



Australian Government

Comcare

Employee guide to amendments to the *Occupational Health and Safety (Commonwealth Employment) Act 1991*.

Introduction

Parliament has passed important amendments to the [*Occupational Health and Safety \(Commonwealth Employment\) Act 1991*](#) (the OHS Act). The amendments are contained in the [*Occupational Health and Safety \(Commonwealth Employment\) Amendment \(Employee Involvement and Compliance\) Act 2004*](#).

The amendments come into effect on 13 September 2004. An explanation of how the amendments affect you as an employee is provided below.

Background

The OHS Act establishes a framework for the health and safety of Commonwealth employees at work. It covers Commonwealth departments and agencies, statutory authorities and Government Business Enterprises (GBEs).

The OHS Act sets out general duties which apply to various parties at the workplace, including employers, employees, contractors, manufacturers and suppliers of plant and substances and persons erecting or installing plant in a workplace. The OHS Act is supported by regulations that relate to specific hazards and risks and codes of practice that give guidance on how to comply with the law.

Section 16 of the OHS Act states that an employer must take all reasonably practicable steps to protect the health and safety of the employer's employees. Section 21 of the OHS Act states that you, as an employee, must take all reasonably practicable steps to:

- ensure that you do not take any action or make any omission that creates a risk or increases a risk to your health or safety or the health or safety of any other person at or near a workplace;
- cooperate with your employer or any other person who has a duty of care under the OHS Act; and
- use equipment in accordance with instructions.

Prior to 13 September 2004, proceedings for breaches of the OHS Act could only be undertaken by way of criminal prosecution. In addition, the OHS Act applied the 'shield of the Crown' which meant that Commonwealth departments, agencies and authorities or their employees could not be prosecuted for criminal offences under the OHS Act. Only GBEs and their employees were liable to prosecution. If an employee of a department, agency or authority contravened the OHS Act, the employee could be subject to disciplinary action under the *Public Service Act 1999* or under relevant terms and conditions of employment but could not be prosecuted under the OHS Act.

New provisions

A number of changes have been made to the compliance and enforcement provisions in the OHS Act. These changes:

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

From 13 September 2004 onwards:

- GBEs and their employees are subject to both civil and criminal enforcement mechanisms;
- employees of Commonwealth departments, agencies and authorities are subject to both civil and criminal enforcement mechanisms; and
- Commonwealth department, agency and authority employers are subject only to civil enforcement mechanisms.

Dual civil and criminal penalty regime

There is a new schedule inserted into the OHS Act: 'Schedule 2 - Civil proceedings and criminal prosecutions in respect of breaches of the Act'. This introduces a dual regime of enforcement. Under the dual regime, breaches of the OHS Act will generally be dealt with in civil proceedings. However, criminal prosecutions are available for serious breaches of the OHS Act, where a breach of certain provisions in the legislation (such as breach of an employer's duty of care and breach of an employee's duty of care) causes death or serious bodily harm and the person was negligent or reckless as to whether the breach would cause death or serious bodily harm.

Criminal remedies also apply for conduct which amounts to contempt of the Safety, Rehabilitation and Compensation Commission such as refusing to provide information or documents or attend as a witness before a Commission public inquiry.

Civil proceedings

Under the new provisions, civil proceedings for a declaration of contravention of the OHS Act are available in respect of certain breaches. Only Comcare or an investigator appointed by Comcare may apply to the court for a declaration of contravention of the OHS Act.

The court may relieve a person from liability for a possible contravention if the person acted honestly and having regard to all of the circumstances, the person ought fairly to be excused for the contravention.

If a declaration of contravention is made, the court may impose a pecuniary (money) penalty order or a remedial order against the person. The Court can also make any other consequential orders, including orders as to costs that are considered appropriate.

An employee may be liable for civil pecuniary penalties for breaches of:

- the duty of care of employees (s.21(1));
- the requirement to provide assistance and information (s 43(2)); and
- the requirement to comply with an improvement notice (s 47(6)).

Employees may also be subject to civil pecuniary penalties through being 'involved' in a contravention of a provision of the OHS Act by another person. A person may be 'involved' in a breach of a provision of the OHS Act if and only if the person has:

- (a) aided, abetted, counselled or procured the breach; or
- (b) has induced, whether by threats or promises or otherwise the breach; or
- (c) has been in any way, by act or omission, directly or indirectly knowingly concerned in or party to the breach; or
- (d) has conspired with others to effect the breach.

Other New Remedies

There are a number of other remedies to support voluntary compliance and enforce the OHS Act if voluntary compliance is not achieved.

Under the new injunctive powers, Comcare or an investigator may apply to a court for an injunction against a person who has breached, is breaching or proposes to breach the Act or its regulations. The court can grant an injunction to either restrain a person from performing an act in breach of the legislation or require a person to do something to prevent such a breach.

There is also a new remedy of enforceable undertakings. This gives Comcare the power to accept a written undertaking in relation to the fulfilment of an obligation under the OHS Act. 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 direct order of the court or by resumption of suspended proceedings.

Under the new remedial powers, if the court has made a declaration of a contravention of the OHS Act or convicts a person of an offence against the legislation then the court can make a remedial order 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.

Courts also have remedial powers in relation to protecting an employee if an employer has taken action in breach of section 64 (witness not to be prejudiced in employment) or section 76 (employers not to dismiss employees on certain grounds). The court is able to make orders to reinstate the employee, pay the employee compensation or issue injunctions to prevent or remedy the conduct threatened by the employer.

Criminal prosecutions

Under the OHS Act, an employee could be prosecuted for:

- the following offences where the breach causes death or serious bodily harm and the person was either negligent or reckless as to whether that breach would cause death or serious bodily harm:
 - duty of care of employees (s. 21(1));
 - requirement to provide assistance and information (s. 43(2));
 - requirement to comply with improvement notice (s. 47(6));
 - requirement not to tamper with/remove notices (s. 50); and
 - requirement not to interfere with equipment (s. 72).

An employee could also be prosecuted for:

- the requirement to give information/ produce documents to the Safety, Rehabilitation and Compensation Commission (s. 54(1));
- failure to attend as a witness before the Commission (s. 57);
- refusal to be sworn or answer questions of the Commission (s. 59); and
- contempt of the Commission (s. 61).

Increases in penalty levels

There is a substantial increase in the level of penalties. The table on the next page shows previous and new penalties under the OHS Act. It also shows what sort of penalty may apply to a particular offence.

What provision is there for an employer to indemnify employees?

You should ask your employer what provisions apply in your workplace for employees to receive assistance in relation to legal proceedings or potential proceedings.

The general policy underlying the provision of assistance to employees in civil and criminal proceedings is that the proceedings arose out of an incident relating to the employee's employment and the employee acted reasonably and responsibly.

Indemnification for employees of agencies covered by the *Financial Management and Accountability Act 1997* is governed by the Legal Services Directions issued by the Attorney-General pursuant to 55ZF of the *Judiciary Act 1903*. Assistance available for employees under the Legal Services Directions may involve paying the costs of an employee's legal representation and related costs (eg travel costs), fines, damages or penalties.

Commonwealth authorities covered by the *Commonwealth Authorities and Companies Act 1997* can indemnify their directors or officers (officer includes employees) and obtain insurance from Comcover in respect of this liability. Comcover may also indemnify a director, officer or employee of the insured Commonwealth authority if he or she is not indemnified by the Commonwealth authority.

Previous and new penalty levels

Section	Description	Previous penalty	New civil penalty person/body corp	New Criminal penalty Person/body corp
16	Duties of employers re employees	\$110,000	\$242,000	\$495,000 (for death/serious bodily harm);\$330,000 (for exposure to substantial risk of death/serious bodily harm)
17	Duties of employers re third parties	\$110,000	\$242,000	\$495,000
18	Duties of manufacturers re plant and substances	\$22,000	\$48,400/ \$242,000	\$99,000/\$495,000
19	Duties of suppliers re plant and substances	\$22,000	\$48,400/ \$242,000	\$99,000/\$495,000
20	Duties of persons erecting or installing plant	\$22,000	\$48,400/ \$242,000	\$99,000/\$495,000
21	Duties of employees re OHS	\$5,500	\$9,900	\$19,800
43(2)	Failure to comply with an investigator's request for assistance	\$3,300 or 6 mths imprisonment or both	\$3,300	\$3,300 or 6mths imprisonment or both
45(5)	Failure to comply with direction not to disturb a workplace	\$27,500	\$27,500	\$55,000
45A(3)	Failure to ensure compliance with no disturbance order	N/A	\$27,500	\$55,000
46(4)	Failure to comply with a prohibition notice	\$27,500	\$27,500	\$55,000
47(6)	Failure to comply with an improvement notice	\$11,000	\$1,100 for each day	\$99,000
50	Tampering with or removing a notice	\$3,300 or 6 mths imprisonment or both	N/A	\$3,300 or 6mths imprisonment or both
54	Refusing or failing to give information or provide document to SRC Commission	\$1,100	N/A	\$3,300 or 6mths imprisonment or both
57	Failure by witness to appear before SRC Commission	\$3,300 or 6mths imprisonment or both	N/A	\$3,300 or 6mths imprisonment or both
59	Refusal to be sworn or answer questions	\$3,300 or 6mths imprisonment or both	N/A	\$3,300 or 6mths imprisonment or both
61	Contempt of SRC Commission	\$3,300 or 6mths imprisonment or both	N/A	\$3,300 or 6mths imprisonment or both
64	Prejudicing employee because of inquiry appearance	\$3,300 or 6mths imprisonment or both	\$3,300	N/A
72	Wilful or reckless interference with protective equipment or safety device	\$3,300 or 6mths imprisonment or both	N/A	\$3,300 or 6mths imprisonment or both
73	Employer not to levy employees	\$27,500	\$27,500	N/A
76	Dismissing employee because of complaint	\$27,500	\$27,500	N/A

Questions and Answers

Do I have to do anything differently as a result of the amendments?

No. The amendments do not impose any new duties on employees. There is no change to your duty of care to take all reasonably practicable steps to protect the health and safety of yourself and other persons at or near the workplace. What has changed is the potential consequences of failing to meet that duty of care.

I am an elected health and safety representative (HSR). Could I be prosecuted for something that happens while I am performing my role as an HSR?

No. When you are performing your role as an HSR, you are not acting as an 'employee' within the meaning of OHS Act. Therefore, an HSR could not be prosecuted for breaching the duty of care applying to employees. In addition, subsection 28(7) of the OHS Act continues to provide that an HSR is not liable in civil proceedings for any failure to exercise his or her HSR powers or the manner in which he or she exercises them.

Could an employee be penalised twice for the same conduct?

New Schedule 2 of the OHS Act explains the interaction between criminal and civil prosecutions. Civil proceedings cannot be taken if a criminal conviction for substantially the same conduct has been made. Also, civil proceedings must be stayed if criminal proceedings are commenced.

Criminal proceedings can be commenced after a declaration of contravention or pecuniary penalty has been made. However, this does not mean that criminal prosecutions will be instituted as a matter of course.

Why has the Parliament imposed criminal penalties on employees but not employers?

Removing the shield of the crown for employees of Commonwealth departments, agencies and authorities reflects the common law position that officers, servants and agents of the crown have no immunity from the criminal law. It is consistent with State and Territory OHS legislation and ensures that Commonwealth employees can be held accountable where they have acted wrongly.

Whilst a Commonwealth department, agency or authority cannot be criminally prosecuted for an offence against the OHS Act or regulations they are subject to civil proceedings for a declaration of contravention and liable to pay a pecuniary penalty order. They are also subject to other civil sanctions such as remedial orders, injunctions and enforceable undertakings.

More information: www.comcare.gov.au