

COMPLIANCE AND ENFORCEMENT POLICY

A policy for Comcare's
compliance and enforcement
activities



Australian Government

Comcare

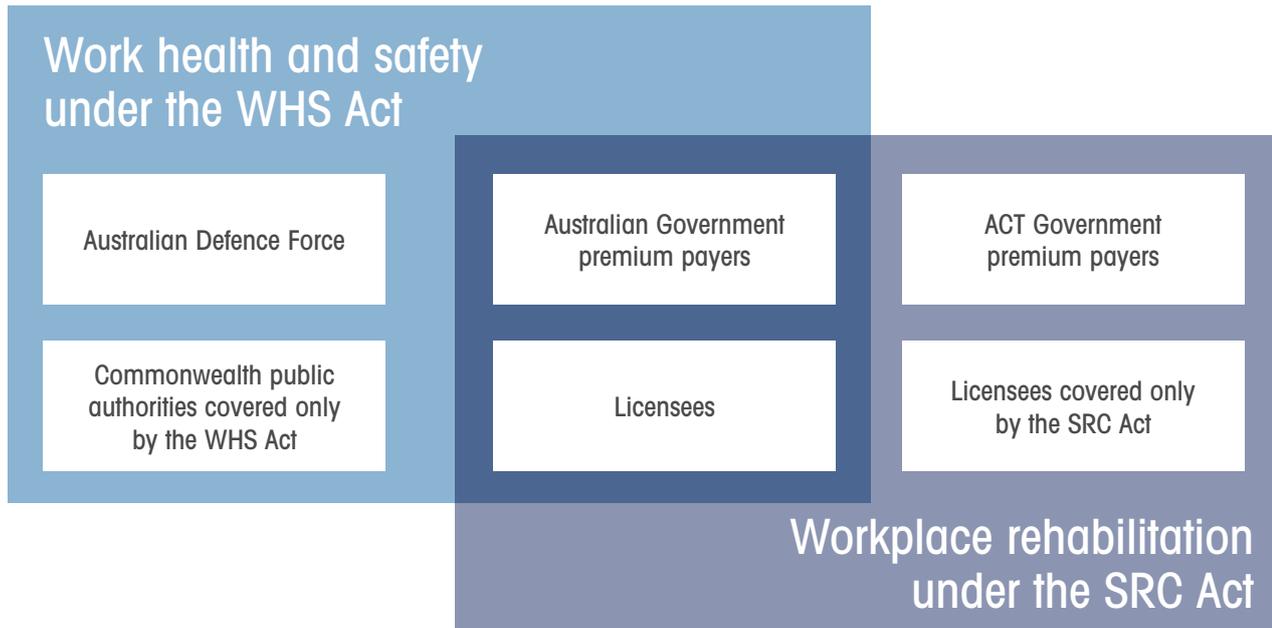
INTRODUCTION

ABOUT COMCARE

Comcare has functions and powers under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and the *Work Health and Safety Act 2011* (WHS Act), which include regulatory functions and powers for compliance and enforcement.

The WHS Act aims to protect workers against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work. The workplace rehabilitation provisions of the SRC Act aim to maximise an injured worker's chances of an early and safe return to work.

Comcare's compliance and enforcement activities promote these aims within the Comcare jurisdiction, which centres on Commonwealth entities and licensees:



Within this jurisdiction, our compliance and enforcement activities are directed towards:

- > duty holders and authorisation holders under the WHS Act
- > rehabilitation authorities and approved workplace rehabilitation providers under the SRC Act.

Our legislation and jurisdiction are described in more detail on pages 5–6.

Comcare is a body corporate.¹ It acts through its staff members to undertake operational compliance and enforcement activities. In relation to work health and safety, Comcare appoints staff members as inspectors under section 156 of the WHS Act, and can also delegate its functions and powers to staff members under section 154. To undertake compliance and enforcement activities in relation to workplace rehabilitation, Comcare delegates powers and functions under the SRC Act to staff members under section 73B.

Comcare staff are engaged under the *Public Service Act 1999* and are expected to be impartial, committed to service, accountable, respectful and ethical.

The cost of Comcare's compliance and enforcement activities is recovered by the regulatory contributions and licence fees that are charged to regulated entities under sections 97D and 104A of the SRC Act.

¹ Comcare is established as a body corporate under the SRC Act. It is a 'corporate Commonwealth entity' for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

WHAT THIS POLICY DOES

The purpose of this policy is to set out Comcare's approach to its regulatory functions and powers under the WHS Act and SRC Act.

The policy is informed by the responsibilities and expectations that apply to Comcare under the *Public Governance, Performance and Accountability Act 2013*, other legislation and external policies.² In relation to work health and safety, this policy is aligned to the *Australian Work Health and Safety Strategy 2012–2022* and the *National Compliance and Enforcement Policy*.

This policy is for Comcare staff, the Comcare jurisdiction and the general public. It applies from 1 July 2016.

We explain in the glossary how this policy uses certain words. The legislation and other sources referred to in this policy are listed at the end of the document.

WHAT THIS POLICY DOES NOT DO

It is not within the scope of this policy to cover specific aspects of Comcare's compliance and enforcement activities in detail. As mentioned towards the end of the document, Comcare publishes Regulatory Guides to provide more detailed guidance than can be provided here.

This policy is not intended to address specific obligations imposed on Commonwealth entities under the *Commonwealth Fraud Control Framework*, the *Commonwealth Risk Management Policy* or the *Cost Recovery Guidelines*.

The Safety, Rehabilitation and Compensation Commission also has regulatory functions and powers under the SRC Act.³ This policy does not cover those functions and powers.

2 These include the Australian Government's *Guide to Regulation and Regulator Performance Framework*, as well as principles stated in guides like the Australian National Audit Office's *Administering Regulation: Achieving the Right Balance* and the Administrative Review Council's *The Coercive Information-Gathering Powers of Government Agencies*. For investigations and legal matters, they include the *Australian Government Investigations Standards*, the *Prosecution Policy of the Commonwealth* and the *Legal Services Directions*.

3 The Safety, Rehabilitation and Compensation Commission is established by the SRC Act. Its functions include granting licences under Part VIII of the SRC Act. The Commission can impose conditions when granting licences, and monitors compliance with those conditions. Under the SRC Act, Comcare provides assistance to the Commission to enable it to perform its functions. However, the regulatory functions of Comcare and the Commission are distinct.

OUR APPROACH

Comcare’s vision is to be a leading Australian regulator which oversees a jurisdiction that is knowledgeable about its duties and obligations and is committed to compliance and best practice.

We strive to make our compliance and enforcement activities consistent, constructive, transparent, accountable, proportionate, responsive and targeted. To put these principles into practice, we will focus on four areas for our future activities.

1. We are clear about our regulatory responsibilities and priorities

We will clarify the objectives of our regulatory activities, to ensure we can be firm but fair and find the most appropriate response for each situation. We will maintain a program of authorisations, approvals, monitoring and investigations so that we have a responsible overview of the jurisdiction, can consider whether the aims or objects of the regulatory regime are being achieved, and suggest improvements to the legislation. We will work on improving processes and developing staff capability to increase the overall quality and consistency of our decisions.

2. We base our activities on evidence and risk analysis

We will continue to build our capacity to obtain relevant intelligence and data, and also to make reliable assessments of risk. This will allow us to focus on activities that are likely to have the most impact. We will improve our understanding of regulated entities’ operations and identify current and emerging issues in the jurisdiction.

3. We enable the jurisdiction to take responsibility for its own compliance

We will make it easier for regulated entities to comply without intervention from Comcare, by helping them first to understand their duties and obligations and then to take effective action to comply on an ongoing basis. For this to occur, there will need to be committed two-way engagement between regulated entities and Comcare. We will make our publications more concise and accessible. We will encourage regulated entities to go beyond mere compliance by informing themselves about best practice and leading change.

4. We are mindful of the impact we have on regulated entities’ operations

We will increase our awareness of the financial and other burdens we impose on regulated entities. This applies to all levels of our business, whether in relation to the cost effectiveness of our operations as a whole or to particular activities. Before we make a decision, we will consider what we want to achieve and whether there is a less onerous way to get to our desired result. If we think there has been a breach, this may include considering whether a less severe response is appropriate out of the available range of responses.

OUR LEGISLATION AND JURISDICTION

WORK HEALTH AND SAFETY ACT

Objects

The WHS Act implements model work health and safety laws that have also been adopted in most of the Australian states and territories.

The object of the WHS Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. The Act aims to protect workers against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work, with a view to attaining the highest level of protection as is reasonably practicable.

Work health and safety duties

The primary mechanism in the WHS Act for achieving its objects is the imposition of 'health and safety duties'. For instance, a person who conducts a business or undertaking (PCBU) has a duty to ensure the health and safety of workers engaged by that person while the workers are at work in the business or undertaking, so far as is reasonably practicable. The PCBU is required to manage risks by:

- > eliminating risks to health and safety so far as is reasonably practicable; and
- > if elimination is not reasonably practicable—minimising the risks so far as is reasonably practicable.

The main PCBUs covered by the WHS Act are Commonwealth entities and licensees.

Another health and safety duty applies to an officer of a PCBU, who must exercise due diligence to ensure that the PCBU complies with its duty. Workers also have health and safety duties which require them to take reasonable care for their own health and safety while at work.

In addition to the general health and safety duties, the WHS Act and *Work Health and Safety Regulations 2011* also contain more specific obligations and prohibitions.

The WHS Act protects workers and reduces risk by requiring that some workplace activities only occur when an authorisation from Comcare is in place. For instance, a licence is required to undertake certain types of high risk work or to operate certain facilities that involve major hazards.

The persons who participate in the Comcare jurisdiction under the WHS Act include:

- > PCBUs and officers, in their capacity as duty holders
- > applicants for, and holders of, work health and safety authorisations
- > workers, both as duty holders and as beneficiaries of the regulatory regime.

SAFETY, REHABILITATION AND COMPENSATION ACT

Aims

The aim of the SRC Act is to establish an efficient, effective and equitable framework for rehabilitation and workers' compensation for injured workers.

Workplace rehabilitation maximises injured workers' opportunities for:

- > an early and safe return to work, either in their pre-injury role or in suitable alternative employment; or
- > sufficient recovery from their injuries to allow productive participation in the community.

Workplace rehabilitation obligations

The workers covered by the SRC Act are mostly employees of Commonwealth entities and licensees. An injured worker's 'rehabilitation authority' is a defined office holder within the employer's organisational structure.

If requested by an injured worker, a rehabilitation authority must arrange for an assessment of the worker's capability of undertaking a rehabilitation program. The rehabilitation authority may also initiate this assessment.

A rehabilitation authority may determine, often after an assessment has occurred, that an injured worker should undertake a rehabilitation program. In making that determination, the rehabilitation authority must consider factors such as the suitability and benefits of the program for the injured worker as well as the potential reduction in future compensation liabilities for the employer if the program is provided.

A rehabilitation authority may provide a rehabilitation program for an injured worker itself, or it may make arrangements with a workplace rehabilitation provider approved by Comcare to provide a rehabilitation program on its behalf. Comcare approves workplace rehabilitation providers in accordance with the *Nationally Consistent Approval Framework for Workplace Rehabilitation Providers*.

An injured worker who does not undertake a rehabilitation program provided for them risks forfeiting workers' compensation that would otherwise be payable.

Where an injured worker is undertaking, or has completed, a rehabilitation program, their employer must take all reasonable steps to ensure that the worker continues to be employed in a role to which they are suited in their current circumstances. The employer may provide that employment itself, or may assist the injured worker to find a suitable role.

Rehabilitation authorities must comply with additional requirements in the *Guidelines for Rehabilitation Authorities* issued by Comcare under section 41 of the SRC Act. An employer is expected to support its rehabilitation authority by, amongst other things, developing and maintaining an effective rehabilitation management system.

The participants in the Comcare jurisdiction in relation to workplace rehabilitation under the SRC Act are:

- > rehabilitation authorities and employers
- > approved workplace rehabilitation providers, and applicants for approval
- > injured workers.

OUR COMPLIANCE AND ENFORCEMENT ACTIVITIES

Our compliance and enforcement activities in relation to both work health and safety and workplace rehabilitation combine proactive and reactive components. We have various compliance tools that we can apply in different circumstances. Some of these are based on reaching agreement with regulated entities. Other compliance tools are backed by legislated enforcement options, and we will not hesitate to use these options when we consider it necessary and appropriate in more serious cases.

We group our compliance and enforcement activities into four main streams:



providing information and advice



making authorisation and approval decisions



monitoring the extent of compliance in the jurisdiction



investigating alleged or potential contraventions

A particular activity may incorporate components from different streams.

We undertake these activities for various purposes. For example, we may take immediate action to prevent harm that is ongoing or imminent. In some cases, we may need to evaluate a situation to see if we consider that a duty or obligation has been breached. If we consider there has been a breach, we may use compliance tools with a view to correcting poor behaviours or requiring systems improvements. We may want to raise awareness and capacity in the jurisdiction on a specific topic, such as the risks that arise in a particular industry sector.

Our decisions on when and how we undertake specific activities require us to weigh up many factors that depend on the circumstances of each case, such as:

- > our analysis of data, intelligence and risk
- > the severity and scope of an alleged breach
- > the compliance tools that are available in a particular situation
- > a regulated entity's compliance history and its attitudes towards compliance.

The intensity of our interactions with the jurisdiction will vary accordingly. At the less intense end of the spectrum, we may provide general training that any regulated entity can choose to attend. At the other end, we may prosecute a regulated entity for a serious contravention.

As we progress towards our vision of a jurisdiction that is well informed and committed to compliance and best practice, the balance of our activities will shift towards the more proactive and enabling measures. Over time, our need to call on sanctions and compulsive tools should be reduced.

In the rest of this section, we elaborate on our four activity streams.



PROVIDING INFORMATION AND ADVICE

The primary responsibility for complying with the duties and obligations imposed on regulated entities by the WHS Act and SRC Act lies with the regulated entities themselves. By providing information and advice, we work towards a jurisdiction that is engaged and equipped to comply.

We see providing information and advice as the core activity for achieving our vision. It includes education and training, and other proactive, preventative and consultative activities. We plan these activities, based on the needs of the jurisdiction and our analysis of information, intelligence and data. They could relate to a particular industry, hazard or injury type.

Providing information and advice could develop into monitoring compliance, for instance if it becomes apparent in the course of delivering training that a regulated entity has a significant lack of knowledge on a particular topic.



MAKING AUTHORISATION AND APPROVAL DECISIONS

Comcare makes authorisation and approval decisions, with the object that certain activities are only undertaken after the suitability of persons, things or processes have been checked.

Our authorisation and approval decisions are 'front end' compliance. For instance, we aim to ensure that certain activities are only undertaken by persons who have appropriate experience or qualifications and who are of appropriate character. These decisions include work health and safety authorisations and approvals of workplace rehabilitation providers. If Comcare grants an authorisation or approval, some form of monitoring will normally follow.



MONITORING COMPLIANCE

By monitoring the extent to which persons in the jurisdiction do or do not comply with duties and obligations, we increase our understanding of the jurisdiction so that we can better contribute to achieving the objectives of the regulatory regimes we administer.

Monitoring compliance is a general name for activities that may have specific labels, like 'audits' or 'inspections'. It may be proactive or reactive.

Monitoring may or may not involve the use of statutory tools like improvement notices, prohibition notices or WHS undertakings. In many cases, the only 'tool' is the provision of targeted information and advice, or reaching agreement with a regulated entity to achieve specific improvements (e.g. a compliance plan).



INVESTIGATING CONTRAVENTIONS

By investigating alleged or potential contraventions, we endeavour to ensure that those who breach duties and obligations are held to account.

An investigation has the following features:

- > Comcare has formed a view that a contravention may have occurred or may occur—this could be based on an allegation, a notification or intelligence.
- > Comcare considers that the contravention or possible contravention is of a nature that could warrant judicial proceedings, i.e. prosecution.
- > Comcare undertakes activities that are directed towards gathering evidence for the possible judicial proceedings.

Because of the different nature of Comcare’s powers and functions under the WHS Act and SRC Act, our investigations occur only under the WHS Act.

Some initial monitoring activity may be required, for instance to allow Comcare to form a view as to whether a contravention may have occurred or may occur. It is also possible that an investigation reverts to monitoring, for instance if Comcare’s view about the appropriateness of a prosecution changes.

The fact that Comcare categorises its activities in a particular case as an investigation does not necessarily mean that a prosecution will be commenced. An investigation might conclude on the basis that no contravention has occurred. An investigation might also conclude, for example, upon Comcare accepting a WHS undertaking.

ACCOUNTABILITY

COMPLAINTS

Comcare's complaints process allows any person to make a complaint about any of Comcare's activities, including our compliance and enforcement activities.

The details of how to make a complaint are available on the Comcare website. The specific steps Comcare takes in considering a complaint will depend on the issues and concerns that are raised. We take all complaints seriously and will ensure that each complaint is considered by the most appropriate person or area within Comcare.

INTERNAL AND EXTERNAL REVIEW

For some decisions made by Comcare, our inspectors and delegates, there is a statutory process to allow persons affected by the decision to seek internal and/or external review. For example:

- > an inspector's decision to issue an improvement notice can be reviewed under Part 12 of the WHS Act
- > a decision by Comcare to refuse an application for approval as a workplace rehabilitation provider can be reviewed under section 34R of the SRC Act.

An internal review is conducted by a person appointed by Comcare. The internal reviewer must be a person who was not involved in the initial decision. An external review is conducted by the Fair Work Commission or the Administrative Appeals Tribunal.

Comcare will advise the specific details of statutory internal or external review rights when giving the relevant decision.

For decisions in audit matters, there is no statutory review process. However, Comcare has established its own procedures for internal review. The details are on the Comcare website.

OTHER MECHANISMS

Other mechanisms may be available in particular circumstances to dispute a Comcare decision in relation to our regulatory functions and powers. For example, it may be possible to commence an application for judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

Comcare's conduct more generally is subject to scrutiny under various statutory processes, such as under the *Ombudsman Act 1976*, the *Freedom of Information Act 1982* or the *Public Interest Disclosure Act 2013*.

MORE INFORMATION

CONTACT US

For general inquiries, or to notify Comcare of an incident or issue that warrants a regulatory response, please telephone our call centre on 1300 366 979.

More information about Comcare and our compliance and enforcement activities is available on our website: www.comcare.gov.au.

REGULATORY GUIDES

As one aspect of providing information and advice to our jurisdiction, Comcare publishes Regulatory Guides on specific regulatory topics on our website.

Our Regulatory Guides provide more detailed guidance for our regulated entities than we can include in this policy.

Regulatory Guides explain Comcare's views on topics such as:

- > the nature of duties and obligations owed by regulated entities
- > the decision-making process for authorisations and approvals
- > specific compliance tools and how we decide when to use them.

The Regulatory Guides provide general guidelines in relation to the prosecution of offences and the acceptance of WHS undertakings under the WHS Act.

We aim to provide Regulatory Guides on a broad range of important topics for the jurisdiction and welcome feedback on their coverage, content and format.

GLOSSARY

approved rehabilitation program provider	See approved workplace rehabilitation provider.
approved workplace rehabilitation provider	The SRC Act refers to approved providers of rehabilitation programs for injured workers as 'approved rehabilitation program providers'. This policy refers to them as approved workplace rehabilitation providers , adopting the terminology from the <i>Nationally Consistent Approval Framework for Workplace Rehabilitation Providers</i> and the legislative instruments that Comcare makes under the SRC Act to implement the Framework. An approved workplace rehabilitation provider is one type of regulated entity.
audit	An audit is one type of compliance and enforcement activity that is part of the monitoring compliance stream.
breach or contravention	This policy uses breach as a general word for failing to comply with a duty or obligation, under either the WHS Act or the SRC Act. A contravention is a failure to comply with a duty or other obligation under the WHS Act.
Commonwealth entity	This policy uses Commonwealth entity as a general expression for entities that form part of the Commonwealth Government or are closely associated to the Commonwealth Government. Some examples are Commonwealth Government departments, the Australian Defence Force and bodies corporate like Comcare.
compliance	When used on its own, compliance means adherence to duties, obligations or standards required under the WHS Act or SRC Act (or related legislative instruments). In some contexts, Comcare may use words like conformance to mean the same thing.
compliance and enforcement activity	This policy refers to all Comcare activities that promote compliance, or that deter or respond to non-compliance, as compliance and enforcement activities . This is a compound expression. We do not attempt to draw a line between what is a compliance activity and what is an enforcement activity.
compliance tool	<p>A compliance tool is any specific measure that Comcare uses to achieve an outcome in relation to compliance. A compliance tool may be established in various ways, such as:</p> <ul style="list-style-type: none"> > a specific legislative provision > the conditions of an authorisation or approval > agreement between Comcare and a regulated entity. <p>A compliance tool may be accompanied by a mechanism to compel a regulated entity to do, or to not do, something.</p>
duty holder	Some obligations under the WHS Act are referred to as duties. A person who owes a duty is a duty holder . A duty holder is one type of regulated entity.
employee	See worker.
enforcement	This policy does not refer to enforcement on its own. The policy uses compliance and enforcement together in relation to Comcare's activities under its regulatory functions and powers, particularly in the compound expression compliance and enforcement activity .
health and safety duty	Some of the duties owed under the WHS Act are called health and safety duties . The holder of a health and safety duty is a duty holder.

injured worker	See worker.
inspection	An inspection is one type of compliance and enforcement activity that is part of the monitoring compliance stream.
inspector	An inspector is a person appointed as an inspector by Comcare under section 156 of the WHS Act.
investigation	Investigation is defined on page 9. Comcare uses this definition for the purposes of applying the <i>Australian Government Investigations Standards</i> .
licensee	A licensee is the holder of a licence issued by the Safety, Rehabilitation and Compensation Commission under Part VIII of the SRC Act.
officer	This policy uses officer in the same way as in the WHS Act. This is a specific word for a person with defined duties in relation to a PCBU.
PCBU	This policy uses person who conducts a business or undertaking (PCBU) in the same way as in the WHS Act.
regulated entity	A regulated entity is a person towards whom Comcare may direct its compliance and enforcement activities under either the WHS Act or the SRC Act. This is a general expression and includes duty holders, authorisation holders, rehabilitation authorities and approved workplace rehabilitation providers.
Regulatory Guide	Regulatory Guides are a category of guidance material produced by Comcare to provide more detailed guidance for regulated entities on specific regulatory topics than can be included in this policy.
rehabilitation authority	This policy uses rehabilitation authority in the same way as in the SRC Act. A rehabilitation authority is one type of regulated entity.
worker	When this policy is referring to work health and safety under the WHS Act, worker has the same meaning as in the WHS Act. When this policy is referring to workplace rehabilitation under the SRC Act, it uses worker or injured worker to mean an employee under the SRC Act for whom a rehabilitation authority may provide a rehabilitation program.

REFERENCES

LEGISLATION AND LEGISLATIVE INSTRUMENTS

Administrative Decisions (Judicial Review) Act 1977

Freedom of Information Act 1982

Guidelines for Rehabilitation Authorities 2012

Legal Services Directions 2005

Ombudsman Act 1976

Public Governance, Performance and Accountability Act 2013

Public Interest Disclosure Act 2013

Public Service Act 1999

Safety, Rehabilitation and Compensation Act 1988

Work Health and Safety Act 2011

Work Health and Safety Regulations 2011

OTHER DOCUMENTS

Location

Administering Regulation: Achieving the Right Balance (2014)

www.anao.gov.au

Australian Government Cost Recovery Guidelines (2014)

www.finance.gov.au

The Australian Government Guide to Regulation (2014)

www.cuttingredtape.gov.au

Australian Government Investigations Standards 2011

www.ag.gov.au

Australian Work Health and Safety Strategy 2012–2022

www.safeworkaustralia.gov.au

The Coercive Information-Gathering Powers of Government Agencies (2008)

www.arc.ag.gov.au

Commonwealth Fraud Control Framework 2014

www.ag.gov.au

Commonwealth Risk Management Policy (2014)

www.finance.gov.au

National Compliance and Enforcement Policy (2011)

www.safeworkaustralia.gov.au

Nationally Consistent Approval Framework for Workplace Rehabilitation Providers (2015)

www.hwca.org.au

Prosecution Policy of the Commonwealth

www.cdpp.gov.au

Regulator Performance Framework (2014)

www.cuttingredtape.gov.au