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OHS changes matter, but not at the cost of jobs

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Mr MORRIS (Mornington) (15:37): It is a pleasure to rise to open the debate for the opposition this afternoon on the Occupational Health and Safety and Other Legislation Amendment Bill 2021,which, as the long title tells us, is a bill to amend the Occupational Health and Safety Act 2004, the Dangerous Goods Act 1985, the Equipment (Public Safety) Act 1994 and the Workplace Injury Rehabilitation and Compensation Act 2013.

There are, in reality, five different aspects to this bill. Part 2 essentially relates to the labour hire provisions. It inserts definitions of 'employer' and 'employee' and seeks to impose a common regime—in the case of labour hire companies and their employees—where the same standards apply to both the labour hire firm and the employer at the location where the particular individual goes about their day-to-day business.

Part 3 relates to indemnities on pecuniary penalties—so essentially preventing people from insuring against pecuniary penalties, or organisations and companies insuring against pecuniary penalties. The interesting part about Part 4 is that it is headed 'Service of notices', but it includesclause 15, which the explanatory memorandum says is a minor amendment, but in fact it is much broader than that, and I will come back to it. The part also facilitates the electronic service of notices, as the heading suggests, and other minor changes.

Part 5 has another rather innocuous heading, 'Powers of certain office holders', and that certainly conceals some nasties as well. Part 6 is headed 'Seized items', and remarkably the text of that part of the bill reflects the heading.

But more broadly the bill is an interesting insight into the thinking of the government. It is an insight into the priorities of the government.

Now, some may characterise the changes that are proposed in this legislation as reasonable, and undoubtedly there are provisions in this bill that are reasonable, there are provisions in this bill that essentially mirror changes that have been made in other Australian jurisdictions governed by both sides of politics.

But equally there are some provisions in this bill which, from my perspective at least, could only be characterised as questionable.

The second observation I would make is that the changes proposed by this legislation could under no circumstances be considered to be urgent. Do the people of Victoria consider

these changes to be a priority? They certainly do not in my part of the world.

Perhaps they do in Labor land. Perhaps if you are a government employee—and I hasten to add I am not maligning government employees; there are many thousands of terrific government employees—or someone who is getting up and going to work every day, has a full income, or not only has a full income but perhaps had a rise in the value of their assets, which has happened in both the stock market and in terms of housing prices, you are totally unaffected by the pandemic. The only inconvenience that you have is the fact that you cannot go to the supermarket after 9 o'clock at night. Then, if that is the land you are living in, legislation like this might be a priority.

But I do not live in that land. I live in the real world.

I live in a world where small businesses are hanging by their fingernails, literally barely surviving. They get up every day and they think, 'How on earth am I going to pay the bills? How am I going to meet the rent next week? How am I going to meet the wages this week? How am I going to make sure that the week after I still have a business to come to?'.

At the same time they are trying to homeschool their kids. They are dealing with the mental health impacts of the pandemic. It may not be affecting them directly —although, sadly, there are, in my observation, many people in small business that are really struggling from a mental health point of view. Or, they might not be struggling with a mental health problem from the direct impact of the pandemic but many of them are certainly suffering from the impact of the way in which the government has managed the pandemic.

There is a reason the economy, while it superficially looks okay, has for many, many businesses effectively tanked.

Every day I talk to people who have not had an income, a reasonable income, since February last year—if they were not affected by the bushfires. Yes, they have had a semblance of normal trading in the times we have not been locked down but in the 200 and whatever days we have been , they are really struggling. They are barely surviving.

As I say, the mental health impact is not just on the kids, although I think any member of this house would have seen firsthand the impact of the pandemic on the mental health of kids. It is not just that. Adults are hit hard too. They cannot cope with the pressure of homeschooling, they cannot cope with the pressure of potentially losing a business that they have built from the ground up, a business that is now evaporating around them—literally evaporating around them—through no fault of their own.

This is government business time. This is the time when business should be discussed that affects the whole of Victoria, a Victoria that is in crisis—business that affects the whole state. Instead what we are discussing in fact is a bill that is intended to benefit one section of the community at the expense of the other.

I will give you a direct example from the bill. The bill creates a new duty which requires labour hire providers and host employers—this is part 2—to work together by engaging in consultation.

What does that mean? That means consulting and cooperating and coordinating activities to ensure the protection of the health and safety of labour hire workers. Now, that is absolutely critical—the protection of the health and safety of any worker is absolutely critical—but a failure to comply with the consultation duty is proposed by this bill to be an

indictable offence.

The requirement to consult is going to have a direct impact on the flexibility of small businesses, and if you take flexibility away from small businesses you again endanger their survival. They are already, frankly, facing an existential threat. That existential threat is COVID. They need to be able to staff up quickly when demand booms. Labour hire is an efficient way for small businesses to do that, and this bill directly limits that flexibility. There is a real disincentive to use labour hire built into this bill—the indictable offence I referred to earlier.

This is exactly an example of what we should not be talking about at the moment. We should not be talking about legislation that endangers jobs. We should not be talking about legislation that puts at risk the recovery.

Yet the government goes along on its merry way. It talks about the impact on small business, but it does not understand it. It talks about the impact on the economy, but it does not understand it. What it does not seem to understand is that if small businesses do not survive then the long-term impact on the economy, and more importantly because of that the long-term impact on jobs, is going to be horrendous.

This is a bill and a government that is engaged in social engineering. You could not get a better example of the sort of social engineering we are seeing, effectively harnessing COVID to achieve an outcome. This bill is an excellent example of that.

Turning to the detail of the bill, as I said, it has essentially five parts; the last is really not contentious in any way. Starting with part 2, labour hire, it inserts a number of definitions. It inserts, as I mentioned, an extended definition of 'employer' and 'employee' and puts in a requirement,—a duty, to consult. I do not think I have yet mentioned the penalties, but the penalties for that failure to consult are 180 penalty units for a natural person and 900 penalty units for a body corporate.

Safety in the workplace has to be paramount, whether it is this workplace—and we see these screens around us here—or whether it is a heavy manufacturing plant where the risks are more about potentially getting caught in machinery or run by over by a forklift or whatever.

Whatever the workplace, there are inherent risks and safety has to be paramount. But along with that—and it is not really a 'but'; it goes directly with it—we need to make sure that regulation does not become overly complex, that it can be understood by the people who are doing the job.

Whether it is on the factory floor or working in Parliament House, the people that are doing the job need to understand the rules, so they cannot be overly complex and should not be confusing.

But this bill, as I mentioned, suggests that the labour hire employer and the host employer, for the purposes of OH&S, are jointly responsible. So you have immediately got a situation where there is potential confusion and, worse than the confusion, the real risk that safety objectives in the workplace might be undermined. We need consistency.

And of course we also, I know, understand across the chamber that health and safety obligations have to be shared. It is not all the employer's responsibility, it is not all the employee's responsibility—responsibility has got to be shared. When you have overly

prescriptive laws—and this bill in this section is, in my view, overly prescriptive—there is a real opportunity there to start a blame game and undermine the objectivesand in fact lessen the safety of the workplace.

A failure to consult will become an indictable offence. And beyond the risk to occupational health and safety in a workplace, the very existence of that indictable offence is going to be a problem because it is an imprecise obligation.

Effectively, given the words in this bill, we are requiring the courts to determine whether the level of cooperation and the level of consultation have satisfied the legislative requirement. We just do not know that. We are going to have to ask the courts. That of course leads to uncertainty and again raises business risk. So again you have a potential threat to jobs, although in this case the risk to workplace safety I think is higher.

Moving on to part 3 of the bill, which is the section related to indemnities for pecuniary penalties, and againamending the OH&S act, the Dangerous Goods Act and the Equipment (Public Safety) Act. Essentially it is two measures, the first being a prohibition on insurance and indemnity for pecuniary penalties and the second beingan offence for undertaking those activities. It is targeting indemnity. And I should also note, to be fair, that we understand that it is not about insuring against court costs. It is not about insuring against any penalties that might be imposed by the courts. It is about the direct pecuniary penalties.

The point is again about business risk, because if you cannot insure against something, then you increase the business risk. That means you have got to make provision in other ways. And if you have to make provision in other ways, those are funds that are not used to employ people and those are funds that are not used to grow the business. So that really is a significant issue. It is effectively a punitive measure again on jobs at a time when we can least afford it.

There is a second aspect to this: that it runs the risk of deterring people from becoming engaged in corporate governance. We might have a situation where good people wary of the penalties do not engage and the standard of corporate governance erodes, so I think that is a potential risk as well.

But if we are going to proceed with this provision, how about we make it even handed, aim for consistency on indemnity prohibition? Why shouldn't a union official be penalised under the act—be personally liable to pay the penalty? Why shouldn't a union be prohibited from paying the official's penalty? If we are going to go down this path on one side, why don't we make it fair on both sides?

Again, these are significant penalties. As I mentioned, it is $300 for the individual, $1500 for a corporate.

Moving on to part 5—as I mentioned, the innocuously named 'Powers of certain office holders'—essentially this is about both health and safety representatives and union representatives being able to take photos or make sketches or recordings of any part of the workplace at which a member of a designated work group works.

Again, I understand the intent of this clause, but I really have some problems with it, and those problems are deep enough that I am proposing a reasoned amendment. Therefore, I move:

That all the words after 'That' be omitted and replaced with the words 'this house refuses to read

this bill a second time until the government has fully addressed concerns about the appropriateness of the provisions in the bill relating to powers of entry and offences by authorised representatives'.

Clause 29, which authorises the actual taking of photographs, is fairly straightforward, but clause 30 is the power with regard to union officials and clause 31 is the safety net, which allegedly provides a limitation to the way in which any photographs taken in the course of exercising those duties may be used.

Now, the problem I have with that is that the so-called safety net, clause 31, has holes big enough to drive a truck through. Literally it has holes big enough to drive a truck through. As I mentioned, clause 30 gives union officials a statutory right to take photos and make recordings when they enter workplaces.

One problem is that there is nothing in the legislation to indicate that they actually have to tell people they are recording conversations—no obligation to disclose that they are recording conversations at all—and that is a substantial increase in the powers of the union at the expense of small business and at the expense of jobs. There is a problem with that and, as I mentioned, with the safety net.

The relevant words are under clause 31. You cannot use or disclose information 'for a purpose not reasonably connected with the exercise of a power under this part'—under part 8, which is where the rights of union officials are defined for the purposes of the workplace safety legislation. And the concern is: what does 'not reasonably connected' mean? What exactly does 'not reasonably connected' mean? It is not defined in the bill. And if you do not know what it means, then the offence becomes irrelevant.

In my view, it is not really creating an offence at all.If you do not create an offence, if you do not have that safety net which is critical to the integrity of this process, then the photographs or the recordings can be used for a whole range of purposes that they should not be used for.

For example, if a union official takes a photo or makes a recording and then decides to use it on a website to criticise, in their view, safety at a particular site, is that legitimate?

It really has the capacity to allow occupational health and safety to be weaponised, to become part of the toolset of industrial relations, and that is not what any of us are seeking to achieve with workplace safety. It would be a real risk to workplace safety should that occur. The opportunity to misuse a photograph or misuse a recording, to agitate on alleged health and safety issues is a problem.

We do recognise the utility of this power, but you have got to have the safety net right. I am not sure it is warranted, but if it is, you have got to have the safety net right, and in terms of this legislation, it is not right, because, as I have said, it is potentially an industrial weapon. And that is not what workplace safety should be about and it is not what workplace safety legislation should be about.

I think I may have skipped over part 4. Yes, I did, so I will just come back in the couple of minutes remaining to part 4. I will just say very quickly with regard to part 6, which is 'Seized items', I think I indicated very quickly earlier that I have no problem with that part. The provisions are quite sensible from my perspective.

Going back to part 4—two issues. The second-reading speech refers to, on page 4:

… the Government has committed to introducing an infringement notice regime under the OH&S Act by the middle of this year.

And that is why we are putting electronic delivery of infringement notices in now.

I am not aware whether that regime has in fact been introduced or not. If it has not yet been introduced, it does beg the question of why those provisions are being inserted into the act, but, as I said, I am not aware of the detail on that. I simply raise the question.

The final point on part 4 is, as I mentioned right at the outset, clause 15 on the provisional improvement notices. The intention is to, in section 60(2) of the OH&S act:

… after "person" insert "or, if the person is a body corporate, an employee, agent or officer of the body corporate,".

The problem with that from the perspective, again, of the opposition is that it is unclear what the limitations are that are placed on that provision.

So it cannot be simply any employee of the body corporate. It has got to be an employee who understands the activity, has knowledge of the activity, has knowledge of the risks that are associated with that activity, and unfortunately the words that are in this bill simply do not make that explicit and again potentially lead to a diminution of the efficacy of the act that we already have in place. So I flag those concerns as well.

But to return to where I started: I do question why we have a bill like this before us at this time. This is a bill that has the potential to cost us jobs, not help us create jobs. This is a bill that has the potential to grind more small businesses into the ground at a time when we know damn well they are not doing it tough, they are literally hanging by their fingernails.

Many—I hesitate to say most, but sadly if we do not get this resolved soon, there is a risk it may be most—small businesses are in real trouble.

And I only have to walk down the street and talk to local traders, local tradies. People that have worked for decades to build up their business so they have got a nest egg for retirement are suddenly, well into their 40s, into their 50s, finding that what they have got is not worth anything and they are either going to have to start from scratch or they are going to have to build up again.

Those are the issues we should be addressing in this government business time. On this bill, as I said, there are some reasonable parts, but legislation like this should be put aside so the Parliament can do what it needs to do and work in the service of the people of Victoria.