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Official Committee Hansard

SENATE

EMPLOYMENT, WORKPLACE RELATIONS, SMALL
BUSINESS AND EDUCATION LEGISLATION
COMMITTEE

**Reference: Occupational Health and Safety (Commonwealth
Employment) Amendment Bill 2000 and Safety, Rehabilitation and
Compensation and Other Legislation Amendment Bill 2000**

WEDNESDAY, 4 APRIL 2001

CANBERRA

BY AUTHORITY OF THE SENATE

WITNESSES

**ANDERSON, Mr Alexander John Cairns, Assistant Secretary, Legal Policy
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**HARTLEY, Dr Margaret, Director, National Industrial Chemicals Notification
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SENATE
EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS
AND EDUCATION LEGISLATION COMMITTEE

Wednesday, 4 April 2001

Members: Senator Tierney (*Chair*), Senator Carr (*Deputy Chair*), Senators Brandis, Collins, Ferris and Stott Despoja

Participating members: Senators Abetz, Allison, Boswell, Brown, Buckland, Calvert, George Campbell, Chapman, Coonan, Cooney, Crane, Crossin, Crowley, Eggleston, Faulkner, Ferguson, Gibbs, Gibson, Harradine, Harris, Hogg, Hutchins, Knowles, Lightfoot, Ludwig, Lundy, Mackay, Mason, McGauran, O'Brien, Payne, Schacht and Watson

Senators in attendance: Senators Carr, Collins, Murray and Tierney

Terms of reference for the inquiry:

Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2000 and Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000

Committee met at 12.48 p.m.

ANDERSON, Mr Alexander John Cairns, Assistant Secretary, Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

ROWLING, Mr John, Assistant Secretary, Safety and Compensation Policy Branch, Department of Employment, Workplace Relations and Small Business

HARTLEY, Dr Margaret, Director, National Industrial Chemicals Notification and Assessment Scheme

LEAHY, Mr Barry, Chief Executive Officer, Comcare

CHAIR—The committee is resuming its hearing into the provisions of the Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2000 and the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000. The committee received yesterday from the minister the government's proposed amendments to the licensing provisions of the SRC bill. The bill provides for ministerial directions to operate in conjunction with the proposed new provisions by providing guidance to the SRC Commission on such matters as the criteria for granting licences. Members have copies of this draft direction.

I welcome officers from the Department of Employment, Workplace Relations and Small Business and from agencies within the portfolio. The committee has before it submission No. 6. Are there any changes that you wish to make?

Mr Rowling—No.

CHAIR—I now invite you to make a brief opening statement, and then we will go to questions.

Mr Leahy—Chair, I come bearing gifts following the last hearing where there were a number of questions about reports that were presented to the SRCC and also SRCC

consideration of the amendments that are contained in these pieces of legislation. The first point I should make is that the government in developing this legislation and other legislation obviously takes into account a range of factors. One of the major factors obviously has been the views of SRCC.

We have examined the minutes of the relevant meetings of SRCC, which go back at least as far as 1993. Rather than provide the committee with the minutes, because we simply have not had an opportunity to check with all of the members of the commission as to whether or not they want the minutes released as the minutes reveal the positions of particular parties, we have tried to provide you with a summary of the SRCC's consideration of the legislation including, where appropriate, the views of those parties who were antipathetic to the particular changes that are being proposed in the legislation.

I have a couple of documents, one on the SRCOLA amendments and the other on the OHSCE amendments. In addition, we have spoken to the chair of the commission and he has agreed, as has Telstra, to provide you with a copy of the Corrs Chambers Westgarth 1998 report on the review of occupational health and safety and the rehabilitation legislation administrative arrangements. We have all of these documents here for you.

Senator JACINTA COLLINS—Thank you.

Mr Leahy—That is probably about all I need to say by way of introduction.

CHAIR—We will move to questions.

Senator JACINTA COLLINS—Obviously we might have some further questions as a result of the review of the documentation. I would propose that we try to do that on notice once we have had an opportunity to look at them, and similarly in relation to the minister's draft directions that I have also received today.

CHAIR—Yes, fine.

Senator CARR—I wondered if we can get copies of these documents.

Mr Leahy—They are here if you want them.

CHAIR—Just before you start, I remind you that we have a brief time for this hearing. We will go another five minutes later than 1.15 p.m. because of our lateness in start. We will be finishing right on 1.20.

Senator JACINTA COLLINS—Mr Leahy, in relation to the issue that I have raised with you in the past in terms of a private briefing that the minister offered us, I should indicate that he has offered a further briefing on these directions, if we require it, in relation to part-time workers in the Commonwealth and other income. Rather than my going into the full detail of it, are you able to respond on that issue?

Mr Leahy—Yes. At the moment there is provision within the act, which is not proposed to be changed, which allows any income that part timers earn in both Commonwealth employment and outside employment to be taken into account in calculating their normal weekly earnings. The effect of the amendment that is proposed in the SRCOLA legislation will be nil in terms of part-time employees.

Senator JACINTA COLLINS—Can I take it that, rather than us wasting the committee's time in the absolute detail of that, perhaps on notice you could give me the references to the clauses. I can then look through that when we have more time.

Mr Leahy—Sure.

Senator JACINTA COLLINS—Still on the OH&S bill, is there any basis for the concern of overrepresentation of health and safety committees?

Mr Leahy—This goes to the issue about changing the number of committees that might be available in particular organisations—I think there are a couple of points to make. Firstly, there is nothing in the legislation at the moment nor is there anything in the proposed legislation that would inhibit employers and employees from agreeing to a greater number of committees than those prescribed in the legislation. The legislation prescribes a minimum number of committees and, in one way at least, the number of committees is more certain than is currently the case because at the moment, as you would be aware, the legislation requires that committees be established only when requested by the involved union or by employees. The new legislation would provide that they must be established. The legislation attempts to set a minimum standard but allows flexibility for a greater number of committees than is provided for in that minimum standard.

Senator JACINTA COLLINS—But at the moment when requested by employees, Mr Leahy—correct me if I am wrong—the minimum standard is far greater than the minimum standard proposed here?

Mr Leahy—It is; that is correct.

Senator JACINTA COLLINS—Is there any indication—the unions said otherwise from their experience—that, as a rationale for this minimum standard, there has been overrepresentation of committees in public sector workplaces?

Mr Leahy—The government's position is simply that we are seeking to establish a minimum standard and that there would be capacity for the employer and the employees to agree to a level of committees well beyond that minimum standard. As to whether or not there is a view that there is current overrepresentation, the government obviously thinks that that is a potential with the current arrangements because it is seeking to allow for a more streamlined process.

Senator JACINTA COLLINS—I presume that the government feels there is a potential; I am asking what is the reality from the government's experience with the current schema to date.

Mr Leahy—I do not know that we have done any detailed research on that.

Mr Rowling—I am not aware of that either.

Senator JACINTA COLLINS—So currently, from the government's perspective, there is no basis for arguing that the current minimum standard—albeit as requested—needs to be further diminished.

Mr Leahy—But the thrust of the legislation is to establish minimum standards beyond which, by agreement, employers and employees can establish whatever is necessary. There is nothing in this legislation which forces a lesser level of representation. It allows for, where sensible, a lesser level of representation but it does not inflict or impose on employers, unions and employees a greater level of representation if it is not required.

Senator JACINTA COLLINS—But it establishes the potential, regardless of what employees in a workplace request, for there to be, for instance, one committee for Telstra in Victoria?

Mr Leahy—That is correct.

Senator JACINTA COLLINS—Thank you. The minister's recent letter to us reads:

The aim of the amendments is to simplify the current arrangements which are unnecessarily complex and prescriptive.

At the moment you cannot explain to the committee why the current regime of health and safety committees is prescriptive. You cannot give us indications of overrepresentation there.

Mr Leahy—But I have indicated to you the rationale of the government in putting forward the legislation—

Senator JACINTA COLLINS—Yes, I understand the policy rationale.

Mr Leahy—That is sufficient explanation, I would have thought, Senator.

Senator JACINTA COLLINS—We will have to agree to differ on that. The next point is in relation to consultation. From experience with—what was affirmative action and is now equal opportunity legislation—

Mr Leahy—Women in the workplace.

Senator JACINTA COLLINS—There have been some concerns that the introduction of less prescription there led to a situation where employers do not need to report consultation. What prescription exists in this bill in relation to the manner of consultation—none at all or—

Mr Leahy—The new legislation actually places an onus on employers to conduct genuine consultations with their employees in terms of developing safety management arrangements, and I could point you to the new paragraph 16(2)(d).

Senator JACINTA COLLINS—What page are we on?

Mr Leahy—It is item 27, which is on page—

Mr Anderson—Page 8 of the bill.

Mr Leahy—There is a compulsion on employers to consult with employees in there. If employers do not consult, then they are in breach of their duty of care and can be pursued by Comcare.

Senator JACINTA COLLINS—Okay. So this is more prescriptive than what does exist in the equal employment opportunity arrangement, as I would understand. But are they required to report in any way the nature of consultation? How does the SRCC become aware that consultation is or is not occurring at an appropriate level?

Mr Leahy—There would be two ways that the commission or Comcare would become aware: one would be by way of complaint; and the other is that Comcare has a program of planned investigations which covers all agencies—that covers about 20 per cent of the agencies each year—and the safety management arrangements would be examined as part of those planned investigations. So if we, through that process, discovered that there was some breach of that new part of the legislation, then we would pursue the employer because they are in breach of the act.

Senator JACINTA COLLINS—But to what level do they need to indicate consultation? Did they tick a box in a plan that says ‘we have consulted’ or must they detail the nature of the consultation that has occurred?

Mr Leahy—That is not provided for in the act. It may be that that is something that could be provided for by guidelines from SRCC. That is a matter that SRCC will consider most likely at its next meeting.

Senator JACINTA COLLINS—When is that meeting?

Mr Leahy—It is 23 April.

Senator JACINTA COLLINS—So we could on notice be in a position to review where the SRCC is on guidelines before we report?

Mr Leahy—Yes, I think that is probably right.

Senator JACINTA COLLINS—If I can put that issue on notice. An additional concern we had was the number of issues that get moved into guidelines and that we are not in the position to appraise at this stage.

Mr Anderson—Another avenue that would be available where employees or particularly where a health and safety representative has concerns about the adequacy of consultation is that it would be possible for a provisional improvement notice to be given, which could go to the concern as to whether there has been compliance with the employer's duty in that particular avenue of consultation. That is a way of triggering involvement by Comcare if the matter is not rectified to the representative's satisfaction. It is not only dependent on the planned investigation program.

Senator JACINTA COLLINS—That is by nature of the complaint also in one sense?

Mr Anderson—Yes.

Mr Leahy—The other thing that must be provided for in the new safety management arrangements is a dispute resolution mechanism. That is a further capacity for ensuring consultation at the workplace.

Senator JACINTA COLLINS—On the last occasion we became bogged down on the issue of workplace association representatives and whether the existence of one could preclude a request by a union member to be represented by their union in relation to health and safety matters. Can you advise us further on that, Mr Leahy?

Mr Leahy—The policy intent behind the legislation is to enable choice. If an employee wanted his or her union to represent them, then that is what the legislation is intended to effect. However, following the discussion in the committee last time around, I believe the department has approached AGS for further legal advice. I do not know whether we have received that yet. Have we?

Mr Anderson—My analysis of the legislation is still in line with the interpretation that I gave to the committee at its previous hearing, but the policy intent is as Mr Leahy has just mentioned. Whether the provision as drafted correctly reflects the government's intention is a matter that we have under consideration.

Senator JACINTA COLLINS—So this is an issue that may require amendment.

Mr Anderson—That is possible.

Senator JACINTA COLLINS—Could you take on notice, and I understand that you might need to seek the minister's advice on this, as to whether we can receive the Attorney-General's advice as well?

Mr Anderson—I can take that on notice, Senator.

Senator JACINTA COLLINS—Another issue we touched on was with respect to the rationale for amendments regarding Crown immunity. Mr Leahy, did you have anything further to add on that issue?

Mr Leahy—I think you have to look at the proposed legislation as a package. While the bill removes shield of the Crown for employees, as you know it does not remove it from the

employers. The removal from the employees is consistent with what occurs in all the bodies corporate in Commonwealth employment—all the GBEs, et cetera. However, in the Commonwealth, of course, employees who, in pursuit of their duties, take reasonable action and act in a reasonable manner would receive some indemnity for any legal costs that might occur as a result of any case that was brought before them. When I use the word ‘employees’, I am referring to all levels of employees and officers of Commonwealth departments.

There are a couple of things I would like to say about the non-removal of the shield of the Crown from the organisations. Firstly, it would be the view of the government—and this is a view that is held across all legislation—that it is a bit of a nonsense for the Commonwealth to pursue the Commonwealth in respect of the Commonwealth’s breach of the Commonwealth’s legislation. It would be fiscally irresponsible to start with. However, under the new legislation with the inclusion of enforceable remedies, injunctions and remedial orders, it would be possible for Commonwealth bodies such as departments to have such enforceable undertakings and also to have injunctions and remedial orders from the courts. Through these processes we are trying to ensure that the Commonwealth agencies act in a manner which prevents injuries rather than acting in a manner that takes the stick to them after the injuries have occurred, particularly given that taking the stick to them is merely the Commonwealth pursuing the Commonwealth.

Senator JACINTA COLLINS—The reason we raised this issue, and I think this occurred in some of the evidence as well, is the differential between the approach here at Commonwealth level as opposed to the approach that has been taken on Crown immunity in other jurisdictions. Is there a rationale for why the bar was set as it was in this case as distinct from other jurisdictions?

Mr Leahy—We can provide you with a table of what occurs in other jurisdictions. I will just take advice on this from one of my colleagues but I do not think it is the case that in all other jurisdictions the organisations have had the bar lifted.

Senator JACINTA COLLINS—I am sorry, I do not mean the bar lifted completely. It is set at different stages.

Mr Leahy—In any event, it is a common position across all Commonwealth legislation that the Commonwealth not pursue the Commonwealth for the reasons that I have mentioned. I will just check on other jurisdictions. Perhaps Mr Anderson could assist here too.

Senator JACINTA COLLINS—He was here on the last occasion so at least has the benefit of being involved in the discussion on the last occasion, unlike you.

Mr Anderson—I have the impression that some of the concern on this may derive from the ACTU’s submission to this inquiry, which I have now had the opportunity to consider. It refers in a number of places to actions taken in Victoria and there has been some publicity about endeavours by the Victorian government to address what is referred to as industrial manslaughter. But I do not consider that there is any inconsistency between what the Commonwealth government is proposing and what is in place in Victoria.

One aspect of that is the provision in the Victorian Crimes Act for prosecution for an action that involves conduct endangering a person or a person’s life. This offence is part of the substantive criminal law in Victoria; it is not something specific to occupational health and safety and, as part of the general criminal law, that prohibition would already apply to Commonwealth officers. Commonwealth officers could be charged under that state law if their actions in the workplace or elsewhere came within the terms of the offence. But the

nature of that provision in the Victorian Crimes Act is not such as to apply to the Crown in right of Victoria but rather to persons who commit that offence.

The other specific reference to Victoria is the approach taken in the Victorian Occupational Health and Safety Act where there are penalties directed at officers of organisations rather than individuals. In enforcement actions, particularly prosecutions depending on intent, this is a matter of how intent of a body corporate should be found—which mental states of which officers or agents of a corporation should be examined. There is provision already in the Occupational Health and Safety (Commonwealth Employment) Act for using the conduct of an officer or employee of a GBE to discern the liability of the GBE and, from 15 December this year, the criminal code will expand the ways in which liability of a body corporate can be determined.

The Victorian legislation goes further than the Criminal Code: in cases where an offence is proved to have been committed by a body corporate with the consent or connivance of an individual, then that officer or person is also guilty of the offence. That is something different from attaching liability to the body corporate per se; it is expanding the range of people that can be drawn in. The civil enforcement approach, which is the emphasis of the Commonwealth bill, has parallel provisions. The positive measures for injunctions, remedial orders and so forth can be directed not only to an organisation but also to individuals involved in any misconduct by an organisation. The Commonwealth expects that to be effective.

Senator JACINTA COLLINS—So what you are suggesting is that the Criminal Code does not generate the same problems that the Victorian legislation does in relation to industrial manslaughter and that then avoids the concerns that the ACTU has with respect to the situation of Victoria.

Mr Anderson—I do not consider there is any ground for concern about less adequate enforcement of the duties in the Commonwealth legislation as it is proposed. I do not consider that the measures in the Victorian legislation fundamentally change—they do not go to the scope for an emanation of the Crown to be prosecuted and they do not indicate there is a gap in the Commonwealth legislation. The issues addressed by those parts of the Victorian legislation that have been mentioned are addressed by other elements of the Commonwealth legislation.

Senator JACINTA COLLINS—Since I am not a lawyer, I will review what you have provided us with and, if I have further questions, I will come back with questions on notice on that issue. Can you provide us with the policy rationale for the changes to the Industrial Chemicals (Notification and Assessment) Act?

Dr Hartley—Thanks, Senator. The National Industrial Chemicals Notification and Assessment Scheme, which I will call NICNAS for short, operates under a policy to protect the public, workers and the environment from chemical risk and we do that through ensuring best regulatory practice in terms of promoting safe chemical use. We are also looking to reduce unnecessary regulatory burden in doing that regulatory practice. For example, the proposed changes that we have under section 5 of the IC(NA) Act, which is on page three of the SRCOLA bill for your reference, which addresses certain polyesters to be considered as polymers of low concern, arise from such an approach because we have based our considerations on the scientific experience both within NICNAS over the past years and also looking at overseas regulatory agencies. This has shown that certain polyesters are relatively benign and that in the past they were overregulated compared with their potential risk. Our reasoning is to allow certain polyesters to be considered as polymers of low concern, reflecting that new technology in polymer chemistry starts to remove harmful organic

solvents that have adverse impacts on the environment. These polyesters tend to have no organic solvents to them—they are more water based—so they are then providing enhanced protection of human health and environment. So the policy reason behind changing our regulatory stance against certain types of chemical molecules is really based on our scientific understanding as it evolves and also ensuring that we spend effort on regulation that is comparative with the risks that they pose.

Senator JACINTA COLLINS—I have not at this stage come across any controversy on these amendments. Is there any controversy in terms of the scientific assessment of these polymers?

Dr Hartley—I do not think there is any controversy. There is some difference of opinion between industry and the regulatory agencies elsewhere, including NICNAS, in that the US EPA have actually allowed an industry self-regulatory scheme on this matter. We have taken an approach more aligned with Canada and the European Union where we ascertain that setting up criteria to define these chemicals is one way of allowing us to have a look at data. We will still carry out a risk assessment but with reduced data needs. That is not the position that industry proposed, which was to deregulate the assessment of these chemicals completely. We still want to make sure that those criteria are used properly by the industry. Through scientific knowledge and understanding over the years we may well agree with them in the future but at the moment we reserve the right to still undertake a risk assessment, because that is addressing the public interest.

Senator JACINTA COLLINS—So the controversy, if any, exists at the end of deregulating further?

Dr Hartley—Yes, I think so.

Senator JACINTA COLLINS—I have a couple of questions about hearing loss, a couple of questions about stress claims and the questions that were taken on notice on the last occasion on a few other areas. I am happy to put these ones on notice as well. We can deal with them that way.

CHAIR—We also have a number of documents to be tabled. Is it the wish of the committee to table these documents? There being no objection, it so ordered. That concludes this hearing. I thank the officers for attending today.

Committee adjourned at 1.20 p.m.