Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Inquiry into the provisions of the OHS and SRC Legislation Amendment Bill 2005

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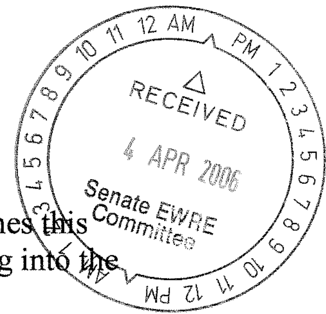

INTRODUCTION

The Australian Rail, Tram and Bus Industry Union (RTBU) welcomes this opportunity to make a submission to the Senate Committee inquiring into the provisions of the OHS and SRC Legislation Amendment Bill 2005.

The RTBU is a federally registered Union of employees with a membership of 33,000. As the title indicates our membership comprises employees employed by organizations involved in or in connection with the rail industry, the tramway industry and the bus industry. With the exception of the membership in the bus area where it is confined to the bus operations of certain governments, membership can be found in both the private and public sectors.

The objectives of the RTBU include to "improve, protect and foster the best interests of its members."[1] Occupational health and safety is an important area in this regard.

As understood and assuming it becomes law in its current form, the OHS and SRC Legislation Amendment Bill 2000 (the "Bill") presently before the Senate will have an immediate and direct impact on a certain group of RTBU members. It will also have a potential impact on many other members. The details of this impact and potential impact are explained below.

This is a major concern to the RTBU. For reasons set out in this submission it is our position that the passing of this Bill will result in a diminution in the occupational health and safety rights and protections of our members impacted by it. The same applies to the workforce in general where these provisions will apply.

To address our concerns, this submission commences by outlining the effect of the Bill. This is followed by a description of the application of the Bill to members of the RTBU. This will be followed by a critique of the impact of the Bill and the grounds given by the government in promoting the Bill. Finally a number of concluding observations are made.

It is the position of the RTBU that the Federal Government's case in support does not stand up to scrutiny and hides the real purpose. This Bill, in our view, is simply another attempt by the Federal Government to spread its control of workplace related matters as far as possible. Having done that, to the extent that any such legislation doesn't put workers and their unions in a straightjacket and let loose managerial prerogative, the Federal Government will endeavour to ensure that it does.

In that regard, this Bill stands on a continuum of attacks on the trade union movement in particular and workers in general.

This Bill is contrary to the interests of workers and positive OHS provisions. The RTBU calls on this Committee to recommend to the Senate that it reject the Bill.

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[1] Australian Rail, Tram and Bus Industry Union. RULES OF THE AUSTRALIAN RAIL, TRAM AND BU INDUSTRY UNION. Rule 5(a)

THE EFFECT OF THE BILL

Based on a reading of the Explanatory Memorandum[2] and the Bills Digest[3] the purpose of the Bill is twofold.

Of minor significance is the correcting of some drafting errors made to the legislation in 2001.

Of prime significance are provisions designed to broaden the application of the Occupational Health and Safety (Commonwealth Employment) Act 1991 (OHS (CE) Act). This occurs in two parts.

Firstly, the Bill intends to bring within the scope of the OHS (CE) Act a number of Commonwealth Authorities that, to date, have remained outside that Act.

Secondly and more controversially, the Bill intends to bring what would be regarded as private sector commercial corporations within its jurisdiction. The basis for this can be found in a decision by the federal government to permit Commonwealth entities that have been privatised or private entities who compete with either Commonwealth entities or privatised entities to become self-insured under the Safety, Rehabilitation and Compensation Act 1988.[4] Under the Bill, self-insured entities will become subject to the provisions of OHS (CE) Act and become known as" a non-Commonwealth licensee."[5]

As such, any corporation eligible to seek self-insurance for workers compensation under the Safety, Rehabilitation and Compensation Act 1988 will, if the Bill becomes law and upon being granted a licence to self-insure, come under the provisions of the OHS (CE) Act.

APPLICATION OF THE BILL TO MEMBERS OF THE RTBU

For the Bill, assuming it becomes law, to have any impact on members of the RTBU depends on whether there are any corporations that are currently self- insured under the Safety, Rehabilitation and Compensation Act 1988. Further it may depend on whether there are any commonwealth privatised corporations or corporations that can claim that they compete with a current or privatised commonwealth entity and the likelihood of them seek self-insurance under the federal scheme

Up until recent years, the federal government played a direct role in the operation of railways

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[2] House of Representatives. EXPLANATORY MEMORANDUM – OHS AND SRC LEGISLATION AMENDMENT BILL 2005. p.1

[3] Department of Parliamentary Services. BILLS DIGEST – OHS AND SRC LEGISLATION AMENDMENT BILL 2005. p.2

[4] Ibid pp. 2-3

[5] OHS and SRC LEGISLATION AMDNDMENT BILL 2005. Item 14.

From 1917 to the mid 1970's, the federal government owned and operated the Commonwealth Railways. The Commonwealth Railways owned the infrastructure from Port Augusta to Kalgoorlie and Port Augusta to Alice Springs and operated trains over that section of railway track. It also operated the Indian Pacific passenger train and the Ghan passenger train.

In the mid 1970's the Commonwealth Railways combined with the non-urban railways in South Australia and the freight operations in Tasmania. The result was the formation of the Australian National Railways Commission, owned and operated by the federal government.

In 1992, the federal government and the States of New South Wales and Victoria formed the National Rail Corporation. This corporation took control of the operation of the inter-state freight rail operations.

In the late 1990's the federal government privatised the Australian National Railways Commission.

In 2002, the federal government and the states of Victoria and New South Wales privatised the National Rail Corporation.

It follows that any of the private corporations who took over the operations of the Australian National Rail Commission or the National Rail Corporation are eligible to seek a licence to self-insure. Further, any corporation deemed to be a competitor of any of these corporations are eligible to seek a licence to self-insure.

It should also be noted that Pacific National (ACT) Pty. Ltd., the corporation that took over the National Rail Corporation is already self- insured under the Safety, Rehabilitation and Compensation Act 1998. However, at present, it applies the various OHS Acts in the various states/territories where it has operations. However, in the event the Bill becomes law, the employees of Pacific National (ACT) Pty. Ltd. will come under the provisions of the OHS (CE) Act

Without getting into any detail the application of the bill can mean that:

- Any rail operator competing with the Indian Pacific and/or Ghan
- Any interstate freight rail operator
- Any rail operator in Tasmania
- Any intra-state rail freight operator in South Australia

may apply for a licence to self-insure under the Safety, Rehabilitation and Compensation Act 1988 and, as a consequence be covered by the OHS (CE) Act.

There is also a potential for it to have an effect on certain infrastructure maintenance work as the privatisation of the Australian National Railways Commission included its infrastructure maintenance activities in South Australia and Tasmania.

THE IMPACT OF THE B ILL

The mere act of changing the application of legislation to any group of employees does not, ipso facto, mean that it will result in a negative impact or lead to diminution in the rights and protections currently enjoyed by the relevant group of employees. What matters is the actual impact of any such change.

In this case, the change of application means a transfer of coverage from state legislation to federal legislation. However, in practice, within the sphere of federal legislation impacting on workers, one consistent impact of any transfer from state to federal legislation under the current federal government that can be guaranteed is that it will be detrimental to the interests of workers. This Bill is no different.

Without going into any forensic exercise of comparison between the current federal and state OHS Acts, there are two examples that can be given to show that this Bill is detrimental to the interests of workers.

The first example can be seen with Occupational Health and Safety Representatives (OHS reps). It is noted that the federal government has a Bill[6] before Parliament to seriously erode the rights and capacity of OHS reps to represent their members at the workplace. The Bill seeks to remove the right of union representation and reinforce managerial prerogative.

A recent study by the Health and Safety Executive in the UK addressed the role and effectiveness of OHS reps.[7] The study set out six prerequisites for effective worker representation in occupational health and safety. They are:[8]

- A strong legislative steer
- Effective external inspection and control
- Demonstrable senior management commitment to both OHS and a participative approach and sufficient capacity to adopt and support participative OHS management
- Competent hazard/risk evaluation and control
- Effective autonomous worker representation at the workplace and external trade union support
- Consultation and communication between worker representatives and their constituencies

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[6] Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005

[7] Health and Safety Executive. The Role and Effectiveness of Safety Representatives in Influencing Workplace Health and Safety. RESEARCH REPORT NO. 363. Health and Safety Executive, Sudbury, 2005

[8] Ibid. p. 113

Whichever way it is looked at, it cannot be reasonably said that the working environment of the OHS rep as envisaged by the federal government meets these prerequisites.

With respect to the examples shown in this submission, none of these prerequisites can be met, regardless of any good will of certain managers.

It is the position of the federal government to undermine the role of a union in the workplace by whatever means available. One of those means is clearly through occupational health and safety. The government is endeavouring to remove union involvement in the workplace through the Bill.

There is no doubt that the various state laws, whilst not perfect, are much more sympathetic to the role of OHS representatives, in both spirit and intent, than is the federal government's position as set out in the Bill.

The second example can be seen in what is known as the "safety gap." The Australian Council of Trade Unions addresses this issue in its submission.[9] It reveals a disgraceful position when a comparison is done between the activities of Victoria's Worksafe and the federal government's Comcare, even when considered on a relative basis. The table in the ACTU submission cannot give any reasonable person confidence that their OHS rights and protections will not diminish upon a transfer to federal OHS legislation. In the important areas of numbers of investigators, workplace interventions, safety prohibition and improvement notices and prosecutions, the federal government falls abysmally behind Victoria.

Given these examples of the likely outcome of the application of the OHS (CE) Act, combined with the ideological predisposition of the current federal government towards workers and their unions, the RTBU is clearly of the view that it would be in the best interest of its members to remain in the relevant state OHS system.

THE FEDERAL GOVERNMENT'S POSITION

In the Regulation Impact Statement in the Explanatory Memorandum, the federal government states that the objective of the Bill is:

"To provide for optimum levels of health and safety by facilitating an integrated approach to workers' compensation and OHS across the Commonwealth scheme."[10]

This is a non sequitur. It does not follow that integrating workers compensation and OHS will provide an optimum level of health and safety. Indeed, in this case, the opposite is the effect. Whether one leads to the other depends upon the content of the legislation and unfortunately, the federal legislation is deficient in a number of respects.

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[9] Australian Council of Trade Unions. SUBMISSION TO THE INQUIRY INTO THE PROVISIONS OF THE OHS AND SRC LEGISLATION AMENDMENT BILL 2005. Australian Council of Trade Unions, Melbourne, pp.3-4

[10] Explanatory Memorandum, op. cit. p.iii

The federal government goes on to argue about the inefficiency of compliance costs where corporations are required to meet the OHS legislation in a number of states/territories.[11] The problem here is that the Commonwealth simply makes the assertion and lets it hang – at no point does the Commonwealth seek to substantiate its position. It follows that the Commonwealth makes no attempt to offset any so-called compliance costs by the benefits of a more effective state/territory OHS regime. The Commonwealth's assertion simply cannot be accepted at face value.

The federal government then goes on to say that it has consulted with "all Commonwealth authorities and private sector corporations which have obtained a licence under the SRC Act"[12]Apparently all licensees support the Bill.[13] The first thing that strikes you here is the narrowness of the consultation process. If any parties are likely to support such a change then the parties consulted are the ones. After all, they are already half way there and it's not hard to work out that an employer would prefer legislation that is more favourable to it that its alternative. It is noted that, not unsurprisingly, there was no consultation with unions, employees or state governments. In all, the consultative process could hardly be used to signify widespread support.

Finally, the Department of Employment and Workplace Relations asserts that the changes on the Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005 will "provide employees with expanded opportunities for direct involvement in the design and supervision of the occupational health and safety programs in their workplaces."[14] Like the Commonwealth's claim on compliance costs, the Department simply makes it and lets it hang. The Department for some reason doesn't see the need to meet the obvious retort – how? Further, when compared to the criteria devised by the UK Health and Safety Executive on the prerequisites for effective OHS representation, this statement by the Department can only be considered as absurd and mere propaganda.

In our submission the grounds in support of the Bill as laid out by the Commonwealth almost appear as afterthoughts – something to put up to avoid dealing with the real reason behind the Bill. As mentioned in the introduction, it is the RTBU's position that this is simply a further step along the path to providing a legislative framework in favour of employers and at the expense of employees.

SUMMARY AND CONCLUSION

The main impact of this Bill is to broaden the application of the OHS (CE) Act beyond its current boundary and, in particular, into the private sector. Thus the first observation is that it involves an expansion of the Commonwealth's role in OHS.

The second observation is that in relative terms to the states/territories the role of the Commonwealth in OHS is insufficient and unsatisfactory.

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[11] Ibid. p. iv

[12] Ibid p. viii

[13] loc. it.

[14] Department of Employment and Industrial Relations SUBMISSION TO THE INQUIRY INTO THE PROVISIONS OF THE OHS AND SRC LEGISLATION AMENDMENT BILL 2005. p, 3

The third observation is that the Commonwealth's grounds for putting this legislation forward are unsustainable.

The final observation is that the role of the Commonwealth in workplace relations is one that has seen it pursue an agenda of significantly diminishing the rights and entitlements of workers.

Putting these observations together, it is clear that this Bill is contrary to the interests of workers that it cannot assist in improving health and safety in the workplace and for those reasons must be opposed.

The RTBU repeats its call in the introduction for this Committee to recommend that the Senate reject the Bill.

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