

**SENATE EMPLOYMENT, WORKPLACE RELATIONS,
SMALL BUSINESS AND EDUCATION
LEGISLATION COMMITTEE**

Consideration of Provisions

**Occupational Health and Safety
(Commonwealth Employment) Amendment Bill
2000**

**Safety, Rehabilitation and Compensation and
Other Legislation Amendment Bill 2000**

May 2001

© Commonwealth of Australia 2001

ISSN 1441-9890

This document was produced from camera-ready copy prepared by the secretariat of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. The report was printed by the Senate Printing Unit, Parliament House, Canberra.

MEMBERS OF THE COMMITTEE

Chair

Senator John Tierney (LP) NSW

Deputy Chair

Senator Kim Carr (ALP) VIC

Members

Senator Jacinta Collins (ALP) VIC

Senator Jeannie Ferris (LP) SA

Senator Andrew Murray (AD) WA

Senator George Brandis (LP) QLD

Substitute members

Senator Winston Crane (LP) WA to substitute for Senator George Brandis (LP) QLD for matters relating to Workplace Relations and Small Business.

Senator Andrew Murray (AD) WA to substitute for Senator Natasha Stott Despoja (AD) SA for matters relating to Workplace Relations and Small Business.

Participating members

Senator Eric Abetz (LP) TAS

Senator Brian Gibson (LP) TAS

Senator Lyn Allison (AD) VIC

Senator Brian Harradine (IND) TAS

Senator Ron Boswell (NPA) QLD

Senator Leonard Harris (PHON) QLD

Senator Bob Brown (AG) TAS

Senator John Hogg (ALP) QLD

Senator Geoffrey Buckland (ALP) SA

Senator Steve Hutchins (ALP) NSW

Senator Paul Calvert (LP) TAS

Senator Susan Knowles (LP) WA

Senator George Campbell (ALP) NSW

Senator Philip Lightfoot (LP) WA

Senator Grant Chapman (LP) SA

Senator Joseph Ludwig (ALP) QLD

Senator Helen Coonan (LP) NSW

Senator Kate Lundy (ALP) ACT

Senator Barney Cooney (ALP) VIC

Senator Sue Mackay (ALP) TAS

Senator Trish Crossin (ALP) NT

Senator Brett Mason (LP) QLD

Senator Rosemary Crowley (ALP) SA

Senator Julian McGauran (NPA) VIC

Senator Alan Eggleston (LP) WA

Senator Kerry O'Brien (ALP) TAS

Senator John Faulkner (ALP) NSW

Senator Marise Payne (LP) NSW

Senator Allan Ferguson (LP) SA

Senator Chris Schacht (ALP) SA

Senator Brenda Gibbs (ALP) QLD

Senator John Watson (LP) TAS

Secretariat

John Carter

Joanna Gaudry

Cheryl Hardiman

Jan Willis

Address

S1.61

Parliament House

CANBERRA ACT 2600

Phone (02) 6277 3520

Fax (02) 6277 5706

E-mail eet.sen@aph.gov.au

Website: www.aph.gov.au/senate/committee/eet_ctte

TABLE OF CONTENTS

MEMBERS OF THE COMMITTEE	iii
GOVERNMENT SENATORS' REPORT	1
LABOR SENATORS' REPORT	9
AUSTRALIAN DEMOCRATS SENATORS REPORT	19
APPENDIX 1	21
LIST OF SUBMISSIONS	21
APPENDIX 2	23
WITNESSES WHO APPEARED BEFORE THE COMMITTEE AT PUBLIC HEARINGS	23

GOVERNMENT SENATORS' REPORT

BACKGROUND TO THE LEGISLATION

1.1 On 7 February 2001 the Senate referred to its Employment, Workplace Relations, Small Business and Education Legislation Committee the Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2000 and the Safety, Rehabilitation and Compensation and Other Legislation Bill 2000.

1.2 The first of these bills amends the *Occupational Health and Safety (Commonwealth Employment) Act 1991* to provide improved health and safety protection for Commonwealth employees. It also contains technical amendments, and transitional application and saving provisions.

1.3 The Safety, Rehabilitation and Compensation and Other Legislation Bill 2000 contains the following provisions: amendment to the *Industry Chemicals (Notification and Assessment) Act 1989* to streamline the operation of the National Industrial Chemicals Notification and Assessment Scheme, including minor and technical corrections; amendment of the *Safety, Rehabilitation and Compensation Act 1988* in relation to the operation of the Commonwealth workers' compensation scheme, including minor technical, policy and consequential amendments; amendment to the *Equal Opportunity for Women in the Workplace Act 1999* to correct a technical anomaly; amendment to the *Income Tax Assessment Act 1936* to authorise provision of taxation information to Comcare; amendment to the *National Occupational Health and Safety Commission Act 1985* to reflect the name change of the Australian Chamber of Commerce and Industry; and amendment to the *Occupational Health and Safety (Commonwealth Employment) Act 1991* to make consequential amendments in relation to the collection of premiums.

1.4 Both of these bills were introduced into the House of Representatives on 7 December 2000.

1.5 The Committee received eight submissions in relation to these bills. It held public hearings on 30 March and 4 April 2001. A list of submissions and witnesses at the hearings are to be found in appendices to the report.

Provisions of the Occupational Health and Safety Amendment Bill

1.6 Amendments to the Occupational Health and Safety Act contain two important policy elements. First, a number of amendments modernise and streamline outdated provisions that are currently inhibiting the effectiveness of the act. Second, the amendments are intended to bring occupational health and safety measures into line with policy underlying workplace relations' legislation currently in force. Consistent with this focus is moving occupational health and safety regulation away from the restrictive imposition of solutions to allowing employers and employees to work together to improve workpractices at their particular workplace.

1.7 The *Occupational Health and Safety (Commonwealth Employment) Act 1991* establishes a statutory framework for the protection of health and safety at work of Commonwealth employees in departments, statutory bodies and in government business enterprises. The act imposes a general duty of care on employers in relation to their employees, employers in relation to third parties, on manufacturers in relation to plant and substances, persons erecting or installing plant in the workplace and employees. The act establishes an institutional structure whereby employers and employees can cooperate in addressing health and safety matters through the establishment of designated workgroups, health and safety representatives and through health and safety committees.

New civil law and compliance mechanisms

1.8 The act provides for various compliance mechanisms and there are penalties, including imprisonment, which the act provides for in cases of a breach of the act. Proceedings for breaches of the act may proceed only by way of criminal prosecution, but compliance is rarely enforced by prosecution. Since 1992 50,000 accidents have been reported, resulting in 1,770 investigations. There have, however, been only 9 prosecutions arising from these investigations. The time taken in these prosecutions ranged from 16 months to five years. The small number of matters dealt with by the courts may be partly explained by effect of the current provisions restricting prosecution of the Commonwealth and its authorities and their employees (the so-called ‘Shield of the Crown’), but it does appear that the criminal penalties under the act have a limited role in encouraging compliance with its provisions.

1.9 The bill proposes to amend this enforcement regime to one based upon both civil and criminal remedies in cases where the act is contravened. The criminal prosecution process, as noted above, is relatively lengthy and is time consuming because a higher standard of proof is required. The Committee is advised that by the time a decision to prosecute is made, the prosecution could be out of time.¹ Under the act, all prosecutions against individuals must be brought within twelve months of the alleged offence having been committed. The proposed amendments give promise of speeding up the process of enforcement. There will no longer be any requirement for prosecutions to be launched by the Director of Public Prosecutions, except in the case of serious breaches of the act. The availability of civil penalties would enable Comcare to initiate and conduct proceedings in its own right. New remedies are introduced to support the encouragement of voluntary compliance and to ensure that effective enforcement measures are available should voluntary compliance not be achieved. Comcare is to be given the power to accept undertakings as an alternative to prosecution, these being enforceable through the courts in the case of undertakings not being complied with. Monetary penalties are increased under the bill.

Employers’ duty of care

1.10 The key amendment proposed to this act relate to the employers’ duty of care and to workplace arrangements. There are problems with current requirements in relation to duty of care. Some current requirements are orientated towards process rather than outcomes; there are restrictions on the ability of employers to take measures appropriate to the circumstances of their businesses; and the current mandated role for unions is inconsistent with the thrust of workplace relations policy.

1 Submission No 6, DEWRSB, p.19

1.11 Union involvement, about which the Committee heard much evidence will be dealt with more fully in a later section. It suffices to say here that unions which the Act currently requires to be given a formal role in occupational health and safety arrangements in workplaces are not necessarily representative of all workers. The bill aims to improve the process of consultation between employers and employees through the facilitation of a more direct relationship: one based on a common understanding of the needs of a local workforce and a particular workplace.

1.12 The bill therefore removes prescriptive provisions involving consultation with unions and sets out new obligations on employers to develop safety management arrangements in consultation with their employees for the purposes of: enabling effective cooperation between employers and employees to develop appropriate OH&S arrangements; providing adequate mechanisms for informing employees about these arrangements; providing adequate processes for reviewing such arrangements and varying them when necessary; providing for dispute resolution procedures to deal with problems that might arise during the course of consultations; and provide for a manner in which a health and safety committee is to be established and operated. State and territory legislation includes provision of certain elements of safety management arrangements, for instance those relating to risk identification and assessment, written corporate health and safety policies and employee and management training.

Provisions of the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill

1.13 This bill amends the *Safety, Rehabilitation and Compensation Act 1988* legislation which provides the basis for the operation of the Commonwealth public sector workers' compensation scheme.

1.14 The main features of the act are: that the public sector workers' compensation scheme is fully-funded, with employers financially accountable for the cost of work-related injury and disease through the payment of an annual premium to Comcare, which administers the act; that there is a no-fault scheme with limited access to common law; that it has an integrated and cost-effective approach to injury prevention and rehabilitation; that it provides a comprehensive benefit structure including income replacement payments; and that it provides reasonable medical and rehabilitation costs.

1.15 As the Minister noted in his second reading speech, the amendments are largely of a 'housekeeping nature'. While the Commonwealth scheme is one of the better-performing schemes in Australia, it has become clear through various court and tribunal decisions, and the experience of day-to-day administration that there are anomalies in the current operation of the act. Amendments proposed in this bill will provide some improvements to benefits; some adjustments to eligibility for benefits; and some improvements to procedures in relation to licensing provisions, approval of rehabilitation providers, the administration of premiums, and changes to ensure consistency of Comcare's financial arrangements with the Commonwealth Authorities and Companies Act.

Improvements to benefits

1.16 The Minister provided detail as to improvements to benefits under the scheme. These included improved access to compensation to employees who suffer a hearing loss; ensuring that all employees covered by the act can receive compensation beyond age 65 if

they are injured over the age of 63, and enabling claimants to have the costs of treatment from a wider range of health practitioners than at present reimbursed, without having to obtain a referral from a medical practitioner. The bill also ensures that compensation payments for former employees are maintained at 70 per cent of indexed normal weekly earnings.²

Adjustments to eligibility

1.17 As well as ensuring the security of benefits, the bill tightens up eligibility criteria, mainly in response to court decisions which indicate that Parliament's original intention is not being achieved under the current legislation. The bill amends the act in a way which will achieve that intention by providing that there should be a close connection between the disease and the employment in which the employee is engaged. The bill lists a number of specific factors that a court should take into account in determining the extent of this connection. These include, but are not restricted to, the duration of employment, the nature of the employment tasks, any medical predisposition of the employee to the ailment, and any other activities that the employee may be engaged in which are not related to the employment.

1.18 The bill will amend the act to provide for separate tests for establishing entitlements to compensation for disease and injury. The amendment will ensure that where an injury occurs at work which is a natural progression of a disease, it will be deemed not to be an injury for the purposes of the act, even though an employee will not be prevented from attempting to establish that the employment contributed to a material degree to the condition of the disease itself. As a result of court decisions the Commonwealth has found itself liable to pay compensation to employees suffering heart attacks and strokes at work, even where there is no evidence that employment has brought on these conditions. The courts have also called into question whether in certain circumstances compensation is inequitable because employees may or may not be compensated for the same condition depending on whether they were at work or at home when an incidence of ill-health occurred.

Compensation

1.19 Judicial interpretation has also been at odds with the intentions of Parliament in regard to determining amounts of compensation. The objective of the current act was to preserve rather than extend the rights of employees injured prior to the commencement of the current act. Employees injured under the 1971 legislation had no entitlement to payment for non-economic loss, and this provision was continued under the current act, although it was later held by a court that such an entitlement was automatic. The bill before the Committee restores the original intention of the Parliament.

1.20 Also provided for in the current act is a provision that Comcare can deduct a claimant's earnings from his or her weekly compensation payments. In one case, the Federal Court ruled that the earnings of a security guard position could not be taken into account in calculating a former Australian Federal Police officer's weekly incapacity payments.³ The amending bill ensures that any earnings of a claimant can be taken into account by Comcare when assessing the amount of compensation payable.

2 Hon Peter Reith MP, Hansard, House of Representatives, 7 December 2000, p23592

3 *Comcare v Chenall* (1996) 139 ALR 380

Other amendments

1.21 The bill also amends the *Industrial Chemicals (Notification and Assessment) Act 1989* legislation which operates to protect Commonwealth workers and the environment from chemical risk. Amendments to the act will reduce the regulatory burden that are part of procedures to promoting safe chemical use. Currently, some companies are reluctant to import or produce particular polyesters of low molecular weight because of the cost of introduction through the National Industrial Chemicals Notification and Assessment Scheme.

1.22 The Committee heard evidence that recent scientific experience has shown that certain polyesters are relatively benign and that their use has been over-regulated compared to their potential risk.⁴ The proposed inclusion of low risk polyesters in the polymer assessment category in the act will mean that Australian industry will not need to provide extensive test data, which will lower introduction fees and faster penetration of the market. It will encourage companies to introduce less hazardous chemicals from abroad.

1.23 The bill also includes minor or technical amendments to four other bills referred to in paragraph 1.3.

Consideration of the issues

1.24 At public hearings held on 30 March and 4 April the Committee pursued a range of interests. First, on the continuing participation of unions in consultations and in committee processes at the workplace level on matters relating to occupational health and safety; second on the role of the courts in determining whether a close link could be established between an illness or injury and a pre-existing condition; and third, the issue of Crown immunity.

The role of unions

1.25 Submissions and oral evidence from the ACTU, representing all unions, was strongly critical of provisions that removed the necessity to include trade unions in new workplace arrangements for consultations and committees on occupational health and safety. Evidence was given of the recognition by some employers of the value of trade union participation in OH&S matters.

1.26 Although a fair proportion of the time was spent on this issue at the hearing, it appears that much of the objection to these provisions on the bill rests on conjecture. Evidence provided by DEWRSB officers suggest that the participation of unionists – if not union officials – is unlikely to be affected by these changes. The Committee majority sees the intention of the legislation to exclude from the health and safety committees that will be established in workplaces, union officials who are necessarily representing members in a workplace. Individual union members are not faced with any restriction on their membership of such a workplace body.

1.27 The rights of unionists are well protected. The bill provides for an individual employee to request representation from his or her union. As the Committee was advised:

4 Dr Margaret Hartley, *Hansard*, Canberra, 4 April 2001, p.31

The policy intent behind the legislation is to enable choice. If an employee wanted his or her union to represent them, then that is what the legislation is intended to effect.⁵

1.28 Government members of the Committee make the point that the provisions in the current legislation which have included trade unions in special relationships in the organisation of occupational health and safety arrangements have a declining relevance to contemporary workplace relations. The involvement of unions in such arrangements has limited historical justification. Public sector union membership has been in decline over a number of years and is now estimated at between 40 and 50 per cent of the workforce. In some workplaces the proportion would be much lower, and employees in those workplaces are unlikely to see either value or relevance to having union officials compulsorily represent them on local workplace committees.

Judicial interpretation of compensation eligibility

1.29 The Governments are obliged to enforce the intentions of Parliament, in this case in respect to legislation introduced and passed during the period of the Hawke government. It has not been suggested at any time that the policies contained in the current act are outmoded or misguided. The intention of this bill is to strengthen them. The conflict between parliamentary intent and judicial interpretation on a number of issues in recent years has been experienced by successive governments. Oppositions can take no advantage from the likelihood of the courts weakening the intent of legislation which has found general support from both sides of Parliament.

'Shield of the Crown'

1.30 This was an issue that required clarification. ACTU representatives expressed concern about the partial lifting of Crown immunity for the reason suggesting it was to be applied discriminately: that individuals could be prosecuted, but that the 'people who have control of the resources', meaning, presumably, senior management, are not subject to any sort of penalty, having Crown immunity.⁶ It was suggested that Commonwealth practice should follow that of Victoria and Queensland, where chief executive officers could be prosecuted.

1.31 However, the Committee heard evidence at the second day's hearing that there was a long-standing view that it was 'a bit of a nonsense for the Commonwealth to pursue the Commonwealth in respect of the Commonwealth's breach of Commonwealth legislation'.⁷ There were processes to ensure that Commonwealth agencies act in a proper manner to prevent injuries. Advice was given to the Committee that there was no inconsistency between Commonwealth and Victorian practice in relation to prosecutions, and that the Commonwealth's civil enforcement code has parallel provisions with the Victorian Crimes Act.

5 Mr Barry Leahy, *Hansard*, EWRSBE Committee, Canberra, 4 April 2001, p. 30

6 Ms Sharelle Herrington, *ibid*, p11

7 Mr Barry Leahy, *ibid*, p30

Conclusions

1.32 The Committee's consideration of these complementary bills confirms its view that they are, in the main, pieces of machinery legislation introduced for the purposes of updating technical provisions across a range of government operations. Government senators are of the view that the amendments are necessary and timely, the Government having acted on advice that such legislation is required. Parliament has little choice but to respond to judicial interpretation of legislation which is contrary to the intentions of Parliament. Amendments contained in the Safety, Rehabilitation and Other Legislation Amendment Bill are warranted on this account.

1.33 Amendments contained in the Occupational Health and Safety Amendment Bill are of a different order to the extent that they implement changes consistent with modern workplace practice. Government senators support this legislation because it promotes a progressive culture-change at the workplace through a greater measure of shared responsibility for workplace safety without removing any existing obligation upon employers.

1.34 Government senators commend this legislation to the Senate.

John Tierney

Winston Crane

Jeannie Ferris

Chair

LABOR SENATORS' REPORT

Occupational Health and Safety (Commonwealth Employment) Bill 2000

1.1 In considering this legislation, Labor senators note the amendments proposed by the Government in the light of general agreement that the current Commonwealth scheme is entirely self-funding and is performing well. It notes that more stringent standards of compliance with OH&S guidelines and directions over recent years have resulted in marked improvements in the overall performance of government agencies in reducing workplace related illness and accident rates. This is the result of the heightened consciousness of a better informed and trained workforce. Opposition senators support legislative and administrative measures that strengthen this continuing trend, and to this end will support a number of provisions in this bill.

1.2 In this report, Opposition senators address three issues arising from their examination of provisions of the Occupational Health and Safety Amendment Bill 2000. These are:

- elimination of union involvement in matters of occupational health and safety;
- uncertainties about consultation in workplace safety management arrangements; and,
- proposed amendments increasing the strength and variety of the enforcement regime.

Union involvement in OHS matters

1.3 The Government senators' report describes the involvement of unions in OH&S as an 'historical legacy', the implication being that historical processes are, in this case, irrelevant to the evolution of legislation protecting the rights of employees, and that unions have no legitimate interest in a matter in which their members expect continuing representation on their behalf. The question of whether unions have a continuing legitimate role to play in this employment related role is a matter for employees and unions. It should not be legislated out of existence without their consent. Labor senators note the comments of ACTU Vice-President Bill Mansfield to the Committee on this subject:

Unions have made a significant contribution to improving the standards of occupational health and safety. In association with management, unions have introduced preventive strategies through their members activities at workplace level and through the activities of officers of unions, who have particular responsibilities in occupational health and safety issues. I believe that unions can lay claim to being in part responsible for the success of the existing workers' compensation and occupational health and safety arrangements in the Australian government employment area, which has a low incidence of injury and a low level of premiums.¹

1.4 Later in his evidence Mr Mansfield referred to recent statements from the OH&S manager at Telstra, the largest agency covered under the this legislation, that the performance of Telstra in occupational health and safety was in no small regard related to the involvement of unions in the occupational health and safety arrangements in that organisation.

1 Mr William Mansfield, *Hansard*, Canberra, 30 March 2001, p. 2

1.5 His point was that the union movement – through its members at the workplace level and through its officers at the state and national levels – kept management in Telstra up to the mark in terms of its occupational health and safety performance.

1.6 The AMWU submission stated that a number of unions, including the AMWU, had recently negotiated agreements with the Department of Defence, ARPANZA and Sydney Airport Corporation, and that in negotiation with these parties there were no significant difficulties or indications that the current arrangements were an impediment to health and safety in the workplace.² Consistent with this evidence, the Committee heard that even though occupational health and safety arrangements for Australian Defence Industries in Victoria come under Victorian legislation (in the case of Victorian workplaces) the former consultative arrangements at ADI under Comcare and the Commonwealth act have been so successful that ADI management and unions have agreed to continue those same processes despite having recently come under Victorian law.³

1.7 The ideology which is at the core of this provision takes the line that trade unions are increasingly irrelevant to the needs of employees, and that it is undesirable to have the status of unions recognised in legislation with regard to workplace cooperative arrangements. The declining level of union membership is cited in support of this argument. The Government makes certain assumptions about the relevance of its legislation, based on union membership figures, and characterised more by ideological rhetoric associated with labour market deregulation, rather than with regard to the realities of the workplace, and the shared interests of employers and employees.

1.8 Labor senators make the point that an ideological stance on matters relating to occupational health and safety is neither a constructive policy development nor a prudent one. Such a policy disregards the main issues at stake. As the Committee was advised:

—despite any government or anybody’s ideological position or thinking whether unions are irrelevant or not, the academic research shows that even in countries like the United States, where the level of unionisation was 15 per cent, actively involving unions in occupational health and safety processes in workplaces and consultation improves the occupational health and safety outcomes. I think it would be really important that this government notes that, in fact, that is the role that workplace representatives have and that we are about getting occupational health and safety outcomes. It is not an adversary situation; it is about working together to get good occupational health and safety outcomes and decrease our toll. That is what we are on about.⁴

1.9 The Committee also received evidence that research conducted by Worksafe Australia, and in the results of the Australian Workplace Industrial Relations Survey of 1995, confirming the long-standing belief that good health and safety outcomes are achieved through union involvement in consultation processes. The Workplace research shows that if

2 Submission No 4, Australian Manufacturing Workers Union, p.7

3 Dr Deborah Vallance, *Hansard*, Canberra, 30 March 2001, p.6

4 Dr Deborah Vallance, *ibid.*, p. 14

unions back members of health and safety committees, the result will be lower workers compensation claims.⁵

Proposed workplace consultation arrangements

1.10 Labor senators are concerned at the vagaries of policy concerning the proposed workplace consultation arrangements, a problem reflected in the lack of precise detail about how occupational health and safety committees are intended to operate. The natural concern of Labor senators is that if a system which is working well across the country is to be replaced by something else, the new arrangements should give promise of achieving at least as much success as those which are being replaced. Labor senators believe that the vast majority of employers and employees would see this as an obvious point to make.

1.11 While the bill makes reference to consultation with ‘employees of the employer’. There is no indication of how this process will work. The ACTU has expressed concern how the employees to be consulted will be selected; whether they will be responsible to their fellow employees during their involvement in consultation; whether they will be trained in OH&S matters and what represents a ‘Safety Management Arrangement’ over which they will be entitled to be consulted.⁶

1.12 Draft ‘guidelines on consultation in respect of developing safety management arrangements’ were received by the Committee from Comcare on the day the Committee finalised the report thus limiting the Committee’s ability to evaluate them.

1.13 The CEPU submission argues that changes to workplace consultative mechanisms will result in, among other difficulties, less effective workplace-level consultation; a limit on the obligation of the employer to consult, rather than to reach an agreement; committees dominated by employer representatives and such committees not directly linked to workplaces.⁷

1.14 The understanding of unions is that they would be excluded from any participation on occupational health and safety committees, even when an employee wished to have his or her union involved. Under questioning by the Committee, the Department’s view was at first equivocal.⁸ The Department was later able to provide a written opinion from the Attorney-General’s Department confirming the unions’ interpretation of Item 30 of the bill. The advice read: ‘If there is a person who comes within the definition of a workplace association representative at the employee’s workplace for the employee, then the employee cannot choose to be represented by an officer or employee of a different representative association such as a union.’⁹

1.15 There continues to be confusion as to the intent of the legislation with regard to the element of choice available to employees to be represented by a union in relation to health and safety matters. The Committee was given advice at the second hearing that the policy

5 *ibid.* p. 9

6 Submission No 2, Australian Council of Trade Unions, p.12

7 Submission No 5, Communications Electrical Plumbing Union, p.4

8 *Hansard*, *ibid.*, pp.22-23

9 DEWRSB, Tabled Additional Information, Attachment C

intent behind the legislation was to enable choice. Departmental officers advised that they were considering whether the provisions, as drafted in the bill, correctly reflected the Government's intentions.

My analysis of the legislation is still in line with the interpretation that I gave to the committee at its previous hearing, but the policy intent is as Mr Leahy has just mentioned. Whether the provision as drafted correctly reflects the government's intention is a matter that we have under consideration.¹⁰

1.16 Departmental officers did not rule out the possibility of an amendment.

1.17 Advice from the Attorney General's Department confirms that there is a problem, but the Department has not provided the Committee with any detail of the outcome of their consideration of the matter. Labor senators are of the view that this matter is fundamentally important and will need to be resolved before the bill comes up for debate in the Senate.

1.18 The Government's rationale for the legislation is that it will provide for a wider representation of employees as health and safety representatives. The Government puts much emphasis on the provisions which oblige employers to set up occupational health and safety committees. It is the view of Labor senators that the terms of the employee representatives on health and safety committees are at the discretion of employers. If unions are to be explicitly excluded from negotiations for the formation of health and safety committees on the new mode, however that is to be structured, the degree of protection of employee interest is at risk. Well-ordered arrangements than have been instituted over many years are at risk of being replaced by *ad hoc* committees of people who may have little experience or interest in the running of an effective OH&S regimen. The workplaces most adversely affected will be, ironically, those which have experienced a sharp decline in levels of union membership. The costs of this are unlikely to be increasingly felt by management in the form of increased insurance premiums.

Changes to the enforcement regime

1.19 Labor senators are in broad agreement to what is proposed in new enforcement regime provisions. It is proposed that a dual system of enforcement be introduced, providing for civil remedies as far as possible, and retaining criminal law remedies for serious breaches of the act. Labor senators accept that the result should be a more expeditious process of enforcement.

1.20 There is one point of contention Labor senators note the views put to the Committee by unions urging an amendment to Item 161 providing that a criminal penalty should still apply where an employer engages in conduct, or allows conduct to occur which endangers a person. Labor senators interpret what is proposed as the retention of criminal penalties when a contravention results in death or serious bodily harm, rather than when an employee is exposed to such a risk. This does not take the law far enough, and does not offer sufficient deterrent to careless or wilfully negligent behaviour and administration by employers. Labor senators take the view that OH&S legislation is as much concerned with limiting exposure to risk as to the prevention of injury. This point was made in the ACTU submission:

10 Mr Alex Anderson, *Hansard*, Canberra 4 April 2001, p.30

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 who 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 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.¹¹

1.21 Labor senators are strongly of the view that Item 161 should be amended to retain the criminal liability of an employer who knowingly and willingly allows a course of action which exposes employers to serious bodily harm.

Safety, Rehabilitation and Compensation Legislation Amendment Bill 2000

1.22 Workers' compensation legislation has a long history. The first no-fault scheme was introduced in 1912. New legislation in 1930 revised and extended the scheme. Further improvements legislated for in 1971 had the effect of greatly increasing the costs of the scheme. The current act, introduced in 1988 effectively dealt with this problem by shifting liability for contributions from the government as a whole to individual departments and agencies, with premiums determined by their record of claims. This provided the incentive for agencies to develop appropriate cultures of occupational health and safety awareness, and effective strategies to deal with sickness and accident problems in the workplace. The 1988 legislation also strengthened the test for liability, requiring those seeking compensation under the scheme to be able to demonstrate that employment was a contributing factor in the contraction of a disease 'in a material way'.

1.23 The bill currently before Parliament proposes a large number of amendments to a number of acts. Among other things, these amendments provide for simplified licensing procedures for employers who wish to self-insure; the streamlining of Comcare's administrative arrangements; ensuring that Comcare's approval and supervision of rehabilitation providers is tightened; and, improving some benefits under the scheme.

1.24 Labor senators support these and other, more technical amendments intended to ensure that the SRC Act works to the benefit of employees and allows Comcare to operate more effectively. Amendments to the Industrial Chemicals (Notification and Assessment) Act are also supported, as are technical amendments to other acts listed in the bill.

1.25 One centrally important element of the SRC Legislation Amendment Bill is, however, opposed by Labor senators. This provision relates to the definition of injury and disease. In brief, Labor senators believe that the imposition of such stringent tests to establish the connection between the workplace and the nature of the injury or disease will result in an injustice to large numbers of claimants, and is a measure at odds with the central purpose of the legislation. At the heart of the issue is the matter of costs.

11 Submission No 2, Australian Council of Trade Unions, p.14

The issue of costs

1.26 Labor senators reiterate an obvious point put to the Committee at its public hearing on this bill: that workers compensation is provided under no-fault legislation. It is legislation that balances costs against fair compensation. Changes to workers compensation legislation in state jurisdictions has occurred at times of increasing costs: when significant unfunded liabilities have existed and claim rates have increased. None of these preconditions exists for the Commonwealth now, as will be shown.

1.27 In his second reading speech the then Minister also noted that a workers compensation scheme must balance the costs of such a scheme with fair access to compensation and effective rehabilitation of injured workers. Despite this statement, it appears that the cost issue looms much larger in the mind of the Government than does the issue of fair treatment of employees. However, it has not been made clear as to why this is so. An examination of costs and claims over the past five years would not suggest that the issue of costs is significant.

1.28 Minister Reith has made some statements in the House of Representatives which try to establish the intention of this legislation as being similar to that of the current act introduced in 1988. The circumstances are entirely dissimilar. In 1988 the Commonwealth scheme was faced with a cost blow-out which required changes to both administrative arrangements and more stringent compensation tests. The current position in relation to cost containment is a matter of pride to Comcare, and the table below shows the reason why.

<i>Year</i>	<i>1996-1997</i>	<i>1997-1998</i>	<i>1998-1999</i>	<i>1999-2000</i>
Claims received	28,807	24,532	21,170	19,512
Claims accepted	25,442	21,468	17,262	16,372
Claims received as a percentage of employee numbers	6.99	6.39	5.83	6.36
Claims accepted as a percentage of employee numbers	6.18	5.59	4.76	5.34

1.29 The table demonstrates the decline in the number of claims accepted as a percentage of employee numbers. It should also be noted that a comparison of workers compensation premium rates around Australia shows that at 1 per cent, Commonwealth rates are the lowest in Australia, to be compared, for instance, with New South Wales at 2.8 percent, Victoria at 2.2 per cent, and Western Australia at 3 percent.

1.30 Comcare's annual report for 1999-2000 states that it has reduced injury frequency rates per 100 employees by a further 6 per cent, improved claims management performance and exceeded the average durable return to work rate by 10 per cent.

1.31 By any measure, Comcare's performance has been very good, and has demonstrated progressive improvement. There can be no justification, on cost indicators alone, for the Government's policy of tightening compensation eligibility conditions. Labor senators note that the submission from the Department of Employment, Workplace Relations and Small Business provides a summary of cases which have seen compensation claims successfully pursued by employees, presumably on grounds which the Government considers to be insufficient. The Government appears to be as much determined to restrict the scope of claims as to restrict costs. This is to be achieved by narrowing the scope of courts and tribunals to make judgements which, in the Government's view, have taken too liberal an interpretation of existing provisions. The current downward trend of successful compensation decisions for employees is, presumably, regarded by the Government to be insufficiently steep. Acceleration of the trend is to be achieved by restricting the definition of compensable injury and disease.

Defining injury and disease

1.32 Amendments contained in this bill are intended to establish a stronger test regarding the connection between work and injury; between work and disease, and to clarify the relationship between work and disease. Ailments are not to be compensable unless there is a close connection between the ailment and employment. Nor can ailments be treated as injuries, and nor is aggravation of an ailment to be considered an injury. Nor may be claimed as an injury any incident of event in the workplace which is a natural progression of a disease.

1.33 Labor senators are of the view that the effect of these provisions is to severely limit the right of Commonwealth employees to workers compensation. The Government denies that these provisions will be more stringent than any that currently exist in any state or territory jurisdiction, but as the Committee was advised by one union authority:

We did look at this question and it is very clearly the toughest that is proposed of all the jurisdictions in existence. Victoria is the only jurisdiction that actually goes to the extent of listing factors in terms of a significant contributing factor. None of the other jurisdictions go to that extent. South Australia talks about a substantial cause, which relates to stress. Western Australia requires employment to be a contributing factor and to have contributed to a significant degree—that is for disease only. Queensland requires a significant contributing factor. Tasmania requires it to be to a substantial degree. The Northern Territory requires that it materially contributed to. Those are the phrases used, but it is really left for the courts to determine precisely in the circumstances of each individual case what that means. Only Victoria goes to the extent of limiting any factors. None of the jurisdictions go to the extent of adding an additional exclusion in relation to natural progression of a disease, and that is of substantial concern to the unions.¹²

1.34 Labor senators are of the view that the result of the passage of the bill in this form will be prolonged and costly legal wrangling over conflicting interpretations of medical evidence. As the Committee was advised :

We see that as a mechanism really to only increase the costs of the scheme and to cause real problems for any individual to establish an entitlement for

12 Ms Sharelle Herrington, op.cit., p. 9

compensation. It will be a wonderful area for the medico/legal consultants to become involved in. I suggest that the scheme costs will go up substantially in relation to medical and legal costs if that amendment goes through. The only people who will suffer from that amendment will be the individuals who will find it much too complex an issue and much too costly to ever go to the trouble of trying to establish that there is no natural progression in the disease which has been contributed to by their work..¹³

1.35 Labor senators make the point that these provisions have no justification as a cost limiting measure. They are introduced at a time when the social justice factor in workers compensation requires affirmation at a time of rapidly changing work practices and culture, and with transformed workplaces.

1.36 The 1995 Australian Workplace Industrial Relations Survey found that half of the workforce was experiencing higher levels of stress. Appreciable increases are reported in the pace of work and in the length of working days. As many as 43 per cent of employees reported that they had no say in the way their work is organised or over decisions at work which affect them. The resulting stress is likely to result in damage to health, with heart disease being a particular problem.

The issue of management responsibility

1.37 Labor senators also note that the more stringent tests on whether illness or injury can be related to the workplace takes no account of the responsibilities of employers. Under the proposed legislation the ‘normal management requirements’ of the workplace provide no grounds for compensation under any circumstances.

The expansion of the ‘management action’ exclusion is wrong in principle. Entitlement to workers compensation is related to any injury or disease which arises out of or in the course of employment. If management action is a contributing factor to the injury/disease then the issue to be dealt with is the proper education and training of managers and how both they and the system deals with staff. The focus should not be on looking at ways to reduce entitlements by erecting artificial barriers.¹⁴

1.38 There can be little doubt that poor management is a major contributory factor to stress in the workplace. Labor senators again draw the attention of the Senate to the basic principle that underpins OH&S legislation: that it is ‘no-fault’ legislation. There are limits to the extent to which exclusion clauses and conditions may be inserted without destroying the reason for the act’s existence. There appears to be a view in the Government that too many compensation cases brought by employees are succeeding; that legal loopholes are being opened up that should be closed. It appears that the courts and tribunals are to be fettered in the discretion they can exercise in recognition of employee’s rights and entitlements. Labor senators believe this view of the role of courts and tribunals in OH&S matters to be perverse.

13 ibid.

14 Submission No 5, CEPU, p.3

Conclusion

1.39 These are complementary bills as to their legislative purpose. They are also complementary in their defects. Each contains provisions which are desirable in their technical aspects, and in minor policy changes they are intended to implement. These provisions, however, are wrapped around hard-core policy elements which quite overshadow the desirable aspects of the bills and render them liable either to drastic amendment or defeat.

1.40 The Occupational Health and Safety (Commonwealth Employment) Bill 2000 is, in the view of Labor senators, a conceptually flawed bill because it will almost certainly result in a deterioration in the outcomes for occupational health and safety. As stated previously, the intentions of the bill appear to provide for form over substance: that is, the implementation of arrangements consistent with the Government's view of workplace relations, but having almost nothing to do with the maintenance of a first-rate occupational health and safety regimen. An element of this conceptually flawed proposal is the vagueness of the regimen which is to replace what currently exists. Labor senators anticipate a chaotic bedding-down of a system which unlikely to provide the same level of assurance to both employers and employees as the current arrangements ensure.

1.41 The Safety, Rehabilitation and Compensation Legislation Amendment Bill 2000 is also conceptually flawed in the way it seeks to limit access to entitlements to employees. Labor senators are conscious of the need for legislation of this kind to contain various exclusion provisions limiting claims to illnesses and injuries which have a direct connection with employment. This was provided under the 1988 legislation. The objection to this legislation is that the balance between justice for employees, and laudable cost containment provisions is seriously overturned. An expeditious, largely administrative process, operating to the benefit of employers, is bound to be replaced by a highly litigious process whose major beneficiaries will be the legal and medical professions. These changes are to be made despite the continued record of improvement in the OH&S record of Commonwealth agencies and the lowest premiums in the country.

1.42 Finally, Labor senators, noting the record of the courts and tribunals operating under current law, put the view that attempts to fetter the discretion of these bodies does not give promise of any sure success in achieving the legislative outcomes desired. All that can be assured is an escalation of costs and a loss of confidence in the system of workers compensation. This will flow through to workplace relations generally.

1.43 Labor senators will move for extensive amendments to both bills.

Senator Kim Carr

Senator Jacinta Collins

Deputy Chair

AUSTRALIAN DEMOCRATS SENATOR'S REPORT

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.

Necessary amendments will be considered by us having reviewed the evidence and submissions. We will consult further concerning these.

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&S¹. 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.

Senator Andrew Murray

¹ For the proper use of the principles of search and entry provisions see the Senate Standing Committee for The Scrutiny of Bills' Fourth Report of 2000. 6 April 2000.

APPENDIX 1

LIST OF SUBMISSIONS

List of submissions received from organisations

- 1 Miller Health Pty Ltd, Mr John Miller, JAMISON, ACT
- 2 Australian Council of Trade Unions, Mr Bill Mansfield, MELBOURNE, VIC
- 3 National Council of Self Insurers, Ms Fleur Dooley, CHATSWOOD, NSW
- 4 Australian Manufacturing Workers' Union, Mr Mike Nicolaidis, MELBOURNE, VIC
- 5 Communications Electrical Plumbing Union, Mr Brian Baulk, CARLTON SOUTH, VIC
- 6 Department of Employment, Workplace Relations and Small Business, Mr Barry Leahy, CANBERRA, ACT
- 7 Community and Public Sector Union, Mr Doug Lilly, MELBOURNE, VIC
- 8 Queensland Workers' Health Centre, Ms Judy Kennedy, WOOLLOONGABBA, QLD
- 9 The Superannuated Commonwealth Officers Association (Federal Council), Ms Helen Allnutt, MAWSON ACT
- 10 The Hon Tony Abbott MP, CANBERRA ACT
- 11 CPSU (Vic) Injured Workers Support Group, MELBOURNE VIC

APPENDIX 2
WITNESSES AT PUBLIC HEARINGS
FRIDAY, 30 MARCH, 2001
CANBERRA

WITNESSES

ANDERSON, Mr Alex, Assistant Secretary, Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

HERRINGTON, Ms Sharelle, Divisional Assistant Secretary, Communications Division, Communications Electrical and Plumbing Union

MANSFIELD, Mr William, Assistant Secretary, Australian Council of Trade Unions

ROWLING, Mr John, Assistant Secretary, Safety and Compensation Policy Branch, Department of Employment, Workplace Relations and Small Business

SWAILES, Mr Noel, Acting Chief Executive Officer, Comcare

VALLANCE, Dr Deborah, National Occupational Health and Safety Coordinator, Australian Manufacturing Workers' Union

WEDNESDAY, 4 APRIL, 2001

ANDERSON, Mr Alex, Assistant Secretary, Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

HARTLEY, Dr Margaret, Director, National Industrial Chemicals Notification and Assessment Scheme

LEAHY, Mr Barry, Chief Executive Officer, Comcare

ROWLING, Mr John, Assistant Secretary, Safety and Compensation Policy Branch, Department of Employment, Workplace Relations and Small Business