

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

Submission no: 2

Received: 22.4.05

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22 April, 2005



Dear Mr Carter
Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

Dear Mr Carter,

**Re Occupational Health and Safety (Commonwealth Employment)
Amendment (Promoting safer Workplaces) Bill 2005.**

1. The ACTU opposes the passage of the *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005*.
2. If enacted, the Bill would exclude Commonwealth authorities and Commonwealth government business enterprises from the industrial manslaughter offences recently created by the *Crimes (Industrial Manslaughter Amendment Act 2003* (ACT). It would also exclude, on a pre-emptive basis, the operation of similar legislation if enacted in other States or Territories. The NSW Government has proposed similar legislation, which is currently at the exposure draft stage¹.
3. The ACTU submits that the application of the criminal law of a State or Territory should not depend upon whether the employer is a Commonwealth authority or not. The Bill would create a gross inequity whereby the criminality of particular activity is determined by the status of the employer, not the activity.
4. It is precisely this problem that industrial manslaughter laws are designed to address.
5. The purpose of industrial manslaughter legislation is to overcome existing barriers to the prosecution of corporate employers for recklessly or negligently causing workplace deaths. Industrial manslaughter legislation is generally

¹ *The Occupational Health And Safety Legislation Amendment (Workforce Fatalities) Bill 2004* (exposure draft). In 2002 the Victorian government introduced, but did not proceed with industrial manslaughter laws.

designed to ensure that corporate employers do not escape the scope of the general criminal law on manslaughter due to the difficulties in proving a company (as opposed to a natural person) has been or intended to be reckless.

6. Such laws address criminally reckless or negligent conduct by an employee of an employer, or senior officer of an employer where that person's conduct causes a workplace death. They to focus on the culpability of the corporation, and act as a deterrent where other forms of regulation have failed to alter behaviour.
7. One stated purpose of industrial manslaughter legislation is to create equal obligations between small, unincorporated employers who can be successfully prosecuted for manslaughter, and larger employers where attributing liability to individuals is frustrated by the requirement to prove the person was "directing the mind and will" of the company.
8. It is difficult to imagine why Commonwealth business enterprises should be immune from laws designed to punish those guilty of this type of recklessness, where their conduct is proven to have caused a death.
9. The ACTU rejects as totally fallacious the reasons advanced for the passage of this Bill.
10. In the Second Reading Speech the Minister claims that industrial manslaughter laws place employees and employers "in an adversarial environment and create an culture of blame." He lauds the government approach based upon prevention, not punishment. While the ACTU supports education, advice and compliance activities as part of the programs to promote safer workplaces, prosecution is an effective deterrent, and creates a powerful incentive for employers to change their behaviour to reduce the risk of workplace deaths. The logical conclusion from the Second Reading Speech would be to abandon all prosecutions and remove all penalties from the various OHS laws.
11. The Minister complains that the ACT legislation duplicates existing offences. This is certainly not the legislative intent, which is to fill the gap that currently frustrates the prosecution of corporate employers, regardless of the extent to which the officers and senior employees have gross disregard for the welfare of their employees.
12. It is asserted that industrial manslaughter laws wrongly presumes that employers are solely responsible for workplace deaths. This fails to understand the prosecutorial burden of proving that the reckless or negligent conduct of the employee or officer of the employer caused the death.
13. The Bill is offensive in that it seeks to exempt senior office holders in Commonwealth agencies from the criminal law of the state or Territory in which they perform work. No justification for differential treatment based upon the standing or status of Commonwealth agencies and GBEs is put

forward. Rather the only rationale is to undermine the legislative intention of the Territory.

14. Further, families of victims may suffer additional distress due to differential treatment.

15. The ACTU recommends that the Committee votes against the Bill.

Yours sincerely

Cath Bowtell
Industrial Officer