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PRESIDENT
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10 May 2004

Senator Brett Mason
Finance and Public Administration Legislation Committee
Parliament House
Canberra ACT 2600

Dear Senator Mason,

The ACTU and its affiliates - CPSU, CEPU and AMWU - wish to oppose numbers of the provisions in the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002.

The Trade Union movement is disappointed that the Federal government has once again presented this Bill to Parliament. Particularly as Australia has recently ratified ILO Convention No.155 *Occupational Safety and Health and the Working Environment*.

Since 1981, Convention 155 has provided a strong basis for the drafting of legal and operational frameworks of workplace health and safety. Article 4 of the Convention refers to *"the most representative organisation of employers and workers..."*. Under this Bill, the establishment of associations which are not registered associations, creates a form of representation which is not bound by democratic rules and would apply only for the purposes for health and safety.

Alternatively, if the Committee does not agree to recommend that the Bill not be supported we are of the opinion that the Committee should extend the inquiry and report on the Bill until after the Productivity Commission report on the National Workers' Compensation and Occupational Health and Safety Frameworks is released and the likely impacts of the Government's decision on occupational health and safety can be identified and assessed.

Yours faithfully,

Sharan Burrow
President

ACTU AND AFFILIATE SUBMISSION ON THE OCCUPATIONAL HEALTH AND SAFETY (COMMONWEALTH EMPLOYMENT) AMENDMENT (EMPLOYEE INVOLVEMENT AND COMPLIANCE) BILL 2002

2004

1. INTRODUCTION

1. The introduction, for the third time, of this Bill which seeks to amend provisions of the OHS (Commonwealth Employment) Act is lamentable.

2. The ACTU and affiliate unions in the Australian Government sector believe it should not be supported in its current form. In our opinion areas of the Bill breach ILO Conventions to which Australia is a party i.e. Convention 155 and Convention 87.

3. Additionally, we are of the opinion that the Committee should extend the inquiry on the Bill until after the Productivity Commission report on the National Workers' Compensation and Occupational Health and Safety Frameworks is released. This is of particular importance given that the PC's Draft Report included recommendations that could extend the coverage of the Commonwealth legislation. It would be detrimental for Australian health and safety performance if the Bills proposal's were accepted and there was an increase in the number of workers covered by such an amendment.

4. Our strongest objections go to proposals which seek to:

   - change the nature and structure of occupational health and safety committees in workplaces

   - reduce the potential application of criminal penalties for breach of OHS standards.

5. The Bill seeks to delete all references to union involvement in improving OHS performance and creates structures which do not have any requirement to be democratic, to be in the control of employees or to have clear rights for consultation and participation in health and safety.

6. The Bill provides that an employee can be representated by any association for *"employee representatives"*. This allows non registered associations of any make up being given the power to represent employees. The trade union movement is of the strong opinion that this breach of Article 4 of ILO Convention 155, is a clumsy and bureaucratic mechanism for the involvement of employees.

7. The Bill provides that any employee representative organisation can request the right to be involved in consultations by submission to a public official (the CEO of Comcare) in the prescribed form. That official issues a certificate with whatever restrictions deemed necessary which then has validity for a fixed period of twelve months.

8. Section 16B of the Bill, is almost certainly in breach of the terms of ILO Convention 87 re 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.

9. The key test of whether the Bill should be passed is *"is it good public policy and will it result in improved OHS performance in the Australian government employment work area"*. In the opinion of the ACTU there is significant evidence to support the current arrangements where H&S Representatives are elected through a process involving their union and virtually no evidence which supports the proposition that individual employees elected to OHS committees could improve on existing arrangements.

10. This position is not one of wishing to exercise "union power", but one of maintaining and encouraging a status quo that has proven to work as opposed to an unproven system based around an ideology.

11. The ACTU and unions representing employees in the Australian Government Employment (AGE) area do not support the proposals set out in the Bill and seek that either the government withdraw it or alternatively the non government Parties defeat it.

12. Unions provide an independent source of information and advice to local OHS representatives. This enables those representatives to operate most effectively in dealing with what can be complex matters.

13. The OHS performance in the AGE area has been the best in Australia. This reflects existing structures involving unions and their elected local representatives in working with Management to improve OHS in the AGE area.

2. PROPOSED AMENDMENTS WILL BREACH ILO CONVENTIONS

2.1 ILO Convention 155

14. Australia has recently ratified ILO Convention 155. Article (4) provides that national governments should consult with the most representative of organisations. This does not envisage the creation of in-house splinter groups claiming representative rights as proposed in this Bill.

15. Sub-section 5(1) of the Bill defines an employee representative, in part, as :

    - *"in relation to a designated work group ... an association of which an employee included in the group is a member ..."*

16. The definition of an employee association means *"an association of employees a principal purpose of which is the protection and promotion of the employees' interests in matters concerning their employment".*

17. This defintion creates a separate category of associations for the purposes of health and safety in the Commonwealth.

18. This health and safety legislation should reflect the current industrial arrangements in this country and this provision has the potential for various groups of employees to *"establish"* an *"association"* which would be outside the organisations registered under the *Workplace Relations Act 1996.*

19. For example, the Chatswood office of the Tax Office OHS Association could be formed and seek representation under the legislation alongside the major union the CPSU. The views of the employee group could be largely in line with those of management or they could be radically opposed to any management approaches to improve OHS. If the Chatswood office was a large one, several different employee associations representing various interests could be formed. How does the nominated Public Official make a decision on whether to allow the application for representative rights. The definition of employee association is so loose and wide it has the potential to create chaos rather than a rational approach to improving OHS in the AGE area.

20. The government should be encouraging measures to strengthen existing collective representation of employees through established registered organisations rather than creating the circumstances for fragmentation and conflict within workplaces through proposals such as allowing ad

hoc associations to be formed to represent the interests of some employees.

2.2 ILO Convention 87

21. The Bill provides that any employee representative organisation can request the right to be involved in consultations by submission to a public official (the CEO of Comcare) in the prescribed form. That official issues a certificate with whatever restrictions deemed necessary which then has validity for a fixed period of twelve months.

22. 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.

23. The ACTU submits that the process outlined above is bureaucratic, designed to exclude unions from the normal work of representing employee interests and will result in a much less effective outcome in terms of occupational health and safety policy and practices in particular departments and agencies.

3. PROPOSED AMENDMENTS WILL DIMINISH CONSULTATIVE ARRANGEMENTS

3.1 Proposed Safety Management Arrangements

24. The Bill proposes to replace workplace consultative structures involving union members and employers acting together to achieve agreed policies and practices with *"consultation"* with employees to develop *"safety management arrangements"*.

25. These proposals have been changed since the last Bill in 2002, however the difficulties the ACTU previously outlined are still relevant to the current 2004 proposals.

26. At present section 16 of the Act provides for an employer to develop an OHS policy and agreement in consultation with involved unions and sections 24 and 25 of the Act provide for union members to be included in consultative arrangements for designated work groups and the election of health and safety representatives. Such agreements are a

formal process which require endorsement by the agency and their employees and their unions.

27. The processes proposed in the Bill are unwieldy and unworkable. There will be no structural mechanisms available to ensure that the safety management systems guarantee participation or effective representation of employees or even workability of the arrangements.

28. Additionally, Section 16B of the Bill proposes that the development of *"safety management arrangements"* occurs in consultation with *"employees of the employer"* or, where accepted by the CEO of Comcare, an *"employee representative"*.

29. The proposal to require a union member/employee representatives to seek permission of a public official prior to a union representative being allowed to take part in consultations or negotiations on OHS would be in breach of the ILO Freedom of Association Convention 187 and/or the Collective Bargaining Convention 98. Licensed consultation is a limp substitute for a requirement to reach agreement and will ultimately reduce employee participation.

30. This is a very serious matter and one which the Parliament should consider very carefully. If carried it would set a precedent for unions to be excluded from involvement in a wide range of Australian government employment workplace relations' negotiations unless they have the approval of a public officer.

3.2 Proposals for OHS Workplace Committees

31. Section 34 of the OHS Act currently provides for Health and Safety Committees to be established where an employer has at least 50 persons employed, or if there are more than 50 persons employed at a workplace and a request is made by a health and safety representative or a majority of employees request that a committee be established.

32. There is no provision in Section 34 for a union, acting on behalf of its members, or a local union representative to initiate a request for the establishment of a health and safety committee. The ACTU believes that this is a further serious weakness in the legislation.

33. The ACTU believes that the existing provisions of the OHS (CE) Act have achieved good results in terms of improving OHS outcomes. No information has been put forward which suggests that union member participation in Health and Safety committees established under the current Act has been ineffective or inappropriate.

34. As a consequence the ACTU believes that the existing provisions of the Act should be maintained and these amendments proposed in the Bill should be withdrawn.

4. PROPOSED AMENDMENTS EXCLUDE UNIONS

4.1 Union involvement improves health and safety performance

35. The ACTU submits that there is no evidence either within Australia or overseas which would lead to a conclusion that excluding unions from OHS processes at workplace or Departmental/enterprise level would improve OHS outcomes. Any rational examination of either the OHS results in the AGE area or studies conducted in Australia or overseas would conclude that the union role should be nurtured and strengthened, not virtually eliminated as proposed in this Bill.

36. The House of Representatives Standing Committee on employment and Workplace Relations acknowledged in its report "Back on the Job" para 6.37:

> *"that union involvement was a factor in the management of a workplace that affected safety and claims performance."*

37. The National Research on Centre Occupational Health and Safety Regulation (NRCOHR) commented that the available data suggests that the introduction of representatives has caused major changes in OHS attitudes and practices saying:

> "They worked best when the OHS legislation gives them a significant role, and when management adopted a positive attitude to OHS, and gave representatives enough time to perform their duties. A further factor in the success of the representative provisions is union support.
> (NRCOHSR 2003 p. 6)"
>
> Page 43. Interim Report Productivity Commission

38. In *"Statutory OHS Workplace Arrangements for the Modern Labour Market"* Richard Johnstone, Michael Quinlan and David Walters report on a range of international and Australian studies in coming to the following conclusion:

"While there is considerable variation in the detail of these findings, taken collectively, they all lend support to the notion that joint arrangements, trade unions and trade union representation on health and safety at the workplace are associated with better health and safety outcomes than when employers manage OHS without representative worker participation".

This Bill is winding back systems with a proven track record.

4.2 Decreasing union participation

39. The Bill proposes that the employer must prepare and keep an up-to-date list of all designated work groups and ensure that the list is available at all times for inspection by investigators and employees. There is no provision for unions to be provided with a list of designated work groups which would enable unions to obtain information on where such groups are established and where there may be a need to seek to establish such a group.

40. Unions are representative democratic organisations with processes which allow members to be actively involved in decision making and within which there are provisions for individuals who represent employees to be held accountable to the membership and their fellow employees for their actions.

41. The Bill also makes reference to consultation with *"employees of the employer"*. There is no indication as to how employees will be consulted, how the employees to be consulted will be selected, whether they will be in any way responsible to their fellow employees during their involvement in consultation and whether they will be trained in OH&S matters. (The current licence conditions which apply to licenced authorities such as Telstra and Australia Post have a similar consultative terminology. There is no evidence in any of these organisations of processes for direct consultation with employees even though their licence condition allows it. Employers would generally find it more effective to consult with employees through their representative organisations.)

42. In regard to the election of OHS employee representatives the Bill proposes that an election required under the legislation should be undertaken by management representatives. Essentially these provisions mean that employers can control who they wish to consult with unless 100 employees or the majority petition otherwise. This proposal is totally unacceptable.

43. If employee representatives are to be selected in an election the responsibility for conducting the election must be placed in the hands of employees through the union representing the majority of members or, alternatively, an independent body such as the Commonwealth Electoral Office.

44. The proposal to replace OHS representatives being provided through unions representing employees will result in a serious weakening in the effectiveness of employee involvement in the processes related to improving OHS outcomes in Commonwealth workplaces.

45. This proposal is a recipe for managerial control of employee representation on health and safety issues which is in direct conflict with the objects of the Act, namely

> *"to foster a co-operative consultative relationship between employers and employees on the health, safety and welfare of such employees."* (section 3)

46. The ACTU submits that the purpose of the Bill is not to bring about improved OHS outcomes but rather to implement an ideological agenda which seeks to remove employees' collective representation through unions.

47. There is no evidence which can be drawn from the outcomes of the current provisions to suggest that the requirement to consult and reach agreement are either onerous or ineffective. This part of the Bill which removes unions representing employees from an involvement with management in regard to OH&S should be deleted.

5. PROPOSED PROSECUTIONS DO NOT GO FAR ENOUGH

48. The Commonwealth has had only nine prosecutions in 20 years under the current OHS Act. There needs to be a significant change in the way the Commonwealth OHS Act is enforced. The lack of prosecutions means that employees covered by the Commonwealth Act are being treated differently than employees in any other part of the Australian workforce. They have been missing the protection of a significant component of any compliance strategy.

49. The importance of prosecutions and the use of compliance tools by the regulator is recognised as an effective mechanism for the improvement of workplace health and safety performance.

50. The Bill provides that a range of criminal penalties should be replaced with civil penalties. It also proposes to extend the application of penalties to Commonwealth Department employees who, previously, were excluded from the legislation. In addition, the level of monetary penalties under the Act is proposed to be increased significantly in a number of cases.

51. The Bill intends to provide *"as far as possible ... for civil penalties rather than criminal penalties"*. Whilst not opposed to the use of civil proceedings as part of an enforcement regime in the OHS area the ACTU believes that the deletion from the Act of a criminal penalty involving the potential for imprisonment will result in a lower level of diligence by those responsible for implementing its provisions.

52. Limiting criminal prosecutions to cases where breaches of general duties result in death or serious bodily harm is a retrograde step. It is universally accepted that OHS legislation is concerned with limiting exposure to risk and not just the prevention of injury.

53. The basis of OHS law is the limiting of workers' exposure to risk not simply penalising the consequences of that exposure. If only the consequences are singled out it is not consistent with the objectives underpinning OHS Law. For example, should someone be killed in a freak accident quite possibly no-one would be prosecuted in such a case. Compare this to an employer whom knowingly and recklessly exposes workers to a well-known risk but luckily no one is hurt. In the latter case a criminal prosecution may well be reasonable because it is the exposure to the risk not the consequence of the exposure which should be dealt with by the criminal law. This is a basic philosophy of OHS legislation which is being challenged if these changes are made.

54. The circumstances outlined in the Bill which justify criminal proceedings do no provide for sufficient penalties on the individuals who commit serious breaches of the standards required in the OHS area.

55. Sections 18 and 19 of the Bill provide for penalties on individuals and organisations for a range of nominated offences.

56. Such legislation would not be difficult to write, for example the Victorian Crimes Act provides for prosecution for an action involving *"conduct endangering a person or persons' life"*.

57. The addition of the defence of *"reasonable excuse"* will make prosecutions even more difficult. The prosecutor has to show that the employer failed to take all reasonably practicable steps. In addition,

the prosecutor will now need to show that the employer does not have a *"reasonable excuse"*. It is also not defined what would constitute *"reasonable excuse"*.

58. The jurisdiction to hear civil proceedings is conferred on the Federal Court but not the criminal jurisdiction. It should have both to ensure some uniformity of approach to enforcement nationwide (as per the Trade Practices Act).

59. While *'Shield of the Crown'* immunity under the Act has been lifted for the individual it has not been fully lifted for Commonwealth employers. If the employee is liable why not the employer, to the same extent? It may also be preferable to look at penalties directed at *"officers"* of organisations rather than individuals, similar to the provisions of the Victorian OH&S Act (s52). The intent being to attach liability directly to the body corporate and thereby indirectly controlling individual conduct.

60. Provisions which seek to allow government departments to be subject to some enforcement actions (undertakings, remedial orders, injunctions) are generally supported, with the proviso that the Federal Court should have jurisdiction under ss77A and ss77B as per the earlier comments.

61. The ACTU demands a full and comprehensive review of Comcare's prosecution policy.

6. BACKGROUND INFORMATION: COMMONWEALTH PERFORMANCE

62. Overall the performance of the Commonwealth workers' compensation and occupational health and safety arrangements is one of below average cost and improving results. There is no case based on these results for undertaking radical changes to OHS arrangements at employer or workplace levels.

63. The framework for the implementation of the AGE OHS legislation involves the Safety Rehabilitation and Compensation Commission which is supported by Comcare, a statutory authority with body corporate status which undertakes both regulatory and claims management functions.

64. The total number of employees covered by the legislation is around 300,000 made up principally of the AGE (approx 160,000), Telstra, Australia Post (licensees approx 120,000)and the Australian Defence

Forces. Employees in the ACT government (approx 16,000)are also covered by the scheme.

65. The following table shows the total number of claims received and accepted since 1996-1997. The data indicates that the number of claims received and accepted as a percentage of employee numbers has remained relatively stable.

Claims Received and Accepted : 1996 - 1997 to 2002 - 2003

	Employees	Claims accepted	Claims per 100 employees
1996-97	411682	25442	6.18
1197-98	384042	21468	5.59
1998-99	362647	17262	4.76
1999-00	305277	16372	5.36
2000-01	307695	15738	5.11
2001-02	304035	15611	5.13
2002-03	305918	15032	4.91

Standardised comparative performance data, for frequency of injury resulting in five or more days off contained in the CPM report published in November 2003 based on 1997/2000 performance reports the Commonwealth at 9.8 injuries compared with the Australian average of 17 per thousand employees.

66. In the course of the 1999-2000 year, the SRCC contributed to the development of the second Comparative Performance Monitoring report. The report, which was released in April 2000, includes a range of OHS, workers' compensation and return to work indicators. The Commonwealth scheme has generally performed above the national average when measured against these indicators.