



## Workplace Relations Amendment (Better Bargaining) Bill 2005

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## Workplace Relations Amendment (Better Bargaining) Bill 2005

**Date Introduced:** 9 March 2005

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** Schedules 1 to 4 come into force 28 days after the Act receives Royal Assent

### Purpose

The Bill amends the [Workplace Relations Act 1996](#). It:

- allows the Australian Industrial Relations Commission (Commission) to more readily suspend a bargaining period where one or both of the parties to a collective bargaining process are taking ‘protracted’ industrial action. [The Commission currently may suspend a bargaining period under section 170MW. Industrial action can only be protected from injunctions and damages claims where a party first seeks a bargaining period from the Commission in accordance with provisions under Division 8 of Part V1B of the WR Act. Where a bargaining period is suspended and industrial action continues, action may be taken to stop it (injunction) and seek the recovery of any loss (damages)]. The current Bill will not affect or limit all bargaining forms under the WR Act, for example, the Bill will not affect employer-initiated lock-outs under Australian Workplace Agreement (AWA) negotiations
- allows a third party (neither employer nor employee), affected by industrial action, such as a business client, to apply to the AIRC to have a bargaining period suspended and thus terminate protected industrial action
- limits protected industrial action to single employers
- denies access to protected industrial action during the life of a certified agreement (CA), including over claims for matters not addressed in the certified agreement and thus nullifies the effects of the Federal Court’s *Emwest* decision.<sup>1</sup> (The *Emwest* decision held that the WR Act’s provisions on certified agreements and protected industrial action did not prevent a new claim, hence CA, on a subject matter not addressed in a current CA between the same parties).

### Background

The background to this Bill is reviewed in [Bills Digest](#) No. 77 2003–04<sup>2</sup> in respect of the Workplace Relations Amendment (Better Bargaining) Bill 2003. As is noted there, certain

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provisions of the current Bill date back to provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.

The Senate Employment, Workplace Relations and Education Legislation Committee reviewed the Workplace Relations Amendment (Better Bargaining) Bill 2003 (with others, see [Senate Report](#)<sup>3</sup>), although this Bill lapsed at the time Parliament was prorogued prior to the federal election on 9 October 2004. The Committee's majority report concurred with the views of the Australian Industry Group on the significance of the Federal Court's *Emwest* decision:

AiG identified three areas of risk arising from the *Emwest* decision, especially for industries in the manufacturing and construction sectors. First, a union might take protected action during the life of an agreement over claims which were not the subject of enterprise bargaining between the parties. Second, a union might take protected action during the life of an agreement over new claims which were not pursued during enterprise bargaining. Third, a dispute might arise in the workplace during the life of an agreement over an issue which was not dealt with during the enterprise negotiations and a union might organise protected industrial action to further its position in that dispute.<sup>4</sup>

Labor senators on the other hand argued in the same report that the Bill would increase the bargaining power of employers during wage negotiations:

Labor senators believe that this is one of the most regressive workplace relations bills introduced in the parliament under the banner of market deregulation, since the first wave of industrial legislation in 1996. Contrary to Government rhetoric about how this bill will benefit workplaces by ensuring that enterprise bargaining processes are fair and user friendly, Labor senators maintain the bill will restrict the right of workers to take industrial action in the event of a true disagreement with their employers.<sup>5</sup>

Labor senators also reported the ACTU's view that the Bill would introduce fetters on the bargaining process:

The effect of this [bill] would be that such agreements would prevent any industrial action occurring in relation to any issue throughout the life of an agreement, even where postponement of bargaining on that issue had been contemplated by the parties prior to the making of the agreement. In this way the [bill] would act as an unnecessary fetter on the parties' freedom to bargain and to negotiate site-specific arrangements for particular types of projects.<sup>6</sup>

The significant development since the last Bill is the High Court's *Electrolux* decision on 2 September 2004<sup>7</sup> which, inter alia, held that bargaining fee clauses in certified agreements did not pertain to the employment relationship, and that certified agreements containing such provisions were void – in other words fetters on the matters which could be agreed to in enterprise bargaining had the chance of being significantly increased.

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In response to the High Court decision, the Government passed the *Workplace Relations Amendment (Agreement Validation) Act 2004* which validated agreements (and protected action engaged to secure these agreements) to the extent that they contained provisions pertaining to the employment relation (For a full account of the High Court decision and the likely effect of the amending legislation, see [Bills Digest No. 56, 2004-05](#)<sup>8</sup>). In any case, the current Bill deletes previous provisions dealing with ‘matters pertaining’ as a result of the above Act coming into force.

It might also be noted that legislation may not be successful in curbing targeted industrial behaviour. Victorian building unions (in particular) have embarked on a ‘go early’ pattern bargaining round with about 40 employers (so far), despite the opposition to the action from the Federal Government and the key employer association the Master Builders’ Association of Victoria. The intention is to lock in 3 year agreements in anticipation of building industry legislation coming into force after 1 July 2005, despite current registered agreements not expiring until October 2005. New agreements appear to have been secured without access to protected industrial action, although the campaign is contrary to the spirit of this Bill.<sup>9</sup>

## Main Provisions

### *Workplace Relations Act 1996*

#### **Schedule 1 – Industrial action and lockouts before expiry of agreement etc.**

**Item 1 repeals the following words in subsection 170MN(1): ‘for the purposes of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement or (section 170 MX) award, engage in industrial action’ and replaces these with: ‘organise or engage in industrial action affecting the employer (whether or not that action relates to a matter dealt with in the agreement or award)’.**

As is explained in the Bill’s *Explanatory Memorandum*:

This item proposes to omit words from subsection 170MN(1) and substitute new words to ensure that industrial action cannot be taken from the time an agreement or an award made under subsection 170MX(3), comes into operation until the nominal expiry date of the agreement or award has passed ...

In *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2003] FCAFC 183 (Emwest), the Full Federal Court found that under the current section 170MN, protected industrial action could be taken, prior to a certified agreement passing its nominal expiry date, provided the protected action was in relation to claims not already covered in the agreement.

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While proposed new subsection 170MN(1) is designed to remedy the decision of the Full Federal Court in *Emwest*, it goes further by prohibiting all industrial action, irrespective of its purpose, until the nominal expiry date of an agreement or an award made under subsection 170MX(3) has passed. For example, as a result of the proposed amendments to section 170MN, industrial action directed at a third party rather than the employer would be prohibited during the life of a certified agreement.<sup>10</sup>

**Item 2** proposes a similar amendment as is in item 1 to **subsection 170MN(4)** (ie, in respect of employer-initiated lockouts).

## **Schedule 2 - Suspension of bargaining periods**

**Item 1** inserts new section 170MWB to provide the Commission with discretion to suspend a bargaining period on application by a negotiating party. **New section 170MWC** provides for the suspension of a bargaining period where industrial action is causing significant harm to a third party on application by the Minister or a third party.

**Proposed paragraph 170MWB(1)(a)** ensures that a suspension of a bargaining period is available only to the parties negotiating the proposed agreement. **Proposed paragraph 170MWB(1)(b)** refers to protected action taking place. **Proposed subparagraphs 170MWB(1)(c)(i)-(iv)** list factors for the Commission to consider in deciding whether a suspension is appropriate (eg duration of the action), although the Commission is not confined to the factors listed. **Proposed subsection 170MWB(2)** allows the Commission to determine the length of the suspension of a bargaining period. **Proposed subsection 170MWB(3)** allows the Commission to extend the suspension of the bargaining period, on the application of a negotiating party. **Proposed subsection 170MWB(4)** provides that a cooling-off period may only be extended once. **Proposed subsection 170MWB(5)** requires the Commission to give the negotiating parties the opportunity to be heard when considering cooling-off applications and any extension applications.

**Proposed subsection 170MWC(1)** requires the Commission to consider a number of factors in exercising its discretion to suspend a bargaining period. These are whether:

- the industrial action is threatening to cause significant harm to any person (other than a negotiating party) and
- suspending the bargaining period would be appropriate by reference to the public interest, the principal objects of the WR Act, and any other relevant matters.

**Proposed subsection 170MWC(2)** provides numerous factors for the Commission to refer to when considering whether significant harm is threatened. **Proposed paragraphs 170MWC(2)(a) and (c)** refer to the interests of employees and the extent to which industrial action disrupts or threatens the viability of a business. **Proposed paragraph 170MWC(2)(b)** refers to the extent to which a person is particularly vulnerable to the consequences of the industrial action. **Proposed subsection 170MWC(3)** allows the Commission to determine the appropriate length of a suspension and **proposed subsection**

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**170MWC(4)** authorises the Commission to extend the period of a suspension of the bargaining period, once only [**proposed subsection 170MWC(5)**]. **Proposed subsection 170MWC(6)** allows the negotiating parties the opportunity to be heard.

**Proposed subsection 170MWC(7)** informs the negotiating parties of the availability of mediation and conciliation services. **Proposed subsection 170MWC(8)** stipulates that any industrial action taken in respect of the proposed agreement where a bargaining period has been suspended is not protected action.

### **Schedule 3 - protected action and related corporations**

**Item 1 inserts new subsection 170ML(3A)** which provides that, for the purposes of subsection 170ML(2) and subsection 170ML(3), 2 or more related corporations cannot be treated as a single employer under sub paragraph 170LB(2)(b).

As the *Explanatory Memorandum* states:

The item is designed to make it clear that protected industrial action may not be taken by or against 2 or more companies that are related to the employer and which may be treated as a ‘single employer’ for the purposes of subparagraph 170LB(2)(b). This item does not affect the ability of employers and employees to make and certify agreements in reliance on the facilitative provision in subparagraph 170LB(2)(b). This item only affects the scope of the immunity conferred by section 170ML (protected action).<sup>11</sup>

### **Schedule 4 – protected action and involvement of non – protected persons**

**Item 1 repeals and replaces section 170MM. New section 170MM** stipulates that protected industrial action can only be taken by parties to whom the proposed agreement will apply (ie, a union, employer, or employee that is a negotiating party in respect of the agreement or a member of a union negotiating party whose employment will be subject to the proposed agreement). Industrial action will lose its protected status if it is organised or engaged in, in concert with any person or organisation of employees that is not protected in respect of the specific industrial action being taken.

## **Endnotes**

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<sup>1</sup> *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2002] FCA, 61.

<sup>2</sup> Steve O’Neill, [Bills Digest No. 77 2003-04](#) on the Workplace Relations Amendment (Better Bargaining) Bill 2003, Parliamentary Library, Department of Parliamentary Services, 2003.

<sup>3</sup> Report of the Senate Employment Workplace Relations and Education Legislation Committee into the Workplace Relations Amendment (Award Simplification) Bill 2002 Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment

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(Choice in Award Coverage) Bill 2004, Workplace Relations Amendment (Simplifying Agreement-making Bill) 2004, 17 June 2004.

<sup>4</sup> *ibid.*, p. 7.

<sup>5</sup> *ibid.*, p. 20.

<sup>6</sup> *ibid.*, p. 21.

<sup>7</sup> *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40.

<sup>8</sup> Jacob Varghese, [\*Bills Digest No. 56, 2004-05\*](#) on the Workplace Relations Amendment (Agreement Validation) Bill 2004, Parliamentary Library, Department of Parliamentary Services, 2004.

<sup>9</sup> ‘Victorian construction employers clear way for pattern deal’, [www.workplace.com.au](http://www.workplace.com.au), 20 April 2005.

<sup>10</sup> Workplace Relations Amendment (Better Bargaining) Bill 2005, *Explanatory Memorandum*, p. 10.

<sup>11</sup> *ibid.*, p. 14.

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