# CHAPTER 1

## INTENT OF THE LEGISLATION

1.1 The Workplace Relations Amendment Bill 2000 was introduced in the House of Representatives, with notice given the same day, on 11 May. The Government's expectations were to have the bill pass both Houses before the winter recess. A short period before the introduction of the bill into the House, Senator Andrew Murray moved, by leave, to have the bill referred to this Committee, contingent upon the bill's introduction in the House.

1.2 It is unfortunate that the Government has chosen to take such an underhanded approach in trying to push through dubious industrial relations legislation. The haste with which the bill was referred and the timeline imposed on the Committee did not allow for effective scrutiny of the proposed legislation, nor adequate time to consider the sixty or more submissions before writing its report.

### The bill in its political context

1.3 The Minister's second reading speech was an attempt to put the bill in the broad context of workplace 'reform' policy development. It was clear from his remarks, however, that the timing of the proposed legislation owed everything to the persuasion of employer peak bodies to have legislation enacted in time to counter a perceived threat of industrial action in Victoria known as Campaign 2000. In submissions that were later sent to the Committee there was comment on the issue of whether good public policy could result from having legislation with such far-reaching consequences to the social and industrial fabric of the workplace drafted, apparently, for the specific purpose of dealing with a 'threat' that was both speculative and ephemeral.

1.4 The strong coincidence of Campaign 2000 and the introduction of this bill is matched by another coincidence – less well-known to the general public – of a 'misinformed and misleading campaign of vilification' directed at the Federal Court in general and at particular judges.[1] There is a view, reported in press commentary, that the Federal Court has favoured unions in recent cases because of the close association of particular judges with the 'industrial relations club'. This is claimed to be evident in decisions of the Federal Court not to support the Australian Industrial Relations Commission in its issuing of return-to-work orders and in the case where the Federal Court laid aside an interlocutory order made in the Victorian Supreme Court. While the Minister's second reading speech made no reference to such matters influencing his decision to insert in this amending legislation section 170MTA, it must be assumed that there is a connection. What is becoming generally recognised outside legal-industrial circles is the Government's long-term aim of marginalising to the point of insignificance the body of industrial law which has evolved since 1904.

1.5 Campaign 2000 has been taken by the Government to be a threat to the future of enterprise negotiation in the settlement of employee claims for improved wages and conditions. Enterprise agreements have been an accepted practice in Australian workplaces since 1993 and are under no threat from anyone. In fact, only 22 per cent of the workforce

---

1 Submission No. 49, Toby Borgeest, Slater and Gordon, p. 6.

now rely solely on old style awards as the legal basis for their terms and conditions of employment. A further 22 per cent are covered by over-award payments and unregistered agreements. Around 42 per cent are covered by registered collective agreements, and a further 14 per cent rely on individual contracts. The Minister referred to similar figures in his speech. This raises the question of why any more legislation is required to assist a process in an advanced stage of relatively painless evolution. The centrally-controlled industrial relations system which the Minister refers to in his second reading introduction to this bill has largely ceased to exist.

1.6 The Government's chosen strategy to 'protect enterprise agreements' or counter Campaign 2000 is to limit pattern bargaining by further restricting access to protected action. The process is reinforced by the easier access of employers to common law processes which may be invoked against unions persisting in pattern bargaining. This is a simplified description of a more convoluted drafting exercise particularly evident in relation to amendments to section 170 of the act which will be dealt with in more detail in Chapter 2.

1.7 Labor senators point out that the legislation assumes that for the purposes of enterprise bargaining each workplace or business operates independently of other similar industries. This is highly unrealistic. As the Committee was told in evidence by an AWU representative:

> We think that taking away the smoke and the sound and the fury, this will be business as usual because most employers currently ring up their colleagues, find out what they are paying and then they confront us. In the aluminium window making industry, which is a metal industry, or in the dye casting industry, they always tell me what every other employer has paid in that industry. We think that when you strip away the emotion and some of the positioning by various players, this is just a debate about whether one form of remuneration and its process is better or worse than any other.[2]

1.8 As the Australian Centre for Industrial Relations Research and Training (ACIRRT) has stated, all labour markets are connected, as are different business units, either through the market mechanism of competition or by means of customer-supplier relations. Workers operating in such environments are affected by arrangements set in workplaces to which they supply, or from which they receive supplies. The example is often given of the effect of a decision made by some retailers in the early 1990s to extend their hours of business, the consequences being changes to penalty rates, not only for shop assistants but also those, for instance, in the warehousing and transport industries. Market forces have an impact on enterprise bargaining across industries and the industrial relations system must have the flexibility to deal with this. Labor senators agree with the view put by ACIRRT that amendments directed at denying or eradicating such tendencies will, sooner rather than later, create inefficiencies and inequities as the parties grapple simultaneously with market pressures and the arbitrary dictates of poorly conceived legislation.[3]

---

2 Mr Bill Shorten, *Hansard*, 29 May 2000, p. 116.

3 Submission No. 22, Australian Centre for Industrial Relations Research and Training, p. 1.

**The response of unions**

1.9 The scope of the legislation has profound effects upon the union movement. It affects the operations of unions in their representation of employees and it highlights for debate the role of unions and their place in a just society. All submissions from a broad range of unions see this bill as an unwarranted attack on unionism. Labor senators have been concerned by a legislative policy that has shaped such a blunt instrument, which is to be used against institutions known to have strongly supported the concept of enterprise bargaining from its beginnings under a Labor government. The practical difficulties for unions are best summed up in evidence presented to the Committee by the Shop, Distributive and Allied Employees' Association (SDA) at its first public hearing:

> If the bill is passed, it does put unions in a most extraordinary position. If you have an agreement with a company that you want to renew when it comes to the end of its term and you are making a series of claims which inevitably involve similar or the same claims as you are proceeding with other employers, if the employer refuses to negotiate, which it can do, and the Commission cannot instruct an employer to negotiate reasonably, and if the employer goes to the Commission and says, 'This union is pattern bargaining,' as a result of this bill the Commission would then be required to terminate the bargaining period, and therefore you cannot take any industrial action to put any pressure on the employer to negotiate. Under the existing act, the Commission does not have the power to arbitrate on any issues which are the subject of negotiation in an enterprise agreement. It basically means that the work of the union is frustrated. You cannot negotiate because the employer refuses and cannot be made to negotiate. You cannot take industrial action because that avenue has been taken away. You cannot take your claims to arbitration because that power does not reside in the Commission under the existing law. So what do you do? You can do nothing. So the effect of this bill is to very deliberately frustrate the normal work of a union in negotiating on behalf of employees if the employer wants to go down the path of frustrating it.[4]

1.10 The bill represents an attack on unions at the most fundamental level: at their reason for being; and at the cultural attachment they represent for many employees; and as institutions characteristic of, and representative of, a free society. Labor members of the Committee do not see this bill as one which aims simply at the elimination of a particular threat of industrial action at a particular time. It is not a piece of 'machinery' legislation drafted for a specific technical purpose. New section 170LGA represents much more than the closing of a loophole. Its effect is to close down union entitlement to negotiation of wages and conditions except in those cases where employers consent to their involvement in this fundamental process. The bill may therefore be regarded as ideologically driven in the sense that it is intended to upset a generally harmonious balance between mutually respecting players.

1.11 Some insight into the role of unions which is under attack is conveyed in a submission from the CFMEU:

> The desire of unions to pursue common or uniform claims in an industry or occupation derives from a number of fundamental motives. Foremost amongst these is the collectivist culture of unionism itself. At its core, unionism constitutes a rejection by workers of a radical individualist ethos. The act of joining a trade

4 Mr Joe De Bruyn, *Hansard*, 26 May 2000, p. 76.

> union is an affirmation of the basic notion that an individual worker is in an unequal bargaining position with his or her employer and that they have interests in common with other workers.[5]

1.12 While Labor senators agree that the restructuring of the economy, subsequent changes to the workplace, and important social changes occurring over the past twenty years have had an impact on unionism, the end result has been to make unionism even more relevant to an increasingly casualised and indifferently managed workforce. Focus on the workplace can result in localised exploitation. As the CFMEU submission continues:

> The assumption underlying the bill is that it is in the public interest that the horizon of Australian workers be always limited to the circumstances existing at their individual workplace. For this reason the act will prevent workers from determining and pursuing industrial claims unless they relate to that enterprise exclusively. The only means people will have to have a say in what happens in their working lives is through participation in negotiations within the four walls of an enterprise. They will listen to the discussion about what is happening in the global economy safe in the knowledge that they cannot lawfully combine with others in their industry to influence the shape of that economy or to determine how its spoils might be distributed.[6]

1.13 The unfairness of the bill lies in the penalty it places upon unions which have played an important role in managing the difficult process of structural adjustment in industry over the past fifteen years. An example of this is the Finance Sector Union, at the cutting edge of managing redundancy negotiations resulting from the inroads into labour by infotechnology and bank branch closures. The Committee noted evidence that the union had worked assiduously over the past decade to conclude enterprise agreements:

> There has not been one single issue that a single employer has brought to this union that we have not been able to resolve by way of an agreement, albeit occurring after a period of industrial action or some campaigning. …If we look at productivity improvement, profitability improvement…the employers, at least, cannot complain about the effectiveness…we have no opposition to enterprise bargaining – our track record is there – but it is clear to us that in our industry…there are issues that now transcend the enterprise. They are more of a systemic nature, and they need a multi-employer or a quasi-industry approach to deal with them. If this legislation does anything to limit our capacity in that regard, I think it is extremely unfair, especially for a union like us…[7]

1.14 Unions like the Finance Sector Union are placed in this invidious position as a result of the definition placed on the meaning of pattern bargaining under new section 170LGA, and the high probability that the Commission, newly restricted in the range of its discretion by amendments to section 127, would deny protected action to the union were it to take industrial action in support of its claims.

---

5 Submission No. 33, Construction, Forestry, Mining and Energy Union (CFMEU), p. 6.

6 ibid., p. 4.

7 Mr Anthony Beck, *Hansard*, 26 May 2000, p. 73.

**An employer's bill**

1.15 This is an employer's bill. The circumstances of its introduction into Parliament have already been referred to earlier in the chapter and warrant further comment from Labor senators in relation to Campaign 2000. Its accurate labelling as an 'employer's bill' is also manifested in new subsection 170LGA(4), which requires the Commission to have particular regard to the views of employers. This has attracted the particular ire of unions and aroused concern and bewilderment among legal practitioners experienced in industrial law. There is also bias in that the bill only seeks to prohibit pattern bargaining by employees notwithstanding the fact that pattern bargaining is often carried out by employers and by organisations that represent employers. Finally, this section of this report deals with more general issues of inequality to be found in the way that unions will be forced to deal with employers under new amendments to the act.

*Campaign 2000*

1.16 To deal with Campaign 2000 first, Labor senators note that the sudden appearance of the bill in Parliament is due to the fact that the Government has heeded the urgent pleas of some business interests who have taken fright at an allegedly impending industrial campaign to be waged by the Metal Trades Federation of Unions(MTFU), commencing in July 2000. It should be noted that there are a number of employers and employer organisations, such as the Australian Catholic Commission for Employment Relations (ACCER) and four state governments, that have expressed opposition to the scope of this bill.

1.17 ACCER's submission noted that the bill:

> …seeks to remove the right of employees to take protected industrial action in pursuit of such bargaining, which is considered to be a denial of the basic right of employees to take industrial action as a genuine last resort.[8]

1.18 The Minister indicated in his speech introducing this bill that this campaign represents a serious threat to the workplace relations system. The report of Government party senators provides evidence from Ai Group sources suggesting a conspiracy to mount massive industrial unrest. Some comments from Labor senators on Campaign 2000 are appropriate.

1.19 The Ai Group submission makes the assertion on three occasions that the AMWU through the MTFU have an objective to 'bring an end to enterprise bargaining'[9]. Despite having gone to the trouble of attaching union material to the submission the Ai Group has provided no evidence that this is the case.

1.20 The discussion of the contempt action taken by Ai Group against the individual unions and their officials has no bearing on whether this particular piece of legislation should or should not be enacted; in fact it is merely an example of how the current legislation enables parties to take action under the law. The use of this example to further the case for this legislation is gratuitous and emotive and appears aimed at attempting to paint the unions involved as irresponsible and prone to unlawful action. As such this particular example is

8 Submission No. 38, Australian Catholic Commission for Employment Relations, p. 11.

9 Submission No. 15, Australian Industry Group, p. 3.

irrelevant to the current question before the Committee which is specific to the Government's bill.

1.21 Such a comment would indicate a recognition of equality that is not evident in the support by the Ai Group for this section.

1.22 The Ai Group submission makes the claim that:

> …it was not intended that protected action be available to parties engaging in industry or pattern bargaining.[10]

1.23 The Ai Group has either failed to recognise that the provisions of the *Industrial Relations Act 1988* immediately in place prior to enactment of the *Workplace Relations Act 1996* were considerably different to the current Act, or it is deliberately discounting the effect the 1996 Act has had on the Commission's powers to arbitrate to resolve disputes.

1.24 While Labor senators believe that difficulties have arisen and that there is an increase in industrial disputation as a result of the provisions of the 1996 Act, no convincing evidence has been provided that the proposed bill will enable the Commission to resolve disputes more effectively than is currently the case. Indeed the proposed bill if enacted is likely to have a further adverse effect on disputes.

1.25 In the view of Labor senators there has been a massive misinformation campaign about Campaign 2000. As one witness told the Committee, Campaign 2000 was not directed at undermining the continued negotiation of local issues at a local level, but is about redressing the balance between enterprise bargaining and the needs and issues that arise at industry level.

> It is about trying to improve the skills and industry policy developments across an industry. It is about trying to meet new needs such as the growing casualisation of the workforce and trying to find new entitlements, such as portable entitlement schemes, which might meet the needs of that industry…From an employer point of view, it is to ensure that some employers obviously do not continue to undercut others simply because these employers are able to evade striking an enterprise bargaining arrangement.[11]

The Australian Workers' Union (AWU) noted that:

> …at the moment in Australia employers can have any method of remuneration from the piece rate system used in shearing sheds through to salaries through to hourly rates of pay and which, through the process of negotiation, can be collective or AWAs.[12]

1.26 The AWU considered the Government's aim of singling out one remuneration negotiating process as ridiculous. The Committee was told that by August, Campaign 2000 would be over because most employers will have negotiated an agreement. Some central features might have to do with common minimum wage increases and with training. Much of

---

10 ibid., p. 18.

11 Mr Leigh Hubbard, *Hansard*, 29 May 2000, p. 111.

12 Mr Bill Shorten, *Hansard*, 29 May 2000, p. 116.

the negotiation would be local and so far as the AWU was concerned, no agreement would be signed off until each individual site had voted on it.

1.27 Another perspective on Campaign 2000 was also given by the AWU which suggested that competition between employer groups is also a factor in creating public apprehension about Campaign 2000. The Committee was told that the Ai Group was in competition with Victorian Employers Chamber of Commerce and Industry (VECCI) as to which would be the paramount employer organisation. In the view of the AWU an employer demarcation dispute had been caught up with, and had fuelled, a bid for legislative action. As the Committee was told: 'If the textile industry or the fruit picking industry had common expiry dates, we do not think people would be panicking, but the employer group involved has seized upon this campaign as a way of reinvigorating its membership.'[13]

1.28 Labor senators are not inclined to speculate upon the broad outcome of Campaign 2000 should the legislation pass the Senate. They do make the obvious point that should employers invoke the full letter of the new law in order to frustrate the legitimate processes of agreement renegotiations, the issue will not be resolved by August as the AWU estimated, assuming normal timeframes, but many months later. Those months would be spent in protracted litigation going to the foundations of this bill.

*The views of employers: subsection 170LGA(4)*

1.29 Subsection (4) requires the Commission, in determining whether claims are not capable of being pursued at the enterprise level, 'to have particular regard to the views of the employer who is the negotiating party to the proposed agreement'. This provision, on its face, appears to Labor senators to be highly questionable. They can understand a desire to give priority to the views of parties who would be affected by an enterprise agreement over persons who would not. It is obviously unfair to give preference to the views of one party over another. The Committee has not had time to seek legal opinion on this matter, but it does raise the issue of whether legislation can be valid which attempts to fetter the discretion of a statutory body such as the Commission, especially on matters of justice.

1.30 Labor senators agree with Professor Keith Hancock, who has labelled this provision as a 'gratuitous insult to the Commission'.[14] The same point was made by the SDA in giving evidence to the Committee. The SDA labelled as 'one-sided, biased and unfair' the provision of the bill that the Commission must have particular regard for the views of employers, and branded it an attack on the independence of the Commission.[15]

1.31 A more detailed view of the legal difficulty was put by Mr Kevin Bell QC:

> The other thing that the bill provides for is that the Commission must have regard to the views of the employer. That is really telling the Commission that it must pay particular regard to the views of the employer and that is one-sided, biased and unfair legislation and it also attacks the independence of the Commission itself. There is in my experience no precedent in Australian industrial history for the Commission to be guided by the views of one party to an industrial situation or

13 ibid., p. 116.

14 Submission No. 42, Professor Keith Hancock, p. 2.

15 Mr Joe De Bruyn, *Hansard*, 26 May 2000, p. 76.

> dispute. This marks, I think, a sad day when, in legislation supposedly governing fairly and equitably a resolution of disputes between parties, in a conflict of interests the interests of one party to that conflict are to be regarded as predominant. However, speaking more technically, the requirement that the views of the employer be paid specific regard by the Commission will, I think, result in a confused outcome. Are the views predominant? What is the status of other views? What is the status of the views of the unions or their employee members? What is the status of the view that may be expressed by an intervener, for example, the Minister? The Commission will be left to resolve these conundrums as with others under this legislation.[16]

1.32 Finally, in regard to this provision, Labor senators noted the reaction of the Ai Group to criticism made of the subsection's lack of fairness. It was suggested to Ai Group chief executive Mr Bob Herbert that some members of his organisation would be embarrassed by the support given to this provision by the Ai Group on the grounds that a company is likely to have a much greater knowledge of the issues which are relevant to its enterprise than a union which may be engaged in pattern bargaining. It was therefore not unreasonable for the Commission to be required to have a 'particular regard' to the views of the employer.[17]

1.33 It is not clear that this particular provision resulted from any special lobbying from the Ai Group. Mr Herbert's response was simply: 'We do not mind getting a free kick every now and again, Senator.'[18]

1.34 Subsection 170LGA(4) is, in the view of Labor senators, surely intended as a free kick awarded in front of the union goal posts by an umpire under duress. Its lack of procedural fairness is almost certainly bound to come to the attention of higher tribunals.

*General issues*

1.35 The comprehensive nature of the bill's provisions in favour of employers is well summarised in evidence to the Committee from the ACTU:

> The bill will swing the balance to employers, firstly, by constraining the bargaining capacity of workers and unions; secondly, by introducing cooling-off provisions that will unequivocally favour employers; thirdly by giving employers greater discretion under section 127 to stop industrial action; and fourthly, by constraining the jurisdiction of the Federal Court. There is nothing in this bill for employees or their unions; it is all one way. There are no similar constraints imposed on employers, who will continue to be free to use individual contracts in a pattern bargaining fashion. They will be free to continue to use proposed non-union collective agreements in a pattern bargaining fashion. It leaves employer groups, including the AiG…to continue to pattern bargain in their particular ways, issuing bargaining guides to their employers. Employers can continue to lock out workers under an employer pattern bargaining fashion. This proposed legislation is all one way.[19]

---

16 Mr Kevin Bell QC, *Hansard*, op. cit., p. 119.

17 Submission No. 15, Australian Industry Group, p. 18.

18 Mr Bob Herbert, *Hansard*, 26 May 2000, p. 37.

19 Ms Sharon Burrow, *Hansard*, 26 May 2000, p. 25.

1.36 There is a peculiar inconsistency in the Government's approach to workplace relations which may be identified in this bill. The dismantling of the current framework of industrial laws is apparently justified, philosophically, by a preferred reliance on the market. Classical liberalism in the conduct of business affairs suggests that contracts between interested parties, freely entered upon, are a more desirable way to proceed, provided that they are in the public interest. The bill casts doubt upon the Government's accord with these principles where it is convenient for them to legislate otherwise to contain industrial campaigns.

1.37 A number of submissions illustrate this point. The Shop, Distributive and Allied Employees' Association (SDA) points out, for instance, that the legislation assumes that one can have enterprise bargaining and industry bargaining and that there is a tension between them and no middle way. As the submission points out, this is a fallacy:

> There are many in-between positions between an agreement covering a single enterprise or employer, and an agreement covering a whole industry…there is a continuum across agreements which cover a single enterprise right across the spectrum to agreements which cover a whole industry. Whether it is desirable to have single employer agreements, or multi employer agreements covering most, or part of an industry, or whole industry agreements is a matter for the parties themselves to determine, including by virtue of the existing Workplace Relations Act, the employees themselves by way of a secret vote, and should not be determined or improved or restricted by legislation by Parliament.[20]

1.38 The inequity of the legislation was also brought home to the Committee in evidence given on behalf of the Independent Education Union of Australia (IEU). It was pointed out that while the Victorian Catholic Schools Association were opposed to bill, and had taken the unprecedented step of writing a joint submission with the IEU to this inquiry, it could not be forgotten that employers – even the Catholic Education Office – look for avenues of escape when they are pressed by unions. This is significant given that the Catholic Education Office, unlike some employer organisations, accepts that unions have a right to collectively bargain and take industrial action. The behaviour of other employers could be expected to be even more severe. The IEU noted that:

> In 1997, we mounted a campaign for parity of wages with government schools in Victoria. For three weeks we picketed outside the Catholic Education Office. Work bans were in place in the 500 schools. When it got really tough the employers stopped our payroll deductions. Why would we trust employers in this industry to not run down to the Commission, cry pattern bargaining, and get the bargaining periods suspended and render our action unlawful.[21]

1.39 The Committee considers this evidence as a pointer to the likelihood of irresponsible employers provoking serious and prolonged industrial disputes. The consequences of such actions cannot be foreseen, but violence and a permanently damaged relationship with a workforce are possibilities that cannot be ruled out if unions are denied a legitimate outlet for the redress of grievances. The use of the courts to impoverish a union to the point of its collapse is more likely than not to result in a pyrrhic victory for the employer.

---

20 Submission 8A, Shop, Distributive and Allied Employees' Association (SDA), pp. 7-8.

21 Ms Debra James, *Hansard*, 29 May 2000, p. 98.

1.40 It is important to note that, under this Government's divisive laws, the number of long-term disputes has risen. In his response to the Workplace Relations Bill 2000 the shadow minister for Industrial Relations, Mr Arch Bevis, noted that:

> Disputes between 10 and 20 days have risen by 11 per cent during the period of this government. Disputes of more than 20 days have risen by a whopping 131 per cent.[22]

1.41 Labor senators note that one of the ironies of this proposed legislation, assuming that it passes the Senate, is that it will then run the gauntlet of the Commission and courts which it ultimately seeks to abolish. The bill will provide, as several witnesses and submissions have stated, considerable income for legal practitioners over the next two years or longer. These aspects are dealt with in Chapter 2.

22 Mr Arch Bevis, *Hansard*, 1 June 2000, p. 15848.