The Senate

Finance and Public Administration Legislation Committee

Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002

June 2004

Commonwealth of Australia
ISBN 0 642 71410 X

This document is prepared by the Senate Finance and Public Administration Legislation Committee and printed by the Senate Printing Unit, Parliament House, Canberra.

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Introduction

Background

1.1 The Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 was introduced into the House of Representatives on 26 June 2002 by the then Minister for Employment and Workplace Relations, the Honourable Tony Abbott MP. It was passed by the House of Representatives on 29 March 2004, and introduced into the Senate on 30 March 2004.

Reference of the bill

1.2 On 31 March 2004, the Senate adopted the Selection of Bills Committee Report No. 6 of 2004 and referred the provisions of the bill to the Senate Finance and Public Administration Legislation Committee for consideration and report by 17 June 2004.

Purpose of the bill

1.3 The purpose of the bill is to amend the *Occupational Health and Safety (Commonwealth Employees) Act 1991*, which provides the statutory framework for the protection of the health and safety at work of Commonwealth employees in departments, statutory authorities and government business enterprises. The amendments in the bill are designed to enhance the protection for Commonwealth employees at work and contribute to implementation of a national occupational health and safety strategy.

Submissions

1.4 The Committee advertised its inquiry into the bill on the internet and in *The Australian* newspaper. In addition, the Committee contacted a number of organisations alerting them to the inquiry and inviting them to make a submission. A list of submissions received appears at Appendix 1.

Hearings and evidence

1.5 The Committee held one public hearing at Parliament House, Canberra, on Thursday, 13 May 2004. Witness who appeared before the Committee at the hearing are listed in Appendix 2.

1.6 Copies of the Hansard transcript from the hearing are tabled for the information of the Senate. They can be accessed on the internet at http://aph.gov.au/hansard.

Acknowledgement

1.7 The Committee wishes to thank all those who assisted with its inquiry.

Chapter 2

The Bill

Background to the bill

2.1 This Bill is similar to a bill introduced in 2000 that was considered by the Senate Employment, Workplace Relations and Small Business and Education Legislation Committee and reported to the Senate in May 2001. The 2000 bill lapsed at the 2001 federal election.[1]

2.2 As with the 2000 bill, the new bill seeks to amend the *Occupational Health and Safety (Commonwealth Employees) Act 1991* (hereafter, the Act) to enable individual workplaces to develop occupational health and safety policies suited to their own requirements. The new bill 'includes some additional changes to provide further protections for employees'.[2] The Government is also seeking through this bill to address what it sees as the Act's inconsistencies with the Government's broader workplace relations policy framework. Namely, 'that employers and employees at each workplace should have primary responsibility for deciding maters affecting their relationship'.[3]

2.3 As mentioned before, the OHS (CE) Act prescribes the statutory framework for the health and safety at work of Commonwealth employees in departments, statutory authorities and government business enterprises. The Act also places responsibilities on third-party employers, employees and others who engage Commonwealth employees in the workplace.[4] In essence,

> … the OHS [CE] Act codifies and prescribes the duties of employers, employees and other persons in relation to the occupational health and safety of employees. It provides for workplace health and safety monitoring through a system of designated work groups, health and safety committees and health and safety representatives. In all of these areas, unions have a consultative and an active role under the OHS [CE] Act.[5]

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1 For the content of this report, refer to Parliamentary Paper No. 133 of 2001

2 Mr Tony Abbott MP, second reading speech, p.1

3 DEWR, Submission, p.5

4 *Explanatory Memorandum*, Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002, p.iv (hereafter, Explanatory Memorandum)

5 Bills Digest No. 112 2000-01, *Occupational Health and Safety (Commonwealth Employment)Amendment Bill 2000*, p.4

2.4 Further, the OHS (CE) Act in conjunction with the *Safety, Rehabilitation and Compensation Act 1988* 'seeks to limit the human and financial cost of injury and illness in the workplace'.[6]

2.5 The OHS (CE) Act provides for various compliance mechanisms, namely:

- the issuing of provisional improvement notices by health and safety representatives (s.29);
- investigations concerning compliance with the OHS (CE) Act or accidents or dangerous occurrences (s.41);
- the issuing by investigators of prohibition notices (s.46) or improvement notices (s.47);
- the protection of employees who may complain about an occupational health and safety matter, assist an investigation or cease work in accordance with a direction of a health and safety representative (s.76); and
- fines (or terms of imprisonment where appropriate) for breaches of the Act.[7]

2.6 As the OHS (CE) Act currently provides, persons from Commonwealth departments and agencies, other than Government Business Enterprises (GBE's) or third-party providers, are immune from prosecution. However, where persons from Commonwealth departments or agencies are suspected to have breached the Act, they may be the subject of public enquiries through the Safety, Rehabilitation and Compensation Commission. Where contraventions of the Act are found, the responsible persons may face 'disciplinary action under the *Public Service Act 1999* or other relevant terms and conditions of employment'.[8]

2.7 Since the OHS (CE) Act came into force in 1991, to 30 April 2004, there have been some 77 600 reported incidents. Of these, 2 236 were further investigated. From these investigations, there have only been 10 prosecutions, eight of which were successful, and one is pending. According to the department, each prosecution has taken considerable time with each case experiencing significant delays from the time the incident was reported to the outcomes for the parties involved.[9]

The proposed amendments in the bill

2.8 The Minister's second reading speech to the bill states that:

> The amendments in this bill will shift the focus of occupational health and safety regulation in Commonwealth employment away from imposing solutions and towards enabling those in the workplace to work together to

6 Explanatory Memorandum, p.v

7 DEWR, Submission, p.4

8 DEWR, Submission, p.4

9 DEWR, Submission, p.7

> make informed decisions about workplace safety. While this will give employers and employees added flexibility in meeting their obligations, the new compliance provisions will ensure that such flexibility is subject to a strong and effective enforcement regime if obligations are not met.[10]

2.9 The bill amends the OHS (CE) Act in the following three key areas:

- The penalty and compliance regime;
- The employer's duty of care; and
- Workplace arrangements.

2.10 The bill also proposes some minor or technical amendments that address shortcomings in current provisions concerning the issuing of notices and investigations of alleged contraventions of the Act as well as changes to how departments and agencies report on these matters to the Parliament.[11] The following discussion looks at each of these key amendments in turn.

The penalty and compliance regime

2.11 Amendments to the penalty and compliance regime are directed at voluntary compliance, dual civil and criminal penalty provisions and other new remedies, including increasing penalty levels, removing, in part, the shield of the Crown from Commonwealth employers and removing it fully in relation to Commonwealth employees.

Voluntary compliance

2.12 The aim of encouraging voluntary compliance is to improve health and safety outcomes by developing a 'safety culture' in workplaces. It is also directed towards achieving more efficient outcomes than currently achieved from prosecutions. While the Act in its current form recognises voluntary compliance—namely, through the role of health and safety representatives[12]— it is not considered to be explicitly stated.

2.13 The proposed amendment inserts two new objects in the Act. The first addresses the aforementioned issue by inserting specific reference to voluntary compliance and encourages employers and employees to observe their statutory obligations. The second emphasises the need for an effective enforcement regime if obligations are not complied with by utilising both 'civil remedies and, in serious cases, criminal sanctions'.[13]

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10 House of Representatives *Hansard*, 26 June 2002, p.4382

11 DEWR, Submission, p.5, 26, 28-29

12 DEWR, Submission, p.8

13 Explanatory Memorandum, p.2

2.14 In addition, Item 158, proposed Schedule 2, clause 16 introduces a clause to enable Comcare, as regulator, to 'accept a written undertaking relating to an obligation under the Act. Undertakings may provide an alternative to civil proceedings, and can be accepted whether or not civil proceedings have commenced. The clause also provides for enforcement of undertakings, either by direct order or by resumption of suspended proceedings'.[14] Therefore, enforceable undertakings are designed to encourage voluntary compliance.[15]

Dual civil and criminal penalty provisions

2.15 The existing compliance and penalty regime is supported only by criminal law proceedings. The proposed amendments, contained in Item 158 – Schedule 2, propose a dual civil and criminal system. While the criminal provisions are maintained for the most serious breaches, the introduction of civil remedies will allow resolutions that are more expeditious. In addition, the amendments will enable Comcare to initiate and pursue proceedings independently whereas currently all matters are referred to the Director of Public Prosecutions.[16]

Other new remedies

2.16 Item 158, clause 14 of Schedule 1 of the bill proposes several additional remedies including the provision of powers to the relevant courts 'to grant injunctions in relation to both civil and criminal proceedings for alleged or potential breaches of the Act'.[17] Secondly, Comcare or an investigator 'may apply to a court for an injunction against a person who has breached, is breaching or proposes to breach the [OHS (CE)] Act or regulations'.[18]

2.17 In addition, Item 158, clause 15, proposes new remedies that protect employees following action taken by their employers for breaches under sections 64 and 76—namely, witnesses are not to be prejudiced in employment and employers are not to dismiss employees on certain grounds, respectively—of the OHS (CE) Act.[19] This clause is intended to 'allow a court to make certain remedial orders that it considers appropriate, to rectify a state of affairs'.[20] Moreover, these remedies are considered consistent with the provisions contained in the *Workplace Relations Act*

14 Explanatory Memorandum, p.30

15 DEWR, Submission, p.8

16 DEWR, Submission, p.9

17 Explanatory Memorandum, p.29

18 Explanatory Memorandum, p.29

19 DEWR, Submission, pp.10-11

20 Explanatory Memorandum, p.29

1996 concerning freedom of association[21] and with current Commonwealth criminal law policy.[22]

Increasing penalty levels

2.18 Further amendments propose to increase the pecuniary penalty levels. The existing penalty levels have not changed from when the OHS (CE) Act came into force and are considered to have fallen behind the average levels imposed by state and territory jurisdictions.[23]

Shield of the Crown

2.19 Finally, the bill seeks to amend the coverage of the shield of the Crown for the Commonwealth. As mentioned above, the Commonwealth, its agencies and employees are immune from prosecution under the OHS (CE) Act, with the exception of GBE's. This immunity is being removed for Commonwealth employees only. This is because removing the immunity for the Commonwealth itself would be inconsistent with Commonwealth criminal law policy. However, the Commonwealth will be made liable to the full range of new civil remedies, including pecuniary penalties, mentioned earlier.[24]

2.20 To this end, the bill amends the 'shield of the Crown' so that it is possible to:

- Seek and obtain a declaration that the Commonwealth or a Commonwealth authority has breached a statutory duty or requirement;
- Secure a pecuniary penalty order from a court in respect of the Commonwealth or a Commonwealth authority; and
- Obtain a declaration against a Commonwealth employee or an employee of a Commonwealth authority, or to prosecute such a person. Such a person will also be liable to pay pecuniary penalties.[25]

The employer's duty of care

2.21 Section 16 of the OHS (CE) Act prescribes the statutory obligations that employers must comply with regard to the health and safety of their employees. Under the current arrangements, an employer must consult with an 'involved union' together with other relevant people when developing OH&S policies and when reviewing

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21 DEWR, Submission, p.11

22 Explanatory Memorandum, p.28

23 DEWR, Submission, p.11

24 DEWR, Submission, p.13

25 Bills Digest No. 137 2002-03, *Occupational Health and Safety (Commonwealth Employment)Amendment (Employee Involvement and Compliance) Bill 2002*, p.4 (hereafter, Bills Digest No. 137)

mechanisms for OH&S measures.[26] Items 26, 27 and 29 in the bill amends the OHS (CE) Act in this respect and are discussed below.

2.22 Item 26 repeals paragraph 16(2)(d), which requires an employer to develop an occupational health and safety policy with 'involved unions' and/or others deemed appropriate. In its place is substituted new paragraph 16(2)(d) that 'imposes an obligation on the employer to develop safety management arrangements in consultation with their employees'[27] with a prescription for the areas that must be covered by safety management arrangements.

2.23 Item 27 repeals paragraph 16(3) and substitutes a new subsection. With reference to Item 26, the development of an occupational health and safety agreement is replaced by a requirement on the employer to develop safety management arrangements in consultation with the employer's employees. The term 'safety management arrangements', used in the bill, refers to all the collective elements that could be included in the arrangements.[28]

2.24 The proposed amendments, however, '…do not specify any matters which must be included'[29]—consistent with the aim of removing prescription and facilitating the development of appropriate arrangements at the enterprise level—with those provided in the subsection as a guide only, namely:

- A written occupational health and safety policy;
- Risk identification and assessment;
- Occupational health and safety training; and
- The making of agreements between the employer, the employees and their representatives on continuing consultation and other matters.[30]

2.25 Nonetheless, Item 29 inserts two new sections (16A and 16B) in the OHS (CE) Act providing statutory requirements for employers to have regard to advice of the Safety, Rehabilitation and Compensation Commission when developing or varying safety management arrangements on matters, regardless of whether advice is directed exclusively or at employers generally.[31]

2.26 Furthermore, an employee may be represented in consultations about safety management arrangements if the employee asks for such representation. The amendments in proposed section 16B enable an employee who wishes to be

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26 Bills Digest No. 137, p.5

27 Explanatory Memorandum, pp.5-6

28 DEWR, Submission, p.17

29 DEWR, Submission, p.17

30 DEWR, Submission, p.17

31 DEWR, Submission, p.17

represented by an employee representative to have their identity protected. This is achieved through applications to the Chief Executive Officer of Comcare who then certifies that an employee has requested representation from a third party.[32]

Workplace arrangements

2.27 Part 3 of the OHS (CE) Act provides the statutory framework for employers and employees to address health and safety matters at the workplace. Such matters are addressed through co-operative consultation processes, such as establishing designated workgroups, selecting health and safety representatives and establishing health and safety committees. A discussion of how the bill proposes to amend these workplace arrangements follows. In essence:

> [t]he role of 'involved unions' is being amended with provisions for direct arrangements between employers and employees on relevant matters. Unions will, however, still be able to participate if this is requested by an employee or employees.[33]

Designated workgroups

2.28 'Designated workgroups' are mechanisms for employees to participate in the health and safety consultation process and from where health and safety representatives are selected.

2.29 Item 42 repeals and replaces subsections 24(1) to (3). It removes the statutory provision for involved unions to request of an employer the establishment of, or the variation of an existing, designated workgroup and replaces it with provisions for employees to make such requests directly to their employer. An employee representative or involved union will only be able to make such a request of an employer if an employee requests them to do so.[34] The relevant new provisions are designed to:

- Enable any employee to request his or her employer to establish or vary designated workgroups;
- Enable an employee representative, if requested by an employee, to request the employer to establish or vary designated workgroups;
- Require the employer to enter into consultations with the employer's employees or the employee representative to establish or vary the designated workgroups within 14 days of receiving such a request; and
- Enable an employer to enter into consultations about varying designated workgroups:

32 Explanatory Memorandum, pp.6-7

33 DEWR, Submission, p.20

34 Explanatory Memorandum, pp.8-9

- with the health and safety representative of each designated work group proposed to be varied; and
- if an employee in a designated workgroup proposed to be varied so requests, an employee representative.[35]

2.30 The remaining provisions of subsection 24 of the OHS (CE) Act remain intact. However, Item 43 inserts the following two new sections into the Act (24A and 24B):

> Proposed section 24A provides that consultations on designated work groups (DWGs) are consultations to develop safety management arrangements as required under paragraph 16(2)(d). However, such consultations are not to be taken as sufficient to fulfil, on their own, the requirement to develop safety management arrangements.[36]
>
> Proposed section 24B will require that the employer maintain an up-to-date list containing details of all DWGs comprised of employees performing work for the employer, the categories of employees included in those DWGs and ensure that the list is available for inspection by the employees and investigators. Categories of employee must be described in the list.[37]

Health and safety representatives

2.31 The OHS (CE) Act provides that a single health and safety representative be selected from each designated workgroup. Health and safety representatives are seen as performing an integral role in the development of health and safety policies and effective outcomes by representing the interests of their colleagues in the workgroup. Health and safety representatives are bestowed specific powers under subsection 25 of the Act enabling them to perform this duty effectively.[38]

2.32 The amendments in the bill change the provisions for selecting health and safety representatives by removing what is seen as existing restrictions that prevent some employees from being selected. The OHS (CE) Act currently provides for,

> [the] election of [health and safety representatives] is either by unanimous agreement of the members of the work group or by election [subsection 25(3)]. If an election is held it is conducted by the 'involved union' or, in the absence of an 'involved union' by someone authorised by the Commission [subsection 25(4)].[39]

35 DEWR, Submission, p.21

36 Explanatory Memorandum, p.9

37 Explanatory Memorandum, p.9

38 Bills Digest No. 137, p.6

39 Bills Digest No. 137, p.6

2.33 Where the 'involved union' carries the election, 'only employees nominated by an involved union are entitled to be candidates in the election'.[40]

2.34 Item 44 repeals subsections 25(4) to (10) and substitutes a new subsection 25(4). In effect, this removes the existing provisions relating to the election of health and safety representatives and replaces it with a provision relating solely to unanimously selected representatives.[41]

2.35 Item 45 proposes to insert three new sections (25A, 25B and 25C) concerning the election of health and safety representatives.

2.36 First, proposed section 25A stipulates the requirements to which an employer must adhere regarding the filling of vacancies in the office of health and safety representatives of a designated workgroup, particularly where there is not a unanimous selection and an election is required. Elections need only be conducted where 'the lesser of 100 employees or the majority of employees in the designated workgroup so request' and 'an election must be conducted in accordance with new regulations'.[42]

2.37 Second, proposed section 25B simplifies the existing arrangements of subsection 25(10) requiring that employers must prepare and keep up to date a lists of all health and safety representatives and ensure that the list is available for inspection at all reasonable times by their employees and by investigators.[43]

2.38 Third, proposed section 25C requires an employer to notify employees in a designated workgroup of a vacancy in the office of health and safety representative, or the selection of an health and safety representative, within a reasonable time.[44]

Health and safety committees

2.39 Section 34 of the OHS (CE) Act provides that an employer must establish a health and safety committee where the:

- number of the employer's employees at the workplace is at least 50;
- employees are included in one or more designated workgroups; and
- employer is requested to establish the committee by:
  - a health and safety representative; or
  - an involved union.[45]

40 DEWR, Submission, p.22

41 Explanatory Memorandum, p.9

42 DEWR, Submission, p.23

43 Explanatory Memorandum, p.10

44 Explanatory Memorandum, p.10

2.40 Item 61 repeals and replaces section 34 so that an employer must establish a health and safety committee where:

- the employer has at least 50 employees across all workplaces, or
- there are at least 50 employees in that workplace and the health and safety representative of a designated work group has made a written request or a majority of the employees in the workplace make a written request to the employer.[46]

2.41 In addition, proposed subsection 34(4), which provides that 'the number of members of a health and safety committee chosen by the employer must not exceed the number of members chosen by the employees to represent their interests',[47] will protect employees' interests and ensure equilibrium between these interests and those of the employer.[48]

Investigations and the role of representative unions

2.42 Section 41 and 48 of the OHS (CE) Act provide for investigations of breaches of the Act and appeals against decisions of investigations, respectively. As the Act currently stands, involved unions may initiate such proceedings. The following items in the bill are consequential amendments to the amendments discussed earlier:

- Item 71 amends subsection 41(5) to provide that a employee representative may, if requested by an employee, request Comcare or the Safety, Rehabilitation and Compensation Commission to direct an investigator to conduct an investigation; and
- Items 102, 103 and 104 amend section 48 to enable an employee representative to make appeals against decisions of investigators where an employee affected by the decision has requested the representative to make the appeal.[49]

45 DEWR, Submission, p.23

46 Bills Digest No. 137, p.7

47 DEWR, Submission, p.24

48 DEWR, Submission, p.24

49 DEWR, Submission, p.24

Chapter 3

Evidence to the inquiry

3.1 The Committee received evidence from a number of unions and two agencies with carriage of the legislation, the Department of Employment and Workplace Relations and Comcare. The four unions – Communications, Electrical and Plumbing Union (CEPU); Australian Manufacturing Workers' Union (AMWU); Community and Public Sector Union (CPSU); and Australian Council of Trade Unions (ACTU) – were united in their criticism of the proposed changes to the role of unions in workplace arrangements for OH&S matters. Concern was also raised that some of the provisions in the bill contravene International Labour Organisation (ILO) agreements to which Australia is a signatory.

3.2 Some members of the Committee also raised the issue of proportional representation as a measure that might enhance employee representation on departmental bodies dealing with OH&S issues.

3.3 The sections below look at these issues in turn, before concluding with a recommendation on the bill.

'Flexibility' and 'impediments'

3.4 For the unions, the main point of contention with the bill concerns the provisions to remove the current obligation for an employer to consult with an 'involved union' or registered organisation in developing OH&S policies and associated measures. The unions argued that there is no justification for such a change, except from an 'ideological' standpoint. They disputed the view that new measures are needed to introduce 'flexibility' and remove 'impediments' under the Act. Indeed, union witnesses argued the reverse, claiming the proposed measures in the bill will hinder arrangements that currently work well.

3.5 Ms Herrington from the Communication, Electrical and Plumbing Union (CEPU) exemplified the unions' criticism on this point, stating:

> There is concern with the ideological thrust of the amendments, which is to remove the role of unions in workplace health and safety. It is clearly our view that this will act to the detriment of workplace health and safety rather than to improve it. Specifically, we have concerns that the provisions sought to be introduced would introduce a system that is very vague, very bureaucratic, open to misinterpretation, manipulation and abuse and one that is largely unenforceable.[1]

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1 F&PA, *Transcript of Evidence*, 13 May 2004 (hereafter F&PA), p.2

3.6 Union witnesses particularly criticised the absence of any evidence to support the implication that the current role of unions is an impediment to achieving OH&S outcomes or one of the alleged 'deficiencies' in the Act.[2] When asked if they had received any complaints from government agencies or the Commonwealth about union involvement in OH&S issues, the witnesses said they had not been made aware of any problems.[3]

3.7 Mr Rodda of the Community and Public Sector Union (CPSU) referred to the following example where Comcare – one of the agencies sponsoring the bill – had invited the involvement of the union to help an agency deal with an OH&S concern. Mr Rodda stated:

> You might be aware that at the National Gallery of Australia there has been some controversy about the air-conditioning and health and safety standards. I was invited last year by Comcare to participate in a tripartite group with the director, Brian Kennedy, and the CEO of Comcare to oversight the implementation of recommendations. Evidence like that flies in the face of suggestions that we are an impediment—when you have Comcare, as the statutory authority with responsibility for oversight of this act, actually asking the unions to be more involved than we have to.[4]

3.8 The Committee also heard that local and overseas research indicates that union involvement in supporting and training staff representatives is one of the necessary elements of a sound OH&S system.[5]

3.9 The unions also disputed the claim, made in departmental evidence to the Committee, that under the current system an involved union is the only body that can represent employees.[6] The requirement under the Act that a health and safety representative (HSR) must be nominated by a union does not, union witnesses further contended, mean that nominees must be union members.[7]

3.10 Nor has it been the practice, these witnesses said, for unions to only nominate union members as HSRs. The health and safety agreement of the Department of Communications, Information Technology and the Arts (DCITA) was cited as an example of a department negotiating with a union and resulting in a health and safety

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2 F&PA, 2

3 Ms Herrington, Dr Vallance, F&PA, 6

4 F&PA, 6

5 F&PA, 3. See also Dr Vallance, AMWU, Additional Information – 'Research evidence regarding the positive effect of unions on health and safety performance'

6 DEWR, Supplementary Submission 2a, p.6. On a similar point, see Ms Lipp, DEWR, F&PA, 11

7 See supplementary Submission 1a from the CEPU on behalf of it and the CSPU and Australian Manufacturing Workers' Union (AMWU), p.1

committee comprised of union representatives and non-union employee representatives.[8]

3.11 In response to some of these concerns, the department stated that:

> The Bill recognises that unions will have an important role in OHS [Occupational Health and Safety] in Australian Government workplaces if this is requested by one or more of their members. The Bill also recognises that significant numbers of Australian Government employees are not union members and have a right to be fully involved in OHS matters.[9]

3.12 To support the latter point about union membership, the department referred to the CPSU's evidence that in some workplaces CPSU has less than 50 per cent membership and at times as low as 30 per cent membership.[10] According to the department's evidence, these figures appear to be fairly indicative of the level of union membership across the Commonwealth public sector.[11]

3.13 In its response, the department also stated that the bill will remove 'current legislative restrictions which inhibit the ability of some employees to become health and safety representatives'.[12] Presumably these 'legislative restrictions', as opposed to the unions themselves, are some of the 'deficiencies' that the department has identified in the Act.[13] The department also claimed, however, that the provision for HSRs to be elected for each designated workgroup would address problems that have arisen because of delays in unions conducting elections in workplaces.[14]

3.14 On the question of whether current arrangements limit HSRs to union members to the exclusion of non-union employees, Mr Ellis of Comcare made the following observation:

> The act at the moment says that there are two ways of being selected as a health and safety rep. One is by unanimous selection. In my experience, all you have to have is one person who disagrees and then it has to go to an election. Currently under the act it provides that, where there is an involved union, that election must be conducted by the involved union, and only people who are nominated by the involved union can be selected as a health and safety representative. I have had a number of questions from employees from time to time about this, where they have put their hand up to be nominated by the union thinking they were well qualified—they were not union members, but they were well qualified to be a health and safety rep—

8 F&PA, 8

9 DEWR, Supplementary Submission 2a, p.6

10 DEWR, Supplementary Submission 2a, p.6

11 F&PA, 11

12 DEWR, Supplementary Submission 2a, p.2

13 Ms Lipp, F&PA, 11

14 DEWR, Supplementary Submission 2a, p.6. See also Mr Ellis, F&PA, 21

> but the union has had a union member nominate and that person has been put up as the sole nomination.[15]

Breach of ILO conventions

3.15 The ACTU, AMWU and CEPU argued that an element of the proposed changes to work place arrangements appears to contravene several ILO conventions to which Australia is a signatory. In the ACTU's view:

> The proposal that a union member must seek permission from a public official (who may or may not agree) to involve his/her union representative in OHS matters is preposterous. It is almost certainly in breach of the terms of ILO Convention 87 (Freedom of Association) and/or Convention 98 (Collective Bargaining) to which Australia became a party in 1973. Should this legislation be carried into law the ACTU will seek an urgent ruling on this matter through the ILO Committee of Experts.[16]

3.16 In particular, the new section 16B is seen as hampering the involvement of union officials in consultations or negotiations by requiring them to obtain the permission of a public official in advance of doing so.[17]

3.17 When questioned on this matter, departmental witnesses indicated that these concerns are unfounded and possibly misconceived. Ms Merryfull of DEWR made the following observation:

> Proposed section 16B allows an employee representative organisation to go to the CEO of Comcare and get a certificate that says, 'We've been asked to represent an employee in negotiations.' There is a misconception that that has to occur every time an employee representative represents the employee. That is not the case at all. That only exists where the employee does not want to put up their hand and say, 'I want my union to represent me.' They want anonymity. That is the only circumstance in which that provision is meant to apply.[18]

3.18 The department also noted that section 16B is modelled on a similar provision – section 170KLA – in the *Workplace Relations Act 1996*. The purpose of this provision is to protect the privacy of employees who want to be represented on OH&S matters but do not want to be identified by their employers.[19] Ms Merryfull said of section 16B of the bill:

> It is based on a very similar provision in the Workplace Relations Act that operates, as you know, where, under an LK agreement, a person can request

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15 F&PA, 13-14

16 Submission 5, p.4. See also F&PA, 18

17 CEPU, Submission 1, p.2

18 F&PA, 18. See also DEWR, Supplementary Submission 2a, pp.4-5

19 DEWR, Supplementary Submission 2a, p.5

> that a union enter into consultation with their employers. That act provides that you can get a certificate from the registrar. But the unions have consistently said that under our bill the employee will always be required to get a certificate—that is what they are referring to in terms of the public official—but that is not the case.[20]

3.19 Departmental witnesses concurred with a proposal from some members of the Committee that the principle of protecting employee privacy could be clarified in the bill without altering its intent.[21] The Committee believes that the Senate should consider inserting into the bill wording to this effect when bill goes into Committee of the Whole in the Senate.

3.20 The department also claimed that by providing for direct consultation between employees and employers the bill strengthens the Commonwealth's compliance with ILO conventions, particularly the recently ratified Convention No. 155 Occupational Health and Safety and the Working Environment. The department noted further that the bill is in line with State and Territory OH&S laws, none of which has caused concern about compliance with ILO conventions.[22]

Proportional representation?

3.21 As mentioned in chapter 2 and above, the OHS (CE) Act provides that a single health and safety representative be selected from each designated workgroup to sit on a workplace safety committee. Senator Murray asked whether it were possible or desirable to have more that one representative from a workgroup elected on the basis of proportional representation.

3.22 Each of the unions represented at the hearing indicated they had no objection to a system of proportional representation relative to the size and composition of workgroups. However, following the hearings the unions indicated concerns that having more than one representative per delegated workgroup could potentially lead to workplace conflict, detract from OH&S issues and increase bureaucracy and cost.[23] In the union's view, these side effects might occur because of:

> …the additional cost of training and supporting dual HSRs, the capacity for internal disputes, the capacity for inertia as roles become blurred, the capacity for confusion within staff as to the demarcation and the capacity for a manager to manipulate the situation by favouring one or the other HSR.[24]

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20 F&PA, 18

21 F&PA, 18

22 DEWR, Supplementary Submission 2a, p.4

23 CEPU, submission 1a, p.4

24 CEPU, submission 1a, p.4

3.23 The department was also sceptical about the need and benefit of having two representatives per group. In its supplementary submission the department stated:

> In relation to committees, employees will be free to decide the composition of their representation on health and safety committees. This could include a form of proportional representation if the employees wish. It would not be consistent with the aims of removing prescriptive processes as far as possible and not imposing solution if the Bill were to impose conditions on who may be elected to represent employees.[25]

3.24 At the hearing, Mr Ellis of Comcare also argued that one representative was preferable to two, echoing some of the concerns raised by the unions about the repercussions of having two representatives. On the rationale for only having one representative, Mr Ellis stated:

> It does work having one. There could be a range of issues from an operational perspective in having two. The role of that person is to represent the members of their work group back to their employer. If you had two people with two different views representing the position back to the employer it could create confusion and other problems. Having one is a sensible way to deal with it. The act works well having one health and safety rep at the moment.[26]

'Outcomes' versus 'processes'

3.25 Leaving aside the new measures the bill introduces, the Committee wishes to comment on the general argument departmental witnesses advanced that the bill will shift the current focus away from 'processes' to more meaningful OH&S 'outcomes'.

3.26 In her opening statement to the Committee, Ms Lipp of DEWR stated that under the Act 'there is a focus on process, such as the requirement that the OHS policy provide for the making an agreement, when what is needed is the achievement of better health and safety outcomes'.[27]

3.27 However, when asked to explain how the changes to workplace arrangements would achieve better outcomes, departmental witnesses seemed to confuse 'outcomes' with 'processes'. In responding to questioning on this distinction, Mr Ellis of Comcare stated:

> The outcome in changing the arrangements for selection of health and safety reps is about involving all employees in the process and about giving everyone the opportunity to participate. So the outcome is at that level.[28]

3.28 Mr Ellis went on to say:

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25 DEWR, submission 2a, p.7

26 F&PA, 21-22

27 F&PA, 11

28 F&PA, 15

> The bill itself looks at the requirement to have safety management arrangements which are negotiated between the employees and the employer direct to give the employees the opportunity to directly affect their own health and safety in the workplace by putting on the table those issues that are relevant for them. So I think that, in terms of process versus outcomes, the changes to the bill that are being proposed are about outcomes for employees in giving them a greater ability to have a say in their own health and safety at the workplace.[29]

3.29 The Committee considers that, while enabling employees to have a more direct say in addressing OH&S matters in their own workplace may be a desirable outcome in its own right, this simply addresses part of the *process* by which measures might be developed to achieve OH&S outcomes. It does not of itself ensure that better OH&S outcomes will result.

3.30 When pressed on the issue, departmental witnesses were unable to demonstrate how the bill in general or the provisions on workplace arrangements in particular would lead to OH&S improvements. Instead, the department's evidence suggests that it is *assumed* that OH&S improvements will flow from changes to the way HSRs are to be elected. In discussing the thinking behind the asserted link between direct employer-employee consultation and better OH&S outcomes, Ms Lipp told the Committee:

> I think this is *premised* on the fact that more flexible arrangements will lead to a more productive workplace which will have an improved health and safety outcome.[30]

3.31 The Committee also notes that the department did not take the opportunity in supplementary evidence after the hearing to demonstrate how the bill will achieve improvements in OH&S matters. For instance, the department stated the following in its supplementary submission:

> The Bill does not lay down any prescriptive processes which must be followed in developing the safety management arrangements but provides guidance on the matters that might be included in safety management arrangements. The Bill provides a framework in which employers in consultation with all of their employees will examine the circumstances of their individual workplaces to identify and assess safety risks and develop measures to control them. This will result in improved OHS outcomes.[31]

3.32 The Committee is disappointed that the department was not able to do more than simply assert that the proposed measures would lead to improvements, rather than show, by way of elucidation or relevant examples, how the bill would achieve this end.

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29 F&PA, 15

30 F&PA, 20, emphasis added

31 DEWR, Supplementary Submission 2a, p.2

Recommendation 1

3.33 The Committee recommends that the Senate pass the bill.

Senator Brett Mason

Chair

Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2004

Labor Senators' Report

June 2004

1. The core philosophy and provisions of this bill have previously been before the Parliament in the Occupational Health and Safety (Commonwealth Employment) Bill 2000 ('the 2000 bill'). The Labor Senators' report to a Senate inquiry into that Bill supported a number of provisions in that bill, but expressed grave concerns about those provisions that sought to remove unions from involvement in health and safety issues in Commonwealth workplaces.

2. Labor senators support the inclusion of civil penalty provisions into the OH&S scheme for Commonwealth employees, and have no issue with those parts of the bill that genuinely seek to improve health and safety outcomes in Commonwealth workplaces. Provisions that would introduce new remedies of injunctions and enforceable undertakings are welcomed.

3. However, those aspects of the bill that are designed to further the Government's anti-union obsession risk worsening OH&S outcomes for Commonwealth workplaces and cannot be supported.

Employee representation

4. Labor senators do not believe those provisions in the bill that seek to remove unions from involvement in health and safety in Commonwealth workplaces will in any way improve health and safety outcomes.

5. Evidence from all parties supported the view that OH&S outcomes in Australian government enterprises were good and compared favourably to those in other industries. As noted by the ACTU: "The Bill is winding back systems with a proven track record".1

6. The bill would remove or reduce the role of unions in relation to the election of health and safety representatives, in requesting or varying designated work groups, in calling for investigations, in requesting prosecutions and in other consultative provisions.

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1 Submission No. 5, ACTU, page 7

7. Labor senators believe that these amendments have no basis in good public policy, but are driven entirely by the anti-union ideological obsession of the current federal government. The evidence – and lack thereof – presented to the committee about any public policy-driven need for theses changes confirmed our view.

8. The Department of Employment and Workplace Relations (DEWR) was unable to provide any evidence to the committee that union involvement impeded health and safety outcomes, or that removing unions would improve health and safety outcomes. In fact, DEWR was unable to provide any examples where union involvement had caused health and safety concerns:

> Senator FORSHAW—Can you point to any specific examples of where union involvement in occupational health and safety issues has been an impediment or a problem?
>
> Ms Lipp—I do not think that we necessarily believe it has been an impediment.[2]

9. In contrast the unions who made submissions and appeared before the committee provided substantial empirical and academic evidence that union involvement in OH&S issues improved health and safety outcomes. The AMWU's document headed "Research evidence regarding the positive effect of unions on health and safety performance" listed 18 studies that confirmed this view. These included studies by the World Bank and academics from the United Kingdom, USA and Australia. No evidence or research was presented to the committee to refute these studies.

10. This academic evidence is supplemented by the unions' evidence that they made substantial investments in OH&S training for their officials and for OH&S representatives.[3]

11. That the bill would allow unions to be involved in OH&S activities on the request of individual employees is no answer to our concerns on this issue. Given that the Government has made it so clear that it is opposed to the role of unions in this matters, it would be a brave employee who would put their hand up to request union involvement.

12. The bill provides an alternative mechanism for union representation if employees are concerned about seeking such representation. Section 16B provides for application to the CEO of Comcare for a certificate proving that employees have asked to be represented by a union. It is entirely unrealistic to expect this option to be taken up by employees who are busy completing their day to day tasks in the

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2 *Hansard,* Canberra, 13 May 2004, p. 16

3 *Hansard,* ibid., pp 4-5.

workplace. Labor senators agree with the CEPU's assertion that "this provision is totally bureaucratic and unworkable".[4]

13. This provision also raises the totally unacceptable notion that employees need to obtain third party approval to be represented by their union. Labor senators are concerned that the bill will further breach ILO conventions. As noted by the ACTU in its submission:

> The proposal that a union member must seek permission from a public official (who may or may not agree) to involve his/her representative in OH&S matters is preposterous. It is almost certainly in breach of ILO convention 87 (Freedom of Association).[5]

14. The combination of these provisions means that employees who want to have union representation on OH&S issues are left with the Hobson's choice of either openly asking for union representation in a union-averse workplace or having to make an application to the CEO of Comcare. This is unacceptable and the provisions of the bill that effect these changes must be rejected.

Election of health and safety representatives

15. Labor senators acknowledge that in some minor ways the bill is less blatantly unfair to employees than the 2000 version of this bill, but these apparent improvements are minimal and would have little effect when considered in the scheme of the bill as a whole.

16. For example, the bill now includes a provision that the number of management representatives on a health and safety committee must not exceed the number of employee representatives, which was not included in the 2000 bill. However the equal representation of employees and management is not assured in practice, as the election of employee representatives is conducted by management, increasing the chance that management will influence the selection of the employee representatives as well as their own.

17. The conduct of elections for employee representatives by management is justified by DEWR on the grounds that employers have primary duty of care for the health and safety of employees.[6] This proposition fails to recognise the crucial role that employees and their representatives have in ensuring OH&S outcomes. While management may have primary legal responsibility for OH&S, there is no-one more motivated to ensure such outcomes than the employees whose health and well-being is at risk if OH&S issues are not properly addressed.

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4 Submission No. 1a, CEPU, para 27

5 Submission No. 5, ACTU, page 4

6 Submission No. 2a, DEWR, page 7

18. The Government's stated rationale for no longer involving unions in the election of health and safety representatives is that it is unfair to exclude non-union members from this process. DEWR'S submission claims that the bill "removes restrictions on employees becoming health and safety representatives to ensure that all employees are able to take on this role if they wish".[7]

19. However, unions gave evidence that non-union members can and do become health and safety representatives under the current Act:

> Just on the issue of health and safety reps, we do have a number of health and safety reps that the CPSU elects who are non-members. That is because they are the keenest and the best people for the job. Certainly the act does not require us to be exclusive about the way in which we treat union members and non-union members.[8]

20. Labor senators therefore reject the view that the Act needs to be amended to ensure that non-union members are adequately represented on health and safety committees.

Penalty Provisions

21. Labor senators are concerned about union's submissions that penalty provisions are not adequate to ensure deterrence from poor OH&S outcomes, and will be moving amendments to ensure that offences exposing persons to substantial risk of grievous bodily harm are adequately drafted.

Conclusion

22. Labor senators recommend amendment of the bill, to remove those provisions designed to reduce or remove union involvement in health and safety at Commonwealth workplaces. Without such amendments, the bill puts at risk the current good health and safety outcomes in this sector.

23. Labor senators also note that many of the concerns raised in this minority report are also raised in the majority report. The conclusion reached by the majority that the Bill should be passed is therefore inconsistent with their own findings.

Senator the Hon. John Faulkner **Senator Michael Forshaw**

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7 Submission No. 2, DEWR, page 22

8 Mr Graham Rodda, *Hansard,* ibid., p. 8

The Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002

Australian Democrats Minority Report

June 2004

Senator Andrew Murray

The Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 is similar to one introduced in 2000, which lapsed as a result of the 2001 federal election. The 2000 Bill was considered by the Senate Employment, Workplace Relations and Small Business and Education Legislation Committee. It reported in May 2001.

In my Minority Report, I said the following:

> The Australian Democrats consider these bills should be passed with amendment. There are a number of useful advances in the proposed legislation as detailed in the Report.
>
> A key area of concern to us is the place of unions in the maintenance and advancement of workplace health and safety. Unions supplement the regulatory and inspectorial roles of State H&S departments in an irreplaceable way. Unions as a whole sometimes get criticised as a result of the actions of some unionists in misusing the provisions of the various State health and safety Acts. Such unionists raise non-existent H&S issues to achieve other industrial objectives, and misuse entry and search provisions under the pretext of H&S. Such behaviour needs to be addressed. However the way to deal with those abuses is not to clamp down on legitimate useful or effective union H&S activity. Evidence was strongly expressed on this issue, and the Democrats will need to assess whether the intentions of the Bills goes too far in this respect. In my view union officials with expertise in H&S should continue to be involved as appropriate in workplace health and safety.[1]

My views and our position remain unchanged.

The failure of the Government to have the 2000 Bill passed before the 2001 election, and the failure to progress it until four years later, is a clear indication that this Bill carries a low Government priority.

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1 Senate Standing Committee on Employment, Workplace Relations and Education, *Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2000*, p.18

I note some improvements from the 2000 Bill to the 2002 Bill. For example, unlike the 2000 Bill, this Bill provides that if an employer fails to call for nominations within 6 months of the vacancy occurring the Australian Industrial Relations Commission (AIRC) can direct the employer to do so. This Bill also makes provision for election rules to be prescribed by regulation.

The Bill does not, however, address the concerns raised by me in the 2000 Senate Report about ensuring that any new legislation secured the continuing place of unions in the maintenance and advancement of workplace health and safety.

The Committee again received evidence that indicates union involvement in supporting and training staff representatives is one of the necessary elements of a sound OH&S system.[2]

I note that the Department has stated that the Bill does not exclude unions from involvement in OH&S; although any involvement requires a request to be made by one or more of their members. My impression is that this approach does not seem to put a high enough value on union activity in this field.

The Department also noted that the Bill is in line with State and Territory OH&S laws. In that respect I found the table attached, based on information provided by the Department in their supplementary submission, very useful.

It is obviously desirable to harmonise legislation in OH&S wherever possible, and we would try to be mindful of that objective in any amendments we might move.

At first glance there may be some provisions in State laws that could improve the current Bill with respect to the involvement of unions, in recognition of the valuable role unions can play in OH&S. For example, the NSW Occupational Health and Safety Act 2000 allows for a union representative to be present at inspections.

I also have the view that there is a lack of flexibility in the Bill's approach, and that it is possible that non-union enthusiasts in OH&S might find it difficult to become an OH&S representative.

It seems to me where the non-union sector of the relevant workgroup is large *and* the workgroup itself is large, that there could be provision for more than one employee OH&S representative, and that representatives could be elected on a proportional representation basis. I am not suggesting that more than one representative would be a requirement, but it should be available as an option if both the employer and employees find that productive.

As I understand the Act and Bill, there is no option to have more than one OH&S representative if the circumstances so dictate.

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2 CEPU, Additional Information

I suspect the reality and likelihood, anyway, is that by virtue of training, expertise and commitment in most cases union representatives will still dominate OH&S matters in Commonwealth workplaces.

Senator Andrew Murray

Comparison of Union involvement in OH&S Legislation

	Cwth OHS(CE) Act 1991	Cwth OHS(CE) Amt Bill	NSW	Vic	Qld	SA	WA	TAs	NT	Act
Unions involvement in OHS policies/ agreements	Yes	Possible	Possible	No provision	No provision	Possible if requested	No provision	No provision	No provision	Possible if no H&S committee
Unions involvement in Designated workgroups	Yes	No specific provision	No specific provision	Possible if person is authorised	No provision	Possible if employee is a union member	No provision	No provision	No provision	Yes
Union involvement in OHS Committees	Yes	Possible on request	No specific provision	No provision	Possible if employee notifies employer	Possible if requested by a union member	No specific provision	Possible if agreed union member may be elected	Possible elected person may be a union member	No specific provision
Union involvement in H&S representatives	Yes	No specific provision	Possible – union to conduct election if requested	No specific provision	Possible	No specific provision	No specific provision	No specific provision	No provision for H&S reps.	Possible. Union may apply for disqualification of H&S rep.
Union involvement in enforcement provision	Yes	No specific provision	Yes. Notification of inspection and take union rep on inspection	No specific provision	No provision	Yes. Union may apply for review and must be consulted before Minister grants exemption from the Act	No provision	No provision	No specific provision	Possible, union may apply for review of decision.

Source: Department of Employment and Workplace Relations, supplementary submission.

Appendix 1

Submissions Received

1. Communications, Electrical and Plumbing Union (CEPU)

1a. Communications, Electrical and Plumbing Union (CEPU) (Supplementary Submission)

2. Department of Employment and Workplace Relations

2a. Department of Employment and Workplace Relations (Supplementary Submission)

3. Australian Manufacturing Workers' Union (AMWU)

4. Community and Public Sector Union (CPSU)

5. Australian Council of Trade Unions (ACTU)

Appendix 2

Public Hearings

Thursday 13 May 2004 - Canberra

Communications, Electrical and Plumbing Union

Ms Sharelle Herrington, Divisional Assistant Secretary, Communications Division

Community and Public Sector Union

Mr Graham Rodda, Division Secretary, Public Sector and Policy Division

Mr Vince McDevitt, Lead Industral Organiser

Australian Manufacturing Workers Union

Dr Deborah Vallance, National Health and Safety Officer

Department of Employment and Workplace Relations

Mr Stewart Ellis, General Manager, Occupational Health and Safety (Commonwealth Employment) ACT Policy and Support, Comcare

Ms Linda Lipp, Assistant Secretary, Safety, Compensation and International Branch

Ms Dianne Merryfull, Assistant Secretary, Legal Policy 2 Branch