WORK HEALTH AND SAFETY BILL 2014

Statement by Minister for Commerce

HON MICHAEL MISCHIN (North Metropolitan — Minister for Commerce) [10.02 am]: It is my great pleasure today to table the Work Health and Safety Bill 2014, a draft or green bill, for public comment.

Over the past several years, a harmonisation process has been pursued under the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety. Agreed to by states and territories in 2008, the fundamental objective of the intergovernmental agreement was to produce an optimal model for a national approach to occupational safety and health regulation and operation. This harmonisation process has resulted in a model work health and safety bill and supporting model regulations and codes of practice developed by Safe Work Australia for implementation by all Australian jurisdictions.

Although the state government supports in principle the idea of harmonising work health and safety legislation across jurisdictions, it does not support uniformity and harmonisation for their own sake. The legislative regime for occupational health and safety in Western Australia has to date provided a sound framework for workplaces, and this is evidenced by the statistics for lost-time injuries, diseases and traumatic work-related fatalities. These show a trend of reduction in the number of people being injured or harmed in the course of their work since the inception of the Western Australian Occupational Safety and Health Act 1984. However, the state government recognises the necessity of reviewing its occupational health and safety legislation in order to ensure that it continues to effectively meet its objectives and reflects the changing work environment.

The paramount consideration for a responsible state government is to have a regulatory regime that serves the best interests of Western Australians, and to be satisfied before introducing any changes that those changes will enhance, rather than compromise, the safety of workplaces.

I announced in August this year that the state government intended to craft a version of the model work health and safety legislation based on the best features of the model commonwealth bill, but adapted and suited to the Western Australian working environment. The green bill has been drafted to include the core provisions of the model WHS bill but has been refined to reduce red tape and maintain the compliance burden at an acceptable level. The tabling of this bill, however, should not be construed as locking in a transition from the WA OSH act to a Western Australian version of the model WHS laws. The purpose of the consultation is to assess the merits or otherwise of moving from the existing laws to this variant of the model WHS laws. I am confident that this approach will enable the government to determine whether to enhance the existing legislation by adopting some of the provisions of the model WHS laws or move to a variant of the proposed bill, or continue as at present.

In introducing this green bill, it would be useful to reflect on the legislative approach to OHS to date in Western Australia. It is generally accepted that the 1972 report of the British Committee of Inquiry into Health and Safety at Work, established and chaired by Lord Robens, has had a significant influence on OHS legislation in many jurisdictions, including Western Australia. As a move away from factories and shops prescriptions, this report proposed that general duty of care and consultative obligations be embedded in safety and health legislation. Rather than a prescriptive approach, the Robens report suggested that the primary responsibility for taking action should lie with those who create the risks and work with them. It was proposed that OHS legislation should provide a flexible system under which employers and employees could consult and achieve a high degree of self-regulation, supported by general legislative requirements and codes of practice. In view of this, the Robens report proposed an enabling act containing a clear statement of the general principles of OHS responsibility.

In Western Australia, the general duty of care principles were incorporated into the WA OSH act, with duties of care placed on employers to provide and maintain a safe working environment, as far as is practicable, and for employees to take reasonable care to ensure their own safety and health and that of others. The general duty of care approach allows those who know their workplace and the safety and health hazards and risks to develop safe systems of work appropriate to their particular working arrangements. This duty of care legislative approach has continued in the model WHS bill and is also reflected in the green bill. Of particular note is that the green bill, like the model WHS bill, places a primary duty of care on the person conducting a business or undertaking to ensure, as far as is reasonably practicable, the health and safety of workers. The PCBU is defined to mean "a person conducting a business or undertaking alone or with others, whether or not for profit or gain". It can be a sole trader—for example, a self-employed person—each partner within a partnership, a company, an unincorporated association, or a government department or public authority, including a local government authority.

The concept of the PCBU was discussed during the initial national review for the harmonisation of the safety and health legislation, which recommended its inclusion in the model laws as it was considered a fundamental element of addressing work practice in the twenty-first century. Conceptually, it is similar to the current duties of

care under the WA OSH act imposed in 2005, which make it clear that those involved in less traditional employer–employee–type relationships—for example, principal contractors and labour hire employers—also have a duty of care for safety and health. The use of the term PCBU not only makes it explicit that all those who have control at the workplace have duties of care, but also makes the legislative requirements easier to understand for workplace participants, which is an important objective when reforming legislation. Importantly, this primary duty of the PCBU to ensure safety and health is qualified by the term "so far as is reasonably practicable". The concept of "reasonably practicable" includes the extent to which a person is able to influence and control a safety outcome. As with the model WHS bill, the green bill, like the WA OSH act, sets out what is meant by "reasonably practicable". It is defined to mean what could reasonably be done at a particular time to ensure that WHS measures are in place.

The green bill, like the model WHS bill, sets out the matters to be weighed up in determining what is "reasonably practicable". They are: the likelihood of a hazard or risk occurring—that is, the probability of a person being exposed to harm; the degree of harm that might result if the hazard or risk occurred—that is, the potential seriousness of injury or harm; what the person concerned knows, or ought reasonably to know, about the hazard or risk and the ways of eliminating or minimising it; the availability and suitability of ways to eliminate or minimise the risk; and after assessing the extent of the risk and the available ways of eliminating or minimising it, the associated costs, including whether these are grossly disproportionate to the risk.

Control is an important aspect of determining what is reasonably practicable. In view of this, reflecting the approach in South Australia when adopting the model WHS bill, the green bill provides that if a person does not have direct control of a particular risk to health and safety, the extent to which they must eliminate or minimise the risk depends on the extent to which that person has the capacity to influence and control the risk.

Alongside the use of the term "PCBU", the term "worker" has been used instead of "employee" to better capture all those at the workplace. A "worker" is defined as any person who carries out work for a PCBU, including employees, contractors, subcontractors, employees of a contractor or subcontractor, outworkers, apprentices or trainees, work experience students and employees of a labour hire company placed with a "host employer".

As with the WA Occupational Safety and Health Act 1984, workers must take reasonable care for their own health and safety and that of others who may be affected by their actions or omissions. They must also comply, as far as they are reasonably able to, with any reasonable instructions given by the PCBU to comply with the work health and safety laws and cooperate with any reasonable policy or procedure relating to health and safety at the workplace. As with the introduction of the concept of a PCBU to clarify duties, the green bill, like the model work health and safety bill, also addresses the obligations of officers within corporations and other organisations to manage work health and safety risks. Although not a new obligation for Western Australian workplaces, it is made explicit in the model work health and safety legislation and also the green bill.

An officer of a PCBU must exercise due diligence to ensure that the PCBU complies with its health and safety duties. This duty relates to strategic, structural, policy and key resourcing decisions. "Due diligence" is defined to mean taking reasonable steps, including acquiring and keeping up-to-date knowledge of work health and safety matters, gaining an understanding of the nature of the operations of the PCBU and the associated hazards and risks, and ensuring that the PCBU has and uses appropriate resources and processes to eliminate or minimise risks to work health and safety. As with the concept of the PCBU, the duty placed on officers to exercise due diligence is, in my view, a clarification of an existing duty contained within the WA OSH act. I would like to acknowledge at this point the work many officers of corporations and other organisations already carry out in exercising due diligence to manage work health and safety risks. This will not be a new obligation for those people.

Continuing the general duty of care principles advocated by Lord Robens and included in the WA OSH act and model work health and safety bill, the green bill places general duties on designers, manufacturers, importers and suppliers of plant, structures and substances. This recognises that these duty holders can influence the health and safety of their products before they are used in the workplace. As such, these PCBUs will be required to ensure, as far as is reasonably practicable, that their products are without risks to health and safety when used at a workplace throughout their entire life cycle. As I mentioned, Lord Robens promoted consultation as a means of improving safety and health standards and this principle was incorporated into the WA OSH act. The green bill, like the model work health and safety bill, requires consultation, cooperation and coordination between duty holders so that those with shared responsibilities work together to make sure that action is taken. The PCBU must, as far as reasonably practicable, consult with workers and health and safety representatives. The formal consultative mechanisms established under the WA OSH act are continued with provision for the establishment of HSRs, health and safety committees and issue resolution procedures.

The green bill retains the current arrangement under the WA OSH act of a tripartite Commission for Occupational Safety and Health to inquire into and report on work health and safety matters. It is proposed that

the commission will continue this important role under the new legislative regime. With respect to modifications to the green bill to suit the Western Australian working environment, as previously advised by the state government, the green bill does not contain the provisions relating to the right of entry to workplaces by work health and safety entry permit holders, because this matter is already appropriately addressed within the state's industrial relations legislation; the power for HSRs to stop work, because each worker has the right to cease unsafe work and it is not appropriate to impose a new function and responsibility on HSRs; and the reverse onus of proof in discrimination proceedings, as this is contrary to the legal system whereby the burden of proof rests with the person making an allegation. In the government's view, these three areas largely revolve around process rather than being directly linked to the improvement of safety and health standards in Western Australia.

Penalties in the green bill reflect those in the model work health and safety bill. Similar to the WA OSH act, there is provision for a court to recognise the seriousness of an offence, and three categories of criminal offences are provided for breaches of the general duties. The maximum penalties depend on the category of the offence and whether the offender is an individual—for example, a worker or a PCBU—an officer as defined, or a body corporate. A category 1 offence is one in which a duty holder, without reasonable excuse, engages in conduct that recklessly exposes a person to risk of death or serious injury or illness. For a body corporate, the maximum penalty is $3 million; for an individual, such as a PCBU or an officer of a PCBU, the maximum penalty is $600 000 or five years' imprisonment, or both; and for an individual as a worker, the maximum penalty is $300 000 or five years' imprisonment, or both. A category 2 offence is one in which a duty holder fails to comply with a work health and safety duty that exposes a person to risk of death or serious injury or illness. For a body corporate, the maximum penalty is $1.5 million; for an individual as a PCBU or as an officer of a PCBU, the maximum penalty is $300 000; and for an individual as a worker, the maximum penalty is $150 000. A category 3 offence is one in which a duty holder fails to comply with a work health and safety duty. For a body corporate, the maximum penalty is $500 000; for an individual as a PCBU or as an officer of a PCBU, the maximum penalty is $100 000; and for an individual as a worker, the maximum penalty is $50 000. These are an increase on the penalties contained within the WA OSH act, reflecting both the need for a strong deterrent and appropriate response by the courts when there is a failure to meet a duty of care responsibility.

With respect to the general area of legal proceedings, the green bill does not provide the right, as under the model work health and safety bill, for a person to ask the regulator to allow them to enter into an enforceable undertaking in lieu of prosecution for an alleged contravention. The power for inspectors to issue infringement notices, also contained in the model work health and safety bill, is not included in the green bill.

In reducing the compliance burden, some minor modifications have also been made, most of which align with the current provisions of the WA OSH act. These include restricting the scope of the green bill so as to exclude volunteers from the meaning of "worker". This reflects the current provision under the WA OSH act whereby volunteers are covered by the general duty of care placed on employers and self-employed people to ensure the safety and health of persons other than employees. To also reduce the burden on PCBUs, the requirement that the PCBU must keep a record of all notifiable incidents for at least five years under the model work health and safety bill has been removed. This is, in my view, a red tape reduction that removes an unnecessary record-keeping requirement. There is nothing to stop the PCBU from keeping these records as long as they wish, but it is unnecessary to dictate this record-keeping requirement given that the regulator will have a record of the incident. For consistency with an existing right under the WA OSH act, the right of PCBUs or persons issued with an improvement notice by an inspector to apply for a review by the regulator has been modified. Under the model work health and safety bill, a PCBU or person must apply to the regulator within 14 days. However, under the green bill, they are able to apply for a review up until its date of compliance.

The state government looks forward to learning the views of all workplace participants and the community on the green bill. As I also mentioned to this house before, the Council of Australian Governments agreed in May this year to investigate how the model work health and safety laws could be improved, with a particular focus on reducing red tape. This review is underway and is expected to be completed shortly. It will look at whether the model work health and safety laws are evidence based, cost effective and proportional to the work health and safety risks they seek to address; are simple and streamlined for business to comply with; and, when possible, allow duty holders flexibility in how they comply with their obligations. The outcome of this COAG review, together with the comments submitted on the green bill and the earlier Western Australian regulatory impact statement for the model work health and safety regulations, will provide a foundation upon which we can consider the best regime for Western Australia.

As I alluded to earlier in my reference to the Robens principles, the betterment of workplace safety is very much about everybody participating and doing their bit. In that spirit, I now encourage all those with an interest in workplace safety to consider and comment on the green bill. Today's tabling of the green bill commences the period for which it will be available for public comment, which will close on 30 January 2015. The bill will be available on the website of the WorkSafe division of the Department of Commerce, and this site will also

provide details on how those interested in doing so may submit their comments. The state government is keen to develop the best legislation suitable to the Western Australian working environment. I now table the draft Work Health and Safety Bill 2014.

[See paper 2195.]