SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

Inquiry into the
Work Health and Safety Bill 2011
and the
Work Health and Safety (Transitional and Consequential Provisions) Bill 2011

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The Australian Manufacturing Workers' Union welcomes the opportunity to comment on the Commonwealth WHS Bill.

The AMWU represents workers directly employed by the Federal government and the ACT Public Service. e.g Defence Department and workers employed by self insurers e.g. Thales.

This brief comment is discussed under the following headings:

1. Proposed amendments to the Safety, Rehabilitation and Compensation Act
2. Overarching issue of coverage
3. Issues specific to the Commonwealth and oversights in the Model Work Health and Safety Act, post endorsement by WRMC
4. Consultative arrangements
5. Prosecutions in the Commonwealth Work Health and Safety Bill
6. AMWU critique of the Model Work Health and Safety Act.

1. Proposed Amendments to the Safety, Rehabilitation and Compensation Act

The AMWU supports the proposed inclusion of 104 (2A) in the SRC Act as this adds additional criteria (on OHS past performance) for the SRCC to consider before granting a licence.

2. Overarching Issue of Coverage

The AMWU strongly supports the transfer of OHS regulation of Comcare licensees to the relevant State and Territory jurisdiction. As submitted by the ACTU, the AMWU does not understand why this transfer will not apply to all licensees. The impost of OHS regulation was the significant reason for licensees to be covered by the Commonwealth rather than the relevant State and Territory jurisdiction. That impost will be removed and therefore there is no reason to stay within the Commonwealth system. This long term demand of the private sector has been realised and as a consequence the Commonwealth sector should only cover those employed by the Commonwealth government.

3. Omissions in the Commonwealth Bill

Since the drafting of the Model WHS Act, a number of errors/oversights have been raised at meetings of SafeWork Australia and with Senator Evans, Minister for Tertiary Education, Skill Jobs and Workplace Relations.

The Work Health and Safety Act needs to be consistent with the Fair Work Act. This has been the policy intent of WRMC and the Federal government, but it is does not appear to be reflected in the current Bill.

(a) To be consistent with the Fair Work Act, the words, *and photographic identification*, must be deleted in clause 125.

(b) To be consistent with the Fair Work Act, clause 110 to be amended to provide that in criminal proceedings for discriminatory conduct the prosecution will only bear the evidential burden of establishing the reason for the discriminatory conduct.

(c) To be consistent with the Fair Work Act, clause 113 to be amended so that in civil proceedings brought for alleged discriminatory conduct, the plaintiff would not have to prove the reason why the defendant engaged in the discriminatory conduct.

4. Consultative Arrangements

The AMWU believes that the introduction of the Model WHS Bill is an excellent opportunity to review and revise the current consultative arrangements which exist for Commonwealth employees and employers i.e. this is an excellent time to provide for effective and properly representative arrangements. The AMWU believes that an example of best practice in this area is the South Australian Advisory Council. This approach could easily be modified for the Commonwealth, especially with the departure of the self insurers from the Comcare system back to the relevant State jurisdictions.

The AMWU supports the retention of Section 73A in the SRCC Act in conjunction with the provisions of Schedule 2 in the South Australian Model WHS Bill which should be adopted for Commonwealth (see Appendix for extract Schedule 2 SA Bill and SRCC ACT section 73A). The Commonwealth WHS Act needs to be overseen by a proper tripartite committee, which includes employers (inclusive of the Federal government as an employer), unions and health and safety experts. The Commonwealth should enter into consultation with employers and unions on how best to create a representative consultative forum.

5. Prosecutions under the Model WHS Bill

The AMWU supports the amendment of Section 230 as is the NSW Work Health and Safety Act 2011 which has been recently passed by the NSW Parliament (see relevant extract in Appendix). The AMWU has consistently supported the right of unions to prosecute, as existed under the previous NSW OHS Act 2004 and therefore supports the inclusion of this compromise policy position reflected in the current NSW WHS Act 2011.

6. AMWU Critique of the Model Work Health and Safety Act

The AMWU submits that the Model Work Health and Safety Act fails to meet terms of reference for the National Review into the OHS Model Law Review. The key components of these shortcomings are:

- Lack of clear commitment to tripartitism in the objects of the Model WHS Act. Tripartitism has a long history in Australia and is widely recognised as being advantageous to improving OHS standards. It is recognised by the United Nations International Labor Organisation (ILO) through Occupational Safety and Health Convention, 1981 No.155[1]; a convention Australia has ratified. In fact, tripartism underpins the whole structure of the ILO. A strong and robust health and safety framework must be built on a tripartite approach to health and safety.

- Lack of general risk management obligation in the Model WHS Act. The object of ensuring health and safety is to eliminate the hazard, and if that is not possible, control it and require the duty holder to be proactive utilising a systematic process as distinct from an ad hoc reactive response. The Commonwealth WHS Bill WHS Act must be amended by the insertion of Model WHS Regulations 19, 20, 21 and 22 into the Bill. As currently worded Commonwealth WHS Bill and regulations limit the systematic approach to risk management to those risks in the regulations. This is short sighted and fails to adopt a universally accepted approach to the control of all work related health and safety risks. Additionally one of the significant costs in the Comcare system are the poor health outcomes caused by exposure to psychosocial risk factors. Mandating of a comprehensive risk management approach for ALL work related risks to health would be a very useful regulatory tool in addressing these risks.

- Limitation of rights of Health and Safety Representatives. The Model WHS Act limits the right of HSR to issue a Provisional Improvement Notice and a cease work to after the HSR have received training. This is a clear diminution of rights currently enjoyed by Commonwealth HSRs. There is no justification for such a limitation and there has been no evidence produced to support this policy decision of WRMC.

- Removal of the clear right of unions to initiate a prosecution. See comment above.

- The AMWU is concerned that gross negligence is not included as one of the tests for a Category 1 offence in the WHS Bill. A test of recklessness requires foresight of the likelihood of an outcome of a breach of a duty. To be guilty of a criminal offence where recklessness is an element, it must be established that the accused is subjectively aware of the substantial risks, there is a probable chance the consequences will occur and the accused carries out the breach, despite being aware of the risks. The test for recklessness is more difficult to establish than a test for gross negligence. Gross negligence does not require subjective intent to be proved, and the accused is judged against the standard of the hypothetical reasonable person. *A test for gross negligence is more suitable in the context of workplace health and safety, where much effort is put into establishing appropriate standards of safety and enforcing those standards when duty holders fall short of meeting those duties.*

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[1] ILO Occupational Safety and Health Convention, 1981 No.155, Article 4 & Article 15

- HSR access to training:
  - Currently in Victoria, a request from a HSR to attend a course must not be made less than 14 days before the course is due to start. The Bill extends this period out to a maximum of 3 months. The current Victorian OHS Act provisions need to be adopted in the Commonwealth

  - The minimum number of training days a HSR is entitled to current attend in South Australia is an initial course of 5 days and refresher training on 5 days in year 2 and 5 days in year 3

- Unduly harsh penalties on HSRs:
  - Currently no jurisdiction that allows the regulator to make application for the disqualification of a HSR. No evidence has been provided that justifies this policy position by WRMC. Section.65(2)(b) of the Bill should be deleted

  - Section 65 (3) of the Bill provides that the Tribunal may disqualify a HSR for a specified period or permanently. The current Commonwealth Occupational Health and Safety Act 1991 at s.32 provide that a HSR can be disqualified for a specified period not exceeding 5 years. Section 65(3) should be amended to conform with the maximum 5 year disqualification period detailed in the current Commonwealth Act.

APPENDIX

SAFETY, REHABILITATION AND COMPENSATION ACT 1988 - SECT 73A Guidelines by Commission

(1) The Commission may prepare and issue to the Chief Executive Officer written general policy guidelines in relation to the operation of this Act or any other Act (except the *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005*) to the extent that the Act confers functions or powers on Comcare.

(2) The Commission may prepare and issue to the principal officer of a licensee written general policy guidelines in relation to the operation of this Act to the extent that the Act confers functions or powers on the licensee.

(3) The Commission must not issue guidelines that are inconsistent with any directions under section 73 of this Act or section 12A of the *Occupational Health and Safety Act.*

(4) Any guidelines that are inconsistent with a direction of the kind referred to in subsection (3) have no effect to the extent of the inconsistency.

(5) Comcare must comply with any guidelines issued and in force under subsection (1).

(6) A licensee and any person acting on its behalf must comply with any guidelines issued and in force under subsection (2).

Edited extract of South Australian Advisory Council
Division 2—Membership 2—Composition of the Advisory Council

(1) The Advisory Council consists of 11 members of whom—
- (a) will be appointed by the Governor and of these—
  - (i) 1 will be the presiding member appointed on the recommendation of the Minister; and
  - (ii) 4 will be persons who, in the opinion of the Minister, are suitable to represent the interests of employers and 4 will be persons who, in the opinion of the Minister, are suitable to represent the interests of workers
- (b) 1 will be the Executive Director (*ex officio*); and
- (c) 1 will be the Chief Executive of WorkCover (*ex officio*).

Division 4—Functions and powers 8—Functions of the Advisory Council

(1) The functions of the Advisory Council are—
- (a) to keep the administration and enforcement of this Act, and any other legislation relevant to occupational health, safety and welfare, under review, and to make recommendations for change as the Advisory Council thinks fit; and
- (b) to advise the Minister (on its own initiative or at the request of the Minister) on—
  - (i) legislation, regulations, codes, standards and policies relevant to occupational health, safety and welfare; and
  - (ii) national and international developments in the field of occupational health, safety and welfare; and
  - (iii) the establishment of public inquiries and legislative and other reviews concerning issues associated with occupational health, safety and welfare; and

(c) to provide a high level forum for ensuring consultation and co-operation between WorkCover, associations representing the interests of employees or employers, industry associations, Government agencies and other public authorities, and other interested persons or bodies, in relation to occupational health, safety or welfare matters; and

(d) to prepare, adopt, promote or endorse prevention strategies, standards, codes, guidelines or guidance notes, and to recommend practices, to assist people in connection with occupational health, safety and welfare; and

(e) to promote education and training with respect to occupational health, safety and welfare, to develop, support, accredit, approve or promote courses or programmes relating to occupational health, safety or welfare, and to accredit, approve or recognise education providers in the field of occupational health, safety and welfare; and

(f) to keep the provision of services relevant to occupational health, safety and welfare under review; and

(g) to collect, analyse and publish information and statistics relating to occupational health, safety or welfare; and

(h) to commission or sponsor research in relation to any matter relevant to occupational health, safety or welfare; and

(i) to initiate, co-ordinate or support projects and activities that promote public discussion or comment in relation to the development or operation of legislation, codes of practice and other material relevant to occupational health, safety or welfare; and

(j) to promote occupational health, safety or welfare programs, and to make recommendations with respect to the making of grants in support of projects and activities relevant to occupational health, safety or welfare; and

(k) to promote occupational health, safety and welfare within the broader community and to build the capacity and engagement of the community with respect to occupational health, safety and welfare; and

(l) to consult and co-operate with relevant national, State and Territory authorities; and

(m) to report to the Minister on any matter referred to the Advisory Council by the Minister; and

(n) as it thinks fit, to consider any other matter relevant to occupational health, safety or welfare; and

(o) to carry out other functions assigned to the Advisory Council by or under this or any other Act.

(2) The Advisory Council may, with the approval of the Minister—

(a) perform functions conferred on the Advisory Council by or under a law of the Commonwealth, another State or a Territory;

(b) confer (subject to conditions or limitations (if any) specified by the Minister) functions of the Advisory Council on an authority established by or under a law of the Commonwealth, another State or a Territory.

(3) The Advisory Council should seek—

(a) to ensure that South Australia takes advantage of initiatives that are recognised as being at the forefront of occupational health, safety and welfare practices; and

(b) insofar as to do so is in the best interests of the State, to achieve a high level of consistency between occupational health, safety and welfare standards and requirements under this Act and corresponding standards and requirements under the laws of the Commonwealth, the other States and the Territories.

(4) The Advisory Council should, as far as reasonably practicable, ensure that information provided for use in the workplace is in a language and form appropriate for those expected to make use of it.

(5) If the Minister receives a recommendation from the Advisory Council under this Act, the Minister should, within 2 months, respond in writing to the Advisory Council in 10 relation to the recommendation.

(6) The Advisory Council may establish such committees and subcommittees as it thinks fit (which may, but need not, consist of, or include, members of the Advisory Council) to advise it on, or to assist it with respect to, any aspect of its functions under this Act.

(7) The Advisory Council has the power to do anything necessary, expedient or incidental to the performance of its functions.

NEW SOUTH WALES: Work Health and Safety Act 2011

230 Prosecutions

(1) Subject to subsection (4), proceedings for an offence against this Act may only be brought by:
   (a) the regulator, or
   (b) an inspector with the written authorisation of the regulator (either generally or in a particular case), or
   (c) the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate, but only as permitted by subsection (3) if the offence concerned is a Category 1 offence or a Category 2 offence.

(2) An authorisation under subsection (1) (b) is sufficient authority to continue proceedings in any case where the court amends the charge, warrant or summons.

(3) The secretary of an industrial organisation of employees can bring proceedings for a Category 1 offence or a Category 2 offence only if the regulator has (after referral of the matter to the regulator and the Director of Public Prosecutions under section 231) declined to follow the advice of the Director of Public Prosecutions to bring the proceedings.

(4) The regulator must issue, and publish on the regulator's website, general guidelines for or in relation to:
   (a) the prosecution of offences under this Act, and
   (b) the acceptance of WHS undertakings under this Act.

(5) Nothing in this section affects the ability of the Director of Public Prosecutions to bring proceedings for an offence against this Act.

(6) The court before which proceedings for an offence against this Act are brought by the secretary of an industrial organisation of employees must not direct that any portion of a fine or other penalty imposed in the proceedings be paid to the prosecutor (despite section 122 of the *Fines Act 1996*).