The Model National Work Health and Safety Bill:
What needs to be done to get it right?

- Workplace Relations
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An AMMA Discussion Paper

Changes needed to the model national Work Health and Safety Bill

With the Model Work Health & Safety Bill due to be tabled in federal parliament shortly, substantive changes must be made to the legislation which, as it stands, is unworkable and unfair for employers and industry.

Developments in recent weeks include the NSW Government threatening to renege on adopting the Model Bill, which all states and territories have promised to use as the basis of their work health and safety systems from 1 January 2012. This shows that state government stakeholders, in response to pressure from the labour movement, remain committed to making substantive changes to the legislation rather than just minor technical amendments.

It is therefore timely that AMMA re-state its concerns with the draft legislation on behalf of employers in the resources sector, and raise new issues that have emerged with the latest draft of the Model Bill.

The NSW Government has threatened to refuse to adopt the model legislation unless it is specifically amended to include provisions that currently exist in the NSW jurisdiction:

- a reverse onus of proof on persons conducting a business or undertaking (employers) who are prosecuted for alleged breaches of the legislation; and
- the ability for unions to prosecute alleged breaches.

The Australian Greens party, which will have the balance of power in the Senate from 1 July next year, has signalled its support for the NSW Government proposals.

Not only does this jeopardise the goals of OHS harmonisation, which were to reduce red tape and compliance burdens for businesses that operate across multiple jurisdictions, it stacks the odds even further against employers trying to defend themselves against prosecutions.

Given that the Work Health & Safety Bill contains increased penalties, including a maximum $3 million fine and/or five years' jail for a 'category one' offence, a reverse onus of proof and union prosecutions must not form part of the system either nationally or in individual states.

Unions should not be able to prosecute offences under the model legislation, firstly, because they are not objective parties and, secondly, because they lack the training of authorised inspectors and the regulator. Nor should a 'moitey' (a proportion of the cash penalty amount) be able to be paid into union coffers in the event of a successful union prosecution, as is currently the case under the NSW OHS Act 2000.

While AMMA supports the goals of a nationally harmonised work health and safety system that makes the rules clear for employers, urgent changes are needed to the Model Bill before it passes through parliament to restore balance and consistency to the proposed scheme.

In particular, the Work Health & Safety Bill and the Fair Work Act 2009 must be made consistent with each other in order to remove the potential for unions to bypass the more strict IR legislation in favour of the more lenient OHS legislation.

Differences between the two pieces of legislation would give unions back-door entry under the Work Health & Safety Bill where they lack entry rights under the Fair Work Act. This is despite the fact that union entry rights have already been massively expanded under the Fair Work Act. To enter a site to investigate a breach of the Work Health & Safety Bill, union permit holders are not required to have members on-site. Under the Fair Work Act, union permit holders must have members on-site and the breach must relate to one of those members.

Permit holders will also have greater access to documents and employee records under the Work Health & Safety Bill, which as currently drafted will encourage unions to bypass the stricter controls of the Fair Work Act in favour of the more lax controls proposed in the Work Health & Safety Bill.

It is crucial that overlapping and inconsistent areas between the Work Health & Safety Bill and the Fair Work Act be harmonised. This in no way signals AMMA's support for the Fair Work Act's provisions, but merely underscores the importance of consistency being maintained across overlapping jurisdictions so that employers, employees and unions are in no doubt as to their rights and obligations.

AMMA welcomes feedback from its members and other interested parties on the issues discussed in this paper. Please contact AMMA senior workplace policy adviser Lisa Matthews with any comments by Friday, November 12, 2010. Phone (02) 9211 3566 or email lisa.matthews@amma.org.au.

Specific changes required to the Work Health & Safety Bill

The changes to the Work Health & Safety Bill proposed in this paper are based on the latest publicly released version of the draft legislation, dated 11 May 2010. In the yet-to-be-tabled final version of the Bill, some technical and other amendments will have been made which could affect the numbering of the quoted sections of the legislation.

Right of entry

Section 117 should be amended to remove the right of a permit holder to enter a worksite to investigate a suspected safety breach unless the alleged breach relates to a member of the permit holder's union. This would make the Work Health & Safety Bill consistent with the Fair Work Act 2009, which requires a suspected breach of IR laws to be in relation to a union member before a permit holder can enter a site to investigate. Under the Work Health & Safety Bill, a permit holder can enter to enquire into a suspected safety breach that affects any 'relevant worker', defined as either a union member or someone eligible to be a union member.

Section 119 should be amended to require between 24 hours and 14 days' notice of entry to investigate a suspected safety breach, consistent with s487 of the Fair Work Act that requires such notice before permit holders can enter to investigate an alleged breach. As the Workplace Health & Safety Bill currently stands, OHS permit holders are only required to give notice of entry to investigate a suspected breach 'as soon as is reasonably practicable' after entering a site. Even then, permit holders can bypass any notice requirements in 'urgent' situations.

Section 130 should be amended to require permit holders to disclose the names of union members on a particular site before entering. At present, the Bill does not require permit holders to disclose the names of union members without their consent. Nor does the Bill require a union to have any members on-site to enter to investigate a suspected breach or to hold discussions.

Powers of elected health and safety representatives

Section 68 should be amended to remove the right of an elected health and safety representative (HSR) to seek the assistance of 'any person' in relation to a safety matter. As currently drafted, this person could be a union official (or anyone else) and would give back-door entry to unions who would not otherwise have the right to enter a workplace because they were not eligible to represent the interests of workers. If a HSR needs assistance from any person, access should be restricted to the regulator or an authorised inspector. Persons conducting a business or undertaking (PCBUs) should not be required to facilitate access to the worksite to union officials who have no other right to be there.

Section 85 should be deleted to remove the power of HSRs to order work to cease where they have a reasonable concern that workers would be exposed to an 'immediate' or 'imminent' risk to their health or safety. Workers already have a common law right to cease unsafe work and the only other person who should be authorised to make such orders is an inspector or a regulator.

Section 90 should be deleted to remove the right of HSRs to issue Provisional Improvement Notices to rectify an alleged safety breach. Again, the only person who should be authorised to issue such notices is the regulator or an authorised inspector.

Access to information and records

Section 118 should be amended to remove the right of permit holders to inspect and make copies of any 'directly relevant' documents when investigating an alleged safety breach. Access to documents should specifically exclude confidential or commercially sensitive information as well as employee records of non-union members. This section of the Work Health & Safety Bill should be made consistent with s484 of the Fair Work Act which prohibits permit holders from accessing non-member records while exercising right of entry. Under IR laws, permit holders can access non-member records only with the approval of the federal industrial tribunal Fair Work Australia. Permission from a higher authority should also be required under OHS laws before unions can access non-member records under the guise of investigating safety issues.

Section 48 should be amended in relation to the duty on PCBUs, when consulting with workers over safety matters that directly affect workers, to share 'relevant information' about the matter. This section should specifically exclude confidential or commercially sensitive information and should leave the type of information to be shared with workers up to the PCBU's discretion.

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Discriminatory conduct

Section 110 should be amended to remove the prospect of criminal proceedings being brought against PCBUs alleged to have discriminated against workers in relation to their rights and powers under the legislation. The section should also be changed to remove the reverse onus of proof on persons who are subject to criminal proceedings over alleged discriminatory conduct. Only civil proceedings should be available under this section of the legislation.

Section 104 should be amended to bring maximum fines for discriminatory conduct into line with maximum penalties for other breaches of the legislation. Maximum fines under this section of the Work Health & Safety Bill are $500,000 per breach for corporations and $100,000 for individuals, compared to $50,000 for corporations and $10,000 for individuals in many other parts of the legislation. The proposed penalties for discriminatory conduct are excessive and should be reduced.

Determination of work groups

Section 52(b) should be amended to remove the phrase "or their representatives". As currently drafted, the section says a work group is to be determined by negotiation and agreement between the PCBU and the workers who will form the work group "or their representatives". This opens up the possibility of such representatives being union officials, lawyers or anyone else for that matter, and has the potential to industrialise safety issues. AMMA is not opposed to having work groups but maintains that consultation over determining the work group should be simple and uncomplicated and be between the PCBU and the workers, with no external parties involved.

Right of appeal

The Bill as currently drafted does not include a right of appeal against successful prosecutions. This may well be an oversight in the drafting but the legislation needs to be amended to include a statement bestowing rights of appeal, particularly in light of NSW Government calls for a reverse onus of proof on employers facing prosecutions.

About AMMA

Established in 1918, the Australian Mines & Metals Association (AMMA) is the national employer association for the mining, hydrocarbons and associated processing and service industries, including construction and maintenance companies operating in Australia's resources sector.

AMMA advocates on behalf of its members for the establishment of a legislative framework for workplace relations that provides for innovation, employee engagement, best practice, productivity and a safe workplace.

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