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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Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary,

INQUIRY INTO THE OHS AND SRC LEGISLATION AMENDMENT BILL 2006

Please find following a copy of the Union's submissions to the Committee in the above Inquiry.

The Union welcomes the opportunity to make submissions to the Committee, and we apologise for the late lodgement of these submissions.

If you have any questions or comments please contact Linton Duffin on (03) 8645 3333 or at linton.duffin@twu.com.au.

Yours sincerely,

JOHN ALLAN
FEDERAL SECRETARY

cc:

SUBMISSIONS OF THE TRANSPORT WORKERS' UNION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS, AND EDUCATION LEGISLATION COMMITTEE INTO THE PROVISIONS OF THE OHS AND SRC LEGISLATION AMENDMENT BILL 2005

1. The Transport Workers' Union ("the TWU") supports the submissions of the ACTU in relation to the provisions of the OHS and SRC Legislation Amendment Bill 2005 ("the Bill").

2. The TWU adopts the submissions of the ACTU in total and believes that these aptly describe the circumstances relating to the introduction of the Bill and the reasons why the Senate Committee should not support the Bill.

3. The TWU notes that its members appear to be amongst those workers who are most likely to be transferred from the State jurisdictions to the Federal jurisdiction as a result of applications by employers. We are therefore particularly concerned with this potential movement and the potential for worse safety outcomes and/or worse benefits where a workplace accident has occurred.

4. The shift from the State jurisdiction to the Federal jurisdiction has significant ramifications for our members. Accordingly this submission touches on some of the problems associated with the transfer as well as the specifics associated with the Bill.

5. In particular the TWU is concerned with:
   i) the generally less favourable benefits to seriously injured workers under the Comcare scheme as opposed to most State schemes;
   ii) the generally less developed enforcement mechanisms in the Commonwealth OHS Act and the inspectorate ability under Commonwealth legislation;
   iii) the difficulty associated with using OH&S and workers compensation schemes designed for the public sector vis a vis those applied in the private sector;
   iv) the ideological basis of legislative change by removing the role unions play in the protection of workers under OHS laws as promulgated by the Commonwealth parliament rather than the existing State jurisdictions;
   v) the centralisation of OHS laws and the consequent reduction in the capacity for Federalism to develop benefits associated with matters in a State and across States.

BACKGROUND TO THE BILL

6. The TWU notes the genesis of this Bill is the Productivity Commission inquiry into a National Workers' Compensation and Occupational Health and Safety Frameworks.

7. The Productivity Commission program was one of taking over the State systems by stealth. We note that the Commission recommended in relation to OHS

> *that a progressively expanded number of employers could apply for coverage under an alternative national scheme, restricted to self-insurers in the first instance. The Commission considers that these same employers should be able to opt for coverage under a single national OHS regime – the Australian Government's OHS regime. (pxxx)*

8. Relevantly the Productivity Commission suggested that the employers would be able to opt for coverage under an OHS scheme. We note that this recommendation has been rejected by the Commonwealth. We further note that the Commission made recommendations with respect to workers compensation which intended, inter alia, “to actively encourage self-insurance applications under Comcare.”

9. The Bill gives effect to these recommendations by the Productivity Commission. It is of course unfortunate that the Productivity Commission chose to adopt such recommendations in the face of overwhelming public opposition to the changes mooted, as demonstrated by the position of the State Governments.

10. It is clear that a number of current State Governments have been elected following extensive public debate over workers compensation schemes, particularly the introduction of schemes which reduced benefits to workers, and which became central election issues.

11. The most significant of these was the election of the current Victorian Government in 1999 . This followed an extensive public debate over workers compensation after contentious workers compensation changes were passed by the Kennett Government in 1997. The Kennett Government passed legislation abolishing common law

entitlements for workers, and one of the major issues in the 1999 election was the re-introduction of those common law benefits.

12. The Victorian public did not re-elect the Kennett Government, and the decision to substantially reduce benefits to injured workers was a critical element in that election.

13. The TWU submits that the Government ought be pursuing reforms which reflect popular concerns with the removal of benefits for injured workers, rather than an ideological approach to industrial relations. Policies which are designed to sideline the legitimate representative organisations of employees and to pursue an approach to the health and safety of employees which is unlikely to lead to improved outcomes at the workplace are not the correct approach to industrial welfare.

14. Alternatively the Government ought propose its changes publicly to ensure that a genuine mandate exists to remove benefits from workers through the expansion of second rate compensation and OHS legislation.

15. It is important to remember that the Productivity Commission recommended that employers who adopted the Comcare scheme be permitted to elect to remain in the relevant State and Territory OHS scheme. The Bill removes from employers this election. Accordingly workers are placed in a position of substantial disadvantage. Their employer can choose to adopt a less favourable compensation scheme and they will then, automatically, receive a less beneficial OH&S scheme.

16. Worse still they are in no position to put their case forward. The Minister acts upon the application by the company with no right for employees to indicate their approval or otherwise of the application.

17. Contrary to the position advocated by the Government there is no logic to the idea that there be mandatory application of the OHS Act. Whatever benefits that may exist from self-insurance under the Comcare scheme need not necessarily exist in relation to OHS legislation.

18. Contrary to the position of the Government, the idea that benefits exist in the national application of health and safety laws apply to employees is difficult to establish. Simply

put, if the most beneficial scheme to employees is a State scheme the idea that national consistency should warm the cockles of an employee's heart is ludicrous.

19. Employees are not concerned with the idea of being treated differently merely on the basis of their geographical location. They are seeking the best treatment from OHS laws and if that is found in their State laws they will prefer this. The Government's transparently dubious motives and their political spin ought be rejected as being inappropriate and employees, their representatives and employers should be given the opportunity to adopt the OHS regulation which is most appropriate.

Deficiencies with the Comcare scheme

20. The TWU is concerned about the failure to ensure that statutory benefits for seriously injured workers and common law entitlements to compensation under the Comcare scheme have been maintained.

21. The common law benefits have not been increased under the Comcare scheme for many years. Had the benefits been increased commensurate with either average weekly earnings or inflation, the maximum common law entitlements payable for non-pecuniary loss would be substantially higher.

22. Given that common law schemes would normally be associated with the most severely injured workers, the suppression of the benefits for non-pecuniary loss places benefits at almost superficial levels.

23. This may not be as great a problem were it not for an equally unjust capping of statutory benefits for injured workers. Unlike some jurisdictions where the absence of common law entitlements or restrictions on common law entitlements is counterbalanced by a relatively generous statutory entitlement system, the Comcare statutory lump sum impairment benefits are set at levels which are substantially less than those in most State jurisdictions.

24. The TWU is further concerned with the lack of appropriate dispute resolution procedures in the Comcare scheme. Unlike many of the State jurisdictions, the Comcare scheme relies not on independent third party review systems (such as conciliation schemes), but upon internal review mechanisms. In the event that the initial

decision is maintained the only alternative is for an injured worker to challenge the decision at the AAT. This is an expensive exercise, encourages litigation and increases costs upon the system and the worker.

25. The failure to provide for speedy and appropriate alternative dispute resolution procedures is problematic for private sector workers in particular. Many public sector workers have more beneficial leave arrangements than exist in the private sector. Accordingly the need for a speedy resolution of a dispute is less direct for public sector workers. However for private sector workers – the workers the TWU represents – who may be brought into the coverage of the OHS and Comcare systems as a result of some of the amendments introduced in the Bill, the need for a speedy alternative dispute resolution system is critical.

26. The Comcare scheme would be improved substantially with the introduction of an alternative dispute resolution system and the increase in both statutory and common law entitlements to a level commensurate with the State jurisdictions.

Deficiencies with enforcement

27. The TWU is concerned with the general failings associated with enforcement associated with a move from the State jurisdictions to the Federal jurisdiction. In this context the TWU enforcement includes all steps up to and including prosecution.

28. For example, we note that in the NSW jurisdiction there are 301 active field inspectors and Victoria 236 while in the Australian Government in total there are 16 (see Workplace Relations Ministers' Council Performance Monitoring 2005 p46-47).

29. Even when calculated as a proportion of employees both NSW and Victoria operate on 1.1 field inspectors per 1000 employees – in the Commonwealth it is 0.7. However we are equally concerned with the apparent lack of regular attendances at workplaces.

30. The material seems to suggest that the State jurisdictions continue to supply the feet on the ground for inspectorate services on a fee-for-service basis.

31. It should be understood that the road transport sector, and the air transport sector (areas where the TWU has significant membership) do indeed have significant

numbers of workplace injuries and some very serious injuries. Road accidents frequently occur (and the interaction between negligence or other statutory schemes in the road transport and workers compensation schemes is one of some significance for our membership) and the outcomes can often be dramatic. However there are numerous other incidents in the logistics industry (carting of dangerous goods, or petroleum based products can require extensive training as the consequences of accidents can be dramatic) where close inspection as well as investigation and prevention mechanisms need to be in place.

32. 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.

33. The fact that inspectorate services are not found in the Commonwealth regulators will create an imbalance between the State and Commonwealth jurisdictions. Given that TWU members are amongst the first to face this issue the TWU registers its strong concerns that competitive federalism will be the result with the potential for State inspectorate services ceasing to properly cater for the employers who have moved into the Federal jurisdiction.

34. What we appear to be left with is a Government making policy without adequate consultation with those who represent the employees or the injured in the system – the people for whom the legislation is enacted beneficially.

Deficiencies with the OHS Amendment Bill

35. It is unfortunate that the Government has chosen to put ideology ahead of workers' safety. Playing politics through the removal of references to trade unions as was done in previous legislation has ramifications for the health and welfare of workers.

36. It is worth remembering the history of self-regulation prior to the introduction of workers compensation statutes. Thousands of workers suffered injuries in accidents at work – to the extent that it came to be regarded as an undeclared war at the workplace.[1]

37. Governments and regulators ought adopt a consistent course through the history of industrialisation – a course aimed at a consistent pattern of improving the safety of employees through legislative and judicial decisions. The results would be an improvement in the circumstances of workers.

38. However the changes brought by the Government are not to this effect. They are designed to centralise workers compensation and occupational health and safety. This regulation is explicitly intended to benefit business – ostensibly reductions in cost and management expenses, but in reality with the objective of giving greater control to managers at the expense of workers or third parties.

39. However the object of both pieces of legislation should be to minimise injury, lost time and maximise safety and award fair compensation where injury has occurred. It is, and should be, a second order issue as to whether the costs of a safe workplace are marginally increased. Critically this purpose in the legislation is to benefit employees. Yet nowhere in the proposals by the Minister is the position of employees evaluated.

40. In investigating the decision whether to grant a licence to operate in the Commonwealth system there ought be an explicit requirement to:
    a) ensure full employee consultation of the decision of the company to seek regulation by Comcare and the Commonwealth OHS Act;
    b) have the Commonwealth and the States conduct briefing sessions for employees as to the benefits and detriments associated with the movement; and
    c) give employees the choice to accept or reject this approach.

41. The failure to ensure that employees are regarded as legitimate stakeholders in the process of occupational health and safety and workers compensation entitlements is compounded by further amendments which were introduced into the OHS Act designed to remove the role of unions from the system.

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1 See Bartrip P and Burman S., *The wounded soldiers of industry: Industrial Compensation Polict 1833-1897*, Clarendon press Oxford 1983.

42. This approach is in contrast to the approach adopted by the Victorian Government which conducted the Maxwell inquiry into occupational health and safety in Victoria. That inquiry noted that the role of employee representatives in the process was critical.

43. The Maxwell inquiry noted that:

> *"There is universal agreement that employee participation is a necessary condition of the effective regulation of workplace safety. This means that everyone who works at a workplace – not just the "employees" of the "employer" – must be able to participate in and be consulted about health and safety matters at that workplace. Chapter 13 recommends introducing the concept of "worker" to ensure that both the benefits of the safety duties, and the right to participate, are enjoyed by every person who is at work at a workplace, whatever the basis of his/her engagement."*

44. This approach to health and safety is critical. All persons at a site, be they managers, employees, labour hire, contractors, visitors are entitled to believe both that the workplace is as safe as practicable and that their input and involvement will minimise risks of injury for other persons.

45. The Commonwealth's approach in this legislation and the outcomes associated with the movement to the Commonwealth jurisdiction appear to have forgotten these principles.

The ideological basis of changes

46. The Bill, by expanding the range of corporations who are subject to the terms of the Act and by mandating that they obey the provisions of the Commonwealth OHS Bill, does so not on any policy or evidentiary basis, but rather on a purely ideological view that the purported cost savings of a centralised insurance and OHS system are a legitimate end in themselves. This approach ignores, and is often in contradiction to, the stated object of OHS legislation – to ensure that *workers* are provided with a safe workplace and protected from unnecessary risk (not to ensure that employers are not 'burdened' by the cost of risk management).

47. Further, the Bill does not provide for any employee input into the decision to leave the State jurisdiction for the Federal jurisdiction, despite the possible loss of protection or

entitlements that the employee may incur as a result. Again, this is not due to a particular evidence based policy position, but purely on an ideological approach to OHS regulation.

48. The Bill unfortunately does not provide for a modern approach to OHS regulation, instead reverting to the failed 19th century self-regulation and self-insurance model.

49. In contrast to the Government's approach to this important area of social welfare policy, the Victorian Government conducted a comprehensive review of OHS regulation which aimed for 21st century best practice. It noted the importance of ensuring that there was proper employee involvement in OHS processes.

50. The Maxwell Report into OHS in Victoria further noted that

The Act provides for representation of employees by elected health and safety representatives (HSRs), who represent members of "designated work groups". But the majority of Victorian workplaces do not have HSRs. The lack of workplace representation is the major failure of the OHS legislation over the last 18 years. It calls for special measures. Two such measures are proposed: roving health and safety representatives, and a limited right of entry for OHS-qualified union officials.

51. By contrast the Commonwealth legislation seeks to limit the capacity for proper representation. The Commonwealth should, if it intends to seek to take over the State jurisdictions, ensure that the recommendations of the Maxwell Inquiry as outlined above are implemented in Commonwealth legislation.

Penalties for breaches of OHS laws

52. The Commonwealth legislation continues to adopt a softly-softly approach to industrial regulation. If employers are going to be mandated to move to the Federal jurisdiction there needs to be proper penalties imposed on non-Commonwealth entities.

53. It has been demonstrated time and time again that negligent employers ought be made to realise the consequences of failing to provide a safe system of work. Professor Richard Johnstone has repeatedly made the point that higher fines and a broader

range of sanctions do concentrate the minds of corporate entities on the importance of safety at work.

54. The incentive effects of penalties in the system are fundamental. This was recognised by the Kennett Government in 1997.

55. One of the Kennett Government's changes to workers compensation and OHS schemes was to substantially increase the penalties imposed. This was done as part of the quid pro quo for removing common law entitlements.

56. The Second Reading Speech of Mr Roger Hallam, Minister for Finance stated, inter alia,

> *"Maximum penalties for offences under the Occupational Health and Safety Act 1985 and the Equipment (Public Safety) Act 1994 will be increased for a body corporate from $40,000 to $250,000 and for an individual from $10,000 to $50,000."*

57. The increase in penalties was directed at ensuring that employers in the Victorian jurisdiction were properly protected. A failure to replicate these penalties in the Commonwealth system does nothing to improve health and safety and in practice provides additional incentives upon employers to limit their interest in improvements to health and safety.

Conclusions

58. The TWU submits that the Bill ought be rejected.