Work Health and Safety (Transitional and Consequential Provisions) Bill 2011

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Work Health and Safety (Transitional and Consequential Provisions) Bill 2011

Date introduced: 6 July 2011
House: House of Representatives
Portfolio: Education, Employment and Workplace Relations
Commencement: Sections 4 and 5 and Schedules 1–4 on 1 July 2012; all other provisions on the day of Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose


Background

This Bill is a companion to the Work Health and Safety Bill 2011 which contains all the relevant background information.2

Committee consideration

The Work Health and Safety Bill 2011 and this Bill were referred to the Senate Education, Employment and Workplace Relations Committee on 7 July 2011 for inquiry and report by 26 August 2011.3

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1. The Work Health and Safety Act 2011 is expected to commence on 1 January 2012.

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Key provisions

Section 4 of the Bill provides definitions of terms used in the Bill. Importantly, the terms ‘plant’, ‘structure’, ‘substance’ and ‘supply’ in relation to duties imposed under the OHS Act continue to apply (because of provisions of this Bill) under the Work Health and Safety Act 2011 (WHS Act) (when enacted) and retain the same meaning and application under that Act.

Clause 5 provides a broad regulation making authority which extends to making regulations of a transitional, application or saving nature in respect of the OHS Act, SRC Act and the WHS Act.

Schedule 1

This schedule repeals the OHS Act.

Schedule 2

Part 1—Application

Item 1 provides that the OHS Act continues to apply in relation to any breach occurring before the ‘commencing day’ which is defined in section 4 of the Bill as being 1 January 2012.

Part 2—Application of duties imposed under WHS Act

Item 2 exempts designers from the duties imposed under proposed section 22 of the WHS Act if the designer started, or completed, the design before the ‘commencing day’. The exemption terminates if the design is not completed within two years of the commencing day—that is, by 1 January 2014. By way of further exception to the rule in subitem 2(1), any calculations, analysis or safety testing of the product will come under the WHS Act.

Item 3 exempts manufacturers from the duties imposed under proposed section 23 of the WHS Act in respect of processes started or completed before the ‘commencing day’. Duties imposed on a manufacturer under provisions of the OHS Act continue to apply in relation to any plant or substance, or any associated process which the manufacturer started and prosecutions for breaches will be made under the OHS Act. The exemption lasts for 12 months. The WHS Act will apply to any safety calculations, analysis testing or examination made for manufactured products.

Item 4 exempts importers from the duties imposed under proposed section 24 of the WHS Act in relation to the importation of any plant, substance or structure if the importer started the importation before the ‘commencing day’ (importers can be deemed to be manufacturers in certain circumstances under the OHS Act). Duties imposed on an importer by the OHS Act will apply if the importation commenced before the commencement of the WHS Act, as will any breaches of a duty. The exemption lasts for 12 months after which time the WHS Act will apply. Provisions of the WHS Act will apply to any calculations, analysis, testing or examination that is relevant to determining the safety of the imported product.

Item 5 exempts suppliers from the duties imposed under proposed section 25 of the WHS Act in relation to the supply of any plant, substance or structure. For a supply process started before the

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commencement of the WHS Act, the relevant provisions of the OHS Act will apply to suppliers and deemed suppliers. Where the OHS Act continues to apply, it will apply in relation to any breach of that Act by a supplier. The exemption applies for 12 months, after which time the WHS Act will apply. In respect of any safety analysis or calculations made in relation to the supply of plant, the relevant duties of the WHS Act will apply.

Item 6 exempts those who install, construct or commission plant or structures from the duties imposed under proposed section 26 of the WHS Act. Subitem 6(1) defines the terms ‘OHS installer’ and ‘WHS installer’ with the latter definition reflecting the role of PCBU (person conducting a business) consistent with the WHS Act. For an installation project started by a WHS installer before the commencement of the WHS Act, the relevant duty provisions of the WHS Act will not apply (for a period of two years). The duties imposed on OHS installers under the OHS Act will apply to installations commenced before WHS Act commencement.

Part 3—Notifiable incidents

Item 7 stipulates that the WHS Act applies to ‘notifiable incidents’ of which the PCBU was made aware on or after the commencement of the WHS Act, even if the incident occurred before WHS Act commencement.4

Item 8 provides that where a person was required to maintain a record of an incident under the OHS Act before the ‘commencing day’, the OHS Act’s provisions (and regulations) continue to apply in relation to that incident.

Part 4—Work groups, health and safety representatives and committees

Item 9 ensures that designated work groups, health and safety representatives (HSRs) and health and safety committees (HSCs) appointed under provisions of the OHS Act continue under the WHS Act. Any process or procedure to appoint representatives which was commenced under the OHS Act before the commencement of the WHS Act, continues under the OHS Act and will have effect under the WHS Act, providing the process is completed within three months. If not, the process will need to be recommenced under the WHS Act. Membership of HSCs under the OHS Act continues under the WHS Act. Under section 65 of the WHS Act (when enacted), a HSR will become part of a health and safety committee, if they consent. Under subitem 9(4) an HSR is deemed to be appointed to a health and safety committee that is preserved under subitem 9(1). Item 10 provides that accredited health and safety training provided by the Commission and undertaken by a person under the OHS Act will be recognised training under the WHS Act.5 This arrangement will terminate after 12 months.

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4. Section 35 of the Work Health and Safety Act 2011 provides that a ‘notifiable incident’ is an incident involving the death of a person, serious injury or illness of a person or a dangerous incident.


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Item 11 ensures that an OHS Act ‘provisional improvement notice’ (PIN) in effect immediately before WHS Act commencement continues to apply as if the OHS Act had not been repealed.  

Item 12 continues the disqualification of a person from being a health and safety representative under the OHS Act to the WHS Act. If an application is made under the WHS Act to disqualify a health and safety representative in relation to performance or use of information, the role performed under the OHS Act will be relevant to the application.

Part 5—Comcare and inspectors

Item 13 defines the term ‘residual operation of the OHS Act’ to mean actions and failures to act before WHS Act commencement.

Item 14 ensures that an investigator appointed under the OHS Act before the commencement of the WHS Act continues as an inspector under the WHS Act and identity cards transfer.

Item 15 allows an inspector to perform certain functions under the WHS Act in relation to anything arising in connection with the residual operation of the OHS Act. A reference in the WHS Act to an offence will be taken as a reference to an offence against the OHS Act. Any action or information acquired under the WHS Act may be used in relation to the residual operation of the OHS Act.

Item 16 ensures that an inspector may exercise the functions and powers of an investigator under the OHS Act in relation to the residual operation of that Act.

Item 17 further ensures that Comcare may use WHS Act powers of investigation in relation to the residual operation of the OHS Act. A contravention of the WHS Act will be taken to mean a contravention of the OHS Act. Information acquired under the WHS Act may be used in relation to the residual operation of the OHS Act.

Part 6—Enforcement measures

Item 18 ensures that any ‘prohibition notices’ in force under the OHS Act continue to apply as if the OHS Act had not been repealed.

Item 19 continues the application of improvement notices in force under the OHS Act as if that Act had not been repealed.

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6. Section 90 of the Work Health and Safety Act 2011 provides that a health and safety representative can issue a provisional improvement notice where he or she reasonably believes that a person is, or has, contravened a provision of the Act in circumstances that make it likely that the contravention will be continued or be repeated.

7. Section 195 of the Work Health and Safety Act 2011 allows an inspector to issue a ‘prohibition notice’ to stop, or prevent, an activity at a workplace, or modify the way the activity is carried out, where the activity involves a serious risk to health or safety of a person emanating from an immediate or imminent exposure to a hazard.

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Item 20 allows written undertakings which have been made under the OHS Act to continue for the 'transitional period for the undertaking' (lasting for up to two years after WHS Act commencing day).

Part 7—Other matters

Item 21 ensures that licenses, permits and similar accreditations made under the OHS regulations have effect as ‘preserved authorisations’ under the WHS Act, subject to its regulations.

Item 22 applies exemptions to the OHS Act prescribed by its regulations to have effect under the WHS Act.

Item 23 applies each provision of the Occupational Health and Safety Code of Practice 2008 as a ‘preserved code of practice’ for purposes of the WHS Act, subject to ministerial variation.

Item 24 applies annual report functions prescribed under the OHS Act to apply for the financial year July 2011 to December 2011.

Schedule 3—Safety, Rehabilitation and Compensation Act 1988

Part 1—Consequential amendments

This Part replaces references in the SRC Act to the OHS Act with references to the WHS Act and this Bill upon its enactment.  

Item 18 inserts new subsection 104(2A) into the SRC Act which introduces additional caveats on the Safety Rehabilitation and Compensation Commission (SRCC) on the issuing of workers compensation licences to corporations where past conduct of the corporation calls into question the corporation’s capacity to meet Commonwealth standards in complying with State and Commonwealth OHS law, the rehabilitation of injured employees and the management of their claims.

Item 19 repeals and replaces paragraph 104A(2)(b) of the SRC Act which, in part, attributes the cost of a licence to the costs of Comcare and the SRCC in carrying out their functions under the OHS Act, the WHS Act and this Bill upon its enactment.

Part 2—Transitional provisions relating to regulatory contributions and licence fees

This Part allows Comcare under item 24 to vary premiums and regulatory contributions, vary licence fees under item 25 and vary regulatory contributions from the Department of Defence under item 26 for the 2011–12 financial year. This will reflect the costs of the Commission and Comcare based on their functions under WHS Act, this Bill upon its enactment as well as the OHS Act for that part of 2011-12 after the WHS Bills are operational.

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8. It would appear that the item numbers 17A–25 in the Explanatory Memorandum do not uniformly match the item numbers in Schedule 3 to the Bill.

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Schedule 4—Other consequential amendments

Minor amendments are made to paragraph 120(a), paragraph 501D(4)(a), paragraph 544B(8)(a), paragraph 631C(a), paragraph 745L(a) and paragraph 1188BB(a) so that, for the absence of doubt, a person will not be taken to be a worker carrying out work for the Commonwealth, or be an employee of the Commonwealth under the Work Health and Safety Act 2011 (when enacted).
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2463.

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