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## Workplace Relations Amendment (Choice in Award Coverage) Bill 2002

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Workplace Relations Amendment (Choice in Award  
Coverage) Bill 2002

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19 May 2003

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# Workplace Relations Amendment (Choice in Award Coverage) Bill 2002

**Date Introduced:** 13 November 2002

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** The earlier of proclamation or the day after 6 months after Royal Assent

## Purpose

This Bill amends the *Workplace Relations Act 1996* (the WR Act) to:

- place conditions on the service of logs of claims including content and notice requirements, and
- limit the Australian Industrial Relations Commission's (the Commission) capacity to make any dispute findings for employers with less than 20 employees, unless an employee is a member of the disputing organisation

## Background

### History of provisions

Proposed section 101A of the Bill relates to the notice and information requirements for logs of claims. This provision was first introduced in the Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999. That Bill was introduced on 30 June 1999 and an amended version passed the House of Representatives on 29 September 1999. The Bill did not pass the Senate. The Senate Employment Committee reported on the Bill on 29 November 1999. The Government agreed to reintroduce the Bill in smaller parts.<sup>1</sup> Proposed section 101A was reintroduced along with the exemption for small businesses without union members in the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001 (the Small Business Bill).<sup>2</sup> That Bill was introduced on 30 August 2001 but did not progress before the 2001 federal election was called. The present Bill is identical to Schedule 6 of that Bill.

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## What are logs of claims and how are they used?

In short, a log of claims is a registered letter sent to employers by unions with a list of claims for working conditions for the employees of that organisation. In practice, it is used as a trigger mechanism which will result in the particular employer/s and union being bound by the terms of a federal award that sets minimum employment terms covering employees of the respondent employer. The log is the first requirement for a registered organisation to attract the jurisdiction of the Commission which may then make a finding regarding the claims. It is important to note that while the WR Act allows 'enterprise associations' to be registered, it is only the larger registered industrial organisations (ie. a federal union, or a federally registered employers' association) which may actually be party to a federal award. Following the service of a log of claims, the next step is to notify a 'paper' dispute to the Commission. As the Commission puts in its advice to employers:

Union demands on employers are frequently made by a letter demanding agreement, within a specified time, to matters set out in a log of claims. If the demands are not agreed to, the union will normally notify the Australian Industrial Relations Commission that an alleged industrial dispute exists between it and the employers. The Commission, on being notified (WR Act, s.99) will list the alleged industrial dispute for hearing. At the hearing the Commission will normally decide whether there is an industrial dispute and if so, who the parties to it are and what the matters in dispute are. Employers (who the union asserts were sent the log of claims) will be advised of the time and place of the hearing...<sup>3</sup>

An employer may not respond to the log, or issue a log of counter claims, either way establishing the boundaries of the dispute, or the 'ambit' of the dispute. For example, if a log of claims includes a pay increase of \$20 and the employer responds with an offer of \$5, then a Commission's finding of \$4 or \$21 would be invalid. While the ambit of the claim exists (ie. it is not exceeded), the Commission has the jurisdiction to determine and vary the provisions of any resulting award. Where the ambit is exhausted, the log serving process must be repeated. It should be noted that the Commission's discretion in determining the provisions of an award is also governed by provisions of the WR Act setting out the safety net role of awards and allowable award matters (sections 88 and 89).

The Commission may find in relation to a log served on employers that an 'interstate industrial dispute' exists under section 101 of the WR Act. The Commission *may* then resolve the industrial dispute by determining appropriate terms and conditions which are then binding on the parties affected by the dispute. For example, the Commission would consider whether employment in a particular enterprise is sufficiently governed by a non-award arrangement and therefore may not make a finding of an industrial dispute.

The general principle is that federal awards bind the parties respondent to them, and as businesses change hands or start up in the relevant industry, it is very likely that unions will seek to have these enterprises 'roped in' to the relevant, usually, parent or industry award. The union/s may serve the previous log of claims which led to the 'parent' award

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being made on the new businesses, thus allowing the Commission to vary the award's schedule of respondents to include the new businesses.

In summary, this Bill is designed to address the following:

- a section 101 claim may be determined without an employer having been aware that its business is to become a respondent to a federal award, and
- as a result, business costs are increased by being required to provide their employees with access to award-based entitlements, such as paid overtime, which they may otherwise not have.

### Court findings

The Commission and the High Court have recognised that 'paper' disputes may seem odd to those unfamiliar with the system, but they have held that, in general, the 'requirements [of the ambit doctrine] not only promote, but necessitate the making of inflated demands'. The High Court has also noted that 'money claims for wages and allowances which seemed extravagant when made, appear, in the light of inflation, to be reasonable some years later.'<sup>4</sup>

### Constitutional issue

Logs of claims are complicated by constitutional questions about the basis for Commission's power to administer Commonwealth workplace relations laws. Currently, the power relating to dispute prevention and settlement is based on the conciliation and arbitration power in section 51(xxxv). For the purposes of this Digest, it is sufficient to note that the effect of reliance upon the conciliation and arbitration power is that the Commission's findings cannot automatically be made to bind an industry as a whole (a 'common rule' approach), but rather must be applied to specific parties in dispute.<sup>5</sup> This applies in the states but not the territories. As noted in section 141 of the WR Act, a common rule approach can be taken in the territories and classes of public sector employment, consistent with constitutional limitations on the Commission.

### Small business exempt without union member

Another requirement reintroduced by the present Bill is that an organisation with less than 20 employees cannot be bound under a federal award unless one such employee is a member of the disputing organisation (the union which served the log). Although the organisation and employer must be identified, any individuals cannot be identified in the Registrar's certificate to the effect that an employee is a member of an organisation.

In general, however, there is no requirement that there only be a dispute with employers that have employees that are members of the union. The Australian Labour Law Reporter notes that:

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Unions act as parties in their own right and not merely as agents for their current members. Consequently, the High Court has held that *a union may notify a dispute with employers who do not at the time employ any members of that union* and the union is entitled to expect a federal arbitral tribunal to make an award in settlement of the dispute. (See *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees Association* (1925) 35 CLR 528)... The rationale for this approach is that unions have an interest in protecting their members' working conditions and consequently, ensuring that these conditions are not undermined by employers employing non-union members at lower rates of pay or on lower conditions.<sup>6</sup>

This would suggest that the requirement of being a union member should not necessarily be a requirement for whether or not a federal award should apply to a particular workplace.

### **Position of groups**

In 1999, the Government changed the objects of Part VI of the WR Act, dispute prevention and settlement, so that it included that the Commission actually 'encourage the making of agreements between employers and employees at the workplace or enterprise level'.<sup>7</sup> This offsets the general objective which remains that wages and conditions of employment are protected by a system of enforceable awards established and maintained by the Commission.<sup>8</sup>

Irrespective of whether the requirement to be a union member should be included, the focus on relieving any possible burden on small business is the general context in which the Government's position should be considered. The Minister confirms this in his Second Reading Speech:

The Bill... will enhance the ability of small business to resist attempts to rope them into federal awards...the Government is demonstrating its commitment to making... the system better meet the needs and circumstances... particularly of small business.<sup>9</sup>

The ACTU Secretary said the following of the omnibus Small Business Bill which included the provisions introduced separately in the present Bill:

[the Bill] would remove legal rights from half the Australian workforce, or more than 3 million employees of businesses with less than 20 staff... [the laws] would unfairly discriminate against half the workforce. Why should employees have fewer legal rights and protections just because they work in a small business?<sup>10</sup>

In his Second Reading Speech, the Minister counted 1,122,000 private sector, non-agricultural, small businesses in Australia, noting that these accounted for 96% of all businesses.<sup>11</sup>

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## Victorian retailers decision <sup>12</sup>

On 17 January 2003, the Full Bench of the Commission made an award in favour of the Shop, Distributive and Allied Employees Association (SDA) in response to a log of claims initially served on over 35,000 employers in the Victorian retail industry on 26 June 1998. The SDA eventually sought the roping in of 17,268 employers in an interim award. The Bill could be seen as a response to this sort of case. The Full Bench outlined key positions and its findings:

**The Commonwealth**, supported by the employer parties, strenuously opposed the application on the basis of its potential to affect labour costs and employment levels....[23] It was submitted that the outlook for the Victorian retail trade indicates that if the application were granted there would be significant negative impacts on the businesses concerned. ...

[57] **The SDA** contended that retail employees in Victoria not subject to federal awards or agreements are disadvantaged because the conditions in Schedule 1A provide only limited protection. The key areas of disadvantage were said to be: the absence of provision for overtime, penalty rates, annual leave loading, shift loadings and severance entitlements....

[62] ...It is probable that some Schedule 1A employees are paid wages at the minimum level prescribed and that they do not have the benefit of many conditions which commonly apply to employees covered by federal awards and agreements. We find that some Schedule 1A employees in the Victorian retail sector are likely to be so disadvantaged....

[76] ...It is beyond doubt that the safety net provided in Part XV for Schedule 1A employees is less comprehensive and at a lower level than the safety net provided by the Commission's awards in the retail industry...

[78] We have taken into account the fact that most of the approximately 17,000 employers affected did not appear before us either to oppose the award or otherwise. Nevertheless, for the reasons we have identified some caution is desirable. We intend, therefore, that the roping-in should take place in a staged process so that all of the increases in labour costs are not introduced at the same time....<sup>13</sup>

## Main Provisions

### Conditions on Commission finding dispute

Under section 99 of the WR Act, alleged industrial disputes must be notified to the relevant Presidential Member of the Commission or a Registrar. Where such a dispute comes before the Commission, the Commission shall determine the parties and matters in dispute, *if it considers that the alleged industrial dispute is an industrial dispute.* **Item 2**

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introduces **proposed section 101A** that sets out criteria to be satisfied before the Commission can find a dispute:

- the log of claims must be accompanied by a notice containing prescribed information
- the dispute was notified at least 28 days after the log of claims was served (ie. time to consider the log)
- the initiator of the dispute served each party to the dispute with notice of the time and place of the proceedings at least 28 days before the day of the initial proceedings, and
- the log of claims does *not* include any demand that
  - requires conduct that would breach the freedom of association provisions
  - an objectionable provision be included in an award or agreement (removal of preference clauses, ie. clauses conferring a right based on membership of an organisation)<sup>14</sup>
  - does not pertain to the relationship between employers and employees.

Only small businesses with organisation members can be parties to dispute

**Proposed subsection 101B(2)** requires the Commission to give each employer notified of an alleged dispute a notice in writing requesting that the employer inform the Commission, within a specified period, whether it employed less than 20 people on the service day. **Proposed subsection 101B(3)** states that if the employer informs the Commission that it employs less than 20 people on the service day, the Commission must not determine that the employer is a party unless:

- the commission is not satisfied that the employer employed less than 20 people on the service day, or
- the Commission is satisfied that the employer employs a member of that organisation.

**Proposed subsection 101B(4)** requires those small businesses determined to be parties, ie. having a union member, to be given a notice in writing inviting the employer to make written comments on proposed award within a specified period.

Service day is the day the log of claims was served (**proposed subsection 101B(5)**). Casual employees engaged on a regular and systematic basis for a sequence of periods of at least 12 months are to be included in the 20 people, but not other casual employees (**proposed subsection 101B(6)**).

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## Concluding Comments

The Bill represents a change to the award coverage of non-unionists and a challenge to traditional legal authority which upholds the ability of unions to affect both unionised and non-union workplaces through safety net awards. The Bill will also have the effect of reducing union right of entry for the purposes of having discussions with employees as that right is conditional upon an award being in place.<sup>15</sup>

## Endnotes

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- 1 For further information about the Small Business Bill, see Stephen O'Neill, 'Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001, [Bills Digest](#), No. 60, 2001–02, p. 3.
- 2 *ibid.*
- 3 AIRC, *Information sheet for employers*, Form R.5. [www.airc.gov.au/assets/rtf/FormR5.rtf](http://www.airc.gov.au/assets/rtf/FormR5.rtf)
- 4 *R v Ludeke, Ex parte Queensland Electricity Commission and Ors* (1985) 159 CLR 178 cited in *Federated Furnishing Trades Society of Australia v Withams Warehouse and Ors* (1990) ALLR, ¶147. See *CCH Australian Labour Law Reporter* (ALLR) at ¶2-535 where '...it is noted that excessively wide and non-specific claims, may, occasionally, result in a finding that an industrial dispute has not been created [but this would be] unusual and most logs of claims, albeit of extremely wide ambit, would still be capable of generating an industrial dispute.'
- 5 ALLR, at ¶ 2-460 states that 'The High Court has held that 'arbitration' can relate only to a particular dispute and the particular disputants so any decision made in arbitration of a dispute can only be binding on the actual parties to that dispute (see *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311 ). In Whybrow's case it was held that 'arbitration' within the meaning of sec 51(35) of the Constitution can only take place between ascertainable parties who possess ascertainable differences (see, for example, Latham CJ at pp 317-318). The Court declared invalid a provision of the 1904 Act which authorised the Commonwealth Court of Conciliation and Arbitration to declare a "common rule" in any industry.'
- 6 ALLR, ¶2-460, 'Arbitration and Arbitration processes', emphasis added.
- 7 WR Act, paragraph 88A(d)(i), inserted by No.119 of 1999, Schedule 1, item 2, commenced 20 October 1999. This new approach was reflected in amendments to paragraph 111(1)(g) and section 111AAA of the WR Act to impose more stringent criteria before a federal award could be made.
- 8 WR Act, paragraph 88A(a).
- 9 The Hon. Tony Abbott MP, House of Representatives, [Debates](#), 13 November 2002, p. 8856.
- 10 ACTU, 'Abbott clears way for lower wages, more sackings', [Media Release](#), 30 August 2001.

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- 11 The Hon. Tony Abbott MP, House of Representatives, [Debates](#), 13 November 2002, p. 8856.
- 12 [Shop, Distributive and Allied Employees Association and \\$2 and under and others](#), AIRC Full Bench, PR926620, Melbourne, 17 January 2003.
- 13 *ibid*, emphasis added.
- 14 In any case, any log demand regarding preference clauses cannot be a ‘matter in dispute’ as employers are prohibited under sections 298K and 298L from discriminating against persons for prohibited reasons such as membership of an industrial association. See *Re AMWU & Ors; Ex parte The Shell Company of Australia Limited & Ors* (1992) 174 CLR 345 as cited in *Thiess Contractors Pty Ltd v Australian Collieries Staff Association*, AIRC FB (P9291) (1998) 43 AILR ¶3-788.
- 15 WR Act, section 285C.

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