# CHAPTER 10

## SCHEDULE 11 – INDUSTRIAL ACTION AND SCHEDULE 12 – SECRET BALLOTS

10.1 This Chapter covers Schedules 11 and 12 of the Bill. Schedule 11 amends the WR Act in relation to industrial action, and Schedule 12 would introduce new provisions to the Act requiring secret ballots prior to industrial action.

### Outline of proposed amendments

*Industrial action*

10.2 The Bill makes the following key amendments to the provisions of the WR Act relating to protected industrial action:

- extension of the period of notice required for protected industrial action from three working days to five working days;
- requiring notices of protected industrial action to contain more precise details as to the nature and duration of proposed industrial action;
- separation of the provisions of the Act allowing the Commission to suspend and terminate bargaining periods, to amend and set out more clearly the circumstances in which the Commission would be required to terminate a bargaining period, and introduce new provisions to require the Commission to suspend a bargaining period if a party is engaging in unprotected industrial action and to impose cooling off periods in cases of protracted industrial action;
- introduction of new provisions to prevent 'pattern bargaining' by organisations of employees;
- emphasising that the Commission must act quickly to prevent unprotected industrial action from occurring, and allowing State Supreme Courts jurisdiction to enforce Commission orders under section 127 of the WR Act;
- repealing section 166A of the WR Act to prevent unnecessary delay in access to injunctions or common law remedies against unprotected industrial action;
- clarification that 'sympathy' industrial action cannot be protected industrial action under the WR Act; and
- amending the provisions regarding prohibition of 'strike pay'.

*Secret ballots*

10.3 Schedule 12 of the Bill introduces new provisions to the Act requiring unions and employees to conduct secret ballots before taking industrial action. In effect, no industrial action by unions and employees could have 'protected' status under the Act

unless a secret ballot has been conducted. Other prerequisites for protected action remain in place, for example, industrial action can only be taken during a bargaining period for an agreement.

10.4 The new provisions require a union or group of employees to apply to the Commission for a secret ballot order, with specific details of the nature and duration of the proposed industrial action. New section 170NBCA generally requires the Commission to determine all applications for a secret ballot order within four working days. The Bill also prevents the Commission from ordering a ballot where proposed industrial action is to be taken in pursuit of 'pattern bargaining' arrangements.

10.5 The costs of the ballot will be borne by the applicant, however applicants will be able to seek reimbursement of up to 80% of the costs of the ballot from the Commonwealth Government under proposed section 170NBFA.

10.6 A ballot would be passed if at least 50% of those employees eligible to vote voted in the ballot, and of the employees who voted, more than 50% voted in favour of the industrial action. Which employees are eligible to vote depends on who applies for the ballot order – if a union applies, only those employees who are union members and who would be subject to the agreement being negotiated can vote. If a group of employees applies for the ballot order, all employees who would be subject to the proposed agreement are be eligible to vote.

*Evidence*

10.7 The Committee heard evidence as to the level and nature of industrial disputes in Australia under the WR Act. This evidence is discussed in Chapter 3 of this report.

10.8 In general, employer organisations submitted that the provisions of the WR Act are not operating to prevent damaging industrial action, particularly unprotected industrial action. Most employer groups therefore supported further measures outlined in the Bill:

> In general terms, the AI Group believes that the Workplace Relations Act 1996 has worked reasonably well, with the main exception being in the process relating to enterprise bargaining, protected industrial action and compliance. Our agenda is one of proposing practical changes based around our experiences with the operation of the legislation over the past 33 months.[1]

> …illegal industrial action is still a problem for our industry. Strikes of 24 or 48 hours duration, for example, can be called without warning and can be costly and disruptive. By the time companies have obtained injunctions the workers have returned to work and the strike is over. These are the issues

1 Evidence, Mr Robert Herbert, Canberra, 1 October 1999, p. 43

> which have led the New South Wales Minerals Council to support the major changes to the act.[2]

10.9 Employee organisations, lawyers and academics, on the other hand, disagreed that further changes need to be made to the provisions of the Act relating to industrial action. Some characterised the Bill as ideologically driven.

> The changes in the area of industrial action amount to there being no right to strike under the second wave Bill…The legislation concerning industrial action in the second wave Bill is tantamount to an absolute prohibition on industrial action. There is no way we could mount a strike of the nature of the Oakdale dispute under this legislation, and that is a bad thing for democracy. There is every good reason to provide for some real form of protest.[3]

10.10 The Committee also heard concerns that the proposed amendments would breach Australia's obligations under International Labour Organization Conventions, amounting to unacceptable interference with unions rights to regulate their own internal affairs, a breach of article 3 of convention 87.[4]

10.11 This rest of this Chapter considers each of the main proposed amendments (notice of industrial action, suspension and termination of bargaining periods, pattern bargaining, amendment of section 127, repeal of section 166A, strike pay amendments and secret ballots) in more detail.

**Notice of industrial action**

10.12 Section 170MO of the WR Act requires a union or employees proposing to take any protected industrial action to give the relevant employer three working days notice in writing of the action, or if the action is in response to a lockout by the employer, then the union or employees must give the employer notice in writing. Under this section, employers must also give three working days notice in writing of their intention to lock out employees, or if the lockout is in response to industrial action taken by employees, then the employer must give the employees or union written notice of the lockout.

10.13 Items 29 – 32 of Schedule 11 of the Bill amend section 170MO to ensure that employees and unions intending to take any protected industrial action would be required to give five working days written notice of the action, and employers wanted to lock out their employees must give five working days notice in writing. If the action was in response to existing industrial action or a lock out, section 170MO would continue to provide that the parties simply have to give notice in writing of the action in response.

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2 Evidence, Mr Denis Porter, Sydney, 22 October 1999, p. 216

3 Evidence, Mr Tony Maher, Sydney, 22 October 1999, p. 273

4 Evidence, Mr Mordy Bromberg, Melbourne, 8 October 1999, p. 208

10.14 New subsection 170MO(5) also requires the written notice to include specific details about the proposed industrial action, including the precise nature and form of the intended action; the day or days on which it is intended the action will take place; and the duration of the intended action (item 33).

*Evidence*

10.15 The Department submitted in a policy document that the amendments would give effect to the Government's election commitment to 'require earlier notification of an intention to take industrial action', and would give the parties a better opportunity to negotiate and reach agreement before industrial action takes place. [5]

10.16 Employer groups supported the proposed amendment:

> It is very important that employers receive sufficient notice of protected action to enable them to adequately make preparations to minimise losses and damage to the business concerned. Industrial action can be very damaging, the losses resulting can be great, and this amendment would assist employers in minimising the damage resulting from the 'necessary evil' of protected action.[6]

10.17 Employers also gave examples of inadequate notice of industrial action under the current provisions of the WR Act:

> The current machinery provisions for the taking of protected action have…been abused by: blanket notices of intention to take industrial action being given…; Notices are given on a regular basis directed against a substantial number of employers without there being a real intention to take industrial action against any specific individual employer at any specific time; 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; 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.[7]

10.18 The Department also provided examples of specific decisions of the Commission where 'inadequate' notices of industrial action were deemed to comply with the current provisions of the WR Act:

> …in *Southcorp Australia Pty Ltd re: s127(2) application to stop or prevent industrial action (Print N8922)*, the Commission accepted that a notice drafted in very broad terms would satisfy subsection 170MO(5). By comparison, in *National Workforce Pty Ltd v. Australian Manufacturing Workers' Union*, the Court of Appeal of the Supreme Court of Victoria

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5 http://www.dwrsb.gov.au/group_wra/other/btrpay.htm (November 1999)

6 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3356

7 Submission No. 267, Master Builders Australia, vol. 6, pp. 1234-5

> suggested a stricter interpretation as to the degree of specificity required in a notice of intention to take industrial action. In practice, some employers have been served with notices that simply restate portions of the definition of industrial action contained in subsection 4(1) of the Act. The nature of the intended action is then unclear and an employer is not put on notice as to specific actions to be taken by employees.[8]

10.19 The Law Council of Australia expressed some reservations about the proposed amendments, considering that the Bill provisions would compound Australia's alleged breaches of the International Labour Organization's Convention on Freedom of Association and Protection of the Right to Organise.[9]

*Conclusion*

10.20 A majority of the Committee supports the amendments to extend the period of notice employees and unions must give their employers of intended industrial action, and the period of notice employers must give their employees if the employer intends to lock employees out. Industrial action can have very serious financial consequences for both employers and employees, and there is benefit in ensuring that the parties have adequate time to prepare for these consequences.

10.21 A majority of the Committee also supports the proposal to require specified information in written notices of industrial action. Subsection 170MO(5) currently provides 'A written notice…under this section must state the nature of the intended action and the day when it will begin.' The provision seems fairly clear, however, the evidence demonstrates that the provision has not operated to give effect to the clear intention of the legislature.

10.22 The Committee majority notes that there are concerns that the amendments may affect Australia's compliance with ILO Conventions to which it is signatory. However, it notes that the Government is continuing to discuss the matter with the ILO.

***Recommendation***

10.23 That the amendments relating to notice of intended industrial action and lockouts be enacted.

**Suspension and termination of bargaining periods**

10.24 The Bill repeals section 170MW, which currently sets out the circumstances in which the Commission, at its discretion, may suspend or terminate a bargaining period. Section 170MW is to be replaced by several new sections setting out the

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8 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2392

9 Submission No. 468, Law Council of Australia, vol. 22, p. 5733

circumstances in which the Commission may either suspend or terminate a bargaining period.

10.25 The most significant changes from the current provisions are:

- generally removing the Commission's discretion as to whether it suspends or terminates a bargaining period;
- removing the ability of the Commission to suspend or terminate a bargaining period in relation to workers previously covered by a paid rates award;
- removing the ability of the Commission to terminate a bargaining period and proceed to arbitration under section 170MX on the grounds of threats to life, safety, health, etc or damage to the Australian economy, unless the Commission had previously suspended the bargaining period on these grounds;
- introducing new grounds on which the Commission must suspend a bargaining period – where industrial action has been occurring for 14 days or longer ('cooling off periods'), and where unprotected industrial action is occurring.

*Cooling off periods*

10.26 Employers generally supported the proposals for mandatory cooling off periods where industrial action had been occurring for 14 days or more. It should be noted that industrial action would only be suspended if a party applied to the Commission, and the Commission was not satisfied that it was in the public interest for the bargaining period (and industrial action) to continue.[10]

> There should be a cooling-off period during extended protected industrial action in order to preserve businesses and create a better environment to facilitate the settlement of disputes.[11]

> This will encourage the parties to settle the matters at issue between them without recourse to further industrial action. It could act as a circuit-breaker in protracted disputes.[12]

10.27 On the other hand, unions were generally opposed to the proposals; the consequences of which were described to the Committee by one union official:

> We also wish to make some response to the submissions made by the Australian Industry Group where they commend the proposal to terminate a bargaining period after 14 days of industrial action and make reference to the dispute this union had with the Australian Dyeing Company. During the ADC dispute, our members were locked out for most of December until

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10 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2393

11 Evidence, Mr Robert Herbert, Canberra, 1 October 1999, p. 45

12 Submission No. 375, Business Council of Australia, vol. 12, p. 2607

> ADC lifted the lockout notice at Christmas. By the end of December, the only bargaining power these workers had was to continue to withdraw their labour. Had they been deprived of the right to continue taking protected industrial action, it would not have enabled fair negotiations to recommence, and it would certainly not have enabled a cooling off of the dispute. It would have fundamentally shifted the balance of power in ADC's direction.[13]

10.28 Other witnesses were concerned about the lack of discretion given to the Commission compared with the current provisions of the WR Act, in particular relating to the Commission's ability to terminate bargaining periods and arbitrate under section 170MX.[14]

*Paid rates awards*

10.29 The Department submitted that 'the existing criterion concerning parties subject to a paid rates award would be removed (consistent with the continuing move away from paid rates awards in the system).'[15]

10.30 The State Public Services Federation asserted that it was often difficult for public sector employees to reach agreements with Governments due to funding arrangements – Governments may cut budgets available to particular agencies, but will refuse to cut programs or public services in line with these budget cuts, leaving little room for negotiated wages and conditions improvements:

> It is because we are in that situation that the provisions—which can be conveniently referred to as the 170MX provisions—are of substantial importance to us. Anything that weakens those provisions puts our people in a very difficult position. Ordinary enterprise bargaining just cannot take place, and…our members have relied on the Commission as a place to go. It is also to be remembered that in many of the areas we cover, industrial action is something which we would want to avoid—protected or otherwise. The maintenance of those provisions is really the only viable option…[16]

*Conclusion*

10.31 A majority of the Committee believes that the introduction of cooling off periods for industrial action by employers and employees would assist in alleviating the damaging effects of industrial action for all parties. It would also potentially assist in resolving disputes through negotiation.

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13 Evidence, Ms Robbie Campo, Sydney, 26 October 1999, p. 364

14 See, for example: Evidence, Mr Robert Elliot, Melbourne, 8 October 1999, p. 170; and Evidence, Professor Ronald Clive McCallum, Sydney, 26 October 1999, p. 353

15 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2393

16 Evidence, Dr Brian Jardine, Sydney, 22 October 1999, p. 226

10.32 In relation to access to arbitration for those formerly on paid rates awards, the Committee notes that the Commission has been converting paid rates awards to minimum rates awards under the existing award simplification provisions. The award simplification process will result in paid rates awards becoming less relevant over time. The Committee does not think that it is appropriate to maintain special provisions for public sector employees in the WR Act. Public sector disputes should be dealt with in accordance with standard procedures in the Act.

***Recommendation***

10.33 That the amendments regarding suspension and termination of bargaining periods be enacted.

**Pattern bargaining**

10.34 'Pattern bargaining' occurs where a party negotiating an agreement attempts to seek bargained outcomes consistent with those achieved in other workplaces, normally within the same industry or sector. The Bill prevents the Commission from ordering a secret ballot where there is evidence that the applicant is engaging in 'pattern bargaining'. This means that no protected industrial action can take place to pursue 'pattern' claims. In addition, the Commission is required to terminate a bargaining period (and cannot arbitrate) where an organisation of employees is engaged in pattern bargaining.

10.35 The Bill does not include a definition of 'pattern bargaining', but includes a new section 170LG (item 17 of Schedule 11), setting out circumstances not constituting pattern bargaining (for example, claims to give effect to a decision of the Full Bench of the Commission establishing national standards.)

*Evidence*

10.36 The Australian Industry Group gave evidence about pattern bargaining by the Australian Manufacturing Workers' Union in Victoria – 'Campaign 2000':

> It is a very serious threat to industry and you only need to go to the words of the union itself…in a letter from the secretary of the metals division in Victoria…He starts by saying that the AMW metals division has embarked on an industry wide campaign in the metals industry to replace enterprise bargaining. The Campaign 2000 is to replace enterprise bargaining. The rest of it is about how they are going to go about that campaign. By and large that is that they will use the protected action provisions which were put in place to facilitate enterprise bargaining, not to replace it. As part of the process, they will make claims for across-the-board outcomes and set a pattern, one company after the other, so they get common outcomes across industry. Indeed, this document skites about having achieved 800 enterprise agreements which all expire on 30 June next year. We have this apprehension about this winter of discontent next year...from February next year, the unions intend not to sign off on one enterprise agreement, so they can build up a head of steam against 800 or 1,000 companies to push a range

> of claims which they are now drawing up including compensation in wages for GST.[17]

10.37 The Australian Industry Group believed that the proposed Bill provisions would prevent this campaign from continuing:

> If the legislation were introduced as proposed—and we support it and we believe it should be—it would say that pattern bargaining is not a basis for which you can have protected industrial action.[18]

10.38 However, the Australian Industry Group submitted that common site agreements should remain permissible for specific project or construction sites.[19]

10.39 Other employer groups strongly supported the proposed amendments:

> Rather than focusing on developing innovative agreements with employers on a workplace-by-workplace basis, it is unfortunate that some unions are still driven by outdated concerns with 'comparative wage justice' and how enterprise bargaining can be 'coordinated'. Some within the union movement describe their approach to bargaining as 'coordinated flexibility' and seek to characterise the more effective enterprise approach as 'fragmented flexibility'.[20]

> 'Pattern bargaining' continues to be a serious problem in the Australian labour relations system…The essential problem with pattern bargaining is that there is a commonality of outcomes resulting from a refusal of the union involved to actually bargain with the employer to meet the circumstances of the of the particular workplace…A key rationale for enterprise bargaining is that of promoting discussions and agreement on the problems and prospects of particular workplaces, and using agreements to rectify problems and promote prospects, and this key rationale is defeated by a pattern bargaining approach.[21]

10.40 Dr Richard Hall, from the Australian Centre for Industrial Relations Research and Training, was opposed to the amendments for a combination of reasons:

> My understanding is that if some or all of the terms sought by a bargainer are the same or are substantially the same as another formal or informal agreement then there is no right to take protected action. For proposed legislation, as I understand it, that is meant to be premised on the ideals of

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17 Evidence, Mr Robert Herbert, Canberra, 1 October 1999, pp. 49-50

18 *ibid*., p. 50

19 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3104

20 Submission No. 375, Business Council of Australia vol. 12, p. 2627

21 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3357-8

> allowing parties to freely negotiate the bargains they want, this crass interventionism seems nonsensical.[22]

10.41 The Health Services Union of Australia also opposed the amendments, submitting that workplace-level agreements were not always appropriate in the health sector:

> …pattern bargaining in many sectors makes sense, particularly in the funded sectors, such as the aged care sector in various states and in the public hospital sector. The reality is that these sectors are totally dependent upon government funding. There is very little practical point in seeking to negotiate and bargain individually with employers in these sectors; their hands are largely tied, and this is the message they deliver to unions…The pattern bargaining provisions would seem to us to undermine the best use of resources between unions and employers. They would lead, in our view, to artificial differentiation in claims.[23]

10.42 Education unions and the Community and Public Sector Union also agreed that industry-wide pay and conditions arrangements would be more appropriate in some Government-funded sectors.[24] On this point, Catholic employers also indicated that they would prefer to have the option of negotiating agreements with broader coverage than individual workplaces, in order to avoid wasting resources.[25]

*Conclusion*

10.43 Pattern bargaining is inconsistent with one of the primary objects of the federal industrial relations system – to ensure that wages and conditions are set according to the needs of individual workplaces. Tailoring conditions of work to meet the needs of individuals businesses and their employees boosts flexibility, productivity and competitiveness.

10.44 A majority of the Committee notes attempts by unions in the manufacturing sector in Victoria to move away from this primary objective, and revert to inflexible, uncompetitive industry-wide pay and conditions. The Committee majority considers that legislation to prevent pattern bargaining is a matter of some urgency.

***Recommendation***

10.45 That the proposed amendments to prohibit pattern bargaining be enacted.

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22 Evidence, Dr Richard Hall, Sydney, 22 October 1999, p. 252

23 Evidence, Mr Robert Elliot, Melbourne, 8 October 1999, pp. 170-1

24 See, for example, Evidence, Ms Wendy Caird, Sydney, 22 October 1999, p. 228; and Evidence, Mr Robert Durbridge, Melbourne, 7 October 1999, p. 120

25 Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 142

**Amendment of section 127**

10.46 Section 127 of the WR Act allows the Commission to make orders to stop or prevent industrial action. The main amendments to section 127: require the Commission to hear applications within 48 hours where possible, or issue an interim order stopping the industrial action; confer jurisdiction on Supreme Courts of States and Territories to enforce section 127 orders by the Commission; limit the types of industrial action taken by employers against which section 127 orders could be obtained by unions; and allow the Commission to issue a section 127 order where unprotected industrial action has taken place in the last three months and there is a reasonable possibility that further unprotected industrial action will occur at that workplace.

10.47 The Queensland Government indicated that it was not happy with the proposed extension of jurisdiction to its Supreme Court given the increasing number of section 127 orders sought:

> The Queensland Government is concerned about the potential burden that may be imposed upon the resources of the Supreme Court of Queensland by this amendment...The Queensland Government considers that this matter should be the subject of further investigation to determine the appropriateness of the jurisdiction, the extent of the potential workload arising under these provisions and the possible funding arrangements that may need to be implemented to facilitate the amendment.[26]

10.48 Regarding the other amendments, employer groups generally favoured the changes, pointing out that action in breach of the WR Act's provisions needs to be stopped quickly and effectively:

> On industrial action—and this is a serious question—why should unions who take unprotected action…in other words, action that the parliament of Australia has decided should not receive protection, not be quickly subject to section 127 orders to desist? What is the point of having a statutory scheme of nominating some action protected and then simply ignoring it?[27]

> …the current provisions for the seeking of orders under section 127, in particular to redress industrial action, are not working. They have become bogged down in legality and do not satisfactorily address the nature of industrial action common to the building and construction industry. In short, the procedures are not effective against one-off stoppages.[28]

10.49 However, other witnesses submitted that this quick and effective remedy would only be available to employers, while employees' ability to stop unauthorised forms of industrial action would be hampered by the Bill:

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26 Submission No. 473, Queensland Government, vol. 23, pp. 5988-9

27 Evidence, Mr Reginald Hamilton, Canberra, 28 October 1999, p. 533

28 Evidence, Mr Alan Grinsell-Jones, Canberra, 28 October 1999, p. 502

> …there is a lack of even-handedness insofar as section 127—as it presently exists—allows employers an almost untrammelled right to get injunctive relief against unions and employees…whereas there is no corresponding right enjoyed by employees if employers decide to take a particular course that amounts to…industrial action…There have been some limited cases where the commission has interceded in favour of employees in such cases, but the Bill would now have those cases removed entirely from the act. It would be completely one-sided.[29]

*Conclusion*

10.50 A majority of the Committee supports the amendments to ensure that access to orders to stop or prevent industrial action can occur quickly. As already discussed in this Chapter, industrial action can be very damaging to both employers and employees.

***Recommendation***

10.51 That the proposed amendments to section 127 be enacted.

**Repeal of section 166A**

10.52 Section 166A prevents employers from bringing common law tortious actions against unions in relation to conduct in furtherance of claims that are the subject of an industrial dispute, unless the Commission certifies that: it is not likely to be able to stop the conduct through conciliation; or that it has not been able to resolve the dispute within 72 hours of a person notifying the Commission that they want to bring a common law action; or that it would cause substantial injustice to the person who wants to bring the common law action to prevent them from proceeding.

10.53 The Department submitted that repealing this section was aimed at 'preventing unnecessary delay and damage in relation to industrial action. By imposing a pre-litigation Commission process, section 166A restricts the ability of a party affected by illegitimate industrial action to obtain speedy access to an injunction or common law remedy.'[30]

10.54 The following extracts represent the different range of views on repealing section 166A:

> …there are arguments both for and against deleting s.166A…It is recognised that the s.166A conciliation requirement can act as a 'pressure point' in resolving unprotected disputes…It is acknowledged that there have been instances where this has acted as a means of bringing the dispute to

29 Evidence, Mr James Nolan, Sydney, 26 October 1999, p. 416

30 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2399

> resolution through compulsory conciliation…However there are reasons for arguing that this mindset should be changed.[31]
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> Section 166A should be retained because it has value as a successful circuit-breaker in serious disputes. For the sake of investment, growth and employment and in recognition of the importance of balance and fairness in workplace relations, we believe the Senate Committee has a responsibility to heed the submissions and evidence of the AI Group, especially as it relates to protected industrial action compliance.[32]
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> The removal of section 166A, which provides for a cooling off period before commencement of common law tort actions, will encourage damages actions against industrial organisations rather than encouraging resolution of disputes by way of conciliation.[33]

*Conclusion*

10.55 A majority of the Committee does not believe that repealing section 166A will remove the scope of the Commission to conciliate disputes (the Commission would still be able to conciliate a dispute if the parties agreed that this would be of assistance). The amendment will pressure unions to cease unprotected industrial action, as they risk greater exposure to common law remedies could occur more quickly than under the current provisions of the Act.

***Recommendation***

10.56 That section 166A be repealed.

**Strike pay**

10.57 It is illegal under the WR Act for employers to pay employees for any period of industrial action – section 187AA. The Bill amends section 187AA so that if employees take any period of industrial action, it is illegal for an employer to pay the employees for the whole day on which they took industrial action, even if the action only lasted for part of the day.

10.58 The Department submitted that this amendment was necessary as 'there has been some uncertainty about (section 187AA's) application to partial work bans and overtime bans. The proposal to more expressly define the period in relation to which payment is prohibited will overcome any ambiguity in the current provisions.'[34]

10.59 Some employers were concerned that the amendment may have the effect of forcing unions and employees to take strike action for a whole day, which would be

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31 Submission No. 375, Business Council of Australia vol. 12, pp. 2628-9

32 Evidence, Mr Robert Herbert, Canberra, 1 October 1999, p. 45

33 Submission No 462, Turner Freeman Solicitors, vol. 22, p. 5666

34 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2400-1

more damaging for businesses than more moderate industrial action, or action for a shorter period:

> …we have some concerns with the proposals for amending the strike pay provisions, as we believe they pay insufficient regard to the commercial realities of dealing with industrial action. In this regard we do not consider that there is, in the building and construction industry at least, any demonstrable need to change the current provisions.[35]

> …if, for example, a stoppage of work takes place for one hour and employees are to lose pay for the whole day or shift, the employees are likely to remain of strike for the whole day or shift, thereby worsening the situation for the employer in terms of lost production and sales. Ai Group believes the current provision is adequate with the opportunity for employers to apply the common law principle of 'no work as directed, no pay'.[36]

10.60 Unions were also opposed to the proposed amendment, suggesting that it would lead to earlier escalation of industrial disputes:

> …the situation in health has always been that an industrial campaign will start with a tokenistic, if I can use that term, industrial action by employees, designed merely to show the seriousness of the intent of the employees to the employer. Commonly, that is a stop-work meeting for perhaps half an hour at a low point in the day when staff know that is going to be of minimum impact to the clients. Our concern is about the provision in the act that would mean that employees taking that type of conduct would have the whole of their day's pay withdrawn. That would lead, in effect, to an all or nothing situation: either you walk out for the day or you do nothing, which really escalates the heat in an industrial campaign too early in the process.[37]

*Conclusion*

10.61 A majority of the Committee believes that there is a need to clarify the existing provisions of section 187AA to remove confusion as to the circumstances in which employees are not to be paid for industrial action. As a general rule, if employees refuse to work as directed by their employers, then they should not be entitled to be paid.

10.62 A majority of the Committee notes concerns that the minimum period of deduction of pay proposed by the Bill – one day – may be too long, and could result in premature escalation of industrial disputes. There may be a case for reviewing the

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35 Evidence, Mr Alan Grinsell-Jones, Canberra, 28 October 1999, p. 502

36 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia vol. 14, p. 3114

37 Evidence, Mr Robert Elliot, Melbourne, 8 October 1999, p. 174

provision after a period of time to determine whether the new provision has this practical effect.

***Recommendation***

10.63 That the proposed amendments to section 187AA be enacted.

**Secret ballots**

10.64 Employers supported the principle of secret ballots to ensure that industrial action was supported by the affected employees, and to ensure that employees were given the opportunity to democratically express their opinions on proposed industrial action. As the Department put it:

> The introduction of compulsory secret ballots prior to the taking of protected action is designed to ensure that where protected action is proposed, the employees directly involved will be able to make the decision on whether or not it should be taken. Protected action ballots will thus reinforce genuine agreement making processes at the enterprise and workplace level by strengthening democratic decision-making.[38]

10.65 Employers generally supported the proposed secret ballot provisions:

> For unions and employees to receive the benefit of the legislation that confers on them the status of being protected from the liability for such damage, it is reasonable in our view to expect that the legislation requires that a majority of employees who will be involved do in fact support taking such serious action against their employer.[39]

> …it is highly desirable that industrial action must not occur unless due democratic processes have been undertaken…Industrial action is seen at best as a 'necessary evil' not as a desirable form of conduct, because of the damage to ordinary business operations that can occur, and because of the existence of many alternative ways of addressing industrial claims and concerns. These sorts of restrictions on industrial action are appropriate.[40]

10.66 Unions and some academics and lawyers were of the view that the process for the proposed secret ballots would place restrictions on the ability of employees to take industrial action, and for this reason did not support the proposed provisions:

> Now secret ballots are not something which, as a concept, we have a particular problem with. What we do have a problem with, though, is a process which involves so much delay, which is so technical and so difficult to comply with and which so compromises the bargaining position of

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38 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2391

39 Evidence, Mr Bruce Williams, Perth, 25 October 1999, p. 313

40 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3363

> workers that it is really nothing more than a tactic to deprive workers, again, of their capacity to bargain…worse than that, we have to pay for it ourselves.[41]

> …the requirement of a secret ballot and the supply of detailed information in every case to secure protected industrial action weakens the bargaining power of the union. What is the justification for this when the commission at present has the discretionary power to order a secret ballot on argument and/or evidence that such a course is called for?[42]

10.67 The Textile, Clothing and Footwear Union submitted that secret ballots would restrict the ability of employees from a non-English speaking background to take industrial action, due to the complicated proposals for ballot papers specifying (presumably in English) the exact nature, time and duration of industrial action.[43]

10.68 Professor Ronald McCallum was concerned that the move to introduce secret ballots would result in employees ignoring the regulated processes for protected industrial action in the WR Act and simply taking wildcat industrial action, possibly against the advice of their unions, and for which unions could not be held legally responsible.[44]

10.69 The Western Australian Trades and Labour Council gave evidence that the legislative provisions requiring secret ballots for industrial action in Western Australian have not been used:

> … And why have they never been used? Not because people have been particularly defiant, but because they are inoperable. You cannot pass legislation which ultimately is inoperable and unable to be used by parties. Employers are not interested in using the provisions, employees are not interested in using the provisions and, certainly, there has been no attempt by either the government or any interested party as defined under the state legislation to trigger a secret ballot process in spite of industrial action occurring.[45]

10.70 This view was countered by evidence from the Western Australian Chamber of Commerce and Industry who said:

> …it is very difficult, if not impossible, to ascertain whether the Western Australian legislation provisions have worked or not because one would need to ascertain other things. Has it been an influence on the behaviour of people in taking or not taking industrial action? Has it been an influence on people taking matters to the industrial commission before or after taking

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41 Evidence, Mr Lloyd Freeburn, Melbourne, 7 October 1999, p. 73

42 Evidence, Professor Joseph Isaac, Canberra, 1 October 1999, p. 55

43 Evidence, Ms Robbie Campo, Sydney, 26 October 1999, p. 364

44 Evidence, Professor Ronald McCallum, Sydney, 26 October 1999, p. 350

45 Evidence, Ms Stephanie Mayman, Perth, 25 October 1999, p. 307

> industrial action? Has it been an influence on the industrial commission in issuing orders to cease industrial action? All of those sorts of things really need to be examined rather than rely on the superficial view that the legislation is inoperable and has or has not been used. I have not got the answers to those questions.[46]

*Conclusion*

10.71 A majority of the Committee agrees that legislation should be introduced to require secret ballots prior to protected industrial action. This will ensure that it is employees, and not their union officials, who decide whether industrial action is necessary to further claims for a workplace agreement.

***Recommendation***

10.72 That the amendments to require secret ballots in order to take protected industrial action be enacted.

46 Evidence, Mr Brendan McCarthy, Perth, 25 October 1999, p. 316