

OHS ACCESS

INFORMATION PAPER

AND

**INVITATION TO SUBMIT
COMMENT**

on the

**Proposal to Allow Access to Workplaces
by
Authorised Representatives of
Employee Organisations
for
Occupational Health and Safety Purposes**

July 2009

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I. INTRODUCTION

The Minister for Workplace Relations has announced the proposal to amend the *Workplace Health and Safety Act 1995* (the WHS Act) to allow appropriately authorised representatives of employee organisations to enter workplaces to discuss health and safety issues or to enquire into and facilitate the resolution of a health and safety issue at the workplace, subject to specified conditions and protections.

This paper invites comment, discusses the background to this issue, and provides detail of the proposal to provide for access for occupational health and safety (OHS) purposes.

In brief, the proposal includes provisions for:

- a process to be established where an employee organisation may nominate one or more officials to be assessed for an OHS access card, which permits access to workplaces for OHS purposes, under certain conditions;
- OHS access cards to be issued by the Director of Industry Safety (a person appointed under the WHS Act), subject to the nominee meeting specified criteria;
- entry to workplaces to be permitted where members of the relevant employee organisation, or persons eligible to be members, work;
- purpose of entry to be to discuss health and safety issues during breaks or to enquire into and facilitate the resolution of a health and safety issue at the workplace;
- powers to include making enquiries, observing work, requesting documents, interviewing relevant people, and consulting with relevant duty holders and inspectors; and
- protections and sanctions to be included, including a requirement that OHS access card holders will not use or disclose information acquired at the workplace for a purpose not reasonably and directly connected with the health and safety of a worker.

Comment is invited from individuals, organisations and industry bodies. Please send your written submissions to:

Workplace Standards Tasmania
PO Box 56
ROSNY PARK TAS 7018

or via email to wstinfo@justice.tas.gov.au

The closing date for submissions to be received is 26 August 2009.

Please indicate if you wish all or part of your submission to remain confidential. Please also indicate whether or not you agree to any part of your submission to be publicly attributed to yourself and/or your organisation.

2. BACKGROUND

2.1 Why introduce provisions allowing access to workplaces?

Allowing OHS access card holders (appropriately authorised officials of employee organisations) to access workplaces is intended to facilitate improvement to workplace health and safety and to better assist employers and employees to identify risks and hazards before injuries occur.

The Government believes that workplace health and safety is best managed when all parties at work, i.e. employees, other workers, employers and other people with responsibilities under the WHS Act, work together to identify and resolve OHS issues. Employees and other workers are often able to identify hazards and risks, because of their knowledge of the work and their day to day experience of the work environment.

However, it is recognised that not all workers feel confident in raising OHS issues. Although the WHS Act provides for employees' safety representatives and health and safety committees, many workplaces are without these mechanisms.

As part of their function of representing their member's interests, employee organisations have a legitimate interest in OHS. They can make a positive contribution, and can particularly assist those employees who feel unable to raise issues with their employer, especially where there are no formal consultative mechanisms at the workplace.

Some employee organisations have argued for a formal, recognised role in accessing workplaces for OHS purposes. Such provisions have been introduced in most Australian jurisdictions. With the exception of Tasmania and South Australia, all States and mainland Territories now have legislative provisions that allow authorised officials of employee organisations to access workplaces for OHS purposes. South Australia included OHS access provisions (referred to as right of entry) in a Consultation Bill which was released for public comment until 13 March 2009.

Right of entry for OHS purposes is also recognised in the Commonwealth *Fair Work Act 2009*¹, and its predecessor the *Workplace Relations Act 1996*.

OHS access card holders will not undertake the role of inspectors and they will have no enforcement powers. The intent is that they will have a role in resolving issues at the workplace and it is proposed that they have powers of enquiry to assist them. The proposal provides an additional means by which OHS issues may be addressed at the workplace without necessarily requiring

¹ Division 3 of Part 3-4 of the Commonwealth *Fair Work Act 2009* sets out requirements for exercising rights of entry under State or Territory OHS laws. Rights of entry under State or Territory OHS laws are subject to the requirements of the Act at any workplace where the division applies. A State or Territory OHS law is defined as a law of a State or Territory prescribed by the regulations (prescribed in Regulation 3.25 of the *Fair Work Regulations 2009*). Tasmania's WHS Act contains no right of entry provisions and is currently not cited. It should be presumed that if such provisions are included in the WHS Act, it will be prescribed in due course.

the intervention of Government inspectors. The proposed provisions aim to facilitate improvement to health and safety at work through increased cooperation and consultation between workers and employers (or other relevant duty holders).

2.2 What consultation has occurred on this issue?

Public comment was sought on right of entry in 2006 as part of the Review of Workplace Health and Safety in Tasmania. (The Discussion Paper issued by the review team raised the question in the context of appropriately qualified and trained representatives of employee or employer organisations.²) There was a further opportunity to comment when the review's interim report³ was released in 2007.

The Review's final report stated⁴:

Submissions on this issue were polarised along the lines of employee and employer representative organisations.

The report quoted employee organisations supporting right of entry for union officials/employee representatives⁵, and it reported employer/industry organisations and individual employers as being against right of entry provisions (other than for inspectors)⁶.

During the time of the review, a limited six month trial of union right of entry was underway. Given that it was expected the agency [Workplace Standards Tasmania (WST), Department of Justice] would consider the issue further, the review team did not make a recommendation of the issue, but nevertheless stated⁷:

...because the Workplace Relations (Work Choices) Amendments allow unions entry into workplaces for genuine workplace health and safety reasons, subject to corresponding provisions in the State or Territory OHS Acts, the inclusion of a provision enabling union entry to provide support in genuine workplace health and safety matters would seem appropriate.

Feedback from employer and employee organisations on the abovementioned trial was also polarised. (The trial involved the construction industry and the mining industry, although no accesses took place in mining due to there being no complaints to be acted upon.) Responses from individual employers were mixed. A number were negative, some were positive, and others were neutral or contained both positive and negative points.

² Department of Justice Tasmania, *Review of Workplace Health and Safety in Tasmania 2006 Discussion Paper (March 2006)* pp. 14-17

³ Department of Justice Tasmania, *Review of Workplace Health and Safety in Tasmania 2006 Interim Report* report prepared by D Brown & S Hyam, February 2007

⁴ Department of Justice Tasmania, *Review of Workplace Health and Safety in Tasmania, Safe from Injury and Risks from Health Final Report (November 2007)*, p. 220 para.795

⁵ *ibid.*, pp. 220-221, paras 796 to 798

⁶ *ibid.*, p. 221, paras 799 to 800

⁷ *ibid.*, p. 222, para. 804

The mixed feedback is acknowledged. The Government considers it is important for any system of right of entry to include appropriate protections and limitations to address potential concerns. Proposals in this regard are addressed more fully under the next question.

It is considered the trial was successful in identifying hazards that may not have otherwise been investigated. WST received a total of 70 Notification Forms from the Construction, Forestry, Mining and Energy Union following visits to construction sites. Each notification form related to an inspection of a workplace. A total of 365 hazards/risks were identified during the 70 site visits.

More recently, in 2008/09, the issue of allowing authorised representatives to enter workplaces was considered in the context of consultations regarding industry specific OHS legislation to cover mining. Members of a tripartite Reference Group on Mine Safety Legislation were able to agree on an approach to OHS access for representatives of employee organisations.

The Government acknowledges the work of the Reference Group on Mine Safety Legislation in researching approaches in other jurisdictions, considering the issues and developing a model for the industry. Although, in accordance with its terms of reference, the Reference Group focussed on proposals for the mining industry, it is the Government's view that provisions for access to workplaces for OHS purposes are capable of application across all industries.

The purpose of this information paper is to invite comment from the broader group of stakeholders and interested parties.

2.3 Have the concerns raised about OHS access been considered?

Yes, the Government has taken into account the concerns raised about OHS access/union right of entry.

The issues considered have not been limited to those raised in Tasmania. In addition, a number of recent OHS reviews in Australian jurisdictions, including the National Review into Model OHS Laws⁸ (the National OHS Review), were examined for their consideration of any concerns raised. A number of the reviews identified stakeholder concerns.

By way of example, in 2004 Chris Maxwell, reviewer of Victoria's *Occupational Health and Safety Act 1985*, reported employer opposition to right of entry by union officials, mentioning employer concerns about potential use by unions for the recruitment of members or for industrial relations purposes.⁹ The second report of the National OHS Review

⁸ On 4 April 2008 the Federal Minister for Workplace Relations announced a National Review into Model Occupational Health and Safety Laws. The review's reports make recommendations on the structure and content of a Model OHS Act intended for adoption by all jurisdictions.

⁹ C Maxwell, *Occupational Health and Safety Act Review*, report to the Victorian Government., March 2004, p. 215

referred to submissions with concerns relating to the potential for use for industrial purposes or to confuse industrial and OHS matters.¹⁰

Encouragingly, the available information does not show evidence of widespread misuse.

For example, Maxwell examined the NSW experience with OHS right of entry provisions. He found no outspoken opposition against the provisions from NSW employer bodies¹¹. He reported an estimated 1,000 union officials had written authorities under the NSW provisions entitling them to enter workplaces¹². There had been four applications for the revocation of such an authority, and Maxwell assumed the numbers would have been higher had there been misuse.¹³

The second report of the National OHS Review quoted one national employer organisation as saying the introduction of such provisions in Victoria, Queensland and Northern Territory had not appeared to have led to significant issues¹⁴. The quote went on to express the need for protections, of the sorts that were in place.¹⁵

The Queensland Government was also quoted as not having experienced abuse of the provisions, and spoke of checks and balances.¹⁶

The Government considers the concern regarding potential for misuse can best be addressed in Tasmania by appropriate conditions and limitations, sanctions and education. It is important that the provisions be used for OHS purposes, not industrial purposes. It is especially important that the legislation be very clear that the powers may be used only for purposes related to OHS.

Concerns have also been expressed that officials of employee organisations do not have the skills or independence of inspectors. It is accepted that in most cases such officials do not have the background, training and experience of inspectors, and that they represent their members' interests and therefore do not present as truly independent third parties.

That is not to say that officials of employee organisations cannot have an appropriate role in workplace health and safety that includes access to workplaces. In recognition of the above concern, the role proposed for officials is not the same as that of an inspector. OHS access card holders will not have enforcement powers. They will not be able to give directions or to stop work. It is proposed they have a role in discussing health and safety

¹⁰ *National Review into Model Occupational Health and Safety Laws, Second Report to the Workplace Relations Ministers' Council, January 2009*, p. 310

¹¹ C Maxwell, *Occupational Health and Safety Act Review*, report to the Victorian Government., March 2004, p. 216

¹² *ibid.*

¹³ *ibid.*

¹⁴ *National Review into Model Occupational Health and Safety Laws*, *op. cit.*, p. 311, para. 45.38

¹⁵ *ibid.*

¹⁶ *ibid.* p. 309, para. 45.29

issues, and enquiring into and facilitating the resolution of OHS issues at the workplace. It is proposed that nominees for OHS access cards will be required to have appropriate knowledge, qualifications, experience or training, to the satisfaction of the Director of Industry Safety.

Other potential concerns include the time that may be taken (or down time) when an official is on site, plus the potential for disagreement between an OHS access card holder and an employer or other relevant person regarding OHS access, exercise of powers, or an OHS issue. To deal with the potential for disagreement, it is proposed the legislation provide for such matters to be referred to an inspector for resolution. With respect to the former concern, it is intended the legislation specify that an OHS access card holder must not intentionally hinder or obstruct an employer, worker or other duty holder under the Act. Further, it is expected that time spent in resolving an OHS matter may be offset by prevention of accidents and injuries and may improve morale through the resolution of issues of concern. Where the visit is proactive, i.e. for the purpose of holding discussions, it is proposed the discussions must be held during meal or other breaks.

The Government encourages feedback on potential concerns and how they might be addressed.

2.4 Why not wait on the National Model OHS Act?

There is still some way for the National process to go. The agreed target for all jurisdictions to implement a consensus National Model OHS Act and Regulations is by December 2011.

On 18 May 2009 the Workplace Relations Ministers Council (WRMC) finalised its consideration of the recommendations arising from the National OHS Review, including right of entry. WRMC's decision will form the basis of drafting instructions for a draft Bill for consultation.

With respect to right of entry, WRMC agreed to most of the recommendations on the subject by the National OHS Review, noting that the provisions should be consistent with those of the [Commonwealth] *Fair Work Act 2009*.

Although it might be argued that Tasmania should wait until the Model OHS Act is adopted before implementing OHS access, it would mean a delay of up to two years before introducing rights that are available in most of the rest of Australia.

Acting now will deliver a capacity to have authorised union officials on the ground much earlier than waiting for the conclusion of the national process. This can be expected to deliver positive OHS outcomes. This additional consultation mechanism is especially important for workers that do not have access to elected health and safety representatives or health and safety

committees, or at workplaces where workers do not feel comfortable raising issues under current mechanisms.

2.5 Are the proposed provisions similar to those in other States?

The legislation in all States and Territories, and the proposals arising from the National OHS Review, were examined. There are commonalities and differences between all the jurisdictions, and the proposals for Tasmania include a number of concepts covered elsewhere. The Northern Territory legislation (Division 7 of part 4 of the Northern Territory *Workplace Health and Safety Act 2007*) was the most influential in the development of Tasmania's approach.

3. PROPOSALS RELATING TO OHS ACCESS

3.1. OHS access card

In the proposals below, a person approved to enter a workplace under these provisions is issued with an identity card which is referred to as an OHS access card. The approved holder is referred to as an OHS access card holder for the duration of the approval.

3.2 Health and safety

Note that where the term 'health and safety' is used below it applies only to the extent that it falls within the scope of the *Workplace Health and Safety Act* (WHS Act) (as it applies to persons employed in, engaged in or affected by industry).

3.3 Definition of employee organisation

It is proposed that 'employee organisation' be defined to reflect the meaning in the *Industrial Relations Act 1984* and the *Commonwealth Fair Work Act 2009*. (Both Acts define an employee organisation in terms of an organisation of employees, with 'organisation' defined by reference to further provisions dealing with the registration of organisations).

3.4 Scope of these provisions

It is proposed that the right of access to workplaces apply to those workplaces where one or more members, or persons eligible to be members of the employee organisation concerned, work. Such a workplace is referred to as a relevant workplace, in this paper.

3.5 Objects

The objects of the proposed new provisions are to establish a framework to:

- a) assist in securing the health and safety of workers by enabling employee organisations to:
 - i) represent their members in matters concerning occupational health and safety;
 - ii) discuss occupational health and safety legislation matters with workers in relevant workplaces;
 - iii) identify and make enquiries regarding occupational health and safety issues at the workplace; and
 - iv) consult with the employer, person who exercises management or control over the workplace or any other relevant duty holders in order to facilitate the resolution of health and safety issues at the workplace;

and

- b) balance the above with the right of employers and other parties to operate without undue intervention or hindrance.

3.6 Approval

The authority to approve an OHS access card holder will rest with the Director of Industry Safety. (For information, the Director of Industry Safety is a State Service officer or employee appointed to be Director of Industry Safety by the Minister under the WHS Act. The Director exercises a number of functions under the Act. Decisions of the Director may be appealed under section 41 of the WHS Act.)

3.7 Eligibility

Preconditions will apply to the approval of a person seeking an OHS access card. It is proposed that the person must:

- a) be an official or officer who is an employee of the employee organisation concerned;
- b) be nominated for approval by the responsible officer or principal of the employee organisation concerned (note that this does not preclude this person nominating him/herself);
- c) hold an entry permit issued under the Commonwealth *Fair Work Act 2009*. (This requirement ensures that the same conditions apply to all OHS access card approvals in Tasmania, notwithstanding that there are some workplaces outside of the scope of the *Fair Work Act*. Note that the *Fair Work Act* contains its own eligibility criteria including that the Fair Work Authority 'is satisfied that the official is a fit and proper person to hold the entry permit' (s.512));
- d) have the knowledge, qualifications, experience or training appropriate to an OHS access card holder, to the satisfaction of the Director of Industry Safety. It is proposed that the decision regarding the appropriate knowledge, qualifications, experience or training be discretionary, according to each case. For information and clarification it is proposed that the Director of Industry Safety may publish information to indicate the type of knowledge, qualifications, experience or training

that would be appropriate or that explains how the assessment is to be made.

For clarification, the approval of more than one official from the same organisation is not precluded. Also not precluded is the nomination and approval of persons from interstate.

3.8 Conditions of approval

The legislation will specify conditions of approval with which the OHS access card holder must comply. It is proposed that these conditions will be:

- a) compliance with the provisions of this legislation with respect to right of entry;
- b) not to intentionally hinder or obstruct an employer, worker or other duty holder under the Act;
- c) not to misrepresent the extent of his/her authority;
- d) not to use or disclose information acquired at the workplace for a purpose not reasonably and directly connected with the health and safety of a worker; and
- e) compliance with any other conditions imposed by the Director of Industry Safety.

It is proposed that a penalty of 50 penalty units be specified.

(Note: A penalty unit in Tasmania is currently \$120. Each penalty specified in the WHS Act is a maximum. The court uses its discretion to determine the quantum of any fine up to the maximum.)

3.9 Issue of identity cards (OHS access cards)

It is proposed that the legislation will require the Director of Industry Safety to issue an identity card (the OHS access card) to each nominee approved by the Director.

The OHS access card will include:

- a) a statement that the holder is authorised under the WHS Act subject to the conditions specified in the Act (with relevant section and division or part referenced);
- b) the holder's name and photograph;
- c) the employee organisation represented;
- d) the expiry date;
- e) and any further information considered appropriate by the Director of Industry Safety.

3.10 Return of OHS access cards

It is proposed that a person issued with an OHS access card must return the card to the Director of Industry Safety within 14 days after the expiry or cessation of approval.

It is proposed that a penalty of 10 penalty units be specified. It is proposed that this be a provision which may attract an infringement notice, in which case the penalty would be 0.5 penalty units.

3.11 Production of OHS access card

It is proposed that the OHS access card holder must produce the OHS access card for inspection upon a reasonable request for such production.

3.12 Term of approval

The term of approval for an OHS access card holder is proposed to be three years.

3.13 Cessation of approval

It is proposed to specify the circumstances under which the approval ceases or expires. These are when:

- a) the term of office expires and the former card holder is not approved for a further term;
- b) the person is no longer an official or officer who is an employee of the nominating organisation;
- c) the person resigns from being an OHS access card holder (resignation is to be in writing and submitted to the Director of Industry Safety);
- d) the person no longer holds an entry permit issued under the Commonwealth *Fair Work Act 2009*;
- e) the Director of Industry Safety disqualifies the person; or
- f) the nominating employee organisation asks the Director of Industry Safety to cancel the nomination (either immediately or from a specified future date).

3.14 Disqualification

It is proposed that the legislation include provisions regarding disqualification, along the following lines:

- a) Grounds for disqualification are:
 - i) misuse of the powers or functions of an OHS access card holder; or
 - ii) contravention of a condition of approval
- b) For clarity (and without limiting the above) a misuse of powers or functions includes use of an OHS access card holder's powers or functions for a purpose other than a health and safety purpose.

- c) An application for disqualification on one or both the above grounds may be made by an employer or other person.
- d) If the Director of Industry Safety is satisfied that the OHS access card holder has misused the powers or functions or contravened a condition of approval the Director may disqualify the person from holding an OHS access card either for a specified period or permanently.
- e) The Director of Industry Safety may initiate disqualification without an application, where satisfied that the OHS access card holder has misused the powers or contravened a condition of approval.

3.15 Purpose of entry/functions

It is proposed that an OHS access card holder may enter a workplace, subject to the conditions of approval listed earlier, for the purpose of one or both of the following:

- a) to discuss health and safety issues during a meal break or other break in work with workers at a relevant workplace;
- b) to enquire into and facilitate the resolution of an occupational health and safety issue at the workplace.

3.16 Conditions of entry

Proposed conditions of entry for an OHS access card holder are:

- a) production of the OHS access card to the person apparently in charge of the workplace, as soon as reasonably practicable after entering;
- b) compliance with a reasonable request by the person apparently in charge of the workplace to comply with an occupational health or safety requirement that applies to the workplace.

It is proposed that 10 penalty units be specified for a) and 20 penalty units for b).

3.17 Powers

It is proposed that in exercising their functions at a relevant workplace an OHS access card holder may:

- (a) consult with, discuss with, or make enquiries of workers at the relevant workplace (if the workers consent) at convenient or appropriate times;
- (b) consult with the employer and any other relevant duty holder at the relevant workplace about relevant occupational health and safety matters;
- (c) observe or review work, the workplace, processes, plant, equipment or the use of materials and substances at the workplace. This may include the taking of photographs, subject to the photograph being relevant to improving occupational health and safety at the workplace;
- (d) review documents or parts of documents relating to or directly relevant to occupational health and safety at the workplace.

An OHS access card holder may consult with inspectors in connection with their functions at a relevant workplace.

3.18 Duty to allow entry

It is proposed that the legislation include a duty on a person to allow entry, without unreasonable delay, by an OHS access card holder entitled to enter the workplace.

3.19 Reference of matters to an inspector

It is proposed that the legislation contain provision to refer to an inspector (by an OHS access card holder or employer or other relevant duty holder) when an issue/dispute/disagreement arises (between the card holder and the employer or relevant duty holder) regarding:

- a) right of entry;
- b) exercise of powers and functions; or
- c) a health and safety issue

3.20 Residential premises

It is proposed that the legislation limit the right of entry by an OHS access card holder to a workplace used as residential premises to circumstances where the consent of the occupier is provided.

3.21 Administrative matters

It is proposed that the provisions allow for administrative and process matters to be dealt with without the need for further legislation.

3.22 Regulations

It is proposed that the provisions include a 'head of power' to write future regulations pertaining to OHS access/right of entry.

3.23 Consistency with the *Fair Work Act 2009*

It is proposed that the provisions should be drafted to avoid any inconsistency with the right of entry provisions of the Commonwealth *Fair Work Act 2009*. (Note that the provisions do not need to be the same. The Federal and State legislation can say different things and both can still apply. However it is intended to avoid provisions that clearly conflict with each other.)