bill gives investigators the power to give such directions orally (Item 81). Such directions will however cease to have effect after 48 hours, or if it is revoked, or when a written direction is issued;

(k) replacing the current two requirements for employers to notify and report workplace accidents and dangerous occurrences, with only one requirement (Item 122);

(l) requiring the SRC Commission to provide copies of reports of investigations to GBEs and, where requested to do so, require the GBE to provide details of actions taken arising from the recommendations in the report (Item 106); and

(m) enabling documents to be made available for inspection at the offices of Comcare rather than those of the Commission (Item 124).