

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005

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Australian Government

**Department of Employment and
Workplace Relations**



**SENATE EMPLOYMENT, WORKPLACE RELATIONS AND
EDUCATION LEGISLATION COMMITTEE**

***Inquiry into the provisions of the Occupational Health and
Safety (Commonwealth Employment) Amendment (Promoting
Safer Workplaces) Bill 2005***

**Submission by the Department of Employment and Workplace
Relations**

April 2005

OCCUPATIONAL HEALTH AND SAFETY (COMMONWEALTH EMPLOYMENT) AMENDMENT (PROMOTING SAFER WORKPLACES) BILL 2005

OVERVIEW

1. The Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005 (the Bill) was introduced into the House of Representatives on 9 March 2005. The Bill has not been debated. It was referred to the Senate Employment, Workplace Relations and Education Legislation Committee on 16 March 2005.
2. The Bill will exempt employers and employees covered by the *Occupational Health and Safety (Commonwealth Employment) Act 1991* from Part 2A of the *Crimes Act 1900* (ACT) and any other similar industrial manslaughter legislation enacted by any other Australian State or Territory that is prescribed in regulations.

POLICY RATIONALE

Introduction

3. On 27 November 2003, the Legislative Assembly of the ACT passed the *Crimes (Industrial Manslaughter) Amendment Act 2002*. This legislation commenced on 1 March 2004. That Act inserted a new Part 2A into the *Crimes Act 1900* (ACT) containing two new criminal offences of industrial manslaughter: one for employers and one for senior officers.
4. The Australian Government considers industrial manslaughter laws are inconsistent with the overall objective of an occupational health and safety legislative framework which is to protect workers from risks to health and safety, thereby preventing injuries and fatalities before they occur.
5. As it is possible that some Commonwealth authorities, particularly Government business enterprises and the employees of such bodies, may be liable to prosecution under the ACT industrial manslaughter laws, the Government has introduced the Bill to ensure that it does not apply to Commonwealth employers and employees. The Bill will also provide certainty for Commonwealth employers and employees should other Australian jurisdictions enact similar industrial manslaughter legislation.

ACT Industrial Manslaughter Laws

6. Part 2A of the ACT *Crimes Act 1900* creates two offences of industrial manslaughter – one for senior officers and one for employers. (In this case, employer includes a contractor.) The offences will apply where:
 - a worker of the employer dies in the course of employment or in the provision of services to the employer, or is injured and later dies; and
 - the employer or senior officer's conduct caused the death of the worker; and
 - the employer or senior officer was reckless about the conduct causing serious harm to the worker or another worker or the employer or senior officer was

negligent about causing the death of the worker or any other worker of the employer.

7. An employer's or senior officer's omission (ie failure to act) can be conduct for the purposes of the offence of industrial manslaughter.

8. The maximum penalties for these offences is \$200 000 and/or 20 years imprisonment for individuals and \$1 million for corporations. The court may also order a corporation to take any action to publicise the offence, notify specific persons of the offence or to carry out a specific project for the public benefit (even if unrelated to the offence).

Australian Government views on industrial manslaughter laws

9. The Australian Government objects to the ACT laws and any other State and Territory laws which create specific industrial manslaughter offences on the basis that:

- existing offences are available to deal with workplace deaths under occupational health and safety and general criminal laws;
- they single out the conduct of employers and senior officers;
- are contrary to approaches for best practice for workplace health and safety.

10. Industrial manslaughter laws are unnecessary as there are existing offences available under the general criminal law and OHS legislation to deal with the involvement of employers and employees in workplace deaths or serious injuries. It is not the Commonwealth's intention to exclude employers, employing authorities or employees from these general criminal laws, or to affect the concurrent operation of State or Territory laws which promote occupational health and safety.

11. Industrial manslaughter laws such as the ACT laws are unbalanced as they single out employers while ignoring the role of other parties who have duties under OHS laws to ensure the health and safety of employees, such as other employees, manufacturers, and suppliers of plant and equipment. This creates inequities and gaps in attributing responsibility for workplace fatalities and serious injuries.

12. These laws are also inconsistent with the national approach to OHS, which all Australian States and Territories committed to in the National OHS Strategy 2002-2012. The Strategy sets national targets to reduce the incidence of workplace injury and fatality, and is based on the principle that prevention requires cooperation and commitment from all workplace parties to be involved in and accept responsibility for occupational health and safety.

13. The Government believes that the best way to improve workplace health and safety is through a cooperative approach between employers and employees to prevent injuries and fatalities. Industrial manslaughter laws, on the other hand, place employers and employees in an adversarial environment and create a culture of blame. This inhibits their ability to work together to eliminate workplace safety hazards and prevent the unwanted consequence of endangering workplace safety.

Commonwealth approach to OHS

14. The *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the OHS(CE) Act) establishes a statutory framework to secure the health and safety

of Commonwealth employees in departments, statutory authorities and Government business enterprises while at work. The principles underpinning the Act emphasise that workplace health and safety is a partnership between all parties in the workplace, with a particular focus on prevention.

15. The Australian Government is strongly committed to improving OHS outcomes in all Australian workplaces. The Government's regulatory approach to OHS places an emphasis on the prevention of workplace injuries and fatalities by encouraging voluntary compliance while providing appropriate penalties where this is not achieved. Imprisonment penalties are not considered appropriate to meet this objective. The general criminal law is capable of dealing with offences relating to death and injury where gaol terms are warranted. It is the Government's view that workplace fatalities will not be reduced by emphasising punishment.

16. The Government's commitment to the prevention of workplace injuries and fatalities is demonstrated through amendments to the OHS(CE) Act in 2004 which introduced a stronger and more effective compliance and enforcement regime that promotes voluntary compliance but also contains strong sanctions for non-compliance.

17. The Commonwealth regulatory approach therefore assists all parties in the workplace to meet their health and safety obligations but provides appropriate sanctions where these obligations are not met. The Government believes that this is the most effective way to improve workplace safety.

Amendments to the OHS (CE) Act which came into force in September 2004

18. The amendments to the OHS(CE) Act which were introduced under the *Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Act 2004* are substantially different to Part 2A of the ACT Crimes Act.

19. The new enforcement and compliance framework in the OHS(CE) Act aims to improve occupational health and safety performance and prevent workplace deaths and serious injuries, by:

- providing a greater focus on encouraging voluntary compliance;
- creating a dual civil and criminal penalty regime;
- introducing remedies of injunctions, remedial orders and enforceable undertakings to enable Comcare to work with employers and other duty holders to remove risks to the health and safety of employees before an injury or fatality occurs; and
- substantially increasing penalty levels to bring them into line with community standards.

20. Comcare is able to accept a written undertaking in relation to an obligation under the Act. This will assist in achieving voluntary compliance. An undertaking may be accepted whether or not civil proceedings have been commenced. If the undertakings are not complied with, it can be enforced by a direct order of the Court or by resumption of suspended proceedings.

21. Comcare or an investigator may apply to a court for an injunction against a person who breaches, proposes to breach or has breached the Act or its regulations. The injunction can be prohibitory, mandatory or interim, restraining persons from

performing acts in breach of the legislation or requiring persons to perform acts to prevent such a breach.

22. The court can also make a remedial order if it thinks it is appropriate to remedy a state of affairs that arose as a direct or indirect result of the conduct that was the subject of the declaration or offence.

23. Criminal penalties are reserved for the most serious contraventions of the OHS(CE) Act which result in death or serious bodily harm (if the contravention is reckless or negligent) and for offences which are more appropriately dealt with in the criminal justice system, such as contempt.

24. There is a criminal offence which applies where an employer has breached its duty of care to an employee and the breach exposes an employee to a substantial risk of death or serious bodily harm, and the employer was negligent or reckless as to whether that breach would expose the employee to that risk. The maximum penalty for this offence is \$495,000 (4,500 penalty units).

25. There is also a general criminal offence that applies where a person breaches a duty of care that they owe to another party and the breach causes death or serious bodily harm to that other party, and the person was negligent or reckless as to whether that breach would cause death or serious bodily harm. This offence applies to employers, employees, manufacturers, suppliers and certain contractors. The maximum penalty for this offence is \$333,000 (3,000 penalty units).

26. All Commonwealth employers are subject to the full range of civil penalties and remedies. Government Business Enterprises (GBEs) and their employees continue to be subject to criminal penalties.

27. The 2004 amendments removed the statutory immunity from criminal liability for employees of the Commonwealth and Commonwealth authorities. This removal reflects the common law position that officers, servants and agents of the Crown have no immunity from the criminal law and ensure that Commonwealth employees can be held accountable where they have acted wrongfully. It also brings these employees in line with employees of GBEs and is consistent with the position in relation to Crown employees in most of the States and Territories.

28. The shield of the Crown was not removed for the Commonwealth itself because this would be inconsistent with Commonwealth criminal policy.

29. The criminal offences in the OHS(CE) Act cover conduct by a wide range of persons, including manufacturers, suppliers and all employees. Unlike the ACT industrial manslaughter legislation, it does not single out employers and senior officers.

SUMMARY OF AMENDMENTS

Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005

30. The Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005 would amend the OHS (CE) Act to insert a new section 11A.

Details of Amendments

31. The Bill would amend the OHS(CE) Act to exclude Commonwealth employers, employing authorities and employees covered by the OHS(CE) Act from the application of Part 2A of the *Crimes Act 1900 (ACT)* (new subsection 11A(2)).

32. New s 11A(2) will provide that the new s 11A applies to criminal liability imposed by Part 2A of the *Crimes Act (ACT)* that is in respect of a person's death that occurs during or in relation to, the person's employment or provision of services to another person. This ensures that if Part 2A was amended, for example by inserting other offences which do not impose criminal liability in respect of a person's death that occurs during or in relation to the person's employment, those offences would not be affected.

33. To provide certainty for Commonwealth employers and employees, should other Australian jurisdictions enact similar industrial manslaughter legislation, the Bill provides a mechanism for excluding those laws through the making of regulations (new subsection 11A(1)).

34. The proposed amendments would limit the scope of the exclusion to a law of a State or Territory that imposes criminal liability in respect of a person's death that occurs during, or in relation to, the person's employment or the provision of services to another person. It is not the Commonwealth's intention to exclude employers, employing authorities or employees covered by the OHS(CE) Act from the application of general criminal offences, such as manslaughter, murder and culpable driving.

35. Section 4 of the OHS(CE) Act provides that it does not affect the operation of a law of a state or territory that promotes the occupational health and safety of persons and is capable of operating concurrently.

36. The amendments in this Bill do not affect the operation of this provision. The Bill will not affect the ability of the States or Territories to legislate in the area of OHS generally, or for the application of those laws to employers, employees and employing authorities covered by the OHS(CE) Act where those laws are capable of applying.

37. New subsection 11A(6) would make clear that section 4 and section 11 of the OHS(CE) Act do not affect or limit the operation of the proposed s 11A.

Application of the ACT industrial manslaughter laws to the Commonwealth

38. The potential application of the ACT industrial manslaughter laws to Commonwealth employers, employees and employing authorities covered by the OHS (CE) Act is uncertain.

39. However, it is possible that Government Business Enterprises and their employees may be liable to prosecution under the ACT industrial manslaughter laws.

40. The result of the September 2004 removal of the statutory immunity from criminal liability for employees of the Commonwealth and of Commonwealth authorities generally is that employees of these entities who are 'senior officers' as defined in section 49A of the *Crimes Act 1900* (ACT) could also be liable to prosecution.

41. The exclusion of employers and employees covered by the OHS(CE) Act from the ACT industrial manslaughter provisions by the Bill will resolve this uncertainty.

Retrospective application of the Bill

42. Although the Bill would commence on the date on which it receives Royal Assent, the proposed amendments make it clear that the provisions are to apply to conduct (including an omission) of an employer, employing authority or employee covered by the OHS(CE) Act occurring on or after 1 March 2004. This is the date on which Part 2A of the ACT *Crimes Act 1900* came into effect.

43. In order for the Bill to achieve the policy objective that employers and employees who are covered by the OHS(CE) Act should not be subject to legal action under the ACT industrial manslaughter legislation, it is important that the Bill operate retrospectively. This retrospectivity ensures that there is no gap for potential liability for Commonwealth employers and employees under the ACT laws.

44. The proposed retrospective operation of this Bill will not have a detrimental effect on Commonwealth employers and employees. The Bill would not remove all liability for these people where a workplace death occurs; it would simply exclude them from the operation of the ACT industrial manslaughter laws.

45. To date, there is no known incident involving a fatality since the ACT legislation commenced on 1 March 2004. However, the possibility that there have been incidents that would expose employers and employees covered under the OHS(CE) Act to prosecution under the ACT laws cannot be ruled out. Of particular concern are incidents where a death does not occur for a number of years after the act or omission which causes the death, such as asbestos related injuries and other dust diseases.