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No. 77 2003–04

Workplace Relations Amendment (Better Bargaining) Bill 2003

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 77 2003–04

Workplace Relations Amendment (Better Bargaining) Bill
2003

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Economics, Commerce and Industrial Relations Group
17 February 2004

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Workplace Relations Amendment (Better Bargaining) Bill 2003

Date Introduced: 6 November 2003

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The amendments set out in Schedules 1, 2, 3, 4 and 5 amend the [Workplace Relations Act 1996](#) (WR Act, the Principal Act) and will commence 28 days after the Act receives Royal Assent.

Purpose

The Bill proposes:

- to allow the Australian Industrial Relations Commission (AIRC) to order ‘cooling-off’ periods where one or both of the parties to a collective bargaining process are taking ‘protracted’ industrial action. The proposal will not affect or limit all bargaining forms under the WR Act, for example, the Bill will not affect employer-initiated lock-outs under Australian Workplace Agreement (AWA) negotiations
- to allow a third party (neither employer nor employee), affected by industrial action, such as a business client, to apply to the AIRC to have a bargaining period suspended and thus terminate protected industrial action
- to limit protected industrial action to single employers
- to deny access to protected industrial action during the life of a certified agreement (CA), including over claims for matters not addressed in the certified agreement and thus nullify the effects of the Federal Court’s *Emwest* decision¹
- to confine protected industrial action to matters which pertain to the employment relationship and to deny protected industrial action to parties not directly in an employer employee relationship, which will be subject to any certified agreement.

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Background

Certain provisions of this Bill have appeared in earlier Bills, although others are new provisions. All deal with restricting access to or suspending protected industrial action solely in the context of negotiating certified agreements.

Limited powers to resolve disputes

While the Bill has as its main purpose allowing the AIRC to order cooling off periods during (mainly) union bargaining negotiations for certified agreements, bargaining and disputes occur also in respect of federal awards and Australian Workplace Agreements, although these other bargaining forms are not addressed in the Bill. For all three forms of bargaining and dispute resolution, the AIRC has a reduced or no role under the WR Act.

The AIRC's dispute resolution function under its award-making powers is circumscribed by the WR Act. [Section 89](#) (functions of the Commission), [section 89A](#) (allowable award matters) and [section 143](#) (making and publication of awards) limit the arbitration function of the AIRC under its award-making arm to the making 'safety net' awards, and thus the effect of the combined restraints makes the resolution of the gamut of industrial disputes less likely under traditional arbitration by awards and orders. The AIRC's Justice Munro summed up both the pre and post 1996 arbitral changes in a speech recently:

To the extent that arbitration of employment conditions continued to be a significant function (of the AIRC), it rapidly accreted characteristics akin to conditioned delegations from government. The detail of statutory guidance about the manner of exercise of most discretions increased almost exponentially ... Alterations of statutory functions were and are still reinforced by collateral measures ... Against that background, it would be a stupidity to be confident that the current functions and structures in the federal tribunal will remain stable ... The complexity of the statutory regime and the associated "lawyering" of tactical moves in negotiations, involve new layers of difficulty.²

In the context of negotiating certified agreements, a full bench of the AIRC in the case known as *Hunter Valley No.1 (1997)*³ initially determined that the WR Act allowed the parties to a CA dispute considerable scope to cause each other (and the surrounding communities) considerable economic damage before AIRC intervention was warranted under [section 170MW](#) of the WR Act. Industrial action by either side can be taken during CA negotiations after a bargaining period is notified (WR Act: [sections 170MI](#) and [170ML](#)).

Perhaps not surprisingly, this 'let them rip' view was subsequently overturned by the Federal Court.⁴ The Federal Court found that the AIRC Full Bench had misconceived the nature of the power to terminate a bargaining period under [section 170MW](#) of the WR Act, which inter alia allows the suspension of bargaining when personal or property damage occurs or where economic dislocation results. Termination of bargaining is a pre-

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requisite to the AIRC arbitrating the differences into an award of the AIRC (albeit for a limited time: [section 170MX](#)). The Federal Court held that section 170MW did not require that the circumstances identified in section 170MW in fact exist, and, thus upheld Justice Boulton's original decision to begin the process of settling the dispute by terminating the bargaining period, the practical consequence of which is a resumption of work.

Applications to terminate bargaining periods under section 170MW are comparatively infrequent, with 45 such applications in 2002-03, as against about 7 500 applications to certify collective agreements and over 15 000 applications to initiate bargaining periods.⁵ In other words, the AIRC tends to refrain from determining CA negotiations, and prefers to leave the negotiations to the parties in accordance with the spirit of the WR Act's principal objects (WR Act: [section 3](#)).

The AIRC may exercise dispute resolution powers under the terms of a current certified agreement, but this depends on the wording of the (compulsory) disputes resolution clause of the CA [[subsection 170LT\(8\)](#)], and what role such a clause may afford to the AIRC in resolving disputes when a CA is extant.

Finally, bargaining may take the form of AWA bargaining, that is over the terms of an individual agreement. Provisions of the WR Act allow parties to take industrial action while negotiating an AWA, and no formal role in tempering this process is ascribed to the AIRC, nor to the Employment Advocate. The current Bill will not restrict protracted AWA action of the sort endured in the course of the G&K O'Connor industrial dispute. In the three years from 1998 the company and the meat union (AMIEU) tested the provisions of the WR Act, with five cases in the AIRC, seven in the Federal Court and one each in the Victorian Supreme Court and the High Court. It involved the longest lockout since the 1930s (nine months) at the end of which the AIRC (Justice Boulton) issued orders under section 127 of the WR Act for the employer to cease AWA protected industrial action.⁶ The case involved the hiring of industrial agents to spy on union meetings and huge legal fees, resulting in a workforce employed initially under AWAs and later, by a safety net award.⁷

Thus it could be argued of the Bill that it has a misplaced focus by limiting the proposed cooling off periods to only certified agreement negotiations which involve protected industrial action, and provides no avenues to resolve failed AWA bargaining.

Each of the Bill's purposes listed above is discussed under its own schedule below. These are prefaced with a general overview of recent industrial activity and of protected industrial action as first recognised in federal labour law in 1993.

Industrial action, recent data

Restricting access to protected industrial action for collectives of workers by legislation is usually associated with some form of increase in industrial activity. Although that form of industrial action which might be defined as protected is not captured by the Australian

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Bureau of Statistics, the most recent industrial disputes data indicates that the long term trend of a decline in industrial disputation in aggregate continues: [Industrial Disputes](#) (Cat.No.6321.0) reports that

During the twelve months ended August 2003, there were 656 disputes, 56 less than in the twelve months ended August 2002. During the twelve months ended August 2003, there were 274 700 working days lost, 4 800 less than in the twelve months ended August 2002.⁸

The number of working days lost per thousand employees, in aggregate, also fell for each of the past four years (to August) from 88 to 49 to 35, and 34 working days lost (per 1000 employees) for the 12 months to August 2003. Due mainly to the effects of a national education industry campaign, working days lost per 1000 employees increased to 50 for the 12 months to October 2003.

The right to strike

The current Bill, inter alia, curbs access to protected industrial action by allowing the AIRC to suspend protected industrial action at the time when a certified agreement is being negotiated. The suspension of protected action renders a party continuing the action liable to common law damages.

The WR Act has been criticised for failing to give effect to the main International Labour Organisation (ILO) conventions on industrial action, ILO Convention 87 (freedom of association) and Convention 98 (collective bargaining). The issues raised concerned protected action which must be in relation to claims for a single business enterprise agreement (not multi-employer or industry wide) dealing with issues pertaining to the employer-employee relationship. The ILO's Committee on the Application of Conventions and Recommendations observed that the WR Act prohibits 'sympathy action' and actions involving demarcation disputes, and that unions can be deregistered if action interferes with the provision of public services.⁹

Access to protected industrial action was provided initially under amendments made to the [Industrial Relations Act 1988](#) in the context of the recognition of the move from the AIRC's award system to enterprise bargaining.

However the concept was crucially important to facilitating enterprise bargaining, as strikes and lockouts had long been recognised in the United States federal labor law – the enterprise bargaining 'model' underpinning Australia's 'new' collective bargaining process.¹⁰ Thus if the US bargaining model was to be emulated locally, some tolerance of strikes and lockouts had to be afforded.

For the Coalition Parties the acceptance of legitimate industrial action represented a major concession at the time. During the passage of the Coalition's *Workplace Relations and Other Legislation Act 1996* (WROLA Act) the then industrial relations minister, the Hon

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Peter Reith acknowledged in 1996 that the Coalition Parties were obligated to recognise industrial action:

For the Coalition Parties to recognise the right to strike was a significant policy shift, but a necessary policy shift, given that we ourselves had been encouraging the system to move towards an enterprise focus. In the context of a bargaining system a right to strike in prescribed limited circumstances is both reasonable and consistent with good international practice. As a result we make provision for that in this legislation.¹¹

Protected industrial action was thus recognised as in keeping with ‘good international practice’ and accessible for bargaining periods. However, it is useful to mention that other and related amendments of the IR Reform Act had attempted to secure a degree of immunity to those employees who had engaged in or were otherwise associated with industrial action (ie the provisions provided immunity from other actions for loss or damages, or termination). These provisions were contained in the then ‘freedom of association’ provisions of sections 334 and 334A of the *Industrial Relations Act 1998*.

These provisions were not carried over into WROLA Act, and in certain ways the current Bill seeks to further reduce legislative immunities for industrial action, or being connected with such action. This is because the effect of having protected industrial action suspended, eg as provided by the application of an ‘affected’ third party as proposed by the Bill, is to expose the party taking the action (often a union, its officers and members) to legal suit and ultimately damages.

By the time that the [Workplace Relations Legislation Amendment \(More Jobs Better Pay\) Bill 1999](#) was introduced to the Parliament, the Coalition proposed a number of restrictions to accessing protected industrial action, as elaborated by the Workplace Relations Minister, the Hon Peter Reith:

One of the critical proposed changes in the ‘More Jobs Better Pay’ Bill is in the area of protected action over new agreements. Put simply we are wanting to do three things:

Require secret ballots to be conducted before the legal right to strike can be taken

Require genuine workplace bargaining rather than industry wide pattern bargaining as being a sufficient trigger to the right to strike;

Enable a cooling off period to be ordered by the AIRC to bring a halt to the right to strike in protracted disputes where this is causing economic damage or loss of job security.

Why are we doing this? – because the right to strike has to carry with it some responsibilities – these include the responsibility that it be democratically exercised, that it be based on a genuine dispute at a workplace over negotiations for a new agreement and that it not be counterproductive to the interests of the workforce.¹²

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Schedule 1: Deny access to protected industrial action before expiry of a certified agreement

The Bill aims to overturn the consequences of the Federal Court's *Emwest* decisions. From the facts disclosed in Federal Court proceedings, Emwest's 71 employees were covered by a 1988 Award and an enterprise agreement (the 2000 agreement) certified on 30 April 2001 with a nominal expiry date of 30 June 2003. This agreement with the Australian Manufacturing Workers Union covered a broad range of employment terms and conditions, but did not deal directly with redundancy issues. In the negotiations leading to the operative enterprise agreement, both parties agreed to drop redundancy as an issue and deal with it as a separate topic in the following year.

However, the parties also had an agreement certified by the AIRC on 14 December 1998 with a nominal expiry date of 30 September 2000 providing for redundancy processes and severance payments. It was over this redundancy agreement (which had passed its nominal expiry date) that the union served notice upon Emwest pursuant to [section 170MO](#) and [section 170MR](#) of the WR Act.

The matter was first heard by Justice Kenny in *Emwest* (6 February 2002). It was held that [section 170MN](#) of the Workplace Relations Act does not always prevent a union and its members engaging in industrial action in support of claims against an employer even when the relevant employees are covered by a current (ie unexpired) certified agreement. However, the claims related to the industrial action must not be matters dealt with in the certified agreement.

The Full Federal Court upheld the reasoning of Justice Kenny in [Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union \[2003\]](#) FCAFC 183, 15 August 2003.

According to the CCH *Australian Industrial Law News*:

The logic of the Full Court's decision is that because the Federal Government's legislative regime restricts award coverage to a finite number of allowable matters, other matters are to be the subject of agreement at the enterprise level. It follows then that the presumed policy behind section 170MN to encourage parties to adhere to their agreements, would be inconsistent with a notion that prohibited a party from effectively negotiating a matter that is not the subject of an existing agreement. Recourse to industrial action is part and parcel of the bargaining process.¹³

The major employers' association, the Australian Chamber of Commerce and Industry (ACCI) in a [press release](#) strongly condemned the decision on 15 August 2003, and canvassed the possibility of legislative action being taken to offset the Court's decision:

Today's decision by a full bench of the Federal Court in the *Emwest* case is an unwelcome, unintended and damaging extension of the right to strike in Australia. The decision will negatively impact on workplace bargaining by permitting unions to engage in industrial action after an agreement has been made with an employer. This

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decision is based on the Federal Court's interpretation of the Workplace Relations Act. It decided that section 170MN of the Act is open to multiple interpretations.

The Court has preferred an interpretation which differs from the intent of the Keating Labor government when it introduced the right to strike into Australian law in 1993 - laws which were retained by the Howard government in 1996. This is an alarming extension of the right to strike in Australia ... The impact of this decision should be addressed by the parliament by legislative change to preserve its original intention.¹⁴

Thus provisions of this Bill reflect this desire for legislative action to close off 'extra claims' during the life of a certified agreement. However the notion that industrial issues are closed for the life of a particular agreement is at odds with the fact that businesses are at liberty to significantly restructure the business during the course of an agreement, which will be responded to by claims from employees and their organisations, an issue also recently acknowledged by the Federal Court in matters pertaining to a restructure of Australia Post.¹⁵

Schedule 2: Cooling off periods (suspending protected action)

The [Workplace Relations Legislation Amendment \(More Jobs Better Pay\) Bill 1999](#) introduced the concept of the cooling-off period and would have implemented other restrictions on accessing protected industrial action, such as pre-industrial action secret ballots. Provisions under Schedule 11 of that Bill would have required the Commission to suspend a bargaining period after industrial action has been engaged in, in order to establish a cooling off period during which parties may attempt to settle the matters at issue between them without recourse to industrial action. Similarly suspension of the bargaining period may have applied after 14 days of industrial action had been taken.

This Bill also attempted to curtail access to 'pattern bargaining'. Pattern bargaining has been defined by the Department of Employment and Workplace Relations as and when:

a party seeks common outcomes on an all or none basis from agreements across a number of enterprises or workplaces, usually within the same industry or for multiple enterprises at a particular project or site.¹⁶

Although the current Bill does not address pattern bargaining, another Bill currently before the Parliament, the [Building and Construction Industry Improvement Bill 2003](#), attempts to make pattern bargaining illegal in the building and construction industry. However the research organisation ACIRRT contends that most international bargaining models involve some mix of pattern bargaining and workplace bargaining:

there is no sector in the Australian labour market or bargaining system in the OECD which fits this fictitious model of 'genuine' enterprise bargaining – all bargaining systems contain elements of pattern-setting and workplace bargaining¹⁷

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The 'More Jobs Better Pay' Bill was set aside by the Senate on 29 November 1999. [Senator Murray](#) on behalf of the Australian Democrats made the following comments about the proposed amendments under Schedule 11 of the 'More Jobs Better Pay' Bill:

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.¹⁸

The Government decided to reintroduce provisions of the 'More Jobs Better Pay' Bill in separate Bills. The [Workplace Relations Amendment Bill 2000](#) proposed a new section 170MWA requiring the Commission, to suspend a bargaining period to allow for a period of cooling-off during which the negotiating parties could attempt to settle the matters at issue between them without recourse to industrial action. This Bill was introduced to the House of Representatives on 11 May 2000, and was in part conceived as a legal response to the then looming 'Campaign 2000' of the metal unions.

Under a related provision, the AIRC would have been able to terminate a bargaining period, on application by a negotiating party, if an organisation of employees engaged in pattern bargaining in respect of the proposed agreement. So, pattern bargaining was not to be outlawed per se (it actually forms the basis of the federal award system) instead access to protected industrial action was to be denied.

Among the Bill's other measures were provisions to:

- deny legal protection otherwise available under the WR Act to unions, union officials and employees who engage in industrial action as part of a campaign of 'pattern bargaining'
- require the AIRC to act within 48 hours on applications under the WR Act's section 127 to stop industrial action
- provide for the AIRC to suspend access to legal forms of industrial action, and
- give the Federal Court power to determine if industrial action is 'protected action' for the purposes of the Principal Act.

The Australian Council of Trade Unions (ACTU) in its [submission](#) to the Workplace Relations Amendment Bill 2000 commented:

The Bill would make it virtually impossible to take protected industrial action in support of claims being pursued throughout an industry or in the workforce generally, even though a separate agreement is negotiated at each enterprise. Effective bargaining is impossible without an entitlement to take lawful industrial action

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because employers would know that the employees and their unions had no means to put pressure on them. The Bill would put Australia in even further breach of international law regarding collective bargaining.

The Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee which reported on 5 June 2000, and this Bill ultimately failed to pass the Senate.

The next attempt to curtail union bargaining and introduce ‘cooling off’ periods was in the form of the Workplace Relations Amendment (Genuine Bargaining) Bill 2002. It initially attempted to allow the AIRC to suspend a bargaining period (and thus suspend access to protected industrial action) if the listed behaviours below (at proposed s.170MW2A) were apparent in bargaining, ie the criteria identified by Justice Munro in bargaining disputes arising from Campaign 2000 (*Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors* [Print T1982]):

(a) the first party’s conduct shows an intention to reach agreement with persons in an industry who are, or could become, negotiating parties to another agreement with the first party, rather than to reach agreement with just the other negotiating parties; and

(b) the first party’s conduct shows an intention either:

(i) to reach agreement with all persons in an industry who are, or could become, negotiating parties to another agreement with the first party; or

(ii) to reach agreement with none of them;

rather than to reach agreement with just the other negotiating parties; and

(c) the first party’s conduct shows an intention primarily to reach agreement with a person other than the other negotiating parties; and

(d) the first party’s conduct shows a refusal to meet or confer with the other negotiating parties; and

(e) the first party’s conduct shows a refusal to consider or respond to proposals made by the other negotiating parties. The existence of one or more of the matters mentioned in paragraphs (a) to (e) would tend to indicate that the first party is not genuinely trying to reach an agreement with the other negotiating parties.

However the ‘Genuine Bargaining’ Bill was amended, with the provisions above deleted during its review by the Senate Employment, Workplace Relations and Education Legislation Committee.¹⁹

Senator Murray noted that the Government had accepted the amendments proposed by the ALP and Australian Democrats, bar two:

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The bill that we were presented with was significantly altered by Labor and us, with five successful Democrat amendments and two successful opposition amendments. Some very important technical provisions survived ... The government has, very sensibly, accepted all of those amendments apart from the two that refer to bargaining in good faith.²⁰

The then Employment and Workplace Relations Minister, the Hon. Tony Abbott, commented on the Senate amendments noting that he was prepared to accept the removal of cooling-off periods:

A number of amendments were moved in the Senate. The effect of those amendments is to provide a weaker form of legislative reference to the Munro reasoning. The amendments also remove from the bill the cooling off period provisions. Nevertheless, even as amended in the ways the government is prepared to support, the bill is a significant reform.²¹

Nevertheless the [Workplace Relations Amendment \(Genuine Bargaining\) Act 2002](#) by amending the Principal Act currently:

- provides guidance to the Commission on when parties are genuinely negotiating
- allows parties to apply for suspension or termination of bargaining periods without having to identify the specific bargaining periods involved, and
- gives the Commission express power to prevent, or attach conditions to, the initiation of new bargaining periods where a bargaining period has previously been withdrawn or suspended.

It would thus appear that the AIRC has the power to effect a ‘cooling-off’ period should it deem that the suspension of protected industrial action may spur the parties to an agreement.

Schedule 2: Allow a third party to apply for bargaining period suspension

The Minister’s [Second Reading Speech](#) to the current Bill, notes that the amendments to WR Act’s section 170MW to allow a third party to make an application for a termination of bargaining:

provides the Commission with a remedy to address the impact of industrial action on the welfare of third parties who are not currently directly involved in a dispute.

These amendments deliver on promises the Government made earlier this year to amend the *Workplace Relations Act*, as part of the higher education reform package.²²

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It is difficult to imagine that protected industrial action will not result in some economic damage to third parties, and there is at least the potential for the scope of immunity offered under protected action to be narrowed by the Bill.

Schedule 3: Confine protected industrial action to matters which pertain to the employment relationship

The provision in the Bill to confine protected industrial action to matters which pertain to the employment relationship attempts to limit the grounds for taking protected industrial action. The issue has come before the AIRC in a number of matters, and has been before the Federal Court in the *Electrolux* cases.

In June 2002, a Full Bench of the Federal Court considered bargaining fees in the context of a union log of claims served upon an employer, where protected industrial action followed in the course of negotiations. When certain procedures are complied with, protected industrial action is available to employers to use against employees in workplace agreement negotiations, as well as by employees against employers and has been available since 1994 (for collective agreements Part V1B Division 8 and for AWAs Part V1D Division 8, since 1997).

The *Electrolux* case arose as an appeal by unions (Australian Manufacturing Workers Union, Australian Workers Union & Communications Electrical and Plumbing Union) against a previous decision by the Court (Justice Merkel) which found against industrial action taken to include bargaining fees in a CA. The employer (Electrolux) contested elements of a log of claims served upon it by unions and the AWU in particular. These related to the protection of employee entitlements in the event of employer insolvency and bargaining fees (a fee to be served upon an employee who is employed under the terms of any subsequent certified agreement, usually a 'Division 2' [section 170LJ](#) certified agreement under the WR Act).

Justice Merkel held that certain contentious items within the AWU's log of claims did pertain to the employment relationship, and industrial action could be taken to have these included as legitimate matters of an enterprise agreement (WR Act [section 170LI](#)), e.g. a claim for the protection of worker entitlements. But other components of the claim, e.g. the payment of bargaining fees, it was held, were not matters pertaining to the employment relationship, (following precedent) and thus could not be the subject of industrial action in negotiations for an enterprise agreement.²³

Unions appealed Justice Merkel's decision. A Full Bench of the Federal Court held in [Electrolux No.2](#) on 21 June 2002 that industrial action taken to pursue a union log of claims was legitimate, including over all of the claims, although it did not reach a conclusion on which matters of the claim did pertain to the employment relationship.

Yet in a separate set of appeals, on 10 January 2003, a full bench of the AIRC ruled that union bargaining agents' fees and union notification clauses were not matters that pertain

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to the employment relationship between employers and employees and therefore are not industrial matters which can be included in a certified agreement (refer WR Act s.170LI).

The AIRC decided not to follow the Federal Court's *Electrolux No.2* case, and to date has not been influenced by moves of the NSW Industrial Relations Commission to adopt bargaining fees (as part of its enterprise bargaining principles). Instead, the AIRC followed the reasoning of its previous decision in *Atlas Steels (National Union of Workers; re Atlas Steels Metals Distribution Certified Agreement 2001-2003 and Ors* ([PR917092](#), 29 April 2002).

The issue of whether bargaining fees could be included in certified agreements was put to rest in the [Workplace Relations Amendment \(Prohibition of Compulsory Union Fees\) Act 2003](#) which amends the Principal Act and was passed by the Senate on 26 March 2003.

The new legislation seeks to:

- prohibit conduct designed to compel people to pay compulsory bargaining services fees
- prohibit the inclusion of compulsory bargaining service fees clauses in agreements, and make void existing clauses
- provide for the removal of compulsory clauses, and
- prohibit the making of false or misleading representations about bargaining services fees.

However as CCH's industrial law editor has put it:

The law was not entirely clear on this matter; while a Full Bench of the AIRC had decided that bargaining fees did not "pertain" to the employer/employee relationship and thus could not be included in certified agreement, a Full Bench of the Federal Court had expressed doubt as to the correctness of that view (admittedly by way of obiter dicta) in the *Electrolux No 2* case).²⁴

The Electrolux company had also sought leave from the High Court to make an appeal against the Federal Court's decision. At the time of writing this appeal has not been determined.

Schedule 4: Limit protected industrial action to single employers

[Section 170LB\(2\)](#) of the WR Act currently provides:

For the purposes of this Part:

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(a) if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer; and

(b) if 2 or more corporations that are related to each other for the purposes of the *Corporations Act 2001* each carry on a single business:

(i) the corporations may be treated as one employer, and

(ii) the single businesses may be treated as one single business.

The aim of the amendment of Schedule 4 of the Bill is to deny such entities being treated as a single employer, thus protected industrial action will be denied to such businesses. Action would not be protected when taken against a subsidiary company, where an agreement was being pursued with the holding company (or vice versa). The CCH *Australian Industrial Law News* in its comments on the Bill notes that these provisions may have the effect of preventing unions from negotiating with the head offices of large companies.²⁵

Schedule 5: Protected action and non-protected persons

[Section 170MM](#) of the WR Act prohibits industrial action involving secondary boycott. The Bill proposes to replace this with one which stipulates that industrial action taken in concert with employees of different employers is unprotected.

Protected industrial action can be taken only by parties to whom the proposed agreement will apply. Section 170MM of the WR Act provides that industrial action may lose its status as protected action if it is taken 'in concert' or organised 'in conjunction' with unprotected persons. Where the issue of proving whether the action has been taken in concert and thus leading to the suspension of protected industrial action has come before the AIRC, it has been difficult to prove.²⁶

Basis of policy commitment

In the Coalition's workplace relations policy taken to the November 2001 Federal Election, some commitment to at least parts of this Bill's provisions was made, including a commitment to introducing cooling-off periods under circumstances of protracted industrial action:

Part 7 Helping to resolve workplace disputes.

Industrial disputes are best resolved at the workplace by the parties directly involved. The Coalition supports an independent industrial body, the Australian Industrial Relations Commission (AIRC) as being an important forum for conciliation and arbitration of industrial disputes. As the workplace relations system increases its flexibility, and as employers and employees take greater responsibility for workplace outcomes, alternative dispute resolution systems, such as legally recognised mediation and cooling-of periods can help resolve workplace disputes.

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The Coalition will:

A The Australian Industrial Relations Commission

Maintain and support the Australian Industrial Relations Commission as an independent conciliator of industrial disputes, as a body approving collectively negotiated workplace agreements, and as the arbitrator of safety net award wages and conditions of employment.

B Mediation and alternative dispute resolution

Give legal recognition to alternative dispute resolution of industrial disputes – including by voluntary mediation. In cases of protracted workplace bargaining disputes, empower the Australian Industrial Relations Commission to suspend a protected (lawful) strike to allow for a cooling-off period and resumption of work whilst conciliation or mediation takes place.²⁷

Commentary on the Bill

The ACCI view of the need for a Bill to nullify *Emwest* has been referred to earlier, and in a subsequent press release, ACCI lauds the current Bill:

To protect the gains made in reducing dispute levels in Australia, and to drive disputes down to comparable OECD levels, we must close these loopholes before they are exploited by those union officials in key industries that see militancy and strikes as a standard method of doing business ... The Bill does this in two ways - by preventing the right to strike being used during the life of agreements; and by requiring the right to strike to be used only where claims concern employer and employee issues. This Bill is also important if we are to maintain the integrity of the enterprise bargaining system - why would an employer negotiate an agreement with a union only to be exposed to industrial action by the union whilst the agreement exists? The Bill would deter this outcome ... The Bill also proposes to expand the AIRC's powers to order a cooling off period for industrial action, as well as providing remedies for third parties - such as small businesses or contractors damaged by strike action. These proposals are also supported.²⁸

In a paper *What's in a name? The Federal Government's IR agenda* Anthony Forsyth argues that the direct reduction in union influence is the main preoccupation of the Government, in introducing this and related Bills:

The Minister's public comments, and the package of Bills cracking down on unlawful industrial action and the behaviour of officials, indicate that the reduction of union power and influence is now the main theme framing the shape and direction of Government policy.

Of course, this has been a major focus of the Government's industrial relations agenda since it came to office in 1996, the confrontation with the Maritime Union was a defining episode of the first term. But the heat has clearly been turned up on the

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unions in this third term. Curbing their power has become a much more explicit feature of the Government's policy rhetoric and program.²⁹

The *Industrial Relations and Management Newsletter* reports on the ACTU's comments on this Bill, which it says will remove workers' rights to take industrial action in many circumstances, and give employers new powers to avoid bargaining with employees. It notes that the grounds for terminating bargaining periods would be significantly broadened, allowing third parties affected by industrial action, or the threat of it, to apply to the AIRC to suspend the industrial action.³⁰

Main Provisions

Proposed amendments to the [Workplace Relations Act 1996](#)

Schedule 1—Industrial action and lockouts before expiry of agreement etc.

Item 1 of Schedule 1 repeals “for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement or award, engage in industrial action”, from WR Act [subsection 170MN\(1\)](#) **and replaces that phrase** with “organise or engage in industrial action affecting the employer (whether or not that action relates to a matter dealt with in the agreement or award)”.

Item 2 repeals “for the purpose of supporting or advancing claims in respect of the employment of employees whose employment is subject to the agreement or award, lock out such an employee from his or her employment”, from WR Act [subsection 170MN\(4\)](#) **and replaces that phrase** with “lock out an employee whose employment is subject to the agreement or award from his or her employment (whether or not that lockout relates to a matter dealt with in the agreement or award)”.

Thus under items 1 and 2, industrial action or lock outs cannot be taken during the life of an agreement or an award, regardless of whether the dispute involves matters not covered by the dispute or award. These provisions are designed to nullify the effects of the *Emwest* decision, but have been extended to awards, as well as certified agreements.

Item 3 provides that the amendments made by items 1 and 2 apply to industrial action or lock-out action taking place on or after the commencement of the Schedule.

Schedule 2—Suspension of bargaining periods

Item 1 inserts new section 170MWB. Proposed subsection 170MWB(1) allows the (Australian Industrial Relations) Commission to suspend a bargaining period for a period specified in an order, when a negotiating party applies to the Commission for the

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bargaining period to be suspended and protected action is being taken in respect of the proposed agreement and the Commission considers that the suspension is appropriate.

The Commission is to have regard to factors such as whether suspending the bargaining period would be beneficial to the negotiating parties by assisting in resolving the matters at issue; the duration of the action; whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of the Act, and any other matters that the Commission considers relevant.

In considering whether the action is threatening to cause significant harm to a person, the Commission may have regard to the extent to which an employee is particularly vulnerable to the effects of the action; the extent to which the action threatens to damage the ongoing viability of a business carried on by the person or disrupt the supply of goods or services to a business carried on by the person; or reduce the person's capacity to fulfil a contractual obligation; or cause other economic loss to the person.

Under new subsection 170MWB(2), the period of suspension specified must be a period that the Commission considers appropriate and **under new subsection 170MWB(3)**, the Commission may extend the period of suspension by a specified period. Such applications may be made by an organisation, person or body directly affected by the action (other than a negotiating party) or the Minister. The Commission must not extend the suspension if it has previously been extended (**new subsection 170MWB(4)**). The negotiating parties must be given an opportunity to be heard (**new subsection 170MWB(5)**). **New subsection 170MWB(6)** allows the parties to be informed that they may voluntarily submit the dispute to the Commission to conciliate, or have the issue mediated. **New subsection 170MWB(7)** clarifies that action taken under a suspension is not protected industrial action. **New section 170MWC** allows third parties affected by the bargaining dispute to apply for a suspension of protected action, where the Commission considers it is causing harm, including economic harm to a business.

Item 2 applies the suspension of bargaining amendments to bargaining periods which begin after the commencement of item 2 (28 days after Royal Assent).

Schedule 3—Claims not pertaining to employment relationship

Item 1 of Schedule 2 inserts new subsection 170ML(6A) which has the effect of denying the status of protected industrial action to action taken in pursuit of a claim which is not related to the employment relationship. The provision is designed to nullify the effect of the *Electrolux* decision. It applies in relation to a bargaining period that begins at or after the commencement of Item 2 (28 days after Royal Assent).

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Schedule 4—Protected action and related corporations

Item 1 inserts new subsection 170ML(3A) which states that for the purposes of subsections 170ML(2) and 170ML(3) (allowing the organising or engaging in industrial action), two or more employers cannot be treated as a single employer under paragraph 170LB(2)(b), (which otherwise allows related companies to be treated as the one employer).

Schedule 5—Protected action and involvement of non-protected persons

Item 1 repeals and replaces section 170MM. New section 170MM relates to industrial action taken in concert with non-parties. Currently, section 170MM provides that industrial action will not be protected where it is taken in concert with or organised by a person who is not a ‘protected person’, ie a person also entitled to take protected action. However the current provision does not require that person to be protected in relation to the *same* agreement. Accordingly, action can be taken in concert by employees of different employers, as long as all employees are entitled to take protected action. In some circumstances this makes it possible to pursue industry-wide protected action.

The proposed section 170MM provides that industrial action will not be protected where it is taken in concert with or organised by others who are not protected *for that particular industrial action*, ie, in pursuit of a particular agreement with a particular employer. The amendment applies to industrial action occurring on or after the commencement of Schedule 5 (28 days after Royal Assent).

At any one time, different groups of employees are entitled to take protected action against different employers, so simultaneous action may well occur without any intention to act in concert. The Bill provides no definition of acting in concert nor does it describe the evidence that might be required to prove that employees are acting in concert.

Concluding Comments

The Bill facilitates the Government’s response to the Federal Court’s *Emwest* decision in an apparently decisive way, although it is possible that parties to industrial disputes may resort to informal agreements to circumvent the Bill. The Bill also appears to have a reasonable purpose in allowing parties the opportunity to ‘cool off’ during protracted disputes. However the provisions are not designed to afford the AIRC any defined role in resolving the dispute, and protracted industrial disputes occur outside of certified agreement negotiations, which the Bill does not address.

The Bill also gives effect to the Government’s response to the Federal Court’s *Electrolux No.2* decision, although the AIRC has reaffirmed its view that collective agreements with

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provisions not pertaining to the employment relation should not be certified. Finally, it is possible in multiple enterprise bargaining rounds (for collective agreements) that all protected action may be lost for legitimate participants where a few, presumably employees, partake or are otherwise caught up in the ‘wrong’ industrial action.

Endnotes

- 1 Federal Court of Australia [Emwest Products Pty Ltd v AMWU \[2002\] FCA 61](#)
- 2 Australian Industrial Relations Commission (AIRC), Munro J. ‘Decision making without fear or favour in industrial tribunals? Balancing Acts, policies, ethics and consumers in justitiating industrial matters’, [Speeches](#), 15 October 2003.
- 3 AIRC, Boulton J, *Print P6557*, 7 November 1997.
- 4 Federal Court of Australia, *CFMEU & Ors v Full Bench of the AIRC & Coal & Allied Operations P/L* (1998) 84 IR 314.
- 5 AIRC/AIR [Annual Report 2002-03](#), pp. 10, 78 and 79.
- 6 AIRC, Boulton J, *Print S0987*, 17 November 1999.
- 7 ‘Blood and guts grind’, *The Australian*, 6 November 2001.
- 8 *ABS Industrial Disputes*, (Cat.No. 6321.0)
- 9 For a review of the issues raised by ILO committees on Australian labour legislation, see ACTU submission to the Senate’s Building and Construction Industry Inquiry, December 2003, pp. 30–31.
- 10 As the full Australian bargaining legislative model provides for and enforces individual agreements (AWAs), it actually provides for outcomes not envisaged in the US federal bargaining model.
- 11 The Hon Peter Reith: ‘Address to TUTA Industrial Relations Conference’, Melbourne 26 November 1996.
- 12 The Hon Peter Reith: ‘Australian Workplace Relations Framework into the Next Millennium’ Sydney, 3 November 1999.
- 13 ‘Emwest encourages flexible bargaining’ *CCH Australian Industrial Law News*, September 2003.
- 14 ACCI, ‘The right to strike – warning to employers’, *Media Release*, 15 August 2003.
- 15 See for example the Federal Court decision on claims following restructuring of Australia Post in *Clarke v Boulderstone Hornibrook Pty Ltd* [2003] FCA 1426, 5 December 2003.
- 16 Quoted in ACIRRT’s Adam Report No. 35 ‘Pattern Bargaining – taking a closer look’ (December 2002).
- 17 *ibid.*

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- 18 Australian Democrats Minority Report to the inquiry and Report on the *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill*, by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee November 1999, p. 397.
- 19 [Report on the provisions of bills to amend the Workplace Relations Act 1996](#): Workplace Relations Amendment (Fair Dismissal) Bill 2002, Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002, Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002, Workplace Relations Amendment (Genuine Bargaining) Bill 2002 and Relations Amendment (Fair Termination) Bill 2002 (May 2002).
- 20 Senate *Hansard*, 19 November 2002, p. 6694.
- 21 House of Representatives *Hansard*, 16 October 2002, p. 7752.
- 22 The Hon Kevin Andrews, House of Representatives *Hansard*, 6 November 2003.
- 23 The Federal Court of Australia, [Electrolux Home Products Pty Ltd v Australian Workers Union \(FCA, No. S157 of 2001, 14 November 2001\)](#).
- 24 CCH *Australian Industrial Law News*, Issue 4, April 2003.
- 25 CCH *Australian Industrial Law News*, Issue 11, November 2003.
- 26 AIRC *Metal Trades Industries Association of Australia v Australian Workers' Union & Ors* Print P0754, 8 May 1997. In this case the AIRC reviewed the facts of a multiple employer bargaining dispute and resolved not to suspend protected industrial action in relation to some of the businesses.
- 27 The Liberal Party of Australia, *Choice and Reward in a Changing Workplace*, November 2001.
- 28 ACCI, 'Closing loopholes in the right to strike' *Media Release*, 6 November 2003.
- 29 Anthony Forsyth, 'What's in a name? The Government's IR Agenda' CCH *Australian Industrial Law News*, July 2003.
- 30 'The most contentious issue – the right to strike and collective bargaining under attack', *IRM Newsletter*, v.20 n.11, December 2003, p. 5.

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