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Bills Digest

No. 60 2001–02

Workplace Relations and Other Legislation
Amendment (Small Business and Other
Measures) Bill 2001

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Workplace Relations and Other Legislation Amendment
(Small Business and Other Measures) Bill 2001

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Economics, Commerce and Industrial Relations Group
19 September 2001

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Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001

Date Introduced: 30 August 2001

House: House of Representatives

Portfolio: Employment, Workplace Relations and Small Business

Commencement: Schedule 5 (Secondary Boycotts) commences on Royal Assent. The other schedules commence on a day to be fixed by proclamation, but if each has not commenced on or within 6 months of receiving Royal Assent, it commences on the first day after.

Purpose

The purpose of this Bill is to exempt business and small business in particular from certain labour regulations, ie, those which arise directly from statute and those potentially arising from industrial awards and agreements. The purpose of the Bill as expressed in its Second Reading Speech, is to protect small business and their employees 'from unwanted and unwarranted third party interference'.

The Bill seeks to:

- insert new objects into the *Workplace Relations Act 1996* (WR Act) obliging the Australian Industrial Relations Commission (AIRC) to take into account the special needs of small business and make a requirement for the President of the AIRC to report on any subsequent AIRC rule amendments with the Minister which will give effect to this policy
- exclude access to the WR Act's termination of employment remedies by dismissed employees unless they were employed by an enterprise which employs 20 or more employees assuming that they have not been excluded from access on other grounds such as serving a 3 month probation period or being employed as a casual employee with less than 12 months continuous service etc
- allow the AIRC to dismiss unmeritorious termination of employment applications without hearings and permit employers not to attend hearings in certain circumstances

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- reduce procedures for employers in drawing up and filing Australian Workplace Agreements (AWAs) which set out employment terms of their employees
- allow certified agreements to be certified without a hearing by the AIRC
- allow the Australian Competition and Consumer Commission (ACCC) to bring representative actions on behalf of business under Part IV (sections 45D and 45E) of the *Trade Practices Act 1994* against restrictive trade actions
- increase the chances of small business in evading the grasp of the federal award jurisdiction by requiring the AIRC to not to make findings of industrial disputes (WR Act section 101) unless certain conditions are first met
- further restrict union entry into workplaces for inspection purposes by requiring a written invitation and permit, 5 days notice to the business owner or occupier of the premises (currently 24 hour notice) and limit union visits to workplaces for the purposes of consulting members to once every six months
- disallow agreement provisions restraining the replacement of employees with contract labour. Similarly, awards will be prevented from addressing the use of contractors by defining any clauses regulating the use of contractors as non-allowable. Textile Clothing and Footwear Industry award clauses would be exempt but only in so far as the contract provisions dealt with pay for outworkers.

Background

Small business policy

Aspects of the Government's latest small business policy agenda as contained in a Cabinet memorandum appeared in the national media in early August 2001.

The Cabinet document prepared by the Department of Employment, Workplace Relations and Small Business (DEWRSB) for Small Business Minister, the Hon. Ian Macfarlane essentially outlined the reform areas contained within this Bill. A federal election is due by the end of the year. Small business policy is of concern to the Coalition Government. The current Bill provides a policy agenda to this constituency particularly as the Bill is not likely to be passed by the Senate, given the limited sitting time of Parliament in the context of a possible November federal election.¹

Some reasons for pursuing an industrial or workplace reform agenda to win political support from the Coalition's small business constituency were included with media reports of the leaked Cabinet document:

A large part of the small business sector has been grumpy with the Howard Government for more than a year, mainly because of dissatisfaction with the

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implementation of the new tax system. Many believe it hurt their cash flows and resent being tax collectors - but the Government cannot respond to these concerns as it is committed to the reforms that accompanied the GST.

Because of this, the Government is looking for other ways to win back small business.

The central focus of Macfarlane's memo is workplace relations reform, with 13 proposals for changes to industrial laws and associated measures.²

Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999

Various aspects of the current Bill have been before the Parliament previously. The Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999 (MOJO Bill) was introduced in June 1999 to House of Representatives and reviewed in [Bills Digest 94 1999-2000](#). The MOJO Bill attempted to implement through legislation the Coalition's 1998 workplace relations election commitments (*More Jobs Better Pay*) and was comprised of 18 Schedules. Had this Bill had been passed, it would have substantially amended the WR Act (and others by consequence).

The Senate Employment Committee reported on the MOJO Bill on 29 November 1999, however the Bill did not pass the Senate, and the Government agreed to bring most of these Schedules back as separate Bills or 'bite-sized chunks', as former Workplace Relations Minister Reith put it.

There are some parallels with this Bill and the MOJO Bill. The similarities are discussed under separate subject headings below. The discussion continues with the subjects of the Bill which have been introduced in other Bills, or are new provisions, ie introduced in the current Bill.

Federal awards and small business policy objects

The current Bill contains measures to regulate the servicing of logs of claims on employers by unions to bind employers to awards (note also MOJO Bill Schedule 6).

The size of the workplace establishment, per se, has not been a criteria for the AIRC proceeding to bind it under a federal award, although the WR Act introduced other restrictions on making federal awards. Under amendments made to section 111(1)(g) and under section 111AAA the WR Act imposes more stringent criteria militating against the making of a federal award. Also, objects of the WR Act recognise alternative employer-employee relationships to award-based relations.

Union membership as a criteria for making an award has been considered by the Courts. Since the *Metal Trades Case* in 1935, the accepted legal approach from the High Court has been to allow the making of an award with an employer where no union members were present, or to use the phrase from that decision, make an award 'for future members'. Thus, the accepted industrial position has been to promote industrial awards and union membership as a means of preventing discrimination against union membership by

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allowing unions to act as parties principal in the formal industrial processes, an objective noted in the *Australian Labour Law Reporter*:

Unions act as parties in their own right and not merely as agents for their current members. Consequently, the High Court has held that a union may notify a dispute with employers who do not at the time employ any members of that union and the union is entitled to expect a federal arbitral tribunal to make an award in settlement of the dispute. (See *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees Association* (1925) 35 CLR 528.) Further, a union may dispute with an employer about the conditions of non-unionists who are eligible to join the union. (See *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387.) The rationale for this approach is that unions have an interest in protecting their members' working conditions and consequently, ensuring that these conditions are not undermined by employers employing non-union members at lower rates of pay or on lower conditions.³

This Bill introduces new criteria to be considered by the AIRC when extending the award system, that of there being at least one union member present in a workplace before the member's employer can be bound under an award. Changes proposed by the current Bill in respect of right of entry, awards and certified agreements (note also a similar condition in the 'Transmission of Business' Bill⁴) cumulatively diminish the notion of registered organisations of employees (federal unions) acting as parties in their own right, ie their involvement under certain processes of the Act, will be conditional on being 'invited' by a union member.

The Government could argue that non-union bargaining streams (Division 2 certified agreements and AWAs) represent an alternative to the award stream and therefore the award stream need no longer play the role it once did. This is valid except for a) the low proportion of the workforce under non-union agreements and AWAs⁵ and b) the current requirement to match agreements against the relevant or designated award for the purposes of assessing the agreement against the 'no disadvantage' test (Part VIE of the WR Act). Thus, awards and award-making are central to the formal bargaining streams.

As more rights to represent employees in formal proceedings will hinge on a union being invited, presumably, the exercises of 'naming names' and finding out who was the union member who invited an inspection are likely to increase. The Bill introduces certain protection measures supposed to help ensure confidentiality by providing a role for a third party, the Australian Industrial Registrar. The Registrar may be persuaded of evidence of union membership by a federal union (but on the other hand, may not be so persuaded on occasions). Noting this evidence, the Registrar will issue a certificate indicating his satisfaction (or not issue a certificate as the case may be).

The proposed amendment to the WR Act's objects re the special concerns of small business being particularly considered by the AIRC, including by way of a report to the Minister, is new. The Bill's *Explanatory Memorandum* (EM) suggests that the impact of the new objects may be that employees in financially vulnerable small businesses may find

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it difficult to access award wage increases delivered (annually) through the safety net adjustment reviews, if the AIRC is sufficiently guided.⁶ In other words, the EM is speculating that one potential result of this policy is that employers could argue that their particular businesses be exempt from passing on the increases (a wage principle currently available). However, as the Ansett Airlines collapse shows, financial vulnerability is not necessarily confined to small businesses.

Termination of employment provisions

The MOJO Bill also sought to amend the WR Act's termination of employment provisions (Part VIA Division 3) by allowing the AIRC to dismiss unmeritorious termination of employment claims as well as making other amendments (Schedule 7). That Schedule was substantially reflected in a subsequent Bill. That Bill (now an Act) was discussed in [Bills Digest 31 2000-01](#). DEWRSB has provided a summary of the latest termination of employment amendments of the *Workplace Relations (Termination of Employment) Act 2001*:

1. A three month default qualifying period before unfair dismissal claims can be brought by new employees (period able to be increased or decreased by written agreement)
2. An obligation on the Australian Industrial Relations Commission to specifically consider the differing capacity of businesses of different sizes to comply with dismissal process and procedures – such as the absence of dedicated human resource specialists in small and medium business
3. Expanded costs orders able to be made against parties who act unreasonably in pursuing, managing or defending claims
4. Penalties available against lawyers and advisers who encourage making or pursuing unfair dismissal applications where there is no reasonable prospect of success, or who encourage defence of applications where there is no reasonable prospect of a successful defence (penalties – up to \$10 000 company, \$2000 individual)
5. Requirement for lawyers and advisers to disclose 'no win no pay' or contingency fee arrangements
6. Power to have the Australian Industrial Relations Commission dismiss matters following initial conciliation if they have no reasonable prospect of success
7. Power to have the early dismissal of claims which are made beyond the jurisdiction of the Australian Industrial Relations Commission
8. Power to have speedier dismissal of claims where workers fail to attend hearings, or where second applications on the same dismissal are made

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9. Tightening the rules relating to the granting of extensions of time for the lodgement of late applications
10. Tighter rules relating to claims by demoted employees⁷

Nevertheless, the current Bill introduces further termination issues despite the fact that the 'Termination of Employment' Act has only recently received Royal Assent (22 August 2001) and came into effect on 30 August 2001. The new Act's impositions, eg on legal practitioners having to report their payment systems to the AIRC and the possible penalties against advisers for being involved with vexatious litigation have been questioned by legal practitioners as to their actual effect.⁸ Arguably, it may be helpful to wait for a better appreciation of the amendments effected on the WR Act's termination of employment provisions by the *Workplace Relations (Termination of Employment) Act 2001* prior to passing further amendments.

In any case, excluding small business from the termination of employment provisions has been the subject of both proposed regulations and Bills since 1997, most recently addressed in the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 [No.2]. This Bill, as with previous attempts, failed to pass the Senate (26 March 2001).

The current Bill widens the 1998 criteria for excluding small business employees from accessing the WR Act's unfair dismissal provisions. The previous criteria was of a business employing **15 or less** but this cap is proposed to be widened to include businesses employing **less than 20** under this Bill. This definition of small business accords with that used by the Australian Bureau of Statistics (ABS), although the Bill excludes short-term casuals from the count whereas the ABS does not consider the legal status of small business employees.

The ABS reported that in 1999, small businesses employed just over 3.1 million people or 47 per cent of the total non-agricultural private sector workforce. Just over 69 per cent of persons employed in small business were employees while the remaining 31 per cent were persons working in their own business, either as employers or own account workers. Approximately 527 800 small businesses employ approximately 2.1 million employees.⁹

The Bill's *Explanatory Memorandum* estimates that the proposed unfair dismissal provisions are likely to exempt 170 000 small businesses and 685 500 employees. It estimates that the federal jurisdiction extends to about 3.687 million employees and 200 000 businesses, therefore the Bill reduces access to the federal termination provisions of a significant number of businesses and employees.¹⁰ It could be guessed that the majority of the potentially exempt businesses/employees would be Victorian, as the federal termination provisions cover the Victorian private sector workforce. However, the Bill will not exempt all small business from unfair dismissal laws since the other State industrial jurisdictions cover the bulk of small business employees.¹¹

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Agreement-making: AWAs

Schedule 9 of the MOJO Bill, addressing the simplification of the making of AWAs, was re-introduced to the Parliament in the form of the Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000. This Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. A [report](#) on this Bill (and three others) was made on 7 September 2000. The Bill failed to pass the Senate on 9 October 2000.

[Bills Digest 21 2000-01](#) provides background to the amendments brought to the AWA provisions of the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act) by the *Agreement between the Commonwealth Government and the Australian Democrats* (October 1996), as well as discussing Schedule 9 of the MOJO Bill. The 1996 amendments essentially provide the current structure for making and filing AWAs, eg the requirement that similar AWAs be offered to similarly classified employees.

There appear to be differences between the AWA provisions of the current Bill and the AWA Procedures Bill. For example, the current Bill does not make provision for the Employment Advocate (EA) to determine whether an existing AWA or part of an AWA transmits to an employer's successor. Such a role was accorded to the EA in the AWA Procedures Bill. Thus under the current Bill a new employer will become party to existing AWAs and be able to vary these only with the consent of the relevant employee. Also, the AWA Procedures Bill proposed to repeal Division 8 of Part VID which allows parties recourse to industrial action in the course of negotiating an AWA. Division 8 is retained under the current Bill with only minor modification.

Agreement-making: Certified Agreements

The aim of the current Bill in respect of certified agreements (CAs) is to allow these to be registered (or varied) with the AIRC without the AIRC conducting a hearing. The role of a hearing: a) explains the document to the AIRC and b) provides guidance on the agreement's contents in the event of a later dispute over a provision. All certified agreements are required to have dispute resolution provisions [WR Act s.170LT(8)] and these may allow the AIRC to arbitrate over an issue.

While Schedule 8 of the MOJO Bill proposed reforms to the certification process, the current Bill's approach to CAs is quite different. Objections to the Bill's provisions are likely to hinge around the proposed central role of the employer (not union or bargaining agent) advising staff of their rights to a hearing within 7 days of the agreement being approved by a majority of those in the workplace. Also, hearings for the variation, extension or termination of certified agreements between corporations and employees (section 170LK) can be requested by a relevant union if it has been authorised by an employee who is a member. In many cases the parties agree to allow the union to be party to the agreement, but in such cases, it appears that the union will be restrained in acting in its own right (ie, requesting a hearing).

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This Bill does not address transmission of business provisions for CAs. These provisions have been proposed to be amended in another Bill (see [Bills Digest 123 2000-01](#)).

ACCC representative actions

Section 87 of the *Trade Practices Act 1974* (TPA) currently restricts the ability of the Australian Competition and Consumer Commission (ACCC) to bring representative actions on behalf of persons or a group of persons who have, or are likely to suffer loss or damage as a result of a breach of the TPA.

The ACCC may bring such actions in relation to breaches of the whole of Part IVA (unconscionable conduct), under Part IVB (industry codes) or Part V (consumer protection). However, under section 87, it may not bring a representative action in relation to Part IV (restrictive trade practices) if the matter involves contraventions of the boycott provisions in sections 45D and 45E of the TP Act.¹²

For some time the Government has been seeking to extend the ability of the ACCC to bring representative actions to cover all aspects of Part IV. The first attempt was in the Trade Practices Amendment (Country of Origin Representations) Bill 1998. The nominal target of the proposals is certain restrictive trade behaviour by businesses primarily against businesses (eg tenants against shopping mall owner/operators). However debate on that Bill occurred against the backdrop of the 1998 maritime dispute. The restrictive trade provisions had little to do with country of origin issues. Concerns were expressed that the Bill would allow the ACCC to conduct (retrospective) secondary boycott actions on behalf of businesses against trade unions. In the outcome of the parliamentary debates, the provisions allowing the ACCC to bring Part IV representative actions omitted from the Bill entirely.

The Government revived the issue in the Trade Practices Amendment Bill (No.1) 2000. The Senate rejected the proposal to allow the ACCC to bring representative actions for all of Part IV and 'carved out' actions re sections 45D and 45E. The current Bill seeks to remove this carve-out.

The general proposal has been supported by a number of inquiries. It was most recently by the Baird Committee in 1999¹³, the Australian Law Reform Commission in 1994¹⁴ and the Reid Committee¹⁵ in 1997, although none of these reviews considered the implications from an industrial relations perspective.

The proposals also broach the time-honoured conundrum of unions engaging in industrial actions which may indirectly harm businesses, while pursuing their purposes of association. Trade unions were rendered illegal under eighteenth century British Combination Acts due to union wage policies (conspiracies) restraining businesses engaging in their trade.¹⁶ In the early twentieth century, British unions were granted statutory immunity from certain tort actions. In light of the history, those who oppose the current Bill's provisions fear that unions are likely to be caught as the target of ACCC

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representations where their industrial roles and actions are perceived as being anti-competitive.

The issue of boycott actions harming local businesses was highlighted in the maritime dispute of 1998. Much of the Government's concerns during the waterfront actions were expressed in terms of the need of making ports 'competitive'. Users of port services had been financially disadvantaged by restricted access to ports due to pickets. Some traders had exported certain products loaded on to ships by non-union labour. These ships were not unloaded at their international destinations by union labour. The produce rotted or was not delivered, and businesses sought compensation.

The ACCC took Federal Court action against the Maritime Union of Australia (MUA) seeking injunctions, declarations and findings of fact which could have been used in subsequent actions.¹⁷ The ACCC required a fund to be set up to compensate the businesses affected.¹⁸

In other proceedings, the Federal Court had made certain findings none of which favoured Patrick Stevedores (the employer). The Court did find that Patrick Stevedores restructured its companies into a number of labour-supply companies within the previous 12 months. The only asset of the labour supply companies was their contract to provide labour to other companies within the group. Any cut to the supply of labour such as that due to industrial action made void the contracts between supply and purchasing companies. The cancellation of the contract deprived the labour-supply companies of their only asset. The Court found that there was an arguable case that such actions may have deprived Patrick employees who were members of the MUA of their right to freedom of association. So with this finding recorded, Patrick Stevedoring ultimately agreed to meet a reported \$7.5 million costs suffered by businesses which had been harmed through the various actions of many parties. The fund, in part, contributed to the settlement of a number of legal matters to finalise the maritime dispute.¹⁹ The episode highlighted the representative actions which the ACCC can take without specific legislation.

The *Trade Practices Amendment Act (No.1) 2000* was passed in the House of Representatives on 19 June 2001 with the House accepting Senate amendments to remove items dealing with representative actions by the ACCC. The current Bill re-introduces similar provisions with respect to the ACCC and representative actions over secondary boycotts.

Right of Entry

Right of entry provisions in law (and, previously in awards) have been seen as crucial to effective representation of unions at the workplace. Former NSW Attorney-General J. Shaw QC with C. Walton observed that right of entry arrangements were consistent with Article 11 of the ILO's Freedom of Association Convention (Convention 87) noting:

It is plain that effective trade union representation of employees cannot occur without access on the part of the union and its authorised representatives to workplaces in

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order to recruit non-unionists, to communicate with union members and take up their concerns and to police award prescriptions and occupational health and safety requirement by inspecting the workplace in order to ascertain whether legal proceedings ought to be instituted.²⁰

Amendments to the right of entry provisions initially proposed in the WROLA Bill required that entry by authorised union officers to a workplace for the purposes of inspecting pay records or plant and machinery, would require an invitation from one or more members.²¹ The WROLA Bill, before amendments, also proposed a new section 291A which was designed to protect the confidentiality of those members who made the invitation (the current Bill re-introduces a similar protection).

In negotiations with the Australian Democrats the WROLA Bill's right of entry provisions were re-written.²² Thus the current right of entry provisions under the WR Act do not require written invitations from union members but do require evidence of a permit to enter, issued by the Australian Industrial Registrar on application by the organisation (union) concerned. Inspections can be for the purpose of inspecting suspected breaches of awards/agreements (section 285A), or for holding discussions with employees (sections 285C). Professor Bill Ford has written a comprehensive article on the current and previous right of entry provisions.²³

The MOJO Bill also proposed similar restrictions on the right of entry by union officials and inspectors (Schedule 13) to the initial WROLA Bill, requiring entry to be made conditional on an invitation.

The current Bill's *Explanatory Memorandum* estimates that there are a possible 43 200 federal workplaces which may be involved with the proposed tighter entry procedures.²⁴ This represents a significant reduction from the 200 000 establishments which the *Explanatory Memorandum* estimates are currently within the federal jurisdiction.

Contract work

The provisions of the current Bill which render illegal award and agreement provisions which govern the use of contract labour are new. The MOJO Bill did address allowable award matters (in Schedule 6) and proposed to remove many current matters which either are allowable, or, have not been deemed to be non-allowable. Under transitional items of the *Workplace Relations and Other Legislation Amendment Act 1996*, existing federal awards were required to be simplified, ie must only address the 20 allowable matters which 'new' awards are required to conform to under WR Act, section 89A. (The AIRC provides a very useful [Resource Book](#) outlining allowable award matters and the cases which have considered these, with award matters listed in alphabetical order in that Book). Award clauses governing the use of contract labour were not to be deemed non-allowable by the MOJO Bill.

In the same year, 1999, a Full Bench of the AIRC reviewed the use of award provisions concerning contractors and outworkers in the simplification of the *Textile Industry Award*

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1982 and determined that such clauses are incidental to the effective operation of that award.²⁵ The inclusion of outworker provisions in allowable award matters²⁶ arose as a result of the Agreement between the Commonwealth Government and the Australian Democrats.²⁷

To conclude on contractors and the MOJO Bill, the MOJO Bill did propose to remove the WR Act's independent contractors provisions currently found at sections 127A-C (MOJO Bill at Schedule 16), but had no effect on award or agreement provisions addressing the use of contractors. Below is the type of clause addressing the use of contractors, in this case in an engineering workshop, which will be rendered non-allowable in both awards and agreements under this Bill:

Clause 36

Contractors will be used by the employer to carry out work at the employer's facilities and off-site as required.

Wherever practicable the employer will use its own existing employees to carry out work that is within their capabilities.

The parties to this award acknowledge that circumstances can arise where it is more efficient to use contractors for a particular job. These circumstances would usually entail at least one of these factors: current workforce being fully utilised, or use of special tools, materials, equipment or specific skills not readily available to the employer.

The employer will keep the Consultative Committee and unions informed and involved prior to the use of contractors

Every effort will be made to minimise the use of contractors by adopting a skill and technology transfer strategy to ensure that specialised skills and technology held by contractors are transferred to Authority employees where appropriate.²⁸

Responses to the Bill

The Australian union movement has expressed its views on the Bill. Schedule 6 of the Bill will allow more workplaces and employees to be removed from the auspices of the AIRC and its regulation. The ACTU has responded to the Bill in these terms:

More than three million employees of small businesses would lose their legal protections against lower wages, unfair sackings and sub-standard conditions under legislation introduced in Federal Parliament today.

ACTU Secretary Greg Combet said the small business amendment Bill would remove legal rights from half the Australian workforce, or more than three million employees of businesses with less than 20 staff ...

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"These laws would unfairly discriminate against half the workforce. Why should employees have fewer legal rights and protections just because they work in small business? ...

Mr Combet said the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001 discriminated against small business employees by:

.allowing sub-standard individual contracts to apply without review by any independent umpire, including the Industrial Relations Commission and the Office of the Employee Advocate;

. banning unfair dismissal claims;

. exempting many businesses from awards and commission hearings; and

. preventing union representatives from visiting many businesses.²⁹

Given the Bill's subject matter and the background of many of its provisions it is likely that the Australian Labor Party will oppose this Bill. The Australian Democrats also appear not to favour this Bill. Senator Andrew Murray told *The Australian Financial Review*:

We are not going to accept that radical agenda - Australians don't want that agenda. It strikes me as whistling in the dark.³⁰

At the time of writing COSBOA (Council of Small Business Organisations of Australia) had no public statement addressing the Bill on its website (<http://www.cosboa.com.au/>), although it can be presumed that it would favour this Bill.

Main Provisions

Schedule 1 – Objects provisions

Part 1 – Amendments

Item 1 inserts **new subsection 3(ha)** into the Principal Objects of the *Workplace Relations Act* requiring the AIRC to take into account the circumstances of employers and employees in small business in performing its functions and in exercising its powers under this Act (including through appropriate changes to its principles, procedures and rules).

Items 2 to 4 insert similar obligations to consider the circumstances of small business employers and employees into the WR Act provisions dealing with **setting the award safety net** [**new paragraph 88A(d)(iii)**], the **termination of employment** provisions [**new subsection 170CA(3B)**] and in making **certified agreements** [**new subsection 170LA(1A)**].

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Part 2 – Application and transitional provisions

Item 5 allows the amendments made by this Act to apply to any proceedings before the AIRC whether in progress or to be started.

Item 6 obliges the President of the AIRC to complete a review of the Rules of the AIRC (section 48 WR Act) in light of amendments made by this Bill to the WR Act. The President must report on his review to the Minister and create or vary AIRC Rules according to his review.

Schedule 2 – Unfair Dismissal

Part 1 – Amendments

Item 2 inserts the small business exclusion provision into the unfair dismissal provisions with the **new subsection 170CE(5C)**. This provision refuses applications for relief from harsh, unfair or unjust terminations if the employer at the time of the dismissal employed less than 20 employees, not including short-term casual employees but including the dismissed person. Apprentices and trainees who have signed registered training agreements are not covered under this provision [see **new subsection 170CE(5D)**].

Item 3 inserts **new subsection 170CEAA**. Under **new subsection 170CEAA(2)** the AIRC may dismiss an application for a remedy against an unfair unjust or harsh termination by a small business employee where the AIRC determines that the applicant does not have a ground for making the application. Under **new subsection 170CEAA(3)** the AIRC can dismiss a similar application on the grounds that it is frivolous or vexatious. Under **new subsection 170CEAA(4)** the AIRC is not required to hold hearings in making an order under new section 170CEAA, and is required to take into account the cost to the employer's business if a hearing was required and the employer attended.

Item 4 prevent challenges to a determination to dismiss an application by preventing the AIRC from varying or revoking an order made in respect to a small business unfair dismissal application through **new subsection 170JD(4)**. **Item 5** prevents an appeal being made to a Full Bench via **new subsection 170JF(3)**.

Schedule 3 – Australian Workplace Agreements (AWAs)

Item 1 of Part 1 repeals Divisions 1,2,3,4,5 and 6 of Part VID of the WR Act and the following new provisions are inserted.

New Subdivision A of Part 1 outlines that this Part (Part VID) of the WR Act which deals with the making, approval and operation of AWAs. **New Subdivision B** provides definitions for the terms used in the Part. **Subdivision C (new section 170VAC)** sets out the constitutional basis for the Part; ie including AWAs made with an employer who is a

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constitutional corporation or where the employees are employed by the Commonwealth or who are involved in interstate or overseas trade.

Division 2 – Making an AWA

New section 170VB allows an employer and employee to make an AWA before the employee commences employment subject to procedures of making an AWA (**new section 170VBA**). The making of an AWA requires that:

- the parties sign the AWA;
- the employee must have genuinely consented;
- the employee must have received a copy;
- the employer must have explained the effect of the AWA and given an information statement to the employee prepared by the Employment Advocate (EA) on matters such as Commonwealth employment laws and occupational health and safety laws.

The employee may withdraw consent to the AWA by written notice to the employer before the end of the ‘cooling-off’ period defined as 5 days from the date of signing by a new employee and 14 days from the date of signing by an existing employee. If the employer has filed the AWA, then written notice must be forwarded to the Employment Advocate within 7 days of the employer being advised [**new section 170VC(6)**]

New section 170VBB requires that AWAs have provisions on discrimination as prescribed by regulations eg that the parties respect workplace diversity etc (WR Act Schedule 8). If these provisions are absent the AWA is deemed to have them. AWAs must have dispute resolution procedures which may be reviewable by the AIRC. AWAs must not contain provisions prohibiting their disclosure nor contain provisions which offend the WR Act’s freedom of association provisions (Part XA).

New section 170VBC specifies that the nominal expiry date is the third anniversary of the ‘AWA date’. This is defined as the later date of signing, although the AWA may specify an earlier expiry date.

New section 170VBD specifies options for the period of operation of an AWA. For the starting date these can be: the AWA date; a date specified or if the employee is new, on the date employment commences. An AWA will stop operating if it has not been filed with the EA within 60 days of its start date. Other options for stopping the operation of an AWA, include: replacement of the AWA by another; by the EA refusing to approve the AWA or by a formal termination proceeding. Also an employee’s withdrawal from an AWA during the cooling off period means that the AWA is taken not to have started.

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Division 3 – Approval of AWAs

New section 170VC provides that an employer must apply in writing to the EA to have an AWA approved within 60 days from the AWA date. Copies of the document must be forwarded to the EA. Two or more agreements may be forwarded in the one notice if the employer is party to them all, and the agreements need not be in the same terms.

New section 170VCA sets out that an AWA is taken not to have operated if the employee withdrew from it under the cooling-off period.

New section 170VCB requires the EA to approve the AWA providing the requirements under Division 2 have been complied with, and if the AWA passes the no disadvantage test (WR Act Part VIE). If undertakings or information is given to the EA about the AWA complying with Division 2, the EA may approve the AWA. **Subsection 170VCB(5)** allows the EA to approve the AWA even if it does not pass the no disadvantage test but is satisfied that it is not against the public interest to approve the AWA.

New Section 170VCC allows the President of the AIRC to establish principles for the guidance of the Employment Advocate concerning approval of AWAs.

New section 170VCD requires the EA to issue an approval notice, or a refusal notice to the employer. The notice must identify the designated award.

New subsection 170VCE(1) provides that an AWA which has started to operate ceases to operate if no application to approve the AWA has been received by the EA within 60 days after the AWA date. **Subsection 170VCE(2)** stipulates that the EA cannot approve an AWA if a refusal notice has been issued.

New subsection 170VCF(1) obliges the employer to provide the employee with a copy of the EA's approval/refusal notice.

Division 4 – Effect of AWA

New Subsection 170VD(1) stipulates that a current AWA excludes any award which would otherwise apply to an employee. Qualifications are provided on the extent of exclusion in respect of arbitrated awards made by the AIRC as a result of failure of bargaining [**new subsection 170VD(2)**], and as an 'exceptional matter' order [**new subsection 170VD(3)**]. **New subsection 170VD(4)** stipulates that an AWA excludes the operation of any State award or agreement which would otherwise apply. **New subsection 170VD(5)** outlines the relationship between an AWA and a certified agreement which might otherwise apply to the employee and in most cases the AWA will exclude the certified agreement, except where the CA comes into effect after the nominal expiry date of the AWA.

New subsection 170VDA(1) stipulates that an AWA prevails over employment conditions prescribed in State law, with the exception of occupational health and safety, workers

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compensation and apprenticeships. An AWA also prevails over a Commonwealth law that is prescribed by the regulations.

New subsection VDD provides that where an AWA employee becomes an employee to a new employer due to the new employer being a successor to the business or any part of, and providing the new employment arrangement comes under the constitutional limitations (**new section 170VCA**), then the new employer becomes bound to the AWA.

Division 5 – Extending, varying or terminating an AWA

New subsection 170VE(1) allows an employer and employee to make a written agreement which extends the nominal expiry date of an AWA. The one agreement can be signed by more than one employee [**new subsection 170VE(3)**].

New subsection 170VEA(1) requires the employer to write to the Employer Advocate for approval of an extension agreement within 60 days of the agreement taking effect.

New subsection 170VEB(1) requires the EA to approve the agreement if it is made correctly. If the agreement is not made correctly the EA can still approve the agreement providing it does not disadvantage either party [**new subsection 170VEB(2)(b)**]. If no application is made to the EA within 60 days of the agreement coming into effect, it ceases to have effect [**new subsection 170VEC(1)**].

New subsection 170VED(1) allows the parties to vary an AWA by a written agreement; where the AWA'S nominal expiry date is varied, this cannot be for a period greater than 3 years after the AWA date. An employee can withdraw consent within a 14 day cooling-off period by written notice to the employer and the EA [**new subsection 170VED(2)**]. **New subsection 170VEE(1)** requires the employer to apply to the EA for approval of the variation. This must be within 60 days of the last signature to the variation agreement [**new subsection 170VEE(2)**]. Other subsections require the EA to issue approval/refusal notice and for the employer to give copies of these to employees (**new sections 170VEH and 170VEI**).

New section 170VEK sets out the 3 ways in which an AWA may be terminated. These are [1] through a termination agreement which must be signed individually by employees unlike extension and variation agreements; [2] by termination through the Employment Advocate after the AWA's nominal expiry date, or [3] within the terms of the AWA for its termination.

Items 2 to 5 of Schedule 3 amends Division 7 of Part VID concerning enforcement and remedies. **Item 7** repeals and replaces section 170VX which deals the entitlement to recover shortfalls in entitlements due to the AWA not operating and adds **new subsection 170VXA** dealing with compensation shortfall where an AWA was operating before it was approved. **New subsection 170VXB** addresses recovery of a shortfall of compensation due to a variation agreement ceasing to have effect. **New subsection 170VXC** addresses

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recovery of a shortfall in compensation due to a variation to an agreement being used before it was approved.

The role of bargaining agents being appointed to negotiate an AWA on behalf of an employer or employee is inserted into the start of Division 9 of Part VID [**new section 170WEA**] in similar terms to the current section 170VK.

Schedule 4 – Certified agreements

Item 2 inserts **new subsection 170LJ(3A)** obliges an employer making a ‘Division 2’ agreement (agreement between corporations and employees) to advise his/her employees that they have 28 days from the date of the agreement’s approval, to seek a hearing by the AIRC as to whether the agreement should be certified. A similar requirement is provided for section 170LK agreements (agreements between unions and corporations) in **new section 170LK(7)** via **item 4**. **New subsection 170LR(3)** makes the same requirement in respect of requests for hearings concerning the certification of agreements made under the Constitution’s conciliation and arbitration power (‘Division 3’ agreements).

Item 10 inserts **new subsection 170LT(11)** which allows the AIRC to approve the variation of a proposed agreement if the AIRC is satisfied that no employee would be disadvantaged.

Item 11 inserts **new subsection 170LVA** which obliges the AIRC to make a decision as to whether or not to certify an agreement without holding a hearing unless there is not sufficient information [**new paragraph 170LVA(1)(a)**] or if any of the employees or unions affected by the agreement seek a hearing. This request must be within 28 days of the agreement is made.

Items 12 to 27 amend provisions under Division 7 of Part VIB – extending, varying or terminating certified agreements. **Item 27** adds **new subsection 170MHB** to Division 7. **New subsection 170MHB(1)** obliges the AIRC to make a decision whether or not to extend, vary or terminate an agreement without holding a hearing. Where union members are employed under a section 170LK certified agreement and the union is bound by that agreement, the union cannot request a hearing unless requested by a union member for whom the union is eligible to represent.

Schedule 5 – Secondary boycotts

Item 1 amends section 87(1A)(b) of the *Trade Practices Act 1974* by omitting (‘other than section 45D or 45E’).

Item 2 amends section 87(1B)(a) by omitting (‘other than section 45D or 45E’). The effect of the amendments will allow the ACCC to take representative actions on behalf of

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businesses and individuals whose interests are damages by boycott actions (discussed above).

Schedule 6 – Federal awards

Item 2 inserts **new subsection 101A** which prevents the AIRC from making a finding of an industrial dispute after a log of claims was served on a party (usually the employer) unless:

- the log of claims was accompanied by a information about the federal award-making system as prescribed in the regulations
- the dispute was notified at a minimum of 28 days after the log was served
- 28 days notice was given to each person addressed in the claim of the time and place proposed to proceed the claim.

Also, the AIRC must not proceed to make a finding if the log contained non-allowable award matters, provisions which offended freedom of association provisions, ‘anti-AWA’ provisions or preference for union members.

New subsection 101B(2) requires that the AIRC must not make a finding of a dispute without informing itself of each employer’s employment size as the time the log was served. **New subsection 101B(3)** prevents the making a finding of a dispute where the business employed less than 20 people on the service day, unless one employee was a member of an registered organisation (union) or the employer in fact employed more than 20 people. **New subsection 101B(4)** requires the AIRC invite a small business employer who is to become a respondent to an award the opportunity to make comments on the draft award. **New section 290A** will allow a union to apply to the Industrial Registrar for a certificate indicating the Registrar’s satisfaction that an employee of the employer is a member of the union.

Schedule 7 – Entry and inspection of premises by organisations

Part 1 – Amendments

Item 1 inserts **new subsection 285B(2A)** which qualifies an authorised person’s right to enter a workplace for inspection purposes on the basis of the relevant organisation having an invitation specified in new subsection 285CA.

Item 2 amends subsection 285B(3)(a) which concerns an inspection for the purposes of ascertaining award/agreement breach by relating the suspected breach to employees who are members of the union, which is authorised to make the inspection.

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Item 4 inserts **new subsection 285B(3A)** which prevents the copying of the employers documents unless these relate to the employment of the relevant union's member.

Item 5 repeals and replaces subsection 285C(2). This provision allows entry for the purposes of holding discussions. New provisions require an invitation from an employee who is a union member; that entry only be during working hours and during the employee's meal break (as is the requirement currently) and the authorised person is entitled to enter the premises again for the purposes of holding discussions within 6 months.

Item 6 inserts **new subsection 285CA** sets out the requirements for a current invitation. These that it must be written and signed; be given to the organisation and is a current organisation. A current invitation is defined in **new subsection 285CA(2)** to include an invitation given no earlier than 3 months before the proposed entry or is certified under proposed section 291B no earlier than 3 months before the proposed entry. **New subsection 285CB** allows an inviting employee to maintain his/her confidentiality to his/her employer, for which the relevant union must have regard.

Item 7 repeals and replaces section 285D. **New subsections 285D(1) to (4)** set out the obligations of the authorised person entering a workplace to produce evidence to the employer or occupier of an invitation to enter. **New subsection 285DA(1)(a)** requires the authorised person to give 5 days notice to the employer/occupier before entry. **New subsection 285DA(1)(b)** requires the notice to stipulate a nominated day. **New subsection 285DA(2)** allows the employer/occupier to nominate an alternative time. **New subsection 285DB** prohibits an authorised person from entering residential premises. **New section 285DC** allows the Industrial registrar to issue entry cards to authorised persons. Employers are prevented from dismissing or discriminating against an employee because that employee has sought to give an organisation an invitation to enter under **section 285EA**. Organisations (unions) are prevented from coercing a person to breach section 285EA or to coerce a person to provide the organisation with an invitation under subsections of **new section 285EB**.

Item 10 inserts **new section 291B** allows the Industrial Registrar to certify that an organisation has received a prescribed invitation.

Item 11 inserts **Schedule 9 – Information relating to entry to premises under section 285B or 285C** into the schedules attached to the WR Act. Schedule 9 is a plain English guide to the new right of entry provisions, setting out what rights a union official has to enter an employer's premises and for what purposes. It sets out the qualifications to entry, choices over suitable times, the rights of employers/occupiers, and, upon entry, what an authorised person can and cannot do.

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Part 8 – Contracts for services

Part 1 – Amendments

Item 3 inserts amendments after subsection 89A(6). **New subsection 89A(6A)** will prevent the AIRC from regarding award clauses dealing with contract for services as incidental to the effective operation of the award. **New subsection 89A(6B)** allows an exemption to subsection 89A(6A) in respect of TCF award provisions providing pay equity for TCF contractors (outworkers).

Item 4 inserts **new subsection 170LU(2B)** requiring the AIRC to refuse to certify an agreement if it restricts the employer in any way in relation to contracts of services (either entry into them or their terms).

Item 5 inserts **new section 170LZA** which deems that provisions of certified agreements restricting employers entering into contracts for services (or their terms) are void.

Item 7 inserts **new section 170MDB** which allows certain people including the Minister to make an application to the AIRC to remove contract for service provisions from certified agreements.

Part 2 – Application and transitional provisions

Item 10 stipulates that within 12 months of Schedule 8 commencing, the AIRC must review all awards containing ‘contract for service’ provisions (other than TCF award contract for service clauses). Any award contract for service clause ceases to have effect after 12 months of the Schedule coming into operation. At the end of this time, the AIRC may remove contract for service clauses from awards.

Concluding Comments

While the Bill addresses matters of long standing concern to small business, most notably in the new unfair dismissal proposal, the Bill introduces reforms which will be of interest and available to other businesses. For example, the restrictions over right of entry will apply to all businesses, as will the ability to have collective agreements certified without hearings, and indeed the simplified procedures for entering into AWAs.

The Bill also clearly outlines the workplace relations small business reform agenda for the Government in a lead-up to an election. However, upon close examination it can be seen that the bulk of the issues raised in the Bill have been put forward previously in other Bills. Therefore the current Bill cannot be seen as innovative, except for the provisions on contractors which will not be allowed under ‘allowable award matters’, nor for that matter under agreements.

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Endnotes

- 1 Changes to Parliamentary Sittings were announced by the Leader of the House, the Hon. Peter Reith on 7 September 2001. These changes put back scheduled October sittings and culled planned sittings for December.
- 2 ‘Howard’s plan to win small business’, *The Courier-Mail*, 13 August 2001.
- 3 CCH *Australian Labour Law Reporter*, [¶2-460].
- 4 *Workplace Relations (Transmission of Business) Amendment Bill 2000*.
- 5 The Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001, *Explanatory Memorandum*, acknowledges that AWAs ‘only cover 1% of employees in Australia’, p.11. While DEWRSB’s *Agreement Making in Australia under the Workplace Relations Act 1998 & 1999* (DEWRSB 2000) reported that s.170LK agreements covered 9% of 1.562 million employees under agreements in the review period. The overwhelming majority of these employees were under union agreements.
- 6 Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001, *Explanatory Memorandum*, p. 5.
- 7 See attachment to ‘Government secures unfair dismissal changes’, Joint Media Release by The Hon Tony Abbott and the Hon Ian Macfarlane 8 August 2001 which outlines the most recent amendments made to the termination provisions of the *Workplace Relations Act 1996*.
- 8 For example, Slater and Gordon’s submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee re consideration of the Workplace Relations Amendment (Termination of Employment) Bill 2000.
- 9 ABS *Small Business in Australia 1999* Cat. No. 1321.0, (23 May 2000).
- 10 Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001, *Explanatory Memorandum*, p. 24.
- 11 Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001, *Explanatory Memorandum*, p. 8.
- 12 The ACCC may also bring representative actions under Part IVA of the *Federal Court of Australia Act 1976*, however to use these provisions the ACCC needs to establish that it has a ‘claim’, whereas under s.87 of the TP Act, it has a statutory right to proceed.
- 13 Joint Select Committee on the Retailing sector, *Fair Market or Market Failure? A Review of the Australian Retailing Sector*, August 1999.
- 14 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, 1994, p. 46.
- 15 House of Representatives Standing Committee on Industry, Science and technology, *Finding a balance: towards fair trading in Australia*, May 1997, p. 133.
- 16 P. Elias and K. Ewing, *Trade Union Democracy, Member’s Rights and the Law*, (London, Mansell Publishing, 1987), note the chapter, ‘The Historical Context – Restraint of Trade’, p. 3.

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- 22 *Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001*
- 17 ACCC, ‘ACCC/Maritime Union of Australia’, *Media Release*, 27 May 1998.
- 18 ACCC, ‘Waterfront dispute case settled’, *Media Release*, 3 September 1998.
- 19 An account of the maritime dispute, including representative actions made by the ACCC on behalf of businesses financially damaged during the incident can be found in Parliamentary Library *Current Issues Brief* no. 1 1998-99. (The Australian Bureau of Statistics did not record any working hours lost during the maritime dispute as workers were not on strike and technically were unemployed).
- 20 J. Shaw and C. Walton, ‘A Union’s Right of Entry to the Workplace’, *Journal of Industrial Relations*, v.36, n.4, 1994, p. 546.
- 21 *Workplace Relations and Other Legislation Amendment Bill 1996*, Schedule 15
- 22 Cited in endnote 10 at Schedule 15 – Registered Organisations.
- 23 W.J. Ford, ‘Being there: Changing Union Rights of Entry Under Federal Industrial Law’, *Australian Journal of Labour Law*, v.13, no.1, June 2000.
- 24 *Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001*, *Explanatory Memorandum*, p. 24.
- 25 AIRC *Print R2749*, 12 March 1999.
- 26 WR Act, section 89A(2)(t).
- 27 *Agreement between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill* (October 1996).
- 28 *State Transit Authority of New South Wales Bus Engineering Maintenance Award* [S0238] Clause 36 – Contractors.
- 29 ACTU, ‘Abbott clears the way for lower wages, more sackings’
<http://www.actu.asn.au/vunions/actu/article>.
- 30 ‘Industrial reform faces Senate block’ *The Australian Financial Review*, 9 August 2001.

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