CHAPTER 1

INTRODUCTION

1.1 On 11 May 2000 the Senate passed a motion moved that day by Senator Andrew Murray (AD-WA) providing for the reference of the Workplace Relations Amendment Bill 2000 to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, contingent upon the introduction of the bill in the House of Representatives that day.

1.2 The objects of the bill, in amending the Workplace Relations Act 1996, are as follows:

- to define 'pattern bargaining' (where unions lay claim to common terms and conditions across a number of employers, regardless of the circumstances of individual businesses), and provide defined consequences where pattern bargaining occurs, in particular, the termination of the relevant bargaining period, so that industrial action is no longer protected;

- to enhance the effectiveness of the Australian Industrial Relations Commission's power to issue orders that unlawful industrial action cease or not occur;

- to provide for cooling off periods in respect of protected industrial action; and

- to protect rights to pursue common law remedies in response to unlawful industrial action in Supreme Courts without additional litigation in the form of anti-suite injunctions being sought from or issued by the Federal Court.

1.3 The bill also makes a number of minor technical amendments.

Background to the bill

1.4 Previous reports of this Committee dealing with workplace relations reform legislation have noted the divergence of views as to whether changes to the law represent an incremental shift from centralised wage-fixing and regulation of employment, or whether change is more fundamental, representing a move toward an almost completely deregulated labour market environment. The reforms provided for under these acts facilitated a shift in focus from national and industry level wage fixing to workplace level wage fixing. These reforms were made necessary by structural changes to the Australian economy and the requirement that Australian businesses become internationally competitive.

1.5 National Wage Case Decisions in 1987 and 1991 giving effect, respectively, to the restructuring and Efficiency Principle and the Enterprise Bargaining Principle, led the way to the *Industrial Relations Reform Act 1993* and the *Workplace Relations and Other Legislation Amendment Act 1996*. The major change in the 1993 Act was the shift from a compulsory arbitration system which disallowed strikes, to an enterprise bargaining system that made strikes lawful provided they were taken to win an enterprise agreement. This framework was retained in the Coalition government's 1996 Act, which, as its title suggests, emphasises the primacy of the workplace and the individual enterprise in negotiating conditions of

employment. This emphasises the link between productivity and employee remuneration and other benefits.

1.6 The Workplace Relation Act saw an attempt to limit the scope for industrial action, something that was specifically allowed for in the 1993 Act. Section 127 was inserted into the WR Act to provide some limited scope for employees to engage in industrial action in support of their claims and allow employers to lock out employees in the negotiation of single-business agreements. In circumstances where negotiation has broken down, both strikes and lockouts attract 'protected' status, either party being immune to civil actions in the courts. Section 127 was negotiated through the Parliament as part of an agreement which saw the reintroduction, in more restricted form, of sections 45D and 45E into the Trade Practices Act. This was intended to provide a legal remedy for employers affected by secondary boycotts and other forms of industrial action damaging to their businesses.

1.7 Nonetheless, the pursuit of industry-based claims has continued in some industries, particularly in long established industries with traditionally high levels of union membership. Industry-based claims represent the phenomenon of pattern-bargaining which is the antithesis of workplace bargaining. It became clear to the government that the 1996 Act was not achieving its purpose in discouraging industrial disputes, and that what some unions had allegedly claimed to be 'draconian' legislation was being effectively circumvented by them. In particular, the legislation was proving to be ineffective against unions determined to subvert the principle of workplace negotiation and enterprise agreements and return to a regime of de facto centralised wage negotiation at an industry level.

1.8 According to one submission received, employers faced with industrial disputes chose not to have recourse to section 127 of the WR Act because unions have disregarded orders made by the Commission. Employers have relied instead on common law action against unions in the state supreme courts. This in turn has led to unions exercising their common law rights, most notably through anti-suit injunctions for the purpose of having litigation moved from state supreme courts to the Federal Court.[1] This practice, known as 'forum shopping', has disturbed the balance between the dispute settlement role of the Commission and the common law rights of the parties in relation to damage resulting caused by industrial action. Legal argument and jurisdictional issues have sometimes overshadowed substantive questions at the heart of a dispute. In the 'second wave' legislation proposed in 1999, amendments were made to section 127 to confer enforcement jurisdiction upon state supreme courts and the Federal Court. These provisions are contained in this amendment bill.

1.9 Amendments proposed in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 would have prohibited pattern bargaining had the bill been passed by the Senate. This Committee, in its majority report to the Senate in November 1999 concluded that pattern bargaining was inconsistent with the primary object of the federal industrial relations system; that of ensuring that wages and conditions were set according to the needs of individual workplaces. The Committee took the view that tailoring conditions of

1 Submission No.27, Appendix B, Stuart Wood, The Death of Dollar Sweets', Paper resented to the HR Nichols Society's XX1 Conference, 5-6 May 2000,

work to meet the needs of individual businesses and their employees boosted flexibility, productivity and competitiveness.[2]

1.10 The Committee's inquiry into the 1999 bill did not deal in great depth with the subject of pattern bargaining. Some evidence did anticipate submissions received for this inquiry. The Australian Industry Group (Ai Group) advised the Committee of its apprehension of 'a winter of discontent' in 2000, warning of the serious threat to industry which would result from an industry-wide campaign, known as Campaign 2000, by the AMW metals division to replace enterprise bargaining. Ai Group claimed that the Amalgamated Metal Workers Union (AMWU) boasted of having achieved 800 enterprise agreements all due to expire on 30 June 2000. The Ai Group believed that amendments to section 170LG would prevent this campaign from continuing.[3]

1.11 The Committee majority takes the view that governments have no option but to respond to clearly evident attempts or intentions by powerful sectional interests to damage the productivity of industry. The Minister's statement to the House of Representatives on the introduction of this bill did not avoid the immediate issue of a threatened industrial campaign in Victoria. The statement referred to the serious threat to workplace relations in Victoria, a threat likely to compromise many of the gains made since the introduction of enterprise bargaining nearly a decade ago. It was a matter that called for immediate remedial legislation.[4]

1.12 The threat to industry by the impending dispute was effectively conveyed to the Committee in the submission of the Australian Industry Group, which stated:

> While the manufacturing industry is the target of the unions' present campaign to end enterprise bargaining, if pattern bargaining is not effectively dealt with it will undoubtably flow on to other sectors of the economy. Already, constructions have succeeded in gaining substantial industry-wide concessions by the forceful use of pattern bargaining in that sector. The experience of the Victorian building industry dispute provides a vivid example of why urgent legislative reform is necessary to stamp out the practice and protect the process of enterprise bargaining in the Australian workplace relations system.[5]

1.13 The Ai Group's submission to this Committee in 1999 was referred to by the Minister for Employment, Workplace Relations and Small Business in his introduction of the bill in the House of Representatives on 11 May 2000. The Minister also referred revisions contained in this bill to clauses identified as deficient as a result of the Committee's consideration of the 1999 amendment bill.[6]

1.14 The Committee majority emphasises that although this bill is claimed in some quarters to outlaw pattern bargaining, the intent of the legislation recognises workplace

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2 Senate EWRSBE Legislation Committee, *Report on Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, November 1999, p.118

3 ibid., p.116-117

4 *Hansard*, House of Representatives, 11 May 2000, p.15489

5 Submission No 15, Australian Industry Group, p.4

6 *Hansard*, op.cit., p.15490

reality. For instance, the Government recognises that collective agreements in some industies; for instance the retail industry, are supported by both employers and unions because of their efficient process of negotiation and appropriateness. Evidence was presented which demonstrated that pattern bargaining can be an efficient regulator of wages and conditions, and that the state public sectors and community service providers, in particular, would be forced into extremely cumbersome and time-consuming processes if current practices were to change. Even opponents of the proposed legislation accept that pattern bargaining will not disappear as a result of its passage. The primary objective of the legislation is to ensure that pattern bargaining can no longer take place with the support of protected industrial action: that the outcome of wage negotiations in one enterprise do not determine the outcome in other enterprises.

Campaign 2000

1.15 The initiative taken by unions in Victoria, operating under the banner of the Metal Trades Federation of Unions, aimed at replacing enterprise agreements with pattern bargaining, was the catalyst in the governments response of presenting to Parliament, in redrafted form, elements of the proposed 'second wave' legislation which failed to pass the Senate in 1999.

1.16 The Metal Trades Federation of Unions (MTFU) comprises elements of five unions. The most ardent of these in its determination to end enterprise bargaining is the Australian Manufacturing Workers Union (AMU). Other unions expressing varying degrees of solidarity include the CEPU, AWU, TCFUA and the CFMEU. Using protected action, or the threat of it, and using the loophole in the current legislation, the MTFU have so organised their agreements with employers to ensure that as many as 800 of these expire on 30 June 2000.

1.17 A number of witnesses at the inquiry represented Campaign 2000 as an exercise in paranoia by employers; the Australian Industry Group in particular being singled out for special mention. The AI Group submission, however , included documents giving clear evidence of militant union plans for widespread industrial unrest. Some unions regard enterprise agreement arrangements as involving too many trade-offs: that now employers engage in divide and rule tactics, and a resulting perception among some employees that unity has been lost. The MTFUs aim is to have all industry represented by the AI Group, and to deal with it as one union, the aim being to be in a position to negotiate from strength and take collective action if the AI Group's offer is not good enough.

1.18 There is a nostalgic tone to the rhetoric of Campaign 2000. AMWU speaker's notes refer to the over-award campaigns of the 1950s and 1960s, and the 38 hour week campaign of the 1970s, all such triumphs forgotten and the promise of fresh excitement swept away with, in their view, the unfortunate embrace of enterprise bargaining in the 1990s. The Committee majority views Campaign 2000 as representing a resurgence of militancy which has as much to do with the future of union leadership and rank-and-file commitment to unionism as it does to 'wage justice' or any similar catchcry. The following extract therefore reads as a curious anachronism:

> If we are going to have a stoppage we have a state-wide stoppage for 24 hours rather than have one or two sites out for 3,4,5,6,7,8 weeks and everyone else working. We might have the whole state stopping for a day or may be 48 hours or we may say we are going to put right across the board for one week an overtime ban on every site in Victoria or we may say we are going to have one day off a month in pursuit of shorter hours, so on the 4th Friday of every month every site

> stops that day. Whatever strategy we opt for will be determined at Shop Stewards and Mass Meetings.
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> We need to be able to deliver collectively on the job to force the employers to see that the only way to settle this dispute is to get up a collective agreement. This is what industry campaigning is about, this is what we need to do, you as delegates will be the key driving force along with the Organisers.[7]

1.19 According to Ai Group claims, the pattern bargaining approach being adopted by the manufacturing unions resemble that applied by some of the same unions in the Victorian building and construction industry. This strategy was successful in extracting from employers a 24 per cent wage increase and a 36 hour week. Such conditions were impossible to justify with an anticipated decline in building activity of at least 12 per cent by 2001. However, the widespread industrial campaign put a few employers under enormous pressure and they eventually conceded. Having breached the wall other employers were forced to make similar concessions and the pattern of common outcomes now extends across the whole of the building industry in Victoria.

1.20 The Ai Group submission states that the organisation has refused, with the support of member companies, to enter into negotiations for an industry-wide agreement with the unions. The Ai Group has also pursued action through the courts to force unions to comply with the law. Following a stop-work meeting in Victoria in November 1999 it pursued contempt of court proceedings in the Federal Court against three unions and officers of these unions as a result of their failure to comply with Commission orders to return to work.[8]

1.21 The Committee understands that at the time of tabling this report the AMWU, CEPU and other manufacturing unions in Victoria are refusing to re-negotiate enterprise agreements which expire on 30 June 2000. Unions are also pressing employers to attend employer forums convened by the MTFU to negotiate an industry pattern agreement. The union is also arranging meetings with employers in the areas of contract maintenance, automotive components, labour hire and general metals manufacturing for the purpose of negotiating pattern agreements at the industry sector level.

1.22 As the MTFU appears determined to overthrow enterprise agreements in favour of industry-wide agreements, it is appropriate that the Committee majority reminds the Senate of the worst aspects of a process that is in danger of being revived. As the submission Shell Australia has set out, the centralism of industry patterning resulted in, among other things:

- employees and management at the enterprise being precluded from the negotiation process;
- limited ability to reward employees for real change and productivity;
- denial of the opportunity to properly recognise the outcomes of job redesign, to develop local classification structures linked to reward systems, and the development of complementary career paths through which employees could progress;

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7 Submission No 15, Australian Industry Group, Annexure B

8 ibid.

- enterprise issues unable to be accommodated in the process, thus engendering significant resentment at the workplace through the festering of an unresolved or dismissed issue;

- retarding development of future job opportunities by hanging on to traditional tasks and relativities; and generating high-cost outcomes totally unrelated to the productivity of the business and distortion of internal relativities through remuneration not being determined on a proper work value principle.[9]

1.23 The abuse of pattern bargaining would see the return of these discredited and discarded practices, which would operate to the detriment of industry and its employment capacity. In view of all the evidence the Committee majority regards as irresponsible attempts by some union officials and federal opposition parliamentarians to dismiss Campaign 2000 as a furphy. This said, the Committee majority also recognises that the union movement generally has its own difficulties in dealing with unions which reject the widely accepted principles of enterprise bargaining which most unions have successfully followed.

The focus of the Committee's inquiry

1.24 The Committee has identified for consideration the two interrelated aspects of this bill. The first is the issue of pattern bargaining itself which is for the first time defined in this bill as:

> …a course of conduct or bargaining, or the making of claims, being a campaign, or part of a campaign, that involves seeking common outcomes in respect of wages and, or, other employment entitlements.[10]

1.25 Much evidence was heard in defence of the principle of pattern bargaining, and of current negotiation practices involving pattern bargaining which had received support from both employers and unions. The Committee heard convincing evidence that such practices as operate successfully and harmoniously in the current labour market are unaffected by the legislation so long as they are pursued at the level of the workplace, or across a number of workplaces by agreement between parties to negotiation.

1.26 The Committee also heard a great deal of evidence on the second and related issue, that of removing protected status from any industrial action initiated by unions in support of claims based on pattern bargaining. Evidence was heard in relation to how the Act might be interpreted and acted upon by the Australian Industrial Relations Commission, assuming that the Commission had sufficient discretion under the Act to do so in a way that was fair to both parties.

1.27 A third aspect of the bill is the subject of the Committee's inquiry. This was the operation of the legal processes bearing on decisions to be made about the law's application to pattern bargaining. The government maintains that its intention is not to reduce the discretionary powers of the Australian Industrial Relations Commission, and the committee majority accepts this assurance, believing that it will be tested by the Commission, and probably by the courts, in due course and found to be firmly based, notwithstanding the drafting of section 170LGA, which some witnesses claimed was unclear.

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9 Submission No 63, Shell Company of Australia, pp.2-3

10 Explanatory Memorandum, p.4

1.28 Also related to legal processes, is the matter of allowing state supreme courts jurisdiction in industrial matters and prohibiting the Federal court from issuing anti-suit injunctions in respect of proceedings being brought or pursued in respect of industrial action in some circumstances. The Committee heard a great deal of evidence on this issue, the adverse evidence suggesting that section 170 MT was an attempt by the government to weaken, by attrition, the Federal Court and, by implication, the whole corpus of federal industrial legal culture. The Committee majority believes that the logic of enterprise bargaining requires the removal of jurisdictional restrictions in areas of law affecting the workplace; that common law and the application of commercial legal principals are as relevant to the operation of the WR Act as the body of industrial law.

1.29 These issues are considered in more detail, and in the light of evidence presented, in the following chapter.