AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION

SUBMISSION TO SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

INQUIRY INTO THE SAFETY, REHABILITATION AND COMPENSATION AND OTHER LEGISLATION AMENDMENT BILL 2006

JANUARY 2007

EXECUTIVE SUMMARY

This submission address the amendments proposed by the Federal Government in the Safety, Compensation and Other Legislation Bill 2006

The Australian Rail, Tram and Bus Industry Union (RTBU) is a federally registered union with some 35,000 members employed in the public and private sectors and in all States and Territories. The RTBU has some 1,250 members who will be directly affected by these amendments if they become law, and with the potential for many more.

The amendments focus on reducing or removing certain current workers compensation entitlements in the Safety, Rehabilitation and Compensation Act 1988 (Cwth).

This is done by removing an entitlement to workers compensation for injuries/illnesses occurring whilst travelling to and from work (unless at the instruction of the employer), and whilst absent from the workplace during a recognised recess (again, unless with the approval of the employer). The Bill also narrows the connection between activities in the workplace and any consequent injury/illness. In addition, the Bill proposes amendments that broaden the scope for Comcare to reduce the amount paid to an employee who is currently on workers compensation.

There is no sense of balance in this Bill. The amendments solely favour the employer and, in this case, the Federal Government as employer. They are amendments that appear to be motivated by cutting the cost of the workers compensation to employers that apply the Comcare workers compensation scheme.

The result is that employees with legitimate workers compensation claims will be denied an entitlement. It's not that the incidence of injuries/illnesses will diminish and it's not that they will no longer occur in the workplace. It's simply that they will no longer be compensable under workers compensation. This situation is neither fair, nor reasonable, nor equitable.

Further, the amendments are likely to be counterproductive. They will act as a disincentive on employers to focus adequately on occupational health and safety in the workplace. And, to the extent that they reduce the cost of the workers compensation scheme, this is achieved by transferring the cost to the private individual and/or the public purse through the social welfare and health systems.

Finally, these amendments appear to be consistent with a pattern of behaviour by this Federal Government in recent years of finding ways and means of advancing the interests of employers at the expense of employees.

The RTBU calls upon this Committee to recommend that the Senate reject the Bill.

INTRODUCTION

The Australian Rail, Tram and Bus Industry Union (RTBU) welcomes and appreciates the opportunity to make this submission to the Senate Committee addressing the Safety, Rehabilitation and Compensation and Other Legislation Bill 2006 (the "Bill").

The RTBU is a Union of employees registered pursuant to the Workplace Relations Act 1996 (Cwth). The constitution of the RTBU defines its membership as comprising the following[1]:

- employees employed in or in connection with the railway industry.
- employees employed in or in connection with the tramway industry.
- employees employed by one of a number of publicly owned urban bus operators.

Save for the membership employed by some public bus authorities/employers, the RTBU has no restriction on the class or category of employee who, according to the constitution, may become a member. Accordingly, the RTBU has members employed in operations, maintenance and administrative work that cut across the categories of blue-collar and white-collar employment. A similar situation exists with respect to coverage in the public and/or private sector. Other than the bus sector, members may be employed in either the public or private sectors. The current membership is approximately 35,000.

The Bill is designed to amend the Safety, Rehabilitation and Compensation Act 1988 (the "Act") in a number of respects.

With respect to the application of the Bill, the RTBU has members who stand to be directly affected by its provisions in the event it becomes legislation. Two companies – Pacific National (ACT) Ltd and John Holland Rail Ltd - employ these members. Both of these companies are self-insured under the provisions of the Act.

Pacific National (ACT) Ltd. is the successor to the National Rail Corporation Ltd. (NRC). The NRC, in turn, was a successor to the rail freight operations of the various State Government owned railway operations and the Federal Government owned Australian National Railways Commission. Formed in 1992, the NRC was owned by a combination of the Federal Government (majority owner) and the State Governments of New South Wales and Victoria (minority owners). It was subsequently privatised in 2002 by way of a sale to a consortium of Patrick Corporation and Toll Holdings Ltd. It was renamed Pacific National (ACT) Ltd. Amid a deal of acrimony and corporate legal manoeuvring, Toll Holdings Ltd became the sole owner in 2006. The RTBU has approximately 1,000 members employed by this company.

[1] Australian Rail, Tram and Bus Industry Union, RULES OF THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION, Australian Rail, Tram and Bus Industry Union, Redfern 2006, Section 4

John Holland Rail Ltd. is a part of the John Holland Group of companies. It is a company that has traditionally been involved in construction and engineering. In the 1990's however, and upon the contracting out of railway infrastructure maintenance by the Court Liberal Government in Western Australia, it became involved in railway maintenance work as one of two successful tenders for the work. Since that time and spurred on by the growth of contracting out, it has expanded its activities in the rail industry beyond Western Australia, particularly in Victoria and New South Wales. The RTBU has approximately 250 members employed by John Holland Rail.

This brief corporate history helps to understand how RTBU members employed in the private sector are covered by what is essentially a workers compensation scheme for employees of the Commonwealth and ACT Governments and related bodies.

With Pacific National (ACT) Ltd. it was simply a matter of retaining the workers compensation system that applied when its predecessor was under majority ownership of the Federal Government.

John Holland Rail Ltd. is in an entirely different position. It is a privately owned company and always has been. Its coverage under the Act followed a decision by the Federal Government to expand the catchment area of the Act. This it did by deciding that any privately owned company that may have previously been an entity of the Commonwealth, or competes with an entity of the Commonwealth, or competes with a former entity of the Commonwealth, may apply to become self-insured for workers compensation purposes and if so the provision of the Act will apply[2]. Whilst John Holland Rail Ltd. has used this route, it is by no means clear who it was being compared with in order it meet the criteria. Pacific National (ACT) Ltd. and its predecessor, NRC, for example, do not and have never had any involvement in railway infrastructure maintenance. Nevertheless, in the countdown to Christmas 2006 and amid some controversy, the Comcare Board certified its application for self-insurance[3].

It follows, if the example of John Holland Rail Ltd. is any guide, that, in the rail industry, at least, there is real potential for the number of RTBU members being covered by the Act, to expand significantly.

The RTBU has no doubt that the Federal Government is seeking to increase the number of employers covered by the Act[4]. This Bill is another fillip to that objective. The Bill is designed to reduce – at least in the immediate term - workers compensation costs to employers. Ipso facto, that would not be a problem. But in this case the reduction in the

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[2] OHS and SRC LEGISLATION AMEMDMENT ACT 2005. For details see, Senate Employment, Workplace Relations and Education Legislation Committee, REPORT INTO THE PROVISIONS OF THE OHS AND SRC AMENDMENT BILL 2005, Australian Government, Canberra, 2005

[3] Skulley M., Unions draw line on Comcare, AUSTRALIAN FINANCIAL REVIEW, Tuesday 12 December 2006. Schubert M., Worcover alarm on contractor, THE AGE, Wednesday 13 December. Australian Council of Trade Unions, Injured workers to get less compensation under federal government self-insurance scheme, MEDIA RELEASE, Australian Council of Trade Unions, Melbourne 13 December, 2006

[4] See the part of this submission on the broader context.

cost to the employer is to be achieved by transferring the cost to the employee. In other words, it's not that the costs will disappear; it's simply that they will be transferred to someone else. And it's not that the relevant workplace injuries and/or illnesses will disappear either; it's simply that the employer will, by legislative fiat, no longer have any responsibility to contribute to their cure (despite the work contributing to the cause). This Bill travels a one-way street – the employer takes all.

To make matters worse, this Bill is unlikely to aid the cause of a reduction in workplace injuries and illnesses. Indeed it is likely to aid a movement in the opposite direction. An initial saving in workers compensation payments could motivate employers to take their eyes "off the ball". As costs diminish in one area of the operation, attention switches to other areas. A consequence is a relative neglect of occupational health and safety (OHS) matters in the workplace and, inevitably, an increase in workplace injuries and illnesses. This in turn leads to further complaints by employers about costs; this Federal Government reacts by cutting workers compensation entitlements again; employees bear the cost again, employers focus elsewhere again and the whole process repeats itself. Catch 22! The Federal Government experiences blowback as its decisions generate a downward spiral in workplace health and safety and a corresponding upward spiral in workers compensation costs increase due to increases in the number and severity of workplace injuries and illnesses.

Thus, it should come as no surprise that the RTBU is vehemently opposed to the Bill.

This submission expands upon that opposition.

The first part of the submission is a summary of the contents of the Bill and the grounds given in support by the Federal Government.. At this point it will become evident that the Bill is designed to favour employers at the expense of employees.

This is followed by a critique of a number of specific items in the Bill with a focus on their inherent unfairness.

The critique of specific items in the Bill should not be seen in isolation. It must be seen in the broader context of the approach by this Federal Government to OHS matters in general. The next part of this submission addresses this point.

Finally we present a summary and conclusion.

OUTLINE OF THE BILL

The Bill seeks to amend the Act in a number of respects. The Financial Impact Statement within the Explanatory Memorandum summarises the amendments as follows[5]:

- Amend the definition of 'disease' to strengthen the connection between the disease and the employee's employment;
- Amend the definition of 'injury' to exclude injuries arising from reasonable administrative action taken in a reasonable manner;
- Remove claims for non-work related journeys and recess breaks where the employer has no control over the activities of the employee;
- Amend the calculation of retirees' incapacity benefits to take account of changes in interest rates and superannuation fund contributions;
- Update measures for calculating benefits for employees, including the definitions of 'normal weekly earnings' and 'superannuation scheme';
- Ensure that all potential benefits from suitable employment can be taken into account when determining incapacity payments;
- Enable determining authorities to directly reimburse health care providers for the cost of their services to injured employees; and
- Increase the maximum funeral benefits payable.

An analysis of these amendments readily identifies that their overwhelming effect is to reduce an employee's entitlements to workers compensation for work related injuries and illnesses. This is to be achieved by narrowing the notion of the workplace and/or the definition of a workplace injury/illness. It is not, of course, a situation that such injuries/illnesses will not continue to occur – they clearly will – the simple point is that an employee will no longer be able to claim an entitlement to workers compensation in the event he/she incurs such an injury /illness.

Reducing the cost of workers compensation is a key objective of the Federal Government. In that regard the explanatory memorandum states[6]:

[5] Parliament of Australia, SAFETY, REHABILITATION AND COMPENSATION AND OTHER LEGISLATION AMENDMENT BILL 2006: EXPLANATORY MEMORANDUM, Australian Government, Canberra, 2006, p.i

[6] Ibid. p.v

"The Government's primary objective with the workers' compensation scheme established under the SRC Act is to minimise the human and financial cost of work-related injury and disease while at the same time providing appropriate compensation and support for employees injured or made ill through employment. In this context, the Government is seeking to strike a balance between the obligation of employers covered by the scheme to employees injured or made ill through work and the need to ensure that the costs of the scheme are maintained at a reasonable level."

In his second reading speech, the Minister for Employment and Workplace Relations opens by saying:

"The scheme has come under growing pressure in recent years from increasing numbers of claims, longer average claim duration and higher claim costs."[7]

The theme running through these quotes is that the incidence of workplace injuries/illnesses has increased to such a degree that the costs are getting out of hand. The solution to that problem is to simply reduce that incidence by legislating certain categories of injury/illness out of existence. The fact that the Federal Government makes a link between what it regards as an unacceptable increase in costs and the other amendments to the Act supports the position that the changes are essentially motivated by cost factors.

It appears that the idea of attacking the cause of these injuries/illnesses at their base never occurred to the Federal Government.

The Federal Government estimates that the amendments will generate savings in the order of $20 million for itself and an additional $7.2 million for self-insurers.[8] Given the nature of the amendments, this represents a transfer of monies due to employees to the Federal Government and the relevant self-insurers. It is, in effect, a zero sum game – the Federal Government and the self-insurers take all. There is not a single benefit to employees amongst these amendments.[9]

The Federal Government also claims that the amendments are the result of a need to remedy the consequences of court decisions that have distorted the intent of the Act. They also claim that the incidence of certain injuries/illness lie beyond the control of the employer, hence no entitlement should exist. These claims are addressed in the following part of this submission.

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[7] Andrews K., SAFETY, REHABILITATION AND COMPENSATION AND OTHER LEGISLATION AMENDMENT BILL 2006: Second Reading Speech. Australian Government, Canberra, 2006, p.1

[8] Ibid, p.2

[9] The increase in the funeral benefit can hardly be considered an improvement. It merely represents a catch-up with the payment made under other workers compensation scheme and, in any event, the entitlement to such a payment has been narrowed as a consequence of other amendments.

SPECIFIC OBJECTIONS

Amendments to the Definition of "Disease"

The Bill seeks to amend the Act by affecting a diminution in the entitlement of an employee to claim workers compensation as a consequence of contracting a work related illness. This will occur because the Bill provides that to be entitled to workers compensation; an employee must show that the disease "was contributed to, to a significant degree; by the employees' employment".[10] The Bill goes on to provide a number of matters that are to be taken into account when determining whether the apposite relationship exists.[11]

It is alleged by the Federal Government that, as a consequence of a number of court decisions, the original intent of the Act has been distorted. The effect of these court decisions is to compel the payment of workers compensation in circumstances that were never intended to attract such a payment.

According to the Federal Government, it is not to the point that work may have been a contributing factor. Work must have contributed "to a significant degree". This provision is reflected in the Bill.

This amendment is objectionable for a number of reasons.

Firstly, the amendment is complex and confusing and one where, upon analysis, it is difficult to understand how it will apply in practice. This is a result of the introduction of the value-laden term "significant" into the equation and how it would apply in to a particular set of circumstances.

Presumably if a number of factors combine to result in an illness, each of them must have been "significant" in their own way. In the absence of any one of them the illness would not have occurred. Thus, if an employee contracted an illness as a consequence of the coming together of five factors, only one of which can be traced to the workplace, the employee should be entitled to workers compensation. This is so even though the workplace represented only 20% of the factors, but without it the disease would not have been contracted In cases such as this, forensic exercises by Comcare or a Court would likely be a frustrating and expensive exercise as attempts are made to apply the new provision in the circumstances before it.

The Explanatory Memorandum contains examples of Court decisions where the Federal Government alleges the original intent of the Act was undermined.[12] It is by no means clear that the amendments in this Bill would have (or should have) produced the desired outcome for the Government in those cases.

[10] Safety etc. Bill, s5B(1)
[11] Ibid, s5B (2). See also s5B(3)
[12] Explanatory Memorandum, op. cit. p.iv

The fact that the Administrative Appeals Tribunal (AAT) in one of the decisions quoted found that non-work related matters were "more significant" does not mean that the employment related matters were therefore "not significant". Indeed this, in our view, is what the Tribunal was saying.

Further, the Federal Court decision in Re Treloar and Australian Telecommunications Commission[13] picks up the problem of assessing the degrees of significance outlined above. That is, if work was a contributing factor, whether it was allegedly "large or small" is not to the point. Indeed a case such as the one before the Court where the issue was the contributing factors where an employee contracted skin cancer points to the difficulties to attributing "significance"

It is also somewhat ironical that the decision in Re Treloar was made in 1990, yet the alleged fault was only picked up in 2006. If the ostensible basis for this amendment emerged in 1990 why has it taken 16 years to pick it up – of which time the current Federal Government had been in power for 10 years? This point adds further support to the view that the amendments are essentially motivated by cost considerations

The outcome of this amendment is simply to make the law more complex, less comprehensible and more prone to bad outcomes. For a Government that prides itself on being "regulation busters", this hardly meets its claim. On the other hand, however, it is consistent with the provisions of other labour-based legislation such as "Workchoices".

Secondly, the only immediate loser is the employee. The amendment purports to tighten the reins on the relevant claims simply on the basis that the test is now "tougher". It is tougher because the Federal Government says it is. Thus, the level of rejected claims is likely to increase. An employee who resists such a rejection will be compelled to undertake an expensive and time consuming appeal process. The appeal process is now made all the more complicated as the employee will soon discover as he/she sits in the body of the Court whilst the legal profession engages in an arcane exercise of defining and applying the term "significant".

Thirdly, it is no coincidence, in our submission, that this amendment (and the amendment on the term "injury) comes at a time when the incidence of psychological "illnesses", such as stress, depression and anxiety has become a serious issue in the workplace.[14] In our submission these amendments are aimed directly at such illnesses as may result from contemporary pressures in the workplace and at providing an alternative means for rejecting such claims. If the Federal Government was "fair dinkum" about dealing with the workplace problems associated with psychological illnesses, it would go to the source of the problem rather than establish means by which it can claim the source of the problem lies elsewhere.

[13] [1990] 26 FCR 316

[14] See for example VicHealth. WORPLACE STRESS IN VICTORIA: Developing a Systems Approach. Victorian Health Promotion Foundation, Melbourne, 2006

Amendments to the Definition of "Injury"

The Bill seeks to amend the Act to effectively deny an employee an entitlement to workers compensation when the "injury" suffered was as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.[15]

The term "reasonable administrative action" includes action concerned with disciplinary matters and/or promotion, transfer, reclassification and/or the entitlement to a benefit.[16]

These amendments do not deny that such an injury may occur or that it may occur as a result of "reasonable administrative action" as defined. They simply provide that in such a case, no entitlement to workers compensation will ensue.

In this matter, the Federal Government again complains that it has been on the receiving end of unfavourable court decisions that, again, have extended the operation of the Act beyond its original intent.[17]

These amendments are objectionable for a number of reasons.

Firstly, it removes an incentive for employers to treat their employees with dignity and respect at all times, including those times that may involve conflict. Research on bullying in the workplace identifies that one of the major culprits is the boss.[18] In that regard the Victorian employee support group, Job-Watch had the following to say:

"Job-Watch has dealt with a large number of cases where people in managerial, supervisory, ownership or Executive Director positions believe their position gives them the right to treat employees in any manner they see fit, particularly in a climate of job insecurity and unemployment."[19]

Employee abuse and mistreatment dressed up as discipline or the denial of benefits such as a promotion must not be permitted and an employee who suffers because of such action must not be denied workers compensation. This amendment diminishes that entitlement.

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[15] s5A(1)
[16] s5A(2)
[17] Explanatory Memorandum, op.cit. pp iv-v. It is noted that the earliest decision complained about was in 1997, so with respect to this matter it has taken the federal government only 9 years to discover that it is a problem. This is an improvement on the time taken to identify that the definition of "illness" is a problem.
[18] A survey by the ACTU in 2000 revealed that of the people who reported that they had been the victims of bullying in the workplace, 70% identified a manager as the source of the bullying. See Marles R., Occupational Bullying In Australia, www.actu.asn.au/AboutACTU/actunews/OccupationalBullyingInAustralia.aspx
[19] Smiljanic V. Submission by Job-Watch to a WorkCover Investigation of a Code of Practice for Workplace Bullying. Job-Watch, Melbourne, 2000, pp. 8-9

Secondly, it is, in our submission, no defence to say that bullying in the workplace by an employer would still create an entitlement to workers compensation because it would lie outside the boundary of "reasonableness". That may be the case in strict terms. The problem is that the amendment increases the likelihood of claims being rejected. Afterall, what employer is going to freely acknowledge that he/she acted in other than an appropriate manner at all times. In that case, the employee is left in the invidious position of having to pursue an expensive and time consuming appeal; an option that is simply not open to many. By comparison, the current legal position that, in our view rightly, provides a narrow window of opportunity to reject a claim, reduces the possibility of the denial of a legitimate claim.

Thirdly, it removes an incentive for employers to develop and implement a proper disciplinary procedure and to adhere to it. The use of "informal chats" and "a word in your ear" are inappropriate for resolving serious issues and personal matters. In that regard the criteria in s5A (2) are too expansive and susceptible to all sorts of chicanery.

Fourthly, the amendment comes at the issue from the wrong end. With appropriately trained and qualified management, a proper disciplinary policy, clear and well-articulated policies and procedures and the right of employees to representation, the possibility of incurring an injury as a result of disciplinary and other matters of conflict should surely diminish. But it appears that this is too difficult a proposition for the Federal Government as it entails a progressive approach and acknowledges and promotes the rights of employees in the workplace.

Fifthly, the savings to the Comcare system are marginal. The explanatory memorandum puts the combined savings from the amendments to the definitions of "disease" and "injury" at $5 million per annum. [20] According to the 2005-06 Comare Annual Report, the total workers compensation costs (excluding third party recoveries and claims administration costs) were $219 million.[21] This means a total saving of 2.28%. If the total premium pool is used, the percentage saving declines to 2.23%.

Of course, this saving does not factor in the cost side of the impact of the amendments. A rejected claim can have a number of other consequences. The employee may be absent on sick leave or leave without pay. The employee in all likelihood will, if on extended unpaid sick leave, access the social welfare system and the public health system. It the employee's employment is ultimately terminated, recourse to the social welfare and public health system is likely to be ongoing In that regard, what the amendments will ultimately do is simply transfer any payment to the employee from the employer to the public purse. It might make the Comcare system look slightly better but it will be achieved via the metaphorical use of wires and mirrors When these factors are taken into account, any overall savings to the Federal Government are likely to dissipate in circumstances where a grave injustice has been committed against one if its citizens.

[20] Explanatory Memorandum op.cit p. ii
[21] Comcare, COMCARE ANNUAL REPORT 2005-2006, Comcare, Canberra, 2006, p.21

Amendments to Journey and Recess Claims for Workers Compensation

An entitlement to workers compensation for what are known as "journey injuries" is to be heavily circumscribed by the amendments in the Bill, Indeed, it can safely be said that, for the overwhelming number of employees, the entitlement will no longer exist. This is because the only basis upon which an entitlement would arise – travelling to/from work – will no longer be covered.

Under the Bill, an employee will only be entitled to a "journey claim" where the journey was undertaken "for the purpose of employment and is the result of a direction by the employer"[22] In the event that there is any doubt about what this means the Bill makes it clear that "travel between the employee's residence and the employee's place of work is taken not to be at the direction or request of the Commonwealth or a licensee".[23]

A similar situation will also exist with respect to an injury/illness incurred whilst an employee is enjoying a recess period during the working day. At present it matters not where the employee is or what he/she is doing during the recess. This will no longer be the case. An entitlement to workers compensation will be restricted to recess breaks taken at the employee's place of employment or, if the employee is absent from the place of employment, where the employee attends an employer-sanctioned event.[24] Thus, if an employee leaves the workplace to get a meal – a common event – and in doing so, trips and injures his/her leg, there will be no entitlement to workers compensation.

The Federal Government claims three grounds in support of these amendments. It states that they cover periods of time that are not connected to work; that any injury/illness would occur at a time where the employer lacks the requisite control, and that the cost of such claims are becoming prohibitive.[25]

The amendments and the grounds given in support are objectionable for a number of reasons.

Firstly, travelling to/from work and recess periods during the working day are an integral part of work. If an employee was not required to work, he/she would neither have undertaken the journey/s nor the recess where and when the injury/illness occurred or was contracted. In other words, if it weren't for the work, the injury/illness would not have occurred.

Secondly, the claim about "control" misses the point about the connection with work and why the employee was doing what he/she was doing at the time of the injury/illness. This claim is part of a broader campaign by employers to avoid their responsibilities to their

[22] Safety etc. Bill. op.cit. s6
[23] ibid. S6(2)
[24] ibid s6
[25] Explanatory Memorandum, op.cit. pp.xii-xiii

employees by alleging the absence of control. The aim here is to transfer responsibility for accidents in the workplace from the employer to the employee. This issue is addressed in more detail in the next part of the submission.

Thirdly, when it comes to occupational health and safety and the obligation of employer to their employees, simply claiming they will cost too much cannot justify their abrogation.

Finally, by denying an entitlement to workers compensation will not diminish the incidence of the injuries/illness, nor will it ultimately reduce the cost. As long as the injuries occur, costs will be incurred. These amendments simply transfer the cost to the employee and a strong likelihood exists that some at least of the cost will be transferred to the public purse.

Other Specific Objections

Firstly, as noted earlier, the increase in the funeral benefit can hardly be seen as an improvement in the provisions in the Act.[26] The explanatory memorandum explains that the increase in the amount of the benefit to $9,000 is based on increasing the amount up to that paid in NSW, whilst enabling the Act to avoid the open-ended payment in Queensland and Tasmania.[27] Further, the current entitlement to a funeral benefit will be reduced as the entitlements to workers compensation diminish.

Secondly, Subsections 8(9E), 8((9F) and 13(1) provide for an index to be used as a basis for increasing the quantum of certain monetary entitlements on an annual basis. This index will replace the existing formula in the Act. The problem here is that the index is to be contained in Regulations and will be as determined by the Minister for Employment and Workplace Relations. Given the attitude of the Federal Government on wage increases and benefits to employees generally, it would be difficult to have any confidence that the index, if used, will provide for other than marginal increases, if any.

Thirdly, some of the other amendments - the amendments to the definition of superannuation scheme, and normal weekly earnings, and the capacity to take all "potential" earnings from suitable employment into account – travel a one-way street. Each of them increases the capacity of the employer to reduce the entitlement an employee would receive under the current Act.

Finally, in the explanatory memorandum, the Federal Government claims that:

"There has been consultation with Comcare, self-insurers and affected unions at meetings of the Safety, Rehabilitation and Compensation Commission over the past three years."[28]

[26] See fn 9.
[27] Explanatory Memorandum. op.cit. p.9
[28] ibid. p.xi, xviii.

What this statement effectively says is that the only consultation that has occurred has been at the level of the Comcare Commission. If, according to the Federal Government, that should suffice to fulfil its obligations on consultation, then if falls a long way short of what most people would regard as reasonable. Further, to the extent that it has "consulted" with the Comcare Commission, what does that mean? Whilst it may have been raised at a meeting, it is our understanding that the Commission is not regarded as a forum for developing legislation – the ultimate outcome is developed and determined elsewhere. The simple transfer of information concerning the intention of the Federal Government hardly falls within definition of the term "consultation". This outcome is, unfortunately, consistent with the approach taken with other labour legislation.[29] Given the contents of the Bill, it is understandable that the Federal Government would prefer as narrow a consultation process as possible.

[29] Unless, of course, it refers to employers, who with the introduction of Workchoices, received special treatment from the Federal Government through employer only briefings.

THE BROADER CONTEXT

This Bill fits comfortably with the underlying policy approach of the current Federal Government to occupational health and safety in particular and industrial relations in general. To that end, there has been a constant stream of changes (not all of them, legislative) designed to increase the power and authority of the employer in the workplace at the expense of the employee.

At the time of the election of the Liberal/National Party Government in 1996, the primary involvement of the Federal Government in occupational health and safety (other than for its own employees) came through the National Occupational Health and Safety Commission (NOHSC). Formed in the mid 1980's the NOHSC assumed an important role in the development of national occupational health and safety (OHS) standards, contemporary research and development, and raising awareness of OHS matters in industry and the community generally. Protected from government interference by its own Act, the NOHSC was a tripartite body with an independent Chair.

Upon the election of this federal government in 1996, the NOHSC was set on a path to destruction. It capacity to set OHS standards was effectively stifled. As the then Minister stated:

"There will be less emphasis on the development and/or promulgation of national OHS standards and codes developed by the NOHSC."[30]

The budget was cut and its work centralised in Canberra. Ultimately, in 2005, the Federal Government took the final step and killed it off altogether.[31]

In its place came the Australian Safety and Compensation Commission (ASCC). With the exception of a conditional ability to make OHS standards, the ASCC has no legislative underpinning and independence and its employees are employees of the Department of Employment and Workplace Relations. It is a Body that is in effect beholden to the Minister for Employment and Workplace Relations who controls the purse strings and much of its activity. This is the case even though the governing body was established on a tripartite basis,

Having set up an OHS mechanism it can effectively control, the Federal Government turned its attention to expanding its control of the OHS agenda beyond its own employees. Thus we see the capacity of certain private corporations to become self-insured for workers compensation under the Act. As seen in the example of the John Holland Group of companies, it appears to be a relatively easy task to pass the test for

[30] Press Release by Mr. Peter Reith May 1997. This can be found in O'Neill S. & Thomas J., BILLS DIGEST: Australian Workplace Safety Standards Bill 2005 and National Occupational Health and Safety Commission (Repeal, Consequential and Transitional Provisions) Bill 2005. Parliamentary Library, Canberra, 2005, p. 6

[31] National Occupational Health and Safety Commission (Repeal, Consequential and Transitional Provisions) Bill 2005

eligibility for self- insurance. Shortly thereafter the Federal Government amended the Occupational Health and Safety (Commonwealth Employees) Act 1988 to provide for its application to those private corporations who self-insure under the Act.[32]

This legislation was ably complemented by the inaptly titled Occupational Health and Safety (Commonwealth Employees) Amendment (Promoting Safer Workplaces) Act 2005 (the "2005 Act"). This Act sought to override the application of the then recently introduced industrial manslaughter laws in the Australian Capital Territory to employees covered by the Commonwealth OHS Act. Further, in the event that any other State or Territory was contemplating industrial manslaughter legislation, the 2005 Act overrode any such legislation in advance.

Having enlarged its capacity to rid itself of what it regarded as pesky State legislation, the Federal Government turned its attention to enhancing employer power in the workplace.

The first instalment was a the fundamental change to the operation of occupational health and safety representatives and committees under the Act.[33] The Act was amended to remove the capacity of employees to involve their unions in the election and operation of safety representatives and committees.

Not satisfied with being given more control of the workplace, certain employers have been engaging in an exercise of seeking to diminish their responsibility for workplace accidents, injuries and illnesses. This is to be achieved by correspondingly increasing the responsibility of employees.

The Australian Chamber of Commerce and Industry, for example has been pursuing a "blueprint" that entails increasing employee responsibility for OHS in the workplace through a legislated duty of care.[34] And, like the Federal Government's position on this Bill, the ACCI justifies its position by alleging that certain activities in the workplace are somehow beyond its control and responsibility should lie with the employee. Whilst attributing greater responsibility to the employee, empowering the employee is not on the agenda. For example, the ACCI's notion of employee involvement means involving employees in health and safety programs that encourage "commitment to the achievement of business goals and an awareness of shared responsibilities", to permitting the making of "practical and constructive suggestions" and involvement in "briefing sessions, focus groups and in some cases it may be appropriate or necessary to have a health and safety committee."[35] Each of these examples occur in a context where the employer maintains control of the agenda

[32] OHS and SRC Legislation Amendment Bill 2005
[33] Occupational Health and Safety (Commonwealth Employment) Amendment Act 2005
[34] Australian Chamber of Commerce and Industry. MODERN WORKPLACE: SAFER WORKPLACE: An Australian Industry Blueprint for Improving Occupational Health and Safety 2005-2015. Australian Chamber of Commerce and Industry, Canberra, 2005
[35] Ibid. p. 30

It is also noted that the employer endeavour to avoid responsibility for the actions of the company extends beyond occupational health and safety.[36] Those who have the authority and control in the workplace must retain responsibility for the workplace. It is the employer who has that authority – the rest follows.

As an ever-reliable ally of the employers and always willing to dance to the employers' tune, what finds its way onto the legislative agenda is this Bill. As noted earlier, this Bill seeks to reduce the employer responsibility for workplace or workplace related injuries or illness in a range of particular circumstances.

Another recent example of the Federal Government's position can be seen in a letter from the Prime Minister to the State and Territory leaders on changing occupational health and safety laws in the mining industry. According to the Sydney Morning Herald:

"His [the Prime Minister] letter says health and safety requirements have emerged as a potential barrier to expansion of minerals and energy production and exports."[37]

The article goes on to state:

"Individual mine managers should not be solely responsible in law for matters in which other parties might also have obligations, Mr. Howard's letter says."

And.

"Mr. Howard says resources companies and industry groups had raised the issue with the Federal Government recently."[38]

The statements made here fit in neatly with much that is being said by the federal Government to support the amendments in this Bill and shows the alacrity with which it will move to assist the employer agenda.

The example of journey accidents is another case in point. The Federal Government asserts that they are beyond the control and hence should not be the responsibility of the employer. Thus they should not fall within the range of legitimate workers compensation payments. It has already been noted that the reason for the employee being where he/she was at the time of the injury/illness was related to work and as such employers bear a responsibility. Further, in many cases, what happens at work or the way in which work is performed can have a direct impact on the employees' travel or recess arrangements. The arrangement of working hours is a case in point. The increasing incidence of employee unfriendly hours of work with, for example, extended hours over an extended number of

[36] Corporations and Markets Advisory Committee, PERSONAL LIABILITY FOR CORPORATE FAULT – REPORT. Australian Government, Canberra, 2006

[37] Davis M. Ease Legal Liability for Mine Safety: PM, SYDNEY MORNING HERALD, Monday 28 December 2006, p.3. Not unexpectedly, the NSW Government quickly rejected this approach. See State Snubs PM on Mining Laws, SYDNEY MORNING HERALD, 29 December 2006, p.5.

[38] Davis M., ibid.

days is a recognised cause of fatigue that, in turn, does not close down the minute an employee departs the workplace.

One of the forums being used by the Federal Government to pursue its OHS agenda is the Workplace Relations Ministers Council. Following a meeting in May 2006, the State and Territory Industrial Relations Ministers released a communiqué that appropriately sums up the broader policy position of the Federal Government. Amongst the observations made in the Communiqué are:

- That the federal minister would not guarantee that OHS standards for companies who self-insure under Comcare would not fall.

- The state and territory minister expressed concern about companies transferring to Comcare simply to secure low OHS standards and little oversight.[39]

These points are well made when it comes to the provisions in the Bill. The federal minister would not guarantee that standards would not fall because it was contrary to the intent of the federal government. Further, it is clear that the introduction of lower standards for workers compensation will be used as a marketing tool by the federal government to attract new "clients" to self-insure under Comcare.

[39] Minister for Industrial Relations (NSW), COMMUNIQUE FROM STATE AND TERRITORY INDUSTRIAL RELATIONS MINISTERS, 19 May 2006, pp. 2-3.

SUMMARY AND CONCLUSION

Employees who are covered by the Safety, Rehabilitation and Compensation Act 1988 will lose entitlements and be worse off as a consequence of the proposed amendments becoming law.

These are long held entitlements and are regarded as important by employees. It is very reassuring to employees to know that whilst travelling to/from work or whilst absent from the workplace during a recess, they are covered by workers compensation. It is important that where the activities undertaken at work or in the workplace contributes to an injury or illness that the employee is covered by workers compensation. It is also important that an employer is not given unreasonable scope to minimise the level of payment to be made to an employee on workers compensation.

But, this will no longer be the case in the event the Bill goes through Parliament.

The Federal Government makes a number of claims to defend its position. None of these defences are satisfactory in our submission.

On the important claim that the amendments are designed to put in place the original scheme of the Act, the Federal Government alleges that a series of court cases have distorted its operation and compelled an employer to make payments in circumstances where payment was never intended. There is little put forward by the Federal Government to justify this allegation. Indeed a number of the decisions relied upon by the Government appear in no way inconsistent with the Act as it currently stands or as the Federal Government asserts was intended. Consequently, it is by no means clear that the amendments will do as the Federal Government desires. Nevertheless, it is the stated intention of the Federal Government that the amendments are designed to narrow the entitlement of employees to workers compensation.

On our analysis, it is clear that the overriding objective with the Bill is to reduce the cost of workers compensation to employers. This is so, regardless of its impact on employees and regardless of any alternative approaches.

Ironically, the amendments could have the opposite effect to that intended by the Federal Government in pursuing its cost-cutting agenda. The Bill, providing as it does a disincentive for employees to be vigilant on occupational health and safety in the workplace, has the potential to lead to an increase in the incidence and severity of workplace injuries/illnesses. That, of course, will have a negative effect on the costs of the workers compensation system and compel this Federal Government into another round of cost cutting. The outcome is an ongoing downward spiral for employees.

Further, the reality is that these amendments are not designed to save money in the overall sense. They are designed to transfer the costs of certain injuries/illness that occur in the workplace from the workers compensation system to the individual employee.

Depending upon the circumstances, these costs will then be transferred to the public purse in the form of the social welfare network or the public health system. Consequently, and ultimately, the cost comes back to government.

The only reasonable conclusion that can be drawn from an analysis of the amendments in the Bill is that they impact negatively on employees in a manner that is unfair, unreasonable and inequitable. The costs of any change are borne solely by the employees and/or the public purse. The sole beneficiaries of the amendments are the employers. In our submission this constitutes bad public policy making as the policy is highly skewed to advantage one group in the community to the disadvantage of another and to advantage one group that is already in an advantageous position relative to the other.

For the reasons as set out in this submission, the RTBU seeks that the Committee recommend that the Senate reject the Bill.

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