CHAPTER 4

STANDING OF THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

'As I've said before, I'm going to stab it (the Australian Industrial Relations System) in the stomach.'

John Howard, 1992

'Firstly, we do have a unique institution in this country. It has served us well for 100 years. You have to think long and hard about changing its role. We think that the balance that is now in the current legislation between conciliation and arbitration is about right.'

Robert Herbert, Australian Industry Group, 1 October 1999

Introduction

4.1 The Labor Senators believe that there was no justifiable rationale in 1996 for the award stripping process. The claim by this Government to be encouraging 'choice' in the employment relationship is completely at odds with a prescriptive formula for what can and what can't be included in an award. The same criticism can be made of the next round of award stripping proposed by the Bill.

4.2 The Governments proposals to alter the nature and functioning of the Commission are also without merit. They reflect an ideological obsession, and have no claim to being in any way good policy.

Impact of the Workplace Relations Act

Impact on awards

4.3 One of the major 'reforms' of the 1996 changes to the Act was to curtail the powers of the Commission by limiting the matters contained in awards, the so-called 'allowable award matters' (section 89A). The original proposal by the Government was to reduce such allowable matters to 18, but as a result of negotiation with the Democrats, 20 allowable matters were settled on.

4.4 The rationale behind the reform was deceptively simple: awards had, according to the Government, become excessively complicated, and compliance was a burden to employers.

4.5 In the 1996 Majority Report of this Committee, attention was drawn to the real potential for disadvantage that would arise from such a move. The argument advanced there was also a simple one: in limiting award allowable matters, the

Government was simply broadening the scope for negotiations at the enterprise level, including within that scope matters which had previously been contained in awards.

4.6 Removing these matters from awards provided employers with a windfall for negotiations. There was no requirement that existing terms and conditions would be picked up in agreements – employees were required to bargain for their old conditions all over again, trading off productivity or other benefits to regain access to their old entitlements. This is particularly unfair, given that many awards had already been through a couple of rounds of restructuring in return for productivity under the former Restructuring and Efficiency and Structural Efficiency Principles.

4.7 Further, in situations where a significant disparity in bargaining power existed between employer and employee, these matters were unlikely to be resolved in favour of the employee. Where equality in bargaining was extant, the conditions removed from awards could be regained through agreements. But the real victims were the most disadvantaged, those with little bargaining power who were further marginalised in an economic and social sense:

> The ACTU submits that the award system has been seriously weakened as a result of the 1996 amendments to the Act, with the effect of reducing the foundation of minimum standards which underpins agreements. Employees have lost significant award entitlements as a result of the application of items 49-51 of the *Workplace Relations and Other Legislation Amendment Act 1996*, which require the removal of award provisions not expressly permitted by section 89A of the Act.[1]

> Bray and Waring (1998:74) have argued that under award simplification many groups of employees that previously enjoyed award protections have since lost them. These employees…are unlikely to possess the industrial strength to persuade employers to include equivalent provisions in enterprise agreements. Employers of such employees will correspondingly enjoy a significant and uncompensated increase in managerial prerogative.[2]

4.8 There was evidence that particular groups of workers that are heavily reliant on awards had lost not just conditions of employment, but that their take home pay had been reduced as a result of changes to awards made under the WR Act:

> CHAIR—The other issue that I want to raise is in relation to outworkers. As some present would know, we had an inquiry into outworkers in 1995. It reported in 1996 and 1997. Is the condition of outworkers worse now than it was in 1995?
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> Ms Curr—Outworkers tell us that they are getting less money now than they were then.

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1 Submission No. 423, Australian Council of Trade Unions, vol. p. 1

2 Submission No. 430, Newcastle Trades Hall Council, vol. 20 p. 21

CHAIR—In 1995?

Ms Curr—Yes.[3]

4.9 For many workers, take home pay has been reduced as a result of the removal/limitation of penalty rates and overtime payments that has occurred through award simplification. Also, and this is a particular problem in the clothing, textile and footwear industry, employers may be paying employees below award standards and getting away with it, as the Government no longer takes an active role in inspecting and enforcing award breaches.

4.10 Many individual employees made submissions to the Inquiry, indicating that employees are very angry about the effects award simplification has had on their working conditions:

> The fact that the Government has said that no worker will be worse off does not hold with us. Since the introduction of the first part of the Bill people are unsure of the future, are working longer and losing conditions that have helped produce a healthy Australian way. When talking to family members, work mates and people in general they also are unsure of the future and are very apprehensive.[4]

> The average worker, like myself, has worked and fought hard along with our unions to obtain our rights and conditions of employment for decades. I do not want to see all of this wiped away with the stroke of a pen…[5]

> Reduction in pay has also occurred, as the CEOs have cut the individual nurses' hours by reducing 'change over times', cutting out time for allowance of education sessions and with unrealistic time schedules, lowered the standard of care to the patients.[6]

> Why doesn't the government for once think of the families that are struggling, what type of world do we live in, everything revolves around money and not people. We are not robots, we are humans, push people too far and society will crack.[7]

4.11 This report considers in more detail the impact of award simplification on vulnerable workers in Chapter 7. However, it should also be noted that award simplification has affected all workers, not just those reliant on awards. By reducing the number of conditions and entitlements in awards, the no-disadvantage test has also been reduced. This means that agreements are now being assessed against a lower safety net standard of pay and conditions:

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3 Evidence, Pamela Curr, Fair Wear Campaign, Sydney, 26 October 1999, p. 367

4 Submission No. 71, Mr John Griffiths and family

5 Submission No. 48, Mr Edward Baldyga

6 Submission No. 63, Ms Judith Walpole

7 Submission No. 78, Ms Eve Matsakos

> …award simplification has affected the operation of the 'no disadvantage test'. The problem for employees and their unions is that awards against which certified agreements and AWAs are to be compared have narrowed considerably in scope as a result of award simplification at the same time as the substantive provisions of awards fall further and further behind enterprise agreements. As firms and unions were negotiating second, third or even fourth round agreements in 1997, 1998 and 1999, awards were a far less relevant benchmark than they were in 1993. The 'no-disadvantage test' has therefore become a weaker test in 1997-99 than in 1993-4, providing greater scope to employers to negotiate conditions less than the last agreement, but higher than the relevant or designated award.[8]

> In terms of the no disadvantage test, our concerns are this: the no disadvantage test, originally introduced under the previous act, was introduced in an environment where there was, arguably, at that time, a strong award safety net. The rates of pay, indeed at that time, let alone the conditions, bore some relationship to what was really going on in the industries. We now have a situation where, when one is testing an AWA or a certified agreement against the award safety net, we are finding that, because of the progression of time and pay increases largely moving in many sectors through certified agreements, the relevance of the award safety net is becoming less and less.[9]

4.12 The Newcastle Trades Hall Council recommended that the no-disadvantage test for agreements should therefore be changed to allow the Commission to develop appropriate and relevant standards against which agreements could be assessed. Other submissions also questioned whether the current no-disadvantage test was adequate, and suggested that new agreements should possibly be tested against the agreements which they would replace:

> There is a question as to whether the primary benchmark for employees already covered by agreements should be (i) the award or (ii) the pre-existing certified agreement. Approach (ii) ensures that people entering into agreements are no worse off than they were beforehand, whereas (i) only ensures they are no worse off than under the award. The key issue is the extent to which the award system maintains its relevance. If it does not, then approach (i) increasingly offers no protection.[10]

4.13 Professor Keith Hancock also suggested that AWAs should be tested against certified agreements that would otherwise apply to the employee:

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8 Submission No. 430, Newcastle Trades Hall Council, vol. 20, p. 21

9 Evidence, Mr Timothy Lee, Perth, 25 October 1999, p. 327

10 Dr David Peetz, Submission No. 386, vol. 13, p. 34

> …a true no disadvantage test would take as the starting point where you are before the AWA is entered into, which means that in the relevant case you would refer to the enterprise bargain rather than to an award.[11]

Conclusions

4.14 Contrary to the Government's 'rock solid guarantee' that no workers would be worse off, the WR Act has operated to significantly disadvantage many employees. Those reliant on awards have lost terms and conditions of employment, with little chance of replacing them through agreements. Those employees able to negotiate agreements with their employers have had their agreements tested against a continually withering and irrelevant safety net.

4.15 The Labor Senators consider that the no-disadvantage test needs to be amended, to ensure that conditions of employment are tested against fair and relevant employment standards. The Labor Senators support the proposals put forward by the Newcastle Trades Hall Council, Dr David Peetz and Professor Keith Hancock in this regard. Either the Commission must be given the power to develop and maintain relevant safety net standards for all industries, occupations and classifications, or the no-disadvantage test must be radically changed to ensure that new agreements are tested against the terms and conditions most recently applying to employees. This is the only way to ensure that workers are not disadvantaged.

Impact on the Australian Industrial Relations Commission

4.16 The amendments introduced by the 1996 Act indicate an antipathy on the part of this Government to the role played by the Australian Industrial Relations Commission in governing the relationship between employer and employee. For the first time, the Commission's broad discretion in determining the contents of awards, only fettered by Constitutional limitations, was to be limited by boundaries set by Parliament. The award making power, the central feature of the Commission (and it's predecessors') functions since the establishment of such a body in 1904, was severely limited. One employer group which appeared before the 1996 Inquiry, condemned the stripping of awards, stating:

> In terms of schedule 5, the awards, ARTIO does not believe it is sound policy for a government to legislate what should or should not be the content of an award when it itself is not the direct employer… Once you start a process of dictating what you will and will not have in an award, then any government can add anything it wants to an award. We do not believe that it is sound to freeze awards. They have historically been developed over a period of time. Although the process of change is very slow, they do, in fact, take into account changes within our industry and in society generally. We believe it is vital not to restrict this evolutionary process.[12]

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11 Evidence, Professor Keith Hancock, Canberra, 28 October 1999, p. 515

12 Evidence, p. E 773, M. Carter (Australian Road Transport Industrial Organisation)

4.17 This attitude of resentment, perhaps even contempt, was reflected in many of the other changes proposed by the Government in 1996:

- removing the Commission's power to ensure that awards were 'relevant, consistent and fair';
- removing the Commission's power to make paid rates awards, and consequently, the power to prevent or settle an industrial dispute by making a paid rates award;
- making arbitration by the Commission a 'last resort' in dispute situations, rather than allowing arbitration 'where necessary';
- amending section 111 to reverse the presumption of public interest against the making of a Federal Award where employees were attempting to flee an inadequate state system; and
- allowing state enterprise agreements to override federal awards.

4.18 The Committee did not receive a great deal of evidence dealing with the impact of the WR Act on the Commission itself. Not surprisingly, present Commissioners probably did not think it appropriate to make submissions to this Inquiry. However, a former Commissioner and Deputy President, Professor Joe Isaac, provided a submission to the Committee which set out his views on the Commission's reduced discretion:

> Until recently, the changes in principles and procedures of the federal tribunals have been driven not so much by legislation as by the exercise of the wide discretion available to tribunals within the statute. This discretion manifested itself in a number of ways, including the introduction of economic capacity as a constraint on wage increases, awarding equal pay for work of equal value regardless of gender…the formulation of a coherent and comprehensive set of wage fixing principles; showing flexibility and sensitivity to changing economic circumstances by operating in a centralised mode when it was warranted and…moving to a decentralised system of wage fixing with a workplace-improved-work-practices focus. All these changes were made on the basis of submissions in proceedings by parties and interveners, including governments, without legislative prompting. Since 1993, legislation has been the prime mover in the changed approach of the…Commission to the settlement of disputes and determination of awards.[13]

Conclusions

4.19 The Commission, which is equipped with the industrial and economic expertise to effectively settle and prevent damaging industrial disputes (and to determine whether its involvement in a dispute is appropriate at all), is no longer equipped with the statutory power to fully use this expertise.

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13 Submission No. 377, Professor Joe Isaac AO, vol. 12, p. 1

4.20 Instead of a system where the independent expert can make decisions based on a balanced considerations of the submissions of all of the parties to a dispute, we now have a Commission circumscribed by legislative proposals made by a Government which only ever seems to take into account the views of employers. The amendments now proposed to further limit the Commission's arbitral functions are yet another example of the unbalanced and unfair approach of this Government.

4.21 Labor Senators recommend amendments to the Act:

- to provide a greater role for the AIRC in prevention and settlement of industrial disputes and to act in the interests of fairness and in the national interest;

- to provide the Commission with the power to arbitrate on all employment-related matters in order to ensure that employees have the protection of effective awards which provide fair and relevant terms and conditions of employment; and

- discretion be provided to the Commission to arbitrate in cases where negotiations to conclude an agreement have failed within a reasonable period.

Amendments set out in the Bill

4.22 In the proposed legislation, the Government continues along the path of reducing the power and effectiveness of the Commission, and goes even further, by proposing changes that will have the effect of compromising the Commission's independence. Below is a brief summary of the proposed changes affecting the AIRC:

a) limited seven-year terms will be introduced for Commission members (Item 18 – Subsection 16(1A);
b) the Government will be able to appoint Acting Commissioners for a specified period;
c) Commissioners may be compulsorily re-trained as determined by the President;
d) allowable award matters are further reduced, with the following being excluded:
    - skill based career paths;
    - tallies and bonuses;
    - long service leave;
    - notice of termination;
    - leave for jury service;
    - superannuation; and
    - trade union training leave, and union picnic days;
e) a new section will be introduced to specifically remove the following as incidental allowable award matters:
    - minimum or maximum hours of work;
    - transfers between work locations;

- transfers from one type of employment to another (eg part time to full time);
- training and education;
- recording of work times;
- accident make up pay;
- union representation for dispute settling procedures;
- union picnic days;
- limitations of numbers of employees of a certain types; and
- tallies;

f) the requirement that the Employment Advocate refer an AWA to the Commission when uncertain about whether or not it disadvantages employees is removed;

g) the Commission's power to compulsorily conciliate during an industrial dispute will be limited to those matters where compulsory arbitration is available, that is, allowable award matters;

h) the Commission may, if requested, provide voluntary conciliation on matters including non-allowable award matters, which will attract a fee;

i) a voluntary mediation service will be introduced, providing an alternative to voluntary conciliation by the Commission. Mediation is to be conducted by independent third party mediators, accredited through a newly created Mediation Adviser. The Adviser is appointed by the Minister and subject to his discretion, in the same manner as the Employment Advocate; and

j) in unfair dismissal matters, the Commission's discretion is reduced in certain circumstances (see Chapter 9 'Job Security' of this report).

4.23 The Committee received and heard a great deal of evidence concerning these proposals during the inquiry. The most persuasive and authoritative evidence concerning these matters came from three sources: Professor Keith Hancock, of the National Institute of Labour Studies[14], Professor Joe Isaac AO, a Professorial Fellow at the University of Melbourne's Department of Management and former Commission Deputy President[15], and Professor Ronald McCallum, foundation Professor in Industrial Law at the University of Sydney and Special Counsel in Industrial Law to Blake Dawson Waldron.

Limiting the terms of Commissioners

4.24 Item 18 of Schedule 2 to the Bill would amend the WR Act to allow Commissioners to be appointed for fixed terms of seven years. The Government submitted that fixed term appointments to the Commission would:

> …allow for the Commission to respond more flexibly to changing workloads and pressures…The proposed provisions will…provid[e] the

14 Submission No. 15

15 Submission No. 377

> Government with greater flexibility to assist the Commission, in terms of staffing numbers and required expertise, to meet changes in its workload.'[16]

4.25 However, the introduction of fixed terms appointments has the potential to undermine the Commission's independence and integrity, and many people believe that this independence and integrity is more important than flexible staffing arrangements. Professor Hancock observed the following in his written submission to the Inquiry:

> It is a vice of this proposal that it undermines the apparent, and perhaps the actual, independence of the Commission. Governments are parties and interveners in the Commission. Even when they are not formally represented, they often articulate views about the preferred outcomes of Commission deliberations. Under the terms of the Bill, they will be in a position to reward or punish Commission members who give decisions that governments do or do not favour. Whether or not they exercise that option, they will exert an influence which goes beyond the legitimate one of presenting cogent submissions.[17]

4.26 Professor McCallum submitted:

> …in my considered judgement, it would be a mistake for the Parliament to permit seven year appointments, certainly for presidential members of the Commission. After all, it is Australia's foremost tribunal with a pedigree stretching back to a superior court of record. In a time of rapid industrial and employment, it is essential to have the fairness compact overseen by a fully tenured and independent tribunal.[18]

4.27 Professor Isaac agreed:

> I think it would be bad for the standing of the commission and the public's perception of its independence from government influence for the proposed provision to be allowed to go through on the justification that it would allow a more 'flexible' appointment arrangement.[19]

4.28 Employer groups also expressed reservations about the introduction of fixed term appointments to the Commission:

> ACCI's objective is to ensure that decisions are balanced and take full account of employer views, operations and concerns. Members of the Commission should also be independent of control or influence by the Government or any other party appearing before them...ACCI has in the past proposed a statutory objective of balance in appointments between employer

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16 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p 271

17 Submission No. 15, Professor Keith Hancock, National Institute of Labour Studies, p. 9

18 Professor Ronald McCallum, Submission No. 90, p. 4

19 Professor Joseph Isaac, Evidence, Canberra, 1 October 1999, p. 56

and employee practitioners. It is not clear what contribution the Bill would make to improving achievement of these objectives.[20]

…we express some caution about the proposal to legislate for fixed term appointments. While the Ai Group acknowledges that it is a matter for the Government it is most important to ensure that the independence and neutrality of the Commission is not compromised. Appointments to the Commission should be made on merit and the particular expertise of the individual concerned.[21]

4.29 Most other witnesses strongly opposed the amendment:

…the proposed introduction of fixed term appointments to the Commission will remove its independence and authority. Members of the Commission will, in exercising the jurisdiction, be mindful of the effects on the likelihood of them continuing with a further appointment. This would particularly be the case in hearing matters to which the Government (or its instrumentalities) was a party. Would there not be an argument about the potential for conflict of interest in the event that a member was hearing a case involving the person who held the power to remove or maintain them in their positions?[22]

..fundamental to the effective operation of the AIRC is the public's perception that decisions of the AIRC have been made independently, that they have not been influenced by outside or irrelevant considerations and that they have not in any way been influenced by the government of the day...The introduction of fixed term appointments to the AIRC has the potential to disturb this perception as concerns may arise that the AIRC is not adequately protected from external influences, and in particular the influences of the executive government. In this respect Justice Teague of the Victorian Supreme Court has commented: '*through tribunalisation, the executive arm of government is able to exercise power in a number of ways…The executive exercises power in making the appointments of presiding and other members of tribunals, with the shorter the period of appointment, the greater the potential for the continuing exercise of power.*[23]

The proposed power to appoint new members for a fixed term rather than for life is open to abuse and could result in the independence of the Commission being undermined. The power is very wide and no safeguards have been built in. The reasons for new provisions appear unclear. Until now it has been considered necessary for members of the Commission to

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20 Australian Chamber of Commerce and Industry, Submission No. 399, p. 10

21 Australian Industry Group and the Engineering Employers' Association, South Australia, Submission No. 392, p. 10

22 Australian Nursing Federation (SA Branch), Submission No. 458, p. 9

23 International Centre for Trade Union Rights, Submission No. 460, pp. 22-3

> have life tenure and nothing seems to have changed as to the functions of the Commission to warrant a departure from this settled position.[24]

Conclusions

4.30 While the Commission is not a judicial body, but a tribunal exercising executive arbitral powers[25], it is nevertheless required to exercise these functions in a quasi-judicial manner, analogous to courts.[26] Commissioners hear evidence, apply legislative provisions and legal precedents, and make binding decisions affecting the rights of parties. It is therefore essential to ensure that the Commission is free from improper influence and that public perceptions of its independence are maintained.

4.31 The Government's proposals have been widely criticised by those who made submissions to the Inquiry and appeared at Inquiry hearings, including employers. The Labor Senators consequently reject the proposal to limit the terms of Commissioners on a form of precarious employment.

Reducing allowable award matters

4.32 The number and nature of allowable award matters to be reduced is dealt with briefly above.

4.33 The proposal here is to move further down the path of award stripping embarked on in 1996, and to effectively remove any discretion from the Commission in supervising that process. At the time of writing, the transitional provisions relating to award simplification in the *Workplace Relations and Other Legislation Amendment Act 1996* are being considered by the High Court, which is hearing an application from the CFMEU that the provisions are beyond the Commonwealth's constitutional power. In these circumstances, the Government should at least consider being a little more circumspect in proceeding with these changes. If the provisions are found to be unconstitutional, Australian employers and employees will be thrown into turmoil, and the proposed amendments would only increase uncertainty and confusion.

4.34 The removal of discretion from the Commission in this instance reflects a continuing unwillingness on the part of the Government to accept the decision of a properly constituted independent statutory tribunal, with a significant degree of expertise in the subject it is dealing with.

4.35 It also reverses one of the positions agreed between the Government and the Democrats in the negotiations that secured passage of the WR Act in 1996. In the

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24 The Victorian Bar Incorporated, Submission No. 463, pp. 4-5

25 See majority judgement of Dixon CJ, McTiernan, Fullagar and Kitto JJ in *The Queen v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254

26 See, for example, minority judgement of Taylor J. in *The Queen v. Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at p ???: "[The special character of the arbitral functions] bear little, if any resemblence to executive or legislative functions as generally conceived; on the contrary, both in their nature and exercise they present a number of features which are characteristic of judicial functions."

Government/Democrats Agreed Statement of Position, October 1996, the following appeared under the heading 'Award Simplification':

> 2.2 The scope of allowable matters is to be expanded as follows. Superannuation will be included (on the basis that it will be removed when superseded by legislation – see attached letter from the Australian Democrats on this matter). In relation to hours, specific reference is to be made to rest periods and variations to hours and notice periods to make it clearer that such variations are covered in the allowable matters. This would reinforce the desired emphasis on regularity and predictability of working hours. Reference will also be made to skill based career paths (complementing the existing classification of employees); including cultural leave in the relevant section; and protection for outworkers. The Commission may also include in an award provisions that are incidental to the allowable matters and necessary for the effective operation of the award.

4.36 Professor Isaac rejected the need for further reductions in allowable award matters, and warns against its consequences in the following terms:

> The significance of this reduction in the list of allowable matters, is not merely that it reduces the role of the Commission (and one may ask why this is justified?), but more importantly, that it effectively reduces the size of the 'safety net' on which weaker sections of the workforce and those that are unable to engage in enterprise bargaining rely. This group is on the safety net because it does not have the capacity to engage in enterprise bargaining or is unable to secure more favourable terms through enterprise bargaining. Close to one-third of employees are in this category; and while this group spans remuneration levels up to $1000 per week, it is dominated by low wage earners, women and migrants, a large proportion of whom are part-time workers.[27]

4.37 In Chapter 7 of this report, we deal with the deleterious impact of the 1996 amendments on disadvantaged workers. The Bill would further reduce the Commissions ability to deal with the factors in employment that lead to and exacerbate disadvantage. In particular and by way of example, the express prohibition which would prevent the Commission from dealing with minimum or maximum hours of work, transfers between one type of employment and between work locations, and the recording of working times are most pernicious for those most at risk. As considered in Chapter 7, there has already been a striking deterioration in the working conditions of certain groups in our society. This would do even more damage.

4.38 It is not intended to cover the evidence on every proposed amendment to allowable award matters. However, this report covers three areas which received a great deal of criticism during this Inquiry: training and skill-based career paths, tallies and long service leave.

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[27] Professor Joe Isaac AO, Submission No. 377, p. 4

Training and skill-based career paths

4.39 Items 2 and 13 of Schedule 6 to the Bill would preventing awards from including clauses relating to training and skill-based career paths. The Department submitted that the amendments were necessary because:

> Many simplified awards have retained training and study provisions as either directly allowable, or incidental and necessary to, skill based career paths. It was not the intention that training or education provisions would fall within the scope of either section 89A(2) or section 89A(6) of the WR Act (for example, the WROLA96 Implementation discussion paper included study leave as an example of matters that would with award simplification 'be for determination at the enterprise or work level.[28]

4.40 However, there was very little support for the Government's position, even from employer groups:

> Ai Group does not agree that this matter is more appropriately dealt with exclusively at the workplace or enterprise level. A number of very significant awards have been restructured in such a manner as to encourage employees to undertake training based on approved industry training packages and acquire additional skills for which they will be rewarded by being classified at a higher level …the answer would not appear to us to lie in scrapping skill based career paths from awards. What Ai Group will be striving to achieve…is a structure that is compatible with the industry training packages but which, at the same time, is not a straitjacket that limits the scope of enterprises to put in place their own classification and training arrangements.[29]

4.41 The Australian Catholic Commission for Employment Relations, which represents the Catholic Church as employer of hundreds of thousands of Australians, said:

> ..the removal of skill based career structures from the award has the potential to disrupt the internal relativities between the various classifications in each award. This in turn will lead to grievances about the appropriate rate of pay for work to be performed.[30]

4.42 Unions and community groups also opposed the amendment, some expressing disbelief:

> It was a complete surprise to us that the minister put forward a provision which removes skill based career paths and the essential underpinnings of training and skills development that we have all been working on over the

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28 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p. 289

29 Australian Industry Group and the Engineering Employers' Association, South Australia, Submission No. 392, pp. 22-23

30 Australian Catholic Commission for Employment Relations, Submission No. 167, p. 20

> last 10 years to get this country to a stage where it competes on the basis of skills and not on the basis of low wages. I hope that this provision is one that would receive unanimous endorsement for rejection by members of the Senate inquiry, because its whole nature flies in the face of joint union worker and employer activity over the last 10 years to bring forward an extensive skills regime that can help not only current workers but also our children come through a structured training environment.[31]
>
> ACOSS is particularly concerned with the Government's proposed deletion of skill-based career paths from the allowable matters…This, together with the removal of training and staff development provisions in the 1996 Act, undermines efforts to encourage increased productivity in Australian workplaces through investment in human capital.[32]
>
> Do we really believe that…undoing all of the effort and the work by all parties which went into establishing skill based career structures and the associated processes are going to make Australia a better place?[33]
>
> Nothing could be more illustrative of how out of step this provision is, not just with the union, but with the employers of our members in all states and territories.[34]

4.43 The Queensland Government also strongly opposed the proposal:

> Our view is that any industrial relations system that is going to contribute to better employment impacts should not be looking at removing things like skills from awards. We did not see any reason why that should be removed, and we certainly see it as a negative. We believe awards should continue to provide for them.[35]

4.44 Some submissions raised the point that the amendment would disproportionately affect workers in industries with mobile workforces:

> The effect of this amendment would lead to a situation where awards would contain a classification structure but no detail on how employees can progress through the structure by reference to training requirements and acquisition of skills. Such a proposal would be detrimental to building workers who do not have the luxury of years of continuous employment with one employer…At a time where the Commonwealth, with the assistance of the States, is pursuing a national training framework with nationally recognised skills and qualifications, it is unbelievable that the

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31 Timothy Ferrari, Australian Liquor Hospitality and Miscellaneous Workers' Union, Evidence, Sydney, 26 October 1999, p. 358

32 Australian Council of Social Services, Submission No. 476, p. 5

33 Linda Rubinstein, Australian Council of Trade Unions, Evidence, Canberra, 1 October 1999, p. 22

34 Robert Durbridge, Australian Education Union, Evidence, Melbourne, 7 October 1999, p. 114

35 Dr Simon Blackwood, Queensland Department of Employment, Training and Industrial Relations, Evidence, Brisbane, 27 October 1999, p. 468

> same Government would seek to remove skill-based career paths from national awards that complement the system.[36]

4.45 Other submissions emphasised the need for training and skills development for low paid workers, many of whom continue to rely on awards to set their actual conditions of employment:

> These changes will particularly affect low-paid employees, who are more likely to be reliant on awards for their wages and conditions. Clear, accessible career paths provide one of the few means available to low-paid employees to obtain higher wages[37]

4.46 Ms Petty Li, a witness employed in the clothing industry as an outworker, echoed these concerns:

> …if award standards are stripped back we will not even get the minimum standards we are currently striving for, which include …opportunities for training to improve our skills…[38]

4.47 In this regard, the Committee received evidence from Dr Iain Campbell about an increasing trend in Australia where low paid workers are 'trapped' in low paid jobs. Dr Campbell urged a greater emphasis on training and skills development to reverse this trend:

> …there are enough grounds for concern to suggest that contemporary labour market trends are developing this kind of enclosed segment at the very bottom of the labour market…In principle, if we are going to look at policy solutions to try to break down that trend, renewed effort around training and skills would seem to me to be the answer. I suppose there are grounds for concern that, for example, casual employees get far less access to skills and training than most employees, and certainly someone who is a job seeker and who moves into a short-term casual job is not going to have the opportunity in that job to build up their skills.[39]

4.48 Another relevant issue in considering this proposed amendment is whether the current skills and training arrangements in Australia are sufficient to meet the demands of the labour market. The Committee did not receive a great deal of evidence on this point, however, one union raised particular concerns about the rail industry:

> …there has been a diminution in the skill formation within the industry. It was traditional that railways—as big employers—also undertook to provide

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36 Construction Forestry Mining and Energy Union (Construction & General Division), Submission No. 177, pp. 6-7

37 Australian Council of Trade Unions, Submission No. 423, p. 82

38 Petty Li, Fair Wear Campaign, through Ms Sally Eng (interpreter), Evidence, Sydney, 26 October 1999, p. 366

39 Dr Iain Campbell, Centre for Applied Social Research, RMIT University, Evidence, Melbourne, 8 October 1999, p. 188

> an enormous amount of training. To give you an example, the State Rail Authority here in New South Wales had its own training college at Chullora—or the apprenticeship school, I think it is called. That has now closed. The training college that the State Rail Authority has at Petersham in the inner suburbs of Sydney has been hived off as a separate entity. What we are also finding is that in the training of railway-specific…skills such as the driving of a locomotive…the new employers, with some exceptions like the National Rail Corporation, are not providing that training at all. They are relying on the publicly owned systems that we still have, be it Queensland Rail or FreightRail here in New South Wales, to train locomotive drivers and then seek to employ them. A number of the employers at this point are simply relying on ex-railway employees to provide the work, be it shunting, examining wagons and carriages, or driving. We are very concerned that—and as you will note in our submission we talk about an ageing work force, which the railways have—within the space of a few years there will be a dearth of persons competent and qualified to perform a broad range of railway functions because the training is simply not being done at the moment.[40]

Long service leave

4.49 The Bill would prohibit award clauses relating to long service leave. Department submitted that 'long service leave arrangements are already provided for in all State and Territory jurisdictions through legislation. There are some differences between long service leave provisions across the States/Territories and between the various legislative provisions and federal award provisions, with some federal award provisions more generous than the relevant State/Territory legislation and other less so.'[41]

4.50 This amendment attracted widespread opposition, even from many employer groups, who thought that removing long service leave from awards would cause additional administrative burdens for employers, and result in increased long service costs to some businesses:

> …the abolition of long service leave as an allowable award matter would mean that in several States, particularly South Australia where the State standard is higher than that generally contained in Federal Awards, the outcome would be an increase in employer costs, notwithstanding the proposed transition period of 2 years.[42]

> We would see that that would create administrative burdens to members, especially where they have national businesses operating across state borders. Removing the long service provisions from federal awards for our

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40 Andrew Thomas, Australian Rail, Tram and Bus Industry Union, Evidence, Sydney, 22 October 1999, p. 289

41 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p. 290

42 Australian Industry Group and the Engineering Employers' Association, South Australia, Submission No. 392, p. 23

> members—those like Pedders, Kmart, Mazda Australia, Hyundai Australia and Midas, and also businesses which operate franchise type arrangements—would subject these sorts of businesses to a multiplicity of different arrangements across different states, including different access times to long service leave and different outcomes in relation to the amounts of leave that are due. So what we currently have under the federal award is one set of conditions of employment under the vehicle industry repair services and retail award, which applies to our member businesses across various states, and it provides for consistency and ease of administration as well as a standard set of outcomes. From our end, we would have some real concerns with the removal of long service leave from federal awards. That would create difficulty and complication.'[43]

> We understand the argument: why should something be duplicated in the award if it is in legislation elsewhere? The reality in a lot of those smaller workplaces is that they do not have CCH subscriptions to that legislation. It becomes a bit of a practical difficulty for people to be going between three or four different pieces of legislation to find out what should be done on a particular matter. They find administrative and workplace convenience by being able to look at one document and say, "That is what it says about that", even if it is superannuation or long service leave.'[44]

4.51 Unions were also opposed to the amendment, particularly because it would affect employees in itinerant industries, such as construction, where employees do not work for the same employer for very long, and therefore rely on specific industry-wide long service leave schemes, enabling portability of long service leave entitlements:

> The best example of why you should not remove long service leave is the Oakdale issue. Oakdale workers were retrenched. They were owed $6.3 million. The only money they got before it was finally resolved was their long service leave entitlement, and they got that for two reasons. Firstly, there was a centralised long service leave fund available for the industry set up under Commonwealth law—and which Minister Reith is on record as wanting to abolish. Secondly, there is an award provision detailing the entitlement level, as well as other aspects of it—for example, that it is based on industry service, it is portable, et cetera. If those elements are removed and Minister Reith abolishes the fund, then there is a direct removal of workers' entitlements because we would fall back on the state act, which is a lot less attractive than what we currently enjoy. So there will be a direct loss of entitlements if it comes out of the award.'[45]

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43 Gregory Hatton, Motor Traders Association of New South Wales, Evidence, Melbourne, 7 October 1999, p. 130

44 John Ryan, Australian Catholic Commission for Employment Relations, Evidence, Melbourne, 8 October 1999, p. 142

45 Tony Maher, Construction Forestry Mining and Energy Union, Evidence, Sydney, 22 October 1999, p. 274

4.52 The Australian Chamber of Commerce and Industry agreed that the proposed amendment would result in some loss of entitlements for employees in some cases:

> 'The only areas where there might be some effect on the pay packet is in relation to the deletion of long service leave from the list of allowable matters and replacement of the few federal long service leave awards with state legislative long service leave systems and also a change in the area of allowances which would affect some extreme interpretations of allowances, but, apart from that, the pay packets would remain the same.'[46]

Tallies and bonuses

4.53 The Bill would amend section 89A, so that 'piece rates' remain allowable award matters, but 'tallies' and 'bonuses' would be non-allowable (however, under pressure from the Fair Wear campaign, the Government has made some last minute changes to the Bill to ensure that bonuses for outworkers would remain an allowable matter).

4.54 The main impact of this amendment would be in the meat and agricultural industries, where various forms of tallies, bonuses and piece rates are widely used to set wage rates.

4.55 The Australasian Meat Industry Employees' Union provided a very detailed submission to the Inquiry about the impact that the amendment would have on meat workers. It seems that it is meat industry tallies that the Government is specifically targeting with this amendment:[47]

> Immediately after the [1998] federal election, Peter Reith made some statements to the meat employers' conference. He indicated the Government would be supporting attempts by employers to strip awards that meatworkers had enjoyed in the first instance by participating in the AIRC hearings in support of an application by some companies, including the American ConAgra, in the leat industry to remove the tally provisions from industry awards. The minister said that he was ready to legislate if necessary if the AIRC did not support the application of these firms. [48]

4.56 The Union's submission made the following points:

> Removing tally provisions, given that most employers would maintain some form of incentive system, would destroy the effectiveness of the award safety net, as well as possibly leading to grossly unfair results for employees who would be stripped of substantial bargaining power. Award tally provisions represent a key award entitlement, which must be maintained in

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46 Reginald Hamilton, Australian Chamber of Commerce and Industry, Evidence, Canberra, 28 October 1999, p. 523

47 *More Jobs, Better Pay*, September 1999, p. 31

48 Governor-General's Speech Address-in-Reply, Senator Carr, Hansard p. 163, 11 November 1998

> order to avoid substantially reducing the award safety net…Employees in the meat industry are not highly paid by community standards…The effect of making tallies a non-allowable award matter would be to make it legally possible to reduce a tally workers gross pay by 25%. The safety net value of the award would become virtually irrelevant.[49]

4.57 During the course of this Inquiry, the Commission handed down a decision removing tally clauses from the meat industry award due to the operation of a particular section of the award simplification transitional provisions[50]. These provisions require that all wage rates in awards must operate as minimum rates, and the Commission decided that the meat industry tallies were not operating as minimum rates.

4.58 The restrictive and unfair provisions of the existing WR Act have therefore succeeded in seriously undermining the award safety net for meat industry workers, who will now have to renegotiate and trade off pay and conditions to regain access to results-based payments. The Government has achieved its objective and would no longer seem to need to remove tallies and bonuses from allowable award matters.

4.59 Otherwise this ideologically-driven amendment will affect vulnerable workers in other industries. For instance:

> [In the shearing award] the formula currently, for argument, was a tally of 500 sheep per week. That is where the award is struck from. It starts off at a base rate of 500 sheep a week, X amount of dollars. I have not got the formula with me…Then there are allowances attached to that formula, which bring it up to the present shearing rate of $168.59. In that instance, if the second wave goes through, we lose the right to work off that formula to strike any further pay increases. In that regard, the 500 sheep per week that our current rate is based on is a tally.[51]

> …even though we are classified as working for piece rate, the first four boxes [of mushrooms] an hour we pick are classified as normal rate and those after that are classified as bonus. That would then cause us to possibly lose it, if it is under that classification, wouldn't it? You say the piece rate would stay. That is not a problem. Our classification is piece rate, but they also class it as bonus.[52]

4.60 These two statements, from members of the Australian Workers' Union, demonstrate that there is considerable uncertainty as to whether results-based payment systems in many awards would be affected by the proposed amendment.

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49 Australasian Meat Industry Employees' Union, Submission No. 521, vol. 26, pp. 6944-5

50 Print F0512, 24 September 1999

51 Samuel Beechey, Australian Workers' Union, Evidence, Melbourne, 8 October 1999, p. 149

52 Barbara Stevens, Australian Workers' Union, Evidence, Melbourne, 8 October 1999, p. 149

4.61 The ACTU thought that this confusion about the difference between piece rates, tallies and bonuses would lead to lengthy proceedings before the Commission:

> As piece-work remains as an allowable matter, there is an immediate problem of uncertainty, as the three terms are used interchangeably in industries such as clothing and meat. This uncertainty will lead to lengthy proceedings before the Commission, and could lead to clothing workers, including outworkers, losing their entitlements to bonus payments.[53]

4.62 The Government Senators' report refers to a confusing, jargon-laden statement from the Department regarding what the difference is between tallies, bonuses and piece rates. It is clear that not many people really understand the difference, and for this reason it is probably best that matters be left in the hands of those Commissioners that deal with the relevant industries, and who have an expert knowledge of the area.

Conclusions

4.63 The proposal to remove training and skill-based career paths from awards indicates that the Government has not properly considered its amendments to allowable award matters, or is simply motivated by an unreasonable ideological desire to downgrade the Commission and its awards. As witness after witness pointed out during this Inquiry, it would be insane to remove training provisions from awards. It is not in the interests of the Australian community or the economy.

4.64 The amendment would send the wrong signal to employers and employees about the importance of training and skills formation. Many employers and employees have spent a great deal of time establishing industry-wide training frameworks. If these industry-based structures were removed, many employers may not have the time, resources or inclination to renegotiate training and career path structures for their own workplaces.

4.65 Similarly, the amendment to remove long service leave from awards is another example of the ill-considered, ideologically-motivated proposals which characterise this Bill. The Labor Senators note that both employers and employees would be disadvantaged by the amendment, and that in the main, both employers and employees did not support this amendment. It should be rejected.

4.66 The proposal to remove tallies and bonuses from awards was directly targeted at workers in the meat industry. The Government failed to consider the consequences of this amendment on other workers, demonstrated by the fact that it has already had to make a Government amendment to the Bill to exempt outworkers' bonuses. This smacks of ill-considered policy making on the run. The Labor Senators believe that the Commission should retain discretion to make awards containing tallies and bonuses. The Commission has expertise in this complex area and is capable of

53 Australian Council of trade Unions, Submission No. 423, p. 83

simplifying awards to maintain benefits for workers, while streamlining administrative procedures.

4.67 It is hard to escape the impression that the amendments relating to awards are motivated by an irrational abhorrence of the Commission and unions. Just briefly, the Bill would also restrict award clauses dealing with public holidays to those public holidays declared by State and Territory Governments. However, there is one important exception proposed by the Government to this general policy – even if State Governments declare 'union picnic days' as public holidays, as is the case in the Northern Territory and ACT, these could not be included in awards. No explanation has been proffered for this inconsistency, and it can only be assumed that the Government wants to obliterate any reference to 'unions' in awards.

Restricting the Commission's power to conciliate

4.68 The Government submitted that the proposed amendments to limit compulsory conciliation and introduce a new voluntary conciliation function:

> …are consistent with the policy of encouraging employers and employees to take greater responsibility for their own workplace relations. They will also help ensure that voluntary mediation becomes an effective option as an alternative to the Commission's voluntary conciliation role…The proposed changes will not involve a reduction in the role of the Commission, as the Commission will retain its ability to conciliate in relation to all matters where it currently exercises conciliation powers. However, it is proposed to introduce a requirement for the parties to consent to the exercise of this jurisdiction in relation to non-allowable matters.[54]

4.69 Some employer groups, including ACCI[55] and the Business Council of Australia[56] supported the amendments, as did Mr Des Moore, director and sole employee of right wing 'think tank', the Institute for Private Enterprise:

> I ask that the Committee consider this bill against the urgent need for Australia to reduce labour market regulation to a minimum and, in particular, to change the existing role of the AIRC to that of a voluntary adviser and mediator providing service to both employers and employees, with those on low incomes being eligible for subsidised or free access.[57]

4.70 However, the proposal to restrict the Commission's power to conciliate by reducing allowable award matters and only empowering the Commission to order compulsory conciliation where the dispute relates to such matters is impracticable. Professor Hancock makes the sensible point that there appears to be no justification

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54 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p. 275

55 Australian Chamber of Commerce and Industry, Submission No. 399, p. 75

56 Business Council of Australia, Submission No. 375, p. 44

57 John Moore, Institute for Private Enterprise, Evidence, Melbourne, 7 October 1999, p. 81

for this restriction, and if imposed, it would in all likelihood hamstring the Commission's ability to resolve disputes:

> Whether or not the principle of allowable and non-allowable matters is warranted in respect of the contents of awards, it is difficult to see any basis for limiting the subject matter of the Commission's conciliation function. Indeed, it is likely to prove to be an inconvenient restriction. Disputes often have multiple subjects and, in many instances, the 'true' nature of a dispute only emerges clearly after exploration of the positions of the rival parties. The proposal threatens the effectiveness of the Commission's performance as a conciliator.[58]

4.71 Professor Isaac is similarly critical of the proposal, remaining unconvinced by the justification put forward by the Minister in support:

> The Minister's justification for this change in the Act is that 'compulsory conciliation, will be reoriented, consistent with the increased emphasis on employers and employees having greater responsibility for their own workplace arrangements and greater choice of dispute resolution process'. This is hardly a persuasive argument… (I)f one of the parties is unwilling to take the voluntary route and the dispute drags on, should the Commission not have the power to order the parties to a compulsory conference? Is there any evidence that this traditional procedure has deleterious effects on workplace relations? Does the exclusion of compulsory conciliation really provide greater choice of dispute resolution process, as suggested by the Minister, or does it limit choice?[59]

4.72 Professor McCallum pointed out that since 1904, the then Commonwealth Court of Conciliation and Arbitration has had broad powers of conciliation in order to promptly and effectively settle industrial disputes:

> …I regard public and prompt conciliation to be a right of Australian citizens at work, as it bolsters the fairness compact. Without compelling evidence showing the failure of Commission conciliation, it is my view that it should not be watered down by a fee for service which is utilised only to push voluntary conciliation into the private domain and out of the public realm.[60]

4.73 There was also considerable opposition to the proposed limits on compulsory conciliation from unions and employee associations[61], lawyers[62], community groups[63]

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58 Professor Keith Hancock, National Institute of Labour Studies, Submission No. 15, p. 10

59 Professor Joe Isaac AO, Submission No. 377, p. 7

60 Professor Ronald McCallum, Submission No. 90, p. 4

61 For example, see Australian Council of Trade Unions, Submission No. 423, pp. 78-9; Australian Medical Association, Submission No. 461, p 4; Shop Distributive and Allied Employees' Association, Submission No. 414, pp. 456-8; Independent Education Union of Australia, Submission No. 416, p. 12; Ansett Pilots Association, Submission No. 295, p. 2; Australian Manufacturing Workers' Union, Submission No. 424, pp. 68-9; Newcastle Trades Hall Council, Submission No. 430, p. 25; Australian Nursing Federation (WA Branch), Submission No. 471, p. 7; Construction, Forestry, Mining and Energy Union (United Mineworkers' Federation Division), Submission No. 479, pp. 10-12

and some more moderate employers, who thought the current system of compulsory conciliation was operating effectively and did not need to be changed:

> Ai Group does not support the proposed distinction between compulsory conciliation and voluntary conciliation…on the following grounds:
>
> - The existing system of conciliation is accessible, relatively uncomplicated and supported by Ai Group;
>
> - A division between compulsory and voluntary conciliation could create confusion as well as opening up divisions between parties as to which issue falls into one category or the other…[64]

4.74 The Australian Industry Group elaborated on this submission at the first public hearing in Canberra:

> On conciliation and mediation, we support a continuing role for the Australian Industrial Relations Commission in an impartial, accessible and affordable manner. The AI Group does not see value in prescribing a distinction between compulsory and voluntary conciliation, and the charging of a fee to access voluntary conciliation. The AI Group members are frequent customers of the conciliation services provided by the commission, a body which, in our view, retains the respect of both employers and employees. The AI Group strongly supports a continuing role for conciliation…We strongly favour dispute resolution through conciliation or mediation rather than through litigation.[65]

4.75 Others agreed that conciliation by the Commission is a useful and uncomplicated means of resolving industrial disputes:

> The conciliation function of the Commission has proved over many years to be a very valuable one. It is extraordinary that such a radical departure from the Commission's traditional and historical role in this connection could be advocated without a single reference to any practical difficulty which has been thrown up by the system of compulsory conciliation of industrial disputes.[66]

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62 For example, see Jim Nolan, Submission No. 456, pp 28-30; International Centre for Trade Union Rights, Submission No. 460, pp. 26-30

63 For example, see Federation of Ethnic Communities' Councils of Australia Incorporated, Submission No. 417, p. 6; Uniting Church in Australia Board for Social Responsibility, Submission No. 440, pp. 2-3; Womens' Electoral Lobby, National Pay Equity Coalition and Business and Professional Women Australia (NSW Division), Submission No. 429, pp. 19-20; Women for Workplace Justice Coalition, Submission 441, pp. 11-12

64 Australian Industry Group and the Engineering Employers' Association, South Australia, Submission No. 392, p. 11

65 Robert Herbert, Australian Industry Group, Evidence, Canberra, 1 October 1999, p. 44

66 Jim Nolan, Submission No. 456, p. 29

4.76 Despite this general lack of evidence to support the proposals, the Department's submission did provide some hypothetical examples of situations where the Government considers compulsory conciliation inappropriate:

> …the Commission may (currently) exercise conciliation powers in situations where one or more of the parties may consider its involvement to be inappropriate or premature, and on occasions, may become involved in matters of a relatively minor nature. While there are no statistics that provide information on the extent to which this occurs, the potential to involve the Commission in such circumstances conflicts with the objective of ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees should rest with employers and employees.[67]

4.77 However, Professor Isaac, who is a former Commissioner, did not agree with the Department's assertion that the Commission becomes involved in disputes at inappropriate times. He pointed out that most conciliation undertaken by the Commission has not been on a compulsory basis, and submitted:

> The Commission has generally exercised this power with discretion and sensibility on the timing of its intervention and the handling of the conciliation process.[68]

4.78 It is unfortunate that the Department could not provide any concrete examples of cases where it considered that the Commission had exercised its conciliation powers inappropriately.

4.79 On the other hand, many other submissions and witnesses provided examples of situations where the Commission had exercised its conciliation functions in relation to non-allowable matters with beneficial outcomes, that would in their opinion not have been resolved without conciliation. For example:

> I made reference to two particularly lengthy disputes in Victoria in 1997. We will use Email as an example. The picket lines got quite robust, both parties were intractable on the issues between the parties and the employers were seeking action in the Supreme Court and the Federal Court to try to force workers back to work. What resolved those two disputes, and others to follow, was the ability to force the parties together to conciliate. It was true hands-on conciliation. The commission in those cases was very tenacious and really drew out the issues amongst the parties. It would not have been resolved if it had been a case of voluntary conciliation. The employers would have hung out and probably hung their hats on litigation, which would have inflamed the dispute. I suggest that those disputes would have lasted a lot longer than they did.[69]

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67 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p. 276

68 Professor J Isaac AO, Submission No. 377, p. 6

69 Dave Oliver, Australian Manufacturing Workers' Union, Evidence, Sydney, 26 October 1999, p. 395

> The conciliation powers of the Commission provide an informal process of resolving disputes, and one that is not burdened by complex and time-consuming legal processes… Typically, matters referred to the Commission by the union for conciliation have not secured the agreement of the employer…In the past 12 months the list of items referred for conciliation by the union has included matters as diverse as staffing levels; workplace harassment and contractual obligations. It is highly doubtful whether, given the choice, employers would have 'agreed' to any of these items being referred to conciliation.[70]

4.80 Most of those who objected to the amendments were primarily concerned about the inability of the Commission to intervene to resolve a dispute where one party to the dispute has significantly less bargaining power than the other. It was submitted that in these cases, the party with greater bargaining power would simply refuse to agree to conciliation:

> Commission conciliation processes…assist in evening up the imbalance between employers and employees with little bargaining power. In a situation where an employer simply refuses to negotiate on a staffing or work overload issue, for example, the employees can (currently) invoke the authority of the Commission in conciliation, even though there is not arbitral jurisdiction in relation to the matter. While it may be that in some disputes the parties will agree to voluntary conciliation, this will not always be the case, and is less likely in cases where employees have little bargaining power, meaning that the employer is in a strong position to impose its view.[71]

> The maintenance of a strong and independent industrial tribunal is seen as essential to ensure that the principles of fairness, equity and justice are maintained for employers and employees alike, and to ensure the protection of vulnerable parties. The ACCER suggests that the bill would narrow the ability of the commission to carry out this role by allowing compulsory conciliation on arbitral matters only (and) introducing voluntary conciliation for other matters on a fee-for-service basis…[72]

4.81 The Committee was provided with evidence about how a similar system of voluntary conciliation in Victoria had operated to the detriment of vulnerable employees:

> The experience of Victorian employees…was that consent of employers was difficult, if not impossible, to secure. The facilities of the State Commission were severely under-utilised, even though no fee was charged for the services available. The Victorian system fell into virtual disuse...We

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70 Australian Nursing Federation (Western Australian Branch), Submission No. 471, p. 7

71 Australian Council of Trade Unions, Submission No. 423, p. 79

72 John Ryan, Australian Catholic Commission for Employment Relations, Evidence, Melbourne, 8 October 1999, p. 138

> consider that, in any federal system of voluntary conciliation or mediation, the problems encountered in Victoria would recur and that the requirement to pay a fee would be a further disincentive to using such a system.[73]

4.82 While of course it will normally be employees who are in a position of weaker bargaining power, the Committee was also provided with one example of a group of employers who were alarmed by the proposed amendments because of the industrial strength of their employees:

> The position of contractors on building sites makes them commercially vulnerable to industrial action. Almost universally notification of industrial disputes to the Commission is made by an employer or employer organisations in an attempt to enlist the aid of an independent third party to bring pressure to bear on the CFMEU to cease industrial action, constructively negotiate etc. There are a range of issues which are likely to fall outside of matters where the Commission can compulsorily conciliate. …Voluntary conciliation requires the agreement of both parties. It would be our expectation that the CFMEU would not generally agree to voluntary conciliation as it has the knowledge that it is able to exert considerable commercial pressure on subcontractors through the pursuit of industrial action…MBA Inc considers that the restriction of compulsory conciliation to allowable matters deprives employers in the building and construction industry of the ability to utilise the services of an independent third party…crucial given the nature of working arrangements on construction projects.[74]

> Because of the mobility of labour, the ability to be able to move from site to site quickly, you could have, practically, a situation where one employer is singled out for industrial action and neither the union nor the employees have any desire whatsoever to agree to conciliation because they are able to simply put so much pressure on the builder that they have to cave in.[75]

4.83 It was generally acknowledged that there were many employers and employees who would behave responsibly under the proposed system of voluntary conciliation, but many witnesses were concerned that it is not these employers and employees who generally become involved in protracted industrial disputes:

> It is possible that some non-government school employers may agree to voluntary conciliation although it is the employers most likely to be in dispute who will be least likely to agree.[76]

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73 Women for Workplace Justice Coalition, Submission No. 441, pp. 11-12

74 Master Builders Australia Incorporated, Submission No. 267, p. 9

75 Alan Grinsell-Jones, Master Builders Australia, Evidence, Canberra, 28 October 1999, p. 508

76 Independent Education Union of Australia, Submission No. 416, p. 12

4.84 Another concern was that, in general, limiting the Commission's power to intervene to conciliate industrial disputes would lead to an increase in disputation, or at least length of disputation:

> To limit this (compulsory conciliation) power could lead to prolongation and festering of disputes as well as stoppages as one or other party, usually the stronger party, resists conciliation. This is hardly a recipe for good industrial relations…should the economy move to fuller employment, the absence of compulsory conciliation may well lead to more frequent and longer industrial action.[77]

> It is hard to conceive how a costly voluntary conciliation process, where the Commission is unable to make an order or award or compel a person to do anything, could possibly be effective or provide an improvement on the existing system…It actually limits early intervention.[78]

Conclusions

4.85 The Labor Senators accept the evidence presented opposing this limitation of the Commission's powers and reject the proposed amendment. In our view, the case for this change is marked by a paucity of logic and evidence, and the potential risks are very real. For these reasons, we recommend that this not be agreed to.

4.86 The proposal to create a regulated mediation system is also rejected. The fact, as noted by both Professor Isaac and Hancock, is that private mediation has always been available. The route has rarely been taken. In this context, we agree with Professor Hancock's comment that this proposal is nothing more than a 'gratuitous expression of no confidence in the Commission'.

4.87 Finally, we reject as completely without merit the proposal that a fee be charged for the service of conciliating a dispute through any process in any circumstance. As noted by Professor Isaac, this proposal has one simple effect, it 'puts the financially weaker party at a disadvantage.'

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77 Professor J Isaac AO, Submission No. 377, p. 6

78 Uniting Church in Australia Board for Social Responsibility, Submission No. 440, p. 2