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No. 125 2001–02

Workplace Relations Amendment (Genuine
Bargaining) Bill 2002

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Workplace Relations Amendment (Genuine Bargaining) Bill
2002

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Law and Bills Digest Group
1 May 2002

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Workplace Relations Amendment (Genuine Bargaining) Bill 2002

Date Introduced: 20 February 2002

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: Substantive changes to the *Workplace Relations Act 1996* concerning 'genuine' and 'pattern' bargaining are to come into effect on a date to be set by proclamation but no later than 6 months and one day after the date of Assent. Proposed changes providing for statutory cooling-off periods in enterprise negotiations are to come into effect immediately related changes affecting the bargaining process commence.

Purpose

The Bill amends the *Workplace Relations Act 1996* (the Principal Act) to give effect – albeit in modified form – to two longstanding Government policy proposals. The first would place even greater emphasis on enterprise bargaining by making it harder to obtain access to protected bargaining under the Principal Act. The major target of the proposed legislation is *de facto* or covert forms of industry-wide bargaining, sometimes referred to as 'pattern bargaining'.¹ The Bill also seeks to confer on the Australian Industrial Relations Commission (the Commission) new powers to suspend a 'bargaining period' for a specified time. The suspension or termination of the 'bargaining period' by the Commission removes the statutory protection available to persons engaged in industrial action in pursuit of a new workplace agreement.

Background

The past decade has seen significant changes to the determination of pay and conditions for an Australian workforce that now includes just over 9.23 million employees.²

The most pronounced institutional change has been the decline in influence of tribunal-based systems of conciliation and arbitration and the rise of enterprise bargaining in its various forms.

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Accompanying the move away from the arbitral model, the focus of wage determination has shifted from the industry and national level to that of the individual business or enterprise.

Pressure for changes to wage fixing arrangements increased during the 1980s partly prompted by other developments in the economy including the floating of the Australian Dollar in December 1983 and the subsequent deregulation of numerous product markets. In 1990, the Hawke Government and the Australian Council of Trade Unions (ACTU) entered into a sixth iteration of their Prices and Incomes Accord (Accord Mark VI) which supported a shift from centralised wage-fixing to enterprise bargaining. The Australian Industrial Relations Commission facilitated the spread of enterprise level bargaining in its October 1991 National Wage Case decision.³ Amendments to the Industrial Relations Act in 1993 significantly altered the status of federal awards, converting them from the main vehicle for regulating employer-employee relations to a means for providing safety net and minimum employment standards underpinning agreement making.

A further spur to enterprise bargaining came with the *Workplace Relation 1996*, which substantially re-ordered the objectives and priorities of federal industrial law. The 1996 amendments, *inter alia*, made provision for enterprise agreements including those that could be made directly between employers and employees without union involvement.⁴ Parliament altered the objects of the Principal Act, providing that ‘the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and the employee at the workplace or enterprise level’.⁵ The use of Certified Agreements and Australian Workplace Agreements (AWAs) was encouraged (inevitably) at the expense of industrial awards with the Commission’s arbitral powers in respect of award making confined to 20 allowable matters.⁶ The Commission was deprived of its power to make ‘paid rate’ awards⁷ and its powers of award making were expressly confined to making ‘minimum rate awards’.⁸ A process of award simplification – involving the removal of non-allowable matters from federal awards – followed in the late 1990s. This also contributed to a reduction in the number and pervasiveness of federal awards.

The Workplace Relations Act makes certified agreements the principal vehicle for collective bargaining in the federal industrial sphere and gives legal force to the proposition that ‘the appropriate organisational unit for the negotiation and application of certified agreements is the workplace or enterprise.’⁹ Hence, there is only limited scope for multi-employer agreement making under the Principal Act. Multi-employer bargains may only be certified by a Full Bench of the Commission and only then where a public interest test has been identified and the Commission is satisfied that the matters dealt with could not be handled by other means. Significantly, industrial action taken in respect of the making of a multi-employer bargain is not protected action for the purposes of the Workplace Relations Act.¹⁰

Professor Mark Wooden, a strong advocate of more flexible labour market arrangements, has described the evolution of the present arrangements in following terms:

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The new industrial relations landscape in Australia is one where national and industry-wide considerations are more likely to be subordinate to the needs of enterprises and workplaces, and where employers and employees are expected to determine their own arrangements without any significant involvement from industrial tribunals ...

Prior to the late 1980s, employment conditions for the large majority of Australian employees were heavily dependent on highly prescriptive, multi-employer awards, determined on their behalf by tribunals and commissions which had little or no direct knowledge of individual enterprises. Further, the focus of these awards at the industry or occupational level served to promote a relatively high degree of uniformity across enterprises. Today the situation is far different. Legislative change has facilitated the development of legally enforceable enterprise-based collective bargaining arrangements, with most awards now providing only a benchmark above which wages and other conditions can be negotiated. In other words, arbitrated settlements are gradually being replaced by negotiated settlements as the cornerstone for the determination of wages and conditions.¹¹

As Professor Wooden has also observed, the impact of enterprise bargaining has, however, been muted by not only the residual influence of the award-based model (including at the State level) but also by the growth of non collective forms of enterprise bargaining. The latter individualist streams of agreement making take two forms: (a) registered individual contracts, and (b) unregistered or common law contracts.

Registered individual agreements are prevalent in the senior managerial levels of the Australian Public Service where the use of AWAs is strongly encouraged.¹² Practically all 1640 Commonwealth Senior Executive Service (SES) employees¹³ are parties to AWAs.¹⁴ (Of the remaining 116 000 or so APS employees outside the SES, about another 4800 are currently covered by AWAs.¹⁵)

More generally, however, the incidence of registered individual agreements like AWAs is not statistically significant, particularly in the private sector.¹⁶ In fact, both collective agreement making and AWAs are more common in the Australian Public Service than in any other industry.¹⁷

On the other hand, although the figures commonly cited are not as robust as they might be, it is widely accepted that the use of (unregistered) individual contracts has risen appreciably in most sectors over the past quarter century. For instance, the percentage of employees whose pay and conditions are set by such common law contracts has risen steadily from about 12 percent of the workforce in the mid 1970s to about 38 percent of all employees in May 2000. In the private sector, close to 50 percent of workers have their principal terms and conditions of employment set by unregistered common law contracts rather than by either awards or by various forms of enterprise agreements.¹⁸

The growth in individual contracting, taken together with the residual impact of award-making¹⁹ – principally through adjustments to the minimum rates of pay of low paid workers – means that importance of collectively determined enterprise agreements can

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sometimes be overstated.²⁰ Probably only about one third of all workers rely on collective enterprise bargains for their principal terms and conditions of employment. In the private sector the comparable rate is closer to 1 in 5 workers.²¹

Outcomes

As recently as 1996, fears were being expressed that shifting the focus of industrial relations to the workplace would 'introduce significant instability into the bargaining process'.²² Initial concerns were that a shift to a more decentralised system would produce something like the 'wage explosions' of 1974-75 and 1981-82 when periods of Commission sponsored wage restraint gave way to damaging rounds of industry-based bargaining.²³ To date, however, such concerns have proven largely unfounded. Long periods of high unemployment that had again peaked in the early 1990s, a significant decline union membership, a changing industrial relations culture and competitive pressures on and within the Australian economy appear for the present and the foreseeable future to have changed the dynamics of wage fixing.²⁴

The move to less centralised wage fixing also has been associated more recently with better economic outcomes including strong employment growth, low inflation, low interest rates, rising real wages and a better productivity performance.²⁵ Levels of industrial disputation have also remained at or about their historical lows.²⁶

Commenting on these largely favourable outcomes, Minister Abbott observed in his Second Reading Speech to the Bill that:

Enterprise bargaining has produced benefits for both employees and employers. Employees have gained better wages, more relevant conditions, more jobs and greater workplace participation. At the same time, employers have gained higher productivity, increased competitiveness and lower industrial dispute levels.

Significantly, the outcomes from this system have been far superior to those of the centrally controlled system that preceded it. Over the life of the Coalition government, the lowest paid workers dependent on award rates of pay have received safety net adjustments of \$64 a week, or a nine per cent increase in real wages. This contrasts markedly with the five per cent decrease in real wages for low paid workers which occurred under the previous 13 years of Labor government.²⁷

In making these remarks, the Minister also observed that enterprise bargaining had attracted bipartisan support commenting that:

The previous Labor government and the ACTU both adopted enterprise bargaining as policy in their Accord Mark VI in 1990, and pursued it vigorously in industrial tribunals, legislatively and publicly.

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For all of the deficiencies of the previous Labor government, for all of the inadequacies of the bargaining model implemented at that time, Labor knew what we all know—that workplace bargaining is a structural reform that benefits Australia.²⁸

In the context of these remarks and generally buoyant economic conditions, it is perhaps worth counselling against over-stating the effect of bargaining arrangements on macro-economic outcomes. The economy is invariably influenced by a myriad of forces that infrequently swamp the impact that bargaining processes have on economic welfare. It will be recalled that for much of the 1950s and 1960s Australia enjoyed low inflation, very low unemployment, low interest rates, a relatively strong currency and comparable levels of productivity and economic growth to those presently being experienced. All this occurred under what would now be seen as a ‘rigid’ and highly centralised wages system dominated by industry and national level bargaining.

Competing claims about the relative performance of the economy and national institutions ought to be tempered by what is known about the prevailing international conditions and the policy priorities of the time. Claims that workers have benefited from higher real wage growth over the past few years than during the period of the Accord years ignore the fact that policies pursued during the former period were deliberately focussed on dealing with high unemployment caused in part by excessive wages growth in 1981-82.²⁹ It will also be recalled that during the period of the Accord, policy makers deliberately tried to improve economic welfare by raising the ‘social wage’. Sometimes increases in the social wage were traded off against nominal increases in pay and conditions delivered via the traditional wage fixing machinery.³⁰

Apart from the pursuit of better economic outcomes, changes to bargaining arrangements, especially those promoted by the present Government have also asserted the importance of promoting individual rights and confined the role of industrial organisations such as trade unions. On this view, enterprise bargaining together with granting easier access to registrable forms of individual agreements (eg AWAs) made directly between workers and employers is a good thing in itself. Although a monetary value cannot be attached to greater individual involvement in the bargaining process, it is nonetheless clearly an important consideration for policy-makers as well as those directly affected. A contrary view is that in the short term at least enterprise bargaining loads the scales in favour of employer interests. The bargaining power of the parties is unequal. Many individual workers cannot, particularly during times of relatively high unemployment, bargain on equal terms with their employer. The endemic and long recognised weakness of union organisation at the workplace level in Australia also makes the process somewhat problematic for employees at those workplaces where a union presence has been barely nominal for many years. This would also in part explain union and employee support for continuation of some industry level bargaining on simple cost/benefit grounds.

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Anti-Pattern Bargaining Legislation

The present Bill differs significantly from earlier attempts to restrict ‘pattern bargaining’ in the federal sphere.

The Workplace Relations Legislation Amendment (More Jobs, Better Pay Bill) 1999 (the MOJO Bill) sought amongst a raft of other measures to prevent the Commission from allowing parties to enterprise bargaining access to protected industrial action where they were engaging in ‘pattern bargaining’. The MOJO Bill did not attempt an inclusive definition of pattern bargaining. Instead proposed section 170LG set out the circumstances that did not constitute pattern bargaining.

The provisions of the MOJO Bill were referred to the Senate Committee for Employment, Workplace Relations and Small Business on 11 August 1999 and a detailed report was tabled on 29 November 1999.³¹ By early December 1999 it was clear that the MOJO Bill would not pass the Senate.³² During ongoing discussions with the Government however, Senator Andrew Murray (Western Australia), the Australian Democrats spokesperson on industrial relations, indicated that he was prepared to further consider those provisions in the Bill effecting minor changes or technical changes to the Principal Act.³³ What followed was a stream of legislation largely breaking the MOJO Bill up into its constituent parts or ‘bite size chunks’.³⁴

On 11 May 2000 the Government introduced the Workplace Relations Amendment Bill 2000. This was done against the background of a foreshadowed Australian Metal Workers Union (AMWU) campaign (known as ‘Campaign 2000’) to re-negotiate somewhere in the order of 500 to 800 enterprise agreements at the end of June 2000. In essence, the 2000 Bill sought to revive proposals relating to enterprise bargaining in the MOJO Bill that had been sidelined in the Senate since December 1999. However, there were also significant differences. Among the measures contained in the Workplace Relations Amendment Bill were proposals to:

- deny legal protection otherwise available under the Principal Act to unions, union officials and employees who engage in industrial action as part of a campaign of ‘pattern bargaining’
- require the Australian Industrial Relations Commission to act within 48 hours on applications under section 127 of the Principal Act to stop industrial action
- provide for the Commission to suspend access to legal forms of industrial action, and
- give the Federal Court express power to determine if industrial action is ‘protected action’ for the purposes of the Principal Act.

As with the MOJO Bill, ‘pattern bargaining’ by unions was not outlawed per se but access to protected action was to be denied.

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The Workplace Relations Amendment Bill 2000 was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee on 11 May 2000 and a Report was completed and tabled on 5 June 2000.³⁵ This Bill also failed to pass the Senate.

Assessment of previous Bills

The proposal in the MOJO Bill to restrict the use of pattern bargaining by denying employers and union access to protected action received a mixed response, including from employer interests.

The view supported by the Government and most employer groups was that pattern bargaining was a serious problem in the Australian labour relations system and at odds with a key rationale of enterprise bargaining which is to promote discussion and agreement on problems and prospects in individual workplaces. As protected action was not available to parties engaging in bona fide industry level bargaining there was no reason to extend such protection to cases where covert or de facto industry bargaining is occurring. It was further argued that the amendments would not prohibit pattern bargaining but merely deny those engaging in it the right to take protected industrial action.³⁶

A contrary position was that irrespective of the objects of the Principal Act, there was nothing inherently wrong with pattern bargaining per se, and that it would be unfair to penalise those firms or unions that found it convenient or cost effective. Some submissions argued that the legislation could inadvertently disturb long-standing practices such as the use of common site agreements. Others opposing the proposal argued that enterprise bargaining was either impractical or inefficient in some sectors.³⁷

Some of these arguments were echoed during debate on the Workplace Relations Amendment Bill 2000 and in evidence to the related Senate Committee inquiry.³⁸

Against the background of concern about the implications of the Campaign 2000, the Bill's provisions dealing with pattern bargaining and proposed changes to the Commission's powers to order the cessation of industrial action attracted more detailed scrutiny (and criticism) than the measures put forward in the MOJO Bill.³⁹

The principal arguments raised by Government Senators in their Report on the Workplace Relations Amendment Bill 2000 were that:

- the Bill did not prevent pattern bargaining but merely confined the statutory protection for those engaged in industrial action to those pursuing genuine enterprise level claims,
- the proposed legislation was necessary to deal with Campaign 2000,
- the proposals left the Commission sufficient discretion to allow current practice in pattern bargaining to continue where it would be in the public interest,

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- restricting the right of unions and workers to engage in industry level bargaining did not breach Australia's international treaty obligations to allow free collective bargaining and freedom of association⁴⁰ arising principally under the International Labour Organisation's Constitution and ILO Conventions No. 87⁴¹ and No. 98.⁴²

The Labor Senators' Report on the Workplace Relations Amendment Bill 2000 noted employer opposition to the Bill on the grounds that it denied protection to forms of bargaining in common industries where enterprise bargaining was impractical, ie as in multi-employer sites.⁴³ The Labor Senators further argued that the proposed definition of 'pattern bargaining' was too wide and uncertain, having the potential to call into question any claim for entitlements which had any significant degree of commonality with any other log of claims. This they said ignored the actual intention of the parties and the common practice of developing a basic industry log of claims but allowing for enterprise variations to emerge once negotiations commence.⁴⁴

Technical objections were also raised to the 2000 Bill. It was suggested that the Bill would unreasonably confine the discretion of the industrial umpire (ie the Commission). The most contentious of this being the requirement that the Commission deny statutory protection to those engaged in bargaining where *any* of the matters being pursued in the claim could form part of an enterprise level agreement.

More broadly, Labor Senators' took the view that this was an 'employer's bill', noting that, for example, proposed subsection 170LG(4) required the Commission to give particular weight to the views of relevant employers in determining whether a union claim amounted to 'pattern bargaining'.⁴⁵

The Australian Democrats through their spokesperson, Senator Andrew Murray, attempted to steer a middle course contrasting support for legislative changes that improved enterprise bargaining arrangements with the goal of encouraging both fair and productive outcomes.⁴⁶

Senator Andrew Murray's Minority Report did not dismiss the need for further reform of enterprise bargaining procedures. He also rejected suggestions that the 2000 Bill would render all strikes unlawful.⁴⁷ He further concluded that even if the Bill were passed in the form introduced:

Industry-level bargaining would still be perfectly legal where employers and unions so desire it, with access to industrial action on exactly the same basis as has been available to unions since 1904;

Access to legally protected industrial action would continue to be available for genuine enterprise bargaining as it has since 1993, but there is a legal question mark about whether this would extend to common logs of claims even where the union is prepared to pursue genuine enterprise-level negotiations on it;

The power of the Commission to suspend bargaining periods where unions and employers are not genuinely trying to reach agreement that has existed since 1993

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would continue, but with a further proviso that where a union is found to be engaging in pattern bargaining even in the absence of industrial action the Commission must terminate the bargaining period.⁴⁸

Senator Murray concluded however, that the Bill was unbalanced – dealing principally with the concerns of employers about possible abuses of the present law.⁴⁹

Senator Murray was also unconvinced by claims that there was an urgent need to pass the proposed law to deal with Campaign 2000.⁵⁰

On the critical provisions contained in proposed section 170LGA dealing with the Commission's discretion, Senator Murray concluded that they were 'too wide, too difficult to understand, too ambiguous, biased to employers' and swept into the area to be re-regulated 'practical routine effective bargaining processes that should be left alone.'⁵¹

Senator Murray suggested that the 2000 Bill failed to address concerns from the ILO about restrictions on collective bargaining. He also drew attention to the apparent contradiction inherent in the Government proposing legislation that would act as a significant disincentive to pattern bargaining by unions while the Commonwealth itself has either encouraged or engaged in various forms of pattern or industry level bargaining.⁵²

The latter criticism was taken up before a Senate inquiry into APS employment matters where it was alleged that the Commonwealth Government in its guise as an employer routinely engaged in pattern bargaining. Simply stated, the argument here was that while the Government claims that Commonwealth Departments and agencies are free to bargain as individual entities,⁵³ these bodies are constrained by centrally determined policy parameters and guidelines.⁵⁴ The Senate Finance and Public Administration References Committee in its October 2000 report lent support to such contentions, concluding that:

Rhetoric about the decentralised environment of the Workplace Relations Act in which agency heads have flexibility to negotiate terms and conditions to suit their workplace has been misleading. The reality is that, while agencies have greater flexibility, the Government is the ultimate employer and has in place policy parameters and guidelines to protect its policy interests.⁵⁵

Any double standards in relation to the incidence of pattern bargaining have been denied by spokespersons for the Government. It is interesting to note, however, that a survey of APS managers in late 2001 tends to support the view that the so called 'Policy Parameters' do have a perhaps unnecessarily constraining influence on enterprise level bargaining in the APS. To quote the Survey findings:

One in three agencies (32 per cent) said that less prescriptive Policy Parameters would help them achieve their objectives, and a further 12 per cent sought greater details in the parameters. These were also the two main recurring themes in a question seeking the views of agencies on desired changes to the parameters. Without over-interpreting the responses, there are a small number of agencies which find the [centralised]

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clearance process [associated with the parameters] a constraint and possibly more importantly, believe it frustrates genuine agreement making.⁵⁶

At the time of writing the same Policy Parameters remain in force as have been criticised in the past.

Cooling - off Periods

The Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and the Workplace Relations Amendment Bill 2000 each provided for the modification of the Commission's powers to terminate protected bargaining periods under the Principal Act.

The MOJO Bill proposed the repeal of section 170MW of the Principal Act that sets out the conditions for the Commission suspending or terminating a bargaining period. Among the proposals was a mandatory cooling-off period to be ordered by the Commission and which would have in most instances limited bargaining periods to a maximum of 14 days.⁵⁷ The Commission retained discretion to allow the bargaining period to continue only where it believed such action was in the public interest.

The Workplace Relations Amendment Bill 2000 took a slightly different tack. Under that proposed law, section 170MW of the Principal Act was to be amended to provide that the Commission must order a cooling-off period where it considered that it would assist the parties to resolve the matters in dispute. (As under the MOJO Bill, the Commission would have retained the discretion not to suspend the bargaining period where it believed that such a suspension would not be in the public interest.)

Each of these proposals was criticised on a variety of grounds. The MOJO proposal was seen by some as contrary to the 'bargaining model'. Another criticism was that there was no provision for arbitrating a dispute when a bargaining period had been terminated under the proposed 14 day rule.⁵⁸ Other critics noted that the restrictions on the duration of the bargaining period could even apply where union members had not engaged in continuous or substantial forms of industrial action during the relevant period. (It was suggested that the taking of protected action on one day of a 14 day bargaining period would be sufficient under the MOJO Bill to trigger a suspension of a bargaining period.⁵⁹)

In relation to the cooling-off provisions of the Workplace Relations Amendment Bill 2000, Senator Andrew Murray noted that the notion was 'inherently attractive' but needed further refinement if it was not to undermine the right to strike. In addition, Senator Murray noted that the existing provisions already allow the Commission to suspend a bargaining period under sections 170MW and 170MV where parties are not genuinely negotiating, have failed to comply with directions, are endangering health or welfare or causing significant damage to the economy. He added that he thought that these existing provisions could and were being used effectively by the Commission.⁶⁰

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Main Provisions

Schedule 1 – Genuine Bargaining

Item 1 provides for the inclusion of **new subsection 170MW(2A)** in the Principal Act.

Under the Principal Act parties to enterprise bargaining may engage in what is usually called ‘protected action’. Protected action, whether taken by employers or by employees and unions, may only be instigated during what is termed the ‘bargaining period’ prior to the making of a new enterprise agreement. Industrial action (eg strikes or lock-outs) taken during a bargaining period is, subject to the other provisions of the Principal Act, ‘protected’ from legal proceedings that might otherwise have been instituted by an injured party.

Paragraph 170MW(2)(b) of the Principal Act currently provides that the Commission may terminate or suspend the bargaining period where it is satisfied that the party taking industrial action is not genuinely trying to reach agreement with the other negotiating parties.

Proposed subsection 170MW(2A) requires that the Commission consider a range of factors that may lead it to conclude that a party taking protected action is acting with an ulterior purpose and that, in the circumstances, the bargaining period ought to be terminated or suspended.

Proposed subsection 170MW(2A) identifies five instances where the Commission must consider whether or not to suspend or terminate a bargaining period because one or other of the parties is not bargaining in good faith. The first two cases are detailed in **proposed paragraphs 170MW(2A)(a) and (b)** and relate to what some would argue are either cases of ‘pattern bargaining’ or covert examples of industry level bargaining.

Unlike previous attempts to restrict pattern bargaining or, to be more precise, deny legal protection to those engaging in it, the current proposal:

- does not attempt an exhaustive or explicit definition of ‘pattern bargaining’,
- focuses on the intentions of the party taking industrial action and not simply on whether their conduct directly affects more than one enterprise
- does not automatically remove protection for those engaging in pattern bargaining or require the parties to establish that their conduct is in the public interest,
- does not unreasonably fetter the discretion of the Commission,
- applies to all parties engaging in industrial action (not just unions or employees), and

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- does not, as was the case under subclause 170LG(4) of the Workplace Relations Amendment Bill 2000, require the Commission to give particular attention to employer views.

Proposed paragraph 170MW(2A)(c) deals with a situation where a bargaining party commences protected action against one party but primarily with the intention of influencing another negotiating party. The precise nature of the conduct to be covered is unclear, but seems to stop short of secondary boycott activity as the Principal Act already excludes secondary action from the protection available during bargaining periods (section 170MM).

Proposed paragraphs 170MW(2A)(d)–(e) may also be relevant where pattern bargaining is occurring but have a more general application to instances where one of the parties is seeking to use the bargaining period for an ulterior purpose. From a legal standpoint, these provisions have equal application to employers as well as unions and employees. In practice, however, given that unions more frequently make use of protected action than employers, the new provisions will be more popular with employers than employees and their representatives.

Item 2 provides for the insertion **new section 170MWA** into the Principal Act. This provision deals with situations where the party that initiated the bargaining period gives notice it no longer wishes to proceed with the enterprise agreement connected with the relevant bargaining period. The Explanatory Memorandum states that the rationale for this proposal is to ensure that negotiating parties do not manipulate bargaining periods to deny the Commission jurisdiction under section 170MW. The latter allows the Commission to suspend or terminate bargaining periods when the initiating party is not acting in good faith.

Proposed subsection 170MWA(2) provides that a party that has used paragraph 170MV(b) to terminate a bargaining period that it initiated may be constrained by the Commission from instituting a subsequent bargaining period relating to a similar or like agreement. The Commission may either bar such a new bargaining period outright or else allow it to go ahead subject to conditions. It is proposed that the Commission may issue a restraining order at the instigation of one of the other parties to the negotiations [**proposed subsection 170MWA(4)**] or on its own initiative or at the request of the relevant Commonwealth Minister [**proposed subsection 170MWA(5)**]. The latter proposal may be seen as somewhat at odds with the idea of collective bargaining free from third party interference.

From a technical perspective, it might be argued that the proposed amendments add little to the existing regulatory framework. The Commission's power to terminate or suspend a bargaining period under paragraph 170MW(2)(b) is not fundamentally changed.

As noted in the Explanatory Memorandum, the principles contained in **proposed subsection 170MW(2A)**:

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...are drawn from the decision of the Commission in *Australian Industry Group v Automotive, Food Metals, Engineering, Printing and Kindred Industries Union & Ors* [Print T1982]. [Where] Munro J terminated Campaign 2000 bargaining periods at a number of workplaces on the basis that the parties were not genuinely trying to reach agreement.⁶¹

Schedule 2 – Cooling-off periods

Item 1 of Schedule 2 provides for the inclusion of **new section 170MWB** in the Principal Act.

This provision specifically empowers the Commission to suspend bargaining for a fixed time on the application of one of the negotiating parties and where protected action is being engaged in by one of the other negotiating parties.

The period of suspension is to be determined by the Commission at its discretion [**proposed subsection 170MWB(2)**].

The period of suspension may be extended [**proposed subsection 170MWB(3)**] but the Commission may do so only once and not without first giving all parties the opportunity to be heard [**proposed subsections 170MWB(4) and (5)**].

Proposed subparagraphs 170MWB(1)(c)(i)–(iv) indicates the factors the Commission ought to have regard to in determining whether to suspend the bargaining period. However, the weight to be given these factors is a matter for the Commission to determine.

Sections 170MV and 170MW of the Principal Act already allow the Commission to suspend a bargaining period where: the parties are not genuinely seeking agreement, have failed to comply with directions, are endangering the health or welfare of the community or are causing significant damage to the economy.

A proposal to confer more detailed powers to suspend bargaining periods on the Commission formed part of the Workplace Relations Amendment Bill 2000. The present Bill, however, does not confer further power on the Commission to suspend a bargaining period until industrial action has begun. Nor is the present Bill generally cast in such a way as it would in most instances all but oblige the Commission to suspend a bargaining period.⁶² Unlike the 2000 proposal, this Bill places a limit on the number of times that a suspension of a bargaining period may be extended (The Bill does not, however, limit the length of the initial suspension or the subsequent extension.)

Like the previous proposal to amend the Principal Act, the proposed amendments might perhaps, be criticised on the basis that they are unnecessary given the extensive powers already given the Commission to suspend bargaining periods.⁶³

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Concluding Comments

The Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and the Workplace Relations Amendment Bill 2000 proposed quite radical changes to the *Workplace Relations Act 1996* and the making of collective enterprise agreements.

Those two Bills were not enacted and attracted considerable criticism, much of which is recorded in the two Senate Committee Reports previously referred to in this Digest. Fundamental objections to those earlier proposals were that they were unbalanced, ie primarily anti-union, and sought to tie the hands of the independent industrial umpire, the Australian Industrial Relations Commission. Both Bills also drew criticism from the International Labour Organisation.

The Government has now substantially modified its proposals and produced a Bill that may be seen as quite uncontentious.

With the relatively unremarkable passing of Campaign 2000, continuing low levels of industrial disputation and sustained moderation in wage outcomes, the industrial relations scene is relatively benign. Understandably then, the proposals canvassed in 1999 and 2000 for reforming the Workplace Relations Act that were themselves said to endanger established industry-wide bargaining arrangements are apparently now regarded as less pressing.

Consistent with employer, union and third party representations to two Senate Inquiries, there also appears now to be a better appreciation of the nature of pattern bargaining. In particular, there seems to be a greater acceptance of the argument that pattern bargaining can take many forms and need not necessarily produce 'one-size fits all' outcomes. Similar pay claims made simultaneously across an industry or at a number of enterprises may in fact produce quite different outcomes from one enterprise to the next. Interestingly, this is a point by critics of the previous Bills⁶⁴ and indirectly by Government spokespersons defending the centrally determined Policy Parameters relied on by disparate Commonwealth agencies to facilitate enterprise bargaining in the Australian Public Service.⁶⁵

One likely source of adverse comment on the present Bill is the ILO. The ILO and other bodies have previously expressed concern about the Government's reluctance to extend existing immunities from legal action (available to those engaging in enterprise level bargaining) to participants in multi-employer and industry level negotiations. The lack of statutory protection from legal proceedings for those engaging in industry level collective bargaining has been consistently criticised by the ILO through its Committee of Experts. There is ongoing dialogue between the Government and the ILO on these matters but a consensus appears no closer than when this matter was last canvassed by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee in mid 2000.

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As the present Bill makes no significant changes to current bargaining arrangements but principally provides further non binding guidance to the Commission in dealing with procedural issues, the ongoing disagreement between the ILO and the Commonwealth Government over freedom of association and collective bargaining matters need not be revisited here. Those interested in the ‘international dimension’ of the debate on bargaining arrangements can gain a useful insight to the current state of play from submissions to recent Senate inquiries referred to earlier and from material available on the ILO Website.⁶⁶

Given that certified agreements are the dominant form of wage bargaining in the Australian Public Service, the Bill, albeit obliquely, raises some fairly basic questions about the logic and the appropriateness of enterprise and productivity bargaining in the public sector. One such fundamental issue is whether it is in fact possible to have ‘genuine’ enterprise bargaining in the public sector in the terms envisaged either in this Bill or the legislative proposals advanced in 1999 and 2000.

Generally, the government sector is subject to other special burdens such as the obligation to account to Parliament and the electorate for public money but also has particular advantages when it comes to the bargaining process. Government is unique amongst employers in being able to sponsor legislation that can have the direct effect of changing the rules under which bargaining occurs. Indeed many terms and conditions of APS employment, for example long service leave entitlements, are governed by legislation. As an employer, Government has ‘deeper pockets’ than most of its private sector counterparts and the commensurate levels of industrial muscle to use in bargaining with its own workers.

The constitutional and administrative structures within which governments operate and under which public servants are employed are built on the principle that public servants are in an ultimate sense employed by the Commonwealth and not by individual agencies.⁶⁷ All government departments and APS budget-funded agencies are centrally funded.⁶⁸ Work level and employment classification standards have a common core right across the service,⁶⁹ even though rates of pay attaching to similar or like jobs may vary from agency to agency. Policy-making within the Commonwealth arena is enlivened by whole of government considerations and not just by individual agency priorities. There is also an underlying logic in ensuring that individual agency bargains do not have a negative impact on the efficiency or cost effectiveness of other government bodies or agencies.⁷⁰ The use of centrally determined ‘Policy Parameters’ to limit the content of enterprise level agreements reflects some of these factors and considerations.

The public sector bargaining environment is also different to that of the private sector. The value of many public sector outputs – for example, policy advice – is notoriously difficult to measure and this makes it hard to estimate changes in productivity. Wage bargaining in the public sector is subject to over-arching political and not just financial constraints with the former operating quite differently to the market pressures that discipline private sector behaviour. In the private sector, politics plays a lesser role and managers, workers and

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unions are generally free to trade-off cost savings and agreed efficiencies for whatever improvements in pay and conditions that the market will bear. In the public sector, other stakeholders have a more direct interest in the bargaining process and the outcomes it produces. This may mean that in the public sector productivity bargaining may not operate effectively, not because productivity gains cannot be identified by the bargainers, but because identified savings are not politically acceptable to other interests or stakeholders.⁷¹ It is also usually accepted, that because government services many of the more vulnerable within the community, protected industrial action associated with public sector enterprise bargaining is likely to have quite different and more immediate consequences than when it features in private sector wage negotiations.

Given the above, and given the costs associated with enterprise bargaining in APS agencies,⁷² there is an argument for re-conceptualising what is meant by ‘genuine bargaining’ in the public sector context. There may even be scope for allowing some component of industry level bargaining and easier access to independent third party arbitration where public sector pay and conditions are at issue.⁷³ Such matters may merit fresh consideration, if not in the context of the present Bill, at least as part of a wider review of the mechanics of wage fixing generally.

That said, some who opposed the previous Bills might find enough in the present proposals to justify their taking a different approach.

Endnotes

- 1 Although ‘pattern bargaining’ has no precise legal meaning, the expression is commonly taken to refer to situations where a negotiating party attempts to obtain outcomes consistent with those achieved in other workplaces, normally within the same industry or sector.
- 2 ABS, *Labour Force (Preliminary)*, January 2002, Cat No. 6202.
- 3 For a thoughtful discussion of the changed role of the Australian Industrial Relations Commission see: Justice A. J. Boulton, ‘The Changing Role of the Commission’, Industrial Relations Society of Australia 1999 National Convention, Fremantle 21–23 October 1999.
- 4 Refer section 170LK of the *Workplace Relations Act 1996*.
- 5 Subsection 3(c) *Workplace Relations Act 1996*.
- 6 Subsection 89A(2) *Workplace Relations Act 1996*.
- 7 ‘Paid rates awards’ specify actual entitlements rather than minimum rights and conditions.
- 8 Subsection 89A(3) of the *Workplace Relations Act 1996*.
- 9 Breen Creighton and Andrew Stewart, *Labour Law; an introduction*, 3rd edition, Federation Press, 2000, p. 150.
- 10 Section 170LC and subsection 170MI(1) of the *Workplace Relations Act 1996*.

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- 11 Mark Wooden, 'Industrial Relations Reform The Unfinished Agenda', *Quarterly Bulletin of Economic Trends*, Mercer-Melbourne Institute, 2000(3), pp. 14–20.
- 12 Department of Employment and Workplace Relations, Supporting Guidance for Policy Parameters for Agreement Making in the Australian Public Service, April 2000, p. 9.
- 13 Public Service and Merit Protection Commission, *State of the Public Service Statistical Bulletin 2000–2001*, p. 9.
- 14 Department of Employment, Workplace Relations and Small Business, *APS SES Remuneration Survey: revised version*, May 2001. Senate Finance and Public Administration References Committee, 'Australian Public Service Employment Matters', *First Report – Australian Workplace Agreements*, October 2000. Paddy Gourley, 'More Scrutiny Needed On AWAs', *The Public Sector Informant*, Canberra Times Supplement, February 2002.
- 15 Workplace Relations Implementation Group and National Institute of Labour Studies, Department of Workplace Relations and Small Business, 2001 Survey of Agreement Making in the APS, October 2001. As at 21 December 2001 there were 103 certified agreements operating in the APS, which is now moving into its third round of certified agreements since wage fixing in the APS was devolved to the agency level in 1997.
http://www.dewr.gov.au/workplaceRelations/publicSector/APS/Final_Survey_Report_5_October_2001.pdf
- 16 Various estimates suggest that only about 2 percent of Australian employees are covered by AWAs. <http://www.oea.gov.au/graphics.asp?showdoc=/home/statistics.asp&SubMenu=2>
- 17 Workplace Relations Implementation Group and National Institute of Labour Studies, Department of Workplace Relations and Small Business, op cit, p. v.
- 18 Duncan Macdonald, Iain Campbell and John Burgess, 'Ten Years of Enterprise Bargaining In Australia: An Introduction', *Labour and Industry*, Volume 12(1), August 2001, pp. 1–25.
- 19 Again, the residual influence of awards appears to be higher in the private sector. Over a quarter of private sector employees still rely exclusively on awards while in the Australian Public Service, close to 90 percent of Commonwealth Government agencies relied exclusively on stand-alone certified agreements to set the pay and conditions of non SES staff. Workplace Relations Implementation Group and National Institute of Labour Studies, Department of Workplace Relations and Small Business, op cit, p. v. ABS, *Employee Earnings and Hours, Australia*, May 2000, Cat No.6306.0.
- 20 Steve O'Neill and Bronwen Shepherd, 'The Role of Safety Net Awards', IRS E-Brief, August 2001. <http://www.aph.gov.au/library/intguide/econ/safety.htm>
- 21 ABS, *Employee Earnings and Hours, Australia*, May 2000, Cat No.6306.0.
- 22 Senate Economics References Committee, *Report on Consideration of Workplace Relations and Other Legislation Amendment Bill 1996*, August 1996, p. 95.
- 23 Report of the Committee of Review, *Australian Industrial Relations Law and Systems* (the Hancock Report), April 1985, Volume 2, pp. 156–158 for a discussion of these questions.
- 24 For differing perspectives on these developments see: Duncan Macdonald et alia, op cit, Mark Wooden, 'Industrial Relations Reform – The Unfinished Agenda', op cit, and 'Industrial

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- Relations Reform in Australia: Causes, Consequences and Prospects', *Australian Economic Review*, volume 34, September 2001, pp. 243–262.
- 25 OECD, *Economic Surveys: Australia*, August 2001, especially pp. 25–48 and 90–99.
- 26 Mark Wooden, op cit, pp. 254–255 summarising ABS historical data.
- 27 House of Representatives, *Debates*, 20 February 2002.
- 28 *ibid.*, p. 504.
- 29 What was so elegantly referred to at the time as the problem of 'real wage overhang'.
- 30 B. Chapman and F. Gruen 'An Analysis of the Australian Consensual Incomes Policy: The Prices and Incomes Accord', ANU, October 1989. *Indecs, State of Play 8: the Australian Economic Policy Debate*, Allen and Unwin, 1995.
- 31 See:
http://www.aph.gov.au/senate/committee/EET_CTTE/wrkplace/workplace%20relations%20report.pdf
- 32 Bills Digest No. 94 1999–2000, especially pp. 14–16.
<http://www.aph.gov.au/library/pubs/bd/1999-2000/2000bd094.htm>
- 33 Anna Chapman, 'Industrial Legislation in 1999', *Journal of Industrial Relations*, volume 42 No. 1, March 2000, p. 31.
- 34 A term used in a related context by then Minister for Employment, Workplace Relations and Small Business, Hon Peter Reith. House of Representatives, *Debates*, 11 October 2000, p. 21222.
- 35 http://www.aph.gov.au/senate/committee/EET_CTTE/wrab2000/contents.htm
- 36 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, November 1999, pp. 116–118.
- 37 *ibid.*, pp. 117–118.
- 38 House of Representatives, *Debates*, Second Reading Speech, Minister for Employment, Workplace Relations and Small Business, 11 May 2000, p. 16337. Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, op cit, June 2000.
- 39 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, op cit, June 2000.
- 40 *ibid.*, pp. 4 and 10–16.
- 41 Freedom of Association and Protection of the Right to Organise.
- 42 The Right to Organise and Bargain Collectively.
- 43 *ibid.*, pp 31–32.
- 44 *ibid.*, pp. 32–36.

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- 45 *ibid.*, pp.25–30.
- 46 Senator Andrew Murray (Australian Democrats), Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *op cit*, June 2000, pp. 47–66 at p. 65.
- 47 *ibid.*, p. 55.
- 48 *ibid.*, p. 60.
- 49 *ibid.*, pp. 59 and 60.
- 50 *ibid.*, p. 61. See also Martin Watts ‘Wages and Wage Determination in 2000’, *Journal of Industrial Relations*, June 2001, pp. 181–182.
- 51 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *op cit*, June 2000, p. 61.
- 52 *ibid.*, p. 60.
- 53 Refer comments by then Minister for Workplace Relations, Hon Peter Reith, cited in Senate Finance and Public Administration References Committee, *Australian Public Service Matters, First Report: Australian Workplace Agreements*, October 2000, p. 18.
- 54 Department of Employment and Workplace Relations, *Policy Parameters for Agreement Making in the APS (April 2000)* and *Supporting Guidance for Policy Parameters for Agreement Making in the Australian Public Service (April 2000)*.
[http://www.dewrsb.gov.au/workplacerelements/publicsector/APS/policy/Policy_Parameters_for_Agreement_Making_in_the_APS_\(March_2000\).htm](http://www.dewrsb.gov.au/workplacerelements/publicsector/APS/policy/Policy_Parameters_for_Agreement_Making_in_the_APS_(March_2000).htm)
http://www.dewrsb.gov.au/workplacerelements/publicsector/APS/Dec2001SupportGuidance/TOC_Intro_and_WRPolicy_for_SupGuide_Dec_2001.htm
- 55 Senate Finance and Public Administration References Committee, *op cit*, October 2000, pp. 15–20.
- 56 Workplace Relations Implementation Group and National Institute of Labour Studies, Department of Workplace Relations and Small Business, *op cit*, October 2001, pp. ix and 40–41 and 43.
http://www.dewr.gov.au/workplaceRelations/publicSector/APS/Final_Survey_Report_5_October_2001.pdf
- 57 The fourteen day limit began to run from the first instance of industrial action was taken during a bargaining period.
- 58 Dr David Peetz, *Submission No. 386*, Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, September 1999, pp. 2926–2927.
- 59 ACTU, *Submission No. 423*, Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, September 1999, pp. 4466–4467.
- 60 Senator Andrew Murray (Australian Democrats), Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *op cit*, June 2000, pp. 64–65.

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- 61 Explanatory Memorandum, p. 6.
- 62 Refer: Senator Andrew Murray (Australian Democrats), Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *op cit*, pp. 64–65.
- 63 ACTU, *Submission*, Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Consideration of the Provisions of the Workplace Relations Amendment Bill 2000, June 2000, p. 460.
- 64 John Buchanan of the Australian Centre for Industrial Relations Research, *Submission*, Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Consideration of the Provisions of the Workplace Relations Amendment Bill 2000, June 2000, pp. 545–546.
- 65 Dr Peter Shergold, Evidence to Senate Finance and Public Administration References Committee, *Australian Public Service Matters, First Report: Australian Workplace Agreements*, October 2000, cited at pp. 15–16.
- 66 See International Centre for Trade Union Rights, *Submission*, Workplace Relations, Small Business and Education Legislation Committee, Consideration of the Provisions of the Workplace Relations Amendment Bill 2000, June 2000, pp. 498–543 for a useful discussion of the issues albeit from a particular perspective. For ILO material see: <http://www.ilo.org/public/english/sitemap.htm>
- 67 *Public Service Act 1999*, subsection 22(1).
- 68 Under the Appropriation Bills. The Parliamentary Departments are funded under separate Appropriation Bills but these must also be agreed with the Government.
- 69 Refer: Public Service Classification Rules 2000, and Work Level Standards
<http://www.dewrsb.gov.au/workplaceRelations/publicSector/australianPublicService/workStandards/ASO/ASO%20introduction.htm>
- 70 For further commentary along these lines see: Dr Michael Keating, ‘The Hard Bargain’, *Australian Quarterly*, volume 69, November–December 1997, pp. 34–38.
- 71 Or gains can be identified but cannot be pursued for political reasons.
- 72 Workplace Relations Implementation Group and National Institute of Labour Studies, Department of Workplace Relations and Small Business, *op cit*, pp. 15–19.
http://www.dewr.gov.au/workplaceRelations/publicSector/APS/Final_Survey_Report_5_October_2001.pdf
- 73 Arbitration is only available in the last resort and then is subject to the constraints detailed in section 89A of the Principal Act.

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