

CLAUSE NOTES

WORKPLACE HEALTH AND SAFETY AMENDMENT BILL 2009

Part I	Preliminary
Section 1	A formal provision specifying the title of the proposed Act. The Act amends the <i>Workplace Health and Safety Act 1995</i> , by inserting a new Part to provide for appropriately authorised officers of employee organisations (union officials) to enter workplaces for occupational health and safety (OHS) purposes. A small number of other amendments are made for the purposes of, or to ensure consistency with, the new Part.
Section 2	A formal provision specifying the commencement date of the Act. The Act will commence on a day or days to be proclaimed.
Section 3	A formal provision, specifying the name of the Act to be amended (the <i>Workplace Health and Safety Act 1995</i>), which is referred to throughout the Bill, and these Clause Notes, as the “Principal Act”.
Section 4	This amends section 3 (Interpretation) of the Principal Act by adding a small number of new definitions (to allow for concepts in the new provisions) and changing a small number of existing definitions for clarification (where the need for such clarification became clear during the drafting of the new provisions).
(a)	This subsection inserts a definition of “chief official”. The definition is required to identify

the head person who runs the operation of the employee organisation concerned in Tasmania.

- (b) This amendment makes changes to the existing definition of “contractor” in the Principal Act , to clarify that it covers an individual engaged under a labour hire arrangement.
- (c) This subsection inserts a definition of “employee organisation”. The term “employee organisation” is used, rather than union, because the State and Commonwealth legislation that refers to these bodies uses the terminology “employee organisation”. The proposed definition in the Principal Act refers to definitions under both the *State Industrial Relations Act 1984* and the *Commonwealth Fair Work Act 2009*.
- (d) This subsection inserts definitions of :
- “officer” – necessary to refer to the officials within an employee organisation that may be authorised under these provisions;
 - “OHS access card” – the name of the permit that allows an authorised official of an employee organisation to enter workplaces(issued under section 22E); and
 - “OHS access card holder” – the term used to refer to a person who has been granted an OHS access card (under section 22E) and is therefore entitled to enter workplaces (subject to the provisions in new Part 3A).
- (e) This amendment makes changes to the existing definition of “principal” in the Principal Act , to clarify that it covers a person who engages an individual to perform work under a labour hire arrangement.

- (f) This subsection inserts a definition of “relevant duty holder”, as a shorthand means of referring to any duty holder who has duties to a worker under section 9 of the Principal Act (an employer, an employer who exercises, or is in a position to exercise, management or control over a workplace, or a principal (who is not an employer) who has control or management over a workplace) and section 11 (a responsible officer).
- (g) This subsection inserts a definition of a “worker” as an individual who carries out work at a workplace and who is an employee or a contractor. The term “worker” is particularly appropriate to modern workplaces where persons may be engaged under different arrangements to the traditional contract of employment.
- (h) This amendment makes changes to the existing definition of “workplace” to clarify that it includes a part of the workplace.

Section 5 After section 22 of the Act, Part 3A is inserted.
Note that section numbers in Part 3A refer to new numbers to be inserted in the Principal Act.

Part 3A **Rights of entry for OHS access card holders**

Division 1 – Issue of OHS access cards

Section 22A This section specifies the objects of this Part. The objects focus on balancing the securing of the health and safety of workers (by enabling employee organisations to represent them and to consult, make enquiries about and seek to resolve OHS matters) with the rights of

relevant duty holders to go about their business without undue intervention or hindrance.

These objects were developed to reflect the positive intent of the new provisions in contributing to the health and safety of workers, while recognising the potential for the new rights to impact on the activities of others, hence the need for balance.

Section 22B

This section provides that the operation of certain other laws are not affected by new Part 3A.

(1) The *Industrial Relations Act 1984* (the IR Act) is cited because it includes provision for right of entry. The right of entry provisions under the IR Act are different to those in the Bill, and they include right of entry to talk with or interview employees or to investigate an alleged breach of the IR Act. To avoid confusion about whether or not these provisions continue to operate, this subsection clarifies their status.

(2) There are some circumstances where entry by OHS access card holders would not be appropriate. In particular, it is not intended that entry should occur under circumstances where law enforcement or emergency management laws preclude entry.

This subsection therefore provides that an OHS access card holder must not enter or remain at a workplace if such entry or presence is precluded by a State or Commonwealth law that provides for the investigation of an offence, maintenance of law and order, or an emergency to be dealt with.

Section 22C

This section deals with the application and nomination process for an OHS access card.

(1)

Applications for an OHS access card must be submitted to the Director of Industry Safety, an officer appointed under the Principal Act (referred to as the Director) on a form approved by the Director.

Only the chief official of the employee organisation concerned may apply to the Director to issue a card to a nominated person. Given the card holder will be a representative of the employee organisation, this ensures that the head person, running the employee organisation in Tasmania, has control over who is to be nominated on behalf of the organisation.

(2)

This subsection provides that only a chief official or an officer of the employee organisation may be nominated. This ensures that the nominee has an appropriate role within, or is an employee of, the organisation.

Section 22D

This section sets down criteria for the issue of OHS access cards.

(1)

The Director must be satisfied that the nominee is:

- an officer of an employee organisation
- holds an entry permit under the Commonwealth *Fair Work Act 2009* (the FW Act); and
- has the knowledge, qualifications, experience or training appropriate to an OHS access card holder.

The requirement to hold an entry permit under the FW Act recognises the reality that, for the majority of workplaces in Tasmania, right of entry for OHS purposes cannot occur

unless the person holds an entry permit under the Commonwealth's Act. Given this requirement, it is not necessary for the Bill to duplicate the requirements under the FW Act for ensuring a nominee is a fit and proper person, for those nominees that have a Commonwealth entry permit (for those nominees without such a permit see under subsections (2) to (4))

With respect to the requirements regarding knowledge et cetera, it should be noted that the role is different to that of an inspector, therefore it is not expected that nominees must have the same level of OHS expertise as inspectors. Nevertheless, it is expected that nominees would understand the rights and responsibilities of OHS access card holders and have the capacity to facilitate resolution of OHS matters at the workplaces concerned. In recognition that appropriate knowledge, experience and so on may be gained in any number of different ways, the Director of Industry Safety will assess each case individually. (Subsection (5) allows the Director to publish guidelines, so that potential nominees may know the sorts of things that would be appropriate.)

(2),(3) & (4)

In the event that an employee organisation operates only under the *State Industrial Relations Act 1984*, and therefore none of its officers has an entry permit under the FW Act, these subsections allow the Director to waive the requirement to have an entry permit issued under the FW Act, and substitutes an assessment similar to that under the FW Act. This ensures that all OHS access card holders are "fit and proper" persons, taking into account similar criteria, no matter whether the assessment is done under Commonwealth or

State legislation. This ensures consistency and avoids having dual standards.

Subsection (2) allows for the Director to waive the requirement at (1)(b) (which specifies that the nominee must have an entry permit under the FW Act), subject to:

- receiving a declaration under (3) from the chief official; and
- the Director being satisfied the nominee is a “fit and proper person to be an OHS access card holder”.

Subsection (3) spells out the requirements of the chief officer’s declaration, i.e. that the employee organisation does not provide services to “national system employees” and is not an “organisation” under the FW Act.

Subsection (4) spells out the matters that must be taken into account by the Director in considering whether a person is a fit and proper person to be an OHS access card holder. For consistency, the provisions mirror those in the Commonwealth FW Act for an entry permit holder. The considerations focus on previous offences or sanctions (including disqualification) in relation to industrial relations, health and safety, entry and certain crimes.

These considerations do not apply to nominees who already hold an entry permit under the FW Act, because they have already been assessed under the Commonwealth’s processes.

(5) & (6)

For information and clarification of the requirements that nominees must meet regarding knowledge et cetera, subsection (5) enables the Director to publish guidelines to indicate the type of knowledge, qualifications,

experience or training that would be appropriate and/or that explains how the assessment is to be made.

Subsection (6) provides for the above guidelines to be general, by applying to all industries, or to deal the requirements of a specific industry. This provides the flexibility to decide on an as needs basis whether certain industries may have particular requirements.

Section 22E

This section details the process for the Director to grant and issue OHS access cards and to notify relevant persons of decisions.

It should be noted that existing section 41 of the Principal Act provides an appeal mechanism against decisions of the Director.

(1) This subsection allows the Director to issue or refuse to issue an OHS access card to a nominee.

(2) Subsection (2) provides for notification of the outcome to the chief official who applied on behalf of the nominee.

This keeps the chief official “in the loop”. The nominee will know if he or she has been granted a card by receipt of the card.

(3) This subsection indicates that further OHS access cards may be issued in response to applications from the same official.

This removes any confusion or suggestion that only one access card may be issued for each employee organisation. It is considered that any quota on numbers would be unnecessarily inflexible.

- (4) This provision clarifies that cards may be issued to interstate nominees.

This approach recognises that a number of employee organisations have, resident in other jurisdictions, experts either in health and safety or in the hazards and conditions in particular industries. It is considered to be in the best interests of OHS to not exclude a role for such persons. They must meet the same requirements, and applications undergo the same processes, as for local nominees.

- (5) & (6) Subsections (5) and (6) indicate the information that must or may be on the card. One of these requirements is that the card is to contain a photograph of the holder. Other information pertains to name, union, entitlement to access subject to the Act, and any conditions. The Director may add other information he or she considers necessary.

- (7) The OHS access card remains in force for three years, except where the holder ceases earlier (such as when the holder leaves the union, no longer has an entry permit under the FW Act or is disqualified. See section 22L for the full list).

Three years validity for a card was chosen because it aligns with the FW Act.

Section 22F

This section deals with conditions of issue, which the Director may apply to the granting of a card.

- (1) The Director may impose conditions on the card, upon issue, (by an instrument in writing).

- (2) Conditions are required to be relevant to the objects of this Part (see objects at section 22A).
- (3) To ensure that the chief official knows of any restrictions that apply to the card, subsection (3) requires the Director to notify him or her of such conditions.
- (4) The OHS access card holder is required to comply with the conditions, and with any imposed by the Director at a later time (see section 22M(4)).

The maximum penalty is a fine of 50 penalty units. The penalty level reflects that the card holder is an individual, and most likely an employee, and that a breach of this provision is moderately serious, but not as serious as a breach of his or her general duty of care.

Division 2 – Rights and responsibilities in relation to OHS access card holders

Section 22G

This section deals with the workplaces an OHS access card holder may enter, when entry may occur and the purpose of entry.

- (1) An OHS access card holder may enter a workplace where one or more workers are eligible to be members of the employee organisation (which is specified on the card), regardless of whether or not any are actually members.

Most jurisdictions allow authorised officers of employee organisations to enter workplaces where one or more workers or employees working at the workplace are members of the employee organisation concerned, or are eligible to be members, (subject to any other

conditions relating to right of entry in the jurisdiction).

The provisions here adopt the abovementioned approach, with a slight change to the way it is expressed. This model has the advantage that eligibility rules of employee organisations are readily available (unlike membership lists) and therefore can be easily referred to.

It is intended that OHS card holders will only visit workplaces where, according to the employee organisation's rules, a membership entitlement exists.

- (2) An OHS access card holder may only enter during the hours when workers work at the workplace.

This provision was added in response to public comment that entry should only occur during working hours.

- (3) There are only two purposes for which an OHS access card holder may enter a workplace.

They are to:

- (a) discuss health and safety issues, relevant to the workplace, with workers during a meal break or other break; or
- (b) enquire into or facilitate the resolution of a health or safety matter that has arisen at the workplace.

(a) is focussed towards proactive visits, where the OHS access card holder may raise OHS awareness, discuss any concerns, and talk about issues relevant to the workplace (but not about issues that clearly do not apply to the workplace concerned).

The restriction on the times the discussions may occur is intended to avoid disruption to work arising from a visit that is proactive and hence likely to be less urgent than an entry under (b).

(b) is focussed towards reactive entry where a concrete matter has arisen at the workplace, and it requires resolution.

This provision enables the OHS access card holder to enter the workplace for the purpose of enquiring into the matter or facilitating resolution of it. Because the matter has already arisen, and may potentially be urgent, there is no requirement that discussions must occur during breaks.

Given that the focus of (b) is on enquiry and facilitation of resolution of the matter, the provision deliberately does not refer to investigation of a breach of the legislation, which implies powers of investigation and (potentially) enforcement – more akin to an inspector's role. OHS access card holders are not intended to be “quasi inspectors” and their powers reflect this positive role of enquiry and facilitation.

The above two purposes of entry are referred to in later sections that restrict the use of information, provide that entry must not occur for any other purpose, and require that action for other purposes must not occur.

(4)

Entry to premises used mainly for residential purposes is only allowed if the occupier consents. This reflects provisions in a number of other jurisdictions, and protects occupiers' privacy at home.

It is intended that where workplaces and residences are joined (for example where a shop is joined to a house or flat), an OHS access card holder may enter the part of the premises that is a workplace, but will require permission to enter the area used as a residence or home, notwithstanding that, say, accounts are processed at the residence or phone calls are taken.

Section 22H

This section deals with the OHS access card holder's powers, once entry has occurred, and the limitations on those powers.

(1)

This subsection lists the OHS access card holder's powers upon having entered a workplace.

The OHS access card holder is not intended to undertake the functions of an inspector, and there are no enforcement powers. The powers are targeted towards enquiring, observing, reviewing and consulting.

The OHS access card holder may discuss with, make enquiries of or consult with workers at the workplace, subject to the worker's consent and at times that are convenient to the relevant duty holder or person in charge of the workplace.

Note that this power is not limited to persons eligible to be members of the employee organisation concerned. The provision is not limited to such workers, in order to allow the OHS access card holder to gather as much information as possible. This enables the OHS access card holder to develop a fully informed view which is in the best interest of both the resolution process and OHS.

Photographs may be taken, of the work, workplace, processes, plant, equipment or use of materials and substances at the workplace, if relevant. The protections later in the Bill prevent the use of these photographs for unrelated purposes.

Documents relating to or directly relevant to health or safety at the workplace may be reviewed. There is no power to require copies or to take documents away.

OHS access card holders may consult with inspectors at the workplace.

The powers are balanced, and allow the access card holder to enquire into or facilitate the resolution of health and safety matters. Some respondents to the invitation to public comment suggested additional powers while some suggested reducing the powers. Subsection (1) represents the middle ground and, importantly, is targeted to the OHS access card holder's role.

Protections and controls are found in some later sections and subsections.

(2) An OHS access card holder is not permitted to exercise the power to review documents if it would contravene a State or Commonwealth law. In particular, this means that laws governing privacy will override the right to review documents.

(3) & (4) These provisions allow the OHS access card holder to request, and the duty holder to comply with the request, so far as reasonably practicable, for the information that would breach a State or Commonwealth law (such as identifying information) to be removed or obscured.

It is not intended that such amended information be required to be provided when the obscuring or deletions render the information useless or the work in obscuring or deleting information outweighs any potential benefit of the information.

The penalty for failing to comply, where it is reasonably practical to do so, is a maximum fine of 20 penalty units. This is lower than other penalties applying to relevant duty holders under this Part, in recognition that the offence is in relation to failing to alter documents rather than a failure to provide information.

Section 22I

This section deals with offences by OHS access card holders.

(1) to (6)

These subsections list five things that an OHS access card holder must not do, plus one that he or she must do (at (3)).

Feedback from public comment indicated that, although respondents did not necessarily agree on specific controls or sanctions, employers, industry and employee organisations generally supported having controls and sanctions to prevent misuse, maintain or minimize impact on particular rights, and provide for health and safety (of the access card holder and potentially others).

These subsections include some of the key controls against misuse, and provide for a fine not exceeding 50 penalty units for those things that must not be done. This penalty is assigned to all offences that have the potential to disrupt or discredit the system of OHS access, whether by an OHS access card holder or any other person.

(1) An OHS access card holder must not enter a workplace where he or she knows (or ought reasonably to be expected to know) that the requirements regarding eligibility for membership are not met, after purporting that he or she can enter on the basis of eligibility.

(2) An OHS access card holder must not enter a workplace, purportedly for an authorised purpose, for any other purpose than the two purposes allowed (listed in section 22G(3)) or, having legitimately entered, perform an action for another purpose.

This precludes an OHS access card holder from using the entry for, or combining it with, other purposes, including recruitment of members.

(3) An OHS access card holder must show his or her card, as soon as reasonably practicable after entering a workplace, to the person in charge of the workplace, or if requested to do so by that person.

The penalty of 10 penalty units reflects the procedural nature of the requirement. Nevertheless, it is considered important for ensuring that the OHS access card holder reports as soon as possible to the person in charge of the workplace, especially to enable that person to know that the card holder is present.

(4) An OHS access card holder must not, without the consent of the occupier, purport to use the entry provisions to gain entry to premises that he or she knows to be used mainly for residential purposes.

- (5) An OHS access card holder must not exercise a power unless he or she complies with a reasonable request by the person in charge of the workplace to comply with a safety and health requirement.
- (6) An OHS access card holder must not intentionally hinder or obstruct any person.
- (7) A former OHS access card holder must return the card within 14 days after it expires, or after he or she ceases to be an access card holder.

This requirement is more of an administrative nature. Nevertheless, requiring cards to be returned takes them out of circulation, minimising the risk that they will be lost, stolen or otherwise find their way into the hands of someone who may use them for a fraudulent purpose. A contravention may attract a fine, albeit, because of the administrative nature of the offence, a small one (a maximum of 5 penalty units).

Section 22J

This section lists offences by other persons in relation to OHS access card holders.

Penalties for contravening the requirements of this section are, in each case, a fine not exceeding 50 penalty units, which is the level set for the most important provisions of this Part.

(1) to (3)

A person must not intentionally hinder or obstruct an OHS access card holder exercising his or her power, or refuse or delay entry.

These provisions support the rights and role of OHS access card holders.

(4)

A person must not take action to intentionally give the impression (or being reckless to giving

such an impression) that something is authorised by this Part.

This is a very broadly worded provision that protects against a range of misrepresentations, such as people pretending to be OHS access card holders and OHS access card holders misrepresenting their powers.

(5)

This provision deals with confidentiality of information. A person must not, except for the purposes of entry, use or disclose information obtained, except in specified circumstances. These include where there is a serious and imminent threat to life or health and safety, or there is reason to suspect an unlawful activity and the disclosure is necessary for its investigation or reporting of the matter to the relevant persons or authorities.

The penalty for a contravention is a maximum fine of 50 penalty units.

This subsection reflects a similar provision in the Commonwealth's FW Act.

This approach is intended to balance the right of confidentiality, with the interests of safety and law enforcement. This is an additional protection to that under section 22H(2) which precludes an OHS access card holder reviewing documents where to do so would breach a State or Commonwealth law.

Section 22K

In the event that the parties cannot resolve matters, this section covers the referral of disputes, questions or issues regarding OHS access to an inspector, and specifies the action that an inspector may take. The actions taken by an inspector relate to seeking resolution first, and if that fails, making an order, based on his or her opinion. Orders may be given orally

(followed up by notice in writing) in order to expedite resolution.

Where the matter deals with a health and safety issue, rather than issuing an order, the inspector must decide whether action under the Act is required. As he or she would in relation to any other OHS matter.

(1)

An issue or dispute or question regarding:

- the right to enter;
- the exercise of the OHS access card holder's powers after entry; or
- a health and safety issue in relation to the workplace,

may be referred to an inspector by:

- an OHS access card holder
- a relevant duty holder in relation to a workplace; or
- a person in charge of a workplace

(2)

An inspector must attempt to resolve the matter between the parties.

(3) to (6)

If the inspector cannot resolve the issue dispute or question, the action he or she can take depends on what the matter was about.

If the issue, dispute or question is about the right to enter, the inspector may:

- order that entry may occur, if he or she is satisfied that the requirements for entry have been satisfied; or
- if he or she is of the opinion that the requirements for entry have not been satisfied, order that the OHS access card holder must not enter until the requirements have been met;
- take any action prescribed in the regulations or that can otherwise be taken under the Act.

If the card holder is ordered not to enter, the inspector must consider whether the inspector should take action under the Act in relation to the issue that gave rise to the attempted entry.

If the issue dispute or question is about the exercise of powers after entry, the inspector may:

- order that exercise of the power must be allowed, if he or she is satisfied that the exercise of it is authorised under this Part; or
- if he or she is of the opinion that the exercise of the power is not authorised, order that the OHS access card holder must not exercise the power;

(7) & (8) If the issue, dispute or question is about a health or safety issue, the inspector must determine whether he or she ought to take action under the Act in relation to the issue. An inspector may issue an order orally or by notice in writing but if it is orally, it must be followed up within 48 hours with a notice in writing.

(9) A person must not, without reasonable excuse, fail to comply with an order. (Penalty not more than 50 penalty units.)

A later amendment ensures that the inspector's notice of the order may be appealed by the recipient, in the same way that other notices issued by inspectors under the Principle Act may be appealed.

(10) An inspector is to also give notice of the outcome to the other parties to the matter, within 48 hours.

Division 3 – Expiry, cancellation and disqualification from holding OHS access cards

Section 22L

This section describes the circumstances under which a person ceases to be an OHS access card holder. These are when he or she:

- ceases to be an officer of the employee organisation;
- ceases to hold an entry permit under the FW Act (unless exempted from this requirement);
- is disqualified by the Director.

In addition the card may be cancelled following written notice to the Director from the card holder or the chief official of the employee organisation.

In relation to the latter, given that the chief official is the person who lodges the original application nominating the person, he or she has been given the power to seek cancellation of the card.

Section 22M

This section deals with processes for disqualification of the OHS access card holder.

The Director has the power to disqualify an OHS access card holder on his or her volition or on application from:

- a worker at;
- a person in charge of; or
- a relevant duty holder in respect of a workplace at which the card holder has exercised a power.

Disqualification may be permanent or for a specified period of time. Alternatively the Director may instead decide to impose conditions on the OHS access card.

The Director must not disqualify a person or impose conditions on the card without giving the holder the opportunity to show cause why the action should not be taken. The Director must give at least 14 days notice in this regard.

Combined with the monetary penalties, this Bill has strong sanctions against the misuse of the provisions. Further, an OHS access card holder risks loss of his or her FW Act entry permit if convicted of a breach of the provisions of this Part or is disqualified from holding an OHS access card.

Section 6

This section amends section 27 of the Principal Act. Section 27 deals with the composition of a health and safety committee and subsection (4) mentions “a union”. Because new Part 3A uses the term “employee organisation”, this amendment substitutes the latter term for “union”, for consistency.

As a consequence, section 27(7), which defines “a union” is redundant and is deleted.

Section 7

This section amends section 41 of the Principal Act regarding appeal rights.

Proposed new section 22K gives inspectors powers to issue orders, either by notice in writing, or orally followed by notice in writing. This amendment extends existing appeal rights against notices issued by inspectors to the new instruments, i.e. notices issued under section 22K(7) or (8).

Section 8

This section amends the schedule of matters for potential regulations to include matters to which the provisions in new Part 3A relate.

It is not intended to draft regulations prior to Part 3A coming into effect.

Section 9

This is a standard repeal provision to remove the empty shell of the Bill after all its provisions have come into effect.