



Australian Government

Comcare

# Safety at Work – Your responsibilities as an employer

A GUIDE TO THE LAWS COVERING HEALTH AND SAFETY IN COMMONWEALTH WORKPLACES

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# Introduction

This guide is to help employers understand their responsibilities under the Commonwealth Occupational Health and Safety (OHS) legislation. It provides an overview of the legislative framework the Commonwealth operates within, followed by sections regarding the employer's duty of care, OHS workplace consultative arrangements, incident notifications and enforcement procedures.

## The legislative framework

### What is the relevant legislation?

The occupational health and safety of persons in the Commonwealth OHS jurisdiction is primarily regulated by the Occupational Health and Safety Act 1991 (the Act) and Regulations made under that Act, the Occupational Health and Safety (Safety Arrangements) Regulations 1991 (Safety Arrangements Regulations) and the Occupational Health and Safety (Safety Standards) Regulations 1994 (Safety Standards Regulations). These prescribe certain obligations regarding the health and safety of persons, consultation in relation to occupational health and safety matters, the investigation of incidents and the enforcement of obligations. In general, state/territory OHS-related laws do not apply to employers and employees covered by the Commonwealth OHS legislation.

The main obligations are contained in the Act. These obligations are supported by additional requirements set out in the Safety Standards Regulations and the Safety Arrangements Regulations which have the force of law.

The Safety Arrangements Regulations set out the mandatory supplementary provisions about various procedures, responsibilities and obligations associated with the Act, such as incident notification requirements and incident investigations.

The Safety Standards Regulations set out mandatory requirements with respect to risk assessments, competencies and certification standards, control of specific risks in the workplace such as plant, occupational noise, manual handling, hazardous substances, confined spaces, major hazard facilities, electricity, driver fatigue, construction work and falls from two metres or more.

The Act, Safety Arrangements Regulations and Safety Standards Regulations are further supported by the Occupational Health and Safety code 2008 (the Code) made under the Act. This code has been approved by the Minister for Employment and Workplace Relations (Minister).

### Role of codes of practice

The purpose of the Code is to provide practical guidance to employers and others about ways of achieving compliance with the obligations imposed by the Act. Code of practice is a source of practical guidance on safe work practices and risk management in relation to specific hazards and/or hazardous activities.

They are designed to be used in conjunction with the Act and Regulations but are not legally binding. Civil or criminal proceedings cannot be instituted solely on the grounds that an employer failed to comply with a code. However, a code is admissible in evidence before a court as proof of the standards of health and safety that should be achieved in order to comply with the relevant provisions of the Act and regulations on specific OHS matters.

If a code is used as evidence in legal proceedings concerning a breach of the Act or regulations, it reverses the burden of proof to the duty holder. This means that if an employer has not followed the guidance provided in the code, it must prove that the related provisions of the Act or regulations were complied with by other equivalent or better means.

Employers must comply with a code of practice unless they identify another way of achieving the same or better safety standards than those prescribed in the particular code. If the employer determines that they can meet or better the safety standards prescribed by a particular code by alternative means; it is appropriate and lawful for them to do so.

### Codes of practice

Codes of practice approved by the Minister are generally prepared by the Safety, Rehabilitation and Compensation Commission for the Minister's consideration. Other bodies, however, may also bring a proposed code of practice to the Minister for the Minister's approval.

A code of practice may apply generally or to a specific area or specific category of employees.

## Who is an employer?

Not surprisingly, in the context of legislation aimed at ensuring health and safety at work, one of the key duty holders is the employer. Who then are the employers covered by the legislation?

The employers covered by the Act are Commonwealth departments and agencies, Commonwealth authorities and private sector organisations licensed to self-insure under the *Safety, Rehabilitation and Compensation Act 1998* (non-Commonwealth licensees).

### What are Commonwealth authorities?

Commonwealth authorities are defined in the Act to include:

- authorities set up for a public purpose by a law of the Commonwealth (or a law of a Territory, other than the Australian Capital Territory, the Northern Territory or Norfolk Island);
- companies in which the Commonwealth (or a Commonwealth authority set up by legislation for a public purpose) has a controlling or substantial interest;
- companies declared by the Minister to be Commonwealth authorities; and
- companies which have a licence under Part VIII of the *Safety, Rehabilitation and Compensation Act 1988*; and were not eligible corporations for the purposes of that part when the licence was granted.

## What is a non-Commonwealth licensee?

Non-Commonwealth licensee means a body corporate:

- for which a licence under Part VIII of the *Safety, Rehabilitation and Compensation Act 1988* is in force;
- that was an eligible corporation for the purpose of that part when the licence was granted; and
- that is not a Commonwealth authority for the purposes of the Act.

## What is a GBE and how does that differ from a Commonwealth authority?

The term Government Business Enterprise (GBE) is used in the Act to describe particular Commonwealth authorities.

GBEs are commonwealth authorities in which the Commonwealth has a controlling or substantial interest (and in the latter case are declared by the Minister to be a commonwealth authority). GBEs may also be commonwealth authorities listed in schedule 1 of the Act, or gazetted to be a GBE by the Minister.

The importance of this definition is that GBEs are subject to the criminal penalty regime, while the Commonwealth and Commonwealth Authorities (other than GBEs) are subject to the civil regime only. In other words GBEs are subject to a broader range of liability for offences under the Act.

## Who is an employee?

An employee is:

- a Commonwealth employee;
- a Commonwealth authority employee; or
- a non-Commonwealth licensee employee.

### Specified employees

To avoid any doubt, persons holding certain Commonwealth positions are specified as being Commonwealth employees. These are:

- the Australian Federal Police Commissioner, Deputy Commissioner and Australian Federal Police employees;
- members of the Australian Defence Force;
- persons holding a Commonwealth office;
- a person constituting a Commonwealth authority, who is a member or a deputy member of such an authority, or is a member or a deputy member of a body established by such an authority, or acting in those capacities; and
- certain other persons who may be declared to be Commonwealth employees e.g. Australian Defence Force Cadets.

## Where / when does the Act apply?

Various parts of the legislation can apply to workplaces or more generally when employees are at work. It is important to understand what these mean in context of the legislation.

### What is a workplace?

Workplace is defined in the Act to mean:

- any Commonwealth premises in which Commonwealth employees or Commonwealth contractors work; or
- any Commonwealth premises in which Commonwealth authority employees or Commonwealth authority contractors work; or
- any non-Commonwealth licensee premises of a non-Commonwealth licensee in which non-Commonwealth licensee employees, or non-Commonwealth licensee contractors, of the licensee work.

However, workplace does not include any part of premises that is primarily used as a private dwelling.

“Premises” means premises that are owned or occupied by the employer, and are further defined under the Act to include any place (whether or not enclosed or built) including a place situated underground or underwater. It includes:

- a building;
- an aircraft;
- a vehicle;
- a vessel; and/or
- any structure whether fixed or moveable (including tents) whether on land, on the bed of any waters, or floating on any waters.

The definition also extends to any part of a premises.

### What does “at work” mean?

The scope of the duty of employers extends to all employees while they are at work. The phrase “at work” is therefore a very important concept since it defines the scope of the duty.

Employees are at work whenever they are performing work in the course of their employment or arising from their employment. That is, the obligation extends to any place where work activities require the employee to be. It includes any part of premises which an employee might use in performing acts normally and reasonably incidental to her or his work duties. It may include an office, a factory, a construction site, a client site, a road, railway track, a shop or a temporary stand.

## Does the Act apply overseas?

The Act's reach extends to the Commonwealth, Commonwealth authorities and non-Commonwealth licensees not only throughout Australia but also on Australia's external Territories (e.g. Cocos (Keeling) Islands, Macquarie Island, Norfolk Island, and Lord Howe Island). Some parts of the Act also apply to work performed outside Australia and Australia's external Territories.

## What about workplaces not under the employer's control?

All parts of the Act apply to employees when they are working in workplaces controlled by a contractor for building and construction purposes or where they ordinarily work in premises not controlled by a Commonwealth employer or a non-Commonwealth licensee.

(Note this reflects changes that came into effect from 1 May 2007 as a result of changes to the *Safety Arrangements Regulations*.)

## When is a workplace controlled by contractors?

In the context of occupational health and safety a party has control of a workplace if it is able to direct or command any action. Thus it follows that with such control comes the ability to compel corrective action to secure safety.

A workplace is controlled by a contractor when an employer **unambiguously** relinquishes control of a site or a particular item of plant to contractors for construction or maintenance purposes. This means that the employer would not have any power to direct or command any action in the workplace, or related to an item of plant, that is so controlled by the contractor.

### Case example

An employee of an air-conditioning contractor had three of his fingers severed when his hand was caught in the pulley system of a piece of air-conditioning plant at a Telstra facility. The injured worker was involved in cleaning the plant room rather than servicing the air-conditioning unit. The injury was able to occur because the guard on the particular item of plant was not adequate to prevent a person's hand from being caught in the pulley system.

Under the arrangements between Telstra and the contractor, Telstra retained the right to direct the contractors in relation to health and safety matters. More particularly, the contractor did not have exclusive possession of the air-conditioning plant at the facility. The contractor only had possession to the extent necessary to carry out the maintenance required by the contract. Telstra was able to operate the plant, inspect it and, if necessary, modify it, provided it did not interfere with the maintenance work.

The Full Bench of the Australian Industrial Relations Commission (AIRC) considered the application of section 14 of the Act and whether a workplace was "controlled" for construction or maintenance purposes.

Adopting a purposive approach to the interpretation of section 14(1), the AIRC found that the expression "controlled" in section 14(1) is concerned with ultimate control in the sense of "directing action" or "command" and does not refer to control that is shared with the employer unless it also carries with it the ultimate right to control in the sense of "directing

action” or “command”. Having made this finding, it followed that the workplace and the work performed by the employees of the contractor **were** covered by the Act and Telstra was not exempt from the requirements of the Act.

*Telstra v Comcare [2007] AIRC FB 438.*

## Duty of care

The Act imposes strict duties on key stakeholders in the workplace to ensure health and safety. These duties are called the general duties of care.

The duties place responsibilities on employers, manufacturers, suppliers and persons erecting or installing plant, as well as employees themselves with respect to ensuring the health and safety of people at work.

Breaches of the duties attract heavy penalties including civil penalties of up to \$242,000 and criminal penalties of up to \$495,000 for an offence causing death or serious bodily harm. Individuals can also be held personally liable. These issues are discussed further in the chapter on Enforcement.

### Reasonable practicability

The duties of care impose obligations to do all that is reasonably practicable. This is an important concept under the Act. While the phrase is not defined, the Courts have interpreted “reasonable practicability” to involve a balancing of the nature, likelihood and gravity of the risk to safety with the cost, difficulty and trouble necessary to avert it. Factors the court will consider include the nature and severity of the hazard, the relevant person’s knowledge of potential controls, the availability of controls, relevant codes of practice and legislation, and the cost of applying a control balanced against the risk posed by the hazard.

The more obvious the hazard and the greater its consequences, the more steps need to be taken to avert it.

## Employer’s duty

Employers are required to take all reasonably practicable steps to protect the health and safety at work of their employees. This duty is not, however, limited to employees. It also extends to contractors in relation to matters over which the employer has control or would normally have had control but for an agreement with the contractor to the contrary.

The employer’s duty to non-employees extends to persons at or near their workplace.

The employer also has a duty to take all reasonably practicable steps to ensure that persons at or near a workplace under their control, who are not their employees or contractors, are not exposed to risk to their health or safety arising from the conduct of their undertaking. The duty is concerned with risks to health and safety. It is not necessary for an accident to occur for there to be a breach of the duty. The mere exposure of an employee to a risk to their health and safety is sufficient. The same applies for non-employees at or near the workplace.

## What is a risk?

Risk means the potential for danger.

Exposure of members of the public to legionella pneumophila, the bacterium that causes Legionnaires' Disease, from an air conditioning cooling tower is sufficient to constitute a breach of the duty to non-employees at or near the workplace even if no one contracts Legionnaires Disease.

*R v Board of Trustees of Science Museum [1993] 1 WLR 1171.*

## What does the duty involve?

This duty requires employers to take proactive steps to identify hazards affecting the health and safety of their employees and eliminate or minimise the risks arising from those hazards so far as is reasonably practicable.

The scope of the duty at least requires employers to:

- provide and maintain a safe working environment;
- provide and maintain plant that is safe and free from risks to health;
- provide and maintain safe systems of work;
- provide and maintain a working environment that provides adequate facilities for the welfare of employees at work;
- ensure the workplace under their control is safe for the employees and without risk to their health;
- provide and maintain a safe means of access to, and exit from, the workplace under their control;
- ensure safety in the use, handling, storage or transport of plant or substances at work;
- to develop in consultation with employees written health and safety management arrangements (HSMA's);
- provide employees, in appropriate languages, the information, instruction, supervision and training necessary to enable them to perform their work in a manner that is safe and without risk to their health;
- take appropriate action to monitor the employees' health and safety at work, and the conditions of the workplaces under the employer's control;
- maintain appropriate information and records relating to the employees' health and safety; and
- provide appropriate medical and first aid services for their employees.

The above is not an exhaustive list of what the duty requires. It is intended only as a minimum guide to the scope of the duty. It is necessary for employers to develop and implement appropriate systems to ensure the health and safety of people at their workplaces.

The Safety Standards Regulations prescribe the mandatory requirements relating to the elimination or management of specific hazards. While not legally binding, the Australian Standards; AS/NZ Standard 4801:2001 – *Occupational health and safety management systems – Specification with guidance for use* and AS/NZ Standard 4804:2001 – *Occupational health and safety management systems - general guidelines on principles, systems and supporting techniques* may be useful in assisting employers in the practical implementation of systems to ensure health and safety at work.

There are also a number of audit tools which are based on AS4801, such as SafetyMAP. Organisations can use OHS auditors to audit their OHS Management System using these tools.

## Employer as manufacturer, supplier, erector or installer

Employers covered by the OHS Act ('Commonwealth employers') should be aware that if they are acting in the capacity of a manufacturer, supplier, erector or installer of plant or substances they may be subject to state/territory OHS laws in respect of those roles. This would be the case where the employer they are providing the service to is not a Commonwealth employer. If the service is being provided to a Commonwealth employer then only the provisions of the OHS Act will apply, as outlined in the section on duties – see page 16.

### Case example: need for adequate systems for handling dangerous goods

An employee of a company was engaged in tasks related to the destruction of dangerous and volatile waste materials used in the manufacture of propellants and high explosives in an area designated for that purpose. A second employee arrived at the site and assisted in a number of tasks. As the second employee was preparing to leave, the waste material ignited and there was an explosion. Both employees suffered burns, one of them so severe that he subsequently died. The company was at the time a GBE.

The company was prosecuted for three counts of breach of its duty of care in failing to take all reasonably practicable steps to ensure a safe workplace, adequate instruction, training and supervision, and a safe system of work for using, handling, storing and transporting substances.

The company was convicted and fined \$75,000.

*Glass v Australian Defence Industries Ltd (Local Court, Sydney, Staunton LCM (as she then was), 4 September 1998).*

### What is plant?

Plant is defined in the Act to include any machinery, equipment or tool, and any component thereof.

The Courts have held that plant must be given a broad meaning in the context of OHS legislation. Plant is not confined to machinery of a productive nature. Nor is it confined to mechanised, electrical or electronic equipment. It is broad enough to include every tool, equipment or machinery in the workplace from chairs and desks, to forklifts and cranes.

For the purpose of discharging their obligations in relation to the use of plant or a substance, employers are entitled to reasonably rely on the information supplied by the manufacturer or the supplier of the plant or substance relating to health and safety in the use of the plant or substance.

### **Case example: need to ensure appropriate plant maintenance**

An employee of a transport company sustained serious injuries to his leg when a poorly welded stanchion gave way on a rail car during shunting operations. The company was at the time a Commonwealth employer. The employee was left with 15% permanent impairment as a result of the accident.

The company was prosecuted and fined \$30,000.

*Australian National Railways Commission v Wray (Adelaide Magistrate's Court, unreported, Boxall SM, 14 August 1997)*

## **Meeting duty of care through risk management**

OHS risk management is widely considered by all industries and businesses as the most practical way of finding and fixing workplace health and safety problems.

It is now the standard process for controlling workplace health and safety hazards in all Australian OHS jurisdictions.

The well defined steps of risk management are the primary tool used in the prevention of workplace injury and disease. Simply put, it is the systematic application of management policies, procedures and practices to the four step process of:

- identifying all hazards arising from work which present a risk to health and safety;
- assessing the risks associated with the identified hazards;
- eliminating the risks or, if it is not reasonably practicable to eliminate the risks, controlling the risks in accordance with the hierarchy of controls; and
- monitoring and reviewing the process to ensure that the desired outcome has been achieved.

Refer to Comcare publication *Identifying hazards in the workplace* (OHS 10) for more detailed information on the risk management process.

## Identification of hazards

There are many methods which are useful in identifying hazards including:

- a visual inspection;
- auditing;
- testing;
- technical or scientific evaluation;
- analysis of injury, workers' compensation and near-miss data;
- discussions with designers, manufacturers, suppliers, importers, installers, erectors, employers, employees; and
- a quantitative hazard analysis.

## Assessing risk

This is the process of determining whether there are any risks associated with the identified hazards. This generally involves consideration of the nature of exposure to hazards, including the frequency and level of exposure, pattern of exposure (continuous or intermittent) and adequacy of any existing risk control measures.

One method of assessing risks is to use a risk assessment table. Record the risk rating for each hazard you have identified. To construct an assessment matrix, you can:

- establish a specialist risk assessment team;
- get expert or specialist advice; and
- brainstorm within the workplace, particularly with employees, health and safety representatives and health and safety committee members (where such committees are in place) - they are often a valuable source of information and experience.

Before introducing new or changed work practices, substances or plant - review your original assessment.

Assessments of likelihood and consequence can be translated into levels of risk using a risk assessment table. Areas of high risk can be given first priority for elimination or control in the workplace.

## Risk assessment table

	Very Likely	Likely	Unlikely	Highly Unlikely
Fatality	HIGH RISK	HIGH RISK	HIGH RISK	MEDIUM RISK
Major Injuries	HIGH RISK	HIGH RISK	MEDIUM RISK	MEDIUM RISK
Minor Injuries	HIGH RISK	MEDIUM RISK	MEDIUM RISK	LOW RISK
Negligible Injuries	MEDIUM RISK	MEDIUM RISK	LOW RISK	LOW RISK

## Controlling risk

This is the process of determining and implementing appropriate measures to control risk. The best way to control a hazard is by the application of a system called the 'hierarchy of controls'. If possible, the best option is to eliminate the hazard. If this is not possible, the impact of the hazard should be reduced by the application of one or more of the remaining processes in the hierarchy of controls, as follows;

- eliminating the hazard;
- substituting the hazard giving rise to the risk with a hazard that gives rise to a lesser risk;
- isolating the hazard from the person put at risk;
- minimising the risk by engineering structural changes to the work environment or work processes;
- minimising the risk by administrative means such as adopting safe working practices or providing appropriate training, instruction or information; and
- using appropriate personal protective equipment (PPE).

## Monitoring and Reviewing risks

The process does not stop when current workplace hazards are controlled. Systematic monitoring and reviews must be performed so that new hazards can be controlled. New hazards can be due to:

- the use of new technology, equipment or substances;
- new work practices;
- changes in work environment, for example, moving to a different office, staff reduction; or
- new staff with different skill/knowledge levels.

## Duties of employees

Employees must take all reasonably practicable steps to ensure that they do not take any action, or make any omission, that creates a risk, or increases an existing risk, to their health or safety or to the health and safety of other people at or near the workplace.

Employees are also required to co-operate with their employer or any other person holding a duty under the Act to the extent necessary to enable them to fulfil that duty.

Employees are required to use equipment, in accordance with any instructions given by their employer, consistent with its safe and proper use, and in the manner necessary to protect their health and safety or the health and safety of others at or near the workplace.

### Case example: foul temper proves very costly

A radio announcer who intimidated and verbally abused co-workers was personally prosecuted on two charges of failing to take reasonable care for the health and safety of others in his workplace.

The announcer had on 10 occasions over a 12-month period subjected fellow workers to verbal abuse and threats of violence. He had also physically assaulted one worker.

The incidents resulted in abused workmates taking time off, being afraid, and not wanting to come to work.

The announcer was convicted under the equivalent provisions to section 21 of the Act (duty of employees) in the Victorian OHS legislation and fined \$10,000.

*WorkSafe Victoria v Reginald Mowat (unreported, Ballarat Magistrate's Court. Magistrate Mornane, 22 July 2004).*

### How does the employee's duty relate to the employer's duty?

Both employers and employees have duties of care. The employer and employee duties overlap in that the employer and employee can be held responsible and prosecuted for a breach of their respective duties from the same incident.

### What protection is there for employees who raise safety concerns?

Employers must not:

- dismiss an employee;
- cause injury to an employee's employment;
- prejudicially alter the employee's position; or
- threaten to do any of the above.

because the employee:

- complained or proposes to complain about a matter concerning the health, safety or welfare of employees;
- assists or proposes to assist the conduct of an investigation (for example by giving information); or
- ceased or proposes to cease work in accordance with a direction of a health and safety representative, provided it does not continue after an investigator has made a decision that work should be performed or an agreement is reached to that effect with the person supervising the work.

An employer who breaches these obligations may be subject to civil action.

## Duties of manufacturers

The Act imposes a duty on manufacturers of plant or substances that would be expected to be used by employees, in relation to ensuring the safety of the plant or substances.

### Obligations of manufacturers of plant

Manufacturers of plant are required to take all reasonably practicable steps to:

- ensure that the plant is so designed and constructed as to be, when properly used, safe for employees and without risk to their health;
- carry out, or cause to be carried out, the research, testing and examination necessary in order to discover, and to eliminate or minimise, any risk to the health or safety of employees that may arise from the use of the plant; and
- to make available to an employer, in connection with the use of the plant by employees at work, adequate information concerning:
  - the use for which it is designed and has been tested;
  - details of its design and construction; and
  - any conditions necessary to ensure that, when put to the use for which it was designed and tested, it will be safe for employees and without risk to their health.

In relation to the obligation to undertake research, testing and examination, the manufacturer is entitled to reasonably rely on research, testing or examination undertaken by others.

### Obligations of manufacturers of substances

Similarly, manufacturers of substances must take all reasonably practicable steps to:

- ensure that the substance is so manufactured as to be, when properly used, safe for employees and without risk to their health;
- carry out, or cause to be carried out, the research, testing and examination necessary in order to discover, and to eliminate or minimise, any risk to the health and safety of employees that may arise from the use of the substance; and
- make available to an employer, in connection with the use of the substance by employees at work, adequate information concerning:
  - the use for which it is manufactured and has been tested;
  - details of its composition;
  - any conditions necessary to ensure that, when put to the use for which it was manufactured and tested, it will be safe for employees and without risk to their health; and
  - the first aid and medical procedures that should be followed if the substance causes injury.

In relation to the obligation to undertake research, testing and examination, the manufacturer is entitled to reasonably rely on research, testing or examination undertaken by others.

## What if the plant or substances are imported?

Where a plant or a substance is imported into Australia by a person who is not the manufacturer of the plant or substance and at the time of the importation the manufacturer of the plant or substance does not have a place of business in Australia, the importer takes on the responsibilities of the manufacturer for the purpose of these duties.

## Duties of suppliers of plant and substances

The Act imposes a duty on suppliers of plant or substances expected to be used by employees at work with respect to the safety of these plant or substances. Suppliers must take all reasonably practicable steps to:

- ensure that, at the time of supply, the plant or substance is in such condition as to be, when properly used, safe for employees and without risk to their health; and
- carry out, or cause to be carried out, the research, testing and examination necessary in order to discover, and to eliminate or minimise, any risk to the health or safety of employees that may arise from the condition of the plant or substance; and
- make available to an employer, in connection with the use of the plant or substance by employees at work, adequate information concerning:
  - the condition of the plant or substance at the time of supply;
  - any risk to the health and safety of employees to which the condition of the plant or substance may give rise unless it is properly used;
  - the steps that need to be taken in order to eliminate such risk; and
  - in the case of a substance - the first aid and medical procedures that should be followed in the event of the condition of the substance causing injury to an employee.

In relation to the obligation to undertake research, testing and examination, the supplier is entitled to reasonably rely on research, testing or examination undertaken by others.

The obligations of suppliers are not intended to cover persons who supply plant or substances merely through their role as financiers.

## Duties of persons erecting or installing plant in a workplace

The Act imposes an obligation on persons who erect or install plant in workplaces, for the use of employees at work, with respect to the safety of the plant. Erectors of plant are required to take all reasonably practicable steps to ensure that the plant is not erected or installed in such a manner that:

- a) the plant is unsafe for, or constitutes a risk to the health of, employees at the workplace where the plant is erected or installed; or
- b) the process of erection or installation is unsafe for, or constitutes a risk to the health of, employees at the workplace where the plant is erected or installed.

Erectors of plant are entitled to reasonably rely on the information supplied by the manufacturer or the supplier of the plant, relating to the erection or installation of the plant in a manner that ensures the health and safety of employees who use the plant.

# HSRs and OHS workplace consultative arrangements

The Act sets out various workplace arrangements that an employer must put in place in order to facilitate consultation between the employer and their employees on the health, safety and welfare of employees at work.

The Act provides for the establishment of the following types of workplace arrangements:

- health and safety management arrangements (HSMAs);
- designated work groups (DWGs);
- health and safety representatives (HSRs); and
- health and safety committees (HSCs).

The Act sets out the functions and powers of these various types of workplace arrangements. For more information refer to the OHS Workplace Consultative Arrangements – A guide to Commonwealth Legislative Provisions (OHS 67) available on the Comcare website.

## What does consultation involve?

### What is consultation?

Consultation means to appropriately inform employees, inviting and considering their response. Sufficient action must be taken to secure employees' responses and give the employees' views proper attention.

Consultation requires more than a mere exchange of information. Employees must be contributing to the decision-making process.

*Australian Workers' Union v Campbell Mushrooms Pty Ltd 1183/96 Print N4825 (1996)*

## When is consultation required?

Under the Act consultation is required:

- on request by the HSR, regarding the implementation of changes that may affect the health and safety at work of the employees in their DWG;
- with an employee, or their representative (if requested to by an employee), in relation to establishing or varying DWGs and HSMAs; and
- with the relevant HSRs if the employer proposes to vary a DWG.

## How is consultation effected?

If there is a health and safety committee (HSC) the employer must:

- make available to the HSC any information (subject to certain exceptions), relating to risks to the health and safety of employees at any workplace under the employer's control or arising from the conduct by the employer of an undertaking (or from plant or substances used for the purposes of the undertaking); and
- permit any HSC member to take such time off work as is necessary for them to participate in the performance by the HSC of its functions (without loss of remuneration or other entitlements).

Restricted information: subject to certain exceptions, an employer must not make available to a HSC information of a confidential medical nature about an employee or information subject to legal professional privilege.

If there are HSRs the employer must:

- in relation to a workplace at which some or all of the employees work for the employer:
  - allow the HSR to inspect the workplace and to accompany an investigator during any investigation at the workplace; and
  - if there is no HSC at the workplace, upon request, consult with the HSR concerning the development, implementation and review of measures to ensure the health and safety at work of employees in the DWG;
- allow the HSR to attend any interview at which the HSR is entitled to be present under the Act;
- subject to certain exceptions, provide the HSR with access to any information to which they are entitled to obtain access under the Act (after they have requested access);
- permit the HSR to take time off work to exercise the powers of a HSR (without loss of remuneration or other entitlements); and
- provide the HSR with access to certain facilities.

## What is an employee representative?

Employees can choose to be represented during consultations regarding HSMA's by either another employee, or by an employee representative.

An employee representative means, in relation to an employee, a registered organisation or an association of which:

- the employee is a member; or
- another employee in the DWG to which the employee belongs, is a member.

The employees who are members of the employee representative organisation or association must be qualified to be members of that organisation or association, by virtue of the work those employees do.

If requested by an employee, the employee representative can:

- represent the employee in consultations with the employer;
- apply for a certificate to represent an employee who chooses to remain anonymous, during HSMA consultations;
- request an employer to establish or vary DWGs;
- make a request to Comcare or to the Commission for an investigation;
- make an appeal to the reviewing authority regarding the decision of an investigator; and
- request Comcare to institute proceedings in relation to a breach of the Act or Regulations where such proceedings have not been instituted by Comcare within six months of the breach occurring.

## What are health and safety management arrangements (HSMAs)?

Section 16 of the Act provides that employers must develop written health and safety management arrangements in consultation with employees or, on request, their employee representatives. The aim of health and safety management arrangements is to enable effective co-operation between the employer and employees to achieve a safe and healthy workplace.

Health and safety management arrangements must:

- enable effective co-operation between an employer and its employees;
- promote and develop appropriate measures to ensure the health, safety and welfare of employees at work;
- provide adequate mechanisms for:
  - informing employees about the arrangements;
  - reviewing the arrangements;
  - varying the arrangements; and
  - dealing with disputes that may arise in the course of consultation.

Employers that are required to establish a health and safety committee under section 34 of the Act are also obliged to provide in their HSMAs for the way in which the health and safety committee is to be constituted and operated.

In addition to the above requirements, HSMAs may provide for:

- an OHS policy;
- arrangements relating to risk management;
- making of agreements between the employer, employees and employee representatives in relation to continuing consultation on OHS matters and other matters agreed to by the affected parties;
- training in relation to OHS.

## Using employee representatives

An employee may still be involved in consultations concerning HSMA's, even though they have chosen to be represented in the same consultations by another employee, or by an employee representative.

Employees who choose to be represented by an employee representative can remain anonymous. The employee representative can obtain a certificate from Comcare to represent employees in specific consultations.

An application to Comcare from an employee representative must be in the 'prescribed form' and satisfy the CEO of Comcare that the employee requesting representation has requested to be represented by the employee representative, and that their identity not be revealed.

The certificate and the employee representative must not identify the employee(s) concerned.

## What is a designated work group (DWG)?

A DWG is a group of employees whose composition is determined through consultation with employees. The number of groups and the number of employees in each group will depend on the nature of the employer's business and geographic distribution.

DWGs are established for the purpose of selecting HSRs. DWGs may only be established and varied in accordance with the prescribed procedures.

### Procedure for establishing and varying DWGs

An employee, or on request, their employee representative, may request an employer to enter into consultation to establish or to vary DWGs.

The employer must, within 14 days after receiving such a request, enter into consultation with each employee and/or the employee representative who made the request.

Within 14 days after the completion of consultation, the employer must establish or vary (as the case may be) the DWGs, in accordance with the outcome of the consultation.

Consultation regarding the establishment or variation of a DWG must be directed principally at how to group employees in a manner that best:

- enables the employees' interests relating to occupational health and safety to be represented and safeguarded; and
- takes account of the need for any HSR selected for that DWG to be accessible to each employee included in that group.

The following factors must be taken into account, by the parties in any consultation relating to the establishment or variation of a DWG. These include:

- the number of employees;
- the nature of each type of work performed by the employees;

- the number and grouping of employees who perform the same or similar types of work;
- the workplaces, and areas within the workplaces, where each type of work is performed;
- the nature of any risks to health and safety at the workplaces; and
- any overtime or shift working arrangements at the workplaces.

So far as is reasonably practicable, DWGs must be established in such a manner that each of the employer's employees are included in a DWG.

The employer may also seek to vary a DWG by entering into consultation with the HSR of the DWG proposed to be varied or an employee representative where an employee in the DWG has requested their involvement.

The employer must keep up to date lists of all DWGs which must describe the categories of the employees included in each DWG and ensure these lists are available for inspection by investigators and employees at all times.

## What is a health and safety representative (HSR)?

A HSR represents the OHS interests of employees in a designated work group (DWG). They perform an important role in the Commonwealth jurisdiction in facilitating communication and consultation between employers and employees.

### HSR selection and term of office

One HSR may be selected for each DWG.

To be eligible for selection as the HSR for a DWG, the person must be an employee included in the group and not have been disqualified.

A person is selected as the HSR for a DWG if:

- all of the employees in the group unanimously agree to the selection; or
- they are the only candidate for election at the close of the nomination period; or
- they are elected as the HSR of the group.

If there is more than one eligible candidate nominated at the end of the nomination period, the employer must conduct, or arrange for the conduct of, an election at the employer's expense. All employees within the DWG are entitled to vote in the election process.

For more information on how to conduct an election see Comcare's online publication *Guide to conducting HSR elections*.

If the HSR or deputy HSR has been selected by unanimous agreement of employees in the DWG, they must inform the employer as soon as possible after selection.

Within a reasonable time after a HSR has been selected, the employer must notify employees in writing of the name of the HSR for the DWG.

The employer must:

- prepare and maintain an up-to-date list of the HSRs for each DWG; and
- ensure that the list is available for inspection by employees and investigators.

A HSR will hold office for the period specified in the HSMA's applying to the employees in the DWG. If the period is not specified, the term of office is for a default period of two years.

The Act contains provisions regarding resignation, disqualification (by the SRC Commission) and casual vacancies. For more information refer to the Comcare publication 'OHS Workplace Consultative Arrangements – A guide to Commonwealth Legislative Provisions (OHS 67)'.

**Note:** The employer must allow the HSR to take time off work to undertake training without loss of remuneration or other entitlements. HSRs are required to undertake training through a course accredited by the Safety Rehabilitation and Compensation Commission (SRC Commission).

### What are the powers and functions of a HSR?

The HSR has broad powers for the purposes of promoting or ensuring the health and safety at work of the employees in the designated work group, including:

- inspections of a workplace, if:
  - there has just been an accident or a dangerous occurrence;
  - there is an immediate threat of an accident or dangerous occurrence; or
  - the HSR has given the employer reasonable notice of the inspection;
- requesting that an investigation be conducted at the workplace;
- accompanying an investigator during any investigation at the workplace by the investigator;
- if there is no HSC at the workplace - representing the employees in the group in consultations with the employer concerning the development, implementation and review of measures to ensure the health and safety at work of the employees in the group;
- examining the records of the HSC;
- investigating employee complaints regarding the health and safety of any of the employees at work;
- with the consent of the employee concerned, attend any interview concerning health and safety at work between an employee in the group and an investigator or the employer or a person representing the employer;
- access to any information under the employer's control relating to risks to health and safety of employees; and
- to issue provisional improvement notices.

In the exercise of the HSR's powers they are entitled to be assisted by a consultant, provided the employer or SRC Commission has agreed, in writing, to the provision of assistance by the consultant or provision of the employer's information to the consultant by the HSR.

The HSR and, if applicable, the consultant, are not entitled to have access to information over which the employer is entitled to claim, and does claim, legal professional privilege and to information of a confidential medical nature relating to a person who is or was an employee of the employer unless that person has provided written consent permitting the HSR or, HSR and the consultant, to have access to the information or the information is in a form that does not identify the person or enable the identity of the person to be discovered.

The HSR does not have an obligation to exercise any of their powers nor will they be liable in civil proceedings because they did not exercise such a power or because of the manner in which such a power was exercised.

## Provisional improvement notices

A HSR has the power to issue a provisional improvement notice (PIN) where a HSR believes, on reasonable grounds, that a person is breaching, or has breached and is likely to breach again, a provision of the Act or the Regulations.

Before issuing a PIN, the HSR **MUST** enter into consultations with the person supervising the work performed in an attempt to reach agreement on rectifying the breach or preventing the likely breach. If agreement is not reached within a reasonable time, the HSR may issue a PIN to the person responsible for the breach.

The PIN must specify certain information that is set out in the Act including:

- the breach of the provision of the Act or Regulations that is occurring or is likely to occur and set out the reasons for that opinion;
- a period of not less than seven (7) days within which the responsible person is to take action necessary to prevent any further or likely breach; and
- the action the responsible person is to take.

The HSR must give a copy of the PIN to the responsible person. The responsible person will be either the employer if the PIN relates to an employee or owner if the PIN relates to a workplace or plant etc.

Within seven (7) days after the PIN is issued, the responsible person may request Comcare to conduct an investigation of the subject matter of the PIN. When such a request is made, the PIN is suspended pending an investigator's determination.

The HSR may request that Comcare investigate a matter that is the subject of a PIN if the responsible person:

- has not complied with the PIN within the specified time; and
- has not requested an investigation.

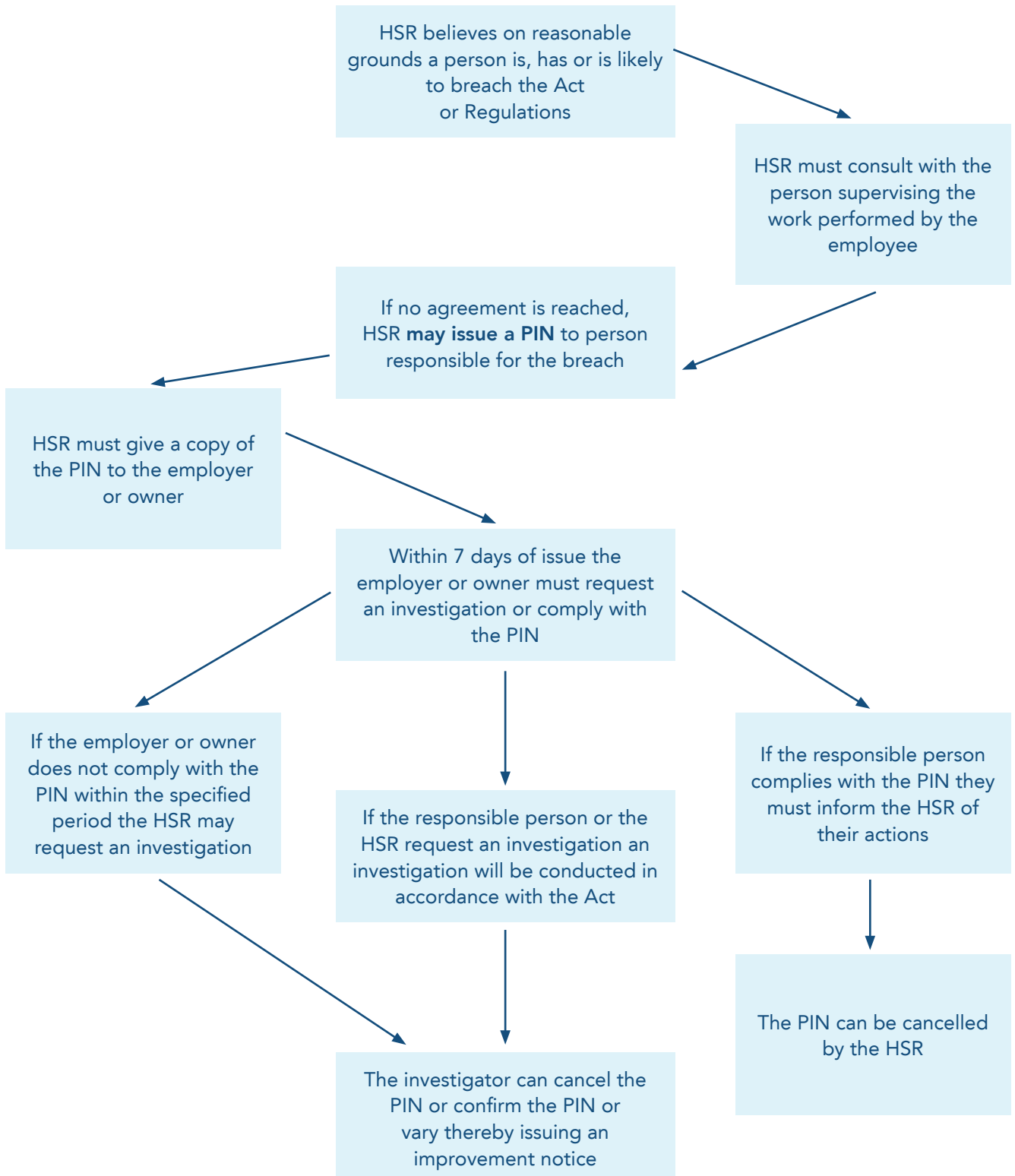
The Act sets out the procedure for an investigation to be conducted of the work that is subject to the disagreement.

**Note:** If the investigator confirms or varies the PIN, the investigator is taken to have decided to issue an improvement notice in those terms.

An employer who has been issued with a PIN must:

- ensure that, to the extent that the PIN relates to any matter over which the person has control, the PIN is complied with; and
- take such steps as are reasonably practicable to inform the HSR who issued the PIN of the action taken to comply with the PIN.

## Process for issuing a PIN



A HSR can only issue a PIN if:

- they reasonably believe a person is, has or is likely to breach the Act or Regulations;
- they have consulted the person supervising the work (supervisor); attempted to reach agreement on rectifying or preventing the breach with the supervisor; and
- no agreement can be reached within a reasonable time with the supervisor.

## Directions to cease work

The Act also sets out the action which HSRs may take where they have reasonable cause to believe that there is an immediate threat to the health or safety of one or more of the employees unless the employee ceases to perform particular work.

In those circumstances, the HSR must inform the person supervising the employee(s) of the threat to health or safety. If the person's supervisor cannot be contacted immediately, the HSR must direct the employee(s) to cease work in a safe manner and as soon as practicable inform the supervisor of this direction.

Where an employee has ceased to perform work in accordance with a direction given by a HSR, the employer may direct the employee to perform suitable alternative work. This does not apply, however, if the HSR has agreed with the person's supervisor that the cessation of work was not, or is no longer necessary, or where an investigator has made a decision that effectively means the employee should perform the work.

## What are health and safety committees (HSCs)?

The HSC is a formal structure which helps employers and employees discuss and resolve OHS issues in the workplace.

### When should a HSC be established?

Employers must establish a HSC for their organisation when the number of employer's employees is not normally less than 50.

An employer must also establish a HSC if:

- the number of the employees of the employer in a particular workplace is normally not less than 50;
- the employees are included in one or more DWGs; and
- the employer is requested in writing to establish a committee by a HSR or a majority of employees in that workplace.

Membership of committees is agreed between the employer, employees and/or employee representatives. The number of members representing the employer must not outnumber members representing the employees.

An employer may, in consultation with employees or any other persons, establish additional committees concerned with occupational health and safety, including HSC sub-committees.

The committees, including the HSC, must be established by written instrument.

### **What are the functions and powers of a HSC?**

The HSC has the following functions:

- help the employer to develop, implement, review and update measures used to protect the health and safety at work of the employees;
- facilitate co-operation between the employer and the employees in relation to occupational health and safety matters;
- help the employer to distribute information relating to health and safety at work (in appropriate languages); and
- other such functions as are prescribed or are agreed upon between the employer and the HSC.

A HSC has the power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions (outlined above).

## **Incident notification**

Employers have an obligation to notify Comcare of accidents or dangerous occurrences that involve employees, contractors (performing work in connection with the employer's undertaking) and third parties. Employers covered by the Act must keep records of all notifiable incidents.

### **What is a notifiable incident?**

A notifiable incident is an accident or dangerous occurrence that arises out of the conduct of the undertaking or out of work performed by an employee in connection with the employer's undertaking.

An employer may be required to notify incidents that occur in a workplace even if a contractor controls that workplace for the purposes of construction or maintenance.

For more information see Comcare publication *Guide to Incident Notification* (OHS 43).

### **What is an employer's undertaking?**

An employer conducting an undertaking refers broadly to activities carried on during the course of the employer's business or enterprise, regardless of whether it is carried out at a workplace as defined in the Act. Employees are taken to be at work when performing work in connection with the employer's undertaking, whether or not the work is carried out at a workplace. The business of an employer could be carried on in any number of workplaces, permanent or temporary.

It should be noted that where the undertaking is conducted on the employer's behalf by a contractor or subcontractor, this is considered to form part of the employer's undertaking. Therefore, the employer has the responsibility for notifying Comcare of any incident involving such a contractor or subcontractor.

### **Example**

A contract diesel fitter from a labour hire firm undertaking repair work on an Army vehicle which has broken down on its way to a training exercise, injures his hand requiring treatment from a doctor.

The contractor is performing work in the course of the Army's undertaking and the injury is a serious personal injury. The incident is therefore a notifiable incident.

## **When is a contractor conducting an undertaking on the employer's behalf?**

In determining whether a contractor or subcontractor is conducting, on the employer's behalf, the employer's undertaking, the following factors should be considered:

- whether the function contracted out is a function of the employer by virtue of legislative or administrative arrangements;
- the nature of the relationship between the employer and the contractor as evidenced by the contractual arrangements; and
- where and how the function is performed.

## **When is an accident a notifiable incident?**

An accident is a notifiable incident if it causes the death of or serious personal injury to any person (employee, contractor or third party) or if an accident causes an employee (who performs work in connection with the undertaking) to be incapacitated for a period of 30 or more successive working days or shifts.

## **What is a serious personal injury?**

A serious personal injury means an injury to, or disease in, a person that is caused in the course of work and for which the person needs to be;

- given emergency treatment by a registered medical practitioner;
- treated in a hospital as a casualty, without being admitted to hospital; or
- admitted to a hospital.

## **What does incapacity mean?**

Incapacity means an injury or disease that causes the employee to be incapable of performing work for 30 or more successive working days or shifts.

## What is a dangerous occurrence?

A dangerous occurrence is an occurrence that resulted from operations that arose from the undertaking conducted by an employer and could have caused:

- the death of, or serious personal injury to any person; or
- the incapacity of an employee for the duration of 30 or more successive working days or shifts;

but as a result of which the death, serious personal injury or incapacity did not occur.

## Notification process

If an incident results in the death of any person it must be notified to Comcare within two hours by telephoning the relevant state office. Further details of the incident may be subsequently faxed.

Serious personal injuries, incapacities and dangerous occurrences must be notified to Comcare within 24 hours. This notice may also be faxed to Comcare or may be lodged online at <https://cis.comcare.gov.au/forms/notify.html>.

It is the responsibility of the employer to ensure that notifiable incidents are notified to Comcare within the required time.

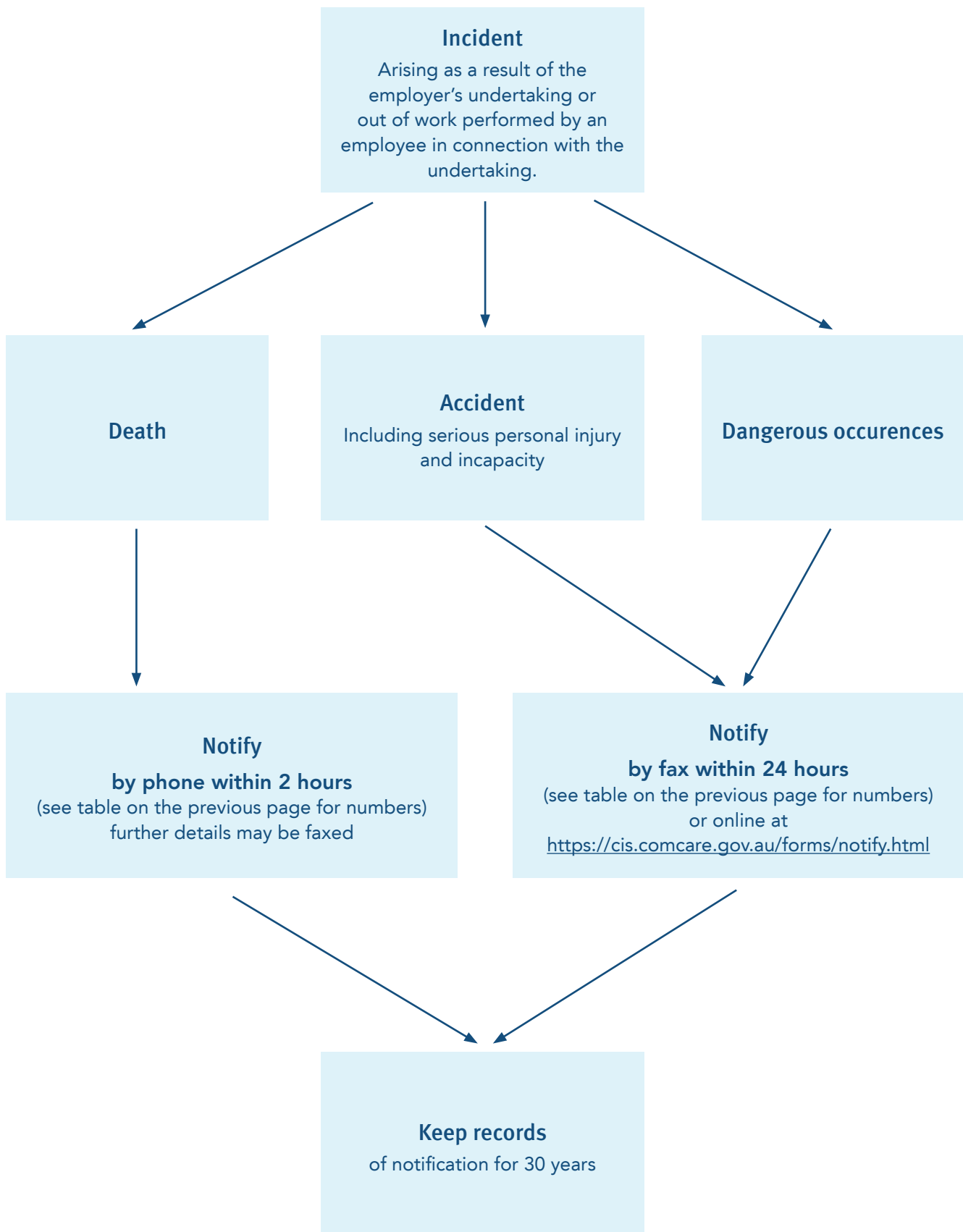
In addition, an employer must retain a record of each accident or dangerous occurrence which is required to be notified to Comcare, for a period of 30 years.

**Note:** Making a claim for workers' compensation does not satisfy the requirement to notify the incident to Comcare nor does the notification of an incident become a claim for compensation.

## Comcare office contacts

State	Fax Number	Phone Number	After hours telephone contact for deaths and major accidents
NSW/ACT	1300 305 916	1300 366 979	1300 366 979
WA	1300 305 916	1300 366 979	1300 366 979
QLD	1300 305 916	1300 366 979	1300 366 979
SA/NT	1300 305 916	1300 366 979	1300 366 979
VIC/TAS	1300 305 916	1300 366 979	1300 366 979

## Notification process



## Notification form

Notice of an incident must provide details of the incident including:

- name of the employer;
- name of person injured (not required for dangerous occurrences);
- whether the workplace is a major hazard facility (MHF);
- time and date of incident;
- address of the workplace;
- details of the accident including the location, involved plant, equipment, process or substance;
- name, classification and contact number of person notifying; and
- action that the employer has taken, or proposes to take, to prevent recurrence of an accident of the same kind.

Comcare has a *Notification Incident Form* which can be used to give notice of notifiable incidents. The form is available from the Comcare website.

## Enforcement

There is a range of enforcement actions that may be commenced by Comcare when OHS legislative obligations are not met by duty holders. The maximum penalty for criminal breaches of the Act is \$495,000 and \$242,000 for civil breaches. In addition, individuals can be held personally liable in certain circumstances.

Compliance with the Act and its Regulations is monitored and evaluated through Comcare investigations.

OHS obligations are enforced through:

- letters of statutory obligation;
- letters of warning;
- improvement notices;
- prohibition notices;
- declarations of contravention and pecuniary penalty orders;
- injunctions;
- remedial orders;
- enforceable undertakings;
- civil court proceedings; and
- criminal court prosecutions.

For more information see publication *Comcare Enforcement Policy* (OHS 50).

## Why are investigations carried out?

Investigations may be carried out for many reasons. Broadly speaking, investigations will often occur in order to check whether the requirements of the Act or the Regulations (that is, the duties as set out in the earlier chapters of this guide) are being complied with and to determine whether there was a breach or possible breach of the Act or the Regulations.

The investigations may be part of scheduled investigations conducted across Australia each year or they may be conducted as a result of Comcare being notified of an OHS related matter in the workplace. OHS matters could include fatalities, serious injuries, complaints about unsafe conditions or an ongoing pattern of minor but similar incidents or injuries.

For more information see Comcare publication *When an Investigator Calls ... putting health and safety law to work* (OHS 3).

**Note:** An employee representative in relation to an employee may make a request to Comcare or to the SRC Commission that an investigation be conducted at a workplace at which the employee performs work for an employer. The SRC Commission is not under any obligation to conduct an investigation in such circumstances.

## What can an investigator do when they enter a workplace?

In conducting an investigation, an investigator may, to the extent it is reasonably necessary to do so, enter a workplace, at any reasonable time during the day or night and:

- search the workplace;
- inspect, examine, take measurements of or conduct tests concerning the workplace or any plant, substance or thing at the workplace;
- take photographs, or make sketches, of the workplace or any plant, substance or thing at the workplace;
- require a person to provide reasonable assistance, to answer questions and to give them any documents requested relating to the conduct of the investigation;
- take possession of plant, a substance or a thing and remove it from the workplace; and
- take a sample of the substance or thing and remove that sample from the workplace.

### Do not disturb notices

In conducting an investigation, an investigator may also direct the person who is, or who may reasonably be presumed to be, for the time being in charge of operations at the workplace, to ensure that the following not be disturbed for a specified period:

- a particular workplace or a specified part of a particular workplace; or
- particular plant, or a particular substance or thing.

The investigator will give written notice of the direction to that person but in some circumstances that direction can be given orally.

The direction may be renewed by giving another direction in writing.

Where an investigator gives a do not disturb notice to a person, the person must arrange for the notice to be displayed at the relevant workplace until the direction has expired, been revoked or varied.

The investigator will then notify:

- the owner of the workplace, plant, substance or thing to which the direction relates (where that person is not an employer); and
- the HSR of a DWG that includes an employee performing work at a workplace or involving the plant, substance or thing to which the direction relates.

**Note:** An employer who fails to comply with a do not disturb notice may be subject to civil action or a criminal prosecution. For further information, please refer to the table setting out penalties on **page 43**.

## Can an investigator shut down the operations?

An investigator may issue a prohibition notice to an employer if, having conducted an investigation, the investigator forms the opinion that it is reasonably necessary to do so in order to remove an immediate threat to the health or safety of any person. Comcare or an investigator may also apply to a court for a prohibitory injunction if a person is breaching or proposes to breach the Act or its Regulations. It is important to note however, that the issue of a prohibition notice will not necessarily result in operations being shut down. In most circumstances, the prohibition will relate to a part of the workplace, an activity, the use of a piece of plant or substance, or a particular procedure.

## What is a prohibition notice?

A prohibition notice is a written direction prohibiting an activity that the investigator believes involves or will involve an immediate risk to the health and safety of any person.

## What is a prohibitory injunction?

A prohibitory injunction is a writ granted by a court prohibiting or restraining a person from doing an activity or specified act. Failure to comply with the requirements of a prohibitory injunction may lead to civil proceedings against the relevant person and any consequential orders considered appropriate by the court (including orders as to costs).

## Can the investigator compel certain things to be done?

Where, having conducted an investigation, an investigator believes that a person is breaching a provision of the Act or its Regulations, or has breached a provision of the Act or its Regulations and is likely to do so again, the investigator may issue an improvement notice to the responsible person. Depending on the nature of a breach or possible breach of the Act or its Regulations, Comcare or an investigator may decide that it is appropriate to make application to a court for a mandatory injunction. A mandatory injunction is a writ granted by a court requiring the relevant person to do a specified act. Failure to comply with the requirements of a mandatory injunction may lead to civil proceedings against the relevant person and any consequential orders considered appropriate by the court (including orders as to costs).

## What is an improvement notice?

An improvement notice is a written direction requiring a person or organisation to improve a workplace or system of work so that it complies with the law.

The notice specifies:

- the breach of the provision of the Act or its Regulations that the investigator believes is occurring or is likely to occur, and the reasons for that opinion; and
- a reasonable period for the responsible person to take specified action necessary to prevent any further breach or likely breach of the provision.

## Procedure for prohibition notices

Investigator issues prohibition notice to employer – given to person (who is or is reasonably presumed to be) for time being in charge of relevant activity undertaken by employer.



Employer must:

- give a copy of the notice to each health and safety representative (if any) for a group of the employer's employees performing work that is affected by the notice; and
- display a copy of the notice at or near each workplace at which that work is being performed (until the notice has expired, been revoked or varied).



The employer must ensure that the notice is complied with, to the extent the employer has control over any matter to which the notice relates.

Note: An employer who breaches this requirement may be subject to civil action or a criminal prosecution. For further information, please refer to the table setting out penalties on page 43.



Investigator informs employer if they consider that action taken by an employer to remove the relevant threat to health and safety is not adequate to remove that threat.

Prohibition notice cease to have effect when:

- The investigator notifies the employer that he or she considers that the employer has taken adequate action to remove any threat to health or safety; or
- The notice is revoked.

Investigator may revoke/vary a notice by giving written notice to the person who is, or who may be presumed on reasonable grounds to be, for the time being in charge of the activity referred to in the original notice.



If original notice is varied:

- the new notice must set out text of original notice and variations to it;
- the new notice must specify a period for compliance that the investigator reasonably considers is sufficient to enable compliance;
- the employer must display copy of new notice at or near each workplace where relevant work being performed (until new notice expires, or is revoked/varied); and
- the investigator and employer must take all reasonable steps to give copy of new notice to all persons who were given a copy of the original notice.

## Procedure for improvement notices

### Investigator issues improvement notice to responsible person.

Note: If the responsible person is an employer but it is not reasonably practicable to give the notice to the employer, the improvement notice may be given to the person who is, or who may reasonably be presumed to be, for the time being in charge of the activity undertaken by the employer in connection with which the investigator believes the employer is breaching, or is likely to breach the Act or the Regulations.

If the above paragraph applies, investigator gives copy of notice to employer as soon as practicable afterwards.



The responsible person must ensure that the notice is complied with, to the extent that the notice relates to any matter over which the person has control.

Note: If the responsible person breaches this requirement, they may be subject to civil action or a criminal prosecution. For further information, please refer to the table setting out penalties on page 43.



If the notice is issued to an employer, the employer must:

- give a copy of the notice to each HSR for a designated work group of the employer's employees performing work that is affected by the notice; and
- display in a prominent place, a copy of the notice at or near each workplace at which that work is being performed (until the notice has expired, been revoked or varied).

Upon issuing the notice, the investigator must give a copy of the notice to certain persons including:

Where the notice is issued to an employee relating to work performed by the employee for an employer – **to that employer**

and

Where the notice relates to any workplace, plant, substance or thing that is owned by a person (who is not the responsible person or a person who is an employer referred to in the previous box) – **to that owner**

and

Where the notice is issued to a person (not being an employer) who owns any workplace, plant, substance or thing by reason of which a breach of the Act or regulations has occurred or is likely to occur – **to the employer of the employees who work in that workplace or who use that plant, substance or thing**

Investigator may revoke/vary notice by giving written notice to the person who is, or who may reasonably be presumed to be, for the time being in charge of the activity of the subject of the original notice.

If notice is varied:

- the new notice must set out text of original notice and variations to it;
- the new notice must specify period for compliance that investigator considers is reasonable;
- the employer must display copy of new notice at or near each workplace where relevant work being performed (until new notice expires, or is revoked/varied); and
- the investigator and employer must take all reasonable steps to give copy of new notice to all persons who were given copy of original notice.

## Appeals against an investigator's decision

The Act provides a mechanism for an appeal against a decision made by an investigator in conducting an investigation or having conducted an investigation. The appeal may be made by notice in writing, to the Australian Industrial Relations Commission within 14 days of the decision of the investigator.

## Inquiries and reports

Where an investigator has conducted an investigation, the investigator must, as soon as is reasonably practicable, prepare a written report relating to the investigation and give it to the SRC Commission.

The SRC Commission must give a copy of the report to the employer. The SRC Commission may also give a copy of the report to the Minister.

The Act also contains provisions for the SRC Commission to conduct an inquiry. These provisions do not apply to a GBE or a non-Commonwealth licensee.

## Proceedings

The Act creates a dual regime of enforcement of its provisions. That is, the Act provides for civil proceedings or criminal prosecutions to be commenced in relation to breaches of the Act (depending on the type of breach concerned). The following persons and entities can be subject to both civil and criminal enforcement mechanisms:

- employees of the Commonwealth, Commonwealth authorities or non-Commonwealth licensees;
- non-Commonwealth licensees; and
- GBEs and their employees.

The Commonwealth and Commonwealth authorities, other than GBEs, are subject only to civil enforcement mechanisms.

## Civil proceedings

There is a range of remedies that are available in civil proceedings which are commenced to enforce the provisions of the Act. These are:

- declarations of a contravention;
- injunctions;
- pecuniary penalty orders;
- remedial orders; and
- enforceable undertakings.

## Declarations of contravention

Comcare or an investigator may apply for a declaration that a person has contravened certain provisions of the Act or for a pecuniary penalty order. The application is made either to the Federal Court of Australia or the Supreme Court of a State or Territory.

**The Court can make a declaration of contravention if it considers that a person has breached one of the following provisions, or was involved in such a breach:**

- duties of employers in relation to their employees;
- duty of employers in relation to third parties;
- duties of manufacturers in relation to plant and substances;
- duties of suppliers in relation to plant and substances;
- duties of person erecting or installing plant in a workplace;
- duties of employees in relation to occupational health and safety;
- requirement to provide assistance and information;
- requirement to ensure compliance with direction that a workplace not be disturbed;
- requirement to ensure that a prohibition notice is complied with;
- requirement to comply with improvement notice;
- requirement not to prejudice witnesses in employment;
- requirement not to levy employees; or
- requirement not to dismiss employees on certain grounds.

The Act sets out certain matters which must be specified in a declaration of contravention.

## What does 'involved in a breach of the Act' mean?

The Act provides that a person is involved in a breach of a provision of the Act if, the person has:

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

## Can individuals be held personally liable?

Any employee who aids, abets, counsels, induces, conspires or is knowingly concerned in the commission of an offence can be the subject of a declaration of contravention and face pecuniary penalties. This may be the case for managers and officers within organisations in certain circumstances where their conduct constitutes a breach.

## Pecuniary penalties

Once a declaration of contravention is made by the court, the court can order the person to pay the Commonwealth a pecuniary penalty.

The table at the end of this chapter sets out the maximum penalty for a breach of provisions that can lead to a declaration of contravention being made under the column titled Civil penalty on page 43.

The penalty is a civil debt payable to the Commonwealth, and Comcare may enforce the order as if it were an order made in civil proceedings for debt recovery. The Act, however, provides that the court cannot direct that a person be imprisoned in default of the payment of the civil penalty.

Proceedings for a declaration of contravention or a pecuniary penalty order must be started within six years of the alleged breach that is in question. If proceedings are commenced against a person for one or more contraventions which could lead to a declaration of contravention, the person is not liable to more than one civil penalty if it is in relation to the same conduct.

The normal rules of evidence and procedure for civil matters are to be applied by the court in proceedings for a declaration of contravention or a pecuniary penalty order.

Part 1 of Schedule 2 of the Act describes the interaction between civil proceedings and criminal proceedings in relation to conduct that is substantially the same.

Where an individual has previously given evidence or produced documents in civil proceedings, then that evidence is not admissible in subsequent criminal proceedings against them, if the conduct alleged to constitute the offence is substantially the same. The rule doesn't apply however, in criminal proceedings regarding the falsity of the evidence given by the individual in the civil proceedings.

## Can you be excused from liability?

The court may, in civil penalty proceedings only, relieve a person from liability for a contravention if it appears to the court that the person has acted honestly and, having regard to all the circumstances, the person ought fairly to be excused. The court may relieve the person either wholly or partly from the potential liability. However, these provisions do not apply to proceedings commenced for a criminal offence under the Act.

A person may apply for such relief in anticipation of civil penalty proceedings being taken against them.

## Injunctions

Comcare or an investigator may apply to a court for an injunction if a person has breached, is breaching, or proposes to breach the Act or the Regulations. There are different types of injunctions which the court may grant. These are set out on the following page.

## Prohibitory injunctions

The court may grant an injunction restraining the relevant person from breaching the Act or the Regulations if a body has breached, is breaching or proposes to breach the Act or the Regulations.

The court may also make an order requiring the relevant person to do something if:

- the court grants an injunction restraining the relevant person from engaging in actionable conduct; and
- in the court's opinion it is desirable to make the order.

## Mandatory injunctions

The court may grant an injunction requiring a person to do something if the person has refused or failed (or is refusing or failing, or is proposing to refuse or fail to do something) and the refusal or failure did (does or would) constitute a breach of the Act or the Regulations.

## Interim injunctions

Before deciding an application for an injunction, the court may grant an interim injunction which:

- restrains the relevant person from engaging in the conduct; or
- requires the relevant person to do an act.

**Note:** The power to grant injunctions is in addition to (and does not limit) any other powers of the court.

## Remedial orders

A court can, if requested to do so, order a person to take any steps that it considers are necessary and appropriate to rectify the state of affairs and that are within the person's power to take. This can only occur in certain circumstances specified in the Act.

In certain circumstances the court can make orders:

- to require the employer to reinstate an employee/former employee;
- to require the employer to pay compensation to an employee/former employee;
- to require the employer not to carry out a threat made by the employer, or not to make any further threat; or
- an injunction, and any other orders considered necessary to prevent or remedy the conduct.

The court also has the power to make any other consequential order that it considers appropriate.

## Enforceable undertakings

There is also provision in the Act for Comcare to accept a written undertaking from a person that they will fulfil an obligation they have under the Act. This encourages voluntary compliance with the requirements of the Act, as it acts as an alternative to prosecution or civil proceedings.

If civil proceedings have commenced (seeking a declaration of contravention), the court may adjourn those proceedings if Comcare considers that an appropriate written undertaking is in force and Comcare asks the court to adjourn the proceedings.

A person must not withdraw or vary their written undertaking without Comcare's written consent.

If the court considers that a person has breached a term of an undertaking, or that the person has withdrawn or varied the undertaking without Comcare's written consent, the court may:

- revive any adjourned proceedings; or
- make an order directing the person to comply with the undertaking and any other consequential orders it considers appropriate.

In addition, Comcare or an investigator may apply to a court for such an order if the person has breached, is breaching or proposes to breach the undertaking.

## Criminal prosecutions

### Death or serious bodily harm

Criminal liability attaches to a person who breaches one of the provisions set out in the table on the following page where:

- the breach causes death or serious bodily harm; and
- the person was either negligent or reckless as to whether that breach would cause death or serious bodily harm.

### **Breach of provisions of the Act constituting offence**

- duties of employers in relation to their employees (s16);
- duty of employers in relation to third parties (s17);
- duties of manufacturers in relation to plant and substances (s18);
- duties of suppliers in relation to plant and substances (s19);
- duties of person erecting or installing plant in a workplace (s20);
- duties of employees in relation to occupational health and safety (s21);
- requirement to provide assistance and information (s43);
- requirement to ensure compliance with direction that a workplace not be disturbed (s45(5));
- requirement to ensure compliance with oral direction that a workplace not be disturbed (s45A(3));
- requirement to ensure that a prohibition notice is complied with (s46(4));
- requirement to comply with improvement notice (s47(6));
- requirement not to tamper or remove notices (s50); and
- interference with equipment (s72).

A defence of reasonable excuse is available for breaches of the following provisions:

- requirement to provide assistance and information;
- requirement not to tamper with notices; and
- interference or otherwise with equipment.

### **Substantial risk of death or serious bodily harm**

Criminal liability attaches to an employer who breaches subsection 16(1) of the Act where:

- the breach exposes an employee to a substantial risk of death or serious bodily harm; and
- the employer was either negligent or reckless as to whether that breach would expose an employee to substantial risk of death or serious bodily harm.

### **Other offences**

Criminal liability may attach to a person who intentionally breaches one of the following provisions:

- subsection 54(1) – requirement to give information or produce documents;
- section 57 – failure of a witness to attend;
- section 59 – refusal to be sworn or answer questions at a SRC Commission enquiry; and
- section 61 – contempt of the SRC Commission.

## Table of maximum penalties

(Note: Refer to Schedule 2 of the Act)

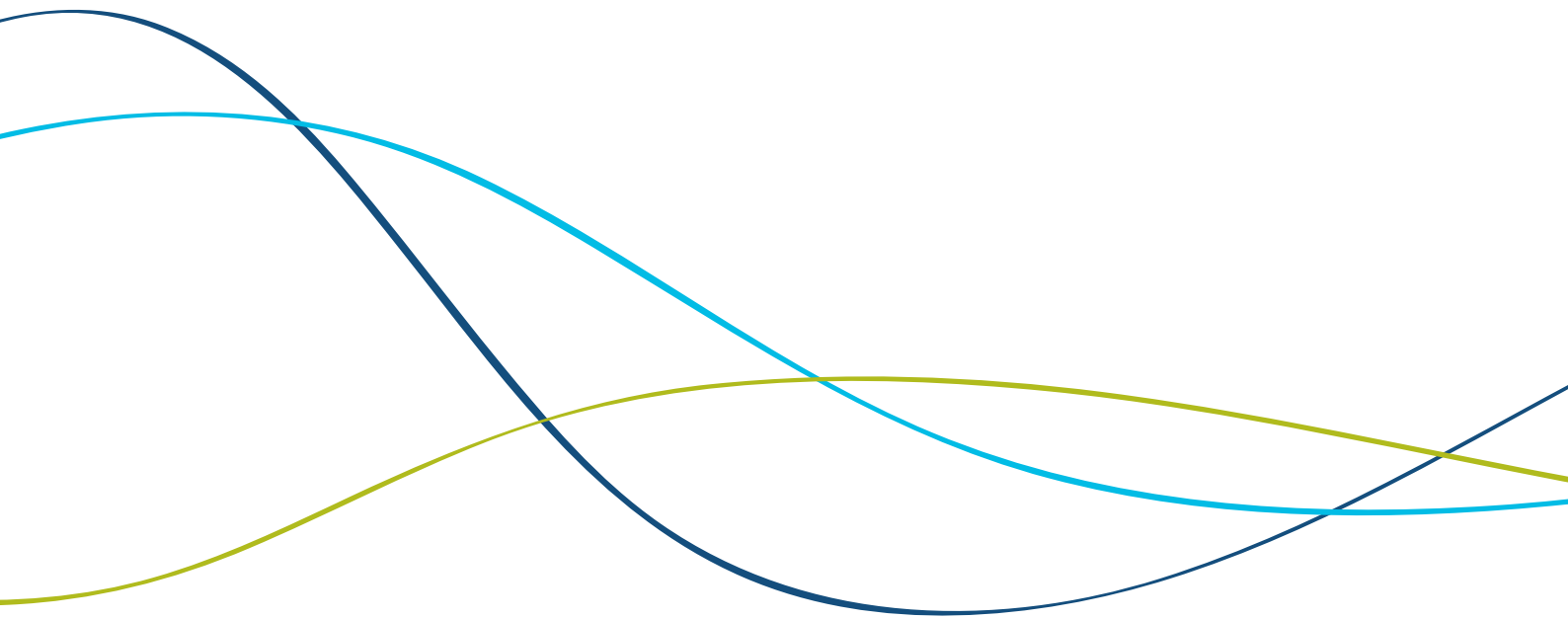
Section	Description	Civil penalty Person/body corporate	Criminal penalty Person/body corporate
16	Duties of employers in relation to employees	\$242,000/\$242,000	\$495,000 (for death/ serious bodily harm) \$330,000 (for exposure to substantial risk of death or serious bodily harm)
17	Duties of employers in relation to third parties	\$242,000	\$495,000 (for death, serious bodily harm or exposure to substantial risk of death or serious bodily harm)
18	Duties of manufacturers in relation to plant and substances	\$48,400/\$242,000	\$99,000/\$495,000
19	Duties of suppliers in relation to plant and substances	\$48,400/\$242,000	\$99,000/\$495,000
20	Duties of persons erecting or installing plant in a workplace	\$48,400/\$242,000	\$99,000/\$495,000
21	Duties of employees in relation to OHS	\$9,900	\$19,800
43(2)	Failure to comply with an investigator's request for assistance	\$3,300	\$3,300 or 6 months' imprisonment or both
45(5)	Failure to ensure compliance with direction not to disturb a workplace	\$27,500	\$55,000
45A(3)	Failure to ensure compliance with oral direction not to disturb a workplace	\$27,500	\$55,000
46(4)	Failure to ensure compliance with a prohibition notice	\$27,500	\$55,000
47(6)	Failure to ensure compliance with an improvement notice	\$1,000 for each day on which section breached	\$99,000
50	Tampering with or removing a notice	N/A	\$3,300 or 6 months' imprisonment or both

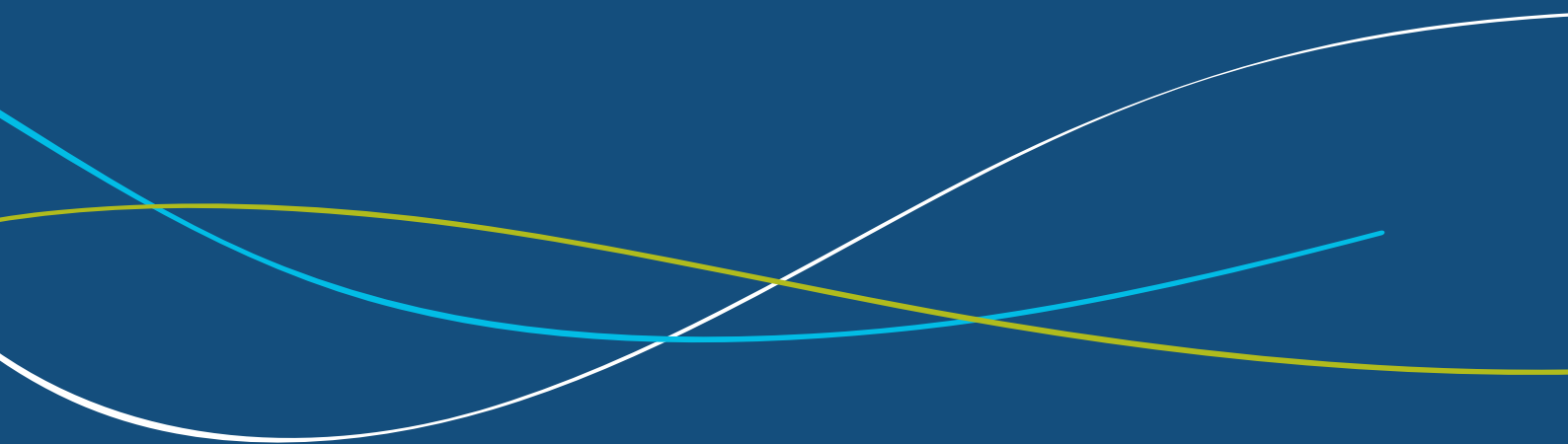
54	Refusing or failing to give information or provide document to SRC Commission	N/A	\$3,300 or 6 months' imprisonment or both
57	Failure by witness to appear before SRC Commission	N/A	\$3,300 or 6 months' imprisonment or both
59	Refusal to be sworn or answer questions	N/A	\$3,300 or 6 months' imprisonment or both
61	Contempt of SRC Commission	N/A	\$3,300 or 6 months' imprisonment or both
64	Prejudicing employee because of inquiry appearance	\$3,300	N/A
72	Reckless or negligent interference with protective equipment or safety device	N/A	\$3,300 or 6 months' imprisonment or both
73	Employer not to levy employees	\$27,500	N/A
76	Dismissing employee because of complaint	\$27,500	N/A

## Related Comcare References

- OHS consultative workplace arrangements – A guide to commonwealth legislative provisions (OHS 67)
- Health and safety management arrangements - A guide to developing HSMA's (online)
- An employer's guide to conducting an election for a HSR in the Commonwealth jurisdiction (online)
- Identifying hazards in the workplace (OHS 10)
- Comcare enforcement policy (OHS 50)
- Health and safety representatives handbook (OHS 4)
- Injury Prevention: Some Practical Suggestions for Managers (PUB 34)
- Officewise: A guide to health and safety in the office (OHS 1)
- Bullying in the workplace: A guide to prevention for managers and supervisors (OHS 65)
- Participating in effective health and safety committees (OHS 12)
- When an investigator calls ... putting health and safety law to work (OHS 3)
- Guide to incident notification (OHS 43)







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