

Enforceable undertaking given by:
**Commonwealth of Australia as represented by the Department of
Defence to Comcare for the purpose of clause 2 of Schedule 2 of the
Occupational Health and Safety Act 1991**

Purpose

1. The commitments articulated in this Undertaking are enforceable undertakings given in accordance with clause 16 of schedule 2 of the Act, to Comcare in fulfilment of obligations under the Act. This Undertaking is given as a consequence of and in mitigation of the Alleged Contravention, and as evidence of the remedial action and future safety commitments that are proposed and outlined in this Undertaking.

Background

2. Defence consists of a number of distinct organisations. The three most significant are:
 - (a) The Department of Defence (**DOD**) – a department of State headed by the Secretary with approximately 14,500 Australian Public Service (**APS**) personnel;
 - (b) The Australian Defence Force (**ADF**) – consists of three Services (including Reserves) and is headed by the Chief of the Defence Force (**CDF**) comprising some 13,200 Navy, 27,800 Army, 14,000 Air Force and 20,200 Reserve personnel. Service Chiefs also administer their respective Cadet Service although the Cadet Service is not a component of the parent Service; and
 - (c) The Defence Materiel Organisation (**DMO**) – a prescribed agency under the Financial Management and Accountability Act 1997, headed by its Chief Executive Officer (**CEO**) with some 4,600 APS, 350 Navy, 490 Army, 840 Air Force and 150 Reserve personnel.
3. ADF and DOD are the recognised employers under the Comcare scheme with DOD incorporating DMO.
4. The mission of Defence is to defend Australia and its national interests. Defence is the largest Commonwealth land owner and has environmental stewardship of over almost 3 million hectares of land with more than 700 leased or owned properties containing more than 25,000 built assets.
5. Within Australia, Defence operates across approximately 1,300 sites and conducts activities in every State and Territory. Defence activities cover the land, sea and air environment. Defence workplaces are often integrated involving ADF and APS personnel working side by side with contractors. Activities undertaken by Defence are both local and international, there is a unique diversity of work environments, locations and workforce arrangements. As importers of foreign military platforms, equipment and supplies there is a complexity of arrangements involved and varying standards of OHS practice to be integrated to ensure compliance with standards of safety acceptable to Defence.

6. In Australia there are approximately 1,000 establishments across DOD and the ADF that use hazardous substances.

Investigation and Alleged contravention

7. Under the Act a national pro-active investigation was conducted between May and October 2009 to ascertain compliance with Part 6 of the Regulations at ADF and DOD workplaces. The pro-active investigation concluded that DOD and the ADF were in breach of section 16(1) and (2) of the Act and regulations 6.12, 6.13, 6.14, 6.17 and 6.19 of the Regulations at workplaces that use hazardous substances.

Acknowledgement

8. DOD and ADF acknowledge the conclusion of the pro-active investigation undertaken by Comcare and in response to the Alleged Contravention enters into this Undertaking to not only meet, but exceed compliance with Division 3 of Part 6 of the Regulations concerning the duties of an employer in relation to the use of hazardous substances.
9. DOD and ADF acknowledge and accept the duties an employer has in relation to the use of hazardous substances. DOD and the ADF are committed to fulfilling the duties contained in Division 3 of Part 6 of the Regulations and thus seek to develop and implement a consistent, comprehensive and inclusive system for the management of hazardous substances across all those workplaces that use hazardous substances.
10. Over a two year period from the Undertaking Date, DOD and ADF propose to undertake identifiable actions in response to the Report of Investigation which are set out in Part 2 of Schedule 1 of this Undertaking.

Definitions

11. In this Undertaking:
 - “Contractors” has the meaning given by the Act.
 - “the Act” means *the Occupational Health And Safety Act 1991*.
 - “the Alleged Contravention” means the facts or circumstances which are described in the Report of Investigation and summarised in paragraph 7 of this Undertaking.
 - “the Auditor” means the auditor engaged pursuant to paragraph 17.
 - “Comcare” means the body corporate established by section 68 of the *Safety, Rehabilitation and Compensation Act 1988*.
 - “the Employer” means the ADF and the DOD.
 - “the Regulations” means the *Occupational Health And Safety (Safety Standards) Regulations 1994*.
 - “the Reporting Dates” are the dates listed in Schedule 2 being the dates on which the Employer will report to Comcare on the implementation of this Undertaking.
 - “the Report of Investigation” means the report of investigation number 4143 issued to the Employer under section 53 of the Act.
 - “this Undertaking” means this document.

“the Undertaking Date” means the date the Undertaking is to have effect from being the date on which it is executed by Comcare.

Proceedings will not be issued

12. Despite the Alleged Contravention, Comcare has agreed not to pursue enforcement action under the Act in relation to the matters identified in the Report of Investigation on the basis the Employer enters into and complies with this Undertaking for a period of two years from the Undertaking date.

Assurance about future behaviour

13. To rectify the Alleged Contravention in relation to the use of hazardous substances, the Employer proposes to develop and implement a consistent, comprehensive and inclusive system for the management of hazardous substances across all those workplaces that use hazardous substances.

Occupational health and safety commitments

14. The Employer undertakes to do all the identified steps listed in Part 2 of Schedule 1 to this Undertaking.
15. The Employer must, so far as is reasonably practicable:
 - (a) Do and ensure that its officers, agents and employees do all things reasonably necessary to prevent a recurrence of the matters that constituted the Alleged Contravention;
 - (b) Abstain and ensure that its officers, agents and employees abstain from doing any act, matter or thing which gave rise to or allegedly gave rise to the Alleged Contravention; and
 - (c) Ensure that it use its best endeavours to observe and implement industry best practice in respect of the use and management of hazardous substances in compliance with the Act.
16. Unless specifically agreed with Comcare or provided otherwise, all acts, measures, programs, or things required to give effect to Part 2 of Schedule 1 to this Undertaking shall be performed on or before the dates listed in Part 2 of Schedule 1 to this Undertaking.

Reporting

17. The Employer must:
 - (a) Report to Comcare on the Reporting Dates on the development and/or implementation of any measures it has committed to develop and/or implement in accordance with Part 2 of Schedule 1 of this Undertaking and plans as specified in paragraph 2 of Part 2 of Schedule 1;
 - (b) Provide all documents and information reasonably requested by Comcare from time to time and facilitate verification, inspection or audit for the purpose of enabling Comcare to assess compliance with this Undertaking;
 - (c) Three months prior to the date for conclusion of the Undertaking at its own cost and after consulting with Comcare, engage an external auditor nominated by the Employer and approved by Comcare to conduct an

independent compliance audit of the measures developed, implemented and/or affected in accordance with this Undertaking; and

- (d) Ensure that:
- (i) Comcare is advised of the Auditor's engagement;
 - (ii) the Auditor conducts and concludes the audit; and
 - (iii) it provides Comcare with a copy of the audit report and any comments or recommendations arising by the Employer as soon as reasonably practicable
 - (iv) Comcare is provided with all necessary or required action plans or recommendations developed in response to audits. When the Employer decides not to create an action plan provide reasons.

Publicity

18. The Employer acknowledges that this Undertaking constitutes a public declaration of the Employer's commitment to occupational health and safety and its response to the Report of Investigation. The employer acknowledges that Comcare may:
- (a) Issue a media release on execution of this Undertaking referring to its terms and to the concerns of Comcare which led to its execution;
 - (b) From time to time publicly refer to this Undertaking; and
 - (c) Make this Undertaking available for public inspection, including by publishing it on Comcare's website.
19. The Employer agrees and undertakes to publish this Undertaking on its intranet site for access by all staff nationwide.

Costs

20. Subject to clause 21, the Employer agrees to pay Comcare its costs and expenses incurred in implementing, monitoring and facilitating compliance with this Undertaking.
21. Assuming there is substantial compliance with the Undertaking, in accordance with clause 20, Comcare's recoverable costs are not to exceed \$154,240.
22. Subject to clauses 23 and 24, in the event there is any breach (or anticipated breach) or substantial non compliance with the Undertaking, the Employer also agrees to pay Comcare its costs, fees and expenses (including the cost of any expert or technical advice in relation to control measure implemented by the Employer) arising to investigate the breach, anticipated breach or substantial non compliance.
23. In accordance with clause 22, Comcare's recoverable costs are not to exceed \$32,000 for each reactive investigation undertaken.
24. In addition to clause 22, if legal proceedings are commenced in relation to any proven breach, the Employer will also pay Comcare its party/party legal costs on the appropriate Court scale.
25. If the amount of Comcare's recoverable costs in accordance with clauses 22 or 23 cannot be agreed within a reasonable period, those costs are to be assessed

by an agreed appropriately qualified independent costs assessor. If there is no agreement on the independent costs assessor to be engaged, a costs consultant will be nominated by President of the ACT Law Society (or his nominee). The costs will be payable within 30 days of an invoice from Comcare.

Enforceability

26. The Employer acknowledges that this Undertaking is enforceable at law and that it will be subject to penalties if it does not comply with this Undertaking.
- (a) Subject to giving the Employer reasonable notice and a reasonable opportunity to respond to the audit findings without limiting the generality of this clause, Comcare may, in its absolute discretion, deem any serious or significant finding by the Auditor that the Employer has failed to give full effect to any provisions of this Undertaking to be a breach of this Undertaking.
 - (b) Without limiting any other power, right, authority, or privilege it may enjoy, Comcare may, in proceedings arising from any breach or anticipated breach of this Undertaking, inter alia:
 - (i) Apply for an injunction restraining any such breach;
 - (ii) Apply for an injunction to ensure compliance with this Undertaking;
 - (iii) If no proceedings are on foot, commence proceedings against the Employer in respect of the Alleged Contravention dealt with in the Report of Investigation; and
 - (iv) Apply for any further order it considers appropriate.
 - (c) If the Employer actually or proposes to breach, vary, or withdraw this Undertaking without the written consent or approval from Comcare then:
 - (i) Comcare may pursue proceedings; or,
 - (ii) If no proceedings are on foot, commence proceedings against the Employer in respect of the Alleged Contravention dealt with in the Report of Investigation.

In any such proceedings the Employer may not object to Comcare tendering this Undertaking.
 - (d) Any act or omission by the Employer which is inconsistent with or in contravention of this Undertaking is and is deemed by Comcare to be a breach of this Undertaking.
 - (e) In accordance with clauses 21 to 24 (both inclusive), the Employer acknowledges that it will bear the costs incurred by Comcare pursuant to this clause.

Acknowledgements

27. The Employer acknowledges that
- (a) Comcare's acceptance of this Undertaking does not affect Comcare's or an investigator's:

- (i) Power to investigate or pursue civil or criminal proceedings in respect of similar or related Alleged Contraventions which occur after the Undertaking Date; or
 - (ii) Authorities, powers, and obligations in respect of conduct of the Employer which is not the conduct that gave rise to the Alleged Contravention.
- (b) This Undertaking in no way derogates from the rights and remedies available to any other person or entity other than the Employer and Comcare arising from any conduct described in this Undertaking or arising from future conduct.
 - (c) Under the Act the Employer has duties concerning Contractors. This Undertaking includes those obligations.
 - (d) This Undertaking has no operative force until accepted by Comcare.
 - (e) This Undertaking will formally conclude 2 years after the Undertaking Date or at an earlier date if Comcare confirms in writing that the Undertaking has been fully executed.

Signed by: Stephen Merchant

Signature of Acting Secretary
Stephen John MERCHANT
 Name of Stephen Merchant

Date: 4 June 2010

In the presence of:
Carmel McGlath

Signature of witness
CARMEL MCGLATH

Name of witness
19 JARVA CRES. CAMPBELL ACT 2612
 Address of witness

Signed by: A.G. Houston

Signature of Chief of the Defence Force
A.G. Houston
 Name of A.G. Houston

Date: 31 May 2010

In the presence of:
P.G. Laver

Signature of witness
P.G. LAVER

Name of witness
OCDF suite R1 Russell Offices
 Address of witness Canberra ACT

Accepted by Comcare pursuant to clause 16 of Schedule 2 of the *Occupational Health And Safety Act 1991* by its duly authorised delegate:

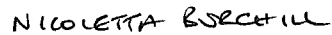


Signature of Chief Executive Officer



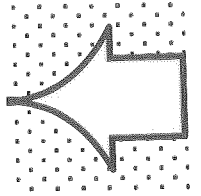
Name of Chief Executive Officer

Name of witness



Signature of witness





Schedule 1

PART 1 OBJECTIVE AND GOAL

Over a two year period the Department of Defence (DOD) and the Australian Defence Force (ADF) will develop and implement a consistent and comprehensive and inclusive system for the management of hazardous substances across all DOD and ADF workplaces that use hazardous substances. The goal will be to achieve the following:

- 1 Develop a comprehensive, consistent and inclusive hazardous substances management system.
- 2 Support and enable Groups and Services to implement the comprehensive, consistent and inclusive hazardous substances management system through the provision of revised policies, procedures, "how to" guidance, templates and implementation tools.
- 3 Improve DOD and ADF systems to record and manage hazardous substances information.
- 4 Address training and sustainment of personnel with knowledge and experience in hazardous substances and the systematic management of hazardous substances compliance and assurance.
- 5 Implementation of a hazardous substances lifecycle approach to reduce the overall risks associated with hazardous substances including addressing linkages and relationship between Groups and Services.
- 6 Identify and address non-compliance in hazardous substances management by implementing assurance processes to achieve a sustained outcome.

PART 2 THE UNDERTAKING GIVEN TO COMCARE

It is proposed to achieve the system for management of hazardous substances by doing the following things within the specified timeframes in paragraphs 1-23. These actions constitute the steps DOD and ADF will take to achieve the objective and goal above as follows:

- 1 Dedicate a Team Leader from each large Group or Service to work closely with the Occupational Health Safety Branch team to manage the implementation of the Group or Service remediation plan in alignment with the new hazardous substances system being developed and implemented across DOD and the ADF. *Anticipated date for completion June 2010.*

- 2 Develop and commence a program plan incorporating each of the sub-projects defined in sub paragraph 2 to 23. Provide Comcare with sub-project plans when they are prepared and this is to be done a minimum of two months prior to completion. A covering report analysing the adequacy of the plans will also be provided.
- 3 Mandate ChemAlert as the information system to be utilised to register workplace hazardous substances. *Anticipated date for completion November 2010.*
- 4 In view of the Objectives and Goals of this Undertaking review the extant SafetyMAN policy relating to hazardous substances and consider any necessary changes. Following the review, develop and implement a Hazardous Substances Defence Instruction (General) or a revision of the current SafetyMan Defence Instruction (General) or SafetyMan Manual to establish 'whole of Defence' governance arrangements. This will include DMO. *Anticipated date for completion November 2010.*
- 5 Establish a hazardous substances domain within the existing OHS Management System to enable technical control of procedures, system assurance and provisions for performance improvement. This will include the role of technical regulators for assurance of non-safety systems within Groups/Services and DMO. *Anticipated date for completion December 2010.*
- 6 Review, amend and update hazardous substances procedures and guidance to reflect any new policies. *Anticipated date for completion July 2011.*
- 7 Develop a common workplace risk assessment approach in consultation with Groups and Services and integrate this with the ChemAlert Tool. *Anticipated date for completion November 2010.*
- 8 Establish an engagement strategy with Contractors affected by the Undertaking to facilitate a collaborative approach to developing and implementing contractor related compliance with the hazardous substances management system. *Anticipated date for completion November 2010.*
- 9 Review the adequacy of assurance processes and implementation strategy for mandatory legislative requirements. *Anticipated date for completion November 2010.*
- 10 Prior to the full training needs analysis being undertaken, deliver "upfront" training to manage the identified hazardous substances risks associated with the conduct of the initial stocktake and provide a mandatory awareness component. *Anticipated date for completion December 2010.*
- 11 Prepare workplace guides that further develops "how" procedures are implemented within the individual workplace. *Anticipated date for completion February 2011.*
- 12 By way of Defence policy, establish clear responsibilities for the monitoring and implementation of the hazardous substances management system and associated hazardous substances exposure reduction plans. *Anticipated date for completion February 2011.*
- 13 Develop procedures for Managers/Commanders in relation to hazardous substances responsibilities, risk acceptance and compliance including addressing the effectiveness of handovers in relation to outstanding hazardous

substances matters during leadership changes. *Anticipated date for completion February 2011.*

- 14 Review assurance mechanisms within non safety systems to ensure compliance with OHS requirements is identified and integrated. This will include DMO, DS and JLC addressing the following separate systems:

- (a) Acquisition, Procurement and Sustainment Systems
- (b) Logistics System
- (c) Infrastructure, Garrison and Estate Systems

Anticipated date for completion March 2011.

- 15 Review logistics information systems and where a requirement is identified develop a plan to implement any amendments required to enable improved management of hazardous substances in DOD and ADF inventory. *Anticipated date for completion August 2011.*

- 16 Undertake a comprehensive training needs analysis and workforce plan to review the status of safety roles (including hazardous substances safety roles for Managers/Commanders) and ascertain the approach that needs to be adopted to adequately resource hazardous substances compliance at the unit level. *Anticipated date for completion August 2011.*

- 17 Develop a common training package where there is a DOD and/or ADF hazardous substances training requirement. *Anticipated date for completion August 2011.*

- 18 Establish operational and reverse logistics systems to prevent, so far as is reasonably practicable, the entry of prohibited hazardous substances into Defence workplaces. *Anticipated date for completion August 2011.*

- 19 Define the role of Joint Health Command in relation to the conduct of health surveillance for hazardous substances requirements and then identify the procedures necessary to enable health surveillance to be undertaken. *Anticipated date for completion August 2011.*

- 20 Conduct a review of the guidance provided to major acquisition projects in relation to hazardous substances to reduce the risk at DOD and ADF workplaces associated with the use of hazardous substances. *Anticipated date for completion August 2011.*

- 21 Establish recording processes and mandate them for all required hazardous substances training. *Anticipated date for completion December 2011.*

- 22 Achieve the realistic implementation of Group and Service remediation plans across DOD and the ADF. *Anticipated date for completion February 2012.*

- 23 Conduct an internal review and using an auditor nominated by DOD and approved by Comcare also undertake an external audit to assess the progress of the implementation and effectiveness of the new hazardous substances management system. DOD and ADF will then develop an ongoing plan based upon the outcome of the review and the audit. *Anticipated date for completion May 2012.*

- 24 Present two seminars to industry stakeholders. The first seminar will identify the approach taken by Defence to develop, adopt and implement a revised hazardous substances management system. The second seminar will highlight the effectiveness of the new system in terms of overall hazard reduction. *Anticipated date for completion May 2012.*

Dated the 4th day of June . 2010.

