

## Opposition Senators' Report

2.1 The Opposition does not support the changes proposed in the OHS and SRC Legislation Amendment Bill 2005. In its view the bill represents another attempt by the Government to spread its control of workplace related matters as far as possible into the private sector by broadening the application of the Occupational Health and Safety (OHS) Act beyond its current boundaries. Over fifteen thousand workers have already been removed from the state and territory OHS systems by businesses applying to self-insure under Comcare, a figure which is set to rise.

2.2 The Opposition acknowledges that one of the stated objectives of the bill is to implement the Government's response to the Productivity Commission's report into national workers' compensation and occupational health and safety frameworks.<sup>1</sup> Yet it is significant that the Productivity Commission's recommendation with respect to workers compensation, which were designed to encourage self-insurance applications under Comcare, faced overwhelming opposition from state governments.<sup>2</sup>

2.3 The most controversial provisions of the bill are those which intend to bring commercial corporations, including Commonwealth entities which have been privatised and private entities which compete with the Commonwealth, within the jurisdiction of the Commonwealth OHS Act. In this report, Opposition senators examine three issues arising from their examination of the bill:

- enforcement and compliance arrangements under the proposed changes;
- union involvement in occupational health and safety, especially in the light of other OHS amending legislation currently before the parliament; and
- whether any evidence exists to support the view that current state OHS laws create confusion for business and increase compliance costs, and that time and resources which would otherwise go to improving workers' the health and safety are currently being wasted.

### **Enforcement, self-regulation and voluntary compliance**

2.4 Opposition senators are concerned by evidence from unions that the proposed changes will result in a diminution of standards under the current Commonwealth OHS system. There is no requirement in the legislation for companies to work towards higher health and safety standards. As noted by the ACTU submission, the existing compliance obligations under the Commonwealth OHS Act are very poor compared with state and territory acts. As a consequence, business is encouraged to lower health and safety standards without fear of prosecution.<sup>3</sup> Opposition senators are concerned

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1 Department of Employment and Workplace Relations, *Submission 2*, p.2

2 Transport Workers' Union of Australia, *Submission 9*, p.3

3 Australian Council of Trade Unions, *Submission 4*, p.2

that a system which encourages self-regulation and voluntary compliance will create more confusion and result in less compliance in the workplace. This inevitably will translate into more injuries and deaths. It also runs counter to the objectives of the Australian Safety and Compensation Council's National OHS Strategy to reduce occupational injury by 40 per cent and fatalities by 20 per cent by 2012.<sup>4</sup>

2.5 This is particularly relevant to the building and construction industry. Construction workers have a significantly higher chance of being killed at work than workers in other industries, and the incidence of serious injury among construction workers is about 50 per cent higher than the average for all industries. Opposition senators are only too aware of the industry's poor OHS record which accounted for 13 per cent of all fatalities and 9.2 per cent of all injuries over the six year period from June 2002.<sup>5</sup> According to the CFMEU submission, the proposed legislation will compound these alarming figures because it is likely that many larger national contractors will take advantage of the opportunity to leave the state systems and enter a more lax Commonwealth regime.<sup>6</sup>

2.6 The committee heard compelling evidence from the ACTU that the Government's enforcement agency, the Safety, Rehabilitation and Compensation Commission, is dysfunctional in terms of policing the Commonwealth OHS Act. Comcare lacks appropriate dispute resolution procedures, which could have an adverse effect on private sector workers who may fall under the umbrella of the OHS and Comcare systems, many of whom, have less beneficial leave arrangements than their public sector counterparts.<sup>7</sup> The changes being proposed will further weaken Comcare's ability to ensure compliance with the law. The AMWU submission argued that extending coverage of the Commonwealth OHS Act to multi-state employers which self-insure under Comcare, will open up a 'safety gap' that will threaten the welfare of workers and their families. The submission correctly pointed out that the Commonwealth does not maintain a force of safety inspectors, relying instead on the services of state inspectors under a memorandum of understanding. Penalties on employers are substandard and rarely enforced.<sup>8</sup>

2.7 Opposition senators agree with the argument put forward by unions that the standards enforced by Comcare are not as stringent as those which operate under state jurisdictions. The National Council of Self Insurers told the committee that self insurance provides an extra layer scrutiny on top of inspectorate activity because companies voluntarily become involved in safety audits which are reported to the relevant state regulator.<sup>9</sup> Yet Opposition senators are not convinced by this argument.

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4 *ibid.*

5 *Committee Hansard*, 21 April 2006, p.23

6 CFMEU, *Submission 1*, para. 4

7 Transport Workers' Union of Australia, *Submission 9*, para. 2

8 Australian Manufacturing Workers' Union, *Submission 8*, para. 10

9 Mr Peter Harris, *National Council of Self Insurers*, *Committee Hansard*, 21 April 2006, p.6

The system of audit and compliance is not as effective as having inspectors on the ground. The proposals in this bill will do nothing to increase the level of workplace inspections and financial penalties which have already had a strong and positive influence on OHS practice and compliance.

2.8 Opposition senators draw attention to the final report of the Royal Commission into the Building and Construction Industry, which concluded in part:

There is persuasive support for the view that the extent of compliance with occupational and health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted and convicted and having a meaningful penalty imposed. The presence of occupational health and safety inspectors is important.<sup>10</sup>

2.9 It is in this context that that the Opposition notes the Commonwealth's extremely limited OHS enforcement capacity which, according to a recent comparative performance monitoring report for 2003-04, amounted to a paltry 16 inspectors and investigators and no prosecutions for a workforce of approximately 286,000 employees.<sup>11</sup> This is in stark contrast to the 301 and 236 active field inspectors operating in New South Wales and Victoria, respectively. While the Opposition is aware that Comcare currently has access to 268 investigators, the evidence from Victoria shows that Comcare has used that state's inspectorate on only a dozen occasions over the past five years.<sup>12</sup>

2.10 The following table from the monitoring report paints a stark picture of voluntary compliance under Comcare compared with Victoria's WorkSafe system.

**Table 1: Voluntary compliance<sup>13</sup>**

<b>2003-04</b>	<b>Comcare</b>	<b>Victoria's WorkSafe</b>
Number of safety inspectors/investigators	<b>16</b>	<b>236</b>
Workplace interventions	<b>245</b>	<b>43,719</b>
Safety prohibition and improvement notices	<b>17</b>	<b>12,492</b>
Prosecutions	<b>0</b>	<b>110</b>
Number of employees	<b>286,000</b>	<b>2,103,800</b>
Number of workplaces	<b>N/A</b>	<b>300,000 (approx)</b>

10 Australian Council of Trade Unions, *Submission 4*, p.5

11 Finance Sector Union of Australia, *Submission 6*, p.3

12 Mr Steve Mullins, Australian Council of Trade Unions, *Committee Hansard*, 21 April 2006, p.14

13 Reproduced from Australian Council of Trade Unions, *Submission 4*, p.3

2.11 The Opposition notes the strong concerns expressed by the Transport Workers' Union about the likely effect of the bill on enforcement in the transport industry:

It is difficult to see how, in the event that there is a significant shift from the State jurisdictions to the Federal jurisdiction, the Government has the resources currently to properly protect workers in this environment. Self-insured workplaces may (or may not) have an incentive to improve their workplace safety. But self-insurance is not enough. There must be some meaningful inspectorate services to ensure workplace safety.<sup>14</sup>

2.12 At the committee's public hearing, DEWR officers challenged the evidence presented by unions on a range of issues. They told the committee that before amendments were made to the Commonwealth OHS Act in 2004, only government business enterprises could be prosecuted for a breach of the act, and criminal prosecutions were the only sanction available. According to DEWR, this explains the small number of prosecutions under the act, which has since been rectified. Comcare can now bring civil proceedings against the Commonwealth and its authorities where there has been a breach of the act. DEWR argued that the enforcement regime under the OHS Act is now more robust than it used to be.<sup>15</sup>

2.13 When asked at a public hearing to provide evidence to support this position, neither DEWR nor Comcare could do so. Opposition senators find it unacceptable that DEWR made the claim that a lack of prosecutions does not reflect Comcare's unwillingness to prosecute, yet failed to provide any figures to support the assertion.

### **Union involvement and employee representation**

2.14 Opposition senators are concerned by the Government's continued ideological assault on the legitimate role of trade unions in representing the interests of employees in the workplace. They believe that an ideological stance on matters related to occupational health and safety is neither a constructive policy development nor a prudent one. They reject the Department's claim that the bill will increase opportunities for employees to be involved in OHS arrangements and preserve the current active role played by unions in enforcing compliance with OHS standards. At the committee's public hearing, the department was unable to demonstrate how the bill will provide for such guarantees. The submission from the RTBU made the valid point that, like the Government's claim regarding the compliance costs associated with state OHS laws, 'the department simply makes it and lets it hang'.<sup>16</sup>

2.15 The Government's intention with this and other amending legislation before the parliament is to remove union involvement from the preventative OHS institutions

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14 Transport Workers' union of Australia, *Submission 9*, para.32

15 Mr John Kovacic, Department of Employment and Workplace Relations, *Committee Hansard*, 21 April 2006, p.33

16 Australian Rail, Tram and Bus Industry Union, *Submission 7*, p.7

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which currently exist in the workplace. The Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005, which was introduced into the parliament in August 2005, will, if passed, remove the right of union representation in the workplace, reinforce managerial prerogative and remove all references to unions from the OHS Act. The bill will also seriously erode the rights and capacity of OHS representatives to represent their members at the workplace. Taken together, both OHS amendment bills seek to curtail the choice of employees in the public sector to be represented by a union in occupational health and safety matters.

2.16 The committee's attention was drawn to evidence from the United Kingdom which shows that unionised workplaces are generally safer than non-unionised workplaces.<sup>17</sup> The submission from the Australian Manufacturing Workers' Union (AMWU) argued that the steady reduction in the number of work-related injuries and deaths in the manufacturing industry is largely due to the role of unions in promoting healthy and safe workplaces and their ability to work cooperatively with employers and state regulatory bodies.<sup>18</sup>

### **Harmonising state and territory OHS laws**

2.17 An argument raised in support of the bill by the National Council of Self-Insurers (NCSI) and DEWR is that self-insurers who operate in more than one state currently face a significant administrative and cost burden because they have to meet different state regulatory and legislative requirements.<sup>19</sup> According to the NCSI, the bill will remove this impediment to business profitability and efficiency, and encourage and stimulate business growth and development. These, however, are familiar claims which could not be substantiated at a public hearing.<sup>20</sup> The Opposition believes that the level of confusion arising from different state laws is overstated, and claims of additional compliance costs to employers who have to comply with conflicting OHS state laws lack any evidentiary basis.

2.18 The Opposition is concerned by evidence from the CFMEU and the RTBU that the proposals in the bill will enable the absurd situation where employees performing the same job in one workplace are subject to two different OHS standards, one covered by Comcare and the other by a state jurisdiction.<sup>21</sup> This has the potential to introduce two systems working alongside each other in one organisation. In these circumstances, large businesses will be able to choose which legal system workers are covered by. Opposition senators believe this is a recipe for confusion, possible

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17 Mr Andrew Thomas, RTBU, *Committee Hansard*, 21 April 2006, p.28

18 Australian Manufacturing Workers' Union, *Submission 8*, para. 8

19 Self Insurers of South Australia, *Submission 5*, p.1

20 Department of Employment and Workplace Relations, *Submission 2*, p.3

21 Mr William Bodkin, CFMEU, *Committee Hansard*, 21 April 2006; Mr Andrew Thomas, RTBU, *Committee Hansard*, 21 April 2006, p.30

disputation and ultimately less safe workplaces. Mr Andrew Thomas from the RTBU told the committee:

...having two systems working side by side has the potential for total and utter confusion. I must say that in the 20 years that I have been in this union I have not heard employers complain about the fact they are covered by different occupational health and safety regimes in different states.<sup>22</sup>

2.19 The unions put forward a convincing argument at the committee's public hearing that the Government should be making an attempt to harmonise the different state and territory OHS laws and seek greater cooperation between the states and the Commonwealth on this issue. The current bill seeks to undermine and further fragment existing state OHS schemes and weaken the protection and enforcement available through state laws. The Opposition agrees with the view put forward by the Community and Public Sector Union that state legislatures are the most appropriate bodies to regulate workers' compensation and OHS because they are responsive to the circumstances and needs of the workers and industries in each state.<sup>23</sup>

## **Conclusion**

2.20 The Opposition believes the Government is attempting to rush this legislation through the parliament without consulting unions, employees or state and territory governments. It is concerned that the Government has failed to examine how the changes will affect OHS standards across the states and territories. Any proposals to amend the OHS Act should aim to improve occupational health and safety standards and reduce injuries, illness and fatalities as a first priority, not seek to reduce compliance obligations on business which is this bill's one and only objective.

2.21 When considered alongside other OHS legislation currently before the parliament, the Opposition is of the view that the Government is attempting to transform the OHS system by stealth and in ways that ultimately will be detrimental to the health and safety of workers. The Government is using this bill to pursue an extreme anti-union view, to the extent that it believes the trade union movement has no role to play in occupational health and safety matters in the workplace, to the clear disadvantage of working people and the community at large.

2.22 Opposition senators believe that the Government is adopting the wrong approach in its push to extend coverage of the Commonwealth OHS system. The Government should be encouraging cooperation between state and federal governments to achieve uniform OHS codes and standards and harmonised OHS laws. The unions raised serious concerns about the likely effect of the proposals on the health and safety of employees, especially workers in the finance sector, the building and construction industry and manufacturing. Voluntary compliance will not work in these industries. The proposals under consideration will have unfortunate

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22 Mr Andrew Thomas, RTBU, *Committee Hansard*, 21 April 2006, p.30

23 CPSU (SPSF Group), *Submission 3*, para. 1.6

consequences for enforcement and compliance and will strip back the rights and legal protections which workers currently enjoy under the Commonwealth OHS Act. Any proposal to change the law should strengthen compliance measures and increase financial and other penalties for breaches of the law, not weaken them as this bill seeks to do.

2.23 Opposition senators agree with the ACTU that any policy proposal which significantly extends coverage of the Commonwealth OHS Act should be referred to the Australian Law Reform Commission before legislation is considered by the parliament.

### **Recommendation 1**

**Opposition senators recommend that the bill be referred to the Australian Law Reform Commission to examine the bill's constitutional implications.**

### **Recommendation 2**

**Opposition senators recommend to the Senate that the bill in its current form be rejected.**

Senator Gavin Marshall  
Deputy Chair

