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Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005

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Contents

Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005

Date Introduced: 23 June 2005

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The substantive provisions of the Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005 will commence with Royal Assent. The amending provisions contained in Schedule 1 will take effect on a day or days to be proclaimed, however should they not commence by proclamation within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period. The provisions in Schedule 2 will commence 28 days after the receipt of Royal Assent.

Purpose

The Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005 ('the Bill') proposes changes to the *Occupational Health and Safety (Commonwealth Employment) Act 1991* ('the OHS Act') with a view to modifying:

- the role of unions in relation to occupational health and safety arrangements in Commonwealth workplaces
- the powers of Comcare
- the powers of Health and Safety representatives, and
- the annual reporting requirements of Commonwealth employers.

Background—legislative history of the proposed changes

This is the third attempt by the federal Government to introduce the proposed changes contained in this Bill.

The first attempt, introduced as the Occupational Health and Safety (Commonwealth Employment) Bill 2000 ('the OHS Bill 2000'), lapsed with the prorogation of the Parliament for the 2001 elections. The second attempt, the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 ('the OHS Bill 2002'), introduced in June 2002, became law on receiving Royal Assent in 2004. However, the *Occupational Health and Safety (Commonwealth*

Employment) Amendment (Employee Involvement and Compliance) Act 2004 ('OHS Amendment Act 2004') had been significantly watered down as a result of the parliamentary process. In particular, the OHS Amendment Act 2004 lost all the items which proposed changes to union involvement in occupational health and safety arrangements in Commonwealth workplaces.

To obtain a comprehensive overview of the changes proposed in the Government's previous attempts referred to above, readers of this Bills Digest are referred to the following additional material, which also includes reactions in the media and of interest groups to the previously proposed changes:

- Nathan Hancock, 'Occupational Health and Safety (Commonwealth Employment) Bill 2000', *Bills Digest*, No. 112, Department of the Parliamentary Library, Canberra, 2000-1
- Jennifer Norberry, 'Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002', *Bills Digest*, No. 137, Department of the Parliamentary Library, Canberra, 2002-3
- Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of Provisions*, Occupational Health and Safety (Commonwealth Employment) Bill 2000, Safety, Rehabilitation and Compensation and other Legislation Amendment Bill 2000, May 2001.

Main Provisions

Schedule 1, Part 1—Amendments to the *Occupational Health and Safety (Commonwealth Employment) Act 1991*

The amendments proposed in this Part of the Bill are modelled after the proposed amendments which were unsuccessfully brought before Parliament as part of the OHS Bill 2002. These provisions have been discussed in detail in the respective Bills Digests referred to above. However, when compared to the provisions contained in the OHS Bill 2002, some of the provisions proposed in this Bill have been modified. Apart from some editorial modifications, three changes warrant mentioning. These include:

The introduction of 'in-writing' requirements

Several of the proposed provisions in his Bill, whilst otherwise identical with the provisions as proposed previously, now stipulate 'in-writing' requirements. For example, **item 9**, proposed **new paragraph 16(2)(d)** now provides that the health and safety management arrangements which are to be developed by the employer in consultation with the employees must be in writing.

Where the proposed provisions contain 'in-writing' requirements, the Bill also provides that these *written* instruments will not be *legislative* instruments for the purpose of the *Legislative Instruments Act 2003* ('the LIA'). As a consequence, these written instruments become effective without having to be registered with the Federal Register of Legislative Instruments, as maintained by the Department of the Attorney General, and will not be subject to parliamentary scrutiny and the disallowance procedure.

The increase of the threshold in proposed new section 16B

The proposed new legislative regime aims at increasing consultation between employers and employees. However, there may be situations where employees consider it preferable to remain anonymous and the Bill accounts for this situation. Like its predecessor contained in the OHS Bill 2002, proposed **new section 16B** enables a representative to represent employees during consultations with the employer without revealing their identity. To obtain such a certificate, the representative must apply to Chief Executive Officer of Comcare ('the Officer'). Proposed **new subsection 16B(1)** provides this officer with the discretion to issue such a certificate. However, before the Officer may issue the certificate, the employees chosen representative will be required to satisfy the Officer that two cumulative requirements are fulfilled. These requirements include that:

- the employee's representative has been asked by the employee to represent the employee in the consultations (**proposed new paragraph 16B(1)(a)**), and
- the employee has requested his or her identity to remain confidential (**proposed new paragraph 16B(1)(b)**).

In contrast, section 16B as previously proposed as part of OHS Bill 2002, merely stipulated that that the Officer may issue such a certificate if he or she considers that the representative had been asked to represent the employee.

When compared with the previous version, the proposed new provision is more stringent, because it:

- contains the additional requirement that the employee's representative has to satisfy the Officer that the employee requested that their identity to be protected, and
- stipulates a higher threshold before the certificate may be issued—under the proposed law, the Officer must be satisfied that the requirements are fulfilled. When compared to the previous threshold, the new provision appears to require a higher level of persuasion or certainty before the Officer may issue the certificate.[1]

The effects of this increased threshold on the rate of employee representation remain to be seen, yet it seems to be arguable that the Officer's decision not to suppress a requesting employee's identity may inhibit employees' request for representation. Interestingly, the proposed legislation is anxious to stress that the certification process is not designed to prevent representation *per se*. Proposed **new subsection 16B(10)** emphasises expressly

that the refusal to issue a certificate does not imply the denial of the right to be represented in the consultation. However, from a legal point of view this clarification seems to be necessary because proposed **new paragraph 16A(2)(b)** already stipulates expressly that employees may utilise the services of a representative.

Changes to the pool of persons who can be subject to civil proceedings and criminal prosecution for not complying with improvement notices

Item 35 proposes to repeal existing subsection 47(7) of the OHS Act. This subsection is part of the regime set out in section 47 of the OHS Act under which workplace health and safety inspectors can issue improvement notices to persons who, in the opinion of the inspector, are currently breaching provisions of the OHS Act or regulations, have breached those provisions in the past, or are likely to breach them in future. For the purpose of this section, the recipients of an improvement notice are called a 'responsible person'.

Under subsection 47(6) of the OHS Act, responsible persons must ensure that the improvement notice is complied with. If a responsible person fails to ensure compliance, he or she may be liable to criminal prosecution or civil action under Schedule 2 of the OHS Act.

Under section 47 of the OHS Act, the scope of responsible persons who may be liable to criminal prosecution or civil action is currently limited by the operation of subsection 47(7). In essence, this subsection carves out those responsible persons who are either:

- employees of employers other than government business enterprises, or
- employers other than government business enterprises.

The limitation contained in section 47(7), however, is at odds with the provision contained in section 11 of the OHS Act as amended by virtue of item 17 of the *Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Act 2004*. This recent amendment was introduced to subject the Commonwealth and Commonwealth authorities to the new civil proceedings and criminal prosecution regime for breaches as contained in Schedule 2 of the OHS Act (the punishment regime). The Explanatory Memorandum to the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 stated that, as a result of the (then) proposed amendments:

> Commonwealth employers will, however, be liable to proceedings for a declaration of contravention by a court and to pay a pecuniary penalty pursuant to an order of the court. The Commonwealth and Commonwealth authorities will also be liable to the other new civil orders concerning enforceable undertakings, remedial orders and injunctions. […] The amendments will also provide that Commonwealth employees will not have immunity against prosecution and will, therefore, be subject to all the enforcement mechanisms under the Act. Government business enterprises and their

> employees will continue to be subject to all the enforcement mechanisms under the Act.[2]

The proposed repeal of subsection 47(7) of the OHS Act will remove the limitation on subsection 47(6), aligning the subsection's scope with the intended coverage of the OHS Act's punishment regime.

Schedule 1, Part 2—Transitional, application and saving provisions

Under proposed substituted section 16(2)(d), employers will be required to develop written health and safety management arrangements. Acknowledging that the development of such arrangements may require some time, **item 57** of **Part 2** of the Bill proposes to provide employers with a period of grace of 18 months in which the employer is deemed not to have breached the duty of care set forth in subsection 16(1) of the OHS Act.

In addition, the proposed clauses in this part will save currently applicable OHS policies (**item 58 of Division 1, Part 2**) and agreements between employers and the unions (**item 59 of Division 1, Part 2**). Division 2 of Part 2 proposes transitional provisions for the amendments suggested in relation to designated workplace groups and the health and safety representatives.

Schedule 2—Consequential amendments of other Acts

The Bill proposes amendments to the *Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Act 2001* (EWRSBL). **Items 1** to **3** of **Schedule 2** of the Bill repeal subsection 2(3) as well as the heading and items 89 to 132 of Schedule 1 of the EWRSBL as they became law as part of the amendments proposed in the OHS Bill 2000. As indicated above, the OHS Bill 2000 lapsed with the prorogation of Parliament prior to the 2001 elections, making these provisions, which were based on the successful enactment of the OHS Bill 2000, obsolete.

Concluding Comments

As indicated above, the most recent previous attempt by the Commonwealth Government to pass the amendments proposed in this Bill met with political resistance.

The proposed changes have been commented upon previously and the reader is referred to the two Bills Digests and the Senate Report referred to on page 3 of this Bills Digest. However, the amendments proposed in this Bill raise other issues. The more stringent certification process involving an administrative decision maker and possible reluctance by employees to request representation without the assurance of anonymity, may prove to be a strong deterrent for seeking employee representation. As the mechanisms for

employee representation could operate as a deterrent to representation, Parliament may want to consider when debating this Bill that:

- even the unintended exclusion of unions from representing in OHS consultations may weaken OHS for Commonwealth employees overall. Leading OHS experts Johnstone, Quinlan and Walters have recently argued that:
  - the analysis of international research suggests that consultative arrangements and union representation:

    > on health and safety at the workplace are associated with better health and safety outcomes than when employers manage OHS without representative worker participation[3]

    Further, the authors have emphasised that there:

    > …is no reliable evidence of the effectiveness of arrangements to represent worker's interests in OHS in which trade unions are not involved in a supportive and enabling capacity.[4]

  - the representation of employees can lead to significant attitudinal changes in the workplace and an increase in OHS compliance[5]
  - unions provide important contributions to OHS support and training.[6]

  At the same time, the authors acknowledge the changing face of the workforce and appreciate that changes may be required to the way employees are represented, by themselves and by the unions.[7]

  This issue has also been raised in a recent publication released by the Technical, Supervisory and Administrative Division of the AMWU, which argues that:

  > There is no evidence either within Australia or overseas which would lead to a conclusion that excluding unions from OHS processes at workplace or Department/enterprise level would improve OHS outcomes.[8]

- the measure proposed under section 16B could amount to:
  - a violation of a freedom of association possibly implied into the Constitution,[9] and
  - a violation of Australia's international obligations under various Conventions administered by the United Nation's International Labour Organisation (ILO) to which Australia is a party. For example, under the *Freedom of Association and Protection of the Right to Organise Convention of 1948*, which Australia ratified in February 1973, Australia is under an obligation to ensure that 'worker's and employers' organisations shall not be liable to be dissolved or suspended by administrative authority'.[10] This issue has also been raised in a recent publication released by the Technical, Supervisory and Administrative Division of the AMWU.[11] This publication further noted that, amongst other things, the proposed amendments in this Bill could also violate Australia's international obligations

under the *Occupational Safety and Health Convention of 1981* and the *Right to Organise and Collective Bargaining Convention of 1949*.[12]

Endnotes

1 The meaning of '*satisfied*' has been discussed in *Blount Inc v Registrar of Trade Marks* [1998] 440 FCA (1 May 1998). There, Branson J held that the decision maker must 'be persuaded, having given proper consideration to those factors and circumstances that the Act requires him or her to give consideration to, that such matter is more probable than not.' See also *Rejfeck v McElroy* (1965) 112 CLR 517 at 521.

2 Explanatory Memorandum to the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002, p. 4.

3 R. Johnstone, M. Quinlan and D. Walters, *Statutory OHS Workplace Arrangements for the Modern Labour Market*, Working Paper No. 22, National Research Centre for OHS Regulation, Australian National University, Canberra, January 2004, p. 4.

4 ibid., p. 21.

5 ibid., p. 5.

6 ibid., p. 20.

7 ibid., p. 21.

8 M. Nicolaides, National Secretary, Australian Manufacturing Workers' Union, E-data sheet, Notice to all Commonwealth Employees, 7 July 2005.

9 Whilst this freedom has not been formally recognised, the High Court has repeatedly hinted that such an implied freedom may exist in the Constitution. See, for example, *Kruger v The Commonwealth of Australia* (1997) 190 CLR 1, pp. 91, 116 and 142. The issue has been raised again more recently in *Mulholland v Australian Electoral Commission* [2004] HCA 41, for example, at paragraphs 113-6.

10 Australia registered ratification of the *Freedom of Association and Protection of the Right to Organise Convention of 1948* on 28 February 1973. It entered into force twelve months after the registration.

11 Nicolaides, op. cit.

12 Australia registered ratification of the *Occupational Safety and Health Convention of 1981* on 26 March 2004 and of the *Right to Organise and Collective Bargaining Convention of 1949* on 28 February 1973. They entered into force twelve months after their registration. All ILO Conventions referred to in this Bills Digest are reproduced on the International Labour Organisation's webpage at http://www.ilo.org/ilolex/english/convdisp2.htm, accessed 20 July 2005.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2699.