MINES SAFETY AND INSPECTION AMENDMENT BILL 2004

Second Reading

Resumed from 25 August.

MRS C.L. EDWARDES (Kingsley) [10.36 pm]: I note that many of the provisions in the Mines Safety and Inspection Amendment Bill 2004 are similar to the changes that were brought forward in the occupational safety and health legislation. On that occasion a number of concerns were raised. Whilst I do not propose to go into those concerns in the same depth as I did when they were raised in debate on the occupational safety and health legislation, I need to raise them again in respect of this legislation to ensure that in future when people read the amendments they understand the reason for our total opposition to some of those issues. They include changes to the penalties and offences, particularly a number of offences involving gross negligence. The Minister for Consumer and Employment Protection did not provide me with any justification or comfort for it applying to small organisations, such as the local football club that may employ a bar person, a coach or support staff and pay them a stipend. They will now be caught up by the new offences, particularly the new penalties for gross negligence. As such, this is of major concern. The Government's amendment that has been incorporated into this legislation does not appease our concerns about the definition of gross negligence and how a court is likely to interpret it. Our other concern is the provisional improvement notices, which can be issued by accredited safety and health representatives at the minesite. Our concern with the occupational safety and health legislation related to training and assessment. The training had not been finally determined at that time; nor had whether representatives could be accredited after mere attendance at a training course. I think the Government tends to think that although attendance will lead to accreditation, it will not necessarily be an assessment of their understanding or knowledge of the work that they will be required to undertake. I take the Government's view that on the eastern seaboard, where provisional improvement notices have been in existence for a considerable period, the difficulties that are presupposed have not been experienced. Those difficulties include that the PINs could be abused by health and safety representatives in a workplace for industrial relations purposes. The concern of the Opposition is the constant blending of occupational health and safety or safety in the workplace with industrial relations issues. While there is that mix and the lines are blurred, there will always be a problem with safety in the workplace, and particularly with where responsibility lies.

PINs will be a bigger issue in the mining industry. The mining industry essentially has looked after safety on its own. In particular, it has had its own committees, such as the Mines Occupational Safety and Health Advisory Board, which falls under the responsibility of the Minister for State Development. It is administered by the Department of Industry and Resources, which provides the inspectorate service. MOSHAB is essentially tripartite in nature and mainly consists of representatives from operators in the industry, the mines inspectorate, employee inspectors and unions. It has similar functions to those of WorkSafe Western Australia. There are proposed changes. If this Government is returned to office after the next election, those changes will lead to the eventual transfer of the whole of mines safety to WorkSafe. Indeed, there is some concern in the mining industry that the current review of BHP Billiton Ltd will lead to one of the Government's major recommendations; that is, that mines safety be transferred wholly across to WorkSafe. Nothing leads me to believe that that would result in an improvement in occupational health and safety in the mining industry. Although all accidents are serious in nature, reports have always indicated - I have quoted a number of them previously in this House - that 80 per cent of accidents are due to human error. Whether or not the inspectorate falls under WorkSafe or the mining industry, it will not change human error. It is important that the people from the Department of Industry and Resources who have a greater level of expertise and knowledge of the mining industry work very closely with the mining industry. It is more likely that they will work together to a greater extent to ensure that it will always lead to improvements in the mining industry.

There is a concern with the Occupational Safety and Health Tribunal taking over the determination of certain matters, including appeals to decisions of the State Mining Engineer and entitlements under stop-work provisions. Goodness me; what on earth would the Occupational Safety and Health Tribunal know about decisions of the State Mining Engineer? I cannot believe that the minister has considered that issue and regards that as appropriate. At least when appeals were made to the courts, a trained lawyer who had been appointed as a magistrate was able to make those determinations, with the help of expert witnesses. The members of the tribunal will not be legally trained and may or may not call upon that level of expertise, yet they will be making determinations on decisions that are made by the State Mining Engineer. I believe that will prove to be a big mistake.

As I have indicated, the penalties are far too high. There is a concern about directors' responsibility. That matter has not been worked through properly. The Government will find that that will probably be addressed through the courts. There is serious concern that the safety agenda will be taken over by the industrial relations

agenda, and that the mines inspectorate will be transferred to WorkSafe at some point as a result of the BHP inquiry.

Although we will not support this legislation, we will not oppose it either. We do, however, have serious concerns about the proposed Occupational Safety and Health Tribunal, the penalties, and the definition of "gross negligence". Those matters are not supported. I believe the Government will find out in due course that the concerns that we have raised in this House will be proved. That will be most unfortunate.

MR C.M. BROWN (Bassendean - Minister for State Development) [10.46 pm]: I thank the Opposition for its comments on the Mines Safety and Inspection Amendment Bill, and in particular for the fact that it has not sought to incorporate in this debate the concerns that it raised when we dealt with the Occupational Safety and Health Legislation Amendment and Repeal Bill. We are pleased that we have not had to traverse grounds that have been traversed in considerable detail previously. As the member for Kingsley has said, many of the provisions in this Bill are either similar or identical to those contained in that Bill, which went through this House a short time ago.

The member for Kingsley raised the question of gross negligence. What we have done in this Bill, as we have done in the other Bill, is be very careful about where this definition can apply. It will not simply be left to the broad judgment of the courts. The Bill provides that "gross negligence" applies to general duty of care breaches in circumstances in which the offender knew that the breach would be likely to cause death or serious harm to a person to whom the duty was owed but disregarded that likelihood, and the contravention did in fact cause such death or serious harm. We are not talking about a circumstance that arises inadvertently. We are talking about a circumstance in which it is drawn to someone's attention that something is wrong and needs to be remedied. It is an active drawing to attention that that is the case. It is then a disregard of that matter, which results in serious injury or death. That cannot be accepted today. It is one thing if it happens by inadvertence, or because knowledge is not sufficient. However, when it is clearly drawn to the attention of someone that a practice or procedure may be life threatening and may result in serious injury, but no remedial action is taken and as a result a life is lost or a person is seriously injured, that is absolutely unforgivable. In those circumstances, we think the penalty is appropriate. It should not and will not have broad application. It has been done in that way quite deliberately.

Provisional improvement notices are a matter of concern, and have been raised by the Opposition and, it is true, by some industry members. We have given a number of undertakings in that regard. I gave a clear undertaking in my second reading speech that we will have an early review of that provision if difficulties arise in its implementation.

Mr M.J. Birney: Has this got the approval of the Chamber of Minerals and Energy of Western Australia?

Mr C.M. BROWN: Many of the provisions have its approval, but not all of them.

Mr M.J. Birney: Which ones do not? Which ones is it opposed to?

Mr C.M. BROWN: It has expressed concern about provisional improvement notices and other matters that industry does not particularly like. However, as the member for Kingsley quite faithfully reported to Parliament, this provision has operated interstate for many years. When the provision was first introduced in other States, concern was raised that it would lead to all sorts of difficulties, but it has not. We looked at the experience in other States and saw an opportunity to incorporate that provision in this Bill. It has to be understood that this is a provisional improvement notice, not a prohibition notice. A prohibition notice issued by an inspector means that work must stop in that area. A provisional improvement notice means that the issue must be dealt with in a certain period of time, and it can be reviewed by an inspector. An inspector can override a health and safety representative. Other constraints have also been included in the Bill to ensure that that provision is not misused. For example, the Bill provides that a health and safety representative will not issue a notice without first consulting with the employer. Further, if a second occupational health and safety representative is present at the workplace, the health and safety representative will confer with and seek the agreement of that second occupational health and safety representative -

Mr M.J. Birney: Does the Association of Mining and Exploration Companies approve of this?

Mr C.M. BROWN: It has been involved and has raised concerns similar to those expressed by the Chamber of Minerals and Energy. However, we have been quite conservative in a variety of areas. A number of unions involved in this matter have said that the Government has taken a conservative position and they have urged us to go much further. However, we have said that we will not go further. We do need to make progress, however, and we need to bring this legislation into line with at least some of the provisions that are effectively operating interstate. There is no doubt that improvements have been made in the area of health and safety. Are we at a point at which we can be satisfied? I do not think that we will ever be satisfied with health and safety standards.

I read in this morning's paper that another life has been lost. In this instance, I understand that the man was working at a small mine site with his partner in the goldfields area. I do not have all the details. We must do everything we possibly can to ensure a safe workplace. From time to time, that will make people feel a little uncomfortable. However, that obligation is on the Government and I think that is what the community wants us to do.

I can assure the member for Kingsley that, although I understand the reservations that have been raised, we have been conservative in developing this Bill. It was developed after exhaustive consultation with both industry and the union movement following a large review by former Commissioner Robert Laing. This legislation has, therefore, been in the gestation period for probably two or three years. I think the member for Kingsley, in fact, referred in her speech on a previous Bill to the fact -

Mrs C.L. Edwardes: We started it.

Mr C.M. BROWN: That is right, the previous Government commenced it with an initial review by former Commissioner Gavan Fielding that was later taken over by former Commissioner Robert Laing. This Bill has, therefore, been a long time in the making. Some decisions had to be made. I think people are fairly relaxed about most provisions in the Bill. I understand there is some nervousness about a couple of provisions. In my judgment they are conservative provisions; they are a step forward, but they are not radical in any sense. I thank the Opposition for, although raising the reservations, not opposing passage of the Bill.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clauses 1 to 16 put and passed.

Clause 17: Part 2 Division 1 inserted -

Mrs C.L. EDWARDES: This clause introduces the definition of gross negligence and the duty imposed on a person. Although I take on board the minister's comments, the definition does not say that a contravention that is likely to cause death and/or serious harm to a person must be brought to the attention of the person by whom the duty is owed. If the clause were worded in that way, I would have less of a problem with it. However, it states that the offender knew that the contravention would be likely to cause death and/or serious harm but acted or failed to act in disregard of that likelihood. The examples I brought to the attention of the House indicated that the courts are likely to interpret "knowledge" as not necessarily being actual or direct knowledge. If the words that the minister used were in the clause - that is, that the knowledge was brought to the attention of a person and the person disregarded it and a death or serious harm occurred - I, like the minister, would have no hesitation whatsoever in supporting the clause. However, I am concerned about the severe penalties, one being imprisonment. For an individual's first offence the penalty is a fine of $250 000 and imprisonment for two years, and for a subsequent offence a fine of $312 500 and imprisonment for two years. For a corporation's first offence the penalty is $500 000 and for a subsequent offence a fine of $625 000. I do not have the confidence in this clause that the minister has.

Mr C.M. BROWN: It is true that the member for Kingsley asked what the word "knew" means. Parliamentary counsel was instructed in the way that I indicated in response to the second reading debate and it came forward with those words. A debate could be had with parliamentary counsel about the use of that word. However, in my response I have indicated the way in which the proposed section is to operate. An instruction was given to parliamentary counsel and it has developed those words. As far as I am concerned, that is the intent of the clause.

Clause put and a division taken with the following result -

Ayes (23)

Mr P.W. Andrews	Mrs D.J. Guise	Ms S.M. McHale	Mr E.S. Ripper
Mr J.J.M. Bowler	Mr J.N. Hyde	Mr A.D. McRae	Mrs M.H. Roberts
Mr C.M. Brown	Mr J.C. Kobelke	Mrs C.A. Martin	Mr P.B. Watson
Mr A.J. Dean	Mr R.C. Kucera	Mr M.P. Murray	Mr M.P. Whitely
Mr J.B. D'Orazio	Mr J.A. McGinty	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Dr J.M. Edwards	Mr M. McGowan	Ms J.A. Radisich	

Noes (10)

Mr C.J. Barnett	Ms K. Hodson-Thomas	Mr R.N. Sweetman	Mr J.L. Bradshaw *(Teller)*
Mr M.J. Birney	Mr R.F. Johnson	Mr T.K. Waldron	
Mrs C.L. Edwardes	Mr P.D. Omodei	Ms S.E. Walker	

Pairs

Mr S.R. Hill	Mr M.F. Board
Mr N.R. Marlborough	Mr A.D. Marshall
Mr D.A. Templeman	Mr W.J. McNee
Dr G.I. Gallop	Mr M.G. House
Mr F.M. Logan	Mr J.P.D. Edwards
Ms A.J. MacTiernan	Mr M.W. Trenorden

Independent Pairs

Dr J.M. Woollard
Mr P.G. Pendal
Dr E. Constable

Clause thus passed.

Clause 18 put and passed.

Clause 19: Section 9A inserted -

Mrs C.L. EDWARDES: Clauses 19, 21, 23, 24, 25 and 27 are all essentially applying gross negligence to particular breaches of those sections referred to in the clauses. Therefore, we oppose each of them for the reasons I have outlined with regard to the definition of "gross negligence".

Mr C.M. BROWN: For the same reasons I have outlined, we support the clauses. That is why they are there.

Clause put and passed.

Clauses 20 to 79 put and passed.

Clause 80: Section 4 amended -

Mrs C.L. EDWARDES: This part of the Bill deals with amendments to provide for the Occupational Safety and Health Tribunal to determine certain matters, and as pointed out in my second reading contribution, this is a major area of concern for the mining industry as well as for the general workplace, where there is a blurring of the lines between safety in the workplace and industrial relations. The Opposition cannot understand why the Government believes that the Occupational Safety and Health Tribunal will be able to more adequately deal with the matters that will now be referred to it under the Mines Safety and Inspection Act, as against referring those matters to a safety and health magistrate. As such, the Opposition is absolutely and totally opposed to these provisions.

Mr C.M. BROWN: This change provides for matters to be considered by the tribunal instead of a magistrate. It deals with a range of matters that, quite frankly, are better suited to being dealt with by a tribunal than by a court in terms of enforcement mechanisms. A range of matters were previously considered by the magistrate, such as, for example, any dispute over the composition of a health and safety committee, which is obviously much better dealt with by a tribunal than by a magistrate. A magistrate looks at strictly legal issues. The question is whether a safety and health committee of one composition is more valid than that of another type.

Mrs C.L. Edwardes: Why didn't you send the appeals to the proposed SAT?

Mr C.M. BROWN: Essentially because it was regarded that a tribunal would constantly deal with these kinds of matters in occupational health and safety, and SAT would look at administrative decisions of government. It was considered that on those matters, particularly as one person is envisaged to deal with these matters all the time, the tribunal would be better placed to look at administrative-cum-representative type issues. The importance of that aspect is that the modern approach to occupational health and safety is based on principles laid down by Lord Robens in 1971-72. The old way of implementing occupational health and safety was that Governments had millions of individual regulations, and inspectors checked the workplace regarding how many toilets were provided, the number of employees and myriad other things. These matters are better dealt with in a practical application at the workplace level. To achieve that practical application, it is critical for the voices of companies and employees to be heard. Many people misunderstand the thrust of modern occupational health and safety legislation: they have misunderstood it as being a deregulatory path, which is not correct. It is a

different type of system. The rules of occupational health and safety are primarily crafted at the workplace. To craft those rules accurately at the workplace requires input from both the company and the employees through their representatives and through the committee. Therefore, the entire basis of the Robens philosophy enshrined in this Bill and the other measure dealing with occupational health and safety requires representative models to be effective. A tribunal in this area is much better in dealing with such matters by using discretion rather than a magistrate simply enforcing the law. Dealing with breaches of the Act will be left with the magistrate, but the discretionary areas that relate to the operations of the Robens principles are better operated at a tribunal.

Mrs C.L. EDWARDES: How many of those matters that will now go to the tribunal were heard by the safety and health magistrate in any one year?

Mr C.M. BROWN: It was a very small number. I do not know the number in terms of mines. In relation to the other legislation, the Minister for Consumer and Employment Protection tells me it is about a half-dozen a year. It is not a large number in this area.

Mrs C.L. EDWARDES: That is my point: it is not a large number. The minister will not have a person regularly dealing with these issues, which was the reason given for taking the discretionary matters away from the safety and health magistrate. People do not always get the same safety and health magistrate. I think a deliberate attempt was made to establish a health and safety tribunal for reference of these matters. Again, that role will be expanded. The minister has included industrial relations matters in that role. This is the very basis of what the Government proposes that the tribunal will deal with in future. As such, the Opposition accepts none of the justifications given previously or tonight.

Mr C.M. BROWN: I accept that there is a fundamental difference between the Opposition and the Government on this matter. We have debated this type of provision over many years. I think we debated it in a former Parliament and, no doubt, next year when the member for Kingsley and I are doing other things perhaps more pleasant than debating this, at least in this place, others might pick up the cudgels and continue the debate. I am not sure that it will ever be a matter on which we will reach harmony.

Clause put and passed.

Clauses 81 and 82 put and passed.

Clause 83: Section 102 replaced and transitional provisions -

Clause put and a division taken with the following result -

Ayes (18)

Mr P.W. Andrews	Mr J.N. Hyde	Mr A.D. McRae	Mr P.B. Watson
Mr J.J.M. Bowler	Mr J.C. Kobelke	Mrs C.A. Martin	Mr M.P. Whitely
Mr C.M. Brown	Mr R.C. Kucera	Mr M.P. Murray	Ms M.M. Quirk *(Teller)*
Mr A.J. Dean	Mr M. McGowan	Mr A.P. O'Gorman	
Mr J.B. D'Orazio	Ms S.M. McHale	Ms J.A. Radisich	

Noes (10)

Mr C.J. Barnett	Ms K. Hodson-Thomas	Mr R.N. Sweetman	Mr J.L. Bradshaw *(Teller)*
Mr M.J. Birney	Mr R.F. Johnson	Mr T.K. Waldron	
Mrs C.L. Edwardes	Mr P.D. Omodei	Ms S.E. Walker	

Pairs

Dr G.I. Gallop	Mr M.G. House
Mr S.R. Hill	Mr M.F. Board
Mr N.R. Marlborough	Mr A.D. Marshall
Mr D.A. Templeman	Mr W.J. McNee
Mr F.M. Logan	Mr J.P.D. Edwards
Ms A.J. MacTiernan	Mr M.W. Trenorden

Independent Pairs

Dr J.M. Woollard
Mr P.G. Pendal
Dr E. Constable

Clause thus passed.

Clauses 84 to 87 put and passed.

Clause 88: Section 4 amended -

Mr C.M. BROWN: I move -

Page 114, after line 15 - To insert -

(4) Section 4(1) is amended by inserting the following definition in the appropriate alphabetical position -

"

"Mining Industry Advisory Committee" means the committee referred to in section 14A(2) of the *Occupational Safety and Health Act 1984*;

".

Agreement for this amendment has been reached between the Chamber of Minerals and Energy and the Government. The chamber was keen to see the advisory committee, even though it is an advisory committee of the Commission for Occupational Safety and Health, reflected in this legislation. We were happy to accept the suggestion; hence this amendment is moved.

Mrs C.L. EDWARDES: It was not the chamber's preference, though.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 89 to 94 put and passed.

Title put and passed.

Reconsideration in Detail - Motion

On motion by Mr C.M. Brown (Minister for State Development), resolved -

That the Bill be reconsidered in detail for the further consideration of clause 2.

Reconsideration in Detail

Clause 2: Commencement -

Leave granted for the following amendments to be moved together.

Mr C.M. BROWN: I move -

Page 2, lines 6 and 7 - To delete the lines and substitute -

(1) This Act, other than -

(a) Part 7 Division 2; and

(b) section 88(4),

comes into operation on a day fixed by proclamation.

Page 2, after line 17 - To insert -

(4) Section 88(4) comes into operation -

(a) on the day on which section 115 of the *Occupational Safety and Health Legislation Amendment and Repeal Act 2004* comes into operation; or

(b) if on that day section 88(1) of this Act has not yet come into operation, on the day on which that subsection comes into operation.

These provisions are to incorporate the changes to section 88 that we made a little earlier.

Amendments put and passed.

Clause, as amended, put and passed.

Third Reading

Bill read a third time, on motion by Mr C.M. Brown (Minister for State Development), and transmitted to the Council.