Review of: Administration of the Victorian Occupational Heath & Safety Act 2004

Submission by: Australasian Meat Industry Employees Union (Victoria)

October 2007

AMIEU RESPONSE TO STENSHOLT REVIEW OF OHS ACT

Background

The Australasian Meat Industry Employees Union represents the workers in:

- Abattoirs,
- Boning Rooms,
- Smallgoods Manufacture,
- Casings,
- Rendering and
- Retail Meat Industry.

These are some of the most dangerous workplaces with OHS issues ranging from amenities (not provided) to exposure to zoonotic diseases. Occupational health & safety has been a fundamental pursuit of the AMIEU for more than half a century.

Terms of Reference

We welcome the opportunity to comment on the administration of the Occupational Health and Safety Act 2004. However we are concerned that the scope of the review is limited to addressing unintended consequences of the new provisions of the Act.

In particular there have been changes in the Industrial climate and the workforce, which has given rise to new government commitments. Legislative change needs to be considered as a consequence. For example the introduction of Work Choices and the replacement of NOHSC with the ASCC have given rise the government commitments at COAG and WRMC about "harmonisation". Increasing precarious employment and the use of casualisation, Labour Hire or contracting out have impacted on the nature of the workforce and the need for support for health and safety representatives and protection for the workers who raise health and safety issues.

Order of comment

Comments are not made in order of priority, but are made in line with the order of clauses in the Act.

Occupational Health and Safety Advisory Committee

In the years from 1985 to 1992 Unions played a positive role in the Victorian Occupational Health and Safety Commission as well as in supporting, resourcing and training health and safety representatives. The abolition of the Commission and the legislative attempt in 1992 to remove the Union from playing a positive role in workplaces was a step backward.

In our comments in 2003 we said:
There should be a tripartite OHS body under the Occupational Health and Safety Act specifically to advise and make recommendations to the Minister in respect to legislation, standards, national and international development and the establishment of research priorities, public enquiries and legislative reviews. This body should also have responsibility for developing a long term, at least ten years, strategic plan for improving workplace health and safety.

An example from the previous Victorian Occupational Health and Safety Commission was the proposed development of Industry Codes of Practice. Not only did the abolition of the Commission mean that work was scrapped, it meant that the planning and direction in health and safety was lost.

Since the abolition of the Commission, there has been no attempt to evaluate future risks and modes of prevention. In fact, since occupational health and safety has been tied into the Victorian WorkCover Authority, the entire focus has been on injuries that have been accepted as compensable. Emerging injuries or illnesses have not been researched or methods of prevention have not been given sufficient consideration.

Maxwell recommended that a statutory advisory committee be established for OHS. The committee referred to as OHSAC is covered by s 19 of the OHSA 2004. We consider that OHSAC that was established in the 2004 Act displays serious shortcomings.

The role that has been given to the OHSAC of advising the Board according to rules established by the Board is problematic. Decisions of the Board on OHS are not transparent. The Board operates without the involvement of key stakeholders and relies on the "good will" of the Chair and CEO to relay information to the Board and back to the OHSAC.

It is unacceptable for decisions which relate to the VWA as a regulator of OHS to be inaccessible to scrutiny. For example, the recent development of the Strategy 2012 included no role for the OHSAC. Given the significance that the VWA places on the new Strategy this is a serious shortcoming. The AMIEU and other Unions do not support a number of the initiatives but will have no opportunity to have our views considered as the Strategy is provided to OHSAC fait accompli.

Maxwell indicated that:

- the Board must be accountable to the committee in relation to the action it takes, or does not take, in response to the advice or recommendations it receives from the committee. (para 244).

However the VWA tends to treat OHSAC as a body to "sell" the decisions that have been made by the Board. This is not appropriate.

The AMIEU believes that OHSAC must be the principal tripartite source of advice to the Minister and the Board on the Authority's functions regarding occupational health safety and welfare as detailed in *Section 7 of the OHS Act*.

OHSAC should give advice and make recommendations to the Minister and the Authority about policy, strategy and regulatory arrangements for workplace health and safety in Victoria.

Hierarchy of Control

The AMIEU supports the inclusion of section 20(1) the concept of ensuring health and safety which imposes the requirement to eliminate risks. [Although we still do not support the inclusion of reasonably practicable as we argued in 2003 and consider that "possible" should replace "reasonably practicable".] We consider that if elimination of the risk is not possible the requirement to reduce risks should be expanded to require the application of the hierarchy of control.

Our experience is that the silence on the hierarchy of controls in the Act has led to the WorkSafe Inspectorate allowing Administrative Controls to be used to reduce risk when elimination cannot be achieved, despite the practicability of redesign or engineering controls.

A supermarket chain (a self-insurer) decided that they needed to change the design of meat cases to achiever better display of the products. They introduced new meat cases into two stores to trial the improved display, without any discussion with the health and safety representative who represented the butchers, meat wrappers and packers in the store.

The health and safety representative in the trialling store suggested that the new meat case would introduce new manual handling risks. She made submissions to the store and the central supermarket health and safety staff. The OHS staff from the central office acknowledged that there may be manual handling risks introduced but nothing was done to improve the design of the meat cases that were being trialled.

The HSR eventually issued a PIN, which identified the breach of section 21 of the Act and proposed that there should be simple controls, that is the meat case should be redesigned and shelf heights should be altered so that the packers were not working from below knee height to above head height i.e. raise the bottom shelf, lower the top shelf and reduce from 6 to 5 shelves.

The supermarket called in WorkSafe who agreed that there was a breach of section 21 however they accepted that the solution was to apply administrative controls. The workplace initially did nothing but eventually applied administrative controls and did not alter the meat case. The workers had to kneel to fill the lowest shelf and stand on a ladder to fill the highest shelves.

The outcome of this was that the meat packer suffered a shoulder injury from manual handling requiring months off work. If however the Act required the application of the well known Hierarchy of Controls it would have been a clear requirement that the HSR and the Inspector could have required the employer to apply to ensure health and safety.

Similarly, at a smallgoods manufacturer the health and safety representative identified a risk for the workers who were constantly bending over making sausages on tables that were too low and developing back injuries. The employer could not eliminate the making of sausages on tables so they proposed “light exercises need to be implemented before, during and after shifts.” Unfortunately the HSR could not argue that there was a breach of section 20 of the Act.

The AMIEU believes that section 20(1)(b) of the Act should be amended to:

> **“if it is not possible/reasonably practicable to eliminate risks to health and safety, to control those risks at source by redesign, substitution, isolation or engineering controls in preference to administrative controls or the use of personal protective equipment.”**

Consultation

With the introduction of the 2004 Act section 31(1)(c) in the 1985 Act was amended by:

- extending the duty of employers to consult;
- relocating the right of HSRs to be consulted into the consultation duty in s.35 and 36; and
- removing unnecessary requirements on HSRs to consult with their employer before doing a number of things.

During negotiations on the new Act, Unions expressed their concern that the drafting of s35 and 36 provisions would lead to a diminution of the role of HSRs and their exclusion from consultation by employers.

These concerns were specifically raised in meetings with you and the legislative drafters. At that time Unions were assured that our concerns were unwarranted because the established role of HSRs in consultation would continue and was guaranteed by the provisions of s36(2) of OHSA 2004.

In his review of the 1985 Act Maxwell confirmed that giving elected health and safety representatives certain rights and powers contributed in real terms to improvements to the health and safety of workplaces

> 'HSRs play a critical role on workplace health and safety' (para 957)

He went on to acknowledge that in workplaces without elected HSRs, workers often 'missed out' on these benefits and recommended that the Act give these workers certain rights; specifically, the right to be consulted. Unions were fully in support of this. However, there was no suggestion that the rights of HSRs should be weakened, which is in fact what sections 35 & 36 do.

Maxwell specifically stated that the new duty of an employer to consult with employees was intended to be in addition to the duty to consult with HSRs.

> 'The duty to consult imposed on the employer …. should not be subject to practicability. No relevant change to the workplace should be made without consultation with the appropriate HSR (or any deputy) or if there is no HSR, with the employees themselves (967)'

Unfortunately that is not what has resulted.

The provisions of s.35 and 36 are confusing and ambiguous. S 35 (1) requires the employer to consult with employees 'who are or likely to be directly affected'. WorkSafe's initial advice on how this would operate sought to limit the involvement of HSRs to be consulted only when they were 'directly affected'. This is contrary to the provisions and rights of HSRs to represent members of their designated work group (DWG).

S36(2) is also poorly drafted and has not delivered the certainty promised before the 2004 Act was introduced.

Most recently during the consolidation of the OHS regulations some employer associations vigorously opposed any change to the current consultation duty and have actively opposed the inclusion of a consultation provision in the consolidated Regulation.

In January 2006, the Financial Review reported that Business groups were to press the government to remove the consultation provision as it was 'unnecessary and not in the spirit of the OHSA 2004'. In response to this Review, employer associations have again raised their objections suggesting that unions are seeking a new provision to give HSRs a 'pre-eminent role'[1]

Employer opposition is based on a misunderstanding of the law. The requirement to consult with HSRs is not new. The role of HSRs in consultation has been a

[1] Occupational Health News 12 September 2007

fundamental of our OHS Act since 1985 and regulations have included the necessity to consult HSRs in identifying, assessing and controlling hazards.

Further the rights of 'workers' safety delegates' to be consulted are international rights which apply in Victoria through our adoption of ILO Convention 155[2]. The wording of the current provisions and the difficulties in administration and interpretation do not deliver these rights.

The AMIEU believes that sections 35 and 36 must be re-written to ensure that the workers' elected representatives - the Health and Safety Representatives are not undermined as is currently the case.

The following suggested wording delivers Maxwell and government commitments and does no more than restore what were the previous provisions in the Occupational Health and Safety Act 1985. The provisions must state:

> **35 Duty of employers to consult**
> (1) When doing any of the following things, an employer must consult with the HSR/s where they exist or with employees directly affected where they do not …
>
> **36 How are HSRs and employees to be consulted**
> (1) An employer who is required to consult with HSRs where they exist or with employees where they do not must do so by…….
> (2) delete
> (3) ..if the employer and the HSRs or the employer and employees directly where no HSRs exist have agreed to procedures…..

The provision should not be qualified by 'reasonably practicable'. Maxwell specifically stated that the provision should not

The provision should include a requirement that HSRs have a reasonable opportunity to consult with their DWG

This requires no more than what is assumed by Part 7 of the OHSA 2004 and gives effect to s4(5) of the OHSA which provides the right for employees to be represented in relation to health and safety issues.

Discrimination against Employees

The AMIEU acknowledge that the provisions in the 2004 Act with regard to the discrimination against employees for raising health and safety issues are an improvement from those in the 1985 Act. However, the objective of providing real protection to elected health and safety representatives and workers has not been achieved. There is no doubt that in the current situation many workers are afraid to raise OHS issues in the workplace.

Prior to the 2006 state election this objective was clearly stated in ALP policy

11. Labor will legislate to provide greater protection for workers who raise safety issues or who suffer a workplace injury.

All workers should be encouraged to raise occupational health and safety issues at the workplace. Identifying issues at the earliest opportunity reduces the risk of workplace injuries occurring.

[2] ILO Recommendation 164 provides detailed guidance

Following an injury, workers should also be able to lodge a WorkCover claim and be protected from discrimination.

As a result of the Howard Government's radical work laws, workers will require greater support in creating safer workplaces. They can no longer rely on unfair dismissal laws to protect them from unscrupulous behaviour.

Labor will also ensure that workers can make a complaint about a safety issue to Worksafe or to his or her union on a confidential basis and that, unions are not required to provide any details on right of entry that might identify the individual who reported a health and safety concern.

A re-elected Bracks Government will legislate to provide increased protection for workers who raise safety issues or who suffer an injury.

ALP Policy, 2006

Unfortunately there are many cases of discrimination against workers who raise OHS issues or who claim WorkCover when they suffer injuries.

In the review of the 1985 OHS Act, Maxwell identified significant increase in precarious employment. While the 2004 Act has attempted to acknowledge the increase in casual, labour hire and contractor employment in some sections (for example the negotiation of DWGs, who can be represented by elected HSRs, etc), there is absolutely no recognition of this in this division, which only applies when there is a direct employer/employee relationship.

This is a major concern to the AMIEU as approximately 40% of the workers in the meat industry are employed through Labour Hire firms. In a significant proportion of these instances the Labour Hire company is owned by the same people as the abattoir which employs management staff only or even nobody at all.

The fact that sections 76 - 78 provides no protection against discrimination for 40% of the workers in one of the most dangerous industries is totally insufficient.

A typical example: A worker who is a labour hire worker at a workplace has a concern about OHS. The worker raises this concern: perhaps with an elected OHS HSR or with a supervisor. As a result, he loses his job at that workplace. He may be 'moved' to another workplace by his employer (the labour hire company), or simply lose his job altogether. Particularly when the Labour Hire firm only provides workers to the one host employer, there can be no other placements so there is effective dismissal.

Section 76 must be amended to provide protection to all workers and employment/potential employment in a contractual chain are covered. This is essential.

The government commitment is to encourage workers to raise OHS issues, and to protect those workers when they do and provide them with greater support to create safer workplaces.

However, the section is limited in that before WorkSafe can take any action, there needs to be possible/proven 'discrimination' and this discrimination is measured in material terms only, namely:

- actual or threatened dismissal, injury to or alteration of the position to the employee's detriment; or

- refusing to offer employment to a prospective employee, or treat that prospective employee differently *(Section 76[1[)*

because the employee, or prospective employee:

- is or has been an elected HSR or member of an OHS committee; or
- exercises or has exercised a power as a HSR/committee member; or
- assists or has assisted/given information to an inspector/ HSR/committee member; or
- raises or has raised an issue/concern about OHS to the employer/inspector/HSR/committee member/other employee. *(Section 76[2])*

This fails to take into account that many HSRs and employees, while not necessarily having their employment/position threatened, face what can only be described as harassment once they become active in OHS, whether in pursuing the resolution of issues, or exercising their rights, such as issuing a PIN or calling the union/an inspector. This harassment can become unrelenting, shocking workers who, until having been elected as HSRs, had been employed with no previous problems. After becoming active, they have found their work performance being questioned, increases in checks/surveillance, etc.

An example was in one workplace where the HSR repeatedly raised OHS issues, both verbally and by email but was harassed and abused for raising them. After two years of harassment the HSR became clinically anxious, depressed and unfit for work. This was claimed under WorkCover and eventually accepted. The workplace did not address the issue of bullying and harassment of the HSRs for raising OHS issues. When the worker was away from the workplace and received treatment he gradually recovered. The workplace indicated that their “duty of care” meant that they could only allow him to return to work if he was not HSR. WorkCover terminated his weekly payments because he was fit to return to pre-injury duties which had nothing to do with being a HSR as that was an “industrial issue”.

While alleged bullying can be addressed under the general duties of the employer under Section 21, this section should also specifically acknowledge that bullying and harassment of HSRs and other employees directly as a result of their OHS activity is a frequent occurrence. **To offer real protection to workers, to genuinely encourage them to become active in OHS, the scope of this section must be expanded to protection from harassment and bullying.**

The reverse onus of proof is not working – to date the focus of WorkSafe remains as though the burden of proof is on the complainant. WorkSafe investigators demand that HSRs provide "proof" of discrimination which is beyond scope of what HSRs can do and gather. The reverse onus of proof, introduced in acknowledgement of this, only kicks in once WorkSafe has been convinced by the HSR or the employee, that discrimination did in fact occur.

VTHC has made submission regarding concerns that the lack of effectiveness of this provision is also being exacerbated by how WorkSafe has administered/investigated complaints under this provision. The AMIEU supports the VTHC submission.
The inspectorate must be trained to deal with the issues; it needs to be pro-active and focussed on supporting the HSR and seen to do so. WorkSafe needs to ensure that the inspectorate is properly resourced to do so.

The AMIEU demands that Government commitment to protect and support HSRs and workers be delivered.

Authorised Representatives of Registered Employee Organisations

The OHSA 2004 includes provisions for union right of entry. Maxwell carefully considered the submissions of unions to introduce a provision similar to that already in place in other jurisdictions to allow for representatives of registered employee organisations right of entry into workplaces. He found that the provision was a positive one and that there was no evidence that it had been misused elsewhere, and consequently recommended that the new Act should include it.

This was also consistent with the commitment by the ALP that it would "*ensure that workers can make a complaint about a safety issue to WorkSafe or to his or her union on a confidential basis and that, unions are not required to provide any details on right of entry that might identify the individual who reported a health and safety concern*".

Whilst ARREOs do not have to reveal the names of the worker/s who contacted the union with the issue/concern or who are members of the organisation, they must give a notice to employer upon entering. This notice must be in the form approved by the Authority and must include a description of the suspected contravention.

This often means that the workers who requested the ARREO to attend are identified. For example, if we identify the contravention of the Act being with the unguarded brisket saw it is obvious that the operator of the brisket saw is the worker concerned.

What this requirement does is to effectively provide many employers with adequate information to be able to identify the worker/s who have raised the issue. This has led to a number of unions reporting that these workers have then been intimidated, harassed, and even had their employment harmed or terminated. **The requirement to give details of the suspected contravention must be removed, and s 76 needs to be amended to include ARREOs.**

Once on site, ARREOs should not have to be limited to consideration of the (single) issue nor be restricted in what they can do.

Further, to maximize the effectiveness and usefulness of ARREOs, the Act should give ARREOs some preventative rights.

The Workplace Relations Act specifically prevents the entry of Unions into workplaces where the employees are employed on Australian Workplace Agreements (AWA) even if every worker is a member of the Union. This means that it is impossible for a Union Official to enter a workplace to educate members about the need negotiate DWGs and elect HSRs even if they are also ARREOs

One of the principles of the OHSA 2004 is that "employees are entitled, and should be encouraged, to be represented in relation to health and safety". The current ARREO provisions limit those rights to representation only when a breach of the Act is suspected.

Other jurisdictions in their right of entry provisions have broader access provisions which include the ability of union officials to enter workplaces to talk to workers about their rights. For example:

Queensland Workplace Health and Safety Act 1995
'90J Powers for discussing workplace health and safety
'(1) An authorised representative for an employee organisation may enter a place for the purpose of discussing matters relating to workplace health and safety at the place with a worker at the place if—
(a) the place is a workplace or a relevant workplace area; and
(b) a worker working at the place is an eligible member of the employee organisation.
'(2) After entering the place, the authorised representative may discuss matters relating to workplace health and safety at the place with a worker who—
(a) is an eligible member of the employee organisation; and
(b) wishes to take part in the discussion.
'(3) A discussion mentioned in subsection (2) may take place only when the worker is on a work break, including a meal break.

'90K Notice of entry or exercise of particular power
'(1) This section applies for the entry into a place under this part by an authorised representative.
'(2) The authorised representative must give the occupier of the place written notice of the entry and the reasons for the entry—
(a) for entry under section 90J — at least 24 hours before the entry; or
(b) otherwise — as soon as practicable after the entry.

Part 8 provisions of OHSA 2004 should be amended to include access similar provisions.

When an ARREO attends a workplace, where are no HSRs, to investigate a suspected contravention and identifies a risk. The ARREO raises this with the management representative who (too often) refuses to discuss the risk let alone eliminate/control it. Hence the ARREO visit has identified the hazard and assessed the risk but it does not achieve any reduction of the risks or prevent the injuries.

In order to address this situation the ARREO needs powers similar to those of HSRs to issue PINS and to stop situations of immediate danger where no HSRs have been elected. **ARREOs should have similar powers to HSRs in workplaces where HSRs do not exist. This would ensure that workers in these workplaces were not penalised for not having yet elected an HSR.**

Considering that the government is committed to "harmonisation" it should be noted that the ARREOs in NSW can accompany the inspectorate. This would assist in overcoming difficulties that occurs currently.

When an ARREO calls an inspector to report a risk that he or she has identified, the inspectorate does not have to inform the ARREO what action, if any, they have taken. When we ask to be provided any reports on their inspections we are informed that we are not entitled to copies. We are informed that we can be provided copies of reports by the HSR, however, where there are no HSRs (which is why the ARREO had to go to the inspectorate and not the HSR) this is a Catch 22.

This could be overcome if the ARREO could accompany the inspector on the inspection and be given a copy of the report as a participant in the inspection.

Being accompanied by an ARREO could also be a real advantage to the inspector. ARREOS are much more familiar with their own industries and workplaces than the inspectorate can be (unless they have been recruited from the particular industry) and can assist the inspector with details.

For example, an inspector attended a workplace following a notifiable injury which occurred in the knocking box. When he attended the workplace he was advised to look at tangential problems. A risk was identified and an Improvement Notice issued. However the risks in the knocking box and cradle were not addressed. Some weeks later, when the workers informed us of the fact that the issue had not been inspected, the Union Support Officer had to contact the inspectorate, advise what should have been looked at, and how to control the risks in the knocking box.

New South Wales Occupational Health and Safety Act 2000
69 Power of employees' representative to accompany inspector
(1) An inspector who is proposing to undertake an inspection of a place of work with respect to a matter that may affect the health, safety or welfare of employees at the place of work:
(a) must, to the extent that it is practicable, consult a representative of the employees or an industrial organisation of employees whose members are employed at the place of work, and
(b) must, if requested to do so by the representative, take the representative on any such inspection.

Part 8 provisions of OHSA 2004 should be amended to include access similar provisions.

Compliance Codes

Sections 149 - 152 of the 2004 Act, which introduce compliance codes, create significant confusion. Given that the Act was assented to in December 2004 yet there has not yet been one compliance code out for public discussion by October 2007 indicates the problem.

Debates on the issue have occurred through the Stakeholder Reference Group and individual reference groups for each chapter of the Consolidated Regulation. While these debates were occurring the Reference Groups had to also consider the impact of government commitments, through COAG and the WRMC, to remove impediments to the adoption of National Standards and Codes and enable the "harmonisation" of OHS standards.

Codes of Practice (COPs) under the 1985 Act were clear. **Codes of Practice could prescribe a way that a hazard could be controlled or a process followed. The duty holder could depart from the COP by proving that they had followed/adopted an approach that was as good as or better than the Code of Practice. This must be reinstated**. There is no equivalent in OHSA 2004.

In our view Victoria's Compliance Code approach has unnecessarily confused what had previously been established by the OHSA 1985 and is at odds with the regulatory framework of all other jurisdictions.

Although Maxwell proposed the removal of s 56 he did not propose that the legal status of codes be removed.

The other major concern that we have is administrative. The VWA has withdrawn the resources (i.e. labour hours) that are necessary to develop compliance codes. This is totally unacceptable.

Unions have argued for additional resources to be provided to complete the task of updating the current Codes of Practice. The translation of the Regulations was undertaken by the CFP team who were provided with significant resources to complete the task. WorkSafe management has determined that the translation of current Codes will not be undertaken in the same manner. All codes are being treated as "business as usual" and absorbed into various areas within WorkSafe without any additional resources being provided.

This is completely unsatisfactory. The translation of current codes is a much larger task than the Regulations and already deadlines have not been able to be met and inconsistencies in approach are creating unnecessary duplication.

WorkSafe should reinstate the CFP resources to progress the revision of the outstanding Compliance Codes as a matter of priority and ensure sufficient resources are available for the development of new Compliance Codes.