
**SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE**

# Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999

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# TERMS OF REFERENCE

a) the impact of the *Workplace Relations Act 1996*, including (but not limited to):

   i. whether the principal objects of the Act (particularly paragraphs 3(j) and (k)) have been fulfilled in practice;

   ii. the impact on wages, employment, productivity and industrial disputation levels;

   iii. the impact on job security, unfair dismissals, job prospects, the protection of employee entitlements and conditions, and whether these can be improved;

   iv. the impact on the balance between work and family responsibilities, and whether these can be improved;

   v. the balance provided between the roles, rights and obligations of employers (including small business), employees and their respective organisations;

   vi. the powers, standing and procedures of the Australian Industrial Relations Commission, the Office of the Employment Advocate and the Industrial Registrar;

   vii. whether provisions to promote industrial democracy and employee ownership can be enhanced; and

b) in light of the committee's findings in relation to the matters listed in paragraph (a), the provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and all relevant matters related thereto.

# PREFACE

The Committee received over 500 submissions and conducted eight public hearings. While the number of submissions is only about one-third of the number received during the 1996 inquiry into the Workplace Relations Act, they nevertheless followed the same trend.

A Senate inquiry into legislation tends to attract submissions from those people or organisations who are opposed to the legislation, as those who are supportive generally see no need to make submissions in relation to a Bill which has passed in the House of Representatives and which they support.

This inquiry has been no exception, and an orchestrated campaign by unions saw many like-minded submissions, from unions and other individuals and organisations who are opposed to the passage of the legislation, being made to the Committee.

An opportunity was given to many of those who submitted similar evidence to speak to their submissions at the public hearings.

In preparing this report the Committee has attempted to put in perspective the view of those who supported, and those who opposed, the legislation.

The full transcript of the public hearings, and all of the submissions (other than confidential submissions) are available to the public.

Senator Alan Ferguson
Chair

# INTRODUCTION

## THE WORKPLACE RELATIONS LEGISLATION AMENDMENT (MORE JOBS, BETTER PAY) BILL 1999

### Progress of the Bill

On 11 August 1999 the Senate referred to the Committee for Employment, Workplace Relations, Small Business and Education for inquiry, the provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 which had been introduced to the House of Representatives on 30 June 1999. On 29 September 1999 the Government successfully moved 52 amendments to the Bill in the Consideration in Detail stage of debate in the House. The Bill passed its third reading in the House on this day and the Bill was introduced to the Senate on 14 October 1999. Further consideration of the second reading of the Bill was adjourned to the first sitting day of the 1999 summer sittings.

### Workplace relations reform – the next phase

As described in Chapter 1, the provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, builds on the changes introduced through the *Workplace Relations and Other Legislation Act 1996* and are in accordance with the policy directions outlined in the Government's pre-election statement on industrial relations – *More Jobs, Better Pay* released in September 1998. These changes continue the evolutionary process toward a more flexible and responsive industrial relations system in Australia.

The Australian economy has enjoyed a healthy rate of growth in recent years despite being faced with a difficult international economic environment throughout 1998. Buoyant economic conditions provide ideal opportunities to implement reform measures which help the economy adjust and adapt to changing economic circumstances. The 1996 workplace relations reforms were an important and necessary component of this Government's overall reform process: one intended to ensure that Australian businesses and Australian workers are able to reap the benefits of more stable, long-term economic growth.

In preparation for the drafting of the Bill, the Government prepared and circulated a number of discussion papers in 1998 and early 1999, inviting interested parties to debate and make comment on the proposals. The Government also took into account reports into and statistics on the operation of the workplace relations' system and current provisions and formulated amendments to improve the operational aspects of the legislation. Consultation included discussions in the National Labour Consultative Council, its Committee on Industrial Legislation and meetings with business, community, church and women's groups.

**The provisions of the Bill**

The main aim of the amendments to the *Workplace Relations and Other Legislation Act 1996* (henceforth the WR Act) contained in the Bill, as summarised in the Explanatory Memorandum, are to:

- reinforce the new workplace relations framework introduced by the *Workplace Relations and Other Legislation Amendment Act 1996* by amending the Principal object of the Act to emphasise the basic safety net role of awards, choice as to jurisdiction, the role of the courts and Commission in stopping or preventing unprotected industrial action (Schedule 1);
- change the name of the Australian Industrial Relations Commission to the Australian Workplace Relations Commission and revise its structure, change the name of the Australian Industrial Registry to the Australian Workplace Relations Registry and increase the focus of both the Commission and the Registry on improving access to their services by employers, employees and organisations (Schedule 2);
- establish a distinction between voluntary and compulsory conciliation by the Commission, with compulsory conciliation being available only in relation to matters where arbitration powers may be exercised. Voluntary conciliation would be available in respect of a wider range of matters on payment of a fee. (Schedule 4);
- provide for the voluntary use of mediation in industrial disputes for use as an alternative or supplement to the processes of the Australian Workplace Relations Commission and provide for a national accreditation scheme for workplace relations mediators and create the role of the Mediation Adviser to oversee and facilitate the use of mediation to resolve workplace disputes (Schedule 5);
- reinforce the role of awards as a safety net of basic minimum entitlements by amending the principal object and the objects of Part VI of the WR Act, by further limiting the allowable award matters and encouraging the acceleration of the award simplification process and by strengthening the presumption in favour of existing forms of regulation and introduce new requirements in relation to logs of claims (Schedule 6);
- reform the termination of employment provisions to ease the burden that unfair dismissal applications impose on employers, reinforce disincentives to speculative and unmeritorious unfair dismissal claims, and introduce greater rigour into processing by the Australian Workplace Relations Commission of unfair dismissal applications (Schedule 7);
- streamline the requirements for certification of agreements, including allowing applications to be made to the Workplace Relations Registrar for certification of agreements in cases where there is no need for scrutiny by the Australian Workplace Relations Commission (Schedule 8);

- simplify the processes for the making and approval of AWAs by consolidating the existing assessment of 'filing requirements' and 'approval requirements' into a one step approval process, and by giving parties access to a streamlined approval process for AWAs providing remuneration in excess of $68000 per year (Schedule 9)
- clarify rights and responsibilities relating to industrial action by distinguishing more clearly between protected and unprotected action, requiring protected industrial action to be preceded by secret ballots, providing access to cooling off periods and strengthening the remedies against unlawful industrial action and clarifying the 'strike pay' provisions of the WR Act (Schedules 1, 11 and 12);
- reform the right of entry provisions of the WR Act consistent with the principle that unions should act as representatives of their members and be accountable to those members, and not act as uninvited quasi-inspectors at the workplace (Schedule 13).
- strengthen the operation of freedom of association provisions of the WR Act by extending the existing prohibitions to cover a broader range of conduct and prohibited reasons and by prohibiting the inclusion in certified agreements and awards of provisions which encourage or discourage union membership, or which indicate support for unionism or non-unionism (Schedule 14);
- clarify the operation of provisions of the Act which preserve aspects of the previous Victorian system and provide for the expanded operation in Victoria of provisions contained in other Parts of the Act (Schedule 15); and
- repeal the provisions that allow the Federal Court to vary or set aside contracts made with independent contractors (Schedule 16).

Schedules 3, 10, 17 and 18 to the Bill introduce a range of consequential and technical amendments.

*Government Amendments to the Bill*

On 29 September the Government successfully moved 52 amendments to the Bill. In introducing these amendments to the House of Representatives the Minister for Employment, Workplace Relations and Small Business stated that:

> [m]ost of the amendments are technical in character, designed to ensure that the provisions of the Bill operate in the manner intended. The remaining amendments result from consultations with a range of groups, including employer and employee representatives, women's groups, church groups, legal practitioners and industrial advocates.[1]

1 The Hon. Peter Reith MP, *House of Representatives Hansard*, 29 July 1999, p. 8265

## The Committee's inquiry

The terms of reference for the inquiry require the Committee not only to consider the provisions of the new legislation but also the operation of the WR Act. The Committee received 542 written submissions including a significant proportion from private citizens, mostly from Victoria. The Committee also conducted eight public hearings, in four states where it heard evidence from over 70 witness groups comprised of employer organisations, unions, academics and research organisations, government departments and statutory bodies, community groups, legal organisations, and individuals.

Much of the evidence received by the Committee on both the operation of the WR Act and the potential impacts of the provisions contained in the current Bill was unfavourable. Union groups in particular, argued that recent changes to industrial relations law in Australia has reduced the working conditions of the average Australian worker. They claimed that this had resulted in increased insecurity of employment, greater inequality in the distribution of income, increased difficulties in balancing both family and employment responsibilities and a shift to a more adversarial employment relationship. Individuals who wrote to the Committee were concerned about the potential for a reduction of wages and other employment conditions as a result of the new legislation. Some stated that they were not comfortable with individual negotiations with their employer and preferred collective bargaining arrangements. As in all cases when the Senate refers Bills to its standing committees, critics of the legislation have a much more direct intent in voicing their dissatisfaction than those who are advantaged by the new measures, or who are unaffected.

Other witnesses, including the business community supported the Government's industrial relations reform agenda and highlighted to the Committee the importance of having a progressive and flexible industrial relations system. It was argued that the WR Act was an important step in ensuring that Australia would be able to compete more effectively in a global market place and that the amendments contained in the current Bill were a further significant development. Some witnesses, while generally happy with the broad direction of the Government's reforms, were of the view that they did not go far enough, claiming that further deregulation would be required if Australia was to substantially reduce its structural unemployment rate.

As this report makes clear, this Bill can be regarded as a step in a policy evolution toward a decentralised and deregulated arrangement for industrial relations management. It is an evolution which began before the coalition were returned to power in 1996 and which has been accelerated since. This policy is consistent with other elements of government policy which are intended to promote growth and prosperity across the whole productive sector in Australia, and should be seen as complementing other economic reform measures.

The Government party majority on the Committee commends this Bill to the Senate.

# CHAPTER 1

# OVERVIEW

## Australian Workplace Relations in Context

1.1 A comprehensive commentary on the development of Australian employment law and practice is available in the earlier report of the Senate Economics References Committee, tabled in the Senate before the introduction of the Workplace Relations Amendment and Other Legislation Bill in 1996.[1]

*An evolutionary set of reforms?*

1.2 Evidence provided to the Committee during the course of public hearings indicates that there is a divergence of views about the nature of this Bill, and whether the reforms it contains are evolutionary, or broader in scope.

1.3 The Government describes the Bill as part of an evolutionary set of reforms, a further step in an incremental shift from centralised regulation of employment to a deregulated labour market environment.

1.4 Evidence presented to the Committee by employer groups supports this view. The Australian Chamber of Commerce and Industry, in emphasising the moderate nature of the Bill's amendments, notes that that there is scope for considerably more fundamental labour market reform:

> Both the 1996 Bill and this current Bill were essentially evolutionary sets of amendments. They retained the award system, they retained the Industrial Relations Commission and they retained all the existing features of the labour relations system. As such, our policy does not involve that. It does involve major substantial changes to the existing key features of the labour market. So those comments apply both to the 1996 Bill and to this Bill…We are dealing here with an evolutionary, moderate Bill that makes amendments and refinements relating to existing labour market institutions, rather than making wholesale radical change to them.[2]

1.5 The Business Council of Australia also supports this view:

> We see the Bill as a progressive evolutionary step after the 1996 workplace relations reforms…We believe that there are no grounds for consideration of a policy shift back to a more highly regulated and

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1 *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, Report of the Senate Economics References Committee, August 1996, Appendix 4

2 Evidence, Mr Reginald Hamilton, Canberra, 1 October 1999, pp. 35-6

> centralised system. Rather, looking to the future, the main game should be encouraging high performing workplaces with more and more employees negotiating workplace agreements…This Bill is primarily addressing problems exposed since the passage of the 1996 amendments.[3]

1.6 Unions and employee associations reject the 'evolutionary' description of the Bill. The Secretary of the Victorian Trades Hall Council made the following comments:

> We say that indeed this package of legislation is not, as claimed by the minister in his second reading speech, a matter of evolution. We believe you do not need a 300-page Bill to tinker with legislation. We believe this is fundamental change that is proposed and it is, in our view, to take workers in the industrial system backwards in terms of regulation.[4]

1.7 Given this divergence of views about the significance of the Bill's provisions, it is necessary to place the Bill in its recent historical context to shed further light on the issue.

*Recent historical context*

1.8 In the last 20 years, Australian wage fixation has moved incrementally from a centralised model of awarding national wage increases to match increases in the cost of living, to a much more devolved system, where wages are primarily set at the workplace level, based on improvements in productivity.

1.9 This shift first started to occur in 1987, with the Commission's introduction of the Restructuring and Efficiency Principle[5], was reinforced (albeit at an industry level) by the Structural Efficiency Principle[6] which accelerated following the development of the Enterprise Bargaining Principle in 1991[7].

1.10 From this time, the Commission's decisions and the Government's legislative reforms (most significantly through the *Industrial Relations Reform Act 1993* and the *Workplace Relations and Other Legislation Amendment Act 1996*) have facilitated this shift in focus from national and industry level wage fixation to workplace level wage fixation. These changes were made necessary by structural changes to the Australian economy, which have required Australian businesses to become more internationally competitive.

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3 Evidence, Mr David Buckingham, Melbourne, 7 October 1999, p. 103

4 Evidence, Mr Leigh Hubbard, Melbourne, 7 October 1999, p. 63

5 National Wage Case Decision, Full Bench, 10 March 1987, Print G6800

6 National Wage Case Decision, Full Bench, 12 August 1988, Print H4000

7 National Wage Case Decision, Full Bench, 30 October 1991, Print K0300

*Workplace Relations Act 1996*

1.11 Following the Coalition's election in March 1996, the Government introduced the *Workplace Relations and Other Legislation Amendment Act 1996*, which renamed and significantly reformed the *Industrial Relations Act 1988*. The amendments focused on achieving wage increases linked to productivity at the workplace level. The new name of the Act reflected this, as did new provisions relating to negotiating and certifying agreements. The Act also introduced a new form of agreement, Australian Workplace Agreements, which could be made between an employer and an individual employee.

1.12 Two other significant reforms were to restrict the Commission's ability to make awards in relation to matters outside a core of 20 'allowable award matters' set out in section 89A, and the introduction of provisions requiring the Commission to review and simplify awards to remove all provisions falling outside these 'allowable award matters' after a transitional period of 18 months. These provisions achieved what the Commission had decided it could not do itself under the former legislation, this is, limit the contents of the award safety net to a set of core minimum conditions.[8]

1.13 The role of the Commission, and that of its awards, have developed to reflect the increasing emphasis on setting wages and conditions by agreement at the workplace. It was inevitable that the scope for arbitration by the Commission would be reduced in line with these changes, and the Commission itself had recognised this earlier.[9]

1.14 The limitation of the Commission's arbitral powers to 'allowable award matters' represents a logical development from the introduction of the concept of awards as a safety net of minimum wages and conditions in 1994. If parties are to be encouraged to set pay and conditions at the workplace level, then it is necessary to remove from awards the matters on which parties are expected to bargain. Matters left in awards are those appropriate to the award safety net, as defined by legislation, and by the Commission in its interpretation of section 89A of the *Workplace Relations and Other Legislation Amendment Act 1996*.

1.15 Award simplification also represents a logical development after the earlier award review requirements established under section 150A of the *Industrial Relations Act 1988*.

*Conclusion*

1.16 The detail of the Bill's provisions needs to be considered in the context of this background. The Bill, and in particular provisions of the Bill that are designed to:

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8 Safety Net Adjustment and Review Decision, Full Bench, 21 September 1994, Print L5300, p. 39

9 National Wage Case Decision, Full Bench, 30 October 1991, Print K0300

- encourage employers and employees to reach employment agreements that best suit the needs of their enterprises in terms of flexibility and productivity;
- reduce the reliance of employers and employees on the Commission to determine wages and conditions; and
- reinforce the safety net role of awards and simplify award provisions,

can be described as evolutionary steps, continuing the progressive developments of the last 20 years.

# CHAPTER 2

# OBJECTS OF THE WORKPLACE RELATIONS ACT 1996

2.1 Part A of the Committee's terms of reference required it to examine the impact of the Workplace Relations Act 1996. As part of this the Committee was asked to assess whether the principal objects of the Act (particularly paragraphs 3(j) and (k)) have been fulfilled in practice.

2.2 Section 3 of the *Workplace Relations Act 1996* outlines the principal object of the Act which is to provide a framework for cooperative workplace relations which promotes the prosperity and welfare of the people of Australia. This chapter reports on the evidence presented to the Committee on the performance of the WR Act against a range of key objectives. It should be noted, however, that some of these received little if any attention in submissions or in oral evidence to the inquiry.

**Encouraging the pursuit of high employment growth, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market.**

2.3 The Committee was presented with various views on the impact of the Workplace Relations Act (WR Act) on the Australian economy. These views ranged from the view expressed predominantly by unions that the WR Act has had no discernible impact on economic growth and employment, to the employer groups and some economic research organisations who argued that these changes had fostered significant productivity improvements and that this was important for Australia's competitiveness both domestically and internationally. In addition were the views of some academic witnesses who suggested that it was simply too early to determine the overall impact on the economy.

2.4 Australia has enjoyed a relatively sustained period of economic growth since the recession of the early 1990s. The economic indicators point to a high average rate of growth in GDP, amongst the highest in the OECD, particularly in 1997-98.[1] The economic recovery from this recession has been compared to other economic recoveries, in particular that following the recession of 1982-83. The current recovery is noteworthy in a number of respects. The recovery from this latest recession was not as rapid as was observed in the mid 1980s and certainly did not produce the same rates of employment growth in its initial stages. The ACTU notes in particular the relatively slow growth of full-time employment.[2] However growth has continued at a relatively steady pace, and has included growth in full-time employment. Associated with this has been a gradual decline in the unemployment rate, with more significant

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1 OECD, *Economic Outlook – Preliminary Edition, November 1999*, OECD, Paris, p. 57

2 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4385

falls in the last year, bringing the rate of unemployment to its lowest levels since the beginning of the decade.[3]

2.5 The Committee has considered the effect of the introduction of the WR Act in 1996 on economic outcomes. While the Committee heard a number of differing opinions on the economic impact of the WR Act there was little in the way of research presented which could illuminate the issue. The area most likely to yield some information is the change in labour productivity, an area which the WR Act was directly attempting to improve. Data on labour productivity shows that there have been significant improvements over the last 10 years and that in the last 2 years there has been a particularly strong improvement. Australian Business Limited had the following comment to make with respect to productivity improvements:

> There is no disputing that Australia's recent impressive productivity performance is largely a result of microeconomic reform, of which labour market reform has been one of, if not the most significant aspect.[4]

2.6 The Business Council of Australia, highlighted in its submission the difficulty of quantifying the direct impact of the WR Act on economic outcomes but suggested that:

> At a time when productivity and employment growth is strong and inflation, interest rates and industrial dispute incidences are at low levels there is no reason not to assume that the reforms to the Australian workplace relations system introduced by the 1996 legislation have contributed to these outcomes.[5]

2.7 Improving living standards is also an objective. This area was contentious with arguments put to the Committee that while the living standards for some have been improved under the WR Act, those in weaker bargaining positions have not enjoyed the same increase.

2.8 Evidence was presented to the Committee of growing levels of income inequality, both between the highest and lowest paid as well as between men and women. However, while the gap may have been increasing, it was also the case that average real wages for all earnings levels has increased in recent years. While some have been doing better than others, even the low paid have received the benefit of real wages increases. The growth in real wages in part reflects the low inflation environment that has been maintained in recent times. A flexible labour market, inter alia, helps to restrain labour costs and therefore reduces the pressure on business to increase prices for goods and services.

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3 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2231

4 Submission No. 457, Australian Business Limited, vol. 22, p. 5401

5 Submission No. 375, Business Council of Australia, vol. 12, p. 2569

2.9 Any gap between male and female earning may reflect a number of factors. One witness suggested that in highly feminised industries, that is those with a high proportion of female employees such as nursing, a greater proportion of employees were reliant on the award rather than certified agreements and therefore wage increases were usually much lower than those negotiated under certified agreements.[6] The Women for Workplace Justice Coalition stated that:

> Women are not in a job long enough to participate in the negotiation of a certified agreement or Australian Workplace Agreement…
>
> Where women are concentrated in less secure employment, such as casual or part time employment, they may feel less able to negotiate with their employer over the terms of a certified agreement.
>
> [Women] will rarely have the bargaining power to contradict what their employer wants in a certified agreement of Australian Workplace Agreement.[7]

2.10 A counter argument put to the Committee was that women were more likely to trade off large pay increases for other conditions of employment which allowed them to better balance family and work responsibilities.

2.11 The Committee notes that the ACTU is pleased with the current economic outcomes and conceded that the WR Act 'has not made anything worse' and is, at least partially, the cause of these positive economic outcomes.

2.12 In addressing economic considerations relating to the WR Act the ACTU said:

> …it is true that the economic parameters are very good and we are very proud of that…but…all these outcomes…low inflation rates and good GDP growth are not something that has just happened because of the Act…these trends of low inflation and high levels of productivity are not just simply the outcomes of the 1996 legislation. The 1996 legislation has not made anything worse…[8]

2.13 Whilst it is difficult to isolate the impact of the WR Act on overall economic performance, the Committee believes that the WR Act has been an important component in restructuring the Australian economy, creating a foundation for continuing economic growth and ensuring Australia remains internationally competitive.

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6 Submission No. 520, New South Wales Government, vol. 26, pp. 6925-6

7 Submission No. 441, Women for Workplace Justice, vol. 21, pp. 5180-81

8 Evidence, Ms Jenny George, Canberra, 1 October 1999, p. 26

**Ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employers and employees at the workplace or enterprise level**

2.14 There is little doubt that the WR Act has achieved this objective which has, in principle, received the support of both political parties, trade unions and employers over the last ten years. These changes were in response to the recognition that to be internationally competitive, workplaces needed to be flexible and a large part of this was to allow individual workplaces the discretion to determine the most appropriate working arrangements for their circumstances. The WR Act continued this evolutionary path, a key component of which was the introduction of a greater degree of choice with respect to the types of agreements that could be entered into by employers and employees, and the simplification of awards.

2.15 The provision of a formal option for individualised agreement making was generally accepted as a positive aspect of the legislation. More concern was raised about the use rather than the principle of AWAs. The rationale for the simplification of awards is to retain them to provide a safety net of enforceable minimum wages and conditions. Thereby encouraging employers and employees to enter into agreements. Simplifying awards involved removing certain award provisions that were either covered by other legislation or were deemed to be issues better determined at the workplace level. It was the latter which generated the most comment.

2.16 Employer groups who made submissions to the Committee believed the changes to agreement making were beneficial to productivity.[9] The NSW Minerals Council suggested that the WR Act had been essential in the restructuring of the coal industry and highlighted in particular the benefits of AWAs and having awards focused on providing a safety net only.

> The passage of the Workplace Relations Act (together with the consequential measures, particularly section 150A overhaul of awards) has been arguably the most important policy initiative for the coal industry in terms of its reform and restructuring since the 1940s.[10]

With respect to award simplification the New South Wales Minerals Council said:

> In May 1998, the Australian Industrial Relations Commission bought down its decision in relation to non allowable matters in the coal industry awards. This decision removed key provisions which had been major impediments to the efficiency of mining operations including seniority and preference to unionists.

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9 See for instance submission No. 267, Master Builders Australia Inc., vol. 6, p. 1231; Submission No. 375, Business Council of Australia, vol. 12, pp. 2577-8; Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3408

10 Submission No. 497, New South Wales Minerals Council Limited, vol. 24, p. 6363

> The removal of seniority from awards has been a significant milestone. Seniority and the associated preference to retrenched workers provision had had a pervading influence on the coal industry, impacting on recruitment, retrenchment, training, shift allocation and leave allocation processes.[11]

2.17 Some employer organisations believed that unions were using pattern bargaining to subvert the intention of the legislation which was to allow for the establishment of agreements at the enterprise or workplace level. They therefore supported the proposed changes in the current Bill to prevent pattern bargaining occurring. Others believed that industry wide agreements were logical in some circumstances and promoted their use.[12]

**Enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, wether or not that form is provided for by this Act.**

2.18 The WR Act introduced a much wider range of choice in agreements than was previously available in Australia's industrial relations system, allowing employers and employees to choose a form of agreement which best suits their individual circumstances. The WR Act provides for individual agreements in the form of AWAs as well as collective agreements which can be either negotiated between a union and an employer or directly with employees. Multi-employer agreements have also been available under sections 170LB(2) and 170LC.

2.19 The Department of Employment, Workplace Relations and Small Business provided the Committee with information on the take-up of the alternative forms of agreement. The statistics reveal that while certified agreements are the dominant form of agreement, the split between union and non-union certified agreements as well as the growth in AWAs and continued use of multiple employer agreements suggests that employers and employees have embraced the increased choice in agreement making.[13]

2.20 The Queensland Branch of the Australian Workers' Union commented in its submission to the inquiry on the requirements under section 170LC of the WR Act for establishing a multiple-business agreement. They argued that requiring certification by a Full Bench of the Commission, which must only approve the agreement if it is considered to be in the public interest, was cumbersome and a deterrent to many who may wish to institute a multiple-employer agreement.[14] The data presented by the Department of Employment, Workplace Relations and Small Business, indicates that 14 agreements were certified under this provision between 1 January 1997 and 30

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11 *ibid.*, pp. 6363-4

12 See Submission No. 267, Master Builders Australia Inc., vol. 6, pp. 1231-2; Submission No. 392, Australian Industry Group and the Engineering Employers' Association of South Australia, vol. 14, pp. 3096-7

13 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2081

14 Submission No. 506, The Australian Workers' Union Queensland Branch, vol. 25, p. 6457

June 1999 covering 761 employers. The data also shows, however, that while there is little difference in the total number of multi-employer agreements certified under the WR Act compared to the previous legislation, there are around three times as many employers who are party to such agreements.[15]

**Providing the means:**
**(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level; and**
**(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment.**

2.21 It was put to the Committee that there were sectors of the economy that were dependent on awards, particularly in the TCF and manufacturing sectors, despite the availability of enterprise bargaining since 1991. The ACTU argued that employees had lost significant award entitlements as a result of the award simplification process, particularly in workplaces where no certified agreements existed.[16]

2.22 The submission from the Department of Employment, Workplace Relations and Small Business drew the attention of the Committee to the Award Simplification Decision of the Full Bench of the Commission on 23 December as evidence of the fact that award simplification is not about reducing entitlements. The Department stated that the only way in which the level of an award entitlement can be reviewed under award simplification is within items 49 (7)(b) and (c) and 51(6)(b) and (c) of the Workplace Relations and other Legislation Amendment Act 1996, which concern productivity and efficiency.[17]

**Providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them.**

2.23 The Committee heard evidence of attempts by both employers and unions to subvert the agreement making process. It was alleged that such instances had become more prevalent since the introduction of the 1996 legislation.

2.24 A particular concern of many unions was that while the Act provides for unions to represent individual members in AWA negotiations where they have been nominated as the bargaining agent, they are often unable to have any substantial impact.

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15 Submission No. 329, The Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2084-5

16 Submission No. 423, Australian Council of Trade Unions, vol. 19, pp. 4363-5

17 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2104

2.25 The Department indicated to the Committee that the framework established by the 1996 legislation aims to achieve a balanced and fair system which effectively meets the needs of both employers and employees. They state that the success of the new framework is reflected in the acceleration in agreement making under the WR Act since the new provisions came into affect.[18]

**Ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association.**

2.26 It was put to the Committee that freedom of association relates to the basic human right, as defined in the International Labor Office (ILO) Constitution, for employees to join a collective organisation if they wish to do so and is not about not joining one if they do not wish to.[19] It was suggested that union preference clauses were completely within the spirit of the ILO definition provided that they did not force employees to join and argued therefore that they should not be considered as objectionable clauses under the WR Act.[20]

2.27 The Committee heard allegations of employee victimisation by employers for either being in a union or seeking to join a union. However the Employment Advocate indicated that the largest proportion of complaints received by his office were actually from employees claiming to feel pressured to join the union.[21]

2.28 The Office of the Employment Advocate was criticised by unions for being biased in its operations to enforce the freedom of association provisions of the legislation. It was claimed that the OEA particularly targeted unions to ensure that they did not attempt to pressure employees into joining but ignored employers accused of preventing or restricting the ability of employees to join a union. The Employment Advocate denied these allegations, stating that his office investigated every complaint that it received. He explained that they received significantly more complaints from employees regarding forced unionisation than complaints about not being able to join a union.

2.29 The submission from the Department of Employment, Workplace Relations and Small Business indicates that they have identified gaps in the operation and coverage of Part XA of the Act relating to freedom of association in the context of the Employment Advocate's investigations of possible breaches. The Department stated that these were taken into account during the policy development process for the

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18 *ibid*., pp. 2116, 2120

19 Evidence, Mr Mordy Bromberg, Melbourne, 8 October 1999, pp. 208-9

20 Submission No. 460, International Centre for Trade Union Rights, vol. 22, pp. 5584-5

21 Evidence, Mr Jonathan Hamberger, Canberra, 28 October 1999, p. 487

Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.[22] Amendments to this part of the Act are discussed in Chapter 12.

**Ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively.**

2.30 Unions were critical of some aspects of the legislation, which they claim have not allowed them to operate effectively. Their complaints focused on the right of entry provisions and the prohibition of union preference clauses included in awards and agreements.

2.31 Evidence was given that the current rules surrounding right of entry unduly restrict the operations of unions and their ability to meet with and recruit new members. It was claimed that employers often sent a member of the managerial staff along to meetings or they were conveniently located nearby and that this resulted in many employees either not attending or being too intimidated to raise issues of concern with the union organiser.[23]

2.32 The Committee also heard evidence from employers and employer organisations about the abuse of right of entry provisions by unions. A particular complaint arose in relation to construction sites upon which there are usually a number of different employers. The WR Act requires a union to give an employer at least 24 hours notice of the union's intention to exercise its right of entry. However, it was claimed that, once on a building site, union representatives sought to talk to all employees or investigate the records of any employer despite the fact that they may have notified only one of them. It was also claimed that unions were issuing notices of their intention to enter a workplace, sometimes with up to ten union officials listed, at anytime between two given dates, usually a week, and then often did not turn up.[24]

2.33 Unions submitted that under the WR Act there had been a significant increase in demand for union resources and legal representation which was placing a significant financial drain on them.[25] Unions were critical of the current Act which they claimed restricted their ability to recruit new members.[26]

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22 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2140

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

24 Submission No. 267, Master Builders Australia Inc., vol. 22, p. 5770

25 Evidence, Mr Tony Maher, Sydney, 22 October 1999, p. 274

26 Evidence, Mr Kilian Jeffers, Brisbane, 27 October 1999, p. 450

**Enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration.**

2.34 Some witnesses claimed that the WR Act reduced the role of the Australian Industrial Relations Commission and were critical of its perceived weakened role. These claims are discussed in Chapter 3.

2.35 It was put to the Committee that the inability of the Commission to arbitrate beyond the 20 allowable matters has resulted in more protracted industrial disputes and an associated disharmony in the workplace, as was allegedly the case in the waterfront dispute.[27]

2.36 The Commission has retained some discretion, under section 170MX, to arbitrate on non-allowable matters in limited circumstances. That is, where the Commission believes that there is no prospect of agreement between the parties and the parties have been customarily covered by a paid rates award or where industrial action threatens serious harm to the community or the economy.[28]

2.37 Evidence presented in the submission from the Department of Employment, Workplace Relations and Small Business showed that there have only been a few cases which have been arbitrated under section 170MX since its introduction in January 1997.[29]

**Assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers.**

2.38 It was put to the Committee that flexibility in hours of work could create greater uncertainty, particularly for part-time and casual employees which made it harder to balance work and family responsibilities.

> Award simplification has enabled employers to distribute working hours and incidence of work in ways which dislocate private life and family commitments…The 'flexibility' that was much touted as the end product of the 1996 amendments has tipped the scales in favour of flexible outcomes for employers at the expense of those employees with reduced industrial muscle.[30]

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27 Submission No. 424, Australian Manufacturing Workers' Union, vol. 20, p. 4765

28 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2153

29 *ibid*., p. 2156

30 Submission No. 441, Women for Workplace Justice Coalition, vol. 21, p. 5185

2.39 The Committee was told that the ability to change rosters with only a week's notice and an increased span of standard working hours could result in people starting or finishing work outside of the hours of operation of child care centres.[31]

2.40 The Committee accepts that there will be cases where the arrangements in some workplaces do not suit everyone and was presented with examples of this throughout the course of the inquiry. However, many people have secured much better arrangements for balancing work and family responsibilities at their workplace. The Department of Employment, Workplace Relations and Small Business's publication, *Work and Family State of Play 1998*, indicates that a significant proportion of agreements contain at least one family friendly provision.

2.41 Senator Collins questioned the Department about how family friendly provisions were defined for this study and referred to comments that other witnesses had made that what were recorded as family friendly provisions were, at the workplace level, actually family unfriendly. In response the Department stated that they did not accept this criticism, having been careful to include only those provisions which they judged to be beneficial to employees. The Department informed the Committee that:

> …in the hours of work area, the sorts of flexibilities that we have included, and we say they are likely to benefit employees and families, are time in lieu of overtime at ordinary and penalty rates, hours averaged over an extended period, flexible start and finish times, flexible system in operation, hours of work negotiated by employees or decided by the majority of employees, make up time and banking and accrual of RDOs. With each of those the department would say that they provide substantial potential benefits to employees and their families. In compiling the report we have attempted to ensure that only those flexibilities which we judge have a beneficial effect are included.[32]

2.42 Similarly, the Employment Advocate stated to the Committee:

> I understand the argument broadly from people like ACIRRT that flexibility is all one way—I think even if you forget about the flexible hours, there are still a lot of family friendly provisions in a high proportion of AWAs. But on the flexible hours issue our experience is—and this is based on spending quite a lot of time talking to employees about this—that many employees do appreciate flexible hours. Of course, there might be some situations where a 'flexible hour provision' may be to the detriment of an employee. There may be some circumstances but there are many, from our experience, where it is actually at the request of the employees that those flexible hours have been put in there. Often it is a win-win situation.[33]

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31 Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p.379

32 Evidence, Mr Barry Leahy, Canberra, 28 October 1999, p. 540

33 Evidence, Mr Jonathan Hamberger, Canberra, 28 October 1999, p. 490

**Respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.**

2.43 Submissions and oral evidence were given to the Committee in relation to the issue of the gender pay gap. The data used in most cases was ABS data on the ratio of male and female average weekly ordinary time earnings or data compiled by the Department of Employment, Workplace Relations and Small Business. Drawing conclusions based on the ABS data should be done with caution. This is because it is an aggregate figure revealing little about the underlying reasons for the discrepancies. For example, it is not clear how much of the pay differential reflects the industrial and occupational composition of employment for both males and females. Traditionally, the industries and occupations dominated by female employment tend to be lower paid compared to traditionally male dominated industries and occupations.

2.44 Academic researchers and women's groups interested in the impact of the WR Act and in particular the introduction of AWAs on female employees were critical of the lack of available data. It was argued that until detailed information was made available on the wages and conditions contained in AWAs it would not be possible to assess the impact of the Act.[34]

2.45 Data presented in the submission from the Human Rights and Equal Opportunity Commission (HREOC) from ACIRRT's Agreements Database and Monitor (ADAM) provides a breakdown of annual average wage increases by industry and cross-references this with the proportion of women in the workforce. The largest increase was in the construction and mining sector, a male dominated industry.[35] The Committee heard from the New South Wales Minerals Council that award rates of pay in this industry are over twice the levels in other industries.[36] Therefore, any gender pay gap may not necessarily reflect direct or even indirect discrimination by employers but may reflect the occupations and industries in which males and females predominantly work.

2.46 The submission from the Human Rights and Equal Opportunity Commission also includes data on complaints received under the Sex Discrimination Act, a high proportion of which related to employment. The submission also states that there has been an increase over the past three years in the number of complaints relating to employment although they did not claim that the WR Act has contributed to this increase.[37]

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34 See Submission No. 496, Dr Barbara Pocock, vol. 24, p. 6194, and Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5800

35 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5810

36 Submission No. 497, New South Wales Minerals Council, vol. 24, pp. 6364-6

37 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5881

2.47 The WR Act requires the AIRC to prevent and eliminate discrimination in the performance of its award making and award simplification functions and to refuse to certify an agreement if it is discriminatory on any of the specified grounds. Similarly AWAs must contain anti-discrimination provisions. The Department's submission indicates that these provisions seem to be working effectively with few, if any, examples where the AIRC has been required to take remedial action to ensure that awards or agreements do not contain provisions that discriminate on the specified grounds.[38]

2.48 The Department also notes that the provisions under the Sex Discrimination Act and the WR Act which allow the Sex Discrimination Commissioner to refer discriminatory awards or agreements to the AIRC have so far not been used. According to the Department one explanation for this is that the requirements of the Commission have ensured that few, if any, awards or agreements contain discriminatory provisions.[39] The Department also indicated a range of agencies including themselves, the OEA, the HREOC, the Affirmative Action Agency and State and territory labour and equal opportunity agencies undertake activities to raise the awareness of both employers and employees of anti-discrimination issues.[40]

2.49 Allegations about access to parental leave and discrimination on the basis of pregnancy were also bought to the Committee's attention. The submission from HREOC, and evidence given by the Sex Discrimination Commissioner at the Sydney hearing on 26 October, made reference to the report of the National Pregnancy and Work inquiry, *Pregnant and Productive*.[41]

**Assisting in giving affect to Australia's international obligations in relation to labour standards**

2.50 The Committee received written submissions and heard oral evidence from a number of witnesses who argued that some provisions of the *Workplace Relations Act 1996* breach Australia's international obligations with regard to a number of International Labour Organisation Conventions to which Australia is a signatory. In particular they point to the Committee of Experts report which highlights the concerns of the ILO in relation to the changes to Australia's industrial relations laws that were introduced in 1996, particularly relating to freedom of association and protection of the right to organise and the right to bargain collectively.

2.51 The International Centre for Trade Union Rights (ICTUR) argued that Australia plays an important part in the community of nations and is highly respected

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38 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2163, 2166

39 *ibid*., p. 2169

40 *ibid*., pp. 2169-71

41 *Pregnant and Productive: it's a right not a privilege to work while pregnant*, Human Rights and Equal Opportunity Commission, 1999

internationally and for these reasons it is important that Australia demonstrates leadership in the observance and application of international human rights instruments.[42]

2.52 The majority of the Committee understands the concern expressed in terms of Australia's compliance with ILO conventions but notes that the ILO has not made a final judgement on whether Australia's industrial relations legislation is in breach of any convention. The Department of Employment, Workplace Relations and Small Business informed the Committee at its public hearing in Canberra on 1 October that while the ILO had made an observation and expressed concerns, dialogue between the Government and the ILO is continuing.[43]

2.53 A majority of the Committee considers that it is inappropriate to comment on this matter until discussions between Australia and the ILO have been finalised.

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42 Evidence, Mr Mordy Bromberg, Melbourne, 8 October 1999, p. 206

43 Evidence, Mr Barry Leahy, Canberra, 1 October 1999, p. 5

# CHAPTER 3

# THE IMPACT OF THE WORKPLACE RELATIONS ACT 1996

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

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

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

**Wages, employment, productivity, and industrial disputation levels**

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

*Wages*

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

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

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

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

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

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

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

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

2 *ibid*., p. 2202

3 *ibid*., p. 2196

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

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

*Living Standards*

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

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

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

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

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

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

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

*Productivity*

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

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

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

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

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

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

9 *ibid*., p. 2223

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

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

*Employment*

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

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

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

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

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

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

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

*Industrial disputes*

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

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

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

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

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

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

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

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

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

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

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

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

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

**Job security, unfair dismissals, employee entitlements and conditions**

*Job Security*

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

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

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

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

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

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

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

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

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

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

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

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

*Unfair Dismissals*

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

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

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

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

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

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

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

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

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

*Protection of employee entitlements*

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

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

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

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

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

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

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

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

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

*Right of entry*

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

*Awards and Agreements*

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

*Industrial action*

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

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

31 *ibid*., p. 4427

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

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

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

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

*Australian Industrial Relations Commission*

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

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

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

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

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

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

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

*The Office of the Employment Advocate*

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

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

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

**Industrial democracy and employee ownership**

*Industrial Democracy*

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

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

*Employee Ownership*

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

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

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

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

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

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

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

# CHAPTER 4

## SCHEDULE 1 - OBJECT OF THE WORKPLACE RELATIONS ACT

4.1 Schedule 1 of the Bill contains amendments to:

- the principal object of the WR Act set out in section 3; and
- the WR Act's objects and the Commission's functions relating to dispute settlement and prevention, contained in Part VI of the WR Act.

**Outline of proposed amendments**

*Amendments to the principal object*

4.2 Item 1 expands the principal object to emphasise that employers and employees have the ability to choose the most appropriate jurisdiction for regulation of their employment relationship. This amendment is designed to ensure 'that the Act does not create a presumption in favour of the extension of Commonwealth regulation.'[1]

4.3 Item 2 amends the role of awards as set out in the principal object. Under subparagraph 3(d)(ii), it is an object of the WR Act to provide 'the means to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment'. The amendment replaces the concept of a 'fair and enforceable safety net' with a new focus on ensuring that awards provide 'basic minimum wages and conditions of employment', and that awards do not contain wages and conditions above the safety net. The amendment also emphasises that the role of awards is to help address the needs of the low paid.

4.4 Item 3 expands the principal object of the Act to specifically provide that industrial action which is prohibited by the WR Act (so-called 'unprotected action') should be countered by timely measures to stop and prevent unprotected action from taking place. The amendment also recognises the new procedures proposed in the Bill for conducting secret ballots of employees before protected industrial action can occur.

4.5 Item 4 amends the principal object to recognise amendments to:

- limit the Commission's ability to conduct compulsory conciliation of industrial disputes to those disputes where the Commission could potentially arbitrate (generally, the Commission can only arbitrate in relation to 'allowable awards matters' set out in section 89A of the WR Act);

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1 Explanatory Memorandum, p. 3

- introduce a new system of voluntary conciliation by the Commission to resolve industrial disputes and facilitate agreement-making; and
- legislatively recognise private mediation as an option for resolving industrial disputes and facilitating agreement-making.

*Amendments to Part VI*

4.6 Item 5 of Schedule 1 amends section 88A of the WR Act, which sets out the objects of the Act with regard to preventing and settling industrial disputes. The amendments relate to the making of awards, and remove the requirement that awards 'act as a safety net of fair minimum wages and conditions of employment', and replace this with a new paragraph specifying that awards are to operate as a safety net of 'basic minimum wages and conditions of employment in respect of appropriate allowable award matters'.

4.7 The practical effect of the change will be to require the Commission to take a different approach to making safety net adjustments, to ensure, for example, that wage increases are not uniformly applied to all wage rates contained in an award, but only those which represent 'basic minimum wages'. See paragraphs 1.23 – 1.26 below for a more detailed explanation of this amendment.

4.8 This amendment also emphasises that awards are intended to assist in addressing the needs of the low paid, and must not provide for wages and conditions of employment that are above the safety net. Item 5 complements the amendment contained in item 2.

4.9 Item 6 amends section 88B, and relates to the performance of the Commission's functions to prevent and settle disputes. This amendment also replaces the concept of a safety net of 'fair minimum wages and conditions of employment' with a safety net 'providing basic minimum wages and conditions of employment in respect of appropriate allowable award matters', as discussed above.

4.10 Item 7 inserts a new section 88C into the WR Act, which provides that the Commission is not to have regard to the maintenance of relativities within awards when exercising its dispute prevention and resolution functions. This amendment is designed to reinforce the principle that awards provide only a safety net of basic minimum wages and conditions. The role of awards is not to be regarded as providing for a range of skill-based classification pay points.

*Evidence*

**No presumption in favour of the extension of federal regulation**

4.11 The Department's submission states that the amendment in item 1 will 'reinforce the new workplace relations framework introduced by the *Workplace*

*Relations and Other Legislation Amendment Act 1996* by amending the Principal object of the Act to emphasise….choice as to jurisdiction..'[2]

4.12 This amendment to the principal object complements more detailed changes to be made to section 111AAA and associated provisions. The proposed changes will strengthen the presumption in favour of State employment regulation, including by legislative minimum conditions. Legislated minimum conditions of employment are a relatively new phenomenon in Australia. There are currently two examples: the Western Australian *Minimum Conditions of Employment Act 1993* and Schedule 1A of the WR Act, which applies to Victorian employees.

4.13 These changes were foreshadowed in the Minister's More Jobs, Better Pay Implementation Discussion Paper, which proposed amendments to the WR Act to:

> …give greater recognition to cases where an employment relationship is subject to statutory minimum employment conditions. Recognising the special circumstances in Victoria (which has referred certain of its workplace relations powers to the Commonwealth), the Government (in consultation with Victoria) will examine how a wider range of employment arrangements provided for by the previous State law can be brought within the scope of the stronger presumption.[3]

4.14 The proposed amendment to the principle object enables both employers and employees to choose the most appropriate jurisdiction to regulate their employment relationship.

4.15 Jobwatch Inc estimated that approximately 40% of Victorian workers are not presently covered by federal awards and rely on the minimum conditions established by Schedule 1A:

> '…the 1996 hand over of most industrial relations powers to the Commonwealth created a situation where not all Victorian workers were automatically covered by federal awards. We still have a number of workers who are not within the federal award system…in Victoria, 40 per cent of Victorian workers only have five rights… In Victoria there is a huge disparity in the employment conditions between those covered by federal awards and agreements and those covered by schedule 1A. It is a situation of great injustice where some Victorian workers have conditions that are so much better than others, and the ones with the worst are the ones that are the most vulnerable and the ones that are not organised—they are not in unions.'[4]

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2 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2321

3 *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay*, May 1999, p. 13

4 Evidence, p. 176, Ms W Tobin, Jobwatch Inc.

4.16 The ability to move to federal award coverage was not such an important issue for unions and employees in other States, even in Western Australia, where minimum conditions are set under State legislation. Western Australian unions were less emphatic that their members would be better off under federal awards, as the following Hansard excerpt indicates:

> 'Senator MURRAY—Is it your belief that the Workplace Relations Act 1996, the federal legislation, is better than the state legislation you fall under?
>
> Ms Mayman—It has a better no disadvantage test than the state legislation. I am prepared to go that far.
>
> Senator MURRAY—There are 20 allowable matters in the federal legislation that you are under. How many minimum conditions?
>
> Ms Mayman—The minimum safety net here in this state at the moment on wages, for example, is $40 lower than the minimum award provision.
>
> Senator MURRAY—So workers would be better off under federal legislation?
>
> Ms Mayman—Workers are better off in terms of their minimums under federal legislation.'[5]

4.17 The Western Australian Branch of the Community and Public Sector Union stated:

> 'With respect to conditions of employment and pay, all things being equal, we maintain awards that have virtually every condition of employment in them for our membership and we can continue to maintain those awards in the state (Western Australian) system, on top of which, of course, there might—and I stress might—be enhancements in an enterprise bargaining agreement. That has served our members very well. It has been positive and we have generally been able to achieve reasonable outcomes under the state legislation. I think our members would generally see that in terms of pay and conditions they have been pretty well served in the state system.'[6]

4.18 The Committee received evidence that some employees currently enjoy conditions well above award standards, so are less likely to want federal award coverage. For example, the Australian Mines and Metals Association (AMMA) supported strengthening the presumption in favour of State regulation, making the following comments:

> Combined with the proposed s111AAA(1), the object appears to extend the protection afforded to employees and companies operating under various

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5 Evidence, p. 307, Ms S Mayman, Trades and Labour Council of Western Australia.

6 Evidence, p. 324, Mr D Robinson, Community and Public Sector Union.

> state jurisdictions. Considerable time and expense is incurred by businesses fending off unwanted attempts by unions seeking to rope those organisations into the federal system. Employers and employees deserve greater protection when a strategic choice has been made by such organisations and their employees to operate under a particular state instrument.[7]

4.19 The AMMA submission highlights their members' advanced employment relations policies and pay levels well above award standards.[8] In this context, attempts by unions to 'rope' employers into federal awards are probably unlikely to be supported by either the affected employers or employees.

4.20 The Committee was provided with examples of unions attempting to use the current provisions of the WR Act to 'rope' employers into the federal system. For example, the Australian Chamber of Commerce and Industry provided several case studies in their submission to the Committee.[9] Some unions also provided evidence on this point.

*Conclusion*

4.21 Item 1 implements the Government's objective of preventing unions from artificially extending the coverage of the federal jurisdiction to displace State regulation, where federal instruments provide higher wages and conditions.

4.22 A majority of the Committee supports this objective and **recommends** that the amendment contained in item 1 of Schedule 1 be enacted.

**Award safety net of basic minimum wages and conditions**

4.23 The Bill requires the Commission to alter its approach to safety net wage adjustments. The Safety Net Review decisions made under the WR Act to date are referred to in the Department's submission:

> The issue of internal relativities in relation to safety net has been the matter of consideration in safety net review issues. Given the additional focus now being placed on the low paid, it is appropriate to reinforce in the legislation the fact that the maintenance of internal relativities is not a factor to be taken into account in safety net considerations. Relativities between awards would however continue to play an important part in the adjustment and operation of the safety net.[10]

4.24 The amendments in Schedule 1 of the Bill, along with the amendment to remove 'skill-based career paths' from the list of allowable matters in section 89A,

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7 Submission No. 381, Australian Mines and Metals Association Inc., vol. 13, p. 2842

8 i*bid*., p. 7

9 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3331–40

10 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2344

will require the Commission, when reviewing the award safety net, to focus on adjusting minimum pay points for award classifications, rather than maintaining vertical relativities within award classifications.

4.25 Over time, this would mean that award pay rates for employees performing work within a classification at higher skill levels would be subsumed into minimum pay rates for their classification:

> A consequence of targeting protection on the low paid (eg through flat, differential or capped increases) is that there will be some compression of internal relations within awards. This was comprehended by the WR Act – which specifies that the Commission is to have regard to 'the need for any alterations to wage relativities *between* awards to be based on skill, responsibility and the conditions under which work is performed (emphasis added),' without referring to relativities *within* awards.[11]

4.26 The Department points out that these amendments reinforce the Government's understanding of how the WR Act would operate. The Minister's speech and the Joint Governments' submissions to the Safety Net Review cases indicate that it was originally intended that, through an incremental process of compressing internal award relativities, awards would become a true minimum safety net of wages and conditions. Wages and conditions above this basic safety net were intended to be set by agreement.

4.27 Some witnesses and submissions opposed the proposed amendments. A representative example is provided by the ACTU's submission:

> The amendments to paragraph 3(d) remove the concept of fairness from the safety net, an extraordinary admission by the Government that it sees fairness as an unreasonable requirement. The redefinition of the safety net as comprising basic minimum conditions which address the needs of the low paid is directed at removing from awards any provisions which might be seen as other than 'basic', reinforced by the requirement that awards do not provide for wages and conditions above that 'basic' safety net. The notion that awards exist only to protect the very lowest paid, rather than to ensure fairness for all employees, and ensure that disputes are resolved after considering the interests of all parties, is strongly opposed by the ACTU.[12]

4.28 The Human Rights and Equal Opportunity Commission also opposed the proposed amendments, because in their view a disproportionate number of women, compared to men, rely on awards to set their actual pay and conditions:[13]

> The current WR Act object provides scope for the AIRC to consider the impact of safety net increases on all employees relying on awards to

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11 *ibid*.

12 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4440

13 See Table 6, Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5827

> determine their actual pay and conditions with an emphasis on the low paid….HREOC supports retaining the AIRC's current discretion to consider both the low paid and the award dependent when awarding safety net increases as both aspects impact on the ability of the AIRC to minimise gender based inequitable pay outcomes.[14]

4.29 The Committee was given evidence suggesting that parts of the workforce remain unable to make agreements with their employers, and rely solely on awards to regulate their pay and conditions. It was suggested that these employees seem to be concentrated in service industries and rural and regional areas, with low levels of unionisation:

> Thirty per cent of the industries we cover do not have enterprise agreements; they rely strictly on the award system. These industries include fruit growing and packing, horse training, shearing, the amusement parlour and entertainment industries, sportsgrounds, nurseries, primary production and dairies, ski resorts and catering companies. These are difficult to service, small, isolated workplaces. Union employee interaction tends to occur only when problems arise. Because of this, the employees in the above industries depend heavily on the goodwill of their employers and any safety net decisions made by the Australian Industrial Relations Commission.[15]

4.30 The Business Council of Australia suggested that it is only in exceptional cases that employers and employees are unable to bargain, but evidence presented by other witnesses, including the Queensland Government, suggests that the problem is much broader than this, particularly affecting rural workers, small business employees and women.

4.31 The Australian Chamber of Commerce and Industry supported the proposed amendments as a means of imposing restraint on safety net increases to awards by the Commission:

> The proposed amendments are more than justified because of the way union claims and AIRC awarded increases have accelerated in recent years. If the labour relations award system is to be a true safety net, there has to be an appropriate level of restraint. It is time that this longstanding threat to the private sector is terminated by appropriate amendments to the objects of the Act, and for awards.[16]

4.32 The Business Council of Australia submitted:

> The [safety net] system should make available basic terms and conditions of employment that are a sufficient guarantee of fair and reasonable treatment

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14 *ibid*., p. 5865

15 Evidence, Mr Bill Shorten, Melbourne, 8 October 1999, p. 146

16 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3274

> in exceptional circumstances where (formal or informal) enterprise bargaining does not apply.
>
> Minimum wages and conditions should not be linked or act as a disincentive to enterprise bargaining – that generally reward specific gains in productivity. Under enterprise bargaining wage increases reflect economic circumstances. Firms doing well will pay well, and firms doing poorly will pay less.[17]

*Conclusion*

4.33 An objective of the proposed amendments is to ensure that safety net wage increases are not generally applied to all wage rates in awards, but are specifically targeted at the low paid. If awards focus on basic minimum pay and conditions they will encourage agreement making, linking increases in wages and conditions to productivity and establishing terms of employment that suit the circumstances of the particular workplace. The Committee supports this objective, as consistent with the aim of providing a floor under wages, which takes modern economic imperatives into consideration and puts responsibility for workplace relations where it belongs: with employers and employees.

4.34 A majority of the Committee also supports the objective of encouraging the Commission to exercise restraint in awarding safety net increases, as suggested by the Australian Chamber of Commerce and Industry, as safety net increases do not necessarily reflect improvements in productivity.

4.35 There is considerable evidence that employees covered by agreements enjoy better pay and conditions than those employees on awards. Little evidence was presented to the Committee to suggest that employees are choosing to remain on awards, or that awards are acting as a disincentive to bargaining.

***Recommendation***

4.36 A majority of the Committee **recommends** that the amendments in items 2, 5, 6 and 7 of Schedule 1 be enacted.

**Unprotected industrial action inconsistent with Act**

4.37 This amendment makes it clear that unprotected industrial action is contrary to the objects of the Act. The amendment incorporates a reference to the proposed secret ballot provisions in the principal object. The Committee's majority conclusions on the secret ballot amendments are discussed in detail in Chapter 11.

*Conclusion*

4.38 A majority of the Committee notes the absence of any real concerns regarding this amendment, which would merely reinforce the existing provisions of the Act

17 Submission No. 375, Business Council of Australia, vol. 12, p. 2581

regarding protected industrial action. The majority of the Committee **recommends** that this amendment be enacted.

**Arbitration, compulsory conciliation, voluntary conciliation and mediation**

4.39 The Committee's majority views on these amendments are set out in detail in Chapter 6.

# CHAPTER 5

# SCHEDULE 2 - RENAMING AND RESTRUCTURING THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION AND REGISTRY

5.1 This Chapter discusses proposed amendments to the Australian Industrial Relations Commission (the Commission), and the Australian Industrial Registry (the Registry). The Committee received many submissions and a great deal of evidence dealing with the name of the Commission and Registry and the proposal to allow fixed term appointments to the Commission.

## Outline of proposed amendments

*Change of name for Commission and Registry*

5.2 Item 8 and other consequential amendments set out in Schedule 2 propose to rename the 'Australian Industrial Relations Commission' as the 'Australian Workplace Relations Commission'. Similarly item 45 and other consequential amendments set out in Schedule 2 will rename the 'Australian Industrial Registry' as the 'Australian Workplace Relations Registry'. Item 85 and other consequential amendments set out in Schedule 2 will rename the 'Industrial Registrar' and 'Deputy Industrial Registrars' as the 'Workplace Relations Registrar' and 'Deputy Workplace Relations Registrars'.

5.3 Items 14 and 15 amend the provisions of the Act setting out the requirements for appointment to the Commission to replace 'skills and experience in the field of industrial relations' with 'skills and experience in the field of workplace relations'.

*Simplification of the Commission's Presidential structure*

5.4 Items 9 and 202, and various other consequential amendments set out in Schedule 2, simplify the Commission's Presidential member structure by collapsing the current three tiers of Vice Presidents, Senior Deputy Presidents and Deputy Presidents into one level. All Presidential members, except for the President, would be designated 'Vice Presidents', and would be paid the same new Vice President salary (Item 25). Transitional provisions set out in item 204 would maintain salary rates for those Presidential members currently paid more than the proposed Vice President salary rate.

5.5 Item 16 amends section 11 of the Act, so that in the case of future appointments, Vice Presidential members will hold seniority according to their date of appointment. However, Item 205 preserves the current Presidential members' existing seniority arrangements.

*Presidential members with legal qualifications*

5.6 Item 12 amends the WR Act to entitle Presidential members or former Presidential members who have appropriate legal qualifications to the same designation as a Judge of the Federal Court.

*Fixed term appointments to the Commission*

5.7 Item 18 amends the WR Act to allow the Governor-General to appoint Commissioners for a fixed term of seven years, in addition to normal life tenure arrangements established under section 16 of the Act

*Appointment of acting Commissioners*

5.8 Item 21 inserts a new section 18A into the WR Act to allow the Governor-General to appoint acting Commissioners, where the Governor-General is satisfied that the appointment is necessary to enable the Commission to effectively perform its functions.

*Annual training program for Commissioners*

5.9 Items 22 amends the WR Act to require the President of the Commission to develop a training and professional development program for Commissioners, and the amendment in item 23 requires all Commissioners to participate in the program.

*User-friendly systems and procedures*

5.10 Items 36 – 38 and item 61 amend the Act to require the Commission to have greater regard to the needs of employers, employees and other users of the Commission's services in performing its functions, and to provide user-friendly systems and procedures. Items 48 and 101 make equivalent amendments to require the Registry to provide user-friendly systems and procedures.

*Harmonising administration of the Commission and Registry*

5.11 Item 100 and various other items amend the Act to give the President of the Commission greater control over the administration of the Registry. In addition, item 38 requires the President of the Commission to report on the performance and efficiency of both the Commission and the Registry in the President's annual report. The requirement for the Registrar to make a separate annual report would be repealed (item 96).

*Harmonising Registry appointments*

5.12 Item 118 facilitates greater harmonisation of appointments to the federal Registry and State Registries, by allowing employees of State Registries to be appointed as Deputy Workplace Relations Registrars, and by exempting these appointees from the requirement in section 83 of the WR Act that Deputy Registrars be employed under the Federal Public Service Act.

*Evidence*

**Change of name for Commission and Registry**

5.13 The Department provided evidence that the proposed change of name:

> is intended to reflect the changes in, and the evolution of, the Commission's role and functions. The Commission is evolving to become more attuned to the current and proposed workplace relations framework where the primary responsibility for addressing matters affecting the employer/employee relationship is focused at the workplace level, but with a safety net of minimum wages and conditions.[1]

5.14 Some witnesses disagreed with this assessment, suggesting that the Commission's primary functions continue to be focused on setting industry-wide safety net award standards, with diminishing involvement in 'workplace' level arrangements set through agreements:

> First, there is the renaming of the commission from the Industrial Relations Commission to the Workplace Relations Commission. Some may think this is mere nomenclature but words are the lexicon of our life and nomenclature is of enormous importance. The notion of an industrial relations commission bespeaks of a body that sets minimum wage rates and work rules and that occasionally certifies industry wide agreements. The nomenclature of workplace relations bespeaks of a body which is confined to the operations of the domis of a single enterprise. That, in essence, is why I believe a name change is unnecessary.[2]

> The ACTU is opposed to the use of the term 'workplace relations' to replace the term 'industrial relations' in the Act. While in one sense, this is not a substantive change, it does symbolise a major shift in the Act's focus to the individual enterprise and, more significantly, towards the individualising of the employment relationship at the expense of employee rights to collective bargaining and union representation. While the ACTU is aware that, to a certain extent, this change in focus has already occurred, the Commission has so far retained an ability to make industry-wide awards, to certify multi-employer agreements and to resolve disputes involving more than one workplace. In that sense, the change in the descriptive term is misleading.[3]

5.15 Employer groups submitted that the name change was appropriate because the new name would reflect the workplace focus of the overall federal system:

> The focus of the labour relations system should be on the workplace, rather than on other possible levels including award, industry or the national level.

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2323

2 Evidence, Professor Ronald Clive McCallum, Sydney, 26 October 1999, p. 349

3 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4441

> The Commission does perform functions at all levels, particularly at the award and industry levels. Nevertheless, the focus of Commission policy priorities should be on providing greater scope for workplace level decisions, and this proposed change is consistent with that objective.[4]
>
> (The renaming) will reflect the increased focus of the system on the workplace. Also a change in title may provide impetus in some small way for the recognition by the Commission and the parties who appear before it that statutory changes also require institutional and cultural changes.[5]

5.16 The Australian Council of Social Services agreed that the proposal to change the name would lead to a change in culture and priorities for the Commission, but did not agree that this change would be positive:

> The effect of the 1996 amendments to the Act has been to limit substantially the powers of the Commission in relation to the setting of minimum wages and conditions and in the resolution of disputes. In this context the renaming of the Australian Industrial Relations Commission is significant. It reflects a vision of a reduced and narrow role for this body. It is a movement away from a concern with the social and economic objectives for society to the primacy of market-driven workplace arrangements.[6]

5.17 Another suggestion put by the Department in favour of the proposed name change was that the name of the Commission and Registry should reflect the name of their enabling legislation.[7]

5.18 In other Australian jurisdictions, the names of relevant tribunals do seem to correspond with their enabling legislation, as demonstrated in the examples below. The retaining of an 'industrial' emphasis, rather than 'workplace', most likely reflects the historical development of the jurisdiction in Australia.

- in New South Wales, the *Industrial Relations Act 1996* creates the 'Industrial Relations Commission of New South Wales';
- Victoria no longer has an equivalent tribunal, since the referral of Victorian industrial relations powers to the Commonwealth. However, the former *Employee Relations Act 1992* established the most recent Victorian tribunal - the 'Employee Relations Commission of Victorian';
- in Queensland, the *Industrial Relations Act 1999* establishes the 'Queensland Industrial Relations Commission'; and

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4 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3275

5 Submission No. 375, Business Council of Australia, vol. 12, p. 2583

6 Submission No. 476, Australian Council of Social Services, vol. 23, p. 6074

7 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2324

- in Western Australian, the *Industrial Relations Act 1979* establishes the 'Western Australian Industrial Relations Commission'.

In South Australia and Tasmania, the names of the relevant tribunals do not exactly match the names of their enabling legislation:

- in South Australia, the *Industrial and Employee Relations Act 1994* establishes the 'Industrial Relations Commission of South Australia'; and
- in Tasmania, the I*ndustrial Relations Act 1984* establishes the 'Tasmanian Industrial Commission'.

5.19 An alternative option for renaming the Commission, similar to the former Victorian tribunal, was suggested during the Committee's public hearings:

> It has been suggested to us that, if we must look at changing the name, a more appropriate alternative would be the Employment Relations Commission. Do you have any comment on that suggestion?
>
> I would agree with that. I would prefer industrial relations because it is a well understood term, but I think employment relations is far more accurate than workplace relations.[8]

5.20 Evidence presented to the Committee regarding the proposed change of name for the Registry was limited. The Department submitted that the name of the Registry should reflect the name of the Commission it services, particularly as the Bill proposes to further integrate the Commission and Registry, and give the President of the Commission greater responsibility for managing the work of the Registry (see paragraphs 1.76 to 1.82 below).[9]

5.21 Little evidence was presented to the Committee about the proposal that appointees to the Commission should have experience in 'workplace relations', rather than 'industrial relations'.

*Conclusion*

5.22 The name of the Commission should ideally reflect its functions, to avoid confusing members of the public who use its services.

5.23 Suggestions by employer groups that the Commission's name should be altered to promote cultural change away from the Commission's historical concentration on industry-wide arrangements are persuasive.

5.24 A majority of the Committee accepts the Department's submission that the name of the Registry and Registrars should reflect that of the Commission.

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8 Evidence, Professor Keith Hancock, Canberra, 28 October 1999, pp. 515-6

9 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2322-3

***Recommendation***

5.25 That the provisions of Schedule 2 be enacted.

**Simplification of the Commission's Presidential structure**

5.26 The Commission currently has four levels of Presidential members: (in order of hierarchy) the President, Vice Presidents, Senior Deputy Presidents and Deputy Presidents. The Bill proposes to abolish the offices of Senior Deputy President and Deputy President, so that all Presidential members (except the President) would become Vice Presidents.

5.27 Submissions to the Committee generally supported the proposed changes. It was indicated that the current structure was unnecessarily complex, the result of confusing historical events and legislation,[10] and has not been reviewed since 1991.[11]

5.28 The Business Council of Australia, in support of the amendments, submitted:

> This will provide for a flatter, more contemporary structure, bearing in mind the AIRC is a non-judicial body. The existing number of levels seems to be a product of history.[12]

5.29 Professor Isaac, a former Commissioner who appeared before the Committee, also supported the proposed simplification of the Presidential structure:

> This change in effect reverts to the structure which prevailed before the 1993 Act and is to be commended as removing an unwarranted and artificial hierarchy of Presidential members.[13]

5.30 The Bill contains transitional provisions to ensure the continuity of appointment of the current Presidential members, and to maintain current arrangements regarding seniority.

5.31 The new salary rate for Vice Presidents (equivalent to the salary of a Federal Court judge) would be slightly lower than the salary that current Vice Presidents are entitled to (103% of the salary of a Federal Court judge). However, Schedule 2 includes a transitional salary maintenance provision for the two current Vice Presidents.

5.32 The new Vice President salary rate is the same as Senior Deputy Presidents are currently paid, and higher than the salary that the Commission's single Deputy

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10 Detailed in Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3275-6

11 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2326

12 Submission No. 375, Business Council of Australia, vol. 12, p. 2583

13 Submission No. 377, Professor J Isaac AO, vol. 12, p. 2686

President[14] is currently paid (95% of the salary of a Federal Court judge). In effect, no current Presidential member would be financially disadvantaged by the proposed amendments, and the Commission's remaining Deputy President will receive a significant pay increase.

*Conclusion*

5.33 The amendments simplify the Commission's staffing structures, in line with contemporary developments in both the public and private sectors, and would simplify the Commission's personnel administration. In addition, the proposed amendments would have the benefit of considerably simplifying Division 1 of Part II of the WR Act.

5.34 Comprehensive transitional arrangements are contained in the Bill to ensure that no Presidential members are disadvantaged either financially or in terms of seniority. In fact, the current Deputy President will receive an increase in salary. There has been no suggestion that the amendments would affect the standing or prestige of the Presidential members or of the Commission.

***Recommendation***

5.35 That the amendments in Schedule 2 to alter the Commission's Presidential structure be enacted.

**Presidential members with legal qualifications**

5.36 Prior to 1988, section 7 of the *Conciliation and Arbitration Act 1904* provided that Presidential members of the Commission with appropriate legal qualifications were entitled to the designation 'Justice'. This provision was removed with the enactment of the *Industrial Relations Act 1988*, although existing members at that time were entitled to retain their designation under transitional provisions set out in the *Industrial Relations (Consequential Provisions) Act 1988*.[15]

5.37 The Department submitted that the amendment to restore this entitlement to Presidential members with legal qualifications 'is designed to operate as an attraction and recruitment measure, to assist in attracting highly qualified legal practitioners to the Commission.'[16]

5.38 Professor Isaac did not support the proposed amendment asserting that the Commission is not a judicial body – it exercises arbitral, rather than judicial, powers

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14 Note that there are more Deputy Presidents appointed to the Commission, however, the other Deputy Presidents are dual appointees from State tribunals and are paid by their respective State tribunals.

15 Section 80

16 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2327

under the Constitution[17] and that this amendment will create two classes of people doing exactly the same thing.[18]

5.39 However the Committee notes that two classes of Commissioners (Justices and non-Justices) already exist. The current President, two Senior Deputy Presidents and eight Deputy Presidents are styled Judge or Justice, meaning that almost 40% of current Presidential members (including dual appointees from State tribunals) are already entitled to the designation.[19]

*Conclusion*

5.40 Presidential members and other Commissioners are required to perform functions in a manner analogous to judges.[20] They hear evidence, apply legislative provisions and legal precedents, and make binding decisions affecting the rights of parties. They must also write and publish reasons for their decisions in a manner similar to judges writing and publishing judgements of a court.

5.41 The Commission performs its functions in a quasi-judicial manner, and it is an advantage to the Commission to have a contingent of Presidential members and Commissioners with high-level legal qualifications and training, in addition to experience in industrial and workplace relations.

5.42 Entitling legally qualified Commissioners to be styled 'Justice' will recognise the special 'quasi-judicial' nature of the Commission, increase the esteem in which the Commission is held, and promote the Commission as a prestigious place to work for members of the legal profession. A majority of the Committee believes that it is reasonable to assume that reinstating the designation will prove beneficial in attracting eminent and respected lawyers to the Commission.

***Recommendation***

5.43 That the amendment in item 12 of Schedule 2 be enacted to allow Presidential members with requisite legal qualifications to elect to have the same designation as a Judge of the Federal Court.

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

18 Evidence, Professor Joe Isaac, Canberra, 1 October 1999, p. 58

19 Australian Industrial Relations Commission website: *http://www.airc.gov.au/my_html/members.html*, 3 November 1999

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

**Fixed term appointments**

5.44 Item 18 will not require all future appointments to the Commission to be on a fixed term basis. The normal system of appointments for life would continue under section 16 of the WR Act. Item 18 will simply introduce the option for the Governor-General to make Commission appointments for a fixed term of seven years, with an option to reappoint.

5.45 The Department submitted that fixed term appointments to the Commission would:

> …allow for the Commission to respond more flexibly to changing workloads and pressures…The possible introduction of temporary and fixed term appointments was foreshadowed in the Ministerial discussion paper released in July 1998, *Improving access and service delivery: administration of the AIRC and the Registry*. The proposed provisions will, in part, meet these commitments by providing the Government with greater flexibility to assist the Commission, in terms of staffing numbers and required expertise, to meet changes in its workload.[21]

5.46 The Business Council of Australia and the Australian Wool Selling Brokers Employers' Federation agreed that the option of fixed term appointments would contribute to a more flexible human resource framework for the Commission.[22]

5.47 The Chamber of Commerce and Industry Western Australia made the following submission:

> We are conscious of the need for the maintenance of judicial independence…However, judicial independence is not the sole consideration...There is a need to ensure that members of the Commission are not immune from expectations of reasonable performance. Currently Commissioners are able to avoid termination of their appointments other than in the most extreme circumstances. This mechanism of seven year appointments also potentially allows for fresh perspectives to be included in the personnel of the Commission and so ensures that the Industrial Commission as a whole remains abreast of contemporary workplace relations practices and issues.[23]

5.48 Other employer groups such as ACCI and AIG were more cautious about the proposal.

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21 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2327

22 Submission No. 375, Business Council of Australia, vol. 12, p 2584; Submission No. 397, Australian Wool Selling Brokers Employers Federation, vol. 14, p. 3221

23 Submission No. 474, Chamber of Commerce and Industry Western Australia, vol. 23, p. 6013

5.49 Submissions made by employees, unions, lawyers and academics opposed the amendment, on the basis that fixed term appointments would compromise the independence of the Commission, or at least weaken public perceptions of the independence of the Commission:

> The Australian Nursing Federation (SA Branch) believes that the proposed introduction of fixed term appointments to the Commission will remove its independence and authority. Members of the Commission will, in exercising the jurisdiction, be mindful of the effects on the likelihood of them continuing with a further appointment.[24]

> ...fundamental to the effective operation of the AIRC is the public's perception that decisions of the AIRC have been made independently, that they have not been influenced by outside or irrelevant considerations and that they have not in any way been influenced by the government of the day (or any alternative government). The introduction of fixed term appointments to the AIRC has the potential to disturb this perception as concerns may arise that the AIRC is not adequately protected from external influences, and in particular the influences of the executive government.[25]

5.50 The Business Council of Australia provided the Committee with many examples of fixed term appointments for members of non-judicial statutory bodies, including Auditors General, Ombudsmen, anti-discrimination tribunals and anti-corruption commissions.[26]

5.51 There are many precedents of tribunals, and even courts, operating with fixed term members, and the Committee was not provided with evidence pointing to a lack of independence within these bodies. In addition, the Department provided information about fixed term appointments to State industrial tribunals:

> Section 35 of the South Australian *Industrial and Employee Relations Act 1994* provides for 6 years initially, renewable for a further 6 years or until 65. Section 83 of the Western Australian *Workplace Agreements Act 1993* provides for appointment to the Workplace Agreement Commission for terms not exceeding 5 years (renewable). Section 6 of the Tasmanian *Industrial Relations Act 1984* provides for appointments after 1992 to be for a period of 7 years and for Enterprise Commissioners section 61ZA provides for appointments for a period not exceeding 7 years. Prior to 1 July 1999, section 272 of the Queensland *Workplace Relations Act 1997* provided for terms of 7 years initially, thereafter for periods not exceeding 7

24 Submission No. 458, Australian Nursing Federation (SA Branch), vol. 22, p. 5454

25 Submission No. 460, International Centre for Trade Union Rights, vol. 22, pp. 5501-2

26 Submission No. 375, Business Council of Australia, vol. 12, p. 2584 and Attachment D

> years. However, term appointments have now been replaced by tenured appointments in Queensland.[27]

5.52 The Commission has had its own fixed term appointees: under section 16(1A), the former President of the Commission, Deidre O'Connor, was appointed for a fixed term, and Commissioners who are appointed under section 16(2) (dual appointments for members of State industrial authorities) may also be appointed for fixed terms.

5.53 The Department also drew the Committee's attention to an example of judicial fixed term appointments.[28] Section 13 of the New South Wales *Local Court Act 198*2 provides:

> Where the Governor considers it appropriate that a Magistrate should be appointed for a particular term of office, the Governor may, in the commission of the Magistrate's appointment:
>
> (a) by a reference to dates, specify the term of office (not being a term continuing past the date on which the Magistrate will attain the age of 70 years) for which the Magistrate is appointed…

*Conclusion*

5.54 A majority of the Committee accepts that it is of vital importance to maintain public confidence in the impartiality and independence of the Commission.

5.55 A majority of the Committee also accepts that it would be of benefit to provide more flexible arrangements for appointments to allow the Commission to temporarily increase its complement of Commissioners to deal with major projects.

5.56 A majority of the Committee believes that the proposed amendments reconcile the two objectives of maintaining independence and allowing more flexibility in appointments.

***Recommendation***

5.57 That item 18 of Schedule 2 be enacted to allow the Governor-General to make appointments to the Commission for fixed seven year terms.

**Appointment of acting Commissioners**

5.58 Item 21 allows the Governor-General to appoint acting Commissioners, where the Governor-General is satisfied that the appointment is necessary to enable the Commission to effectively perform its functions.

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27 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2328

28 i*bid*.

5.59 Existing sections 17, 17A, 17B and 18 of the WR Act allow the Governor-General to appoint, respectively, Acting Presidents, Acting Vice Presidents, Acting Senior Deputy Presidents and Acting Deputy Presidents to the Commission. The Governor-General may appoint anyone to these acting positions who meets the ordinary requirements for permanent appointment to the Commission, and there is no requirement that the acting appointments be made from current members of the Commission. The proposed amendment extends these arrangements to permit acting non-Presidential Commissioners.

5.60 The Business Council of Australia submitted that the proposal, in combination with the proposal to introduce fixed term appointments, would:

> …provide a more flexible human resource framework for the Commission that assists cover cyclic, sudden, and short or long term fluctuations in the demand for service.[29]

5.61 There was some suggestion that the appointment of acting Commissioners would undermine the independence of the Commission:

> The proposed s16(1A) of the Bill to provide for 7 year appointments and acting Commissioners (s18A of the Bill) represent an undesirable and unwarranted intrusion into the Commission's independence.[30]

*Conclusion*

5.62 This proposal is a technical amendment to bring provisions regarding the appointment of non-Presidential Commissioners into line with provisions allowing appointment of acting Presidential members.

5.63 The Committee received no evidence that the existing provisions of the WR Act or acting Presidential members had affected the independence or integrity of the Commission.

5.64 The ability to appoint acting Commissioners will allow the Commission to manage periods of leave and illness more effectively, to maintain levels of service. It will also allow the appointment of additional Commissioners to deal with short term fluctuations in work load.

***Recommendation***

5.65 That item 21 of Schedule 2 be enacted to allow the Governor-General to appoint acting Commissioners.

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29 Submission No. 375, Business Council of Australia, vol. 12, p. 2584

30 Submission No. 468, Law Council of Australia, vol. 22, p. 5732

**Annual training program for Commissioners**

5.66 The Bill requires the President of the Commission to develop an annual training and professional development program for Commissioners, and all Commissioners to participate in this program.

5.67 Submissions to the Committee generally supported this amendment. For instance, the Business Council of Australia submitted:

> In the words of the Australian National Training Authority – '*Today's and tomorrow's workers must never stop learning: learning is not just for children and young adults: it is lifelong. Only lifelong learning can guarantee that individual Australians will be prepared for change*'. The provisions will enable members of the Commission to publicly model vocational training arrangements that need to apply (in varying degrees) to the entire Australian workforce.[31]

*Conclusion*

5.68 Continuing training and professional development will benefit Commissioners' personal development and lead to a culture of continuous improvement and excellence in service.

***Recommendation***

5.69 That items 22 and 23 of Schedule 2 be enacted to require Commissioners to participate in an annual training and professional development program to be developed by the President.

**User-friendly systems and procedures**

5.70 Parts of Schedule 2 amend the WR Act to require the Commission and the Registry to focus on the needs of employers and employees in performing its functions, and to provide user-friendly systems and procedures.

5.71 The Department submitted:

> The conduct of the Commission has important commercial and industrial ramifications for parties that use its services. Concerns expressed by industry during the preparation of (*Time for Business: the Report of the Small Business Deregulation Taskforce* – the Bell Report) suggest that more needs to be done to ensure that Commission and Registry processes and practices are not too demanding or inconvenient for participants of the system. The Bell Report found that 'The Australian Industrial Relations Commission is seen as process driven and not user friendly. Accessible forums and simple transparent processes are needed' (page 5). The Bell Report also noted that 'small business operators say that AIRC hearings are held at unsuitable times and locations, its proceedings and documentation

31 Submission No. 375, Business Council of Australia, vol. 12, p. 2584

> too formal, and legal representation is essential in order to participate in the process' (page 49.[32]

5.72 The Tasmanian Chamber of Commerce and Industry pointed to difficulties faced by local businesses because there is only one Commissioner, based in Hobart, to handle the Commission's work in Tasmania. This causes delays and difficulties for businesses outside Hobart.[33] More flexible processes using the full range of current communications technology could assist in alleviating these problems. However, some witnesses thought that increased use of technology would pose problems, for example:

> The minister has foreshadowed internet and electronic mail submissions, increased use of telephone and video conferencing and the possibility that the performance of AIRC members will be linked to case turn-around time. He has also indicated that the AIRC's role increasingly will be focused on the provision of information and advice. While these changes are designed to deliver flexibility in AIRC functioning, they also have the potential to render tribunal processes perfunctory.'[34]

*Conclusion*

5.73 The amendments to simplify the Commission's processes and procedures form part of the Government's continuing implementation of the recommendations of the Small Business Taskforce.

5.74 The focus on the needs of those who use the Commission's services, particularly employers and employees who may not have had much experience in dealing with the Commission's procedures, is consistent with the primary objectives of the Act to devolve responsibility for industrial relations to parties at the workplace level. A majority of the Committee considers that the Commission has the ability to develop simpler, user-friendly processes and procedures while still ensuring that it properly fulfils its functions under the WR Act.

***Recommendation***

5.75 That the amendments in the Bill which requires the Commission to have greater regard to the needs of employers, employees and organisations in performing its functions, and to provide user-friendly systems and procedures, be enacted.

**Harmonising administration of the Commission and Registry**

5.76 Various items in Schedule 2 amend the WR Act to give the President of the Commission greater control over the administration of the Registry, and require the

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32 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2324-5.

33 Submission No. 481, Tasmanian Chamber of Commerce and Industry Ltd, vol. 24, p. 6144

34 Submission No. 299, Ms Bernadine Van Gramberg, Victoria University and Associate Professor Julian Teichner, Monash University, vol. 7, p. 1436

President to report on the performance and efficiency of the Registry in the President's annual report, rather than the Registry preparing a separate annual report.

5.77 The Business Council of Australia submitted that these measures would increase accountability and transparency and:

> …add to public confidence in the operations of those bodies. Consideration should be given to prescribing key performance indicators in legislation, with scope for additional indicators to be introduced from time to time or for specific purposes by regulation. Legislated performance indicators should extend to reporting on complaints about service delivery and the manner in which complaints were resolved.[35]

5.78 The Department submitted that the proposed amendments would:

> …allow for greater harmonisation, integration and simplification of practices and procedures. The Workplace Relations Registrar will report directly to the President rather than to the Minister, as is currently the case. The Registrar will continue to be a statutory office holder.[36]

5.79 The Committee did not receive any submissions or evidence opposed to these amendments.

*Conclusion*

5.80 The amendments streamline management and administration of the Registry, and ensure that the activities of the Registrar are more closely aligned with the work of the Commission.

5.81 The amendments shift the Registry's lines of accountability from the Minister to the Commission. One of the Registry's primary functions is 'to act as the registry for the Commission and to provide administrative support to the Commission'[37], so the Committee believes that strengthening the Registry's accountability to the Commission is appropriate.

***Recommendation***

5.82 That the amendments contained in Schedule 2, which give the President of the Commission greater responsibility for the performance of the Registry's functions, be enacted.

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35 Submission No. 375, Business Council of Australia, vol. 12, p. 2584,

36 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2325

37 Paragraph 63(1)(b) of the Workplace Relations Act

## Harmonising Registry appointments

5.83 Item 118 of Schedule 2 inserts a new section into the Act regarding the dual appointment of employees of State industrial tribunals to the Commission as Deputy Registrars or acting Deputy Registrars.

5.84 The Department submitted that this amendment would remove a technical impediment to further harmonisation of the administration of Australian State and Federal industrial tribunals:

> The WR Act provides for the functions of the Australian Industrial Registry (section 63) and allows it to act as the registry for State industrial bodies. However, the WR Act contains an impediment to allowing State registries to undertake the full range of federal Registry functions by restricting the appointment or staffing of the Registry to persons employed under the Public Service Act 1922. The WR Act is being amended to remove this impediment to allow staff employed by a State Registry to be appointed as a (Deputy Registrar). Such an appointment would be subject to the Minister reaching agreement with the appropriate State authority and to the terms of the industrial law of that State. This will accelerate the harmonisation of service delivery between the Commission and State industrial tribunals with a service delivery mix of federal and State resources that provide the most effective outcome.[38]

*Conclusion*

5.85 A majority of the Committee supports further administrative harmonisation of Australia's six different industrial relations jurisdictions. A great deal of evidence was heard regarding the complexity for employers and employees of operating within different State and Federal systems.

5.86 The amendment is a technical amendment to provide for a minor exemption from the barrier to appointment of Registry staff who are not federal public servants (subsection 83(1)). The exemption would only apply in the case of dual appointments of staff employed in State industrial tribunals to the statutory positions of Deputy Registrar.

***Recommendation***

5.87 That the amendment in item 118 of Schedule 2 to allow dual appointment of the staff of State industrial tribunals as federal Deputy Registrars or acting Deputy Registrars be enacted.

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38 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2330

# CHAPTER 6

## SCHEDULE 4 – CONCILIATION AND SCHEDULE 5 – MEDIATION

6.1 This chapter deals with amendments to the WR Act relating to the Commission's powers to conciliate industrial disputes, set out in Schedule 4 of the Bill, and to recognise mediation as an alternative mechanism for resolving industrial disputes, set out in Schedule 5 to the Bill.

### Outline of proposed amendments

*Conciliation*

6.2 Under the WR Act, the Commission may only deal with an industrial dispute by arbitration, or settle an industrial dispute by making an award, if the industrial dispute relates to 'allowable award matters', which are set out in subsection 89A(2) of the Act.[1] There are other limited situations in which the Commission can exercise arbitral powers, for instance, in relation to 'exceptional matters' under section 120A.

6.3 The Commission's ability to conciliate industrial disputes is not currently limited in this way. However, Schedule 4 of the Bill amends the Act so that the Commission can only exercise its compulsory conciliation powers in the same circumstances that it can currently exercise its arbitral powers. These circumstances include, amongst other things:

- settlement of disputes about allowable award matters (item 7 of Schedule 4); and
- settlement of disputes about exceptional matters (item 8 of Schedule 4).[2]

6.4 Schedule 4 also introduces a new Part VA, conferring new powers on the Commission to voluntarily conciliate other types of industrial disputes, matters that are at issue between the parties relating to negotiation of a certified agreements, or issues arising under awards or agreements.

6.5 This new jurisdiction can only be exercised if all parties to the dispute agree to conciliation, and to operate on a user-pays basis, with the Bill proposing a fee of $500 for this service.

6.6 The Bill allows the Commission to decide whether a dispute referred to it can be dealt with by compulsory conciliation, and to separate parts of a dispute that can only be dealt with by voluntary conciliation.

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1 Subsection 89A(1) of the Workplace Relations Act

2 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2330

6.7 A Commissioner who has conciliated an industrial dispute is also prevented from later arbitrating on the dispute, unless the parties agree to the same Commissioner arbitrating.

*Mediation*

6.8 Item 6 of Schedule 5 introduces new provisions to allow federal industrial disputes to be mediated by independent accredited workplace relations mediators. The Act does not currently prevent parties to a dispute from using mediation to resolve the dispute. However, the new provisions give legislative recognition to mediation as an option, promoting it as an alternative method of resolving disputes.

6.9 The Bill allows for the appointment of a Mediation Adviser, with the functions of overseeing the approval of mediation agencies, promoting the use of mediation, approving mediation agencies to assess and accredit mediators, and determining competency standards for accredited workplace relations mediators.

**Compulsory and voluntary conciliation**

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

> …are consistent with the policy of encouraging employers and employees to take greater responsibility for their own workplace relations. They will also help ensure that voluntary mediation becomes an effective option as an alternative to the Commission's voluntary conciliation role…The proposed changes will not involve a reduction in the role of the Commission, as the Commission will retain its ability to conciliate in relation to all matters where it currently exercises conciliation powers. However, it is proposed to introduce a requirement for the parties to consent to the exercise of this jurisdiction in relation to non-allowable matters.[3]

6.11 The Australian Chamber of Commerce and Industry and the Business Council of Australia, supported the amendments:

> It is difficult to justify compulsory conciliation over a matter which is not allowable, and which either has been or will be removed from awards, and which cannot be arbitrated. Voluntary conciliation over non-allowable matters is a logical consequence of the original decision to restrict awards to allowable award matters, and it appears that this issue was simply overlooked in the initial development of the Bill.[4]
>
> This part of the Bill is not about restricting the Commission's real teeth – because it is not about limiting its powers of arbitration. Currently, where the Commission does not have powers of arbitration the parties are

3 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2331

4 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3341

> resolving industrial disputes (often with the assistance of the Commission when a dispute arises) without an imposed solution, although the means may be recommended. Therefore the amendments will ensure that this process occurs in an environment where the parties have a greater say in the process for achieving their resolution, rather than having no choice other than to accept the compulsory conciliation process of the Commission.[5]
>
> The establishment of the distinction between 'voluntary' and 'compulsory' conciliation is simply recognition that the Commission now has limits on its arbitral powers and consequently also should have limits on its capacity to compel parties to participate in processes against their will over subject matters that the Commission has now power to arbitrate on.[6]

6.12 Mr Des Moore, the Director of the Institute for Private Enterprise, also supported reducing the extent of the Commission's powers to compulsorily conciliate industrial disputes:

> I ask that the Committee consider this Bill against the urgent need for Australia to reduce labour market regulation to a minimum and, in particular, to change the existing role of the AIRC to that of a voluntary adviser and mediator providing service to both employers and employees, with those on low incomes being eligible for subsidised or free access.[7]

6.13 There was, however, opposition to the proposed limits on compulsory conciliation from unions and employee associations,[8] academics,[9] lawyers,[10]

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5 Submission No. 375, Business Council of Australia, vol. 12, p. 2606

6 Submission No. 474, Chamber of Commerce and Industry, Western Australia, vol. 23, p. 6015

7 Evidence, Mr John Moore, Melbourne, 7 October 1999, p. 81

8 For example, see Submission No. 423, Australian Council of Trade Unions, vol. 19, pp. 4441-2; Submission No. 461, Australian Medical Association, vol. 22, p. 5628; Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, pp. 3796-9; Submission No. 416, Independent Education Union of Australia, vol. 18, p. 4299; Submission No. 295, Ansett Pilots Association, vol. 7, p. 1390; Submission No. 424, Australian Manufacturing Workers' Union, vol. 20, p. 4794-5; Submission No 430, Newcastle Trades Hall Council, vol. 20, p. 5011; Submission No. 471, Australian Nursing Federation (WA Branch), vol. 23, pp. 5786-7; Submission No. 479, Construction, Forestry, Mining and Energy Union (United Mineworkers' Federation Division), vol. 23, pp. 6115-7

9 For example, see Submission No. 90, Professor Ronald Clive McCallum, vol. 2, p. 272; Submission 377, Professor Joe Isaac AO, vol. 12, pp. 2689-90

10 For example, see Submission No. 456, Mr Jim Nolan, Barrister, vol. 22, pp. 5377-9; Submission No. 460, International Centre for Trade Union Rights, vol. 22, pp. 5505-9

community groups[11] and some employers, who thought the current system of compulsory conciliation was operating effectively and did not need to be changed.[12]

6.14 Other witnesses submitted that the system of compulsory conciliation was an established and proven method of settling industrial disputes, and that there should be clear evidence put forward to justify any proposals to restrict the Commission's powers to intervene:

> I regard public and prompt conciliation to be a right of Australian citizens at work, as it bolsters the fairness compact. Without compelling evidence showing the failure of Commission conciliation, it is my view that it should not be watered down by a fee for service which is utilised only to push voluntary conciliation into the private domain and out of the public realm.[13]

6.15 Professor Isaac, a former Commissioner, claimed that most conciliation undertaken by the Commission has not been on a compulsory basis, and submitted:

> The Commission has generally exercised this power with discretion and sensibility on the timing of its intervention and the handling of the conciliation process.[14]

6.16 Other submissions and witnesses provided examples of situations where the Commission had exercised its conciliation functions over disputes about non-allowable matters with beneficial outcomes, disputes that would not, in their opinion, have been resolved without conciliation.[15]

6.17 Parties who objected to the amendments in Schedule 4 were primarily concerned about the inability of the Commission to intervene to resolve a dispute where one party to the dispute has significantly less bargaining power than the other. It was submitted that in these cases, the party with greater bargaining power would simply refuse to agree to conciliation:

> The maintenance of a strong and independent industrial tribunal is seen as essential to ensure that the principles of fairness, equity and justice are maintained for employers and employees alike, and to ensure the protection of vulnerable parties. The ACCER suggests that the Bill would narrow the ability of the commission to carry out this role by allowing compulsory

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11 For example, see Submission No. 417, Federation of Ethnic Communities' Councils of Australia Incorporated, vol. 18, p. 4316; Submission No. 440, Uniting Church in Australia Board for Social Responsibility, vol. 21, pp. 5161-2; Submission No. 429, Women's Electoral Lobby, National Pay Equity Coalition and Business and Professional Women Australia (NSW Division), vol. 20, pp. 4895-6; Submission 441, Women for Workplace Justice Coalition, vol. 21, pp. 5188-9

12 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3073

13 Submission No. 90, Professor Ronal Clive McCallum, vol. 2, p. 272

14 Submission No. 377, Professor Joe Isaac AO, vol. 12, p. 2689

15 Evidence, Mr Dave Oliver, Sydney, 26 October 1999, p. 395

> conciliation on arbitral matters only (and) introducing voluntary conciliation for other matters on a fee-for-service basis…[16]

6.18 The Committee was provided with one example of a group of employers who oppose the proposed amendments because of the industrial strength of their employees:

> The position of contractors on building sites makes them commercially vulnerable to industrial action. Almost universally notification of industrial disputes to the Commission is made by an employer or employer organisations in an attempt to enlist the aid of an independent third party to bring pressure to bear on the CFMEU to cease industrial action, constructively negotiate etc. There are a range of issues which are likely to fall outside of matters where the Commission can compulsorily conciliate. …Voluntary conciliation requires the agreement of both parties. It would be our expectation that the CFMEU would not generally agree to voluntary conciliation as it has the knowledge that it is able to exert considerable commercial pressure on subcontractors through the pursuit of industrial action…[17]

6.19 It was stated to the Committee that there were many employers and employees who would behave responsibly under the proposed system of voluntary conciliation, but some witnesses were concerned that it is not these employers and employees who generally become involved in protracted industrial disputes.

6.20 Reference was made during the public hearings to the successful use of voluntary conciliation and mediation in the United Kingdom to resolve disputes.[18] The Advisory Conciliation and Mediation Service (ACAS) was established in the late 1970s in Britain, and provides voluntary conciliation, arbitration and mediation services to employers and employees: ACAS conciliators have no power to impose, or even recommend, settlements. ACAS has also evolved to provide assistance to employers and employees to construct workplace cultures which prevent disputes from occurring in the first place and following a 'rational approach', perceived to be based upon 'jointness'.[19]

*Conclusion*

6.21 These amendments have attracted some criticism that they are intended to reduce the powers and functions of the Commission. The Committee does not agree with this assertion, and considers that the Commission remains an integral part of Australian industrial institutional arrangements. The Committee emphasises that its

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16 Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 138

17 Submission No. 267, Master Builders Australia Incorporated, vol. 6, p. 1238

18 See, for example, evidence, Mr Walter Stewien, Melbourne, 8 October 1999, p. 163

19 *Joint problem solving: does it work? An evaluation of ACAS in-depth advisory mediation*, Kessler, I. and Purcell, J. ACAS Occasional Paper No. 55 http://www.acas.org.uk/pubs/occp55.htm (7 November 1999)

support for these amendments is not in any way to be taken as a reflection on the professionalism of the Commission and its Commissioners.

6.22 The Committee considers that most of the evidence opposing these amendments demonstrates why the amendments are necessary: many participants in Australia's industrial system continue to take the view that they are locked into an adversarial process where the focus is not on reaching mutually acceptable outcomes, but arguing before the Commission why one party is right and the other wrong. For this reason, the Committee considers that it is necessary to limit access to the 'safety blanket' of compulsory conciliation.

***Recommendation***

6.23 That the amendments proposed in Schedule 4 to limit compulsory conciliation to matters where the Commission could later arbitrate, and to allow the Commission to conciliate on a voluntary basis in other circumstances, and associated amendments, be enacted.

**Fees for voluntary conciliation**

6.24 The Bill requires that the Commission charge $500 for parties to use its new voluntary conciliation services. The Department submitted that it would be necessary to charge a fee for the Commission's voluntary conciliation services to:

> …encourage employers and employees to resolve minor disputes directly in the workplace…encourage employers and employees to consider more fully whether conciliation provided by the Commission, or private mediation is best suited to their needs and the particular circumstances of the dispute [and] remove the current disincentive to using alternative dispute resolution services which may be more appropriate, but for which fees are payable..[20]

6.25 Some witnesses were opposed to the introduction of fees on the basis that this would disadvantage those on low incomes. However, it should be noted that item 54 of Schedule 4 introduces a provision to allow the Commission to waive all or part of this fee where the Commission is satisfied that charging the fee would cause a person hardship.[21] Other witnesses opposed the amendments, as they would tend to discourage the use of relatively flexible and non-legalistic conciliation procedures to resolve disputes.[22]

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20 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2333

21 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2331

22 Submission No. 412, Slater and Gordon Solicitors, vol. 16, pp. 10-11

*Conclusion*

6.26 A majority of the Committee believes that there is merit in the proposal to create a 'level playing field' to allow private sector firms to compete in the dispute resolution market.

***Recommendation***

6.27 That the amendments in Schedule 4 regarding the new voluntary conciliation powers of the Commission be enacted.

**Mediation**

6.28 There is a difference between 'conciliation' and 'mediation'. The Committee received evidence about the technical difference:

> In the terms of the AIRC, you will have a commissioner who is conciliating who will frequently express the point of view during the process. A mediator will attempt to get the parties to look at all the opportunities and do some lateral thinking. They will talk to the parties one on one privately and get to know what they are thinking. A conciliator does the same thing, but a conciliator will express views during the process, and will say, 'This is a point of view in the legislation. Have you looked at that?' It is really a situation of mediation with a little more involvement. But having said that, the Americans tend to use the words 'conciliation' and 'mediation' as meaning exactly the same thing.[23]

6.29 It was generally accepted that the introduction of legislative provisions to recognise private mediation as an alternative to Commission conciliation procedures would be a positive step. There was some opposition to the amendments contained in Schedule 5, but this opposition was generally associated with the perception that the mediation provisions were part of a 'package' of amendments to reduce the Commission's powers and standing, rather than opposition to the principle of mediation:

> We see mediation as being appropriate in matters to do with equal opportunity and harassment. The problem with mediation for us is that people have to agree, they have to abide by the outcome. We believe that the existing disputes resolutions procedures, when helped by the independent umpire, provide the most commonsense resolution. Some of the debate about mediation is really about the privatisation of the Industrial Relations Commission…We have no objection to mediation in some areas, but we think in workplace relations and industrial relations the existing system provides an adequate alternative…It depends on the dispute. With matters

23 Evidence, Mr Walter Stewien, Melbourne, 8 October 1999, p. 166

> which are easy to resolve, mediation is good, but with matters which are protracted, that is not so.[24]

6.30 Some witnesses indicated that they considered the amendments in Schedule 5 unnecessary, as parties could already access private mediation if they chose to do so:

> The empirical evidence is the almost total absence of mediation from our current system. Mediation is available now and has always been available. It is not used because it does not work and because it is unnecessary.[25]

6.31 Others supported the use of mediation as an alternative dispute resolution mechanism, but did not agree with the proposed model:

> …there is merit in introducing mediation as an alternative means of dispute resolution. The AI Group proposes, however, that the mediation process should be built into the existing system, be carried out by accredited members of the commission and be publicly funded. We strongly favour dispute resolution through conciliation or mediation rather than through litigation.[26]…if you want to introduce mediation—and there might be some advantages—then it ought to be on the same basis, without a fee. However, it should not prevent private providers, if they wish to enter the market, from being there, for which understandably they would charge a fee.[27]

6.32 Some witnesses supported the amendments on the basis that the provisions would promote mediation as an alternative dispute resolution mechanism:

> A process of rational analysis, discussion and negotiation can occur in a confidential form without legal jargon and where mutually agreed resolutions can be achieved. In my view, mediation provides such a process. The amendments in the Bill encourage the greater use of mediation whilst ensuring standards and accreditation to maintain the professionalism of the mediators. Legislation which encourages mediation will help to change the mind-set of some parties and voluntary mediation will become more common.[28]

6.33 The Committee was also given evidence that small businesses would be likely to support the increased use of mediation to resolve industrial disputes:

> The optimum is to resolve it in the workplace without a third party. Between that and going before the Industrial Relations Commission, I have no doubt that mediation in some form would be far more acceptable to small firms as it is in so many other areas—taxation law and trade practices law. There are

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24 Evidence, Mr Bill Shorten, Melbourne, 8 October 1999, pp. 151-2

25 Evidence, Mr Lloyd Freeburn, Melbourne, 7 October 1999, p. 74

26 Evidence, Mr Robert Herbert, Canberra, 1 October 1999, p. 44

27 *ibid*., p. 46

28 Evidence, Mr Walter Stewien, Melbourne, 8 October 1999, p. 162

> all sorts of mediation processes. Small business wants to get the job done and stay on the job. That has got to be the principal objective. But between that and the industrial relations process, without question I think mediation is a better option.[29]

*Conclusion*

6.34 A majority of the Committee agrees with measures to support and extend the use of mediation, a non-adversarial and non-legalistic means of resolving disputes similar to the conciliation function exercised by the Commission. It is noted that businesses may prefer to use the option of private mediation as an alternative to conciliation by the Commission, which is still perceived by some to be adversarial and formal in its processes.

***Recommendation***

6.35 That the new provisions to formally recognise mediation as a mechanism for resolving industrial disputes, and to establish a system of accredited workplace relations mediators be enacted.

29 Evidence, Mr Rob Bastian, Canberra, 28 October 1999, p. 523

# CHAPTER 7

# SCHEDULE 6 – AWARDS

7.1 This chapter deals with proposed amendments to provisions of the WR Act relating to awards. Awards are orders made by the Commission in settlement of industrial disputes.

**Outline of proposed amendments**

7.2 Schedule 6 of the Bill includes:

- amendments to regulate processes prior to the making of an award (logs of claims);
- amendments relating to the contents of awards (allowable award matters, agreement encouragement clauses and objectionable provisions);
- new provisions requiring the Commission to simplify existing awards, and requiring the Registrar to review obsolete awards;
- an amendment to limit the application of safety net wage increases made by the Commission; and
- amendments to prevent employers covered by State industrial arrangements from being 'roped in' to federal awards.

**Provisions to regulate the log of claims process**

7.3 The new provision proposed in item 21 of Schedule 6 prevents the Commission from finding that an industrial dispute exists for the purposes of exercising its dispute settlement functions (ie arbitrating and making a binding award), where the dispute is based on a log of claims and:

- the log of claims was not accompanied by an information sheet (proposed paragraph 101A(a));
- the dispute was notified under the Act less than 28 days after the log was served (proposed paragraph 101A(b));
- each party to the dispute was not properly notified of the time and place for proceedings at least 28 days before the proceedings (proposed paragraph 101A(c));
- the log contained demands for terms and conditions that would contravene the freedom of association provisions of the Act (proposed subparagraph 101A(d)(i));
- the log contained demands for 'objectionable provisions' to be included in an award or agreement (proposed subparagraph 101A(d)(ii)); or

- the log contains claims for terms and conditions that do not pertain to the employment relationship (proposed subparagraph 101A(d)(iii)).

*Evidence*

7.4 The Department submitted:

> Over the years, the practice of serving 'logs of claims' has developed in the federal industrial sphere to provide evidence of the existence of an industrial dispute. Windeyer J described this practice in *Ex parte Professional Engineers' Association*: 'The dispute here is a 'paper dispute'. To permit the creation of a malady so that a particular brand of physic may be administered must still seem to some people a strange way to cure the ills and ensure the health of the body politic. But the expansive expositions by this Court of the meaning and effect of par. (xxxv.)…have brought a great part of the Australian economy directly or indirectly within the reach of Commonwealth industrial law and of the jurisdiction of the Commonwealth industrial tribunal. The artificial creation of a dispute has become the first procedural step in invoking its award-making power.[1]

7.5 The process of 'paper' disputes developed by the courts means that the Commission can exercise its functions to prevent and settle industrial disputes without having to wait until interstate industrial action, for example a strike or a lockout, is actually occurring. However, as the Department points out, despite the integral importance of logs of claims to establishing whether the Commission can exercise its dispute settling powers, there is currently no regulation of the process of creating and serving logs of claims in the WR Act.[2]

7.6 The Department also submitted that the proposed amendments would ensure that demands included in logs of claims were matters over which the Commission could exercise jurisdiction (ie matters relating to the employment relationship)[3] and assist recipients of logs of claims (particularly small business employers) to better understand the processes and procedures of the federal award-making jurisdiction.[4]

7.7 Employer groups supported the amendments to assist employers to understand the Commission's award making jurisdiction and to allow employers more time to respond to logs of claims (ie the proposed paragraphs 101A (a), (b) and (c)). For instance, the Business Council of Australia submitted that it supported amendments to enable employees who become the subject of logs of claims to better understand the implications of the demand and to prepare for their response:

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2360-1

2 *ibid*., p. 2361

3 *ibid*., p. 2362

4 *ibid*., p. 2363

> Currently there is potential for employers (particularly small business) who are served with logs of claims (and who are not members of employer organisations) not having sufficient time to ascertain explanations of the processes of the Commission, its powers and the rights of parties served with logs.[5]

7.8 The Australian Industry Group and the Australian Chamber of Commerce and Industry supported the amendments for similar reasons:

> The creation of an industrial dispute within the meaning of the Constitution is largely a legal fiction not easily understood in the community. The proposed amendments will assist respondent parties in understanding their rights and obligations in relation to the process of creating industrial disputes and will allow adequate time to seek advice about their rights.[6]

> Employers are frequently surprised, upset and astonished about the extravagant nature of claims in logs of claims, and an information sheet will provide the employer with some guidance about the Constitutional considerations leading to logs of claims. The…Commission has itself recognised this problem, and has provided a standard information sheet which explains the issues to employers. Unfortunately this information sheet is not provided with logs of claims, instead it is served on employers with the AIRC notice of hearing. Since the notice of hearing is frequently not served on individual employers at all (because of substituted service), thousands of employers do not receive any explanation about the reasons for the extravagant claims made in the log of claims they received. This is very undesirable.[7]

7.9 The Committee also heard evidence about how small business employers react to being served with logs of claims:

> …it terrifies the pants off little people who do not know what is going on… a staggering 60 per cent of net job growth comes from small firms and microfirms…So not only is it an unpleasant process but, to the uninitiated—the new start-ups, people who are really blotting up labour—it is a major fright…[8]

7.10 Employer groups generally did not comment on the amendments in proposed paragraph 101A(d). However, many unions were opposed to paragraph (d), believing that it would lead to additional litigation. The new provisions would prevent the Commission from finding that a dispute exists where a single demand in a log of claims did not, for example, pertain to the employment relationship. Unions claimed

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5 Submission No. 375, Business Council of Australia, vol. 12, p. 2604

6 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3089

7 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3340

8 Evidence, Mr Rob Bastian, Canberra, 28 October 1999, p. 522

that the issue of which matters are considered to relate to the 'employment relationship' is a complex legal issue normally determined by the courts:[9]

> ….one invalid claim in a log of claims invalidates the whole log and the union would have to start all over again with the process. The incentives to challenge each and every claim because it would no longer be severable and it would invalidate the whole thing are very high. You can imagine the amount of litigation that would go on around each and every claim.[10]

7.11 The Shop, Distributive and Allied Employees Association submitted that if paragraph (d) were enacted the Commission would effectively be prevented from finding a dispute existed in many cases: if a log of claims had not been constructed to meet the proposed requirements, then the Commission could not find a dispute under proposed paragraph 101A(d), and if the union did 'construct' the log of claims to meet the new requirements, High Court authority would prevent the Commission from finding that a dispute existed anyway.[11]

*Conclusion*

7.12 A majority of the Committee supports the amendments, as they will allow parties not familiar with the federal jurisdiction time to seek independent advice and to prepare their response to the log of claims. The Committee acknowledges that this will result in some additional delay for the parties in some cases. However, it is essential to ensure that all parties can properly participate in Commission proceedings affecting them, and the Committee considers that this objective outweighs slight procedural delays.

***Recommendation***

7.13 That the proposed amendments to regulate logs of claims be enacted.

**Allowable award matters**

7.14 The Bill contains amendments to:

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9 Some examples of types of demands that do not pertain to the employment relationship were provided by the Department of Employment, Workplace Relations and Small Business (Submission No. 329, vol. 11, p. 2361 – claims for an employer to provide employees with health insurance or to pay for the schooling of employees' children) and the Shop Distributive and Allied Employees' Association (Submission No. 414, vol. 17, pp. 3741-2 – claims for pay roll deductions of union dues, right of entry of union officials, and union encouragement clauses)

10 Evidence, Ms Linda Rubinstein, Canberra, 1 October 1999, p. 27

11 In *Caledonian Colleries Ltd & Ors v. The Australasian Coal and Shale Employees' Federation* [No 2] (1930) 42 CLR 558 at pp 579-580 it was held that no real dispute existed because the log was served by the Federation merely for the purpose of attracting federal industrial jurisdiction: *Australian Labour Law Reporter*, p 3491-2, CCH Australia Ltd, 1999, quoted in Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, Attachment 8, p. 4028-9

- *remove some allowable award matters from subsection 89A(2)* (skill-based career paths, tallies and bonuses (except for outworkers), long service leave, notice of termination, and jury service);
- *clarify the scope or meaning of particular allowable award matters* (ceremonial leave, public holidays, allowances, and redundancy payments);
- *clarify that some matters are not allowable* (transfers between locations, transfers between types of employment, training or education (except for trainees and apprentices), recording hours of work, accident make-up pay, union picnic days, dispute resolution procedures where no choice as to representatives, limits on numbers/proportions of employees in particular types of employment or classifications, maximum or minimum hours of work for part time employees and tallies); and
- *clarify the types of matters that may be included in an award because they are 'incidental' to allowable award matters.*

*Evidence*

Skill-based career paths

7.15 The Department submitted that this amendment would have the effect of removing training and study provisions from awards, which would be matters for determination at the enterprise or work level.[12] It was not originally intended that training and study provisions would be allowable award matters, which is why they are not currently included in section 89A(2). However, most groups who commented on this proposal assumed that its purpose was to prevent the Commission from adjusting internal relativities in award pay rates.

7.16 The Australian Chamber of Commerce and Industry supported the proposed amendment, stating:

> In relation to skill based career paths, ACCI submits that the entrenched Australian practice of establishing and maintaining multiple levels of minimum wages makes us unique in the OECD…These are 'classification' levels which are supported by the term 'career paths' in s.89A(2)(a).[13]

7.17 The Australian Catholic Commission for Employment Relations did not support the proposed amendment:

> ...the removal of skill based career structure from the award has the potential to disrupt the internal relativities between the various classifications in each

12 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2345

13 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3296-7

> award. This in turn will lead to grievances about the appropriate rate of pay for work to be performed.[14]

7.18 The Committee also received union submissions which opposed the amendment mainly on the grounds that it would erode the national skills base:

> It was a complete surprise to us that the minister put forward a provision which removes skill based career paths and the essential underpinnings of training and skills development that we have all been working on over the last 10 years to get this country to a stage where it competes on the basis of skills and not on the basis of low wages.[15]

7.19 Some submissions raised particular concerns that this amendment would have a disproportionate and negative effect on women[16], workers in industries with mobile workforces[17] and low-paid workers, including outworkers.[18]

*Conclusion*

7.20 A majority of the Committee is of the view that training and skill development are matters best resolved at the workplace level.

***Recommendation***

7.21 That the amendments to remove skill-based career paths and training from the list of allowable award matters be enacted.

Tallies and bonuses

7.22 The Government has made some amendments to the Bill to ensure that bonuses for outworkers remain an allowable matter. In other cases, wage payments based on tally or bonus systems will become non-allowable in awards. However, piece rate based wage systems will remain an allowable matter.

7.23 Regarding the difference between tallies, bonuses and piece rates, the Department made the following submission:

> 'Tallies are based on inputs, in contrast to piece rate systems, which are based on outputs…Bonuses are not related to production levels in a systematic way, often being a one-off payment when a specified level of production or performance is reached. They are provided in addition to the

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14 Submission No. 167, Australian Catholic Commission for Employment Relations, vol. 4, p. 744

15 Evidence, Mr Timothy Ferrari, Sydney, 26 October 1999, p. 358

16 Evidence, Ms Fran Hayes, Sydney, 26 October 1999, p. 408; Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5868; Submission No 520, New South Wales Government, vol. 26, p. 6926

17 Submission No. 177, Construction, Forestry, Mining and Energy Union, Construction & General Division, vol. 4, pp. 836-7

18 Evidence, Ms Petty Li through interpreter Ms Sally Eng, Sydney, 26 October 1999, p. 366

> minimum rates of pay, in contrast to piece rates, which are an alternative to minimum time-based pay rates of pay. Piece rate systems may also include a guaranteed minimum payment, generally close to, or slightly above the minimum time-based rate of pay in the award.'[19]

7.24 During the Committee's consideration of the Bill, the Commission handed down a decisions relating to tallies in the Federal Meat Industry (Processing) Award 1996, which provides some guidance as to the nature of tallies:[20]

> 'The simple effect of the unit tally (as specified in the (the award)) is to increase unit labour costs as output exceeds minimum and then maximum tally. However, the extent to which this feature of the tally constrains capacity utilisation and the level of output on a given shift depends also on a number of other factors, such as stock availability on the day and chiller capacity . . . Both head and unit tallies are based on inputs - such as the number of heads - rather than a measure of output, such as weight processed, yield per animal, or any other measure of quality. This has implications for the impact of the tally on incentives facing both employees and management. Unit tallies in particular are complex and prescriptive. The (award) tally provisions are over 50 pages long.'[21]

7.25 In this decision, the Commission decided to delete the tally provisions from the meat industry award, because they were not operating as minimum rates as required by the Act.[22] The Commission also commented that the tally provisions in the meat industry award had fallen into disuse because of its complexity and the conceptual difficulties involved in their application. The award provisions were seriously out of date and lacked the flexibility needed to meet the variety of work methods employed in the various plants covered by the award.[23]

7.26 Tallies and bonuses are also used to set pay rates in agricultural industries, including sheep shearing and fruit picking, and the clothing industry. The Australian Workers' Union and some of its members provided the Committee with evidence about the impact in these industries of the removal of award provisions for tallies and bonuses. However, there was some confusion as to whether the retention of 'piece rates' as an allowable award matter would allow these employees to retain their current wage rate systems.[24]

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19 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2345-6

20 Full Bench, 24 September 1999, Print F0512

21 Ibid, quoting the Productivity Commission's 1998 Report, *Work Arrangements in the Australian Meat Processing Industry*

22 *ibid.*

23 *ibid*.

24 Evidence, Mr Sam Beechey, Mrs Barabara Stephens, Melbourne, 8 October 1999, p. 149

7.27 The ACTU thought that this confusion about the difference between piece rates, tallies and bonuses would lead to lengthy proceedings before the Commission because of the problem of uncertainty, as the three terms are used interchangeably in industries such as clothing and meat.[25] However, as noted above, the Government has amended the Bill to specify that bonus payments for outworkers would remain an allowable matter.

*Conclusion*

7.28 A majority of the Committee believes that tally and bonus systems are more appropriately developed at workplace or enterprise level.

7.29 The Committee notes that 'piece rates' will remain an allowable award matter, and while some payment systems in the agricultural industry may currently be described as 'tally' or 'bonus' systems, they are in effect generally operating as piece rate systems and could be reformulated as such in the relevant awards. The Committee also notes that employers and employees who believe that tally or bonus systems best meet their workplace's need for flexibility and productivity are free to develop tally or bonus systems of payment through certified agreements.

***Recommendation***

7.30 That the amendments to remove tallies and bonuses from the list of allowable award matters be enacted.

Long service leave

7.31 The Department submitted that:

> …long service leave arrangements are already provided for in all State and Territory jurisdictions through legislation. There are some differences between long service leave provisions across the States/Territories and between the various legislative provisions and federal award provisions, with some federal award provisions more generous than the relevant State/Territory legislation and other less so…The Bill contains a two year transitional provision for the removal of long service leave provisions from awards, to enable the parties to address the issues of inconsistency between current award arrangements and entitlements that apply under State or Territory legislation.[26]

7.32 This amendment was supported by some employer groups:

> Long service leave is dealt with through State legislation…There is no need to second guess the State legislatures. Where awards deal with the same

25 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4446

26 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2346

> issues dealt with in legislation a second order of difficulty too often arises, arising from differences in the requirements in the two schemes.[27]

7.33 However, some employer groups did not support the amendment, as they did not think that removing long service leave provisions from awards would result in simplification of requirements. Instead, these employer groups thought that removing long service leave from awards would cause additional administrative burdens for employers, or result in increased long service costs.[28]

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

> The best example of why you should not remove long service leave is the Oakdale issue. Oakdale workers were retrenched. They were owed $6.3 million. The only money they got before it was finally resolved was their long service leave entitlement, and they got that for two reasons. Firstly, there was a centralised long service leave fund available for the industry set up under Commonwealth law—and which Minister Reith is on record as wanting to abolish. Secondly, there is an award provision detailing the entitlement level, as well as other aspects of it—for example, that it is based on industry service, it is portable, et cetera.[29]

*Conclusion*

7.35 A majority of the Committee supports this amendment, as it will remove an additional layer of regulation in relation to long service leave. Long service leave is already regulated by federal and State legislation.

7.36 Regarding concerns that some employees and employers will be disadvantaged by moving from award regulation of long service leave to sole regulation of long service leave by legislation, the Committee majority notes that there is a two year interim period proposed before long service leave provisions would have to be removed from awards. This will give these employers and employees some time to attempt to negotiate alternative arrangements under agreements.

***Recommendation***

7.37 That the amendment to remove long service leave from the list of allowable award matters be enacted.

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27 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3295

28 Evidence, Mr Gregory Hatton, Victorian Automotive Chamber of Commerce, Melbourne, 7 October 1999, p. 130, Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 142

29 Evidence, Mr Tony Maher, Sydney, 22 October 1999, p. 274

Notice of termination

7.38 This amendment will remove provisions from awards that are already dealt with in legislation. The WR Act sets minimum notice requirements on termination[30]:

> Minimum required periods of notice of termination by an employer, based on age and years of employment, are provided for as a general minimum entitlement by the Workplace Relations Act. This legislated standard is identical to the award standard for required periods of notice of termination by an employer set by the *Termination, Change and Redundancy Test Case* (Print F6320).'[31]

7.39 However, some employers were opposed to the amendment, because it would also have the effect of removing award clauses requiring employees to give their employers notice on resignation. There are no equivalent legislative provisions requiring employees to give notice.[32]

7.40 Some unions also opposed this amendment as particular awards provide for longer periods of notice of termination than those minimums set out in the WR Act.[33]

*Conclusion*

7.41 A majority of the Committee agrees with removing duplication of provisions in awards and the WR Act. The Committee majority notes that the amendment may remove provisions from awards requiring employees to give their employers notice on resignation, but considers that affected employers could negotiate notice requirements directly with their employees, that most effectively meet the needs of their particular workplace.

***Recommendation***

7.42 That 'notice of termination' be removed from the list of allowable award matters.

Jury service

7.43 The Bill removes 'jury service' from the list of allowable award matters. Payments for members of the public required to serve on juries is dealt with in State legislation. For this reason, the Business Council of Australia and the Australian

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30 Section 170CM of WR Act

31 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2350

32 Evidence, Mr Gregory Hatton, Melbourne, 7 October 1999, pp. 130-1; Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086

33 Submission No. 380, Construction Forestry Mining and Energy Union (Mining and Energy Divisions), vol. 13, p. 2803

Chamber of Commerce supported the amendment.[34] The Department submitted that the Government's policy position was that it was not appropriate for awards to compel employers to pay allowances for 'non-work related matters' such as jury service, and that only about one third of all federal awards currently contain provisions relating to jury service, so these provisions do not form part of the award safety net.[35]

7.44 Unions and employee groups opposed the removal of jury service from the list of allowable award matters:

> Like the removal of paid leave for blood donors…paid leave for jury service is a public interest issue which should be of concern to the whole community. The ability to draw on the greatest number and diversity of people as potential jurors is vital to the operation of our legal system.[36]

7.45 The Australian Industry Group also opposed this amendment. AIG claimed that awards currently contain obligations for employees, as well as employers, relating to jury service, which are not duplicated in State legislation.[37]

*Conclusion*

7.46 A majority of the Committee considers that it is inappropriate for the federal award system to require employers to make up the difference between payments for jury service by a State Government, which may be perceived by some to be inadequate, and employees' wages.

7.47 A majority of the Committee also notes that only about one third of all federal awards contain provisions relating to jury service. These provisions are therefore only currently enjoyed by selected employees, with employees covered by the remaining two thirds of awards being required to accept State payments, or to negotiate alternative arrangements in agreements.

***Recommendation***

7.48 That 'jury service' be removed from the list of allowable award matters.

Ceremonial leave

7.49 The Bill inserts a new allowable award matter, 'ceremonial leave for Aboriginal and Torres Strait Islander people, and other like forms of leave, to meet

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34 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3295; Submission No. 375, Business Council of Australia, vol. 12, p. 2603

35 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2350

36 Submission No 423, Australian Council of Trade Unions, vol. 19, p. 4447-8

37 Submission No. 393, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086

cultural obligations'. This replaces part of the current allowable award matter in paragraph 89A(2)(g), relating to personal leave.

7.50 This amendment was generally supported by employer groups.[38] In particular, the Australian Chamber of Commerce and Industry made a fairly detailed submission about the history of this matter, and the Commission's test case decision on the scope of the existing paragraph 89A(2)(g).[39] The Committee did not receive a great deal of other evidence about this amendment.

***Recommendation***

7.51 That the amendments to remove 'cultural leave' from the allowable award matter relating to personal and carers' leave, and to include a new allowable award matter in the Act relating to ceremonial leave for Aboriginal and Torres Strait Islander people, be enacted.

Public holidays

7.52 The proposed amendment clarifies that the only types of provisions that can be included in awards under the allowable award matter 'public holidays' (paragraph 89A(2)(i)) are those relating to holidays declared, proclaimed or gazetted to be public holidays by State and Territory governments.

7.53 This amendment was opposed by employees who thought that the changes might result in the abolition of some public holidays contained in awards that are not generally declared by State Governments, for example, Easter Saturday,[40] and union picnic days.[41]

7.54 On the other hand, some employer groups supported the amendment on the grounds that federal award provisions should not override State responsibilities.[42]

7.55 The Australian Industry Group gave its 'conditional support' for the amendment, but thought that there may be some difficulties associated with moving from the award Test Case standard of 11 public holidays to State declared holidays, which could in fact entitle employees to additional holidays, and create different levels of entitlements in different States.[43]

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38 See Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3085; Submission No. 375, Business Council of Australia, vol. 12, p. 2603

39 Submission No. 399, p 33, ACCI

40 See, for instance, Submission No. 400, Ms Maria Cullia; Submission No. 32, Gareth Rawnsley; Submission No. 288, Peter Ibbott and Sonia Griffin

41 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4447

42 Evidence, Mr Reginald Hamilton, Canberra, 1 October 1999, pp. 37-8

43 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086

*Conclusion*

7.56 A majority of the Committee agrees that responsibility for determining public holidays lies with State and Territory governments. It is acknowledged that this results in different standards across the various jurisdictions. This, however, has always been the case with public holidays.

***Recommendation***

7.57 That the proposed amendment to clarify the meaning of the allowable award matter 'public holidays' in paragraph 89A(2)(i) be enacted.

Allowances

7.58 The Bill more clearly defines what types of 'allowances' are allowable award matters under paragraph 89A(2)(j). The new provisions specify that allowances only cover monetary allowances of three main categories (reimbursement allowances, disability allowances and skill-based allowances).

7.59 The Department submitted that the amendment is necessary to address the lack of guidance provided by the wording of the current provision, noted by the Commission in a decision on the Commonwealth Bank of Australia Officers Award:

> …we do not find much assistance from the context in which the term 'allowances' appears in section 89A(2)(j). Certainly it may be accepted that an allowance within the meaning of the term used in that paragraph must be an allowance of a kind appropriately the subject of an industrial award. Essentially the elements of such an allowance…:an entitlement in the employee to a payment notionally distinct from the wage for a purpose connected with the employment relationship, and particularly to compensate for some condition of or related to the work.[44]

7.60 The Department also submitted that the proposed new paragraph 89A(2)(j) was designed to adopt the elements of the Full Bench's interpretation of paragraph 89A(2)(j) in the Award Simplification decision.[45]

7.61 Employer groups supported the amendment because it would provide certainty to the 'allowances' allowable matter.[46] Unions and employee associations were generally opposed to the amendment, providing specific examples of types of allowances that they believed could no longer be included in awards if the new provision was enacted.[47]

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44 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2349

45 Hospitality Industry Award, Full Bench, 23 December 1997, Print P 7500

46 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086; Submission No. 375, Business Council of Australia, vol. 12, p. 2603

47 See, for example, Submission No 423, ACTU, vol. 19, pp. 4445 - 4448

*Conclusion*

7.62 A majority of the Committee agrees that there is a need to clarify what sort of allowances are covered under the allowable award matter in paragraph 89A(2)(j), and notes in this regard that a Full Bench of the Commission has criticised the existing provision for not providing sufficient guidance as to the intention of the legislature. The Committee majority believes that the proposed provision has been drafted to encompass those payments that, according to current industrial practice and usage, are generally understood to be 'allowances'.

***Recommendation***

7.63 That the amendment to clarify the meaning of the allowable award matter 'allowances' be enacted.

Redundancy payments

7.64 The proposed amendment clarifies that award provisions relating to redundancy payments would only be allowable under paragraph 89A(2)(m) if the provisions relate to circumstances where an employee's employment is terminated at the initiative of the employer, and on the grounds of redundancy. The Department provided examples of where 'redundancy payments' have been interpreted as meaning something broader:

> At present, there are some awards such as the building industry awards which define redundancy as a situation where an employee ceases to be employed by an employer other than for reasons of misconduct or refusal of duty. Under these awards, employees become eligible for redundancy payment in ordinary resignation situations which are not 'genuine redundancy'.[48]

7.65 Employer groups supported the amendment because it would result in greater certainty as to the meaning of paragraph 89A(2)(m).[49] The Committee did not receive a great deal of other evidence about the proposed amendment.

7.66 However, the CFMEU did provide evidence that the amendment could affect entitlements in the mining industry:

> The coal mining industry award currently provides for payment of severance and retrenchment pay in circumstances where employees are terminated due to technological change, market forces or diminution of reserves. These

48 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2350

49 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3301. See also Submission No 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3086

> factors fall outside what is comprehended by the narrow definition of redundancy pay proposed by the Government.[50]

*Conclusion*

7.67 A majority of the Committee believes that the Bill's definition of 'redundancy pay' reflects the general community understanding of redundancy, and will provide more certainty in the interpretation of paragraph 89A(2)(m).

***Recommendation***

7.68 That the amendment to clarify the meaning of the allowable award matter 'redundancy pay' be enacted.

*Clarification of non-allowable matters*

7.69 The Bill inserts a list of matters which are not 'allowable award matters' to further clarify the operation of subsection 89A(2). These matters are set out in full in item 13 of Schedule 6 (proposed subsection 89A(3A)). Two matters attracted the most comment: accident make-up pay and transfers between locations and types of employment.

Accident make-up pay

7.70 Accident make-up pay is an additional payment required of employers to 'top up' the difference between an injured employee's normal salary and the amount of compensation they are paid under workers' compensation legislation. This is a matter already dealt with by State, Territory and Federal workers' compensation legislation.[51]

7.71 This amendment was generally supported by employers, with unions and employee associations opposed the amendment, submitting that the proposed changes would result in a loss of entitlements for employees, with workers in the construction industry being identified as most likely to be affected.[52]

*Conclusion*

7.72 A majority of the Committee agrees that employees' compensation for work-related injuries and illnesses is a matter most appropriately dealt with by State and Territory legislation (and federal legislation with regard to federal employees).

7.73 The various workers' compensation and occupational health and safety schemes established by State and Territory governments reflect a determination of what proportion of the costs of a workplace accident should be borne by employers,

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50 Submission No. 380, Construction, Forestry, Mining and Energy Union (Mining and Energy Division), vol. 13, p. 2803

51 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2349

52 Evidence, John Sutton, Sydney, 22 October 1999, p. 272

employees and the government. As has been indicated in some major industry reports, the costs of workplace injuries should be shared between these three groups. Workers' compensation schemes establish levels of benefits for injured employees based on this policy decision.

7.74 Governments set levels of benefits in line with an assessment of how workers' compensation payments interact with other scheme objectives, for example, encouraging early return to work and effective rehabilitation. Award provisions to 'top up' workers' compensation benefits may have the effect of negating these return to work and rehabilitation objectives.

***Recommendation***

7.75 That the proposed amendment to specify that 'accident make-up pay' is not an allowable award matter be enacted.

*Transfers between locations and types of employment*

7.76 The Department submitted that these amendments, to remove award provisions dealing with matters relating to transfers between locations and types of employment (eg casual, part time, full time) were appropriate, as these are matters best dealt with by agreement at the workplace.[53]

7.77 Some witnesses were concerned about the effect that this exclusion might have on award provisions designed to protect pregnant workers and new parents.[54]

*Conclusion*

7.78 A majority of the Committee is not convinced that these concerns have any foundation and agrees that these matters should be dealt with at the workplace level.

***Recommendation***

7.79 That the proposed amendments to specify that transfers between locations and types of employment are not allowable award matters be enacted.

**Safety net increases linked to award simplification**

7.80 The Bill proposes an amendment to the Act to prevent variations to awards to adjust wages to incorporate safety net increases, unless the award has been simplified under the new award simplification provisions. The Department submitted that this amendment 'is aimed at accelerating the award simplification processes'.[55]

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53 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2351, 2353

54 Evidence, Ms Grace Grace, Brisbane, 27 October 1999, p. 443

55 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2356

7.81 The amendment was strongly supported by the Australian Chamber of Commerce and Industry, which submitted that unions had frequently tried to delay the award simplification process because they opposed it:

> …the rationale…is…that restructuring of awards is a difficult process, that it is difficult to persuade unions in particular to cooperate with that process of reform, and that both a 'carrot' and 'stick' were necessary, the carrot being the safety net adjustment for the unions, and the stick being that this would not be available unless there was measurable progress or outcomes of restructuring.[56]

7.82 The Business Council of Australia supported the proposed amendment on the grounds that it would increase the pace of award simplification, but thought that the Commission should take 'a more directive role in the process to bring the process to resolution. This will assist the parties by enabling them to not become too distracted from their paramount priority of implementing enhanced workplace arrangements.'[57]

7.83 The Committee received evidence indicating other witnesses (some employer groups, unions, employees, community groups, lawyers, academics, State Governments) were opposed to the amendment:[58]

> Award simplification is a lengthy process; it is unjust to impose this requirement on the an employee who cannot speed the award simplification process along…Employees should not be penalised by not receiving pay rises to which they are entitled, especially when the AIRC may not have fully reviewed or even started to review their award because of resource or staffing issues within that organisation.[59]

*Conclusion*

7.84 A majority of the Committee notes that the rationale for the amendment is to encourage unions to expedite the process of award simplification. The Committee has received evidence that the pace of award simplification has been quite slow, and needs to be accelerated.

7.85 A majority of the Committee notes that the Government has passed an amendment to the Bill to stop this provision coming into operation until six months after commencement of the Bill – this means that safety net increases probably wouldn't be affected until April 2001. This gives the Commission and the Government some additional time to ensure that award-reliant employees are not disadvantaged by the slow pace of award simplification to date.

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56 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3308

57 Submission No. 375, Business Council of Australia, vol. 12, p. 2604

58 See, for instance, Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4451-2; Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5867; Submission No. 398, Jobwatch Inc., vol. 14, p. 3255-6

59 Submission No. 398, Jobwatch Inc., vol. 14, p. 3255-6

***Recommendation***

7.86 That the proposed provision be enacted.

# CHAPTER 8

# SCHEDULE 7 - TERMINATION OF EMPLOYMENT

8.1 This chapter deals with Schedule 7 of the Bill which proposes changes to Division 3 of Part VIA of the Act – Termination of Employment. The changes are broadly aimed at minimising legal costs, and to discourage vexatious or unmeritorious claims in line with the Government's policy statement, More Jobs Better Pay.

## Outline of proposed amendments

8.2 The changes: broaden the scope of the termination of employment provisions; prevent persons from choosing whether to lodge a claim under federal or state legislation if they are entitled to a federal remedy; limit the discretion of the Commission and the Federal Court of Australia to accept applications 'out of time'; limit access to a remedy in respect of termination of employment for employees who have resigned (constructive dismissal), except in exceptional circumstances; confer new powers on the Commission for dismissing an application; impose additional criteria on the Commission when deciding unfair dismissal claims; introduce new provisions relating to the awarding of costs; prevent multiple applications for the same termination; and prohibit advisers from encouraging the pursuance of unmeritorious claims.

8.3 This chapter reports on those aspects of the amendments which were most contentious, in that they generated the most comment in submissions and in oral evidence. Where specific amendments are not discussed explicitly it can be taken that the view of the majority of the Committee is that they be enacted as described in the Bill.

## Constructive dismissal

8.4 The current operation of the Workplace Relations Act allows an employee who has been forced to resign to initiate an application for an unfair dismissal. Item 8 of the Bill qualifies the scope of the expression 'termination of employment at the initiative of the employer' in relation to cases of resignation. The amendment would limit access to a remedy for an employee who has resigned to circumstances where the employee is able to establish that the employer has indicated, directly or indirectly, that the employee would be dismissed if he or she didn't resign, or has engaged in conduct that the employer considered would cause the employee to resign. Where a prima facie case is established the onus is on the employer to prove their conduct did not involve the intent of forcing the employee to resign.[1]

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2368

8.5 The Shop Distributive and Allied Employees' Association (SDA) argue in their submission that these new provisions are unnecessary: that section 170CDA will add a significant layer of complexity to an issue which is already able to be dealt with properly by the Commission and Courts, through the application of well established case law.[2]

8.6 The Department suggests that some recent decisions have expanded the notion of what constitutes constructive dismissal beyond those that occur at the initiative of the employer. These amendments will ensure that the provisions operate as they were intended, that is, to allow employees to apply for unfair dismissal where the employer intends his or her actions to result in the resignation of the employee or directly indicated that the employee should resign or be sacked. They also note that the tightening of the provisions will act as a disincentive to make and pursue claims that have little prospect of success.[3]

***Recommendation***

8.7 A majority of the Committee **recommends** that these amendments be enacted.

**Out of time Applications**

8.8 The Act allows the Commission to accept applications after the 21-day lodgement period where the Commission considers that 'it would be unfair not to do so'. The Bill requires the Commission to consider whether 'it would be equitable to accept the application'. New subsection 170CE(8A) requires that the Commission be guided by a set of criteria to reach a decision.

8.9 According to the ACTU these conditions will remove the Commission's discretion to consider all the factors leading to the lodgement of a late application.[4] Similar concerns were raised by the SDA and the ALHMWU.

8.10 The Victorian Automobile Chamber of Commerce (VACC) told the Committee that they no longer bother to argue on jurisdictional grounds that an application is out time because their experience with the Commission is that they will accept it anyway.[5] The VACC give an example of an application that was lodged 16 days out of time while the applicant was on a skiing holiday for 10 days between the time of termination and submitting the application.[6]

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2 Submission No. 414, Shop Distributive and Allied Employees' Association, vol. 17, p. 3785

3 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2377

4 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4455

5 Evidence, Mrs Leyla Yilnmaz, Melbourne, 7 October 1999, p. 135

6 Submission No. 389, Victorian Automobile Chamber of Commerce, vol. 13, p. 2960-1

*Conclusion*

8.11 These amendments remove the historical tendency for the Commission to accept the vast proportion of late applications by providing a new benchmark from which to make these assessments. The provisions will allow late applications to be accepted when there are genuine reasons for it being so.

***Recommendation***

8.12 A majority of the Committee **recommends** that these amendments be enacted.

**Commission Certificates**

8.13 The Bill changes Commission functions for the conciliation phase of an unfair dismissal application. The requirements placed on the Commission are that if the Commission is satisfied that all reasonable attempts to conciliate an application have been unsuccessful, or are likely to be unsuccessful it must issue a certificate allowing the applicant to elect to proceed to arbitration. The certificate must state the Commission's assessment of the merits of the application and the Commission has the discretion to make recommendations to the parties at this stage, including that the applicant discontinue his or her application.[7]

8.14 The Bill introduces requirements for conciliation which would vary according to whether the application indicates grounds for unlawful or unfair dismissal or a mixture of both. In relation to an unfair dismissal application, the Commission is required to state, on the balance of probabilities, whether the application is likely to succeed at arbitration. That is, the Commission must make a finding at the conciliation stage about the merits of the application. If the Commission determines that the arbitration of an application is unlikely to succeed, then the applicant would not be able to proceed. The Department explained that this improves the effectiveness of the conciliation process and reduces the number of unmeritorious cases that proceed to arbitration.[8]

8.15 These amendments were criticised by both unions and legal practitioners. It was argued that there were a number of issues associated with this that may: prevent the Commission from being able to make an accurate finding; unfairly deny an applicant access to arbitration; and substantially increase the costs and time associated with conciliations. There were also concerns about conciliators who hear unfair and unlawful dismissal cases but are not legally trained.[9]

8.16 Redfern Legal Centre suggested that people often do not seek representation until after the conciliation stage and are unlikely to have sufficient evidence with them

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7 Submission No. 477, Maurice Blackburn Cashman, vol. 23, pp. 6090-1

8 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2377

9 Submission No. 484, Fitzroy Legal Service, vol. 24, p. 6163

to substantiate their case.[10] The BCA expressed doubt that the Commission would have sufficient evidence to support a finding of 'likely to succeed' in the conciliation stage where information provided was disputed or contradictory.[11] Many argued that conciliation would therefore need to become a mini-hearing which would involve substantial increases in costs and time imposed on all parties and that this would be a further imposition on small business.

8.17 The Committee is also aware that many employers, particularly small business proprietors, choose to settle at the conciliation stage because of both the financial costs, and costs associated with the time needed to progress with the case to arbitration. The VACC told the Committee

> …the majority of their members will decide to resolve an unfair dismissal claim at either the first conciliation conference or even prior to the conference in order to avoid having to appear before the commission to argue the matter because of the inconvenience and expense. Members will usually choose to settle on a sum that covers their legal fees.[12]

*Conclusion*

8.18 A majority of the Committee understands the difficulty of protecting the rights of employees who are dismissed unfairly or unlawfully while at the same time protecting employers from vexatious claims.

8.19 A majority of the Committee acknowledges the evidence raised in submissions about the problems identified in this Schedule. It supports the use of the Commission as a 'filtering agent' in cases involving unfair dismissal and believes that the amendment is warranted.

***Recommendation***

8.20 A majority of the Committee **recommends** that these amendments be enacted.

**Amendments in relation to costs**

8.21 Various items of Schedule 7 of the Bill will: introduce new tests and broaden existing tests to increase the scope for awarding costs in respect of frivolous or vexatious claims; allow the Commission to require an applicant to provide security for costs that may be awarded against them; require representatives from either side, to inform the Commission whether they are engaged on a cost arrangement, or in the case of a legal practitioner, a contingency fee arrangement; and allow the Commission to award a penalty against an adviser for encouraging a party to proceedings in relation to an unfair or unlawful termination to pursue an unmeritorious or speculative claim.

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10 Submission No. 369, Redfern Legal Centre, vol. 12, p. 2516

11 Submission No. 375, Business Council of Australia, vol 12, p. 2619

12 Evidence, Mrs Leyla Yilmaz, Melbourne, 7 October 1999, p. 131

*Awarding of costs*

8.22 Objections to the amendments have been made on grounds that costs of proceedings are more likely to be borne by employees than employers.[13]

8.23 Fitzroy Legal Services note that an applicant who has a punitive or vexatious application for costs made against them cannot make an application for the costs they incurred in defending the application. It is suggested that this tactic may be pursued by some employers to deter employees from making or pursuing a claim.[14]

8.24 Increased scope for the awarding of costs is aimed at deterring claims that have little chance of success. The Committee notes that while the scope has been increased, the amendments are unlikely to see a significant increase in the number of cases where costs are awarded against applicants. It is highly unlikely that applicants who believe they have a genuine claim and present a reasonable case but subsequently lose their case will have costs awarded against them.

*Cost arrangement disclosure*

8.25 Legal practitioners were concerned about the requirement on representatives to disclose cost arrangements to the Commission and the ability of the Commission to award a penalty against advisers for encouraging an unmeritorious claim. The Law Council of Australia claimed that revealing 'contingency fees' is an unwarranted intrusion upon the solicitor/client relationship.[15]

8.26 The Department suggested that the engagement of legal practitioners on a 'no-win, no-pay' arrangement can be a motivating factor for the pursuit of speculative claims as claimants have nothing to lose, and encourage advisers to advocate the lodgement and continuation of claims.[16] The Law Council, however, submitted that contingency fee arrangements serve the purpose of providing access to justice given increasing restrictions on Legal Aid funding.[17]

8.27 A majority of the Committee believes that the disclosure of such arrangements will equip the Commission with more information in determining the merits of an unfair dismissal application.

*Penalties against advisers*

8.28 The Bill prohibits an adviser from encouraging an employee to make or pursue an application for unfair dismissal if the adviser should have been aware that

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13 Submission No. 519, McDonald Murholme Solicitors, vol. 26, p. 6915

14 Submission No. 484, Fitzroy Legal Service, vol. 24, p. 6163

15 Submission No. 468, Law Council of Australia, vol. 22, p. 5728

16 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2375

17 Submission No. 468, Law Council of Australia, vol. 22, p. 5728

the application had no reasonable prospect of success. Where it is believed that an adviser has contravened this section, an application may be made to the Federal Court for an order imposing a penalty on that adviser.

8.29 The proposal to penalise advisers was criticised by legal groups. Maurice Blackburn Cashman[18] and the Victorian Bar Association[19] expressed concerns about several technical matters. It is the view of the majority of the Committee that any technical matters will be resolved in the normal course of implementation of the legislation.

*Conclusion*

8.30 A majority of the Committee supports the amendments contained in Schedule 7 of the Bill relating to costs. The amendments will help to ensure that unmeritorious or speculative claims are actively discouraged while maintaining a fair and equitable system of protection for people who have their employment terminated unfairly or unlawfully.

***Recommendation***

8.31 A majority of the Committee **recommends** that the amendments to the Commission's power in awarding costs and requiring the disclosure of cost arrangements as well as introducing penalties for advisers that encourage speculative claims be enacted.

18 Submission No. 477, Maurice Blackburn Cashman, vol. 23, p. 6094

19 Submission No. 463, The Victorian Bar Inc., vol. 22, p. 5673

# CHAPTER 9

## SCHEDULE 8 – CERTIFIED AGREEMENTS
## SCHEDULE 9 – AUSTRALIAN WORKPLACE AGREEMENTS

9.1 This chapter deals with amendments proposed in regard to certified agreement provisions, Australian Workplace Agreements (AWAs) and relevant and designated awards. Schedule 8 of the Bill streamlines the requirements for certification of agreements; simplifies processes for making and approving AWAs; and effects a number of technical changes in relation to agreements. The changes are intended to facilitate the spread of agreement making and provide greater encouragement to employers and employees to decide the working arrangements which best suit them.

**Schedule 8 – Outline of proposed amendments**

9.2 This Schedule proposes amendments principally directed at streamlining the requirements for certification of agreements, including:

- providing for applications for certification of 'Division 2' agreements to be made to the Workplace Relations Registrar, without the need for scrutiny by the Commission;
- providing that applications for certification considered by the Commission need not involve hearings unless necessary in the circumstances;
- clarifying the right to be heard;
- removing the restriction on the certification of an agreement for part of a single business;
- clarifying the obligations of employers in relation to providing employees with 14 days notice in respect of agreements
- providing a mechanism for 'switching' from the section 170LJ stream of agreement-making (agreements with employee organisations) to the section 170LK stream (agreements with employees) in certain circumstances;
- removing the capacity of employee organisations to prevent the variation or extension of section 170LK agreements (while retaining a representation role for organisations, where requested by a member); and
- prohibiting anti-AWA provisions.[1]

9.3 This report does not address the minor technical and consequential amendments also made by this schedule of the Bill.

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2378-9

*Evidence*

9.4 The Committee received evidence in respect of some, but not all, the changes effected by this schedule. This report focuses on the main aspects.

**Certification of agreements by the Registrar, and by the Commission without hearings**

9.5 The Department gave evidence that:

> The 'fast track' approach to certification (by the Registrar) is a more targeted approach, and ensures that only those agreements which need to be tested will be tested by the Commission, on an exceptions basis…[2]

> The requirement for parties to attend AIRC hearings for agreements to be certified has been identified as a major concern for parties to agreements and their organisations. The requirement to attend hearings (which are often very brief and straight forward) requires parties to wait for their application to be listed for hearing and then take time away from their workplaces to participate in hearings…where the applications could be dealt with expeditiously and with minimal cost on the basis of written applications only…[3]

9.6 In supporting these amendments, some employer organisations put to the Committee their concerns about what they see as unnecessary formalities surrounding certified agreements. The Australian Chamber of Commerce and Industry submission referred to a case study, in which an agreement was negotiated with staff and included consultation with the relevant union, within about five months, but was followed by a formal certification process which proved to be more onerous and frustrating than negotiating the agreement itself. This culminated in a 10-minute hearing before the Commission, which was best regarded as a formality.[4]

9.7 Australian Business told the Committee of its view that the majority of applications for certified agreements were 'job lots', and in the vast majority of these proceedings the Commission did not require any submission of substance from the parties. In most cases the Commission formed its view on the basis of the agreement and a statutory declaration.[5] Australian Business stated as follows:

> In the case of agreements which clearly pass on the paperwork, the requirement for formalised hearings seems onerous, both on the Commission's time, since the Commission has already come to the view that it is able to certify the agreement without the hearing, and also the time

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2 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2380

3 *ibid*., p. 2381

4 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3289-92

5 Submission No. 457, Australian Business Industrial, vol. 22, p. 5415

> of the parties to the agreement, not all of whom are in capital cities. We are supportive of all these amendments because, in fact, it is not inconsistent with what is happening now and is clearly a saving of time and resources on all parties, including the Commission.[6]

9.8 On the other hand, some unions opposed these amendments. For example, the Shop, Distributive and Allied Employees' Association put to the Committee its view that:

> …the whole purpose of a public hearing is to ensure that the body charged with approval of the certified agreement or AWA has acted properly. It would, in our submission, be a retrograde step to remove from the Commission, or the Workplace Relations Registrar, the obligation to have public hearings for each and every agreement which is to be certified.[7]

9.9 The Community and Public Sector Union referred to the importance of public hearings to ensure what appears on paper is genuine. They state in their submission that:

> There have been many cases of agreements coming before the Commission for certification where employer declarations and submissions, particularly in relation to the no-disadvantage test and process requirements, have been found to be superficial or misleading. These deficiencies are exposed only through the submissions of union parties or inquiries by the Commission itself in a public hearing.[8]

**Switching from s170LJ stream to s170LK stream, and extension, variation and termination of agreements made under s170LK**

*Switching between section 170LJ agreements and section 170LK agreements*

9.10 Proposed section 170LVA allows the Commission to certify an agreement purportedly made under section 170LJ (ie. an agreement negotiated with one or more unions) as an agreement made under section 170LK (ie. an agreement made directly with employees) if a valid majority of employees who would be covered by the agreement have approved the agreement, in circumstances where one of the unions which negotiated the agreement later claims that it did not validly execute the agreement.

9.11 In support of the amendment, the Department submitted:

> This amendment will address concerns raised by employer organisations about situations in which unions have purported to make agreements under section 170LJ...and the union subsequently claims, for example, that the person purporting to enter into the agreement was not authorised to do so. In

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6 Evidence, Mr Dick Grozier, Sydney, 26 October 1999, p. 399

7 Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, p. 3715

8 Submission No. 379, Community and Public Sector Union (PSU Group), vol. 13, p. 2727

> these circumstances, an employer is currently obliged to repeat the entire agreement making process in order to make an agreement in the same terms directly with employees under section 170LK.[9]

9.12 Some employer groups provided evidence about cases where senior officials of particular unions had refused to sign off agreements made by other union officers because they did not comply with union 'policy'.[10]

9.13 The Australian Chamber of Commerce and Industry provided the example of the refusal of the Australian Manufacturing Workers' Union to sign off an agreement negotiated by another union (the Australian Workers' Union) under section 170LJ at Crown Scientific and Pharmaglass Pty Ltd. The AMWU had only 4 members at the workplace, but refused to sign the agreement because it did not contain the common expiry date for the AMWU's 'Campaign 2000'.[11]

9.14 There was little evidence from other witnesses about the proposed amendment.

*Extending, varying and terminating section 170LK agreements*

9.15 Under the current provisions of the WR Act, unions can become bound by an agreement made directly between an employer and employees under section 170LK. This often occurs where unions have some members at a workplace covered by a section 170LK agreement.

9.16 In circumstances where a union is bound by such an agreement, the union currently has the right to veto any proposed changes to the agreement. The Bill amends the provisions of the WR Act to remove the capacity of unions to prevent the variation, extension, or termination of section 170LK agreements, while still retaining a role for such organisations, where requested by a member, to represent the interests of employees.[12] The Department submitted that:

> The existing provisions are inconsistent with the agreement-making framework established by the WR Act because they have the potential to undermine the capacity of employers and a majority of employees...to give effect to agreed decisions on matters relating to their working arrangements.[13]

9.17 Some employers supported the proposed amendments:

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9 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2382

10 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3098

11 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3293

12 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2382

13 *ibid*, p. 327

> It is inappropriate for an employee organisation that may be representing only a minority of employees (indeed, only one employee) to have a right of veto over the extension or variation or termination of a certified agreement or the right to apply for termination of a certified agreement.[14]

9.18 Unions generally opposed the proposed amendments:

> This reform proposal is designed to further circumscribe unions' democratic rights to properly represent the interests of their members. Not only is this proposal contrary to principles of natural justice, but it runs counter to the continuous nature of collective bargaining which must be able to adapt to changing circumstances.[15]

**Prohibition of anti-AWA provisions in certified agreements**

9.19 The Bill will prohibit the certification of agreements which purport to restrict the use of AWAs. The Department stated to the Committee that:

> The capacity of collective agreements to restrict or prevent individual agreements represents a curtailment of the freedom of individual agreement making, and tends to put the collective rights of a majority ahead of individual rights…[16]

9.20 The Business Council of Australia supported this view in its submission, stating that:

> [An Anti-AWA provision] in effect imposes the collective (or majority) will of employees over those of the individual – even if the individual and his/her employer are in agreement. This seems inappropriate in these circumstances where the legislation has specifically provided for individual arrangements.[17]

9.21 In supporting the amendments, the Australian Industry Group put to the Committee that:

> If a collective agreement is on foot and applies to the workplace, why cannot the employer have the opportunity to offer individual contracts to people in the workforce? At the moment in union shops that is not open to you. In most cases unions will prevent AWAs being made by forcing the employer to make an agreement in their collective certified agreement that AWAs will not be made for the life of the agreement. The employer is therefor hamstrung for the life of that agreement. If they want to choose a

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14 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3099

15 Submission No. 430, Newcastle Trades Hall Council, vol. 20, p. 5012

16 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2383

17 Submission No. 375, Business Council of Australia, vol. 12, p. 2594

> group of employees or one employee in respect of whom they wish to make an AWA – it cannot be done.[18]

9.22 Some union groups stated their opposition to the amendment. The Australian Liquor, Hospitality and Miscellaneous Workers Union told the Committee that:

> It is not unusual for collectively bargained agreements to contain a non-AWA provision. This merely reflects the choice of the employees and their employer to enter into collective agreements. …The proposed amendment is, in effect, saying that people are not free to make this choice…indeed…it is a choice that is not legal.[19]

9.23 The Newcastle Trades Hall Council argued that the provision did not allow employers and employees to determine what the most appropriate agreement should be. They stated that:

> This reform is dictating the contents of agreements and is thus contrary to the WR Act.[20]

**Schedule 9 – Outline of proposed amendments**

9.24 In summary, these amendments make AWAs more widely accessible, easier to make, and provide scope for greater flexibility to encourage working arrangements which better suit the needs of business and employees. The major amendments include removing the current requirement that an employer provide an employee with a copy of an AWA at least 5 days (or in some cases 14 days) before signing it; permitting AWAs to take effect from the day of signing; removing the requirement that identical AWAs be offered to comparable employees; introducing modified 'no disadvantage test' procedures for AWAs with employees whose remuneration is more than $68 000; removing requirement that Employment Advocate refer AWAs to the Commission where there is concern that the AWA does not pass the 'no disadvantage test'; removing the current ability to take protected industrial action in support of a claim for an AWA; allowing an AWA to prevail over a certified agreement; and giving the Employment Advocate power to take legal action against employers who breach AWAs.

*Evidence*

**Filing and approval of AWAs**

9.25 The Bill removes the requirement that an employer provide an employee with a copy of an AWA at least 5 days (or in some cases 14 days) before signing it, and permits AWAs to take effect from the day of signing. The Department's submission stated:

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18 Evidence, Mr Roger Boland, Canberra, 1 October 1999, p. 48

19 Submission No. 326, Australian Liquor, Hospitality and Miscellaneous Workers Union, vol. 10, p. 1885

20 Submission No. 430, Newcastle Trades Hall Council, vol. 20, p. 5013

> The proposal to permit parties to an AWA to agree that it should take effect from the day of signing allows employers and employees to give immediate effect to, and benefit from wages, conditions and working arrangements to which they have agreed. It also enables the Employment Advocate to dispense with the time consuming and resource intensive task of issuing filing receipts.[21]

9.26 In supporting these amendments, some employer groups suggested that the current provisions in these regards are a disincentive to adopt AWAs, especially in the recruitment of new staff. The Australian Chamber of Commerce and Industry referred in its submission to:

> A recent (and not isolated) case where a manager recruited 23 staff with the intention of offering them AWAs…the recruits had already commenced when the offer of an AWA was made. They had to be employed under Award conditions for several weeks until the offer was made and fourteen days had elapsed. Both the manager and the recruits found this situation convoluted and absurd.[22]

9.27 The SDA was one of the unions which criticised these amendments suggesting that:

> …the Government's approach is to put the 'cart before the horse', namely to provide that an AWA will become legally operative from the date it is signed or from the date the employment commences, even though that AWA has not been sighted or approved by the Employment Advocate.[23]

9.28 In relation to the repeal of provisions requiring employees to receive a proposed AWA 5 or 14 days prior to signing it, the Community and Public Sector Union state that:

> Substituting a cooling-off period will be to the detriment of the employee interest, as it will allow an employer to press for an immediate signature. Employees will always be put in a more difficult position if they have to withdraw from an agreement they have previously accepted.[24]

**AWAs for comparable employees**

9.29 The Bill will removing the requirement that identical AWAs be offered to comparable employees. The Department put to the Committee that:

> The obligations imposed by the current provision can be confusing for employers (for example, many employers are unaware that individual

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21 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2385

22 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3281-2

23 Submission No. 414, Shop Distributive and Allied Employees' Association, vol. 17, p. 3695

24 Submission No. 379, Community and Public Sector Union (PSU group), vol. 13, p. 2733

> performance may be taken into account in determining what conditions should be offered) and can limit the scope for flexibility in tailoring AWAs to the particular circumstances of both employees and employers (for example, improved balance between work and family commitments).[25]

9.30 The ACCI put its support for this amendment as follows:

> In one line of business fifteen comparable staff were offered AWAs. …Eleven wanted to tailor the contract to align with their personal requirements. They rejected the AWA because it did not have this flexibility. One staff member complained 'these are not individual contracts. People who have asked for minor alterations have been told it cannot be changed. It is a sham. …'[26]

9.31 Some witnesses opposed this amendment, on the basis that it may allow employers to provide different pay and conditions to employees performing the same job. For example, the National Union of Workers stated in their submission that:

> Employers will be free to discriminate between employees and will be free to progressively bid down wages and conditions through the selective application of AWAs to individual employees.[27]

**AWAs for high income earners**

The Bill introduces modified 'no disadvantage test' procedures for AWAs with employees whose remuneration is more than $68 000; and removes the requirement that the Employment Advocate refer AWAs to the Commission where there is concern that the AWA does not pass the 'no disadvantage test'. The Department submitted to the Committee that:

> The current requirement that the Employment Advocate refer an AWA to the Commission where there is concern about whether the AWA passes the no disadvantage test adds an unnecessary layer to the approval process, places additional resource demands on both the Commission and the parties to the AWA, and delays commencement of AWAs…According to statistics provided by the Office of the Employment Advocate in the period 20 April 1998 to 31 July 1999 only…1.8 per cent of all AWAs processed during this period…were referred to the AIRC. Of the 972 AWAs which have been dealt with by the AIRC…only 106 AWAs were refused approval. However, from the time an AWA was referred to the AIRC to when the EA was notified of the result, has been' on average 151 calendar days.[28]

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25 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2386

26 Submission No. 329, Australian Chamber of Commerce and Industry, vol. 15, p. 3282

27 Submission No. 126, National Union of Workers, vol. 2, p. 466

28 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2386

9.32 The Australian Council of Trade Unions did not support the amendment and stated that:

> …it is important that the EA be required to refer cases where there is concern about whether the no-disadvantage test has been complied with…to the Commission. A number of such cases have been referred to the Commission, which has produced reasons for decisions which are important in maintaining at least a little confidence in the integrity of the system.

9.33 The Australian Manufacturing Workers Union opposed the amendment relating to the application of the no-disadvantage test for higher income earners. They put to the Committee that the no-disadvantage test should not be waived for AWAs with remuneration greater than $68,000 because it could not be assumed that these workers were any more informed about their award entitlements or that they are in a stronger bargaining position.[29] However, the Committee notes that an employee in these circumstances is able to request that the Employment Advocate assess the AWA for the purposes of the no-disadvantage test.

**AWAs and protected industrial action**

9.34 The Bill removes the current ability to take protected industrial action in support of a claim for an AWA. The Committee notes the following comments made in the Department's submission:

> The Implementation Discussion Paper…foreshadowed that provisions enabling protected action to be taken in the negotiation of AWAs would be repealed as they are not relevant to the negotiation of individual, as distinct from, collective, agreements…the AWA industrial action provisions only appear to have been used in very rare circumstances…[30]

9.35 Some employer groups stated their support for this amendment. For example, the Australian Industry Group said:

> AI Group strongly supports AWAs as an important agreement making option for employers and employees and in the light of the experience of the use of AWAs, believes the amendments which are proposed are necessary and appropriate.[31]

9.36 Some other witnesses opposed the amendment. For example, the Australian Catholic Commission for Employment Relations stated:

> While it is acknowledged that it might be an unusual occurrence for an individual employee to take protected industrial action, nevertheless this

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29 Submission No. 424, Australian Manufacturing Workers Union, vol. 20, p. 4784

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

31 Submission No. 392, Australian Industry Group/Engineering Employers' Association South Australia, vol. 14, p. 3101

> could arise in some circumstances. This provision also creates an inconsistency in the legislation as protected industrial action is allowed during the bargaining of a certified agreement.[32]

**Allowing an AWA to prevail over a certified agreement**

9.37 The Department put to the Committee that:

> Overall, the amendments free up the interaction between AWAs and certified agreements so that the workplace relations system provides parties with effective choice about the regulation of terms and conditions of employment in ways that suit their particular circumstances. Under the existing provisions, these options have been limited. Flexibility to use AWAs during the life of certified agreements can assist, for example, where market rates for particular groups or specialists move erratically and an employer wishes to use AWAs to retain such staff. Where a certified agreement is in place, employers and employees should not be precluded form further negotiation of terms and conditions of employment.[33]

9.38 The Shop, Distributive and Allied Employees' Association linked this amendment with the amendment prohibiting certified agreements from containing anti-AWA clauses and said:

> …not only can an employer, during the life of a validly operating collective agreement enter into AWA's, but…each AWA which comes into existence after and during the life of a certified agreement will prevail over the contents of the certified agreement.
>
> In other words, AWA's are given absolute paramountcy over collective agreements…
>
> …This…is nothing more or less than a total attack on the whole concept of collective agreement making.[34]

9.39 The New South Wales Minerals Council in support of the amendment stated:

> …the ability of Australian Workplace Agreements to operate over Certified Agreements to the extent of any inconsistency is important in order to give affect to individual requirements in the workplace and to prevent persons taking the best from both types of agreements.[35]

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32 Submission No. 167, Australian Catholic Commission for Employment Relations, vol. 4, p. 750

33 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, pp. 2387-8

34 Submission No. 414, Shop, Distributive and Allied Employees' Association, vol.17, p. 3713

35 Submission No. 497, New South Wales Minerals Council, vol. 24, p. 6366

**Enforcement powers of the Employment Advocate**

9.40 Amendments contained in the Bill will give the Employment Advocate the power to take legal action against employers who breach AWAs. In supporting these amendments, the Employment Advocate said:

> …it would be better for the Employment Advocate to have the power to actually take legal action in its own right for breaches of part VID and…breaches of AWAs and…seek recovery of any shortfall that occurred, rather than having to rely on the party doing it themselves…[A]t the end of the day it should be the primary responsibility of the parties to protect their rights. I think practical experience shows that really it is important to have a body that can assist employees, particularly, to ensure that their rights are observed.[36]

9.41 A majority of the Committee also believes that providing the Employment Advocate with enhanced powers to enforce AWAs will improve the operation of the Act and ensure that employees who cannot afford to take legal action themselves are not disadvantaged.

*Conclusion*

9.42 A majority of the Committee supports the facilitation of agreements at the workplace; removing obstacles to choices about agreements; reducing the cost and formality involved in having an agreement approved; and preventing unwarranted interference by third parties in agreement making. Making legislative requirements as simple and straight forward as possible will assist employers and employees in taking more direct responsibility for determining their own employment conditions.

9.43 A majority of the Committee believes that the Bill achieves these aims, at the same time as maintaining and improving important protections for employees. In particular, a majority of the Committee agrees that providing the Employment Advocate with enhanced powers to enforce AWAs will improve the operation of the Act and ensure that employees who cannot afford to take legal action themselves are not disadvantaged.

***Recommendation***

9.44 A majority of the Committee **recommends** the enactment of the amendments in Schedules 8 and 9.

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36 Evidence, Mr Jonathan Hamberger, 28 October 1999, p. 488

# CHAPTER 10

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

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

### Outline of proposed amendments

*Industrial action*

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

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

*Secret ballots*

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

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

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

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

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

*Evidence*

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

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

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

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

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

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

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

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

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

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

**Notice of industrial action**

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

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

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

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

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

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

*Evidence*

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

10.16 Employer groups supported the proposed amendment:

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

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

> The current machinery provisions for the taking of protected action have…been abused by: blanket notices of intention to take industrial action being given…; Notices are given on a regular basis directed against a substantial number of employers without there being a real intention to take industrial action against any specific individual employer at any specific time; notices being given which do not specify the particular type of industrial action which is intended to be taken or the time at which it is to commence; notices of intention to take industrial action being given without there having been any discussion or attempt to reach agreement with an individual employer prior to the notice being issued.[7]

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

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

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

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

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

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

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

*Conclusion*

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

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

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

***Recommendation***

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

**Suspension and termination of bargaining periods**

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

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

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

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

10.25 The most significant changes from the current provisions are:

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

*Cooling off periods*

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

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

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

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

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

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

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

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

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

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

*Paid rates awards*

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

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

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

*Conclusion*

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

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

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

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

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

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

***Recommendation***

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

**Pattern bargaining**

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

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

*Evidence*

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

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

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

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

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

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

10.39 Other employer groups strongly supported the proposed amendments:

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

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

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

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

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

18 *ibid*., p. 50

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

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

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

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

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

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

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

*Conclusion*

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

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

***Recommendation***

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

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

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

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

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

**Amendment of section 127**

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

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

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

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

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

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

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

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

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

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

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

*Conclusion*

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

***Recommendation***

10.51 That the proposed amendments to section 127 be enacted.

**Repeal of section 166A**

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

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

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

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

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

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

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

*Conclusion*

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

***Recommendation***

10.56 That section 166A be repealed.

**Strike pay**

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

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

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

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

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

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

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

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

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

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

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

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

*Conclusion*

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

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

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

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

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

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

***Recommendation***

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

**Secret ballots**

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

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

10.65 Employers generally supported the proposed secret ballot provisions:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Conclusion*

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

***Recommendation***

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

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

# CHAPTER 11

# SCHEDULE 13 – RIGHT OF ENTRY

11.1 The Chapter examines the Bill's proposed amendments to the right of entry provisions of the WR Act. The proposed changes attracted attention from many witnesses, particularly unions.

## Outline of proposed amendments

11.2 This Schedule introduces new requirements for entry to places of employment by union officials, consistent with the principal that unions have a role in representing employees, but which does not extend to allowing interference with the operation of businesses.

11.3 Currently, a holder or a permit under the WR Act is authorised to enter premises, on 24 hours notice, in order to hold discussions with union members, or employees who are eligible to be members. Visits may only take place during meal breaks or other breaks.

11.4 Under the proposed amendments, a union official may enter a workplace only upon written invitation from an employee who is a union member. Provision is now made to ensure the confidentiality of the employee issuing the invitation. The Commission has slightly increased powers to revoke a permit given to a union official if there is evidence that the powers of entry are being abused.

## Abuse of right of entry provisions

*Evidence*

11.5 In support of these amendments the Master Builders' Association of Western Australia (MBAWA) supplied written evidence that on occasions the Construction, Forestry, Mining and Energy Union had advised employers of their intention to send up to ten named union officials to building construction sites, in their view, for the purposes of intimidating builders and their employees and sub-contractors. The MBAWA reported that six union officials who had forced their way onto a building site for the purpose of holding a meeting during working hours had been charged with trespass.[1]

11.6 Matters outlined in the submission of the MBAWA were raised with the organisation by members of the Committee when the MBAWA appeared at the hearings in Perth. The MBAWA told the Committee that circumstances occasionally arose when police had to be called to building sites to deal with union officials who abused their right of entry; that the matter could not usually be resolved by any

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1 Submission No. 470, Master Builders' Association of Western Australia, vol. 22, p. 5770

approach to the Industrial Commission because of unacceptable time delays. Recourse to civil law was necessary in order to dispel the heat from confrontations.[2]

11.7 Since the commencement of the WR Act the Office of the Employment Advocate has received 55 complaints and inquiries in relation to right of entry provisions. All the complaints were from employers. The overwhelming majority of complaints were resolved without recourse to legal action.[3] Although only one case has proceeded to court, the Department's submission indicates that the problem of abuse of entry permits is probably worse that collected data indicates.[4] Anecdotal evidence from the Office of the Employment Advocate suggests that some union officials are entering building sites on 'fishing expeditions'.[5]

11.8 Union opposition to the amended provisions of the Act is based on two major premises: that employees may not understand awards and conditions sufficiently well to know when to use their rights to call in a union official; and that there is insufficient enforced compliance of workers' rights in the absence of union involvement.

11.9 The Shop Distributive and Allied Employees Union argues in its submission that while the current law at least ensures that right of entry for the purpose of having discussions with employees is conducted in a civil and reasonable manner, the proposed amendments will have the effect of significantly restricting right of entry because of the written invitation provision. The SDA considers this to be a potential invitation for management intimidation as employers will know that one of their employees has a grievance. A union visit may be seen a threatening act rather than a routine and acceptable tradition in the Australian workplace.[6]

11.10 Another submission claimed that the proposal to require a written invitation was particularly unfair to casual, part-time, young, female and NESB workers.

11.11 Some witnesses criticised the amendment requiring that meetings be held in places designated by the management suggesting that such venues may not offer sufficient privacy and may be under the surveillance of employers. The International Centre for Trade Union Rights (ICTUR) has submitted that the ILO has recognised that access to the workplace must involve 'due respect for the rights and property of management', but that an element of balance is required. The ICTUR argued that the provisions of this Bill are unbalanced, being excessively geared in favour of employers and occupiers.[7]

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2 Evidence, Mr Kim Richardson, Perth, 25 October 1999, p. 295

3 Submission No. 328, Office of the Employment Advocate, vol. 10, pp. 2029-2030

4 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2149-50

5 *ibid*.

6 Submission No. 414, Shop, Distributive and Allied Employees Union, vol. 17, p. 3683-5

7 Submission No. 460, International Centre for Trade Union Rights, vol. 22, p. 5572

11.12 Several case studies alleging intimidation were cited in evidence presented in a number of submissions. The Committee majority, however, notes that unscrupulous, intimidatory and illegal practices may be found on both sides of the workplace divide.

11.13 A majority of the Committee further notes that the submission from the Australian Chamber of Commerce and Industry advocated more stringent conditions on right of entry than are provided for in this Bill, including a restriction on the number of visits that can be made to a work site and safeguards against the improper use of invitations to organisations.[8] The Committee majority believes that there are adequate safeguards for employer rights in this Schedule.

***Recommendation***

11.14 A majority of the Committee **recommends** the provisions of Schedule 13 be enacted.

8 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3371

# CHAPTER 12

# SCHEDULE 14 – FREEDOM OF ASSOCIATION

12.1 This Chapter deals with amendments to the freedom of association provisions in Schedule XA of the WR Act. The amendments are set out in Schedule 14 of the Bill.

**Outline of proposed amendments**

12.2 The amendments are directed at closing gaps in the coverage of the existing provisions as well as additional measures in relation to closed shops. The major changes are:

- the prohibition of 'indirect or implied threats';
- re-enactment, in a single provision, of the list of 'prohibited reasons' for conduct by industrial associations, employers, employees, independent contractors and people who engage independent contractors, and extension of the list to cover additional matters such as conduct aimed at forcing people to pay fees to a union in lieu of union dues and other union membership related matters;
- express prohibition of discrimination by an employer against an employee or independent contractor for a 'prohibited reason';
- consolidation into a single provision of all conduct for a 'prohibited reason' by industrial associations against employers, independent contractors and employees;
- prohibition of the establishment or maintenance of a 'closed shop';
- prohibition of indirect conduct to bring about a contravention of the freedom of association provisions;
- vesting jurisdiction in State courts to deal with breaches of the freedom of association provisions, and allowing the courts to grant injunctions to prevent an apprehended breach of the Act; and
- expanding the definition of 'objectionable provision' to include union encouragement and discouragement clauses, and preventing these types of clauses being included in awards or certified agreements.

12.3 The provisions that attracted most attention in this Inquiry were the closed shop provisions, the amendments relating to 'objectionable provisions' and the amendments to prevent coercion into restrictive arrangements. The rest of the amendments were fairly uncontroversial, either because the amendments were generally agreed, or because the amendments simply re-enacted many of the existing freedom of association provisions in a simplified, consolidated form.

## Closed shop provisions

*Evidence*

12.4 There are already provisions in the Workplace Relations Act which would prohibit employees from being coerced to join a union, for instance, section 298K prohibits employers from refusing to employ a person because they are not a union member. Other provisions relate to coercion by unions.

12.5 The new provisions introduce the concept of a 'closed shop' to the Act, and give more guidance as to when a closed shop is in existence. The Bill does not exhaustively define 'closed shop'. However, the Bill inserts a new section 298SB, which provides that a closed shop is presumed to be in existence where a number of conditions are fulfilled.

12.6 Unfortunately a number of witnesses misinterpreted how the provisions would operate:

> My workplace has 80 per cent union membership. This has nothing to do with anyone being forced to join; rather, young people cannot help but see how useful and helpful it is to have a union represent them. In a situation such as this with 80 per cent membership, under the proposed legislation, my workplace, and any workplace with over 60 union membership will be deemed a closed shop…Do the last 20 per cent who joined the union have to revoke their membership and therefore their rights?[1]

12.7 The Department provided supplementary submissions on notice emphasising that this is not the way that the proposed provisions would work:

> The circumstances described (workplaces with 60% union membership) would not on their own indicate a contravention of the proposed closed shop provisions…At least three things would need to be shown in order for there to be a contravention of the closed shop provisions…The first is that a closed shop is in existence or is intended to be brought into existence. The second is that a person has established or maintained the closed shop (alone or with others), or engaged in conduct with intent to establish of maintain a closed shop. The third is that that person has been found to have engaged in other contravening conduct as described in proposed section 298VA.

12.8 In other words, union membership at levels of 60% or more does not automatically mean that a closed shop exists. There would need to be additional evidence that it is a condition of employment that employees join a union or that employees would be disadvantaged if they did not join a union.

12.9 Employer groups generally supported the policy intention behind the provisions, but some were concerned by the reverse onus of proof created by proposed subsection 298VA(4) – this subsection provides that if a person (including an

1 Evidence, Miss Claire Hamilton, Canberra, 1 October 1999, p. 20

employer) has been found to have breached the freedom of association provisions relating to coercion to join an 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.

> …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.[2]

12.10 The Australian Industry Group stated:

> 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…[3]

12.11 Some unions and employee associations, academics and the Queensland Government opposed the provisions. The following comment is representative of these submissions:

> 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.[4]

12.12 Some witnesses expressed concern about how the provisions would be enforced:

> …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

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

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

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

> spectre of government inspectors…compelling workers to provide evidence of their union status.[5]

12.13 Some witnesses questioned why there would be no converse presumption that a non-union shop existed if union membership was below a certain rate.[6]

12.14 The Department provided supplementary information on notice addressing this point, explaining that:

> …closed union shops are more likely to exist and become entrenched through some form of explicit or implicit arrangement between unions and employers in certain industries. Additional measures are seen by the Government as being necessary to address this more systematic restraint of freedom of association.[7]

12.15 The need for further action to address 'systematic' restraint of freedom of association in some industries was put to the Committee in evidence about the continuing impact of a union 'closed shop' on non-union subcontractors in the construction industry. Employees of Western Ceilings, a small family company, generally do not join a union because of their religious beliefs. The company submitted:

> In the period from October 1996 to February 1997, our presence on commercial sites provoked industrial action on a number of occasions, following visits to these sites by an organiser from the CFMEU. We took these disputes to the Arbitration Commission and in each case we received a favourable decision which enabled us to complete our contracts…However, we have become painfully aware that these disputes have damaged our goodwill with a number of builders who once awarded us regular work…It is also significant that the contracts which have been won since the disputes are for work inside completed buildings, which are no longer regarded as construction sites. We know that each of these builders would be happy to use our services more frequently, but they are restricting the work awarded to us to those sites that are unlikely to attract attention from the unions.[8]

*Conclusion*

12.16 A majority of the Committee is satisfied that the legislative provisions as drafted will ensure that workplaces will not be investigated simply because of high union membership. The OEA would also require evidence that union membership is a condition of employment, or that people would be disadvantaged if they did not join the union.

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

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

7 Supplementary submission, Department of Employment, Workplace Relations and Small Business, Questions arising from hearing, Canberra, 1 October 1999

8 Submission No. 130, Western Ceilings, vol. 2, p. 488

***Recommendation***

12.17 That the proposed new provisions relating to closed shops be enacted.

## Objectionable provisions

12.18 'Objectionable provisions' must be removed from awards and agreements under existing section 298Z of the Workplace Relations Act. Subsection 298Z(5) defines 'objectionable provisions' as 'provisions that require or permit…or have the effect…of requiring or permitting any conduct that would contravene (the freedom of association provisions).'

12.19 This encompasses clauses that express preference in employment for people who are or are not members of a union. The Bill proposes to expand the definition of 'objectionable provisions' so that awards and agreements cannot include any provisions that encourage or discourage union membership, or indicate general support for employees being a union member or non-member, even if these clauses fall short of a preference clause.

*Evidence*

12.20 The Department suggested that the proposed amendments were designed to ensure that awards and agreements do not indirectly express preference for union membership or non-membership 'through statements of encouragement or discouragement or service fee arrangements. 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 employees.'[9]

12.21 The Business Council of Australia supported these amendments, considering that union encouragement clauses should be proscribed because:

> They…offend the principle of freedom of association…[and because] Enterprise bargaining and agreements should be about working arrangements between the employer and employees – not about the self-interests of the bargaining agent.[10]

12.22 The Business Council of Australia provided an example of a clause in the KFC National Enterprise Agreement:

> It is the policy of the employer that all its employees subject to this agreement shall join the union. Accordingly, the employer undertakes to positively promote union membership by strongly recommending that all employees join the Shop, Distributive and Allied Employees Association…All employees, including new employees at the point of

9 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2412

10 Submission No. 375, Business Council of Australia, vol. 12, p. 2643

> recruitment, shall be given an application form to join the union together with a statement of the employer's policy.[11]

12.23 It would appear from the evidence of the Business Council of Australia that in some cases employers agree to union encouragement clauses in their certified agreements at the insistence of a union, not because the employers believe that this will promote a harmonious and productive workplace.

12.24 The Australian Mines and Minerals Association expressed their concerns this way:

> It is naive in the extreme or misleading to suggest that the presence of so-called 'encouragement clauses' within agreements do not lead to the placement of unreasonable pressure on employees or prospective employees to join or remain a member of a particular industrial organisation. The current Act has been interpreted as permitting such clauses. Pressure through 'encouragement clauses', direct or implied, runs counter to the principles of freedom of association. AMMA therefore strongly supports the above provision as doubt will be removed as to what constitutes an unlawful provision.[12]

12.25 Other employer groups, such as the Australian Catholic Commission for Employment Relations also supported the amendment:

> …we say you have the right to join or not to join a union, free from coercion or duress or influence…when we looked at the encouragement clauses, we felt that was providing an influence in one direction that would be inconsistent with our principles.[13]

12.26 Witnesses representing unions and submissions from unions opposed the proposed prohibition of union encouragement clauses. The SDA submission stated:

> 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.[14]

12.27 However, the Office of the Employment Advocate, which has responsibility for the freedom of association provisions of the Act, gave evidence that some employers do interpret award encouragement clauses as requiring them to coerce employees to join the union:

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11 *ibid*., p. 2642

12 Submission No. 381, Australian Mines and Metals Association Inc, vol. 13, p. 2855

13 Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 141

14 Evidence, Mr Joseph De Bruyn, Brisbane, 27 October 1999, pp. 422-3

> Certainly we have had experience of employers telling us, when we say we are concerned about their conduct, 'Oh no, we have to make everyone join the union.' What they then do is point to an encouragement clause. I believe they are not understanding what the clause says. The clause does not require them to make people join; it only requires them to perhaps encourage people to join. As long as you do that properly you can do that without breaching the freedom of association laws.[15]

12.28 Aside from this issue of misinterpretation or misunderstanding, the Employment Advocate was not opposed to employers encouraging or discouraging union membership in a manner that did not infringe on an employee's right to choose.[16]

*Conclusion*

12.29 A majority of the Committee notes that union encouragement clauses, in their implementation, probably result in employees, particularly new starters, believing that they must join the union in order to keep their jobs. The Committee majority believes that union encouragement clauses do operate in some cases to restrict employees' freedom of association.

***Recommendation***

12.30 That the provisions to prohibit union encouragement clauses in awards and agreements be enacted.

**Restrictive arrangements**

12.31 The Bill prevents action being taken against a person because they have refused to enter into a 'restrictive agreement or arrangement' (see paragraph 298BA(m)). Subsection 298BA(4) would define 'restrictive agreement or arrangement' to mean:

> …a written or unwritten agreement…or arrangement that requires a person to provide the same, or substantially the same, terms or conditions of employment or engagement…to some or all of the person's employees or independent contractors that work at a workplace or in an industry as they are provided to another person's employees or independent contractors who also work at that workplace or in that industry.

*Evidence*

12.32 There were two main concerns about this proposal:

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15 Evidence, Mr Jonathan Hamberger, Canberra, 28 October 1999, p. 490

16 Evidence, Mr Jonathan Hamberger, Canberra, 28 October 1999, p. 489

- it could limit the ability of multi-employer projects (particularly in the construction industry) to be conducted with similar terms and conditions of employment applying to all contractors involved in the project; and
- it could outlaw the Homeworkers' Code of Practice.

12.33 The Department submitted that the purpose of the amendments was to prevent independent contractors from being coerced to enter into multi-employer 'site arrangements' requiring them to provide similar terms and conditions of employment as their head contractors and other contractors.[17]

12.34 Some employer groups suggested that the proposed amendment did not take into account the practical reality of conducting large multi-employer projects in Australia. The Australian Industry Group submitted:

> A specific site or project agreement is designed to create necessary common conditions on a specific site where numerous sub-contractors are employed. An example would be a site agreement for construction of a city building which specifies common safety practices applicable at the site, or common rostered days off which will avoid delays in work due to staggered absences of sub-contractor staff…***It is submitted that major sites or projects will be unworkable without there being the right to make site specific requirements of sub-contractors***.[18]

12.35 The Australian Chamber of Commerce and Industry agreed, citing the findings of a recent Productivity Commission report, *Work Arrangements on Large Capital Building Projects*:

> While a greater enterprise focus in negotiations is desirable, it needs to be recognised that if all work arrangements were negotiated at an enterprise level, head contractors could lose important elements of control over building sites. Coordinating and planning work could be problematic if work arrangements negotiated individually by subcontractors differed significantly.[19]

12.36 Master Builders Australia also opposed the proposed changes which it saw as putting in jeopardy the use of site based agreements which have been generally accepted by those in the industry as contributing to improved industrial relations on major projects.[20]

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17 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2408

18 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, pp. 3118-9

19 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3366-7

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

12.37 The Australian Mines and Metals Association expressed similar concerns regarding resource sector projects:

> Certainty and security of an investment on a project is a key consideration. To that end, the capacity to ensure stability in employee relations is fundamental. AMMA expresses reservations regarding the above provision if a consequence of its passage is to further limit the capacity to use project agreements on major projects. This area is particularly vexing given the need to ensure certainty and security in employee relations when considering large financial investment.[21]

12.38 Several witnesses questioned the impact of the proposal on the Homeworkers Code of Practice . For example:

> We are…concerned at the possible implications of the Freedom of Association provisions in the proposed Bill for operation of voluntary codes and arrangements such as that for the Homeworkers' Code of Practice developed through the Fair Wear Campaign which is crucial for (Non-English Speaking Background) women. While this campaign operates only in the area of textiles, clothing and footwear work, it is a model of community, union and private sector cooperation to ensure that manufacturing and subcontracting arrangements do not act to exploit vulnerable workers…Many of our members come from countries where Governments have colluded to act against their constituents for narrow ends. We entreat you to demonstrate that this does not occur here.[22]

12.39 Another submission stated:

> Any changes that affect the code will directly affect one of the main tools by which industry exploitation is challenged. Good Shepherd notes Minister Reith's assurances that making the Code illegal was 'certainly not intended', and further that should his advice confirm that the code would indeed become illegal, he would intend to make an appropriate amendment. We would applaud such an amendment, but note however that it is yet to become a reality.[23]

*Conclusion*

12.40 A majority of the Committee notes that the Government did not intend that the new provisions to prohibit restrictive agreements and arrangements would affect the Homeworkers' Code of Practice, and has undertaken to make an appropriate amendment to exclude the Code from the operation of the proposed provisions if necessary.

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21 Submission No. 381, Australian Mines and Metals Association Inc, vol. 13, p. 2855

22 Submission No. 411, Association of Non-English Speaking Background Women of Australia, vol. 16, p. 3497

23 Submission No. 311, Good Shepherd Social Justice Network, vol. 8, p. 1523

12.41 Regarding the impact of the proposed provisions on multi-employer site agreements, the Department's evidence demonstrates that it is these particular types of arrangements that the provisions seek to outlaw (along with pattern bargaining outcomes). A majority of the Committee notes concerns amongst employers that these provisions would have an adverse impact on the ability of contractors to efficiently conduct large scale construction projects, and the potential negative impacts on securing investment in Australia's resource sector.

12.42 However, a majority of the Committee considers that the potential impact of these amendments on the viability of important sectors of the Australian economy, and has reached the conclusion that these concerns are outweighed by the importance of ensuring that independent contractors are not coerced into providing the same conditions of employment as their head contractors.

***Recommendation***

12.43 That the amendments to prohibit employers, contractors and industrial associations from exerting pressure on other persons to enter into restrictive site agreements or arrangements be enacted.

# CHAPTER 13

# SCHEDULE 15 – MATTERS REFERRED BY VICTORIA

## Outline of proposed amendments

13.1 Victoria referred most of its powers relating to industrial relations to the Commonwealth under the *Commonwealth Powers (Industrial Relations) Act 1996*. As a result, the WR Act contains provisions dealing with the employment conditions of Victorian employees. Part XV of the WR Act and Schedule 1A to the Act deal with, amongst other things, minimum terms and conditions of employment in Victoria.

13.2 Schedule 15 of the Bill contains amendments to Part XV and Schedule 1A to improve the operation of Victorian minimum terms and conditions of employment. While many of the amendments are of a technical nature[1], the Bill would make amendments in the following substantive areas:

- allowing inspectors authorised under the WR Act to enter and inspect premises where it is believed that employees are employed on conditions set under Schedule 1A, and to enforce any breaches of these minimum terms and conditions;
- clarifying the operation of entitlements to annual leave and sick leave under Schedule 1A;
- ensuring that employees who work more than 38 hours a week are entitled to be paid for these additional hours of work; and
- ensuring that employers can stand down employees employed under contracts underpinned by Schedule 1A minimum terms and conditions.

*Evidence*

13.3 It was generally agreed that the amendments in this Schedule would fix practical problems that had arisen since the referral of Victorian powers to the Commonwealth, and benefit Victorian employees working under Schedule 1A minimum terms and conditions:

> We commend that drafting of the Bill in that it will have the Act deal much more elaborately than is presently the case with Annual Leave in Schedule 1A. This is very desirable from the point of view of employers and employees needing to operate in accordance with the schedule.[2]

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2413

2 Submission No. 468, Law Council of Australia, vol. 22, p. 5731

## Enforcing terms and conditions of Victorian employees

13.4 The technical problems which have prevented inspectors representing the Department of Employment, Workplace Relations and Small Business from enforcing the Schedule 1A minimum conditions were highlighted as an area of particular concern during the inquiry:

> The department effectively does not prosecute employers who breach (Schedule 1A terms and conditions). Our organisation decided to outline these problems because we trust that the Committee will recommend that the problems be addressed…There have been no prosecutions at all in Victoria with regard to schedule 1A workers…The Department of Employment, Workplace Relations and Small Business does not believe it has the power to prosecute—it is a matter relating to the difficulty with referral of powers.[3]

> When the WR Act was amended by the *Workplace Relations and Other Legislation Amendment Act (No.2) 1996*, no provision was made to allow this Department's authorised officers to enter into workplaces where the terms of employment of employees were governed by contracts of employment underpinned by the minimum conditions of employment contained in Schedule 1A. Nor was provision made for the Department's authorised officers to bring actions under sections 178 and 179 of the WR Act in respect of breaches of the Schedule 1A minimum conditions…[4]

13.5 Items 1-6 and 8 of Schedule 15 to the Bill will rectify these problems.

## Clarifying leave entitlements

13.6 Regarding the proposed changes to clarify annual leave and sick leave entitlements under Schedule 1A, the Department submitted that the amendments had been developed in response to 'numerous requests from Victorian employers and employees seeking assistance in the interpretation of Schedule 1A…whether Schedule 1A gives casual employees (who already receive a loading in lieu of these entitlements) an entitlement to paid annual leave and sick leave…and how entitlements to annual leave and sick leave should be calculated when there is a variation in the weekly hours of work of an employee.'[5]

13.7 Some witnesses opposed these particular amendments as they considered that they would further reduce what were already very basic conditions of employment:

> Some other proposed changes in this schedule will actually compound existing inequities Victorian employees covered by Schedule 1A currently experience. Two of the changes that will have a detrimental effect on these

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3 Evidence, Ms Wendy Tobin, Melbourne, 8 October 1999, pp. 177, 182

4 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2414

5 *ibid*., p. 2415

> employees are those proposed in the new subsections (3) and (5) of Clause 1 of Schedule 1A, which relate to the calculation of annual leave and sick leave. These clauses rely on a mathematical model which excludes the time an employee is on leave from the calculation equation. The impact this will have, especially in relation to the accrual of annual leave, gives Victorian employees less annual leave over time than those covered by other state laws or federal awards, which include time taken as leave in the calculation of leave entitlements.[6]
>
> The proposed changes to Clause 1 of Schedule 1A will see that casual and seasonal workers who currently are entitled to minimum conditions of employment in respect of annual leave and sick leave, will lose those entitlements. The very specific changes introduced by Item 14 of Part 1 of Schedule 15 of the Bill is aimed to take away from existing Victorian employees even the poor minimum conditions they are currently entitled to. There is no justification given by either Government for further reducing the minimum entitlements of Victorian employees.[7]

*Conclusion*

13.8 A majority of the Committee acknowledges that there is general support for the proposed amendments to correct technical deficiencies in the operation of Part XV and Schedule 1A to the WR Act.

13.9 While there are some concerns about possible disadvantage to some workers through the changes to annual leave and sick leave entitlements, the Committee majority notes that it is not normal in any Australian jurisdiction for casual employees to be entitled to paid annual or sick leave. This is why casual employees receive higher pay rates than their full time and casual counterparts – their pay rates incorporate loading in lieu of standard leave provisions.

***Recommendation***

13.10 That the proposed amendments to Part XV and Schedule 1A be enacted.

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6 Submission No. 398, Jobwatch Inc., vol. 14, p. 3258

7 Submission No. 414, Shop Distributive and Allied Employees' Association, vol. 17, p. 3780

# CHAPTER 14

## SCHEDULE 16 – INDEPENDENT CONTRACTORS

### Outline of proposed amendments

14.1 Schedule 16 repeals sections 127A, 127B and 127C of the WR Act. These sections currently allow the Federal Court to review certain contracts engaging independent contractors to perform work, other than private or domestic work. Under the provisions, a party to the contract (or their representative) may apply to the Federal Court for review on the grounds that the contract is unfair or harsh.

14.2 The Court, when reviewing the contract, can have regard to: the relative strength of bargaining positions of the parties; whether any undue influence or pressure was exerted on any of the parties, or unfair tactics used by a party; and whether the remuneration paid under the contract is less than that paid to an employee performing similar work.

14.3 If the Court establishes that the contract under review is unfair or harsh, the Court may make an order varying the terms of the contract or setting aside the whole contract or part of it.

*Evidence*

### Repeal of the unfair contract provisions

14.4 The Business Council of Australia noted that paragraph 127C(1)(b) had been held by the High Court to be constitutionally invalid[1], leaving the rest of the provisions 'constitutionally uncertain'. The BCA also pointed out that other federal and State legislation may provide a mechanism for reviewing unconscionable contracts, including the *Trade Practices Act 1974*.[2]

14.5 The Australian Chamber of Commerce and Industry pointed out that the impact of the repeal 'is significantly diminished given the availability of review powers in other Federal and some State legislation'.[3]

14.6 The Australian Catholic Commission for Employment Relations, as an employer of independent contractors, said that it supported these contractors having the ability to access to review of their contracts in the Federal Court.[4]

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1 *Re Dingjan; Ex parte Wagner* (1995) 1983 CLR 323

2 Submission No. 375, Business Council of Australia, vol. 12, pp. 2646-7

3 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3384. The relevant legislation is: *Trade Practices Act 1974 (Cth)*, ss 51AA, 52 & 87; *Fair Trading Act 1985 (Vic)*, s 11; *Industrial Relations Act 1996 (NSW)*, s106; *Industrial Relations Act 1996 (Qld)*, ss275 & 276.

14.7 Unions, particularly those representing employees in the transport and textile, clothing and footwear industries, opposed the amendments. The Transport Workers' Union gave evidence that many of their members, who are 'owner drivers' of trucks, would be adversely affected if the provisions were repealed.

> The union has made application to the Court under sections 127A-127C on numerous occasions over the last few years, usually on behalf of owner driver members whose contracts have been terminated unfairly. In such cases, the provisions have proven to be a useful means of obtaining a more satisfactory outcome for the owner drivers concerned, usually through settlements achieved after proceedings have been issued. Only rarely have cases brought by the Union under sections 127A-127C proceeded to a full trial and determination by the Court.[5]

14.8 There were concerns expressed by unions, churches and community groups about the impact of the amendment on outworkers in the textile, clothing and footwear industry:

> Most outworkers are considered by their employers to be independent contractors rather than employees so that they do not come under an award. Removing the power to scrutinise contracts is fundamentally unfair and there can be no doubt that this will further marginalise outworkers.[6]

14.9 Other witnesses raised more general concerns about unfair contracts being used to disadvantage vulnerable groups within the community, such as women and people from a non-English speaking background, or employees of small businesses:

> It is of some concern that the new laws will repeal provisions allowing the Federal Court to cancel or vary unfair contracts. Many of the employment contracts brought to the Centre are amazingly one sided and bad. Employment contracts do not evolve naturally from a fair bargaining position in the first place. This means employers can contract workers with vastly unfair conditions without any fears of redress.[7]

14.10 Senator Murray raised the issue of parallel developments to prevent people who are in reality working as employees from being classified as independent contractors:

> The Ralph tax reforms…have indicated that the personal service area needs tightening up in terms of people avoiding PAYE provisions by incorporation. Although they have not gone to the extent of wiping it out completely, the proposed narrow definition would deliver something like

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

5 Submission No. 93, Transport Workers' Union of Australia (Victorian and Tasmanian Branch), vol. 2, p. 289

6 Submission No. 442, Rev Tim Costello, vol. 21, p. 5200

7 Submission No. 369, Redfern Legal Centre, vol. 12, p. 2517

> $500 million, according to the estimates, to revenue. It has attraction to the Treasury. It also has the attraction of moving persons who are really employees back into the employee sector.[8]

14.11 The Government, during the course of the preparation of this report, has announced that it will be implementing this particular Ralph recommendation.

> The Government will adopt measures recommended by the Review to contribute to the fairness and equity of the tax system. These include: Restricting the ability of individuals to reduce tax by diverting the income they earn from their personal services to an entity (a company, trust or partnership). Known as the 'alienation of personal services income', this undermines the income tax base and raises significant equity issues. The proposed approach will treat the income of an entity that is earned through the provision of personal services as the income of that individual for tax purposes…This measure will commence from 1 July 2000.[9]

*Conclusion*

14.12 A majority of the Committee believes that the measures to be implemented by the Government in the next six months to ensure employees are not inappropriately classified as independent contractors will considerably alleviate the need for sections 127A-C of the WR Act.

14.13 In general, the evidence demonstrates that it is normally more vulnerable workers who would require the protection of these provisions (for example, outworkers). Under the Government's new arrangements, it will be much more difficult for people who are not genuine contractors to work as independent contractors. Genuine independent contractors have more bargaining power and would be less likely to need or want Federal Court intervention to review the terms of their contracts.

14.14 A majority of the Committee also notes that there would continue to be remedies available for cases of unconscionable or misleading conduct under the *Trade Practices Act 1974*, and other review mechanisms are available to independent contractors in some State jurisdictions.

***Recommendation***

14.15 That sections 127A, 127B and 127C be repealed.

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8 Evidence, Senator Andrew Murray, Canberra, 1 October 1999, p. 40

9 Treasurer, Press Release No. 074, 'The New *Business* Tax System: Stage 2 Response', 11 November 1999

# PREFACE TO LABOR AND DEMOCRATS MINORITY REPORTS

The need to review the impact of the current Workplace Relations Act, as a major part of the Terms of Reference of this Inquiry, was agreed by all members of the Committee. It is therefore unfortunate that many important issues were not adequately canvassed in the Majority Report.

Labor and Democrat Senators agree that a number of matters need close consideration in the context of the operations of the current act. These include that;

- industrial relations law should include a social justice agenda.
- all workers need to be covered by an industrial instrument.
- Australia meets its international obligations.
- the industrial relations system should be focussed on the prevention and settlement of disputes through negotiation in the first instance.
- the ability of workers to be able to balance their work and family lives must be promoted.
- the needs of workers vulnerable to discrimination are adequately protected.
- adequate standards for Victorian workers are provided.
- there is a strong and independent industrial relations commission.

The Labor Senator's report, in its nature and length, attempts to address these issues so that the Inquiry's Terms of Reference and the depth of evidence provided is more fully reflected.

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| Senator Jacinta Collins | Senator Kim Carr | Senator Andrew Murray |

# LABOR SENATORS' REPORT

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# CHAPTER 1

# OVERVIEW

1.1 The *Workplace Relations Act 1996* was a major departure from the manner in which the Commonwealth had regulated industrial relations since 1904. In 1996 the Senate undertook a major inquiry resulting in a majority report rejecting the Government's legislation. Subsequently the Government and the Australian Democrats came to agreement on a range of amendments enabling the legislation to pass the Senate and return to the House of Representatives. In final consideration in the House on 21 November 1996 Minister Reith claimed that the legislation would provide for;

> ... a fair go for all so that the system is appropriately balanced and delivers benefits for both employees and employers...[1]

1.2 The submissions and witnesses involved in the current inquiry demonstrate there is little evidence to support Minister Reith's claims. In spite of this the Government has proposed another massive set of amendments less than three years after the original Act was passed.

## Economic Considerations

1.3 The Government's case is essentially that the 1996 legislation has delivered the economic gains promised by the Minister and that the proposed amendments are evolutionary and necessary for the further operation of the Act. The Government's case was presented by the Department of Employment, Workplace Relations and Small Business (DEWRSB). To a degree the major employer groups who made submissions and appeared before the Committee shared this view. It is important to note however, that there is not consensus, even amongst the supporters of further change, as to the degree or detail of change needed.

1.4 The issues put forward by DEWRSB in its submission may be classified in one of three ways. Firstly as operational or technical issues, secondly ideological issues and finally 'second bite' issues – those that were considered and rejected in 1996.

1.5 Evidence provided by DEWRSB is problematic in two senses: firstly it was selective; and secondly there are concerns as to how the data actually addressed the terms of reference in relation to the period that the data actually purports to cover. Much of the data presented actually related to the early 1990s well before the operation of the 1996 legislation.

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[1] The Hon. Peter Reith MP, 21 November 1996, House of Representatives, *Hansard,* p. 7217.

1.6 Evidence was received from a wide range of academics, community organisations, individuals and unions in opposition to the proposed amendments. This evidence demonstrated that the 1996 Act has had wide ranging and serious negative social impacts that, when foreshadowed by the Opposition in 1996, were ignored by the Government. In 1996 the then Labor Shadow Minister for Industrial Relations, Bob McMullan, said:

> We believe that this bill will probably not deliver anything like the economic benefits which it seeks, but it will definitely deliver the social costs which we fear- the social costs for individuals and families, the social costs for our society as a whole.[2]

1.7 Detailed evidence was heard demonstrating that since the inception of the 1996 Act there has been a range of negative outcomes including:

- the award simplification process which has resulted in the loss of entitlements;
- growth in employment which has been slower than the preceding three years and is tempered by a growth in precarious employment – in particular full-time casual work and temporary employment;
- a poor outcome in reducing the numbers of the very long term unemployed;
- widespread fear of and growing job insecurity;
- the increasing incidence of loss of employee entitlements due to insolvency; and
- the continued increase in hours of work in turn impacting negatively on the balance between work and family life.

1.8 In addition there has been a widening of income inequality, in particular wages growth per hour being less for part-time and casual workers than full-time workers. Income inequality has also seen a widening gender gap in over award payments. In a range of industries many of Australia's most vulnerable workers – in the most precarious forms of employment and on the lowest wages – have experienced wage cuts, particularly through the loss of financial compensation for non-standard working hours.

1.9 The labour market and economic system in the period 1996 to 1999 has, when compared with the previous 3 years and with similar economic growth rates, failed to generate the same employment outcomes. Indeed, the average annual growth of employment in the period February 1993 to February 1996 was 3.1 per cent, while the average annual growth rate in employment in the period February 1996 to October 1999 has been just 1.76 per cent. As a result the average monthly employment generated in the period February 1993 to February 1996 was over 20,000 compared with an average of just over 12,000 jobs per month in the period February 1996 to October 1999.

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[2] The Hon. Bob McMullan MP, 30 May 1996, House of Representatives, *Hansard*, p. 1826.

*Conclusions*

***1.10*** Labor Senators conclude:

- evidence provided to support the bill has little statistical economic validity;
- overall employment growth post 1996 has weakened;
- full time employment growth post 1996 has weakened; and
- the rate at which the long term unemployed has reduced has slowed since 1996.

**Australia's International Obligations**

1.11 Australia is one of the original members of the International Labour Organisation with a long standing reputation for leadership in this field. It is of concern that following enactment of the 1996 Act the Australian Government was called to account for identified breaches of ILO Conventions 87 and 98. The Government's culpability is all the greater in view of the Majority Report on the Workplace Relations and Other Legislation Amendment Bill 1996 that flagged potential breaches of these conventions.[3]

1.12 The overwhelming balance of evidence in this inquiry shows the provisions of this Bill will put Australia further out of step with the international community, and make us again the subject of an embarrassing review by the relevant ILO bodies. The Department of Employment, Workplace Relations and Small Business advised that dialogue is ongoing on the 1996 Act. However the mere fact that the Government has sought to argue with the Committee of Experts is not evidence that Australia is not in breach of our international obligations.

1.13 Labor Senators note the slow pace and seemingly intractable nature of the ongoing dialogue between the Australian Government and that body, and lack of any commitment by the Government to take remedial action.

1.14 In light of the evidence presented and the findings of the Committee of Experts the Labor Senators conclude that the 1996 Act contravenes Australia's international obligations as a member of the International Labour Organisation. The enactment of further legislation of this kind is likely to exacerbate Australia's contravention and is particularly ill advised.

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[3] Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996, Senate Economics References Committee, August 1996, pp. 231-43.

**Recommendation**

**Labor Senators recommend amendments to the Act to ensure Australia is able to meet its international obligations regarding labour standards.**

**Standing of the Australian Industrial Relations Commission**

1.15 Much of the evidence received by the Committee in both submissions and in hearings went to the proposed changes to the Australian Industrial Relations Commission (AIRC). The historical role of the Commission and the often judicial background of previous Commissioners has been important in establishing public confidence in the AIRC as an institution.

1.16 The view that the Commission is not a judicial body but rather a tribunal exercising executive arbitral powers in the same manner as courts was not challenged by any evidence presented to the Committee. The requirement to exercise these functions in a quasi-judicial manner is demonstrated by the role of the Commissioners to hear evidence, apply legislative provisions and legal precedents, and make binding decisions affecting the rights of parties. It is therefore essential to ensure that the Commission is free from improper influence and that public perceptions of its independence are maintained. Public confidence in the Commission is essential to ensure acceptance of the Commission's decisions.

1.17 The Government's proposals to alter the AIRC were widely criticised in many submissions and during inquiry hearings. The proposal to limit Commissioner's terms of appointment was criticised for compromising the Commission's independence. The Labor Senators conclude that even the perception that the Commission is not independent would do it damage in the eyes of the public. The Labor Senators do not support the erosion of the Commission proposed in the Bill.

1.18 Evidence was considered concerning the proposal to institute private mediation to act as a supplementary dispute resolution service to the AIRC. The Labor Senators see no merit in the proposal to create a regulated mediation system. The fact is that private mediation has always been available. However, parties have generally had confidence in the Commission for the resolution of disputes.

1.19 Many witnesses discussed the removal of the discretion of the Commission with regard to the making of awards to settle disputes. Despite the Government's rhetoric about bargaining in the workplace, a large proportion of Australian workers remain dependent on the award system for their terms and conditions of employment. The award simplification process and the limitation on the Commission to make awards within the 20 allowable matters provided for in the 1996 act has seen the most disadvantaged workers further disadvantaged. These workers are those who depend on the award to set their total terms and conditions of employment.

**Recommendation**

**Labor Senators recommend amendments to the Act:**

- **to provide a greater role for the AIRC in prevention and settlement of industrial disputes and to act in the interests of fairness and in the national interest;**
- **to provide the Commission with the power to arbitrate on all employment-related matters in order to ensure that employees have the protection of effective awards which provide fair and relevant terms and conditions of employment; and**
- **discretion be provided to the Commission to arbitrate in cases where negotiations to conclude an agreement have failed within a reasonable period.**

**Awards**

1.20 Submissions and witnesses drew on the experience of the initial round of award simplification to strongly criticise the proposed amendments as further reducing basic terms and conditions. Labor Senators also note the removal of long service leave, notice of termination and superannuation (which is the subject of another bill) will have a negative impact on vulnerable workers.

1.21 Several witnesses commented on the removal of 'skill based career paths' as an allowable matter and the specific removal of 'training and education' as an incidental allowable matter as particularly short-sighted.

1.22 The removal of leave for the purposes of serving on a jury was seen in the same light as the 1996 Act's removal of Blood Donor leave and Defence Force leave from awards as an attack on community values. Following the removal of blood donor leave from awards, evidence presented to the Committee demonstrated a considerable reduction of blood supplies in Victoria and the ACT. These provisions cast doubt on the sincerity of comments by the Prime Minister exhorting corporations to embrace a

> …new social coalition of individuals, business, government, charitable and welfare organisations - each contributing their unique resources and expertise to directly tackle problems.[4]

1.23 It is apparent that without the compulsion of an award, some businesses seem to be unwilling to adopt Mr Howard's principles with respect to providing the opportunity for employees to undertake valued community activities. This should not have been an unexpected result.

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[4] John Howard, The 1999 Hollingworth Trust Lecture On Youth Unemployment, "Opportunities For Australian Youth", Melbourne, 10 June 1999.

**Recommendation**

**Labor Senators recommend:**

- **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; and**
- **the AIRC be empowered to make awards without limitation on content to facilitate the settlement of industrial disputes.**

## AWA's and the Employment Advocate

1.24 The powers of the Employment Advocate and the administrative approval procedures stand to be enhanced by the Bill. It is regrettable that the Employment Advocate chose to, if not ignore, then only peripherally address the terms of reference for this inquiry in his written submission. The written submission outlined the activities of the Office of Employment Advocate (OEA) since inception. In effect the only deficiency that the Employment Advocate identified with the 1996 Act was that complaints were received regarding the statutory delays placed in the Act.[5]

1.25 In making this point the Employment Advocate has ignored an important function that the statutory time limits perform. First, the time period allows employees the opportunity to seek independent advice in private and away from the workplace. The Labor Senators see this as extremely important. The lack of review or mechanisms for appeal after approval of an AWA requires that employees be given every opportunity to make an informed decision whether or not to sign documents.

1.26 The second reason is closely associated with the first point. The ability to take an AWA away from the workplace for a period of time, whether advice is sought or not, lessens the opportunity for employees to be placed under duress to sign. The Labor Senators are of the opinion that any diminution of this ability would only lead to an increase of cases of duress in regard to AWAs.

1.27 The Office of Employment Advocate has a dual role of administering AWAs and also assisting in the compliance aspects of the Act. Throughout the inquiry process a great deal of evidence alleged bias on the part of the OEA staff in dealings with regard to freedom of association issues and lack of diligence in investigating claims of duress by employers.

1.28 While the Employment Advocate has provided a response to the allegations made in this process, they are primarily an unsupported rejection of the claims. The Employment Advocate has failed to effectively refute the evidence placed before the inquiry of serious bias in the OEA's operations.

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[5] Submission 328, The Employment Advocate, vol. 10, pp. 2006-7.

1.29 The Labor Senators conclude that there is a conflict of interest inherent in the roles the OEA undertakes. Further there is a widespread general lack of public confidence in the OEA, particularly with respect to impartiality that impinges on the credibility of the OEA.

**Recommendation**

**Labor Senators recommend that the OEA be abolished.**

**In addition to the abolition of the OEA, Labor Senators recommend the following general amendments to the Act with regard to AWAs:**

- **the protection from duress to new employees offered AWAs needs to be provided. This protection must be in the same terms as that currently provided for existing employees, and should provide that employees are not to be treated as new employees in cases of transmission of business;**
- **a prohibition should prevent the offering of AWAs as a means of undermining collective agreement making;**
- **the registration and approval of individual agreements should reflect the transparency and accountable processes that are applied to certified agreements; and**
- **on application by any interested party, any decision made with respect to AWAs or award designations must be subject to independent review by the AIRC.**

**Balance and bargaining**

1.30 A number of the Bill's provisions relate to issues of balance and the ability of participants to bargain. Evidence as to the affect of the 1996 Act on the ability of employees to effectively organise and bargain demonstrates the difficulties currently faced by workers.

1.31 The 1996 changes to the powers and role of the Commission in conjunction with the limitation on matters that may be inserted into awards, and the limited ability for employees to influence the form of agreement offered, has impacted negatively on the bargaining position of workers and unions.

1.32 Perhaps the most stark example of the advantage that employer's currently hold is a case reported by Australasian Meat Industry Employees Union (AMIEU) – G&K O'Connor's Meatworks in Pakenham in Victoria. Employees have been locked out of the premises for 8 months for refusing to accept wage cuts of between 10 and 17½ per cent. The employer unilaterally refused to negotiate and then instituted industrial action which was described by O'Connor's own counsel as 'fairly unsophisticated' and by Justice Spender as 'a baseball bat lockout'. This lockout has now become the longest lockout in Victoria since the Great Depression. Despite

repeated attempts in both the AIRC and the Federal Court the union has been unable to resolve the dispute due to the intransigence of the employer.

1.33 The promotion of 'choice', which the Government has consistently claimed is available for both employers and employees, was seriously questioned by many of the participants. Evidence detailed the 'take it or leave it' nature of offers of non-union certified agreements and AWAs. It was also apparent that some employers flatly refused to negotiate with unions or employees for the introduction of s.170LJ certified agreements. The lack of any requirement to 'bargain in good faith' has resulted in the wishes of the majority of staff simply being disregarded.

1.34 The current Act has allowed employers to ignore the objects of the Act. It is a cause of serious concern that the Commonwealth and former Victorian Governments have been in this group. An example brought to the attention of the Committee was the actions of the Department of Employment, Workplace Relations and Small Business where a majority of workers in the Department are union members who sought to be covered by a further union agreement. The Departmental Secretary refused to negotiate a s.170LJ certified agreement even though his department is directly responsible for the administration of the WR Act.[6] This situation illustrates the unbalanced nature of the current Act where there is no real choice available to employees.

1.35 The DEWRSB example is far from isolated. The situation in Victoria for state public servants was described as:

> …in Victoria … it has been impossible to get a promotion without agreeing to an AWA..[7]

1.36 The Labor Senators consider such actions as a form of 'economic duress'. This deliberate action to refuse to negotiate demonstrates the imbalance in the employment relationship and a misuse of managerial powers that is contrary to the intention of both s.3(c) and s.170WG of the WR Act.

1.37 In addition the Commonwealth and Public Sector Union (CPSU) identified the Commonwealth Department of Finance and Administration and the new Commonwealth Government agencies of Employment National and the Australian Prudential Regulatory Authority as having instituted policies of not negotiating collective agreements. Staff are required to enter into AWAs in order to improve their terms and conditions of employment above the base provided for in out of date agreements.

1.38 It is evident that refusal to negotiate when a clear preference for the form of agreement has been made demonstrates contempt for the principle to 'bargain in good faith'. The Labor Senators believe that this principle is a fundamental requirement of

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[6] Evidence, Wendy Caird, Sydney, 22 October 1999, pp. 227-8.

[7] Evidence, Brian Jardine, Sydney, 22 October 1999, p. 229.

any bargaining process and should be accommodated and encouraged within the industrial relations structure.

**Recommendation**

**Labor Senators recommend that:**

- **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.**

*Industrial Action*

1.39 There are a range of proposals in the Bill that deal with various aspects of industrial action, many of these amendments were put forward in 1996 and rejected by the Parliament. The evidence presented to the Committee demonstrates that these proposals will severely limit industrial action and will fundamentally reduce the rights and ability of workers to be able to effectively negotiate an agreement.

1.40 The evidence presented by DEWRSB regarding industrial action is that the duration of disputes is declining and compliance functions are generally successful in dealing with unprotected action.

1.41 Industrial action is a recognised and legal part of a negotiation process and may be undertaken by both employers and employees. Industrial action is not an end in itself, however Labor Senators recognise that disputes during a negotiating process are an inevitable part of a robust democracy.

1.42 Of concern to the Labor Senators is that the Bill continues to unfairly skew the system away from the interests of Australian workers and harmonious workplaces. The imbalance in the industrial relations system was commenced with the 1996 Act which removed the ability of the Commission to exercise arbitral powers to resolve intractable disputes.

1.43 The evidence presented during the inquiry has demonstrated that this bill will not assist in the reduction of disputation. This bill promotes disharmony in the workplace, lengthens disputes, adds cost to the negotiating process and generates social disharmony, which is inimical to long term economic growth.

1.44 The Labor Senators question the logic behind the Government's belief that making s.127 orders automatic will act to prevent unprotected action from being taken. The automatic nature of a s 127 order is unlikely to affect the willingness to engage in unprotected action.

1.45 It is more likely that the motivation behind the Government's amendments relate to criticisms levelled against Federal Court decisions.

1.46 This issue was directly addressed in an open letter from 80 eminent industrial relations solicitors and barristers, including three QCs;

> The Minister proposes to require the Federal Court to act promptly in dealing with the enforcement of s.127 orders. There is, however, nothing to suggest that the Federal Court has acted in anything other than a prompt and efficient manner in dealing with such enforcement proceedings.
>
> The Federal Court has arranged its business so as to hear s.127 proceedings at very short notice and has been willing to hear such proceedings outside of normal sitting hours. Raising a doubt about the Federal Court's willingness to deal expeditiously with the enforcement of s.127 orders would seem to have more to do with providing a justification for providing employers with a right to choose between issuing enforcement proceedings in the Federal Court or State Supreme Courts. It may also have something to do with the Minister's desire to get even with the Federal Court because of the decisions made by the Court during the course of the waterfront dispute.[8]

1.47 Labor Senators concur with this view and reject the Government's proposals as inappropriate.

*Secret Ballots*

1.48 The assumption made by the Government in pursuing this matter is that industrial action is ordered by union bosses and not authorised by the members who actually go on strike. The Labor Senators reject this narrow minded ideological view that has been promoted in the absence of effective supporting evidence.

1.49 The Minister has consistently claimed that secret ballots exist in the United Kingdom as a justification for this proposal. Such claims are disingenuous as the system proposed in this bill is considerably more prescriptive and overly bureaucratic.

1.50 The provisions proposed are unrealistically complex as well as unnecessary and unworkable. The provisions will increase the time associated with taking protected industrial action and will place a financial burden on unions and ultimately their members.

1.51 It is apparent that this proposal is more about placing obstacles to prevent the taking of any industrial action than responding to a real need. Currently within Division 4 of the 1996 Act the Commission has the power to order a secret ballot on application from affected members. It is significant that applications to the Commission for secret ballots have been rare.

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[8] "A critical analysis of the Reith Proposals" by over 80 of Australia's Leading Industrial Barristers and Solicitors, 2 July 1999

1.52 Under the Western Australian system unions are required to conduct a secret ballot prior to engaging in industrial action. It is significant to consider the comments by the Western Australian Trades and Labour Council that the legislative provisions requiring secret ballots for industrial action in Western Australian have never been used:

> …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.[9]

1.53 The proposal to introduce secret ballots is disincentive to employees to engage in industrial action. In addition the Bill inserts what can only be described as a punitive provision to withhold at least an entire days pay from employees regardless of the duration of the industrial action. There is general agreement between unions and employers that this provision will encourage an escalation of disputation as there will no incentive for employees to return to work after a stop work meeting or short stoppage.

*Right of Entry*

1.54 The Minister describes the 1996 changes to the industrial relations laws and the current Bill as an attempt to de-regulate the labour market. Such claims are made despite evidence of an overall increase in bureaucratic regulation for unions.

1.55 Labor Senators find particularly disturbing the proposals to severely limit a union's ability to investigate award and agreement breaches on behalf of members. 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. When confronted with this data during the Committee's inquiry, the Department advised that it had prosecuted the employers involved in 11 cases, while the employees were forced to prosecute breaches themselves in 752 cases.[10] These statistics demonstrate that the Government has seen fit to abrogate its responsibilities to investigate and prosecute award breaches.

1.56 It is evident that the changes to right of entry will impact adversely on employees who are most vulnerable in the workplace. The proposed amendments to require a written invitation from a union member at the workplace prior to exercising right of entry will act as a considerable disincentive for vulnerable employees to seek assistance.

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

10 Submission no. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2060

1.57 Disadvantaged workers are already the most likely to be affected by award or agreement breaches. The evidence from the TCFUA concerning attempts by the union to investigate possible award breaches demonstrates the difficulty already faced by unions to assist vulnerable employees. The fundamental imbalance of the bill is demonstrated here with no equivalent proposals being put forward to assist unions and employees gain redress when employers deny access to premises and records.

1.58 The Government has comprehensively failed to provide a case for this change. There is no evidence of widespread abuse of the current right of entry provisions. The claims made in both submissions and hearings relate to primarily one industry.

1.59 Employer groups admit that provisions currently exist in the WR Act to deal with abuses of right of entry. There has been very little use of the current provisions of the Act, which leads to the obvious conclusion that the vast majority of incidences where unions exercise their right of entry is done without abuse. In the absence of any demonstrated need by either the Government or employers the Labor Senators reject the need for repressive right of entry provisions that would deny protection to thousands of the most vulnerable workers in Australia.

*Freedom of Association*

1.60 Considerable evidence was received addressing the aspects of the freedom of association provisions of the Bill. The Government has sought to add union encouragement clauses to the range of provisions that are not allowed to be inserted or to remain in awards or certified agreements. This issue was considered at length in the 1996 inquiry. Ultimately the Commonwealth Attorney General's Department produced advice upholding the legality of union encouragement clauses. This is another case of the Minister having a second bite on an issue that has already been rejected.

1.61 No evidence was presented to the Committee that demonstrated that the clauses that currently exist and are legal have been used to breach the freedom of association provisions of the Act. The Department supplied no information showing the prevalence of union encouragement clauses or the existence of any union discouragement clauses in agreements.

1.62 The Labor Senators find no reason to support the prohibition of union encouragement clauses and reject these amendments as ideologically driven

1.63 The other major amendment concerning freedom of association is to prohibit the existence of closed shops and to effectively define a closed shop as a workplace with 60% or greater union membership.

1.64 Many witnesses were genuinely confused about how the closed shop provisions would be implemented by the Government. Confusion centred around 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.

1.65 Concerns were also raised as to how the Employment Advocate would establish the level of union membership in a workplace that was under investigation. Labor Senators find that these concerns are exacerbated by the lack of public confidence in the impartiality of the Office of Employment Advocate.

1.66 Adding to concerns of bias in these provisions is the fact that there is no converse presumption that an enforced non-union shop exists if union membership was below a certain rate. This issue was raised by several witnesses as an indication that the provisions were, in reality, designed to prevent effective unions from organising:

> 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.[11]

1.67 The Labor Senators conclude that this provision is designed to create an environment in which the investigative processes themselves become anti-union and act as a deterrent on union membership. This conclusion is supported by the arrangements by which prosecutions launched by the Office of the Employment Advocate require a ministerial direction coupled with the evidence. That raises serious questions about the OEA's ability to undertake investigations in a non-partisan manner.

1.68 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. Unscrupulous employers will use the 60 per cent membership clause to incite an investigation for the purpose of intimidating unionists and potential unionists. Labor Senators have no confidence that the Employment Advocate would not collude in this practice.

**Needs of workers vulnerable to discrimination**

1.69 Many of the provisions of this bill will have far reaching consequences for vulnerable and disadvantaged workers. Evidence presented to the Committee demonstrated that, in practice, many employees are still disadvantaged, and the provisions of the WR Act introduced in 1996 have exacerbated the problem.

1.70 Thirty years after the first federal case on equal pay, equal remuneration for work of equal value has not yet been achieved for women. Decentralisation of

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[11] Evidence, Mr Lloyd Freeburn, Melbourne, 7 October 1999, p 73.

industrial relations in Australia appears to be having a negative impact on pay equity, although many academics cautioned that they are simply unable to produce concrete findings due to a paucity of data on agreements.

1.71 The HREOC submission provides a detailed critique of the current equal remuneration provisions of the Act and how they have operated since 1996.[12] HREOC have made several recommendations to improve these provisions, including:

- allowing equal remuneration applications to be heard by a Full Bench of the Commission;
- ensuring that the Commission, in determining equal remuneration applications, can consider remuneration matters not limited to 'allowable award matters' in section 89A(2); and
- allowing the Commission to develop principles for equal remuneration applications, that provide a default mechanism to establish work value in the absence of agreement between the employer and affected employees, and specify that differential rates of pay for male and female employees for work of equal value establishes 'discrimination based on sex' for the purposes of the WR Act.

1.72 The Labor Senators concur with these recommendations.

1.73 The Sex Discrimination Commissioner in evidence drew the Committee's attention to the fact that it was possible for her to intervene in proceedings before the Commission relating to discriminatory provisions in awards and agreements. However the Sex Discrimination Act does not allow her to intervene in the Employment Advocate's consideration of AWAs.[13] This is an issue of concern to the Labor Senators as evidence provided to the Committee demonstrated that AWAs are being used in an exploitative manner and serious questions were raised as to the efficacy of the no disadvantage test.

1.74 The issues of awards are discussed elsewhere, however the Labor Senators conclude that the current award system does not provide adequate protections for low paid workers. The limitation of allowable award matters proposed in this Bill will further marginalise vulnerable workers by not providing adequate protection through a fair and effective safety net.

1.75 Evidence presented by HREOC to the Committee raised concerns about the impact of award simplification on women. Labor Senators note that the current award simplification provisions requiring the removal of directly discriminatory provisions, is flawed as this does not address the issue of indirectly discriminatory provisions in awards. An indirectly discriminatory provision could include those allowing changes in rosters and hours with little or no notice, which can have a very detrimental affect

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12 Submission no. 472, Human Rights and Equal Opportunity Commission, vol. 23, pp. 5819-24.

13 Evidence, Commissioner Susan Halliday, Sydney, 26 October 1999, p. 378.

on women with caring responsibilities. The high profile Steggles Chicken case this year is an example of how this may occur.

1.76 Labor Senators concur with HREOC recommendation that this issue should be addressed by allowing the Commission and the parties to awards to deal comprehensively with the issue of eliminating discrimination in awards.[14]

1.77 The Labor Senators note that the fairness and effectiveness of awards is not limited to an assessment of safety net wage increases passed on by the Commission. The award simplification exercise, reducing awards to a core of 20 allowable award matters, has resulted in the loss of substantive terms and conditions of employment, which workers in a disadvantaged bargaining position have little hope of regaining in agreements.

**Recommendation**

**The Labor Committee members recommend that HREOC's proposed amendments as detailed above be adopted.**

**Work and Family**

1.78 The Committee notes that a considerable body of evidence was presented regarding work and family. Many submissions to the Committee dealt specifically with the impact of the WR Act on women, who still tend to have primary responsibility to care for children and elderly family members. The evidence presented in these submissions is not encouraging. Overwhelmingly the witnesses and submissions indicated that the ability to manage both work and carer responsibilities had deteriorated under the deregulated environment promoted by the WR Act, particularly through the deregulation of hours of employment.

1.79 The reason that workers were actually worse off is primarily the initial round of award simplification. In effect the Government arbitrarily cut terms and conditions of employment, this in turn 'lowered the bar' for the no disadvantage test. The Government's approach to further limiting and reducing the awards in this Bill will have the same result. Arbitrary reductions in allowable award matters and the limiting of the scope of safety net wage increases will not only affect award workers, but will also reduce the standard against which agreements and their provisions are tested.

1.80 Evidence presented also demonstrated that agreements reached under the WR Act were often more likely to trade off family friendly conditions that had previously been available to workers.

1.81 Concern is also expressed for what may be described as sham family friendly arrangements. These are provisions that, at face value, appear to operate to allow employees flexibility to balance work and family. However, these provisions will

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[14] Submission no. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5801.

often be worded in a manner that allows them to be implemented by employers to the disadvantage of workers with family responsibilities. In such cases it is the practical application of the provisions when workers seek to access them that becomes the crucial test, not merely the words themselves.

**Recommendation**

**Labor Senators recommend that:**

- **transparency and review mechanisms for all forms of agreements be provided to ensure work and family provisions deliver their stated outcomes. Provisions such as flexible hours or spread of ordinary time should be closely examined to ensure that work and family responsibilities for current and future staff are enhanced; and**
- **priority also be given to the development of model Award and agreement provisions to assist employees balance work and family responsibilities.**

## Job Security

1.82 The nature of employment in Australia has been transformed over the past 20 years, and especially over the past three years. The most significant element in this transformation has been the decline of what could be called traditional lifelong, standard full-time employment and its displacement by more insecure forms of employment such as casual, part-time, fixed term and other forms of contingent work.

1.83 Evidence to the Committee demonstrates that the pace of this change has picked up considerably over the past 10 years. Insecure or precarious forms of employment have grown at almost 10 times the rate of growth in standard employment. From August 1989 to August 1999, the number of casual employees in Australia rose by 69 per cent and the number of other employees by 7 per cent.[15] Between 1996 and 1998 alone, the number of full-time casual employees rose by 10.5 per cent and part-time casual employees by 3.6 per cent.[16] One in four Australians is now in casual employment.[17]

1.84 The extraordinary rate of growth of casualisation in Australia can be linked to various developments such as globalisation of the economy, corporate restructuring, development of new technology and new forms of work organisation. It can be linked also to labour market deregulation, which was the basic area of concern to the Committee.

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15 Submission 473, Queensland Government, vol. 23, p. 5947.

16 Evidence, Dr Barbara Pocock, Canberra, 28 October 1999, p. 516.

17 Submission 496, Dr Barbara Pocock, vol. 24, p. 6191.

1.85 A wide range of evidence to the Committee demonstrates that neither the Act nor the Bill will alleviate the growing casualisation of the Australian workforce. In fact both the Act and the Bill seem to be deliberately designed to encourage what the Government euphemistically refers to as 'flexibility' but in reality has been a major contributor to this growth in casualisation. A flexible working environment must be to the benefit of both employers and employees. However, the evidence presented to the Committee demonstrates that due to the fundamental imbalance of the Act, flexibility has often worked for employers at the expense of employees. Of concern to the Labor Senators is that the likely long term effect of both the Act and the Bill will be to further aggravate negative social and economic consequences for families, individuals and the broader community.

> The proposals in this Bill take no account of this and other changes; instead they are likely to *increase* the growing number of Australians that are outside the protective capacity of agreements or awards and denied the genuine possibility of union membership and the capacity to bargain collectively.[18]

1.86 The evidence presented to the Committee demonstrated the close connection between the apprehension and insecurity in the labour force, and economic change which has brought about (among other things) the extraordinary growth in Australia of precarious employment. It is incumbent on the Government to manage this change so that the consequences of change can be anticipated and managed.

1.87 The Labor Senators conclude that the Government has failed to deal with the consequences of the 1996 Act which has lead to a growing feeling of insecurity in the workforce and further that the Bill will aggravate these feelings.

**Victorian Workers**

1.88 Submissions and evidence from Victoria received by the Committee have shown that effectively two classes of workers exist in that State. Employees whose terms and conditions are set by Federal awards which provide the limited protection of s.89A, allowable award matters, and those who are covered by the minima in Schedule 1A of the WR Act, which includes a mere five conditions of employment.

1.89 The Labor Senators conclude that while some benefits for Victorian employees do exist in Schedule 15 of the Bill (eg employers would no longer be able to force their employees to work 70 hours a week for 38 hours pay, and the Department would at least have powers to prosecute breaches of the minimum conditions), this is clearly inadequate.

1.90 The Labor Senators are particularly concerned that the Bill would actually further disadvantage Victorians working under Schedule 1A. Proposed amendments

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18 *ibid*.

which will exempt some types of employees from entitlements to annual leave and sick leave are without merit.

1.91 It is important to note that of the approximately 300 submissions received from private citizens opposed to the Bill, more than half of these submissions were from Victorians. The Labor Senators believe that as a first step in providing minimum protection for Victorian workers the opportunity should be made available for all Victorian workers to be able to access federal award coverage.

1.92 It is unfair and inequitable that some Victorian employees have to work under Schedule 1A conditions, while others (generally union members) have access to the federal award safety net. The Commonwealth Government ignores this injustice at its own peril, because it is clear that Victorian employees are fed up.

**Independent Contractors**

1.93 In keeping with a consistent theme of this bill the proposal to repeal sections 127A-C is another attack on the most vulnerable workers. Evidence was received from community groups, churches, law firms, State Governments and unions that rejected the need for these amendments. The Government has failed to demonstrate why one of the few protections available to contractors should be removed.

1.94 The Labor Senators conclude that the removal of the ability of the Federal Court to review contracts for 'work' would simply open up a loophole for unscrupulous employers to avoid the terms of employment established under awards and agreements, by artificially contracting out work normally performed by employees. This would encourage the use of precarious forms of employment at the expense of permanent employment.

1.95 The Labor Senators reject any move to limit the rights of all vulnerable workers.

*Conclusion*

1.96 Overall the Labor Senators conclude that the evidence provided to the Committee demonstrates that the *Workplace Relations Act 1996* is regressive and has had serious and far reaching negative social impacts particularly on the most disadvantaged Australian workers. In addition there is a paucity of evidence to support the need to extend further de-regulation on the labour market as proposed in this bill.

1.97 Labor Senators do not claim to come to the above issues without preconceptions. But the evidence that came before the Committee was overwhelming. In particular the opinions of the ordinary people who sent in submissions opposing this Bill, condemning the changes of 1996 for the damage it had done to their work, their health, their family lives, their friends and their community. Also, eminent persons such as Professors' Hancock, McCallum and Isaacs; academics like Drs' Peetz, Pocock and Hall; and the community groups, lawyers, unions, public servants

and employers. Some employers made a real effort to leave political allegiances aside, and deal with the issues before us in a dispassionate and thoughtful manner. Notable for their constructive contributions were the Australian Industry Group, the Victorian Automobile Chamber of Commerce and the Australian Catholic Centre for Employment Relations.

1.98 Unfortunately, the majority report does not reflect much of the evidence. This is unfortunate for those who made an effort to contribute to the Committee's Inquiry. The inability to deal honestly and constructively with the thoughtful contributions of so many people and organisations does no credit to the majority or to the Senate and the Parliament.

1.99 Perhaps the best example of this assertion is in the different treatment by the reports of the issue of work and family. How we balance the competing demands of our working lives with our personal lives is one of the most difficult issues confronting us as individuals and as a society. There was significant evidence put before the Inquiry as well as a much wider continuing debate within the community and the media on this matter. That it only merited five paragraphs in the majority report is disappointing.

1.100 This unfortunate pattern is repeated throughout the majority report. Where the evidence is problematic for the Government case, it is either ignored, misconstrued or conclusions drawn in the absence of any support in the evidence.

1.101 In some ways, the majority report serves as an analogy for the manner that this Government deals with industrial relations. Where the issue is the bargaining power of workers, prescription reigns – when the union can see employees, how, where, when they can take industrial action, under what circumstances, for what reason, how long and the list goes on. When it comes to the bargaining power of capital, or employers, the Minister wants flexibility and choice. Choice, but not mutual choice, and little care for the position of vulnerable workers.

**Report Structure**

1.102 For convenience the Labor Senators have structured the remainder of the report in the following manner. The next 10 chapters involve substantive discussion reflecting the Committee's terms of reference. Within each of these policy areas the impact of the 1996 legislation, and the probable impact of the proposed amendments are examined. Finally **the conclusion sets out, schedule by schedule, our concerns with the Bill.**

**Recommendation**

**Labor Senators recommend that the Act should be amended in accordance with the recommendations set out above, and consequently that the Bill be withdrawn.**

# CHAPTER 2

# ECONOMIC CONDITIONS

*'Never forget the politics and never forget which side we're on. We're on the side of making profits. We're on the side of people owning private capital.'*

- Peter Reith, 9 July 1999

## Introduction

2.1 Very little evidence has been put to the Committee supporting the notion that the reforms of 1996, of themselves, have had a positive impact on employment and industrial outcomes on the Australian economy.

2.2 Employment growth is a function of a number of factors and not restricted to the one-dimensional solutions often cited by some – be they unfair dismissal or reduced wages and conditions.

2.3 A multiplicity of factors influence the efficient and equitable operation of the labour market. Often, the operation of the labour market is analysed from a purely static and narrow perspective. For instance, the fact that wages paid to workers, while representing a cost to employers also represent income to individuals and families is often overlooked. From a dynamic perspective, it is important to recognise the linkages between the labour market, narrowly defined, the macro economy and living standards when considering labour market reforms.

2.4 A well functioning labour market should underpin good microeconomic and macroeconomic policies and also contribute to the standard of living of families. Income and job security and job satisfaction are important criteria in this respect.

2.5 The Inquiry has been presented with very little evidence that the 1996 reforms are directly responsible for strong employment outcomes, strong growth in capital and labour productivity, or improved standards of living.

2.6 From a dynamic perspective, labour market reforms should effect improvements in both the supply and demand for labour. The reforms since 1996 have done little to advance improvements in skills and human capital. Indeed, severe budget cuts have targeted education and labour market assistance programs. These are major deficiencies represented by unbalanced policy making, the consequences of which are dynamic in nature and not generally reflected in the short run.

2.7 An important, but often overlooked element, in labour market reform relates to management practices. International best practice and management horizons which

extend beyond the short term are fundamental to generating harmonious workplaces and generating both labour efficiencies but also innovation amongst workers. Organisational structure is a fundamental source of innovation, yet barely rates a mention in either the 1996 labour market reforms or the Government's proposed 1999-2000 reforms. The Committee received convincing evidence specifically addressing this issue from Mr Hugh McBride who said:

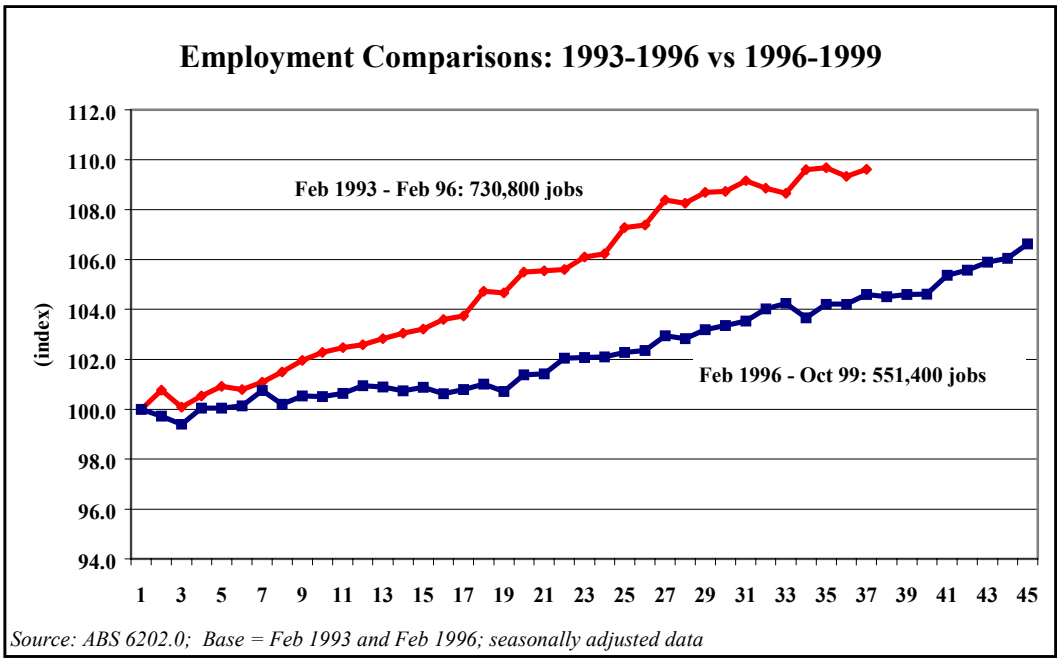
> In other words, the problems are not in the workplace, they are not in the unions – they are in the system. That is not a matter of hearsay, ideology or theory; it is fact. There is plenty of evidence to support that. The evidence is the productivity and competitiveness of the Japanese firms and the US firms that have adopted total quality management in partnership with their unions. Those are facts. You do not fix it by getting rid of unions, you do not fix it by bashing the unions over the head and you do not fix it by punitive measures on the workers. If you go down this path – and this is the significant point – you create an atmosphere in the workplace where it is very difficult to get cooperation and accommodation out of the workers.[1]

## Employment

*Employment growth post 1996*

2.8 It is instructive to note that with roughly similar economic growth rates in the period 1993-1996 and 1996-1999, the employment growth rate has been slower post-1996 reforms. ***Graph 1*** highlights this differential performance.

**Graph 1**




1 Evidence, Mr Hugh McBride, Melbourne, 7 October 1999, p. 123.

2.9 The clear slow down in the pace of employment growth in the last 3½ years, despite similar economic growth rates to the previous three years correlates with:

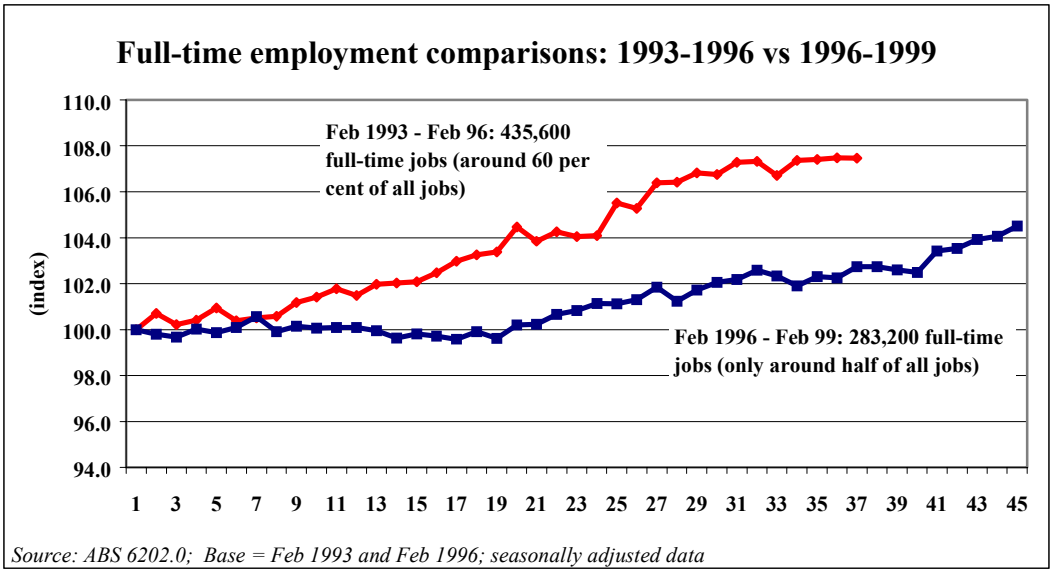
- Severe budget cuts in Commonwealth budgets since 1996-97;
- $1.8 billion worth of budget cuts by the Commonwealth in labour market assistance programs;
- Cuts to education in Commonwealth budgets since 1996-97; and
- Cuts to assistance provided to research and development – primarily through the cuts to the tax concession available for research and development activities.

2.10 In sum, these budget cuts go to those things that drive economic growth in the medium to long term – employability and adjustment to work, skills and innovation.

*Full time employment growth post 1996*

2.11 A closer examination of the aggregate data reveals that in the period February 1993 to February 1996, nearly 60 per cent of the 730,800 jobs that were created were full-time jobs. By contrast, in the period between February 1996 and October 1999, only around half of 551,400 jobs created were full-time jobs. ***Graph 2*** highlights the comparative employment performance in full-time job creation.

**Graph 2**



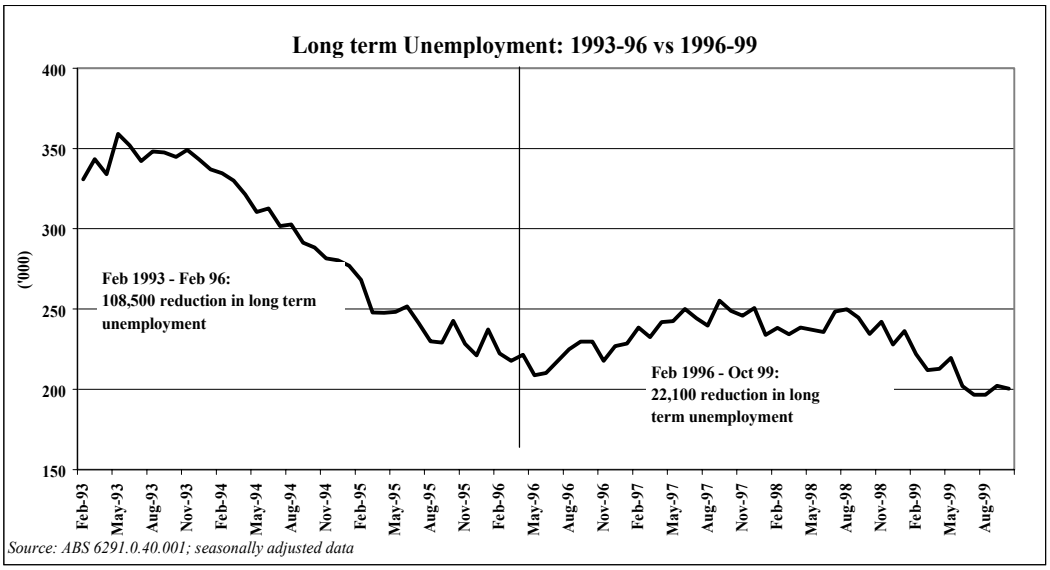

2.12 One of the important elements to reducing the potential for labour market bottlenecks and, to some extent, a quasi measure of flexibility in the labour market is the extent to which the economic system assists those most disadvantaged in the labour market. The long term unemployed, in particular, are recognised amongst the most disadvantaged in the labour market. They represent a pool of non-utilised workers in the economy and to the extent that their capabilities are not utilised, there is an associated economic loss to the nation.

2.13 With respect to the performance of the economy and the labour market to address this economic problem, it is instructive that in the period since the 1996 reforms and the $1.8 billion budget cuts to labour market assistance programs, there has been a marked slowdown in improvements in this area of the labour market.

*Reduction on long term unemployed weaker after 1996*

2.14 ***Graph 3*** highlights this marked difference in long term unemployment outcomes within the past 6 and half years. In the period February 1993 to February 1996, the number of long term unemployed declined by 108,500 . In comparison, in the period February 1996 to October 1999, the reduction has been a mere 22,100.

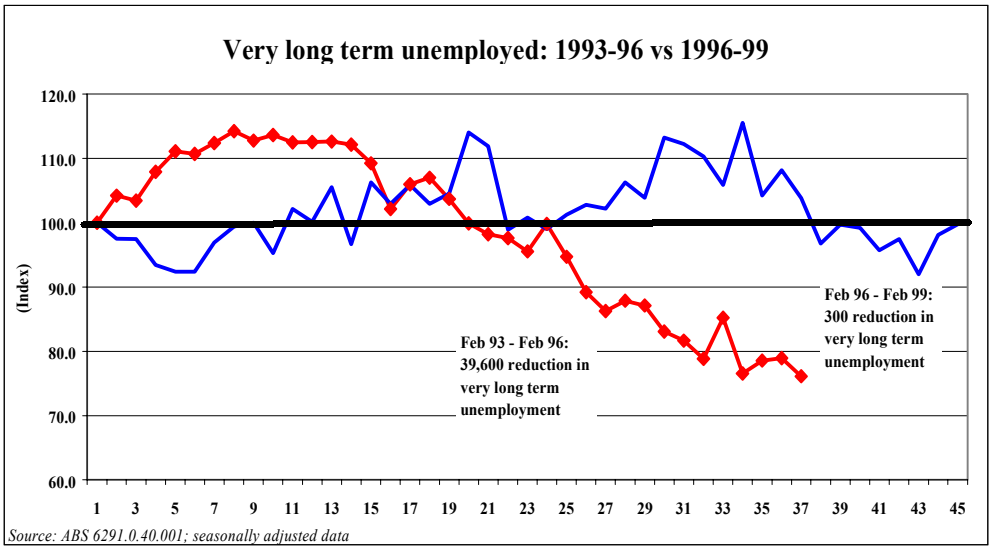
**Graph 3**




2.15 More importantly, the benefits of economic growth has failed to distribute the benefits to those who have been unemployed for more than 2 years – the very long term unemployed. This is a group with an over representation of mature aged Australians, and has significant implications for the standard of living of Australians who have already contributed much to the economy but who now find themselves being structured out of the labour market with few means of effecting a transition back to work.

2.16 ***Graph 4*** highlights the comparative employment performance for the very long term unemployed.

**Graph 4**



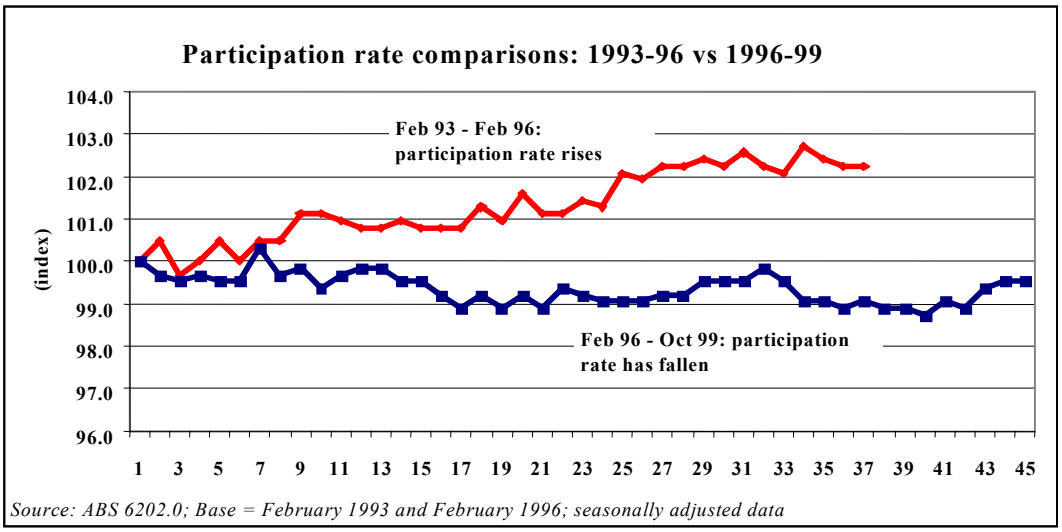

2.17 ***Graph 4*** is instructive in highlighting the lack of progress made in the period since 1996 of getting those unemployed for more than 2 years back into work.

*Participation rate post 1996*

2.18 The divide between 1993 – 96 and 1996 – 99 with respect to the labour market has not been confined only to actual employment outcomes, but has extended to the degree of participation in the labour market. Contrary to economic expectations and historical evidence, the continuation of economic growth in the post 1996 period has not been associated with strong growth in the participation rate.

2.19 ***Graph 5*** highlights this comparative performance on the participation rate for two periods within the past 6 and half years. It reveals that in the period February 1993 to February 1996, the participation rate rose strongly, while it has fallen in the period February 1996 to October 1999. In a period of continued economic growth, Australians have been discouraged out of the labour market in the period post 1996.

**Graph 5**



2.20 While the Government has cited the improvement in labour productivity as vindication of the 1996 industrial relations laws, it is important, from an economic perspective, to recognise that it is the combined effects of labour and capital productivity that are the key to economic growth and reform in the economy.

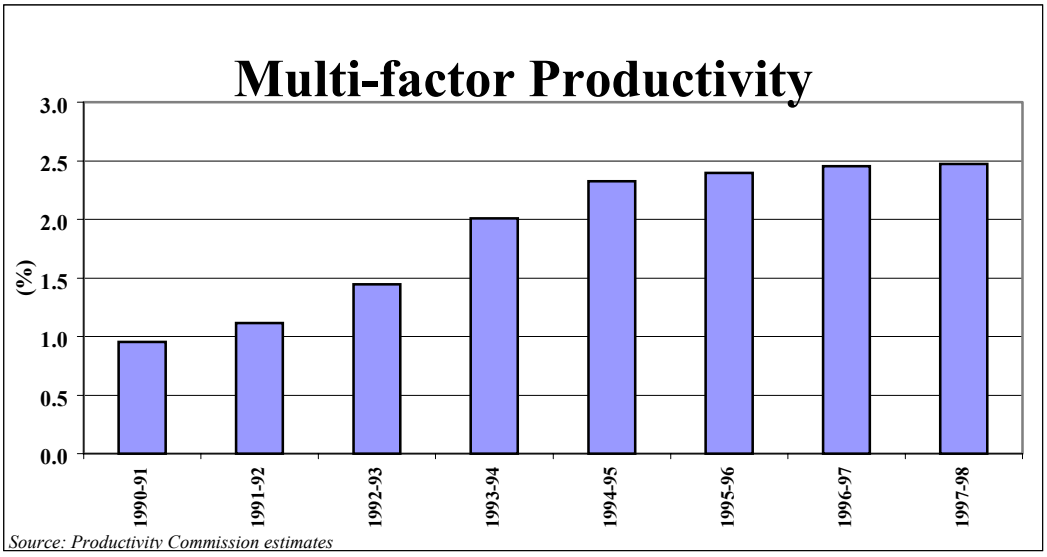
2.21 Sustained improvements in productivity are derived from structural reforms generating significant benefits over time. It is widely recognised that Australia's 'step-up' in productivity is the function of reforms made primarily as a result of the economic policies of the Hawke and Keating Labor Governments in diverse areas such as:

- Financial market deregulation in the 1980s and early 1990s;
- Greater openness of the economy;
- Tariff reforms during the 1980s and early 1990s;
- Wage and industrial reforms during the 1980s and 1990s; and
- Competition reforms during the late 1980s and 1990s.

2.22 The major reforms which have resulted in the improvement in both capital and labour productivity occurred prior to the 1996 changes to the industrial relations laws. The improvement in both the level and growth rate of *multi-factor productivity* represents the gains resulting from 13 years of micro economic reforms.

2.23 As can be seen from ***Graph 6*** the major improvements in Australia's productivity performance occurred during Labor's term in government a result of more than a decade of micro economic reforms.

**Graph 6**



*Conclusion*

2.24 Despite consistent economic growth over the last 6 years, the labour market, in the period 1996 to 1999 has, when compared to the previous 3 years, failed to generate the same employment outcomes. Indeed, the average annual growth of employment in the period February 1993 to February 1996 was 3.1 per cent, while the average annual growth rate in employment in the period February 1996 to October 1999 has been just 1.76 per cent. As a result the average monthly employment generation in the period February 1993 to February 1996 was over 20,000 when compared with only just over an average of 12,000 jobs per month in the period February 1996 to October 1999.

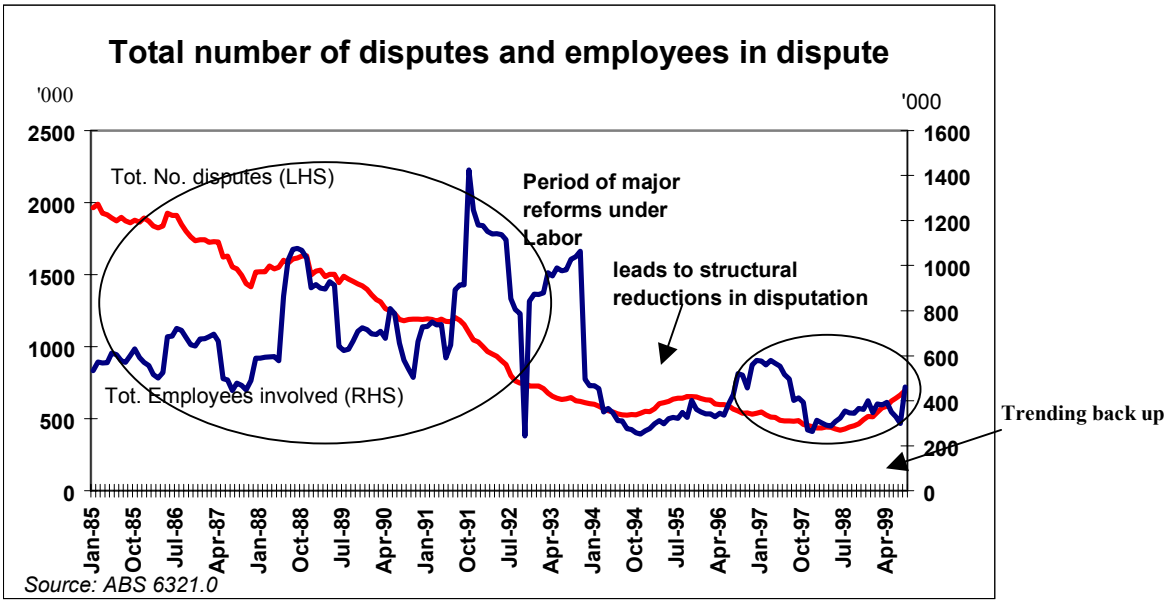
**Causes of disputes**

2.25 Contrary to Government claims, the casual observation of the data on the causes of disputes highlights some important insights into the effects of many years of reform under Labor:

- A pronounced downward trend in the number of disputes over the period of the late 1980s and early 1990s; and
- A structural reduction in the number of employees in disputes in the 1990s.

2.26 These trends, however, have started to reverse in more recent years. ***Graph 7*** highlights this for both the total number of disputes and the number of employees involved.

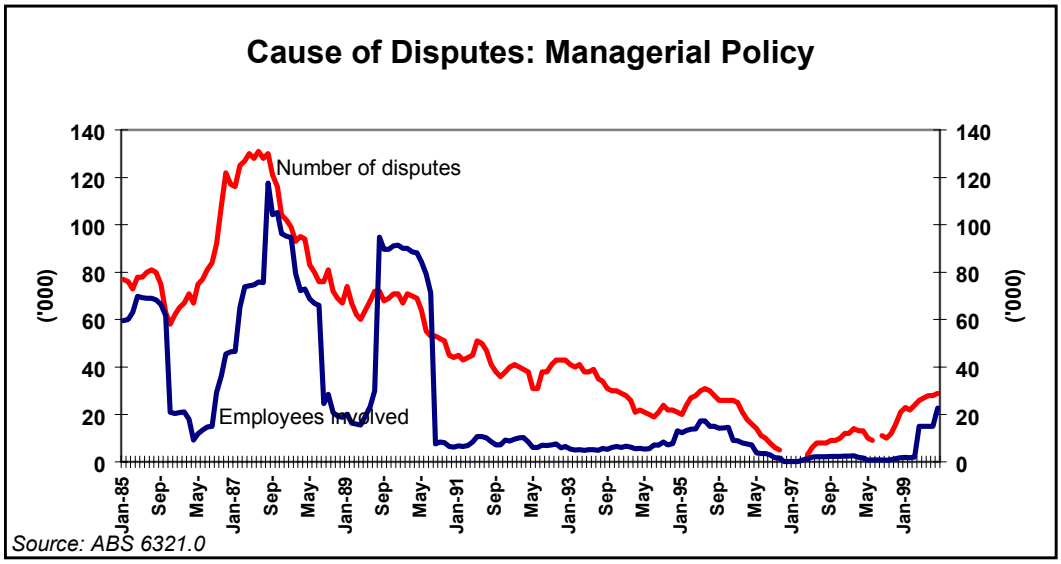
**Graph 7**



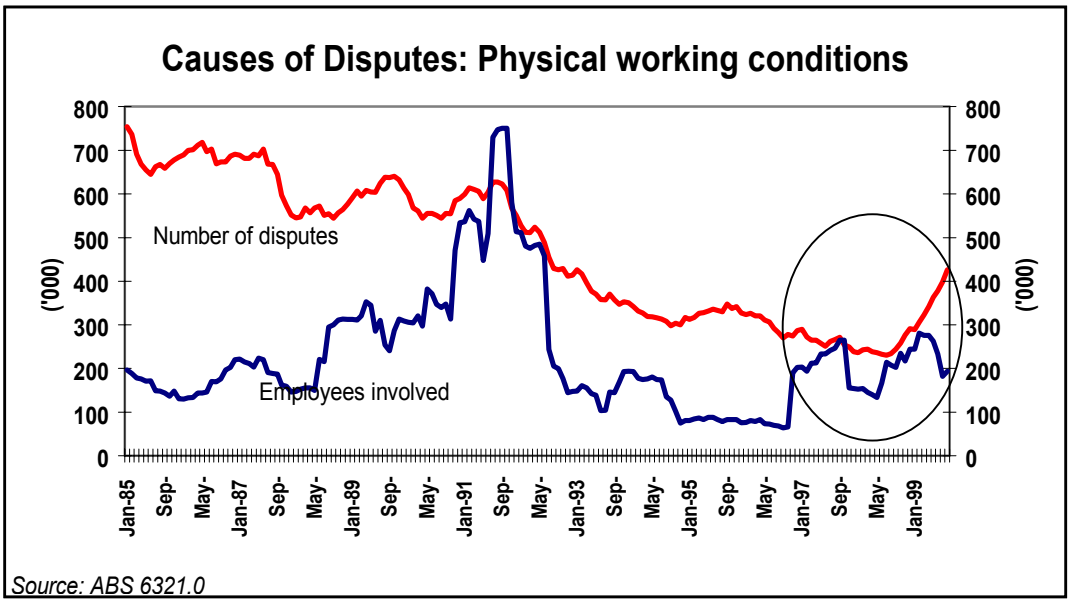

2.27 Indeed, contrary to Government claims, the data reveals some disturbing developments in the post 1996 period. The Government's ideological obsession of continually attacking the rights and conditions of workers has blinded it to the flipside

of the industrial equation, management practices. What is clear from the data is that disputes over managerial policy and physical working conditions have begun to trend upwards since the Coalition came to office (***Graph 8 and 9***).

**Graph 8**



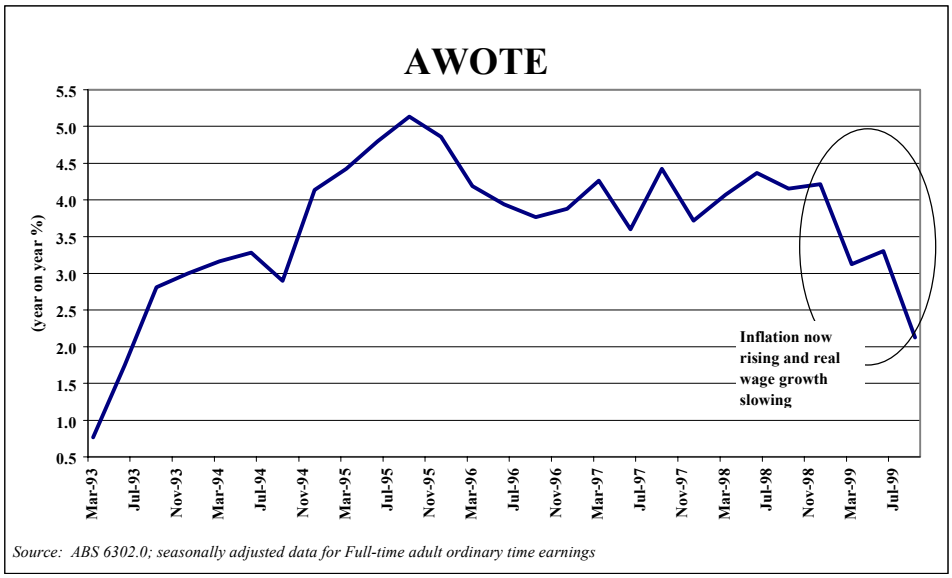

**Graph 9**




**Wage Disparity**

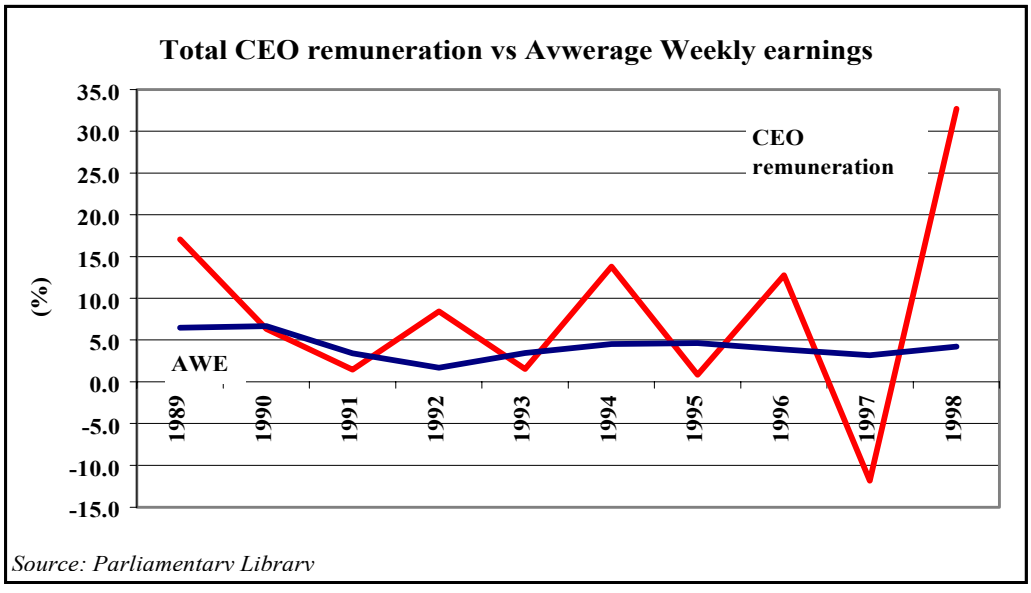
2.28 Latest figures on CEO remuneration reveal a 32.7 per cent rise in total earnings between 1997 and 1998 while the latest data on average weekly earnings reveal that the wages of Australian workers rose by a mere 2.1 per cent in the year to August 1999 (see ***Graph 10***).

**Graph 10**




2.29 The Prime Minister recently cited the disparity between the strong growth in executive salaries compared to those of the average Australian worker. This is a rare acknowledgment that the benefits of Australia's good economic growth performance in recent years have not been shared across the nation. ***Graph 11*** depicts the downward wage outcomes being experienced by Australian workers. It is clear that real wage growth has been slowing in the economy while the salaries of executives have been rising.

**Graph 11**




2.30 The relative wages predicament of Australian workers will be exacerbated by the Government's policy to introduce a goods and service tax next year while

assuming no wage increases to follow from the consequent rise in the inflation rate. This assumption translates into a real wage cut for Australian workers.

**Living standards**

2.31 The Coalition Government's policies have had a negative impact on the living standards of Australian workers and the unemployed. Workplace insecurity, and the inability of jobseekers to be assisted back to work, reflect specific policy choices by the Howard Government. This has impacted most on those least able to deal with it – low paid workers and the unemployed.

2.32 Since 1996, there has been a distinct reduction in fairness within the Australian labour market, one that offends the egalitarian nature of our proud economic and social history.

2.33 On every measure affecting living standards, the gap between the rich and poor has been widened by Coalition policy:

- wage inequality has grown rapidly, with the wages of the low paid failing to keep pace with average wages, while executive salaries continue to soar;
- massive budget cuts since 1996 have hit low-income households the hardest, as evidenced by research from the Melbourne Institute of Applied Economic and Social Research;
- the Government's own modelling confirms that their proposed changes to the tax system disproportionately benefit high wage earners, while slugging low-income households with a GST; and
- the Government's GST package also assumes that Australian workers should accept a real wage cut stemming from the inflationary impact of the GST.

2.34 The majority also discounted the evidence of individuals who told the inquiry that their living standards had declined. The evidence is clear before the inquiry that different groups in the community have been severely disadvantaged by the Act. Even the Department of Workplace Relations and Small Business acknowledges this when it acknowledges that income inequality has increased.

2.35 Furthermore, as is discussed in greater detail later in the report, it is not possible to obtain a true indication of how the WR Act has impacted on the living standards due to serious deficiencies in the availability or existence of detailed data, particularly with respect to the content of AWAs. Labor Senators concur with the view expressed by Dr David Peetz that it is unfortunate that no surveys of employees have been conducted since the introduction of the WR Act. Such data would have provided a more complete picture of how the Act had impacted on the living standards of employees. As Dr Peetz described:

> …an assessment of the impact of the Workplace Relations Act on pay and conditions would normally take as one of its main sources data from employees themselves. For example, information from agreements can tell

> us about the size of wage increases (albeit not for all agreements) and the subject areas covered by changes in conditions, but they cannot tell us whether employees feel better or worse off as a result. Nor can they tell us the impact the implementation of the agreement had on productivity…
>
> …The first official report on the operation of the Workplace Relations Act (Hawke et al 1998) failed to contain data from either employees or employers. (While such surveys are expensive, it is noteworthy that $3m, more than enough for such research, was allocated to an advertising campaign for the Employment Advocate.) Data on the New Zealand experience (based on employee and employer surveys) indicated that radical legislative change has by far its greatest impact in the first couple of years after introduction (Hector & Hobby 1997), so it is particularly unfortunate that there are no officially collected data from employees on the early impact of the Workplace Relations Act.

*Conclusion*

2.36 Changes in industrial relations, taxation and spending have combined to drastically increase economic and social inequality.

2.37 The deepening divide between the haves and the have-nots in Australian society has been exacerbated by the increasing pressures placed on Australian workers, particularly those on lower wages without adequate bargaining power and protection. The inquiry heard that workforce insecurity is now commonplace, and is directly related to the 1996 legislation.

2.38 Workforce insecurity and growing inequality are seriously threatening not only our quality of life, but our social cohesion.

# CHAPTER 3

# INTERNATIONAL OBLIGATIONS

## Introduction[1]

3.1 In 1996, the Majority Committee Report on the Workplace Relations and Other Legislation Amendment Bill expressed concerns about the possibility that some of the proposed amendments, if enacted, would result in Australia breaching its international obligations under certain International Labour Organisation (ILO) Conventions.[2]

3.2 This warning proved to be well founded. The ILO Committee of Experts has now considered and criticised the 1996 amendments in two separate observations.[3] We preface our remarks by noting the Committee of Experts' comments concerning the general complexity of the Act, and their hope that 'the Government will make available simplified summaries of the legislation to workers and employers.' The Labor Senators concur with this suggestion.

## Impact of the Workplace Relations Act

3.3 The evidence available to this Committee clearly indicates that the introduction of the WR Act has placed Australia in breach of its international obligations. In this regard, it is useful to review the specific comments made by the Committee of Experts on the WR Act. Extracts from the Committee of Experts' observations regarding ILO Convention 87 Freedom of Association and Protection of the Right to Organise, and Convention 98 Right to Organise and Collective Bargaining, are set out in Appendix 1.

3.4 The Department has been at pains to minimise the potential embarrassment and damage to Australia's reputation as a good international citizen arising from the

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1 The assistance of Ms Helen Nezeritis, Australian National University Parliamentary Intern, is gratefully acknowledged in the research for this chapter.

2 Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996, Senate Economics References Committee, August 1996 pp 231-243. For a brief explanation of the history and processes of the ILO, see pp 231-234

3 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 1999, *http://ilolex.ilo.ch:1567/public/50normes/ilolex/pdconv.pl?host=status01&textbase=iloeng&document=4524&chapter=6&query=%28Australia%29+%40ref+%2B+%28%23classification%3D02%5F01%2A%29+%40ref&highlight=&querytype=bool*, 25 November 1999

CEACR: Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1948 Australia (ratification: 1973) Published: 1998 *http://ilolex.ilo.ch:1567/public/50normes/ilolex/pdconv.pl?host=status01&textbase=iloeng&document=4031&chapter=6&query=%28Australia%29+%40ref+%2B+%28%23classification%3D02%5F01%2A%29+%40ref&highlight=&querytype=bool*, 25 November 1999

passage of the 1996 amendments, and the apparent conflict between those amendments and our international obligations under these ILO Conventions.

3.5 For instance, the Department suggests at paragraph 98 of section A(i)(k) of their submission that there were 'only a small number of provisions of the Act about which the ILO Committee of Experts has expressed concerns'.[4] This statement is disingenuous, as the observations express concerns about two of the central features of the 1996 Act: those dealing with bargaining, and the rights of unions and their members. These observations should not be viewed lightly, and the quantity of the observations has no bearing on the important substance of the Committee of Expert's comments.

3.6 The Department also submitted that the Committee of Experts made their observations without the benefit of the Government's full explanation. In a supplementary answer to a question on notice from this Committee, the Department even suggested that 'The CEACR's observations resulted in large part from representations made to the ILO by the Australian Council of Trade Unions (ACTU), in some cases without the value of the Government's response'. The Government also made this contention to the ILO Conference's Committee on the Application of Standards.[5]

3.7 The ILO Committee of Experts include eminent jurists and the world's foremost experts on international labour law, whose charter is as follows:

> The Committee's fundamental principles are those of independence, impartiality and objectivity in noting the extent to which the position in each State appears to conform to the terms of the Conventions and the obligations accepted under the ILO Constitution.[6]

3.8 It is astounding that the Government would suggest that the Committee of Experts had failed to seek its views in evaluating the extent to which Australia's laws comply with its international obligations, and frankly embarrassing that the Government would attempt to claim that the Committee's findings were biased in favour of trade union submissions.

3.9 The Government clearly believes that the world's foremost international labour lawyers' observations were poorly founded, and incorrect. The Labor Senators assume that this is also why the Government is conducting 'continuing dialogue' with the ILO regarding the observations, in attempt to persuade the ILO that that

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4 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11 p. 2193

5 Tom Fisher, International Labour Conference, 86th Session, Geneva, June 1998, Committee on the Application of Standards, 16th sitting, 12 June 1998, p. 61

6 ILO Handbook of Procedures Relating to International Labour Conventions and Recommendation, paragraph 53.

Committee of Experts were wrong. This dialogue was referred to by the Department in evidence before the Committee:

> …the dialogue is of a nature where the government is trying to convince the ILO that it is wrong.[7]

3.10 The Labor Senators do not accept the Government's position regarding the Committee of Experts' observations on a number of grounds. Firstly, there is evidence that the experts, at least in their observation concerning Convention 87, had before them all the relevant information, including the Government's views. The Committee of Experts made the following introductory statement to their observation:

> The Committee notes **the information provided in the Government's report, in particular the adoption of the *Workplace Relations Act 1996,* which according to the Government, substantially amended the *Industrial Relations Act 1988*,** and the recent adoption of legislation in certain States: the Labour Relations Legislation Amendment Act, 1997, of Western Australia, amending the Industrial Relations Act, 1979; the Workplace Relations Act, 1997, and the Industrial Organizations Act, 1997, of Queensland; and the Industrial Relations Act, 1996, of New South Wales. The Committee also takes note of the comments of the Australian Council of Trade Unions (ACTU) and the National Union of Workers (New South Wales Branch), **and the Government replies to these comments**. (emphasis added).[8]

3.11 As for the observation relating to Convention 98, there is a possibility that the Government were late in responding to the Committee of Experts:

> Apparently the Government had not replied within a reasonable time, because the Committee of Experts had received it too late – probably during the Committee of Experts' meeting in December – to be considered. The Worker members deeply deplore this negligence on the part of the Government.[9]

3.12 The Department also attempted to convey to the Committee the impression that the ILO does not view the potential breaches of Conventions 87 and 98 as a serious matter. Although never explicitly expressed, the Department's supplementary response on this issue makes a calculated effort to communicate this view:

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7 Evidence, Mr Barry Leahy, Canberra, 1 October 1999, p. 7

8 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 1999 *http://ilolex.ilo.ch:1567/public/50normes/ilolex/pdconv.pl?host=status01&textbase=iloeng&document=4524&chapter=6&query=%28Australia%29+%40ref+%2B+%28%23classification%3D02%5F01%2A%29+%40ref&highlight=&querytype=bool,* 25 November 1999

9 International Labour Conference, 86th Session, Geneva, June 1998; Committee on the Application of Standards, 16th sitting, 12 June 1998, p 66

> If the CEACR had considered that it wanted an urgent response to its observations on Conventions 87 and 98, it would have asked Australia to report in the following year.[10]

3.13 As the Department submits, it is true that the CEACR did not ask Australia to report the following year. However, the Department failed to mention that the Committee on the Application of Standards, to whom the CEACR reports, did ask Australia to report the following year.[11]

3.14 We question the value, if any, of the Government's 'continuing dialogue'. In particular, we question whether the dialogue holds any likelihood of success - which in the Department's and the Government's terms no doubt means convincing the ILO and the Committee of Experts that their observations concerning Convention 98 and perhaps Convention 87 are incorrect.

*Conclusions*

3.15 It is the view of the Labor Senators that we should accept the Committee of Experts' assessment of the 1996 legislation, and their interpretations of the relevant ILO Conventions. The Committee of Experts includes the world's foremost authorities on international labour law, and eminent jurists completely capable of understanding and interpreting the provisions of the WR Act.

3.16 The Department's evidence to this inquiry appeared to give the impression that 'dialogue' is the full measure of our requirements and duties as an ILO member. We contend that this is not only wrong, it is mischievously wrong. Australia, as a sovereign state, has ratified ILO Conventions 87 and 98. The ratification of international conventions brings with it obligations under international law. States must comply with international obligations that they have voluntarily entered into with responsibility and integrity. It is not acceptable for a state to simply breach its obligations at international law. If the Government seriously considers that these obligations are no longer relevant, or inappropriate, then there are formal mechanisms for repudiating the conventions.

3.17 The Committee of Experts in their observation concerning Convention 87 (where they had the full benefit of the Government's views) perhaps best express our obligations:

> The Committee hopes that the Government will indicate in its next report measures taken or envisaged to amend the provisions of the Workplace

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10 Department of Employment, Workplace Relations and Small Business, Questions Arising from Hearing 1 October 1999, p. 2

11 *ibid*, p 80

> Relations Act referred to above, to bring the legislation into conformity with the requirements of the Convention.[12]

3.18 The Government's continuing refusal to address these significant problems raises two possibilities. Either the Department is not competent to deal with such matters, or the Government is deliberately determined to ignore Australia's obligations under ILO Conventions and is willing to bring Australia into disrepute in the international community of nations as a consequence.

3.19 The Labor Senators recommend that the Government immediately comply with the Committee of Experts' request to provide an outline of measures that will be taken to amend the WR Act to bring the Act into conformity with Australia's international obligations.

3.20 The Labor Senators also suggest that the Government review its current approach to the ILO, and take a more serious and considered attitude to Australia's participation in the development and implementation of international labour standards. In this regard, the Labor Senators note that the Government made completely inappropriate representations to the 1999 International Labour Conference, informing the ILO that the Australian Government supported pregnancy testing of women by employers before hiring them.[13] This would seem to have been either a sick joke or the result of complete incompetence, and will bring Australia into disrepute within the international community.

**Amendments proposed in the Bill**

3.21 The rest of this chapter deals with the proposed amendments to the Act set out in the Bill, and their potential impact on Australia's international obligations. Despite the criticisms of the WR Act by the ILO Committee of Experts, it appears that the Government is determined to bring further shame and embarrassment to the nation by enacting more amendments that would place Australia even further in breach of its international obligations:

> It is the very real fear of the Foundation that certain aspects of the proposed legislation will run counter to these charters of civil and political rights and that the good standing in which Australia is generally held in the family of nations may be further impugned by possible future negative determinations by the...Committee of Experts, such as occurred after the passage of the Workplace Relations Act 1996…The new suggested reforms contained in [the Bill] would seem to invite further hostile criticism by the Committee of

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12 CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Australia (ratification: 1973) Published: 1999 *http://ilolex.ilo.ch:1567/public/50normes/ilolex/pdconv.pl?host=status01&textbase=iloeng&document=4524&chapter=6&query=%28Australia%29+%40ref+%2B+%28%23classification%3D02%5F01%2A%29+%40ref&highlight=&querytype=bool,* 25 November 1999

13 *Sydney Morning Herald*, 7 October 1999, p. 19

> Experts. Quite simply these suggested reforms would put Australia at odds with our clear obligations under Conventions 87…and 98…[14]

*Right of entry*

3.22 Convention 87 protects two basic rights: the right of workers and employers to form and join organisations of their choice, and secondly, the organisational autonomy of trade union and employer associations.[15]

> In interpreting the principles of freedom of association and the right to organise, the Freedom of Association Committee of the Governing Body of the ILO has held that: *Workers representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including the right of access to workplaces*.[16]

3.23 Schedule 13 of the Bill tightens provisions for the right of entry of unions into workplaces. The Bill imposes a stringent and heavily regulated system of access to the workplace. The proposed amendments compound what are already stringently regulated access rights of unions from the 1996 Act. The provisions would probably also not conform with the provisions of Convention No. 35, Workers' Representatives 1971, which Australia has ratified.[17]

3.24 Restrictions upon union entry rights and the resulting limits upon investigating breaches of industrial law, undermine workers fundamental rights of freedom of association and the right to collectively organise. Stronger regulation of entry rights restrains the essential service of monitoring compliance with industrial instruments not only for existing members but also to eligible members in the workplace.

3.25 Under the Bill proposals, people who are not union members would not be able to invite a union to their workplace to meet with them or to investigate possible award or agreement breaches. People who are not presently union members would therefore be denied the ability to freely associate and the right to organise:

> The 1999 Bill…curtails even more seriously the right of unions to organise employees. Under the Bill, a non-member would not be able to invite a union representative into their workplace either for the purpose of investigating a suspected breach or for the purpose of holding discussions

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14 Submission No. 290, The Evatt Foundation, vol. 7, p.1343

15 Creighton, B., 1998, *The ILO and Protection of Fundamental Human Right in Australia*, Melbourne University Review, vol. 22(2), p. 247

16 Submission No. 460, International Centre for Trade Union Rights, vol. 22, p. 5566

17 See comments of International Labour Office in WA Trades and Labour Council (Sep. 1999), submission to Senate Employment, Workplace Relations Small Business and Education Legislation Committee, Schedule B

> with that person. This severely limits the freedom of association of individuals and the rights of unions to organise.[18]

*Industrial action*

3.26 The 1996 Act was criticised for breaching Convention 87 on the grounds that the subject matter of lawful or protected strikes was limited. The WR Act prohibits the right to strike in negotiation of multi-employer agreements and grants wide scope to the Commission to terminate a bargaining period, which limits the capacity to take industrial action. The very fact that a differentiation is made between protected and non-protected action, and penalties are set to remedy unprotected action that does take place, impinges on ILO standards of the basic right of all workers' to withdraw their labour and strike.

3.27 The proposed amendments would compound Australia's current breaches of international obligations by 'strengthening' section 127 orders so that they are available almost automatically and in a broader range of circumstances, by outlawing 'pattern bargaining' and by broadening the circumstances in which the Commission would be required to suspend or terminate bargaining periods:

- Section 170ML would ensure that only unionised employees whose employment is to be covered by the proposed certified agreement can undertake protected action.
- Section 170LG, the pattern bargaining provision, introduces an exacerbation of an already existing breach of international conventions by the WR Act. It requires the Commission to refuse an application for a secret ballot to allow protected strike action to take place if pattern bargaining is considered to exist. The 1996 amendments were criticised by the experts for the excessive restrictions imposed upon multi-employer and industry wide agreement seeking.
- The 1996 Act was criticised by the ILO experts because of section '170MW Power of Commission to terminate a bargaining period'. The 1999 Bill goes further in the offending direction. For example, the Commission must arbitrarily suspend a bargaining period after 14 days of protected industrial action to allow for a 'cooling off' period for negotiations to take place between the parties. A bargaining period can now also be suspended if unprotected industrial action takes place during negotiations.

3.28 The International Centre for Trade Unions Rights provided a detailed critique of the proposed amendments to industrial action provisions[19], concluding:

> The net effect of these amendments will be to take Australia even further out of compliance with our industrial obligations regarding the right to strike.[20]

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18 Submission No. 460, International Centre for Trade Union Rights, vol. 22, p. 5574.

19 *ibid,* pp. 5544-50

3.29 The Bill would also curtail the ability of workers to collectively organise and take industrial action by introducing a requirement for secret ballots (schedule 12):

> By placing restrictions on the right of people to unite for the common purpose of taking action to seek better working conditions, the Australian Government are in breach of the Convention for the Right to Organise and Collective Bargaining…The introduction of secret ballots is likely to isolate workers and break up the group spirit.[21]

3.30 The extensive regulation of the process of conducting a secret ballot contravenes the principle that organisations should be free to organise their administration and to formulate their programs. The International Labour Office was critical of similar provisions in the Western Australian *Labour Relations Amendment Bill 1997*.[22]

3.31 A group of eighty industrial lawyers has described the secret ballot rules as 'cumbersome, complex, and time consuming'.[23] They argue that that the aim is purely to make it more difficult for employees to take industrial action. The ACTU goes one step further, describing the secret ballots provisions as an attempt to nullify industrial action all together.[24]

*Collective bargaining*

3.32 Collective bargaining has long been recognised in international law as critical in addressing the inherent imbalance in the employment relationship.

3.33 The Committee of Experts condemned the clear bias to individual agreement making over collective bargaining in their 1998 report. The 1999 Bill takes another step away from collective bargaining. The promotion of AWAs and individual agreements continues to undermine the collective bargaining process and in all likelihood exacerbate the breaches of ILO conventions identified.

3.34 The 1999 Bill proposes that the process leading to AWAs be further simplified and streamlined. AWAs are to be given primacy over federal, state awards and certified agreements, and do not include a role for unions, or the institutional framework that protects the rights of workers in an unequal bargaining situation.[25] Some AWAs are offered on a 'take it or leave it basis',[26] which illustrates most

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20 *ibid*, p. 5545

21 Submission No. 480, Working Women's Centre Tasmania, vol. 24, p. 6132

22 Submission No. 434, Trades and Labour Council of Western Australia, vol. 21, Schedule B

23 'A Critical Analysis of the Reith Proposals by over 80 of Australia's Leading Industrial Barristers and Solicitors', 2 July 1999, p.7.

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

25 Submission No. 456, Jim Nolan, vol. 22, p.5363

26 See, for instance, Evidence, Ms Sally McManus, Sydney, 22 October 199, p. 263

graphically the logic behind the encouragement of collective bargaining, as enunciated in Convention 98. Notably, neither these amendments, nor those proposed in 1996, proposed penalties for refusing to hire someone if they have no desire to sign an AWA.

3.35 The submission by the Department to the Inquiry asserts that the Committee of Experts' judgement of the WR Act on this issue was unjustified. The explanation provided is 'while the WR Act does not require collective bargaining for AWAs, it does not prohibit or prevent collective bargaining'.[27] This explanation is facile. The Bill may allow access to collective bargaining but clearly individual agreement making is encouraged over collective bargaining. The convention is clear: it requires the promotion of collective bargaining.

3.36 Labor Senators also note that the Government indicates in the most recent Article 22 report to the ILO on Convention 98 that 'when a certified agreement has been certified and is in operation, the certified agreement prevails over an inconsistent Australian Workplace Agreement which takes effect during that period.'[28] This statement was presumably made in defence of the Government's position that the WR Act does not undermine collective bargaining so is therefore not in breach of the Convention.

3.37 Unfortunately, the Government will no longer be able to rely on this argument if the Bill is enacted. The proposed amendments would ensure that individual AWAs take precedence over collective certified agreements:

> During its period of operation, an AWA operates to the exclusion of any certified agreement or old IR agreement that would otherwise apply to the employee's employment…[29]

3.38 Before moving away from collective bargaining and the framework of bargaining established by the WR Act, it is discussed elsewhere in this report (Chapter 7 'The needs of workers vulnerable to discrimination') that the deregulated bargaining environment created by the WR Act has had a negative effect on equal remuneration for women, with the gender pay gap appearing to increase. In this context, the WR Act purports to ensure equal remuneration under Division 2 of Part VIA, to give effect to Anti-Discrimination Conventions and Equal Remuneration Convention. The Government clearly needs to assess the interaction of the bargaining framework established by the WR Act and Australia's obligations under these conventions more carefully.

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27 Submission No. 423, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2209

28 Article 22 Report on the Right to Organise and Collective Bargaining Convention 1949 (No. 98) for the period 1 July 1997 to 30 June 1999, p.34

29 Proposed section 170VD, Item 1 of Schedule 9 to the Bill

*Conclusions*

3.39 This report does not pretend to provide a complete review of the evidence before the Committee that dealt with the issue of Australia's international obligations. Within the limitations of this report writing process, the most obvious examples are dealt with. There were many other examples bought to our attention.[30]

3.40 The 'reforms' that are being pursued by the Government are largely an extension of the 1996 amendments. The Bill would further extend Australia's non-compliance with international standards without attempting to rectify the previously identified breaches.

3.41 The general theme of all submissions dealing with this area was, however, consistent. Almost without exception, those whose submissions dealt with this issue concluded, as we do, that the provisions of this Bill will again put Australia out of step with the international community, and make us again the subject of an embarrassing review of our legislation by the relevant ILO bodies. The only exception is the submission of the Department, representing the Government, which, given the foregoing, cannot be accorded any weight.

3.42 Labor Senators recommend the Act be amended to ensure Australia is able to meet its international obligations regarding labour standards.

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30 See, for instance: Human Rights and Equal Opportunity Commission, Submission No. 472, vol. 23, pp. 5818-24; Australian Medical Association, Submission No. 461, vol. 22, pp. 2622-29; Kingsford Legal Centre, Submission No. 253, vol. 6, pp. 1155-6; Liberty Victoria, Submission No. 172, pp. 0810-15; Australian Council of Trade Unions, Submission No. 423, vol. 19, pp. 4373-78; International Centre for Trade Unions Rights, Submission No. 460, vol. 22, pp. 5472-5621; Newcastle Trades Hall Council, Submission No. 430, vol. 20, p. 4998

# CHAPTER 4

# STANDING OF THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

John Howard, 1992

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

Robert Herbert, Australian Industry Group, 1 October 1999

## Introduction

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

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

## Impact of the Workplace Relations Act

*Impact on awards*

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR—In 1995?

Ms Curr—Yes.[3]

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

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

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

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

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

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

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

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

4 Submission No. 71, Mr John Griffiths and family

5 Submission No. 48, Mr Edward Baldyga

6 Submission No. 63, Ms Judith Walpole

7 Submission No. 78, Ms Eve Matsakos

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

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

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

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

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

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

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

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

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

*Conclusions*

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

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

*Impact on the Australian Industrial Relations Commission*

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

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

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

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

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

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

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

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

*Conclusions*

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

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

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

4.21 Labor Senators recommend amendments to the Act:

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

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

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

**Amendments set out in the Bill**

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

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

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

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

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

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

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

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

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

*Limiting the terms of Commissioners*

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

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

14 Submission No. 15

15 Submission No. 377

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

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

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

4.26 Professor McCallum submitted:

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

4.27 Professor Isaac agreed:

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

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

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

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

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

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

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

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

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

4.29 Most other witnesses strongly opposed the amendment:

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

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

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

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

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

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

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

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

*Conclusions*

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

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

*Reducing allowable award matters*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Training and skill-based career paths

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

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

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

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

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

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

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

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

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

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

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

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

4.43 The Queensland Government also strongly opposed the proposal:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Long service leave

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tallies and bonuses

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

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

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

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

4.56 The Union's submission made the following points:

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

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

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

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

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

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

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

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

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

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

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

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

50 Print F0512, 24 September 1999

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

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

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

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

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

*Conclusions*

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

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

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

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

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

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

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

*Restricting the Commission's power to conciliate*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Conclusions*

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

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

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

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

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

# CHAPTER 5

## STANDING OF THE OFFICE OF THE EMPLOYMENT ADVOCATE

*It has been our experience with the Employment Advocate that the office should be renamed the 'Office of the Employer Advocate'.*

- Ms Linda Carruthers, Australian Rail Tram and Bus Industry Union, *Hansard*, Sydney, 22 October 1999, p. 286

**Role of the OEA**

5.1 The Office of the Employment Advocate (OEA) has a dual role of administering Australian Workplace Agreements (AWAs) and to assist in enforcement of the compliance aspects of the Act. The terms of reference of this inquiry with regard to the OEA require an examination of the powers, standing and procedures of this body. A great deal of evidence was presented indicating the manner in which the OEA has undertaken its role since its inception in 1997.

5.2 The OEA defines its role as;

- providing assistance and advice to employers (especially in small business) and employees on the *Workplace Relations Act 1996*, particularly AWAs and the freedom of association provisions;
- filing and approving AWAs, ensuring that they meet all statutory requirements;
- handling alleged breaches of AWAs and the AWA and freedom of association provisions; and
- assisting parties in taking action in relation to alleged breaches of AWAs and the AWA and freedom of association provisions..[1]

5.3 This inquiry has put the spotlight on the performance of the Office of Employment Advocate as an impartial facilitator of fair employment agreements. The title of the office suggests a commitment to fitting both employers and employees into mutually acceptable employment arrangements. The OEA has instituted a performance measure that appears to be statistically based: the number of AWAs approved; number of employers covered; number of AWAs refused or referred and the time taken to approve them.

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[1] Office of the Employment Advocate, *Annual Report 1998-1999*, p. 6

5.4 While such measure are obviously important, they ignore or at least relegate other important tasks and responsibilities, which by their nature are less measurable in statistical terms, but which go to the manner in which AWAs operate. As a consequence of the OEAs activities the measure of success for promotion will be numbers achieved. The submission and evidence presented by the OEA support this conclusion. Labor Senators conclude that this dependence on quantifiable measures at the expense of qualitative measures is indicative of a conflict of interest.

5.5 Dr David Peetz has suggested to the Committee that there is a clear bias in the way the Employment Advocate operates to promote and facilitate the use of AWAs as the preferred form of workplace agreement.[2] Dr Peetz stated that some organisations use AWAs as a means to deunionising the workplace, and suggested that it was for this reason that the OEA was created.

> While there is a lot of rhetoric about freedom of association, the reality is that the Employment Advocate was established to implement the incoming government's agenda in relation to shifting the balance of power. Two of the elements in this were promoting individual contracts and prohibiting compulsory unionism.
>
> In order to prohibit compulsory unionism you have to prohibit discrimination against employees on the grounds of their being union members as well as not being union members. …The great majority, as far as I can tell, of the Employment Advocate's activities in relation to freedom of association issues have been in dealing with people or situations where people do not want to belong to a union …There has been disproportionably less of the other side where people who have been wanting to belong to a union have not been able to, yet the evidence does suggest that the latter is the biggest problem.[3]

5.6 When questioned about its attitude to complaints it received, the OEA released figures to show that since its beginnings in March 1997 it had investigated 397 complaints where the primary issue is freedom of association. Of those complaints, 60 were complaints made by employees against employers. Of those complaints, 45 were regarding the right to be, or not to be, a member of a union. 44.5 per cent of those 45 complaints were from employees who wanted to join or who were in a union. 55.5 per cent of those complaints were from employees who were not in or who did not want to belong to a union.

5.7 No doubt from the Employment Advocate's perspective these figures bear out a pleasing trend toward a more compliant workforce, and one which is more likely to resist unionism than embrace it. There is another, and more plausible interpretation. In the current climate, when the pressure to be a non-unionist is particularly strong, the 44.5 per cent of complaints against employers is a significant proportion. There would

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[2] Evidence, Dr David Peetz, Brisbane, 27 October 1999, p. 433

3 *ibid*, p. 433

be very few NESB women working in the TCF industry who would have heard of the Employment Advocate. There would be very few employees in any industry who would put in a formal complaint against their employer. As was noted above, the dependence of the Office of the Employment Advocate on quantifiable measures of performance at the expense of qualitative measures, assisted by some policy assumptions identified by Dr Peetz, distorts the picture of workplace reform which the OEA envisages.

5.8 There is ample evidence to justify the claim that the end of compulsory unionism has had a much less significant impact on those who are reluctant unionists than those who would prefer to belong to a union but are denied access. Surveys conducted by the Australian Workplace Industrial Relations Survey show that while 5 to 8 per cent of all employees were 'unwilling conscripts', up to 24 per cent were 'unwillingly excluded'.[4] Despite this the OEA does not identify issues of concern to employees in the situation where they are denied access to unions, nor investigate employee satisfaction with the AWA system.

**Australian Workplace Agreements**

5.9 Despite certain claims made by the Employment Advocate about the benefits of AWAs it is difficult to be persuaded in the absence of empirical evidence. From the first appearance by the then Employment Advocate, Alan Rowe, in Budget Estimates the Senate has consistently requested that the OEA undertake a content analysis of AWAs. After further requests for some content analysis during the course of this inquiry, the OEA has provided the Committee with four case studies.

5.10 Unfortunately, these case studies are of little assistance to the Committee, attempting to ascertain the manner in which AWAs have been drafted since their inception. With a figure of 73,057 AWAs approved to September 1999, covering some 1,695 employers, and even allowing for the 'pattern bargaining' nature of these documents, a more comprehensive study was expected.

5.11 There should be no reason why the Employment Advocate cannot provide more detailed analysis of AWA content. The argument that the Act requires confidentiality seems a convenient reason for denying data to the Committee. General information about the employer and employee who are party to each AWA could be provided by the Employment Advocate, while ensuring confidentiality for individual identities. In addition suitably 'sanitised' AWAs could be made available for researchers and the public in order to collect data to assess the impact of these agreements on women and other vulnerable employees.

5.12 Despite the lack of analysis of AWAs a great deal of evidence about the affect of AWAs on individuals was made available to the Committee. The global nature of the no disadvantage test has resulted in terms and conditions of employment being 'traded off' for marginal pay increases and in some case for no increases at all. Of

4 Submission No. 386, Dr David Peetz, vol.13, p 2894

concern to Labor Senators is the issue of employees being able to make an informed decisions that see the permanent removal of conditions of employment for a one off pay increase. Mr Tim Lee of the Australian Services Union described the situation as:

> … how do you reconcile the loss – permanently, I would argue – of an entitlement to be recompensed for working extraordinary hours out of the normal Monday to Friday spread versus a one-off pay increase which is going to diminish in terms of its relevance over time?[5]

5.13 The comments by Mr Lee raise the important point about the diminishing relevance of one-off pay increases in an agreement that may be in place for up to three years and potentially beyond that period if no action is taken to draft a new agreement. Potentially, an employee may agree to an AWA that trades off conditions and over time will also see a reduction in real wages. Without access to more data the long term affects of AWAs on individuals cannot be quantified. However, the weight of anecdotal evidence showed that such arrangements were common.

5.14 The issue of vulnerable and disadvantaged workers is discussed at length in Chapter 7 of this report. With regard to AWAs the evidence presented by Ms Susan Halliday, the Sex Discrimination Commissioner, should be noted. Ms Halliday highlighted the fact that while she is able to intervene with respect to awards and agreements this was not the case for AWAs[6]. This means that another check on the exploitation of women workers is effectively removed.

5.15 Further comments from Ms Halliday indicate that employers are able to disregard the information produced by the Employment Advocate, with serious consequences:

> Sadly, we see the practical, day to day evidence where an employer goes in and collects the information from the Employment Advocate, bins it on the way out, never talks to the employees about their rights and responsibilities. When you have women in that situation who do not speak the language, who are not unionised, who cannot access a working women's centre, what happens? Where do they go? What do they do? In some of the sadder cases, to keep their job, they terminate their pregnancy[7].

5.16 Wage outcomes for women is more fully discussed in the section on workers vulnerable to discrimination, however it should be noted here that major concerns were raised that women, who were perceived to be in a weaker bargaining position than men, have not done well under AWAs. This is particularly the case in part-time and casual employment. Evidence to the effect was anecdotal. However, the anecdotal evidence was supported by a study into wage outcomes in Western Australia which demonstrated a distinct, and growing, wage gender gap under the

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[5] Evidence, Mr Tim Lee, Perth, 25 October 1999, p 327

[6] Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p 378

[7] Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p 378

state individual agreements. The Labor Senators conclude, on balance, that women are disadvantaged under AWAs.

5.17 The lack of transparency and ability to review decisions of the Employment Advocate was discussed in the 1996 report.[8] This lack of transparency was seen as a particular problem in a considerable number of submissions and by many witnesses. The RTBU described the situation as:

> …the Employment Advocate is a law unto himself and that there is no review of his decisions. We have asked that he give us reasons for his determinations and he has simply said, 'I don't have to'.[9]

5.18 The CEPU expressed their concern as:

> It was a bit like the 13th century papacy: we had to accept what the decision was….[10]

5.19 The situation is particularly well illustrated in the case studies supplied by the Employment Advocate to the Committee. Case study 2, D & S Concreting was undertaken by ACIRRT. Mention was made in the submission that an officer of the OEA alerted the employer that an undertaking may be required for an employee paid a 'low concreters allowance'. The case study reports on the next page that no undertakings were sought. Due to the lack of transparency it is not possible to ascertain why the Employment Advocate subsequently approved the AWAs without an undertaking. This would be a pertinent question given the statement by ACIRRT that only one employee was better off under the AWA as opposed to the former employment arrangements.[11]

**Case Studies**

5.20 Throughout the inquiry process, several disturbing allegations were made concerning an apparently inherent bias in the manner in which staff of the OEA have undertaken their duties. These allegations have ranged from a refusal by OEA compliance staff to investigate alleged Award breaches to the deliberate designation of incorrect Awards for the purposes of frustrating a fair and equitable administration of the 'no disadvantage test' (NDT).

- The ALHMWU described a case where a 17-year-old employee from Essentials Pide Bread in Canberra was dismissed within two weeks of joining the Union. The dismissal was made following threats by the employer to do so. This case

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[8] Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996, Senate Economics References Committee, August 1996, pp. 106-9

[9] Evidence, Linda Carruthers, Sydney, 22 October 1999, p 284

10 Evidence, Peter O'Brien, 27 October 1999, p. 481

[11] Case study undertaken by ACIRRT on behalf of the OEA, November 1999, pp 12 – 13, 25

apparently breaches the Freedom of Association provisions of the WR Act, which the OEA administers.[12]

- The CFMEU advised of the use of illegally recorded material by the OEA in evidence.[13]

- In the sale of Australian National Rail and the subsequent contracting by Great Southern Railway Limited of certain services to Serco Australia Pty Limited, staff from the former ANL were required to sign AWAs as a condition of employment. Serco requested designation of an award for the purposes of the NDT and the Employment Advocate determined a South Australian state motel award. The employees were previously covered by a Federal rail award that provided for superior terms and conditions. The initial AWAs were approved against this award. Subsequently the RTBU applied to the AIRC for registration of a new Federal award in the same terms as the previous Federal award. Further AWAs would be compared to the new award for the purposes of the NDT however there was no review of the initial AWAs and no right of appeal or review concerning the Employment Advocate's award designation.[14] The union made the following comment:

  > …it reveals that the Office of the Employment Advocate does not operate in the public interest, and in addition operates and is seen to operate in a manner which exhibits gross conflicts of interest and a lack of regard for procedural fairness or any possibility of independent review of the decisions made.[15]

- The SDA advised of a case in Sportsmart where young employees where told to sign AWAs without explanation as required by the WR Act, and that if they did not sign they would have their hours reduced.[16] This case was reported to the OEA by the union for investigation. The employees requested the OEA to involve the SDA during the process. The OEA however ignored this request with no satisfactory resolution after 12 months.

- Julia Ross Personnel was a case dealt with by the CEPU. It involved Julia Ross Personnel taking over functions previously undertaken by Telstra. The union detailed apparent cases of duress as well as a deterioration in working conditions. The union dealt directly with the OEA to resolve these issues. Despite the union lodging complaints on behalf of members the OEA did not seek to interview or discuss allegations however it appears that the OEA considerably assisted the employer. The union comment is pertinent in regard to

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[12] Submission No. 373, ALHMWU (ACT), vol. 12, p 2541

[13] Evidence, Mr John Sutton, Sydney, 22 October 1999, p 271

[14] Submission No. 291, Australian Rail, Tram and Bus Industry Union, vol. 7, pp. 1348-9

[15] *ibid*., p. 1353

[16] Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, Attachment 4, pp. 3869-3915

public confidence; 'The re-writing of the AWA's on OEA letterhead doesn't help the perception of objectivity'[17]

- The AMIEU provided a detailed history of events for the Australian Food Corporation Pty Ltd plant in Coominya, Queensland. It is evident that there was a great deal of disputation on this site. With regard to the involvement of the OEA it seems unreasonable that the OEA required the union to submit their comments on an AWA in less than 24 hours. Particularly as the AWAs in question were approved on the afternoon of the day the Union's submission was due..[18]

- The CPSU raised concerns about the transparency of the OEA. In the case of the formation of APRA, the agency wrote to the OEA asserting it was award free which was apparently accepted at face value. In addition the issue of coercion for transferring staff to sign AWAs as a condition of continued employment is a continuing problem, notwithstanding the Employment National decision. This was also flagged as a requirement for promotion.[19]

- The situation at Civic Video stores in Sydney where the OEAs guidelines have been apparently ignored with no subsequent action.[20]

- New Breed Security of Western Australia made an apparent blatant attempt to breach the Freedom of Association provisions of the WR Act, when they wrote to employees to make an offer which included the cessation of 'victimisation' conditional upon:

> … the withdrawal of the Unions from this negotiation and the withdrawal of consent for them to inspect records and act as your bargaining agent.[21]

- The Federal Office of the TWU in its submission expressed its lack of confidence in the OEA dealing with agreements in the long distance road transport industry. The union made clear how an understanding of the industry was crucial in approving agreements. Remuneration for a long distance driver is calculated in the Award on a cents per kilometre basis. The submission demonstrated how the increase in the average speed a vehicle is to travel could have dire consequence.[22]

- The Queensland TWU advised of an incident where the State Secretary, when on site at the On Line depot in Brisbane, informed an officer of the OEA who was

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[17] Submission No. 500 and 500A, Communications Electrical Plumbing Union, vol. 24, pp. 6388-6412

[18] Submission No. 521, Australasian Meat Industry Employees Union, vol. 26, pp. 7080-4

[19] Submission No. 379, Community and Public Sector Union, vol. 13, pp. 2708-35

[20] Evidence, Mr Andrew Killion, Sydney, 26 October 1999, p 388

[21] Submission No. 444, Australian Liquor, Hospitality and Miscellaneous Workers Union (WA), vol. 21, p. 5258

[22] Submission No. 447, Transport Workers Union, vol. 21, p. 5296

in attendance of an apparent award breach. The breach involved a 16 hour driving shift without break. The officer declined to assist in any manner.[23]

- There has been a failure of the OEA to act on requests by the CPSU for assistance with regard to duress to its members in the Northern Territory Tourist Commission.[24]

5.21 This list is not exhaustive of the number of cases that were mentioned in connection with the OEA during the course of this inquiry. While the Employment Advocate has provided a response to these allegations in the main this is merely a rejection of the claims. The responses themselves indicate fundamental deficiencies in the manner in which the Employment Advocate sees his role. In particular, the Employment Advocate's assertion that the subsequent making of an interim award by the Commission in the above mentioned Serco case, that was not retrospective, absolves him from any concern, ignores the fundamental fact that the interim award was in the same terms as the rail award that the employees were employed under previously. It would appear that the award that should properly been designated by the Employment Advocate was the rail award.

**An independent umpire**

*5.22* In evidence before the Committee Professor McCallum discussed the standing of the AIRC as part of a 'fairness compact' provided for in the Constitution. Professor McCallum talked about how this concept was being eroded

> [WROLA] … chipped away at part of this fairness compact by allowing the concluding and vetting of Australian Workplace Agreements by the Office of the Employment Advocate, which is not a certifier but in truth a compliance agency.[25]

5.23 Without public confidence in the impartiality of bodies such as the AIRC, these institutions can not function effectively. It is apparent from the evidence that the OEA is gaining responsibility for approval at the expense of the AIRC but without the historical perception of fairness and impartiality enjoyed by the Commission.

5.24 With regard to the functions outlined in the legislation, the Employment Advocate is required to pay particular attention to the need of workers in a disadvantaged bargaining position which is deemed to include women. For family friendly clauses in agreements, evidence from ACIRRT indicates that union negotiated certified agreements are better at realising these sorts of proposals. A more comprehensive discussion of Work and Family issues is canvassed at Chapter 8 of this report.

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[23] Submission No. 163, Transport Workers Union (Qld), vol. 3, pp. 639-40; Evidence, Mr Hug Williams, Brisbane, 27 October 1999, p. 461

[24] Submission No. 445, Community and Public Sector Union (NT), vol. 21, p. 5272

[25] Evidence, Professor Ronald McCallum, Sydney, 26 October 1999, p. 349

5.25 Overall Labor Senators were not persuaded that the OEA has undertaken its role in an unbiased manner. In any event, lack of public confidence in the impartiality of the OEA would be enough to dissuade employees from attempting to seek redress through this office.

**The 1999 amendments**

5.26 Proposed amendments in this Bill:

- allow AWAs to take effect from date of signing, rather than from the date of approval by the Employment Advocate (OEA);
- remove the requirement that the employer must offer the same AWA to all comparable employees, thus allowing a discriminatory approach to offering agreements;
- remove the requirement that the OEA refer an AWA to the Commission when unsure about whether or not it disadvantages employees;
- allow AWAs providing for total remuneration of more than $68,000 to be approved without any checking by the OEA; and
- allow AWAs to be made undercutting a collective certified agreement, even while the latter is in operation.

5.27 The following statement from the OEA should be regarded as significant, particularly when considering his role in undertaking legal action for breaches of Part 6D of the Act:

> The philosophy, as I understand it, based on the legislation as it currently is, is that AWAs devolve responsibility focus on the parties and that, while there is an OEA role, at the end of the day it should really be the primary responsibility of the parties to protect their rights. I think practical experience shows that really it is important to have a body that can assist employees, particularly to ensure that their rights are observed. So my personal view is that yes, it would be better for the Employment Advocate to actually have that power.[26]

5.28 It appears that the Employment Advocate has actually recognised the fundamental imbalance in the power relationship between an employee and an employer, as noted by Justice Higgins over 90 years ago, when he likened the relationship between an employee and an employer to that of a wolf and a lamb.

*Conclusion*

Labor Senators conclude that there is a conflict of interest in the role played by the Office of the Employment Advocate who has been given the task of simultaneously promoting and adjudicating on Australian Workplace Agreements. The result has been

[26] Evidence, Jonathon Hamberger, Canberra, 28 October 1999, p. 488

a diminution of wages and condition of employment, agreements settled under duress, and a denial of the rights of freedom of association for those most in need of this protection.

The submission to this inquiry from Office of the Employment Advocate addressed only peripherally the terms of reference. It provided lengthy response to answers placed on notice, drawing heavily from its data banks, but Labor Senators believe the OEA was unable to effectively refute evidence placed before it, charging the OEA with bias in its operations. For this reason Labor Senators believe the OEA has lost the confidence of unions and they believe the organisation should be abolished.

5.29 In addition to the abolition of the OEA, Labor Senators recommend the following general amendments to the Act with regard to AWAs:

- the protection from duress to new employees offered AWAs needs to be provided. This protection must be in the same terms as that currently provided for existing employees, and should provide that employees are not to be treated as new employees in cases of transmission of business;
- a prohibition should prevent the offering of AWAs as a means of undermining collective agreement making;
- the registration and approval of individual agreements should reflect the transparency and accountable processes that are applied to certified agreements; and
- on application by any interested party, any decision made with respect to AWAs or award designations must be subject to independent review by the AIRC.

# 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.
>
> 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.

# CHAPTER 7

# THE NEEDS OF WORKERS VULNERABLE TO DISCRIMINATION

*'We remain a reformist government but we are a reformist government with a heart.'*

- John Howard, 3 November 1999

*'..we must let slip the leash on those 'wild animal spirits' ...'*

- Peter Reith, 15 September 1999

## Introduction

7.1 The principal object of the WR Act is to '…provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia…, including by:

> j) Respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

7.2 In a decentralised and deregulated bargaining environment, it is more difficult to monitor discriminatory employment practices. Therefore, it is particularly important that the Government ensure that this object is being translated into practice by providing a legislative framework that adequately protects vulnerable employees from discrimination.

7.3 The Government asserts that 'Australia has a comprehensive legislative framework dealing with anti-discrimination issues, supported by government agencies who are dedicated to the administration of, and compliance, promotional and education activities associated with, this legislative framework'.[1] Essentially, the Government believes that the current provisions of the WR Act, in combination with the *Sex Discrimination Act 1984*, the *Racial Discrimination Act 1975* and the *Disability Discrimination Act 1992*, sufficiently protect employees against workplace discrimination in the new deregulated environment.

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1 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2171

7.4 However, the Committee received evidence suggesting that, in practice, many employees are still disadvantaged in their employment for discriminatory reasons, and the provisions of the WR Act introduced in 1996, and the industrial relations climate that the WR Act has produced, have exacerbated the problem.

**Women**

7.5 As highlighted by submissions from a large number of women's organisations:

> It has been a decade of decentralisation. However, we believe this was intensified greatly by the Workplace Relations Act. Protections that were put in place previously in the Industrial Relations Act to counteract some of these tendencies towards dispersion were removed in the 1996 Act and there was also an additional and even more decentralised level added of AWAs.[2]

7.6 Witnesses from women's organisations expressed the following concerns about the WR Act and current Bill;

> The groups representing working women in Australia argued that the proposed Workplace Relations Act if enacted would disadvantage women workers. Three years later we find that our fears have been realised. The act has been detrimental to women workers and we now submit to this inquiry that the proposed amendments will further disadvantage women workers. We are concerned that the safeguards inserted into the act in 1996 after negotiations with the Australian Democrats are now being eroded under these new proposals.[3]

*Equal remuneration for work of equal value*

Impact of the Workplace Relations Act

7.7 A major problem highlighted in the Inquiry is the continuing disparity between male and female earnings. Despite significant work over the last few decades, the gender pay gap continues, and there is evidence to suggest that decentralised bargaining has had a negative impact on equal remuneration for women:

> Data analysis of both the Department of Employment, Workplace Relations and Small Business Workplace Agreements Database and the Australian Centre for Industrial Relations Research and Training (ACIRRT) Agreements Database and Monitor (ADAM) confirm the trend that there is an enterprise bargaining gender pay gap. It should also be noted that the enterprise bargaining gender pay gap (the difference in male and female average annual wage increases achieved under enterprise bargaining) will tend to have a cumulative effect. Given that what is measured here are annual wage increases…we would expect even quite small differences each

2 Evidence, Ms Fran Hayes, Sydney, 26 October 1999, p. 412

3 Evidence, Ms Suzanne Hammond, Sydney, 26 October 1999, p. 406

> year to tend to increasingly magnify existing differences between male and female earnings.[4]
>
> [The Department's] report shows that, of the last 19 quarters in which there has been a difference in the annual average wage increases for men and women, in 14 of those quarters it has been higher for men than for women. Secondly, analysis of the AWIRS data—the Australian Workplace Industrial Relations Survey data—by many independent researchers, including Cornelius Reiman, Michael Alexander and Barbara Pocock, has found a gender pay gap that can be attributed to enterprise bargaining. Thirdly, our own analyses show that lower wage rises under enterprise bargaining have tended to occur in the more highly feminised industries—the more highly feminised parts of the economy.[5]

7.8 Most experts who appeared before the Committee expressed frustration at the limited data available to assess the impact of agreements, including both certified agreements and AWAs, on the gender pay gap.[6] The Human Rights and Equal Opportunity Commission (HREOC) were concerned that the data limitations were 'likely to obscure discriminatory impact'.[7]

7.9 Despite the lack of data collected and provided by the Government, most witnesses were very concerned that the current legislative framework was not adequate to ensure equal remuneration and protect women from discrimination. The Sex Discrimination Commissioner found in some key areas the objects of the WR Act are not supported by appropriate provisions to implement them in practice. For instance, the HREOC submission states that:

> The ability to successfully give effect to the equal remuneration sections of the WR Act in cases where pay discrimination is occurring is essential if the WR Act object…is to be met. The provisions, as currently drafted, are inadequate as a mechanism to address gender based pay inequity or, consequently, to fulfil Australia's international obligations with regard to pay equity'.[8]

7.10 The HREOC submission provides a detailed critique of the current equal remuneration provisions of the Act (Division 2, Part VIA) and how they have operated since 1996.[9] In particular, the HREOC submission discusses the proceedings against HPM Industries, which highlighted specific deficiencies in the current provisions. HREOC make several recommendations to improve these provisions, including:

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4 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5799

5 Evidence, Dr Richard Hall, Sydney, 22 October 1999, pp. 250-1

6 See, for instance, Evidence, Dr Barbara Pocock, Canberra, 28 October 1999, p. 511

7 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 11, p. 5800

8 *ibid*.

9 *ibid*., pp. 22-7

- allowing equal remuneration applications to be heard by a Full Bench of the Commission;
- ensuring that the Commission, in determining equal remuneration applications, can consider remuneration matters not limited to 'allowable award matters' in section 89A(2); and
- allowing the Commission to develop principles for equal remuneration applications, that provide a default mechanism to establish work value in the absence of agreement between the employer and affected employees, and specify that differential rates of pay for male and female employees for work of equal value establishes 'discrimination based on sex' for the purposes of the WR Act.

7.11 The Bill does not currently propose any such amendments, even though the issues highlighted by the HPM case could have been addressed by the Government.

7.12 Labor Senators recommend that HREOC's proposed amendments be adopted.

Amendments proposed in the Bill

7.13 Witnesses expressed grave concerns about the Bill's proposed amendments to the WR Act, and their possible impact on achieving equal remuneration for women:

> I started work 60 years ago and I worked for 54 per cent of the male rate of pay…Then I joined the Air Force and found myself working for 66 per cent of the net pay of the boys working next to me, net of the allotment they sent home to their wives…I used to say that I wished pay equity would come in before Jean Arnot, one of our long-time, hardworking members died, and also before Edna Ryan from WEL died. However, that did not happen. So now I say I hope it will be achieved before I die. However, if this sort of legislation goes through, my two colleagues here will be saying in 30 years or 40 years time, 'I hope it happens before I die.'[10]

7.14 In general, the amendments which were of most concern were amendments to limit the Commission's involvement in assessing agreements to ensure that they meet the no disadvantage test:

> We are concerned that the protections included in the Workplace Relations Act in 1996 providing that the Industrial Relations Commission play a role in ensuring that Australian workplace agreements satisfy the no disadvantage test, and that they meet a public interest test, are now being removed and that the jurisdiction is being taken away from the commission and placed in the hands of the Employment Advocate. We argue that this will be a less stringent and less transparent process.[11]

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10 Evidence, Ms Val Buswell, Sydney, 26 October 1999 p. 409

11 Evidence, Ms Suzanne Hammond, Sydney, 26 October 1999, p. 406

> Proposed amendments to the Workplace Relations Act that agreements may be certified without scrutiny leaves the door wide open for greater instances of discrimination, in my view. The Human Rights and Equal Opportunity Commission proposes that a process of scrutiny should be conducted prior to certification and that this scrutiny should include, in accordance with the principal object of the Workplace Relations Act, whether or not the agreement contains provisions that may be discriminatory, whether employees generally consented to the agreement and whether the agreement satisfies the no disadvantage test requirements.[12]

7.15 On the issue of monitoring agreements, the Sex Discrimination Commissioner also pointed out that it was possible for her to intervene in proceedings before the Commission relating to discriminatory provisions in awards and agreements, but the Sex Discrimination Act does not allow her to intervene in the Employment' Advocate's consideration of AWAs.[13]

7.16 Another provision of the Bill that would seriously impede the ability of the industrial relations system to ensure equal remuneration for work of equal value is the proposal to remove the Commission's power to make safety net wage increases above basic minimum award wage rates.

7.17 Women are disproportionately reliant on awards to set their pay and conditions.[14] The proposed provisions to prevent the Commission from adjusting internal relativities in awards could result in all award-reliant employees above the basic minimum classification pay point in their awards not having access to pay increases until the base pay rate catches up with their current pay rate.

7.18 As a result of the proposed compression of internal award relativities over time, women employed at higher award classification levels would not necessarily be paid according to their skills, duties and responsibilities, which is inherently unfair and discriminatory, and would tend to exacerbate the gender pay gap, given the proportion of award reliant employees who are women.[15]

*Conclusions*

7.19 Thirty years after the first federal case, equal remuneration for work of equal value has not yet been achieved for women. Decentralisation of industrial relations in Australia appears to be having a negative impact on pay equity, although many academics cautioned that they are simply unable to produce concrete findings due to a paucity of data on agreements.

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12 Evidence, Ms Susan Halliday, 26 October 1999, p. 374

13 *ibid*., p. 378

14 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5827

15 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, pp. 5864-5

7.20 Labor Senators believe that the data problems need to be addressed as a matter of urgency, by amending section 358A of the WR Act, which requires the Government to report about developments in agreement-making. The section should be strengthened considerably and should include more detail about the data that should be collected and made available to researchers, as suggested by ACCIRT.[16] In particular, the Department of Employment, Workplace Relations and Small Business should be required to modify the Workplace Agreements Database to ensure all agreements are coded for gender breakdown and quantifiable wage increases.

7.21 The provisions of the Act requiring secrecy for AWAs should also be repealed, and the provisions of the Bill that would further entrench 'secret' AWAs should not be enacted. This will ensure that researchers and the public can have access to the contents of AWAs, in order to collect data to assess the impact of these agreements on women and other vulnerable employees. General information about the employer and employee who are party to each AWA could be provided by the Employment Advocate, while ensuring confidentiality of individuals' identities.

7.22 HREOC, the government agency charged with eliminating discrimination based on gender, has submitted that the current equal remuneration provisions in the Act are deficient in several areas. Labor Senators recommend that HREOC's proposed amendments to the equal remuneration provisions of the Act be adopted in full.

7.23 The proposed amendments to the Act to allow agreements to be certified without scrutiny by the Commission, and without a public hearing will further limit the capacity of the Sex Discrimination Commissioner to intervene in cases of discriminatory agreement provisions - if there is no public hearing before certification of an agreement, how could the Commissioner possibly intervene?

7.24 Similarly, Labor Senators believe that the proposals to remove the Commission's ability to apply safety net wage increases to all wage rates set by awards will have a negative and discriminatory impact on most award-reliant employees, of which a significant proportion are women.

*Pregnancy*

Impact of the Workplace Relations Act

7.25 In reviewing the operation of the WR Act, HREOC also noted that there were a significant number of concerns raised during the National Pregnancy and Work Inquiry about continuing discrimination against female workers who become pregnant:

> While some attest that we no longer suffer blatant discrimination, my work sadly, on a daily basis, reflects otherwise. A submission to the recent national pregnancy and work inquiry…told of a judge's associate who, when eight months pregnant, was told by the judge that he was not going to

16 Evidence, Dr Richard Hall, Sydney, 22 October 1999, pp. 253-4

> support her application for maternity leave because she had chosen a new career. He believed that women should stay at home with their children.[17]
>
> Recently, the FSU consulted its female members who had experienced pregnancy in the workplace as part of the Human Rights and Equal Opportunity Commission inquiry into pregnancy and work. Our members highlighted their concerns around job insecurity, whether they should take maternity leave, and feelings of discrimination in the workplace...Even members with long periods of service had experienced degrees of discrimination and feelings of job insecurity, and particularly doubt as to whether or not they would have a job upon their return to work, or whether or not that job would have changed. This is despite object 3(j) of the legislation.[18]
>
> People are sacked when they become pregnant. These things are clearly unlawful and people are shocked to hear that they are happening. But we have a substantial database which evidences the points that we make. Because we are a legal service, we have to state every call that we take and we have an extensive database to justify the position that I am putting here today.[19]

Amendments proposed in the Bill

7.26 Incredibly, against the backdrop of the HREOC report and findings, the Bill proposes to amend the WR Act to specify that award clauses dealing with transfers of employees between locations and between types of employment are not allowable award matters (proposed paragraphs 89A(3A)(a) and (g) – item 13 of Schedule 6). These amendments will put in jeopardy standard award provisions established by the Commission in the Parental Leave Test Case.[20]

7.27 These provisions entitle pregnant workers to be transferred to a safe job where a doctor certifies that the worker or baby is in endangered by the worker's normal job, and also entitle new parents to work part time following the birth of their child, and to revert to full time employment when their caring responsibilities permit. The forced removal of these clauses from awards will affect the ability of women to balance work and family, particularly because so many women continue to rely on awards for their pay and conditions:

> The removal of award provisions for transfer and test case standards from awards can be expected to have a detrimental effect on the ability of women to combine pregnancy and family responsibilities with their employment.[21]

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17 Evidence, Ms Susan Halliday, 26 October 1999, p. 374

18 Evidence, Ms Susan Kenna, Melbourne, 7 October 1999, p. 86

19 Evidence, Ms Wendy Tobin,Melbourne, 8 October 1999, p. 176

20 Print J6777

21 Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p. 374

> We only have to look at the recent inquiry that was conducted to know that discrimination against pregnant women is still rife and prevalent. To now remove a further protection whereby women are able to transfer between types of employment or locations based upon any needs that may arise and have that extra hurdle for women to go over if they want to partake of those rights is an intrusion into what society is all about—a society where we grow and mature—and denies, yet again, fundamental rights for women who have children. It is unbelievable that it is even being contemplated. Yes, it will be very difficult for women to take these matters up once they are removed from awards and if they do not appear in their enterprise bargaining agreements.[22]

*Conclusions*

7.28 It cannot be expected that award provisions allowing women to transfer between jobs and types of employment to manage pregnancies will be picked up in certified agreements. This would require employees, many of whom may never be affected by pregnancy or parenthood, to negotiate and trade off wages and conditions in return for these 'benefits' currently provided for in awards.

7.29 Labor Senators do not agree that these fundamental types of protections should be viewed as optional 'benefits' for employees to negotiate themselves. To prevent discrimination against women, the Government must provide protection for pregnant workers and new parents in overarching legislative or award provisions. The proposed amendment to prohibit award clauses that deal with transfers between locations and types of employment should be rejected.

*Award simplification*

Impact of the Workplace Relations Act

7.30 The HREOC submission to the Inquiry raised concerns about the impact of award simplification on women. Although the current award simplification provisions require the Commission to remove directly discriminatory provisions, indirectly discriminatory provisions remain in awards. Examples of indirectly discriminatory provisions include those allowing changes in rosters and hours with little or no notice, which can have a very detrimental affect on women with caring responsibilities. This is discussed further in Chapter 8 of this report, which deals with the balance between work and family responsibilities and the impact of flexible working arrangements.

7.31 HREOC recommended that in any future workplace relations reform, the Government ensure that employees are not exposed to either direct or indirect discrimination.[23] HREOC suggested that this should be done by introducing a new 'anti-discrimination' allowable award matter to allow the Commission and the parties

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22 Evidence, Ms Grace Grace, Brisbane, 27 October 1999, p. 443

23 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5830

to awards to deal comprehensively with the issue of eliminating discrimination in awards.[24]

7.32 This may go some way to addressing potentially discriminatory anomalies which have arisen during award simplification, for example, the removal of award clauses which prevent employers from requiring bar attendants to work topless.[25]

7.33 HREOC also suggested that providing the Sex Discrimination Commissioner with the power to refer discriminatory awards or agreements to the Australian Industrial Relations Commission on her own initiative, without the requirement for a formal complaint, would assist in addressing discrimination. At the moment, The Sex Discrimination Commissioner may only refer an agreement or award to the Commission after receiving a complaint in writing from an 'aggrieved person' or a trade union representing an aggrieved person.[26] The Sex Discrimination Commission also thought that she should have some scope to examine discriminatory provisions in AWAs:

> The other option, if you had a wish list, is that I am in a position to intervene with respect to awards and certified agreements but not with AWAs.[27]

Amendments proposed in the Bill

7.34 It is proposed that 'skill based career paths' would be removed from the list of allowable award matters in section 89A(2). Many groups who made submissions to the Inquiry, including employer groups, did not support this amendment, and supported the retention of industry-wide training arrangements in awards. This is discussed further in Chapter 4 'Standing of the Australian Industrial Relations Commission'.

7.35 There were particular concerns, however, about how this amendment would affect women:

> …we are concerned about the removal of skill based career paths from allowable award matters. The development of skill related career paths in low paid female dominated awards—for example, in the hospitality and clothing industries—over the last 10 years has been an important strategy in the quest for pay equity for women. Once lost from these awards, these hard won provisions will be lost forever…women in the industries concerned are unlikely to be in a position to bargain to have career paths included in individual agreements. This is a blow to pay equity.[28]

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24 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5801

25 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4364

26 Section 50A *Sex Discrimination Act 1984* (Cth)

27 Evidence, Ms Susan Halliday, Sydney, 26 October 1999, p. 378

28 Evidence, Ms Fran Hayes, Sydney, 26 October 1999, p. 408

> The inclusion of skill based career paths in awards provide for a level of scrutiny of the objectivity of valuing the work of employees and the level of objectivity inherent in the requirements for moving from one classification to another. The removal of these processes and standards from awards will result in women being dependent on informal processes. Historically, industrial (formal and informal) processes for valuing levels of skill and the criteria for progression from one level to another…have been fraught with discriminatory practices. Only the transparency of formalised processes and standards can provide a forum to address the historically discriminatory assumptions, such as undervaluing skills such as dexterity in women's work and valuing highly skills such as strength in men's work…the removal of this allowable matter will have a direct and immediate impact on the ability of the award system to address discrimination in this area.[29]
>
> The deletion of skill based qualification structures will be highly detrimental for women workers. The New South Wales Pay Equity Inquiry Report found that remedies to address undervaluation of women's employment should include 'reclassification of work, the establishment of career paths and changes to incremental scales'. As women rely on minimum entitlements, the removal of incremental scales will significantly reduce the recognition of women's skills and thereby increase the pay gap.[30]

7.36 The proposals to prevent award clauses from dealing with transfers between locations and types of employment will also have further discriminatory impact on women with children. This amendment is discussed above.

*Conclusions*

7.37 Labor Senators agree that the Commission should have the power to comprehensively deal with the issue of discrimination in awards. Given the current restraints in the WR Act on the exercise of the Commission's arbitral functions, this can only realistically be achieved by expanding the list of allowable award matters to include 'anti-discrimination'.

7.38 Labor Senators do not accept that the current model anti-discrimination clauses for awards and agreements are effective in preventing discrimination. In this regard, HREOC submitted:

> …in practice, a clause restating principles already embodied in legislation does no more to provide a mechanism to actively address discriminatory pay or conditions provisions in awards than other legislative mechanisms such as the Division 2 Part VIA equal remuneration for work of equal value provisions.[31]

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29 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p.5868

30 Submission No. 520, New South Wales Government, vol. p. 6926

31 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5829

7.39 The Government should take more direct responsibility for eliminating discriminatory work practices by arming the Commission and the Sex Discrimination Commissioner with real powers to prevent discrimination. As a starting point, 'anti-discrimination' should be included as an allowable award matter, as suggested by HREOC. Labor Senators agree that the Sex Discrimination Commissioner should be given power to directly refer discriminatory awards and agreements to the Commission, and considers that an equivalent mechanism for referring discriminatory AWAs to the Commission should also be established.

7.40 Labor Senators reject the removal of 'skill-based career paths' from the list of allowable award matters. As pointed out by many witnesses, structured career paths have been essential in improving women's pay and working conditions. Training and career development entitlements should continue to be available to award-reliant employees.

*Paid rates awards*

Operation of WR Act

7.41 A high proportion of women formerly worked under paid rates awards, which have been converted to minimum rates awards under the Commission's award simplification exercise. Paid rates awards traditionally cover publicly funded sectors, including Government employees, nurses and teachers.

7.42 Some witnesses submitted that these workers had been disadvantaged by the operation of the WR Act:

> The 1996 legislation abolished [paid rates awards] and required to Commission to convert them to minimum rates awards. The effect of this is a significant reduction in the work value which has been recognised in CPSU awards through paid rates and incremental ranges. Each classification is assigned a single point minimum rate which in most cases is thousands of dollars below the previous award rate. The role of the award as a safety-net is being substantially eroded in relation to pay entitlements of employees.[32]

Proposed amendments set out in the Bill

7.43 The Bill would further disadvantage workers who have traditionally worked under paid rates awards by removing the ability of the Commission to arbitrate under section 170MX where negotiations for an agreement have stalled between an employer and employees formerly covered by paid rates awards.

7.44 The option of section 170MX arbitration was included in the WR Act as many employees who used to work under paid rates awards are employed by Governments

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32 Submission No. 379, Community and Public Sector Union, vol. 13, Attachment B. See also Submission No. 458, Australian Nursing Federation (South Australian Branch), vol. 22, p. 5446

or Government-funded organisations, and it is difficult for these employees to effectively negotiate for wage increases:

> The amendment will mean the removal of special access to arbitration for workers under paid rates awards, particularly affecting nurses, teachers and other public sector workers who are unable to reach agreement with their government employers.[33]

7.45 The Government has not indicated that there has been any change in the bargaining position of these employees which alleviates the need for access to section 170MX arbitration. The Department's submission merely states that the amendment is 'consistent with the continuing move away from paid rates awards in the system.'[34]

7.46 This rationale is either obfuscatory or disingenuous. It clearly ignores that the current provisions of subsection 170MW(7) relate to employees who were covered by paid rates awards at the time subsection 170MW(7) commenced operation. The conversion of paid rates awards to minimum rates awards through award simplification is irrelevant to the reasons why this provision was inserted into the WR Act in 1996. The Government has not provided any evidence suggesting that public sector employees now have any greater bargaining power.

7.47 Other witnesses raised concerns that removing access to section 170MX arbitration would disadvantage women and undermine remuneration equity:

> My final point on pay equity is that the proposed changes to section 170MW(7) to remove access to arbitration for workers on paid rates awards concern us. Our commitment is to pay equity for all women workers, not just low paid workers. This provision will hit women in female dominated professions in the public sector particularly hard. Many of these professions are arguably still underpaid relative to comparable male professions. Any pay increases will be confined to those that these groups can reach agreement on with their employer. There will be no access to arbitration to resolve unsuccessful negotiations. Women in these groups traditionally have poor bargaining power to achieve pay increases without arbitration, often because their commitment to their clients inhibits them from taking industrial action. We would call on the government to retain the access of these workers to arbitration.[35]

*Conclusions*

7.48 The Government has provided no arguments to support this amendment, or demonstrated any benefits that will flow from this amendment. This is possibly because the amendment will simply increase the power that Governments have to

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33 Submission No. 196, Lutheran Community Care, vol. 5, p. 985

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

35 Evidence, Ms Fran Hayes, Sydney, 26 October 1999, p. 408

unilaterally set conditions of employment in the public sector, leaving their employees with little choice but to accept proposed agreements or forego any wage increases.

7.49 The Committee has been provided with evidence indicating that the amendment would tend to disadvantage female workers, who are concentrated in industries formerly covered by paid rates awards. Labor Senators believe that access to arbitration by the Commission under section 170MX should remain available to former paid rates workers.

**Workers from a Non-English Speaking Background**

*Operation of the WR Act*

> …women of non-English speaking background in the workforce are amongst the most vulnerable…This vulnerability is due to a number of factors, different for every individual. However, they include poor English language skills, lack of familiarity with Australian laws and sources of assistance and advice, lack of experience in their countries of origin with organisations such as unions, discrimination in the workplace and in the process of gaining employment, lack of recognition of overseas-acquired skills and qualifications, and a lack of alternative sources of income (particularly for those subject to the Government's new 2 year waiting period for access to social security in Australia).[36]

7.50 Women are already disadvantaged in terms of pay and conditions in the Australian labour market, and the problems are compounded for women from non-English speaking backgrounds (NESB). The problems facing NESB workers were also highlighted by the Federation of Ethnic Communities' Councils of Australia's submission to the Inquiry:

> The fundamental premise of Workplace Agreements is that there is a level playing field on which employers and employees negotiate as equal partners. This may be the case where the employee is highly skilled and competent in the English language…[b]ut there cannot be equality of position in the case of newly arrived migrant workers who live in total employment insecurity, do not speak fluent English, do not know the Australian Industrial Relations legislation, come from a country where such legislation does not exist and have no idea of their rights. Added to that are the cultural factors that often prevent individuals, especially women, from questioning those in authority, which places some doubt on the fundamental premise of the legislation.[37]

7.51 The increasingly limited focus on only setting pay and conditions through workplace level agreements therefore contains inherently discriminatory outcomes for

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36 Submission No. 411, The Association of Non-English Speaking Background Women of Australia, vol. 16, p. 3496

37 Submission No. 417, Federation of Ethnic Communities' Councils of Australia Inc, vol. 18, p. 4314

workers from some cultural backgrounds. Liberty Victoria, a civil liberties group, agreed with this assessment:

> It is not so much that we disagree with industrial reform. What we are concerned about is that the reform does not occur at the expense of those at the lowest end. Probably one analogy to use about when people come before an employer is that if you are employing me, you have a full plate of food, I have none, and without basic protections that puts me in a dreadful bargaining position…At least under the award system I am guaranteed at least a quarter of your bowl of food. The general direction in which these reforms are going is to take away even my right to that quarter of that bowl of food. It also impacts very much on ethnic groups, women, people who are not conversant with how you negotiate agreements.[38]

*Proposed amendments set out in the Bill*

7.52 The proposed amendments would even further restrict capacity to set wages and conditions outside workplace level bargaining. For instance, allowable award matters would be pruned; removing matters such as training and skills formation from awards, and requiring employees to negotiate agreements to obtain access to training.

7.53 The Commission would also be prevented from flowing safety net increases on to those award-reliant employees who are not paid at the minimum award pay point. Those who have higher skills and qualifications would no longer have access to safety net adjustments, and these employees will have to negotiate any further pay increases with their employers.

7.54 Many of the proposed amendments to the Bill were criticised because they assume all Australian workers can read and write in English, rather than accepting and promoting a multicultural workforce.

7.55 For instance, it is proposed that an employee who wants their union to investigate a possible award breach would have to write an invitation to their union, specifying details of the suspected award breach and details of the evidence of the breach the employee believes can be found in the workplace. This would be a large ask for any employee not fully conversant with Australian industrial relations legislation. However, it will have a much more significant impact on an employee who cannot write in English. Under the proposed provisions, these employees would find it very difficult to even have contact with their unions, let alone recover their entitlements in cases of award breaches.

7.56 Similar fears were expressed regarding the secret ballots proposal. The proposed provisions require detailed applications, supporting material and ballot papers, which would be very intimidating for NESB employees:

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

> 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 action. However, in TCF industries it will impede our members' capacity to make democratic decisions about industrial action due to the low levels of literacy in English and cultural suspicion of government agencies which typify our membership.[39]

*Conclusions*

7.57 Australia has a diverse workforce. The Government must keep this in mind when developing legislative proposals. It is disturbing that the Government has seen fit to propose amendments to the WR Act that are Anglo-centric in nature and clearly ignore the needs of more vulnerable workers from non-English speaking backgrounds.

7.58 Labor Senators believe that there is a continuing need for a fair and adequate award safety net to protect those workers that are unable to bargain, whether this is due to their cultural background or the reluctance of their employer to enter into agreements.

7.59 A fair and adequate safety net cannot only focus on the low paid. Award-reliant employees, who may be lowly paid compared with those on agreements, but are entitled to more than the lowest rate of pay in an award, must also be considered. If the Commission is to be preventing from maintaining a range of award-based classification pay structures, then it is disadvantaged, award-reliant workers who will suffer.

**Low paid and other vulnerable workers**

*Operation of WR Act*

7.60 The Government has submitted that:

> Under the WR Act, awards continue to operate as a fair and effective safety net for workers in a disadvantaged bargaining position. Safety net adjustments have delivered wage increases for award reliant employees and these increases have been more equitably targeted at low paid award employees than under previous legislation.[40]

7.61 Other witnesses and submission did not agree that low paid and vulnerable workers were adequately protected by a fair and effective safety net. The fairness and effectiveness of awards is not limited to an assessment of safety net wage increases passed on by the Commission. The award simplification exercise, reducing awards to a core of 20 allowable award matters, has resulted in losses of substantive conditions

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

40 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2104

and entitlements, which workers in a disadvantaged bargaining position have little hope of renegotiating in agreements.

7.62 The ACTU provided 31 examples of matters that have been removed from awards as the result of award simplification.[41] These matters include:

- award provisions relating to sexual harassment and award prohibitions on requirements to wear inappropriate clothing (this clause was inserted to prevent bar attendants being required to work topless);
- award provisions requiring consultation with employees and unions about redundancy;
- award provisions requiring employers to provide first aid kits in the workplace;
- award provisions requiring employers to provide boiling water and tea and coffee making facilities; and
- award provisions restricting the ability of employers to require employees under 18 years of age to work overtime and night shifts.

7.63 As the ACTU points out, '[w]hile there is no statistical evidence of how removal of these provisions has affected employees in practice, it is likely to be extensive given that even where agreements are in place, these might not cover the particular entitlements removed from the award'.[42]

7.64 In general, it is unfair to arbitrarily remove provisions from awards, particularly where award entitlements may have been the result of earlier productivity measures and negotiated outcomes under the former Structural Efficiency or Restructuring and Efficiency Principles. However, the outcome is even more unfair for low paid workers and those with little bargaining power, as these employees have limited ability to renegotiate even basic conditions, such as the provision of first aid kits or boiling water, in agreements.

7.65 The Uniting Church Board for Social Responsibility submitted:

> A review of Government submissions [to award simplification hearings] will indicate that, in spite of the rhetoric, the Government sought to remove not only process and detail from awards but to reduce a number of fundamental entitlements and protections. The process is not yet complete but the Government is seeking to reduce awards even further and force the process to be done all over again. The legislation seeks to override the outcomes and independent processes to date, with far reaching detrimental effects on all parties but particularly the low paid.[43]

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41 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4364

42 *ibid*., pp. 4634-5

43 Submission No. 440, Uniting Church Board for Social Responsibility, vol. 21, p. 5157

7.66 The Australian Council of Social Services suggests that it is imperative to strengthen the award system to protect low paid workers:

> The establishment of effective wage fixation mechanisms and adequate industrial protection, through a strong award system supported by an independent regulatory structure, is an essential part of the process for maintaining and improving the living standards and job security of low paid workers.[44]

7.67 Vulnerable workers have also been disadvantaged under the new agreement-making framework introduced by the WR Act. This is discussed below under 'Discrimination in agreement making'.

*Proposed amendments as set out in the Bill*

7.68 The Government has proposed a number of amendments that would tend to particularly disadvantage low paid and vulnerable workers.

Termination of employment

7.69 The Bill would amend the unfair dismissal provisions of the WR Act to:

- make it more difficult for employees who have been 'constructively dismissed' to have access to unfair dismissal remedies;
- widen employers' access to costs orders against applicants and allow the Commission to order an applicant to provide security for costs that may be awarded against the applicant;
- limit the circumstances in which the Commission may accept late applications for unfair dismissal remedies;
- require disclosure of whether an applicant's representative or legal adviser has been engaged under contingency fee arrangements;
- prevent the Commission from finding that a dismissal was harsh unjust or unreasonable where one of the reasons for the employee's dismissal was 'operational grounds'; and
- allow greater scope for small business employers to dismiss employees unfairly.

7.70 Most employer groups supported the proposals, but did not provide evidence about the potential impact of these amendments on disadvantaged employees. Most other witnesses who made submissions to the Inquiry were horrified by the proposed amendments:

> Overall it appears that the effect of the amendments is to restrict access for individuals, by narrowing the scope and application of the laws and making

44 Submission No. 476, Australian Council of Social Services, vol. 23, p. 6072

> it more difficult for individuals to have access to representation…It is an inevitable consequence of the amendments in this Bill that: firstly, it will be much easier to shed staff; and secondly, rights and remedies for unfair dismissals will be reduced with the attendant reduction in job security for employees. The changes to the unfair dismissal laws most starkly demonstrate how this Bill undermines job security...These provisions will reduce access to individuals and are more likely to affect applicants who are poor, with language difficulties or non-union members.[45]
>
> In essence, the laws should ensure that employees are treated decently and fairly, and that they are afforded natural justice. However, these basic tenets of unfair dismissal law are undermined by a number of factors that are contained in the federal Government's approach to termination of employment. These include the small business exemption…, amendments that discourage employees from lodging applications and which make it more difficult to seek a remedy, and the perception that unfair dismissal laws impede job prospects.[46]
>
> In introducing the payment of security for costs by applicants to the Commission, many employees who have been unfairly treated by employers will be reluctant to make an application to the Commission. This payment…will be a significant disincentive and prevent many people from pursuing a remedy they are entitled to. At the present time, many employees who have been unfairly dismissed are in a precarious financial position and do not have the resources to recover entitlements.[47]
>
> The proposed amendments in relation to costs will strongly impact on those in the community with the most limited means of exercising their legal rights, by enabling the threat of a costs sanction...The practical effect of these proposed amendments will be to increase the need for employees to incur legal costs in obtaining legal advice within the 21 day time limit in which an unfair dismissal application must be brought. This will most disadvantage those in the community with limited financial resources, poor education, or with communication/language difficulties.[48]

7.71 The amendments to limit access to unfair dismissal remedies in cases of constructive dismissal caused particular concern because of the potential impact on women and young employees who may be harassed or bullied to the point of resignation:

> [The constructive dismissal amendment] indicates a poor appreciation of the circumstances of the phenomenon. Termination of employment in the form of constructive dismissal is well recognised in the field of unlawful

45 ibid., p. 6074

46 Submission No. 473, Queensland Government, vol. 23, p. 5954

47 Submission No. 480, Working Women's Centre, Tasmania, vol. 24, p. 6132

48 Submission No. 462, Turner Freeman Solicitors, vol. 22, p. 5655

> discrimination...An employer who sexually harasses a woman until she resigns does not normally indicate that the woman will be dismissed unless she resigns; nor would the employer necessarily intend, by the employer's conduct, that she resign…Similarly, in cases involving workplace bullying culminating in resignation, the preconditions set by the proposal would normally be absent.[49]

*Conclusions*

7.72 The Government seems to have completed ignored the needs of low paid and disadvantaged workers when developing the proposed amendments in Schedule 7 to the Bill. Employees who have been unfairly dismissed will already be in straightened financial circumstances as a result of their dismissal, and threatening these employees with costs orders will simply ensure that employers can unfairly sack any employees without the independent means to cover large legal fees.

7.73 It should be noted that the proposed amendments specifically target employees with cost orders. There are no complementary amendments to allow the Commission to order employers who unmeritoriously defend unfair dismissal applications to provide security for costs. Additionally, there would be appear to be no mechanism for employees to recover their costs associated with an unsuccessful bid by the employer to seek an order for costs against the employee:

> …an applicant who has a punitive or vexatious application for costs made against them can not make an application for the costs they incurred in defending the application.[50]

7.74 This may be simply a technical oversight by the Government, or another deliberate attempt to disadvantage employees. Regardless, the impact would be most severe on the low paid.

7.75 Labor Senators are concerned about the potential impact of the proposed amendments on low paid and vulnerable workers, and endorses the comments of Turner Freeman Solicitors in this regard:

> Clearly, the [amended legislation] creates a large number of practical and legal difficulties for employees seeking relief from unfair dismissal, that will result in many genuine and meritorious claims being foregone, particularly due to the increased costs involved. Our society ought not to permit the most vulnerable in our community, in most need of access to laws protecting their rights, to be most adversely affected by legislative amendment.[51]

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49 Submission No. 441, Women for Workplace Justice Coalition, vol. 21, pp. 5194-5

50 Submission No. 398, Jobwatch Inc., vol. 14, p. 3255

51 Submission No. 462, Turner Freeman Solicitors, vol. 22, pp. 5658-9

Conciliation fees

7.76 The proposed amendments to introduce a voluntary conciliation jurisdiction for the Commission include a requirement for the Commission to charge a fee of $500 for these services. The Government submitted that it would be necessary to introduce fees to allow private sector mediation firms to compete with the Commission to provide these services to the community.[52]

7.77 Even though the Bill would allow the Commission to waive this fee in the case of financial hardship, some witnesses were concerned that introducing fees would tend to limit access to the Commission for low paid and other disadvantaged workers:

> This submission demonstrates that women workers are skewed towards the poorer and most vulnerable end of the employment spectrum. The need to pay may deter their access and therefore the proposed amendment disproportionately affects women... HREOC proposes that the imposition of fees to access AIRC voluntary conciliation is inequitable, in that the ability of a party to pursue a conciliated outcome may be curtailed by limited resources, irrespective of the merits of the case with potentially discriminatory outcomes.[53]

7.78 It is not clear why the proposed 'financial hardship waiver' provision has been constructed to only allow waiver in the case of 'persons' rather than 'parties' to conciliation proceedings. It may be that this section is only intended to apply to natural persons, not incorporated bodies or employee/employer organisations registered under the WR Act. No definition of the term 'person' is provided in the WR Act or Bill.

*Conclusions*

7.79 It is possible that the simple prospect of fees will deter low paid employees from using the Commission's conciliation services. It will not be clear to many employees what circumstances would suffice to demonstrate 'financial hardship' under proposed section 357B. Labor Senators also note that this provision would require an employee to make a written application to the Commission for waiver, again potentially disadvantaging employees who have poor literacy skills or who are from a non-English speaking background.

7.80 It is not clear why access to waiver would be limited to 'persons', and whether this would restrict applications to natural persons. This may have been intended to prevent unions from making applications for waiver of fees. However, if this was the intention, Labor Senators note that this may inadvertently impact on small incorporated businesses.

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52 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2333

53 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. pp. 5887-8

Limits on expansion of federal award coverage

7.81 Amendments to the principal object and section 111AAA of the WR Act would strengthen the presumption in favour of State employment regulation, including by legislative minimum conditions such as those established for Victorian employees under Schedule 1A of the WR Act, and prevent further transfer of employees from State to the federal industrial relations jurisdiction.

7.82 The proposed amendment to the principle object purports to enable both employers and employees to choose the most appropriate jurisdiction to regulate their employment relationship. However, the Bill does not propose a mechanism to allow choice of jurisdiction issues to be resolved where an employer and their employees do not agree on the most appropriate jurisdiction to regulate their employment.

7.83 Evidence received by the Committee indicates that those employees working under Schedule 1A are very unlikely to agree with their employers that they should remain under these minimum conditions. An overwhelming desire was expressed by representative Victorian employees to move to federal award regulation:

> As a result of the working conditions currently in place for many Victorian workers who do not have a federal award, I am forced to endure many hardships, which I cannot bargain over as a qualified hairdresser. I work on average between 45 to 50 hours in a given week. There is no choice on this. It would seem to me that the people who wrote the provisions for Victorian minimum standards do not understand that it is not normal for a full-time hairdresser on minimum conditions to simply work 38 hours. Shops are open for trade these days for 65 hours a week. The days and times that I am expected to work include one, and sometimes two, 12-hour shifts Saturday and Sunday, all with only half an hour for lunch. These working days at times include public holidays but I am told by my employer that, if I do not work, I will not get paid for the holiday. Penalty rates and overtime simply do not exist. I cannot afford not to work. As an employee, I do not have a choice but to work these hours on a flat rate of pay. My colleagues on federal awards receive penalty rates for late nights, Saturdays and Sundays, compensation for public holidays and overtime rates for working in excess of 38 hours. My colleagues on federal awards are entitled to longer lunchtimes and paid morning and afternoon tea-breaks. Did you have your morning tea today? When was the last time you did a 12-hour day, standing on your feet, with only 30 minutes for lunch? …How long is the government willing to force me to work under these minimum conditions until I find an employer who is not under Victorian minimum conditions? I want a federal award. Why should I not be allowed to have one?[54]

7.84 HREOC also thought that the proposed amendment to prevent transfer between State and federal jurisdictions would unfairly affect disadvantaged workers:

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54 Evidence, Mr Mark Brown, Melbourne, 8 October 1999, pp. 183-4

> Currently, employees who are not covered by a basic minimum of protections within their State jurisdiction may apply for federal award coverage. The current minima are that an agreement must be approved by a State industrial authority and before approving the agreement, that authority is satisfied that: the employees covered by that agreement are not disadvantaged in comparison to their entitlements under the relevant award…The WR Bill proposes to replace these protections with the lower threshold of 'relevant contract of employment'…includ[ing] any arrangement covered by…Part XV and Schedule 1A; the *Minimum Conditions of Employment Act 1993* of Western Australia; the *Industrial and Employee Relations Act 1994* of South Australia…The effect of these proposed amendments is to make it more difficult for the most vulnerable employees (those without award protection – inly legislated minima) to transfer to the federal jurisdiction and gain award coverage.[55]

*Conclusions*

7.85 Evidence presented to this Inquiry demonstrated that the terms of employment established under Schedule 1A of the WR Act fall far short of award safety net standards.[56] Although the Committee did not receive a great deal of evidence about minimum conditions established under Western Australian and South Australian legislation, it is possible that these conditions also fall short of award standards. It is not fair to prevent these workers from accessing the Government's safety net by stealth, by effectively stopping any further transfers from State jurisdictions to the Federal jurisdiction. The award safety net should be available to all Australian employees.

**Discrimination in agreement-making**

*Operation of the WR Act*

7.86 This report has already considered evidence suggesting that women and workers from non-English speaking backgrounds have been disadvantaged by the increasing focus on workplace level bargaining generally, as these types of workers are not well equipped to bargain for their pay and conditions. This section of the report examines the impact of a specific type of agreement, AWAs, on disadvantaged workers:

> As AWAs have been available for just over two years, it is too early to say how women have fared under individual agreements, although the anecdotal material is ominous…Experience of women with over-award payments would indicate that women will be severely disadvantaged if forced onto individual contracts. Australia-wide, women earn only 43.7 per cent of the payments in excess of award and agreement rates that are made to men.[57]

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55 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5802

56 See for instance Evidence, Ms Wendy Tobin, Jobwatch Inc, Melbourne, 8 October 1999, p. 176

57 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4370

7.87 Many employees made private submissions to the Inquiry detailing their experiences with AWAs. These submissions suggest that vulnerable workers, including women, new and young workers, are not properly consulted about their terms of employment under AWAs and are, in many cases, bullied into signing substandard instruments by their employers:

> I was a sale assistant at ShooBiz…within the first four weeks I was employed a contract was given to all employees called an Australian Workplace Agreement. I was asked to sign the contract and return it to head office within two weeks. As I had never seen a contract like this before I asked my store manager to explain it to me. She…was having problems understanding it herself. Although it was worded formally and legally she understood it would affect her and all staff negatively. She informed me that she was not going to sign it, but advised me to do so as she thought that during my probationary period I should go along with the company's wishes…Over the next two week period we felt scared, confused and in danger of losing our jobs if we didn't sign…The store manager and 2nd in charge were constantly on the phone to other store mangers trying to decide what they should do so they wouldn't put their jobs in jeopardy or be moved to stores far from their homes. They were under pressure from head office to sign and get their staff to sign. The store environment at the time was very stressful, confusing and emotional…I thought my only choice was to sign the contract as I was scared that I could have been fired in my probation period.[58]

> I have been an employee of …Civic Video since 1993 as a shop assistant…In February 1999 I attended work and my manager presented me with an AWA. I was asked to sign it that very day. As I was busy that evening working I took it home to read. I was later reprimanded for doing so. The AWA was to be left on the store premises…It was at no time ever explained to me what an AWA was, how it would change my working conditions, nor that it was an agreement that was non compulsory…My employer attempted to contact me on a number of occasions, both on my mobile and at the beginning of every shift I worked. I felt harassed and dreaded going to work, I felt pressured, I did not feel that I was being given any choice in regards to the signing of the document…My brother Peter is also an employee of Civic Video…Peter experienced similar phone calls and constant harassment by our employer as I did. My brother is only 20 and this was his first job since leaving school…I believe he felt intimidated by our employer and felt that he was unable to raise his concerns in a professional manner with our employer. I contacted the employment advocate after my brother was forced to sign the AWA without being allowed to read it and with our employer standing next to him. When my brother voiced his concerns about not having read the document, our employer answered 'Just sign it'. I found my dealings with the employment advocate frustrating…I finally gave in and signed the AWA on approximately 11 April 1999…I strongly believed that if I did not sign the

58 Submission No. 260, Shae Leviston, vol. 6, pp. 1204-6

> AWA then my employment at Civic Video would be terminated. With the assistance of the SDA I was successful in having my AWA overturned.[59]

7.88 The Committee also received evidence that a new form of employment discrimination has been born from the WR Act – discrimination against employees who choose to remain under awards or collective agreements. Unfortunately, most of the evidence suggests that it is Governments as employers who are generally responsible:

> In the Department of Education we have had discrimination practices where the employer has offered people performance pay based on five per cent of outcome if they have signed an AWA, but has offered on two per cent to those who stuck with the collective bargaining process. That matter is currently before the Federal Court. We have people who are denied the right to bargain on the hours of work, currently before the federal commission, because they refuse to work a 10-day fortnight or a 40-hour week—an increase in hours. They are not allowed to bargain on that question; it is a centrally mandated matter from government.[60]

> I…got a 'higher than satisfactory' level for my performance…I have had the same pay now for nearly four years. But the person sitting next to me who got exactly the same performance outcome and who happened to have signed the AWA got 7.5 per cent. That is a lot of money. I am in a position where I can afford to have principles. A lot of my colleagues cannot. They cannot afford not to take that sort of thing. If you are an individual single income earner, you cannot say, 'I won't take that extra four per cent.' And when that happens more than once, it starts to really hit.[61]

*Amendments proposed in the Bill*

AWAs

7.89 The Bill proposes further changes to the AWA provisions of the WR Act, which will make it easier for employers to discriminate between employees in their terms of employment. AWAs would prevail over certified agreements in almost all circumstances, and AWAs would no longer need to be offered in the same terms to comparable employees. The Department submitted that it was necessary to remove the requirement for AWAs to be offered in the same terms because:

> The obligations imposed by the current provision can be confusing for employers (for example, many employers are unaware that individual performance may be taken into account in determining what conditions should be offered) and can limit scope for flexibility in the tailoring of

59 Submission No. 264, Ms Danielle Keogh, vol. 6, pp. 1218-21

60 Evidence, Ms Karen Batt, Melbourne, 8 October 1999, p. 197

61 Evidence, Ms Judith Mead, Melbourne, 8 October 1999, p. 199

> AWAs to the particular circumstances of both employees and employers (for example, improved balance between work and family commitments).[62]

7.90 The Department made no reference to the potentially discriminatory impact of simply removing this requirement, rather than amending it so that it was simpler for employers to understand, and did not indicate whether or not employer confusion could be addressed through improved education and information programs conducted by the Government or the Employment Advocate.

7.91 Other witnesses were very concerned about the potentially discriminatory impact of the proposed AWA amendments:

> Removal of the requirement in paragraph 170VPA(1)(e) that the employer must offer an AWA in the same terms to all comparable employees will mean that employers will be able to use AWAs to discriminate between employees, possible indirectly on grounds such as sex.[63]

> We are...concerned about the proposal for AWAs to override certified agreements. This would expose women to a round of individual-focused negotiation during the term of a collectively-negotiated instrument…we have a concern about the proposal permitting different AWAs to be offered to employees by an employer…This will give rise to the unsatisfactory situation where employees might be working side by side, performing the same work – and yet some may be on more beneficial AWAs than others. Women (especially those working part time and/or on short term contracts) who are less likely to be unionised, and more likely to have been 'beaten down' in the bargaining process may agree to less beneficial AWAs without even being aware that male colleagues have been offered more beneficial terms.[64]

> The provision that an AWA be offered to comparable employees on similar terms was originally inserted so that AWAs could not be offered to employees in ways that might be discriminatory or unfair…HREOC proposes that as the current provisions do not place an onerous burden on employers for compliance and the current provision provides protections to vulnerable employees, that the current provisions be retained.[65]

*Conclusions*

7.92 The Government has not provided any convincing rationale for the proposed amendments. The amendments would provide employers with wide scope to discriminate between individual employees on grounds irrelevant to their employment

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62 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2386

63 Submission No. 423, Australian Council of Trade Unions, vol. 19, p. 4452

64 Submission No. 441, Women for Workplace Justice Coalition, vol. 21, pp. 5191-2

65 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5885

performance, such as gender, age or favouritism. The Government and others charged with eliminating discrimination would be very limited in their ability to prevent this from occurring due to the secrecy provisions surrounding AWAs.

Certified agreements

7.93 The Bill proposes that the requirement that an agreement cover all employees who could reasonably be expected to be covered be repealed. Apparently this amendment is required to:

> …provide greater choice and flexibility in agreement-making and remove uncertainty about whether an agreement covering part of a single business will be found to comply with subsection 170LU(8).[66]

7.94 In effect this amendment could produce a new level of 'sub-workplace bargaining' where employees in the same workplace could be offered different collective terms of employment. This would seem to allow employers to target particular parts of their workforce, for instance non-unionised employees, and offer lower employment conditions than others are willing to accept. HREOC expressed comprehensive concerns about the proposal:

> The requirement that an agreement covers all employees 'who could reasonably be expected to be covered' was originally inserted so that agreements could not be made with sections of the workforce for the purpose of excluding other sections of the same workforce in ways that could be discriminatory or otherwise to the detriment of employees. For example:
>
> - excluding identifiable groups of workers such as females (given the segregated nature of employment there is potential for this); the removal of this provision would provide scope for employers to grant pay increases to small groups of employees in a strategically strong bargaining position without extending the agreement as would currently be the case, to a broader area of the workforce. In addition, the removal of this provision would provide scope for employer to negotiate reduced pay and conditions relative to those in weaker positions through separate agreements;
>
> - strategically reducing the scope for collective action (proposing agreements to isolated sections of the workforce to reduce their bargaining position) – for example, only those in a bargaining period can take industrial action – where the bargaining group is isolated within a large organisation the impact of any industrial action is reduced and the workers more vulnerable (personally identifiable as 'trouble makers',

66 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2381

> etc) – if this provision was removed the bargaining position of…already vulnerable employees would be made even more precarious.[67]

7.95 HREOC also pointed out that 'this is the only provision in the agreement making stream that provides for the consideration of groups *not* covered by the agreement, and requires the AIRC to consider the discriminatory impact of excluding employees from an agreement in the agreement approval process.'[68] HREOC therefore recommended that the current requirements in subsection 170LU(8) be retained.

*Conclusions*

7.96 Again, the Government has provided the Committee with a very unconvincing rationale for this amendment. If employers are uncertain about how subsection 170LU(8) operates, then surely it would make sense to attempt to address this uncertainty through education and information campaigns before proceeding to the extreme step of repealing the provision. As HREOC has pointed out to the Committee, this provision is the only mechanism currently in the WR Act to ensure that agreements do not unfairly discriminate against groups of employees, such as women, by entirely excepting them from agreement coverage.

**Other discrimination matters**

7.97 HREOC expressed concern about a number of other matters, in particular that there are no formal or legislative links between the Sex Discrimination Commissioner and the Office of the Employment Advocate, nor a requirement that the Employment Advocate consider any discriminatory effects in comparison to other employees in a workplace.

7.98 HREOC also noted that the Government has failed to date to act on recommendations to provide an explicit legislative basis for referral of systemic sectoral or occupational sex based discrimination issues to the Sex Discrimination Commissioner.

7.99 Labor Senators believe that these concerns raised by HREOC should be addressed by the Government.

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67 Human Rights and Equal Opportunity Commission, Submission No. 472, p. 84

68 *Ibid*, pp. 84-5

# CHAPTER 8

# WORK AND FAMILY

*It is fair to say that many employers will say that they can now be trusted to manage their employees without a third party and, my goodness, I think I have even written that rhetoric. But the reality is that I know some who can be trusted and some who cannot, and often the ones who cannot are the ones where we have least coverage industrially to do something about protecting their workers, and that is what concerns me.*

Susan Halliday, Sex Discrimination Commissioner, 1999

## Introduction

8.1 One of the terms of reference for this Inquiry was the impact of the WR Act on the balance between work and family responsibilities, and whether the balance can be improved. The Government Senators' report dealt with this term of reference quite dismissively in just five paragraphs.

8.2 This report provides a more in depth assessment of evidence presented to the Committee regarding work and family. There were actually many submissions to the Committee that dealt specifically with the impact of the WR Act on women, who still tend to have primary responsibility to care for children and elderly family members. The evidence presented in these submissions is not encouraging. Almost all indicated that the ability to manage both work and caring responsibilities had deteriorated under the deregulated environment promoted by the WR Act, particularly through the deregulation of hours of employment. For example, the Human Rights and Equal Opportunity Commission (HREOC) made the following points about deregulation:

> …the flexibility required by employers is often in conflict with the nature of the flexibility required by workers with family responsibilities. The reduction in the role of the AIRC, the deregulation of part-time and casual work and the award simplification process all have potential for negative impact on workers.[1]

8.3 However, the Committee was assured that balance between work and family continues to be a high priority for the Government:

> From its outset, the WR Act has a strong emphasis on work and family balance. This is reflected in the principal object of the WR Act with its specific reference to 'assisting employees to balance their work and family

1 Submission No. 423, Human Rights and Equal Opportunity Commission, Submission No. 472, p. 32

> responsibilities effectively through the development of mutually beneficial work practices with employers'.[2]

8.4 Many submissions from individual employees did not agree that the WR Act had assisted them to reach mutually beneficial outcomes with their employers to balance their work and family commitments. In fact, the reality for many workers seems to be far removed from the Government's rosy view:

> Peter Reith made a promise that no worker would be worse off under his first wave changes. This has been a LIE. Many workers have lost overtime entitlements, sick leave, meal breaks and are required to work unlimited days and hours. Not only have their wages decreased but they have lost quality of life. There is no such thing as family life – the weekend is now work dominated.[3]

> Ms S: We all work harder and harder for less pay, less security and no other rewards. I've been working in this place for 7 years and there has never been a divorce. Last year (1997) two women got divorced and 3 women basically had a nervous breakdown. I am sure there are links between what is happening to us at work and how this impacts on our health and relationships at home.[4]

8.5 Many people were also very concerned that the proposed amendments in the Bill would make the situation worse, and result in them having to spend more time at work, away from their families:

> I am forty five years old and have to work full time as a sales assistant to survive even though my husband is also in full time employment…I wish that I could spend more time with my precious family and have been working towards that goal, but feel that with Mr Reith's proposal I will be working to my grave.[5]

> My husband and I are struggling to make ends meet at the moment and we would probably end up losing our house if this legislation is passed and our pays are cut…I am also concerned for the future of our little girl. She is just four years old. What will she have to look forward to, if we are required to work weekends? We will no longer have any 'family time' and that is very important to us all.[6]

> I am employed full time in the retail industry and only just manage to pay all the Bills required (mortgage, etc). Working in retail, I work odd hours and don't get to spend as much quality time with my family. I have to also

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2 Submission No. 329, Department of Employment, Workplace Relations and Small Business, p. 214

3 Submission No. 336, Julie Heagrey, vol. 12, p. 2442

4 Submission No. 441, Women for Workplace Justice Coalition, p. 5

5 Submission No. 485, Susan Fechner, vol. 24, p. 6167

6 Submission No. 34, Mrs J Luttick, vol.1, p. 148

> work overtime in order to support my family because I am on a low income. If the proposed changes go through I will have to work longer hours with no overtime rate and see less of my family. All this will do is add more pressure and stress, please support ordinary hard working Australians like myself who want to be rewarded and spend quality time with our families. Please say no to the proposed changes.[7]

8.6 The importance to our society of balancing work and family cannot be understated. People need to work to support themselves financially, and the days of the nuclear family with Dad at work earning enough to support Mum and the kids at home have long disappeared. The 'normal' Australian family is no longer a married couple with 2.3 children, and even those families are finding it harder and harder to survive on single incomes.

8.7 If we do not ensure that our working arrangements allow for people to mix work with having children, we will find the long term effects on our population very serious:

> Australian demographers are discovering that the trend towards childlessness and smaller families is no longer confined to women at the upper end of the income and education scale. In what amounts to a new demographic phenomenon, women from low socioeconomic backgrounds, who have historically had larger than average families, are also reducing their fertility, and are doing so at a surprisingly fast rate. The result, revealed in Australian Bureau of Statistics data released this week, is a fall in the national fertility rate for six consecutive years to an all-time low of 1.76 births per woman.[8]

8.8 Academic researchers believe that a lack of family friendly employment practices is contributing to the decrease in the birth rate:

> [Australian Institute of Family Studies researcher, Christine] Kilmartin suggests that the family-friendly work practices increasingly available to women in high-status jobs (such as job sharing, paid maternity leave and flexible hours) are not making their way down to small businesses or women working on the factory floor, and that this is beginning to show up in fertility levels.[9]
>
> Low fertility is the result of conflict between a liberal economic agenda and the persistence of social institutions which are premised on the male breadwinner…The answer is not the conservative social agenda promoted by the Howard Government, but, rather, a liberal social agenda that

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7 Submission No. 74, George Papadopoulos, vol. 1, p. 231

8 Michelle Gunn, Social Affairs writer, *The Australian*, 20 November 1999, p 22

9 *The Australian*, 20 November 1999, p. 23

> encourages women to have children and, at the same time, maintain a high level of attachment to the labour market.[10]

8.9 The rest of this chapter considers in detail evidence suggesting that the WR Act has seriously reduced the ability of workers with children to remain in the labour market, and considers how the proposed changes to the Act set out in the Bill could further destroy work and family balance.

**Impact of the Workplace Relations Act**

8.10 The Government provided the Committee with its *Work and Family State of Play 1998* publication, which consolidates and analyses the most recent information on work and family from various data sources. The Report finds that 'organisations are increasingly providing family friendly provisions that meet the needs of employees and employers at the workplace.'[11]

8.11 The Report outlined what sorts of 'family friendly provisions' are being provided by private sector workplaces, based on data collected from the reports of 2000 firms to the Affirmative Action Agency. The most recent figures were provided for 1997, and indicate that, from this sample:

- paid maternity leave is provided in 15 per cent of workplaces[12];
- permanent part time work is available in 81 per cent of workplaces[13];
- job sharing opportunities exist in 63 per cent of workplaces[14];
- child care or child care assistance is provided in 13 per cent of workplaces[15]; and
- personal/carer's leave is available in 72 per cent of workplaces.[16]

8.12 These data suggest that family friendly entitlements that are costly for employers (child care and paid leave) are still only available in a small minority of workplaces. Personal/carer's leave is an exception, and the report explains that the rapid increase in the availability of personal/carer's leave is predominantly due to the

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10 Peter McDonald, Australian National University demographer, quoted in *The Australian*, 20 November 1999, p. 23

11 Work and Family State of Play 1998, Work and Family Unit, Department of Employment, Workplace Relations and Small Business, p. 1

12 *ibid*, p. 18

13 *ibid*, p. 20

14 *ibid*, p. 21

15 *ibid*.

16 *ibid*, p. 22

efforts of the Commission, which established standard personal/carer's leave clauses in awards through the Carers' Leave Test Case decision in 1994.[17]

8.13 The report comments on the trends as follows:

> …while paid maternity and paid paternity leave are obviously important conditions for employees, and are beneficial for employers in terms of increasing retention rates, they are accessed at most only a few times during the working life of an employee. Similarly, on-site child care centres are a great facility, particularly if no other child care providers are available close to work or home, but they are generally only used by parents with children of pre-school age…Unlike paid maternity leave or child care, being able to leave during the day to care for a child or other family member and having control over start or finish times are part of ongoing conditions that provide employees with greater choice in balancing work and family over a number of years.[18]

8.14 The Report clearly indicates that the Government's current focus is to promote more flexible working hours and arrangements to assist employees in balancing work and family commitments, rather than more expensive options such as paid maternity leave or child care. However, much of the evidence presented to the Committee suggests that the legislative framework provided by the WR Act to achieve flexible working arrangements is actually acting to the detriment of workers with family commitments.

*Flexible working arrangements*

8.15 Unfortunately there was no comparable information provided by the Affirmative Action Agency on the proportion of workplaces where employees have access to flexible working arrangements to meet caring responsibilities. However, data included in the Work and Family Report from the earlier Australian Workplace Industrial Relations Survey 1995, indicated that at only 37 per cent of workplaces employees reported that they 'could use flextime or make the time up later, if they needed time off work to look after family or household members.'[19] This figure is surprising as, unlike the Affirmative Action Agency data, the AWIRS data include public sector employees, many of whom have had access to flextime as an established condition of employment for years.

Agreements

8.16 The Report noted that 53 per cent of certified agreements contained flexible working hours provisions and '79 per cent of AWAs provide at least one family-friendly provision when flexible hours provisions are included.'[20] However, the

17 *ibid*.

18 *ibid*, pp. 5-6

19 *ibid,* p. 44

20 Submission No. 329, Department of Employment, Workplace Relations and Small Business, p. 217

Report noted that flexible work provisions in agreements may not actually benefit employees with families in practice:

> …it should be noted that the existence of such arrangements is not necessarily an automatic indicator of family-friendliness in agreements. The way in which the flexible working hours arrangements are determined and implemented will impact on the benefits for workers with family responsibilities.[21]

8.17 For this reason, HREOC criticised the Report's methodology in analysing the 'family friendliness' of flexible hours provisions in agreements:

> …an examination of the coding fields used in the report's analysis raises concerns about the report's conclusions on the incidence of work and family provisions in agreements. Indicators of potentially work and family friendly provisions included time off in lieu at ordinary time rates: this provision is most commonly used to reduce the take home pay of employees…and are at the discretion of management so would therefore not be seen as a work and family provision;…and hours averaged over an extended period, compressing working week and flexible start and finish times: these provisions are equally indicative of working patterns that actively make it difficult for employees to balance work and family responsibilities such as increased irregularity of hours and ordinary hours or work at unsociable times including weekends and early or late start and finish times. These figures would be considerably different if these less robust indicators were removed from the analysis.[22]

8.18 This is a significant point. While in theory, many certified agreements and AWAs made under the WR Act may appear to include family friendly hours provisions, these provisions are often open to be used in a way that actually limits the ability of workers to balance their family commitments.

8.19 The evidence presented to this Inquiry suggests that flexible working hours are more often used to benefit employers, rather than employees:

> Changes to working time arrangements can provide flexibility to both employers and employees, for example, where available, 'make-up time' provisions allow employees to take time off for reasons such as family responsibilities and 'make-up' the time at a later stage. A significant number of the changes in working time arrangements however appear to have provided flexibility to, and gains for, management – particularly in terms of deploying staff to cover peak periods of activity while limited flexibility has been achieved for workers. For example, when asked if they could take some time off work to care for a sick family member, a fair proportion of

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21 Work and Family State of Play 1998, Work and Family Unit, Department of Employment, Workplace Relations and Small Business, p. 6

22 Human Rights and Equal Opportunity Commission Supplementary Submission, 26 October 1999, pp. 2-3

> workers could do so by using their own sick leave or holiday leave (42 per cent) and a smaller proportion could take leave without pay to do so (36 per cent). But only 16 per cent of all workers could take time off and then make it up later. The workers who did have flexibility in this area were primarily managers and professionals.[23]
>
> The recent report on work and family, produced by the Department of Employment, Workplace Relations and Small Business found that 'flexible hours' were common in agreements, with 20 per cent of AWAs containing a provision for averaging of hours of work over an extended period. While this was presented as 'family friendly', the reality is that these provisions enable employers to change hours around on a daily or weekly basis, rather than being required to provide regularity. There is no indication that these provisions give the workers involved any flexibility at all.[24]

8.20 Also, it was submitted that agreements reached under the WR Act were often more likely to trade off family friendly conditions that had previously been available to workers. In addition, these conditions were not generally being traded off for decent wage increases:

> We are seeing perhaps the most egregious examples of trade-offs of compensatable hours, of penalties and of protections against working unsociable hours to be found amongst low paid workers and in industries which are highly feminised…that can be a matter of weekly hours of work being too long—weekly hours being regarded as normal from Monday to Sunday— and the daily span of hours…We are also seeing in bargaining other provisions, which are of disproportionate importance to women, not being settled in AWAs at quite alarmingly low rates. For example [provisions that] relate to child-care arrangements; [that] relate to carers leave. They…at least make some attempt to allow workers time off, typically for family reasons, or that offer some sort of compensation or subsidy, in particular for family and child-care arrangements. Those very important provisions—which we all hoped would be the sorts of provisions to be worked out when employers and employees came together to bargain—have simply not eventuated. Only about 20 per cent of AWAs have mentioned those sorts of provisions at all.[25]
>
> Some people have argued that women are accepting lower pay rates in such bargains because they are getting better family friendly outcomes on other questions—better hours, paid maternity leave and so on. Unfortunately, the research evidence on that from a recent paper developed at ACIRRT in Sydney suggests that is quite to the contrary. Where you find low wage outcomes in highly feminised areas you find poorer outcomes in terms of

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23 Human Rights and Equal Opportunity Commission, Submission No. 472, pp. 49-50

24 Submission No. 466, UTLC Women's Standing Committee, p.12; Submission No. 164, Katherine Wrigley, pp. 6-7;

25 Dr Richard Hall, Australian Centre for Industrial Relations Research and Training, Evidence, Sydney, 22 October 1999, p. 255

> access to family friendly issues. What you find is a pattern of double disadvantage—poor wage outcomes and, in my view, greater loss of control over hours, which is the critical question when you want to examine whether a provision is family friendly or not. I find much of the evidence in a range of reports talking about family friendliness is offered to you in such vague terms that it is very difficult to determine exactly who is benefiting from the flexibility—the employee or the employer.[26]

8.21 The Finance Sector Union provided a specific example. They submitted that their members who work in the banking industry were having problems balancing work and family commitments because agreements had limited their access to paid overtime:

> …our members are increasingly losing control over their hours of work... This is a big issue for our members as 62 per cent of our workers are women…And more than half of our women members have family responsibilities at any time. It is difficult for our members to reconcile their family responsibilities with increasingly excessive hours of work. Our industry has received a lot of publicity around this issue. The figure of one million hours overtime per week being worked in our industry, much of which is unpaid, is a heavily publicised figure.[27]

8.22 The Finance Sector Union suggested measures to improve work and family balance:

> In particular, we agree with the recommendation of the ACTU that a way of overcoming this problem would be to ask the Industrial Relations Commission and the Sex Discrimination Commissioner to develop award provisions which would somehow scrutinise hours of work provisions for their likely effect on workers' ability to meet their family responsibilities as well as their work responsibilities. Further, based on the evidence that Australian workplace agreements are more likely to include provisions around flexible hours of work, and that if the legislation were to go forward Australian workplace agreements would take precedence over other agreements, we would be concerned that the Employment Advocate would be seen to have some responsibility for assessing the impact of flexible hours of work provisions on workers and that this would be a key part of the no disadvantage test.[28]

8.23 HREOC suggested that in some cases 'flexible' hours of work provisions were actually discriminatory in their operation and should be referred to the Sex Discrimination Commissioner:

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26 Dr Barbara Pocock, Evidence, Canberra, 28 October 1999, p. 512

27 Susan Kenna, Finance Section Union, Evidence, Melbourne, 7 October 1999, p. 86

28 *Ibid*

> Hours of work agreement provisions are an area where indirect discrimination may be difficult to identify at the time of agreement approval, and in many cases may only be assessed as discriminatory in their impact in retrospect. For example, a common wording of agreement provisions dealing with hours of work is phrased in terms of '…hours will be worked (so far as practicable) continuously subject to family responsibilities, seasonal fluctuations and the operational requirements of the business'. In this case, an employer may sensitively deal with actual hours worked by an employee in response to caring responsibilities. Equally, organisational requirements may consistently take precedence. In this case, the discriminatory impact of an agreement may only become evident in retrospect.[29]

Awards

8.24 Flexible hours have also been introduced into awards under the WR Act. One of the main 'flexibilities' introduced for working hours was subsection 89A(4), which provides:

> The Commission's power to make or vary an award…does not include: (b) the power to set maximum or minimum hours of work for regular part time employees.

8.25 Provisions in awards setting maximum and minimum hours of work for part time employees have therefore been removed from awards as part of the award simplification process.

8.26 This has had a particular impact on women for two reasons. Firstly, as discussed elsewhere in this report, women are much more likely to rely on awards to set their terms of employment than men, who are more likely to be covered by agreements. Secondly, women make up 72.4 per cent of all part time workers in Australia, as it is still primarily women who are required to combine both paid work and family responsibilities.[30]

> Award simplification has enabled employers to distribute working hours and incidence of work in ways which dislocate private life and family commitments. Rather than providing women with increased flexibility, these changes have negatively influenced the working lives of women by reducing their security of employment and increasing the risk of exploitation. The 'flexibility' that was much touted as the end product of the 1996 amendments has tipped the scales in favour of flexible outcomes for employers at the expense of those employees with reduced industrial muscle.[31]

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29 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5847

30 Submission No. 155, Kim Draisma, University of Wollongong, vol. 3, p. 593

31 Submission No. 441, Women for Workplace Justice Coalition, vol. 21, p. 5185

8.27 Much if the evidence about the balance between work and family related to the removal of the Commission's ability to regulate hours of part time work in awards:

> An indicator of how the changes have reduced the protection afforded by award regulation for working women is the inability of the Commission to set maximum or minimum hours of work for regular part-time employees. Split shifts are problematic. Under the previous award system many women in the hospitality and cleaning industry used to work two shifts: one week from 6.00am to 1.00pm and the next week from 1.00pm to 7.00pm. Now, many of these women are required to work split shifts; from 6.00am to 9.00am and again from 4.00pm to 8.00pm on the same day.[32]

8.28 The Women for Workplace Justice Coalition's submission provided anecdotal reports from some women as to how the changes had affected them. For instance:

> Ms O: Until 2 years ago my husband and I were able to share the child care and the car. Now that I have to work two shifts this is not possible any more. First I used the train at 5.30 in the morning but I was attacked, harassed and touched a few times now I am too scared and my husband drives me to work. This means we have to drag the children out of bed at 5.30am or leave them on their own for over an hour. Sometimes I take a taxi. I don't know what to do. We need the money and I like working but I also feel very worried about my children.[33]
>
> Ms N: My husband and I work in the same factory. There used to be three shifts and we always got different shifts so we could look after our children and had family time together. Now they want us to work 4 days per week, 12 hours every day. If this happens, one of us has to leave because we can't leave our children at home.[34]

8.29 The Women for Workplace Justice Coalition also pointed out that 'the difficulties associated with employment hours are exacerbated by the lack of flexible and affordable child care. Parents who book their children into child care are usually obliged to give many weeks notice and are liable to pay for the booked time. For women who then may only get a few hours of work, this is not cost-effective and often results in a net loss of money.'[35]

8.30 The Sex Discrimination Commissioner agreed:

> It is a case of saying, 'It is something that you will now do because if you want your job here you have to start at 6.30 in the morning.' It does not coincide with the way the rest of the world works out there. That does not mean that your child-care centre is now going to open for you at 6 o'clock

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32 ibid

33 ibid, p. 9

34 ibid.

35 ibid.

> in the morning, and there are very few that do. And to change rosters or to have rosters that rotate often means child-care hell because child-care centres do not work with that scenario, nor are they interested in doing so from my experience. It is about saying, 'No, you have got to drop your child off at 7 a.m. and pick the child up at 6 p.m.' And the days when your rosters are changing—say, you work Monday this week, Tuesday next—the child-care centre booking has to be permanent, so that means you end up paying for both days both weeks, even though you only worked one each week. So you have got to ask who does the flexibility suit and be realistic about all the other infrastructure and support mechanisms that men and women need to actually go to work.[36]

8.31 Other submissions reinforced the view that flexible hours, and particularly the lack of award provisions to set maximum, minimum or even regular hours for part time workers, had negatively affected employees' ability to manage work and family:

> Our concerns in this area have always been to ensure regular and predictable hours of work for part time employees and to ensure that they are not forced into part time work when their preference is for full time work or longer hours, as necessary for financial survival…It is essential for part time women workers to have totally predictable hours of work so that they can meet these [caring] commitments. Schools and childcare centres close at particular times each day and do not open on weekends. These are the non-negotiable realities that most women who work part time must work around.[37]

> One of the issues that we lost last time was the regulation that awards had to say what your minimum and maximum hours would be if you were a part-time worker. Now we have many cases of women, in particular, with no certainty in their hours of work. One week the employer might call them in for five hours, the next week they might get nothing at all.[38]

> On the question of balancing work and family responsibilities in an industry of approximately 70 per cent women [education], the 1996 act has failed in its object and should be amended. A clause in the Victoria schools award was diluted which provided for limiting the spread of part-time hours. That means that if you are a 0.4 teacher, you can be required to come in for four or five days, rather than concentrating the spread of those hours in one or two days. Again, the face-to-face teaching hours dilution is a great concern where it comes to balancing work and family responsibilities.[39]

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36 Susan Halliday, Sex Discrimination Commissioner, Evidence, Sydney, 26 October 1999, p. 379

37 Submission No. 429, Women's Electoral Lobby, National Pay Equity Coalition and Business and Professional Women Australia (NSW), vol. 20, p 25

38 Jennie George, Australian Council of Trade Unions, Evidence, Canberra, 1 October 1999, p. 24

39 Robert Durbridge, Australian Education Union, Evidence, Melbourne, 7 October 1999, p. 113

8.32 It should be noted that the WR Act already purports to provide some protection for part time workers: under subsection 89A(5) the Commission may include provisions in an award facilitating a regular pattern of hours for 'regular part time employees'. A regular part time employee is defined in section 4 as:

> an employee who: (a) works less than full-time ordinary hours; and (b) has reasonably predictable hours of work…

8.33 In light of the evidence discussed above, these provisions are clearly not providing a sufficient guarantee of regular hours for part time employees. The National Pay Equity Coalition suggested that the definition of part time worker should be amended, and provisions reintroduced to allow the Commission to regulate hours of work for part time workers in awards:

> …the availability of part-time work is not in itself helpful to women unless the part-time work is of a regular and predictable nature and the jobs are well designed so as to promote career progression. We believe the definition of 'regular part-time employee' currently in the act does not go far enough in protecting women's income and giving them the certainty they need that they will be able to meet their other responsibilities at certain times of the day. We would like to see the reference to 'reasonably predictable hours of work' replaced with 'regular and predictable hours of work'. This would be consistent with the government's publicly stated reason for wanting to make part-time work more readily available—that is, to help women balance work and family responsibilities. For the same reason, we believe there should also be a provision in the act to prevent an employer unilaterally making full-time jobs part time or reducing part-time hours without consultation with the employee.[40]

8.34 This would require a slight reversal of the current deregulated approach to working hours. However, the Women for Workplace Justice Coalition made an interesting point about the effect of removing regulatory provisions from awards for the sake of improving 'choice' for employers and employees:

> We cannot agree that the present system provides women with valid choices. On the contrary, we consider that the workplace now offers less flexibility for women than it did prior to the 1996 amendments, resulting in increased stress and greater inequity in the workplace…The limitation of the Australian Industrial Relations Commission's award making power means that women cannot 'choose' to have certain matters safeguarded by their award, as they used to be able to do…Nor can women 'choose' to have the Commission arbitrate on matters in the way it used to.[41]

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40 Fran Hayes, National Pay Equity Coalition, Evidence, Sydney, 26 October 1999, p. 408

41 Submission No. 441, Women for Workplace Justice Coalition, vol. 21, p. 5182

Schedule 1A - Victoria

8.35 There is evidence that deregulation of part time hours has not only been a problem for part time workers under awards and agreements, but also for Victorian workers whose conditions are set in accordance with Schedule 1A of the WR Act:

> The issue of flexible working hours, which you raise, is interesting because for schedule 1A employees we have consistent examples where women are being forced to start at ridiculous hours in the morning, or they have been asked to work 12-hour days. In many cases they are not even receiving payment for their overtime. Obviously, one of the limitations of the current schedule 1A is that there is no statutory right to enforcement for paid overtime. The issue of extension of hours is quite pronounced under the schedule 1A.[42]

*Conclusions*

8.36 The WR Act is not currently operating to allow workers to balance their work and family commitments through flexible working arrangements. The evidence before the Committee demonstrates that flexibility in working arrangements is most often benefiting employers, not employees. Workers are increasingly under pressure to work hours and shifts that suit their employers, involving longer hours, unsociable hours without penalty rates and unpaid overtime. This is not assisting workers with family responsibilities, and is probably discouraging workers from having children at all.

8.37 Regarding agreements, many provisions may appear at face value to operate to allow employees flexibility to balance work and family. However, these provisions will often be worded in a manner that allows them to be implemented by employers to disadvantage workers with family responsibilities. The Commission and the Employment Advocate should examine such provisions more carefully when applying the no-disadvantage test to assess how the provisions will operate in practice, and if appropriate require undertakings regarding employees with family responsibilities prior to certification or approval of the agreements.

8.38 Regarding awards, the removal of the Commission's ability to set minimum and maximum, and regular, hours of work for part time employees appears to have had disastrous consequences for many workers attempting to combine work and family responsibilities. The lack of minimum guaranteed hours affects women who need a regular income to support their families, and lack of notice of changes to shifts and working hours creates havoc with child care arrangements.

8.39 72.4 per cent of part time workers are women, and over a million working women have dependent children under the age of 15, of which 170,000 are sole parents.[43] Clearly a major proportion of part time workers are women attempting to

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42 Vivienne Wiles, Jobwatch Inc, Evidence, Melbourne, 8 October 1999, p. 179

43 Submission No. 155, Kim Draisma, University of Wollongong, vol. 3, p.593

balance work and family commitments, and this should be a primary consideration when considering the need for regulation of part time hours.

8.40 The Labor Senators believe that section 89A(4)(b) should be repealed, and award provisions regulating minimum and maximum hours of work for part time employees that have been removed through the award simplification process should be restored by the Commission. The Labor Senators also agree with the recommendations of the National Pay Equity Coalition that the definition of 'regular part-time employee' in section 4 of the WR Act should be amended to read 'regular and predictable hours of work' rather than 'reasonably predictable hours of work'. The evidence presented to the Committee demonstrates that this existing protection is insufficient.

8.41 The Labor Senators also agree that a new provision should be introduced into the Act to ensure that employers of part time employees cannot unilaterally decide to reduce their hours or convert their jobs to full time status, as suggested by the National Pay Equity Coalition.

8.42 Regarding Victorian workers, the Labor Senators believe that the recommendations outlined elsewhere in this report (ie. that federal award coverage be broadened) will address the particular problems faced by Victorian workers with family responsibilities, in conjunction with our proposed changes to awards outlined above.

*Pregnancy and maternity leave*

8.43 The impact of the WR Act on pregnant workers has already been outlined in Chapter 7 on the 'Needs of workers vulnerable to discrimination'. However, in the context of assisting workers to balance their work and family commitments, some additional comments are relevant here.

8.44 It was reported that women had lost access to paid maternity leave since 1996, even though 'parental leave, including maternity…leave' remained an allowable award matter under paragraph 89A(2)(h):

> We were concerned in 1996 with the move towards reducing allowable matters in awards. Some of our fears have been realised. For example, the award simplification process so far has resulted in women losing employment rights such as paid maternity leave.[44]

8.45 The Community and Public Sector Union also told the Committee that some of its members in the former Commonwealth Employment Service have lost access to

44 Submission No. 429, Women's Electoral Lobby, National Pay Equity Coalition and Business and Professional Women Australia (NSW), vol. 20, p 4896

paid maternity leave as a result of the transmission of CES staff to a new Government owned corporation, Employment National.[45]

8.46 It is disturbing that paid maternity leave seems to be disappearing from awards, rather than being extended to cover more employees as working standards improve over time. It is clear that paid maternity leave is not being picked up to a great extent in agreements, as the Work and Family State of Play Report states that only 7% of certified agreements provide for paid maternity leave. Paid paternity leave is even less frequent, appearing in only 2% of certified agreements.[46]

8.47 It is matter of particular concern that the Commonwealth Government has sought to remove paid maternity leave entitlements from its own employees. The Government is clearly not attempting to lead by example to back up its family friendly rhetoric.

8.48 Some submissions also raised the possibility that employers are deliberately employing women as casual employees to avoid entitlements to paid and unpaid maternity leave. For instance, HREOC submitted:

> Due to the lack of solid data, speculative comment is the only option, but based on the concerns documented for this inquiry, it appears there are employers using casual employment status to avoid the rights and responsibilities associated with pregnant employees.[47]

> The vast majority of TAFE teachers are casual workers. The senior teachers, of whom there are far fewer, are permanent employees, and they are largely men. Then we have examples like one that came through where a casual supply teacher who had been there for two years continuously had a teaching load of four days, four hours and 15 minutes, which is half an hour short of a full-time teacher's load. So when she applied for maternity leave payment she was denied it on the basis that she was only a casual; she had never taught a full load. So what we see is people using the system to fall short by 15 minutes a day of what would then offer an entitlement that every other worker would be likely to be entitled to. That exploitation of a system or that calculated usage is something that we find quite unsavoury. It emerged over and over again with instances of women not being able to put their hand up for even unpaid maternity leave. When you see that the tenure for casuals has increased to 3½ years on average, and they are largely women, why is it that they are disadvantaged, have to leave and are not in a position to return to that job because of that status?[48]

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45 Submission No. 379, Community and Public Sector Union, Attachment C

46 Work and Family State of Play 1998, Work and Family Unit, Department of Employment, Workplace Relations and Small Business, p. 26

47 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p.5862

48 Susan Halliday, Sex Discrimination Commissioner, Evidence, Sydney, 26 October 1999, p. 376

8.49 The Queensland Government has recently enacted legislation to address this problem, by extending unpaid parental leave to casual employees who have worked for their employer on a regular basis for two years[49]:

> Probably the most significant initiative that is in the legislation that was not in earlier legislation is the extension of maternity leave to long-term casuals. A significant proportion of the casual work force are women. I think it is slightly less than a third. A significant number of casual employees are in fact employed on that basis on a long-term basis.[50]

8.50 HREOC also stated that the New South Wales Government had undertaken to amend the NSW Act to 'give long term permanent casual workers (ie those who have worked more than two years for an employer) access to maternity leave provisions.'[51]

8.51 HREOC recommended that access to maternity leave also be extended to casuals working under the federal jurisdiction:

> For the purposes of this submission to the Senate Employment, Workplace Relations, Small Business and Education Committee, HREOC reiterates recommendation 25…from the Report of the National Pregnancy and Work Inquiry…That the *Workplace Relations Act 1996* (Cth) be amended to extend unpaid maternity leave to casual employees employed for over 12 months.[52]

*Conclusion*

8.52 The Labor Senators agree that the issue of extending unpaid maternity and paternity leave to casual employees should be seriously considered at the federal level. Such legislative protection would ensure that workers can return to their jobs after having children, which will assist workers in balancing their work and family lives.

*Other issues*

8.53 Other submissions made particular comments about the impact of the WR Act on workers' family lives. Several ex-employees of the Gordonstone mine wrote to the Committee about their experiences under the deregulated bargaining system introduced in 1996, including some confidential submissions that unfortunately cannot be included in this report. The long running dispute between ARCO/Rio Tinto and their employees lasted for 22 months and resulted in the mass sacking of more than 300 employees, who were later found by the Commission to have been unfairly dismissed. The dispute took an enormous toll on the employees and their families. For example:

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49 Sections 16 – 18 *Industrial Relations Act 1999 (Qld)*

50 Marion van Rooden, Queensland Government, Evidence, Brisbane, 27 October 1999, p. 469

51 Submission No. 472, Human Rights and Equal Opportunity Commission, vol. 23, p.5857

52 ibid, p. 66

> I received my letter hand delivered by two security guards informing me that I had been sacked. Not long after this I was declared bankrupt. When I started this job I had two cars which we owned and a house I was paying off. At the end of Arco's carnage I had to sell the house and hand all the money…back to the banks. My wife and family now live together apart from me.[53]

8.54 The WR Act, with its emphasis on bargaining at the workplace level and a reduced role for arbitration of industrial disputes, has created a situation where intractable industrial disputes are occurring with disturbing regularity. Other long and damaging industrial disputes referred to in evidence before this Committee include those at the G&K O'Connor abattoir and the Australian Dyeing Company, and the 1998 waterfront dispute.

8.55 The impact that intractable industrial disputes have on families should not be overlooked in our assessment of the impact of the WR Act on work and family.

8.56 The Committee also received a submission from the New Zealand Council of Trade Unions regarding disturbing trends that are emerging from New Zealand, which has had a similarly deregulated industrial relations system since the early 1990s:

> [In New Zealand] there has been a bi-polar development in work and its impacts on the discharge of family responsibilities. For some, there is not enough work leading to inadequate incomes and an inability to attend to the financial needs of families. At the other end there is 'over work' resulting in families having too much work to attend the personal and emotional needs of family members. These complex trends apply not only within households but within communities (neighbourhoods) leading to cycles of social disadvantage (low rates of couple formation, inadequate outcomes, sub-standard housing, poor health status, low educational achievement, weak employability) which pass from generation to generation intensifying as they do.[54]

8.57 The Labor Senators are concerned that similar trends will occur in Australia unless the Government takes action to regulate hours of work. More standardised and regular hours of work are necessary to limit both underwork and overwork, and the socially dislocating effects of both phenomena.

**Amendments proposed in the Bill**

*Award clauses dealing with transfers between types of employment*

8.58 The Department's submission, which outlined how the WR Act was delivering family friendly work practices, stated that award reliant employees had access to a number of family friendly provisions:

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53 Submission No. 421, Alex Strudwick,

54 Submission No. 395, New Zealand Council of Trade Unions, p. 18

> The WR Act also maintains an effective safety net of fair minimum wages and conditions of employment through the award system. The protection afforded to workers with family responsibilities by awards is reflected in the WR Act through the inclusion of relevant allowable award matters, notably hours of work, personal/carer's leave, **parental leave** and type of employment (emphasis added).[55]

8.59 This submission is quite astounding given that later, at page 297, the Department also outlines the Government's proposal to prohibit award clauses about transfers from one type of employment to another, which will effectively rip the guts out of current award parental leave provisions.

8.60 An essential part of the standard award clauses that resulted from the Commission's Parental Leave Test Case is the right for employees to transfer to part time work during pregnancy and following the birth (or adoption) of a child, and to transfer back to full time work again when the employee's caring responsibilities have reduced. Otherwise, the employee's ability to provide financial support to their new family and the employee's career prospects will be severely impeded.

8.61 The Government merely explains that '[t]hese matters are more appropriately dealt with by agreement at the workplace or enterprise level.'[56]

8.62 This proposed amendment is considered in more detail in Chapter 7 of this report: 'Needs of workers vulnerable to discrimination'. However, the Labor Senators reiterate their strong opposition to the proposed amendment. It will reduce the ability of new parents to balance their work and family responsibilities and should be rejected.

*Part time hours of work*

8.63 The Bill proposes to re-enact current subsection 89A(4) of the Act in new paragraph 89A(3A)(j). As discussed in more detail above, this provision prevents the Commission from making awards that assist part time workers to manage their work and family responsibilities through regular and predictable hours of work:

> A large proportion of women work part time or casual hours because of the family responsibilities they are relied upon to meet, such as caring for children or elderly parents. It is often essential for part-time workers to work predictable hours so they can meet these responsibilities. The proposed amendments do not ensure regularity of working hours, but rather provide the opportunity for employers to make working hours less predictable.[57]

8.64 This new provision should be rejected.

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55 Submission No. 329, Department of Employment, Workplace Relations and Small Business, p. 214

56 ibid, p. 297

57 Submission No. 253, Kingsford Legal Centre, p. 7

*General comments*

8.65 The Bill would further limit the Commission's power to make awards, and would require employers, employees and the Commission to go through another round of award simplification to remove more entitlements from awards. Women, who tend to have primary responsibility for caring, are disproportionately reliant on awards. The Bill amendments will therefore tend to disadvantage workers with family responsibilities, who are already marginalised from the workplace as they normally work part time or casually and have less bargaining strength.

8.66 The HREOC Report *Stretching flexibility: enterprise bargaining, women workers and changes to working hours* found that:

> …the greatest protection for women workers will be in the maintenance and strengthening of minimum standards and protection through a comprehensive no-disadvantage test and the maintenance and strengthening of consultation requirements.[58]

8.67 The Government's approach to further limiting and reducing the award safety net would appear to ignore the complex interaction between awards and agreements through the no-disadvantage test. Arbitrary reductions in allowable award matters and limiting the scope of safety net wage increases will not only affect award workers, but it will also reduce the standard against which agreements and their provisions are tested.

8.68 HREOC recommends that the Government should provide 'a comprehensive no-disadvantage test in the context of properly fixed award conditions to provide the framework for enterprise bargaining to ensure that any increased flexibility in working time arrangements allows all employees…the opportunity to more effectively blend their work and family responsibilities…'[59]

8.69 The Labor Senators endorse this recommendation, and reject the Bill's approach to reducing the award safety net and no-disadvantage test standards. This is discussed further in Chapter 4 on the 'Standing of the Australian Industrial Relations Commission'.

8.70 Labor Senators also recommend that:

- transparency and review mechanisms for all forms of agreements be provided to ensure work and family provisions deliver their stated outcomes. Provisions such as flexible hours or spread of ordinary time should be closely examined to ensure that work and family responsibilities for current and future staff are enhanced; and

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58 *Stretching flexibility: enterprise bargaining, women workers and changes to working hours*, Sara Charlesworth, August 1996, p. 9

59 ibid p. 12

- priority also be given to the development of model Award and agreement provisions to assist employees balance work and family responsibilities.

# CHAPTER 9

# THE IMPACT ON JOB SECURITY, UNFAIR DISMISSALS, JOB PROSPECTS, THE PROTECTION OF EMPLOYEE ENTITLEMENTS AND CONDITIONS AND WHETHER THESE CAN BE IMPROVED

## Job Prospects and Job Security

9.1 The nature of employment in Australia has been transformed over the past 20 years, and especially over the past three years. The most significant element in this transformation has been the decline of what could be called traditional lifelong and standard-time employment and its displacement by less secure forms of employment such as casual, part-time, fixed term and other forms of contingent work.

9.2 Evidence to the Committee demonstrates that the pace of this change has picked up considerably over the past ten years. More insecure or precarious forms of employment have grown almost ten times the rate of growth in standard employment. From August 1989 to August 1999, the number of casual employees in Australia rose by 69 per cent and the number of other employees by 7per cent.[1] Between 1996 and 1998 alone, the number of full-time casual employees rose 10.5per cent and part-time casual employees by 3.6 per cent.[2] One in four Australians is now in casual employment.[3]

9.3 The extraordinary rate of growth of casualisation in Australia can be linked to various developments such as globalisation of the economy, corporate restructuring and development of new technology and new forms of work organisation. It can be linked also to labour market deregulation, which was the basic area of concern to the Committee. Evidence to the Committee demonstrates that, under present and prospective labour market deregulation policy, the growth in casualisation has led to an 'explosion in precarious employment without security or the entitlements which attach to permanent employment'.[4]

9.4 This development has led to the concern that a dual labour market is emerging in Australia, divided between those in standard jobs and those in non-standard jobs.[5]

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1 Submission no. 473, Queensland Government, Volume 23, p. 5947.

2 Dr Barbara Pocock, Department of Social Inquiry, University of Adelaide, Evidence, Canberra, 28 October 1999, p. 516.

3 Submission no. 496, Dr Pocock, Volume 24, p. 6191.

4 Submission no. 423, ACTU, Volume 19, p. 4352.

5 Submission no. 473, Queensland Government, Volume 23, p. 5950.

People in the latter category tend to have jobs at what has been called the boundary of employee and non-employee status, with unfavourable wages and working-time arrangements. They tend not to have the same rights and entitlements as those in standard jobs: less protection from awards, unions and tribunals, less access to structured training and less influence over how or how long they work. Though these jobs are not attractive to the bulk of unemployed people who want regular, full-time work, their 'increasing preponderance' draw in many of the unemployed.[6] 'Such workers are less likely to be productive if they have fears about job security, if their terms and conditions of employment are under threat, and if they do not have a right to fair treatment at work'.[7]

9.5 The apprehension and insecurity that go with precarious forms of employment apply with particular force to women workers and young people. Such issues and others that confront these workers are discussed in Chapter 7 of this report.

9.6 Labor senators strongly agree therefore with the view of the Queensland Government that this is a significant public policy issue that should be addressed through the industrial relations legislative framework.[8] A wide range of evidence to the Committee makes it clear, however, that neither the Act nor the Bill provides the wherewithal to address the issue. Indeed, the indications are that the effect of both is to aggravate the social and economic consequences.

> The proposals in this Bill take no account of this and other changes; instead they are likely to *increase* the growing number of Australians that are outside the protective capacity of agreements or awards and denied the genuine possibility of union membership and the capacity to bargain collectively.[9]

9.7 The Minister has argued that the growth in casualisation (and presumably therefore the need to deal with its consequences) has come to an end: '…you've just heard Leigh Hubbard say as a bald fact that casualisation has been rising. Well actually that is not true.'[10] Evidence to the Committee shows that the Minister is wrong.

> …this is the first time I have ever heard that claim made…Australia now has one of the highest rates of casualisation in the OECD, second only I believe to Spain. The rate of casualisation, according to ABS figures, is currently running at about 26per cent and that has increased…from something approximating 14per cent in the early 1980s….There may well be some individual pockets of the labour market where there have been

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6 Submission no. 165, Dr Iain Campbell and Prof Peter Brosnan, Centre for Applied Research, RMIT University, Volume 3, p. 680.

7 Submission no. 473, Queensland Government, Volume 23, p. 5946.

8 Ibid., p. 5950.

9 Submission no. 496, Dr Pocock, Volume 24, p. 6191.

10 ABC Radio, 18/8/99.

> trends in the opposite direction. But to make a broad claim that casualisation has been decreasing is without any substantive evidentiary basis that I am aware of.[11]

9.8 One witness has suggested that the Minister's comments are 'really in defiance of the ABS figures'.[12]

9.9 The explosion in precarious employment and the workplace experience that goes with it confirm the logical conclusion from the evidence that one of the effects of casualisation is mounting apprehension and insecurity among employees. The evidence demonstrates that this apprehension and insecurity is considerable, serious enough to engage the attention of a responsible government that should be interested impartially in balanced workplace relations. This is the view of the State governments that provided submissions and evidence to the Committee's inquiry.

> The Queensland Government recognises…that workers are less likely to be productive if they have fears about job security, if their terms and conditions of employment are under threat, and if they do not have a right to fair treatment at work…Industrial relations legislation needs to keep pace with (changes in the nature of employment) and new perspectives need to be developed. More of the same is not an option. Further labour market deregulation does not provide the response needed to address these issues.[13]

> The need to ensure that employees are properly protected is made greater by the growing incidence of various forms of "precarious" employment…Casual employees are much more likely than permanent employees to be excluded from standard benefits, receive lower rates of pay and be exposed to employment insecurity. Against this background, the objective should be to increase the protection available to workers, rather than diminish it further as would occur if the…Bill were enacted.[14]

9.10 We were therefore surprised by the Commonwealth Government's assertion through the evidence of the Department that, while the precarious nature of jobs has increased and workplace regulation withdrawn, 'perceptions of job security have continued to improve under the WR Act'.[15] The department's 'range of evidence', once the AWIRS95 data are excluded (because they actually refer to pre-1996 conditions), consists only of the Morgan Poll series data which show that perceptions of job insecurity 'have not changed dramatically' between 1975 and November 1998.[16] A more recent survey conducted by the Saulwick organisation for Job Futures

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11 Dr Richard Hall, Senior Researcher, Australian Centre for Industrial Relations Research and Training, University of Sydney, Evidence, Sydney, 22 October 1999, p. 250.

12 Dr Campbell, Evidence, Melbourne, 8 October 1999, p. 187.

13 Submission no. 473, Queensland Government, Volume 23, p. 5946.

14 Submission no. 520, NSW Government, Volume 26, p. 6921.

15 Submission no. 329, DEWRSB, Volume 11, p. 2249.

16 Ibid., p. 2250.

is reported also to have found a majority of respondents who are 'secure in their jobs'.[17] Without being critical either the Morgan Poll data, gained from telephone polling of 543 people, or the Saulwick canvass of 1,000 people, other more comprehensive polling produces quite different results.

9.11 A survey of 6,770 respondents in more than 100 industries conducted by ACIRRT for the ACTU in 1998 is an example.[18]

> The ACTU report arising from the survey (*Employment Security and Working Hours -- A national survey of current workplace issues*) found 'a significant perception by employees of increased job insecurity over the last 12 months…Key findings of the survey are:
>
> - One third of respondents said that there had been a decline in job security, with 23 per cent reporting a growth in casualisation, 23 per cent a growth in contract employment and 19 per cent increased fixed term employment. Fifty four per cent gave increased job security as a key workplace improvement.
>
> - Fifty nine per cent of casuals and sixty per cent of fixed term employees said that they wanted permanency.
>
> Apart from the inherent insecurity associated with these precarious employment forms, employees also miss out on a number of significant entitlements that are normally attached to permanent employment. Examples of this are:
>
> - Casuals do not receive annual leave, personal/carer's leave, parental leave, notice of termination or redundancy pay. In many cases they do not receive long service leave, even if they have been employed on a regular basis for the required length of time. The casual loading, which varies from 15 to 25 per cent, does not fully compensate for the loss of these entitlements.
>
> - Independent contractors also do not receive these entitlements, even in cases where the contract is for labour only.
>
> - Employees of contractors lose entitlements when the principal changes the contractor, even if their employment continues with the new contractor, as this has not traditionally been viewed as a transmission of business for the purposes of…the Act…[19]

9.12 The ACIRRT survey found that the issue of working hours was associated with the problem of precarious employment and job insecurity. This issue was

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17 *Sydney Morning Herald,,* 12 November 1999.

18 Submission no. 423, ACTU, Volume 19, p. 4511.

19 Ibid., pp. 4392-3.

characterised by increased unpredictability and insecurity of hours and either excessive or insufficient hours.

> …only one third of employees now work a 'standard' working week of 35-40 hours, while others work multiple jobs, are part-time wanting more hours, are unemployed or working unpaid overtime…[20]

> Sixty five per cent of respondents…reported an increased amount of work, 59 per cent reported greater stress and 56 per cent an increase in the pace of work over the past 12 months…[21]

9.13 The Queensland Government has also pointed out that a number of qualitative surveys (pointed) to the increased prevalence of job insecurity in the Australian community.

> For instance, the Middle Australia project conducted in 1997 produced survey data that pointed to some of the uncertainties and anxieties experienced in today's labour market. The survey found that 63 percent of people considered their income and job prospects were decreasing…[22]

> (These and the ACTU) figures suggest that regardless of economic indicators that show signs of improvements, if people feel insecure in their jobs then the appearance of a stronger economy has little meaning for them. This view is confirmed by recent community-based research that ANOP conducted for the Australian Industry group (ANOP, 1999). ANOP found that while the benefits of low mortgage interest rates and falling unemployment are recognised, positive comments are often qualified by fears such as job insecurity. During focus groups, ANOP regularly heard comments like:
>
> > *So the economy is meant to be in good shape. Okay. But I'm still struggling.*
> >
> > *So unemployment is meant to be falling. Okay but my job isn't safe…job security is a thing of the past.*
>
> The move towards a more deregulated system therefore has been associated with the growth of less secure forms of employment…The concern in recent times is that a dual labour market is emerging that is leaving behind many of those in non-standard, precarious employment. This is a significant public policy issue that the Queensland Government believes can and should be addressed through the industrial relations legislative framework.[23]

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20 Submission 423, ACTU, Volume 19, p. 4395.

21 Ibid., p. 4396.

22 Pusey, M., (1997) "Inside the Minds of Middle Australian (Findings From the Middle Australian Project on Incomes, Standards of Living and Quality of Life)", in Australia Quarterly, V.69 (4), pp. 14-21.

23 Submission no. 473, Queensland Government, Volume 23, p. 5947.

> As well as the stress created by uncertain work, this sort of employment can limit a worker's future options -- for buying homes, planning a family and household budgeting -- because of financial uncertainty. Many people become stuck in the vicious cycle of unemployment and casual, short-term low paid jobs. There is also a strong connection and a great deal of movement between low-skilled, insecure employment and short-term unemployment, especially among young people. Many of these find that opportunities for secure full-time employment are closed to them -- often casual employment does not appear to be a stepping stone to more secure employment.[24]

*Impact on employment security of the Workplace Relations Act 1996*

9.14 This and other evidence to the Committee demonstrates the close connection between the insecurity in the labour force and economic change that has brought about, among other things, the extraordinary growth in Australia of precarious employment. Labor senators do not argue that change should be resisted. What must be said is that it is the responsibility of good government to manage change and ameliorate its consequences. Evidence to the Committee shows that the Government's policy, as it is seen in the 1996 Act and the 1999 Bill by community organisations and others who are interested in the consequences, not only does not deal with these consequences but also that it will in many ways aggravate them.

> (The Act) has failed to address the changing nature of the labour market today, including the increase in female employment and the growth in casual, part-time and contract work employment…
>
> (It) has removed the protections available to those working in irregular, insecure forms of employment…the award simplification process…places under threat many important safeguards and conditions of employment, ignoring the fact that large numbers of workers, including any in low-paid, non-standard forms of employment, continue to rely on awards for their terms and conditions of employment.[25]

**9.15** This and other evidence to the Committee shows in other words that the Workplace Relations Act 1996, which eroded the protective capacity of the award system, reduced the powers of the Commission and the unions and left many employees to fend for themselves in bargaining for their wages and conditions, has had a particularly severe effect on those in precarious forms of employment. The Government claims that its next round of so-called 'reform' would create more jobs, bring about better pay and improve productivity and competitiveness. Evidence to the

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24 Submission no. 476, ACOSS,. Volume 23, p. 6071. See also Richard Hall, Evidence, Sydney, 22 October 1999, p. 256.

25 Submission no. 473, Queensland Government, Volume 23, pp. 5952-3. See also Submission no. 423, ACTU, Volume 24, p. 4391; Submission no. 499, Brotherhood of St Laurence, Volume 24, p. 6385.

Committee shows that it would entrench the inequity and disadvantage which the 1996 legislation created and which has caused so much apprehension and insecurity among employees.

*Impact on employment security from the proposed Bill*

9.16 In his second reading speech on the Bill, the Minister, explaining that workplace relations do not involve only economic considerations, said that they were 'also about human relationships, about fair dealing between employers and employees and about social considerations, such as getting the relationship between our work and family life better balanced and giving the many unemployed an opportunity to compete in the labour market'.[26] This next phase of reform therefore, while it would continue to maintain the safety net for the low paid and disadvantaged, would also provide more choice, eliminate centralisation and control and remove unjustified cost to employers. What his Bill actually proposes is:

- to further weaken the role and capacity of the Commission;
- to continue stripping back the award system and its capacity to protect working conditions;
- to inhibit effective independent scrutiny of individual agreements and discourage efforts to reach collective agreements;
- to put extra restraints on employees taking protected industrial action; and
- to obstruct unions from carrying out their responsibilities to protect their members' interests.

Award Stripping

9.17 A great deal of evidence came before the Committee on the implications of award simplification on workers vulnerable to discrimination. Outworkers in particular were highlighted as a category of workers who's situation could be jeopardised under the bill's proposals.

> The (TCFUA) was forced to conduct a test case to convince the…Commission to preserve the current clauses in the Clothing Trades Award that protects outworkers. The award simplification case for outworkers involved a lengthy and expensive court case…This case…achieved a successful outcome even though the Federal Government challenged the…case and argued to reduce award protection for outworkers…

26 Reith, P., House of Representatives, *Hansard*, 30 June 1999, p. 7852.

> The (Bill) will mean reviewing this lengthy process again. This will be both time and resource intensive for all parties…
>
> If this legislation is passed, the union will not be able to go into workplaces and check the records. This is a major concern. In the past, federal and state governments had inspectors who did this work but now this is no longer done. The union is the only organisation actively seeking to enforce award compliance in an industry long known for its exploitative practices. Further limiting unions' right of entry will make it easier for companies to break the law and remain undetected. It will allow sweatshops and exploitation to continue and increase.[27]

9.18 It was evident to the Labor senators that the most vulnerable sections of the workforce would be hurt most.

> Any further reduction in the number and range of allowable matters will remove entitlements from those vulnerable sections of the workforce who do not have the bargaining strength to negotiate agreements…
>
> 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…
>
> …there is no sustained case based on research and evaluation of the current system to justify the changes proposed in this Bill.[28]

9.19 As evidence to the Committee shows, this is not the way to 'fair dealing'. It is not the way to ensure 'a fair go all round'. It is not the way to bring about security in the workplace.

> …in its preoccupation with restructuring the influence of awards and unions, this Bill fails to deal with the most serious workplace and labour market problems facing Australia. In particular, the serious problems I think we should be concerned about are: firstly, casualisation and job insecurity; secondly, working hours; and, thirdly, the proliferation of low wage employment. Indeed, the bill on my estimation and the estimation of others, is likely to exacerbate these problems rather than ameliorate them. While average wage outcomes…have improved…wage inequality has increased. What we are seeing is a polarisation in the Australian labour market…
>
> Award stripping, the encouragement of Australian Workplace Agreements, the limitations on the role of the Industrial Relations Commission…will lead

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27 Submission no. 327, Fair Wear Campaign, Volume 10, pp. 1957-8. See also Submission no. 311, Good Shepherd Social Justice Network, Volume 8, pp. 1522-5; Submission no. 298, Dr Richard Hall/Ms Tanya Brotherton, ACIRRT, Volume 7, p.1423.

28 Submission no. 476, ACOSS, Volume 23, pp. 6073, 8.

> to increased wage dispersion and therefore to more inequality. The growth of casual and contract work and the decline of full-time permanent employment, with the rights, entitlements, protections and security that implies, has also been greatly affected. This Bill does nothing to address these problems, nothing to protect the conditions of casual workers and nothing to enable them to seek more security or better compensation for their insecurity or their access to career paths.
>
> …it is difficult to understand the further attacks on awards, the Commission and unions as anything other than ideology. It is difficult to see the logic of what is going on out there in the Australian labour market as justifying the Bill.[29]

9.20 It is important however, to note that other forms of employment which would not usually be considered precarious could be considered problematic. An example of this is provided by the AFP Association which drew attention in its submission to the continuing judicial indecision over whether or not a member of a police force is an employee, and consequently would attract protections under unfair dismissal legislation and other related matters.

> There has been much judicial division about whether or not a member of a Police Force is an employee.
>
> The uncertainty of the status of Police as employees is highlighted in the decisions of Marshall J. and Moore J. in Konrad and Ward respectively…There is, however, a clear risk that the courts may uphold the line of authority in Perpetual Trustees and decide that Police and AFP members are not employees for the purposes of the Workplace Relations Act generally, with the exception of Division VIA. This requires urgent clarification and should be considered as a matter for inclusion within any amendments to the Workplace Relations Act.[30]

*Conclusion*

9.21 Labor senators believe that job security is important for all workers. All workers should be covered by an industrial instrument. This includes workers not in a typical employment relationship, such as those in precarious employment and those whose employment may prove problematic in this area. Such workers include independent contractors (discussed in Chapter 11), outworkers and Police.

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29 Dr Richard Hall, Evidence, Sydney, 22 October 1999, p. 251. See also Submission no. 520, NSW Government, Volume 26, p. 6935.

30 Submission no. 507, Australian Federal Police Association, Volume 25, p. 6495.

## Employee Entitlements

9.22 The great majority of employers are diligent in setting up processes to meet their liability for accrued employees' entitlements in the event of insolvency. Over the past two years, however, there has been a spate of cases in which companies becoming insolvent have not put aside sufficient assets which would allow their employees to be paid their lawful accrued leave and other entitlements.

9.23 Some of these cases have become notorious because they have involved many employees being owed many millions of dollars, causing great hardship to them and to their families. Moreover, the hardship has been aggravated in some instances when company insolvency and the loss of employees' lawful entitlements have occurred in regional and rural centres which already suffer more than their fair share of economic and social disadvantage.

9.24 The Committee heard evidence from individuals who were able to relate their own personal experiences of such situations. The following is an example from Mr Anthony Dick:

> I was one of 100 people working at the Parrish Meats. I had been there for just under 10 years. I turned up for work on Monday, 16 August. I was called to the general manager's office by someone I did not know. I was told that he was a liquidator appointed by the court and that Parrish Meats was closing down. I was informed by the liquidator that it would be appropriate for me…to leave the premises immediately…
>
> …
>
> We would come out of this closure being paid annual leave, long service leave and superannuation. I would not get their seven per cent, which they were supposed to be paying for me. It had not been paid for quite a while. There was no provision for the breach of contract. I would not be getting that. I would also not be getting my redundancy pay either, which brings to a total the amount of over $22,000.
>
> As of this date, I have not received anything at all…There are more meetings to come, and I am still a bit concerned at this point whether or not I am going to get my annual leave and long service leave as an entitlement. I have just about written off the rest of it. I have virtually been told that there is no money there, that I cannot get it . It has also been indicated to the rest of the workers that, if they do not take this, they might not get anything at all, which I think is very unsatisfactory and, as I said, I had been there for probably a couple of weeks under 10 years.[31]

9.25 The Government has responded to this trend by producing a discussion paper which proposes two options for protecting employees' entitlements in the event of company insolvency.

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31 Mr Anthony Dick, Evidence, Sydney, 22 October 1999, p. 262.

9.26 The Government's discussion paper identifies options for dealing with this issue which require the use of taxpayer funds. Both its Basic Payments Option and its Compulsory Insurance Option are inadequate in that neither of them will protect 100 per cent of employees' entitlements.

9.27 Not only is it unacceptable that the Government has taken so long to produce the discussion paper, either end result is seen as inadequate by some.

> With regard to protection of employee entitlements, we say that the ministerial discussion paper on this topic is an important step forward, and we do not shrink from that, but at the same time we underline that it falls far short of what we regard to be an equitable system. The basic approach that we have here is the requirement that any legislative change should ensure full payment of accrued entitlements. That is the point that we would underline.[32]

9.28 For a smaller call on taxpayers, Labor has put forward a third option which could offer a better, more comprehensive, less cumbersome and less bureaucratic solution. Moreover, though it envisages 100 per cent protection of employees' entitlements as against the Government's limited protection, it could be more affordable.

9.29 The Committee received limited evidence on the issue of protecting employee entitlements in the case of corporate insolvency, it appeared to be overwhelmed by the broad scope of this inquiry. The Labor senators therefore maintain the position that the issue of protecting employee entitlements in the case of corporate insolvency should, as a priority, be looked at closely through a separate committee inquiry.

## Unfair Dismissals

9.30 In this climate of precarious and contingent, and therefore insecure, employment and in light of convincing evidence to the Committee that has been discussed above, we say that, in both the Act and the Bill, the law relating to unfair dismissals is harsh and unfair to employees.

### *1996 changes*

9.31 The present Government came into office with a policy to abolish altogether the previous Government's unfair dismissal regime. In the event, it did not go so far, putting in place instead in the Workplace Relations Act 1996 and other legislation various changes to the unfair dismissal provisions of the *Industrial Relations Reform*

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32 Mr Bruce Nadenbousch, Association of Professional Engineers, Scientists and Managers, Australia, Evidence, Perth, 25 October 1999, p. 332.

*Act 1993*. These changes effectively narrowed opportunities for employees seeking remedy from unfair dismissal through such provisions as:

- excluding from protection under the law numbers of employees, including casuals;
- introducing new costs and charges for applicants;
- limiting access to conciliation and arbitration of applications; and
- transferring the onus of proof in determining applications from employers to employees.

9.32 The consequences for employees is that the first ever rights-based regime of remedy for unfair dismissal has been reduced to what has been described to the Committee as one of only 'minimalist protection'.[33]

9.33 The Committee has received considerable evidence of the consequent significant and negative impact on employees from community and other organisations which represent disadvantaged employees and which are not directly concerned with the clash itself of workplace interests so much as its effects. This evidence shows that in significant respects the 1996 legislation actually denies the guiding principle in S170CA(2) of a fair go all round, the establishment and support of which had been specifically pledged by the Prime Minister before the election that year.

9.34 The intracacies of the process, of seeking remedy from unfair dismissals are covered below.

Eligibility

9.35 The broadening of categories of employees who are inelegible will lead to a grossly unjust and unfair system.

> The broadening of classes or categories of employees who are deemed to be ineligible...has widened the net of workers who have no statutory rights to have their claims heard and assessed on their merits...
>
> In particular, the extension of ineligibility relating to casual and fixed term employees has a considerable impact...on the numbers of employees being able to access the termination provisions...
>
> The rationale for the exclusion of trainees on registered training agreements is also problematic given the extensive concessions and financial assistance provided to employers when they employ a trainee...

33 Submission no. 462, Turner Freeman Solicitors, Volume 22, p. 5650.

In the experience of Job Watch many employees who would otherwise have strong arguments in relation to the unfairness or unlawfulness of their dismissal are automatically denied access to the process because of these technical and arbitrary exclusions. We highlight these 2 specific exclusions because their impact on our client base is more apparent. However, in our view the whole area of exclusion needs to be revisited and its rationale assessed.[34]

## Costs

In circumstances where the government regulates the operation of the labour market by establishing a private legal right of action to individual workers, the cost involved in enforcing this right is a major issue of concern.

Employers can obtain costs against employees in circumstances where the Commission has begun arbitrating a claim, and:

- the application is made vexatiously or without reasonable cause; or
- the applicant acts unreasonably by failing to discontinue the application; or
- the applicant discontinues the application
- the applicant acts unreasonably by failing to agree to terms of settlement that could lead to the discontinuance of the matter.

In contrast, Employees can only obtain costs against employers where the Commission has begun arbitrating, and:

- The respondent acts unreasonably by failing to agree to terms of settlement that could lead to the discontinuance of the matter.
- The respondent acts unreasonably by failing to discontinue a jurisdictional objection.

Therefore, the current cost regime clearly favours employers and, according to the explanatory memorandum accompanying the Workplace Relations and other Legislation Bill 1996, was motivated by a desire to 'discourage applicants from making applications which are without reasonable foundation.' The current regime is unfair to employees and should be modified. Currently, the system fails to provide applicants with adequate opportunities to seek redress against respondents for vexatious or unreasonable conduct in the course of proceedings. In addition, the extremely limited amount of compensation available to arbitration for

34 Submission no. 398, Job Watch, Volume 14, pp. 3241-2. See also Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6160.

> successful applicants is further eroded by the fact that applicants must bear their own costs in asserting their legal rights.[35]

Filing fee

9.36 The introduction of a filing fee for the application of an unfair dismissal claim aims to discourage spurious or unmeritous claims. The major objection to such a fee is that a real cost barrier is imposed up on those dismissed employees with genuine claims from achieving justice.

> While it is assumed that filing fees discourage spurious applications or those without merit these claims are often unsubstantiated, and in fact act as a barrier to justice. Furthermore, these fees are often imposed at a time of considerable stress and hardship. There is an important argument for the removal of the filing fee altogether. In both the Victorian and federal anti-discrimination jurisdictions there is no filing fee for applications. Neither jurisdiction complains of speculative or spurious applications.[36]

> Taken together (the filing fee and costs provisions) act as a real barrier to a dismissed worker irrespective of the merits of the claim. A worker who has been unfairly dismissed, who is not generating an income, is not sure where his/her next income is coming from, who is not in a position to engage legal counsel is clearly in a disadvantaged position under these proposals. They are heavily weighted against employees...The imposition of a cost barrier is in breach of the requirement that a terminated employee is entitled to an avenue of appeal regarding the dismissal as is shifting the onus of proof from the employer to the employee.[37]

Time limit for applications

> Under the previous Industrial Relations Act 1988 the time limit for applications was 14 days after written notice of termination was received by the employee. Under the Workplace Relations Act 1996 this was amended to 21 days after the termination takes effect.

> The difference...is significant. The former requirement for notice to be in writing placed an important obligation on employers to confirm to the employee the reason why they were being dismissed. The Parliament and the courts and Commission has consistently accepted that it (is) an element of natural justice and due process that employees be given a reason for their dismissal...

> The period of the time limit itself also demands attention given that it would have to be one of the shortest time periods for filing legal proceedings of

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35 Submission no. 412, Slater and Gordon Solicitors, Volume 16, p. 3508. See also Submission no. 519, McDonald Murholme, Volume 26, pp.6914-5.

36 Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6161. See also Submission no. 398, Job Watch, Volume 14, pp. 3244-5.

37 Submission no. 172, Liberty Victoria - Victorian Council of Civil Liberties, Volume 4, p. 815.

> any jurisdiction not only in Victoria, but in Australia. Whilst the need for applicants not to sit on their rights is understood and appreciated, the justification for such a short time limit is not compelling.[38]

9.37 These are significant, substantial and so far unanswered charges as to the partial and inequitable ways in which the 1996 legislation set out to limit access by employees to fair and affordable remedies against unfair dismissal. Accordingly, Labor senators concur with the judgment of the Fitzroy Legal Service that the 1996 legislation had 'severely impacted on the balance of interests between employees and employers in the employment relationship',[39] especially as far as they concern unfair dismissals.

*1999 proposals*

9.38 Nevertheless, the Government has judged the 1996 provisions to be good and fair. The Coalition declared in its policy for the 1998 election that, as the result of its unfair dismissal changes, the number of applications against employers had fallen by 49 per cent in the federal jurisdiction and by 18 per cent in all jurisdictions ('More Jobs, Better Pay', September 1998). In the same policy document, however, it also argued that:

> ...unfair dismissal laws are still holding back job creation and deterring employers from taking on new employees. The reform of unfair dismissal laws needs to go further, if unemployed Australians and young people are to get new job opportunities."

9.39 In subsequent public debate, throughout the course of two Senate inquiries and the introduction of its 1999 proposals, the Government has neither explained this extraordinary contradiction nor provided evidence for its position that less protection against unfair dismissal means more jobs.

9.40 It was noticeable that in introducing the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill, Mr Reith did not take the opportunity to explain the Government's assertion that 'unfair dismissal laws are still holding back job creation'. Instead, he spoke only of the need to ease the 'burden' on employers, especially small and medium businesses. In doing so, he probably revealed more of the Government's intent than he meant. The evidence to the Committee on the consequences of the Bill makes it absolutely clear that the Minister's proposals will ease the burden on employers for the most part by unfairly increasing it for employees.

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38 Submission no. 398, Job Watch, Volume 14, pp. 3243-4. See also Submission no. 477, Maurice Blackburn Cashman, Volume 23, pp. 6089-90; Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6161.

39 Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6160.

9.41 We oppose the proposals listed below. As the following evidence shows, they are not only profoundly unfair but they will also add complexity and impracticality to what is still basically -- despite the 1996 changes -- a relatively uncomplicated system.

Exemption of small business

9.42 In his second reading speech, Mr Reith included among seven major objectives for the Bill the removal of 'red tape and unjustified cost, especially from small and medium sized businesses, including in the area of unfair dismissals'. At no point in the speech did he give any reason or any information for the reason for this objective, which is not surprising perhaps given the paucity of his argument the last time he advanced it, during debate on the Workplace Relations Amendment (Unfair Dismissals) Bill 1998.

9.43 It is clear that the Government has two significant problems here. One is that the reasons for exempting from the unfair dismissal provisions is business employing 15 or fewer people are so threadbare, as his second reading speech shows. The other is that he is getting little concrete assistance in this regard from the small business sector, as evidence to the Committee shows. Certainly, the evidence from practitioners and community organisations involved in representing employees in unfair dismissal cases shows that they are not impressed by the proposal.

9.44 The NSW Government's submission is of the view that:

> The proposal to include consideration of the size of a business when determining 'harsh, unjust or unreasonable' should not be pursued. Fairness should be a standard that all workers are entitled to expect. Access to tribunals and unfair dismissal laws should apply equally to all employees, regardless of whether their employer is large or small.[40]

> The Fitzroy Legal Service considers that the intention of the (proposal) is to weaken the obligation on small businesses and enterprises in regards to providing procedural fairness to employees. We are concerned that any diminution of this obligation sends the wrong message to smaller employers who, from our understanding are already over-represented in termination of employment matters. If passed, this amendment would further discourage small employers from conducting termination processes with fairness and due process.[41]

Costs

9.45 The Minister's second reading speech provides no real explanation of the costs proposals in relation to unfair dismissals, saying only in the context of his intent

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40 Submission no. 520, NSW Government, Volume 26, p. 6928.

41 Submission no. 484, Fitzroy Legal Service, Volume 24, p. 6162. See also Submission no. 369, Redfern Legal Centre, Volume 12, p. 2516; Submission no. 477, Maurice Blackburn Cashman Lawyers, Volume 23, pp. 6085-6; and Submission no. 462, Turner Freeman Solicitors, Volume 22, p. 5654.

to ease further the 'burdens' on employers that 'access to costs will be widened'. Costs, of course, are among the most influential of the factors involved in the question whether or not employees are able to gain the protection of a law whose guiding principle is 'a fair go all round'.

9.46 Evidence to the Committee makes it absolutely plain that the Government's costs proposals will put the law out of the reach of employees who, though they may believe that they have been unfairly or unlawfully dealt with, are without the means to obtain help in a jurisdiction where legal aid is not available.

9.47 The bill proposes to incur costs against applicants without 'substantial prospects of a successful claim'. Only the applicants are subject to the threatened costs, which in addition to the filing fee serves to deter workers from accessing claims.

> The threat of costs being awarded against people who are often in hardship situations is an attack on appropriate levels of access to justice and further complicates a process that disadvantaged applicants very often find stressful and overwhelming. The possibility of costs being awarded in addition to a proposal to increase the application fee will reduce the number of claims amongst those most in need of the protection of sound unfair dismissal laws which emphasise natural justice. [42]

9.48 The proposal that the Commission may order an applicant (worker), but not a respondent (employer) to provide security for payment of costs has been described as 'particularly pernicious'.

> This amendment places an unreasonable burden on applicants because
>
> - there is no corresponding provision for respondents to provide security for costs, thus the provision is directly discriminatory; and
>
> - in many cases applicants would simply not be able to afford to comply with this requirement. Even if the amendment applied equally to applicants and respondents, it is far more likely that an applicant would be disadvantaged by this requirement than a respondent.[43]

9.49 Not only would the costs proposals act to make the system unfair: they would also act to undermine the objective (if indeed this is the objective) that the system provide a relatively uncomplicated as well as affordable method of settling disputes.

> (The proposals) will in practice see far more respondents making applications for costs on the basis that it will actively discourage the

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42 Submission no. 520 NSW Government, Volume 26, p. 6928. See also Submission no. 369, Redfern Legal Centre, Volume 12, pp. 2516-7; Submission no. 412, Slater and Gordon Solicitors, Volume 16, pp. 3511-12.

43 Submission no. 412, Slater and Gordon Solicitors, Volume 16, p. 3509. See also Submission no. 477, Maurice Blackburn Cashman Lawyers, Volume 23, p. 6095.

> applicant from pursuing their claim because of the risk of an order for security being made by the AIRC. Administratively, this will place an increased burden on the AIRC.[44]

9.50 Job Watch in fact has recommended that these proposals not be passed into law because of its concerns that they would

> …result in respondents making vexatious, punitive or speculative cost applications, simply in order to deter claims.[45]

9.51 Slater and Gordon Solicitors is of the view that:

> (The proposals to subject conciliation proceedings to costs) would have a detrimental effect on the effective operation of the conciliation process and impede the rigorous processing of claims.
>
> The amendments provide that applications that are discontinued prior to an election to proceed to arbitration may be subject to an application for costs. This would have a detrimental effect on the efficiency of the system and the practical handling of claims by applicants...(and) would undermine the practicality, workability and fairness of the system...
>
> (The proposal that settled claims should be subject to costs) should not be implemented for practical and policy reasons.
>
> - In practice, settlement agreements will include a term indicating that neither party will seek to have costs awarded against the other. If such a term is not included, it is likely to be due to the inexperience or lack of legal knowledge of one or the other parties.
>
> - On policy grounds, the philosophy and purpose of a settlement is to resolve the dispute between the parties. Allowing that resolution to then be the subject of further legal action is antipathetic to the resolution. [46]

Constructive dismissal

9.52 New s.170CDA proposes that if an employee resigns as a result of the conduct of the employer the employee must establish that the employer:

> a) Indicated that the employee would be dismissed if he or she did not resign
>
> b) Had engaged in conduct that the employer intended to cause the employee to resign.

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44 Submission no. 398, Job Watch, Volume 14, p. 3254.

45 Ibid., p. 3255.

46 Submission no. 412, Slater and Gordon Solicitors, Volume 16, pp. 3509-11.

9.53 The onus of proof is thus shifted from the employer to the employee in adducing evidence of proving the employer's intention.

> This subverts the purpose of the unfair dismissal law, the object of which is to provide an employee with a remedy where the termination of the employment relationship is against the will of the employee and unfair...
>
> The amendments cut down the scope of the law on termination at the initiative of the employer and exclude the common law doctrine of constructive dismissal. The objective of the unfair dismissal law is to remedy unfairness in employment not perpetuate and reward the arbitrary exercise of power by an employer who by its conduct deprives an employee of their employment. The proposed amendments to the law on termination at the initiative of the employer are misconceived and are likely to lead to injustice.[47]

9.54 From their experience in this area, Job Watch was able to elaborate further on constructive dismissal provisions.

> Job Watch provides assistance and representation to many workers who have been constructively dismissed. The decision by an employee to leave their place of employment because of the untenable working environment/situation is invariably an extremely difficult action for that worker to take. In our experience, workers are far more likely to try and tough out the conditions and hope the situation improves, rather than make a spontaneous, although very understandable decision to leave. Employment is fundamental to a worker's economic and financial security and it (is) false to assume such decisions are taken lightly or for vexatious reasons.
>
> The link in the Bill between the...course of conduct, and the employer's intention is problematic in the many cases where employees have ceased employment because of onerous or untenable conditions at work. Job Watch regularly represents workers who have been forced to leave their employment because of: workplace harassment and discrimination; workplace violence; victimisation; and serious breaches of occupational health and safety standards. These are, unfortunately, not isolated cases. In many matters, the employer personally had knowledge of and/or participated in the incidents or should have had knowledge of them especially if they had properly monitored health and safety conditions in the workplace.[48]

Operational requirements

9.55 The Bill proposes to exempt relief of employers from unfair dismissal claims on the grounds of 'the operational requirements of the undertaking, establishment or service', regardless of the capacity, conduct, skill, or experience of employees. This

47 Ibid., pp. 3516-7.

48 Submission no. 398, Job Watch, Volume 14, pp. 3246-7.

contravenes the right to contest the fairness of termination by workers, and opens the way to exploitation and injustice for employees in the following ways.

> ...the proposed amendment will result in injustice to employees in the following situations:
>
> 1. where employees are, in fact, selected for redundancy for a reason which has no foundation;
>
> 2. where employees are, in fact, selected for a reason unrelated to their conduct, capacity or performance;
>
> 3. where the selection process used by the employer, in fact, breaches workplace agreements regulating retrenchment; and
>
> 4. where the real reason for selection involves the employee's history of workplace activism such as pursuing occupational health and safety issues or union rights.
>
> ...operational requirements should not be used as a threshold issue with which to remove the legal entitlement of employees to access the jurisdiction.[49]

9.56 Compounding these injustices is the fact that employees dismissed on operational grounds are not in any practical position to check the validity of the above reasons.[50]

Time limit for applications

> Currently the Commission has a broad discretion under section 170CE(8) to allow out of time applications in circumstances where it would be unfair not to do so...[51]

9.57 The current Bill proposes that the acceptance of late lodgements now satisfy 'exceptional' circumtances. The proposed amendments make it more difficult for employees to access fair outcomes as should be oversee by the unfair dismissals jurisdiction. The time limit does not consider the difficulties faced by NESB, migrants, those applicants with disabilities, those applicants subjected to constructive dismissal and those from remote areas.

> The 21-day time limit for lodging applications under the current legislation has been a major disadvantage to unfairly dismissed employees...The proposed amendment is unfair, unnecessary and would eliminate a large number of meritorious claims on an arbitrary basis. Such a provision would certainly not provide a "fair go all round."

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49 Submission no. 477, Maurice Blackburn Cashman Lawyers, Volume 23, pp. 6081-2.

50 See Submission no. 398, Job Watch, Volume 14, pp. 3249-50.

51 Submission no. 477, Maurice Blackburn Cashman Lawyers, Volume 23, pp. 6088-9.

> ...It should be borne in mind that an employee has six years (with the possibility of an extension of time) to file a wrongful termination claim in the civil courts. The 21-day time limit, if anything, should be substantially increased to ensure access to employees, particularly those with additional barriers to accessing legal advice (for example rural employees, migrants or employees with disabilities*).*[52]

Merits review/Dismissal of claim at conciliation

9.58 The Bill proposes that:

> The AIRC will be required at the conciliation stage to make a finding as to whether or not a claim is likely to succeed, with the employee stopped from having the claim arbitrated if the Commission says it is unlikely to succeed.[53]

9.59 Several concerns arise out of such a proposal. It is procedurally unfair that judicial power be exercised to make an assessment at the conciliation stage. Arbitration is not predictable and the informality of conciliation conferences are not suitable for testing the veracity of matters. For example, witnesses are not called. Jobwatch[54] also points out that an applicant would have no avenue of appeal if a conciliator assessed their case as unlikely to succeed.

9.60 The merits review of unfair dismissal claims at conciliation is not supported by employer and employee groups alike.

> Ai Group wholeheartedly supports the objective of introducing greater rigour into the processing of 'unfair dismissal' applications, however, it believes that the mechanisms proposed...may frustrate rather than promote these objectives...
>
> Current practice is that conciliation conferences are relatively informal proceedings, with applicants and respondents making unsworn statements giving a summary of the facts as they know them and an indication of their attitude toward various forms of settlement. In the great majority of cases, such a process is not suitable for testing the veracity of the matters stated by the parties to the extent required to support a finding on the balance of probabilities.[55]

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52 Submission no. 412, Slater and Gordon Solicitors, Volume 16, pp. 3517-8. See also Submission no. 462, Turner Freeman Solicitors, Volume 22, p. 5652.

53 Submission no. 369, Redfern Legal Centre, Volume 12, p. 2516.

54 Submission no. 398, Job Watch, Volume 14, p. 3254.

55 Submission no. 392, Australian Industry Group, Volume 14, p. 3092. See also Submission no. 412, Slater and Gordon Solicitors, Volume 16, p. 3523.

Contingency fees

9.61 The Bill proposes that practitioner's disclose whether cases are conducted on a 'no win, no fee' contingency basis.

> The rationale for (the proposal) is not revealed in the..Explanatory Memorandum. It appears (it) has its genesis in the Australian Democrats' Minority Report (on the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 which stated that) "cases being conducted on a 'no win, no fee contingency (sic) basis should be a matter of public record".
>
> While the jurisdiction is prima facie a no costs one, the Commission does have power to award costs in some circumstances, including a power to award costs on an indemnity basis. The terms and basis on which contingency agreements may be entered into...are governed by legislation and/or the ethical rules of the Bar in each state. There is no justification for the imposition of an additional requirement that practitioners disclose the basis on which their services are engaged...The basis on which a legal practitioner is retained reveals nothing about the merits of the case of the party in question, nor can it be relevant on the question of costs.[56]

*Conclusion*

9.62 Labor senators agree with these criticisms by practitioner and community organisations of the ways in which the proposed amendments act to limit and obstruct access to fair and affordable remedies against unfair and unlawful dismissal. Taken together, these proposals would:

- cut off claimants from sources of financial and legal support,
- force them to represent and defend their own interests,
- make the system more complicated,
- make settlement more legalistic, and
- tilt the balance of influence in unfair dismissal cases squarely and thoroughly on the side of the employer.

9.63 For these reasons, Labor senators oppose the amendments.

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56 Submission no. 463, The Victorian Bar, Volume 22, pp. 5671-72.

# CHAPTER 10

# VICTORIAN WORKERS

*An allegedly unitary industrial system that has such inherent contradictions as two '*safety nets*', which operate according to the form of the industrial regulatory instrument seems, at least, perverse.*

Victorian Government, November 1999

## Introduction

10.1 Victorian employees are currently serving as guinea pigs in an experimental deregulation of most employment conditions. In 1995, the Kennett Government abolished all Victorian State awards. Then, from 1 January 1997, the former Victorian Government referred most of its industrial relations powers to the Commonwealth Government.

10.2 However, this referral of powers has not resulted in Victorian employees receiving the benefits of safety net standards that apply to other workers under the federal jurisdiction. Instead, a completely separate federal system has been established for those workers unable to access federal awards, the equivalent of a federal industrial relations 'ghetto':

> There was a common perception by many members of the Victorian community…that the transfer to the 'federal system' would bring with it the extended benefits associated with federal award terms and conditions…In reality, however, the handover reflected a minimalist approach with a direct incorporation of Schedule 1 of the *Employee Relations Act 1992 (Vic)*…into Schedule 1A of the *Workplace Relations Act 1996*…The incorporation of Schedule 1A in this manner had the consequence of, for those employees covered by it, enshrining in federal law, the lack of statutory entitlements in a broad range of matters, including: paid bereavement leave; jury service leave; paid overtime; penalty rates and loadings; spread of hours; allowances; accident makeup pay; severance payments on redundancy; minimum and maximum number of hours (not an exhaustive list).[1]
>
> Never forget that we do not have a state system in this state. We have, I would estimate, up to 750,000 workers who do not have much more applying to them than a minimum hourly rate of pay for 38 hours, no guarantee of overtime and certainly none of the rights and conditions that those under either a federal or a decent state award system would have. I understand it is estimated in the retail industry that a worker in this state

1 Jobwatch Inc, Submission No. 398, p. 3

> employed in a shop is 25 per cent worse off than a colleague working down the road doing the same work who is under a federal award. That is an outrageous state of affairs in a country like Australia where we think there should be a fair go for all.[2]

## Impact of the Workplace Relations Act

10.3 Minimum terms and conditions for Victorian employees not covered by federal awards are now established under the WR Act – Part XV and Schedule 1A. These provisions give Victorian workers just five conditions of employment:

- four weeks paid annual leave;
- one week paid sick leave;
- a minimum wage;
- unpaid maternity and paternity leave; and
- notice of termination or compensation in lieu.

10.4 Jobwatch estimated that approximately 40% of Victorian workers are not covered by federal awards and rely on the five minimum conditions established by Schedule 1A:

> …the 1996 hand over of most industrial relations powers to the Commonwealth created a situation where not all Victorian workers were automatically covered by federal awards. We still have a number of workers who are not within the federal award system…in Victoria, 40 per cent of Victorian workers only have five rights… In Victoria there is a huge disparity in the employment conditions between those covered by federal awards and agreements and those covered by schedule 1A. It is a situation of great injustice where some Victorian workers have conditions that are so much better than others, and the ones with the worst are the ones that are the most vulnerable and the ones that are not organised—they are not in unions.[3]

10.5 The Inquiry was presented with evidence of widespread exploitation of Victorian workers who are covered by Schedule 1A conditions. For example, a Victorian hairdresser gave the Committee a brief explanation of his situation under Schedule 1A:

> I work on average between 45 to 50 hours in a given week. There is no choice on this. It would seem to me that the people who wrote the provisions for Victorian minimum standards do not understand that it is not normal for a full-time hairdresser on minimum conditions to simply work 38 hours. Shops are open for trade these days for 65 hours a week. The days

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2 Leigh Hubbard, Victorian Trades Hall Council, Evidence, Melbourne, 7 October 1999, p. 64

3 Wendy Tobin, Jobwatch Inc, Evidence, Melbourne, 8 October 1999, p 176

> and times that I am expected to work include one, and sometimes two, 12-hour shifts Saturday and Sunday, all with only half an hour for lunch. These working days at times include public holidays but I am told by my employer that, if I do not work, I will not get paid for the holiday. Penalty rates and overtime simply do not exist. I cannot afford not to work. As an employee, I do not have a choice but to work these hours on a flat rate of pay.[4]

10.6 Not only are Victorian employees covered by Schedule 1A conditions not entitled to overtime or penalty rates, there is actually some doubt as to whether they are entitled to be paid for any hours worked over 38 hours a week, due to the 'minimalist' approach to setting wage rates. A Victorian barrister submitted:

> …I have had cases where employees in the hospitality sector in provincial towns with high rates of unemployment have been working up to 70 hours a week with no additional pay for hours worked beyond 38 hours![5]

10.7 Compounding problems for Victorian employees is the fact that in 1996 the Government overlooked the need to give federal officers the power to investigate or prosecute breaches of Schedule 1A minimum conditions:

> When the WR Act was amended by the *Workplace Relations and Other Legislation Amendment Act (No. 2) 1996*, no provision was made to allow the Department's authorised officers to enter into workplaces where the terms of employment of employees were governed by contracts of employment underpinned by the minimum conditions of employment contained in Schedule 1A. Nor was provision made for the Department's authorised officers to bring actions under sections 178 and 179 of the WR Act in respect of breaches of the Schedule 1A minimum conditions of employment.[6]

10.8 This has allowed employers in Victoria to breach even the very basic protections afforded by Schedule 1A:

> The department effectively does not prosecute employers who breach [Schedule 1A]. Our organisation decided to outline these problems because we trust that the Committee will recommend that the problems be addressed…There have been no prosecutions at all in Victoria with regard to schedule 1A workers…The Department of Employment, Workplace Relations and Small Business does not believe it has the power to prosecute—it is a matter relating to the difficulty with referral of powers.[7]

10.9 An additional problem that has been highlighted in this Inquiry relates to some employees who were excluded from the referral of industrial relations powers by

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4 Mark Brown, Evidence, Melbourne, 8 October 1999, pp. 183-4

5 Peter Holding, Submission No. 19

6 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p. 358

7 Wendy Tobin, Jobwatch Inc, Evidence, Melbourne, 8 October 1999, pp. 177 and 182

the Victorian Government. On the referral to the Commonwealth, certain matters were reserved, including matters pertaining to discipline or termination of law enforcement officers. Law enforcement officers are defined to mean a member of the police force, police reservists, police recruit or protective services officer. The effect of the current Act is to force police back into an inadequate or non-existent jurisdiction, with no rights on termination.

10.10 In effect the Commonwealth has left the extent to which it meets its obligations under the ILO Convention on Termination to Victoria. The Commonwealth has failed to meet its international obligations by abrogating its responsibility to the State of Victoria and by failing to ensure that the Victorian system with respect to 'law enforcement officers' meets the minimum standards established by the ILO Convention on termination.

10.11 The evidence demonstrates that the WR Act has failed to provide adequate protection to Victorians not working under federal awards. The new Victorian Government has expressed it serious concerns with the legislation:

> It is manifestly clear that the current Part XV/Schedule 1A 'safety net' arrangements in the WR Act are unfair to Victorian workers. Victorian workers, who are subject to these provisions, have a demonstrably inferior safety net protection compared to all other Australian workers covered by the WR Act.[8]

10.12 Over the last few years, Victorian unions have attempted to alleviate the situation by extending federal award coverage to as many Victorian employees as possible. However, in small workplaces that are not unionised, this is very difficult:

> In 1993-94 we took probably about 400,000 to 500,000 people from the state system into the federal system to protect them. The only reason we have not done more is the constraints on unionists to organise workers into roping in small employers in particular.[9]

*Conclusions*

10.13 40 per cent of Victorian employees have fared very badly under the WR Act. Employees working under Schedule 1A minima do not even have access to minimum federal safety net conditions:

> Contrary to the claims of the Prime Minister that no Australian worker would be worse off, the case studies presented here show that workers have been profoundly disadvantaged by the WR Act 1996. This is especially true in Victoria, where approximately 40-45% of the workforce have their minimum entitlements determined by the 5 conditions nominated by Schedule 1A of the Act. Several of the case studies show that even these

8 Victorian Government, Submission No. 542 p. 4

9 Leigh Hubbard, Victorian Trades Hall Council, Evidence, Melbourne, 7 October 199, p. 68

> minimum conditions are breached, and the absence of effective remedies leaves workers powerless to enforce their nominal rights under the legislation.[10]

10.14 Unions have managed to improve the situation for many Victorian employees, by extending federal award coverage as far as possible. However, the employment conditions for non-unionised Victorian employees are unfair and inequitable: it is not acceptable that some Victorian employees are not protected by the minimum safety net standards, while others performing exactly the same types of work enjoy award conditions.

10.15 The Labor Senators believe that the Government must take urgent action to rectify the position, by making available federal award coverage to all employees. Alternatively, the Australian Catholic Commission for Employment Relations suggested that former Victorian State awards could be recreated:

> The ACCER does not believe that these statutory minimum conditions are sufficient to provide workers with fair and just standards of employment. Therefore it is believed that such statutory provisions should be supplemented by a safety net of comprehensive terms and conditions of employment based on the previous state awards.[11]

**Amendments proposed in the Bill**

*Amendments to Schedule 1A*

10.16 Schedule 15 of the Bill proposes some limited improvements to Part XV of the WR Act to allow inspectors authorised under the WR Act to enter and inspect premises where employees are employed on conditions set under Schedule 1A and to enforce any breaches of these minimum terms and conditions, and to ensure that employees who work more than 38 hours a week are entitled to be paid for these additional hours of work.

10.17 These amendments, which in reality provide a long overdue fix for technical drafting problems within the Act, were widely supported:

> Schedule 15 is the only schedule which contains any amendments which are of benefit to workers.[12]

10.18 However, as the Victorian Government submitted, the Bill does little else to improve the lot of Victorian workers:

> While there are minor changes which would assist some employees in Victoria, these are relatively minimal and do not address the concerns of the

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10 Victorian Trades Hall Council, Submission No. 413, p. 4

11 Australian Catholic Commission for Employment Relations, Submission No. 167 , p. 32

12 Lloyd Freeburn, National Union of Workers, Evidence, Melbourne, 7 October 1999, p. 73

> Victorian Government to provide a fair, safe, secure and more productive working environment for all Victorians.[13]

10.19 The present conditions in Schedule 1A do not even provide some of the most basic employment entitlements. As one witness pointed out:

> In Victoria, you have no legal entitlement to attend the funeral of your own child. It is not in schedule 1A, so you do not have it. It is probably the most basic of safety nets that is seen in the whole of Australia.[14]

10.20 The Bill does not contain any amendments to allow Victorian employees access to additional conditions, such as bereavement leave, or other 'allowable award matters' as set out in section 89A(2) of the WR Act, to which all other employees covered by the federal jurisdiction are entitled.

10.21 The Bill would actually further disadvantage Victorians working under Schedule 1A conditions, as it proposes amendments to:

- ensure that employers can stand down employees employed under contracts underpinned by Schedule 1A minimum terms and conditions; and
- exempt some types of employees from the entitlements to annual leave and sick leave.

10.22 The amendments to annual leave and sick leave attracted particular criticism:

> Some other proposed changes in this schedule will actually compound existing inequities Victorian employees covered by Schedule 1A currently experience. Two of the changes that will have a detrimental effect on these employees are those proposed in the new subsections (3) and (5) of Clause 1 of Schedule 1A, which relate to the calculation of annual leave and sick leave. These clauses rely on a mathematical model which excludes the time an employee is on leave from the calculation equation. The impact this will have, especially in relation to the accrual of annual leave, gives Victorian employees less annual leave over time than those covered by other state laws or federal awards, which include time taken as leave in the calculation of leave entitlements.[15]
>
> As poor and as substandard as the existing minimum conditions of employment are, the Federal and [former] Victorian Governments have determined to further reduce and cut the essential minimum conditions of Victorian employees…The proposed changes to Clause 1 of Schedule 1A will see that casual and seasonal workers who are currently entitled to

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13 Victorian Government, Submission No. 542, pp. 2-3

14 Wendy Tobin, Jobwatch Inc, Evidence, Melbourne, 8 October 1999, p. 176

15 Jobwatch Inc, Submission No. 398

> minimum conditions of employment in respect of annual leave and sick leave, will lose those entitlements.[16]

10.23 The Government has justified the amendment on the grounds that the Department of Employment, Workplace Relations and Small Business had received numerous requests from Victorian employers unsure as to whether casual employees are entitled to be paid annual leave or sick leave, and that casual employees already receive a loading in lieu of these entitlements.[17]

10.24 However, the Government has not addressed potential problems that will occur if casual or seasonal workers no longer have access to these two minimum entitlements, due to a lack of regulation as to when employees can be employed as casuals:

> One outcome of the proposed amendments is that if an employer designates an employee as a casual employee, (or as a seasonal employee), then that employee will not be entitled to either paid annual leave or paid sick leave. An additional potential concern is the lack of an adequate definition as to what constitutes a casual or seasonal worker.[18]

> What makes these amendments even more worrying is that there is no clear definition as to what constitutes a casual or seasonal worker…The Commission, in Award Simplification decisions, has given effect to the legislative process by ensuring that where workers are genuinely engaged on a regular and systematic basis for less than 38 hours per week, that they are employed as regular part time employees under an appropriate award and are entitled to full pro-rata award entitlements. However, in the case of Victorian employees…, employers are given carte blanche in terms of employing any worker as a casual or seasonal worker. The real effect of the proposed amendment to Clause 1 of Schedule 1A is that wherever an employer designates an employee as a casual employee, or a seasonal employee, then the employee will not be entitled to either paid annual leave or paid sick leave.[19]

10.25 The Committee received evidence from 'casual' Victorian employees, who were clearly working full time hours:

> I started working for [Data Connection], and on average I worked in excess of 60 hours a week which is not exactly what you would call part time. I kept this up for a fair while because I am working to pay for my coffin. That is not being melodramatic; that is a fact...I was told that perhaps I could think of alternative employment because they were not going to be offering me hours in the near future. I said, 'Are you firing me? What did I do

16 Shop Distributive and Allied Employees' Association, Submission No. 414, pp. 126-7

17 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p. 359

18 Victorian Government, Submission No. 542, p. 6

19 Shop Distributive and Allied Employees' Association, Submission No. 414, p. 127

> wrong?' He said, 'No, I am not firing you.' I said, 'Then why won't you let me work?'...I went to see a solicitor about basically being fired because I have got cancer. Come on here! This is Australia—you don't do stuff like this. But it got done and the bottom line is they terminated me and there was jack all I could do about it…I cannot get a bank loan because I am a casual employee. I cannot provide a future for my children because I am a casual employee.[20]

10.26 It therefore seems that in Victoria employees are already being inaccurately designated as casuals so that employers can avoid unfair dismissal claims. The Shop Distributive and Allied Employees' Association was concerned that amending Schedule 1A to remove entitlements to annual leave and sick leave for casuals would only exacerbate the problem:

> …there is nothing in either the minimum wage orders or in Part XV of the Act which defines a casual employee. What this means is that even though a casual employee has to be paid a loading on their base hourly rate, there is no prohibition on an employer employing all employees as casuals…The Workplace Relations Act encourages the introduction and utilisation of regular part time employment in an award situation, but there is no such encouragement within the context of workers in Victoria…It is clear that the changes to Schedule 1A have been made with the view of allowing employers in Victoria to convert all permanent employees over to casual or seasonal status, so as to avoid paying employees in Victoria paid annual leave and paid sick leave.[21]

10.27 Seasonal workers are not paid a loading in lieu of annual leave and sick leave entitlements, so it is even more inappropriate to remove these employees' entitlements.

*Amendments to section 111AAA*

10.28 The Bill proposes amendments to the principal object of the Act and section 111AAA, to strengthen the presumption in favour of State employment regulation, including by legislative minimum conditions. If passed, the Bill would effectively prevent any more Victorian employees from transferring from inadequate Schedule 1A minimum conditions to the federal award safety net:

> ….there is a particular clause in the bill which says that the commission would be precluded from making an award for workers where it is shown that a state employment agreement exists in a workplace. So a Kennett style contract, a schedule 1A contract with a minimum hourly rate of pay and a few conditions, would preclude the commission finding a dispute and then going on to make an award in settlement of that dispute. As you would well know, that is normally the roping of that employer into the federal award.

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20 Elizabeth-Anne Calder, Evidence, Melbourne, 7 October 1999, p. 66

21 Shop Distributive and Allied Employees' Association, Submission No. 414, p. 128

> That would be stopped. So those 750,000 workers who are currently out there, vulnerable and with no standards, would have no hope of finding refuge or safety under a federal award system—or whatever is left of it—if this legislation goes through.[22]

10.29 The Victorian Government also opposed this amendment due to its potential impact on Victorian employees:

> The Government is opposed to these proposals. This submission has previously objected to any additional limitations on the AIRC's capacity to undertake its independent role. Limiting the AIRC's role, as proposed in the Bill, will affect its capacity to help resolve disputes and its flexibility to consider providing basic award coverage for employees. This issue has particular significance in respect of a major private sector application, in the Victorian retail industry.[23]

*Conclusions*

10.30 There are some benefits for Victorian employees in Schedule 15 of the Bill. If passed, Victorian employers would no longer be able to force their employees to work 70 hours a week for 38 hours pay, and the Department would at least have powers to prosecute breaches of the minimum conditions. However, this is clearly not enough.

10.31 It is unfair and inequitable that some Victorian employees have to work under Schedule 1A conditions, while others (generally union members) have access to the federal award safety net. The Government ignores this injustice at its own peril, because it is clear that Victorian employees are fed up. The Committee received approximately 300 submissions from private citizens opposed to the Bill. More than half of these submissions were from Victorians. For instance:

> I am an employee of a Melbourne based retail computer company, who have little or no time for their staff, but it is a job. We are underpaid, and constantly pressured to produce more and more from less and less. Those same employers pay minimal rates, and make their staff work a 46 hour, six day week and expect us to work every public holiday. Should you refuse, they have told us they will replace us. Please do not allow the situation to become worse by supporting the new industrial relations legislation.[24]

10.32 It is disappointing that the Government is now attempting to make matters even worse for Victorian employees not covered by federal awards, by exempting casuals and seasonal workers from annual leave and sick leave entitlements. In the absence of any regulation of casual employment, this will only encourage employers to artificially move their employees into insecure forms of employment.

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22 Leigh Hubbard, Victorian Trades and Labour Council, Evidence, Melbourne, 7 October 1999, p. 64

23 Victorian Government, Submission No. 542, p. 7

24 Roger McDermid, Submission No. 16

10.33 The Labor Senators also note that under the terms of the Agreement between the State of Victoria and Commonwealth of Australia[25], 'the parties will with adequate notice consult with each other in a spirit of cooperation and understanding about matters of relevance and concern to either of them in connection with the Victorian Act and the Commonwealth Act and the matters referred by the Victorian Act.'[26]

10.34 It is not clear what consultations the federal Government had with the former Victorian Government prior to the introduction of this Bill, but it is abundantly clear that the current provisions of the WR Act and the proposed amendments set out in the Bill are of extreme concern to the new Victorian Government.

10.35 The Labor Senators believe that there is little point in making further amendments to 'fix' Part XV and Schedule 1A to the WR Act, and maintain separate federal regulation of Victorian employment conditions. All of the benefits of federal jurisdiction should be available to Victorian employees, including access to the award safety net. The Victorian Government concurs:

> Victoria is especially concerned to ensure that Victorian employees who have not had coverage of a comprehensive award – ie those presently subject to the minima in Schedule 1A of the WR Act – are, in future, fully protected. Victoria considers that the Bill must be amended to provide that the AIRC be given powers to make comprehensive awards with respect to these employees so that they will have terms and conditions of employment which are appropriate for their industry and at least in accordance with community standards.[27]

25 30 May 1997

26 Clause 3

27 Victorian Government, Submission No. 542, p. 12

# CHAPTER 11

# INDEPENDENT CONTRACTORS

## Introduction

11.1 Schedule 16 of the Bill would repeal sections 127A, 127B and 127C of the WR Act, which allow the Federal Court to review contracts engaging independent contractors to perform work, other than private or domestic work. The provisions provide for a party to the contract, or their union, to make application to the Federal Court to review a contract on the grounds that the contract is unfair or harsh.

11.2 This proposal was put forward by the Government in its proposed amendments in 1996. The Democrats did not agree to the proposal then, and it was not part of the Act that passed. The Democrats, in their minority report in 1996 canvassed an alternative option, which we consider briefly at the end of this section.

## Evidence

11.3 The Committee did not receive a great deal of evidence supporting the proposed changes. The Business Council of Australia noted that paragraph 127C(1)(b) had been held by the High Court to be constitutionally invalid[1], leaving the rest of the provisions 'constitutionally uncertain'. However, the Committee was also presented with evidence citing specific cases where the Federal Court had reviewed contracts under sections 127A, 127B and the remainder of 127C. The outcomes of these decisions were not subject to appeal on the grounds of constitutional invalidity, so it may be safely assumed by the Committee that the remaining provisions are sound.

11.4 The Australian Chamber of Commerce and Industry also did not express a strong opinion on the proposed repeal, but pointed out that the impact of the repeal 'is significantly diminished given the availability of review powers in other Federal and some State legislation'.[2] However, Labor Senators note that alternative review is not available in many State jurisdictions.

11.5 Other employers, on the other hand, did not support repealing sections 127A-C. For instance, the Australian Catholic Commission for Employment Relations, as an employer of independent contractors, said that it supported these contractors having the ability to access to review of their contracts in the Federal Court.[3]

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1 *Re Dingjan; Ex parte Wagner* (1995) 19\83 CLR 323

2 Australian Chamber of Commerce and Industry, Submission No. 399, p 118. The relevant legislation is: *Trade Practices Act 1974 (Cth)*, ss 51AA, 52 & 87; *Fair Trading Act 1985 (Vic)*, s 11; *Industrial Relations Act 1996 (NSW)*, s106; *Industrial Relations Act 1996 (Qld)*, ss275 & 276.

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

11.6 The Labor Senators note unions were strongly opposed to these amendments, particularly those representing employees in the transport and textile, clothing and footwear industries. The Transport Workers' Union gave evidence that many of their members, who are 'owner drivers' of trucks, would be adversely affected if the provisions were repealed.

> The union has made application to the Court under sections 127A-127C on numerous occasions over the last few years, usually on behalf of owner driver members whose contracts have been terminated unfairly. In such cases, the provisions have proven to be a useful means of obtaining a more satisfactory outcome for the owner drivers concerned, usually through settlements achieved after proceedings have been issued. Only rarely have cases brought by the Union under sections 127A-127C proceeded to a full trial and determination by the Court.[4]

11.7 The Transport Workers' Union also provided a specific example of where the Federal Court had used the provisions to review an unfair contract:

> …in *Buchmueller v. Allied Express Transport Pty Ltd* (1999) 88 IR 465…the Court found that the contract under which the owner driver worked was unfair and harsh because it provided for total remuneration less than that of an employee performing similar work…Dowsett J. made the following comments…'*there were no factors sufficient to offset the substantial financial disadvantage incurred by the applicant. To some extent, this disadvantage was contributed to by the applicant's inexperience, but the bulk of it was attributable to the unfairness of the contracts'*.[5]
>
> The Court awarded Mr Buchmueller $13,080.00 as compensation. It is to be noted that Mr Buchmueller had been retained in a situation where his remuneration was $13,080.00 less than the minimum award safety net.[6]

11.8 There is also a significant safety issue that arises from the operation of unfair contracts in the road transport industry, which by its very nature has potentially devastating implications for drivers and other road users:

> In the case you refer to, the WRB Transport case, we are talking there about an employee who was driving Adelaide to Sydney without stopping and without proper rest breaks… Having regard to the fact that the employee was being paid by trip money, the incentive was there to keep doing trips until such time as he fell over, and in this situation was involved in a very great tragedy. The other leg of that argument goes to the fact that some employers require our people to do that, otherwise they do not retain their employment.[7]

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4 Transport Workers' Union of Australia (Victorian & Tasmanian Branch), Submission No. 93, p 8

5 *Ibid*, pp 8-9

6 Transport Workers' Union of Australia, Submission No. 447, p 9

7 William Noonan, Evidence, Melbourne, 7 October 1999, p 101

11.9 There were serious concerns expressed by unions, churches and community groups about the impact of the amendment on outworkers in the textile, clothing and footwear industry:

> I would like to address the removal of the right for independent contractors to seek remedy in the Federal Court against an unfair contract. Employers tell outworkers that they are independent contractors which means that they then have none of the rights of employees. Currently, even some factory workers are being told by their employers to accept independent contractor status or no job. This bill will mean that they cannot seek justice when they find themselves being paid $2 an hour. They will not be able to seek recourse in the Federal Court…The fact is that exploitation happens because the industry can get away with it.[8]

> The proposed changes…regarding independent contractors will serve to further disadvantage vulnerable groups within the community especially young workers and more especially young migrant workers. These proposed changes fly in the face of the work done by the fair wear campaign to ensure legislative protection for outworkers.[9]

11.10 Other concerns were raised about unfair contracts being used to disadvantage vulnerable groups within the community, such as women and people from a non-English speaking background, or employees of small businesses:

> It is of some concern that the new laws will repeal provisions allowing the Federal Court to cancel or vary unfair contracts. Many of the employment contracts brought to the Centre are amazingly one sided and bad. Employment contracts do not evolve naturally from a fair bargaining position in the first place. This means employers can contract workers with vastly unfair conditions without any fears of redress.[10]

> It is all right for the likes of me as a barrister and for the likes of highly skilled tradespeople and others who have been able to organise themselves into properly functioning businesses to work as independent contractors, but it is an entirely different matter for people who are typically employed as cleaners, security guards or in some very lowly paid vocation to suddenly find themselves without any rights at all because they have been characterised by an employer—or, in this case, a principal—as a non-employee. So, to that extent, the modest protections that are provided by the award system are denied them because they have lost, by dint of really a legal technicality, their status as employees.[11]

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8 Pamela Curr, Fair Wear Campaign, Evidence, Sydney, 26 October 1999, p. 356

9 Australian Young Christian Workers Movement, Submission No. 166, p. 6

10 Redfern Legal Centre, Submission No, 369, p. 3

11 James Nolan, Barrister, Evidence, Sydney, 26 October 1999, p. 415

11.11 Even the Club Managers' Association Australia, an organisation representing well paid executive employees, who do not have access to award or agreement terms and conditions expressed serious reservations about this proposal:

> At present, legislative provisions exist to protect people such as Club Managers who are not covered by awards or agreements. It is entirely appropriate that provisions contained in the current legislation that allow the Federal Court to cancel or vary unfair contracts be maintained. Should such provisions be repealed by the (Bill) our members could be seriously disadvantaged.[12]

*Conclusions*

11.12 The Government is hard pressed to find any support for these amendments. Employer support is at best lukewarm, and many employers were uncomfortable with the proposals to repeal sections 127A-C. Witnesses from community groups, churches, law firms, State Governments and unions resoundingly rejected the amendments as an unfair attack on some of the most vulnerable employees in Australia.

11.13 The Labor Senators do not believe that sections 127A-C should be repealed. Evidence presented to the Committee demonstrates that workers are often forced into unfair contracts which pay significantly less than they would be entitled to under awards or agreements which pass the no-disadvantage test. In this regard, the Committee notes the outcome of the case *Buchmueller v. Allied Express Transport Pty Ltd*, where the Federal Court awarded more than $13,000 to an employee being underpaid as an independent contractor.

11.14 Removing the ability of the Federal Court to review contracts for 'work' would simply open up a loophole for unscrupulous employers to avoid the terms of employment established under awards and agreements, by artificially contracting out work normally performed by employees.

11.15 The Labor Senators also note that the Government Senators have recommended that sections 127A-C be repealed because the Government is now taking steps to crack down on employees who work as independent contractors as part of the implementation of the Ralph recommendations.

11.16 But, for this reason, it is imperative that the sections of the WR Act allowing the Federal Court to vary or cancel unfair contracts are not repealed.

11.17 Without protection from unfair contracts vulnerable workers could be forced to accept contracts with employment conditions below those of a normal PAYE taxpaying employee, but be forced to pay the same amount of tax as a PAYE employee.

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12 Club Managers' Association Australia, Submission No. 426, p. 2

11.18 Finally, we note the recommendation of Senator Murray in the 1996 Report of this Committee, which was quoted approvingly by the TWU in both their written and oral submission to this Committee:

> It is recommended that the Government give consideration to establishing a new low cost dispute resolution procedure for independent contractors under the Trade Practices Act, based on the NSW model.[13]

11.19 We also note the commitment of the ALP at the last election that 'the protections of the industrial relations system should be extended beyond a narrow definition of employees to include those in employment-type relationships'. This issue was also canvassed in the earlier chapter on job security.

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[13] Supplementary Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996, p354

# CHAPTER 12

# CONCLUSION

## Introduction

12.1 This Chapter summarises the main amendments proposed to the WR Act by each major Schedule of the Bill, refers to the substantive discussion of the amendments in other chapters of this report and summarises the Labor Senators' recommendations on each of the main amendments.

## Schedule 1 – Objects of the Act

12.2 The Bill would amend the principal object of the Act in several areas:

- Item 1 would reinforce the presumption in favour of State regulation and prevent employees from transferring to the federal jurisdiction. The proposal is discussed in Chapter 7 'The needs of workers vulnerable to discrimination' and Chapter 10 'Victorian workers'.

  The Labor Senators reject the proposed amendment and consider that the federal jurisdiction should remain open to those employees covered by State awards and agreements and the Victorian minimum conditions in Schedule 1A, where the Commission decides that this is appropriate.

- Item 3 would oblige the Commission and the courts to stop any industrial action not taken in accordance with the complex procedures established in the Act and proposed under the Bill for 'protected' industrial action. The operation of the current provisions of the Act regarding industrial action and the proposed amendments in the Bill are discussed in Chapter 6 'Balance and bargaining' and in Chapter 3 'International obligations'. Item 3 would also insert a reference to the proposed system of secret ballots into the principal object of the Act. A substantive discussion of the secret ballot amendments is contained in Chapter 6 'Balance and bargaining'.

  The Labor Senators reject the proposed amendment to the principal object, as we do not support the introduction of secret ballots, or the further restriction of the ability of workers to take industrial action to advance their claims in bargaining. The provisions of the Act restricting industrial action are in breach of Australia's obligations under international labour conventions, and the amendments proposed by the Government would compound these breaches.

- Item 4 would amend the principal object to reflect the proposed dichotomy of voluntary and compulsory conciliation by the Commission, and would provide that the Commission's compulsory arbitration powers are only to be exercised as a last resort. A substantive discussion of the proposals is contained in Chapter 4 of this report 'Standing of the Australian Industrial Relations Commission'.

> The Labor Senators do not agree with the proposal to restrict the Commission's conciliation powers to situations where all parties agree to conciliation. This would simply result in those parties to industrial disputes with greater bargaining power refusing to agree to conciliation. This will create more protracted industrial disputes, which are not beneficial to the national economy or the parties involved.

- Items 2, 5, 6 and 7 would amend the principal object of the Act, and the objects of the Act regarding dispute prevention and settlement, to state that the role of awards made by the Commission is only to provide a safety net of basic minimum wages and conditions, and to ensure that awards do not provide for wages and conditions above the safety net and that the Commission cannot maintain internal relativities in awards. These amendments are considered in Chapter 4 'Standing of the Australian Industrial Relations Commission' and Chapter 7 'The needs of workers vulnerable to discrimination'.

> The Labor Senators reject the proposed amendments regarding the role of awards. The Commission should have the broad discretion to establish and maintain a fair and comprehensive award safety net, which provides sufficient protections and conditions for award reliant employees, and provides a fair and relevant standard against which agreements are tested.

**Schedules 2, 4, 5 and 6 – Australian Industrial Relations Commission and Awards**

*Schedule 2 – Australian Industrial Relations Commission*

12.3 The main amendment in Schedule 2 of concern to the Labor Senators is contained in item 18. This amendment would introduce fixed term appointments for Commissioners. A substantive discussion of this amendment is set out in Chapter 4 of this report 'Standing of the Australian Industrial Relations Commission'.

12.4 Other amendments in this Schedule, to change the name of the Commission and to require compulsory retraining programs for Commissioners, are indicative of the Government's general contempt for the Commission.

> The Labor Senators reject the amendment to introduce fixed term appointments to the Commission, as this would undermine the independence of and public confidence in the Commission.

*Schedules 4 and 5 – Conciliation and mediation*

12.5 Schedule 4 would restrict the ability of the Commission to conciliate industrial disputes to those disputes involving 'allowable award matters' and other limited matters. The Commission would be able to conciliate other matters, but only with the consent of all parties to a dispute and only on a cost recovery basis - the Commission would be required to charge a fee of $500 to provide 'voluntary' conciliation services, in order to allow private sector mediation firms to compete with the Commission. Schedule 5 would formally legislate a role for these private sector mediation firms.

12.6 Chapter 4 'Standing of the Australian Industrial Relations Commission' discusses these proposed amendments in more detail.

> The Labor Senators reject the proposed amendments to restrict the Commission's conciliation powers and to introduce fees for conciliation. Where one party has more bargaining power than another, this would be unfair and could result in protracted industrial disputes. Fees would tend to disadvantage vulnerable workers and would discourage the use of conciliation as a quick, non-legalistic means of resolving disputes. The Labor Senators do not regard the amendments in Schedule 5 as necessary – mediation is already available to those parties who want to use it as an alternative to the Commission's procedures.

*Schedule 6 - Awards*

12.7 The amendments in Schedule 6 would further reduce the list of allowable award matters in section 89A of the WR Act, and would specifically provide that a range of other matters are 'non-allowable award matters'. Proposed amendments to section 111AAA would also prevent movement of workers under State jurisdictions and Victorian workers into the federal jurisdiction.

12.8 Chapter 4 'Standing of the Australian Industrial Relations Commission' discusses the proposed amendments to cut back awards, particularly in relation to training, long service leave and tallies. Chapter 7 'The needs of workers vulnerable to discrimination' also discusses the proposal to remove training clauses from awards and considers the impact of the proposed amendments on parental leave clauses established under the Commission's Parental Leave Test Case. The particular effects of the proposed amendments to section 111AAA on Victorian workers are discussed in Chapter 10 'Victorian workers'.

> The Labor Senators reject the proposed amendments to awards. It is imperative that the Commission is empowered to maintain a fair, relevant and effective safety net. Many Australian workers continue to rely on awards to set their terms of employment, as they are unable to access enterprise agreements. Arbitrary removal of award provisions seriously disadvantages these workers, who have little opportunity to regain lost conditions through agreements. Also, arbitrarily reducing the contents of awards undermines the no-disadvantage test and reduces the standards against which agreements are tested.
>
> The Labor Senators do not agree that section 111AAA should be limited to prevent workers under State jurisdictions or Schedule 1A to the WR Act from seeking federal award coverage. In particular, Victorian employees are working under seriously substandard terms and conditions, and the Commission should have the ability to apply awards, and the federal safety net, to these employees.

**Schedule 7 – Termination of employment**

12.9 Schedule 7 proposes unfair and unbalanced amendments to the termination and unfair dismissal provisions of the WR Act. The amendments would allow employers to seek punitive costs orders against employees who make unfair dismissal claims, would prevent workers who are forced to leave their jobs as a result of sexual harassment or bullying from seeking compensation for constructive dismissal, and would attempt to limit employees from engaging legal representation where they do not have enough money to cover a lawyer's costs at the time of the claim.

12.10 The amendments would further complicate administrative procedures for employees who make unfair dismissal applications, particularly regarding time limits.

12.11 These amendments are discussed in detail in Chapter 7, 'The needs of workers vulnerable to discrimination' and Chapter 9, 'Job security'.

> The Labor Senators reject the proposed amendments. They would have the effect of preventing low paid and disadvantaged employees from seeking compensation when they are unfairly dismissed, and will therefore promote job insecurity and unfair dismissals. The amendments would also adversely affect women and younger employees who are mistreated at work to the point where they are forced to resign. The Government should be ashamed of the proposals in Schedule 7.

**Schedules 8, 9, 11 and 12 – Bargaining and industrial action**

*Schedule 8 – Certified agreements*

12.12 The main amendments that would be made by Schedule 8 are:

- introduction of new mechanisms for certifying agreements without a public hearing and allowing certification by the Industrial Registrar, rather than the Commission. These amendments are discussed in Chapter 4, 'Standing of the Australian Industrial Relations Commission' and Chapter 7, 'The needs of workers vulnerable to discrimination'.

  > The Labor Senators reject the proposed amendments. They would reduce the standing of the Commission, and allow discriminatory agreements to go unchecked, further disadvantaging women and other vulnerable workers.

- allowing certified agreements to be made only covering part of a workplace, and prohibiting multi-employer agreements. These amendments are discussed in Chapter 6 'Balance and bargaining' and Chapter 7 'The needs of workers vulnerable to discrimination'.

  > The Labor Senators reject these amendments. Allowing certified agreements to cover only part of a workplace will potentially lead to discrimination against particular employees or groups of employees. The current requirement that a certified agreement apply to all those employees who could reasonable expect to be covered ensures that groups of workers are not excluded for discriminatory reasons. The amendments will also

> undermine the bargaining power of employees, allowing employers to separate groups of workers with industrial strength and ensure poorer outcomes for those with reduced bargaining power. The amendments to outlaw multi-employer agreements will have negative impacts in major sectors of the Australian economy, including construction and natural resources.

*Schedule 9 – Australian Workplace Agreements*

12.13 Schedule 9 would considerable alter the procedural requirements for AWAs. AWAs would commence on the day that they were made, rather than after assessment to ensure compliance with the no-disadvantage test. This would mean that AWAs that do not pass the no-disadvantage test could operate for periods of up to 60 days. Schedule 9 amendments would remove the application of the no-disadvantage test to agreements covering employees with a total remuneration package of more than $68,000.

12.14 The Schedule would also provide that AWAs have primacy over certified agreements and awards, and would remove the Commission's involvement in scrutinising AWAs where the Employment Advocate is not certain whether they pass the no-disadvantage test.

12.15 These amendments are discussed in detail in Chapter 3 'International obligations', Chapter 6 'Balance and bargaining' and Chapter 7 'The needs of workers vulnerable to discrimination'.

> The Labor Senators reject the amendments. They will allow unscrupulous employers to abuse AWAs, potentially even allowing employers to circumvent the no-disadvantage test entirely, particularly for short term and casual workers and those on salary packages above $68,000. The amendments would also compound the Government's breaches of international labour conventions relating to collective bargaining, by giving individual agreements primacy over collectively negotiated agreements. The removal of the Commission's role regarding AWAs is a further unwarranted attack on the standing of the Commission.

*Schedule 11 – Industrial action*

12.16 Schedule 11 contains amendments to various provisions regulating the situations in which industrial action can be taken in support of claims for wages and conditions. The main amendments are:

- to allow employers easier access to section 127 orders, and to prevent employees and unions from obtaining section 127 orders against employers except in the case of unprotected lock outs. This is discussed in Chapter 6 'Balance and bargaining'.

> The Labor Senators reject these amendments. They are unbalanced and would tend to give employers more bargaining power at the expense of employees. The new provisions would require the almost automatic issuing

of an order to stop industrial action, even where it is unclear whether the action is protected or not, and even in cases where industrial action is not occurring, but may occur at some unknown time in the future.

- to prevent employers from paying employees who take industrial action for a whole day, even where the industrial action may have only taken place for a few minutes. This amendment in discussed in detail in Chapter 6, 'Balance and bargaining'.

  The Labor Senators reject this amendment. It is not supported by employers or employees, as it would be unfair and would encourage employees to take longer periods of industrial action.

- to repeal section 166A which requires conciliation by the Commission before an employer can seek common law damages against a union for taking industrial action. This amendment is discussed in Chapter 6 'Balance and bargaining'.

  The Labor Senators reject this amendment. It is not supported by many employers, who value access to conciliation to settle damaging industrial disputes. The amendment would create a more legalistic and less cooperative industrial relations system.

- to require automatic suspension of bargaining periods on application after industrial action has been taking place for two weeks, and to further restrict the circumstances in which the Commission can terminate a bargaining period and arbitrate under section 170MX to settle a dispute. These amendments are discussed in more detail in Chapter 3 'International obligations' and Chapter 6 'Balance and bargaining'.

  The Labor Senators reject the proposed amendments. They would significantly disadvantage employees and unions in negotiations with employers for agreements, and would result in further breaches of Australia's obligations under international labour conventions. The amendments would also prevent employees who are particularly disadvantaged in agreement negotiations from accessing arbitration where their employers are refusing to bargain in good faith.

*Schedule 12 – Secret ballots*

12.17 Schedule 12 would introduce a complex and prescriptive system of secret ballots that would be required before any employees could take protected industrial action under the WR Act.

12.18 The proposed ballots would require the employees or union proposing industrial action to specify the precise nature, form, dates and duration of any industrial action in an application to the Commission, would prevent any industrial action relating to multi-employer agreements, and would require unions and employees to meet part of the costs for these ballots.

12.19 The proposed amendments are discussed in Chapter 3, 'International obligations', Chapter 6 'Balance and bargaining' and Chapter 7 'The needs of workers vulnerable to discrimination'.

> Labor Senators reject the proposed system of secret ballots. It is very prescriptive compared with other secret ballot systems (such as that operating in the United Kingdom), so much so that it would simply prevent protected industrial action from occurring. The prescriptive nature of the ballots, and the extensive requirements for applications and ballot papers in writing would tend to discriminate against those employees from non-English speaking backgrounds or with limited literacy skills. The amendments would also breach Australia's obligations under international labour conventions.

**Schedule 13 – Right of entry**

12.20 The Bill would prevent unions from exercising right of entry unless given an invitation in writing from an employee at a workplace who is also a member of the union. These written invitations would automatically lapse after 28 days and would be required regardless of whether the union exercised right of entry to meet with union members or to inspect suspected award or agreements breaches.

12.21 The Commission would also be given wide-ranging discretion to make orders against union officers who 'abuse' the right of entry permit system, but the Bill contains no equivalent provisions for employers who abuse the right of entry permit system.

12.22 These amendments are considered at length in Chapter 6 'Balance and bargaining', and also in Chapter 3 'International obligations'.

> The Labor Senators reject the proposed restrictions on union right of entry. The amendments would hamper unions in their efforts to ensure that employers comply with their obligations under awards and agreements, at a time when the Government is dedicating very few resources to compliance activities. The amendments would also breach Australia's international obligations and would prevent people who are not union members from meeting with union representatives, unfairly restricting their freedom of association rights under the WR Act.

**Schedule 14 – Freedom of association**

12.23 The amendments proposed in Schedule 14 of the Bill would create a presumption of a closed shop at workplaces which have more than 60% union membership, prohibit union encouragement clauses in awards and agreements and would also prohibit 'restrictive arrangements', such as the Homeworkers' Code of Practice.

12.24 The proposed amendments are considered in Chapter 6, 'Balance and bargaining'.

> The Labor Senators reject the proposed amendments in Schedule 14. The 'closed shop' provisions would discourage union membership, and would potentially create a situation where the Office of the Employment Advocate would investigate and intimidate employees and employers in workplaces with more than 60% union membership. A workplace without 100% union membership is by definition incapable of being a 'closed shop'. The proposed amendments to outlaw union encouragement clauses were rejected by the Australian Democrats in 1996, and should be rejected again. The proposed amendment regarding 'restrictive arrangements' could operate in practice to outlaw cooperative arrangements to ensure decent working conditions for vulnerable employees, such as outworkers.

**Schedule 15 – Victorian workers**

12.25 The Bill makes some limited technical improvements to conditions for Victorian workers who are covered by the five minimum conditions of employment in Schedule 1A to the WR Act. The Bill would also remove entitlements to sick leave and annual leave for casual and seasonal workers in Victoria. The amendments are discussed in Chapter 10 'Victorian workers'.

> The Labor Senators support the minor technical improvements in Schedule 15, but consider that Victorian employees should have access to federal award safety net standards. The current situation of two different federal industrial relations systems and standards is inequitable.

**Schedule 16 – Independent contractors**

12.26 The Bill proposes to repeal sections 127A-C of the WR Act, which allow the Federal Court to review unfair and harsh contracts for work that would otherwise by undertaken by employees. The amendments are discussed in Chapter 11 of this report, 'Independent contractors'.

> The Labor Senators reject the proposed repeals. The removal of these sections would allow employers to unfairly engage people to perform work at conditions below award safety net standards, and leave employees with limited or no recourse to review. This amendment would particularly affect some of the most vulnerable workers in the textile clothing and footwear industry.

**Recommendation**

**Labor Senators recommend that the Bill be withdrawn and that the Act should be amended in accordance with the recommendations outlined in the Overview.**

# APPENDIX 1

# ILO COMMITTEE OF EXPERTS OBSERVATIONS

**Convention 87: Freedom of Association and the Right to Organise**

Article 3 of Convention 87 provides:

> Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and formulate their programmes.
>
> The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 11 of Convention 87 provides:

> Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

The finding of the Committee of Experts regarding the *Workplace Relations Act 1996* and Convention 87 was as follows:

> The Committee is of the view that given that where a strike is "unprotected" under the Act, it can give rise to an injunction, civil liabilities and dismissal of the striking workers (sections 127, 170ML, 170MT, 170MU), even if these consequences are not automatic, for all practical purposes, the legitimate exercise of strike action can be made the subject of sanctions. *The Committee will now turn to consider whether such limitations on strike action conform with the requirements of the Convention*.
>
> (i) Restrictions on the subject-matter of strikes
>
> The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, *which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.*
>
> (ii) Prohibition of sympathy action
>
> The Committee notes that the bargaining period, during which protected industrial action can take place, can be terminated or suspended for a number of reasons (section 170MW) ...The Committee notes that sympathy action is effectively prohibited under this provision (section 170MW(4) and (6)). Industrial action also remains unprotected if it involves secondary

> boycotts (section 170MM). *The Committee recalls in this regard that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is lawful (see General Survey on freedom of association and collective bargaining, 1994, paragraph 168).*
>
> (iii) Restrictions beyond essential services
>
> The Committee notes that the bargaining period can be terminated or suspended …where it is threatening to cause significant damage to the Australian economy or an important part of it (section 170MW(3)). …*The Committee recalls that prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services accepted by the Committee, namely, those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population ...The Committee hopes that the Government will indicate in its next report measures taken or envisaged to amend the provisions of the Workplace Relations Act referred to above, to bring the legislation into conformity with the requirements of the Convention.*
>
> (emphasis added)

**Convention 98: The Right to Organise and Collective Bargaining**

Article 4 of Convention 98 provides:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The Committee of Experts had this to say about the Workplace Relations Act and its relationship to this Convention:

> This emphasis on direct employee-employer relations is particularly evident in Part VID of the Act regarding Australian workplace agreements (AWAs), which are defined in section 170VF: "an employer and employee may make a written agreement, called an Australian workplace agreement, that deals with matters pertaining to the relationship between an employer and employee". This Part promotes AWAs …*The Committee considers that the provisions of the Act noted above do not promote collective bargaining as required under Article 4 of the Convention. It, therefore, requests the Government to indicate in its next report any steps taken to review these provisions of the Act and to amend it to ensure that it will encourage collective bargaining as required by Article 4 of the Convention.*
>
> The Committee notes that with respect to the levels of bargaining, a clear preference is given in the Act to workplace/enterprise-level bargaining …*In short, the determination of what level of bargaining is considered*

*appropriate is placed in the hands of the Commission, which is mandated to give primary consideration to single-business agreements and to use the criterion of "the public interest". The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining.*

The Committee recalls that, since the Convention contemplates voluntary collective bargaining, *the choice of the bargaining level should normally be made by the partners themselves* ...The Committee requests the Government to review this issue and amend the legislation in the light of the requirements of the Convention.

Regarding the subjects of negotiation, the combined effect of sections 166A, 187AA and 187AB prohibit the issue of strike pay being raised as a matter for negotiation. *Considering that in general the parties should be free to determine the scope of negotiable issues (see General Survey, op. cit., paragraph 250), the Committee requests the Government to review and amend these provisions to ensure conformity with the Convention.*

With reference to the provisions of the Act in Part VIB requiring majority approval of a certified agreement, the Committee recalls that where no trade union represents a majority of the workers, the unions should be able to negotiate an agreement at least on behalf of their own members.

(emphasis added)

# DEMOCRAT SENATORS' REPORT

**SUPPLEMENTARY REPORT ON THE WORKPLACE RELATIONS LEGISLATION AMENDMENT (MORE JOBS, BETTER PAY) BILL 1999**

**SENATOR ANDREW MURRAY: AUSTRALIAN DEMOCRATS: November 1999**

## 1 Introduction

Workplace Relations reform often generates great passion from unions of employers, and unions of employees, and individual workers and employers. This is also reflected in the ranks of politicians, particularly if they come from those unions of employers and employees.

The *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (WRLAB) is notable for having drawn great passion from unions of employees, but relatively little from their employer counterparts. It does not seem to be a bill that has excited employers as much as previous industrial relations legislation.

The Democrats are beholden to neither unions nor business. Our policies are strongly supportive of a fair balance between the rights of unions and employers, and of ensuring a strong award safety net, particularly for workers in a disadvantaged bargaining position. We support access to the independent umpire in the Australian Industrial Relations Commission, we support productivity-based enterprise bargaining where employers and employees genuinely wish to bargain, and promoting industrial democracy.

These background principles guide our approach to this legalisation.

This bill is part of a process, the third in a row. This is the third wave of workplace relations legislation.

The first wave, with probably the greatest assault to date on the arbitral powers of the AIRC, was Labor's Brereton reforms of 1994. These laws severely restricted the capacity of the Commission to vet enterprise agreements if they met the global no disadvantage test. As a forerunner to allowable matters, Labor's reform blue print in the 'Working Nation' White Paper in 1994 envisaged awards being pared back to eight to ten core conditions, and enterprise agreements becoming the principle means for advancing industrial causes.

The second wave was the Coalition's Reith reforms of 1996, which picked up Labor's 'Working Nation' blue print, and threw in some old-fashioned Coalition anti-union sentiment. It produced an overhaul of the award system, the introduction of freedom of association, the regulation of industrial action and secondary boycotts, and it proposed Australian Workplace Agreements. The Democrats insisted on more than 170 amendments to this bill to shift it from an anti-union bill to a more even handed reform. Our intention was to allow for more flexibility in conditions upwards and sidewards, but not downwards in terms of reducing wages and conditions.

This Committee has been asked to look at the effectiveness of the 1996 reforms, and it is worth restating some of the evidence on the efficacy of the 1996 reforms. In doing so, it is instructive to use the five tests that Labor's shadow industrial relations spokesperson set down in Parliament in 1997:

**Industrial disputation:**
First, he asked, will there be fewer disputes than under the previous regime?

The answer is yes. The average number of days lost fell from 61.5 days per 1000 employees per month in Labor's last two years to 41.5 days per 1000 employees now.

**Employment:**
Two, will there be more jobs?
In the last eighteen months of the Labor government, 124,000 new jobs were created, of which 43,600,or 35%, were fulltime jobs. In the eighteen months of the Coalition Government following the 1996 Workplace Relations Act, 290,000 new jobs were created, of which 150,000 or 52%, were full time.

**Wage outcomes:**
Three, will the distribution of wage outcomes and benefits be fairer after than before?

Answer, yes and no. In the last two years of Labor, real wages increased by 0.9% and 0.3% respectively, compared to increases of 4.2% and 2.5% respectively in the last two years.

National Wage Case Increases awarded by the AIRC under the new Act for the lowest paid over the last three years have totalled $36 a week, 50% more than the $24 a week awarded in the last three years of the Labor Government. Despite these real increases at the bottom end, the ABS reports that the distribution of income in Australia grows more unfair each year. This unacceptable trend remains unchanged from Labor's years.

**Productivity:**
Again, more good news. In the two years to June 1996, under the old Act, labour productivity rose by an average of 1.7% a year. In the last two years under the new Act, productivity has risen by 3.4% a year.

**Outcomes:**
Five, will the overall wage and salary outcomes be more consistent with a low inflation, low interest rate environment than the outcomes of the present system?

Answer, yes. It is well known that all of this – rising employment, rising real wages, rising productivity, has come in a period of low inflation and low interest rates.

So, on the key economic criteria set by Labor for the 1996 law, it has been clearly a success in delivering better economic outcomes. That is evidenced by higher real wages, employment and productivity.

In contrast, it should be noted that union membership continues to fall, from 50% of the workforce when Bill Kelty took over the ACTU in 1982, to 40% by 1992, to 31% by 1996 and down to 28% by 1998. Only one in five private sector workers are now union members.

Interestingly, the decline in union membership is slowest among women, with membership falling 6.5% over the last four years, compared to the 13.6% fall in membership of men.

Dealing with a few other points. The Office of the Employment Advocate has been criticised for its policing of freedom of association claims. It is to be noted that the freedom of association provisions the Democrats agreed to in 1996 were tested and were crucial to the legal victories of the MUA during the waterfront dispute last year.

It should also be noted that the International Labor Organisation has criticised the 1996 law's restriction on industrial action, arguing that they breach ILO conventions on collective bargaining. Labor's 1993 legislation also breached ILO conventions.

On an operational level, the problem with federal unfair dismissals so complained about by employers under Labor's laws has been largely resolved. Claims are down by 50% in the Federal system under the 1996 Act.

The Australian Industrial Relations Commission has asserted its independence. Sometimes unions have been pleased with the results, sometimes employers and sometimes neither. That is the function of an umpire - to make decisions without fear or favour. Some examples are its rejection of Minister Reith's low Safety Net wage increase offers, and its decisions on the Coal Industry and Tallies.

The award simplification process appears to be proceeding smoothly, with around 50% of all Federal awards either simplified, set aside or deleted, and a further 30% currently being reviewed by the Commission. It has been a time-consuming process, but there have been some good results. The Metal Industry Award, for example, has been reduced from 447 pages to 202 pages, with 132 clauses deleted and 7 related, but unnecessary, awards, set aside.

This is a standard that the Federal Parliament itself can never hope to reach. Minister Reith's third wave workplace relations bill ‘simplifies’ the law by increasing its length by at least 50%.

The Democrats do not believe that a strong or compelling case has been made out on the need for major further reform. The 1996 reforms, whilst not all positive in their effects, have, in a macro sense, assisted in delivering higher real wages, higher productivity, higher employment, and National Wage Case safety net increases, while also assisting in reducing industrial disputation.

Yet, those reforms are not yet fully bedded down. In particular, the enormous undertaking of award modernisation and simplification is only half completed.

Many important provisions of the new Act are yet to be tested in the courts or by the Full Bench of the Commission.

The Democrats are not opposed to improvements and technical changes to the Act. But it is just too soon for major change. We are also prepared to consider clearly identified operational deficiencies in the Act. Some are indeed addressed in the Government's bill, while others have been raised in submissions to the Committee.

However, in many respects the 1999 bill goes much further than the 1996 bill. Amongst other things, the bill proposes a further watering down of the scope of awards (and another round of award simplification when the current one is incomplete), restrictions on access to the Commission's arbitral powers, reductions in the vetting of enterprise agreements, restrictions on access to industrial action and the ability of unions to organise, recruit and represent members. The Democrats do not believe that a case has been made out for such broad ranging changes.

Following the major changes introduced by Ministers Brereton and Reith in the space of a few years, we believe further changes to the Act should be evolutionary. They should be specific and limited, not wholesale and general.

This bill as it stands is too harsh, too regressive and too unfair to attract our support in its current form.

In this minority report, I deal with the amendments in the bill schedule by schedule. My comments make it clear that the vast majority of the major provisions in the bill are unacceptable to the Democrats, while many of the remaining parts of the bill are likely to need substantial amendment to remove harsh, repressive or unnecessary additions.

## 2 'Just say no' or 'Just say yes'

There has been a strong 'just say no' campaign waged on this bill by the unions, and a weaker 'just say yes' campaign waged by a few employer organisations. During my time in the Senate the Australian Democrats have been subject to a number of 'just say no' or 'just say yes' campaigns, by absolute opponents or absolute supporters of proposed Government legislation. At times the Government itself, the Executive, have been guilty of the 'just say yes' mantra, and the Opposition, the Executive-in-waiting, have been guilty of the 'just say no' chant.

At its worst such attitudes deny the right of the people at large, through their parliamentary representatives, to consider matters on their merits.

At the heart of such demands is a denial of the duty of parliamentarians, particularly Senators, to examine all legislation on its merits. At the heart of such demands is a desire to bypass parliamentarians altogether, both in their representative capacity, and in their responsibility capacity.

These sorts of demands are foreign to the two decades of Australian Democrat tradition of responsible and democratic Senate review. Every Government, whatever its philosophy, whatever its proposal, has the right to put its legislation forward and to have it properly considered by Parliament.

There are a number of business groups who have been at the forefront of demanding that the Senate be a rubber stamp. Indeed, some submissions from business have been to the effect that this bill should be rubber-stamped without amendment or due consideration of the merits. On the other side the unions have recommended that the bill be rejected in full without amendment or due consideration of its merits.

The ACTU, for effective campaigning reasons, have promoted the 'just say no' campaign, with a demand that the WRLAB be rejected at the second reading - in other words before any schedule, any clause, can be voted on. This demand has been taken up by some members of the parliamentary wing of the Union movement, the Labor party.

In this report, I propose to consider the merits of the various aspects of the WRLAB. The Democrats party room will determine our final position, assisted by this report.

My conclusions on the merits of each schedule highlight the most serious of the flaws of the bill. My overall conclusion is that major provisions of the bill should be rejected as harsh, unfair, unbalanced and unnecessary. The analysis highlights that, of the acceptable schedules and clauses left, quite a number in my view would need substantial amendment and modification to form the basis of good law. It is evident that only a minority of clauses are non controversial.

## 3 WRLAB overview

The Inquiry has convinced me that a number of schedules have very little merit overall, and should be rejected outright.

| Schedule | Subject |
|---|---|
| 1 | Objects |
| 4 | Conciliation |
| 5 | Mediation |
| 6 | Awards |
| 8 | Certified Agreements |
| 9 | AWA'S |
| 12 | Secret Ballots |
| 16 | Independent Contractors |

There are five Schedules of relatively low importance (except No 15), which are worthy of due consideration. In its submission, the ACTU, despite its 'just say no' campaign, did not even comment on these five schedules of WRLAB. I can only conclude that this is because these schedules either contain good legislation for employees, (Schedule 15 contains clauses which materially and beneficially assist Victorian employees), or are quite modest in effect. These Schedules are:

| | |
|---|---|
| 3 | Employment Advocate |
| 10 | Relevant and Designated Awards |
| 15 | Victoria |

17 Miscellaneous Amendments
18 Amendments of other Acts

The remaining Schedules have major provisions that should be rejected, and other clauses, which need amendment. These schedules nevertheless retain substance worth considering further.

2 The AIRC
7 Termination of Employment
11 Industrial Action
13 Right of Entry
14 Freedom of Association

## 4 Schedule 1: Object of the Workplace Relations Act

This Schedule, in my view, detrimentally alters the direction of the *Workplace Relations Act* (WRA). In addition, any view of the Objects of the Act should await the outcome of discussions and determinations between the Government and the International Labour Organisation (ILO), whose Committee of Experts have made some criticisms of the WRA, which need resolution.

## 5 Schedule 2: Renaming of the Australian Industrial Relations Commission etc. and restructuring of the Commission

Much of this schedule deals with the renaming and restructuring of the Commission and Registry. While I do not personally see the need for a name change (to the Australian Workplace Relations Commission, and the Australian Workplace Relations Registry), it is a measure that has not generated much heat. The Government also intends to restructure the Commission, in a manner that appears acceptable.

The Democrats should not, however, agree to give members of the Commission fixed terms of limited tenure. As has been clearly shown in this Government's life, controlling the appointment process, controlling the dismissal process, and putting employees on short-term contracts, results in a significant and regrettable loss of independence. We opposed the loss of tenure of the Clerks of the two Houses of Parliament (which was supported by the Labor party and the Coalition), and we oppose the way in which senior bureaucrats have been made subject to political control. This attempt to put Commissioners on limited tenure should also be opposed.

Consideration should be given to the now standard Democrat amendment that appointments, (to the Commission in this case), be made on merit. Democrat Senators have now attempted to have this amendment accepted for numerous Government appointments, in many bills. Even the majoritarian British Parliament could accept such a principle. No doubt the Coalition and the Labor party will distinguish themselves by voting against this yet again. I will not detail the case for

this proposed amendment here, because I have detailed it in other Reports, most recently for the Corporations and Securities Committee.[1]

## 6 Schedule 3: Employment Advocate

The seven clauses of this Schedule are relatively modest and technical in nature, and only one may be of concern.

Addressing this Schedule may provide the opportunity to address a number of amendments needed to the WRA itself, as suggested by witnesses. For instance, the ACTU want the Employment Advocate to examine proposed agreements to ensure they properly consider work and family responsibilities, and in particular whether flexible hours provisions contravene the no disadvantage test, if they result in disadvantages to employees with family responsibilities.

Several unions have complained that the Employment Advocate is less than even handed in dealing with Freedom of Association rules, targeting unions for allegedly inappropriate recruiting behaviour, but doing little to prevent de-unionisation strategies by employers. It may be appropriate for the Act to be amended to require the Advocate to be even handed in these matters.

## 7 Schedule 4: Conciliation

The Australian Industry Group (AIG), the ACTU, and other key witnesses are opposed to this Schedule, and I agree with them. The existing system of conciliation is accessible, relatively uncomplicated, and is widely supported by experienced practitioners of industrial relations.

## 8 Schedule 5: Mediation

Union input on this Schedule was weak, and of all the witnesses the AIG gave the most detailed critique. The AIG do not support the Schedule, and their alternative proposal deserves serious consideration, and actually increases the power of the Commission in this area.

The Government proposes setting up an alternative regime to that of the AIRC. I do not recommend supporting that proposal. Mediation should be built into the existing system, build on the strengths of the existing system, and where legislated for, should be publicly funded. That obviously does not preclude the existing and continuing use of private mediation.

[1] Senator Andrew Murray, Australian Democrats, 'Supplementary Report on the Corporate Law Economic Reform Program Bill', 1998, 5.

## 9 Schedule 6: Awards

This is one of the least attractive schedules in the bill. It has the effect of watering down the award safety net and launching a further round of award changes when the current exercise of award simplification is only half complete. In 1997, there were 3197 federal awards. As at 31 October 1999 359 awards had been simplified, a huge number (1245) had been set aside or deemed to have ceased operation, 1172 were undergoing simplification, and 363 were still to begin simplification.

I oppose this Schedule. There are very few clauses worth considering, and a number of the Government's proposals are frankly regressive.

However, one of the clauses that would otherwise be worth considering, (although it would need substantial amendment), concerns the practice of serving logs of claims to initiate paper disputes. These can frighten the life out of small business, quite unnecessarily.

Much has been made of the fact that awards still contain anomalies in them. For instance, I agree there is little to justify keeping union picnic days in awards. However, the fact is that the award simplification and modernisation process begun under the WRA is only half way through. There is little point proposing further rationalisation, simplification, or amendment until that process is bedded down, and its consequences fully understood.

As it is, it is regrettable that Labor and the Coalition have already this year made a major regressive change to awards by entrenching discriminatory wage rates for Australian adults under the profoundly unfair system known as youth rates. How Australians who are legally adults above the age of 18 years can be obliged to accept lower wages for doing adult work still amazes me.

## 10 Schedule 7: Termination of Employment

The Democrats have consistently opposed removing the right to access unfair dismissal provisions, but have always supported improvements to process. There are clearly still problems associated with time, cost and process issues, and the SDA submission for instance, gave support to some of the clauses in the bill.

The evidence of the Queensland Government added further to debunking the myth propagated by COSBOA, the ACCI and the Government that taking away unfair dismissal provisions will create significant numbers of jobs for small business. In the years that Queensland small business were exempt from state unfair dismissal provisions, no extra jobs were created.

I agree with Jobwatch that certain categories should in fact be added to those who can access unfair dismissal provisions – such as trainees on registered training agreements. I am also concerned that probationary periods be properly integrated into the Act's provisions.

A significant number of clauses need amendment, but some should be rejected completely, such as those concerned with constructive dismissal, and those which provide unnecessary further restrictions for small business operational requirements. While this Schedule seeks to attend to some of the procedural problems with the conciliation phase of unfair dismissals and compensation agreements, the proposals in some respects go too far to reduce the rights of the parties and would need significant amendment.

## 11 Schedule 8: Certified Agreements

Although there are a few technical amendments that are supportable, and a number of clauses that could be considered if amended, on balance it is better to oppose this Schedule altogether, than attempt to gut it. A large number of provisions are objectionable and would reduce the protections for employees.

## 12 Schedule 9: AWA's

There are a number of positive matters dealt with in this Schedule, such as better provisions for recovering money due to employees, but the major changes proposed are regressive in that they seek to reduce the level of scrutiny of AWAs by the Employment Advocate and the Commission, and water down the protections for employees. I recommend the Democrats oppose the Schedule.

## 13 Schedule 10: Relevant and Designated Awards

While aspects of this schedule are essentially technical in nature, some of the clauses would need amendment. In particular, the revised and more restrictive definition of the relevant award clause would need to be opposed.

## 14 Schedule 11: Industrial Action

In my view, it is difficult for the Government to advocate a much greater tightening up of this area of industrial disputes, when it is simultaneously boasting that Australia has the lowest level of industrial disputation in eighty years.

Industrial disputation is an essential part of the bargaining and market process, and parties to disputation must be given the opportunity to work matters through. The system we now have seems, by and large, to serve Australia well.

This schedule is about seeking to restrict access to industrial action and increase access to penalties in respect of such action. As such, it seeks to respond to what, in an objective sense, is a non-existent problem. Section 127 does not need to be changed. The existing section 127 provides a strong deterrent to disruptive industrial action, and the Government has failed to make out a case that the provisions are not working and need these reforms. Nor has the Government made out a case for extending the notice period for industrial action from 3 to 5 days, or for broadening

the already too broad definition of prohibited strike pay. Indeed, I believe that the current definition of strike pay needs to be revised to move to a less restrictive approach.

In terms of the provisions on dealing with pattern bargaining, I note that the ACTU and the AIG have made a number of constructive comments in dealing with pattern bargaining which are worth further consideration, although the amendments as they stand go too far.

## 15 Schedule 12: Secret ballots for protected action

This Schedule introduces a rigorous secret ballot regime for industrial action. As a principle, the Australian Democrats are generally strongly supportive of direct democracy. Democrats are also strongly supportive of the democratic protections afforded by secret balloting processes. These are available under the WRA. At present pre-strike ballots are available to employees under section 136 of the Act, and the Commission can order secret ballots at its discretion under section 135. And of course, elections of union officials are by secret ballot. The provisions of section 135 and 136 have apparently been rarely used, suggesting that there maybe little real demand from employers or employees for further access to secret ballots.

However, the new provisions pose great dangers of actually escalating conflict, lengthening disputes, and making for more litigation. (see submissions from Professors Isaac and McCullum.) The committee heard evidence concerning the poorly designed Western Australian secret ballot laws, forced through their compliant upper house before the Coalition lost control of it. They have been an utter failure.

In short, the provisions of this Schedule add little to industrial democracy and add greatly to impediments to unions to undertake legitimate industrial action, while opening up the prospect of longer disputes and litigation.

This schedule should be opposed outright. It does not add to industrial democracy.

## 16 Schedule 13: Entry and inspection of premises by organisations

This Schedule seeks to replace the right of entry provisions inserted by the Democrats and replace it with a variant of the right of entry scheme we rejected in the 1996 bill. It is an unnecessary and unacceptable impediment on the rights of unions to meet and recruit members, and as such is contrary to the general principle of freedom of association. The Democrats support unionism, whether of employees or employers. Collective representation is effective representation.

The Schedule also contains provisions to deal with breaches of the right of entry scheme by union officials. Evidence from the Master Builders Association indicates that intimidation and unacceptable behaviour still bedevil the practice of entry and inspection of premises.

It is vital for industrial democracy and good workplace practice that search and entry provisions are retained, but better practice is desirable. Unions are in a unique position, since they are the only private sector bodies allowed search and entry rights by law. Unions need to adopt best practice in search and entry as exemplified by the best of the Government authorities that have this power. As a start in this direction, I believe a code of practice on search and entry ought to be developed by the Commission, in conjunction with employer and employee organisations.

## 17 Schedule 14: Freedom of association

In the context of the WRA, freedom of association is a fundamental guarantee of the right of employees to join or not to join employee organisations. Resistance to this principle, which at its extreme wishes to force employees to be members of unions, indicates an authoritarian and conformist attitude best associated with by gone days of fascism and communism. Modern resistance to the *practice* in Australia however, often reflects a fear that this principle is being perverted to encourage employees *not* to join unions. That, in its turn is anti-democratic, and contrary to the best interests of working people.

There is nothing wrong, (and much that is right), with union encouragement clauses being included in agreements. Better workplace practices, greater equity, and better productivity often result when workplaces have strong union representation. The fact that some strong unions can also behave badly and counter-productively in some workplaces does not negate the general point.

Some of the clauses in this Schedule advance the principle of freedom of association and others retard it.

Many unions have expressed concerns that the Employment Advocate has been less than even handed in the application of freedom of association provisions, targeting union recruiting activities more heavily than deunionisation activities by employers. Were this Schedule passed in full, I believe that it would have the effect of tilting the freedom of association provision more heavily against the rights of unions to organise effectively. The proposed new closed shop rule is particularly offensive in this regard.

There are a small number of clauses in the schedule which appear to be technical in nature. But other clauses, such as the new list of prohibited reasons in section 298BA appear narrower than the current protections for legitimate union activities, and as such should be viewed sceptically. I am also not readily encouraged to allow the moving of the jurisdiction for these provisions from the specialist judges of the Federal Court to the more generalist State courts.

In short, while some provisions of the Schedule might be acceptable, the schedule as a whole needs drastic surgery.

## 18 Schedule 15: Matters referred by Victoria

Although there are a couple of clauses which would affect Victorian employees negatively, and should be opposed, and some that need amendment, this Schedule is essentially beneficial to the interests of Victorian employees because it expands the rights of Industrial Inspectors and broadens out access to minimum conditions. As such, the schedule has much to recommend it. Indeed, I would go further to suggest that the Federal Government should be now discussing with the Victorian Government means of improving access of the 700,000 award free Victorian workers to the Federal awards system, and this schedule might need to be amended further to achieve such a goal.

## 19 Schedule 16: Independent contractors

These seven clauses overturn provisions which presently confer jurisdiction on the Federal Court to review contracts for services made by independent contractors.

The Democrats supported the passage of these provisions in 1992 and opposed their removal in 1996. They should be retained, and the Schedule opposed.

## 20 Schedule 17: Miscellaneous amendments

No submissions have been received on this Schedule. These clauses are mostly technical, facilitative, or uncontroversial.

## 20 Schedule 18: Amendments of other Acts

This Schedule includes another name change, which I see no point in refusing. Other clauses are mostly technical, facilitative, or uncontroversial.

**Senator Andrew Murray**

# APPENDIX 1

## LIST OF SUBMISSIONS

| SUBMISSIONS FROM ORGANISATIONS | SUBMISSION NO. |
|---|---|
| Aboriginal & Islander Medical Support Service Inc., NT | 505 |
| Ansett Pilots Association, VIC | 295 |
| Association of Non-English Speaking Background Women of Australia, HARRIS PARK, NSW | 411 |
| Association of Professional Engineers, Scientists and Managers, Australia, MELBOURNE, VIC | 321 |
| Association of Superannuation Funds of Australia Limited, SYDNEY, NSW | 287 |
| Australasian Meat Industry Employees' Union, SYDNEY, NSW | 521, 521A |
| Australasian Meat Industry Employees' Union, Victorian Branch, CARLTON, VIC | 08 |
| Australian and International Pilots Association, BOTANY, NSW | 443 |
| Australian Building, Construction, Demolition Employees and Builders Laborers Federation | 394 |
| Australian Business Limited, NORTH SYDNEY, NSW | 457 |
| Australian Catholic Commission for Employment Relations, MELBOURNE, VIC | 167 |
| Australian Chamber of Commerce and Industry, MELBOURNE, VIC | 399, 399A |
| Australian Coalition for Economic Justice, BURANDA, QLD | 293 |
| Australian Council of Social Service, STRAWBERRY HILLS, NSW | 476 |
| Australian Council of Trade Unions (ACTU), CARLTON SOUTH, VIC | 423, 423A |
| Australian Education Union, Federal Office, SOUTH MELBOURNE, VIC | 393 |
| Australian Education Union, Northern Territory Branch, DARWIN, NT | 465 |
| Australian Education Union, Tasmanian Branch, NORTH HOBART, TAS | 170 |
| Australian Education Union, Victorian Branch, ABBOTSFORD, VIC | 211 |
| Australian Electoral Commission, QUEEN VICTORIA TERRACE, ACT | 427 |
| Australian Federal Police Association, ACT | 507 |
| Australian Industry Group and the Engineering Employers' Association | 392, 392A |
| Australian Institute of Company Directors, SYDNEY, NSW | 541 |
| Australian Liquor, Hospitality & Miscellaneous Workers Union, DARWIN, NT | 303 |
| Australian Liquor, Hospitality & Miscellaneous Workers Union, NORTH MELBOURNE, VIC | 435 |
| Australian Liquor, Hospitality & Miscellaneous Workers Union, SUBIACO, WA | 444 |
| Australian Liquor, Hospitality and Miscellaneous Workers Union, BARTON, ACT | 373 |
| Australian Liquor, Hospitality and Miscellaneous Workers Union, HAYMARKET, NSW | 326 |
| Australian Manufacturing Workers' Union, GRANVILLE, NSW | 424,424A, 424B |
| Australian Manufacturing Workers Union, SA | 517 |

## Petitions

183 petitioners from the city of Maryborough [Vic] requesting that the Democrats reject the legislation.

34 SDA members opposing the legislation.

30 petitioners from Telstra, Exhibition Street Exchange opposing the legislation.

117 petitioners from Safeway Hoppers Crossing opposing the legislation.

8 petitioners from Coles Supermarket, Dandenong Plaza opposing the legislation.

7 petitioners from Fletcher Jones Pty Ltd, Melbourne opposing the legislation.

## Form Letters

[3] form letters expressing concern about the proposed Industrial Relations Legislation and the effects it may have on nurses.

# APPENDIX 2

## WITNESSES WHO APPEARED BEFORE THE COMMITTEE AT THE PUBLIC HEARINGS

The following witnesses gave evidence at the public hearings:

### FRIDAY, 1 OCTOBER 1999 - CANBERRA

**BARAGRY**, Mr Ronald Joseph, External Lawyer, Australian Industry Group

**BOHN,** Mr David Anthony, Workplace Relations Act Team, Department of Employment, Workplace Relations and Small Business

**BOLAND**, Mr Roger Patrick, Director, Industrial Relations, Australian Industry Group

**BOWER**, Miss Sarah Rose, External Lawyer, Australian Industry Group

**GEORGE**, Ms Jennie, President, Australian Council of Trade Unions

**HAMILTON**, Miss Claire Emilie, Union Delegate (KFC), Shop, Distributive and Allied Employees Association

**HAMILTON**, Mr Reginald Sydney, Manager, Labour Relations, Australian Chamber of Commerce and Industry

**HERBERT**, Mr Robert Norman, Chief Executive, Australian Industry Group

**ISAAC**, Professor Joseph Ezra (Private capacity)

**LEAHY**, Mr Barry, Group Manager, Workplace Relations Policy, Department of Employment, Workplace Relations and Small Business

**MATHESON**, Mr Scott, Assistant Secretary, Wages Policy Branch, Department of Employment, Workplace Relations and Small Business

**RUBINSTEIN**, Ms Linda, Senior Industrial Officer, Australian Council of Trade Unions

**SMYTHE**, Mr James Edward, Group Manager, Workplace Relations Act Team, Department of Employment, Workplace Relations and Small Business

**TACY**, Ms Lynne Joan, Deputy Secretary, Department of Employment, Workplace Relations and Small Business

**YATES**, Mr Bernard, Group Manager, Labour Market Policy, Department of Employment, Workplace Relations and Small Business

## THURSDAY, 7 OCTOBER 1999 - MELBOURNE

**BUCKINGHAM**, Mr David Anthony, Executive Director, Business Council of Australia

**CALDER**, Ms Elizabeth-Anne, Victorian Trades Hall Council

**CARBSON**, Mr Paul, Victorian Trades Hall Council

**CHESTERMAN**, Mr William John, Senior Industrial Relations Adviser, Victorian Automobile Chamber of Commerce

**CLOHESY**, Mr Francis Nicholas, Area Supervisor, Media Entertainment and Arts Alliance

**DUFFY**, Ms Alanna, National Industrial Officer, National Tertiary Education Industry Union

**DURBRIDGE**, Mr Robert Stuart, Federal Secretary, Australian Education Union

**EWER**, Mr Peter, Research Officer, Victorian Trades Hall Council

**FLACK**, Ms Meaghan Jean, Victorian Trades Hall Council

**FLINN**, Mr Michael, Vice President, Independent Education Union; and Secretary, Victorian Branch

**FORSYTH**, Mr Anthony Joseph, Legal and Planning Officer, Victorian/Tasmanian Branch, Transport Workers Union of Australia

**FREEBURN**, Mr Lloyd Douglas, Assistant General Secretary, National Union of Workers

**HATTON**, Mr Gregory John, Director, Industrial Relations and Training, Motor Traders Association of New South Wales

**HUBBARD**, Mr Leigh, Secretary, Victorian Trades Hall Council

**JAMES**, Ms Debra, Assistant Federal Secretary, Independent Education Union

**KENNA**, Ms Susan Amelia, National Industrial Research Officer, Finance Sector Union of Australia

**McBRIDE**, Mr Hugh (Private capacity)

**MOORE**, Mr John Desmond Cuthbertson Carty, Director, Institute for Private Enterprise

**MORAN**, Mr Jarrod Michael, Industrial Officer, Media Entertainment and Arts Alliance

**MURPHY**, Mr Ted, Assistant Secretary, National Tertiary Education Industry Union

**MURRAY**, Mr Brendan, Industrial Officer, Victorian Branch, Australian Education Union

**NOONAN**, Mr William George, Federal President and Branch Secretary, Victorian/Tasmanian Branch, Transport Workers Union of Australia

**NOYE**, Ms Catherine Anne, Organiser, Finance Sector Union of Australia

**O'CONNOR**, Mr Matthew, Federal Legal/Industrial Officer, Australian Education Union

**READ**, Mrs Jenney Jean, Representative, Finance Sector Union of Australia

**SMITH**, Mr Graeme James, Solicitor Assisting the Business Council of Australia

**SYKES**, Mr Kenneth George (Private capacity)

**SYKES**, Ms Natalie, Assistant Secretary, Victorian Trades Hall Council

**THATCHER**, Mr Colin William, Assistant Director, Business Council of Australia

**WARBY**, Mr Michael James, Editor, *IPA Revie*w; Director, Media Monitoring Unit, Institute of Public Affairs

**WOODEN**, Professor Mark Peter, Consultant, Business Council of Australia

**YILMAZ**, Mrs Leyla, Manager, Industrial and Employee Relations, Victorian Automobile Chamber of Commerce

## FRIDAY, 8 OCTOBER 1999 - MELBOURNE

**BARRON**, Ms Oonagh Marian Elizabeth, Community Research Worker, Job Watch Inc.

**BATT**, Ms Karen Michele, Secretary, Victorian Branch, Community and Public Sector Union

**BEECHEY**, Mr Samuel Peter, Regional Organiser, Australian Workers Union

**BROMBERG**, Mr Mordy, Australian President/International Vice President, International Centre for Trade Union Rights

**BROWN**, Mr Mark Carlisle (Private capacity)

**CAMPBELL**, Dr Iain Graeme, Research Fellow, Centre for Applied Social Research, RMIT University

**CHAN**, Ms Wai-Quen, Industrial Officer, Health Services of Australia

**CHIN**, Mr David, Secretary/Treasurer, Australian National Committee, International Centre for Trade Union Rights

**COGHLAN**, Dr Patrick John, Director, Australian Red Cross Blood Service, Victoria

**ELLIOTT**, Mr Robert John, National Secretary, Health Services Union of Australia

**FORSYTH**, Mr Anthony, Assistant Secretary, Australian National Committee, International Centre for Trade Union Rights

**HOWETT**, Mr Norman Arthur, Executive Committee Member, Australian Catholic Commission for Employment Relations

**KARSLAKE**, Ms Jane (Private capacity)

**LAWRENCE**, Mr Anthony John, Assistant Secretary, Australian National Committee, International Centre for Trade Union Rights

**MASSON**, Mr Ian Arthur, Victorian and Special Services Manager, Australian Mines and Metals Association Inc.

**MEAD**, Ms Judith Anne, Member, State Council, Community and Public Sector Union

**O'ROURKE**, Ms Anne, Assistant Secretary, Liberty Victoria

**PERICA**, Mr Mark, Senior Industrial Officer, State Public Service Federation Group, Community and Public Sector Union

**RENSHAW**, Mr Mark, Member, Community and Public Sector Union

**RYAN**, Mr John, Executive Officer, Australian Catholic Commission for Employment Relations

**SELLSTROM**, Ms Marie Therese, National Human Resources Coordinator, Australian Red Cross Blood Service

**SHORTEN**, Mr Bill, Secretary, Victorian Branch, Australian Workers Union

**SPRING**, Ms Megan Nicole, Research Officer, Australian Catholic Commission for Employment Relations

**STEVENS**, Mrs Barbara (Private capacity)

**STEWIEN**, Mr Walter John, Director (Mediator), Dispute Resolution, Zeugma Stewien Australia Pty Ltd

**TOBIN**, Ms Wendy, Executive Director, Job Watch Inc.

**WHITFORD**, Mr Reginald, Member, Community and Public Sector Union

**WILES**, Ms Vivienne Lee, Solicitor, Job Watch Inc.

## FRIDAY, 22 OCTOBER 1999 - SYDNEY

**BARRACK**, Mr Peter George, Secretary, Newcastle Trades Hall Council

**BOWMAN**, Mr Alan Heard, Chairman, Industrial Committee, National Farmers Federation

**CAIRD**, Ms Wendy, National Secretary, Community and Public Sector Union

**CALVER**, Mr Richard Maurice, Director, Industrial Relations, National Farmers Federation

**CARRUTHERS**, Ms Linda Hope, National Research/Industrial Officer, Australian Rail, Tram and Bus Industry Union

**DICK**, Mr Anthony Robert, Member, Electrical Trades Union

**HALL**, Dr Richard Whitney, Senior Researcher, Australian Centre for Industrial Relations Research, University of Sydney

**HOULTON**, Ms Julie-Anne, National Industrial Officer, Maritime Union of Australia

**JARDINE**, Dr Brian Sinclair, Joint National Secretary, Community and Public Sector Union; and Federal Secretary, State Public Services Federation Group

**KING**, Mr Ian Paul, ex-Lodge Secretary, Construction, Forestry, Mining and Energy Union, Hunter Valley No. 1

**MAHER**, Mr Tony, President, Mining and Energy Division, Construction, Forestry, Mining and Energy Union

**McMANUS**, Ms Sally, Organiser, Australian Services Union

**MENDELSSOHN**, Mr David Martin, Federal Industrial Officer, Community and Public Sector Union, State Public Services Federation Group

**PORTER**, Mr Denis Noel, Executive Director, New South Wales Minerals Council

**QUINLAN**, Professor Michael Garry, Professor and Head of School, School of Industrial Relations and Organisational Behaviour, University of New South Wales

**ROBERTS**, Mr Thomas, National Legal Officer, Construction Division, Construction, Forestry, Mining and Energy Union

**ROBERTSON**, Mr John Cameron, Assistant Secretary, Labor Council of New South Wales .

**RORRIS**, Mr Arthur, Secretary, Illawarra Council of Trade Unions

**STAPLETON**, Mr John Brendan, National Organiser, Community and Public Sector Union

**SUTTON**, Mr John, National Secretary, Construction Division, Construction, Forestry, Mining and Energy Union

**THOMAS**, Mr Andrew George, Assistant National Secretary—Rail Operations, Australian Rail, Tram and Bus Industry Union

**TURNER**, Mr Kieren, Manager, Employee Services, New South Wales Minerals Council

**YOUNG**, Mr Graham George, National Training and Development Officer, Maritime Union of Australia

## MONDAY, 25 OCTOBER 1999 - PERTH

**BLAKE**, Mr Nicholas, Federal Industrial Officer, Australian Nursing Federation

**DICKER**, Ms Barbara Susan, Member, Western Australian Branch, Australian Nursing Federation,

**FINNEGAN**, Mr Mark, Acting Senior Industrial Relations Officer, Community and Public Sector Union

**HATCH**, Ms Debra Dawn, Union Member, Trades and Labor Council of Western Australia

**HEGARTY**, Mrs Sally, Union Member, Trades and Labor Council of Western Australia

**JOHNSTONE**, Mr Ian, Director, Western Australia, Association of Professional Engineers, Scientists and Managers, Australia

**LEE**, Mr Timothy Kevin, Assistant National Secretary, Australian Services Union

**MAYMAN**, Ms Stephanie, Assistant Secretary, Trades and Labor Council of Western Australia

**McCARTHY**, Mr Brendan Patrick, Director, Operations, Chamber of Commerce and Industry of Western Australia

**McLEAN**, Mr Michael Gordon, Executive Director, Master Builders Association of Western Australia

**NADENBOUSCH**, Mr Bruce, Director, Industrial Relations, Association of Professional Engineers, Scientists and Managers, Australia

**NEWMAN**, Mr Garry Robert, Bunbury Branch Secretary, Australian Services Union

**REEVES**, Mr Peter Colin, Industrial Research/Resource Officer, Australian Nursing Federation

**RICHARDSON**, Mr Kimberley, Industrial Relations Manager, Master Builders Association of Western Australia

**RIDLEY**, Mr Jonric, Union Official, Trades and Labor Council of Western Australia

**ROBINSON**, Mr David Alexander, WA Branch Secretary, Community and Public Sector Union, and General Secretary, Civil Service Association

**SOPEER**, Miss Kylie Nicole, Organiser, Australian Services Union

**TOWNLEY**, Ms Caroline Marianne, Member, Australian Nursing Federation

**WILLIAMS**, Mr Bruce David, Manager, Employee Relations, Chamber of Commerce and Industry of Western Australia

## TUESDAY, 26 OCTOBER 1999 - SYDNEY

**ALLPRESS**, Mr Alan John, Business Manager, Western Ceilings

**ALLPRESS**, Mr John Gordon, Managing Partner, Western Ceilings

**BUSWELL**, Ms Val, Legislation Chair, Australian Federation of Business and Professional Women, New South Wales Division

**CAMPO**, Ms Robbie, Industrial Officer, Textile, Clothing and Footwear Union of Australia

**CLIMO**, Miss Siobhain, National Research Officer, Textile, Clothing and Footwear Union of Australia

**CURR**, Ms Pamela Mary, Coordinator, Fair Wear Campaign

**DUONG**, Ms Huyen, Member, Textile, Clothing and Footwear Union of Australia

**FERRARI**, Mr Timothy John, Assistant National Secretary, Australian Liquor, Hospitality and Miscellaneous Workers Union

**GOLUZD**, Mr Jack, General Manager, Workplace Management, Australian Business

**GROZIER**, Mr Dick, Director, Industrial Relations, Australian Business

**HALLIDAY**, Commissioner Susan, Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission

**HAMILTON**, Ms Claire Emilie, Union Delegate, Shop Distributive and Allied Employees Association

**HAMMOND**, Ms Suzanne Margaret, National Industrial Spokesperson, Women's Electoral Lobby

**HAYES**, Ms Fran, Member, National Pay Equity Coalition

**KEOGH**, Miss Danielle Louise (Private capacity)

**KILLION**, Mr Andrew Neil (Private capacity)

**KITSON**, Mr William Arthur (Private capacity)

**KULCZYNSKI**, Mrs Annabelle, Delegate, Australian Manufacturing Workers Union

**LAUBER**, Ms Sabina, Acting Director, Sex Discrimination Unit, Human Rights and Equal Opportunity Commission

**LEECH**, Reverend Christopher William John, New South Wales Member, Fair Wear Campaign; and Social Issues Consultant, Baptist Churches of New South Wales

**LI**, Ms Petty, Member, Fair Wear Campaign through Ms Sally Ng, interpreter

**McCALLUM**, Professor Ronald Clive, Blake Dawson Waldron Professor of Industrial Law, Faculty of Law, University of Sydney

**NOLAN**, Mr James William (Private capacity)

**OLIVER**, Mr Dave, Assistant National Secretary, Australian Manufacturing Workers Union

**POINTON**, Ms Miranda Elizabeth, Senior Researcher, Human Rights and Equal Opportunity Commission

**POULTON**, Mr Grant Donald, Deputy Director, Industrial Relations, Australian Business

**RYBA**, Miss Kazimiera (Kaz), Member, Australian Manufacturing Workers Union

**SCHOFIELD**, Ms Jo-anne, National Industrial Officer, Australian Liquor, Hospitality and Miscellaneous Workers Union

**SWANCOTT**, Mr Neal, National Industrial Officer, Australian Liquor, Hospitality and Miscellaneous Workers Union

**TAYLOR**, Ms Sally, Research Coordinator, Australian Manufacturing Workers Union

## WEDNESDAY, 27 OCTOBER 1999 - BRISBANE

**BIRD**, Mr Graham, Secretary, Victorian Branch, Australian Meat Industry Employees Union

**BLACKWOOD**, Dr Simon, General Manager, Private Sector Industrial Relations Division, Queensland Department of Employment, Training and Industrial Relations

**COLAVITTI**, Mr Anthony Steven, Lawyer, Pro-System Security Management

**COONEY**, Mr Justin, Industrial Officer, Australian Meat Industry Employees Union

**CRAWFORD**, Mr Brian Patrick, Assistant State Secretary, Queensland Branch, Australian Meat Industry Employees Union

**CURREY**, Mrs Jacqueline Therese, Organiser, Shop Distributive and Allied Employees Association, New South Wales Branch

**D'ARCY**, Mr David Campbell, Industrial Advocate, Australian Workers Union of Employees, Queensland

**D'ATH**, Mrs Yvette Maree, Industrial Advocate, Australian Workers Union of Employees, Queensland

**DAVEY**, Mr Paul, Assistant Secretary, Victorian Branch, Australian Meat Industry Employees Union

**DAVIDSON**, Mr Barry, Australian Meat Industry Employees Union

**DAWES**, Mr David Ronald, Industrial Officer, Queensland Council of Unions

**de BRUYN**, Mr Joseph, National Secretary, Shop Distributive and Allied Employees Association

**DIBBEN**, Mr Edward Raymond, Workshop Delegate, Shop Distributive and Allied Employees Association

**GRACE**, Ms Grace, Assistant General Secretary, Queensland Council of Unions

**HANNAN**, Mr Tom, National Secretary, Australian Meat Industry Employees Union

**IZMIRITLIAN**, Mr Leon, Organiser, Shop Distributive and Allied Employees Association

**JEFFERS**, Mr Kilian Thomas, District Organiser and Vice President, Australian Workers Union of Employees, Queensland

**LEE**, Ms Mary, Vice President, Aboriginal and Islander Medical Support Services

**LUDWIG**, Mr William Patrick, Secretary, Australian Workers Union of Employees, Queensland

**MARTIN**, Mr John Robert, Research Officer, Australian Liquor, Hospitality and Miscellaneous Workers Union, Affiliate, Queensland Council of Unions

**McLEAN**, Mr Ian, Secretary, Queensland Branch, Telecommunications and Services Branch, Communications Electrical Plumbing Union

**MYERS**, Mr Anthony Jude, Director, Aboriginal and Islander Medical Support Services

**NOCK**, Mr Wilfred Clifford, Shop Steward, Caltex Refineries and Member, Australian Workers Union of Employees, Queensland

**O'BRIEN**, Mr Peter John Vincent, Consultant, Communications Electrical Plumbing Union

**PEETZ**, Dr David (Private capacity)

**RYAN**, Mr John Francis, National Industrial Officer, Shop Distributive and Allied Employees Association

**SAIN**, Mr Frank, Managing Director, Pro-System Security Management

**SALMON**, Ms Catherine, Policy Officer, Industrial Relations Division, Queensland Department of Employment, Training and Industrial Relations

**THOMPSON**, Mr John Murray, General Secretary, Queensland Council of Unions

**VACCANEO**, Mr Stuart Andrew (Private capacity)

**van ROODEN**, Ms Marion, Policy Officer, Industrial Relations Division, Queensland Department of Employment, Training and Industrial Relations

**WILLIAMS**, Mr Hughie John, Secretary, Queensland Branch, Transport Workers Union of Australia

## THURSDAY, 28 OCTOBER 1999 - CANBERRA

**BASTIAN**, Mr Rob, Chief Executive Officer, Council of Small Business Organisations of Australia

**BOHN**, Mr David Anthony, Workplace Relations Act Team, Department of Employment, Workplace Relations and Small Business

**DREVER**, Mr Philip Malcolm, Assistant Secretary, Labour Relations Policy Branch, Department of Employment, Workplace Relations and Small Business

**GEORGE**, Ms Jennie, President, Australian Council of Trade Unions

**GRINSELL-JONES**, Mr Alan Reginald, National Director, Industrial Relations, Master Builders Australia Inc.

**HAMBERGER**, Mr Jonathan Marc, Employment Advocate, Office of the Employment Advocate

**HAMILTON**, Mr Reginald, Manager, Labour Relations, Australian Chamber of Commerce and Industry

**HANCOCK**, Professor Keith Jackson (Private capacity)

**LEAHY**, Mr Barry, Group Manager, Workplace Policy Relations, Department of Employment, Workplace Relations and Small Business

**MacDERMOTT**, Dr Kathleen Ann, Assistant Secretary, Framework Policy Branch, Department of Employment, Workplace Relations and Small Business

**MATHESON**, Mr Scott, Assistant Secretary, Wages Policy Branch, Department of Employment, Workplace Relations and Small Business

**McILWAIN**, Mr Peter Leslie, Senior Manager, Southern Division, Office of the Employment Advocate

**POCOCK**, Dr Barbara Ann (Private capacity)

**REHN**, Ms Kerry, Assistant Secretary, Workplace Relations Act Team, Department of Employment, Workplace Relations and Small Business

**RUBINSTEIN**, Ms Linda Esther, Senior Industrial Officer, Australian Council of Trade Unions

**RUSHTON**, Mr David, Senior Legal Manager, Office of the Employment Advocate

**SMYTHE**, Mr James Edward, Group Manager, Workplace Relations Act Team, Department of Employment, Workplace Relations and Small Business

**TACY**, Ms Lynne Joan, Deputy Secretary, Department of Employment, Workplace Relations and Small Business

**YATES**, Mr R. Bernard, Group Manager, Labour Market Policy Group, Department of Employment, Workplace Relations and Small Business