Queensland Council of Unions

Work Health and Safety and Other Legislation Amendment Bill 2015

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Introduction

The Queensland Council of Unions (QCU) is the peak union body in Queensland. The QCU supports the Bill that seeks to restore reasonable provisions of the Workplace Health and Safety Act 2012 (the Act) that were removed by the Newman Government in 2014. In amending the Act the Newman Government departed from the important achievement of most Australian governments to introduce harmonised workplace health and safety laws. By introducing this Bill, the Palaszczuk Government is maintaining an election commitment made prior to the 2015 state election.

This submission concerns itself with two aspects of the Bill that reinstate safeguards to workplace health and safety, as well a brief comment about harmonised WHS laws:

- Proposed section 85 Health and safety representative may direct that unsafe work cease;
- Proposed section 119 Notice of entry; and
- Restoration of Queensland being aligned with national WHS laws.

The reinsertion of section 85 into the Act would reinstate the ability of a duly elected Health and Safety Representative (HSR) to direct that unsafe work cease under particular circumstances. As the Bill states this provision is only enlivened "if the representative has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard".

The amendment of section 119 would remove the unnecessary and potentially dangerous requirement for a Work Health and Safety entry permit holder to provide 24 hours' notice before entering a premises pursuant to section 117 of the Act. Before entering the premises the permit holder "must reasonably suspect before entering the workplace that the contravention has occurred or is occurring".

The restoration of Queensland's alignment with national, harmonised workplace health and safety laws is in itself a useful end.

Health and safety representative may direct that unsafe work cease.

An unjustified amendment made by the Newman Government in 2014 was removing the ability of the HSR to cease unsafe work. The introduction of the requirement for 24 hours' notice for entry to a work site was based on spurious grounds, however this amendment had no justification whatsoever. The excuse given by the Newman Government for this amendment was that workers were able to cease work themselves and did not require a HSRs assistance (Parliament of Queensland 2014a).

This disingenuous reasoning ignores a range of factors that illustrate the need for such a provision in the first place. Primarily, HSRs receive mandatory training in relation to their role and as such are able to identify risks far better than someone who has not undertaken training (QCU 2014). Trained HSRs will look for solutions higher up the hierarchy of control and a much higher degree of confidence will come with effective training (Culvenor et al 2003).

The most vulnerable in the workforce will not know how to identify risks, especially the young (QCU 2014). The capacity of HSRs to stop a dangerous process is fundamentally important to protecting workers and assists an employer in their primary obligations under the Act. As was submitted to the parliamentary enquiry that reviewed the amendments eventually made by the Newman Government, the QCU would rely upon the panel review of the model OHS laws that addressed the ability of HSRs to stop work as follows (Commonwealth of Australia 2012:184):

> ''The HSRs, given their training and operation on a day to day basis in the workplace, may be better placed than an individual worker to be able to progress discussions with the person conducting the business or undertaking and have more experience in use of the issue resolution process. Concerns raised in submissions and consultation about the potential for misuse by an HSR of the power to direct a cessation of work, can be met by the provisions that we recommend for the disqualification of an HSR."

Some employers were concerned prior to the introduction of the provision allowing the HSR the ability to cease unsafe work. It was erroneously thought that HSRs, who would be union delegates masquerading as HSRs, would misuse this provision for the purpose of industrial action. This belief was proven to be mistaken by the experience after the adoption of model laws and by virtue of the fact that most HSRs are not union delegates (QCU 2014). As is stated above, in the unlikely event that an HSR did abuse his or her ability to cease unsafe work, the legislation is capable of dealing with such a situation.

There has also been some suggestion that a worker's common law right to not perform unsafe work is sufficient and renders the proposed section 85 unnecessary. This view in our submission is conveniently simplistic and ignores the realities of the workplace. Common law rights are vague and there is benefits to codifying such rights in specific legislation such as this Act (Commonwealth of Australia 2012).

Notice of entry

Under the various acts covering industrial and workplace health and safety, union officials have long held a right of entry into premises (Commonwealth of Australia 1996; Shaw and Walton 1994). In the federal jurisdiction, awards often dealt with right of entry and section 286 of Industrial Relations Act 1988 (Cth) set out the power to enter, inspect and interview so long as the official did not hinder or obstruct an employee in the performance of their duties (Commonwealth of Australia 1996; Mills and Sorrell 1975).

Serious limitations were first placed on union right of entry by the Howard Government in the Workplace Relations Act 1996 (Cth) (WRA). Sections 285B and 285C of the WRA allowed authorised permit holders to enter a workplace for the purpose of investigating suspected breaches or holding discussions with employees. Curiously, section 285D

of the WRA required that permit holders were required to give employers 24 hours' notice to exercise these rights (Commonwealth of Australia 1997).

It is uncertain as to the need for 24 hours' notice and union right of entry had not been an overly contentious issue before the introduction of these provisions in 1996. Much of the WRA was particularly and specifically anti-union and the limitations placed on union right of entry have been interpreted in that context (Balnave et al 2007; Bray et al 2005; Peetz 1998). There is evidence that employers use the 24 hours' notice to undermine union recruitment efforts within the workplace (Pyman 2004).

The right to enter a premises specifically for occupational health and safety reasons was first introduced into Queensland in 2006 by virtue of the Workplace Health and Safety and Other Acts Amendment Bill (Queensland Parliament 2006). Such a provision had existed in New South Wales legislation for decades and more recently in other jurisdictions such as Victoria. A similar provision was adopted in the harmonised workplace health and safety laws that led to the introduction of the most recent act. As submitted by the Queensland Government to the National OHS Review, there had been no evidence of abuse of the right of entry provisions introduced in 2006 (Queensland Government 2008).

In 2014 the Newman Government introduced legislation to introduce a 24 hour time limit on permit holders entering a workplace under the Workplace Health Safety Act 2011. The apparent justification for this amendment was two round table discussions that involved the former Attorney General in late 2012 and early 2013, where it was alleged that officials in the building and construction industry were misusing their right of entry (Queensland Parliament 2014a). The number of complaints concerning right of entry at the time of the Newman Government amendments was 57 (Parliament of Queensland 2014b). However it is not known exactly how many of these complaints were in any way proven (QCU 2014).

To contextualise the number of complaints made concerning alleged misuse of right of entry, that was used to justify the inclusion of 24 hours' notice, it is instructive to consider some other statistics pertaining to workplace health and safety:

1. 32 workplace deaths for the calendar year 2014 for Queensland (Office of Fair and Safe Work Queensland 2015);
2. 107 deaths of Queensland Asbestos Related Diseases Society members for the calendar year 2014;
3. 75,610 non-fatality claims for calendar year 2014 (Office of Fair and Safe Work Queensland 2015); and
4. 9 reported bystander deaths for Queensland (Safe Work Australia 2014).

As demonstrated above, the number of complaints concerning right of entry are numerically insignificant in the scheme of Queensland workplace health and safety. We would also urge the committee to consider the consequences of an alleged misuse of a right of entry compared to restricting the capacity of union officials to intercede in unsafe work practices and systems. To compare the potential minor inconvenience to an employer by

not having 24 hours' notice with the potential for loss of life or serious illness or injury from not allowing access is ludicrous.

In addition it is important for the committee to consider that the only allegations of misuse of right of entry are all located in the building and construction industry. Not only is this an industry that has high level of union membership it also accounts for a high proportion of workplace health and safety incidents including falls from heights, falling objects, electrocution and being hit or trapped by vehicles (Ferguson 2009; Safe Work Australia 2002). The construction industry is associated with completive cost structures that places pressure on workplace health and safety (Bahn and Barratt-Pugh 2009; Ferguson 2009). Therefore, it is not unlikely in that context that workplace health and safety issues will be contentious and it also noteworthy that the CFMEU and Master Builders were locked in some significant disputes at the time in which the "spate" of complaints were made. The context in which these complaints were made lends itself to the conjecture that it was part of campaign on behalf of building industry employers in retaliation to disputation within the building industry.

It was also apparent at the Committee hearing into the 2014 amendments that workplace health and safety right of entry was of no concern to any other employer body. By contrast unions covering diverse industries and occupations were able to point to grave concerns and potential risks associated with the 2014 Bill being enacted.

Irrespective of whether these claims made by employers in the building and construction industry are accurate, which the QCU does not concede, their application is to one industry. It is grossly inequitable to visit these limitations upon unions and employees across all sectors of the community. As has been noted elsewhere, any misuse of right of entry provisions enables an employer or other parties to seek have the officials entry permit suspended or revoked. Moreover, before exercising the right of entry under the Workplace Health and Safety Act 2011 an official must have a reasonable apprehension of a suspected breach. It does not allow for open-slather right of entry.

Restoration of Queensland being aligned with national WHS laws

The 2014 amendments forced Queensland legislation out of step with the harmonised laws introduced in almost every Australian jurisdiction. Harmonisation was a major achievement of Australian governments in introducing consistent laws throughout Australia for the benefit of employees enjoying equal protections and employers facing less complexity, regardless of their location. The gratuitous move away from harmonisation was a retrograde step for Queensland.

Conclusion

The removal of the ability of HSRs to prevent unsafe practices was both prejudicial and ignorant. It is the submission of the QCU that the previous Government to place a requirement of 24 hours' notice on right of entry for workplace health and safety purposes was a complete over-reaction to the relatively small number of complaints received.

The unnecessary and counter-productive limitation on union officials' right of entry was consistent with the anti-union nature of Newman Government legislation generally. HSR's ability to prevent unsafe work was collateral damage in the anti-union crusade undertaken by the Newman Government. The reversal of the 2014 amendments are both justifiable and in our submission essential to ensuring health and safety is given the priority it deserves in Queensland workplaces.

The Palaszczuk Government has a mandate to make these amendments as it unequivocally took this legislative program to the 2015 state election.

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