Senate Finance and
Public Administration
Legislation Committee

Inquiry into

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

Supplementary Submission
by the
Department of Employment
and Workplace Relations

7 June 2004

Preface

At the conclusion of the Committee's hearing into the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 (the Bill) on 14 May 2004, which proposes amendments to the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the Commonwealth Act), the Committee invited supplementary submissions on issues raised during the hearing. The Department of Employment and Workplace Relations provides this supplementary submission in response to the Committee's invitation.

The Department agrees that the existing legislative framework works reasonably well. However, some of the current provisions limit the effectiveness of the Act. The aim of this Bill is to address these deficiencies and thereby improve occupational health and safety in Australian Government workplaces.

The Department makes the following submissions in response to matters raised in evidence before the Committee.

1. The unions claim that the Bill will not improve occupational health and safety (OHS).

There are a number of ways in which the Bill will improve OHS outcomes for Australian Government employees, namely:

(a) The Bill focuses on outcomes and removes prescriptive processes as far as possible. The current requirement for employers to develop an OHS policy in consultation with involved unions is replaced with a requirement for employers to develop safety management arrangements in consultation with all of their employees. 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.

(b) The Bill removes current legislative restrictions which inhibit the ability of some employees to become health and safety representatives. The current restrictions mean that where an election is required, only employees nominated by an involved union can be health and safety representatives. This can exclude employees with relevant qualifications, expertise or an interest in health and safety. The Bill will require health and safety representative positions to be filled within a reasonable time of a vacancy occurring rather than remaining vacant if a union representative cannot be found to take on the role. If an election has not commenced within 6 months of the vacancy, the Safety, Rehabilitation and Compensation Commission can order that an election be conducted.

(c) The Bill recognises that the duty of care is owed to employees. All employees therefore have a right to be involved in occupational health and safety matters at their workplace and be able to assist in the identification and resolution of workplace hazards.

2. The unions claim that the Bill does not go far enough in dealing with criminal prosecutions.

The Bill makes employers and employees more accountable by lifting the shield of the Crown as far as possible. Commonwealth employers will be liable to the full range of civil penalties, but in accordance with Commonwealth criminal law policy, the Commonwealth as an employer would not be liable to criminal prosecution.

The Bill proposes a stronger enforcement regime to improve compliance and provides appropriate penalties where this is not achieved. The Bill introduces a number of new remedies to ensure compliance with the legislation thereby preventing injuries before accidents occur. The Bill is not just limited to imposing punishment after an employee is killed or injured. These remedies include enforceable undertakings, remedial orders and injunctions.

Significantly higher penalties will be available for breaches of the Act. For example, the maximum penalty for breach of the employer's duty of care will be $495,000 (now $110,000 for Government Business Enterprises only).

A new offence has been created to address situations where an employer has breached its duty of care and this exposes employees to a substantial risk of death or bodily harm. The ACTU claimed that this provision should extend to a potential breach which results in a serious risk to a member of the public or a contractor. The Bill in fact increases the penalty for exposing members of the public or contractors to a risk to their health or safety arising from the employer's undertaking from $110,000 to $242,000.

3. The unions claim that parts of the Bill breach ILO Conventions.

Convention 155

The unions claim that the Bill, in giving non-registered associations the power to represent employees, would breach Convention 155 (C.155). The Department submits that the Bill enhances compliance with C.155. C.155 was ratified by Australia in March 2004.

Article 4 of C.155 requires that each country which ratifies the convention shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. Australia complies with this requirement, for example through the National Occupational Health and Safety Strategy 2002-2012 adopted by all Australian governments, the ACTU and the Australian Chamber of Commerce and Industry. The strategy sets targets for the reduction of workplace fatalities and injuries and provides a systematic approach to OHS for governments and industry.

Article 19 of C.155 requires that there shall be arrangements at the level of the undertaking under which workers or their representatives and, as the case may be, their representative organisations in an undertaking, in accordance with national law and practice are enabled to enquire into, and are consulted by the employer on, all aspects of occupational safety and health associated with their work. A definition of the term "workers" is found in Article 3 of C.155 which states –

> "For the purposes of this convention, the term "workers" covers all employed persons".

Guidance on the reference to "workers' representatives" and "representative organisations" in Article 19 can be found in Article 3 of ILO Convention 135, Workers Representatives, 1971 (C.135) which defines workers' representatives as –

> "persons who are recognised as such under national law or practice, whether they are
> (a) trade union representatives or
> (b) elected representatives, namely representatives who are freely elected by the workers of the undertaking in accordance with national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned".

It is important to note that the term "representative organisations" in Article 19 of C.155 is qualified by the words "as the case may be", which indicates that the provision must apply to "workers or their representatives" in the first place, and also, if relevant, their organisations. The Department submits that by requiring employers to consult with all their employees and enabling them to choose who may represent them, the Bill will enhance the representation of employees required under C.155. Employers will still be required to consult with a registered union if this is requested by an employee who is a member of that union.

The Bill strengthens the Australian Government's compliance with Article 19(e) by ensuring that there is provision for consultation with workers and their representatives. The Bill removes the unions' right to conduct elections, thereby opening up candidature to workers' representatives, as provided for by Article 19(e) of C155. All employees will be able to nominate as candidates for election, not just employees nominated by involved unions, as is currently the case.

The Bill is consistent with State and Territory OHS legislation which generally does not give a specific role to unions (see attached table which compares union involvement in OHS legislation across Australian jurisdictions). No issues of non-compliance with ILO conventions have been raised in respect of State or Territory OHS legislation.

Convention 87 (Freedom of Association) and 98 (Collective Bargaining)

The unions also raised concerns about compliance with C.87 and C.98 because of the inclusion in the Bill of proposed s.16B. Section 16B sets out a procedure to protect the privacy of an employee where the employee wishes to be represented but does not wish to be identified to his or her employer as having sought representation.

In such circumstances an employee representative can apply to the CEO of Comcare for a certificate that an employee has requested the employee representative to represent the employee in consultations with his or her employer. The unions allege that proposed s.16B would require an employee representative organisation to obtain a certificate from a public official (the Chief Executive Officer of Comcare) before it is able to represent an employee in consultations with his or her employer.

The Department submits that these concerns are based on a misunderstanding of proposed s.16B. Section 16B is not a precondition to unions representing their members. The Bill does not prescribe any processes for an employee representative to represent an employee. To be represented, an employee only needs to ask his or her representative to represent him or her.

The certificate issued under s.16B will have a finite term (until the employee requests that the certificate cease to have effect, or 12 months). A new certificate can be obtained at the end of 12

months if desired. The employee representative, not the employee, is responsible for obtaining the certificate.

The section is modelled on a provision in the *Workplace Relations Act 1996* (s.170LKA) which protects the identity of an employee who wishes to be represented in the making of agreements with constitutional corporations or the Commonwealth.

4. The unions claim that the Bill imposes an "unwieldy bureaucratic process" for representation of employees.

As indicated above, an employee who wishes to be represented by his or her union does not need to obtain a certificate from a public official. To be represented, an employee only needs to ask his or her representative or union to represent them. Proposed s.16B is included in the Bill to protect the confidentiality of any employee who does not wish to be identified to their employer as having sought representation.

5. The unions claim that the Bill removes a requirement that employers make an agreement with involved unions.

It is not correct that the Commonwealth Act currently requires an agreement to be made between employers and involved unions.

Paragraph 16(2)(d) of the Commonwealth Act requires an employer -

> "to develop in consultation with any involved unions in relation to the employees of the employer, and with such other persons as the employer considers appropriate, a policy, relating to occupational health and safety".

Subsection 16(3) requires that this policy provide for the making of an agreement between the employer and those unions. This does not impose a requirement that an agreement be made. It only requires that the OHS policy provide a process for an agreement to be made. Subsection 16(3) is part of s.16 which imposes the overarching general duty of care on employers. It would not be appropriate to impose a requirement on employers to make an agreement with a union because if the agreement were not made, the employer would be in breach of its general duty of care. Breach of a statutory obligation by one party should not result from inaction on the part of another party.

The Bill will require employers to develop safety management arrangements in consultation with their employees. It provides that employees can be represented in such consultations with an employee representative. This includes unions. The Bill also provides guidance on the matters that might be included in the safety management arrangements and specifically indicates that employers should consider including agreements with employees and their representatives (which includes unions).

The Bill provides transitional arrangements whereby existing OHS policies will continue in force until replaced by safety management arrangements. It provides 18 months for safety management arrangements to be established. An agreement made between an employer and an involved union prior to the date of commencement will remain in force as long as the OHS policy under which it was made remains in force.

6. The unions claim that the Bill is based on the premise that unions are an impediment to OHS.

The Bill recognises that unions will have an important role in OHS 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.

Currently, an involved union is the only body that can represent employees under the Commonwealth Act. In his evidence, Mr Rodda, Division Secretary, Community and Public Sector Union, stated that in some workplaces the CPSU does not have –

> "even 50 per cent membership – sometimes we deal with 30 per cent membership".

This means that a significant number of employees who are not union members may not be participating in health and safety matters at their workplace. Non-union members are also subject to the union's discretion to nominate them if they wish to become health and safety representatives. The Bill will overcome these problems by ensuring that employers must consult all of their employees and that any employee who wishes to become a health and safety representative has the right to be a candidate in the election.

The Bill will also ensure that health and safety representatives are elected for each designated workgroup. This will overcome problems which have occurred because of delays in unions conducting elections. The Bill will place strict obligations on employers to ensure vacancies for health and safety representatives are filled within a reasonable time. Mr Rodda noted in the example given in his evidence of a problem with Australia Post that -

> "luckily there was a health and safety representative in that designated work group".

The Bill will not make it a matter of luck that each designated workgroup has a health and safety representative.

Dr Vallance, National Health and Safety Officer, Australian Manufacturing Workers Union, stated in her evidence that research indicates that –

> "if you have trade union delegates and union health and safety representatives you will have an increased number of health and safety representatives, you are much more likely to have a health and safety committee".

The Department submits that the current legislative framework is not able to ensure that positions of health and safety representatives will be filled or that more committees are likely to be established. The Bill will require each designated workgroup to have a health and safety representative. The Bill will also ensure that more workplaces will have committees because it imposes requirements on employers to establish committees, rather than making this subject to a request.

Senator Forshaw asked how the individual employee or group of employees at a work site, without some sort of ability to access an organisational resource or structure such as a union, would be able to effectively represent themselves on these issues. The Bill will not result in employees having insufficient knowledge and skills to effectively participate in OHS matters in their workplace. The Act will continue to require all health and safety representatives to undergo a course of training accredited by the Safety, Rehabilitation and Compensation Commission so that they will be able to perform their functions. Unions will still be able to provide independent advice, training and support for their members. All employees will be able to seek independent advice and support from Comcare.

5. Issues raised by Committee members

(a) Should the Bill provide for proportional representation?

Senator Murray raised the issue of proportional representation. In relation to health and safety representatives, the Commonwealth Act adopts the general approach of Australian OHS legislation of having one position of health and safety representative for each designated workgroup. Employees can also select a deputy health and safety representative. Health and safety representatives have significant functions and powers and responsibilities under the legislation and must exercise these responsibly. For example, they can issue provisional improvement notices or direct that work cease where there is an immediate danger to employee health and safety. There is no evidence suggesting that there should be any increase in the number of health and safety representatives for each designated workgroup.

The Bill will enable every employee to nominate as a health and safety representative unless disqualified. The Bill therefore makes it a matter for employees to determine who will represent them.

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 solutions if the Bill were to impose conditions on who may be elected to represent employees.

(b) Will employee representatives be accountable to those who have elected them?

The Bill allows employees to choose who they wish to represent them. The Department supports Senator Murray's view that -

> "it is not a solution to make a little association formed for this specific purpose comply with a full registered organisation's provisions" under the *Workplace Relations Act 1996.*

Senator Murray said however that mechanisms must be developed whereby those representatives must formally account for their performance on behalf of the groups that elect them. An employee representative will be accountable through the ability of an employee to terminate the representation at any time. In the case of health and safety representatives, the Act provides for their accountability by requiring that they undergo accredited training, prescribing their powers and providing that they can be disqualified on specified grounds.

(c) Is it appropriate for elections to be conducted by employers?

The primary duty of care for the health and safety of employees is an obligation placed on employers. Ensuring that each designated workgroup has a health and safety representative is an important aspect of protecting the health and safety of employees. It is appropriate that employers should bear the responsibility of ensuring that elections are held when vacancies occur and that they should bear the costs of the election. The Bill provides a safeguard for employees if they have concerns about their employer conducting the election. A majority of employees, or 100, whichever is the lesser, can require that elections for health and safety representatives will be conducted under the regulations, rather than by the employer.

(d) Has the Government consulted the unions about the Bill?

Senator Forshaw asked whether the Government consulted the unions about the Bill. The Safety, Rehabilitation and Compensation Commission provided advice to the Minister in April 1998 on the need to amend the Act and over a number of meetings considered issues covered by the Bill. The Commission includes two members nominated by the Australian Council of Trade Unions. The Committee on Industrial Legislation of the National Workplace Relations Consultative Council was consulted on the Bill prior to its introduction in accordance with usual practice. That Committee includes representatives of the ACTU and employer bodies.

Comparison of union involvement in OHS legislation

	Cwth – *OHS(CE) Act 1991*	**Cwth** – *OHS(CE) Amt Bill*	**NSW** *OHS Act 2000*	**Vic** *OHS Act 1985*	**Qld** *WHS Act 1995*	**SA** *OHS & Welfare Act 1986*	**WA** *OHS Act 1984*	**Tas** *WHS Act 1995*	**NT** *WH Act 1986*	**ACT** *OHS Act 1989*
Unions involvement in OHS policies/ agreements	**YES.** Union involvement mandatory. [s16]	POSSIBLE [Item27-30]	POSSIBLE [Reg 22(5)]	NO provision.	NO provision.	POSSIBLE if requested [s20]	NO provision.	NO provision.	NO provision.	POSSIBLE if no H&S committee. [s27]
Unions involvement in Designated workgroups	**YES.** [s24]	NO specific provision. [Item 42]	NO specific provision. [Reg 301]	POSSIBLE if person is authorised [s29]	NO provision.	POSSIBLE if employee is a union member. [s27]	NO provision.	NO provision.	NO provision.	**YES.** [s37]
Unions involvement in OHS Committees	**YES.** [s34]	POSSIBLE on request [Item 62]	NO specific provision Reg s17(1)]	NO provision. [s37]	POSSIBLE if employee notifies employer. [s86]	POSSIBLE if requested by union member. [s31]	NO specific provision. [s36]	POSSIBLE If agreed union member may be elected. [s27]	POSSIBLE Elected person may be a union official. [s44D]	NO specific provision. [s58]
Unions involvement in H&S representatives	**YES.** Elections conducted by unions – only unions can nominate candidates. [s25]	NO specific provision [Item 46]	POSSIBLE – Union to conduct election if requested. [s25]	NO specific provision. [s30]	POSSIBLE [s67, 70, 74, 76(2)]	NO specific provision. [s27, 28]	NO specific provision. [s29]	NO specific provision. [s32]	NO provision for H&S reps.	POSSIBLE. Union may apply for disqualification of H&S rep.
Unions involvement in enforcement provisions	**YES.** Unions may request inspections, appeal investigator decisions and institute proceedings for breach of Act.	NO specific provision [Item 71, 101-104 and 141-143]	**YES.** Notification of inspection and take union rep on inspection. [s69]	NO specific provision.	NO provision.	**YES.** Union may apply for review and must be consulted before Minister grants exemption from the Act. [s66, 67]	NO provision.	NO provision.	NO specific provision.	POSSIBLE. Union may apply for review of decisions.