DAVID MORRIS MP
Member for Mornington

Worksafe Legislation – A direct and unwarranted attack on employers

Posted on 21 June 2017

I must say that I am pleased to be able to finally debate this bill because, unlike some other matters recently, this bill has been on the notice paper for a considerable period of time, so certainly there has been the opportunity to examine it in detail.

The bill amends the Accident Compensation Act 1985, the Dangerous Goods Act 1985, the Occupational Health and Safety Act 2004 and the Workplace Injury Rehabilitation and Compensation Act 2013. It is truly a bill that proposes a range of changes to a number of different acts.

The bulk of the bill is not controversial. Some might say it might have benefited from broader input, but essentially it is not controversial with one exception, and that is in some of the amendments to the Occupational Health and Safety Act. I am aware that a range of views were canvassed but that there was no broad consultation. Had that broad consultation occurred, there might have been a slightly different and perhaps a slightly better bill.

Over the course of my contribution I will endeavour to flag some of the concerns and issues that either have been raised with me or have emerged during my consideration of the bill. I do want to say that I do not regard it as the job of the opposition to necessarily fix all the detailed issues that might occur in the preparation of a bill and that certainly, from my reading of it, do occur with regard to this bill.

I also want to flag at this point that there are some matters in the bill that I see as a direct and entirely unwarranted attack on employers. They are matters that are dressed up as improvements when in fact they are nothing of the sort. They are matters that under other circumstances the opposition might say, 'Yes, there is a problem; this is the judgement or this is the event that demonstrates why we need to introduce measures'—draconian measures— 'of the type proposed by three clauses in this bill'. But there is no example, there is no judgement, there is no justification for the introduction of these measures, and I certainly do not regard them as appropriate—but I will come back to that when I get to the relevant clause in the bill.

I should say at this point that I do want to acknowledge the very thorough briefing that was given to me, and certainly I appreciate the cooperative and generally cordial relationship that I enjoy with the government and the cooperative way they approach the preparation of

this legislation and legislation in this space in general.

With regard to the purpose of the bill and the commencement provisions, they are both relatively straightforward and really do not warrant any further examination. With regard to the measures proposed to vary the Accident Compensation Act, the first clause in that part is a proposal to allow the payment of travel and accommodation expenses which have been incurred by family members to attend the burial or the cremation of a deceased worker if the family resides more than 100 kilometres away from the location of the service. That amount is proposed to be a maximum of $5000 with indexation, and the indexation is implemented by clause 4 of this bill. I think it is a reasonable provision.

As all members are aware, the cost of a burial, even a relatively simple burial, is significant, and particularly in circumstances where there is not only the bereavement—which is bad enough—but an unexpected and certainly unanticipated bereavement, which is a further considerable burden. In the event of a death remote from home, it is not unreasonable in those circumstances that a contribution should be made to travel and accommodation expenses. The proposal in fact reflects a similar provision which already operates under the Transport Accident Act 1986.It is a not an unreasonable measure and the opposition has no quibble with it.

Clause 4 implements the indexation measures necessary for clause 3,and also removes a number of redundant references that currently exist in the indexation section of the act.

Clause 5 is simply an extension of a cross-reference from section 99 of the Accident Compensation Act to the whole division, division 2B of part IV. That relates to a calculation of the amount of compensation and the capacity to reduce the payment in the event of a judgement or settlement of some type. Clause 6 is a consequential clause that simply ensures that the changes proposed by clause 3 are appropriately applied. That concludes the proposed changes to the Accident Compensation Act 1985.

There are two changes proposed to the Dangerous Goods Act 1985—one of substance and one basically tidying up. The tidying up removes a redundant definition of statutory rule. Clause 8 rewrites the provisions relating to an order in council to regulate the clean-up, removal and transport of asbestos in emergency situations. Again, this is a significant measure and obviously it is important that there are appropriate arrangements in place should these situations arise—which unfortunately they do all too frequently—and what is proposed by the government in this case seems entirely reasonable.

I move on to the Occupational Health and Safety Act 2004. As I said in my opening remarks, the difficulties that the opposition has with this bill all relate to the Occupational Health and Safety Act. The first clause, clause 9, simply clarifies that regulations made under the act also bind the Crown. Clearly there is no difficulty with that.

But in clause 10, that is where there are some challenges in what is proposed by the government. Clause 10 introduces a new offence for a contravention of an enforceable undertaking. An enforceable undertaking, by definition, is capable of enforcement already, so why there is a need a new offence, a new penalty, in this regard frankly is a mystery.

What is proposed is a penalty of 500 penalty units for an individual, which is close to $80 000—$79 285; and for a corporation, five times that—2500 penalty units, or almost $400 000.

The first thing that strikes me about this is the aspect of the scope of the problem.

Enforceable orders are reported in the annual report of the authority, and a check of the most recent report, the report for 2016, shows that a grand total of four enforceable undertakings were agreed in the financial year 2015– 16. Similarly, the previous report for 2014–15, shows a total of eight in that year, which would appear to be not a huge number and I would have thought a reasonable number to keep track of and, if necessary, to take action to enforce the agreement.

It is not only me that has a problem with what is proposed here. The Master Builders Association of Victoria (MBAV) also has a problem with this particular clause. I know they wrote to the minister on 30March this year; they were kind enough to email a copy of that correspondence to me. I thought it would be worth just reading into the record some of the comments the MBAV make on this clause. They said:

Master Builders has assisted a number of members in crafting and implementing enforceable undertakings and as such is aware of the scrutiny that is placed by WorkSafe on ensuring that enforceable undertakings are properly implemented. Master Builders suggest that there have been instances where some of the undertakings have actually been underdeveloped and yet somehow approved by WorkSafe. Duty holders that enter into undertakings do so recognising that the undertaking itself is an alternative to a prosecution— as I mentioned— and possible conviction, enter into the undertakings with strong commitment to improve their businesses and the industry. WorkSafe consider applications for enforceable undertakings very judiciously (against a published policy document).

The proposed new offence appears to be tokenistic and unnecessary.

I must say I consider that that assessment is not unreasonable because, as I have already noted, there are not a great numberof enforceable undertakings in the first place, and there is already section 17 of the principal act, which enables the authority to apply for enforcement and provides the opportunity for court orders to be imposed.

Enforceable undertakings are by their very nature enforceable, so it is rather difficult to see why the government has decided that these provisions and these draconian penalties should be included in the principal act.

And as I mentioned in my introductory marks, there is no evidence that there is even one significant case that would justify this legislation. There was no mention of one in the second-reading speech. I do not wish to verbal the minister, but it seems to me that what is proposed in the second-reading speech is on the basis of hypothetical circumstances that may never eventuate. The opposition does not believe that legislation should create penalties, and in this case very significant penalties, for circumstances which may never arise.

Given that the act has now been in operation for well over a decade—2004 was the date of royal assent— the provisions appear to be working in a more than adequate fashion. The opposition does not support the clause, and under standing orders I wish to advise the house of amendments to the WorkSafe Legislation Amendment Bill 2017 and request that they be circulated. Opposition amendments circulated by MrMORRIS (Mornington) under standing orders.

MrMORRIS—As I said, the opposition does not support this clause. The amendments, while they deal with this clause and clauses 12 and 13, proposes the removal of the penalty. In

relation to clause 11, the authority will now need to be notified of serious incidents where treatment has been administered by nurses and midwives as well as doctors. There is also a redefinition of 'mine' and a new definition for 'tourist mine'.

In regard to the extension of serious incident notification, it has been put to me that WorkSafe are already heavily criticised, particularly by the unions, for failing to send inspectors to notifiable incidents—and that is incidents under the current notification arrangements, which of course apply to specific injury types and to inpatient treatment in a hospital overnight. The expansion of the extent of notification could mean that the number of notifiable incidents will be increased significantly and that in fact they could apply to simple treatments. Business interrupted under sessional orders.

Debate resumed. MrMORRIS (Mornington)— Before question time intervened I was referring to clause 11 and particularly the matter of extending the notification of serious incidents to nurses and midwives.

I was referring to advice that I had had from an informed source that suggested that expanding the duty to nurse treatment has the potential to massively increase the number of notifiable incidents and could potentially apply to simple treatments—possibly splinter removal and possibly minor lacerations. I understand there is a difficulty already with the volume of work which the authority is handling, so I simply express a note of caution about this proposed change. It may be of merit, but it certainly has the potential to significantly expand the scope of notifiable incidents.

With regard to clauses 12 and 13, I will speak to those together because they are closely related. Both clauses introduce a reasonable excuse element: clause 12 to the offence of failing to notify the authority of a serious incident; and clause 13 of failing to preserve a site where a notifiable incident has occurred. They both propose to increase the penalty for the relevant offence for an individual from 60 penalty units to 300, a fivefold increase, and similarly for a corporation, from 240 penalty units to 1200 penalty units. In addition to a 500 per cent increase in the proposed maximum penalty, each offence becomes an indictable offence, capable of being dealt with summarily, but an indictable offence nonetheless.

Both of these proposals have been opposed in correspondence to me by the Master Builders Association of Victoria (MBAV) and the Housing Industry Association (HIA).

I can understand why, because when the list of prosecutions that have occurred for these two offences under sections 38 and 39 of the principal act is considered the penalties are relatively light, except in cases where the fine reported is in fact a combination of a sanction under section 38 or section 39 and other sections of the act or where it appears that there have not been any additional breaches of the act but a significant injury has occurred.

That is certainly the case in one or two circumstances, but if all the incidents from 1 December 2014 are considered, and offences where a fine has been imposed, as I mentioned, for a number of other offences unrelated to section 38 or section 39 are excluded, the average fine is reduced to $5250. If the three incidents where the injuries were serious but there was only a prosecution for failure under section 38 or section 39 are also excluded, the average penalty falls to $2222.

So it does seem to me that on the basis that since December 2014 the average penalty has been $2222 under these two sections, a proposed penalty of $38 056 for an individual or $190 284 for a corporation is again excessive.

I am aware that there is also a suggestion that not everything is being done by the authority to ensure that employers are aware of their obligations under the act. That is something I am sure the authority is able to take on board to ensure that there is a better method of making sure that employers are aware of their obligations, because they are reasonable obligations and they are very important.

The submission from the Master Builders Association indicates that in their view the majority of prosecutions for the failure to notify—section 39—resulted in small fines and very few convictions, reflecting that the courts did not regard the instances of offending to be grave, serious or deliberate. I think that is the importantpoint. The courts have looked closely at each and every one of these cases and come to a conclusion. The history of prosecutions for the offence runs contrary to the government's position that the penalty will create a more effective deterrent that is proportionate to the potential gravity of the offence. This is the view the courts have of the offences rather than the view of the government.

The association also makes the point, and again I quote:

At WorkSafe's Stakeholder Reference Group, attended by employer association and union OHS personnel, Master Builders has repeatedly asked WorkSafe to publicise the prosecution outcomes so as to make employers aware of the expectations (and implications) for notification. WorkSafe has repeatedly failed to inform the community about the duty.

It is reasonable to expect that employers should know, or ought to know, their duties for manual handling, plant, chemical safety and the various OHS regulatory duties that exist, but the expectation to notify WorkSafe immediately after an incident is not well known in the broader community.

Increasing the penalty and making the offence indictable will not reduce the number of prosecutions and it will not reduce the incidences of failure to notify. The suggestion that the offence will create a more effective deterrent is nonsense given there has been no evidence presented to suggest that employers have been deliberate or wilful in their failure to notify.

I again make the point that in these proposals, as in others that I have already referred to, there is no demonstrable need to make these changes. There has been no case that has occurred that demonstrates an obvious flaw in the legislation. There has been no judgement delivered that conveyed a message to the Parliament that the penalties available are clearly inadequate. There is been nothing except a desire by the government to 'improve the operation of the legislation'.

As I have already indicated, and through the amendments I have had circulated, if the House is able to consider this bill in detail, the opposition proposes to modify not only clause 10 but also clauses 12 and 13. In the case of those modifications, the intent would be to not proceed with the increased penalties proposed by the government and also to not allow the proposal to change the nature of the offence, from summary to indictable, to proceed.

Moving on from clauses 12 and 13, there is nothing notable to focus on in clauses 14, 15, 16 and 17. Clause 18 clarifies the powers of an inspector to ask questions and to require the production of documents, regardless of location. It also extends the date by which a proceeding must be commenced from 12 months from the date of the offence to 12 months from the date on which the authority became aware the offence had been

committed.

Again in this case MBAV alone have indicated some concerns. The comments generally refer to WorkSafe already having sufficient powers under section 100 to obtain documents at the workplace where an incident occurs and subsequently in any other place after an incident occurs. That is around the location and whether it is necessary to expand the capacity to obtain other documents.

They also make the point, quite rightly, that these investigations should not be fishing expeditions. Any investigation should be about establishing the facts and making sure that all the necessary documents are available but not that other matters may be uncovered as a consequence of casting a very, very wide net. They make the point that if the proposed amendment does get through the Parliament, there should be a change to the guideline title 'Requirement to answer questions' to reflect the changes to the section, and I think that is not unreasonable as well.

I will now go to clause 19. There is the introduction of electronic service of notices, and that is a reasonable thing given that the current act refers to faxing notices through or posting them. This is simply an extension of the carriage of the information.

However, there has been concern expressed that this may lead to a situation where a prohibition notice might be issued electronically and not physically handed to the employer to make sure that the current behaviour which needs to be stopped or changed is dealt with immediately. These notices are issued where an inspector forms a belief that a worker or workers might be immediately exposed to risk and that the threat exists, is real and needs to be resolved.

While I certainly do not oppose the electronic service of notices, in my viewthere is a need to ensure, in process terms that people do not say, 'All right. I'll send an email', and that they actually do still hand the notice across.

Moving to clause 22, a prosecution has to be brought currently within two years of the offence occurring or effectively with the consent of the Director of Public Prosecutions (DPP).

This clause proposes a significant extension to the current exemptions to include the commencement of a prosecution within one year after a coronial report was made or an inquiry or an inquest ended if it appears from 7 the inquest that an offence has been committed. There are also some new provisions around enforceable undertakings, or at any time with the authorisation of the DPP, which is effectively no change, and there is the issue of fresh evidence.

Both the MBAV and the HIA have expressed some concerns about this proposed measure. There is divergence in terms of the views that have been expressed, particularly in terms of the efficacy of coronial inquiries, but I think it is worth considering, and making sure that if this proceeds—and we do not oppose this particular clause—then there should perhaps be an absolute time limit on the commencemt of a prosecution so that there is some certainty and that there is no need to have the courts make the assessment of whether extremely late prosecutions are necessary or reasonable.

Whether that takes the form of a guideline, or preferably a further amendment, that change would provide certainty. The current provision was originally inserted to provide certainty; this effectively removes the current provision.

There are range of other matters—some 40 clauses— but I have covered the matters that are of principal concern to the opposition. Of course there is considerable breadth in this bill. It is for the most part not controversial.

I do not take any issue with the amendments proposed by the minister—I am happy with those—but I do take exception to clauses 10, 12 and 13. They are in my view a direct, unprovoked and unwarranted attack on employers. They are reprehensible clauses. They do not promote a culture of care, a culture of safety or a culture of cooperation.

They are about confrontation, and that confrontation is anathema to the way the occupational health and safety system has worked in recent years, so the opposition will not support those clauses for that reason.