

The Senate

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Employment, Workplace Relations  
and Education Legislation Committee

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Workplace Relations Amendment (Award  
Simplification) Bill 2002

Workplace Relations Amendment (Better  
Bargaining) Bill 2003

Workplace Relations Amendment (Choice in  
Award Coverage) Bill 2004

Workplace Relations Amendment (Simplifying  
Agreement-making) Bill 2004

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# Chapter One

## Majority Report

1.1 The four bills considered by the committee propose to amend the *Workplace Relations Act 1996* (WR Act) by:

- Changing the award safety net provisions and simplifying the allowable award matters, and clarifying certain aspects of the award making system;
- Changing the bargaining and dispute resolution provisions to encourage parties to negotiate at the enterprise level without recourse to industrial action and to settle their differences without arbitral intervention;
- Limiting trade union involvement in wage claims in the small business sector by, amongst other things, providing businesses with information about their rights regarding the processes involved in the roping-in of employers to federal awards; and
- Changing provisions relating to agreement-making at the workplace level.

1.2 These bills reinforce the Government's determination to make further regulatory improvements in the area of workplace relations that will deliver increased flexibility and choice, more jobs, higher incomes, more productivity and fairness to Australians in one of the core facets of their lives – their work. The Government believes that the Australian economy and labour market must continue to change and that refinement of the WR Act must keep pace with changing circumstances and the lessons of past reforms. These bills will ensure that the financial and productivity employment gains of workplace relations reforms since 1996 will continue to be delivered, and that the core areas of workplace relations reform will continue to evolve.

### **The inquiry process**

1.3 The Award Simplification Bill and Choice in Award Coverage Bill were introduced into the House of Representatives on 13 November 2002. The Simplifying Agreement-making Bill and Better Bargaining Bill were introduced into the House of Representatives on 26 June 2002 and 6 November 2003 respectively. The Senate referred the four bills to the committee on 2 March 2004.

1.4 The committee received 8 submissions and conducted a public hearing in Canberra on 15 April 2003. In preparing this report the committee has drawn on evidence it received at that hearing and from the submissions received. Lists of submissions and witnesses are found in appendices to this report.

## Award simplification

1.5 The Award Simplification Bill proposes to simplify allowable award matters by reducing the number of allowable matters from twenty to seventeen, tightening the scope of some existing allowable matters, and making explicit various matters which are not within the scope of allowable award matters. The proposed changes would see the following removed from allowable award matters: skill-based career paths, bonuses (other than for outworkers), long service leave, notice of termination and jury service.

1.6 Other provisions of the bill provide for a twelve month review of awards during which it is expected that awards will be amended so that they comply with the bill and that non-allowable award provisions will become ineffective by the end of the period.<sup>1</sup>

1.7 The purpose of the amendments is to fundamentally refocus the role of the award system as a safety net of minimum wages to protect the low paid and their conditions of employment, and provide for more flexibility in workplace regulation and less prescription in awards than the existing arrangements. In providing a safety net, the amendments are intended to ensure that enterprise agreements, such as certified agreements and Australian Workplace Agreements, remain the primary focus of the federal workplace relations system, thus providing a basis for increased productivity and reduced costs on businesses.<sup>2</sup>

1.8 Under the expansionist approach taken by the Australian Industrial Relations Commission (AIRC) to the application of section 89A of the WR Act, awards continue to contain provisions that are outside the intended scope of the allowable award matters:

As a consequence, many awards continue to contain unnecessary detail and administrative regulation...provisions that hinder productivity and the efficient performance of work...regulate matters that are more appropriately dealt with at the workplace level...and impose costs on businesses in terms of productivity and unnecessary regulation.<sup>3</sup>

1.9 The Department of Employment and Workplace Relations (DEWR) noted in its submission that the award simplification process which commenced in 1997 (in which 1480 awards have been set aside and over 1220 awards simplified) has been beneficial to employers and employees. Award simplification has established a more streamlined safety net of minimum wages and conditions of employment and has also facilitated agreement making. DEWR is adamant that award simplification 'leads to

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1 Workplace Relations Amendment (Award Simplification) Bill 2002, *Bills Digest*, No. 128 2002-03, Department of the Parliamentary Library 2003, p.4

2 Workplace Relations Amendment (Award Simplification) Bill 2002, Explanatory Memorandum, p.6

3 *ibid.*, p.4



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more productive workplaces', whereas overly complex and restrictive awards 'can act as a barrier to continued employment growth'.<sup>4</sup>

1.10 The Australian Chamber of Commerce and Industry (ACCI) supports the bill, with the exception of the proposal to remove long service leave as an allowable matter if it would impose an additional cost on employers. ACCI believes that the proposed amendments will qualitatively improve the operation of the award system and the workplace relations system as a whole. In particular, ACCI argues that awards are unnecessarily detailed, prescriptive and unsuited to their fundamental purpose under the WR Act. It also expresses some apprehension that awards operating at an 'over the safety net level' actively discourage agreement making, additional productivity and efficiency gains and economic improvement.<sup>5</sup> Mr Scott Barklamb, ACCI's Manager of Workplace Relations, told the committee that there are two main benefits of award simplification:

There would be a much clearer articulation of each of the particular award matters that are addressed in the bill. Further simplification would...ensure that you do not have to look to multiple documents to examine things like jury leave. We think that the primary benefits of that bill would flow from a more concise safety net providing greater confidence in bargaining and a much easier assessment of particular matters addressed in bargaining. The particular matters addressed in that bill...are not direct simplifications that will deliver an instant dollar benefit in workplaces. The benefits lie in assisting and furthering the bargaining system.<sup>6</sup>

1.11 ACCI and DEWR argued in their submissions that a further round of targeted award simplification would reflect the evolutionary nature of the fundamental changes to regulation and policy introduced in 1996-97, or what ACCI describes as the 'experiential or "learning" element' to the proposed refinement of allowable matters.<sup>7</sup> ACCI's submission stresses that the WR Act is not 'perfect, inviolate or beyond amendment' and that the proposed simplification of awards amounts to refinement and improvement of the system that reflects 'ongoing experiences and lessons'.<sup>8</sup>

1.12 DEWR agrees with this assessment by noting that while it is important to retain a safety net of award conditions appropriate for current working conditions, over time the safety net will need to change and evolve in order to be relevant to employers and employees.<sup>9</sup>

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4 Submission No. 6, DEWR, p.14

5 Submission No. 5, ACCI, p.8

6 Mr Scott Barklamb, ACCI, *Hansard*, 15 April 2004, p.4

7 Submission No. 5, ACCI, p.1

8 Submission No. 5, ACCI, p.1

9 Submission No. 6, DEWR, p.15

1.13 The committee majority notes that industry bodies have expressed some reservations with specific proposals of the bill. The Australian Industry Group (AiG), for example, supports the award simplification process, the move away from a uniform approach to the regulation of wages and conditions, and a focus on the setting of wages and conditions at the enterprise level. However, it does not support removal of skill-based career paths, long service leave or jury service as allowable matters, and recommends modification of some of the other proposed amendments.<sup>10</sup>

1.14 While the AiG supports this bill, it raised in its submission four issues for the Committee to consider:

- Whether the gains from a further round of award simplification justify the resources which the AIRC and other registered organisations would need to devote to the process;
- Whether the current focus should be on award rationalisation instead of award simplification;
- Whether the removal of federal awards may force employers to apply both a federal and state award to the same group of employees, with different awards applying to different subject matters; and
- Whether removing long service leave as an allowable matter would move in the opposite direction to the goal of eventually achieving a unitary workplace relations system in Australia.<sup>11</sup>

1.15 Unions also expressed concern that the proposed removal of skill-based career paths from the list of allowable award matters will erode Australia's skills base. The Australian Council of Trade Unions (ACTU), for example, told the committee that repeal of provisions designed to implement career paths linked to classification structures will remove award entitlements such as training programs for career development, provisions in relation to promotion and leave to sit exams.<sup>12</sup>

1.16 The committee majority, however, does not believe the proposed amendment will have a negative impact on Australia's skills base. It notes the evidence provided at a public hearing by DEWR which suggests that removal of skill based career paths from the list of allowable award matters will promote skills formation across Australia:

...the government considers that matters associated with training and education are generally best dealt with by agreement between employers and employees at the workplace level. By allowing employers and employees to respond quickly to changing skills needs and to develop training and education arrangements that meet the particular needs and

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10 The Ai Group's position on each of the proposed amendments contained in the bill is presented in table form. Submission No. 8A, Ai Group, pp.9-17

11 Submission No. 8A, Ai Group, pp.6-8

12 Submission No. 1, ACTU, p.8

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circumstances of their workplace rather than a one-size-fits-all industry based arrangements prescribed in awards, the government believes that skills formation will be boosted.<sup>13</sup>

1.17 The committee majority supports this bill. It believes that the proposed amendments focus awards on their role as a safety net to protect the low paid. The amendments provide for more flexibility in workplace regulation and less prescription in awards, and provide a basis for increased productivity and reduced costs for businesses, especially small business.

### **Bargaining and dispute resolution**

1.18 In his second reading speech of 6 November 2003, the Minister for Employment and Workplace Relations stated that the government is committed to promoting:

...a more inclusive and cooperative workplace system where employers and employees talk to each other, making arrangements on wages, conditions and work and family responsibilities subject to a safety net of minimum wages...

This Bill will ensure that the bargaining process continues to benefit workplaces by ensuring that this process is as user friendly as possible.<sup>14</sup>

1.19 The Better Bargaining Bill proposes amendments to the WR Act that would encourage and assist parties to negotiate at the enterprise level without recourse to industrial action and to settle their differences without arbitral intervention. Specifically, the bill proposes to empower the AIRC to, amongst other things, order a temporary suspension of bargaining periods to provide for a cooling-off period during the negotiation of a certified agreement. During the cooling-off period protected industrial action would not be permitted. When deciding whether to order a cooling-off period, the Commission would be required to consider whether the suspension would assist the parties to resolve the matters at issue, the duration of the industrial action, the public interest and the objects of the WR Act.<sup>15</sup>

1.20 The Commission would also be able to order a cooling-off period if it is satisfied that industrial action is threatening to cause significant harm to a directly affected third party.<sup>16</sup> The Commission would need to consider, amongst other things,

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13 Mr James Smythe, DEWR, *Hansard*, 15 April 2004, p.27

14 Mr Kevin Andrews, Second Reading Speech, *Workplace Relations Amendment (Better Bargaining) Bill 2003*, 6 November 2003

15 Submission No. 6, DEWR, p.25

16 Workplace Relations Amendment (Better Bargaining) Bill 2003, Explanatory Memorandum, p.1

the extent to which the action effects the interests of a third party who is an employee, and whether the third party is particularly vulnerable to the effects of the action.<sup>17</sup>

1.21 Should a third party successfully apply for the suspension of a bargaining period, industrial action which would otherwise have been protected will be rendered unprotected during the term of the suspensions. Under the proposed amendment, applicants would need to show that the industrial action was threatening to cause significant harm.<sup>18</sup>

1.22 The bill will ensure that industrial action cannot be taken from the time an agreement comes into operation until its expiry date, or in relation to a claim which does not pertain to the employment relationship, or where two or more employers are being treated as a single employer.<sup>19</sup> The suspension of protected action means that a party which continues with industrial dispute is liable to common law damages.<sup>20</sup>

1.23 The bill aims to overturn the consequences of the Federal Court's *Emwest* and *Electrolux* decisions which, according to AiG, placed 'unusual interpretations on the existing legislative provisions'.<sup>21</sup> The Federal Court found in its *Emwest* decision that the WR Act does not always prevent unions from engaging in industrial action during the life of a certified agreement. According to ACCI, the law in the wake of *Emwest* is inconsistent with the development of the right to strike in Australia from the early 1990s: 'The right to strike does not legitimately extend to the life of agreements, but is confined to the period of agreement negotiation and renegotiation'.<sup>22</sup>

1.24 In its *Electrolux* decision, the Federal Court extended union rights to take industrial action to matters which extend beyond the employment relationship. AiG told the committee that the decision enables unions to organise protected industrial action in respect of a wide range of social and political issues, which is inconsistent with the objects of the WR Act.<sup>23</sup>

1.25 AiG is highly critical of the impact of the *Emwest* decision on Australia's industrial relations system, claiming at a public hearing that the decision:

...threatens the integrity of Australia's enterprise bargaining system and exposes companies to claims being pursued during the life of their

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17 Submission No. 6, DEWR, p.25

18 Submission No. 6, DEWR, pp.28-29

19 Workplace Relations Amendment (Better Bargaining) Bill 2003, Explanatory Memorandum, p.1

20 Workplace Relations Amendment (Better Bargaining) Bill 2003, *Bills Digest*, No. 77 2003-04, Department of the Parliamentary Library 2004, p.6

21 Mr Stephen Smith, Ai Group, *Hansard*, 15 April 2004, p.21

22 Submission No. 5, ACCI, p.16

23 Mr Stephen Smith, Ai Group, *Hansard*, 15 April 2004, p.19

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enterprise agreement. This decision has created an unworkable bargaining regime and ongoing risks for employers.<sup>24</sup>

1.26 AiG identified three areas of risk arising from the *Emwest* decision, especially for industries in the manufacturing and construction sectors. First, a union might take protected action during the life of an agreement over claims which were not the subject of enterprise bargaining between the parties. Second, a union might take protected action during the life of an agreement over new claims which were not pursued during enterprise bargaining. Third, a dispute might arise in the workplace during the life of an agreement over an issue which was not dealt with during the enterprise negotiations and a union might organise protected industrial action to further its position in that dispute.<sup>25</sup>

1.27 Both AiG and ACCI strongly support this bill principally because it enables employers, employees and unions to make binding agreements which preclude protected action during the life of an agreement. The Ai Group's submission concludes on an emphatic note: 'All of the provisions of the Bill are very important and have substantial merit. It is essential that the bill be passed without delay'.<sup>26</sup>

1.28 ACCI agrees with AiG's assessment that the proposed amendments are balanced and consistent with the goals of the existing workplace relations system:

Put simply, employers in particular need to be able...to do a deal and have that deal deliver a period of industrial peace following the fractiousness of the negotiation period...

There is no legitimate basis for industrial action to be available during the life of agreements entered into in good faith, particularly where that action is in pursuit of new or additional claims which were not pursued in the first instance.<sup>27</sup>

1.29 The ACTU and several other unions are critical of measures contained in this bill. Their submissions argued that the bill will undermine the bargaining power of employees and significantly strengthen the ability of employers in the bargaining process.<sup>28</sup> In considering the evidence the committee majority believes that unions have exaggerated the risks associated with the bill, overstated the scope of the measures being proposed, and overlooked a number of positive aspects of the proposed amendments.

1.30 In reaching this conclusion, the committee majority takes particular note of the evidence provided by DEWR at a public hearing:

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24 *ibid.*

25 *ibid.*

26 Submission No. 8B, Ai Group, p.5

27 Submission No. 5, ACCI, p.15

28 Submission No. 1, ACTU, p.19, Submission No. 2, SDA, p.4

Firstly, suspension for cooling-off is only temporary. Protected action can recommence at the end of the suspension period. Secondly, both employers and employees can benefit from cooling-off periods. Thirdly, the commission, in considering whether or not to exercise its discretion to order a temporary suspension, must have regard to whether suspending the bargaining period would be beneficial to the negotiating parties because it would assist resolving the matters at issue. The thrust of the amendment is to facilitate, not to remove bargaining strength.<sup>29</sup>

1.31 The committee majority notes that cooling-off periods can play a valuable role in the negotiation process by encouraging voluntary mediation and conciliation, thereby allowing parties more time to negotiate without the pressure of continued industrial action. Cooling-off periods may also act as a circuit-breaker in cases of stalemate or protracted industrial dispute, a point overlooked by unions in their evidence to the inquiry. The committee majority is also concerned that the absence of any provisions for cooling-off periods may act as an incentive for parties to continue with industrial action, resulting in substantial long-term costs to employers, employees and to productive workplace relationships.<sup>30</sup>

1.32 The committee majority supports this bill. In considering the costs of suspending bargaining periods and introducing cooling-off periods – for example, it will mean that the WR Act will contain another regulatory mechanism – the committee majority concludes that the gains from such a suspension mechanism outweigh any potential costs. The committee majority firmly believes that balancing the rights and responsibilities of employees and employers is best achieved by allowing parties involved in a protracted dispute to resolve issues without further industrial action.

### **Choice in award coverage**

1.33 Section 99 of the WR Act requires an organisation or an employer to notify the AIRC as soon as it becomes aware of the existence of an alleged industrial dispute. The current practice, which has evolved over many years, involves serving 'logs of claims' to provide the Commission with evidence of the existence of an industrial dispute. Although this practice is an integral part of the federal conciliation and arbitration system, the committee majority is concerned that there is currently little regulation of the log of claims process.

1.34 The main objective of the Choice in Award Coverage Bill is to provide small businesses with appropriate and sufficient information about their rights regarding, and the processes involved with, logs of claims, which is consistent with the government's policy that all businesses need more information and notice when they

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29 Mr James Smythe, DEWR, *Hansard*, 15 April 2004, p.27

30 Workplace Relations Amendment (Better Bargaining) Bill 2003, Explanatory Memorandum, pp.2-3

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receive a log of claims. The bill restrains the ability of unions to rope small businesses which employ no union members into the federal jurisdiction. Further, the bill requires the Commission to inquire into the views of unrepresented small business employers potentially affected by a roping-in claim.<sup>31</sup>

1.35 The then Minister for Employment and Workplace Relations stated during his second reading speech that the amendments will enhance the ability of small business to resist attempts to rope them into federal awards. One way of achieving this is to make the Commission more responsive to the needs of small business:

Many small businesses are not members of registered employer organisations and, consequently, are not represented in the Australian Industrial Relations Commission's hearings and cases. They often do not have the resources or opportunity to influence Commission proceedings and outcomes.<sup>32</sup>

1.36 Significantly, the bill will ensure that more adequate time frames are in place so that businesses are able to participate more effectively in the dispute resolution process. Under proposed section 101A, for example, the Commission is not able to find (under section 101) that an industrial dispute exists unless at least 28 days have elapsed between the day the log of claims was served and the day the dispute was notified to the Commission under section 99.<sup>33</sup>

1.37 AiG in its submission paid particular attention to how the procedural requirements set out in the bill are workable and would further the objective of making the Commission's processes more responsive to the needs of small businesses.<sup>34</sup>

1.38 The committee majority agrees with this assessment. It is particularly concerned about how bewildering it can be for small businesses which are roped into federal awards, especially in cases where logs of claims, which are typically very long and complex documents, are ambit in nature. The committee majority notes the likely impact of logs of claims on small businesses, as explained by ACCI in its written submission:

- a. Small business people are very busy running businesses, paying the bills and struggling to pay wages.
- b. They then receive a written, legalistic letter of claim from a union, which has never attended their workplace, and has to their knowledge no membership amongst their employees.

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31 Workplace Relations Amendment (Choice in Award Coverage) Bill 2002, Explanatory Memorandum

32 Mr Tony Abbott, Second Reading Speech, *Workplace Relations Amendment (Choice in Award Coverage) Bill 2004*, 13 November 2002

33 Submission No. 6, DEWR, p.50

34 Submission No. 8, Ai Group, p.18

- c. This claim is for wages perhaps three or four times what they are paying, for leave, and for absurd things like months and months off work, fully employer funded vehicles, one's birthday off work etc.<sup>35</sup>

1.39 The proposed amendments to Part VI (Dispute Prevention and Settlement) and Part IX (Registered Organisations) are drawn from the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. The amendments are directed towards:

- Restraining the ability of the Commission to find an industrial dispute against an employer employing fewer than 20 people and which does not employ a member of the organisation serving the log of claims; and
- Requiring the Commission to seek the views of small businesses that have notified it.<sup>36</sup>

1.40 Several unions, including the ACTU, the Communications Electrical Plumbing Union (CPEU) and the Shop, Distributive & Allied Employees' Association (SDA) expressed concern with proposed section 101B relating to small businesses. The section states that an employer who has notified the Commission that it employs less than 20 employees cannot be made party to a dispute finding unless it employs at least one union member.

1.41 The ACTU in its submission maintained that: '...it is not practical or desirable for unions to be required to carry out the type of investigation which would be necessary to ascertain the precise number of employees employed by an employer on a particular day'.<sup>37</sup> It also believes that an employer would not find it difficult to work out the identity of a union member, and might take measures to ensure that no union members are employed.

1.42 The concerns are captured in the submission by SDA:

What the government clearly seeks to do in relation to proposed Section 101B is to create a sub-class of employees who will not be protected by awards of the Commission...

This is...a very clear and deliberate intention to create different standards of employment between those persons who are members of unions and those who are not.<sup>38</sup>

1.43 The committee majority notes that these concerns are more than adequately answered in the submission from DEWR, which places the proposed amendments in a

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35 Submission No. 5, ACCI, p.24

36 Submission No. 6, DEWR, pp.49-50

37 Submission No. 1, ACTU, p.31

38 Submission No. 2, SDA, p.12



broader policy context. DEWR argued that the proposed amendments are important because they will:

- Ensure that demands made through the log of claims process are matters over which the Commission may exercise jurisdiction;
- Require parties to more carefully consider the demands made in a log of claims and to devote greater attention to the drafting of logs of claims; and
- Prevent the Commission and the parties wasting time and money dealing with claims for matters that could not be included in an award.<sup>39</sup>

1.44 The Committee majority supports this bill and finds that the concerns raised by unions amount to an overreaction to sensible proposals for legislative reform. It believes the bill is an important step towards addressing the needs and circumstances of small business, reducing unjustified third party interference in small business activities, and allowing small business to choose the most appropriate industrial instrument for their business.

### **Simplifying agreement-making**

1.45 The key reforms to be implemented by the Simplifying Agreement-making Bill are contained in 2 schedules. The first contains amendments that will simplify the procedures for making Australian Workplace Agreements (AWAs), and the second contains amendments relating to certified agreements (CAs).

1.46 The then Minister for Workplace Relations stated in his second reading speech that the proposed amendments to making certified agreements are intended to:

...make agreement making at the workplace level easier and more widely accessible; reduce the delays, formality and cost involved in making a certified agreement; prevent unwarranted interference by third parties in agreement making; and remove barriers to the effective exercise of agreement making choices.<sup>40</sup>

1.47 The main objectives of the AWA provisions of the bill are to:

- Simplify and consolidate procedures for making AWAs;
- Remove the delay before an AWA can come into effect;
- Encourage greater use of AWAs; and
- Enable AWAs to be tailored to suit individual employees.<sup>41</sup>

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39 Submission No. 6, DEWR, p.51

40 Hon Tony Abbott MP, Second Reading Speech, *Hansard*, 26 June 2002, p.4380

41 Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2004, Revised Explanatory Memorandum, p.10

1.48 According to DEWR, the bill is an important part of the government's workplace relations reform agenda. For example, the proposed changes for making and approving AWAs will:

...simplify and consolidate the AWA approval process and remove the unnecessary delay before an AWA comes into effect. This is consistent with the Government's objective of facilitating greater flexibility and choice in agreement making, so that agreements can better reflect the local needs and circumstances of employers and employees.<sup>42</sup>

1.49 In relation to certified agreements, the bill generally replicates Schedule 4 of the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. However, the proposed amendments provide for an option for certified agreements to have a nominal life of five years if the Commission considers it appropriate in all the circumstances.<sup>43</sup>

1.50 AiG in its submission strongly supported the proposed extension to the maximum term for a certified agreement to five years:

The existing three year term for certified agreements is overly restrictive and operates against the interests of both employers and employees in some circumstances...It is difficult to maintain a stable workplace relations environment on a project comprising multiple employers...The existing three year limit on certified agreements can expose companies to claims for higher wages and conditions, backed up by protected industrial action, at a critical time during the construction of a project.<sup>44</sup>

1.51 The ACTU expressed concern that the proposed changes to the AWA and CA provisions will make it easier for employers to obtain approval for individual agreements, facilitate the making of non-union agreements and exclude unions from collective bargaining.<sup>45</sup>

1.52 Unions also repeated their opposition to both the concept of individual agreements as represented by AWAs and the current process for negotiating individual agreements. According to SDA:

The broad secrecy provisions surrounding the making of AWAs is and remains a matter of extreme concern...If AWAs are to remain then rather than simplify procedures the Parliament of Australia should ensure that AWAs are absolutely transparent and in particular that the process for approving AWAs is totally transparent and available for public scrutiny.<sup>46</sup>

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42 Submission No. 6, DEWR, p.63

43 Submission No. 6, DEWR, p.60

44 Submission No. 8B, Ai Group, pp.15-16

45 Submission No. 1, ACTU, pp.32, 33

46 Submission No. 2, SDA, p.27

1.53 The committee majority does not accept the basis of union criticism of the proposed amendments and rejects outright union opposition to AWAs. It believes that AWAs have found significant support among both employers and employees and are a permanent feature of Australia's workplace relations system. However, it finds that the process of negotiating and implementing AWAs needs to be improved to assist employers and employees to directly negotiate their terms and conditions of employment at the workplace level.

1.54 Evidence provided by ACCI, AiG and DEWR shows that the existing agreement-making provisions for AWAs are too complex, time-consuming and costly and prevent employers and employees from immediately accessing the terms and conditions of employment that they have directly negotiated.<sup>47</sup> The committee majority is satisfied that the proposed amendments will not only overcome these shortcomings but will provide appropriate safeguards for the parties to an AWA and strengthen the Employment Advocate's role in relation to compliance.

1.55 The committee majority acknowledges that under the proposed amendments to AWA and CA procedures, employees and employers who have used the federal agreement-making system in its present form will have to acquaint themselves with new arrangements for making and certifying agreements. This adjustment will have benefits thereafter. On balance, the committee majority believes that the proposed amendments to AWA and CA negotiation processes will, amongst other things, substantially reduce the transaction costs of the agreement-making process and increase the attractiveness of agreement-making by removing impediments to genuine choice.<sup>48</sup>

1.56 The committee majority supports this bill because it will make agreement making easier and more widely accessible, reduce the formality and cost involved in having an agreement certified, prevent unwarranted interference by third parties in agreement making, and introduce an option of allowing certified agreements to have an extended nominal life of up to five years.

## **Conclusion**

1.57 The committee majority **recommends** that these bills be passed without amendment.

**Senator David Johnston**  
**Acting Chair**

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47 Submission No. 6, DEWR, p.62

48 Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2004, Revised Explanatory Memorandum, pp. 8, 13



## Chapter Two

### Labor Senators' Report

2.1 Many of the provisions of these four bills have been examined by the Parliament on previous occasions and have repeatedly failed to pass the Senate. Most of the measures being proposed can be found in one form or another in the Government's second wave industrial relations legislation, in particular the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (known as the MOJO bill).<sup>1</sup> The bill was rejected by the Senate principally because it was regarded as unfair to working Australians. The Government has learnt nothing from the rejection of its legislation. It has not attempted to respond to any of the objections to its past efforts to legislate.

2.2 The arguments of the Opposition to the changes proposed in 1999 remain essentially the same today, especially those relating to proposals to remove skill based career paths from awards, make training and education non-allowable award matters, and further weaken the power of the Australian Industrial Relations Commission (AIRC) and reduce its independence.

2.3 Labor senators, therefore, see no compelling reasons to justify the claim by employer groups that the bills have substantial merit and should be passed immediately. They find that the bills reflect the Government's aggressive ideological commitment to a workplace relations 'reform' agenda that is without broader community support.

2.4 The Opposition finds that over the past decade, the Government's workplace reforms have harmed thousands of employees across the country, driven up the rate of casualisation, increased the numbers of the working poor to unprecedented levels, and placed Australia completely at odds with international labour standards. There is no credibility in the Government's claim that the bills are urgent given the current historically low level of industrial disputation. These bills represent a further attack on the entitlements of ordinary workers.

2.5 In the first part of this report Labor senators examine a number of inconsistencies and omissions in evidence from industry bodies and the Department of Employment and Workplace Relations (DEWR) which the committee majority used as a basis for its conclusion and wholehearted support for the bills. It then outlines the Labor senators' main concerns with each of the four bills. Labor senators do not see any merit in these bills and remain steadfast in opposing them. They believe the bills should not be passed by the Senate.

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1 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, November 1999

## Unsupported claims by employer groups and DEWR

2.6 Labor senators are concerned that the committee majority did not address all of the evidence available to it in reaching its conclusions. It notes that the committee majority not only dismissed as overblown the concerns expressed by a number of unions about the likely impact of these bills on the rights and conditions of award dependant workers. It also chose to ignore a range of compelling criticisms of the proposed amendments by unions which show that the Government has embarked on another campaign to attack the wages and conditions of ordinary workers.

2.7 The submissions by the Australian Chamber of Commerce and Industry (ACCI) and DEWR, which were used extensively by the committee majority in its report, are long and descriptive documents which provided neither a compelling and reasoned case for the reform package, nor the evidence to support a number of contentious claims linking the proposed amendments to productivity and efficiency gains and employment growth. Two examples will suffice. Mid-way through its submission, ACCI asserted that refocusing the role of the award system as a genuine safety net of minimum wages will help secure gains in productivity, unlock further gains in efficiency, and ensure that employees and employers have access to bargaining and agreement making.<sup>2</sup> Similarly, DEWR's submission accepts as a given that award simplification leads to more productive workplaces and that complex and restrictive awards can act as a barrier to continued employment growth.<sup>3</sup> These assertions by ACCI and DEWR are highly speculative, yet they are presented as uncontentious statements of fact.

2.8 The assertions were not supported by any data or analysis of the award simplification reform process. ACCI told the committee that its assertions were not based on any particular econometric modelling but on feedback from its members and the cost-benefit analyses done by some employers. When Government and Labor senators asked for evidence to demonstrate that shrinking awards to a minimum safety net produces further productivity and efficiency gains, the following general response was provided:

We have certainly had gains in productivity and efficiency in the wake of the reforms of the early nineties and in 1996...It is the clear position of our members in a wide range of industries that their industry awards would benefit from further simplification.<sup>4</sup>

2.9 Of equal concern to Labor senators is that ACCI and the Australian Industry Group (AiG) could not explain at a public hearing how they reached different conclusions in their written submissions on a number of the proposed amendments. This is an important issue because they claimed to represent the interests of the same

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2 Submission No. 5, ACCI, p.8

3 Submission No. 6, DEWR, p.14

4 Mr Scott Barklamb, ACCI, *Hansard*, 15 April 2004, p.7

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core constituents – employer organisations in all states and territories – and that their arguments were based on feedback provided by member organisations. Labor senators conclude either that member organisations are providing employer groups with different information or, more likely, that employer groups are drawing widely divergent conclusions from the same (or similar) information depending on their vested interests.

2.10 AiG, for instance, unlike ACCI, supports a comprehensive, as opposed to a minimum, award safety net and does not believe that any of the alleged benefits of another round of award simplification justifies the significant costs involved. Discrepancies like this raise serious doubts about the integrity of the claims made by peak employer bodies on behalf of the bills.

2.11 For these and other reasons discussed later in this report, Labor senators do not believe that the evidence presented by employer bodies and DEWR supports the contention that the proposed reforms are urgent, necessary or desirable. In fact, AiG's reservations about the award simplification bill conveyed in its submission leave Labor senators puzzled by the Group's strong support for the objectives of the bill at a public hearing. It is as if the Group's initial reservations with a number of the proposed amendments were swept aside at a public hearing by its stronger commitment to the Government's reform agenda in this area. The Opposition believes that AiG's submission alone provides sufficient grounds to reject the award simplification bill, while DEWR's submission provides at best a half-hearted attempt to justify why the four bills are necessary and urgent.

2.12 The Opposition concludes that submissions by employer groups and DEWR do not provide any evidence to support the committee majority's contentious claims about the alleged productivity gains from the proposed amendments, or the need for continuous regulatory improvement of the workplace relations reforms introduced in the mid-1990s.

2.13 The report now turns to Labor senators' specific concerns with each of the four bills.

### **Award simplification bill – stripping employee entitlements**

2.14 The ACTU argued in its submission that the award simplification bill will strip more entitlements from employees, particularly those who are dependant on awards. It provided evidence to show that the most award dependant industry sectors – accommodation, cafes and restaurants; retail trade; and health and community services – experienced levels of growth in output and employment exceeding the all-industry average for the period 1996-2003, yet real award wage increases over this period fell short of productivity growth and profits.<sup>5</sup> These figures show that the economic case for further reducing, or stripping, the number of allowable awards is largely hollow. In

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5 Submission No. 1, ACTU, pp.4-5

fact, the Opposition does not believe there is any evidence which points to substantial gains to employers and employees from award simplification.

2.15 The Shop, Distributive & Allied Employees' Association (SDA) was equally concerned about the adverse effect of further stripping award entitlements on the capacity for employees to negotiate over entitlements:

Awards simplification does not promote enterprise bargaining over matters which are not contained in awards but rather promotes enterprise bargaining only over the mix of matters that remain in awards. Employers have no legal obligation to provide for any term or condition of employment not required to be provided by an award of the Australian Industrial Relations Commission...The losers will be Australian workers, the winners will clearly be employers who can...achieve significant reductions in the terms and conditions of employment...through enterprise bargaining processes based upon a stripped back award system.<sup>6</sup>

2.16 The affect of the further removal of awards on employees is likely to be extensive. To take one example, the proposed removal of skill based career paths from the list of allowable award matters is strongly criticised by unions. As the CEPU stated in its submission, such a move will not only weaken the no disadvantage test by which enterprise agreements are measured against relevant awards, it contradicts the Government's own national training framework which is designed to ensure that broad based and portable skills are developed.<sup>7</sup>

2.17 Labor senators also believe that removing skill based career paths from awards is ill-informed and will result in lower skills and lower wages for many workers:

Removing skill based career paths...from awards is the Liberals' latest step down their road to a low-skills, low-wage Australia. In the 21<sup>st</sup> century the key sources of productivity growth are skills and ideas...What has this government got against skills formation?...Why does it want to strip out skills formation from the awards system?...because this government has failed to invest properly in skills formation in this country, jeopardising future productivity growth and the prosperity that flows from it.<sup>8</sup>

2.18 The Opposition supports the view of the AIRC that provision of skill based career structures in awards is an important encouragement to workers to improve their skills, contribute to higher productivity and advance to higher wages.<sup>9</sup>

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6 Submission No. 2, SDA, p.3

7 Submission No. 3, CEPU, pp.10-11

8 Craig Emerson MP, Second Reading Speech, *House Hansard*, 25 March 2004

9 Submission No. 3, CEPU, p.7. The AIRC expressed this view in its 1997 review of the safety net.



2.19 Labor senators are also concerned about the effects of removing provisions regarding consultation, education and training, and note the view of the ACTU that such a provision:

...[sends] entirely the wrong message to the workplace in an environment where working cooperatively, and focusing on education and training are vital to our economic position in a competitive world, particularly given the greater attention being given to these issues in Europe, including the UK.<sup>10</sup>

2.20 Labor senators agree with this assessment and express their concern that DEWR could neither satisfactorily explain the Government's policy that the safety net should be a basic minimum set of entitlements, nor provide guidance on what the basic minimum should be. The department could only tell Labor senators that:

The word 'fair' does continue to figure in the object of the act and in the considerations to be taken into account when formulating the safety net. The safety net is designed to be something that is fair and reasonable...it is about pay and conditions for the work that is being done.<sup>11</sup>

2.21 The Opposition agrees with union concerns that the resources which the AIRC and other industrial parties would need to devote to a process of further award simplification should be spent on resolving disputes and serving their members. According to the ACTU, the current round of award simplification:

...must have one of the highest transaction costs of any similar process that we have seen. A new award simplification process would simply drag employer organisations and unions into a kind of make-work scheme in which every wage rate and every award provision would have to be examined in the context of not only whether or not it was allowable but whether it met the new criterion of only basic minimum entitlements being in awards—whatever that means.<sup>12</sup>

2.22 There is also a concern that some of the proposed changes to awards, especially removing long service leave, may result in current uniform prescriptions for a particular entitlement being open to state and territory determination. According to one assessment, this invites the prospect of not only differing prescriptions but also possibly more favourable prescriptions than the current federal standards.<sup>13</sup> Labor senators note that not only could this have adverse consequences for both employers and employees, it is inconsistent with the Government's own stated objective of having a unitary industrial relations system:

The removal of long service leave from awards would particularly affect employers operating in more than one state, making it much more difficult

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10 Submission No. 1, ACTU, p.7

11 Mr James Smythe, DEWR, *Hansard*, 15 April 2004, p.31

12 Ms Linda Rubinstein, ACTU, *Hansard*, 15 April 2004, p.14

13 Workplace Relations Amendment (Award Simplification) Bill 2002, *Bills Digest*, No. 128 2002–03, Department of the Parliamentary Library 2003, p.11

for them to operate. It would mean that a multistate business that currently has one award standing for long service leave would instead have to apply several different long service leave standards, depending on which state the workers were in.<sup>14</sup>

### **Better bargaining bill – weakening the bargaining power of employees**

2.23 Labor senators believe that this is one of the most regressive workplace relations bills introduced in the parliament under the banner of market deregulation, since the first wave of industrial legislation in 1996. Contrary to Government rhetoric about how this bill will benefit workplaces by ensuring that enterprise bargaining processes are fair and user friendly, Labor senators maintain the bill will restrict the right of workers to take industrial action in the event of a true disagreement with their employers. The effect will be to inflame disputes rather than help to resolve them. The shadow minister for workplace relations stated in his second reading speech that:

...the bill does not help to resolve disputes. The bill does nothing to assist parties who are seeking to resolve a dispute; it simply makes it impossible to take protected industrial action. The bill takes away the right to take industrial action and does not resolve any outstanding issues between the employer and employees.<sup>15</sup>

2.24 The Labor senators' overriding concern with this bill is that it is an attempt to strengthen the ability of employers in the bargaining process and significantly weaken the position of workers and their organisations.

2.25 The SDA notes in its submission that the proposed provisions relating to cooling off periods and the protection of innocent third parties have a superficial attractiveness to them and resonate with the broader community's concern about the impact of protected industrial action. However, the Opposition agrees with SDA's conclusion that the provisions are 'extremely offensive' and 'one-sided' because:

...they will achieve nothing other than strengthening the hands of employers in bargaining processes, as well as strengthening the hands of employers generally by effectively being able to preclude the taking of industrial action where a third party employer may be damaged. It would be very easy in this sense for effective collusion between employers, or through employer organisations, to create the necessary dynamics to invoke a termination of the bargaining period...<sup>16</sup>

2.26 Labor senators find that while the Government's claim about protecting third party employers appears on the surface to be reasonable, it is at best a disingenuous proposal. As the ACTU pointed out at a public hearing, it is another example of

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14 Mr Craig Emerson MP, Second Reading Speech, *House Hansard*, 25 March 2004

15 Mr Craig Emerson MP, Second Reading Speech, *House Hansard*, 16 February 2004

16 Submission No. 2, SDA, p. 5

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Orwellian language being used to reduce the power of employees.<sup>17</sup> The suspension of a bargaining period if the industrial action is threatening to cause significant harm to a third party has the potential to apply to most, if not all, types of industrial action:

The very nature of industrial action is that there will be some harm to third parties, including proprietors of businesses who are reliant on the business involved in the industrial action.<sup>18</sup>

2.27 The Opposition's concerns with the bill do not stop there. What the bill proposes is completely at odds both with the way industrial issues are negotiated in the modern workplace and with the current low level of industrial disputation.

2.28 Labor senators see no merit in the part of this Bill that would, in effect, prevent parties from agreeing to leave some matters unresolved during bargaining, allowing these issues to be further negotiated if the need arises during the life of an agreement. Unless the issue is covered in an agreement, it makes sense that changes in circumstances might legitimately generate claims from employees and their organisations.<sup>19</sup> There are occasions where parties to a dispute find it convenient to have single-issue enterprise agreements; that is, to specifically agree to leave a matter for resolution during the term of the agreement. As the ACTU stated in its submission:

The effect of this [bill] would be that such agreements would prevent any industrial action occurring in relation to any issue throughout the life of an agreement, even where postponement of bargaining on that issue had been contemplated by the parties prior to the making of the agreement. In this way the [bill] would act as an unnecessary fetter on the parties' freedom to bargain and to negotiate site-specific arrangements for particular types of projects.<sup>20</sup>

2.29 If parties are concerned about certainty during the life of an agreement, they can simply include a 'no extra claims clause' in their agreement, as is commonly done. This was acknowledged by the ACTU:

In most situations agreements are all-encompassing. Accordingly, protected industrial action is effectively ruled out for the life of the agreement.<sup>21</sup>

2.30 Labor senators acknowledge that the bill is a legislative response to the *Emwest* case. However, the Full Federal Court concluded in the *Emwest* case that allowing for the option of negotiating any outstanding matters during the life of that agreement encourages flexibility in the bargaining process.<sup>22</sup> Yet again, the

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17 Ms Sharan Burrow, ACTU, *Hansard*, 15 April 2004, p.16

18 Submission No. 1, ACTU, p.20

19 Workplace Relations Amendment (Better Bargaining) Bill 2003, *Bills Digest*, No. 77 2003-04, Department of the Parliamentary Library, 2004, p.7

20 Submission No. 1, ACTU, p.19

21 Submission No. 1, ACTU, p.19

22 Submission No. 3, CEPU, pp.24-25

Government is showing that, despite using these words as its mantra, it does not actually support 'choice and flexibility' in the workplace.

2.31 The bill is also at odds with repeated observations of the International Labour Organisation's Committee of Experts that Australian law does not meet the requirements of Conventions 87 (freedom of association) and 98 (collective bargaining), particularly as it concerns the right to strike.<sup>23</sup> The attempt in this bill to further weaken access to protected industrial action will take Australian law even further from complying with these international standards. This supports the ACTU's view that the bill is a further attack on the basic rights of working people and an attempt to shift the entire basis of power to the employer.<sup>24</sup> Labor senators agree, and note further that Australia is the only country in the OECD that does not have an absolute right to collective bargaining. The bill, therefore, is completely at odds with international standards and should be rejected for this reason alone.

### **Choice in award coverage bill – more choice for employers, less choice for employees**

2.32 During his second reading speech on the choice in award coverage bill, the shadow minister for workplace relations stated that the bill is designed to make it easier for small businesses to avoid becoming bound by federal awards. The Opposition is opposed to any attempt to make award conditions of employment optional for small business.<sup>25</sup>

2.33 The Opposition rejects the claim by Government and employer bodies that the provisions of this bill will help overcome the inherently complex and potentially misleading process involving logs of claims and deliver a superior level of natural and procedural justice for those involved in the award making process.<sup>26</sup> Evidence by a number of unions strongly suggests otherwise. The bill will make the log of claims process more complex and costly rather than less so, place a heavier administrative burden on unions, and potentially discriminate against union members whose identities will be more easily known to their employers. According to the ACTU, proposed section 101A, which is designed to prevent the AIRC from finding the existence of a dispute if a single claim is outside jurisdiction:

...has no policy basis other than to force unions to go through the expensive and time-consuming process of re-serving the log of claims... This proposal increases the incentive for employers to challenge provisions of logs of claims, knowing full well that an invalid claim would not result in an award

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23 Submission No. 1, ACTU, p.18; Submission No. 7, NTEU, pp.3-4

24 Ms Sharan Burrow, ACTU, *Hansard*, 15 April 2004, p.14

25 Craig Emerson MP, Second Reading Speech, *House Hansard*, 6 November 2003

26 Mr Scott Barklamb, ACCI, *Hansard*, 15 April 2004, p.2

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provision, but simply because it could lead to the invalidation of the entire dispute finding process.<sup>27</sup>

2.34 The ACTU in its submission and at a public hearing stated categorically that: 'The main, if not only purpose of [the bill], and its 1998 and 1999 predecessors, is to stymie the efforts of the SDA to achieve federal award coverage for Victorian retail employees'.<sup>28</sup> It noted, however, that the circumstances which gave rise to the bill – the log of claims served by the SDA on 35,000 Victorian employers in June 1998 – have largely been dealt with. It noted in particular that the majority of Victorian employees not currently covered by federal awards will probably become entitled to the benefits of common rule awards based on relevant federal awards as a result of the passage of the *Workplace Relations (Improved Protection of Victorian Workers) Act 2003*.<sup>29</sup>

2.35 Labor senators' concerns with the bill extend beyond the specifics of the recent case involving Victorian retail employees. They note the perceptive observation made by the SDA and the CEPU in their submissions that the Government's clear intention in relation to proposed section 101B (Findings in relation to employers in small business) is to entrench a two-tiered wages system with a sub-class of employees who will not be protected by awards of the Commission. In the event of dismissal, underpayment, denial of leave and so on, vulnerable employees will not have a minimum safety net to call on for protection.<sup>30</sup> The SDA summarised the concern in these terms:

There is...a very clear and deliberate intention to create different standards of employment *between those persons who are members of unions and those who are not*. The difference in standards is to allow employers who employ non-union labour only to have the benefit of less than safety net wages and conditions of employment established by the Australian Industrial Relations Commission.<sup>31</sup>

2.36 The Opposition is extremely concerned that by linking federal award coverage to union membership, which is unprecedented in other areas of federal jurisdiction, the bill intentionally sets out to overturn the basis of the conciliation and arbitration system and the award system. While Labor senators accept the claim made by DEWR at a public hearing that the bill does not attempt to regulate whether or not employees of small businesses can belong to a union,<sup>32</sup> this misses the important point which is that the bill ascribes status to an employer on the basis of whether it engages union or non-union members. What this means in practice is that an employer with fewer than

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27 Submission No. 1, ACTU, p.30

28 *ibid.*, p.29

29 *ibid.*

30 Submission No. 3, CEPU, p.21

31 Submission No. 2, SDA, p.16 (emphasis added)

32 Mr James Smythe, DEWR, *Hansard*, 15 April 2004, p.37

twenty employees *and no union members* can be exempt from being included in a federal award.<sup>33</sup> This has the unfortunate effect of both rewarding employers that engage in anti-union practices, and those that create corporate structures to ensure that they employ less than twenty employees per employing entity.

2.37 Labor senators find that proposed section 101B is ill-conceived and dangerous given that some industries, such as electrical contracting, consist almost entirely of small businesses with up to twenty employees. To make matters worse, the bill does not sit comfortably with freedom of association principles. DEWR conceded at a public hearing that the Government has not carried out an assessment of the impact of this most unusual provision on freedom of association principles.<sup>34</sup>

2.38 The ACTU agrees with Labor's assessment of this important issue:

The logic is that unions have an interest not only in the wages and conditions of their members but also in ensuring *potential members* will have access to decent wages and conditions and, just as importantly, in ensuring that that same obligations attach to nonmembers. Clearly it is against the interests of the unions if nonmembers can be employed more cheaply than members because that of course increases the incentive for employers to not employ union members.<sup>35</sup>

2.39 Finally, other inconsistencies and misconceptions in the bill were exposed by union submissions to the inquiry, which the committee majority chose to ignore in its report. For example, the assumption in the minister's second reading speech and in employer group submissions that the bill will provide businesses with more information about their rights regarding roping in of claims is not supported by the terms of the bill. SDA shows in its submission that the way the bill is structured does not guarantee that any independent and meaningful information will be given to employers about their rights regarding roping in of claims:

The only mention in the bill about giving information to employers is a reference in proposed section 101A(a) which would require unions when sending a log of claims to an employer to attach to that log of claims a notice containing information of the kinds prescribed in the regulations.<sup>36</sup>

### **Simplifying agreement-making bill – to the benefit of employers**

2.40 Labor senators are completely opposed to this bill. They note that the provisions contained in the bill were introduced in the parliament in 1999 and again in 2000 and on both occasions were rejected by the Senate. As the shadow minister for workplace relations stated in his second reading speech:

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33 Senator Jacinta Collins, *Hansard*, 15 April 2004, pp.37-38

34 Mr James Smythe, DEWR, *Hansard*, 15 April 2004, p.38

35 Ms Linda Rubinstein, ACTU, *Hansard*, 15 April 2004, p.18 (emphasis added)

36 Submission No. 2, SDA, p.12

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We know that the ideology driving the bill is the government's obsessive dislike of unions, its great love of Australian workplace agreements, its hatred of the concept of collective bargaining, and its embrace of the concept of individual bargaining. The philosophic basis is the pitting of a single employee with little or no bargaining power against a large employer with plenty of bargaining power.<sup>37</sup>

2.41 Submissions by unions agree with this assessment. Unions are concerned that the bill makes it easier to negotiate AWAs and non-union collective agreements, and that it removes the remaining core protections and safeguards in respect of making AWAs and collective agreements.<sup>38</sup>

2.42 The ACTU told the Committee at a public hearing that the proposed changes to the negotiation of AWAs and CAs are designed solely to encourage non-union agreements.<sup>39</sup> It also argued that the proposal to extend the period of operation to five years is unnecessary because existing transaction costs and the time needed for parties to reach an agreement are not major problems: 'If the parties do agree to continue the operation of an existing agreement, they can do that. Nobody needs to do anything and the agreement will continue in operation for as long as the parties want it to'.<sup>40</sup>

2.43 Two other areas of concern and confusion raised by unions indicate that the bill is ill-conceived and has not been properly thought through. They relate to proposals that make it easier for AWAs to be brought into effect prior to being approved, and that remove the automatic process of having a public hearing for the certification of an enterprise agreement. While unions have difficulty accepting the principles behind AWAs, they reject any attempt to water down current procedures for the filing and approval of AWAs. According to the ACTU:

Allowing AWAs to operate prior to being approved for existing employees...will mean employers, knowingly or otherwise, will be able to employ staff on terms and conditions which do not meet the no-disadvantage test, or in circumstances where the agreement has not been adequately explained, or other process-related requirements have not been met.<sup>41</sup>

2.44 The SDA in its submission believes that the introduction of a cooling off period and the consequences that would flow from it are a 'marginal improvement' over the current provisions because they arguably remove some of the most objectionable and obnoxious aspects of the operation of existing provisions. The SDA interprets the bill as providing an employee who is entering into an AWA with an

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37 Mr Craig Emerson MP, Second Reading Speech, *House Hansard*, 11 February 2004

38 Submission No. 1, ACTU; Submission No. 2, SDA; Submission No. 7, NTEU

39 Ms Linda Rubinstein, ACTU, *Hansard*, 15 April 2004, p.14

40 *ibid.*

41 Submission No. 1, ACTU, p.32

absolute right to withdraw their consent to the agreement without their employment being able to be lawfully terminated.<sup>42</sup>

2.45 These issues are, however, overshadowed by the unacceptability of the bill as a whole. There is a high degree of uncertainty over the actual scope of the proposed cooling off period and what this means for the rights of employees when entering into a contract of employment. When questioned about this issue at a public hearing, DEWR could not confirm whether the assessment by the SDA is accurate, inaccurate or only partially correct. A senior officer from the department made the observation that:

Obviously, it is not clear. The situation has not arisen yet because this is a change in the way AWAs will operate...So it is not clear. With regard to the SDA's assertions, it is not as black and white as that. There are a couple of possibilities there.<sup>43</sup>

2.46 The important issue here is that, notwithstanding DEWR's attempt to clarify how the new AWA provisions will operate, a great deal of confusion hangs over this bill, especially whether an employer who makes an AWA *the only* condition of employment can lawfully terminate an employee who decides during a cooling off period not to accept the agreement.

2.47 Labor senators feel strongly that these issues should have been properly considered and resolved before being rushed unnecessarily into the Parliament. This is yet another example of the Government's refusal to consult with all the stakeholders and its disregard for union concerns.

2.48 The Opposition is also concerned about the process of having a public hearing for the certification of an enterprise agreement being made the exception rather than the rule – that is, only if an employee or a union that is involved in the employee's workplace wants a meeting. It believes that such a move does not encourage public transparency and that it would be very difficult for an employee to stand up to an employer and request a public hearing without any ramifications for the employee.<sup>44</sup> Opposition senators fully support the SDA's observation that the normal rules for any certified agreement should include a public hearing: 'It simply is not a burden on employers or organisations of employers or workers to attend public hearings for the purposes of certification of an Enterprise Agreement'.<sup>45</sup>

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42 Submission No. 2, SDA, p. 27

43 Ms Diane Merryfull, DEWR, *Hansard*, 15 April 2004, p.39

44 Senator Gavin Marshall, *Hansard*, 15 April 2004, p.25

45 Submission No. 2, SDA, p.32



## Conclusion

2.49 Labor senators on the committee can see nothing in these bills which recommends their passage. In reaching this conclusion, Labor senators are not opposed to industrial relations reform *per se*, but support a positive approach to reform which would:

- Empower the AIRC to determine fair and relevant award wages and employment conditions;
- Provide better access for employees to collective bargaining rights;
- Restore a requirement on employers and employees to bargain in good faith, and give the AIRC greater power to resolve industrial disputes which are intractable; and
- Ensure that unions are not unfairly impeded from recruiting and representing members.

2.50 Labor senators strongly **recommend** to the Senate that the bills be rejected.

**Senator George Campbell**  
**Deputy Chair**



## Chapter Three

### Australian Democrats' Report

3.1 The following minority report deals with four interrelated workplace relations bills:

- Workplace Relations Amendment (Award Simplification) Bill 2002;
- Workplace Relations Amendment (Better Bargaining) Bill 2003;
- Workplace Relations Amendment (Choice in Award Coverage) Bill 2004; and
- Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004.

#### **Workplace Relations Amendment (Award Simplification) Bill 2002**

3.2 In 1996 the Australian Democrats negotiated the passage of the *Workplace Relations and other Legislation Amendment Act 1996* with the Government. That Bill rationalised an almost unlimited award field and restricted the number of allowable matters for inclusion in awards to twenty (s89A).

3.3 Section 89A(2) was further amended in 2000 with Democrats' support, when tallies were removed from allowable matters and incentive-based payments added.

3.4 The 3222 federal awards in 1996 have been reduced to 1509 awards, which themselves have been rationalised and simplified. This has undoubtedly contributed to a more understandable, streamlined, efficient and productive award system.

3.5 The confusion, duplication and inefficiencies still occurs when numerous and complicated state awards conflict with the better federal system. It is here that there is a far greater need for reform.

3.6 The ACTU submission<sup>1</sup> noted that as of June 2003 the Australian Industrial Relations Commission (AIRC) reported that 95 per cent of the federal award simplification review process had been completed. 3050 federal awards have completed the review process as follows:

- 1164 awards have been simplified;
- 1461 awards have been set aside or superseded;
- 252 awards have been deemed to have ceased operation;
- 173 awards have been identified as not requiring review; and
- 172 awards were at various stages of the simplification process.

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<sup>1</sup> Submission No. 1, ACTU, pp.16-17

3.7 This bill proposes to delete more allowable matters, including skill-based career paths, long service leave, notice of termination and jury service.

3.8 Submissions from both industry groups and unions indicate that there is lukewarm support for the bill. Both the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (AiG) expressed lack of support for the removal of some of the allowable matters proposed in the bill.

3.9 A number of submissions noted that the review to date of allowable award matters had been a massive task, involving large resource commitments from all parties. The review was meant to be completed by mid 1998 but, as mentioned earlier, as of June 2003 5 per cent were still outstanding. Some submissions, including from AiG, have questioned whether the gains from a further round of award simplification justify the resources which the AIRC and other registered organisations would need to devote to the process.

3.10 Other issues raised by AiG as noted in paragraph 1.14 of the majority report, also need to be recognised. In particular, the AiG has asked whether the removal or further reform of federal awards may force employers to apply both a federal and state award to the same group of employees, with different awards applying to different subject matters.

3.11 In this context the Bills Digest also notes that:

The proposed changes to awards facilitated by this Bill introduce a likelihood that former uniform prescriptions for a particular entitlement may be open to State/Territory determination, inviting the prospect of not only differing prescriptions but also possibly more favourable prescriptions than the current federal standards. This is because as the content of federal awards is removed, federal awards will not displace inconsistent State 'laws' under section 109 of the Constitution. Such a prospect appears in contradiction to the thrust of certain other legislative proposals, notably, the *Workplace Relations Amendment (Termination of Employment) Bill 2002* which seeks to displace State industrial codes in respect of unfair dismissal so as to provide a nationally consistent dismissal code for the corporate sector.<sup>2</sup>

3.12 Shifting awards under the federal system to the states is not desirable, and would go against the Australian Democrats' pursuit of and support for a national unitary industrial relations system.

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2 Workplace Relations Amendment (Award Simplification) Bill 2002, *Bills Digest* No. 128, 2002-03, Department of the Parliamentary Library 2003, p.11

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## Workplace Relations Amendment (Better Bargaining) Bill 2003

### *Schedule 1- Industrial action and lockouts before expiry of agreement*

3.13 Schedule 1 aims to alleviate the consequences of the Federal Court's *Emwest* decision which found that under current section 170MN, protected industrial action could be taken prior to a certified agreement passing a nominal expiry date of an agreement or an award.

3.14 The background to the case as I understand it is that in the negotiations leading to an operative enterprise agreement between Emwest and the Australian Manufacturers union, both parties agreed to drop redundancy as an issue and to deal with it as a separate topic in the following year. The agreement was certified in April 2001 with a nominal expiry date of June 2003. However, the parties also had an agreement certified by the AIRC on 14 December 1998 with a nominal expiry date of 30 September 2000 providing for redundancy processes and severance payments.

3.15 According to the Bills Digest,<sup>3</sup> the matter was first held by Justice Kenny who found that section 170MN of the Workplace Relations Act does not always prevent a union and its members engaging in industrial action in support of claims against an employer even when the relevant employees are covered by a current (ie. unexpired) certified agreement. However, the claims related to the industrial action must not be matters dealt with in the certified agreement. And the Federal Court upheld the reasoning of Justice Kenny.

3.16 In determining the appeal the court made the following observations:

Comprehensive agreements may be desirable in some and perhaps most circumstances. But there may be cases when it will be in the interests of good workplace relations to conclude an agreement on some issues and leave less pressing issues for a subsequent agreement.....Indeed the parties may, as Kenny J pointed out, make that intention explicit by the inclusion of a provision that the agreement is intended to be exhaustive of the terms and conditions of the relevant employment relationship.<sup>4</sup>

3.17 AiG in their submission argued that the decision created an unworkable bargaining regime where the following negative outcomes could occur:

- The risk that a union will take protected industrial action during the life of an agreement over matters which were dropped as part of the enterprise bargain;

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3 Workplace Relations Amendment (Better Bargaining) Bill 2003, *Bills Digest* No. 77 2003-04, Department of the Parliamentary Library 2004, p.6

4 *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2003] FCAFC 183 (15 August 2003) per French & von Doussa JJ at paras 37-38

- The risk that a union will take protected industrial action during the life of an agreement over new claims which were not pursued when the enterprise agreement was reached; and
- The risk that a dispute will arise in a workplace during the life of an agreement over an issue which was not dealt with in the company's enterprise agreement, and that a union will organise protected action to further its position in the dispute.

3.18 To avoid such risks one option would be to include a requirement in the *Workplace Relations Act 1996* that parties would have to include a provision in the agreement stating one of two things: either (a) that the agreement was intended to be exhaustive of the terms and conditions of the relevant employment relationship; or (b) that the agreement was not comprehensive and the parties have agreed to leave matters x, y and z for resolution during the term of the agreement.

3.19 A further provision would need to be inserted that stated something along the lines that if scenario (a) was agreed to, then protected action **could not** occur outside the life of the agreement, where if scenario (b) was agreed to, then protected action **could** occur during the life of the agreement pertaining to matters x, y, and z.

### ***Schedule 2 – Suspension of bargaining period (cooling-off period)***

3.20 As I said in my minority report to the More Jobs, Better Pay Bill, and in my second reading speeches to a number of other bills recently before the Senate, it is difficult for the Government to advocate a much greater tightening up of the area of industrial disputes, when Australia has the lowest level of industrial disputation in eighty years.

3.21 The number of disputes continued to decline during the 12 months ended in August 2003: there were 656 disputes, 56 less than the 12 months ending August 2002. The number of worker days lost through industrial disputes also continues to decline: from 928,500 in 1996, 526,300 in 1998, 469,100 in 2000, and 259,000 in 2002. And, the number of working days lost by thousand employees has also fallen from 88 in the 12 months to August 1999 to 34 working days in August 2003, although it has risen again somewhat of late.

3.22 The Bills Digest also points out that applications to terminate bargaining periods under section 170MW are comparatively infrequent, with 45 such applications in 2002-03, as against about 7500 applications to certify collective agreements and over 15,000 applications to initiate bargaining periods.

3.23 The first item under this schedule aims to provide the Commission with discretion to suspend a bargaining period to allow for a cooling-off period.

3.24 The Government argues that the intention of the cooling-off period is to remove, for a period of time, the pressure of protected industrial action from the

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negotiations for a certified agreement, apparently to allow parties room to continue negotiations in a less charged environment.<sup>5</sup>

3.25 While the Democrats fully support giving the AIRC more discretion, it is important to remember that this area was only recently amended via the *Workplace Relations Amendment (Genuine Bargaining) Act 2002*, which provided:

- Guidance to the Commission on when parties are genuinely negotiating;
- Parties to apply for suspension or termination of bargaining periods without having to identify the specific bargaining periods being involved; and
- The Commission express powers to prevent, or attach conditions to, the initiation of new bargaining periods where a bargaining period has previously been withdrawn or suspended.

3.26 Much of AiG's evidence was based on what is known as *Campaign 2000*. The most recent amendments in this area only commenced on 7 February 2003, which not only was after *Campaign 2000*, but is less than 14 months ago.

3.27 In fact recent evidence would suggest that the current provisions to suspend or terminate bargaining are effective, with the AIRC just recently suspending for six weeks the unions' bargaining periods with three of the companies at the centre of Victoria's protracted electricity dispute.

3.28 In addition it might be appropriate at this stage for the Government to reconsider their rejection of Senate amendments 4 and 5 of the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* (see attachment 1).

3.29 The Bills Digest also noted that the bill does not restrict protracted AWA action of the sort endured in the course of the G&K O'Connor industrial dispute, which resulted in a nine month lockout of employees. The Bills Digest goes on to suggest that the bill has a misplaced focus by limiting the proposed cooling-off periods to only CA negotiations and provides no avenues to resolve failed AWA bargaining.<sup>6</sup>

3.30 With respect to item 2 of the schedule, which aims to allow third parties who are seemingly affected by industrial action to make application to the Commission to terminate the bargaining period, the Democrats are not convinced that this amendment is necessary.

3.31 As noted by the ACTU in their submission, it is inevitable that industrial action will have some impact on third parties, including business reliant on the

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5 Workplace Relations Amendment (Better Bargaining) Bill 2003, *Explanatory Memorandum*, p.10

6 Workplace Relations Amendment (Better Bargaining) Bill 2003, *Bills Digest* No. 77 2003-04, Department of the Parliamentary Library 2004, p.3

business involved in the industrial action. The ACTU cited an extract from the Federal Court:

It is inevitable, in my view, that action engaged in directly by unions against very many kinds of employers will, by disrupting the business operations of those employers, also have a direct or indirect impact on the business and other activities of third parties.<sup>7</sup>

3.32 We also hold the view that subsection 170MW(3) of the WR Act already provides appropriate relief for third parties in those instances where industrial action is threatening to endanger the life, personal safety or health, or welfare of the population, or to cause significant damage to the Australian economy.

3.33 Neither AiG nor ACCI provided sufficient evidence in their submissions to demonstrate that the current provisions are not working and the need for new provisions.

3.34 Many of the cases utilised by the Department of Employment and Workplace Relations (DEWR) in its submission to argue for the need for the provisions, to me only demonstrated that the current provisions work. In almost all cases third parties were taken into consideration. DEWR argued that the problem is that the third parties themselves can not make application, only the parties involved, the Minister or the Commission can make an application. I agree with the broad thrust of the ACTU's argument that:

To allow anybody claiming to be affected by protected industrial action to apply to the Commission for suspension of the bargaining period is to facilitate involvement in industrial disputes by all kinds of persons, including ideologues, mischief makers and busybodies, while doing nothing to resolve the actual dispute.<sup>8</sup>

3.35 Not to mention the potential for the Commission's time and resources to be tied up in responding to what could potentially be a large number of speculative third party applications.

### ***Schedule 3 – Claims not pertaining to employment relationship***

3.36 According to the explanatory memorandum, Schedule 3 clarifies that in relation to an agreement proposed to be certified, protected action is not available in relation to a claim about a matter that does not pertain to the employment relationship mentioned in section 170LI. The issue has come before the AIRC in a number of matters, and has been before the Federal Court in the *Electrolux* case.

3.37 In the *Electrolux* case Commissioner Merkel held that certain contentious items within the union's log of claims did pertain to the employment relationship, and

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7 Submission No. 1, ACTU, p.20

8 Submission No. 1, ACTU, p.20



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industrial action could be taken, but that some components were not matters pertaining to the employment relationship and therefore could not be subject of industrial action. A full bench of the Federal Court overturned the decisions, stating that industrial action taken to pursue a union log of claims was legitimate, including overall claims, although it did not reach a conclusion about which matters of the claim pertained to the employment relationship.

3.38 The ACTU also noted the recent decision where a Full Bench of the Commission in AFMEPKIU and Unilever held, in common with the Federal Court on *Electrolux* and contrary to a previous Commission Full Bench, that an agreement can be certified if, taken as a whole, it pertains to the employment relationship, rather than requiring that each provision do so.<sup>9</sup>

3.39 The ACTU in their submission argued that:

The effect of Schedule 3 of the Better Bargaining Bill, if enacted, would be that employers could be in a position to obtain Commission orders stopping industrial action simply by alleging that one or more claims did not pertain to the employment relationship. It should be recalled that doubts about claims can take a long time to resolve; for example, superannuation was not held to be an industrial matter until determined to be so by the High Court in 1986.

3.40 One option to address this concern would be to insert a provision that would ensure that industrial action could only be stopped if industrial action was **only** being taken over the item considered not to be part of the employee relationship.

3.41 However, the problem remains. How do the parties determine what pertains to the employment relationship? As the ACTU points out in their submission, the issue of whether or not a claim does pertain to the employment relationship is complex and the parties engaging in protected action need to be able to make confident and rational decisions.<sup>10</sup>

3.42 Another option would be to establish a process whereby upon a log of claims being served, parties must within (say) three days apply for the AIRC to determine whether an item of concern is in fact part of the employment relationship. The process would further establish that industrial action cannot be taken solely on the uncertain item before the Commission until a decision has been made, but this does not prevent protected industrial action being taken on other matters clearly related to the employment relationship.

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9 Submission No. 1, ACTU, p.22

10 Submission No. 1, ACTU, p.21

***Schedule 4 – Protected action and related corporations***

3.43 This schedule seeks to prevent corporations who are currently treated as a single employer for the purpose of agreement making under section 170VB(2) of the WRA, from being treated as a single employer for the purpose of taking protected action under section 170ML.

3.44 AiG argued in their submission that:

industrial action should not be available at the enterprise level – not where action is pursued across many enterprises, including enterprises which are related corporations.<sup>11</sup>

3.45 In their submission, the ACTU argued that:

The proposed amendments exacerbate the current unacceptable limitations on industrial parties bargaining freely at the level chosen by them.<sup>12</sup>

3.46 The Democrats would have concerns that the provisions would prevent those cases where unions/employees would need to bargain with head office if it was the head office that was responsible for setting workplace relations policy such as maternity and paternity leave. As noted in the Bills Digest,<sup>13</sup> a similar sentiment was reflected in the CCH Australian Industrial Law News. We would need to explore this issue further.

***Schedule 5 – Protected action and involvement of non-protected persons***

3.47 Schedule 5 aims to repeal current section 170MM – Industrial Action must not involve secondary boycott – and replace it with a provision that stipulates that industrial action taken in concert with employees of different employers is unprotected.

3.48 The new provision I assume aims to address sector-wide action as a result of sector-wide agreements.

3.49 We do not believe that enterprise bargaining is necessarily at odds with industry-wide or sector-wide negotiations. (I use the word 'sector' here because industry wide negotiations that apply across Australia seldom occur.)

3.50 Sector-wide collective agreements and enterprise collective agreements are not mutually exclusive, and nor are multi-employer site or sector agreements necessarily at odds with efficient and effective industrial outcomes. In some cases,

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11 Submission No. 8B, AiG, p.14

12 Submission No. 1, ACTU, p.23

13 Workplace Relations Amendment (Better Bargaining) Bill 2003, *Bills Digest* No. 77 2003-04, Department of the Parliamentary Library 2004, p.13

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both employers and employees see benefits in having an industry or sectoral standard in mind as they approach bargaining at an enterprise level.

3.51 Indeed, the federal government itself bargains in a whole-of-government manner in the context of their 'Policy Parameters' that shape bargaining in the public sector and give it a comparable character across different government agencies. A Senate committee received evidence of multi-employer agreements in retailing, media, education and electrical contracting which suited both unions and employers, particularly smaller employers.

3.52 The concern raised by Industry is that industrial action is taken across the sector despite some enterprises having almost reached agreement.

3.53 The ACTU in their submission argued that:

The fact that bargaining and the taking of protected action is co-ordinated or organised across more than one employer does not mean that there is a lack of preparedness to negotiate different outcomes with each employer. If that was the case, the union could be taken to have not genuinely tried to reach agreement before organising or taking the industrial action or not continuing to genuinely try to reach agreement, with the consequence that [via section 170MW] the Commission could, on the employer's application, suspend or terminate the bargaining period.<sup>14</sup>

3.54 The ACTU<sup>15</sup> cited in their submission an example where Munro J in the Metals Case terminated a number of bargaining periods on the grounds that the union did not try and genuinely negotiate or reach agreement before taking industrial action.

3.55 AiG in their submission raised concerns that during *Campaign 2000* and *Campaign 2003*, the first time many employees in the manufacturing industry heard about the union organised industry wide stoppage was when their employers queried them about why they had decided to go on strike. I am assuming that AiG were arguing that the industrial action is not necessarily supported by all employees at all sites. AiG quoted from Justice Munro in dealing with *Campaign 2003*:

In some instances, the response sheets indicate that employees have expressed some dissent from taking industrial action. Otherwise, generally, there is a mixture of evidence indicating that employees will be supporting the stoppage, and plant will be closed. I cannot purport to accurately set out the substance or even the preponderance of each comment by employees or the content of each response. The responses cover a variety of situations. Some employees indicate no intention to participate, some claimed to be

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14 Submission No. 1, ACTU, p.23

15 *ibid.*

ignorant of the stoppage, but probably will participate. A number are reported to have voted to adopt the intention to take the industrial action.<sup>16</sup>

3.56 I once again recommend that the Government reconsider their objection to the Democrats' amendment to require trade unions to have within their rules secret ballot provisions which the members can activate when the members think it appropriate, to be considered as a tool for employees to utilise in this sort of case.

3.57 As for the proposed amendment in the bill, section 170MW has been utilised by the Commission to terminate bargaining periods in sector-wide industrial action. Again the provision could be strengthened by supporting Senate amendments 4 and 5 of the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002*.

3.58 The consequences of the proposed amendment are not clear and we would have to consider it further before supporting the proposal.

### **Workplace Relations Amendment (Choice in Award Coverage) Bill 2004**

3.59 The bill aims to place conditions on the service of logs of claims including content and notice requirements; restrain the ability of unions to rope in small business which employ no union members into the federal jurisdiction; and require the Commission to inquire into the views of unrepresented small business employers potentially affected by a roping-in claim.

3.60 While the Democrats do not oppose the Commission inquiring into the views of small business employers, we do have concerns about excluding small business from the award system simply because none of their employees are union members.

3.61 The Democrats support the concerns raised in the bill's explanatory memorandum that even small scale claims can be bewildering to most small business. However we also support a safety net, including awards, for employees who are unable to protect their interests through enterprise bargaining.

3.62 We will therefore look at ways to amend this bill in terms of how to improve the process for small business without impinging on the legitimate role of unions and without damaging the award safety net.

### **Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004**

3.63 The Democrats support a range of industrial instruments being available for different industrial purposes – awards, collective agreements and individual agreements. We do support a safety net for employees who are unable to protect their interests through enterprise bargaining, that is, through awards and arbitration.

3.64 Despite being a few hundred thousand in number, Australian Workplace Agreements (AWAs) provide useful formalised statutory individual agreement instruments. They have greater in-built protections than the largely unregulated millions of oral and written common law individual agreements, which are largely derived from the master servant common law tradition.

3.65 However, we are concerned with the level of precarious and atypical employment, and we are also concerned about reports of abuse of AWAs and the allegations that some AWAs are failing to pass the no disadvantage test.

3.66 The Bills Digest to this Bill noted that:

Waring and Lewer have calculated over 2000 AWAs have been certified by the Commission and submit that it is probable that these AWAs were passed as not contrary to the public interest even though they did not meet the no disadvantage test.<sup>17</sup>

3.67 A paper by van Barnevald and Nassif<sup>18</sup> argues that two prime reasons underlying the decision of employers to pursue AWAs – reduce labour costs, and avoid the influence of unions – is at odds with the original intention of AWAs, which was to provide more choice for employers and employees.

3.68 A thorough independent review by an organisation such as the Productivity Commission of the current bargaining system, including the effectiveness of AWAs,<sup>19</sup> would need to be undertaken.

3.69 The Democrats would support reforms aimed at better process for AWAs. We oppose Labor and Green calls for the abolition of individual agreements under the federal system.

## Senator Andrew Murray

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17 Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2004, *Bills Digest*, No. 45, 2002-03, Department of the Parliamentary Library 2002, p.11

18 van Barnevald, K. and Nassif, R. (2003) 'Motivations for the Introduction of Australian Workplace Agreements', *Labour & Industry*, Vol. 14, No.2

19 The Democrats would like to see an independent audit of AWAs to determine whether they are passing the no-disadvantage test and to identify safety mechanisms that are being lost as a result of the current process.



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## **Attachment to Australian Democrats' Report**

### **Senate amendments to Workplace Relations Amendment (Genuine Bargaining) Bill 2002**

(4) Schedule 1, page 4 (after line 2), after item 1, insert:

**1B After subsection 170MW(2)**

Insert:

(2B) Genuinely trying to reach agreement includes bargaining in good faith.

(5) Schedule 1, page 4 (after line 2), after item 1, insert:

**1C After subsection 170MW(2)**

Insert:

(2C) In considering whether or not a negotiating party has met or is meeting its obligations to genuinely try to reach an agreement with the other negotiating parties, the Commission must consider whether or not the party has bargained or is bargaining in good faith. Bargaining in good faith includes:

- (a) agreeing to meet face-to-face at reasonable times proposed by another party;
- (b) attending meetings that the party has agreed to attend;
- (c) complying with negotiating procedures agreed to by the parties;
- (d) disclosing relevant information, subject to appropriate undertakings as to confidentiality, for the purposes of negotiations;
- (e) stating a position on matters at issue, and explaining that position;
- (f) considering and responding to proposals made by another negotiating party;
- (g) adhering to commitments given to another negotiating party or parties in respect of meetings and responses to matters raised during negotiations;
- (h) dedicating sufficient resources and personnel to ensure genuine bargaining;
- (i) not capriciously adding or withdrawing items for negotiation;
- (j) not refusing or failing to negotiate with one or more of the parties;

(k)in or in connection with the negotiations, not refusing or failing to negotiate with a person who is entitled under this Part to represent an employee, or with a person who is a representative chosen by a negotiating party to represent it in the negotiations;

(l)in or in connection with the negotiations, not bargaining with, attempting to bargain with or making offers to persons other than another negotiating party, about matters which are the subject of the negotiations;

(m)any other matters which the Commission considers relevant



# **Appendix 1**

## **List of submissions**

- 1 ACTU
- 2 The Shop, Distributive & Allied Employees' Association
- 3 CEPU
- 4 Australian Manufacturing Workers' Union
- 5 Australian Chamber of Commerce and Industry
- 6 Commonwealth Department of Employment and Workplace Relations
- 7 Australian Education Union and National Tertiary Education Union
- 8A Australian Industry Group
- 8B Australian Industry Group
- 9 UTS Students' Association



## **Appendix 2**

### **Hearings and Witnesses**

**Canberra, Thursday, 15 April 2004**

**Australian Chamber of Commerce and Industry**

Mr Scott Barklamb, Manager of Workplace Relations

**Australian Council of Trade Unions**

Ms Sharan Burrow, President

Ms Linda Rubinstein, Senior Industrial Officer

**Australian Industry Group**

Mr Stephen Smith, Director, National Industrial Relations

**Department of Employment and Workplace Relations**

Mr James Smythe, Chief Counsel, Workplace Relations Legal Group

Ms Sandra Parker, Assistant Secretary, Strategic Policy Branch

Ms Dianne Merryfull, Assistant Secretary, Legal Policy Branch



## **Appendix 3**

### **Tabled Documents and Additional Information**

**Public Hearing – Canberra, Thursday, 15 April 2004**

#### **Additional Information**

<b>Date</b>	<b>From</b>
7 May 2004	<b>Australian Industry Group</b> Affidavit filed by Ai Group

#### **Answers to Questions on Notice**

<b>Date</b>	<b>From</b>
10 June 2004	<b>Department of Employment and Workplace Relations</b>

