CHAPTER 3

THE IMPACT OF THE WORKPLACE RELATIONS ACT 1996

3.1 The Committee's terms of reference also required it to examine the impact of the Workplace Relations Act 1996 on a range of economic and social variables, including:

- wages, employment, productivity, and industrial disputation levels;
- job security, unfair dismissals, employee entitlements and conditions;
- the roles, rights and obligations of employers, employees and their respective organisations;
- the powers, standing and procedures of the Australian Industrial Relations Commission, the Office of the Employment Advocate and the Industrial Registrar; and
- industrial democracy and employee ownership.

3.2 This Chapter presents the Committee's findings on these issues. Some have been addressed in part under the objects of the WR Act in the previous chapter and are therefore not addressed in full detail below.

Wages, employment, productivity, and industrial disputation levels

3.3 The Committee was presented with evidence that wages, employment and productivity had all shown positive growth in recent years and levels of industrial disputes were approaching historically low levels. Some of the evidence put before the Committee attempted to highlight the effects on certain sectors of the workforce and the evidence was mostly anecdotal.

Wages

3.4 Real wages have risen for both high and low paid employees and for award and agreement covered employees following the passage of the WR Act. Fundamental to the wage rises for the low paid has been the safety net adjustments to award rates of pay made in the annual living wage cases. The WR Act requires the AIRC, in making safety net adjustments, to have regard to the needs of the low paid and to the living standards generally prevailing in the Australian community. It is noted in the submission from the Department of Employment, Workplace Relations and Small Business that the increases in real wages in the 1990s is in contrast to real wage declines during the 1980s. It is also noted that all three safety net adjustments since the WR Act came into affect have reflected real wage increases. This compared to the

previous three increases under the former legislation in which only one kept pace with inflation.[1]

3.5 DEWRSB data from the Workplace Agreements Database indicates that where the low paid move onto agreements, their wage outcomes are higher than they would have been under the award safety net adjustments.[2] Where agreements are struck at the enterprise level, the outcomes are often mutually beneficial.

3.6 Increases in real wages are not a result of strong growth in nominal wages. Australian Bureau of Statistics data on average weekly ordinary time earnings for full-time adult employees, shows that since 1996, nominal wages growth has been moderate by historical standards, and in recent quarters has eased further.[3] Real wages rises have, therefore, been driven by moderate and sustainable wage increases in a period of low inflation. This compares with the economic upswing of the late 1980s, where substantial nominal wage growth was required merely to keep pace with inflation. From an economic perspective the current situation is far more conducive to sustainable economic growth than the boom-bust cycles of the past.

3.7 At the aggregate level therefore there are no signs that the implementation of the 1996 reforms has had any adverse impact on wages it is more likely that these reforms have helped maintain more sustainable wage increases. The issue of how the WR Act has affected wage outcomes of different population groups, was more contentious.

3.8 Some witnesses were concerned that the introduction of AWAs in some workplaces reflected an attempt by employers to cut the wages and conditions of staff who were covered by awards or certified agreements. Anecdotal evidence presented to the Committee suggested that while base rates of pay were usually higher in AWAs than under the employees' relevant award or certified agreement, the AWA often removed other provisions which would normally supplement an employees take-home pay, such as overtime, penalty rates and bonuses.

3.9 Other evidence given to the Committee indicated quite different outcomes, however, with one witness informing the Committee that when the company he worked for introduced AWAs the impact on base income was an increase in the order of $25,000. This was qualified in the context that it represented a cashing out of other financial components of the certified agreement such as shift penalties, overtime rates and weekend penalty rates. Nonetheless the witness estimated that his income was still $10,000 a year higher under the AWA.

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2226-7

2 *ibid*., p. 2202

3 *ibid*., p. 2196

3.10 One area of concern raised in submissions received by the Committee, was how the WR Act had impacted on wage outcomes for women. Concerns were raised that women, who were perceived to be in a weaker bargaining position than men, may be fairing badly under AWAs, particularly where they are employed on a part-time or casual basis.[4] Again, any evidence to this effect was anecdotal.

3.11 However, data from DEWRSB's Workplace Agreements Database suggests that under certified agreements the gap between average annual wage increases for males and females has narrowed considerably since 1997, although increases have still been slightly higher for males.[5]

Living Standards

3.12 Associated with the impact on wages is the subjective question of how the Act has affected living standards. On the one hand the Committee heard accounts from individuals, particularly those affected by award simplification, who believed that they had been disadvantaged in one way or another under the operation of the Act and that consequently their living standards had fallen. Others, meanwhile, argued that, in general terms, living standards for the population had improved.

3.13 There is evidence to suggest that the general population is at the least no worse off and many are better off than they were before the introduction of the WR Act. A key component of this has been the increase in real wages that have occurred in recent years. Rising real wages mean people have greater purchasing power and therefore an increased standard of living. Real wages have risen for the low paid as well as for those on higher incomes, indicating that, generally speaking, all workers have enjoyed rising living standards. The increases in real wages over the last three years for the lowest paid in the workforce, have been the first significant increases since the beginning of the decade.[6]

3.14 DEWRSB presented additional data in its submission to the Committee on the distribution of income which indicates that all income groups have experienced increases in real disposable income. DEWRSB acknowledges that income inequality has increased although this is a trend which has been evident since the 1980s and not a feature distinct to the period since the introduction of the WR Act. Furthermore, a recent National Centre for Social and Economic Modelling (NATSEM) study indicated that the distribution of income was actually slightly more equal in 1995-96

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4 Submission No. 441, Women for Workplace Justice Coalition, vol. 21, pp. 5190-2

5 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2199

6 see chart 25 in Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2227

compared to 1982. Similar analysis prepared by the Department also shows that there had been little change in the distribution of income between 1994-95 and 1997-98.[7]

Productivity

3.15 The growth in productivity throughout the 1990s has been strong and appears to have quickened in recent years. The trend growth of labour productivity from the March Quarter 1997 to the June Quarter 1999 was 3.7%. This compared to 3.1% from the December Quarter 1991 to the March Quarter 1997 and 1.9% from the December Quarter 1982 to the December Quarter 1991.[8] The Department's submission also draws attention to a recent Productivity Commission report which found that multifactor productivity growth is faster now than in the 'golden age' during the 1960s. These results have derived in part from the continuation of microeconomic reforms undertaken in the early 1990s.[9]

3.16 The ACTU argue that it is not credible to ascribe the observed productivity improvements since 1996 to the WR Act and that the impact of industrial laws on national productivity is at best partial and possibly only marginal.[10] It is the view of the Committee, however, that improvements in productivity are the result of a combination of factors all working in concert, of which workplace relations is an important part.

3.17 Most of the research on the determinants of productivity do suggests that changes to workplace reform take time to filter through to observed productivity improvements. To this end the Committee believes that it is not unreasonable to expect that Australia's productivity performance will continue to see further improvement. This is a view supported by the Australian Chamber of Commerce and Industry who stated that:

> …the Act has continued and probably strengthened the focus of the federal labour relations system on enterprise agreements, both in the objects of the Act and for awards, in the provision of more flexible agreement approval processes, and through the introduction of a procedure for approving individual agreements (Australian Workplace Agreements). These arrangements are undoubtedly beneficial in productivity terms for the private sector, and are achieving far better outcomes than for example the sort of labour relations system that prevailed in the 1970s and 1980s.[11]

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7 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2227-30

8 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2221

9 *ibid*., p. 2223

10 Submission No. 423, Australian Council of Trade Unions, vol. 19, pp. 4387

11 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p.3408

Employment

3.18 It has been argued that there is great difficulty in isolating the impact of the WR Act on employment and unemployment levels. Over the last 3 years, and particularly the last 12 months, Australia has achieved solid labour market outcomes, including continued employment growth, both full and part-time, and falling unemployment.

3.19 Some evidence before the Committee questioned whether the 1996 legislation has led to an increase in part-time and casual employment at the expense of full-time work. When questioned on the issue of casual employment at the Canberra hearing on 1 October, the Department of Employment, Workplace Relations and Small Business told the Committee:

> When you actually analyse the data on casualisation, job security, the nature of part-time employment, our assessment of the available evidence indicates that indeed the workplace relations legislation has not been seeing a deterioration in those areas at all. For example, casualisation has been a labour market trend that has been with us for almost a generation in terms of the growth in that area. Under the period of the current legislation, if anything, we have a seen a significant deceleration. We have not seen a drop in the level of casual employees in the labour market, but in terms of that trend to increase casualisation we have seen a slowing.
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> An important dimension of that is evident in regard to part timers where the incidence of part-time casuals has in fact declined. We have seen an increase in regular or permanent part-time employment, and the Workplace Relations Act has been an important contributor to that change because it has actually opened up and facilitated on a broader plane access by people who are wishing to work part time to be able to do so on a regular and permanent basis. In many areas previously that was denied under awards—the only choice available to work other than full time would have been as a casual…[12]

3.20 The slowing in the overall rate of growth of casual employees was mostly acknowledged and welcomed by other witnesses who appeared before the Committee. Discussion under this topic also covered whether the growth in part-time and casual employment was demand or supply driven. The ACTU presented evidence to the Committee which suggested that 59 per cent of casual employees wanted their employment to be permanent.[13] On the contrary, the submission from the Business Council of Australia cites findings from a study by the National Institute of Labour Studies which, based on AWIRS data, suggests that a high proportion of male and female casual employees are satisfied with the hours they work and were more likely to report that they were generally satisfied with their job than their permanent

12 Evidence, Mr Bernie Yates, Canberra 1 October 1999, p. 13

13 Evidence, Ms Linda Rubenstein, Canberra, 1 October 1999, p. 22

counterparts.[14] The Department of Employment, Workplace Relations and Small Business also suggest that the majority of casual employees are in these types of jobs for family or personal reasons and not because they could not get permanent employment.[15]

Industrial disputes

3.21 The 1996 legislation amended the Act in such a way as to allow for a legal right to take industrial action, 'protected action', during a bargaining period and to prohibit other forms of industrial action which were considered to be incompatible with cooperative working relationships.

3.22 The aggregate evidence on the level of industrial disputes in Australia reveals that there has been a significant decline in their number since the WR Act came into effect. In particular the number of working days lost per thousand employees in 1997 and 1998 was the lowest since 1913.[16] The Department's submission states that it is not possible to quantify how much of this decline can be attributed solely to the provisions of the WR Act as the data does not identify whether employees involved in the disputes are employed in the federal or state jurisdiction, or whether the industrial action is protected or not.

3.23 The Business Council of Australia indicates in its submission that despite the significant fall, the total number of working days lost per thousand employees is still very high compared to other OECD countries. They emphasise that such large numbers of disputes have significant consequences in terms of loss of pay, declining production, falling profits, employment security and inconvenience to customers. In a highly global market place, disruptions to production also have a significant bearing on our international reputation as a reliable trading partner.[17]

3.24 Some business groups argued that the current Act still enabled unions to use the threat of industrial action as a means to circumvent the negotiation process and pressure employers into submission. Master Builders Australia described in their submission what they believed to be an abuse of the current provisions by unions:

> Protected industrial action has been relied upon by the CFMEU, particularly in circumstances where they are attempting to force employers to accept an industry-wide standard agreement. The current machinery provisions for the taking of industrial action, have, however, been abused by:

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14 Submission No. 375, Business Council of Australia, vol. 12, p. 2574

15 Department of Employment, Workplace Relations and Small Business, Questions on notice from Canberra hearing 1 October 1999.

16 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2239-40

17 Submission No. 375, Business Council of Australia, vol. 12, p.2622

- blanket notices of intention to take industrial action being given…on a regular basis…without there being a real intention to take industrial action…;

- notices being given which do not specify the particular type of industrial action which is intended to be taken or the time at which it is to commence; and

- notices of intention to take industrial action being given without there having been any discussion or attempt to reach agreement with an individual employer prior to the notice being issued.[18]

3.25 Some witnesses argued that the introduction of the legislation had created a more adversarial approach to workplace relations. However, evidence in the submission from DEWRSB shows that the average duration of disputes has been declining. The Department stated that this indicates that the compliance functions of the WR Act are generally successful in dealing with unprotected action,[19] although some employer groups suggested that the provisions under section 127 of the Act give little effective power to the Commission to order industrial action to cease.[20]

Job security, unfair dismissals, employee entitlements and conditions

Job Security

3.26 Some submissions to this inquiry suggested that people felt less secure in their employment and that this could be attributed to the continuing increase in the proportion of the workforce employed on a casual or temporary basis such as independent contractors. The ACTU submission states that evidence is mounting that employees are more insecure in employment than has previously been the case. They point to a number of factors, including the continued growth of precarious forms of employment, as underlying this trend.[21] The ACTU evidence derives from its own research.[22]

3.27 These views are contrary to the evidence supplied by the Department of Employment, Workplace Relations and Small Business. The Department suggests that a range of survey evidence indicates that job security is increasing in Australia and has been since the mid-1990s following declines in the early part of the decade. It

18 Submission No. 267, Master Builders Australia Inc., vol. 6, p. 1234

19 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2241

20 See for example Submission No. 267, Master Builders Australia Inc., vol. 6, pp. 1235-7, and Submission No. 381, Australian Mines and Metals Association, vol. 13, pp. 2850-1

21 Submission No. 423, Australian Council of Trade Unions, vol. 19, pp. 4391-3

22 *Employment Security and Working Hours – A national survey of current workplace issues*, prepared by Yann Campbell Hoare Wheeler for the Australian Council of Trade Unions, 1999

is also suggested that by international standards, the level of job security in Australia is quite high.[23]

3.28 The Queensland Government, relying on sources other than the ACTU survey, also suggested that job insecurity has increased. They argue that the historical relationship between job insecurity and the state of the business cycle is no longer as relevant and that it is now more closely associated with industry restructuring.[24] The DEWRSB submission states that where a major reorganisation of a workplace has been undertaken in the two years prior to a survey being taken, people are more likely to report that they feel insecure in their job compared to those who did not undergo any significant workplace change. They dispute the contention that the link with the business cycle has been broken and provide evidence which shows that levels of job security continue to follow closely movements in GDP.[25]

3.29 While there were claims that job insecurity had increased under the WR Act, these were generally the perceptions of those who were opposed to the legislation and little evidence was supplied other than the survey of the ACTU. On this issue the Business Council of Australia brought to the attention of the Committee the findings of a recent study by the National Institute for Labour Studies:

> Within the Australian context, the NILS study found that despite widespread anecdotal evidence of rising levels of job insecurity, empirical data in support of this hypothesis are both scarce and unconvincing.[26]

3.30 Furthermore there was no empirical evidence presented to the Committee showing a direct link between the WR Act and job insecurity. Further arguments were advanced relating to casual employment. While it is true that many people work as casuals by choice it is also the case that there are some workers who work as casuals because that is what they have been offered. However, the Committee notes that, in this context, the WR Act does not express any positive preference for one type of employment over another.

Unfair Dismissals

3.31 Unfair dismissal legislation and its impact on employment has been an issue for debate since the provisions were introduced by the Keating Government in 1994. Critics suggest that the provisions are easily abused and represent a significant deterrent to employers taking on new staff, especially in small business. It has been the Coalition's policy since 1996 to amend the legislation to reduce any incentive for

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23 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2250-1

24 Submission No. 473, Queensland Government, vol. 23, p. 5947

25 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2221-5

26 Submission No. 375, Business Council of Australia, vol. 12, p. 2576

unmeritorious claims to be pursued. The 1996 legislation introduced a filing fee of $50 in an attempt to discourage claims that were not genuine.[27]

3.32 In line with their 1998 policy statement on workplace relations, *More Jobs Better Pay*, the Government sought to make further amendments to the provisions which would provide an exemption for small business (those employing 15 persons or less) and introduce a 6 month qualifying period for new employees in a business of any size. The Bill is still on the Senate Notice Paper.

3.33 Since the introduction of the WR Act the number of unfair dismissal applications has declined. Despite these falls, there are operational problems associated with the existing provisions which employer groups consider act as a disincentive to hiring new staff. Some of these concerns are being addressed in the amendments contained in the current Bill and are discussed in Chapter 8 of this report.

3.34 There were concerns raised relating to people who were not currently eligible for protection from unfair dismissal. The submissions from Job Watch Inc. and the Fitzroy Legal Service both assert that under the current provisions, trainees and any workers on fixed term contracts are not eligible to apply for remedies if they are unfairly or unlawfully dismissed.[28]

Protection of employee entitlements

3.35 Submissions and oral evidence presented to the Committee under this item concentrated on three key areas where employee entitlements and conditions were believed to be placed in doubt or undermined under current industrial law. These were the provisions covering awards and agreements, cases of insolvency, and cases involving a transmission of business.

3.36 On the issue of the protection of employee entitlements in the event of employer insolvency, there was general support for the Government's recent announcement to establish a national safety net scheme for the improved protection of employee entitlements. The Department's submission indicates that the Government is considering two options for implementation early in 2000 and that these are outlined in the Ministerial Discussion Paper, *The protection of employee entitlements in the event of insolvency*, issued on 27 August 1999.[29]

3.37 It was also suggested to the Committee that entitlements are often put at risk when a business changes hands. Similarly, it was argued that the Act does not adequately provide for the situation where, in the case of the merger of two

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27 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2259

28 Submission No. 398, Job Watch Inc., vol. 14, p. 3231; Submission No. 484, Fitzroy Legal Service, vol. 24, p. 6160

29 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2268

businesses, where both have current and valid certified agreements in place, which certified agreement will prevail in the new organisation.

The roles, rights and obligations of employers, employees and their respective organisations

3.38 The WR Act is premised on creating flexibility in the labour market by facilitating a greater focus on agreement making, and dispute resolution being undertaken at the enterprise or workplace level. Accordingly, the 1996 amendments sought to create a framework of rights and responsibilities for employers, employees and their respective organisations which ensured that appropriate standards of industrial conduct were observed.[30]

Right of entry

3.39 The ACTU was concerned that the requirements for obtaining permits and giving advance notice were more onerous than under the previous system. They claim that this has disadvantaged employees because the balance of power now favours employers. The Government's response to these allegations are dealt with in Schedule 13 of the Bill and discussed in Chapter 11 of this report.

Awards and Agreements

3.40 In relation to negotiations over AWAs the Committee was informed that the provision allowing employees to nominate the union as their bargaining agent was ineffective as there was no requirement for the employer or the Employment Advocate to actually deal with the union.

Industrial action

3.41 While the legislation provides for a right to strike it was argued in many submissions, and by witnesses, that the provisions are too narrow and exclude other forms of strike action considered by the ILO to be legitimate. Of concern to many unions was the prohibition on protected action during the term of a certified agreement or an award made under section 170MX, and the restriction of protected action to single enterprises.[31] The ACTU also criticised section 127 of the Act which allows employers a quick and relatively cheap legal avenue to stop or prevent illegitimate industrial action. It is argued that the availability of this provision allows employers to stop industrial action by means other than constructive negotiation.[32] The Committee notes that the industrial action being undertaken is against the law and that employers are not obliged to negotiate outside of a defined bargaining period.

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30 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2277

31 *ibid*., p. 4427

32 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4428

3.42 Employer groups generally supported the Bill, suggesting that the current provisions were not strong enough to prevent intended industrial action occurring even once an order was made by the Commission under this section.[33] An instance of this is when a one day stoppage occurs, imposing some inconvenience and material damages on the employer, but by the next day everyone is back to work. The costs of pursuing the matter in the courts are such that no further action is taken by employers. Amendments contained in the Bill in relation to section 127 are discussed in Chapter 10.

The Australian Industrial Relations Commission, the Office of the Employment Advocate and the Industrial Registrar

3.43 This report has already touched on issues relating to the respective powers of the Australian Industrial Relations Commission and the Employment Advocate. The Committee recognises that having a strong and independent umpire available to employers, employees and their respective organisations is an important feature of a fair an equitable workplace relations system. The Committee believes that the proposed legislative arrangements facilitate the continuation of this.

Australian Industrial Relations Commission

3.44 The Department gave evidence that under the WR Act the roles of the AIRC and the Industrial Registry were refocussed to accord with the new workplace relations framework which gives primary responsibility for determining wages and conditions to employees and employers at the enterprise or workplace level. For the Commission, this involved limiting its capacity for intervention in some areas and providing it with an enhanced role and new powers in others.[34]

3.45 Some witnesses believed that the changes had diminished the powers and standing of the AIRC. Opponents of the changes to the Commission's functions suggest that the most significant of these relate to the Commission's conciliation and arbitration powers.

3.46 Professor Ron McCallum commented on the role of having independent tribunals to ensure fairness is maintained in the application of labour law:

> In my view, the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) weakened these Fairness rights of Australian citizens at work. It did this by allowing Australian workplace agreements which override awards and agreements etc, to receive approval not from an independent and public tribunal, but through a private procedure overseen by the Office of the Employment Advocate which is a type of compliance agency. My quarrel is not with individual workplace agreements perse, but rather with

33 Submission No. 267, Master Builders Australia Inc., vol. 6, pp. 1235-6

34 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2289

> the manner in which they lessen the Australian fairness compact which operates through public processes by independent tribunals.[35]

The Office of the Employment Advocate

3.47 A concern expressed by some witnesses was that the Office of the Employment Advocate did not have the independent status that the Commission enjoyed and it was criticised during the inquiry because of a perception that it was skewed toward the promotion of AWAs.

3.48 The Employment Advocate was also criticised for its application of the no-disadvantage test when approving AWAs, and its perceived inappropriate designation of awards on which to base the no-disadvantage test where there was no relevant award.[36]

3.49 The Committee heard the concerns of employees or unions that designated award, as determined by the OEA, often appear to be completely unrelated to their line of work. However the OEA explained the manner in which appropriate awards are designated and the Committee believes that the allegations of bias are a matter of perception and unfounded on the basis of the data put before the Committee by the OEA and other sources.

Industrial democracy and employee ownership

Industrial Democracy

3.50 Submissions canvassing the issue of industrial democracy concentrated on the value to employers and employees of a consultative, participative and cooperative workplace built around teamwork rather than individualism.

3.51 The Queensland Government criticised the 1996 legislation and the current Bill suggesting that the emphasis on individual agreements was breaking down the concept of collective cooperation and jeopardising productivity.[37] With respect to agreement making, however, the WR Act introduced significant benefits in relation to industrial democracy. There is a greater choice in the type of agreement and in the case of AWAs there is a high level of democracy in determining the terms and conditions of employment. While it is acknowledged that this was entirely possible and frequently occurred prior to 1996, this legislation provided a formal avenue by which more people can access these instruments.

Employee Ownership

3.52 Only a few submissions to the inquiry made any comment on this particular issue. The ACTU supports for introduction of share ownership schemes if it is

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35 Submission No. 90, Professor Ronald Clive McCallum, vol. 2, p. 271

36 Submission No. 291, Rail, Tram and Bus Union, vol. 17, pp. 1348-9

37 Submission No. 473, Queensland Government, vol. 23, p. 5997

combined with good management practices and if an adequate consultative process has taken place.[38]

3.53 A majority of the Committee notes that employee share schemes are the subject of an inquiry by the House of Representative Standing Committee on Employment, Education and Workplace Relations Committee, initiated by the Minister for Employment, Workplace Relations and Small Business in March 1999.

38 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4434