

16 August 2011

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Committee Secretary
Senate Standing Committees on Education,
Employment and Workplace Relations
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Dear Committee Secretary

Supplementary submission to Inquiry into Work Health and Safety Bill 2011

We write to supplement two aspects of our written submission to this Inquiry.

1) Discrimination provisions

We wish to clarify our submission on this point. We are concerned about the case where an employee makes a safety complaint; six months later the employer selects them for redundancy. The redundancy is overwhelmingly motivated by legitimate business objectives, but a small factor in the decision (say 10%) is the desire to punish the complainant.

Under the model Bill, the employer will not be liable for a civil penalty if they can prove that the illegitimate reason was not a 'substantial' reason for the decision.¹ However, we think that the Parliament should penalise decisions in which the illegitimate motive plays *any* real role.

This is the position under the *Fair Work Act*. An employer is liable to a civil penalty (for taking adverse action against an employee who has made a complaint) if the illegitimate reason is just one of the 'real' reasons for a decision² – even if it is only a small part of the overall reasons.³

We submit that the model Bill should be made consistent with the *Fair Work Act*. The Parliament should not tolerate employers bringing illegitimate reasons to bear in making decisions affecting workers.

2) Offences under the WHS Bill

While it is our preference that the model Bill create an express Category 1 offence for grossly negligent conduct exposing another to risk of serious injury or death, we note that if such conduct actually *causes* death or serious injury, this could constitute the crime of manslaughter (where death resulted), or else the crime of 'negligently causing serious injury', under State law.⁴

¹ Section 113(2).

² *Bowling v General Motors-Holden Pty Ltd* (1975) 8 ALR 197 (High Court); recently applied in *Barclay v Board of Bendigo Regional Institute of TAFE* [2011] FCAFC 14 (Full Federal Court)

³ *Fair Work Act 2009* (Cth) s 360.

⁴ See, eg, in Victoria, *Crimes Act* (Vic) s 5, 24.

At the very least, we submit that the Bill should make it clear that grossly negligent conduct may lead to liability under State criminal laws (despite the operation of section 109 of the *Constitution*).

Thank you for the opportunity to make this further submission.

Yours sincerely,

Michael Borowick
Assistant Secretary