

COMCARE REGULATION POLICY



Australian Government

Comcare

PUTTING YOU *FIRST*

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Disclaimer

This publication is intended to provide a summary and general overview of Comcare and the Safety, Rehabilitation and Compensation Commission's approach to workplace health and safety regulation. It is not intended to be a comprehensive outline of the *Occupational Health and Safety Act 1991* or *Safety, Rehabilitation and Compensation Act 1988* and is not a substitute for independent professional advice.

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Comcare
GPO Box 9905
Canberra ACT 2601
Phone 1300 366 979
www.comcare.gov.au

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REGULATION POLICY OVERVIEW

In 2010–11 Comcare started implementing its 2015 Strategic Plan. Comcare is reshaping its role and has identified opportunities for improving the health and safety outcomes of workers and supporting workers when they are injured, in the Comcare scheme.

This Regulation policy is effective from 28 March 2011.

There will be a stronger preventive focus to improve the health, wellbeing and safety experience of workers. There will also be a stronger focus on assisting injured workers to return to health and achieve an early and sustained return to work and an expansion of national safety and rehabilitation audit programs to federal government employers. This document should be read together with Comcare's:

- > annual *Work health and safety plan*
- > *Better practice guidance to decision making* (PUB 75) and
- > *Rehabilitation guidelines for employers* (PUB 19)

Note that Comcare's *Regulation Policy* will continue to be revised and reviewed consistent with the developing regulatory environment.

WHO SHOULD READ THIS POLICY?

Anyone who owes a duty under the *Occupational Health and Safety Act 1991* (OHS Act) in relation to occupational health and safety and anyone with responsibilities under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) including:

- > Commonwealth departments, agencies, authorities and Government Business Enterprises (GBEs)
- > employees of Commonwealth departments, agencies, authorities and GBEs
- > non-Commonwealth licensees and their employees
- > manufacturers and suppliers of plant and substances
- > persons erecting or installing plant in the workplace
- > approved rehabilitation providers.

REGULATION IN THE COMMONWEALTH JURISDICTION

Comcare assists the Safety Rehabilitation and Compensation Commission (the Commission) in ensuring that employers, employees and others comply with the OHS Act and SRC Act.¹

Comcare adopts a regulatory philosophy which seeks to work in partnership with workers, their employers, unions and approved rehabilitation providers to:

- > keep workers healthy and safe at work
- > reduce the incidence and cost of workplace injury and disease
- > assist injured workers return to health and achieve an early and sustained return to work
- > encourage best practice in prevention, rehabilitation and claims management
- > apply appropriate regulatory sanctions for any demonstrable failure to meet statutory obligations.

We partner with federal workers, their employers and unions to keep workers healthy and safe at work, and reduce the incidence and cost of workplace injury and disease.

We will:

- > promote worker health, wellbeing and resilience
- > respond to safety incidents in a timely way
- > seek to ensure appropriate outcomes in response to death or serious injury
- > promote early intervention, and early and safe return to work

Comcare's regulatory approach is one characterised by a continuum of available measures ranging from encouraging better practice through partnerships and collaboration, to education, audit, assurance and enforcement activities.

Comcare is in a unique position, as it operates across all Australian states and territories, to identify areas of weakness in jurisdictional coverage, and coordinate approaches to reduce the regulatory burden and address gaps in health and safety. Comcare's jurisdiction is distinct as the scheme mostly consists of large employers who have relatively mature work health and safety systems.

COMCARE'S AIMS AND KEY PRINCIPLES OF REGULATION

Comcare's primary emphasis in regulation is to assist and ensure compliance with legislative obligations and encourage best practice through the provision of programs that build workplace capability to properly manage workplace risks and assist injured workers achieve an early and sustained return to work. Comcare undertakes compliance and enforcement activities in order to:

- > ensure access to information about OHS and SRC laws and how to comply
- > ensure compliance with OHS and SRC laws or to ensure that those who fail to comply are held to account
- > ensure risks are eliminated or properly controlled
- > take action to deal immediately with serious risks
- > ensure there are appropriate systems in place to effectively manage compensation, rehabilitation, and return to work
- > encourage best practice in return to work and injury management
- > provide a robust rehabilitation provider approval system
- > promote collaboration and effective return to work outcomes for all stakeholders'
- > promote innovation and continuous improvement in return to work solutions

¹ A reference to the OHS Act or SRC Act includes a reference to associated regulations and legislative instruments.

- > promote and achieve sustained compliance with the law
- > deter non-compliance
- > prevent workplace injury.

The key principles of regulation underpinning Comcare's compliance and enforcement activities are:

- > Transparency—Comcare demonstrates impartiality, balance and integrity.
- > Consistency—Comcare endeavours to ensure that similar circumstances lead to similar enforcement outcomes, thus providing greater protection and certainty.
- > Constructive—Comcare provides support, advice and guidance to help people comply with OHS and SRC laws.
- > Accountable—Comcare is willing to explain enforcement decision making and uphold avenues of complaint or appeal.
- > Proportionate—compliance and enforcement responses are proportionate to the seriousness of the non-compliance.
- > Cooperation with stakeholders to ensure maximum compliance.

PART 1—COMCARE'S COMPLIANCE STRATEGY UNDER THE SRC ACT

Comcare's compliance strategies under the SRC Act range from encouraging better practice through to audit and assurance activities for employers who are still developing their compliance systems and capability.

Comcare applies a range of information, education, advice and assistance to encourage better practice through partnerships and collaboration with the jurisdiction. A combination of better practice and compliance measures may be applied that are appropriate to the circumstances.

- > education
- > self evaluation with mandatory reporting
- > audits
- > letter of warning
- > impact upon premium and regulatory contribution
- > statutory enforcement options
 - set conditions upon an applicant's approval or renewal as a rehabilitation provider
 - refuse to renew an applicant as a rehabilitation provider
 - revoke an approval as a rehabilitation provider.

For further information about better practice and compliance activities refer to schedule 1.

A STAGED APPROACH TO ACHIEVE COMPLIANCE—Employers

The Commission has introduced a staged approach to monitoring and encouraging compliance for a licensee that has resisted or been unable to achieve voluntary compliance that accords with the Australian National Audit Office *Better Practice Guide to the Administration of Regulation 2007*². So as to maintain consistency across the scheme Comcare will apply a similar regime to non licensee employers in the performance of their functions under the SRC Act. The OHS Act contains its own enforcement provisions.

² "Policy on revocation and suspension of a self insurance licence".



Comcare will seek to resolve minor or technical non-conformance through various stages. The benefit of a set of graduated responses allows Comcare to impose a response that is proportionate to the risk, escalate or de-escalate regulatory action, and minimise the costs associated with a response. The use of a graduated set of responses also means that the financial, health and time costs of employers and employees can be minimised.

Once Comcare has identified that there is a problem, in the normal course of events, the employer would be notified of the issue in writing and given an opportunity to resolve the problem.

The first level of the staged approach is encouragement and focuses on education and voluntary compliance. This includes activities such as information and presentations provided by Comcare's SRC Act Policy Section.

If encouragement activities are unsuccessful or Comcare considers them to be inappropriate, it could consider activities at the second level in the direction category. This will depend on the issue.

Comcare may:

- > issue a letter requesting an action/direction (such as a report)
- > issue a letter of statutory warning to the principal officer
- > issue a request that the principal officer appear in front of the Commission
- > the CEO of Comcare visit the principal officer of an employer
- > direct that further audits and/or investigations be undertaken to address the issue
- > report the employer's poor performance in Comcare's Annual Report
- > request the employer to report its poor performance in its own Annual Report
- > report the employer's poor performance on Comcare's website.

The third level is restriction. Comcare may, for example, consider it necessary to place restrictions on the manner in which the employer performs its rehabilitation functions. Comcare may also, by virtue of the increased level of regulatory oversight, increase an employer's regulatory contributions to Comcare.

Comcare will have the discretion to undertake a simultaneous mix of the actions identified in the encouragement, direction and restriction categories, depending on the breach or issue. Using a combination of these steps is likely to communicate the seriousness with which Comcare views non-compliance.

At any point during the process it is open to an affected employer to make written representations to Comcare regarding the matters in question, and the appropriateness and effectiveness of Comcare's proposed regulatory response.

A STAGED APPROACH TO ACHIEVE COMPLIANCE—Approved Rehabilitation Providers

A nationally consistent approach to the approval and regulation of rehabilitation providers was developed by a working party of representatives from all Workers' Compensation Authorities nationally (including Comcare), and has been endorsed by HWCA (Heads of Workers' Compensation Authorities).

The national approval and regulatory approach, i.e. Comcare's approach, is detailed in the documents *Guide—Nationally consistent approval framework for workplace rehabilitation providers* and the evaluation methodology and evaluation tool published in the *Workplace Rehabilitation provider evaluation manual*. These documents are available from the HWCA website at www.hwca.org.au

The purpose of the nationally consistent approval framework for rehabilitation providers is to:

- > provide a robust approval system across the workers' compensation authorities;
- > enable objective measurement of provider performance against the conditions of approval
- > establish standards designed to delivery high quality rehabilitation services to workers, employers and insurers.

Comcare (and other workers' compensation authorities) are responsible for maintaining an approval framework that:

- > seeks to ensure provider conformance with the conditions of approval—including Comcare's provider criteria and operational standards
- > creates an efficient and effective system for providers to operate within
- > promotes collaboration and delivers return to work outcomes to all stakeholders'
- > promotes innovation and continuous improvement in return to work solutions.

Comcare is responsible for the approval of rehabilitation providers wishing to operate within our jurisdiction and has adopted an approval and regulatory process consistent with the model endorsed by HWCA. Providers are required to apply to Comcare for approval and meet Comcare's criteria and operational standards—outcome and service delivery standards—which include all requirements of the national framework.

PART 2—COMCARE’S OHS COMPLIANCE STRATEGY

Comcare’s compliance and enforcement strategies range from encouraging better practice through partnerships with employers with mature safety systems, through to audit and assurance activities for employers who are still developing their compliance systems and capability.

PURPOSE AND SCOPE OF OHS COMPLIANCE AND ENFORCEMENT STRATEGY

This strategy builds on the *National Occupational Health and Safety (OHS) Compliance and Enforcement Policy* (the National Policy). The National Policy is a principles-based document agreed to by all heads of Australian workplace authorities to work towards a consistent, national approach to the enforcement of OHS laws. The National Policy is interim in nature, pending the development and jurisdictional implementation of model work health and safety laws.

The purpose of this strategy is to explain Comcare’s approach to OHS regulation.

Comcare’s approach to OHS regulation is also shaped by work health and safety priorities. Each year, Comcare identifies a series of specific health and safety related priorities aimed at continuing to improve worker health and safety. The priorities form the basis of Comcare’s targeted health and safety interventions and activities.

Consistent with the National Policy, Comcare has a risk based and responsive approach to compliance and enforcement.³

RISK BASED REGULATION

Compliance and enforcement actions are targeted to areas of greatest risk to health and safety and where they are likely to have the greatest impact on improving working environments.

³ *National OHS Compliance and Enforcement Policy*.



RESPONSIVE REGULATION

To ensure that Comcare's regulatory response is effective in managing compliance at the workplace—compliance and enforcement measures are responsive to the particular circumstances of the duty holder or workplace that is the subject.

Responsive regulation uses the most effective and appropriate measures to achieve compliance.

Responsive sanctioning complements responsive compliance and enforcement. The principles governing such sanctioning aim to:

- > change the behaviour of the duty holder
- > eliminate any financial incentive of non-compliance
- > be proportionate to the nature of the offence and the harm caused
- > reduce the harm caused by regulatory non-compliance, where appropriate
- > deter future non-compliance
- > be responsive and consider what is appropriate for the particular duty holder.⁴

Regardless of the level of systems compliance and capacity demonstrated by a duty holder, enforcement activity of the types outlined in this policy may be undertaken against employers and other duty holders who are found to be in breach of their legislative obligations and duties.

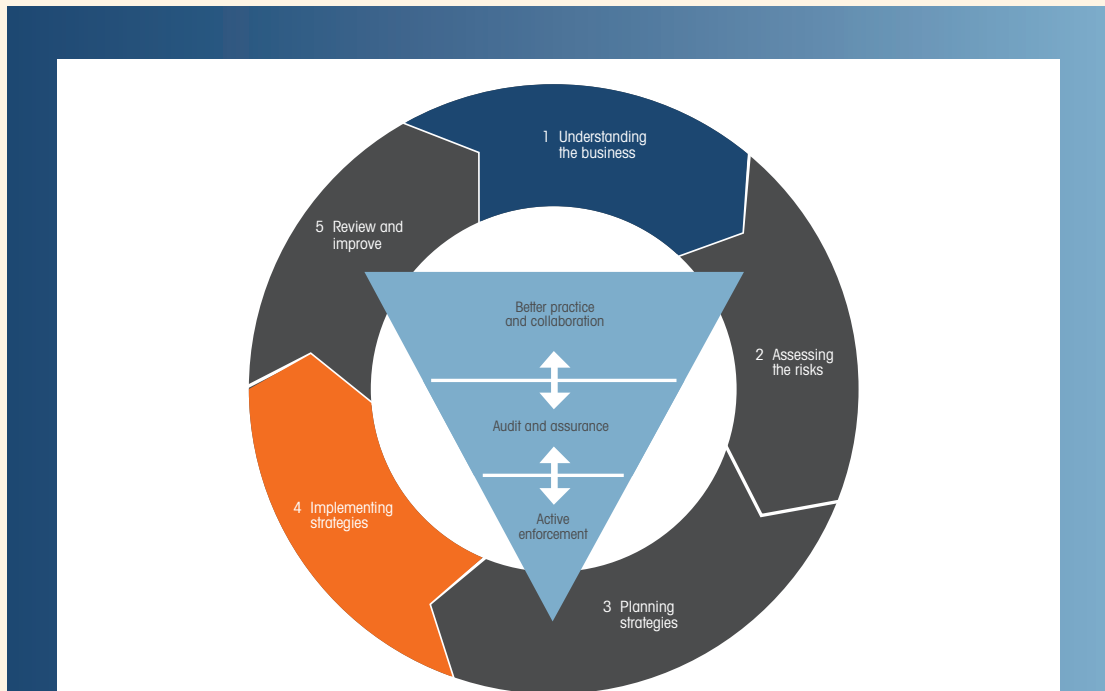
With a clear sense of risk and co-designed treatment options, Comcare is able to identify areas of weakness in jurisdictional coverage and coordinate approaches to address gaps.

APPROACH TO OHS REGULATION

To give effect to our regulatory philosophy and principles, Comcare follows a planned sequence of steps which acknowledges the dual responsibilities that both Comcare and employers have in ensuring safety outcomes are achieved.

The following diagram illustrates the key steps which guide Comcare's regulatory approach.

⁴ *National OHS Compliance and Enforcement Policy.*



STRATEGIC LEVEL

Scheme Integrity

- > Analyses Trends and Patterns
- > Develops Strategy
- > Understands the Business
- > Manages Partnerships

PROGRAMMING LEVEL

Program Management

- > Program Coordination
- > Work Health
- > Work Safety
- > Licensing, Audit and Monitoring

SERVICE DELIVERY LEVEL

Centralised Event and Case Intelligene System

Regional Service Teams

- > Serious Investigations
- > Safety Interventions
- > Health and Safety Audits
- > Health and Safety Education
- > Alliances and partnerships

Other delivery options

- > Other jurisdictions
- > Other Government agencies
- > Industry Forums
- > Employee representatives and groups

As shown in the diagram, the key steps are:

UNDERSTANDING THE EMPLOYERS' BUSINESSES

Understanding our employers allows us to develop tailored interventions that target areas of risk. By doing this we help reduce the regulatory burden by focusing our effort on those who need it. A number of strategies are used to inform us of risks including segmentation and market analysis, employer profiling and environmental scanning.

ASSESSING THE RISKS

Risks are assessed within a risk framework. An assessment is made using up-to-date information received from a range of information sources including incident notification, employer profiles, safety campaigns, industry trends, research, media alerts, workers' compensation claims history, or through work site visits and observations. Issues identified are then categorised and prioritised. Categories include those requiring:

- > a national, potentially multi-jurisdictional effort
- > a whole of agency response
- > more localised intervention
- > oversight only.

Priorities are determined by risk.

PLANNING STRATEGIES

A range of strategies are used to address the levels of identified risk. These are managed through planned campaigns designed and coordinated by a dedicated program management area. The intent of these campaigns is to prevent workplace incidents and achieve improved safety outcomes by influencing health and safety behaviour. The tools that may be used within these campaigns include:

- > collaborative compliance strategies
- > education
- > monitoring and verification activities
- > adjusting regulatory priorities.

IMPLEMENTING STRATEGIES

We aim to target our efforts to those that do not get the safety message and to areas that present as highest risk—in either workplace health or safety. This approach ensures that we are efficient in our service delivery and productivity loss is minimised. We tailor solutions to ensure the desired workplace behaviour outcome is achieved. Solutions are balanced, proportionate to the risk, and visible. Campaigns may involve one or more of the following service delivery options:

- > partnering with other jurisdictions
- > leveraging off industry bodies, universities and research institutions
- > working collaboratively with employers or a range of employers on a particular issue
- > working independently through regional service delivery.

REVIEW AND IMPROVE

We are committed to improving the health and safety of workers. Part of this is being able to measure our effectiveness to ensure continuous improvement and high service delivery standards. This will not only be measured through overall scheme performance, but also by listening to feedback from federal workers and the broader community.

EDUCATION, COMPLIANCE AND ENFORCEMENT MEASURES

Comcare has a range of options as to whether education, compliance assistance, enforcement action—or a combination of these—will be applied in a given situation.

Comcare applies a range of information, education, advice and assistance to encourage better practice through partnerships and collaboration with workers and employers in the jurisdiction. If a duty holder is found to be non-compliant with duties and obligations, a range of enforcement options are available under the OHS Act and others have been endorsed by Comcare. A combination of better practice, compliance and enforcement measures may be applied that are appropriate to the circumstances.

- > education
- > audits
- > inspection
- > Comcare-endorsed enforcement option
 - letter of warning
- > statutory enforcement options
 - Improvement Notice
 - Prohibition Notice
 - written request for particulars of action taken or proposed
 - public inquiry
 - report to the Minister
- > civil remedies and sanctions
 - declaration of contravention and pecuniary penalty
 - injunction
 - remedial order
 - enforceable undertaking
- > criminal prosecution.

For further information about better practice and compliance activities refer to schedule 1. For further information about enforcement options available under the OHS Act refer to schedule 2.

ESCALATION

Regulatory strategies may need to escalate if they do not achieve the desired outcome, or are otherwise not appropriate given the circumstances. One mechanism for escalation and monitoring compliance with the OHS Act is through conducting an investigation.

DECISION TO INTERVENE

Information about safety events received by Comcare will be assessed to determine the appropriate regulatory response.

Comcare may respond by liaising, educating, inspecting, auditing or investigating.

When deciding on the type of intervention and escalating the regulatory approach, Comcare will take into account a number of factors, including:

- > the severity and scale of potential or actual harm—this includes consideration of the risk to safety and the practicality of achieving results
- > available intelligence including the duty holder's compliance history
- > other considerations such as Comcare priorities and campaigns, significant community concern or emerging issues.

In circumstances where the activities of a person or an employer are outside of Comcare's jurisdiction, Comcare works closely with the relevant state or territory workplace health and safety authority and other regulatory agencies.

In responding to a safety event where there is potentially overlapping jurisdiction, Comcare will provide information to other regulators to ensure that appropriate action may be taken in relation to all duty holders.

For further information about compliance strategies including audits, refer to schedule 1 to this policy.

WHAT TRIGGERS AN INVESTIGATION OR INSPECTION?

Comcare exercises discretion in deciding whether to intervene in patterns of behaviour, incidents, cases of ill health, or complaints. There are two types of discretionary responses to incidents which require immediate regulatory examination:

1. In a small number of cases, serious investigations are initiated for those events likely to involve more egregious levels of non-compliance with the Act. For example, workplace incidents resulting in death or serious injury, and reckless or intentional conduct that gave rise to a high risk incident.
2. The majority of our responses are initiated as inspections which encompass activities including education, compliance assistance and compliance monitoring activities. Inspections are focused on achieving a safety outcome and reducing accidental non-compliance. This type of intervention may be incident based or conducted in response to a pattern of incidents. Inspection activities are undertaken collaboratively with employers, workers and employee representatives to invest in better work health and safety outcomes. Under our escalating model, some cases may require use of investigator powers to enforce the appropriate levels of compliance.

The Act does require that an investigation be conducted:

- > where an employer disputes a Provisional Improvement Notice (PIN) issued by a health and safety representative (HSR)
- > following a request from a HSR for investigation or an investigation of a PIN that has not been complied with
- > following a dispute between a supervisor and a HSR about whether sufficient action has been taken to remove an immediate threat to health and safety.⁵

Once an investigation is commenced, a range of statutory enforcement tools become available to an investigator. Consistent with the OHS Act and the National Policy, investigations are undertaken in order to determine:

- > compliance with the OHS Act and Regulations
- > the facts or causes of an accident or dangerous occurrence
- > whether action has been taken or needs to be taken to prevent a recurrence and to secure compliance with the Act
- > lessons to be learnt and to influence the law and guidance
- > what response is appropriate to an alleged breach of the OHS Act or Regulations.⁶

To maintain a proportionate response, most resources available to investigate incidents are devoted to more serious circumstances.

Comcare will generally carry out an investigation of a notifiable work-related death, unless there are appropriate reasons for not doing so.

⁵ Sections 28, 29 and 37 of the Act.

⁶ Section 41 of the Act. *National OHS Compliance and Enforcement Policy* at page 7.

ESCALATION OF ENFORCEMENT ACTION

Where an investigation reveals evidence of non-compliance, enforcement action may graduate from a notice issued by an investigator through to civil proceedings or a criminal prosecution.

In assessing the need for escalation of enforcement action, Comcare has regard to the following priority areas:

- > work-related fatalities and serious injuries or where there is a risk of such consequences
- > non-compliance with notices or directions
- > offences against investigators
- > offences against persons exercising OHS responsibilities at the workplace (e.g. health and safety representatives, workplace health and safety officers, union officers or other persons authorised under the legislation)
- > discrimination against employees on the basis of their OHS activities
- > failure to notify incidents.⁷

All Comcare investigators are appointed under the OHS Act and have extensive powers, including to issue statutory notices, and to compel the provision of information and evidence. For further information about the statutory enforcement options available to investigators refer to schedule 2.

WHAT PRINCIPLES ARE APPLIED WHEN ENFORCING THE OHS ACT?

Most enforcement activity is undertaken by investigators who adopt a flexible and responsive approach in accordance with the Act. In considering a response to an alleged contravention of the OHS Act or Regulations, investigators will have regard to the principles outlined in this policy where appropriate to do so.

Decisions about appropriate enforcement measures occur at various stages of an investigation. Not all of the principles outlined below may be relevant. For example, where there is an immediate threat to the health and safety of a person, a Prohibition Notice may be issued without regard to all of the principles.

In deciding whether, and to what extent, enforcement action is warranted, Comcare applies objective policy considerations to foster consistency and proportionality. These considerations are outlined in the National Policy⁸ and supplemented below, taking into account the particular legislative and administrative framework within which Comcare operates.

Adverse effect

This involves a consideration of the facts, whether it was foreseeable that harm could be caused and the practicability of avoiding the actual or potential harm.

A systematic failure by an employer to appropriately address a known or foreseeable risk is likely to be viewed more seriously than a risk to which an employee was exposed because of a combination of inadvertence on the part of an employee and a momentary lapse of supervision.

⁷ *National OHS Compliance and Enforcement Policy* at page 7.

⁸ *National OHS Compliance and Enforcement Policy* at page 5 outlines the principles that Australian workplace authorities should have regard to in determining the appropriate compliance and enforcement strategy.

It is also relevant to consider:

- > the extent of the risk
- > the seriousness of the breach
- > the actual or potential consequences.

The gravity of the consequences of an incident does not itself dictate the seriousness. However, the occurrence of death or serious injury may manifest the degree of the seriousness of the safety breach.

The objective seriousness of the risk, breach and actual or potential consequences, without more, may call for the most serious enforcement action to meet reasonable community expectations, encourage future compliance with the OHS Act and deter non-compliance.

Culpability

Culpability involves a consideration of how far below acceptable standards the conduct has fallen. It may be relevant to consider whether the duty holder had a licence or permission to undertake particular activities. It might also be relevant to consider industry codes of practice. Comcare may rely on expert evidence in making an assessment of the culpability of each duty holder.

Compliance history and attitude

This involves consideration of any previous findings of non-compliance made against a duty holder and may involve an analysis of relevant incident data. Regard may also be had to the duty holder's cooperation during the investigation.

Likelihood of any breach being repeated

This involves consideration of a duty holder's approach to managing OHS, the steps taken to prevent risk of injury and any alleged failure to comply with a statutory notice issued by an investigator.

Impact of enforcement on encouragement or deterrence

The objects and terms of the OHS Act make it clear that general deterrence and specific deterrence are relevant considerations.⁹ Employers are required to take all reasonably practicable steps to ensure safety in the workplace and should adopt an approach to safety which is proactive and not merely reactive. In many cases it will be necessary to have regard to the need to encourage a sufficient level of diligence by duty holders in the future. This is particularly so where an employer conducts a large enterprise which involves inherent risks to safety.

Any mitigating or aggravating circumstances

It is a significant aggravating factor if the risk of injury was foreseeable, even if the precise cause or circumstances of exposure to the risk were not foreseeable. The situation may be further aggravated if the risk of injury is not only foreseeable but actually foreseen and an adequate response is not taken by the duty holder. The neglect of simple, well-known precautions to deal with an evident and great risk of injury take a matter towards the worst case category.

Comcare will also consider any mitigating circumstances including the extent of effort a duty holder has expended in controlling risks.

⁹ Section 3 of the OHS Act includes at paragraph (f) the object "to provide for effective remedies if obligations are not met through the use of civil remedies and, in serious cases, criminal sanctions".

Whether the risk to health and safety is imminent or immediate

If there is a risk to health and safety, the situation will be assessed by an investigator to determine whether, in the first instance, it is appropriate to issue a prohibition or improvement notice.

Remedies that may be achieved through a particular course of enforcement action

It is relevant to consider the remedies that may be achieved. A combination of enforcement and compliance tools may be used by Comcare and investigators.

Reference material

Information on Comcare publications and compliance assistance material can be found on Comcare's website at www.comcare.gov.au or by contacting Comcare on 1300 366 979.

SCHEDULE 1

BETTER PRACTICE AND COMPLIANCE MEASURES

This schedule describes measures to achieve better practice and for monitoring compliance.

BETTER PRACTICE AND COMPLIANCE MEASURES

Comcare assists employers and workers in our jurisdiction to meet their legislative responsibilities and strive for better practice in safe and healthy workplaces. This involves Comcare working collaboratively with employers and workers in the jurisdiction by:

- > providing information and advice on better practice in health and safety at work
- > promoting development of culture and systems that support worker health, wellbeing and resilience
- > assist and support in the rehabilitation and compensation of injured workers
- > partnering with stakeholders, industry and social partners, and across government on initiatives to improve the health of workers.

BETTER PRACTICE AND COLLABORATION PRINCIPLES

The elements of Comcare's regulatory approach applied through better practice and collaboration are underpinned by the following principles:

1. **Leadership commitment**—Organisations need engagement and commitment from their leaders to develop and continuously improve safety and rehabilitation management culture and systems. Partner engagement at the leadership level is a key element of our approach.

2. **Systems-based approach**—OHS, rehabilitation and compensation management systems provide a framework within which the employer is able to meet their legal responsibilities and achieve sustainable and continuous improvement in OHS, injury management and rehabilitation outcomes.

Effective organisational approaches require a combination of primary, secondary and tertiary level interventions:

- A primary intervention is the undertaking of prevention measures by employers to address hazards in the workplace through risk identification, assessment and control
- Secondary intervention is prevention that aims to reduce the severity of consequences of hazards and harm including responding to early indicators such as near misses, incident reports or absenteeism.

Secondary intervention also provides a "safety net" to catch people who are showing early warning signs of illness or injury so that early rehabilitation intervention and support can be provided before symptoms develop into illness

- Tertiary interventions deal with the consequence of injury, in particular effective rehabilitation strategies.

3. **Effective and regular consultation**—Interactions with our partners are open. We facilitate information exchange and feedback to enable more effective regulatory approaches to current and emerging challenges. We also work in partnership with a range of representative bodies, including employer organisations, unions, service providers, inter-jurisdictional bodies and legal advisors to achieve healthier and safer workplaces.

4. **Evidence-based approaches**—Facts, evidence and analysis are fundamental to how we assist employers and employees to improve workplace safety and the rehabilitation of injured employees. Development of advice, products and solutions is linked to research on better practice.
5. **Incentives**— that workers are at the centre of what we do to ensure that they return safely to their families, friends and communities everyday.

KEY STRATEGIES

Comcare applies a range of information, education, advice and assistance strategies to encourage better practice through partnerships and collaboration with employers in the jurisdiction.

These key strategies are applied to varying degrees across the priority areas. The key strategies include:

- > **Consultation and engagement**—Activities that engage our partners in strategic improvement and developing solutions to identified issues. These activities include meetings with our stakeholders, employer forums, practitioner networks and workshops.
- > **Research and collaboration**—Conducting or supporting research and sharing better practice in the prevention and management of workplace injury or disease—collaborative research and new initiatives partnering with stakeholders, business and government.
- > **Awareness and promotion**—National Comcare Conference, regular seminar series, workshops, forums, website resources, regular communications and sharing of information through newsletters, electronic updates and Safety Alerts.
- > **Better practice guidance**—Specific guidance developed and provided to employers to promote prevention as the primary means of reducing the human and financial costs of workplace injury—guidance on particular high frequency or high severity risks such as psychological injuries.
Rehabilitation guidelines developed and provided to employers (rehabilitation authorities) to promote effective rehabilitation to also reduce the human and financial cost.
- > **Practical tools**—Advice and assistance for employers to adopt an integrated systems approach through continuous improvement of OHS and rehabilitation management systems. For example, performance indicators, self assessment guides, case studies, business case for investment in broader approaches to organisational health.
- > **Education and training**—Training programs to build awareness and capability in health, injury prevention and rehabilitation. These programs are delivered, fee for service, through a calendar of training and tailored in-house training to meet identified needs.
- > **Cooperative compliance**—A targeted strategy to improve work health, safety and rehabilitation compliance by working with a range of stakeholders such as employers, unions, HSRs, rehabilitation case managers, approved rehabilitation providers and other jurisdictions on areas that have been identified as requiring significant improvements in health and rehabilitation services. Compliance plans are designed to improve knowledge, skills and relationships between stakeholders involved.

- > **Performance information**—Monitoring and reporting scheme OHS, rehabilitation and injury indicators and jurisdictional targets. Assistance to enable employers to improve the measurement and monitoring of injury management performance. Premium paying employers have access to an online database Customer Information Services (CIS) and a dedicated helpdesk.

If you require information or guidance contact Comcare by email general.enquiries@comcare.gov.au or telephone 1300 366 979.

COMPLIANCE ACTIVITIES

As a general policy, compliance activities are undertaken cooperatively and without using legislative powers. Comcare may monitor or encourage compliance using a number of different strategies including:

- > audits¹⁰
- > self-audits with mandatory reporting
- > health and safety site visits and inspections
- > monitoring of internal investigative processes and reviewing provision of advice concerning health and safety issues
- > education
- > collaboratively identifying opportunities for improving worker health and safety.

PRINCIPLES APPLYING TO COMCARE'S COMPLIANCE ACTIVITIES

Comcare is accountable to the Minister, the Commission and the Australian public to ensure that the jurisdiction is meeting its obligations under the OHS and SRC Acts.

The following principles provide the rationale for undertaking compliance activities and guidance in relation to the delivery of regulatory services within the jurisdiction.

1. CONTINUOUS IMPROVEMENT

A systems based approach provides for good governance and encourages continuous improvement.

Comcare's approach to regulation is to encourage continuous improvement through a systems based approach with the flexibility to achieve outcomes and work towards ensuring work health and safety.

Audits conducted by Comcare provide objective evaluation and are an important tool in helping managers to stay on track and identify areas for improvement. Evaluation and audit results can be an important input into the design or improvement of internal policies, procedures and processes. Decision makers can use these results when assessing their systems to determine if intervention is required and the extent to which progress is being achieved toward established goals.

Implementing effective management systems for prevention, rehabilitation and compensation management which are assessed internally and externally, provides senior managers with their own assurance mechanism and assists good governance.

¹⁰ The purpose of an audit is to assess compliance and enhance the effectiveness of management practices. Comcare's audits are based on agreed standards such as AS4801/ISO 9001 and the requirements of the legislation and regulations administered by Comcare

2. CO-ORDINATED AND CONSTRUCTIVE

Comcare will ensure a co-coordinated and constructive approach to regulation.

As outlined in this Regulation Policy, Comcare uses a range of regulatory strategies to address work health and safety priorities. A work health priority is a key issue or theme that Comcare is focusing on in a given year.¹¹

Comcare coordinates work on priorities through its campaigns. Services delivered within these campaigns—be they education, advisory, or audits—will be co-coordinated and aimed at building organisational capability to properly manage workplace risks.

Campaign activities will maximise regulatory effectiveness by targeting resources toward priority issues, incorporating lessons learned and sharing best practice with the jurisdiction.

Comcare will:

- > assist in promoting the development of better practice OHS, compensation claims and rehabilitation management systems
- > assist the adoption of a regular cycle of performance evaluation to underpin continuous improvement
- > monitor the influence and reach of advice and guidance
- > provide an active regulatory assurance plan.

3. TARGETED AND PROPORTIONATE

Regulatory interventions will be targeted at identified risks or priority issues. Where non-compliance is identified, compliance and enforcement responses will be proportionate to the seriousness of the non-compliance.

Where compliance issues are identified, responsive regulation seeks to use the most effective, appropriate and proportionate measures to achieve compliance.

Regulatory risks need to be systematically reviewed. Comcare and the jurisdiction need to be able to respond to new and emerging risks. When determining which organisations will be targeted for intervention, consideration will be given to employer risk profiles, identified trends of non-compliance within employer and industry groups, the impact on productivity and any requirements of the Commission.

4. ASSURANCE AND CONSISTENCY

Comcare will provide assurance that legislative obligations are being met.

Licensees are subject to annual audits across the three functions of prevention, rehabilitation and claims management as part of the Licensee Improvement Program. This program recognises continuous improvement and rewards high performers with a co-operative approach to regulation and reduced licence fees. Comcare conducts audits, on behalf of the Commission, of all licensees in the first two years that they hold their licence. Where proven good performance has been established, the Commission may determine that the Licensee is then able to manage their own audits and report to Comcare and the Commission on outcomes. All Licensees undertake their own audits and will undergo audit by Comcare in their final year of licence when seeking licence renewal.¹²

¹¹ For further information, refer to the annual Work Health and Safety Plan available on the Comcare website.

¹² The Commission has endorsed the use of specific audit tools by Comcare when undertaking audits of Licensees for Rehabilitation, Claims Management Systems and Prevention. The Commission endorsed audit tools must be used when undertaking audits of Licensees under the Licensee Improvement Program or tier. These audit tools cannot be amended or changed without consultation with both the Commission and Licensees.

For further information about options available to the Commission in regulating self insurance licences, refer to the Commission website www.srcc.gov.au

All employers and employees covered by the OHS Act are currently subject to Comcare's system and targeted safety audit programs.

Comcare is expanding compliance monitoring activities to include rehabilitation under the SRC Act.

Comcare has a capable pool of auditors and investigators with a broad range of backgrounds, and also draws on external expertise when necessary. Comcare is committed to continually building the skills and capability of its in-house auditors and investigators.

Where a serious issue is detected during any cooperative compliance activity, it may be referred for further and appropriate escalation.

Where there is an identified non compliance with the SRC or OHS Act, corrective actions will be taken.

5. COMCARE ACCOUNTABILITY AND TRANSPARENCY

Comcare will be accountable for decisions, and activities will be delivered by a skilled workforce, demonstrating impartiality, balance and integrity.

The skill and attributes required to deliver the audit program are:

- > knowledge of the *Occupational Health and Safety Act 1991* and *Safety, Rehabilitation and Compensation Act 1988*
- > competence to conduct audits, including auditor training and experience
- > strong relationship skills, with the ability to work collaboratively and professionally with internal and external stakeholders
- > ability to identify emerging issues, deficiencies and non-compliance and to assess actions to address these issues
- > behaviours and conduct that display impartiality, balance and integrity

When Comcare contracts external audit expertise, Comcare remains responsible for the quality of regulatory decisions. Systems and procedures will be in place to ensure outsourced activities are undertaken in accordance with performance standards set by Comcare. Contract management principles and practices provide a framework for managing an outsourced activity, that is—defining the outputs to be purchased, stipulating quality and performance standards, and monitoring of the contract.¹³

¹³ ANAO Better Practice Guide to the Administration of Regulation 2007.

SCHEDULE 2

ENFORCEMENT MEASURES UNDER THE
OCCUPATIONAL HEALTH AND SAFETY ACT 1991

STATUTORY ENFORCEMENT OPTIONS

Following the commencement of an investigation, the OHS Act provides for a range of statutory enforcement measures. Statutory enforcement options can be exercised at various stages of an investigation.

Improvement Notice

An Improvement Notice is a statutory notice¹³ issued by an investigator requiring a person to undertake certain action. The notice has effect as soon as it is given to a person, and the notice includes a time limit for completion. An investigator issues an Improvement Notice based on the opinion that a person is breaching a provision of the OHS Act or Regulations, or has breached a provision of the OHS Act or Regulations and it is likely that the breach will be repeated. An Improvement Notice is used in situations which, while requiring improvement, do not warrant the additional restrictions of a Prohibition Notice. An Improvement Notice may specify action to be taken by an employer, including that an internal or expert investigation be conducted. An investigator may, by written notice, revoke or vary an Improvement Notice. The OHS Act provides for penalties for failure to comply with a notice.

Prohibition Notice

An investigator may issue a Prohibition Notice¹⁴ that prohibits an activity that the investigator believes involves, or will involve, an immediate threat to the health and safety of any person. A Prohibition Notice has a more serious impact on the person to whom it is issued than an Improvement Notice. This is because the activity cannot be started again until adequate action has been taken to remove the threat. For this reason, an investigator must be satisfied that the threat to health and safety is immediate. An investigator may, by written notice, revoke or vary a Prohibition

Notice. The OHS Act also provides for penalties in relation to non-compliance with prohibition notices.

Written request for particulars of action taken or proposed

The Act provides that a written report must be prepared following an investigation and that a copy of the report will be forwarded to the relevant employer¹⁵. The final report may be accompanied by a written request for an employer to provide particulars of any action that is proposed to be taken as a result of the conclusions or recommendations contained in the report. The report may also provide any action that has been, or that is proposed to be taken in relation to any Improvement or Prohibition Notice. A request for particulars of action taken or proposed may be made by a delegate or the Commission in order to assess whether there are appropriate safety measures in place to prevent or minimise future risk of injury. Where there has been a serious or systematic incident of non-compliance, the making of such a request may be accompanied by more serious enforcement action.

Revoking, suspending or cancelling authorisations

Comcare authorises certain people to undertake certain types of work and organisations to undertake certain types of undertakings, such as operating a major hazard facility.

Subject to legal requirements, Comcare may decide to revoke, suspend or cancel any authorisation in order to deal with conduct or practices identified in its investigation, inspection or audit. Such action is a protective measure and may be undertaken even where steps have been taken to remedy a contravention, or where a person has otherwise been punished (i.e. fined).

Comcare recognises that revocation, suspension or cancellation of authorisation may have serious consequences for a person and may also have serious adverse 'flow on' effects. When making decisions about authorisations, Comcare balances these

¹³ Section 47 of the Act.

¹⁴ Section 46 of the Act.

¹⁵ Section 53 of the Act.

considerations with the paramount need to protect workers and other persons and ensure safety.

Public inquiry (not applicable to GBEs and non-Commonwealth licensees)

The Act provides that the Commission may conduct a public inquiry following an investigation. The Commission may hold the whole or part of an inquiry in private if it is considered to be in the public interest to do so. Following a public inquiry, a report may be provided to the Minister for Education, Employment and Workplace Relations (the Minister) and if it is, the report must be tabled in Parliament.

Report to the Minister (not applicable to GBEs and non-Commonwealth licensees)

The Commission may, in certain circumstances, prepare a report to the Minister. The circumstances in which the Commission might prepare such a report hinge on a failure or shortcoming of a duty holder's response to the conclusions or recommendations contained in a report of investigation, or of the employer's action or lack of action in relation to an Improvement Notice or Prohibition Notice. The Minister must cause a copy of the report to be tabled in Parliament.

Can I approach Comcare to review an investigation, inspection or audit?

Individuals and employers can request a review of the professional conduct, process, or findings of an investigation or other compliance activity. A request can be made to Comcare's General Manager of Work Health and Safety or Chief Executive Officer. Comcare has an internal professional review mechanism that can assess concerns, new evidence and findings. The General Manager of Work Health and Safety considers recommendations

arising from this review in deciding whether any further action is required.

What rights do I have under the OHS Act if I disagree with a decision made by an investigator?

The Act provides for certain classes of persons affected by a decision made by an investigator to lodge an appeal with Fair Work Australia (FWA).¹⁶ FWA is the national workplace relations tribunal.

Which decisions may be appealed?

Rights of appeal against an investigator's decision are described in section 48 of the Act. The following decisions made by an investigator may be appealed. The decision:

- > to take possession of plant, substances or things
- > to issue a 'Do Not Disturb' notice, either verbally or in writing to direct that a workplace, plant, substance or thing not be disturbed
- > to confirm or vary a Provisional Improvement Notice (PIN) issued by a health and safety representative (HSR)
- > to issue, revoke or vary an Improvement Notice or Prohibition Notice
- > that an employer who has been issued with a Prohibition Notice has not taken adequate action to remove the threat to health and safety identified by the Prohibition Notice.

In addition, an employee, HSR or employee representative affected by the cancellation of a PIN, or the decision that a person named in an Improvement Notice has taken adequate action to remove the threat named in the Improvement Notice, may appeal those decisions.

¹⁶ Section 48 of the Act.

Who may appeal a decision?

- > an employer affected by the decision
- > the HSR for a designated work group in which is included an employee affected by the decision
- > an employee representative, where requested to do so
- > the owner of the workplace or item to which a decision relates
- > a person who has been issued with an Improvement Notice or a PIN.¹⁷

How do I appeal a decision?

For information on how to lodge an appeal, including the required time period in which to do so, see the FWA rules at www.fwa.gov.au

FWA may affirm or revoke the investigator's decision. It may also vary the investigator's decision and substitute its own decision. To do this, FWA will conduct a hearing into the matter, taking into account relevant evidence.

What happens to a notice or decision once I have lodged an appeal?

Once an appeal is lodged with FWA, the decision of the investigator, including a decision to issue a notice, remains in effect unless FWA makes an interim order to the contrary.

The operation of an Improvement Notice, however, is suspended until the appeal has been determined by FWA or it makes an interim ruling to the contrary.

Civil remedies and sanctions

Civil proceedings provide a range of remedies in response to breaches of occupational health and safety obligations,¹⁸ as well as failure to comply with relevant powers of an investigator during the conduct of an investigation¹⁹. Civil proceedings can also assist prevention by deterring others from breaching their occupational health and safety obligations.

Civil remedies and sanctions include the following:

Declaration of contravention

Comcare may apply to a court (Federal or State/Territory Supreme Court) for a declaration that a person has contravened the OHS Act or Regulations²⁰. This includes contravention of a reasonable request, direction or notice issued by an investigator under Part 4 of the Act. The court will apply the rules of evidence and procedure for civil matters in such proceedings—this means that issues are decided on the 'balance of probabilities'. A declaration by the court is conclusive evidence of the contravention.

Pecuniary penalties

If a declaration of contravention is made against a person, Comcare or an investigator may apply to the relevant court for an order that the person pay a monetary penalty to the Commonwealth²¹. The maximum penalties are set out in the OHS Act and Regulations.

¹⁷ Section 48 of the Act.

¹⁸ Section 77 and Schedule 2 of the Act.

¹⁹ See for example, sections 43 (power to require assistance and information), sections 45 and 45A (power to direct that a workplace not be disturbed), section 46 (failure to comply with a prohibition notice) and section 47 (failure to comply with an improvement notice).

²⁰ Schedule 2, clause 2.

²¹ Schedule 2, clause 4.

Injunctions

Comcare or an investigator may apply to the relevant court for an injunction if a person has breached, is breaching, or proposes to breach the OHS Act or Regulations²².

The court is empowered to grant:

- > prohibitory injunctions—an order of the court that prevents a person from doing a certain act
- > mandatory injunctions—an order of the court that requires a person to take a certain action.

The court may grant an interim injunction while deciding whether to grant one of the above injunctions.

Remedial orders

If the court has made a declaration of contravention, the court may, on request, make a remedial order to fully or partly remedy a state of affairs that arose as a direct or indirect result of the contravention²³. A remedial order requires a person to take steps the court considers necessary and appropriate to rectify the state of affairs. When making such an order, the court must consider any relevant material Comcare provides. If the court makes a remedial order it can make other consequential orders (including orders as to costs) that it considers appropriate.

COMCARE—ENDORSED ENFORCEMENT OPTION

Letter of warning

Comcare may issue a letter of warning if an investigation reveals that a duty holder is alleged to have breached the OHS Act or Regulations following an investigation. The letter gives notice to a duty holder that Comcare:

- > has detected an alleged contravention with the OHS Act or Regulations, and
- > after consideration of the enforcement criteria in the *Regulation Policy* has determined that:
 - prima facie, there is sufficient evidence to commence civil proceedings
 - some form of enforcement action is warranted
 - in all the circumstances, it is not in the public interest to commence proceedings.

Note: Pages 32-35 of this Policy provide more information on Comcare's policy with respect to letters of warning.

DECISION TO COMMENCE CIVIL PROCEEDINGS

The decision to commence civil proceedings is discretionary. Civil proceedings may be commenced at any time during the course of an investigation where, for example, a person fails to comply with an investigator's request to provide reasonable assistance in connection with an investigation.²⁴

An alleged contravention, including a failure to comply with a reasonable request, direction or notice issued by an investigator may be referred to Comcare for consideration. Comcare will consider each case on its merits and apply the principles outlined in this Policy in deciding whether civil proceedings will be commenced.

²² Schedule 2, clause 14.

²³ Schedule 2, clause 14.

²⁴ See for example, section 43 of the Act.

Legal Services Directions

Civil litigation is conducted by Comcare in accordance with the Legal Services Directions 2005 (as amended). The Directions are a set of binding rules issued by the Attorney General about the performance of legal work for the Commonwealth (whether performed in-house, by the Australian Government Solicitor or by other external legal service providers).

In deciding whether to commence litigation, Comcare considers the prospects of success in the matter and takes into account the relevance and admissibility of any evidence, the availability of relevant witnesses and any lines of defence that might be available. In conducting litigation, Comcare adheres to the model litigant principles contained in *The Commonwealth's Obligation to act as a Model Litigant*, at Appendix B of the Directions.

Within what time frame must civil proceedings be commenced?

Civil proceedings must be commenced within six years of an alleged breach of the OHS Act or Regulations on which the proceedings are based.²⁵

How will a decision be communicated?

Generally, a duty holder will be advised of Comcare's decision to commence civil proceedings following the completion of an investigation. Comcare may, however, commence proceedings at any time and does not have to await the outcome of an investigation.²⁶

The outcome of successful proceedings will be published to maximise the deterrent value and educate duty holders. Publication of cases draws attention to the consequences of poor occupational health and safety and the need for real and sustainable improvement in workplace health and safety.

ENFORCEABLE UNDERTAKINGS

Comcare may accept a written undertaking from a duty holder in relation to the fulfilment of an obligation under the Act. This remedy is available to encourage best practice and compliance with the requirements of the Act. If civil proceedings have commenced and Comcare accepts an undertaking, Comcare may ask the court to adjourn the proceedings that are underway.

An undertaking can only be withdrawn or varied with the consent of Comcare. If a person breaches a term of an undertaking, or withdraws or varies the undertaking without Comcare's consent, Comcare will attempt to resolve the matter by consultation. If this is not successful, Comcare can seek a court order that the person complies with the undertaking and any consequential orders. Comcare could also pursue any civil proceedings or criminal prosecution that it had previously elected not to pursue; or Comcare could apply to the court to revive any proceedings that were adjourned because of the undertaking.

CRIMINAL PROSECUTIONS

Criminal prosecution is available for specific breaches of the OHS Act that cause death or serious bodily harm, or expose a person to a substantial risk of death or serious bodily harm, through negligence or recklessness²⁷. Prosecution is also available for certain breaches of Part 4 of the OHS Act (powers of investigators) and of the Regulations. Prosecution is a discretionary action to be determined by the Commonwealth Director of Public Prosecutions (CDPP) having regard to the Prosecution Policy. Not every breach of the OHS Act is automatically prosecuted.

The CDPP has the authority to determine whether or not a prosecution will proceed.²⁸ The Office of the CDPP administers the process of any prosecution with assistance from Comcare.

²⁵ Paragraphs 4.7 and 12.2 of the Legal Services Directions 2005.

²⁶ Section 77 of the OHS Act and see for example, section 43 of the Act.

²⁷ Section 11(2) and (3). Chapter 2 of the Criminal Code Act 1995 sets out the general principles of criminal responsibility, including the fault elements of negligence and recklessness.

²⁸ *Prosecution Policy of the Commonwealth* available at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>

If Comcare's CEO considers that other enforcement options may not be sufficient, the matter may be referred to the CDPP. If the CEO considers that prosecution action is warranted, a brief of evidence will be supplied to the CDPP.

WHEN AND WHY WILL A DECISION TO PROSECUTE BE MADE?

The decision of whether to bring a criminal prosecution for a breach of OHS laws is one of the most significant as the effect on those impacted by the decision (the defendant, worker or family of a deceased worker for instance) will be considerable.

The Australian DPPs have agreed upon a common set of principles that are used to determine the question as to whether or not a prosecution should be commenced or, if commenced, should be permitted to proceed. Although in some jurisdictions these criteria are expressed in different language, they do not differ in substance.²⁹

In determining whether or not to prosecute, three criteria which are common to all jurisdictions in the DPP guidelines need to be met. They are as follows:

- > The existence of a prima facie case—that is, whether the evidence is sufficient to justify the institution of proceedings.
- > There needs to be a reasonable prospect of conviction—that is, an evaluation of how strong the case is likely to be when presented in court. This takes into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court or tribunal that will determine the matter. It also takes into account the admissibility of any confession or other evidence, and any lines of defence available to the defendant.

- > The public interest which may include (but is not limited to) the following considerations:
 - the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature
 - any mitigating or aggravating circumstances
 - the characteristics of the duty holder—any special infirmities, prior compliance history and background
 - the age of the alleged offence
 - the degree of culpability of the alleged offender
 - whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute
 - the availability and efficacy of any alternatives to prosecution
 - the prevalence of the alleged offence and the need for deterrence, both specific and general
 - whether the alleged offence is of considerable public concern.

WITHIN WHAT TIMEFRAME MUST A PROSECUTION BE BROUGHT?

Criminal prosecution against an individual for a breach of the OHS Act must be commenced within one year of the commission of an alleged offence.³⁰

How will a decision be communicated?

A duty holder may be advised of Comcare's decision to refer a brief of evidence to the CDPP for consideration at any time during the course of, or following completion of an investigation.

The outcome of successful proceedings will be published to maximise the deterrent value and educate duty holders. Publication of cases draws attention to the consequences of poor occupational health and safety and the need for real and sustainable improvement in workplace health and safety.

²⁹ See "Prosecutorial Guidelines" agreed by the Australian Directors of Public Prosecutions, as first articulated in 30 June 1993 and *Prosecution Policy of the Commonwealth* available at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>

³⁰ Section 15B of the Crimes Act 1914 (Cth).

ENFORCEMENT ACTION AGAINST EMPLOYEES

In deciding whether to pursue enforcement action against an employee, Comcare takes into account the role, involvement and circumstances of each duty holder in applying the principles contained in this Policy.³¹ For example, the employee's duty is complementary to an employer's duty to provide appropriate training, information, instruction and supervision to enable the employee to fulfil their general duty of care.

When determining whether an employee has failed to take reasonable care of their own or other persons' safety, Comcare will pay particular regard to:

- > the systems of work in place at the workplace
- > the training, information, instruction and supervision provided to the employee
- > other action taken against the employee
- > the position and responsibilities of the employee
- > whether the employee was doing something that was in the normal course of their duties
- > whether any other employee or person was, or was potentially, placed at risk
- > whether the employee failed to have regard to relevant training and instruction concerning the performance of duties likely to impact on the health and safety of employees
- > whether the employee intentionally or recklessly interfered with, or misused anything provided in the workplace in the interests of health, safety or welfare.

Enforcement action may be pursued if the employee has:

- > failed to implement clear safety policy or instructions
- > disobeyed or ignored clear safety policy or instructions
- > failed to use or encourage the use of safety equipment
- > acted recklessly
- > been grossly negligent
- > been "skylarking" (in the absence of relevant training by an employer)
- > failed to prevent or attempt to prevent an incident or obvious hazard
- > wilfully ignored or failed to warn others of an obvious hazard.

Should Comcare ever decide that a criminal prosecution against an employee may be warranted, it would refer the matter to the CDPP. Comcare would consider referring a matter against an employee to the CDPP where:

- > an alleged breach causes death or serious bodily harm
- > the employee was either: negligent as to whether the breach would cause death or serious bodily harm or reckless as to whether the breach would cause death or serious bodily harm.³²

PURPOSE OF A LETTER OF WARNING

The purpose of a letter of warning is to provide a duty holder with the opportunity to avoid proceedings. Where appropriate, it is issued as an alternative to civil proceedings.

³¹ An employee's duty of care is provided for in section 21 of the Act.

³² See Schedule 2, Part 2 paragraph 18(1) (b) and (c) of the Commonwealth Act.

The issuing of a letter of warning is used by Comcare to demonstrate that:

- > action has been taken
- > the alleged contravention has not gone unnoticed
- > that similar leniency may not be forthcoming in relation to a subsequent allegation of non-compliance.

SUBSEQUENT EFFECT

A previous letter of warning:

- > may be taken into account by Comcare in deciding whether to commence proceedings in relation to any subsequent or similar contravention
- > will not be used during proceedings or sentencing for the subsequent contravention except in rebuttal of inaccurate assertions (for example, it may be relevant if the duty holders asserts that they have not previously breached the OHS Act or Regulations).

REGISTRATION OF LETTER OF WARNING

Comcare will maintain a register of letters of warning (the register). At the expiration of 30 days from the date of a letter of warning, Comcare will register the warning in the register unless the duty holder has exercised their entitlement to challenge the warning.

Upon registration of the letter of warning in the register as an alternative to proceedings, the matter is concluded.

The entry in the register will be valid for five years from the date of the letter of warning.

ENTITLEMENT TO CHALLENGE LETTER OF WARNING (30 DAY LIMIT)

A duty holder in receipt of a letter of warning is entitled to challenge the warning, however, the right to challenge a warning will lapse after 30 days from the date of the letter of warning unless the duty holder notifies Comcare in writing within the 30 day period that the warning is challenged.

Where an alleged offender exercises their right to challenge a warning, Comcare will then determine what should occur instead (i.e. whether the warning should be amended and reissued; no further action should be taken; or proceedings should commence).

PROCESS FOR CHALLENGING A WARNING AND REQUESTING ALTERNATIVE ACTION

When exercising the right to challenge a warning, a duty holder should:

- > within 30 days of the date of the letter of warning, notify Comcare in writing that the warning is challenged (N.B: the right to challenge the warning lapses after 30 days)
- > submit what should occur instead (i.e. amendment of the warning OR no further action OR proceedings, and why) and provide any additional information that should be taken into account
- > If requesting that the warning be amended or that no further action be taken, indicate whether the warning should still be withdrawn if Comcare determines that, upon withdrawal of the warning, proceedings will be commenced instead.

CONTENT OF REGISTER

The register includes the following information in relation to each letter of warning entered:

Details of alleged contravention:

- > date(s) of alleged contravention
- > location of alleged contravention
- > other elements of the alleged contravention (i.e. a brief description such as 'failed to comply with an Improvement Notice issued by a Comcare investigator')
- > relevant section of Act or Regulation.

Details of duty holder alleged to have contravened the OHS Act or Regulations:

- > full name of duty holder
- > address of duty holder
- > other contact details of duty holder (email, phone, postal, fax)
- > where the duty holder is a corporation or other organisation, relevant registration etc. details such as ABN, ACN, trading name.

Details of letter of warning issued:

- > date of letter of warning
- > date of expiry of letter of warning.

Registration details:

- > name and position of person registering letter of warning
- > date of entry into the register.

ACCESS TO REGISTER

The register is not available for public viewing, however, a duty holder whose details are entered into the register may, by arrangement with Comcare, view the contents of the register relating to them.

PUBLICATION OF LETTER OF WARNING

Comcare may publish non-identifying details of the letter of warning and matters relating thereto and may incorporate this information into statistics published by Comcare. Personal information will not be published by Comcare, however the duty holder may choose to publish identifying details of the letter of warning.

Comcare will inform an employer in circumstances where a letter of warning has been issued to an employee.

The number of letters of warning issued and the alleged contravention to which they relate will be recorded in Comcare's Annual Report.

LEGAL ADVICE SHOULD BE SOUGHT UPON RECEIPT OF LETTER OF WARNING

It is Comcare's policy not to release:

- > information from the register that may identify a person who is alleged to have contravened the OHS Act or Regulations; or
- > any other identifying information in relation to the letter of warning.

Any person issued with a letter of warning should consult their legal representative about its effect.

Admission of non-compliance is not a prerequisite to a letter of warning. It is not necessary for a duty holder who is alleged to have contravened the OHS Act or Regulations to admit the allegations prior to Comcare issuing a letter of warning.

ISSUING A LETTER OF WARNING

Where Comcare approves and signs a letter of warning, Comcare will issue the letter of warning to a duty holder by registered mail. The letter of warning will include the following information:

a) Alleged contravention

Details of the alleged contravention, including:

- > the date and place of the alleged contravention
- > the other elements of the contravention
- > the relevant section of the OHS Act or Regulation that is alleged to have been breached
- > the maximum statutory penalty for the contravention.

b) Nature of letter of warning

The nature, purpose and effect of the letter of warning.

c) Registering letter of warning

That Comcare will register the letter of warning in the register.

d) Publication of letters of warning

That Comcare may publish non-identifying details of the letter of warning and matters relating thereto in official publications and the media and that the number of letters of warning issued and the contraventions to which they relate are recorded in the Comcare Annual Report.

e) Legal advice should be sought

That legal advice should be sought upon receipt of the letter of warning.

f) Right to challenge warning

The process for challenging a warning and requesting alternative action.

ISSUING OF A LETTER OF WARNING TO A CORPORATION

Where the duty holder alleged to have contravened the OHS Act or Regulations is a corporation, the letter of warning will be sent by registered mail to the registered office of the corporation. It will be addressed to the attention of:

- > the Director of the corporation, or
- > where a corporation has more than one Director
 - the Secretary of the corporation, or
 - where there is no Secretary, the first Director listed on a current Australian Securities and Investment Commission (ASIC) search of the corporation.

SCHEDULE 3

ENFORCEABLE UNDERTAKINGS UNDER THE
OCCUPATIONAL HEALTH AND SAFETY ACT 1991

INTRODUCTION

As outlined in Comcare's *Regulation Policy*, there are a range of compliance and enforcement options for duty holders who do not comply with their legislative obligations.

The objects of the OHS Act promote the security of health, safety and welfare at work of employees, and the protection of third parties at the workplace. They include the specific objects:

- > to encourage and assist persons on whom obligations are imposed under the OHS Act to observe those obligations
- > to provide for effective remedies if obligations are not met, through the use of civil remedies and, in serious cases, criminal sanctions.

The Act enables Comcare to accept a written undertaking from a person who is required to fulfil an obligation under the legislation (the duty holder). An undertaking is a legal agreement which is enforceable in court.

An enforceable undertaking can be offered to adjourn or resolve civil proceedings in which Comcare is seeking a declaration of contravention.³³

Undertakings are rarely accepted in respect of matters involving a workplace fatality or serious contraventions of the legislation. This is because objectives such as deterrence may lead Comcare to determine that proceedings should be continued or commenced. A duty holder would need to satisfy Comcare that an enforceable undertaking is an appropriate regulatory outcome.

Typically, the activities associated with an enforceable undertaking are substantial and should contain specific workplace and industry occupational health and safety benefits and effective management systems relating to the fulfilment of an obligation under the Act.

This schedule provides information on Comcare's approach to enforceable undertakings.

HOW IS AN OFFER OF AN UNDERTAKING MADE?

Comcare does not have the power to demand or require an enforceable undertaking to be offered. A duty holder or their authorised representatives may submit an undertaking to Comcare. Comcare may invite a person to consider the option if it believes that an undertaking may be an effective means for a duty holder to fulfil its obligations under the Act.

A template for an enforceable undertaking can be found at Appendix 1. A duty holder wishing to offer an enforceable undertaking is encouraged to use the template. Comcare will however consider other forms of undertaking offered.

An undertaking needs to be made as soon as possible by an employer. Where court proceedings are substantially advanced, Comcare will be less likely to accept an undertaking.

The undertaking should be addressed to Comcare's Chief Executive Officer, along with any submissions as to why Comcare should accept the undertaking. This schedule and the enforceable undertaking template contains information to enable duty holders to formulate an offer. However, any person considering the prospect of an enforceable undertaking is strongly encouraged to obtain independent legal advice.

³³ Clause 16(3) of Schedule 2.

CONTENT OF AN UNDERTAKING

The undertaking must be in writing and should be tailored to the circumstances of the matter and the outcomes desired.

An enforceable undertaking may commence with relevant information about the duty holder. If an undertaking is being offered in response to a contravention or alleged contravention of the legislation, it should:

- > acknowledge that Comcare alleges a contravention of the legislation has occurred and state the relevant sections of the OHS Act or Regulations
- > set out the facts and circumstances of the alleged contravention
- > set out what the duty holder proposes to do to address the alleged contravention
- > provide assurances about future behaviour
- > outline remedial action that provides benefits beyond minimum compliance with the Act
- > provide evidence and/or explanation of why the employer believes this remedial action will provide benefits beyond minimum compliance with the OHS Act
- > review or establish and implement an occupational health and safety management system which addresses any failures relevant to an alleged contravention and that is subject to third party audit at regular intervals.

The undertaking should ensure general compliance by setting out the activities that will fulfil the duty holder's obligations under the OHS Act and prevent a reoccurrence of a risk, as far as possible.

An enforceable undertaking may be the subject of discussion between Comcare and the duty holder as to form, content, and the appropriate undertakings that Comcare will accept in the circumstances.

Commitment

Demonstrated commitment is a critical element of an undertaking. If the duty holder is an employer, senior management commitment is required. This entails a positive commitment supported by actions to cease an alleged contravention and ensure that it is not repeated. It also entails commitment for example to undertake a program to improve overall compliance and demonstrated involvement by senior management in the improvement program.

Comcare may require evidence that the duty holder has consulted with persons affected by the undertaking about the terms of the undertaking prior to any offer being made. These persons may include:

- > any injured persons
- > family of affected persons
- > employees
- > contractors.

Benefits beyond minimum compliance

Duty holders are expected to comply with the Act. An Improvement or Prohibition Notice, as opposed to an enforceable undertaking, is the appropriate mechanism for ensuring minimum compliance with the Act.

The undertaking should commit the duty holder to a standard higher than minimum compliance with the legislation and/or to activities that deliver a tangible benefit to the health and safety of employees or the community generally.

Examples of undertakings that move beyond minimum requirements and/or propose tangible benefits to employees or the general community may include, but are not limited to, a combination of the following:

- > developing and implementing an appropriate occupational health and safety management system, and an on-going evaluation or audit of the system by an independent third party
- > conducting, facilitating or funding research into a safety issue relevant to the industry and to fulfilment of a duty holder's obligations under the Act
- > implementing specified projects, such as special training programs, to address specific occupational health and safety needs for employees, supervisors and managers
- > undertaking promotion and education campaigns, or targeted publicity regarding workplace hazards.

Publicity

The enforceable undertaking should acknowledge that publicity will occur and make provision for the type of publicity that is to occur. All enforceable undertakings should contain a waiver of confidentiality clause.

Comcare will consider reasonable requests to keep parts of the undertaking confidential, for example, if it is satisfied that information is commercial in confidence. The terms of the undertaking should not include personal information.³⁴

Publicising enforcement outcomes assists in fostering a culture of compliance. Comcare treats the acceptance of an enforceable undertaking as similar to public court findings. This means that enforceable undertakings, including any withdrawals or variations, will be made public.

Undertakings will be publicised in media statements and/or any other appropriate media such as Comcare's website. Comcare will normally place a 'Notice of Acceptance' in an appropriate newspaper and will include the name and number of undertakings accepted in the Comcare Annual Report. The full content of the undertaking will be published on Comcare's website.

Monitoring enforceable undertakings

Details of agreed monitoring and reporting arrangements should be clearly specified in the undertaking.

The duty holder is responsible for self-monitoring compliance with the terms of the undertaking. Comcare or a duty holder may also engage an independent third party to verify compliance with the undertaking.

It is expected that an undertaking will include provision for regular audits and progress reports to Comcare against key milestones. Comcare will oversee compliance with the undertaking and may conduct its own audit to assess compliance.

³⁴ Personal information is defined by the various State, Territory and Commonwealth privacy laws. The *Commonwealth Privacy Act 1988* defines personal information to mean "information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion".

Costs

Provision for the payment of agreed costs should be included in the undertaking.

Comcare may recover, as part of the enforceable undertaking, costs associated with:

- > investigating the alleged non-compliance which gave rise to the undertaking (the investigation costs)
- > any civil proceedings that were instituted
- > considering the offered undertaking (staff costs as well as any technical/legal/consultancy advice costs)
- > publishing the undertaking
- > monitoring compliance with the accepted undertaking.

Comcare will only seek to recover the costs it has incurred. Comcare will not use agreed costs to effectively impose a negotiated penalty.

Unacceptable terms

An offer will generally not be accepted unless the terms are sufficiently clear and detailed by reference to identifiable criteria. This ensures that compliance with the undertaking can be monitored and enforced. If possible the terms should anticipate and remain applicable to changing circumstances.

An enforceable undertaking will not be accepted if it includes:

- > a denial of liability
- > terms purporting to shift liability onto another
- > a statement that the enforceable undertaking is not an admission in relation to action by third parties such as employees, which is unreasonable in all the circumstances (but the enforceable undertaking need not make such an admission)
- > inadequate provision for progress reports and audits
- > remedial action that is piecemeal, not implemented by appropriately qualified persons or not properly funded
- > terms purporting to set up defences for possible non-compliance
- > an attempt to impose obligations on Comcare.

In the event that Comcare considers that one or more of the terms are unacceptable or not sufficiently clear, the duty holder will be advised in writing and given an opportunity to make submissions and/or submit a revised undertaking prior to Comcare making a decision.

Consideration of enforceable undertaking by Comcare

Comcare considers all offers of an enforceable undertaking on their merits. However, in deciding whether an enforceable undertaking is an appropriate regulatory outcome, Comcare applies objective considerations that foster consistency and proportionality. The relevant considerations are consistent with those that Comcare applies to enforcement decisions generally.³⁵

³⁵ *National OHS Compliance and Enforcement Policy* at page 5 outlines the principles that Australian workplace authorities should have regard to in determining the appropriate compliance and enforcement strategy. These principles are outlined in the *Regulation Policy*.

In the course of considering an offer, Comcare may consult with interested parties (industry groups, victims) or other relevant agencies. Comcare may also liaise with the person who offered the undertaking to obtain further information where necessary, prior to making a decision whether or not to accept the undertaking.

In the event that Comcare considers material that is additional to that proffered in the undertaking, the duty holder will be advised and given the opportunity to make submissions prior to a decision being made.

In deciding whether an enforceable undertaking is an appropriate enforcement option, Comcare considers:

- > the nature and extent of the OHS Act or omission giving rise to a contravention or alleged contravention
- > the duty holder's compliance history
- > the quality of the remedial action and activities that are proposed in the undertaking and the extent to which they can achieve measurable improvements in workplace safety and culture.

In assessing the quality of the activities proposed in an undertaking, Comcare will consider how well the proposed activities advance the objectives of the OHS Act and whether it offers outcomes which will advance those objectives.

In some cases, the public interest and statutory objects may demand that contravention of the OHS Act attract court-related enforcement action. There may be factors, such as the seriousness of an alleged contravention or the duty holder's compliance history, which lead Comcare to consider that an undertaking is insufficient protection for employees, or that for objectives such as deterrence, proceedings should be continued or commenced.

In the event that Comcare considers that an enforceable undertaking is not an appropriate enforcement option, a duty holder will be advised and given an opportunity to make submissions in writing.

Acceptance or rejection of an enforceable undertaking

Comcare has a discretion whether to accept an undertaking and cannot be compelled to accept an enforceable undertaking.

If an enforceable undertaking is not accepted, the person making the offer will be informed in writing and will be advised of Comcare's reasons for rejecting the undertaking.

The acceptance of an undertaking will be acknowledged in writing. An undertaking will not take effect until it is signed by a duly appointed representative of a duty holder and Comcare's Chief Executive Officer.

Comcare may accept an enforceable undertaking concerning one aspect of a duty holder's duty but commence or continue proceedings concerning another. Comcare's acceptance of an enforceable undertaking in a particular set of circumstances should not be regarded as a precedent. Although Comcare aims to achieve consistency in determining whether an enforceable undertaking can be accepted, one set of facts in a given case cannot be indicative of the outcome of another due to the range of factors that are taken into consideration.

Request to vary or withdraw an enforceable undertaking

An enforceable undertaking may only be withdrawn or varied with the written consent of Comcare.

A duty holder may submit a request in writing to vary an undertaking where, for example, compliance with the undertaking is subsequently impractical and/or unsustainable or where there has been a material change in circumstances.

Where a duty holder believes its obligations under the undertaking have been fully performed prior to the expiration date of the undertaking, a request to withdraw the undertaking may be submitted to Comcare. A request to have the undertaking withdrawn must be accompanied by a written report detailing how and when the obligations in the undertaking have been discharged.

Comcare will consider such requests and advise the duty holder in writing of its decision.

The provisions of an enforceable undertaking will not be varied so as to cover a deliberate breach of that undertaking. For example, if a duty holder does not comply with the reporting and audit provisions of an enforceable undertaking, this will be regarded as non-compliance with the undertaking which may not be rectified by any subsequent variation.

Comcare will make withdrawals and variations public.

Failure to comply with an enforceable undertaking

Generally, the duty holder making the undertaking will be responsible for:

- > monitoring the implementation of the undertaking
- > reporting to Comcare against key milestones at regular intervals
- > developing procedures to ensure that monitoring and reporting occur.

Comcare will monitor a duty holder's compliance with the undertaking.

If Comcare considers the terms of the enforceable undertaking are not being complied with, Comcare will notify the duty holder and convene a meeting or invite written submissions to be made concerning any possible non-compliance. If, following consideration of any oral or written submissions, Comcare continues to have concerns about possible non-compliance, it will apply to a court to determine the matter and available sanctions will be used. If civil proceedings were not pursued or were adjourned because of the undertaking, they may be instituted or revived.³⁶ Where a person has breached, is breaching, or proposes to breach a term of an undertaking, orders may be sought from the court directing the person to comply with its terms, along with any appropriate consequential orders (for example, orders as to costs).³⁷

Comcare will make public any application to the court to enforce the undertaking.

CONTACTS

To enquire into offering an enforceable undertaking contact the Comcare delegate or investigator noted in the relevant investigation report or the Regional Director of the relevant state or territory Comcare office by calling 1300 366 979.

³⁶ Clause 16(4)(a) of Schedule 2.

³⁷ Clause 16(5) of Schedule 2.

APPENDIX 1

TEMPLATE FOR ENTERING INTO AN ENFORCEABLE UNDERTAKING *OCCUPATIONAL HEALTH AND SAFETY ACT 1991*

Note: This template is designed to assist duty holders under the *Occupational Health and Safety Act 1991* (Oth) to develop an enforceable undertaking. The template is not a mandatory form and duty holders may submit other forms of enforceable undertakings, having regard to the matters set out in the schedule. Use of the template by a person offering an undertaking does not guarantee acceptance of the undertaking by Comcare.

ENFORCEABLE UNDERTAKING GIVEN BY:

[INSERT NAME OF DUTY HOLDER]

TO COMCARE FOR THE PURPOSE OF CLAUSE 2

OF SCHEDULE 2 OF THE *OCCUPATIONAL HEALTH AND SAFETY ACT 1991 (THE ACT)*

PURPOSE

1. The commitments articulated in this undertaking are enforceable undertakings given in accordance with clause 16 of schedule 2 of the OHS Act by the duty holder (or person/entity offering the undertaking) to Comcare in fulfilment of its 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. Include relevant information about the duty holder, including its function/activities/number of employees/contractors and status under the Act.

INCIDENT

3. Include information about the incident, any injuries and facts or circumstances which may have caused or contributed to the incident. Do not include personal information.

ALLEGED CONTRAVENTION

4. Include details of the alleged contravention and state which obligations under the OHS Act and regulations the undertaking relates to. Refer to Comcare's report of investigation.

ACKNOWLEDGEMENT

5. Insert duty holder's acknowledgment of any allegations that there have been contraventions of the legislation. Refer to report of investigation.

DEFINITIONS

6. In this undertaking:
- > “the Act” means the *Occupational Health And Safety Act 1991*.
 - > “the auditor” means the auditor engaged pursuant to paragraph [insert number]
 - > “the alleged contravention” means the facts or circumstances which may have caused or contributed to the incident and any injuries as described in the report of investigation and summarised at paragraph [insert number] of this undertaking
 - > “duty holder” refers to the person or entity offering the undertaking and any reference to duty holder may be replaced with the name of the entity or person
 - > “the employer” means [insert details]
 - > “the incident” means the incident described in the report of investigation and summarised at paragraph [insert number] of this undertaking
 - > “Comcare” means the body corporate established by section 68 of the *Safety, Rehabilitation and Compensation Act 1988*
 - > “the proceedings” means the proceedings [insert the parties, court and matter number if proceedings are on foot]
 - > “the reporting dates” are the dates listed in Schedule 2 or clause [insert number] being the dates on which the duty holder will report to Comcare on the implementation of this undertaking
 - > “the report of investigation” means the report of investigation number [insert number] issued under section 53 of the Act.
 - > “this undertaking” means this document including all annexures and schedules.

PROCEEDINGS (WHERE APPLICABLE)

7. As a consequence of the alleged contravention, Comcare has [commenced/proposed to commence] proceedings against the duty holder under section 77 and Schedule 2 of the Act.
8. Despite the alleged contravention and any admission of liability expressed in this undertaking, Comcare has agreed not to pursue the proceedings on the basis that the duty holder grant, keep and not breach or propose to breach this undertaking.

ASSURANCE ABOUT FUTURE BEHAVIOUR

9. Include an assurance from the duty holder about future behaviour including a commitment to cease any alleged contravention and not recommence it. A suitable assurance might read something like below.

The duty holder will:

- (a) do and ensure that its agents and employees do all things reasonably necessary to prevent a reoccurrence of the Incident or the occurrence of any event similar to the incident
- (b) abstain, and ensure that its agents and employees abstain, from doing any act, matter or thing which gave rise to, or allegedly gave rise to, the Incident or could give rise to the occurrence of any event similar to the incident
- (c) ensure that it uses its best endeavours to observe and implement industry best practice in respect of occupational health and safety and in compliance with the Act.

OCCUPATIONAL HEALTH AND SAFETY COMMITMENTS

10. In particular, and without limitation to the generality of the commitments given in this undertaking, the duty holder must do or abstain from doing (as the context requires) all things listed in Schedule 1 to this undertaking.

Include commitments as a result of any incident to fulfil obligations under the OHS Act and benefits beyond minimum compliance in the schedule and the dates by which they are to be implemented.

11. Unless specifically provided otherwise, all acts, measures, programs, or things required to give effect to the commitments contained in this undertaking shall be performed, made, or implemented on or before the dates listed in Schedule 1 to this undertaking.

REPORTING

12. *Include details of reporting and audit arrangements. These may be included by inserting the following clause and detailing the reporting arrangements in a separate schedule or by including them in the body of this clause.*

The duty holder 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 this undertaking
- (b) provide all documents and information requested by Comcare from time to time for the purpose of enabling Comcare to assess compliance with this undertaking

- (c) develop procedures which will ensure that, [where applicable] its board and senior management, and any employees, contractors or other persons (eg. family members of deceased persons) affected by this undertaking are regularly informed on the implementation of measures described in or effected in accordance with this undertaking
- (d) within six months of the undertaking date, at its own cost, engage an auditor (approved by Comcare in writing) to conduct an independent compliance audit of the measures developed, implemented and/or affected in accordance with this undertaking
- (e) ensure that:
 - (i) Comcare is advised of the auditor's engagement
 - (ii) the auditor conducts and concludes the audit
 - (iii) it reports to Comcare on the findings of that audit as soon as reasonably practicable
 - (iv) it submits a written report three months prior to the expiry date of the undertaking detailing how and when the obligations in the undertaking have been discharged.

PUBLICITY

13. The duty holder does not provide this undertaking in confidence and acknowledges that this is not a confidential document. This undertaking constitutes a public declaration of the duty holder's commitment to occupational health and safety and its response to the report of investigation. The duty holder:

- (a) agrees and undertakes to publish the undertaking in any media and in any form reasonably required by Comcare (as notified to the duty holder in writing)
- (b) acknowledges that Comcare will:
 - (i) issue a media release on execution of this undertaking containing this undertaking or referring to its terms and to the concerns of Comcare which led to its execution
 - (ii) from time to time publicly refer to this undertaking
 - (iii) make this undertaking available for public inspection, including by publishing it on Comcare's website.

COSTS

14. The duty holder agrees and undertakes to bear, reimburse, and/or indemnify Comcare for any costs fees or expenses incurred by Comcare as a result or in respect of its investigation into the incident or any of the matters outlined in the report of investigation, including but without limitation to the generality of the undertaking given in this paragraph:

- (a) The reasonable costs of the investigation (including those costs of engaging any third party in the conduct of such investigation) in the sum of \$(these costs will be advised by Comcare).
- (b) The cost of seeking and receiving legal advice concerning and subsequent to the incident and/or the injury and associated matters in the sum of \$(these costs will be advised by Comcare).
- (c) The cost of receiving, considering, preparing, and settling this undertaking in the sum of \$(these costs will be advised by Comcare).
- (d) Compliance auditing and monitoring costs of \$(these will be advised by Comcare) representing costs to Comcare in monitoring and auditing compliance with the undertaking.
- (e) The costs involved in publishing the Notice of Acceptance being in the sum of \$(these costs will be advised by Comcare).
- (f) The costs incurred in respect of any proceedings initiated by Comcare arising out of the report of investigation in the sum of \$(these costs will be advised by Comcare) or, in the event that any arise, to enforce the undertaking.

The total costs will be due for payment within 30 days of receipt of an invoice from Comcare.

ENFORCEABILITY

15. The duty holder acknowledges that this undertaking is enforceable at law and that it may be subject to penalties if it does not comply with this undertaking.
- (a) Without limiting the generality of this clause, Comcare may, in its absolute discretion, deem any finding by the auditor that the duty holder 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) pursue or recommence the proceedings or if no proceedings are on foot, commence proceedings against the duty holder in respect of the alleged contravention or any matters dealt with in the report of investigation
 - (iv) apply for any further order it considers appropriate.
 - (c) If the duty holder actually or proposes to breach, vary, or withdraw this undertaking then:
 - (i) Comcare may pursue or recommence the proceedings, or
 - (ii) if no proceedings are on foot, commence proceedings against the duty holder in respect of the alleged contravention resulting from the Incident or any matter dealt with in the report of investigation.

And in any such proceedings the duty holder may not object to Comcare tendering this undertaking.

- (d) Any act or omission by the duty holder which is inconsistent with or in contravention of this undertaking is and may be deemed by Comcare to be a breach of this undertaking.
- (e) The duty holder acknowledges that it will bear the costs of the proceedings incurred as at the undertaking date or any other action taken by Comcare in accordance with or pursuant to this clause.

ACKNOWLEDGEMENTS

16. The duty holder acknowledges that:
- (a) Comcare's acceptance of this undertaking does not affect Comcare's:
 - (i) power to investigate or pursue civil or criminal proceedings in respect of similar or related incidents or injuries which occur after the undertaking date, or
 - (ii) authorities, powers, and obligations in respect of any conduct of the duty holder which is not the conduct which gave rise to the incident.
 - (b) This undertaking in no way derogates from the rights and remedies available to any other person or entity other than the duty holder and Comcare arising from any conduct described in this undertaking or arising from future conduct.
 - (c) This undertaking has no operative force until accepted by Comcare.
 - (d) This undertaking will be deemed to be formally concluded when Comcare confirms in writing that the undertaking has been fully executed.

TERM

17. The undertaking commences from the date on which it is executed by Comcare and expires on [insert date].

Dated the _____ day of _____

This undertaking is given on behalf of the duty holder, by [insert name of signatory] who is [insert title and role of signatory in relation to duty holder] and has the authority of the duty holder to grant this undertaking on behalf of the duty holder.

I certify that the persons(s) signing opposite, with whom I am personally acquainted or as to whose identity I am otherwise satisfied, signed this document in my presence.

_____ Signature of witness	_____ Signed for by authorised officer
_____ Name of witness	_____ Name of authorised officer
_____ Address of witness	_____ Signing on behalf of duty holder

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 witness	_____ Signature of Chief Executive Officer
_____ Name of witness	_____ Name of Chief Executive Officer
_____ Address of witness	_____ Signing on behalf of duty holder

SCHEDULE 1

(clause 10)

1. [Itemise representations, promises, commitments, etc and manner and date by which they will be implemented]

For further information contact:

Comcare
GPO Box 9905
Canberra ACT 2601

Telephone—1300 366 979
E-mail—ohs.help@comcare.gov.au
Internet—www.comcare.gov.au

OHS 50 (March 2011)