CHAPTER 2

CONSIDERATION OF THE ISSUES

The nature of pattern bargaining

2.1 Pattern bargaining has been defined as 'a course of conduct or bargaining, or the making of claims, involving seeking common wages and, or, other common employee entitlements, that the Commission is satisfied:

- forms part of a campaign that extends beyond a single business, and
- is contrary to the objective of encouraging agreements to be genuinely negotiated between parties at the workplace or enterprise level.

2.2 The proposed provisions in the bill are aimed at qualifying access to the right to take protected action so that, on an application by a negotiating party, the Commission will terminate a bargaining period where pattern bargaining has been occurring. The bill does not prevent collective organisation, or collective bargaining. Indeed, a pattern bargain as defined can still be made. This aspect of the bill provides that once the Commission finds that an industrial campaign comes within the statutory definition of pattern bargaining then industrial action in support of it will not be protected.

2.3 New section 170LGA defines 'pattern bargaining'. This definition is relevant to new section 170MP and new section 170MWB. The purpose of these amendments is to ensure that protected industrial action is limited to the pursuit of enterprise-specific outcomes, and is not generally available as a means of seeking common outcomes across a number of employers or across an industry.

2.4 It would provide that conduct, bargaining or making of claims which would amount to the first element, and is by an organisation of employees that is a negotiating party to a proposed agreement, is taken to be contrary to the relevant objective, unless the Commission is satisfied that all of the common entitlements being sought are not capable of being pursued at the single business level. The emphasis in this provision is on the way in which claims are pursued, rather than the merits of the entitlements sought. In determining whether or not it is satisfied that the entitlements being sought are not capable of being pursued at the single business level, the Commission will not be considering the merits of those entitlements.

2.5 The Committee understands that an issue not capable of being pursued at the single business level would need to have an intrinsic characteristic that makes it incapable or inappropriate to be pursued at a single business level. The mere convenience or desire of a party to negotiate issues not of that character on a multi employer or industry wide basis would not suffice. This section would also provide that the Commission is to have particular regard to the views of the employer concerned, in determining whether the entitlements sought by an organisation are of such a nature that they are not capable of being pursued at the single business level.

2.6 The section would make clear that an organisation of employees is not taken to have engaged in pattern bargaining merely because the organisation is seeking the inclusion in a

proposed agreement of terms and conditions which give effect to the terms of an order of a Full Bench of the Commission that established national standards.

2.7 Pattern bargaining has been particularly evident in the manufacturing, construction and transport industries because of its connection with industry-wide industrial disputes. It is also fair to note that the practice is widespread across other industries and involves the voluntary agreement of both unions and employers. The Committee notes the evidence from the Independent Teachers Union to this effect:

> …While flexibility of arrangements to take account of particular education, ethnic, religious and financial arrangements can be accommodated, it is in the public interest that there is a general consistency across the nation of wages and conditions for Australia's teachers and education workers. …Employers in the non-government education sector have historically engaged in 'pattern bargaining' with the union over wages and conditions and made multi-employer agreements or agreed to mirror certified agreements.[1]

2.8 The Committee majority considers that the Commission would have discretion to allow current practice in pattern bargaining to continue where a contrary decision would result in such disruption as to be against the public interest.

2.9 The Committee majority is far more concerned with the intent of the proposed legislation to serve the public interest in ways which current legislation is incapable. Pattern bargaining, in the public interest, among employers and unions with strong traditions of working within the spirit and the letter of the law are unlikely to be affected by the passage of this bill. The Committee heard evidence from interested parties whose businesses were much less fortunately placed.

2.10 The employer's perspective on pattern bargaining in the construction industry is described in a submission from the Civil Contractors Association, which clearly indicates a practice at odds with desirable workplace relations policy and practice.

> …Pattern bargaining today is achieved by the relevant union taking the best enterprise agreement it can negotiate with a principal contractor and then moving to impose that agreement in its entirety across other principal contractors who then assist the union in ensuring that all subcontractors will apply the terms and conditions of that agreement and in fact become signatories to the agreement.[2]

2.11 The submission then explains that coercion is applied to contractors and subcontractors, particularly to principal contractors. These contractors are not employers, but project managers, often running international businesses, and who give in to these demands in order to achieve industrial harmony. Subcontractors have no choice but to comply with these practices if they wish to remain in business. Contractors factor in these costs to their tenders.

> The principal contractor has also another reason for not resisting this arrangement and that is that if there is a standard agreement in place, each contractor knows that

1 Submission 2A, Independent Education Union of Australia, p.4

2 Submission No.55, Civil Contractors Federation, p.3

> it will be tendering the next project on the same basis of wages costs as its competitor. This of course completely stifles initiative and innovation.[3]

2.12 In summary, the building industry is saddled with employment conditions for which no arrangements can be made at the enterprise level; have no provision for recognising skill levels, for which unions have no particular regard; and which maintain rigid conditions which often discriminate again particular categories of workers, notably part-time and casual employees who may not wish to work 50 hours a week.

Tightening and strengthening Commission orders

2.13 Amendments to section 127 are intended to enhance the effectiveness of the Australian Industrial Relations Commission's power to issue orders that unlawful industrial action cease or not occur.

2.14 Section 127 was considered to be deficient in that it allowed for delays in applications by employers for timely remedies to impeding or threatened industrial action, and by unions seeking and end to lock-outs. Some of this delay resulted from the fact that issues were technically complex. In one instance, *Hawker de Havilland Ltd and AWU and AMWU,* 28 days elapsed between the first hearing of this matter and an order being granted.[4]

2.15 Under the current provisions there can be uncertainty surrounding the issuing of section 127 orders, even where the industrial action is unprotected. In one case before a full bench of the Commission, *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union,* it was held that the fact that action was unprotected did not compel the conclusion that it should be directed to cease.[5]

2.16 Critics of the current provisions of section 127 point out that it has not dealt effectively with unions determined to establish industry-wide settlements and to use direct action to achieve these aims. It is claimed that section 127 orders have been wholly ineffective in attempting to prevent the AMWU from organising industrial action in support of this objective.[6]

2.17 The proposed amendments to section 127 would clarify that the power to make orders applies only in relation to industrial action that is not, or would not be, protected action and remove uncertainty as to whether an order should be issued, by requiring the Commission to make an order whenever the prerequisites for doing so exist.

2.18 Another amendment would ensure that the power of the Commission to make orders to stop or prevent industrial action extends not only to industrial action in relation to work regulated by an award or an agreement under the current provisions of the Act, but also to industrial action in relation to work regulated by an old IR agreement.

2.19 The current provision which requires the Commission to hear and determine an application for a section 127 order as quickly as practicable, would be repealed and new

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3 ibid

4 Submission No 34, DEWRSB, p. 9

5 ibid.

6 Submission No 27, Mr Stuart Wood, Appendix A, p.6

provisions introduced, which would require an application to be dealt with within 48 hours where practicable. The provision makes clear that the issue of whether the industrial action is or is not protected action is part of the question to be determined within the 48 hour period.

2.20 If the Commission is unable to determine an application within 48 hours, the Commission is to make, within the 48 hour period, an interim order to stop or prevent the industrial action at issue, which would apply until the application is determined. The Commission will not, however, be required to make such an order where it is satisfied that to do so would be contrary to the public interest. The Committee majority notes in particular this provision which preserves the discretion of the Commission.

Anti-suit injunctions

2.21 This aspect of the bill has been dealt with to some extent in Chapter 1 as the issue of competing jurisdictions in the matter of industrial litigation was one which required an urgent legislative response.

2.22 Proceedings to obtain redress for damages caused by industrial action has been a controversial issue for many years, beginning with the use by employers of sections 45D and 45E of the Trade Practices Act against the Australasian Meat Industry Employees Union in the *Mudginberri* case in 1985.

2.23 New section 170MTA expressly confers on the Federal Court jurisdiction to determine whether industrial action is protected, and if so whether it is covered by immunity provisions. This section also prevents the Federal Court from granting anti-suit injunctions and specifically enables the state supreme courts to determine whether or not an action is protected in the course of proceedings for an injunction.

2.24 Evidence was given to the Committee that as the anti-suit injunction power is central to the operation of the Federal Court as a judicial institution, its deprivation of this power means that in industrial cases it cannot guarantee its own integrity, and may create doubts about the constitutionality of its operation in this field of law.[7] Officers from the Department of Employment, Workplace Relations and Small Business, called before the Committee, advised that this provision was an attempt to restore a balance to the bill to ensure continued access to common law remedies. Recent ant-suit injunctions had the effect of reducing, if not denying, access to common law remedies and the new provisions were intended to overcome this problem. The Department also advised the Committee that legal advice had been sought on the constitutional aspects of this section as they affected the role of the Federal Court.[8]

2.25 Support for amendments contained in the bill came from the Business Council of Australia, whose representative explained to the Committee the current problem of 'forum-shopping':

> The issue here is really one of great difficulty in using the legal system. No one has really any certainty as to whether or not an injunction being granted by, for example, the Supreme Court will stand more than 24 hours, because the Federal Court will intervene and stay it. The consequences therefore are that no one has any

7 Mr Kevin Bell QC, *Hansard*, Senate EWRSB Committee, 29 May 2000, p.119

8 ibid., p.131

> certainty in being able to advise as to what the employer's or the employee's legal rights and obligations are. It also leads to a process whereby the courts are drawn into the actual dispute itself. Instead of sitting back and making decisions as to what is the law and what is not the law they are drawn into being part of the dispute. That is not the role of the court.[9]

2.26 In considering this amendment the Committee is mindful that the Federal Court is not a court of common law. That role is vested in the state supreme courts. It is the Government's intention to widen access to common law processes in relation to industrial disputes. The Committee majority sees no difficulty in what is proposed in this bill.

Cooling-off periods

2.27 New section 170MWA is directed at giving formal recognition to cooling-off periods. It will require the Commission, in certain circumstances, to suspend a bargaining period to allow for a period of cooling-off during which negotiating parties could attempt to settle the matters at issue without recourse to industrial action. This suspension would be for a specified period and could be extended on the application of a negotiating party. Provision is also made to prevent the Commission from making an order suspending a bargaining period unless the negotiating parties had been given an opportunity to be heard on the matter.

2.28 Cooling-off periods can play a valuable role in the negotiation process and would allow the parties, in the specified circumstances, further time to negotiate without the pressure of continued industrial action. Cooling-off periods would also enable the parties time to investigate and consider the use of alternative means for resolving a stalemate, for example with the assistance of voluntary conciliation.

2.29 The Committee notes the strong support given to the idea of a cooling-off period by employer representatives, as was explained by a witness from the Business Council of Australia:

> There are many instances where disputes can become quite protracted; parties almost refusing to talk to each other, the battle lines are drawn, people are on strike, there are pickets and the employer has withdrawn because they cannot get an outcome. Often it is useful just to have some breathing space. If there is a cooling-off period, people have to go back to work and start looking at outcomes that could achieve a breakthrough in the dispute that could not easily be obtained if it were not there.[10]

2.30 The Australian Chamber of Commerce and Industry also supports the proposed cooling-off period, claiming that it will provide a 'circuit–breaker' which will reduce disruption and damage caused by disputes that appear to be intractable. ACCI cites cases where the provision of cooling-off periods would have been advantageous, including a 1998 case involving ambulance drivers, a 1997 coal mining case, and a 1997 case involving electricity power workers in Victoria.[11]

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9 Mr Graham Smith, *Hansard*, 26 May 2000, p.9

10 ibid., p.13

11 Submission No. 32, Australian Chamber of Commerce and Industry, p.18-20

ILO Conventions

2.31 The implications of the bill for Australia's international obligations to ILO Conventions was raised in a number of submissions. Several witnesses expressed concern that Australia was on the same footing as Turkey and Swaziland its laws restricting unions from collective and industry-wide bargaining. The majority of the Committee make the point that comparisons of provisions in labour laws across countries is highly problematic. The particular nature of Australia's systems means that direct comparisons with other jurisdictions are not always appropriate.

2.32 A majority of the Committee accepts the assurance from the government that the fundamentals of Australia's federal system of workplace relations have been accepted by the International Labour Organisation as consistent with its obligations under the ILO Constitution and relevant ILO Conventions (particularly C No. 87 and 98). The bill is therefore consistent with the framework which has been accepted by the ILO's supervisory bodies as compatible with those standards.

2.33 At the outset, the Committee majority notes that Australia's conciliation and arbitration systems have long been accepted by the ILO as maintaining a substantial element of collective bargaining, whether inside or outside those systems, and not being incompatible with the Conventions concerning freedom of association and collective bargaining. Since that view was expressed in Case No. 1511 by the ILO Governing Body's Committee on Freedom of Association,[12] the *Workplace Relations Act 1996* has given greater emphasis to collective bargaining, including where it occurs outside the federal system. Importantly, the norms of the federal system are designed to apply to associations of employers and employees that voluntarily apply for registration. The capacity to form or belong to an industrial association is not contingent on federal registration.

2.34 In summary, the Committee majority takes the view that, in broad terms:

- the WR Act protects freedom of association, consistent with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention No. 87), particularly through the provisions of Part XA of the Act;

- the WR Act also protects the right to bargain collectively, consistent with the Right to Organise and Collective Bargaining Convention, 1949 (Convention No. 98), including through provision of a right to take protected industrial action, in certain circumstances; and

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[12] Registration under the 1988 Act is optional. The … [complainant union] … had elected to register and to accept the advantages which derive therefrom. The Committee considers that it is reasonable for the legislation and the … [Australian Industrial Relations Commission] … to require adherence to the norms of the system of conciliation and arbitration as part of the quid pro quo for these benefits. This does not appear to be in any way inconsistent with the guarantees provided by Articles 21 and 3 of Convention No 87, or by Article 4 of Convention No 98. Workers can form and join the union of their own choosing. That union can then elect to register under the federal Act if it wishes. Alternatively, it may register under one or more of the state Acts or it may remain unregistered. Whether registered or not, it may formulate its programs in full freedom. It may also engage in free collective bargaining." Committee on Freedom of Association, 277th Report, *Case No. 1511*, paragraph 229.

- it is well established that the right to strike, which ILO jurisprudence locates within these Conventions, is not an absolute right, but may be subject to provisions laying down conditions for, or restrictions on, the exercise of this fundamental right, and such restrictions may, for instance, concern strike objectives or methods.[13]

2.35 ILO standards recognise the right of workers to seek to bargain collectively at the levels which they prefer, whether enterprise or industry. The bill does not prevent employees and their organisations from seeking to bargain at an industry level. The bill simply provides a mechanism by which access to protected action may be removed, in some circumstances; and this mechanism depends on the exercise of discretions by an independent tribunal.

2.36 The Committee majority also notes that the ILO's Committee on Freedom of Association has recognised the right of employers in an industry to refuse to bargain at an industry level, and that this is not a breach of the principles of freedom of association.[14] The amendments are consistent with that right.

2.37 At the first day of the Committee's public hearing, the opposition referred to submissions to the Committee which take a contrary view. Some refer to observations by the ILO's Committee of Experts on the Application of Conventions and Recommendations about the limitation of protected action to single-business agreements (which was a feature of the *Industrial Relations Act 1988*, as amended by the *Industrial Relations Reform Act 1993*) and the different provision for certification of multi-business agreements in s.170LC of the WR Act. The Department of Employment, Workplace Relations and Small Business has advised that dialogue between Australia and the ILO's supervisory machinery on these matters is still under way. There are material differences of interpretation about the legislation and the Government will continue to provide advice and information about aspects that the supervisory bodies may have overlooked or misunderstood.

2.38 Similarly, the Government will report to the ILO about the current bill, in the normal way (through Article 22 reports), after it is passed. If the ILO's supervisory machinery seeks information, in that or any other context, about the legislation, the Government will explain why it was introduced and how it is consistent with ILO standards.

An anti-union bill?

2.39 This bill has been subject to concerted great deal of criticism from unions which have labelled it as anti-union legislation. The ACTU has argued that the bill will make it impossible to take protected industrial action in support of claims being pursued throughout an industry or in the workforce generally. It has also argued that effective bargaining is impossible without an entitlement to take lawful industrial action because employers would know that unions had no means to put pressure on them.[15]

2.40 The Committee majority does not wish to comment at any length on the future role of unions in an evolving framework of workplace relations reform. It is sufficient to observe

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13 Committee of Experts on the Application of Convention and Recommendations, 1994 General Survey (Freedom of Association and Collective Bargaining), paragraphs 149-151, 154.

14 Committee on Freedom of Association, 202nd Report, *Case No. 915*, paragraph 53.

15 Submission No 18, Australian Council of Trade Unions, p. 7

that as workplace management practices have been challenged in the transformation of Australian business, so the role of unions and the conduct of industrial relations need to adjust to a changed world. It is a gross oversimplification of the enterprise bargaining arrangements to suggest that unions have a lesser role to play because the right to take protected action is curtailed. As the submission from the Ai Group makes clear, the claim that unions make about the value of their contribution to industry productivity generally is supported by employers:

> Ai Group values highly its relationship with trade unions and is engaging with them on a number of constructive fronts….Ai Group strongly supports responsible unionism. In particular, we believe there is an important role to be played by representative bodies…We also note that the unions were amongst the strongest advocates for enterprise bargaining….Should the Workplace Relations Amendment Bill 2000 be passed into law it will not limit the desire or ability of Ai Group and the trade union movement from discussing and dealing with matters which have implications for Australian industry beyond individual enterprises. …there are many issues of mutual interest which can be discussed. These include skills enhancement, innovation, job security and other issues which will further the interests of Australian industry.[16]

2.41 The prevailing concern of critics of this bill over the lack of union 'muscle-power' under the new legislation takes insufficient account of the potential for conducting protected action at the workplace level. It takes no account of the needs of employers for a contented workforce backed by reasonable union support. Individual enterprises are no less immune from pressure from employees than they have ever been. The evidence, however, from unions suggests that they see no alternative to centrally, or bureaucratically, ordered industrial action strategies. In this respect the Committee majority considers it surprising that unions with long records of harmonious and successful dispute resolution achievements to boast of, profess agreement with industrial fundamentalists like the Metal Trades Federation of Unions.

2.42 The Committee majority notes, furthermore, that Commonwealth legislation did not provide for a right to strike, prior to the commencement of the *Industrial Relations Reform Act 1993*, which provided qualified immunity for industrial action in certain circumstances. New South Wales and Tasmania make no provision for protected action in their industrial relations legislation. Queensland and Western Australian legislation contain some provisions for protected action. South Australian legislation makes no provision for protected action, but provides qualified immunity from civil action.[17]

16 Submission No 15, Australian Industry Group, p. 7

17 Additional Information, DEWRSB, Report Tabled Papers, 29 May 2000