Submission to the Finance and Administration Committee

008
RECEIVED
28 FEB 2014
Finance and Administration Committee

Work Health and Safety and Other Legislation Amendment Bill 2014

1. Introduction

On 13 February, the Government introduced the *Work Health and Safety and Other Legislation Amendment Bill 2014* (the Bill). The Bill proposes to make the following amendments to the legislation:

- requirement for at least 24 hours' notice by workplace health and safety (WHS) entry permit holders before they can enter a workplace to inquire into a suspected contravention to align with the other entry notification periods in the *Work Health and Safety Act 2011* (WHS Act) and the *Fair Work Act 2009*;
- increase in penalties for non-compliance with WHS entry permit conditions and introduce penalties for failure to comply with the entry notification requirements;
- requirement for at least 24 hours' notice before any person assisting a health and safety representative (HSR) can have access to the workplace;
- removal of the power of HSRs to direct workers to cease unsafe work;
- removal of the requirement under the WHS Act for a person conducting a business or undertaking to provide a list of HSRs to the WHS regulator;
- allowance for codes of practice adopted in Queensland to be varied or revoked without requiring national consultation as required by the WHS Act; and
- increase in the maximum penalty that can be prescribed for offences in the Electrical Safety Regulation 2002 to 300 penalty units[1].

2. Policy Objectives

The Explanatory Notes claim the objective of the Bill is to implement findings of the WHS Act review and in particular the impact the WHS Act has on businesses[2]. Furthermore the Explanatory Notes say that the construction industry had raised concerns about "*...the misuse of right of entry powers by union officials...*" and "*....the subsequent complexity and disruption this creates for business*"[3].

Alarmingly, there is nothing in the Policy Objectives in regard to the safety of workers or how any of the proposed amendments will benefit workers. it is clear that the objectives of the amendments stem from the Government's anti-union ideology and is yet another attempt to remove Unions from the workplace.

The Government demonstrates its need to make changes to the WHS Act by stating that in a 12 month period there were 57 complaints made to the regulator in regard to right of entry disputes on construction

[1] Explanatory Notes, Work Health and Safety and Other Legislation Amendment Bill 2014 (QLD) 2.
[2] Ibid 1.
[3] Ibid.

sites. Firstly we do not know the outcome of these complaints and whether there was any legitimacy to the complaints; but given the number of Unions that represent construction workers in Queensland and the number of visits Union officials make to site under their WHS right of entry permits, 57 complaints would seem a relatively low number of complaints. The Plumbers Union alone has made 86 visits to site under WHS permits in the past 12 months.

It is also necessary to state that the Explanatory Notes claim that there is no other method to achieve the policy objectives but to implement the proposed legislation amendments. This is simply not true. The WHS Act currently provides various mechanisms for parties to address any concerns they might have in regard to workplace health and safety right of entry. Instead of making legislation amendments that have the potential to put workers lives at risk, the Government should be encouraging parties to make use of these mechanisms that already exist.

The WHS Act provides both the Regulator and the Queensland Industrial Relations Commission (QIRC) powers to deal with right of entry complaints.

Section 141 of the WHS Act provides that any party to the right of entry dispute may request the assistance of the Regulator. The Regulator will not make a determination on the issue but will assist all parties involved to resolve the dispute.

Section 142 of the WHS Act provides the QIRC with the powers to deal with a right of entry dispute. The QIRC may deal with the dispute any way it sees fit including mediation, conciliation or arbitration. If the QIRC deals with the matter by way of arbitration they may revoke, suspend or impose conditions on the right of entry permit. Should any party breach the QIRC's orders, penalties apply.

In fact if a business is so aggrieved by a permit holder, they may themselves apply to the QIRC under section 138 of the WHS Act and request the QIRC to revoke the right of entry permit.

The Explanatory Notes even outline some recent cases where right of entry permits are being challenged[4]. In his Explanatory Speech, the Attorney-General discussed how the introduction of the Building Construction Compliance Branch (BCCB) would assist with the monitoring, auditing and reporting on compliance with industrial relations laws including right of entry[5]. Whilst we do not support the introduction of the BCCB, it simply demonstrates another method where misuse of WHS entry permits will be dealt with.

Given the various actions available to parties to address any right of entry concerns, it is misleading to state that there is no alternative way to deal with misuse of right of entry permits other than to implement amendments to the WHS Act which erode the rights of workers.

3. Proposed Changes

The following is specific comment on the particular amendments being proposed:

3.1 24 hours' notice required by WHS entry permits holders before they can enter a workplace to inquire into a suspected contravention

Currently under section 117 of the WHS Act, a WHS entry permit holder may immediately enter a site once becoming aware of a suspected contravention of the WHS Act. As soon as reasonably practicable the permit holder must provide notice to the relevant person conducting a business or undertaking (PCBU).

If a serious incident occurs on site or a safety issue has arisen, one of our members may contact us and request our assistance. Most times, given the close relationship we have with our members, the member will call one of our Organisers directly. The Organiser can then enter the site as soon as possible and

[4] Ibid.

[5] Queensland Parliament. *Record of proceedings (Hansard)* 13 February 2014, 234-236 (Jarrod Bleijie, Attorney – General and Minister for Justice).

exercise their powers as a WHS entry permit holder to work with the relevant parties and resolve the safety issue, ensuring the safety of workers on site.

The proposed changes have the potential to seriously impact the safety of workers on site as our Organisers will not be able to access the site for at least 24 hours, in some cases longer. Under the proposed changes, the following scenario is likely:

- a member contacts our Organiser at 4.30pm Monday to advise of a serious safety issue that has arisen on site that day;
- under the proposed changes the Organiser is required to notify the PCBU during working hours. So the Organiser would first need to locate the contact details for the PCBU which is not always easy as this information is generally not located on their website. Currently Organisers are able to give the PCBU the notice once on site, so there is no need to track down the contact details prior to entry;
- once the organiser has tracked down the PCBU's contact details they may then submit their right of entry notice. However in this case, it is now after hours, so the Organiser must wait until the following morning to lodge their notice;
- the Organiser lodges their notice at 7am the following morning (Tuesday) to say they will be on site 7am Wednesday;
- The Organiser enters the site to investigate the safety issue on Wednesday at 7am, some 38.5 hours after the issue was first reported to him.

We hold grave concerns for what these 38.5 hours may mean for the health and safety of workers on site. We believe during this time workers may be exposed to risks and in some cases may even be injured.

Working in the building and construction industry is a risky business. The Australian construction industry is consistently placed within the three most hazardous industries to work in with 19 people being killed in the industry in 2013[6] (equating to 10% of the total number of workplace deaths in Australia). In Queensland, workers are more likely to die in the construction industry than any other industry, with 11 workers being killed in 2011-2012 (equating to 28% of the total number of workplace deaths)[7]. Even in relation to non-fatal injuries, the Queensland construction industry is the fourth most dangerous industry to work in. Hence more needs to be done to ensure the workers safety - not less.

However interestingly during the period 2005/2006 to 2011/2012, the rate of non-fatal injuries has significantly decreased in the Queensland construction industry, decreasing by 26%[8].

Through the WHS entry permits, our Organisers play a vital role in ensuring the health and safety of the workers on site. In the past 12 months, our Organisers have exercised their right to enter a site under the WHS Act 86 times.

When an incident occurs on site, a member can call an Organiser and speak directly to them requesting their assistance on site. In most cases an Organiser can be on site within 30 minutes. There is no red tape to get an Organiser on site, apart from ensuring the Organiser holds the appropriate right of entry permit and abides by the law upon entering the site.

---

[6] Safe Work Australia 2014, viewed 27 February 2014, http://www.safeworkaustralia.gov.au/sites/swa/statistics/work-related-fatalities/pages/worker-fatalities

[7] Department of Justice and Attorney-General 2014, viewed 27 February 2014, http://www.deir.qld.gov.au/workplace/statistics/qld-perf-nat-strategy-targets/index.htm

[8] Ibid.

In fact on many occasions the PCBU may also contact the Organiser and request their assistance when a serious incident has occurred. Our Organisers are well respected in the industry and their expertise and knowledge in health and safety is weil regarded by many within the industry.

When our Organisers attend site, they assist the parties (PCBU and Safety Committee) in identifying the safety issues and rectifying the concerns. Specifically the following process usually occurs:

- upon entering site the Organiser meets with the PCBU and the Safety Committee;
- Organiser is given a debrief of the incident that occurred;
- Organiser checks area where incident occurred has been isolated to prevent further concerns;
- Organiser inspects site of the incident;
- with PCBU and Safety Committee, Organiser does full site inspection checking to see if other safety concerns exist;
- parties then reconvene and discuss actions required to rectify any safety issues identified;
- High risk safety issues are fixed immediately prior to workers being returned to area; and
- minor safety issues are fixed in due course with time frames usually set between the parties.

Generaliy the above actions occur without the involved of any representatives from the Regulator. In fact we receive regular complaints from our members saying that it is very difficult to get anyone from the Regulator to come to site. Whilst the Union welcomes the involvement of the inspectors from the Regulator, the reality is they don't have the resources to attend to all safety incidents. Furthermore they don't have the established rapport our Organisers have with the workers on site and the builder representatives. Workers feel safe in calling our Organisers. They know our Organisers have the ability to respond to issues immediately without any bureaucratic red tape and they know that if requested their identify will be kept confidential. Furthermore in most cases our Organisers intimately know the work site, they know the history of any previous safety issues on that site or that have occurred on other sites of the PCBU. Most importantly our Organisers have worked in the industry themselves.

Whiist many may argue that the above process can continue with or without the Organiser present, we are concerned that without our independent presence, the pressure to meet deadlines or profit margins may from time to time override safety issues. We hold these concerns with PCBU with proven track records for resolving safety issues but for a PCBU that show total disregard for workers safety, the results could be a diabolical.

We are well aware of safety incidents where the PCBU has attempted to cover up the safety issue and/or half-heartedly attempted to rectify the problem. Without our involvement in these matters the outcome could have been catastrophic.

The Explanatory Notes state that there are sufficient mechanisms in the WHS Act to resolve safety issues during the 24 hours' notice period. The mechanisms it refers to are:

- the PCBU being required to consult with workers on health and safety concerns and to follow up on concerns raised; and

- ability to raise concerns with the health and safety representatives[9].

Further the Explanatory Notes state that due to these existing mechanisms the removal of the "surprise" element by requiring 24 hours' notice is warranted. We do not accept these views.

The "surprise" element ensures Organisers can come on site and view workers going about their daily business in the site's usual state. The purpose is not to "catch " employers out, rather to see how business is operated on a daily basis, not after the site has been cleaned up for an upcoming safety site visit. We believe that being able to enter site at any time upon a suspected contravention of the Act means the pressure remains on PCBU's to ensure the safety on site is at a high standard at all times.

[9] Explanatory Notes, Work Health and Safety and Other Legislation Amendment Bill 2014 (QLD) 3.

It is not agreed that the existing mechanisms (as stated above) are enough to ensure the safety of workers. The PCBU's obligation to consult workers "*who are, or are likely to be directly affected by a matter relating to work health or safety*"[10] is wide open to interpretation. Unions tend to take a wide approach as to who may be impacted by a safety matter, whilst PCBUs are likely to have a more narrow view. Furthermore for the provision to work effectively it also relies on workers to feel completely safe in expressing their views and raising concerns.

This is similar for the HSRs to work effectively. It needs to be remembered that HSRs are not third parties; they are employees of the PCBU or another employer on site. For their role to be effective on site they must feel secure in their position and know they have the full support of their employer and/or the PCBU.

For the reasons already discussed, it is not enough to allow PCBUs to self-regulate their own safety obligations or to solely rely on HSRs who rely on the PCBU to assist them in resolving the issues. An independent party - one that the workers can fully trust - is paramount to ensure safety remains the number one priority on site. Regardless of what provisions exist in the WHS Act to protect the safety of workers, without an independent third party c- someone whose priority is the safety of the workers - these provisions cannot be fully monitored or enforced. We believe without third party assistance, this provision is not enough to protect workers during the 24 hour notice period.

Furthermore the Explanatory Notes state that despite the above, the WHS regulator can be called at any time. For the reasons already stated, this has also not proved to be an adequate resource in quickly resolving safety concerns on site.

Fair Work Act 2009

The Government also claims the requirement to provide 24 hours' notice is to align WHS right of entry with the right of entry provisions under the Fair Work Act 2009.

Currently under the Fair Work Act 2009, provided at least 24 hours' notice is provided, a permit holder can enter site for the following reasons:

- to investigate a suspected breach of the Fair Work Act or any other industrial instrument[11] or;
- to hold discussions with workers[12].

Clearly in the above scenarios, a 24 hours' delay is not going to place any workers safety at potential risk. It is completely ridiculous to compare the two rights of entries. For the Government to place any merit in this argument is ludicrous.

3.2 24 hours' notice before any person assisting a health and safety representative can have access to the workplace

Currently under section 68 of the WHS Act, the HSR has the power to request the assistance of any person. On many occasions the HSR may request the assistance of an Organiser. The amendments propose to qualify this right by stating that the HSR must give at least 24 hours' notice of the assisting person coming onto site.

For the reasons previously stated, this amendment is opposed.

3.3 Removal of the of health and safety representatives to direct workers to cease unsafe work

[10] *Work Health and Safety Act 2011* (Qld) s 47
[11] *Fair Work Act 2009* (Cth) s 481
[12] *Fair Work Act 2009* (Cth) s 484

One of the justifications for requiring an Organiser to give 24 hours' notice before coming to site is that the HSRs hold powers to resolve health and safety issues immediately. However it is proposed to remove perhaps the most effective power of the HSR - to direct workers to cease unsafe work.

The Explanatory Notes provide no real insight as to why this power is proposed to be removed, apart from saying that the WHS Act provides sufficient mechanisms to address health and safety issues.

Section 85 of the WHS Act sets out the circumstances where a HSR may direct unsafe work to cease. Prior to directing the work to stop, the HSR must consult with the PCBU in an attempt to resolve the matter. However they may direct the work to stop prior to consulting if the risk is so serious or imminent that it would not be reasonable to consult first. Further the HSR must not direct work to cease unless they have had the required HSR training.

it is important to note the circumstances where a HSR may direct work to cease, for example immediate or imminent risk of explosion, collapse of structure, burns, release of toxic chemicals or the use of plant in a manner that is clearly unsafe. Clearly in such circumstances, mechanisms such as consultation, using dispute resolution procedures or contacting the Regulator are not tools that will provide an immediate resolution.

it is of no comfort that individual workers retain the right to cease unsafe work, as pointed out in the Explanatory Notes. Individual workers may have other competing issues that prevent them from ceasing unsafe work, for example fear of retribution from their employer, fear of losing their job, fear of not being able to put food on the table for their family. it is absolutely unreasonable for the Government to think this right in itself is enough to protect our workers.

Furthermore the Explanatory Notes highlight that issues may arise where the individual worker is not from a non-English speaking background. To add to this, what about the situation of a young worker without any experience? How are these workers able to identity a potential risk exists and further, feel secure enough in their employment to make the call to stop work.

Given the HSRs training and operation on a day to day basis in the workplace, and the fact that they are usually more experienced with resolving workplace disputes, they are generaliy better expertly placed than individual workers to make the call that unsafe work cease. The ability of the HSR to make this call on behalf of workers is another important and necessary mechanism to keep all of our workers safe.

Furthermore if concerns exist that perhaps HSRs misuse their power to direct unsafe work to stop, mechanisms currently exist under the WHS Act for HSRs to be disqualified for misuse of their powers.

3.2 Allow for codes of practice adopted in Queensland to be varied or revoked without requiring national consultation as required by the WHS Act

It is concerning to us that decisions regarding the content of Codes and Practices which apply to Queensland will be made by people who do not have intimate knowledge about the specific industry or work site.

There seems to be no real explanation in the Explanatory Notes as to what the benefit of this proposed change is. In the Explanatory Speech the Attorney-General states that there is a need to allow some scope to vary model codes to be more relevant for specific circumstances in Queensland[13]. Whilst we do not in principle disagree with this statement, this is not the change that is being made proposed. The proposed amendment is to simply remove section 274 (2) of the WHS Act which is the requirement to consult with the Commonwealth, each State and Territory, Unions and Employer Organisations prior to any amendments being made.

The fact is, saying that the WHS Act does not currently allow for model codes to be varied to be more relevant for circumstances in Queensland is simply untrue.

[13] Queensland Parliament. *Record of proceedings (Hansard)* 13 February 2014, 234-236 (Jarrod Bleijie, Attorney – General and Minister for Justice).

It is agreed that the requirement to consult with some of these parties (i.e. each Australian State and Territory) may be onerous and unnecessary. However it is believed that to simply remove the requirement to consult with any parties is outrageous and shows that the real reason for the change is that the Government would prefer to implement its own Codes of Practice without any input from any party in the shortest time possible.

4. Conclusion

In the Explanatory Speech the Attorney-General concludes by making the following statements:

"Every Queenslander deserves to be able to go to work and do their job without interference, without fear, without intimidation and without the union bullying tactics, and they deserve to get paid and be treated fairly by all those on the work sites, including the unions".

"Unions will no longer have the right to enter a workplace and use work health and safety as an industrial disputation weapon in this state. They will not have to give 24 hours' notice to be able to enter work sites in Queensland. That is good for business and good for the workers in Queensland. Hopefully we will rid this state of union militant bullying activities".

It is clear that the proposed changes have very little to do with improving the health and safety of workers on site and is everything to do with removing the Union's ability to enter site unannounced. The Government should be completely ashamed of itself in using the health and safety of Queensland workers as a pawn, just to reduce a Union's right to enter the workplace.

The Attorney-General makes no apology that his main objective for these amendments is to reduce the so-called misuse of the Unions' right of entry powers. Instead of making use of the existing mechanisms that exist to reduce any complaints of misuse of workplace entry rights, the Attorney-General plans on eroding the workplace health and safety rights of workers.

if implemented, these changes have a real chance of negatively impacting on our workers. Regardless of what the Government thinks, 24 hours has the potential to expose our workers to serious harm and in some cases may be a matter of life or death.

Given the particularly dangerous nature of the construction industry, it is vital that workers' health and safety rights are not diminished and that Unions have the ability to act without delay in assisting to rectify dangerous safety issues.

The Plumbers Union urges the Finance and Administration Committee to consider the arguments outlined in our submission below and welcome the opportunity to discuss this matter further.

BM O'Carroll

BM O'Carroll
STATE SECRETARY