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

# Consideration of Provisions

## Workplace Relations Amendment (Transmission of Business) Bill 2001

## Workplace Relations (Registered Organisations) Bill 2001

JUNE 2001

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# PREFACE

## THE COMMITTEE'S CONSIDERATION OF THE BILLS

On 5 April 2001 the Senate referred to its Employment, Workplace Relations, Small Business and Education Legislation Committee the Workplace Relations Amendment (Transmission of Business) Bill 2001 and the Workplace Relations (Registered Organisations) Bill 2001.

Both of these bills were introduced into the House of Representatives on 4 April 2001.

The Committee received 23 submissions in relation to these bills. It held public hearings on 18 and 24 May 2001. A list of submissions and witnesses at the hearings are to be found in appendices to this report.

These bills amend the *Workplace Relations Act 1996.* In the case of the Transmission of Business Bill to make the management of workplace relations more efficient by reducing the complexities arising from the existence of multiple or inappropriate certified agreements following the transmission of business. The amendments reflect those first proposed in the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999

The object of the Registered Organisations Bill is to introduce changes to the technicalities of registration and to the internal organisation of registered organisations, particularly in relation to financial accountability, disclosure and democratic control. The amendments to the registration provisions proposed in the bill continue the Government's approach to regulation of organisations as implemented through the WR Act and would ensure that the registration and deregistration provisions are appropriate to the evolving workplace relations framework. In particular, the proposed changes to the registration provisions would extend the concept of freedom of association to the process of forming industrial associations.

In considering these bills, the Committee also took account of the Workplace Relations (Registered Organisations Consequential and Transitional) Bill 2001, which was introduced on 23 May. The Committee has no comment to make on this bill in its report.

# CHAPTER 1

## PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (TRANSMISSION OF BUSINESS) BILL 2001

1.1 The purpose of the bill is to prevent businesses from being automatically bound by federal certified agreements made by a different employer in cases where they acquire a business, or part of a business which may have its workforce already employed under a certified agreement. Under the provisions of this bill a new employer may apply to the Australian Industrial Relations Commission (AIRC) to make a decision to allow a variation to the certified agreement applying to the acquired business. The Commission may either bind the new employer to the current certified agreement, or vary the agreement to some extent, or rule that it need not apply.

1.2 In the lead time for the introduction of this bill, the then Minister for Employment, Workplace Relations and Small Business issued a discussion paper entitled *Transmission of Business and Workplace Relations Issues*. The paper presented as an option the empowerment of the Commission to exempt an employer from being bound by a certified agreement as a result of a transmission of business, or to modify the conditions under which the employer was bound.

1.3 The objective of the bill is to minimise the workplace complexity and cost of managing certified agreements when business is transmitted. The provision of recourse to the Commission is intended to provide a low-cost and more flexible process to address problems arising from anomalies in transmitted agreements. The amendments are not intended to diminish the integrity of the agreement-making process.

### General policy intentions

1.4 The Workplace Relations Act has as its principal object the negotiation and establishment of terms and conditions of employment at the workplace or individual enterprise level. It is contrary to the intention of the act for certified agreements to be automatically imposed upon an employer who had no part in their negotiation, or without there being any process through which actual or potential difficulties arising from a past agreement can be addressed. The business plan of an enterprise following a takeover or amalgamation is highly likely to be altered, so as to warrant changed terms and conditions of employment desirable for continuing employees.

1.5 Currently, more than half of non-farm employees under the federal system of workplace relations have their employment governed by certified agreements. There is, therefore a high likelihood that an enterprise will find itself bound by two or more different agreements in relation to the same group of employees, or have employees performing similar functions on different pay scales or enjoying different conditions of employment. This must be considered an unsatisfactory arrangement from the viewpoint of both employers and employees.

1.6 It is a weakness of the current provisions that the expiry date of an agreement determines which agreement will apply. Priority is given to the earlier agreement. A transmittee employer has to apply a transmitted certified agreement over its own agreement

as a result of an event outside that employer's control; that is, when the certification of the transmitted agreement took place at an earlier time.

1.7 There is also the difficulty of comparing agreements to determine which should prevail. Agreements are often very complex. Disputes may arise between the parties as to whether to take a 'line-by-line' approach, or whether to assess the worth of an agreement in broader terms.

### Outline of changes

1.8 The legislative remedies to the deficiencies identified by the Government and interested parties lie in amendments to sections 170MB(1), 170MB(2) and section 494 of the Workplace Relations Act in relation to the transmission of certified agreements.

1.9 New provisions allow the Commission to order that a certified agreement has limited or no binding effect on a successor, transmittee or assignee of the business, or part of the business to which a certified agreement applied. The Commission is empowered to make an order as to whether, and to what extent, the new employer is bound by the agreement, establishing also a date of effect, which cannot be retrospective.

1.10 Further provisions give the Commission the power to make an order on an application by an employer bound by an agreement, either an employer bound to an agreement as a consequence of a transmission, or one who is an original party to an agreement. In addition, the Commission will be required to give all those bound by an agreement an opportunity to make a submission before it makes its decision.

1.11 The bill also amends section 494 of the act to provide for the expanded operation in Victoria of provisions contained in other parts of the act.

### Consideration of provisions

1.12 The scope of this legislation is narrow and clearly defined. There is only one issue of major policy significance: that being the empowerment of the Commission to determine the continuation or otherwise of certified agreements following the transmission of business. The Committee noted a substantial level of agreement of concerned parties to the amendments proposed in this bill. Of significance is the fact that a number of businesses have made submissions to the Committee on practical issues, both directly and through industry organisations.

1.13 In evidence before the Committee, the National Farmers Federation expressed confidence in the unfettered discretion of the Commission to make judgements in regard to the appropriateness of certified agreements. In dealing with the question as to whether the bill before the Parliament may weaken the anti-avoidance provisions of section 149, as suggested by some unions, the NFF representative argued that it did not. What was required, to ameliorate the harsh effects of an anti-avoidance measure, was the insertion of a provision into section 170MB providing for the Commission to make a decision: an insertion wholly consistent with the current provision in section 149. As the Committee was told, the bill:

> … strengthens an anti-avoidance provision where it has an inappropriate outcome. It strengthens it because it gives the commission discretion to take into account any anti-avoidance motivations we would submit, as Senator Murray put on the table, that might exist in the restructuring of certified agreements. Section 170LY might

> result in an inappropriate bargaining arrangement applying to the detriment of the employees. At least here you have the matter out in the open and you have the Commission exercising a discretion. With section 170LY, …the way that that problem is resolved is arbitrary: it depends on whether or not either or both have gone past their nominal expiry date and which agreement was made first. Surely the Commission should have the ability to ameliorate those factors, which are arbitrary, particularly if one of the certified agreements does not fit well with the business plan of the employer and does not fit well with the entitlements of the employees. So, yes, it does strengthen the current anti-avoidance provision because it provides the Commission with the power to have a sensible outcome rather than one based upon arbitrary factors.[1]

1.14 In response to questioning about current provision in the act for the cancellation of agreements, the NFF representative pointed out that the parties to an agreement may not agree to cancel an existing agreement, as in the case where a transmission of business may result in a conflict between unions.[2]

1.15 Some of the strongest evidence in support of the legislation came from the Australian Industry Group, which reiterated in its submission arguments in its previous submission to this Committee in relation to its 1999 inquiry into the More Jobs Better Pay Bill. The AIG submission to the current inquiry described, by reference to a realistic example, how complicated and unfair the current provisions can be. The example is one which the ACTU would regard as relevant and typical, being a business transmitted from a government department to a private sector company. In this case the employees of the government department have a certified agreement with a three year life, which has been in operation for one year.

1.16 In the above example:

- The private sector organisation would become bound by the award which was binding on the government department. These public sector award conditions may be totally inappropriate in the private sector.
- The transmitted award will apply to all employees of the private sector organisation which are working under the scope of the award, not just those working in the transmitted business.
- If the private company undertakes work 'transmitted' by more than one other organisation, it will, on the face of the WR Act, be required to apply the awards which were binding on each transmittor, together with whatever awards were binding on its workforce prior to the transmission of the businesses. In such circumstances, the company may have to observe many different awards for its workforce.
- If the private company's employees do mixed work (that is, they are not dedicated to one part of the transferred business) then very inconvenient, if not absurd, results may follow. The company may be required to apply the terms of one award to an employee who is performing a particular kind of work, and then apply the terms of another award when the

1 Mr Richard Calver, *Hansard,* Canberra, 18 May 2001, p.18

2 ibid.

same employee undertakes another set of tasks and responsibilities. For instance, in a call centre, the company may be required to apply the terms and conditions of the transmitted award for the duration of each call that an employee takes on behalf of the government department, and then apply different awards when the employee attends to other calls.

- If the transmitted business undertaken by the private sector organisation is taken back by the government department, or transferred to another organisation, the private sector organisation's awards applying at the time of that 'transmission' may flow back to the department or on to the other organisation.

- These difficulties are compounded given the government department's certified agreement.

- The private sector organisation will be bound by the government department's certified agreement, in respect of its employees who work in the business transferred to it.

- Again, if the company undertakes work 'transmitted' by more than one employer, then on the face of the WR Act this may result in the company having to observe, or trying to observe, two or more certified agreements, in addition to the applicable awards.

- Further, if the employees perform mixed work, then the company may be required to apply different certified agreements at different times during the performance of an individual employee's job.

- Equally, the private sector organisation's certified agreements applying at the time of a later 'transmission' may flow back to the government department or on to a second private sector organisation.

- From the time of the transmission, the company will become bound by the department's certified agreement, which will have continuing effect both during its nominal term and beyond its nominal expiry date until terminated or replaced with another certified agreement. Under these circumstances, there may be a strong incentive for a union party <u>not</u> to attempt to reach agreement over a replacement certified agreement with the company.

- If the private company had made a certified agreement prior to the transmission occurring, that certified agreement will prevail if it is still within its nominal term and was certified before the department's agreement was certified, but the company's certified agreement will be overridden by the department's certified agreement to the extent of any inconsistency if it was certified after the company's agreement was certified. (s.170LY(1)(b)).

- The company will not be able to make a new certified agreement which overrides the certified agreement transmitted from the government department (even if its employees vote unanimously to do so) prior to its nominal expiry date. (<u>Note</u>: in the example, this is two years away). Nor can the company and its employees vary the transmitted government department's certified agreement unless they gain a majority vote which includes all of the government department's employees. Such an approach is clearly impractical.

1.17 The AIG argued that the above realistic example illustrates that the legislation puts employers in an untenable situation, and inhibits them in the effective management of their businesses.

1.18 A further consequence is that a transmission may result in mandatory representation by a trade union in a workplace where it has no prior history of involvement. Indeed, this may bring the 'transmitted' union into conflict with another union which has enjoyed traditional coverage rights over the particular workplace.

1.19 Government senators accept that it is logical to assume that the transmission of business difficulties experienced by companies under current provisions, result in private sector reluctance to bid for outsourced public sector work. It is also reasonable to assume that when private companies bid for outsourced public sector work in the future their bids will take account of the significant uncertainty and the potential liabilities which might arise. Thus, the return to the taxpayer is likely to be diminished as a result. Similar problems can also arise in regard to private sector transmission. Amendments to the WR Act are therefore in the public interest.

1.20 The AIG argues that the problems arising from the operation of s.149(1)(d) and its related provisions demonstrate that the legislation has not kept pace with contemporary developments in commercial and industrial practice in Australia. The provisions have existed virtually unaltered since 1914. Furthermore, the existing provisions, traditionally centred around the award system, appear to have been simply grafted onto the agreement-making stream of the WR Act without any appreciation of potential adverse consequences.[3]

1.21 The evidence in the AIG submission in relation to the impracticality of changing a certified agreement by ballot of all parties, including those not working for the company currently doing the work, was taken up by the Committee with DEWRSB officers at the second hearing. It was confirmed at that meeting that the AIG argument was soundly based. As the Committee was informed:

> In the circumstances where a business had a certified agreement which covered all its employees, and part of that business involving, say, 10 per cent of those employees was transferred to another business, as presently operates under the act, the certified agreement transmits with the transmission of part of the business. To vary the agreement involves varying the agreement as a whole, which would involve, as the act is presently framed, getting a valid majority vote of all the employees – both those who are in the transmitting part, and those who stayed with the original business. It would also involve getting the agreement of both the new employer and the previous employer. That, I think you will agree, would be a fairly cumbersome process.[4]

1.22 In response to claims that more thoroughgoing measures might be more appropriate to deal with these problems, Government senators point out that the bill is intended to address, in a fairly simple and straightforward way, some obvious and urgent problems which have emerged with the interaction of a multiplicity of certified agreements on transmission. That is the normal and routine task of machinery legislation such as the Committee has been

3 Submission No 16, Australian Industry Group, pp.11-14

4 Mr James Smythe, *Hansard*, 24 May 2001, p.45

dealing with. The Minister made it clear in his second reading speech upon the introduction of this bill that passage of this remedial legislation would not exclude further policy consideration of measures to rectify other workplace aspects of the transmission laws.

1.23 Government senators note with interest some basic arguments in the submission from BHP which reinforce the need to address the legislative anomalies present in the WR Act. First, it is widely accepted that enterprise bargaining provides a forum for parties to negotiate the most appropriate form of industrial agreement for their workplace. It is incongruous, therefore, for a certified agreement binding at one particular workplace to become binding at another, even where there is a transmission of business. It contradicts the underlying policy of providing a means by which negotiations take place at a particular workplace, taking into account the work and the routines and particular need and circumstances that apply at that particular workplace.[5]

1.24 The above example illustrates the position of employers and employees in straightforward cases of transmission of business, but it could be argued that 'straight-forward cases' are anything but typical. The increasing casualisation of labour, and the normality of a person having a number of employers, adds complexity to the issue. Short and long-term contract labour is handled by employment service providers who must deal with transmission of business issues every day. As one submission explained:

> There are occasions when a Manpower employee may spend several days with Client A, and then the remainder of the week with Client B. Assuming it were found there was a transmission of business between each of those clients and Manpower, Client A's industrial instrument would be binding on the employee for the days he or she worked at Client A, and similarly with Client B. This requires the employee to be working under two industrial instruments. There is also the consideration that Manpower itself is bound to industrial instruments, and these instruments would not be applicable because the client's industrial instruments would be binding.
>
> Another potential outcome of a finding for transmission of business could result in a Manpower employee employed in a call centre environment, answering incoming telephone calls for numerous clients, being engaged under each client's industrial instrument for the duration of such telephone call. Clearly this is impracticable.[6]

1.25 Manpower Services has indicated its support for the bill on the grounds that it avails the company access to the Commission to seek exemption from old enterprise bargaining agreements, while providing security for employees. Manpower sees the onus is on employers to prove their case, rather than on employees.

1.26 The BHP submission indicates concern that employees should not be deprived of their bargain merely because of a 'commercial adjustment'. It proposes a transitional arrangement, but suggests, alternatively, what is proposed in the bill: that the Commission should make an order determining whether a transmission is appropriate.[7]

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5 Submission No 15, BHP Limited, p.4

6 Submission No 11, Manpower Services (Australia), p.4

7 ibid. p5

1.27 Employer reaction to the Discussion Paper was generally very favourable, and as in the case of BHP, other amendment options were canvassed. Australian Business Limited stated in its submission that its preferred option was for an amendment to delete provisions which provide for the transmission of certified agreements in the event of a transmission of business, even though it supported the amendment as proposed in the bill.[8] Government senators recognise the wisdom of legislating along a middle path: one that accepts the rights of employees in circumstances beyond their control, and one that operates as far as possible within the existing structures that determine workplace relations outcomes. The logic of this approach must be apparent even to those on either side of the employer-union divide whose criticism of the bill arises from its limited and practical intent.

1.28 The Australian Chamber of Commerce and Industry (ACCI) has shown strong support for the legislation, claiming that current provisions have caused a wide range of problems. The ACCI submission provides an instance of one case:

> A business is looking at acquiring or merging or expanding their business to acquire a similar operation and the business that they are looking at acquiring has a certified agreement. As the law currently stands the acquiring employer cannot seek to modify that current agreement while it is nominally in force, and the acquiring business is looking at a new certified agreement but it cannot take any steps in its proposed agreement to deal with staff of the business under the earlier certified agreement, because the priority system provides that a prior made and non-expired certified agreement is not affected by a later made certified agreement. In practical terms the new business cannot integrate the businesses because they cannot vary the terms of the existing agreement, except to have a valid majority of people under the agreement agree to cancel it.[9]

1.29 The ACTU told the Committee that the bill is unnecessary and not beneficial to employees. According to Government senators, the overwhelming weight of the evidence is against these propositions. The ACTU's perspective on the evolving practice of workplace relations is often unrealistic. The ACTU's agenda for transmission of business reform, driven by its concern over outsourcing of labour, often following privatisation, is an ideological one. In contrast, the submissions in support of the bill address real and practical issues, and support a modest and tailored solution.

1.30 Government senators also recall the misplaced criticism made by the Opposition in regard to previous workplace relations legislation of Government measures to reduce the powers of the Australian Industrial Relations Commission. Leaving aside the particular details of those 2000 proposed amendments, the claim made by the Opposition was of a deliberate undermining by the Government of the authority of the Commission: a politically inspired response to decisions made by the Commission which were viewed unfavourably by employer groups. It is noteworthy that such claims have not been heard so far in relation to the Transmission of Business Bill. There has been no explicit doubt cast upon the integrity of the Commission by any employer group to the Committee's knowledge. When questioned on this issue of whether employers regarded the Commission as being unduly favourable to the position of employees, the ACCI representative responded:

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8 Submission No 9, Australian Business Limited, pp.3-4

9 Submission No 12, Australian Chamber of Commerce and Industry, p.4

> That has always been the view of some of our people in the same way that the other side, the unions, see it the other way. We both make those sorts of claims from time to time. I would just say this: it is a moderate bill; it leaves things in the hands of the commission. We have to assume prima facie that the commission will properly deal with our submissions and the submissions of unions. On past experience, they have always looked at things like protecting employees. They have not overlooked that. I hope and we expect that they would look at industry views fairly as well.[10]

1.31 Government senators make the point that, as stated by the AIG representative at the hearing, the bill is giving more power, and appropriate power to the Commission. 'It is not doing anything more than that. It is a very sensible piece of legislation.'[11]

1.32 An echo of the ACTU's concerns about outsourcing were touched on briefly during the public hearing during questioning of the Australian Industry Group. While Government senators express no particular view of outsourcing in this report it is worth noting that in the view of the AIG, outsourcing is not done, in most cases, for the purpose of reducing costs, so much as to focus on their core business and to achieve efficiencies. The Committee was referred to the EDS case in which the company, in the view of the Commission, had gone to great lengths to make sure its new employees were not disadvantaged, and where terms and conditions of employment were very favourable. The company would not, however, provide benefits that were inappropriate to the private sector. The Commission supported this approach.[12]

1.33 Government senators believe that the case for passing this bill is overwhelming. The weight of evidence is strongly in favour of introducing what amounts to a modest increase in the power of the Australian Industrial Relations Commission to confirm, or vary, or disallow a claim by an employer in regard to a certified agreement following a transmission of business. The case has been made that current provisions are impractical, costly, and an impediment to business operations and fair workplace relations outcomes.

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10 Mr Reg Hamilton, *Hansard*, op.cit., p.37

11 Mr Stephen Smith, op.cit., p.35

12 ibid., p 31

# CHAPTER 2

## PROVISIONS OF THE WORKPLACE RELATIONS (REGISTERED ORGANISATIONS) BILL 2001

### Background to the legislation

2.1 Statutory requirements for the registration of employer and employee organisations have existed in the federal system since the enactment of the *Conciliation and Arbitration Act 1904*. Obligations upon registered organisations with regard to their internal structures, decision-making processes and reporting requirements have evolved as the advantages accruing to these organisations have increased. There was incremental legislative change through the twentieth century, including the regulation of union elections, rights of individuals and organisations to join, and not to join, an industrial organisation, and other similar protections. The shift from centralised wage-fixing to enterprise bargaining since the early 1990s, among other equally profound changes, has resulted in the industrial relations framework outstripping the rate of adjustment of the regulatory scheme for registered organisations.

2.2 As stated by the Hon Tony Abbott MP, Minister for Employment, Workplace Relations and Small Business, in his introduction of the bill, little attention has been given in recent years to the technical rules which govern the registration and internal administration of registered organisations.

> These rules, currently contained in Parts 9 and 10 of the Workplace Relations Act, constitute a significant portion of that Act. The regulation of the internal affairs of organisations was not substantially amended by either the Coalition's 1996 reforms, or by Labor's 1993 amending Act. Indeed, one has to go back to the recommendations of the Hancock committee in 1984-85 and the subsequent 1988 Hawke government legislation to identify any significant amendments to these statutory provisions. Indeed, some of the current regulatory provisions have remained unaltered for decades.[1]

2.3 As outlined by the Minister in his second reading speech[2], the bill before the House of Representatives (and now the Committee) proposes to achieve two broad policy objectives. The first is that matters relating to the registration and internal administration of registered organisations will be removed from the *Workplace Relations Act 1996* and be transposed into separate legislation. The second objective is the making of minor, technical amendments to these provisions as part of an updating process, particularly in relation to financial accountability, disclosure and democratic control.

2.4 The Committee notes the extensive preparation behind the introduction of this bill. Details of this process are described in the submission from the Department of Employment, Workplace Relations and Small Business. In October 1999 the Minister for Employment, Workplace Relations and Small Business released a discussion paper, *Accountability and democratic control of registered industrial organisations*. The paper outlined proposals by

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1 Hon Tony Abbott MP, *Hansard*, House of Representatives, 4 April 2001, p.26342

2 ibid.

the Government to make changes to the financial accounting, auditing and reporting obligations, changes in relation to the conduct of elections, as well as to broader accountability requirements. The paper also drew upon the Government's response to recommendations contained in the Joint Standing Committee on Electoral Matters report, the Blake Dawson Waldron report entitled *Review of current arrangements for Governance of Industrial Organisations,* as well as a 1997 Human Rights and Equal Opportunity Commission report to the Attorney-General. Submissions were called for. In response, the Government received a significant number of submissions from a wide spectrum of interested parties including trade unions, employer organisations, accounting and auditing professionals, and other interested bodies such as state governments, the Australian Electoral Commission and Human Rights and Equal Opportunity Commission. In December 1999, an exposure draft of the bill was released for public comment.

2.5 Since then the Government has held formal and informal discussions with the ACTU and peak employer groups, including, through the Committee on Industrial Legislation (COIL), a tri-partite sub-committee of the National Labour Consultative Council. In response to these discussions and other formal submissions, the Government has made extensive revisions to the bill. To enable a further meeting of COIL in March this year, Minister Abbott delayed the introduction of the Bill to ensure that all consultative processes had been fully exhausted, so that differences of view on policy or drafting would be minimised. The Committee acknowledges that the bill is a product of a genuine process of engagement in developing effective legislation, demonstrating the Government's willingness to listen and learn from the practical experience of those affected by the proposed legislation.

## Major policy provisions of the bill

### *General provisions*

2.6 The bill retains, as objectives of the act, the efficient management of organisations and encouragement of democratic control of organisations, but also makes several changes to the objectives of the legislation. The bill includes a new objective of 'facilitating the registration of a diverse range of organisations', for the purposes of enabling greater choice of representation. This addition underlines the emphasis in the bill on protecting the rights of employees who choose to join an organisation: that of joining an organisation of their choice, including through establishing a new organisation.

2.7 The amendment removes as an objective that of encouraging members to participate in the organisation's affairs, reflecting the Government's view that it is not appropriate for legislation to influence individual choice about participation in organisations' affairs by stating a statutory preference for individual participation. While it is considered desirable to ensure that registered organisations operate through democratic structures and processes, the bill reflects the view that it is open to individuals to choose the extent of their participation in these processes.

### *Registration*

2.8 The bill largely replicates the registration provisions of the WR Act. The types of associations that can apply for registration and the criteria that apply to registration remain unchanged. However, the bill would change the registration scheme by introducing, for the first time, a prohibition on conduct intended to prevent the formation or registration of an employee association. The bill would also empower the Federal Court to make orders to prevent or rectify the effects of such conduct, and to impose penalties.

2.9 Certain conduct by employers in relation to employees and independent contractors (described below) would be prohibited if the conduct is a reaction to what an employee or independent contractor has done or omitted to do in relation to the formation or registration of an association. Instances of this might include:

- in the case of employees, the dismissal of an employee, injuring an employee in his or her employment, altering an employee's position to the employee's prejudice, and discriminating against an employee; and
- in the case of independent contractors, terminating a contract for services, injuring the independent contractor in relation to the terms and conditions of the contract, altering the contractor's position to his or her disadvantage, and discriminating against an independent contractor.

2.10 Certain conduct by organisations against employers, employees and independent contractors designed to prevent the formation or registration of an employee association would also be prohibited. Under clause 20, an organisation, officer or member of an organisation would be prohibited from taking, or threatening to take:

- industrial action with the aim of coercing a person to contravene the prohibitions on certain conduct by employers in relation to employees and independent contractors; and
- any action for a 'prohibited reason' (that is, an action relating to prohibitions concerning the formation or registration of an association) or for reasons that include a prohibited reason.

2.11 These new prohibited conduct provisions complement the existing protections provided (in sections 253ZW and 253ZX) for members of organisations involved in withdrawal from amalgamation processes, and also complement the extensive protections for freedom of association provided by the WR Act. The new provisions extend the concept of freedom of association in the federal system to cover the formation of new organisations, in particular those attempting to establish an enterprise association. In such cases those involved would be concentrated at a single enterprise and may be vulnerable to discriminatory treatment.

2.12 The other change proposed to the registration provisions is the new requirement that the Commission deal with an application for registration or an application in relation to the prohibited conduct provisions as quickly as practicable (there is no such requirement under the WR Act). This will ensure that such applications are given a high priority and dealt with expeditiously, without affecting the rights of individuals or organisations to raise relevant issues and concerns and be heard in the process (clause 23).

*Deregistration*

2.13 The bill would largely replicate the provisions of the WR Act for the deregistration of an organisation. Deregistration would remain an option of last resort, with the Federal Court required to be satisfied that cancellation of registration would not be unjust. The bill provides for the Federal Court to make orders short of deregistration; for instance, an order restricting the use of the funds or property of the organisation or a branch of the organisation.

2.14 The grounds for cancellation of registration would be extended through amendments in this bill to include non-compliance with:

- *any* court order (not just injunctions) in relation to industrial action or a lockout (clause 31);
- an order made under section 298U of the WR Act, which deals with contraventions of the freedom of association provisions (clause 32);
- an order made under section 21, which deals with contraventions of the provisions prohibiting certain conduct aimed at preventing registration of a new employee association; and subsection 128(2), which deals with contraventions of the prohibition on organisations penalising members for actions in relation to withdrawal from amalgamation of the WR(RO) Act (clause 33); and
- an order of the Federal Court made under subsection 315(5) of the WR(RO) Act in relation to orders to ensure that the organisation complies with a notice issued by the Registrar requesting specified action in relation to its financial reporting obligations (clause 35).

2.15 The proposed changes to deregistration provisions reflect the need to maintain a robust and balanced system of registration and deregistration within the evolving workplace relations framework. The updating of deregistration provisions ensures that key aspects of the current system are backed by appropriate sanctions, and will ensure that the balance between the rights and responsibilities of registered organisations is maintained.

2.16 The provisions of the WR Act which empower the Commission to cancel the registration of organisations on technical grounds would be retained. The provisions which allow the deregistration of an employee organisation where it no longer satisfies the minimum membership requirements would be extended under the bill to apply to employer organisations. These amendments would enhance the balance and fairness of the deregistration provisions (clause 40).[3]

### Consideration of the issues

2.17 The bill does indeed concern itself with matters of a technical and administrative character, as the Government has claimed. Government senators note that the ACTU submission, and other submissions from unions, claim that the purpose of the bill is to marginalise the role of unions and to separate the statutory control of organisations from key aspects of workplace relations legislation. Government senators reject this argument. It is illogical and unsupported by any evidence that a court might decide a matter on the basis of legislation being in a separate act. They reject any notion of a hidden agendas, having in mind the straightforward comment of a DEWRSB officer in addressing this issue:

> It … gives people whose job it is to deal with the administration of registered organisations, both employers and employees, a stand-alone piece of legislation—a manual for them to work with. So it has two effects. One is to make the Workplace Relations Act a simple document for people who may have nothing do to do with the administration of employer organisations and unions—people simply want to bring an unfair dismissal claim or who want to enter into a document which is not encumbered by provisions about the administration of registered organisations. Separately, it is a document for those people who are concerned with the financial affairs of unions or employer organisations or elections relating to unions or

3 Summary of provisions from Submission No 10, WR (RO) Bill, Department of Employment, Workplace Relations and Small Business, pp.22-24

> employer organisations. It is their separate piece of legislation. It is a method of making it more user friendly for both groups of people.[4]

*Protection of new organisations*

2.18 An issue coming before the Committee was the additional power given to the Commission to ensure that a newly represented organisation would not be prevented from representing the industrial interests of the employees specified in the order by the Commission, who happen to be members of the new organisation. DEWRSB officers at the hearing were asked if there had been any instances of existing registered organisations using section 118A to limit the rights of a newly formed organisation. While there were no instances of this, there had been cases of established organisations using legal processes to tie up new organisations for some years. It was the role of the Commission to reconsider any applications from an organisation wishing to maintain its exclusive representation of employees or employers.[5]

2.19 Government senators note this evidence of the need to provide legislative protection to employees wishing to form their own organisations for their representation within a workplace.

*Protection against discrimination and intimidation*

2.20 The Committee was also reminded of the need for legislation, provided for in this bill, to protect employees and independent individual contractors from intimidation at the workplace, and from threats to their freedom of association. Evidence was given to the Committee about a case of a contractor put under duress in relationship to his membership of an organisation. The Committee heard that:

> Not long ago we were contacted by a man named Glen who is a plumber in Victoria who had 10 years previously worked in a Victorian construction site as a plumber, and at that time had joined as a member a registered organisation. He left the industry for a while and became self-employed and ineligible to be a member of that organisation, and subsequently, I think for about five years, he kept on being contacted by the organisation saying that he was required to pay membership dues without giving him any information. He kept responding to that organisation, 'I am ineligible to be a member and I have resigned.' He received some representation saying that he was not allowed to resign. At the end of this ten year period he was awarded a contract to work on another Victorian construction site and was told he would not be able to work on the site unless he paid 10 years worth of membership dues that he owed. This was following a series of representations that were probably not accurate about his ability to resign from the organisation.[6]

2.21 According to departmental officers, a person in such a position has no redress under current provisions in the act. The Committee was told that there is currently no general provision which would allow the Industrial Registrar to take action simply because an organisation supplied false information, and there is currently no remedy.

4 Mr James Smythe, *Hansard*, op.cit., p. 7

5 *Hansard*, 24 May 2001, p. 41

6 Ms Penny Shakespeare, *Hansard*, op.cit., p.42

2.22 This evidence is consistent with that received during the Committee's inquiry into the WR (More Jobs Better Pay) Bill in 1999. On that occasion the Committee heard evidence of union 'closed shops' in the construction industry. The need for legislation to address systematic restraint of freedom of association in some industries was put to the Committee. A small family company described how its presence on industrial sites provoked industrial action on a number of occasions following visits to these sites by an organiser from the CFMEU. Although supported by decisions of the Arbitration Commission, this afforded little protection to the contractors, whose business was damaged.[7]

2.23 Contrary to the views of the ACTU and individual unions who submitted evidence to the Committee, Government members of the Committee regard the strengthening of protection provision under clause 20 as overdue and believe they warrant strong support. The need for such provisions is evident from the accounts of disadvantage dealt with briefly here. These are matters which those who oppose such legislation find convenient to overlook. Industrial practices such as those instanced here require the attention of the law-makers. This bill is a case of overdue legislative housekeeping. It also provides for some changes which reflect the relationship between the role of registered organisations and the needs of a workforce for the twenty-first century.

7 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Report of Consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, November 1999, p.134

# CONCLUSIONS

While a substantial proportion of this legislation may be described as being 'machinery' legislation, its core policy initiatives are essential to its purpose. As Government senators conclude in relation to the WR Registered Organisations Bill, housekeeping legislation must reflect in its detail whatever changes are made necessary by modernising change. Given the dramatic changes in workplace relations over the past twenty years – and that being a reflection of much wider economic and social change – no 'machinery' legislation in workplace relations can leave intact processes which reflect an outdated culture.

Thus, the Transmission of Business Bill provides for changes which are consistent with the objectives of the Workplace Relations Act, and specifically with the need to regulate for a more flexible labour market, one characterised by increased job mobility and a regimen of remuneration and conditions of employment that are determined at the workplace level. The remnants of centralised wage fixation are still to be seen in an attitude which regards an enterprise agreement as a local variant of an industry-wide agreement. Evidence to the Committee was that current legislation in these circumstances impedes the growth of employment. For this reason alone Government senators urge the passage of this bill.

The weight of the Registered Organisations Bill is due partly to the fact that it consolidates all the relevant provisions from the Workplace Relations Act in a separate new act. The opportunity is taken here to modernise the provisions of the old act, and to update them. The regulation of registered organisations now puts an emphasis on freeing up the choices of individuals and groups within those organisations. Government senators consider that this bill demonstrates, in common with the Transmission of Business Bill, a legislative affirmation of the importance of balancing the rights of employers, employees and registered organisations in the modern commercial and labour market environment. The interests of employees has some dimensions which organised labour has often been unwilling to concede, but which these bills recognise.

Government senators commend this report to the Senate, and urge the passage of these bills.

**Senator John Tierney**

**Chair**

# LABOR SENATORS' REPORT

## OVERVIEW

1.1 This is the fifth report put down by this Committee in the current parliament on proposed amendments to the *Workplace Relations Act 1996*. The conclusion of Labor senators on the legislation currently before the Parliament is that the proposed amendments are, like their predecessors, partisan and unbalanced.

1.2 The Government senators' report, echoing the Minister's refrain, describes the bills as 'machinery legislation', introduced for the purpose of doing some 'house-keeping' The impression gained from a reading of the Minister's second reading speeches, and the Government senators' report, is that these bills are almost self-justifying. The Government would have us believe that what it sees as the timeliness of these bills, their relevance and their compatibility with both the spirit of the WR Act and the culture of contemporary workplace relations practice, renders opposition to their passage unreasonable. This is itself an unreasonable proposition. It places far too much store on the Government's credibility in the area of workplace relations. It ignores elements within both Bills that are unfair to employees, substantively eroding rights, and it glosses over overtly political and pernicious changes that are unjustified, unnecessary and unsupported by any evidence.

1.3 Labor senators note this Minister at least attempted to embark on a degree of consultation with concerned parties. And it is true that some policy matters that are addressed in this legislation do appear to be fairly identified. The extent to which these bills succeed in remedying the problems they seek to address is, however, entirely questionable, and certainly not borne out by the evidence presented to the Committee.

1.4 It should be explained at the outset, however, why the 'partisan' label can be appropriately attached to these bills, beginning with the Transmission of Business Bill. The purpose of this bill is to overcome an obstacle to the business plans of employers who wish to reduce wages and conditions of employees inherited from businesses they have taken over. Currently, certified agreements are transferable with the employees who are party to them. Employers argue that the nature of the work, and the conditions of the workplace will almost always vary to the extent that inherited certified agreements are inappropriate to the new business or workplace, even though the general nature and description of duties may be similar.

1.5 Prima facie, this may be an arguable proposition. But like so many proposals concerning industrial relations advanced by this Government, it only remains attractive if viewed superficially. It takes no account of the need to apply an effective anti avoidance provision to protect the rights of the employees concerned. It takes no account of the

unfairness inherent in allowing unilateral action by an employer to terminate the conditions of employment agreed to in a good faith bargain – a process facilitated and encouraged by Government policy. And it completely ignores the serious damage done to workplace relations, to workers and their families, as a result of Government policy since 1996. A high proportion of the workforce has suffered the wholesale outsourcing of public sector functions without employee protection safeguards of the kind implemented in Europe. Over the same period, employees have suffered the increasingly irresponsible behaviour of employers who have put their workforces last in the list of priorities when their businesses have collapsed. It is against the background of these developments that Labor senators are considering these bills.

1.6 While employers point to problems arising from current provisions that impede their investments and takeovers, unions who made submissions to this inquiry point to the distress caused to thousands of workers and former workers who suffer as a result of workplace restructuring. The Transmission of Business Bill does not acknowledge this problem. It simply imposes a blunt solution to a complicated issue. A solution that reverses an eighty year old judicial precedent protecting employees from the deleterious outcome it provides; that is entirely at odds with the practice of other civilised nations; and that offends the very nature of the principles espoused by this Government – determining matters at the workplace level, by agreement between employers and employees.

1.7 In relation to the Registered Organisations Bill, Labor senators note that it has attracted less attention, and that submissions have generally dealt with it relatively briefly.

1.8 The view expressed by unions is that the bill is unnecessary. There is broad objection to the idea of removing such provisions as are to be found in the bill from the body of the Workplace Relations Act. Unions believe that the clear links within a single act between workplace relations and the role of organisations in the system serves a useful purpose, and, in our view, rightly question the motivation of separating them.

1.9 Concern was expressed about the unacceptable level of interference in the internal affairs of registered organisations. Both the ACTU and the Shop Distributive and Allied Employees' Association (SDA) had substantial points to make, and these will be covered later in the report.

1.10 Finally, despite the Government's claim that these bills are merely machinery legislation, Labor senators note that this legislation also seeks to undermine collective organisation. Examples of this include that The Registered Organisations Bill has different Objects provisions than those contained in the current WRA, removing the encouragement for "members of organisations to participate in the organisations' affairs" (WRA S 187A (b)).

In the Transmission of Business Bill, the Government is not concerned with the transmission of individual (albeit often identical) Australian Workplace Agreements (AWAs).

1.11 Labor senators conclude that consideration is not urgent. We question the undue haste of the Government in pursuing this legislation (including the calling of this Inquiry before the Workplace Relations (Registered Organisation Consequential Provisions) Bill had even been tabled in the House). The Government has consulted widely on the issues, but the outcome of these consultations appears to be ambiguous, in the light of evidence received by the Committee.

## WORKPLACE RELATIONS AMENDMENT (TRANSMISSION OF BUSINESS) BILL 2001

1.12 The core policy initiative at the heart of this bill is the granting of additional powers to the Australian Industrial Relations Commission, for the purpose of having the Commission make decisions about whether, or under what conditions, a certified agreement can carry over with an employee in the event that a business comes under new ownership. Currently, the certified agreement continues in force until its expiry. Labor senators have numerous concerns to address in relation to this bill.

1.13 Seeing the Commission in a new light

1.14 It is surprising to see the Government demonstrating a sudden burst of confidence in the Australian Industrial Relations Commission. In their dissenting report on the consideration of the provisions of the Workplace Relations Amendment Bill 2000, Labor senators described a trend beginning in 1996 to dismantle the arbitral and judicial apparatus of industrial relations, which had been a feature of Australian life since 1904. Labor senators noted the incidence of sniping commentary from organisations close to employer groups, and from the then minister for workplace relations. The More Jobs Better Pay Bill, introduced in 1999, and considered by this Committee, proposed the reduction of the conciliation powers of the Commission. The Workplace Relations Amendment Bill 2000 proposed the erosion of the powers and standing of the Commission in ways other than proposed in the 1999 bill. In what one distinguished commentator described as 'a gratuitous insult to the Commission', the bill proposed to fetter the discretion of the Commission by requiring it to have particular regard for the views of one party to a dispute over the views of another party.[1]

1.15 In that inquiry, the obvious unfairness of the Government's position drew comment even from employer groups whose support the Government may have taken for granted. The position of the AiGroup appeared to be equivocal, although they conceded that the weakening of the Commission's powers could be regarded as a 'free kick' to employers. Perhaps a more balanced, and certainly more up-to-date summation of the AiGroup's attitude to the Commission can be seen in the statement of its chief executive, Mr Bob Herbert, who on the occasion of the centenary of the Barton government's introduction of legislation to establish a conciliation and arbitration court, stated:

1.16 Throughout the past century the commission has demonstrated a resilience and adaptability and has quite adequately protected the public interest.[2]

### The issue of the Commission's discretion

1.17 The issue of the Commission's discretion was raised at the public hearings. While some employer organisations did not consider that the Commission was in need of guidelines upon which its discretion might be based, there were some concerns expressed in submissions. Toll Holding Limited claimed that the legislation was flawed by the absence of

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1 Senate EWRSBE Legislation Committee, Consideration of the Provisions of the Workplace Relations Amendment Bill 2000, June 2000, p. 27

2 *Sydney Morning Herald*, 6 June 2001, p.18

a clear and comprehensive test of transmission of business, and that general tests 'or indicia' be devised to guide the Commission's discretion to make orders.[3]

1.18 It is noteworthy that the Rail, Tram and Bus Union makes the same point, obviously from a different perspective.

1.19 The Bill places no restriction, or qualification, or test to be met in order to succeed or otherwise in an application made pursuant to the provisions in the Bill. Because the provisions concern certified agreements, no public interest criteria apply. It appears that the discretion reposed in the Commission on this matter is discretion at large (subject of course to the objects of the Act). Given the general nature of the Bill, why wouldn't an employer want to, 'have a go'.[4]

1.20 The Australian Catholic Commission for Employment Relations (ACCER) has argued that to be effective in its role, the Commission needs to apply a no disadvantage test, as provided for in the WR Act, where the terms and conditions of employment of a transmitted business are currently determined under a certified agreement and where an order is sought by an employee to overturn that agreement. The current certified agreement should be the designated benchmark for the application of this test. The ACCER also believes that employers should be required to submit to the Commission the detail of proposed new terms and conditions of employment in order to ensure that the Commission has access to the widest rage of information possible upon which to base its decision.[5] Labor senators believe these submission illustrate one central failing of the provisions of this Bill: the Government has no clear idea what effect, if any, it is legislating for. This contention is supported by the Department's evidence before the Committee when they were asked to comment on a number of hypothetical and real situations of transmissions of business.

**Senator JACINTA COLLIN**S—Yes, but if the agreement does not transmit the difficulty is that the workers involved who, in good faith, formed an agreement with the transmittor essentially lose all of their conditions. There is no scope for the parties to negotiate an appropriate outcome.

**Mr Smyth**e—No, they do not lose. They would still be covered by the agreement of the transmittee.

**Senator JACINTA COLLIN**S—Yes, and that may be at a standard much lower than what they were previously working under.

**Mr Smyth**e—And if it were, you would imagine the commission would not order that the agreement did not transmit. Or the commission might say, for instance, that the fundamental protections in the agreement, such as the base rate of pay and the leave, do transmit but some of the other aspects of the agreement such as the shift rosters or the way in which work is performed do not transmit, which is a flexibility that this bill provides.

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3 Submission No 23, Toll Holdings Limited, p.8

4 Submission No 8, op.cit. p.19

5 Submission No 17, Australian Catholic Commission for Employment Relations, p.12

**Senator JACINTA COLLINS**—What gives you the view that the commission would necessarily take that approach in applying a very broad discretion? Why would the commission, for instance, not take the approach that the appropriate benchmark is the award safety net? What guidance does the commission have to indicate that it would take into account the conditions that previously applied to these inquiries?

**Mr Smythe**—It would be up to the commission to apply equitable principles. As the NFF pointed out, the transmission provisions are anti-avoidance provisions—sections 149 and 170MB are there to ensure that people do not lose out, that obligations are not evaded by transmission of business. But where there are significant administrative problems and there is a capacity to ensure that some measure of protection is retained, then this bill allows the commission to unscramble the eggs, if you like.

**Senator JACINTA COLLINS**—We can all take the benefit of the NFF in terms of how they think the commission might apply its discretion. What guidance in the act exists?

**Mr Smythe**—The act does not provide any guidance, because the government believes that the commission will act consistently with the objects of the act and the fact that these are anti-avoidance

1.21 Labor Senators remain unhappy with these assurances. In light of the extensive changes to the WRA in 1996, it is difficult, if not impossible to determine how a Court or Commission would exercise its discretion, and what factors would weigh most heavily in its considerations. The primary object of the post-1996 Act is to,

1.22 promote the economic prosperity and welfare of the people of Australia by: (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market (WRA S 3).

1.23 With this as a guide, we would be extremely concerned that the traditional desire by the Courts to prevent avoidance by employers of their obligations to employees may become a secondary consideration.

1.24 Another concern is whether the Commission would see the award safety net as the appropriate benchmark in determining whether to issue an order, or whether it would apply a more embracive no-disadvantage test. In failing to address this issue in this legislation, the Government is storing up more difficulties for itself in the future.

**Unfairness? Which unfairness?**

1.25 One of the more confusing themes pursued by employer organisations in their submission was that employers who purchase a business without determining the cost of employee wages should have an opportunity to cease being bound by previous agreements.

1.26 The ACCER submission deals with the claim made by the Australian Chamber of Commerce and Industry (ACCI) in the instance it cites in its submission of a firm that took

over a large supermarket only to find, to its surprise, that a 'generous' enterprise agreement was in force. ACCI has stated:

1.27 It is easy to say that the new owners should have taken steps to find out about the agreement and compared it to industry norms….[6]

1.28 As ACCER has said:

In reality, where a new employer has taken over a business, the terms of conditions of employment would have been assessed by it before it completed the purchase. This is part of the normal due diligence of business whenever taking over another business and a new workforce.[7]

1.29 Labor senators hope it is unlikely that the Commission would take a sympathetic view of a company's plight in the event of an incidence of employer negligence of the kind described in the ACCI submission. Yet it is also likely that applications from negligent companies for orders from the Commission will be made under these provisions if this bill passes. It is also likely that there will be more strident calls from employer organisations to fetter the discretion of the Commission in regard to these provisions should a virtual no disadvantage rule be applied. The evidence given to the Committee was that the Government has given broad discretion to the Commission, rather than to regulate the way in which this discretion should be exercised. This was to ensure that this section of the act did not become 'a lawyers picnic'.[8]

1.30 However, this bill does invite unfairness and inequity, or at very least the possibility of these outcomes. The potential for an employer to manipulate these provisions as an avoidance measure of previously determined collective bargaining outcomes is clearly invited by this legislation.

1.31 It is instructive to consider the legislative and common law history of transmission of business matters, which was addressed by a number of parties in submissions to the Committee. To quote the CPSU:

1.32 Parliament responded to the decision of the High Court in Whybrow's Case, with legislative amendments to the C&A Act which were introduced in 1914. These were the first transmission provisions which provided that an award was binding on any successor, or assignee or transmittee of the business of a party bound by the award, including any corporation which had acquired or taken over the business of such a party.[9]

1.33 The 1914 amendment, however, did not entirely remove this avenue of avoidance. Instead of waiting until an award was made to transfer, alter or change the corporate identity, the employer could merely change the identity of the business before the matter got to court or during the process of litigation. By using this tactic, the employer knew that by the time an award was made, the business whose name was listed as a respondent, was no longer "in

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[6] Submission No 12, Australian Chamber of Commerce and Industry, p.3

[7] Submission No 17, op.cit., p.12

[8] Mr James Smythe, *Hansard*, 24 May 2001, p.48

[9] Section 29(ba) of *C&A Act 1904*.

existence". This situation came before the High Court in the 1920 case of *Proprietors of the Daily News Ltd v Australian Journalist Association.*[10] In this case the High Court held that the appellant was not bound by the award, as s29(ba) did not apply to a transmission that occurred between dispute finding and award making.

1.34 To remedy this problem Parliament amended the section in 1921 to provide that an employer only had to be party to a dispute to be bound by the eventual award made. Section 29 was amended to state that: *s29 The award of the Court shall be binding on (ba) in the case of employers any successor, or any assignee or transmittee of the business of a party to the dispute or of a party bound by the award, including any corporation which has acquired or taken over the business of such a party.*[11]

1.35 In 1923 the High Court heard a challenge to the Constitutional validity of these provisions in *George Hudson Ltd v Australian Timber Workers Union.*[12] George Hudson and Sons Ltd had made a registered consent agreement with the Australian Timber Workers Union but, in an attempt to avoid the terms of the agreement, established a new business called George Hudson Ltd which performed all the same work as George Hudson and Sons Ltd. George Hudson Ltd, however, refused to apply the terms of the registered agreement. The Supreme Court of NSW imposed a penalty upon George Hudson for breach of the agreement. On appeal to the High Court George Hudson argued that the "transmission provisions" were constitutionally invalid. The High Court decided against George Hudson, citing the purpose of the statute:"*Men are not so likely to submit to peaceful methods of settling their disputes, by agreement (conciliation) or award (arbitration) if they feel that those with whom they dispute can evade the obligations imposed by transferring their business to their sons, or by assigning it to a company having a new name and the same shareholders."*[13]

Justice Isaacs, emphasised that the transmission provisions prevented a gross injustice to employees, "who had been led to make an agreement on the assumption that it was as stable as a compulsive award…", but also to ensure that "a successor to a business could not become so without knowing the statutory obligations of his predecessor to his employees.*"*[14]

1.35 The Court determined that the provision was at least incidental to the constitutional head of power as it was an essential part of maintaining the settlement of an industrial dispute. This point is overlooked in the Ministers discussion paper and the proposals for reform. So to is the point made in the Judgement of Justice Isaccs, that the provision actually enhance certainty by allowing successor employers know the obligations owed to their employees.

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[10] (1920)27 CLR 532.

[11] The Act was also amended to provide for transmission to apply to Consent Agreements (the forebears of our current Certified Agreements) at s24(1) :

*"or any successor or any assignee or transmittee of the business of a party bound by the agreement including any corporation which has acquired or taken over the business of such a party."*

[12] (1923) 32 CLR 413.

[13] 32 CLR 413 at 452.

[14] Ibid at 435. On this point see also the *Proprietors of the Daily News v. Australian Journalists AssocitION* 27 CLR 540 per Isaacs at 545.

1.36 Two things are clear from the history: first, that unscrupulous employers have and will use any legal loophole to avoid compensating employees agreed terms and conditions; and second, that until this legislation, for eighty years both Parliament and the Courts in this country were determined to stop avoidance in this manner. It is a development of great regret that this Government has chosen a different path.

1.37 The rationalisation proffered by the Government, that enterprise bargaining has introduced a new and different element to the mix is both unconvincing and untrue. Certified agreements, as a result of this Governments award stripping exercise, now resemble the awards of old. The injustice of 1923 in avoiding the transmission of an award is entirely replicated in 2001 by avoiding the transmission of a certified agreement.

1.38 And the primary justification in support of these provisions, to prevent the problems associated with different conditions for the same work, is an entirely hypocritical position when advanced by this Government. In the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, the same Government proposed allowing employers to offer different conditions to employees performing the same work through AWAs. So really, how important is consistency in the workplace to this Government or employers? Employers frequently structure differential employment outcomes in certified agreements, in the form of savings provisions, and there has been no legitimate argument proffered as to why such arrangements cannot be applied to transmitted employees. One thing that is consistent with both the 1999 proposal and this one is that they both increase managerial prerogative at employees' expense.

**Workplace bargaining**

1.39 Labor senators have always championed the role of an independent Commission and have been dismayed at previous attempts by this Government to reduce its powers and status. This does not mean that the Commission should be the first port of call in all matters relating to workplace relations. The danger which Labor senators see in this legislation is the expectation of employers that the Commission will not only do their bidding, but relieve them of the responsibility of direct negotiation with their employees over the transmission of business and transferred certified agreements. If employers do not see certified agreements as central to the whole principle of workplace relations, then the Governments sponsorship of a culture change in this area has been a farce and a failure.

1.40 Labor senators have consistently regarded the Commission as the most appropriate body to determine any disputed matters relating to workplace bargaining. The great irony of this Bill is that the rhetoric used by the Government appears to represent a newfound acceptance by this Government of that principle. This is of course a fallacious argument for this particular piece of legislation. The Government is conveniently ignoring the underlying principle of enterprise bargaining that an agreement is made for a term unless set aside with agreement of the parties and that there are no subsequent claims for the life of the agreement. If these provisions were to come into force no employee could be certain that when an agreement was reached that their employer would adhere it to. We have yet to hear a sensible justification from the Government as to why they propose to make the Commission the first

stage in the process of determining a transmission. The closest we came was the following exchange with the Department:

**Senator JACINTA COLLINS**—Going back to what was considered then, are you able to apprise the committee of what was considered in relation to those sections of the act?

**Mr Smythe**—I do not think it would be appropriate to apprise the committee of issues that were raised in policy development, but the point that we make is that there are—

**Senator JACINTA COLLINS**—Perhaps, Mr Smythe, you could take that on notice because that is exactly the issue that interests me. The minister can obviously decide whether or not we can have the benefit of what he has considered in this area in terms of policy development.

**Mr Smythe**—I am sorry; what is it that you wish me to take on notice?

**Senator JACINTA COLLINS**—You indicated that, with respect to the provisions for varying certified agreements, the variation means was considered as an option.

**Mr Smythe**—The variation means was, yes.

**Senator JACINTA COLLINS**—I have asked you whether the committee could have the benefit of that consideration. You have, quite rightly, indicated that that is not something within your purview to offer the committee, but I have asked you to take that on notice and ask the minister to consider whether he is prepared to make that policy development process available to the committee.

**Mr Smythe**—Yes, okay.

**Senator JACINTA COLLINS**—You say that the government has been assured that that is not the simplest way to go. I say back to you—

**Mr Smythe**—I will correct that, Senator. I do not think I could say that a particular option was put up and the government said that that was not the simplest way to go. What I am saying is that, in the broad range of possible things that might be brought forward to address the transmission issues, this bill is regarded as a simple remedy to some of the problems.

**Senator JACINTA COLLINS**—I am still working my own mind through the earlier potential remedy. If the government has gone through the process of that consideration, and it would be useful to my own consideration, I would be interested to see it.

**Mr Smythe**—I will take that question on notice.

**Senator JACINTA COLLINS**—Because of my earlier comment, which was that I thought that the general thrust of this act was meant to be to encourage the parties to resolve such issues before you needed to rely on a determination of the commission's discretion, it seems that the government, for whatever reason—and I do not know it at this stage—has decided to completely bypass that process.

**Mr Smythe**—I do not think that is a fair comment. As I said, it may well be that the government will come up with further legislation at some point to address a broader range of

issues that arise in respect of transmission of business. This is one simple remedy to address some urgent problems in respect of the inappropriate interaction of the said agreements.

**Senator JACINTA COLLIN**S—Yes, but in relation to these sorts of cases, it is a very broad remedy. I am asking why a narrower remedy, which would focus on—at first instance—facilitating resolution amongst the parties of a certified agreement—

**Mr Smyth**e—I think I have already said that the government believes that this is the simplest approach. But, as I have said, I will take on notice whether we can apprise the committee of what other consideration the government may have given to the approach you have outlined.

1.41 This is hardly a satisfactory justification for a major legislative change to the conditions of ordinary working people.

1.42 Labor senators support the notion that industrial participants should bargain in good faith, and the corollary of that proposition, that they should be bound by the outcomes of that process. The capacity for one party to seek relief from the conclusions of their own bargain is simply wrong. In no other aspect of the commercial relationships entered into by the previous owner of a business would such an outcome be tolerated. Ordinary contractual relations entered into by a business survive the sale of the business, so what rationale exists for treating employment relationships any differently?

1.43 The failure of this legislation is that in trying to achieve some certainty for those involved in transmission situations, it offends the most fundamental principles of fairness and equity. It is partisan and invites abuse. It encourages outsourcing as a means of avoiding and minimising labour costs, and does not provide for any protection from the unscrupulous. As noted by the CPSU's Mr Ramsey,

1.44 What this amendment would do would be to enable one part of the equation, the employer, to come along to the commission and say, 'Look, we have changed our mind. We have thought of a more profitable way to do things, and that is by outsourcing. We would like you to undo the arrangement we have entered into with staff.[15]

## A Partisan bill

1.45 Labor senators agree with the proposition that transmissions of business provisions are important to maintain the credibility of the industrial relations system. If the legislation is amended to favour one side over another, confidence in the system is undermined. The concern of Labor senators in this instance is that employers will be given a wider loophole through which they can manoeuvre their exemption from otherwise legally binding agreements.

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15 Mr Steve Ramsey, *Hansard*, 18 May 2001, p.26

1.46 The AiGroup representative at the public hearing on the bills was asked why a company bound by a transmitted certified agreement could not simply reach agreement with its employees to vary the agreement. In later correspondence to the Committee, Ai Group elaborated on its earlier answer to a question at the hearing:

1.47 …Ai Group expressed the view that in many circumstance such a strategy would not be practicable. To highlight this, consider the example of a government department with 10,000 employees (which has a certified agreement) which transmits an operation to an IT company, If the IT company, which has become bound by the department's certified agreement, wishes to vary the certified agreement, an application would need to be made to the AIRC in accordance with section 170MD of the act. This section requires that the Commission can only approve the variation if a valid majority of the employees whose employment is subject to the agreement at the time genuinely approve the variation. Clearly, this would necessitate the involvement of the department's 10,000 employees in the vote, together with the IT company's employees. Such an approach would not be practicable.[16]

1.48 Unfortunately, to allow a remedy of this fashion for this problem would simply be an incitation to the situation that was reported in the dispute at Joy Manufacturing. In this case the company was proposing to break the parent company into four entities and provide different terms and conditions of employment in each sector. This bill would facilitate the opportunity for a company to avoid a collectively determined and voluntary enterprise bargain either as a cost saving measure or as a precursor to outsourcing.

1.49 We are further unenthusiastic about this proposal because the Minister has not provided the Committee with the benefits of his consideration of other remedies more proximate to the bargaining relationship, effectively preventing us from determining whether his decision to pursue this option is a fair and rational one.

1.50 The Committee received submissions indicating a great deal of union unease at the proposals in this bill. The ACTU referred to the continuing validity of claims it made to the committee's inquiry into the 1999 MOJO Bill, in which submission it argued that weakening an already inadequate transmission of business provision would further encourage the types of contracting out and corporate restructuring which were then having an adverse effect upon employers. The ACTU referred to undesirable legal ambiguities that existed under current legislation, but pointed out that these were not addressed in the amendments now proposed. The issue for legislation was how to ensure that privatisation and outsourcing arrangements did not leave employees doing exactly the same work for the benefit of the same people or organisation but at greatly reduced wages and conditions.[17]

1.51 Rather than address this issue, the bill provides only for the restriction of transmission of business in cases where companies are taken over, or businesses or parts of businesses transferred. The ACTU submission states that it is not aware of problems of this nature. Its perspective on the transmission of business problem is one of employers restructuring their businesses or creating new businesses or outsourcing in order to avoid their obligations under certified agreements.

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16 Additional Information, Australian Industry Group, 4 June 2001. Tabled Papers, Senate EWRSBE Legislation Committee Report

17 Submission No 6, Australian Council of Trade Unions, pp.1-2

1.52 Consideration of evidence of this kind demonstrates the validity of Labor senators' claims that this is a partisan bill. The problems have adverse effects on both employers and employees. The case made by the Australian Industry Group and other employers is not without substance. From an employee's perspective, however, the main point of contention is completely overlooked. The bill offers no protection for employees whose jobs have been outsourced to the private sector, either to those directly employed by new companies, or indirectly employed through employment companies. Much wider support for this bill would be evident were it to provide greater degrees of protection for employment conditions for outsourced work. Labor senators fear that the policy path followed so inflexibly by the Government since 1996 makes it highly unlikely that provisions of this magnitude could be agreed to for inclusion in the current bill.

1.53 From an employee's perspective, a transmission of business is a traumatic period in which matters of vital interest to them are decided in their absence. Employees are on the sideline watching while directors and shareholders on both sides negotiate the preservation or enhancement of their assets. These negotiations are often carried out beneath the cloak of 'commercial-in-confidence' discussion, to which employees are not privy. Employees live with the expectation that redundancies will be the first and most popular option for new directors anxious to cut costs to protect share value. This is usually accompanied by an attempt to change a certified agreement to remove some entitlements that may be written in to them. Job insecurity is often a sufficient deterrent to employees who might otherwise take industrial action.

1.54 Speculation of future developments of employer policy in the light of these proposed amendments moves beyond the concerns expressed by the ACTU. The concern of that organisation, as expressed in its submission, is for the fate of outsourced workers, most of them former public sector employees. The concern of particular unions is of the potential licence given to employers to engage in unscrupulous wage-cutting measures. An instance of this possibility was noted in one submission:

1.55 What is to prevent an employer being prepared to bid for another company at a price in excess of what the company is actually worth on the basis that it will recoup that additional amount by lowering costs in the company it has taken over. An important part of the cost-cutting exercise would be the removal of the certified agreement as the legislation would provide for such potential. As the new owner, they would produce figures to the Commission identifying its financial problems and arguing that to survive, the current cost structure must be lowered. Whilst the cost structure is no higher than it was before the transmission, it becomes a problem for the new owner because it bid, 'over the odds', in the first place in the expectation that the legislation provides them with an opportunity to argue for the removal or partial removal of the certified agreement.[18]

1.56 The submission continued:

1.57 In the publicly owned segment of the rail, tram and bus industry, the temptation to pursue the removal of a certified agreement, in a transmission situation through privatisation, will be overwhelming. The provision of these forms of public transport are often attended by public policy considerations manifest in community service obligations or funded deficits designed to reduce reliance on private vehicles or to reduce greenhouse gas emissions or for

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18 Submission No 8, Australian Rail, Tram and Bus Industry Union, p.18

other public goods. With privatisation being overtly designed to reduce costs to government, a private operator will grasp any opportunity to achieve that end. In those circumstances, why wouldn't they attempt to exploit an opportunity that is presented to them.[19]

1.58 Concern was also expressed about the effect of this amendment upon the ease with which business takeovers could be effected. Labor senators can foresee instances where the wages and working conditions of employees could become a bargaining chip in the event of a company takeover. A sale of shares may depend on an assumption that running costs can be reduced at the expense of employees. As one submission argued:

1.59 If outgoing employers have entered into a legally binding agreement with their workforce they should not be able to have the option to effectively dump that agreement in order to get a better price for the sale of their business. They have entered into an agreement and there is no reason why they should not be held to that agreement. If the agreement is thought to disadvantage an incoming employer, the cost of that disadvantage should be borne by the outgoing employer through a slightly reduced sale price for the business. To allow any apparent disadvantage to an incoming employer to lie with the workforce would not only be unfair but seriously undermine the integrity of the enterprise bargaining process.[20]

1.60 Labor senators consider these fears to be highly plausible. That is a measure of how far business ethics have declined in regard to the treatment of employees. That a workforce can be considered to be an impediment to business profit is indicative of a change which has been evident over the past five years as labour is regarded as a commodity existing beyond a social market. For this reason, some fundamental safeguards need to be built into workplace relations structures. To the extent that this bill represents a refinement of policy which appears to be failing in its social objectives, these amendments fail to deliver the necessary improvements.

### Australian Workplace Agreements

1.61 The Government has not proposed that the bill apply to Australian Workplace Agreements. This, presumably, is because the commission does not deal with AWAs. These remain under the purview of the Employment Advocate. References were made to AWAs in evidence to the Committee. The Rail, Tram and Bus Union submitted that:

1.62 The failure to apply the provisions of the Bill to Australian Workplace Agreements (AWA's) creates a paradox. This paradox will arise where the employees in a transmitted company are employed through a combination of AWA's for some employees and a certified agreement for other employees. In this situation (and it does exist) the Bill allows for the removal of certified agreement but not an AWA. This is not only grossly unfair and discriminatory but will contradict the ostensible reasons for the Federal Government seeking such legislation.[21]

1.63 The Committee was also told that AWAs were similar to certified agreements with regard to the potential problems they caused following a transmission of business. The

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19 ibid.

20 Submission No 4, Australian Metal Workers Union, p.5

21 Submission No 8, op.cit., p.10

Community and Public Sector Union representative suggested that AWAs may be a cause of problems resulting from a transmission of business, presumably in cases where a new employer wishes to replace an enterprise agreement with AWAs. The CPSU stated that issue of AWAs was addressed in the discussion paper, and that the omission of any reference to them in the bill left it open to the criticism that it did not address all the relevant issues.

1.64 Labor senators raise the question of whether the hidden agenda of the Government in this Bill is to undermine collectivism in industrial relations. It is inexplicable to us for the Government to treat differently collective industrial instruments compared to individual industrial instruments in a transmission of business context. One of the effects of this differing treatment will be to make AWAs more attractive in comparison to certified agreements, because they will be the only means of achieving certainty and preserving entitlements in a transmission context. There is no logical policy imperative for this differentiation, and its presence in this Bill can only be viewed with suspicion.

## WORKPLACE RELATIONS (REGISTERED ORGANISATIONS) BILL 2001

1.65 The broad policy objective of the Registered Organisations Bill is not clearly evident from the Minister's second reading speech. On the face of it, this is a 'housekeeping' bill, updating and making technical adjustments to provisions currently part of the Workplace Relations Act, but excising those provisions to a separate act for 'ease of access'. The transparency of consultation and drafting is claimed to be evident in the deliberations following the release of the Blake Dawson Waldron report.

1.66 Amongst obviously necessary and commonsense amendments are to be found provisions that reflect a contentious and ideologically driven Government agenda in relation to trade unions. These include:

- providing for a separate act
- whether removing reference to registered organisations from the objects of the principal act may have some unintended consequences
- changes to the objects removed from the WRA and appearing in this Bill
- the widening of the grounds for deregistering an organisation;
- the ability to disamalgamate employee organisations through easier disamalgamation proceedings;
- fiduciary duties imposed on the conduct of officials and the requirement to adhere to Australian Accounting Standards, and;
- increasing the scope and powers of the Office of the Employment Advocate.

### Why a separate act?

1.67 There is broad objection to the idea of removing such provisions as are to be found in the bill from the body of the Workplace Relations Act. Unions believe that the clear links between workplace relations and the role of organisations in he system need to be emphasised within a single act.

1.68 The Shop Distributive and Allied Employees' Association (SDA) has submitted that the bill is nothing other than a device to separate the statutory control of organisations from the key federal workplace relations legislation. The SDA argues that the Government's incorporation of existing provisions of the Workplace Relations Act has occurred mainly because of its overriding purpose of separating control of registered organisations, rather than any proper examination of the relevance of such provisions in a future act. The SDA cites provisions relating to entitlement to membership as no longer relevant given the freedom of association provisions of the Workplace Relations Act. The policy thrust of new provisions in

the bill relating to entitlement to membership are diametrically opposed to the concept of freedom of association.[22] As the SDA submission explains:

1.69 If the Government is genuinely committed to allowing workers to freely associate together, then it is inconceivable that the Government should have legislation forcing registered organisations to accept as members persons that they do not want to accept. If the Government had intended to embark upon a proper and serious examination of the provisions in the Workplace Relations Act relating to organisations, then it would appear that any review of the Workplace Relations Act which was to be consistent with the Government's declared policy of Freedom of Association would come to the considered conclusion that there was no need for retaining provisions so as those found in Division 9 of Part IX of the Workplace Relations Act relating to an entitlement to become and remain a member of an organisation.[23]

1.70 On the other hand, the majority of employer organisations support the excise of the registered organisations provisions from the main body of the Workplace Relations Act.

1.71 Labor Senators will consider this aspect in the context of other amendments.

**Objects of the Act**

1.72 This Bill makes two important amendments to the objects of the WRA. The first inserts a new object of 'facilitating the registration of a diverse range of organisations'. It is curious that the Government seeks to promote the proliferation of unions on the basis of enhancing workplace democracy, yet it is likely that these new smaller unions will be less resourced and therefore less effective.

1.73 The second removes the object encouraging "members of organisations to participate in the organisations' affairs" (WRA S 187A (b)). Its removal is indicative of this Government petty obsession with unions, and their desire to sideline their important role in the industrial process. There is no rational reason to remove this object – participation in the affairs of any organisation is a worthwhile aim particularly where this Government appears to be so enamoured of the notion of volunteerism.

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22 Submisssion No 7, Shop Distributive and Allied Employees' Association, pp.9-10

23 ibid., p.10

1.74 These proposed amendments have the potential to be extremely significant given the importance of the Objects in judicial interpretation of this particular Act.

## Registration and deregistration

1.75 Amendments to current provisions are intended to implement the Government's policy to 'ensure that the registration and deregistration provisions are appropriate to the evolving workplace relations framework'.[24] In effect, this means encouraging the establishment of associations of employees operating at the level of the workplace and outside the trade union movement. The Government is seeking 'diversity' in the range of representational organisations, a characteristic which is seen as important to the effective representation of employee interests. The removal of any specific reference to unions, or to the desirability of encouraging people to join employee organisations is intended to emphasise individual freedoms.

1.76 The problem with this theory, no doubt well understood by proponents of these provisions, is that representation of employee interests is not achieved through ad hoc workplace organisations. As the submission from the Australian Catholic Commission on Employment Relations makes clear:

1.77 The ACCER supports the registration of organisations where they genuinely represent the interests of their members. However, all registered organisations must have the industrial ability and resources - both financial and industrial - to effectively represent and promote the interests of their members. In practice, the formation of a diverse range of organisations may reduce the ability of individual organisations to effectively represent their members.[25]

1.78 The Government's enthusiasm for diversity in employer representation has been noted by the ACTU. In its submission the ACTU makes clear its opposition to the provision in clause 135 enabling a newly-registered organisation to represent employees covered by an order made under section 118A (clause 130 in the bill) before the registration of the organisation. Although provision has been made for the order to be varied to prevent this, the ACTU submits that the onus should be on a party wishing for a variation of the original order to make an application. That is, the newly registered organisation ought not have the ability to represent employees covered by a representation order unless the representation order has been varied to permit this.[26]

1.79 This Bill also seeks to widen the areas where a registered organisation may be deregistered, including, amongst others, through breaches of any court order and freedom of association provisions. Labor senators see no point in extending the grounds for

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[24] Submission No 10, Department of Employment, Workplace Relations and Small Business, p.17

[25] Submission No 17, op.cit., p.6

[26] Submission No 6, op.cit., p.4

deregistration of unions as substantial penalties already exist for breaches of the act. The Government has not made clear the purpose of this amendment. If it had been inspired by union 'delinquency' or had arisen from a failed prosecution, Parliament would have heard about it. This is another instance of an ideologically driven amendment. Labor senators note the comment of the Australian Catholic Commission on Employment Relations on this amendment:

1.80 The ACCER submits that the deregistration of an organisation should be based on a just and fair process. Accordingly, the deregistration of an employee association should be determined by an independent third party with considerable industrial relations knowledge, such as the AIRC. It is not considered to be appropriate for the deregistration of an organisation to be jurisdictionally separated between the AIRC and the Federal Court. Such a distinction may create confusion about which jurisdiction is the appropriate one.[27]

### Disamalgamation provisions

1.81 The Government's ideological agenda is exposed in the provisions seeking to extend the disamalgamation provisions. Labor senators view these provisions as having more to do with interfering in union politics than with sensible and proper regulation. This provision is also ideologically driven in that the Government views union amalgamations as a characteristic of the days of centralised wage fixation. Disamalgamation, on the other hand, is encouraged as a trend in a more desirable direction. There is no significant support for disamalgamation, although the issue is sometimes raised in the context of inter-union disputes.[28]

1.82 One of the idiosyncrasies of the Governments, and the Government Senators' position on this issue, is that any provision that encourages disamalgamation, and similarly that encourages the proliferation of new representative organisations in the workplace, would have the effect of increasing the number of unions an employer is required to deal with. This is in apparent contrast to one of the rationalisations proffered for the Transmission of Business Bill, that it would prevent such a proliferation.

### Fiduciary duties

1.83 Labor senators agree with the ACTU submission that the incorporation of the statutory duties applicable to directors under the Corporations Law is unnecessary in relation to officers and employees of registered organisations. The Government could not provide any evidence to suggest that there were difficulties being experienced by members in accessing relevant financial information from registered organisations under the current arrangements. Union rules bind office holders to generally accepted fiduciary duties, and union office

27 Submission No 17, op.cit., p.17

28 Submission No 6, ACTU, op.cit., p.5

holders are accountable for the administration of funds. The Workplace Relations Act currently provides for the removal of an officer in cases where the organisations rules provide for such removal in the case of misappropriation of funds or gross neglect of duty or gross misbehaviour.

1.84 Furthermore, Labor senators do not consider it relevant to apply to registered organisations, which receive only membership dues, Corporation Law requirements that apply to companies that accept investment funds from shareholders. The ACTU has pointed out that this provision may deter otherwise competent and responsible members form running for union positions.[29] Such positions are often part-time, with officials paid only a token honorarium. This provision appears to be onerous and discouraging to employee organisations. The implementation of these provisions appears to be at odds with the Government's intention of encouraging a wide diversity of employee representation.

1.85 We note with interest the provision contained in Clause 244 that would require the disclosure of expenditures by the organisation on legal fees as well as payroll deduction arrangements entered into with employers. Given the apparent desire to reflect provisions of the Corporations Law in these changes, it's curious that no such provisions exist for the employers under that legislation.

## Office of the Employment Advocate

1.86 Clause 174 (Chapter 9) provides for the Office of the Employment Advocate (OEA) to have responsibility for enforcing a new rule. The rule would make it an offence to make a false representation to a member as to resignation.

1.87 The capacity of the OEA to perform the statutory functions already assigned to it has been the subject of numerous comments by Labor Senators. Of particular concern has been a continued and implacable anti-union bias in the functioning of the OEA since it's establishment. This has most recently been evidenced by the political and distorted report on the construction industry prepared by the OEA for the current Minister.

1.88 Any provision that grants further functions or powers to that organisation would, in our view, be completely lacking in merit.

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29 Submission No 6, op.cit., p.7

## CONCLUSION

1.89 Labor senators acknowledge the degree of policy consultation that has gone into these two bills. Ultimately, however, the scrutiny of this Committee will have an important impact on the final outcome of the bill. Consultations between the Government and interested parties, on a one-to-one basis, are often limited by the inability to test the validity of claims in an open and competitive inquiry process. Labor members of this Committee have heard and read enough to appreciate that the weight of evidence and argument is not as reassuring to the Government as it appears to believe.

1.90 In the first place, Labor senators are convinced, by the weight of evidence, and their own knowledge and experience of the effects of the Workplace Relations Act, that the Transmission of Business Bill is conceptually flawed by serious policy omissions in the parent act. While the amendments to section 170MD may be seen as 'technical' in the way they address an obvious anomaly, the solution which is proposed only highlights more fundamental deficiencies in the Workplace Relations Act. For this reason the bill cannot be supported in its current form. It is important to note that these provisions are in precisely the same terms as Clauses 44, 45, 46, 47 and 48 of Schedule 8 and Clause 7 of Schedule 15 of the failed Workplace Relations Amendments (More Jobs Better Pay) Bill 1999. No additional evidence has been forthcoming in this inquiry to convince Labor senators that these provisions are now worthy of support.

1.91 Labor senators are also surprised at the final shape of the long-anticipated Registered Organisations Bill. It was anticipated that this bill would be rather more 'mechanical' than it has turned out to be, and for that reason will attract even more scrutiny following the tabling of this report. While there are many technical amendments which Labor supports, there are also a number of provisions which clearly indicate this Government's ideological obsession with unions. The evidence has not demonstrated any compelling reason that current prescriptive regulation of registered organisations is in need of improvement. Ideological posturing has no place in legislation that is intended to regulate workplace practice.

Senator Kim Carr

Deputy Chair

Senator Jacinta Collins

**Senator Andrew Murray: Australian Democrats**
**Minority Report**

## 1 Workplace Relations Amendment (Transmission of Business) Bill 2001

Transmission of business provisions have been part of industrial/workplace relations law since 1914. At heart, the intention behind these provisions is to provide a protective mechanism for employees. That intention is worthy of continued support.

The transmission of business provisions in this Bill affect certified agreements. The current award transmission provision in the Act remains unchanged. The key change is to give the Australian Industrial Relations Commission (AIRC) discretion to review the applicability of existing certified agreements in a 'new' business. The AIRC already has that discretion with respect to awards.

The Australian Democrats have a long tradition of supporting the AIRC having an independent discretion to determine industrial relations matters on their merits. Discretion of course is never open-ended, but it has long been our view that wherever possible such discretion is a better guarantor of fairness and flexibility. However we do recognise that discretion can lead to uncertainty and cost until such time as orders have been made.

It seems self-evident to me that the AIRC should have discretion in respect of transmission of employee conditions in business acquisitions, particularly when more than one certified agreement affects 'old', 'transferred' and 'new' employees in a business. The AIRC need to determine which agreement should prevail. Provided that is, the AIRC continue to recognise that the intention behind transmission of business provisions is, in the interests of fairness, to provide a protective mechanism for employees. They must do this while taking into account a need to provide new or reformed businesses with necessary operational flexibility.

However I am alert to the complexities and sensitivities surrounding this matter and will consult further before deciding on what amendments may or may not be necessary.

## 2 Workplace Relations (Registered Organisations) Bill 2001

Since 1904 there has been a general acceptance of the idea that employer and employee organisations that wish to be participants in the federal system of industrial/workplace relations should be subject to specific and detailed regulation over and above that generally applying to corporations or unincorporated entities.

Such regulation has historically gone far beyond a simple system of registration or accreditation. It adds compliance costs to employer and employee organisations over and above that they already contend with as incorporated or unincorporated bodies.

This inquiry has not examined whether there continues to be a justification for this additional regulatory regime to that generally governing incorporated and unincorporated entities. That is a pity, since the debate could be enlightened by revisiting the pros and cons for these specific laws.

The Government motivation for a separate bill is summarised in the Majority Report. The essential Government proposition put forward is that this entity regulation does not really belong within workplace relations legislation that has as its focus agreement making, and the resolution of disputes. That sets aside nearly a century of practice. Registered organisations regulation has been an integral part of the various Acts since 1904 that have progressed to the current Workplace Relations Act.

Those opposed to the introduction of a separate Act cannot use that general objection as providing sufficient justification for opposition to this Bill as of itself. The Government case for creating a separate Act is not meaningfully eroded by such opposition to separate legislation.

What is more important therefore is the content of the new bill.

The Government are to be commended for extensive consultation on this bill. As a result some of the more controversial original proposals have been dropped or modified. The provisions of the new Bill include present provisions in the Act and a number of new measures recommended by other bodies, as outlined in the Majority Report. Many of these are practical and technical improvements.

Consequently the Democrats do not intend to oppose this Bill, but will consider any amendments that may be necessary in areas of legitimate criticism.

**Senator Andrew Murray**

# APPENDIX 1

## LIST OF SUBMISSIONS

**List of submissions received from organisations**

| | |
|---|---|
| 1 | Local Government Association of Qld |
| 2 | National Farmers Federation |
| 3 | Local Government Association of South Australia |
| 4 | Australian Metal Workers Union |
| 5 | Chamber of Commerce & Industry WA |
| 6 | ACTU |
| 7 | Shop Distributive & Allied Employees' Association |
| 8 | Australian Rail, Tram and Bus Industry |
| 9 | Australian Business Limited |
| 10 | Department of Employment, Workplace Relations and Small Business |
| 11 | Manpower Services (Australia) |
| 12 | ACCI |
| 13 | Victorian Farmers Federation |
| 14 | Launceston Community Legal Centre |
| 15 | BHP |
| 16 | Australian Industry Group & the Engineering Employers' Association, South Australia |
| 17 | Australian Catholic Commission for Employment Relations |
| 18 | Community and Public Sector Union |
| 19 | Independent Education Union of Australia |
| 20 | Queensland Council of Unions |
| 21 | Australian Accounting Research Foundation |
| 22 | Recruitment and Consulting Services Association Ltd |
| 23 | Toll Holdings Limited |
| 24 | Confidential submission |

# APPENDIX 2

## WITNESSES AT PUBLIC HEARINGS

## FRIDAY, 18 MAY, 2001

## CANBERRA

**WITNESSES**

BOHN, Mr David Anthony, Acting Assistant Secretary, Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

CALVER, Mr Richard Maurice, Director, Industrial Relations, National Farmers Federation

HAMILTON, Mr Reg, Manager, Labour Relations, Australian Chamber of Commerce and Industry

JONES, Mr Stephen Patrick, Assistant Secretary, Communications Section, Community and Public Sector Union

RAMSEY, Mr Steve, Legal Officer, Community and Public Sector Union

RUBINSTEIN, Ms Linda, Senior Industrial Officer, Australian Council of Trade Unions

SHAKESPEARE, Ms Penny Maureen, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

SMITH, Mr Stephen Thomas, General Manager, National Industrial Relations, Australian Industry Group

SMYTHE, Mr James, Chief Counsel, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

## THURSDAY, 24 MAY, 2001

## CANBERRA

**WITNESSES**

BOHN, Mr David Anthony, Acting Assistant Secretary, Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

SHAKESPEARE, Ms Penny Maureen, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

SMYTHE, Mr James, Chief Counsel, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business