CHAPTER 6

BALANCE AND BARGAINING

'...all is fair in love and war...'

- Rio Tinto decision, AIRC, Construction, Forestry, Mining and Energy Union and Others and Coal & Allied Operations Pty Ltd, Print R9735, 7 October 1999

Introduction

6.1 A significant proportion of the evidence put before the Committee related to the impact that the 1996 Act, and the potential impacts of the provisions contained in the 1999 Bill, on the general balance within the industrial relations system and the capacity for effective bargaining to take place. Unions, academics, and individual citizens all commented that there appeared to have been a significant shift in the balance and bargaining positions in the workplace toward the interests of employers as a result of the 1996 amendments. It was generally feared that some of the amendments in the current Bill would make this situation worse. In this context it was not surprising that employer groups believed that the changes had been beneficial and were supportive of many of the current Bill's amendments.

6.2 At the outset Labor Senators make the point that, of all the issues discussed below, the evidence from Victoria provides the extreme example of how bargaining possibilities have been limited by the Coalition's industrial relations agenda. The plight of Victorian worker is discussed in detail in Chapter 10.

Powers of the AIRC, AWAs and Certified Agreements

6.3 In the area of agreement making, changes to the role of the Commission, some provisions relating to certified agreements and in particular the non-union stream of certified agreements, and the introduction of AWAs have all impacted negatively on the bargaining position of workers and unions.

6.4 As discussed earlier in the report, the WR Act significantly changed the focus of the Australian Industrial Relations Commission, in particular by limiting its arbitral powers. This has removed from employees and unions an important component of their bargaining power.

6.5 There are a number of issues which were raised with the Committee in relation to AWAs and their impact on the balance and bargaining position of employees. Of particular note were concerns raised about the usefulness of the provisions enabling employees to nominate a bargaining agent. The Committee heard that while employees could nominate the union as a bargaining agent for the purpose

of negotiating an AWA, the provisions were not strong enough to ensure that the union could have any significant input to the process.[1]

6.6 The evidence presented before the Committee also suggests that AWAs are being picked up in the low income sector as well as for people on higher income, for which they were originally intended. This raises concerns about the ability of those people in the lower income sectors and their ability to bargain over their employment conditions. The Committee heard that many of the workers affected are women, persons from non-English speaking backgrounds or part-time/casual workers. These workers were less likely to be in a position to challenge the employers proposals.

6.7 Furthermore, Labor Senators note that the Bill contains provisions which would remove the ability of persons negotiating AWAs to take protected industrial action. Labor Senators believe that the infrequent use of these provisions is no justification for its removal. All it amounts to is a further reduction in the mechanisms available to employees to balance their bargaining position with that of employers.

6.8 Award simplification has reduced the discretion of the Commission to include in awards those matters which it considers appropriate. Under the WR Act, if an award contains an non-allowable matter, it must be removed. For employees dependent on awards to define their terms and conditions this process seriously eroded their ability to bargain as they could no longer argue in the Commission for certain conditions to be included in the award.

6.9 Award simplification was also an issue for employees on certified agreements. The Australian Nuclear Science and Technology Organisation submitted to the Committee that through award simplification, the starting blocks for negotiation had been moved backward. In relation to the removal of incremental advancement from their award, they state:

> …that removal has alerted staff to the greater difficulties they face when they have to negotiate in the next certified Agreement. In particular, their confidence in their ability to obtain a fair outcome in the next Certified Agreement is severely damaged.[2]

Conclusion

6.10 Labor Senators are convinced that the changes implemented with the 1996 legislation with respect to the functions of the Australian Industrial Relations Commission, agreement making and award simplification have had a serious and disproportionate impact on some sectors of the workforce. These changes were introduced on the misguided belief that employees would be able to bargain effectively with employers. The evidence presented to this Committee clearly

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1 For example see Submission No. 521, Australasian Meat Industry Employees' Union, vol. 26, pp. 7080-4

2 Submission No. 178, Australian Nuclear Science and Technology Organisation, vol. 4, p. 870

indicates that this is no always possible and employers have been able to exploit the legislative provisions to the their advantage.

6.11 Labor Senators recommend that while a system of workplace-based collective bargaining should be retained, alternative options for workers to maintain and achieve decent wages and conditions should be as readily available through the award system, and through enterprise or industry-based arrangements.

Impact on registered organisations

6.12 During the consideration of the *Workplace Relations and Other Legislation Amendment Bill 1996*, Labor and Australian Democrat Senators raised a number of concerns about the impact of the proposals on the ability of unions to organise their activities and effectively represent their members.

6.13 The concerns raised at the time related to provisions which would:

- encourage the creation of small single enterprise unions;
- abolish the conveniently belong restrictions on registration;
- give greater priority to employers' interests in determining representational rights;
- allow for the disamalgamation of unions;
- change requirements relating to right of entry; and
- abolish union 'preference'.[3]

6.14 It was argued that if enacted, these provisions would substantially distort the balance in the workplace between the interests of employers and employees in favour of employers. Following negotiations with the Australian Democrats, some of the Bill's proposals were watered down, however, the general thrust of the provisions became enshrined in legislation.

6.15 During the course of the current inquiry the Committee it became quite clear that the operation of the *Workplace Relations Act 1996* had impinged on registered organisations both physically and financially. The areas that were particularly highlighted as affecting employee organisations were: right of entry, limits to protected industrial action and the arbitral powers of the Commission, abolition of union preference, award simplification, and increased sanctions against available to employers. Dr David Peetz submitted to the Committee that:

> The object of the Act may be to provide a framework for cooperative workplace relations, but the purpose is to weaken unions. The strategy underpinning the Act involves a number of elements: undermining the

3 Senate Economics References Committee, *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, August 1996, p. 168

> membership base of unions through removing union preference; making it easier for employers to resist unionism and decollectivise employment relations; occupying unions' time and resources in defending 'freedom of association' actions; encouraging fragmentation through disamalgamation and the establishment of enterprise unions; diverting union resources to the defence of numerous long-standing award conditions that have become 'non-allowable'; threatening the financial viability of unions by opening up large areas where employers can seek damages and fines against union actions.[4]

6.16 The WR Act has restricted the operations of employee organisations in a number of ways, the most obvious of which were the changes to right of entry provisions. These changes included obtaining permits, providing advance notice to employers and the removal of right of entry as an allowable award matter. As argued in more detail below, the WR Act strengthened the requirements surrounding the right of unions to enter workplaces to meet with and recruit new members and to inspect time and wages records. The Australian Council of Trade Unions submitted that where employees could not easily access unions free of intimidation then they were unlikely to do so.[5]

6.17 Financial issues were raised with the Committee on a number of occasions. Many unions claimed that under the 1996 legislation a large volume of resources were being directed into legal costs. This was the result of both the reduced power of the Commission to settle disputes and the increase in available legal sanctions which could be levied on unions. In so doing, the capacity of unions to provide services to their members is substantially reduced.

6.18 On the issue of sanctions it was also noted that the provision of the WR Act made it very easy for employers to initiate sanctions against employers but in terms of unions bringing action against employers for breach of agreement the process would take much longer. One could also question the balance in the levels of penalties imposed on unions and employers. In a paper by Margaret Lee and David Peetz, they identify that if unions breach the secondary boycott provisions under the *Trade Practices Act 1974* which were reintroduced as part of the WROLA Bill, penalties range from $750,000 to $10 million. On the other hand, sanctions on employers for breach of an award is a once off $5000 and for an agreement $10,000 and then $5,000 per day. They argue that these penalties are too low to prevent employers breaking the law, and pursuing them is too difficult and costly.[6]

6.19 A similar argument was presented to the Committee by the Mining and Energy Division of the CFMEU:

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4 Submission No. 386, Dr David Peetz, vol. 13, p. 2893

5 Submission No. 423, Australian Council of Trade Unions, vol. 19, pp. 4420-1

6 Lee, M. and Peetz, D., Trade Unions and the Workplace Relations Act, *Labour and Industry*, vol. 9, no. 2, December 1998, pp. 15-16

> The other aspect of breaches of awards and agreements is that you can go straight to the Federal Court, and we have done that a number of times. I can tell you from experience that that takes six to 12 months to prosecute a breach. That is what we face. However, if we breach an order, a return to work order or something like that, they have us in court within 24 hours. There seems to be rules for employers and rules for others.[7]

6.20 The inability to bargain effectively under the WR Act is also highlighted in case studies that were presented to the Committee of intractable industrial disputes. The Australasian Meat Industry Employees Union informed the Committee of a situation where employees had been locked out of the workplace for 8 months. The situation revolved around negotiation for a new agreement where the employer was seeking wage cuts in the order of 10-17½ per cent. When the union refused to accept the terms of the proposal the employer called off negotiations and two months later issued notice of a lock out. The union was unsuccessful in its attempts to end the lockout:

> When the first lockout notice was served, the union sought an injunction in the Federal Court. The union argued that, because the company had not genuinely tried to reach agreement pursuant to the act, O'Connors ought to be prevented from proceeding with the lockout. It was submitted that O'Connors had made no attempt to negotiate since early January and that the approach that the company had taken to those sessions that occurred in December 1998 and January of this year was farcical.
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> The union's application was rejected by the Federal Court. It would seem that basically all a company has to do to be able to lock its workers out under the Workplace Relations Act is to make any claim—in this case, 10 per cent and 17½ per cent wage cuts—then say that negotiations are deadlocked when the claim is refused, and bingo! Employers can with impunity lock out their workers and refuse to pay them any remuneration for ever.

6.21 It appears that in these situations where the Commission has little power to terminate a dispute and arbitrate a decision, employers have the upper hand in the negotiating process.[8]

6.22 This also raises the issue of the requirement, or lack thereof, under the WR Act to bargain in good faith. It is the view of Labor Senators that the lack of any provisions requiring parties to a dispute to bargain in good faith has resulted in an antagonistic environment characterised by a 'survival of the fittest' mentality. This view was supported by Victorian branch of the CPSU who stated that:

> Where there is no commission that has the power to settle a dispute in a timely, cost-efficient manner, you are denying the rights of individuals to collectively

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7 Mr Tony Maher, *Hansard*, Sydney, 22 October 1999, p. 274

8 Evidence, Mr Paul Davey, Brisbane, 27 October 1999, pp. 474-5

> bargain. The best intent of the Senate in inserting the section 170MX provisions has been thwarted by an employer intent on not negotiating in good faith. The removal of the good faith bargaining provisions from the legislation has allowed the commission to sit back and see who wins in the fight on the ground.[9]

6.23 There is some evidence of these effects in the data on the nature of industrial strikes. This data indicates that:

> The introduction in the Workplace Relations Act has seen reductions in disputes over wages and several other causes (reflecting a continuation of trends under enterprise bargaining and the general reduction in the power of unions) but these have been partly offset by an increase in disputes over managerial policy (perhaps reflecting increased employer assertiveness under the Workplace Relations Act).[10]

6.24 Labor Senators agree with the views expressed during this inquiry that the bargaining system in Australia could be improved by reintroducing provisions facilitating bargaining in good faith.[11]

6.25 Overall, it is clear that in the vigorous pursuit for greater flexibility and devolved decision making, the latest round of industrial relations reforms have failed to address the consequent shift in the balance of power between employers and employees. The submission from Dr David Peetz describes how the industrial relations framework in Australia has progressed from one based on arbitration to one based on bargaining. The submission also contrasts the two model and the relative benefits of each. Dr Peetz argues that a bargaining model of industrial relations is not inconsistent with providing workplace justice, but in our transition from an arbitral system, while we may have successfully increased enterprise bargaining and reduced reliance on the Commission to settle disputes, many of the workplace justice components have been lost.[12]

Conclusion

6.26 Registered organisations have played a pivotal role in Australian labour market history, providing a means by which employees are able to act collectively to counter the inherent imbalance in the bargaining position between employers and employees. The evidence presented to the Committee highlights how the WR Act has restricted the influence of unions in the workplace. In so doing, there has been a pronounced shift in the balance of the industrial relations system toward employers.

Labor Senators recommend that:

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9 Evidence, Ms Karen Batt, Melbourne, 8 October 1999, pp. 282-3

10 Submission No. 386, Dr David Peetz, vol. 13, p. 2891

11 *ibid*., p. 2916

12 Submission No. 386, Dr David Peetz, vol. 13

- **all parties be required to conduct negotiations in good faith; and**
- **in cases where employees have provided a clear indication of the type of agreement to be adopted, employers be required to negotiate in good faith to conclude an agreement of that type.**

The Issue of Choice

6.27 The introduction of a greater level of choice was a central component of the Government's rationale for introducing the 1996 legislation as emphasised in the following exert from the Ministerial discussion paper on flexibilities in agreement making:

> Choosing what sort or combination of employee agreements to use and how they are best developed should be based on a strategy of developing and maintaining employee trust and fostering direct employer/employee communication. It will be influenced by the history of employment relations at the workplace, for example, whether there is a well developed union delegate structure, the history of direct communication between the employer and employees and the desires of employees.[13]

6.28 An issue of major concern running through many of the submissions was, however that the legislation did not always achieve genuine choice over the type of agreement selected. Many of the employees and unions provided evidence that if there was any choice at all, it was the choice of the employer. Some of these cases have already been canvassed in discussion on the Office of the Employment Advocate. The issue, however, is broader than whether a collective, rather than an individual agreement, is offered to staff. Of contention is the ability for employers to refuse to negotiate with a union for an agreement to be certified under section 170LJ of the Act and only offer an agreement to be certified under section 170LK regardless of the preference of the staff involved.

6.29 Labor Senators note that considerable evidence was provided by the Community and Public Sector Union indicating that Commonwealth and Victorian Government agencies determined with little if any consultation with their staff the form of agreement to be put in place. Such action gave rise to the claim that both governments had breached section 3 (c) of the WR Act. Labor Senators conclude that both Governments have ignored the issue of choice for employees and thus breached the spirit of the Act.

6.30 The actions of the Department of Employment, Workplace Relations and Small Business came under particular scrutiny. The senior departmental office, Ms Lynn Tacey, in answer to a question by Senator Carr as to whether the Department had refused to conduct a ballot of staff to determine the type of agreement, was informed that no decision had been taken and the issue was under discussion.[14] Three

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13 Ministerial Discussion Paper, *Flexibilities available in agreement-making*, May 1998

14 Evidence, Ms Lynn Tacey, Canberra, 1 October 1999, p. 10

weeks later evidence providing a contrary view of the situation was presented by Ms Wendy Caird, the National Secretary of the CPSU. Ms Caird stated:

> The Secretary of the department was absolutely insistent that it had to be a non-union agreement.[15]

6.31 The argument that choice of agreement is in fact at best only limited under the WR Act and certainly more in favour of the employer than the employee, puts into question the Government Senators comments in the Majority report for this inquiry that increased choice in relation to agreements has been beneficial for industrial democracy.

6.32 Labor Senators are disappointed that industry democracy received such a shallow interpretation in the majority report. Labor Senators note the much broader treatment offered on the subject in the submission by Dr David Peetz. He argues that unlike most European countries there is no legal provision in Australia for corporate industrial democracy, and that industrial tribunals and unions have been the mechanism by which managerial prerogative has been tempered and employees given a voice in the workplace. His concern is that with the decline in the support base of unions and the perceived downgrading of our industrial tribunals that Australia has a weakened base for industrial democracy.[16] Labor Senators concur with these comments.

Conclusion

6.33 While the WR Act introduced may have established formal mechanisms to recognise different forms of agreements governing the wages and conditions of employment, the rhetoric of choice is simply not a reality for many Australian workers. Evidence on the operation of these provisions overwhelmingly indicates that the only choice for employees is between accepting an employers decision on the form of agreement as well its terms or either not having a job or remaining on their current wages and conditions. It is the view of the Labor Senators that the operation of the provisions has in many been to the detriment of employees.

Impacts on Industrial Action

6.34 The Bill contains a number of amendments which would alter the arrangements currently governing industrial action. The proposed amendments of significant concern include:

- changes to the requirements for protected action;
- suspension and termination of bargaining periods;

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15 Evidence, Ms Wendy Caird, Sydney, 22 October 1999, p. 227

16 Submission No. 386, Dr David Peetz, vol. 13, pp. 2924-5

- preventing employees from taking protected industrial action in pursuit of pattern bargaining;
- changes to the operation of section 127 relating to Commission orders to stop or prevent industrial action;
- the repeal of section 166A; and
- strike pay

6.35 Professor Ronald McCallum, foundation Professor in Industrial Law at the University of Sydney and Special Council in Industrial Law to Blake Dawson Waldron, made the following general comments about the changes impacting on industrial action and bargaining:

> On the other hand, schedules 11 and 12 of the Bill seek to establish a new and a rather rigid form of enterprise bargaining which not only truncates the freedom of the parties but which diminishes even further the discretionary powers of the Commission. In a submission of this length, a technical analysis of these schedules is not warranted: Suffice to write that the capacity of trade unions to take protected action that is meaningful is virtually extinguished by complex and bureaucratic secret ballot laws, coupled with a rigid notification process concerning the days on which, and the exact nature of the proposed protected industrial action. Automatic cooling off periods are mandated in the bargaining process which will truncate meaningful bargaining (see, for example, proposed sections 170MW-170MWI). While the Australian Industrial Relations Commission does have a role to play in this process, the provisions are drafted in such a manner that the Commission has very little discretion to delay or to modify the prescriptive rules laid down in these two schedules. In my judgement, this bargaining process, if enacted into law, would not operate to enable the parties to exert economic pressure upon one another which is the essence of collective bargaining.[17]

6.36 Professor McCallum's views are widely shared, including by most academic commentators, the ACTU and unions. The measures contained in these schedules are designed to prevent workers and their unions from being able to take any effective action to bargain. They are manifestly biased against workers and are unsupported either in principle or by any substantive evidence.

Notice of industrial action

6.37 Under the current legislation, the current requirement to give 3 clear working days notice of industrial action means that in practice, 5 days elapse between the day that the notice is given and the day on which the action commences. The day of giving the notice and the day of commencement of the action are not counted in the 3 day period. The notice period is longer if a weekend intervenes in the course of the 3 clear

17 Submission No. 90, Professor Ronald McCallum, vol. 2, pp. 273-4

working days. Further, any action can only be taken within a bargaining period – initiated after 7 days notice.

6.38 Genuine attempts to negotiate an agreement must be made before any protected industrial action can occur (s.170MP) and a bargaining period can be suspended or terminated if genuine attempts to reach an agreement were not made. Genuine attempts to reach an agreement must continue to be made (s.170MW(2)(a) and (b)).

6.39 No evidence was given to the Committee that called into question the effectiveness of these existing requirements. The evidence – as opposed to 'expressions of support' – failed to substantiate the claim that an additional 2 days notice was required in order to provide the parties with additional opportunity to reach an agreement. No example of inadequate opportunity to reach an agreement was given. Indeed, any such claim must be regarded as extremely dubious in light of the existing legislative requirements.

6.40 Evidence from Master Builders Australia suggested that the current provisions were subject to abuse by union. Their discussion centred around a dissatisfaction with the way in which notices were served.[18] The discussion of the proposed amendment did not demonstrate, however, how an additional period of notice would improve the situation.

6.41 The amendments contained in the Bill would also require notices of industrial action to detail the type of industrial action to be taken, the day or days on which it is to occur and the duration. The Department submitted examples of 'inadequate' notices claiming that there has been some uncertainty as to the degree of detail required on the notices of industrial action.[19] These examples appear to be cited in ignorance of the clear guidelines determined by the Full Court of the Federal Court in Davids Distribution v NUW [1999] FCA 1108 at para 88 as to the specification of the nature of proposed industrial action.

6.42 It is to be expected that employers who may be subject to industrial action would want a maximum period of notice and the prescription of every detail of the action. However no genuine inadequacy in the current legislative provisions was identified. On the other hand, Unions and employees have a legitimate right in a bargaining system to engage in industrial action.

6.43 It must be remembered that the very purpose of industrial action in a bargaining system is to bring economic pressure to bear on the other party. If that other party is armed with extensive advance notice of the timing and detail of any action, that party's capacity to avoid the economic pressure is greatly enhanced. The

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

19 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2391-2

idea that employers should be able to take steps to immunise themselves from economic harm is simply contrary to the system of enterprise bargaining. It removes the bargaining power of workers.

6.44 It is notable that in Davids Distribution v NUW [1999] FCA 1108 the Full Federal Court said:

> Industrial disputes are dynamic affairs. Decisions as to future steps often need to be made at short notice, sometimes in response to actions of the opposing party or other people, including governments, and changing circumstances. It would be a major, and unrealistic, constraint on industrial action to require a party to specify three clear working days in advance, exactly what steps it would take. An unduly demanding interpretation of s170MO(5) would seriously compromise the scheme of Division 8 of Part VIB of the Act; it would be difficult for a party to an industrial dispute to obtain the protection contemplated by the Division.[20]

6.45 The extension of the period of notice from 3 working days to 5 would compromise workers' and their unions' ability to take effective industrial action. The requirement for the precise specification of the timing and detail of the proposed industrial action would also severely compromise the effectiveness of any action. There was a general consensus among the submissions from union that the provisions relating to notice of industrial action were just one more hurdle for employees and unions to overcome in order to exercise their legitimate right to protected industrial action. When combined, however, with all the other hurdles, the result would be to effectively severely restrict the ability of employees to take protected action at all:

> If the new provisions are added to those already found in the 1996 Act, then the conditions which would have to be fulfilled for unions to take protected industrial action would be manifestly unreasonable and would substantially limit the means of action open to trade unions.[21]

6.46 Both the Law Council of Australia and the International Centre for Trade Union Rights submitted to the Committee that that these additional measures would compound the existing breaches of ILO Convention 87 as they place further limitations on the right to strike.[22]

Suspension and termination of bargaining periods

6.47 The Bill includes amendments affecting the Acts provisions relating to the Commission's powers to suspend and terminate bargaining periods. Labor Senators are concerned about the proposed requirement for the Commission to impose a mandatory 'cooling off period' by suspending a bargaining after industrial action had

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20 para. 84

21 Submission No. 460, International Centre for Trade Union Rights, vol. 22, p. 5549

22 Submission No. 468, Law Council of Australia, vol. 22, p. 5733; and submission No. 460, International Centre for Trade Union Rights, vol. 22, p. 5549

been taking place for 14 days. They are also concerned about the proposal to remove from the Commission the ability to terminate a bargaining period and proceed to arbitration under section 170MX for workers on paid rates awards where there is no reasonable prospect of agreement.

Cooling off periods

6.48 It is to be expected that employers would support the proposed amendments as they would effectively mean that they could only be subject to a maximum of 14 days industrial action at any one time. After this period, the bargaining period and the ability of employees and their union to take protected action would be suspended. However this desire on the part of employers needs to be considered in the context of a fair system of bargaining in which employees also have rights.

6.49 It is notable that after a bargaining period is suspended, there is no intervention or arbitration by an independent Commission. There is simply the removal of the rights of employees to take any lawful action in pursuit of their claims. They are compelled to cease any action and return to normal work. The manifest and fundamental unfairness of this proposal was the subject of significant evidence.

> This provision is so inconsistent with the bargaining model that it would be difficult to take it seriously were it not for the fact that some interest groups have lobbied for it. It clearly undermines the integrity of the bargaining model and the notion that parties should take responsibility for negotiating workplace matters themselves. Its only purpose is to shift the balance of power from employees to employers and it has no merit.[23]

6.50 On the other hand, the justification of this proposal was notably unsubstantiated by anything other than 'expressions of support' by various employers. The basis of claims that the suspension of a bargaining period will act as a 'cooling off' period is not obvious from the proposal itself. Given the extensive time periods already involved in:

- initiating a bargaining period (7 days);
- undergoing the prolonged secret ballot process (4-6 weeks plus);
- giving 5 working days notice of the action; and
- then 14 days passing since the beginning of any action (which may not even be continuing),

it is difficult to imagine anyone needing a 'cooling off' period.

6.51 Nor is it clear how this unilateral, manifestly unfair and one-sided withdrawal of workers rights has any rational tendency to encourage the parties to reach agreement. An employers' hand would be so significantly strengthened that the

23 Submission No. 386, Dr David Peetz, vol. 13, p. 2927

employer would be less inclined to reach an accommodation. The only influence that could remotely be suggested that might be brought to bear on employees to reach an agreement by the suspension of their rights is the possibility that their bargaining position and strength would be so severely weakened that they would be forced to surrender their claims.

6.52 Again, it is clear that these measures would compound the existing breaches of ILO Conventions regarding industrial action and would clearly be additional legislative breaches of ILO Conventions.

Paid rates awards

6.53 Under the current Act, s.170MX empowers the commission to terminate a bargaining period and proceed to arbitration in two particular circumstances, one of which is where the employees subject to the agreement have their wages and conditions determined by a paid rates award and the Commission determines that there is no reasonable prospect of the parties reaching agreement. The Bill proposes to amend this section and remove this provision. Labor Senators believe that this is a retrograde step as it removes the protections available to employees covered by these arrangements. This view was echoed by the CPSU who submitted:

> Access to special arbitration where acceptable agreements cannot be reached is an important safeguard utilised on several occasions in various areas of public sector employment. The reasoning behind the inclusion of this provision in the 1996 legislation has been well and truly vindicated. Its removal would leave these employees with the alternatives of the award safety-net or an agreement on their employer's terms.[24]

6.54 Rather than limiting the Commission's ability to arbitrate awards under this section many witness argued that the provisions should be expanded. The evidence put before the Committee of intractable industrial disputes provides a strong case for not only preserving the current provisions under s.170MX relating to intractable disputes for employees subject to paid rates awards but extending this more generally to all cases where the Commission determines that there is no prospect of the negotiating parties reaching agreement.

6.55 The evidence also demonstrates that employers as well as unions have sought to have intractable disputes arbitrated by the Commission. MR Herbert from the Australian Industry Group told the Committee:

> We have found that protected action has been too easy to undertake and too hard to end. There have been a number of disputes where the option of arbitration might have had an advantage for the parties.[25]

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24 Submission No. 379, Community and Public Sector Union, vol. 13, p. 2730

25 Evidence, Mr Robert Herbert, Canberra, 1 October 1999, p. 65

6.56 Similarly the submission from the Australian Education Union indicates how State Government's have used these provisions to settle disputes in the education sector:

> The fact…that two State government's…have enthusiastically embraced the opportunity to have the Commission resolve protracted bargaining disputes with the AEU is a clear indication that there remains bipartisan support for a significant retention of the Commission's arbitral powers.[26]

6.57 In any event, the concerns raised by various parties about the deletion of the s.170MX provisions have not been answered in any way by evidence presented to this Committee. There remain compelling reasons to retain the power of the Commission to arbitrate in cases of intractable disputes. No case has been made out for the removal of the Commission's s.170MX powers; indeed not one example of any difficulty arising from the current provision was raised.

6.58 Labor Senators recommend that the Australian Industrial Relations Commission be empowered to make awards without limitation on content to facilitate the settlement of industrial disputes.

Pattern bargaining

6.59 The Bill proposes a new section 170LG which seeks to prohibit unions from 'pattern bargaining'. This amendment generated a great deal of discussion in submissions and during the Committee's public hearings. These discussion clearly highlighted that there was a great deal of confusion of exactly what pattern bargaining was. Labor Senators note that the Government couldn't even determine what pattern bargaining was and had to resort to defining what pattern bargaining wasn't in the drafting of the Bill.[27] This lack of precision was extensively criticised and prompted some witnesses to suggest a definition.[28]

6.60 It seems that the measure is designed to prohibit the pursuit of the same enterprise bargaining claim at more than one enterprise. This would mean that a union would be in breach of the prohibition if it pursued a claim for paid maternity leave across an industry, or for that matter claimed the same quantum wage increase. The breach for making the same claim would apply regardless of the outcome of the claim and the preparedness to negotiate on the claim at the enterprise level.

6.61 The concerns about pattern bargaining being engaged in by unions was relatively narrow, focusing on one union campaign in one State at one point in time (the AMWU Victorian 'Campaign 2000'):

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26 Submission No. 393, Australian Education Union, vol. 14, p. 3145

27 Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, p.185

28 For example, see submission no. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3112

> Ai Group's principal concern and the reason we seek more effective compliance measures, particularly arises out of a situation in Victoria brought about by a small group of unions…Ai Group is not targeting the great majority of unions that continue to operate within the bunds of proper conduct, including conduct involving protected industrial action.[29]

6.62 There was no proper analysis of the requirements of the existing legislation and how these requirements may impact on the concerns raised by employers about this campaign. In particular, no employer gave any evidence or analysis in relation to the requirements of s.170MP or s.170MW. In the absence of any analysis or evidence regarding the operation of the current legislation on the concerns of employers about 'Campaign 2000' it is difficult to justify any amendments regarding pattern bargaining, let alone the amendments that have been proposed.

6.63 In fact, many employers did not support the proposals for a blanket ban on pattern bargaining, believing that there were cases where common agreements were to the benefit of employers as well as employees.[30]

6.64 In addition to being unfair and unbalanced, there is a level of hypocrisy in employer submissions that supported a ban on union pattern bargaining but that permitted employers to pattern bargain. In fact it was clear from the evidence that employers, including the Federal Government as an employer, engage in pattern bargaining. The OEA also appears to promote pattern bargaining in relation to AWAs.

6.65 It is relevant to note that no other country was identified as prohibiting pattern bargaining. This is because such a prohibition would be contrary in principle in a bargaining system. As Dr David Peetz said:

> This proposal offends the principles of the bargaining model. It takes away from the parties the opportunity to decide how they conduct their bargaining. It further takes away the opportunity to decide the level at which they bargain. It involves the Commission in determining what terms and conditions of employment are appropriate to be included in an agreement for a single employer, in direct contravention of the principle that this is precisely what the Commission should not be doing. It appears to permit 'pattern bargaining' by employers (which can occur extensively) but not by unions. It fails to define what pattern bargaining is. Its sole purpose

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29 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, pp. 3103, 3109

30 See for example: Submission No. 267, Master Builders Australia Inc., vol. 6, pp. 1231-4; Submission No. 375, Business Council of Australia, vol. 12, p. 2630; Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, pp. 3104-7; Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3366-7; Submission No. 381, Australian Mines and Metals Association Inc., vol. 13, p. 2847; and Submission No. 167, Australian Catholic Commission for Employment Relations, vol. 4, p. 752

> appears to be to shift of power away from employees to employers, but in doing so it distorts the bargaining model severely.[31]

6.66 As well as being contrary to a bargaining system, evidence was also provided that pattern or multi-employer bargaining was economically beneficial. Professor Joe Isaac submitted to the Committee:

> It is difficult to understand the in-principle objection to multi-employer agreements. There may be situations where a number of employers in the same industry prefer to deal collectivity with the union and to have, as far as possible, uniform wages and conditions within the industry, while allowing certain variations to meet the circumstances of particular firms. Competition and profitability would then be based on managerial performance…On economic grounds, uniformity in pay and conditions ensures greater efficiency in the allocation of resources.[32]

6.67 On the basis of the overwhelming evidence put before the Committee by both employers, union and academics Labor Senators can find no justification for the proposed amendments contained in the Bill.

Section 127 – orders to stop or prevent industrial action

6.68 The Bill proposes a number of amendments to section 127 (s.127) of the Act which allows the Commission to make orders to stop or prevent industrial action. While these amendments aim to improve the efficiency of the provisions in preventing unprotected industrial action, may have the unintended consequence of affecting legitimate industrial action.

6.69 Under the existing legislation, orders can be sought and enforced under s.127 in respect of industrial action. These orders have not, to date, applied to protected industrial action. One of the main amendments to this section of the Act is to require the Commission to hear applications within 48 hours where possible, or issue an interim order stopping the industrial action.

6.70 The proposed amendments will make the issuing of s.127 orders against employees and their unions by the Commission, and their subsequent enforcement by court injunction, automatic. The claimed justification for these measures is the fact that some unions have engaged in unprotected action and that action was unable to be prevented by the current s.127 provisions. There is a possibility, however, that automatic orders under s.127 may be made where the action concerned is protected, especially given the complexity of the requirements to qualify for protected industrial action that would be introduced under this Bill. Where an application is made for a s.127 order and there is some uncertainty about whether or not the action is protected, if the Commission cannot determine the case within 48 hours then it must issue an

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31 Submission No. 386, Dr David Peetz, vol. 13, p. 2927

32 Submission No. 377, Professor Joesph Isaac, vol. 12, pp. 2692-3

interim order requiring the industrial action to stop despite the fact that the action may well be legitimate. This situation will add to uncertainty for those taking industrial action and creates an avenue for abuse of the section by employers. No regard is to be had to the legitimacy or otherwise of the action.

6.71 The Australian Catholic Commission for Employment Relations supported this position stating:

> The time constraint could compromise the procedural requirements for determining whether the industrial action is *protected* or *unprotected*. This may result in the improper resolution of disputes, as the determination of orders would be without regard to the circumstances that have led to the taking of industrial action.[33]

6.72 Labor Senators also note that employers are to be immune from s.127 orders. No explanation has been put forward as to why this should be the case.

6.73 An examination of the practice in relation to the current provisions demonstrates that these amendments are unjustified. Most disputes that are the subject of s.127 applications are resolved without orders having to be made. Only 14.8% of applications result in orders. Orders have been refused in only 9% of cases, a proportion of which were union applications against employers. Over 50% of applications that required determination were decided within 2 days of the application being made. A further 19% were determined within one week. In only a few cases concerning unprotected action have orders been refused, and in those cases only on clear and justifiable grounds.[34] It is also significant that nearly 80% of industrial disputes were for a duration of up to and including 48 hours.[35] The evidence establishes that the Commission acts with appropriate speed and urgency in hearing and determining s.127 applications.

6.74 As well as being unjustified in practice, these amendments are logically unsupportable. This is because it is not apparent why making s.127 orders automatic will act to prevent unprotected action from being taken. If there is a willingness to engage in action that is unprotected, the automatic nature of orders is unlikely to affect this decision. In any event, by the time orders are obtained in relation to wildcat unprotected action, the orders in most cases will have no utility. The very complaint used to justify the amendments will be largely unaffected by them.

6.75 Nor has it been explained why legitimate, albeit unprotected, industrial action should be made subject to automatic orders and injunctions. The removal of Commission and Court discretion opens the way for the unprincipled and unfair operation of s.127. Under these proposals it will be possible for an employer to obtain

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33 *ibid*.

34 Submission No. 329 Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2050

35 Submission No. 167, Australian Catholic Commission for Employment Relations, vol. 13, p. 751

an injunction from a court even where that employer does not have 'clean hands' - contrary to established legal principle. For example, the unprotected industrial action by employees may be a reasonable and proportionate response to illegitimate and perhaps illegal industrial action by the employer. The employer can nevertheless obtain an order and injunction.

6.76 Labor Senators believe that the removal of Commission and court discretion in the issuing of orders and injunctions is without justification or merit. This is particularly the case when the underlying issue will be unaddressed and unresolved. The amendment to allow third parties to seek orders is not designed to encourage a responsibility for workplace solutions and instead is an invitation to third parties to intervene in industrial disputes against the interests of workers who are not even employed by them.

Repeal of section 166A

6.77 The repeal of s.166A will enable employers to sue employees and their unions without having to seek a certificate from the Commission. Currently, the Commission is required to attempt to resolve the dispute and a certificate must be issued if action has not ceased within 72 hours, or earlier if justified. Not one case of difficulties caused by these requirements, including the possible delay in bringing an action, was raised.

6.78 In fact, the operation of s.166A can only be considered to be an unmitigated success. The evidence of DEWRSB is that there were 101 applications under s.166A in the period from 1 January 1997 to 30 June 1999. In the 2½ year period, certificates were issued in only 25 matters, 3 being refused and 73 matters being settled. Only 7 actions in tort were initiated after the granting of a certificate.[36]

6.79 The reasonable concerns and reservations of other significant employer organisations must temper any support for the repeal of the section by some employers. For example the Australian Industry Group submitted:

> Ai Group's experience is that s.166A has proved a useful provision in enabling the Commission to take speedy action in resolving disputes by conciliation without the need for an employer to launch immediately into an action in tort.[37]

Strike pay

6.80 It is currently illegal for employees to be paid for periods of industrial action. The proposal to increase the prohibition to the entire day on which any action is taken is striking for its lack of logic or support.

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36 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2285

37 Submission No. 392, Australian Industry Group and the Engineers Employers' Association, South Australia, vol. 14, p. 3112

6.81 The provision is sought to be justified as a means of overcoming 'any ambiguity in the current provisions'. No examples of difficulties or ambiguities arising from the current provisions were identified however. One case, HSUA v Mt Alexander Hospital [Print P2889] was cited by DEWRSB[38] as an example of uncertainty as to the operation of the strike pay provision (that the Department acknowledges is 'working effectively'[39]). In light of the decision in that case it is difficult to imagine where any uncertainty may exist.

6.82 Furthermore, in what can be identified as a general consensus amongst unions and employers, it is considered that this provision will lead to an escalation of disputation rather than the clarification of any 'ambiguity'.

6.83 For example, Master Builders Australia submitted that:

> It is not uncommon for employees on construction sites to hold stop work meeting during the course of the day. In the vast majority of cases these are of short duration, and work resumes once the stoppage has concluded. Under the proposal there would be no incentive for employees to return to work…[40]

6.84 Similarly the submission from the Australian Education Union alluded to the likely increase more militant forms of industrial action if the new provisions were enacted:

> If a conservative group of employees such as school bursars are driven to take full strike action as a consequence of [current] section 187AA, it is not hard to envisage the level of industrial disputation likely to occur in other more militant industries.[41]

6.85 In the context of the legislation, the proposal to withhold an entire days pay when the only industrial action taken may have been a ½ hour stop work meeting can only be considered unfair and penal in nature.

Conclusion

6.86 Labor Senators believe that the proposed amendments in the Bill relating to industrial action represent a further downgrading of the ability of employees to collectively bargain. Some of the changes discussed here do not appear to be based on any evidence that the Act was ineffective. One must assume therefore that the changes reflect an ideological predisposition to prevent industrial action wherever possible.

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38 *ibid*., p. 2286

39 *ibid*.

40 Submission No. 267, Master Builders Australia Inc., vol. 6, p. 1240

41 Submission No. 393, Australian Education Union, vol. 14, p. 3154

Secret Ballots

6.87 Labor Senators do not agree with the conclusion of the majority of the Committee in regard to the Bill's proposed provisions relating to secret ballots. Labor Senators have serious concerns about the impact these provisions would have on the ability of employees to engage in legitimate industrial action and consequently Australia's compliance with international labour law. The deficiencies in the proposed amendments were borne out time and again in both written and oral evidence presented to the Committee. The secret ballot model as proposed will only serve to interfere in unions organisation of their activities and employees ability to bargain with their employers.

6.88 Schedule 12 of the Workplace Relations Amendment (More Jobs Better Pay) Bill sets out new requirements that would need to be fulfilled before industrial action would qualify as being 'protected'. The proposed provisions would require unions or employees to apply to the Commission for a secret ballot order prior to industrial action being taken. For the ballot to be approved and any subsequent industrial action to be 'protected', at least 50 per cent of eligible employees must have voted and a majority of these employees (ie greater than 50 per cent) must have voted in favour of taking industrial action. The proposed provisions would also require an application to the Commission for a secret ballot order to include specific detail information including, *inter alia*, the precise nature, timing and duration of the proposed industrial action. The cost of a ballot would, in the first instance, be borne by the applicant.

6.89 Criticism of the proposed amendments has been made on a number of grounds: that the provisions are unnecessary and unworkable; that the provisions will substantially increase the time associated with taking protected industrial action; objection to the cost imposition on applicants; and perceptions that the provisions are one sided.

Current provisions in the WR Act to conduct secret ballots

6.90 The Government's intention in introducing compulsory secret ballot provisions is to ensure that the decision to take protected industrial action is decided in a democratic fashion and reflects the wishes of the employees directly involved. In principle, Labor Senators are in complete agreement. Strike action should be used as a last resort once workers believe that all other attempts to settle a dispute have been exhausted. If the employees concerned do not believe that industrial action is appropriate then they should not be forced into it. Labor Senators would contend, however, that there is no evidence that such occurrences are so regular as to require a secret ballot for each proposal to take industrial action.

6.91 The Australian Council of Trade Unions submitted to the Committee that they supported the right of union members to vote on the decision to take industrial action and that such votes were generally undertaken and that some unions routinely

conducted these votes as secret ballots.[42] If employees are concerned, however, that a decision to take industrial action may not reflect the views of employees, section 135 of the Act currently provides for any employee to apply to the Commission for a secret ballot. The ACTU also put to the Committee that there is no bar on employers or any other party from making submissions to the Commission that a ballot should be ordered.[43]

6.92 It is also noted that the Commission is empowered under the current act to order a ballot on its own initiative if it believes that in doing so it would help resolve a dispute, or prevent further industrial action.[44] These powers of the Commission have not been used frequently and where they have been it has not been to ascertain employees' views in relation to industrial action.[45]

6.93 The submission from Australian Business Limited examined the operation of the Act under section 135 and concluded that:

> …while the number of applications is small, the existing provisions appear to be working adequately. It should, however, be noted that the existing provisions are considerably less complex than the proposed amendments.[46]

6.94 Labor Senators do not believe that a case has been made that the existing arrangements are inadequate. Their view is that there is no need for a system of compulsory secret ballots prior to the taking of protected industrial action. There are also other reasons why these proposals should be rejected.

Restricting the ability to take industrial action

6.95 Leaving aside the issue of whether new provisions for secret ballots are necessary, Labor Senators have concerns about the feasibility of the model proposed in the Bill. These concerns relate to the ability of employees to take protected industrial action. The Committee heard on numerous occasions from unions, academics and lawyers that it would be more difficult, more time consuming and costly for employees to exercise their legal right to strike under the proposal.

6.96 The proposed secret ballot system would increase in time required to effect a period of protected industrial action. The Committee heard that it could take, at a conservative estimate, up to six weeks from the time of the application for a secret ballot order to when an outcome of the ballot was known.[47]

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42 Submission No. 423, Australian Council of trade Unions, vol. 19, p. 4470

43 *ibid*.

44 Section 136

45 Ministerial Discussion Paper, *Pre-industrial action secret ballots,* August 1999, p. 3

46 Submission No. 457, Australian Business Limited, vol. 22, p. 5434

47 Evidence, Mr Lloyd Freeburn, Melbourne, 7 October 1999, p. 78

6.97 Proposed section 170NBCA would require the Commission to determine all applications within 4 working days wherever possible. The ACTU submitted, however, that the complexity of the requirements for a valid application will make it possible to delay the process. The submission states:

> …employers…wishing to delay the action will be able to argue a number of issues before the Commission, such as the validity of the bargaining period and whether or not the union has genuinely tried to reach agreement. In addition, procedural issues, such as who should conduct the ballot, the roll and the timetable are all issues for debate which can be used for delay.
>
> Further, if the employer alleges that the union is engaged in pattern bargaining, this must be referred to a Presidential Member, before whom the employer could mount arguments in respect of each issue contained in the claims which are the subject of the bargaining period.
>
> With the potential of appeals, which would presumably delay the holding of a ballot, it is impossible to predict how long the period between the application for a ballot and its commencement would take, but weeks and even months is a certainty.[48]

6.98 The ACTU also expressed a concern about the quorum requirements of the proposed amendments. For a ballot to succeed at least 50 per cent of eligible employees must vote. It is a fact, however, that not everyone in a workplace wants to become actively involved in workplace relations issues, preferring to leave such matters to 'someone else'. A voluntary vote can subsequently result in a low turn out of voters. This is likely to be a greater problem in workplaces that are negotiating non-union certified agreements which, under the proposed provisions, would require all employees covered by that agreement to vote (compared to only union members where a union applies for a secret ballot order in the case of a union negotiated certified agreement). A high level of apathy in the workplace may make it increasingly difficult to get legitimate strike or other industrial action approved.

6.99 The Committee heard from those in support of the proposals, that these provisions are all about ensuring that the decision to take industrial action is democratically decided. However, the submission from the ACTU to this inquiry shows in a very simple example how the requirement for a 50 per cent voter turnout can have the opposite outcome:

> Two examples should be considered, both involving workplaces of 100 employees. In the first, 49 employees in the ballot vote, all in favour of strike action. In the second, 50 employees vote, 26 of them in favour of strike action. In the first example, strike action would not be authorised,

48 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4471

> while in the second it would, even though it would appear that there was substantially more support for the strike in the first example.[49]

6.100 Another concern expressed to the Committee was the highly prescriptive nature of the proposed provisions. An application for a secret ballot must contain details of the precise nature of the intended action as well as the day or days on which it is to take place and its duration.

6.101 These requirements will limit the flexibility available to employees or employee organisations when taking industrial action. Given the significant amount of time required to hold a secret ballot under the proposed model it is conceivable that circumstances may have changed significantly from the time the ballot was initiated to the time that industrial action is taken. Employees are, however, locked into that form of industrial action. Any other form of industrial action would require a completely new ballot to be held. This would also be the case for any subsequent industrial action. This could greatly extend the average time involved before reaching agreement. It may also result in employees or their unions favouring strikes over other less damaging forms of industrial action simply because it is too difficult to organise on ongoing industrial campaign.

6.102 These views were supported by the State Public Services Federation Group of the Community and Public Sector Union who told the Committee:

> The proposals on the secret ballots, if ever implemented, would put people in the position of nominating specific days. If, when you came to the day on which you proposed to have action, you decided that perhaps there were prospects for further negotiation, you would be stuck with it. It seems to me a proposal which, if it were seriously implemented, would push people into taking industrial action when there may well be alternatives.[50]

6.103 This is compounded by the fact that the cost of the ballot is, in the first instance, to be borne by the applicant, and only 80 per cent reimbursed. This added financial drain on unions, who are already resource constrained, is likely to encourage applications for industrial action on a larger scale as it will be too expensive to continually fund ballots. Imposing additional costs on unions is seen to be a further attempt to reduce the influence of unions in the workplace.

6.104 The Textile, Clothing and Footwear Union submitted that secret ballots would particularly restrict the ability of employees from a non-English speaking background:

> The proposed requirement to hold the secret ballot before the taking of industrial action is unnecessary and restrictive to the point of obstructing the right of workers to take industrial actinon. However, in TCF industries it will impede our members' capacity to make democratic decisions about

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49 *ibid*., p. 4474

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

> industrial action due to the low levels of literacy in English and cultural suspicion of government agencies which typify our membership.[51] (Evidence Sydney, 26 October 1999, p. 364, Ms Robbie Campo, TCFUA)

6.105 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 take wildcat industrial action, possibly against the advice of their unions:

> …I suspect, from my long experience in labour law, that such a bureaucratic system will drop industrial action down from union executives and union secretaries to wildcat action. I think we will see an increase in short-term wildcat action, and there will be a series of legal decisions seeking to assert that wildcat action on the shop floor can be sheeted home to trade union officials. Similar case law occurred in England in the late 1960s and early 1970s, to little effect.[52] (Evidence Sydney, 26 October 1999, p. 350, Professor Ronald McCallum)

6.106 Evidence presented to the Committee in Western Australia, where a complex system of secret ballots already exists, supports Professor McCallum's dire predictions, insofar as the WA provisions have simply been ignored:

> …the secret ballot provisions at the state level have in fact never 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.[53]
>
> …our members have never completed a secret ballot for industrial action since that legislation has been in place, and they will not. They have made clear decisions not to comply with that legislation, I should tell you. They have indeed engaged in industrial action ranging from stop-work meetings through to full-blown stoppages that have lasted for 6½ to seven days without complying with the secret ballot legislation. Ultimately, their voice will not be silenced in the way they feel…Inevitably, occasions arise where the union officials are not even aware in the first instance that members have walked off the job, and this indeed did happen in the instance I am citing. We came in after the event. Members were angry about health and safety breaches and left the workplace-quite rightly, in our view. It is

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

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

53 Evidence, Ms Stphanie Mayman, Perth, 25 October 1999, p. 307

> impossible in a scenario like that for the legislation to work efficiently or to work at all.[54]

6.107 The Bill's proposal has also been criticised as being one sided, designed to restrict employees exercising their legal right to take industrial action. One area where the proposals are believed to be one sided is that while a ballot is required to initiate industrial action, no ballot is required to end it. Instead the legislation imposes a time limit on protected action of 14 days after which employees must return to work be subject to legal action. Many witnesses claimed that this showed that the provisions were far from democratic:

> Our concern is also about how secret ballots are being introduced. From our understanding, if you are truly going to be consistent about a democratic approach using secret ballots, why is there not a secret ballot to lift the industrial action? In testing that notion with various people, particularly employers—not necessarily church employers—they say, 'No, we do not want that because that would mean we would not get the action lifted quickly enough.' So the notion is that secret ballots are not just democratic; they also seem to be about the industrial process and people are saying that secret ballots will prolong an industrial process.[55]

> The Minister's refusal to consider secret ballot requirements to call off a strike is conclusive evidence that this proposal has nothing to do with democratic functioning, and everything to do with restricting the right to strike. Further evidence is provided by the lack of any support for proposals such as compulsory secret postal shareholder votes on issues such as takeovers, or whether or not a company should lock-out its employees.[56]

6.108 The ACTU also submitted to the Committee that the requirements for what must be included on the ballot paper were one sided. They stated:

> …another statement to be included on the ballot paper…[is] that there is no requirement for the voter to take industrial action, even if a majority vote for it, and that it is illegal to be paid wages while engaged in industrial action. At the very least, the statement should also say that if the voter takes industrial action pursuant to the ballot, no legal action can be taken by the employer against such action.[57]

6.109 Pre-strike secret ballots are used in other countries and some witnesses drew comparisons between the proposal in the Bill and the system in the United Kingdom. The ACTU commented in its submission that:

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54 Evidence, Mr David Robinson, Perth, 25 October 1999, p. 321-2

55 Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 144

56 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4471

57 *ibid*., p. 4472

> while the UK system is unacceptably complex and technical , and does lead to a great deal of litigation, it is not as rigid or restrictive as that proposed in the Bill.[58]

6.110 In the United Kingdom the *Trade Union and Labour Relations (Consolidation) Act 1992* requires secret ballots to be conducted for any industrial action in order to attract statutory immunity from common law action. There are a number of key differences between the UK system and the model proposed in this Bill. There is, for example, no requirement in the UK model to outline the precise nature, timing and duration of industrial action.

6.111 An important difference in this respect can be seen in relation to the question that is put to employees on the ballot paper. In the UK, all that is required on the ballot paper is at least one of the following two questions:

- Are you prepared to take part in a strike?
- Are you prepared to take part in industrial action short of a strike?

6.112 Where both questions are asked, the decision about what form of action is taken can be decided later. This compares with the proposal in this Bill which requires precise details of the type of industrial action that is to be taken and this must be determined prior to the ballot being conducted.

6.113 In relation to the timing of industrial action the UK system does set a time limit, currently 4 weeks from the date of the ballot,[59] in which industrial action can be called. Employers must also be given 7 days notice of the date or dates on which action is intended to commence. This is far less restrictive than requiring an exact date on which industrial action is intended to commence as well as the duration of the intended action which must all be decided prior to the ballot being conducted.

6.114 For a ballot to be approved in the UK, only a majority of votes in favour of taking industrial action is required. This is much less restrictive than requiring a quorum of 50 per cent of eligible voters as in the Australian proposal.

International labour law

6.115 Some witnesses also argued that the restrictive nature of the proposed secret ballot provisions as described above would put Australia in further breach of ILO Convention No. 87. The International Centre for Trade Union Rights submitted to the Committee their view of the ILO's position on secret ballots:

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58 *ibid*., p. 4473

59 Amendments to the Trade Union and Labour Relations (Consolidation) Act 1992 which received royal assent on 27 July 1999 will extend the validity of a ballot by a maximum of a further 4 weeks with the employers consent. These are expected to come into affect before Easter 2000.

> It is true that the ILO supervisory bodies have, in the past, taken the view that mandatory pre-strike ballots do not necessarily conflict with the principle of freedom of association. However they have also maintained that the legal procedures for declaring a strike, such as secret ballots:
>
> - should be reasonable;
> - should not place substantial limitations on the means of action open to trade unions;
> - should not be so complicated as to make it practically impossible to declare a legal strike; and
> - are acceptable, and do not involve any violation of the principle of freedom of association, only when they are intended to promote democratic principles within trade union organisations.
>
> The secret ballot provisions of the Bill violate each of these principles.[60] (emphasis in original)

Conclusion

6.116 Labor Senators agree with those submissions and witnesses that argued that the secret ballot provisions are excessively prescriptive and will further impede employees and unions in organising their activities. The provisions are overly bureaucratic and will prove difficult to comply with. This will remove the ability of many employees to exercise their legal right to protected industrial action under the WR Act. The inevitable consequence of this is that workers may be forced into industrial action which is not considered legal under the Act.

6.117 In the labour market, a workers ability to withdraw his labour is the primary means of exerting economic pressure on employers during a bargaining process. The model of secret ballots proposed in this Bill will substantially constrain employees ti do this, tipping the balance of power in the bargaining process even further toward employers.

6.118 Labor Senators are not convinced that secret ballot provisions are necessary in relation to the taking of protected industrial action. There is no evidence that the current provisions are not operating effectively.

6.119 Aside from this, Labor Senators believe that if a compulsory system of secret ballots were to be introduced, the current proposal would need to be significantly amended, possibly drawing of some of the features of the system in the United Kingdom, so that it is not as overly prescriptive and would satisfy the ILO's principles associated with the conduct of pre-industrial action secret ballots.

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60 Submission No. 460, International Centre for Trade Union Rights, vol. 22, p. 5553-4

Right of entry

Amendments proposed in the Bill

6.120 The amendments proposed in Schedule 13 of the Bill would change the provisions of the WR Act regulating union right of entry to workplaces. The most significant amendment proposed is to restrict the rights of union officers to enter workplaces to situations where the union has a written invitation from an employee at the workplace who is also a union member.

6.121 This new requirement for a written invitation would apply whether the union officer was entering the workplace to investigate a suspected a suspected breach of the Act, an award or certified agreement, or whether the union officer simply wanted to hold discussions with employees. However, where the union officer is exercising right of entry to investigate a suspected breach, the written invitation from an employee would also have to specify that the purpose of the invitation is to invite entry to investigate a breach, and that the employee union member has reasonable grounds to believe that there is evidence at the workplace relevant to the suspected breach. Any invitation issued to a union would only remain valid for a period of 28 days.

6.122 Proposed section 285CC would allow an employee to request that the union keep the employee's identity confidential. To keep the employee's identity confidential, a union could apply to the Registrar for a 'section 291B certificate', which would be produced to the employer instead of the written invitation. This certificate would state that the Registrar is satisfied that the required written invitation had been issued, but the certificate would not identify any of the employees who signed the invitation.

6.123 Item 13 would amend the Act to allow employers or occupiers of premises to request the union officer to show their invitation or permit. If the officer did not comply with this request, they would not be entitled to stay on the premises. In addition, if the right of entry relates to a suspected breach, then the officer could be required to provide particulars of the suspected breach, including:

- the requirement of the Act, award, order or agreement that is suspected of being breached;
- the person's reasons for suspecting that a breach has occurred; and
- the person's reasons for believing that there is evidence of the suspected breach on the premises.

6.124 Alternatively, the union officer could show the employer/occupier a section 291B certificate which contains a statement relating to the suspected breach.

6.125 This new requirement to provide particulars of a suspected breach is also accompanied by a new entitlement for an employer or occupier who 'is not satisfied that the (union official) has provided adequate particulars' of the breach to eject the union official from their premises.

6.126 The amended right of entry provisions would retain the current requirement for 24 hours notice before exercising right of entry. However, currently a union must only give notice to the occupier of the premises (in many cases this will also be the employer). Under new subsection 285D(2D), the union would be required to give 24 hours notice to both the occupier and the employer, and the notice would now have to be in writing and specify on which date the entry would occur.

6.127 The amendment proposed in item 15 would allow the employer or occupier to require the union officer to only conduct interviews or discussions with employees in a particular room or area of the workplace that is regarded as an employee meeting room or meeting area.

6.128 The Bill would provide the Commission with new powers to vary or revoke permits, and make 'appropriate orders' in circumstances where the Commission is satisfied that the union officer has 'abused' the permit system, has intentionally hindered or obstructed any person when exercising right of entry, has failed to protect an inviting employee's identity or has 'otherwise acted in an improper manner'.

6.129 The Department submitted that the amendments were necessary to 'improve the operation of the current permit-based system while maintaining the right of entry…While the existing statutory scheme is considered to be working reasonably well, experience has indicated that modifications are required in some areas'.[61] Unfortunately, the only relevant experience that the Government seems to have considered in developing the proposed amendments is the experience of employers.

6.130 In general, employer groups who supported the proposed amendments attempted to provide case study examples of union officers abusing their right of entry permits. For instance, the Australian Chamber of Commerce and Industry provided the example of right of entry exercised by the Transport Workers' Union at 'The Recyclers' in Queensland:

> While the director of The Recyclers…was giving evidence in a roping in dispute, the union organiser arrived unannounced, without giving notice at the workplace in question. The employer argued that this was calculated action on behalf of the union to 'cause trouble' by means of upsetting and influencing the employer, while having the ability to talk to staff without management present.[62]

6.131 Setting aside the issue of whether management ought to have the right to monitor contact between union officers and union members, this case study does not demonstrate why further changes need to be made to the right of entry provisions. If the Transport Workers' Union did not provide notice of entry as alleged, then the

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61 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2402

62 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3370

current provisions of the Act would have been breached (subsection 285D(2)). There is currently scope for such breaches to be dealt with under the WR Act.

6.132 While employer groups were keen to see new restrictive and punitive measures enacted to prevent unions from investigating breaches or speaking with their members, there was scarce evidence of breaches of the current provisions of the Act, or at least cases where employers had decided to take action:

> Mr Herbert—If you have rights of representation, you get responsibilities which you must adhere to. That is why, in the right of entry example, I think it is open to you to say, 'If you are jockey and you have done the wrong thing in a race, the stipendiary stewards might suspend you for a fortnight; if you do it again, you might get a month; if you do it a third time, you might be out for a year.' That could be an issue that could apply with your right of entry provisions if you go outside the bounds of the legislation and breach your responsibilities.
>
> Senator GEORGE CAMPBELL—But isn't that provision available to you now? Can't you seek now, under the current act, the revocation of right of entry?
>
> Mr Herbert—Yes, you can.
>
> Senator GEORGE CAMPBELL—Have you ever attempted to?
>
> Mr Herbert—Not often used, but I think there is one—
>
> Senator GEORGE CAMPBELL—Have you attempted to use it?
>
> Mr Herbert—No, but there might be some opportunities coming up where we might.[63]

6.133 The evidence in favour of the amendments was very limited, and generally related to situations where the current provisions of the Act would be sufficient to deal with any genuine breaches of the right of entry laws. On the other hand, the Committee was provided with a great deal of evidence about employers deliberately frustrating right of entry by union officers in breach of the WR Act. Unfortunately, there were no amendments proposed in the Bill to deal with this conduct by employers:

> In some extreme cases, employers have denied all entry rights to our union where the existence of award coverage is disputed. In other cases, employers have impeded inspection of records, imposed unacceptable restriction on access within the workplace, and allocated unsuitable venues for union meetings. CPSU has been forced to use the Commission or the Federal Court to resolve these matters. Orders have been obtained enforcing our rights. However, this has involved considerable expense and time. In the

63 Evidence, Mr Robert Herbert, Canberra, 1 October 1999, p. 52

> meantime, employers have been able to arbitrarily deny our members their right to see their union in the workplace.[64]
>
> There is a company in the northern suburbs called Johnson Matthey, which is a gold refining company. Sixty of the 95 workers applied to join our union. We have had to go to the Federal Court on one occasion and we have had any number of Industrial Relations Commission hearings trying to assert our right of entry…It was a very costly affair in that particular example…generally we find employers will get around the commission's order, and if they really want to dig in we end up in the Federal Court.[65]
>
> As our witnesses will highlight, award non-compliance is endemic to the TCF industries. The government's assumption in proposing these amendments—namely, that unions are abusing the current powers—is simply false. In fact, in the TCFUA's experience, it is the employers who are obstructive and who misuse the current provisions. We refer the Committee to case study No. 6 of the TCFUA national council submission. This case highlights the response of many employers in the TCF industry when they discover that union members have reported a suspected breach. …If these amendments were successful, award breaches would simply go unchecked. While Mr Reith argues that it is not the role of unions to act as industrial inspectors, the TCFUA has no choice, especially in relation to outworkers. In our experience, no other organisation is actively working to enforce award conditions. Mr Reith may be willing to stand by and watch workers in Australia be paid as little as $2 an hour, but the TCFUA is not.[66]

6.134 Unfortunately, the Government seems to have ignored the experience and concerns of employees and unions when developing the Bill. As with much of this Bill, the amendments are clearly unbalanced and unfair, only taking into account the interests and concerns of employers.

6.135 As a result, the amendments drew criticism from a wide variety of people who made submissions or appeared before the Committee. The following extracts provide a representative example of the views of community groups, lawyers, religious organisations, State governments, academics and unions:

> …in order to ensure employees have freedom of choice in union membership and are not prevented from having access to unions, there should be minimalist regulation of union right of access to workplaces. Rather than easing regulation of union right of entry, consistent with notions of freedom of association, the provisions proposed here seek to tighten them further. They thus would move the industrial relations system further away

64 Submission No. 379, Community and Public Sector Union (PSU Group), vol. 13, p. 2719

65 Evidence, Mr William Shorten, Melbourne, 8 October 1999, p. 151

66 Evidence, Miss Siobhain Climo, Sydney, 26 October 1999, p. 363

> from freedom of association than it is at present. Their main effect and purpose is to alter the balance of power away from employees.[67]
>
> The lower paid are the most vulnerable to exploitation and it is unreasonable to expect that they could improve their position by 'disarming' the organisations that have an interest in ensuring compliance with awards and agreements. The Bill does not provide an adequate means to fill the gap if unions are marginalised from the system. ACOSS does not support measures which will reduce the ability of organisation of employers or employees to represent the interests of their members.[68]
>
> The Queensland Government believes that access to workplaces is vital both for unions to effectively represent their members, and to ensure employer compliance with their legal obligations under awards, agreements and legislation. By contrast, the federal amendments place further obstacles in the way of unions being able to access their membership or employees in the workplace.[69]
>
> Changes to the right of entry provisions for unions seem destined to restrict the right to organise, as well as limit the possibility of any general inspections of work sites…Union organisers have traditionally provided a 'watch dog' function that has helped to reduce the incidence of 'sweatshops' and other forms of exploitation in the workforce. Unless the Government implements an effective alternative inspection system, the right of entry provisions, as they exist within the WR Act, should remain.[70]
>
> The Bill is heavily directed towards de-unionising through unacceptable restrictions on right of entry, proposals which were largely rejected in 1996 and which would ensure that that right of entry would be largely ineffective.[71]

6.136 The Department, in answer to a question on notice from the Committee, noted that the Ministerial Discussion paper which preceded the Bill also drew opposition to the Right of Entry provisions. In particular, a submission by 80 IR lawyers said:

> If the right to freedom of association is to be protected, there must be a guaranteed and unrestricted right of access of unions to employees in the workplace. The Government must also acknowledge and do something about the apparent ineffectiveness of departmental inspectors in order to ensure that the significantly stripped-back minimum standards still applicable to employees in Australia, are properly observed.

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67 Submission No. 386, Dr David Peetz, vol. 13, p. 2933

68 Submission No. 476, Australian Council of Social Services, vol. 23, p. 6073

69 Submission No. 473, Queensland Government, vol. 23, p. 5983

70 Submission No. 440, Uniting Church in Australia Board for Social Responsibility, vol. 21, pp. 5167-8

71 Evidence, Linda Rubinstein, Canberra, 1 October 1999, p 21

6.137 The issue of effective award compliance inspection has been identified as an important element in the consideration of the Bill. Two specific facts drawn to the Committee's attention by the Department support the need for less restrictions on union right of entry.

6.138 Firstly, the Minister has given directions under subsection 84 (5) and/or Workplace Relations Regulation 9(3) that prosecutions for a number of matters, including award breaches, are only to be used as a 'last resort'. This directive also applies to contracted inspectors who are employed by various State Governments.

6.139 Secondly, there are very few government inspectors. The breakdown from the Department is as follows:

> As at 30 June 1999, 156 departmental staff were involved in [Office of Workplace Services] activities nationally, with 147 of those staff operating in State, Territory and Regional offices. Of the total number of OWS staff, 88 employees were Workplace Advisers appointed as inspectors under section 84(2)(a) of the WR Act. Under a protocol agreed between the department and the [Office of the Employment Advocate] 19 officers of the OEA were also appointed as inspectors. In addition, 68 State Government inspectors in Queensland, 16 in Western Australia and 28 in South Australia were appointed as federal inspectors under S84(2)(b) of the WR Act.
>
> As at 30 June 1996, 123 departmental staff were involved in awards management activities with 85 per cent operating in State, Territory and district offices. Figures are not available on how many of these staff were appointed as inspectors.
>
> The contracts require the relevant State authority to provide federal compliance services in that State. Federal compliance is defined as the investigation, resolution and were necessary, prosecution of alleged breaches of awards, certified agreements, time and wage records and pay slip regulations.

6.140 In delivering the federal services, officers of the State authority appointed as federal inspectors have the same powers and are subject to the same Ministerial Directions as inspectors directly employed by the Commonwealth. Apart from the specific Queensland, Western Australia and South Australia State based inspectors, it can be seen that there are only 107 inspectors in total in the federal arena and these must provide all of the inspections services for federal matters in Victoria, New South Wales, Tasmania, the Australian Capital Territory and the Northern Territory. It is the combination of these two factors which clearly add weight to the submissions opposing the provisions of the Bill.

6.141 Finally, the Workplace Relations and Other Legislation Amendment Bill, as introduced by the Government in 1996, contained identical proposals to limit union right of entry to situations where a union member employed at the workplace had issued the union with a written invitation. As with the current Bill, the 1996 Bill also proposed that written invitations from employees would expire after 28 days.

6.142 However, the Australian Democrats did not agree with these proposals in 1996, and insisted on broader right of entry provisions that allow unions reasonable access to workplaces not conditional on a written invitation. The compromise agreement between the Government and the Australian Democrats resulted in the current right of entry provisions in the WR Act.

6.143 It is clear that the Government is not satisfied that the current provisions agreed with the Democrats sufficiently restrict the ability of unions to investigate award and agreement breaches, to meet with their members and to recruit new members. The Government is putting forward the same proposals as it did in 1996, with no new evidence justifying change.

6.144 The rest of this Chapter deals with specific evidence relating to each of the main changes proposed to the current right of entry provisions.

Invitation from an employee

6.145 Currently, union officers may be authorised by the Registrar to enter into particular workplaces to investigate suspected award or agreement breaches, and to meet with their members. As long as the union officer holds a current permit and gives 24 hours notice of their intention to use their permit and exercise right of entry, then the officer may enter the workplace without specific invitation.

6.146 The Bill would change the current arrangements so that a union officer would require a written invitation from a member at a workplace every time the union officer proposed to use their permit at that workplace. Each written invitation from a member would lapse after 28 days.

6.147 The amendments are proposed on the basis that unions should only be able to enter a workplace where employees at that workplace want the union there to investigate a breach or to talk to the employees. While this proposition may seem reasonable at an abstract level, it ignores important practical problems:

- requiring an employee to issue an invitation in writing to their union will discriminate against those employees from non-English speaking backgrounds or with poor literacy skills, more than likely the very people most in need of a union's assistance;[72] and
- requiring an employee to sign their name to an invitation will be very intimidating for employees in workplaces where union membership is discouraged. The Bill purports to establish a system of Registrar certificates so that employees can remain anonymous, but this will not provide adequate protection in small workplaces, where it would be more difficult to hide which

72 Submission No. 473, Queensland Government, vol. 23, p. 5983

employee actually had the temerity to invite the union in to investigate a suspected award breach:[73]

> This clause, stripping workers of the right to remain anonymous when seeking union assistance, will effectively mean that employers will be able to pinpoint 'troublemakers' and potentially discriminate against them. It will also mean that employees will be less willing to seek union assistance for fear of retribution. This will particularly affect students and apprentices, who often find themselves in intimidating situations and need the help of the union to resolve them.[74]

> Where employees have to have a signed letter allowing a union official to come into their workplace to talk to them, the dynamics of any workplace where the employer does not want the union there would make it a very brave person to sign such a letter, especially in a call centre where you are monitored consistently for statistics and everything. If the employer wants to target someone, as they have done with our union delegates, it is very easy to do so. It is very easy to put people under a lot of pressure, especially if you are a casual where you do not really have any job security. I think that it would be a very brave person to sign a letter to let the union come in and speak to them just to talk to them about what their rights are.[75]

> …employees, particularly in small workplaces, where employees are all personally known by the employer, may be intimidated not to offer an invitation. Small workplaces dominate in areas of AMWU award coverage. For example, in the printing industry 85.3% of employer establishments employ less than 20 employees.[76]

6.148 Also of particular concern is the proposal that an employee inviting a union to investigate a suspected award breach would be required to provide details of the suspected breach and evidence likely to be at the workplace in the invitation:

> This requirement presupposes that every employee is capable of fully understanding all of the terms of an award and the manner in which they should be applied, and also, has the capacity to determine what constitutes a breach of the award…employees complain tot heir union about matters concerning award compliance, often without being able to identify a particular award clause that may have been breached, or without being able to clearly articulate why they have a concern about non-compliance with the award. Often employees can do no more than say that they feel that they are being underpaid or that their hours of work do not appear to match their wage rates, or that they feel that the way the employer is treating them in terms of their wages and conditions of employment, is not in line with the award. Employees invariably have no idea of what evidence is required to

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73 *ibid*.

74 Submission No. 439, Victorian TAFE Students & Apprentices Network Inc, vol. 21, p. 5149

75 Evidence, Ms Sally McManus, Sydney, 22 October 1999, p. 264

76 Submission No. 424, Australian Manufacturing Workers' Union, vol. 20, p. 4779

> support a prosecution for an award breach and no idea as to where to find that evidence.[77]
>
> s.285CA(1)(c) assumes employees are aware of their entitlements and are able to detect a breach and have access to evidence establishing a breach. This assumption is unsupported by evidence. For example, the Commission, in determining the printing award simplification case, found 'poor language, literacy and numeracy skills are encountered on a regular basis' Print R7898, p. 7. The Commission has also found: 'many employers are unaware of their award responsibilities and employees are not aware of existing award entitlements' Print R7898, p. 10. In light of this evidence, the union often operates as an information agent for both employer and employees.[78]

6.149 The proposals to severely limit a union's ability to investigate award and agreement breaches is particularly disturbing in light of the fact that the Government is no longer actively investigating breaches or enforcing compliance itself. The Department provided evidence that in the period between the commencement of the WR Act and 30 June 1999, the Government received 12,951 allegations of non-compliance with awards and agreements. Of these, it was determined that a breach had occurred in 8,270 cases. The Department also indicated that it had prosecuted the employers involved in 11 cases, while the employees were forced to prosecute breaches themselves in 752 cases.

6.150 The Government is clearly not ensuring that employers comply with their obligations under awards and agreements. It was difficult for the Committee to establish whether this situation has arisen simply because of funding cuts to the Department of Employment, Workplace Relations and Small Business, or whether this is a result of the Government's policy to contract compliance functions to State Governments with deficient monitoring of performance standards.

6.151 Whatever the reason for this lack of activity, the evidence indicates that the Government is failing to protect the rights of employees, and in many cases the only organisations taking any interest in enforcing awards and agreements are unions. The Textile, Clothing and Footwear Union of Australia, who represent some of the most vulnerable employees in the country, provided evidence that this was certainly their experience:

> We estimate that 80 per cent of inspections carried out (by the TCFUA) in New South Wales in any 12-month period would uncover at least one award breach per inspection. It is really not uncommon for our organisers to enter workplaces and find employers claiming that they do not know the award exists and creating a whole lot of hurdles for the union to jump over in order to actually get access to wage records.[79]

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77 Submission No. 414, Shop Distributive and Allied Employees' Association, vol. 17, p. 3676

78 Submission No. 424, Australian Manufacturing Workers' Union, vol. 20, p. 4780

79 Evidence, Miss Siobhain Climo, Sydney, 26 October 1999, p. 369

6.152 Even some employer groups submitted that unions are vital to ensure compliance:

> The proposed amendments make it increasingly difficult for union officials to enter the workplace for the inspection of pay records, and these people have been the only 'enforcers' since workplace inspectors have gone. The enforcement provisions in the Act are minimal and the OEA has no power of enforcement at all…the above proposal could have the effect of making low union density industries employees more vulnerable.[80]

6.153 Another particularly worrying proposal is to allow an employer or occupier to demand details of a suspected breach of an award or agreement. It is reasonable for an employer to be kept informed about alleged breaches, but there is no need for a provision allowing employers to eject union officials where the employer forms the subjective view that the union's details of the suspected breach are inadequate:

> Even where a union official is able to satisfy each of the requirements of proposed section 285D(2B), that does not mean that the union official will gain entry to the premises. Apart from the extremely onerous nature of the proposed (section) the Government has further weighted the whole process in favour of the employer by its proposition…that the employer can prevent the union official from entering the premises by simply telling the union official that the employer 'is not satisfied that the person has complied with the request (for details of suspected breach); or is not satisfied that the person has provided adequate particulars in relation to the request'…The employer has been given enormous power: the right of veto.[81]

6.154 The Department's submission contains no justification for this amendment, which would simply provide an avenue for unscrupulous employers to entirely avoid any exercise of the right of entry provisions.

Conclusions

6.155 The proposed amendments to require a written invitation from a union member at the workplace prior to exercising right of entry are clearly designed to prevent unions from accessing workplaces as far as possible. The requirements will particularly disadvantage employees in small workplaces, those with limited literacy skills and those whose employers actively discourage contact with unions.

6.156 In the opinion of Labor Senators, these vulnerable employees are already most likely to be affected by award or agreement breaches, and the proposed amendments in the Bill will compound these problems. Labor Senators are at a loss as to why the Government would attempt to target vulnerable and disadvantaged employees in this manner.

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80 Submission No. 13,National Electrical and Communications Association, vol. 1, pp. 76-7

81 Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, pp. 3678-9

6.157 The requirements for employees to identify suspected awards breaches and evidence supporting the suspected breaches in their invitation to a union can only be described as farcical. If employees knew their rights under awards or agreements and how to collect evidence to support prosecutions of breaches, then the employees would not need to invite the union to investigate. It is precisely because employees are not always sure of their award or agreement entitlements that they require the assistance of unions.

6.158 It is vital that unions have unobstructed access to workplaces to ensure that employers are not breaching their obligations, particularly when the Government is not providing the resources to ensure compliance.

6.159 Labor Senators are not convinced that employers' privacy or rights are intruded upon by unions exercising right of entry to investigate award or agreement breaches. The records inspected may nominally belong to the employer, but the records are in reality the property of employees. Individual employees can and do object to a union accessing their records on grounds of privacy. The courts have already developed simple and straightforward methods for dealing with such situations[82], and there is no need to introduce bureaucratic and unworkable invitation requirements to protect privacy.

6.160 In this regard, Labor Senators note that Liberty Victoria, the Victorian civil liberties association, were satisfied that current right of entry arrangements were sufficient to protect employees' privacy:

> If employees are in a situation that they believe is dangerous or if something is going wrong in the workplace, I think they should be able to get in touch with their union and the union should be able to come in and have right of access in terms of investigating those complaints. We are not talking about any kind of trivial or unmeritorious complaint. We are saying that, as a general right, unions should not have to go through a complicated process that really puts them in a position where it is difficult for them to investigate various complaints or breaches of health and safety regulations…[83]

Written notice of entry

6.161 Unions are currently required to give employers 24 hours notice before exercising their right of entry to a workplace. The Bill would impose more rigid requirements for this notice to be in writing and to specifically state the date on which the union officer will be exercising the right of entry.

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82 See, for instance Australian Liquor Hospitality and Miscellaneous Workers' Union, Submission No. 444, vol. 21, p. 5229, which provides an example of a decision of the Full Bench that there is nothing to prevent the separate extraction of records relating to union member employees 'if the records are maintained in accordance with the award.'

83 Evidence, Ms Anne O'Rourke, Melbourne, 8 October 1999, p. 154

6.162 Many submissions were concerned about the more restrictive and formal requirements proposed in the Bill. There were also concerns that notice requirements tend to frustrate proper exercise of the right of entry:

> Employers have used this notice period to their advantage, by ensuring that when the authorised officer arrives that the employer is unavailable and as a consequence the time and wages records are also unavailable. Although the records should be available as requested, it is easy for an employer to ensure that they are not available and to inconvenience the authorised officer, who may have travelled considerable distances to visit the site…The section has resulted in members requesting an authorised industrial officer at very short notice in respect of a matter and find they are constrained from having the authorised industrial officer enter the premises and deal with the issue and thereby create instability within the workplace as employees are frustrated from speaking with their industrial officer on site.[84]

> The restrictive right of entry provisions are all designed to hinder the union's legitimate role to represent the concerns of their members. Delaying or impeding a union official's entry into the workplace will mean that disputes will go unresolved leading to frustration and increased stress for workers'…The provisions also give the employer crucial time to exercise undue and inappropriate influence over the workforce.[85]

6.163 The Australian Manufacturing Workers' Union provided examples of employers clearly attempting to intimidate their employees into not speaking with the union:

> After the union advised the employer (Colourcorp Pty Ltd) about the penalties for preventing a union's rightful entry, the employer agreed to allow the union onto the premises. A meeting with workers took place on the site. The employer sent the Production Manager to the meeting. Despite the presence of the Production Manager, some workers asked questions of the union. The Production Manager took a list of names of those workers who asked questions and following the meeting the managing director of the company interviewed each of those workers as to why they had asked questions at the meeting with the union.[86]

6.164 The Textile, Clothing and Footwear Union of Australia agreed that in some situations, providing notice to employers is not appropriate:

> I will just give you a few typical examples of the way in which employers in the industry try to lock out the union. Some of the issues they raise are that the manager is not present during the union visit, that the manager is not available for a number of weeks or that wage records are kept with the

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84 Submission No. 506, Australian Workers' Union (Queensland Branch), vol. 25, pp. 6478-9

85 Submission No. 430, Newcastle Trades Hall Council, vol. 20, p. 5019

86 Submission No. 424, Australian Manufacturing Workers' Union, vol. 20, p. 4759

> accountants but the accountants are unavailable for the inspection…Notices which have been sent by registered mail to the correct address of the employers are sometimes returned to the TCFUA when it is obvious to us that the envelope has been opened. Employers will write to us advising that they have spoken to all their workers and none has indicated they are members of the TCFUA when we clearly know that members work there. These are examples of the way that employers have actually locked unions out of workplaces where we have members. We really believe we need to have immediate access to the workplace in emergency situations—that notice in certain circumstances is simply not appropriate and that we need to actually get in there as soon as issues arise.[87]

Conclusions

6.165 Labor Senators are not convinced that any case has been made out for further complicating the notice requirements for right of entry. The Australian Industry Group gave evidence that to its knowledge it had never even taken action to enforce the current notice requirements under the WR Act. This suggests that union officers are not currently abusing the right of entry provisions and are in the main providing employers with the required notice. Of course, some employers may not care whether union officers comply with the current notice requirements – the Committee believes that in most cases employers are happy for their employees to meet with their union and to allow inspection of their time and wages records.

6.166 Those employers who do not have anything to hide will not fear unions entering into their workplaces. Labor Senators would expect that union officers simply provide notice to these employers as a matter of courtesy.

6.167 However, Labor Senators believe that there ought to be some exemptions from the general requirement to provide notice, where employers are suspected of breaching award or agreement provisions. Unscrupulous employers ought not to be given time to remove evidence of breaches, or to create excuses to avoid inspection of their records.

6.168 There is also a case for allowing immediate access of union officials to their members where members request this. For example, this may be to advise or represent the member on disciplinary matters, or the employee's rights regarding proposals to alter working patterns or shifts.

Employer designated meeting areas

6.169 Proposed subsection 285DA(2) would allow an employer or occupier of premises to request a union officer entering the workplace in order to hold discussions with employees to only conduct interviews or discussions with employees in a particular room or area nominated by the employer or occupier. If the union officer

87 Evidence, Miss Siobhain Climo, Sydney, 26 October 1999, p. 369

does not comply with such a request, then the provision would prevent the union officer from remaining on site.

6.170 Several unions provided examples of how some employers have already attempted to restrict discussions with union to particular areas of the workplace:

> The employer (Scanlon Printing) refused the union its right of entry despite several written requests in accordance with the Act. Finally, after being informed the union might need to have recourse to the Commission, the employer allowed the union onto the premises. The basis of the employer's refusal was that the union would not disclose the name of which employee had requested the union to attend the premises. The employer briefed the employees before the union's arrival stating that although employees could meet with the union they couldn't do it privately. The union organiser was told to stand in a corner of the factory floor away from where employees performed work, so that any employee who approached the organiser would do so in full view of the employer.[88]

> …I have a lot of experience of special rooms, and usually these special rooms are right next to the HR manager's office and usually, often, in a larger room with the HR manager or the team leader sitting down the other end. I think any employee has got a right to privacy, to discuss issues or concerns they may have in the workplace without intimidation and without fear of their employers, knowing that they will be crossing off their name to say that they went and met with a union official and forever be under pressure because of that. I think this takes away people's basic rights to make an informed decision about whether or not they want to be in a union.[89]

Conclusions

6.171 The Government has failed to provide any justification for this proposed amendment. The proposal is clearly designed to allow employers to intimidate their employees, to frighten them so that they will not speak to union officers.

6.172 Some employers provided evidence indicating that they were not so much concerned with unions entering workplaces to investigate award or agreement breaches, but did not want unions entering workplaces to hold discussions with and potentially recruit new union members:

> …in Western Australia, a large number of our members operate within the state jurisdiction and, to be perfectly honest, on many sites—and a feature of the sites is their remote location; it is not easy to organise in that kind of environment—unions are seen as quite irrelevant in large sectors of our industry because of the difficulty of organising. So right of entry at times is a concern for our members. We might have some officials from a union that

88 Submission No. 424, Australian Manufacturing Workers' Union, vol. 20, p. 4759

89 Evidence, Ms Sally McManus, Sydney, 22 October 1999, p. 264

> does not have award or agreement coverage on a particular site waltzing onto a site and seeking to exercise right of entry, and that has occupied the time of our members at times trying to discourage that kind of activity. It has been more an issue where there has been attempted right of entry by organisations that are not party to an award or an agreement or do not necessarily have members on the site. That has been our experience of the problems that we confront in terms of right of entry.[90]

6.173 In other words, the Australian Mines and Metals Association is more than happy with a situation where employees cannot join a union because of the isolated nature of the workplaces. In fact, AMMA are concerned that unions may use right of entry provisions to make contact with employees and allow employees to decide for themselves whether they want to join the union.

6.174 These comments emphasise how the restrictions on right of entry are used to prevent freedom of association. This is discussed further below under 'International obligations'.

6.175 However, it is important to note here that employers who do not want a unionised workforce (possibly because evidence demonstrates that unionised employees obtain better wages and conditions than their non-unionised counterparts) would be able to use the new provisions to frighten employees by directly monitoring contact between their staff and the union.

Abuse of permit system

6.176 The Bill proposes to give the Commission wide discretionary powers to deal with union officers who have breached any of the new right of entry provisions by revoking or varying their permits. In general, there was not a great deal of opposition to this particular amendment from unions, most probably because unions are not abusing the right of entry permit system, as suggested by the Government.

6.177 However, the fact that the Commission would not be given equivalent powers to deal with employers who abuse the right of entry provisions attracted considerable criticism:

> I would be supportive of a sin-bin for employers. We have provided evidence where employers are not even complying with the current provisions about allowing right of entry for our people. The evidence that we have provided shows that we have complied with the current provisions about the required notice period, but we have seen actions from companies, for example, Aristocrat, that changed the time of the meeting on the notice so that when the union turns up, the meal break is over and done with and we have been refused right of entry.[91]

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90 Evidence, Mr Ian Masson, Melbourne, 8 October 1999, p. 196

91 Evidence, Mr Dave Oliver, Sydney, 26 October 1999, p. 396

> The whole structure of the Government's approach to Right of Entry assumes that it is only unions who will act in an improper manner, or who will abuse the permit system. However, from experience, it is clear that employers may act in an improper manner when it suits the employer, as a tactic to prevent or frustrate an effective Right of Entry…There is no attempt by the Coalition Government to introduce legislative provisions which would enable the Commission to make orders against employers who act improperly or who act to obstruct or abuse the Right of Entry system established under the…Act.[92]

Conclusions

6.178 There are already provisions in the Act which allow the Registrar to revoke permits where union officers do not comply with the current right of entry provisions, although evidence from employer groups suggests that these provisions have probably not been used a great deal.

6.179 Labor Senators do not object to these powers being given to the Commission, rather than the Registrar, and for the powers to be extended to imposing conditions on permits, rather than simple revocation of permits.

6.180 However, the Commission should also be given complementary discretionary powers to deal with employers who abuse the right of entry system. The Bill provisions currently target union officers in an unfair and unbalanced way, whereas the evidence before the Committee clearly demonstrates that employers abuse the right of entry system.

International obligations

6.181 Several witnesses suggested that the proposed right of entry provisions would breach Australia's obligations under the International Labour Organization's Freedom of Association and Protection of the Right to Organise Convention No. 87. This Convention provides that:

> Each member of the International Labour Organization for which this convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employees may freely exercise the right to organise.[93]

6.182 The International Centre for Trade Union Rights explained:

> …Australia is obliged in international law to take all necessary and appropriate measures to ensure that workers can freely exercise the right to organise…Australia is also bound in international law to ensure that its laws do not impair the right to organise…the 1996 Act already provides for a heavily regulated scheme of access to workplaces for union representatives.

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92 Submission No. 414, Shop Distributive and Allied Employees' Association, vol. 17, pp. 3680-1

93 Article 11. Australia ratified this convention on 28 February 1973.

> The ICTUR has submitted that the current provisions of the Act contravene the principle of freedom of association in a number of respects…The provisions of the Bill, however, are unbalanced and would result in an access regime which is excessively geared in favour of employers and occupiers, in particular those who wish to deny workers' representatives proper access. If passed, the Bill would see Australia commit serious breaches of its obligations concerning freedom of association in international law.[94]

6.183 Other witnesses agreed:

> Relevant obligations arise from ILO convention 87, the freedom of association and protection of the right to organise, and ILO convention 98, the right to organise and collective bargaining. These require that governments guarantee access by trade union representatives to workplaces so that they can communicate with workers in order to apprise them of the potential advantages of unionisation. The Workplace Relations Act limits this right to circumstances where a federal award is already in place and a union has members at the workplace…We say that the wording of section 285C is at odds with Australia's international obligations in relation to labour standards…the legislation seeks to go further in restricting the right of representation of workers on site.[95]

> The restriction on the right of entry provisions will seriously prejudice the basic concept of freedom of association in the workplace.[96]

6.184 The Department, on the other hand, did not address the possible implications of the proposed amendments for Australia's compliance with international obligations.

Conclusions

6.185 The Government uses rhetoric about protecting freedom of association where it suits the Government's objectives. However, the Government's rhetoric is clearly not matched by its actions in proposing further amendments to restrict right of entry by union officials. If employees are to be able to genuinely decide for themselves whether they want to be in a union, then they need to be able to communicate with the union to assess the union's services.

6.186 It is not sufficient to simply assume that employees will contact a union if they want to join a union, particularly in workplaces where union membership is actively discouraged:

> I am a clothing worker in a factory in Melbourne. Because my boss did not pay us any annual leave loading, we asked the union to come and help us in

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94 Submission No. 460, International Centre for Trade Union Rights, vol. 22, pp. 5565-72

95 Evidence, Mr Timothy Ferrari, Sydney, 26 October 1999, p. 356

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

> February this year. Our union organiser tried to get into our factory to see us but for several months the boss would not let her in. He locked the door. He would pretend he was not the boss and would not let Jenny in. The workers were too scared to go outside the factory to see Jenny. Many workers in my factory are scared to be in the union. When I joined the union the boss said to me, 'Why did you join the union? They can't help you. They just take your money.'…If they had to write a letter they would be scared about that. They would not understand what was written down. It is better for us to work together where we can speak in our own language…Many workers are too scared to join the union because if the boss finds out he might sack them. It is very difficult for workers who are scared and who do not speak much English and who do not know their rights to stand up for themselves. Please do not make it any more difficult for us.[97]

6.187 Labor Senators believe that the proposed amendments to the right of entry provisions do not take account of the reality facing many Australian employees – they may endanger their jobs by joining a union. Employers have far more power than employees in the workplace, and if the employer doesn't want union involvement, then this can effectively curtail their employees' freedom of association.

6.188 The principal object of the WR Act purports to 'ensur(e) freedom of association, including the rights of employees and employers to join an organisation or association of their choice..'[98] However, the actual provisions of the Act do not reflect this object, and the proposed Bill provisions would make matters even worse.

6.189 The WR Act should have provisions to overcome the power imbalance, to ensure that employees can exercise freedom of association and to ensure that we comply with our international obligations. Instead, the Government is proposing provisions to that will increase the ability of employers to intimidate their employees so that they will not join a union even if they want to.

Freedom of association

6.190 Schedule 14 proposes amendments to extend freedom of association provisions in Part XA of the Act. It extends existing prohibitions to cover a wider range of conduct in two significant areas, providing for:

- removal from certified agreements and awards provisions which encourage union membership, or which indicate support for unionism or non-unionism; and

- prohibition of the establishment or maintenance of a 'closed shop'.

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97 Evidence, Ms Huyen Duong, Sydney, 26 October 1999, p. 365

98 Paragraph 3(f).

Union encouragement

6.191 The Bill proposes to amend section 298Z to increase the range of objectionable provisions which are not allowed to be inserted in or to remain in awards or certified agreements to include among other things union encouragement clauses. The Minister In his second reading speech the Minister justified this amendment with the announcement that 'the current prohibition against clauses in agreements which directly require union preference will equally apply to indirect preference provisions such as union encouragement or discouragement clauses.'

6.192 The specific amendments proposed by the Bill are to amend sub-clause 298Z(5) and to insert two new sub-clauses 298Z(6) and (7) and the heading of the clause is amended from 'Removal of Preference Clauses from Awards and Certified Agreements' to 'Removal of Objectionable Provisions from Awards and Certified Agreements.'

6.193 Unions, union peak councils and some independent academic specialists strongly criticised the proposed amendment to section 298Z on a number of grounds including that the amendment would be inconsistent with Australia's international obligations to promote Freedom of Association through to assertions that the proposed amendments were nothing other than an attempt to frustrate union recruitment. Most employer organisations supported the proposed amendments.

6.194 Currently, section 298Z operates to require the Commission to remove from awards or certified agreements preference clauses and, objectionable provisions. Section 298Z(5) defines objectionable provisions to be those in awards or agreements that effectively require or permit any conduct that would contravene this part. In other words, an objectionable provision is a clause in an award or an agreement which requires or permits conduct which would be unlawful conduct under the existing Freedom of Association provisions of the Act.

6.195 The title of section 298Z being 'Removal of Preference Clauses from Awards and Certified Agreements', gives a clear indication as to how the existing clause will operate. Conduct by an employer which gives preference to either non-union members or union members against other employees, is clearly unlawful conduct under the Freedom of Association provisions. Therefore, a Preference Clause in an award or agreement is a clause which requires or permits conduct which would be unlawful under the Freedom of Association provisions. Labor Senators accept the logic of requiring the removal from awards or agreements of clauses which, if agreed to, would contravene the Freedom of Association provisions.

6.196 In relation to the proposed Bill, the question is whether the amendments to Sections 298Z seek to continue this logic, and whether amendments designed to remove from awards and certified agreements, or clauses which have the effect of permitting or requiring conduct, are in contravention of the Freedom of Association provisions. The amendments will require the removal from awards and certified agreements of clauses which deal with matters such as union encouragement and

discouragement where such action is not of itself in contravention of the freedom of association provisions of the Workplace Relations Act.

6.197 In other words, whilst it remains lawful for an employer or any person to encourage or discourage a person from being a member of a union, it will not be possible for a clause to be placed in an award or agreement which refers to that legal conduct.

6.198 The clearest explanation of the impact of the proposed changes to Section 298Z came from the Employment Advocate, in his evidence to the inquiry:

> My understanding of the changes that would be introduced by the Bill is that it would still not be unlawful to either encourage or discourage people to join a union. However, what it would do is prevent the inclusion in certified agreements of provisions designed to do that now.

6.199 When asked to express a personal view about the Bill, the Employment Advocate said,

> I think it is important that Freedom of Association laws are balanced. There is inherently nothing wrong with an employer encouraging or discouraging union membership if they do it in a proper way. There will sometimes be a bit of a grey area about what is proper. The principle, it seems to me, should be that someone should not be victimised or lose anything if they chose to do something different. But there is nothing inherently wrong about an employer saying to someone, for example, ' 'We think the Union is a good organisation. Most people here belong to it. We negotiate with the Union. We actually think it would be good for you and good for the company if you joined.' ' Inherently, in my view, there is nothing wrong with that. But when you get to the point of saying, explicitly or implicitly, ' 'But if you do not join, you will not get a promotion' ', or ' 'don't expect to have a long career here,' ' that is where it becomes a problem and that is what the Legislation broadly expresses now.

6.200 The employment Advocate also said,

> The Bill does remove the ability to put into a certified agreement a clause that says the employer will encourage union membership.

6.201 In another comment on the Bill, the Employment Advocate said,

> Leaving aside whether it is a good or bad thing, I am just saying it is not unlawful. I am not sure that you should try and make something like that unlawful.

6.202 From the evidence, the Bill does not seek to make unlawful the encouragement or discouragement of employees to join or not to join a union. Its purpose is to prevent clauses from being inserted in awards or agreements which refer to encouragement or discouragement of union membership. Employers and employees may continue to encourage or discourage union membership as they see fit, so long as

they do not have a clause in an award or agreement that refers to the legal activity of encouraging or discouraging union membership.

6.203 If the conduct of encouraging or discouraging union membership is not unlawful, then there appears no good reason for removing from awards or certified agreements, clauses which refer to legal conduct. The evidence presented in submissions from unions, union peak councils and some independent experts, suggests that amendments to Section 298Z of the Bill have the intention of attacking or frustrating the capacity of trade unions to organise in the workplace.

6.204 With regard to certified agreements, a common theme of union submissions was that these agreements represent the outcome of negotiations entered into by the employer and the union and the workers. If a union encouragement clause is placed in a certified agreement, and if that clause does nothing more then reflect conduct which is lawful under the Freedom of Association provisions, then there is no justification for the Government to outlaw them. Not only is union encouragement activity not unlawful under the current of Freedom of Association laws, but the Employment Advocate, who is charged with responsibility for enforcing the Freedom of Association provisions of the Workplace Relations Act, has made clear, that in his view, 'There is inherently nothing wrong with an employer encouraging or discouraging union membership, if they do it in a proper way.'

6.205 It is clear to Labor Senators that the proper way to encourage union membership is to have union encouragement clauses in certified agreements. If union encouragement is currently not unlawful, and if there is nothing inherently wrong with union encouragement activity then the question remains as to why is it necessary to remove union encouragement clauses from awards and certified agreements.

6.206 The Department, in its written submission, paragraph 32 of B(xi) said of union encouragement or discouragement clauses,

> Such statements can require the employer to pursue an active role in the encouragement or discouragement of union membership. Such action on the part of an employer will inevitably impact upon the freedom of choice of some employers… (sic).

6.207 Because the Bill does not deal with the actual conduct of employers in encouraging or discouraging union membership, the removal of union encouragement or discouragement clauses awards and certified agreements will not affect that conduct.

6.208 The real effect of removing union encouragement clauses from agreements, was clearly explained in the submission from the National Union of Workers:

> It is not unlawful for an employer to discourage to union membership. An employer needs no provision in an agreement or award to this On the other hand, in the absence of some explicit statement, it is very difficult for any positive view of union membership to be conveyed. It is true that there are

> certain action that, if proved, are unlawful. However, there are many ways in which discouragement or simply disapproval can be conveyed in a workplace.
>
> Such direct messages from an employer are powerful and effective. The removal of the ability for the parties to agree to provisions that encourage union membership leaves the field open to the anti-union message. In similar vein, the SDA in their written submission said,
>
> One purpose of Union encouragement clauses and clauses which are designed to express support for workers being members of trade unions, is to overcome a fear, whether rational or irrational, that many employees have that they will be disadvantaged in their employment if they do exercise their Freedom of Choice to join a trade unions.

6.209 Mr. Joe de Bruyn, National Secretary of the Shop, Distributive and Allied Employees Association said in his evidence to the inquiry,

> We had used union encouragement clauses in our enterprise agreements for a number of years. We have never viewed a union encouragement clause as either being a defacto preference provisions, or a provision which would in any way whatsoever act against workers who freely chose the SDA. In our view, a union encouragement clause creates an environment in which workers do not feel afraid to join a union. They realise the employer has no objection to them joining the union and so they are free to make up their own mind on the question of union membership.
>
> The real proof that union encouragement clauses are not defacto preference provisions or closed-shop arrangements is that we really have 100% membership in any individual store where the union has an encouragement clause in the enterprise agreement. Union encouragement clauses have never delivered to us full membership. The union encouragement clauses do no more than create an environment in which organisers and delegates can actively recruit union members, without the employees being fearful that they may be victimised or discriminated against by the employer if they choose to join the union.

6.210 While the stated intention of this Schedule is to prohibit awards and agreements from containing either union encouragement or discouragement clauses, it would appear that the real intention is to eliminate union encouragement clauses from certified agreements.

6.211 The Department supplied no information showing the prevalence of union encouragement clauses, or the existence of any union discouragement clauses in agreements, although it appears to be the case that, as the ACTU said,

> the application of the prohibition to provisions and agreements discouraging union membership is simply hypocrisy, …., because such agreements do not exist…

6.212 The political intent of the Schedule is far more clearly evident than its intended effect on workplace relations in a narrow sense. As the Secretary of the SDA explained to the Committee:

> What the Government seeks to do by its changes in relation to the so-called closed shop and union encouragement clauses provisions, is to pervert the entire concept of Freedom of Association and in fact, lead to an outcome where there is little real freedom to join unions and to where unions are marginalised from the Australian Industrial Relations system.

6.213 For this reason Labor Senators oppose these provisions in Schedule 14. They could not be expected to support legislation which promised a return to days long past when employers were able to exploit a workforce which was prevented from organising itself effectively to protect its interests. The clauses in this Schedule relating to union encouragement represent an incremental erosion of the rights of unionists.

Closed shops

6.214 The Bill proposes, through Item 34 of Schedule 14 to introduce a new Division 5A - Closed Shops into the Workplace Relations Act. This Division will introduce new Sections 298SA and 298SB which prohibit the existence of closed shops and define what is meant by a closed shop.

6.215 None of the unions or union peak councils appearing before the Committee expressed any support for the concept of a closed shop which involves coercive conduct against employees to require them to join a union. Evidence given to the Committee indicated a reasonable unanimity of views between unions, employers and the Government, namely, that the concept of forced recruitment or forced membership in a union is a matter which is not supported in the Australian industrial relations community.

6.216 Notwithstanding this, the submissions from unions, peak councils and a number of independent experts severely criticised the approach adopted by the Minister in introducing Division 5A into Part XA of the Act. In the light of this consensus, Labor Senators are strongly of the view that a prohibition is unnecessary, an opinion widely shared by representatives of unions, peak employer bodies and independent academic specialists who appeared before the Committee.

6.217 The record shows that proposed closed shop provisions received little unconditional support from witnesses and submissions to the Committee, even from those groups and individuals who supported the legislation in general. Some employer groups were concerned by the reverse onus of proof created by proposed subsection 298VA(4). This subsection would provide that if a person has been found to have breached the freedom of association provisions relating to coercion to join and industrial association, then it is presumed that the person was engaged in conduct with intent to establish or maintain a closed shop, or was knowingly concerned in the establishment or maintenance of a closed shop, unless the person can prove otherwise.

> ACCI has always had concerns about the drastic step of reversing the onus of proof and placing it on the employer, and reiterates these concerns, although it is easy to make too much of the point in this case because the extent to which it will operate is strictly limited by a range of safeguards in proposed s.298VA(4).[99]
>
> …this reverse onus creates a situation where it is very difficult for persons to successfully defend applications for interim injunctions, where the test for such injunctions are that there is a serious issue to be tried and balance of convenience. Once an interim injunction is made it can remain in place for many months and detrimentally impact on the injuncted party to the extent there is little choice except to settle the matter.[100]

6.218 The Australian Industry Group opposed the provisions altogether:

> The word 'maintain' could refer to passive situation of allowing a situation to continue. This could mean that an offence may be committed where an employer allows 60% of employees in a particular group of employees to continue to belong to a union in circumstances where it may be argued that it is reasonably likely that the employer may prejudice an employee's employment for not being a member of the union…These provisions are too obscure and uncertain in relying on a hypothetical assumption so as to constitute conduct that is proscribed by the Act. When coupled with the presumptions and consequent change in onus in enforcement proceedings…the uncertainty is magnified,[101]

6.219 An academic specialist in industrial relations made a similar point:

> There seems to be little merit in these provisions. Protections against compulsory unionism already exist in the Act. Moreover, the 60 per cent union density threshold that contributes to the presumption of a closed shop has an element of bizarreness to it…it would make just as much sense to set a 40 per cent density threshold, below which there exists a prima facie case that an employer is operating a non-union shop. Absent of such symmetry, the provisions would seem to be intended no to promote freedom of association and free choice…but to shift the balance of power.[102]

6.220 A union submission pointed to the absurdity of the provision in these terms:

> The IEU is concerned about the proposed provisions relating to closed shops, in particular with the ludicrous proposal that a workplace with 60%

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99 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3366; See also Submission No. 381, Australian Mines and Metals Association Inc., vol. 13, p. 2854 which supported ACCI's comments regarding reverse onus of proof.

100 Submission No. 375, Business Council of Australia, vol. 12, p. 2644

101 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, pp. 3119-20

102 Submission No. 386, Dr David Peetz, vol. 13, p. 2932

> union membership could be construed as a closed shop…If tests around whether membership was an express or implied condition of (employment) could be met by employers encouraging union membership by making forms available, inviting the union to speak at staff meetings or induction days and offering pay roll deduction facilities, then many non government education institutions could be deemed to be closed shops. Such a situation would be preposterous.[103]

6.221 The Government's black and white view of industrial relations fails to take into account that most employers are worldly–wise in their recognition of the importance of industrial harmony. The closed shop provisions represent the conscription of business in an ideological war against unions. This factor is alluded to in the submission from the Queensland Government:

> A more fundamental concern is that these provisions make an assumption that a high level of union membership is prima facie evidence of a closed shop. They fail to acknowledge that in a number of workplaces both employers and employees recognise the benefits of a highly unionised workforce. Rather than promoting an artificial conception of unions as 'third parties', it should be recognised that unions can and do play an integral role at the workplace and industry level to promote improvements in productivity, innovation, employment and equity outcomes. To suggest otherwise is purely an ideological viewpoint.[104]

6.222 The last comment also reflected some genuine confusion about how the provisions would be implemented by the Government. It was unclear whether the Office of the Employment Advocate would commence investigations of workplaces where there was evidence of more than 60% unionism, or whether this would not occur until there was some additional evidence that a closed shop was being established or maintained at the workplace.

6.223 Further, there were some concerns about how the Employment Advocate would establish the level of union membership in a workplace that was under investigation:

> …to police this, somebody, presumably government inspectors or perhaps employers, would have to compel workers to indicate whether or not they were members of a union. How else can you obtain the evidence that is needed to establish the so-called 60 per cent rule? We would have the spectre of government inspectors…compelling workers to provide evidence of their union status. I put to you: what if a worker says that their union membership is their own private business…how does an employer force workers out of the union if more than 60 per cent in a particular workplace happen to be in the union? Does the employer sack unionists and only hire non-unionists to lower the figure below the 60 per cent? Obviously the sort

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103 Submission No. 416, Independent Education Union of Australia, vol. 18, pp. 4306-7

104 Submission No. 473, Queensland Government, vol. 23, p. 5981

> of stuff we are talking about here is laughable. I say to you it is not put forward presumably as a joke. I say it is a grave abuse of human rights if it proceeds as intended.[105]
>
> At Bunnings, we have to work hard to enrol any employees into the union…for Ted to have achieved 95 per cent union membership is a real achievement which owes nothing to any activities of the company and owes everything to Ted and to his other delegates working on the shop floor… The closed shop provisions of the Bill, if they are enacted, could trigger unwanted, unwarranted and unnecessary intervention and interference by the Employment Advocate in that Bunnings store in Adelaide, thus significantly increase the difficulties imposed on Ted in exercising his legitimate functions as a delegate attempting to recruit and maintain membership levels in his store. Workers who had freely agreed to join the union would feel intimidated into thinking they had done something wrong and would be tempted to resign from the union to avoid further interviews and hassles from the Employment Advocate.[106]

6.224 The fact that there would be no converse presumption that a non-union shop existed if union membership was below a certain rate was raised by several witnesses as an indication that the provisions were, in reality, designed to prevent effective unions from organising:

> Closed shops: this provision is a terrific one! I do not know how a place which could have 61 per cent union membership could possibly be called a closed shop. Obviously, it is not—39 per cent of workers there are not in the union. The provision could possibly be theoretically justified if there was a converse proposition, so that if a workplace did not have 40 per cent union members then the same presumptions applied. You could then intellectually justify that sort of measure. But, without the converse proposition, the measure has to be seen for what it is—that is, an attack on workers' ability to be in unions.[107]

6.225 Another way of looking at Section 298SA is to see it not so much as a provision to secure convictions in the courts, but as a law designed to create an environment in which the investigative processes themselves become anti-union and act as a deterrent on union membership.

6.226 Some of the flavour of what may come is to be gleaned from evidence from the SDA:

> A feature of this definitional approach is that it will be simple and easy for anti-unionists, e.g. the Government, the Office of the Employment Advocate, or agent provocateurs, to make an allegation that the second part

105 Evidence, Mr John Sutton, Sydney, 22 October 1999, p. 272

106 Evidence, Mr Joseph de Bruyn, Brisbane, 27 October 1999, pp. 422-3

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

> of the definition of a Closed Shop exists. Once an allegation is made in relation to a workplace with 60% union membership, investigations will be launched by the Office of the Employment Advocate and all sorts of pressures will be placed on employers and workers to reduce the level of membership.

6.227 In the near unanimous view of unions, union peak councils and independent experts, it is alleged that the prime purpose of the proposed definition of a closed shop is to enable an investigation to occur in relation to a particular workplace. The clear emphasis in the respective union submissions is that the definition of closed shop will enable investigations to take place which will have the real effect of inhibiting or preventing legitimate union activity aimed at recruitment of employees into a union.

6.228 Labor Senators note Government assurances that even very high percentages of union membership in a workplace will not attract the attention of the Employment Advocate in the absence of other evidence that a closed shop is being maintained. Their objection to the closed shop provisions are based on the trigger mechanisms through which an investigation of an alleged closed shop will occur. It is clear, in view of Labor Senators, that these trigger mechanisms will enable investigations to take place at workplaces which merely have a 60 per cent union density level, which is quite normal in many industries. Even if such investigations do not lead to proceedings before a court, given the difficulty of proving the required elements for a contravention of proposed Section 298SA, it is clear that the mere undertaking of wholesale, wide-ranging investigations into 'alleged' closed shops, will, in the opinion of Labor Senators, act as a significant deterrent to existing levels of unionisation and to recruitment of employees into unions.

6.229 Given the opposition of many employers to these provisions, it is unlikely that the Employment Advocate will receive much encouragement to launch campaigns for union reduction in large and well-managed firms. The concern of Labor Senators is that unscrupulous employers will use the 60 per cent membership clause to incite an investigation for the purpose of intimidating unionists and potential unionists. They have no confidence that the Employment Advocate would not collude in this practice. If this occurs the law will be seen to be highly discriminatory in its application, and for this reason alone deserves condemnation as a potential legislative trigger for perverting the course of justice.

6.230 The Ministers 'last resort' direction in relation to the Department prosecuting award breaches contrasts with the intrusive investigative style proposed here.

Conclusion

6.231 Labor Senators believe there is potential for serious industrial relations consequences resulting from these intrusive investigatory visits. The whole thrust of the proposals contained in Schedule 14 is highly unlikely to be provocative and so far as the majority of employers is concerned, unnecessarily burdensome and contrary to good personal management practices.