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

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

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17 April 2003

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

Date Introduced: 26 June 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: Schedule 1 commences 28 days after Royal Assent. Schedule 2 commences immediately after Royal Assent is given to the formal provisions of the legislation.

Purpose

Among other things, to amend the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (the Principal Act) to:

- change the role of unions in relation to occupational health and safety in Commonwealth workplaces
- establish a civil penalty regime for statutory breaches and reform the criminal penalty regime.

Background

The Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 (the 2002 Bill) is similar to one introduced in 2000—the Occupational Health and Safety (Commonwealth Employment) Bill 2000 (the 2000 Bill). The 2000 Bill lapsed with the prorogation of Parliament for the 2001 General Election. A Bills Digest for the 2000 Bill is available online. That Digest contains background information about occupational health and safety for Commonwealth employees and a description of the 2000 Bill's main provisions.

The 2000 Bill was the subject of a report by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. Government members of the Committee supported the 2000 Bill:

> 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]

On the other hand Labor Senators expressed concern about:

- 'elimination of union involvement in matters of occupational health and safety'[2]
- changes to workplace consultation arrangements—in particular lack of detail about how occupational health and safety committees would operate and the exclusion of union participation on those committees[3]
- changes to the enforcement regime. Labor Senators generally supported a dual system of enforcement involving civil and criminal penalties. However, they recommended new offences where an employer's culpable action exposed an employee to the risk of serious bodily harm (the 2000 Bill applied criminal penalties only where an employer's conduct resulted in death or serious bodily harm).[4]

Democrats' Senator Andrew Murray commented on the 'useful advances' in the Bill and remarked on union misuses of power under occupational health and safety (OHS) legislation but said that:

> In my view union officials with expertise in H&S [health & safety] should continue to be involved as appropriate in workplace health and safety.[5]

According to the Minister's Second Reading Speech for the 2002 Bill:

> This Bill includes some additional changes to provide further protections for employees. Some amendments are also included to strengthen the compliance provisions.

The Main Provisions section which follows contains a description of the 2002 Bill and highlights some of the changes made.

Main Provisions

Amendment of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*

Statutory objects

The objects of the Principal Act are set out in section 3 and are:

- to protect the occupational health, safety and welfare of Commonwealth employees, and to protect others at or near workplaces from health and safety risks arising from the activities of those employees
- to ensure that expert occupational health and safety advice is available on matters affecting employers, employees and contractors
- to promote occupational health and safety and foster cooperation between employers and employees in occupational health and safety matters.

Item 1 of **Schedule 1** adds two new objects:

- to encourage employers and employees to observe their statutory obligations
- to address non-compliance by way of civil remedies and, in serious cases, criminal sanctions.

Definitions

Section 14 of the Principal Act provides that where a 'contractor' for construction or maintenance purposes controls a workplace, the Principal Act does not apply to that workplace—except that a person who installs or erects unsafe plant in a workplace will be liable for the criminal penalty contained in section 20. At present, the term 'contractor' is limited to natural persons. The Bill expands the definition to include bodies corporate **(item 7**).

Item 8 inserts a definition of 'employee representative'. In general, this expression means a registered organization of employees or an association of which an employee is a member.

Items 11 and 13 repeal the definitions of 'involved union' and 'registered union', respectively. New and associated terms are inserted instead.[6] **Item 3** defines the word 'association' to be an association whose principal purpose is protecting and promoting the interests of employees in employment matters. **Item 12** defines the expression, 'registered organisation', to mean an organization within the meaning of the *Workplace Relations Act 1996* or a body prescribed by regulation to be a registered organization.

Functions of the Safety, Rehabilitation and Compensation Commission (the Commission) and Comcare

The Commission will no longer be required to respond to requests for information from employees, employers or contractors on OHS matters. It will still be able to do so on its own initiative (**items 19-20**). Comcare will be given the function of responding to requests for information from employers, employees and contractors (**item 63**).

The Commission will be given power to issue directions for the election of OHS representatives (**item 21**).

Shield of the Crown

At present, the Commonwealth, a Commonwealth authority or employees of the Commonwealth or Commonwealth authorities, cannot be prosecuted for an offence under the Principal Act. An exception to this general rule is that a Government business enterprise (GBE) or a GBE employee can be prosecuted.[7] Further information about GBEs is provided in the next section.

The Commonwealth and Commonwealth authorities (except for GBEs) will continue to be immune from prosecution and, in general, will not be liable to pay fines or penalties (**item 17**). However, it will be possible:

- to seek and obtain a declaration that the Commonwealth or a Commonwealth authority has breached a statutory duty or requirement
- to secure a pecuniary penalty order from a court in respect of the Commonwealth or a Commonwealth authority (a provision not found in the 2000 Bill)
- to obtain a declaration against a Commonwealth employee or an employee of a Commonwealth authority, or to prosecute such a person. Such a person will also be liable to pay pecuniary penalties.

Government Business Enterprises

A 'Government business enterprise' is defined in section 5 of the Principal Act to include Commonwealth authorities scheduled to the Act. The authorities presently listed in the Schedule are ANL Limited, Australian Industry Development Corporation, Australian Postal Corporation, Health Insurance Commission, Housing Loans Insurance Corporation, Pipeline Authority and Telstra Corporation Limited. **Item 156** inserts the Australian Government Solicitor and the Defence Housing Authority. **Item 157** omits ANL Limited, the Health Insurance Commission, the Housing Loans Insurance Corporation, the Pipeline Authority and Telstra. However, the Explanatory Memorandum states that Telstra will still be regarded as a GBE because it falls within the general definition of 'GBE' found in section 5.

The Principal Act enables investigations to be conducted in response to workplace accidents, OHS disputes etc. Where an investigation has been conducted a report must be furnished to the Commission. At present, an investigation of a GBE is exempt from this reporting requirement. As a result of **item 106** the exemption for GBEs is removed.

Duties of employers to employees

Paragraph 16(2)(d)[8] of the Principal Act provides that an employer who fails to consult 'involved unions' and other relevant people when developing OHS policies, commits a breach of their statutory duty. An employer must also consult about review mechanisms for OHS measures.

Item 26 amends this provision. As a result, an employer will breach their statutory duty if they fail to consult with employees about 'safety management arrangements' rather than with 'involved unions' about OHS policies. The expression 'safety management arrangements' is defined with reference to a list of matters set out in **new paragraph 16(2)(d)**. These matters must include mechanisms for informing employees about safety management arrangements, varying the arrangements, resolving disputes and, where required, establishing a health and safety committee. **Item 27** lists the matters that may appear in safety management arrangements—including a written occupational health and safety policy, risk management arrangements and OHS training. The matters listed in **item 27** were generally not spelled out in the 2000 Bill.

Employers who are developing safety management arrangements must take account of any advice from the Commission (**item 29**). An employee may be represented in consultations about safety management arrangements if the employee asks another employee to represent them or asks an employee representative to represent them. The amendments enable an employee who wishes to be represented by an employee representative to have their identity protected by way of **proposed section 16B**. **Proposed section 16B** enables Comcare to certify that an employee has requested an employee representative to represent them.

Designated work groups

A 'designated work group' is a group of employees established under section 24 of the Act. Its purpose is to provide a mechanism for employee participation in improving OHS in the workplace.

Item 42 repeals and replaces subsections 24(1)-(3) so that instead of unions or employees being able to ask an employer to establish or vary designated work groups, the request will need to come from an employee, either directly or indirectly (via an employee representative). An employee representative will only be able to ask an employer to establish or vary a designated work group if requested to do so by an employee. (In contrast, the 2000 Bill only permitted employees to request their employers to establish designated work groups.)

Proposed section 24B places new obligations on employers—to keep a current list of all designated work groups and ensure the list is available for inspection by investigators and employees.

Health and safety representatives

Subsections 25(1)-(2) of the Principal Act provide that one employee health and safety representative (HSR) may be selected for each designated work group. The task of the HSR is to represent the health and safety interests of members of a designated work group to their employer. An HSR must attend an accredited occupational health and safety course.[9] The Principal Act gives the HSR a number of powers and functions including workplace inspections, asking an investigator or the SRC Commission to inspect the workplace, investigating OHS complaints made by employees, obtaining information held by the employer about health and safety risks, and issuing provisional improvement notices.[10]

Under the Principal Act, election of the HSR is either by unanimous agreement of the members of the work group or by election [subsection 25(3)]. If an election is held it is conducted by the 'involved union' or, in the absence of an 'involved union' by someone authorised by the Commission [subsection 25(4)]. Existing subsections 25(4) and 25(5)-(10), which deal with election rules and processes, are repealed by **item 44**.

Instead, election procedures will be dealt with in **proposed section 25A**. The amendments mean that if there is a vacancy for an HSR, which has not been filled within a reasonable time, the employer must call for nominations. Unlike the 2000 Bill, the 2002 Bill provides that if an employer fails to call for nominations within 6 months of the vacancy occurring, the Commission can direct the employer to do so. If an election is needed because more than one person nominates for the position of HSR, it must be conducted by the employer and at the employer's expense. Election rules will be set out in regulations but elections need only be conducted under these rules if requested by the lesser of:

- '100 employees normally in the designated work group', or
- 'a majority of the employees normally in the designated work group' [**proposed subsection 25A(4)]**.

In contrast to the 2002 Bill, the 2000 Bill made no provision for election rules to be prescribed by regulation. Instead, elections would have been conducted in accordance with any directions issued by the Commission. The 2002 Bill also preserves the ability of the Commission to issue directions about elections.

Proposed section 26A provides for casual vacancies if health and safety representatives retire early from their office.

Provisional improvement notices

At present, where an HSR believes, on reasonable grounds, that a person is contravening their statutory obligations, he or she must consult with a supervisor to try to come to an agreement about rectifying the situation. If it is impossible to reach an agreement, section 29 of the Principal Act enables an HSR to give a provisional improvement notice (PIN) to the employer or supervisor. The PIN must identify the statutory breach and may specify what must be done to rectify it.

Item 52 clarifies that a notice has effect as soon as it is given to the relevant person. **Item 55** provides that the HSR may request Comcare or an investigator to investigate a matter that is the subject of a notice if the notice has not been complied with or the responsible person has not requested an investigation.

Health and safety committees

Section 34 of the Principal Act provides that an employer must establish a health and safety committee in a workplace where there are at least 50 employees and a request is made by the health and safety representative or by a union. **Proposed section 34**, which is inserted by **item 61,** will mean that an employer must establish such a committee if either:

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

Item 61 is different to its counterpart in the 2000 Bill (item 62) in a number of ways:

- it enables a majority of employees in a workplace of at least 50 employees to ask their employer to establish a health and safety committee. The 2000 Bill only required an employer to establish such a committee if he or she employed at least 50 people in a particular State or Territory, the health and safety representative made a written request and the request was reasonable.
- unlike the 2000 Bill, the 2002 Bill provides that the number of management representatives on the committee must not exceed the number of members chosen to represent employees [**proposed subsection 34(4)**].

Investigations

Part 4 of the Principal Act provides for OHS investigations. Comcare staff or a person knowledgeable about OHS can conduct investigations. Investigations can be conducted as part of Comcare's Planned Investigation Program[11], in response to an accident, as a result of an OHS dispute in a workplace, and following reports of fatalities, serious injuries or

dangerous conditions. Investigators have wide powers to enter workplaces, ask questions, require documents to be produced and issue directions.[12] When conducting an investigation an investigator is empowered to do various things to fix OHS problems including:

- issuing a non-disturbance notice, effective while a threat is removed or the workplace inspected (section 45)
- issuing an improvement notice, requiring a workplace to be improved so that it complies with the Principal Act within a specified time frame (section 47)
- issuing a prohibition notice, prohibiting an activity that the investigator believes poses an immediate threat to any person's health and safety (section 46).

Among other things, **items 65 to 71** clarify that an investigation must proceed if the Commission or Comcare directs that it be carried out—unless the Commission or Comcare revokes the direction. The amendments also provide that while the Commission can revoke a direction issued by Comcare, Comcare will not have a similar power in relation to directions issued by the Commission.

At present, an 'involved union' may request a Comcare investigator or the Commission to carry out a workplace investigation [subsection 41(5)]. **Item 71** repeals subsection 41(5) and inserts a new subsection that provides that an employee representative may make a request to Comcare or the Commission if an employee asks the employee representative to do so.

As stated above, section 45 of the Principal Act enables an investigator to issue a written non-disturbance notice so that threats to occupational health or safety can be removed or an inspection or tests can take place. **Item 80** gives an investigator power to vary or revoke such directions in writing, and sets out where the notice is to be displayed and what it is to contain. If an inspector considers that there is insufficient time to give a written notice, then **item 81** will empower him or her to give a time-limited oral direction that a workplace not be disturbed in order to remove immediate threats to occupational health or safety or allow inspections to take place. As with written directions, oral directions must be complied with by the employer. An oral direction can be revoked, but not renewed or varied.

An inspector also has the power, under section 46 of the Principal Act, to issue a written prohibition notice to an employer directing that an immediate threat to health or safety be removed. An employer must comply with such a notice. **Item 87** provides that a prohibition notice may be revoked or varied in writing and sets out what the new notice must contain, to whom it must be given and where it must be displayed.

Inspectors are empowered to issue written improvement notices where statutory requirements are being contravened or have been contravened (and it is likely that more contraventions will occur) (section 47). **Item 96** gives an inspector the power to revoke or

vary such a notice in writing. It also sets out what the new notice must contain, where it must be displayed and who must be given copies of it.

Revocations and variations of non-disturbance notices, prohibition notices or improvement notices will be appealable to the Australian Industrial Relations Commission, as are presently decisions like the issuing of prohibition and improvement notices (**items 97-100**). Currently, decisions can be appealed by a variety of actors including employers affected by decisions, HSR representatives and 'involved unions'. The amendments remove references to 'involved unions' (**items 101-102**) and instead an employee representative for the 'designated work group that includes an employee affected by the decision who has requested the employee representative to make the appeal', will be able to do so.

Under the Principal Act, it is an offence to tamper with, remove or fail to display non-disturbance, prohibition and improvement notices that must be displayed (section 50). Section 50 of the Principal Act is repealed and replaced to extend these provisions to revocation and variation notices.

Notification and reporting of dangerous accidents and incidents

Section 68 of the Principal Act requires employers to notify and report any fatal accident, serious injury, incapacitation, or dangerous occurrence to the Commission.

Item 122 retains the notification requirement but removes the reporting requirement.

At present regulations can be made about the timing, manner and form of notices and reports.[13] The content and purpose of reports, as presently set out in the Occupational Health and Safety (Commonwealth Employment) Regulations 1991, is quite different to the content and purpose of notices. For instance, regulation 37B itemises the information that must be contained in a notice. This information includes the employer's name, the address of the workplace, the time and date of the accident, details of accident, the name of those who died, were injured or incapacitated, and details of the person giving the notice. Information that must be included in a report given under regulations 37E and 37F includes a description of where the accident occurred and the action that the employer has taken or proposes to take to prevent the recurrence of such an accident.

No explanation is provided in the Explanatory Memorandum about why the reporting requirement is to be removed. For a discussion see Bills Digest No. 112, 2000-01.

Annual reports of Commonwealth entities and authorities

Section 74 of the Principal Act specifies what must be included in annual reports of Commonwealth entities and authorities. These include details of occupational health and safety policies, measures taken to ensure occupational health and safety, statistics of accidents and dangerous occurrences, and investigations undertaken. **Item 132** removes

the reference to occupational health and safety policies and replaces it with a reference to safety management arrangements.

At present, annual reports must also provide details of provisional improvement notices, non-disturbance notices, prohibition notices and improvement notices that are given to employers. **Item 135** removes the requirement that details of non-disturbance notices must be included. **Item 134** adds health and safety outcomes achieved as the result of occupational health, safety and welfare initiatives to the list. Section 74 of the Principal Act also provides that the annual report must contain details of 'such other matters as are prescribed.' This requirement is removed by **item 136** and the annual reports will contain details of matters set down by the Joint Committee of Public Accounts and Audit.

Institution of prosecutions

Section 77 of the Principal Act empowers Comcare or an investigator to initiate prosecutions for offences against the Act or regulations. A health and safety representative for a designated work group or an 'involved union' can ask Comcare to institute proceedings for a breach of the Act or regulations. Before this can be done, 6 months must have elapsed since the alleged breach without proceedings having been implemented.

Item 141 restructures section 77 and also removes the reference to an involved union. Instead, an employee representative can ask Comcare to institute proceedings, but can only do so at the request of an employee.

Penalty limits in regulations

Item 154 provides that civil or criminal penalties for a breach of the regulations cannot exceed 50 penalty units for an individual or 250 penalty units for a body corporate. A penalty unit equals $110. The present limit set by the Principal Act is $1,000.

It is noteworthy that the Government's Legislation Handbook states that as a general principle:

> provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 10 penalty units for individuals or more than 50 penalty units for corporations)[14]

should be contained in primary legislation rather than in regulations.

Proceedings for breaches of the Act

Summary of the new penalty regime

The Bill makes a number of changes to the penalty regime in the Principal Act, including:

- providing civil sanctions such as pecuniary penalty orders, injunctions and remedial orders
- enabling declarations to be obtained against and pecuniary penalty orders to be obtained in respect of Commonwealth authorities and entities
- enabling Commonwealth employees and employees of Commonwealth authorities to be prosecuted and making them liable to pay pecuniary penalties
- increasing criminal penalties
- creating a number of serious offences—where a statutory breach results in death, serious injury or a substantial risk of those things occurring.

New civil and criminal penalties

The Government Senators' report on the Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2000 remarked:

> Proceedings for breaches of the … [Principal 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 (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.[15]

At present, criminal penalties are scattered throughout the Principal Act and there is no provision for civil proceedings. The Bill transfers all penalties into **new Schedule 2** and also enables civil proceedings to be brought for statutory breaches.

In most cases, a statutory breach will render a person liable to criminal or civil actions.[16] However, in some cases statutory breaches will only result in criminal proceedings.[17] In other cases, statutory breaches that presently result in criminal prosecutions will only be actionable in a civil court.[18] For instance, it is currently an offence for an employer to dismiss an employee because he or she has complained about an OHS matter or assisted in an investigation etc (section 76). The maximum penalty is $25,000. The effect of items **138, 139 and 158** is that an employer who breaches section 76 will only be liable to a civil penalty (maximum of 250 penalty units). An advantage of civil proceedings is that the

standard of proof is easier to satisfy. However, it will not be possible to prosecute the employer in criminal proceedings, even if he or she fails to pay the pecuniary penalty. Nor will the employer be potentially subject to the opprobrium associated with a criminal conviction.

Another feature of the new penalty regime is the use of imprisonment. Imprisonment will be retained as a punishment for statutory breaches such as the failure of a witness to attend the Commission or answer questions or produce documents (see **new clauses 20 and 21**). However, while an employer who breaches their statutory duties and causes death or serious bodily harm can be criminally prosecuted, the only available penalty is a fine of up to 4,500 penalty units. Imprisonment is not provided as a sentencing option.[19]

Parallel criminal liability and civil penalties for the same conduct

As the Australian Law Reform Commission points out in its recent Report, *Principled Regulation. Federal Civil & Administrative Penalties in Australia*[20], the following model of liability is becoming common in federal statutes:

> … criminal liability and civil penalties attach to the same conduct. Under this model criminal liability is distinguished from civil penalty liability: criminal or 'offence' provisions generally require proof to a criminal standard of physical elements and certain fault elements (usually intention or recklessness). Civil penalty provisions may require proof of the same physical elements to a civil standard. However, they do not require proof of any fault elements.[21]

However, the availability of both civil and criminal penalties for the same conduct raises policy issues concerning double jeopardy.[22] The High Court recently quoted the United States Supreme Court to explain the rule against double jeopardy:

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[23]

While designed with the criminal law in mind, it has been suggested that if civil penalties are punitive in nature, then 'double jeopardy protection should be extended to subsequent civil penalty proceedings for the same conduct.'[24]

New clauses 9-11 deal with the availability of civil and criminal penalties and, in general, follow the approach taken in other Commonwealth statutes.[25] For instance, a civil penalty cannot be imposed on a person who has been convicted of conduct that is substantially the same as the conduct constituting the contravention (**new clause 9**). However, criminal proceedings can be commenced despite the person being subject to a civil penalty order (**clause 11**). And, in general, evidence given in civil proceedings against a person is not admissible in criminal proceedings relating to substantially the same conduct (**new clause 12**).

Civil proceedings

New Part 1 of **new Schedule 2** deals with civil proceedings. **Clause 1** of **new Schedule 2** gives the Federal Court and State/Territory Supreme Courts jurisdiction in relation to civil proceedings commenced under **new Part 1**.

A court will be able to declare that a person has contravened specified statutory provisions. These include employer's duties to their employees, non-compliance with a non-disturbance direction, a prohibition notice or an improvement notice. If a judicial declaration is made then a pecuniary penalty may be imposed. Pecuniary penalties are listed in **new clause 4** and range from 10 penalty units for each day a person fails to comply with an improvement notice to 2,200 penalty units for an individual who has breached their duties to their employees. Such a penalty is a debt payable to the Commonwealth. **New subclause 4(4)** explicitly provides that a court cannot imprison a person who defaults on payment of the pecuniary penalty.

Comcare or an investigator can apply to a court for declaration or a pecuniary penalty order (**new clause 5**). A limitation period of 6 years from the time of the alleged breach applies (**new clause 6**).

New clause 14 enables Comcare or an investigator to apply to a court for an injunction if a person has breached, is breaching or proposes to breach the Principal Act or regulations. Injunctions that are available will include prohibitory injunctions, mandatory injunctions (requiring a person to do something) and interim injunctions (restraining a person from engaging in conduct or requiring them to do something, before deciding an application for an injunction).

A court that has made a declaration or convicted a person of an offence against the Act or regulations can also issue a remedial order (**new clause 15**). Remedial orders can include rectification, reinstatement and compensation orders.

New clause 16 enables Comcare to accept a written undertaking relating to the fulfilment of a statutory obligation. If proceedings for a declaration have commenced, Comcare can ask the court to adjourn the proceedings if it considers that an appropriate written undertaking is in force. However, if the court considers that the person has breached the undertaking or changed the undertaking without Comcare's consent then proceedings can be revived or the court can order the person to comply with the undertaking.

Criminal offences and penalties

Criminal prosecutions are dealt with in **new Part 2** of **new Schedule 2**. State and Territory courts rather than the Federal Court will have jurisdiction in relation to criminal proceedings (**item 17**).

The Bill creates a number of categories of offence:

- statutory breaches resulting in death or serious bodily harm (**new clause 18**)
- a statutory breach of an employer's duty to their employees which exposes employees to a substantial risk of death or serious bodily harm (**new clause 19**), and
- 'other offences' (**new clause 20**).

Offences resulting in death or serious bodily harm

Where a person breaches one of the 13 statutory provisions enumerated in **new clause 18,** the breach causes death or serious bodily harm, and the person was either negligent or reckless about whether the breach would cause death or serious bodily harm, the person will be guilty of an offence. The maximum penalty available to a court in such a case is found in the table in **new clause 21**. For example, if an employer breaches his or her statutory duty to an employee under subsection 16(1) and death or serious bodily harm results then the maximum penalty is 4,500 penalty units ($495,000[26]). In some cases, penalties differ depending on whether the offender is a body corporate or a natural person. For instance, if death results from the statutory breach of a person's duties erecting or installing plant in a workplace, the maximum penalty for a natural person is 900 penalty units ($99,000) and for a corporation it is 4,500 penalty units.

Offences exposing employees to a substantial risk of death or serious bodily harm

New clause 19 creates a category of criminal offence not present in the 2000 Bill—breach of an employer's duty to his or her employees that exposes them to a substantial risk of death or serious bodily harm. To be guilty of this offence the employer must be either negligent or reckless that that breach would expose the employee to a substantial risk of death or serious bodily harm. Unlike **new clause 18**, which creates offences in relation to breaches of 13 statutory provisions, **new clause 19** only operates with respect to breaches of one statutory provision—subsection 16(1).

New subclause 21(2) provides that section 4K of the *Crimes Act 1914* (Cwlth) does not apply in relation to death or serious bodily harm resulting from failure to comply with an improvement notice. In other words the offender will not be liable to a fine that accumulates for each day that the offender is in breach of the improvement notice.

New subclause 21(3) provides that if a fine is imposed a court cannot direct the person to serve a custodial sentence in default of the payment of the fine.

Other offences

Custodial penalties are retained in the case of some statutory breaches. For the most part, custodial sentences are retained for those who refuse to co-operate with Commission inquiries—for example, where a person refuses to give information or produce documents or fails to attend as a witness. In each case, an offender may be liable to a maximum

custodial sentence of 6 months imprisonment as well as, or instead of, a fine. The Bill retains both the custodial sentence and a fine for these offences.

Transitional arrangements

Transitional arrangements are contained in **items 159-174**.

Schedule 2 amendments

Schedule 2 contains consequential amendments to the *Employment, Workplace Relation and Small Business Amendment (Application of Criminal Code) Act 2001*. The amendments are necessary to remove references to legislation that lapsed.

Endnotes

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1 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of Provisions. Occupational Health and Safety (Commonwealth Employment) Amendment Bill 200. Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000*, May 2001, p. 7.

2 p. 9.

3 pp. 11–12

4 pp. 12–13.

5 p. 18.

6 See, for example, **items 3, 8 and 12**.

7 Section 11.

8 Read in conjunction with subsection 16(1) of the Principal Act.

9 Section 27, Principal Act.

10 Section 28, Principal Act.

11 A Planned Investigation Program is an audit of compliance with the Principal Act in Commonwealth workplaces. See http://www.comcare.gov.au/ohs/2/pip.html (accessed 16 April 2003).

12 SRC Commission & Comcare, op. cit.

13 References to reports are removed from the regulation making power (**item 123**).

14 Department of the Prime Minister and Cabinet, *Legislation Handbook*, para 1.12.

15 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, p. 2.

16 **Items 24, 31, 33, 35, 37, 38, 40, 73, 79, 84 and 94**.

17 **Items 107, 110, 114, 117 and 128**.

18 **Items 119, 131 and 139**.

19 There have been attempts to pass industrial manslaughter laws in some Australian jurisdictions. For instance, a (Workplace Deaths and Serious Injuries) Bill 2001 was introduced into the Victorian Parliament in November 2001 but did not proceed. The Victorian Bill enabled senior officers of corporations found guilty of manslaughter or negligently causing serious injury to be convicted of an offence, The maximum penalties were five years imprisonment and/or $180,000 in the case of manslaughter and two years imprisonment and/or $120,000 in the case of negligence causing serious injury. The Bill also provided that the offences applied to Crown statutory corporations. The Bill also contained large fines of $5 million for a corporation convicted of manslaughter and $2 million for a corporation convicted of negligently causing serious injury. See Victoria. House of Assembly, *Hansard*, Second Reading Speech, Crimes (Workplace Deaths and Serious Injuries) Bill, 22 November 2001. There were also suggestions in 2002 that a Bill would be introduced into the Queensland Parliament but these plans appear to have been shelved. In December 2002 a Crimes (Industrial Manslaughter) Bill was introduced into the ACT Legislative Assembly.

20 Australian Law Reform Commission, *Principled Regulation. Federal Civil & Administrative Penalties in Australia,* Report 95, December 2002.

21 ibid., para 11.27.

22 ibid., paras 11.11-11.12 and following.

23 Quoted in *Pearce v. The Queen* (1998) 194 CLR 610 at 614.

24 Australian Law Reform Commission, op.cit., para 11.37.

25 For example, the *Corporations Act*, *Environment Protection and Biodiversity Conservation Act 1999* and the *Commonwealth Companies and Authorities Act 1997*.

26 A penalty unit is $110.