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Workplace Relations Amendment (Secret Ballots
for Protected Action) Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 116 2001-02

Workplace Relations Amendment (Secret Ballots for
Protected Action) Bill 2002

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22 April 2002

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Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002

Date Introduced: 20 February 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The amendments set out in Schedule 1 will commence on a day to be fixed by proclamation, subject to subsection 2(3), which specifies that the Bill commences after 6 months of it receiving Royal Assent unless an earlier date is fixed by proclamation. The amendments set out in Schedule 2, which are contingent upon amendments proposed by the Workplace Relations Amendment (Genuine Bargaining) Bill 2002, would commence on the later date of the commencement of the amendments made by that Bill or the commencement of Item 24 of Schedule 1 to this Act.

Purpose

The [Workplace Relations Amendment \(Secret Ballots for Protected Action\) Bill 2002](#) will amend the [Workplace Relations Act 1996](#) (the WR Act). The amendments will require the conduct of a secret ballot by union members or non-union members, as the case may be, as a prerequisite for gaining authorisation from the Australian Industrial Relations Commission (AIRC) to take subsequent 'protected' industrial action against the employer during enterprise bargaining negotiations. This is to ensure that those participating in the action have decided upon the action and have not been misled by union officials.

Background

Recent legislative initiatives

A provision to require a secret ballot before employees took protected industrial action was proposed as Schedule 12 of the [Workplace Relations Legislation Amendment \(More Jobs, Better Pay\) Bill 1999](#), (the 'More Jobs Better Pay Bill'). Also at that time, the 1999 Commonwealth Budget introduced funding for the partial costs of conducting these ballots (contained in the 1999 Employment, Workplace Relations and Small Business [Portfolio Budget Statement](#)).

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The 'More Jobs, Better Pay' Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. A report on the 'More Jobs Better Pay' Bill was made in November 1999¹ (see [Senate Report 1999](#)). The Bill failed to pass the Senate on 29 November 1999.

The Government decided to reintroduce schedules of the 'More Jobs Better Pay' Bill as separate Bills. Thus, the [Workplace Relations Amendment \(Secret Ballots for Protected Action\) Bill 2000](#) (the 2000 Bill) was introduced to the House of Representatives on 26 June 2000. [Bills Digest 18, 2000-2001](#) addressed that Bill and provides useful background to the issue of ballots prior to industrial action. That Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee on 16 August 2000.

The Senate Committee reported on that Bill along with three other Bills on 7 September 2000 (see [Senate Report 2000](#)).² Debate on this Bill was adjourned in the Senate on 7 August 2000, thus the Bill failed to pass the Senate.

Current provisions for secret ballots and industrial action

There are currently certain sections of the WR Act dealing, separately, with secret ballots for industrial action and notices to initiate bargaining which may involve industrial action. In the case of secret ballots, there are also separate ballot provisions dealing with the election of officials of registered organisations (unions and employers). Ballots are also used for voting on amalgamations of registered organisations and for approving certified agreements. The provisions below only address the use of a ballot in the context of resolving an industrial dispute. Provisions providing access to protected industrial action are discussed later.

Secret ballots: rationale

Minister Abbott reflected on his proposals to amend the current secret ballot provisions by stating in his [Second Reading Speech](#) to the current Bill that:

A secret ballot is a fair, effective and simple process for determining whether a group of employees at a workplace want to take industrial action. It will ensure that the right to protected industrial action is not abused by union officials pushing agendas unrelated to the workers at the workplace concerned.

Secret ballots on industrial action have been a feature of federal labour legislation since the late 1920s. The current provisions allowing the ordering of a secret ballot by the AIRC under the WR Act (under Division 4 of Part V1) reads:

Section 135: Commission may order secret ballot

(1) *Where:*

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(a) an organisation is concerned in an industrial dispute with which the Commission or another tribunal acting under a law of the Commonwealth is empowered to deal (whether or not proceedings in relation to the dispute are before the Commission or other tribunal); and

(b) the Commission considers that the prevention or settlement of the industrial dispute might be helped by finding out the attitudes of the members, or the members of a section or class of the members, of the organisation or a branch of the organisation in relation to a matter;

the Commission may order that a vote of the members be taken by secret ballot (with or without provision for absent voting), in accordance with directions given by the Commission, for the purpose of finding out their attitudes to the matter.

Also in certain situations, the members of an organisation (union members) may make an application for the AIRC to conduct a ballot:

Section 136: Application by members of organisation for secret ballot

(1) Where:

(a) the members, or the members of a section or class of the members, of an organisation or branch of an organisation are directed or requested by the organisation or branch to engage in industrial action; and

(b) the members directed or requested are, or include, members (in this section called the relevant affected members) who are employed by a particular employer at a particular place of work;

application may be made to the Commission, by at least the prescribed number of relevant affected members, for an order under subsection (2).

The current Bill repeals this provision and its subsequent subsections.

History of ballots and industrial action provisions

A legislative background to ballot provisions relating to industrial disputation in the Commonwealth jurisdiction has been outlined in an AIRC decision by Senior Deputy Harrison on secret ballots, collective bargaining and Australian Workplace Agreements. It can be seen that aspirations to learn true rank and file feelings have been at the heart of both past (and current) amendments to secret ballot provisions:

In 1928 the then *Conciliation and Arbitration Act 1904* (CA Act) was amended to insert a new section which was s.56D. That section allowed the then Commonwealth Court of Conciliation and Arbitration to make an order for the views of members of an organisation or parties to a dispute be submitted to a vote of members of the organisation by secret ballot in accordance with directions given by the Court.

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In or about 1947 and as a part of other variations to the CA Act, s.56D became s.72. Further amendments were made in 1951. The second reading speeches at the time these amendments were introduced each made some reference to them forming part of a campaign which the Government and its supporters were directing against what was described as the sinister challenge of communism. It was said that the amendments would allow the Court itself to order the views of members be ascertained by secret ballot and hence allow the "rank and file" views to be known.

In or about 1956 the section was again amended and it then became section 45. One particular reason for this amendment was the decision in the case known as the "Boilermaker's case" necessitating a reconsideration of the extent to which a Court could exercise certain powers. The amendments made resulted in the establishment of the Commonwealth Industrial Court and the Commonwealth Conciliation and Arbitration Commission.

In 1972 a new section 45 was inserted. In the second reading speech at the time the then Bill was described as including new provisions in relation to the holding of court controlled ballots in relation to industrial disputes. Again it was said to be motivated by a belief that many industrial stoppages did not have the support of rank and file trade unionists.

Further amendments were made in 1977 and 1981. Each amendment was said to be justified as being a practical way of giving effect to the principle that an opportunity should be available for employees to express their personal views on industrial activity. The act would now also allow employees themselves to apply for a secret ballot to ascertain whether they approved of or wanted to participate in industrial action (this power is similar to that now in s.136 of the Act) ...

Further amendments appear to have been made in 1983 which are not necessary to be described. In the amendments made to the Act in 1988 which resulted in the repeal of the C&A Act and the introduction of the *Industrial Relations Act 1988*, section 45 became section 135. Further amendments were made in 1996 by the *Workplace Relations and Other Amendments Act 1996* when the present subsections (2A) and (2B) were introduced.³

Ballots and bargaining

The case which elicited the AIRC's review of ballot provisions concerned the Rail Bus and Tram Union and the operators of Great Southern Railways (previously an operation of Australian National Railways) now owned by the company Serco Australia Pty Ltd. The case highlighted the usefulness of the current secret ballot provisions in resolving industrial disputes over Australian Workplace Agreements. The RBTU put to the AIRC, in the context of bargaining for a certified agreement and utilising the AIRC's conciliation role, that the AIRC conduct a ballot of employees of Great Southern Railways under section 135 around the following question:

When your current Australian Workplace Agreement reaches its nominal expiry date, would you prefer to have your terms and conditions of employment thereafter

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regulated by a collective agreement certified under the Workplace Relations Act to which the RBTU is a party or to continue under another Australian Workplace Agreement [Please tick your preference]

The AIRC determined that the general dispute resolution powers under [subsections 111\(1\)\(d\) and \(t\)](#) and the conciliation role afforded to it for conciliating EBA impasses under [section 170NA](#) were available for this purpose. The outcome of this ballot indicated a preference for a collective agreement.⁴ It shows the usefulness of the current secret ballot provisions in outlining the views of employees for bargaining options when the legislation is generally silent on the expression of employee preference in their choice of bargaining modes.

Protected industrial action

Protected industrial action is available under the WR Act to employers, unions and employees but only where the parties are negotiating an enterprise bargaining agreement (referred to as a certified agreement under the WR Act). Until 1994 industrial action was not protected, but legislation in the form of the [Industrial Relations Reform Act 1993](#) introduced the concept in the context of these negotiations.

The Department of Employment Workplace Relations and Small Business (DEWRSB, now DEWR) explained the concept of protected industrial action in its submission to the Senate Committee's review of the 2000 Bill.

The *Workplace Relations Act 1996* (WR Act) provides significant protections for employees and unions organising industrial action in order to advance their claims in respect of a single business certified agreement. This protection is subject to certain procedural requirements and limited to situations where there has been a genuine attempt to reach agreement. Unions and employees complying with these requirements gain immunity from most forms of civil liability that may arise from the industrial action ([section 170MT](#)). In addition, employers are prohibited from dismissing or injuring an employee in his or her employment wholly or partly because the employee has taken protected action ([section 170MU](#)).⁵

Note that in a significant development, the Federal Court in its [Emwest](#) decision⁶ (as well as the AIRC) has entertained the notion that a union may take industrial action during the course of the operation of a certified agreement. This is in a circumstance where the union is seeking resolution of a matter not included in the first agreement.

The current Bill will alter the provisions available for the taking of protected industrial action. These are currently:

[Section 170MI - Initiation of bargaining period](#)

(1) If:

(a) an employer; or

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(b) *an organisation of employees; or*

(c) *an employee acting on his or her own behalf and on behalf of other employees; wants to negotiate an agreement under Division 2 or 3 in relation to employees who are employed in a single business or a part of a single business, the employer, organisation or employee (the initiating party) may initiate a period (the bargaining period) for negotiating the proposed agreement.*

Note: This subsection has effect subject to subsections 170MW(10) and 170MZ(7).

Also, where the employees engaging in industrial action are members of a registered organisation, the action must be authorised by officials of the union and under its rules.

Section 170MR - Industrial action must be duly authorised

(1) Engaging in industrial action by members of an organisation of employees that is a negotiating party is not protected action unless, before the industrial action begins:

(a) the industrial action is duly authorised by a committee of management of the organisation or by someone authorised by such a committee to authorise the industrial action; and

(b) if the rules of the organisation provide for the way in which the industrial action is to be authorised—the industrial action is duly authorised under those rules; and

(c) written notice of the giving of the authorisation is given to a Registrar.

Section 170MQ - What happens if Commission orders a ballot

(1) If, under subsection 135(2), the Commission has ordered that a vote of members of an industrial organisation be taken by secret ballot in relation to the proposed agreement, the organising of, or engaging in, industrial action by:

(a) the organisation; or

(b) a member of the organisation; or

(c) an officer or employee of the organisation acting in that capacity;

after the making of the order is not protected action unless:

(d) such a ballot has been taken; and

(e) the industrial action has been approved by a majority of the valid votes cast in the ballot.

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(2) If, under subsection 135(2B), the Commission has ordered that a vote of employees be taken by secret ballot in respect of a proposed agreement, the organising of, or engaging in, industrial action by the employees after the making of the order is not protected action unless:

(a) such a ballot has been taken; and

(b) the industrial action has been approved by a majority of the valid votes cast in the ballot.

Statistics on ballots and protected action

The question arises as to how these provisions for secret ballots and notices to initiate bargaining periods are utilised in practice. From the statistics on ballots and bargaining period available in annual reports of the AIRC, the following data in the table can be compiled. However, there are a number of caveats. It is assumed that the bulk of applications to initiate bargaining periods come from unions but applications can be made by employers to instigate lock-outs against their employees. Also, while there are thousands of applications annually to initiate bargaining, these not necessarily result in prolonged action.⁷

Table: Orders for secret ballots and applications to AIRC to initiate bargaining period

Year	96/97	97/98	98/99	99/00	00/01
No. of orders for secret ballot	2	6	1	2	1
No. of applications for bargaining period	4,300	6,613	5,779	9640	6,625

(Source: annual reports of the Australian Industrial Relations Commission 1997- 2001)

The data on requests for secret ballots prior to 1997 has been reported in the Ministerial Discussion Paper, *Pre-industrial action secret ballots*.⁸ It notes the provisions have been accessed sparingly, with some 27 AIRC decisions up to 1997 making reference to both 'secret ballot' and 'industrial action'.⁹

As for bargaining periods, applications to initiate a bargaining period do not equate to industrial action taken. Indeed, Australia has witnessed a very low period of disputation with 50 working days lost per 1,000 employees in the 12 months to December 2001.¹⁰ By contrast, a decade earlier about 200 working days were lost per 1,000 employees, and this itself was a decline from 1980s data.¹¹

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Also the data on industrial disputes do not clearly show enterprise bargaining as the main area of disputation. Australian Bureau of Statistics data on industrial disputes show for the 12 months to November 2001 that disputes over wages only accounted for 14 000 days lost, while disputes against managerial policy accounted for 224 600 days lost.¹² It is true that managerial policy disputes can include those over enterprise bargaining but managerial policy disputes also include other matters such disputes over discipline, rosters, retrenchment, victimisation of unionists and so-on. Falling disputation data can be partly explained by the formalities required to actually engage in protected action. As well as complying with the provisions detailed above re authorisation, the parties are required under [section 170MO](#) of the WR Act to provide notice of action to be taken to the employer (and vice versa).

It is assumed that where employee decisions are made to take action, they are made within the registered rules of the relevant organisation. While it is feasible for non-unionists to take industrial action in enterprise negotiations, [Bills Digest 18, 2000-2001](#) showed that in only one case to 2001 had a group of employees been successful at making an application under the WR Act's bargaining provisions.

Overall, it can be contended that the perceived need for rank and file unionists to specifically express their views on industrial action has not materialised under the avenues which are available under the WR Act. Industrial action has thus declined as bargainers have become 'bargained out', and the bargaining provisions discourage industrial action, a point noted by the senior research fellow at the National Institute of Labour Studies, Mr Mark Cully:

'In Australia, the move to individual and enterprise-based employment agreements meant less scope for collective action, and legislation strictly defining 'legal' industrial action also discouraged strikes'¹³.

Policy Commitment

The Government outlined its policy for protected action ballots in its 1998 federal election workplace relations policy *More Jobs Better Pay*. However, the proposal had also been covered earlier in the Ministerial Discussion Paper [Pre-industrial action secret ballots](#) (August 1998). The policy was subsequently elaborated in a ministerial discussion paper by the Hon. Peter Reith [The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay](#) (May 1999), which proposed:

Protected action will be preceded by a secret ballot process overseen by the AIRC. Ballots will normally be conducted by post, although applications may be made for attendance ballots in appropriate circumstances. An application for a secret ballot will only be able to be made during a bargaining period and will be required to include a range of information, such as the proposed certified agreement to which a secret ballot relates, the group of employees or members who are to be balloted, and the question or questions to be asked in the ballot. The AIRC will be empowered to

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determine whether a ballot should or should not proceed. Before ordering a ballot the AIRC would need to be satisfied that, among other things, the parties have been genuinely bargaining.

Members of organisations making agreements (or the employees to be covered in the case of non-union agreements) would be eligible to vote in a ballot.

The current Bill is the third legislative attempt to give effect to this policy. The policy in favour of secret ballots prior to industrial action was again featured in the workplace relations policy of the Liberal Party of Australia prior to the November 2001 federal election.¹⁴

Views of key organisations

Below are the summaries of points made by the Department of Employment, Workplace Relations and Small Business (DEWRSB), the Australian Council of Trade Unions (ACTU) and major employer organisations such as the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (AiG) to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. These submissions were made in the context of the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000. However their views are still useful.

The extracts attributed to the ALP and the Australian Democrats, are excerpts from their respective minority reports of September 2000 for the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee: *Consideration of Provisions Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000*, *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000*, *Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000* *Workplace Relations Amendment (Termination of Employment) Bill 2000*, September 2000.

The full text of electronic submissions to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee on these Bills can be found [here](#).

DEWRSB:

- Unions and employees complying with these requirements gain immunity from most forms of civil liability that may arise from the industrial action (section 170MT). In addition, employers are prohibited from dismissing or injuring an employee in his or her employment wholly or partly because the employee has taken protected action (section 170MU).
- At present, there is a requirement that industrial action organised by a union must be duly authorised in accordance with the organisation's rules in order to attract protection (section 170MR). **Their rules may require endorsement by members of any proposed action, however, in a matter as important as the taking of protected**

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industrial action, in the Government's view, there should be an explicit requirement in the WR Act that members formally vote to take industrial action or not to take industrial action. (emphasis added)

- Pre-industrial action ballots are an appropriate counterpart to protected action. Protected action is available only in respect of single business certified agreements, reflecting the focus of the WR Act on genuine enterprise-level bargaining, and the decision to take (or not to take) protected action should be made at the workplace level by those employees directly concerned.
- As recent developments indicate, protected action is being used in support of common claims being brought across an industry or parts of industry sectors, using the device of a common expiry date. Recourse to broadly-based protected action through this device reinforces the policy rationale for secret ballots prior to taking protected action. Such provision would ensure that decisions to access protected action were democratically taken, and that they were taken at the workplace level. Over the longer term, normal recourse to secret ballots where protected action was an issue would contribute to developing a culture of employee involvement in workplace agreement-making.
- The Commission's power to order a pre-industrial action secret ballot (including on application by members of an organisation) is discretionary.
- In the United Kingdom, compulsory pre-strike ballots are well established, and were retained in the Labour Government's *Employment Relations Act 1999*.
- Union leaders in the United Kingdom have acknowledged that requirements for secret ballots for elections and for authorisation of industrial action have assisted in improving democracy within unions. For example, a paper commissioned by the Trade Union Congress in 1994 stated:

In recent years there have been encouraging internal democratic reforms (stimulated it must be said in some cases by the 1984 Trade Union Act) which have ensured that leaders have to become more sensitive and directly accountable to their own members, through the introduction of postal ballots for their own elections and before the calling of strikes and other forms of industrial disputation.
- Despite changes to the legislation which require that unions meet the full cost of conducting ballots, balloting has become far more widespread in the UK than the law requires. In addition to pre-industrial action balloting, union positions on proposed settlements and employers' last offers are often determined through balloting. In addition, the introduction of mandatory pre-strike ballots in 1984 coincided with a substantial reduction in industrial disputation in the UK.

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ACTU

- The ACTU supports the right of union members to vote on whether or not to take industrial action, and believes such votes are generally taken. It should be noted that a number of unions routinely use secret ballots prior to taking industrial action. The ACTU notes that secret pre-strike ballots are available when requested by employees under section 136 of the Act.
- In a Ministerial Discussion Paper *Pre-industrial action secret ballots* published in August 1998, the authors found that very few secret ballots had been ordered by the Commission, and that where these had occurred they had generally been to ascertain employees' attitudes to particular issues, rather than their views in relation to industrial action.
- There is no evidence in the Discussion Paper of the Commission refusing applications by employers, or anybody else, for ballots to be conducted in relation to the question of taking industrial action.
- In Western Australia, which has legislated for compulsory secret pre-strike ballots, there has not been one application for a ballot since 1 January 1998, when the legislation came into effect. This is in spite of applications being able to be made by an employer or employer organisation, as well as by a union or union member. (Note however the legislative proposal to repeal the WA provisions for secret pre-strike ballots.¹⁵)
- The Bill proposes to remove the Commission's discretion under subsection 135(2B) to order a secret ballot in the case of unprotected action; this is part of a general thrust by the Government to create a legislative framework in which legal action is the only possible response by employers to unprotected industrial action, rather than encouraging the use of Commission processes to resolve the dispute which has given rise to the industrial action.
- The Minister's refusal to consider secret ballot requirements to call off a strike is conclusive evidence that this proposal has nothing to do with democratic functioning, and everything to do with restricting the right to strike. Further evidence is provided by the lack of any support for proposals such as compulsory secret postal shareholder votes on issues such as takeovers, or whether or not a company should lock-out its employees.

ACCI:

- The Bill proposes the introduction of a qualification on the current bargaining period provisions to the effect that industrial action is not protected unless authorised by a secret ballot and an accompanying scheme to enable this qualification to be implemented in practice.

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- The community interest is in ensuring that industrial action, when it occurs, is not action taken lightly. It is not in the community interest for industrial action to occur as a matter of course. Similarly, the interest of employers is in minimising damaging industrial action and in providing appropriate restrictions on industrial action.
- Industrial action can be extremely damaging, it is rarely if ever an appropriate first resort, and even those who support protection for taking industrial action do so with ambivalence. No-one believes that the taking of industrial action is the best way to resolve disputes, it is only ever defended as a ‘necessary evil’, as a last resort where necessary and where discussions and negotiations have not led to a settlement.
- It is highly desirable that industrial action not occur unless due democratic processes have been undertaken. Parliament has taken the decision to enable employees to take ‘protected’ industrial action and in so doing to breach the ordinary contract of employment obligations to work as directed, and possibly to inflict substantial financial and other damage on the business of their employer.

AiG

- Ai Group’s concern with compulsory secret ballots has been that they tend to polarise the position of parties and may make disputes more difficult to resolve. However, having studied the scheme of secret ballots proposed in the Bill Ai Group believes that a secret ballot process, overseen by the AIRC is an appropriate precondition for the taking or organising of protected industrial action by employees and organisations or employees.
- employees will have an opportunity to vote without fear or favour in a fair and democratic ballot on whether they are prepared to lose wages through protected industrial action in support of enterprise bargaining claims.
- employees will know before voting what the precise claims are and what the nature and duration of the industrial action they are voting on is intended to be; no ballot will be ordered and therefore protected action will not be available if the Commission finds that the applicant has not genuinely tried to reach agreement with the employer prior to the application for a ballot.
- an employer will have the opportunity to argue that the claims being pursued by the applicant for a secret ballot are industry pattern bargaining claims (and consequently the party has not genuinely tried to reach agreement at the enterprise level) and therefore the ballot should not proceed.
- Ai Group **supports the legislative scheme with one important exception**, namely that employees eligible to vote in a secret ballot should not be limited to union members. To do so would create hostility and division within the enterprise.

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ALP

The issue of compulsory secret ballots for strike action was canvassed at length in the Committee's inquiry into the 'More Jobs Better Pay' Bill. No additional evidence has been provided to this inquiry that invalidates the findings of the Labor Senators in their minority report to that inquiry.

As the issues of quorum and the 'electoral role' were addressed at length in the 1999 Minority report it is not intended to repeat them here, except to note that these issues remain as major concerns to the Labor Senators. Labor Senators support the current secret ballot provisions as balanced and reasonable for the parties to a dispute.¹⁶

Australian Democrats

This Inquiry has addressed four bills introduced by the Government in June. With some variations, all four of the bills have been drawn from provisions in the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999. That bill was the subject of an extensive inquiry by this Committee. My report to that Inquiry dealt with all of the schedules to that bill. The comments that I made at that time on the merits of the various schedules by and large continue to apply to these bills which reflect those schedules (Senator Murray).¹⁷

Comparing Bills

While this Bill has similar provisions to the [Workplace Relations Amendment \(Secret Ballots for Protected Action Bill\) 2000](#), there are subtle changes. For example, in respect of non-union employees seeking to take industrial action, the Bill essentially requires a ballot to hold a ballot, although not expressed in such terms, but the Bill seeks evidence of a number of employees of their wish to conduct a secret ballot on future industrial action. The number indicating this initial quorum depends on the size of the relevant workforce. Presumably either a ballot or signed petition would constitute evidence. The method is not spelt out in the Bill.

While the quorum for an eligible poll under the previous proposal was 50 per cent of persons on the roll of voters, this is reduced now to 40 per cent of persons on the roll. The ballot authorises industrial action if more than 50 per cent of these votes are in favour of industrial action.

Main Provisions

Schedule 1 - secret ballots for protected action

Item 3 repeals and replaces subsection 135(2). **New subsection 135(2)** would prevent the Commission from ordering a secret ballot of members of an organisation under subsection 135(1) where the organisation has initiated a bargaining period under section 170MI for an agreement.

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Item 4 repeals subsection 135(2B).

Item 6 repeals existing subsections 136(1), (2), (3), (4), (5), (6) and (7).

Item 8 to Item 15 repeal existing subsections 136(8B), (9) and (10), 138(2) and 138(6), and section 140, and also remove references in subsections 137(1), 138(1), 138(5) and 139 to existing secret ballot provisions.

Item 16 introduces **new section 170MJA** to provide that an employee or employees who wish to initiate a bargaining period under section 170MI, or who wish to give an employer notice of intention to take industrial action under section 170MO may appoint an agent to initiate the bargaining period or to issue the notice on their behalf. **New subsection 170MJB(1)** would protect the identity of employees who appoint agents under new section 170MJA by prohibiting the Commission from disclosing information that would identify persons who have appointed an agent.

Item 17 amends existing subsection 170ML(7) by inserting a reference to new Division 8A. This amendment would ensure that industrial action would only be protected if both the existing provisions in Division 8 and the new provisions regarding protected action ballots in new Division 8A have been complied with.

Item 20 repeals and replaces the existing subsection 170MO(6). The **proposed replacement subsection 170MO(6)** will provide that notice of proposed action cannot be given until a ballot result has been declared.

Item 21 repeals and replaces existing subsections 170MP(1) and (2) with new provisions which no longer require that industrial action is not protected unless the organisation or employees taking action have genuinely tried to reach agreement.

Item 22 is a crucial amendment. It repeals and replaces section 170MQ. **The proposed replacement section 170MQ** provides that industrial action taken by an organisation of employees, its members or employees, or by employees who are negotiating parties, would not be protected action unless the action is taken in response to a lockout of employees, or the action has been authorised by a protected action ballot conducted in accordance with new Division 8A.

Item 24 inserts new section 170MWE which would regulate how protected action by unions or employees may be recommenced after the suspension of a bargaining period has ended. Protected action that has been authorised by a protected action ballot may commence at any time within the 30 day period following the declaration of the ballot or the nominal expiry date of the existing agreement or agreements

Item 25 inserts a new Division into Part VIB of the Act: **New Division 8A – Secret ballots on proposed protected action**

New Subdivision A – General

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New section 170NBA establishes the object of the new Division: to provide access to employees to a ballot, in order to determine whether protected industrial action should be taken.

New Subdivision B - Application for order for protected action ballot to be held

Under **new subsection 170NBB(1)** an application for a protected action ballot could only be made once a bargaining period has commenced. The application cannot be made more than 30 days before the nominal expiry date of the agreement.

Under **new subsection 170NBB(2)** either a union or a group of employees can make an application depending which group initiated the bargaining period under section 170MI.

New subsection 170NBB(3) proposes that an employee or employees acting jointly could not make an application to the Commission for a ballot order unless the application has the support of a prescribed number of employees. If there is less than 80 employees, 4 employees would be required to support a ballot proposal. Workforces of between 80 and 5,000, at least 5 per cent of the employees. More than 5000 employees, at least 250 employees. Unionised workforces must obtain a resolution from their committee of management.

New subsection 170NBB(4) would provide that where an employee or employees have initiated a bargaining period for a non-union agreement and industrial action is proposed, an employee or employees acting jointly may appoint an agent to represent them.

New section 170NBBA proposes mandatory requirements for a ballot application under section 170NBB. Applications would be required to include the following information:

- the question or questions to put to the relevant employees in the ballot, including the nature of the proposed industrial action;
- details of the types of employees who are to be balloted; and
- any details required by rules of the Commission made for the purpose of this section.

New section 170NBBB requires the applicant to provide certain material to the Commission with the ballot application, including:

- a copy of the notice initiating the bargaining period and the particulars accompanying that notice;
- a declaration by the applicant that the industrial action to which the application relates is not for the purpose of advancing or supporting claims to include an objectionable provision (as defined in subsection 298Z(5) of the Act);
- if the applicant is an organisation of employees, a written notice showing that the application has been duly authorised in accordance with the organisation's rules; and

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- if the applicant is represented by an agent, a document containing the name of the employee applicant or applicants.

New section 170NBBC requires the applicant to give a copy of the application to the relevant employer and any person nominated in the application to conduct the ballot within 24 hours of the application being lodged with the Commission.

New Subdivision C – Determination of application and order for ballot to be held

New subsection 170NBCA(1) would provide that in exercising its powers under Division 8A, the Commission must act as quickly as practicable and would be required, as far as is reasonably possible, to determine an application for a ballot order within 2 working days of the application being made.

New subsection 170NBCA(2) provides that paragraph 111(1)(g) of the Act is not to apply to ballot proceedings under Division 8A. (in other words the AIRC cannot decline to deal with the matter on the grounds prescribed in the paragraph 111 (1)(g)).

Under **new section 170NBCB** parties and relevant employees may make submissions and apply for directions. Under **new section 170NBCC** the Commission is empowered to make directions regarding an application for a ballot order or about any aspect of the conduct of a protected action ballot. Any such directions would be orders of the Commission.

New section 170NBCE seeks to ensure that any disruption that may be caused to an employer's operations by the conduct of more than one protected action ballot proposed to be held within a short space of time can be minimised (especially, for example, attendance ballots).

New subsection 170NBCF(1) provides that the Commission must grant an application for a ballot order if it is satisfied that the applicant has, during the bargaining period, genuinely bargained with the employer and is continuing to do so. Conversely, the Commission must not grant an application for a ballot order unless it is satisfied of these conditions. **New subsection 170NBCF(2)** provides the Commission with discretion to refuse an application.

New subsection 170NBCI(1) sets out the information that would be required to be contained in a ballot order made by the Commission, including the name of the applicant or the applicant's agent, the type of employees to be balloted, the voting method, the timetable for the ballot and the names of the person authorised by the Commission to conduct the ballot.

New subsection 170NBCI(2) would require that the order must specify a postal ballot as the voting method unless the Commission is satisfied that the other voting method proposed in the application is more efficient and expeditious than a postal ballot.

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New section 170NBCJ allows the President of the Commission to develop guidelines concerning timetables for the conduct of ballots under Division 8A.

New subsection 170NBCK(1) allows the Commission to order the applicant or the employer of the employees (or both) to provide the Commission with a list of employees who might be eligible to vote in a proposed ballot.

New section 170NBCL would provide for the compilation of the roll of voters by the Commission, who must provide the roll to the authorised ballot agent.

New subsection 170NBCM(1) would establish that a person is only eligible to vote in a protected action ballot if the person

- was employed by the relevant employer on the day the ballot order was made; and
- would be subject to the proposed agreement in respect of which the relevant bargaining period was initiated. If the applicant for the ballot order was an organisation of employees, the person would be required to have been a member of the organisation on the day the ballot order was made by the Commission.

Under **new subsection 170NBCM(2)** a person whose employment is subject to an Australian Workplace Agreement whose nominal expiry date has not passed would not be eligible to vote in a ballot, even if the person meets the other requirements for eligibility.

Under **new subsection 170NBCN(1)**, the ballot agent would be required to add a person's name to the roll of voters for a ballot at any time before voting in the ballot is finished, if the person requests that their name be added to the roll. A process for removing a person's name from the roll of voters is proposed in subsection 170NBCN(3).

New subsection 170NBCO(1) would allow an applicant for a ballot order to apply to the Commission, at any time before the expiry of the ballot order, to have the ballot order varied.

New section 170NBCP would provide that where a ballot has not been held within the period specified in the ballot order, the order expires at the end of that period.

New Subdivision D – Conduct and results of protected action ballot

New section 170NBD provides that a ballot will not be a protected action ballot unless it is conducted by the authorised ballot agent. Any ballot not so conducted will not authorise protected action.

New section 170NBDA requires the ballot paper for a protected action ballot to be in the prescribed form, and contain the following information:

- the name of the applicant or applicant's agent (as the case requires);
- the types of employees who are to be balloted;

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- the name of the ballot agent authorised to conduct the ballot;
- the question or questions to be put to voters, including the nature of the proposed action;
- a statement that the voter's vote is secret and that the voter is free to choose whether or not to support the proposed industrial action; and
- instructions to the voter on how to complete the ballot paper.

New section 170NBDC requires the authorised ballot agent to make a declaration of the results of the ballot in writing, and inform the applicant, the affected employer and the Industrial Registrar, in writing, of the results as soon as practicable after the end of voting.

Under **new section 170NBDD**, industrial action would only be authorised by a protected action ballot if:

- the action was the subject of a ballot conducted in accordance with the provisions of new Division 8A;
- at least 40% of persons on the roll of voters for the ballot established under new section 170NBCL voted in the ballot
- more than 50% of the votes cast in the ballot approved the industrial action; and
- the action commences within a 30 day period after the later of the date of the declaration of the results of the ballot or the nominal expiry date of the existing agreement (or the last occurring nominal expiry date if there is more than one existing agreement). The Commission could extend this 30 day period by up to 30 days if both the employer and applicant for the ballot order jointly apply for such an extension. There may only be one such extension [**new subsections 170NBDD(2A) and (2B)**].

New section 170NBDE would require the Industrial Registrar to keep, for each ballot held under Division 8A, a record of questions put to the voters and the results of the ballot.

New Subdivision E – Authorised ballot agents and authorised independent advisers

Under **new subsection 170NBE(1)**, the Commission may name either the Australian Electoral Commission or another person as the authorised ballot agent.

New subsection 170NBEA(1) sets out who may be appointed as an authorised independent adviser [the appointment of an authorised independent adviser may be required by new subsections 170NBE(3) and (4)].

New Subdivision F – Funding of ballots

New section 170NBF would provide that the applicant for a ballot order is liable for the cost of holding the ballot. Under **new subsection 170NBFA(1)**, the Industrial Registrar is

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required to determine the reasonable ballot cost. **New subsection 170NBFA(2)** provides that the Commonwealth will be liable to pay to the authorised ballot agent 80% of the reasonable ballot costs.

New Subdivision G – Miscellaneous

New subsection 170NBG(1) would provide that the Commission must not disclose information that would identify a person involved with ballot processes. **New subsection 170NBG(2)** would establish exceptions to the prohibition.

New section 170NBGB proposes that where the results of a protected action ballot, as declared by the authorised ballot agent, purport to authorise particular industrial action, and an organisation or person goes ahead and organises or participates in industrial action acting in good faith on the results of the ballot, no legal action is able to be taken against that organisation or those persons if it turns out that the action was not in fact authorised by the ballot.

New sections 170NBGBA, 170NBGBB and 170NBGBC are designed to protect the integrity of the conduct of ballots and ballot results, by limiting the circumstances in which ballot orders, the conduct of ballots and ballot results may be challenged.

Item 29 proposes amending sections 287 and 288 (rights of members re ballots) to specify that neither section applies to protected action ballots conducted under new Division 8A.

Application and Saving

Item 35: Subitem (1) would provide that the amendments in this Bill would apply to industrial action taken on or after the day on which the amendments commence.

Subitem (2) would provide that the amendments would not apply to industrial action taken after the commencing day if:

- the action is protected action under subsection 170ML(2) of the Act;
- the requirements of existing sections 170MO and 170MR – to provide written notice of the intended industrial and, if an organisation is a negotiating party, that the action was properly authorised – were met before the commencement day; and
- the action is taken within 14 days after the commencing day.

Item 36 deals with secret ballots ordered by the Commission under existing subsections 135(2) and (2B). The order for the ballot would continue to have effect and the existing elements of Division 4 of Part VI of the Act would continue to apply. Existing section 170MQ would also apply.

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Schedule 2 - section 170MWB

(Section 170MWB is proposed to be inserted in the *Workplace Relations Act 1996* by the Workplace Relations Amendment (Genuine Bargaining) Bill 2002).

Item 1 introduces new subsection 170MWB(8) allowing the Commission under exceptional circumstances to specify a longer period of notice of 3 days, up to 7 days, without the need for a further ballot.

Concluding Comments

This Bill is designed to make access to protected industrial action under the *Workplace Relations Act 1996*, contingent on there being a ballot of employees involved. The Bill reflects long-standing Coalition policy on secret ballots being a requirement for strike action in particular. While the emphasis is on a speedy conduct of a ballot and limiting the circumstances under which a result might be challenged, the new provisions appear to allow the potential for intervention into the conduct of the proposed ballots by arguing that 'a person acted fraudulently' in aspects of the ballot process.

It would be envisaged that measures such as ballots prior to industrial action being taken would be designed to curb industrial activity, yet the official data on industrial disputes shows that disputes are resulting in few days lost per employee. This suggests that the main role of the amendments will be to act as an influence for unions in particular to re-assess their industrial action options, allowing a shift of negotiating power to employers. Note however the retention of subsection 135(1) would allow the Commission to retain a role in assessing whether union members wish to be employed under AWAs or a certified agreement as evidenced above in respect of the RBTU case.

Endnotes

- 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)
- 2 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee: *Consideration of Provisions Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000, Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000, Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000 Workplace Relations Amendment (Termination of Employment) Bill 2000, September 2000.*
- 3 Australian Industrial Relations Commission in PR908235, 28 August 2001.

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- 4 *Rail Tram and Bus Worker*, v.9,n.3, 2001.
- 5 Submission by the Department of Employment, Workplace Relations and Small Business on the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000, Workplace Relations Amendment (Termination of Employment) Bill 2000, Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000 and the Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000 to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee (August 2000).
- 6 [Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union \[2002\] FCA 61 \(6 February 2002\)](#).
- 7 Note 'Fear of losing jobs puts workers off strike option' in *The Australian*, 16 April 2002.
- 8 The Hon. Peter Reith, Ministerial Discussion Paper, *Pre-industrial action secret ballots*, (August 1998).
- 9 *Ibid*, Appendix A, p.11.
- 10 'Strike rate is lowest on record', *The Australian Financial Review*, 15 March 2002.
- 11 Alison Preston, 'The changing Australian labour market: developments during the last decade' in *Australian Bulletin of Labour*, v.27(3), September 2001, p. 173. See also Bruce Chapman 'The Accord: background changes and aggregate outcomes', *Journal of Industrial Relations* v.40(4), 1998.
- 12 *ABS Industrial Disputes*, Cat. No. 6321, 13 February 2001.
- 13 'Fear of losing jobs puts workers off strike option' in *The Australian*, 16 April 2002
- 14 Liberal Party of Australia, *Choice and Reward in a Changing Australia*, 2001.
- 15 Western Australian Government: [Outline of the Labour Relations Reform Bill 2002](#).
- 16 ALP Minority Report in the Senate Committee Report 2000, referenced in Endnote 1.
- 17 Australian Democrat Minority Report in the Senate Committee Report 2000, referenced in Endnote 1. Senator Murray's comments on the secret ballots proposal of the 'More Jobs Better Pay' Bill noted that the then proposals did little for industrial democracy and add greatly to impediments to unions taking industrial action, and should be opposed.

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