# CHAPTER 2

## PATTERN BARGAINING

### Employer views from Second wave

2.1 A number of employers who made submissions to the Committee's 1999 inquiry into provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 did not support a blanket ban on pattern bargaining.[1] These views are relevant given the broad scope of the bill currently under consideration.

2.2 The Master Builders Australia Inc (MBA) noted in that inquiry that:

> The overall combination of the small size of the average enterprise, the mobility of labour, fluctuations in work activity, strong industry union presence, availability of benefits on an industry-wide basis and fragmentation of employers results in workers having a concept of employment in an industry rather than employment with a specific employer.
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> …
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> There are, however, a number of reasons why a model of enterprise bargaining which allows only bargaining at an individual enterprise level is not entirely appropriate for all sectors of the building and construction industry.
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> The main reason is that the individual enterprise focus, which is a feature of the enterprise bargaining system under the bill, often does not exist in the building and construction industry. Many employers in the industry do not have a single workplace nor a group of employees which is the focus of the enterprise. Employers are required to operate their business according to the nature of the contracts which they are successful in winning. [2]…

2.3 The MBA noted the position taken by a number of its State branches:

> … in its submission to the recent Productivity Commission Inquiry into Work Practices in the Building and Construction Industry, the Queensland Master Builders Association stated 'Builders consider it important to have an ongoing consistent approach to wages and conditions of employment for their projects and therefore minimise the risk of disputation through claims arising on a site or intra-site basis. There is also a preference to have a common and established set of wage rates and conditions of employment for tendering purposes.' [3]

2.4 The MBA went on to state that:

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1 See for example: Submission No. 267, Master Builders Australia Inc., vol. 6, pp. 1231-4; Submission No. 375, Business Council of Australia, vol. 12, p. 2630; Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, pp. 3104-7; Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, pp. 3366-7; Submission No. 381, Australian Mines and Metals Association Inc., vol. 13, p. 2847; and Submission No. 167, Australian Catholic Commission for Employment Relations, vol. 4, p. 752.

2 Submission No. 267, pp. 2-3, to the 1999 inquiry.

3 ibid., p. 3.

> The concept that each individual employer at the enterprise level should negotiate his or her own agreement is not practical on a multi-employer building project. [4]

2.5 The Australian Catholic Commission for Employer Relations (ACCER) argued that:

> In the not for profit sector where common outcomes are generally sought by the parties for certification as multi-employer agreements, such a restriction would create a denial of the basic right of employees to take industrial action as a genuine last resort. In any event, as previously stated in the commentary on Schedule 8 *Certified Agreements*, the parties should not be constrained in their choice of bargaining mechanisms or their scope. [5]

2.6 The Australian Industry Group (Ai Group) noted that:

> The evidence provided by our members in Interest Group 1 (Project and construction site owners and principal contractors), illustrates the overwhelming need for common site agreements on large project and construction sites. [6]

2.7 These employer groups recognise that pattern bargaining is appropriate in a number of contexts. One of the dangers of this bill is its very broad scope, as will be outlined below.

**Definition of pattern bargaining in the current bill**

2.8 Labor senators consider that the definition of pattern bargaining in the bill is far broader than would achieve the Government's stated objectives. The provisions of the bill will potentially capture almost all forms of collective bargaining where any commonality of conditions or entitlements is sought across more than one enterprise. Commonality of claims for at least some conditions and entitlements occurs in bargaining between employees and employers in many industries as a matter of course. Further, the definition of pattern bargaining contained in section 170LGA of the bill is unclear and likely to generate considerable litigation.

2.9 The definition states that pattern bargaining:

> …means 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:
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> (a) forms part of a campaign that extends beyond a single business; and
>
> (b) is contrary to the objective of encouraging agreements to be genuinely negotiated between parties at the workplace or enterprise level.[7]

2.10 It is unclear from the bill itself, the Explanatory Memorandum or the Second Reading Speech how the Commission should satisfy itself that a course of conduct or bargaining is contrary to the objective of encouraging agreements to be genuinely negotiated

4 ibid., p. 3.

5 Submission No. 167, p. 28, to the 1999 inquiry.

6 Submission No. 392, p. 43, to the 1999 inquiry.

7 Bill, section 170LGA(1)

between parties at the workplace level. In evidence given to the Committee, Mr Kevin Bell QC argued that:

> There are several aspects in which this bill contains terms of almost impossible ambiguity. I mentioned the terms 'course of conduct', 'what is bargaining', 'what is conduct involving seeking common wages and entitlements' and 'what is a campaign'…[8]

2.11 The Australian Council of Trade Unions (ACTU) argued that:

> The effect of the proposed section 170LG would be to include as pattern bargaining any campaigning across an industry in support of claims for improved wages and/or conditions by employees in that industry. Such campaigning would be included irrespective of whether the campaign was intended to involve negotiations at the workplace level in relation to some or all of the common claims as well as any additional issues which might be relevant to the enterprise. The preparedness of the union to agree to variable outcomes in relation to the claims, including timing and method of implementation would be irrelevant. [9]

2.12 The SDA support this position in its submission, arguing that section 170LGA(1):

> …has the capacity of affecting almost all forms of enterprise bargaining initiated by unions. The opening words of the section are so broad as to imply that the seeking of any form of common wage rate or common level of wage rise, or any single common employee entitlement from a number of employers will constitute pattern bargaining.
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> Wherever a union makes claims upon more than one employer which contain at least one common employee entitlement, then quite clearly the union has engaged in the course of conduct and would thus fall within the parameters of the proposed Section 170LGA(1). [10]

2.13 There is further confusion in section 170LGA(2), which directs the Commission to consider a course of conduct or bargaining or the making of claims to be:

> …contrary to the objective of encouraging agreements to be genuinely negotiated between parties at the workplace or enterprise level unless the Commission is satisfied that all of the common entitlements being sought are of such a nature that they are not capable of being pursued at the single business level.[11]

2.14 Despite some uncertainty as to the interpretation of section 170LGA(2), the department has indicated that the section requires the Commission:

> …to consider the nature of the common entitlements that are being sought (ie, those that form part of a campaign) and whether they would be capable of being pursued at the enterprise level. If **any** of them are capable of being pursued at the

8 Mr Kevin Bell QC, *Hansard*, 29 May 2000, p. 118.

9 Submission No. 18, Australian Council of Trade Unions, p. 3.

10 Submission No. 8, Shop and Distributive Allied Employees Association, pp. 4-5.

11 Bill, section 170LGA(2)

> enterprise level, then the conduct in question would be take to be contrary to the objective of genuine enterprise bargaining. (emphasis added)[12]

2.15 As was raised in a number of submissions to the Senate inquiry into this bill, it is not at all clear which matters 'are not *capable* of being pursued at the single business level.' It is arguable that almost all entitlements are of such a nature that they are capable of being pursued at the single business level. There are a number of matters such as maternity leave, occupational health and safety and industry training schemes that are best negotiated across enterprises but it is not clear that these would not be capable of being negotiated at the enterprise level.

2.16 Mr Kevin Bell QC considered the concepts of whether entitlements are of such a nature that they cannot be pursued in a single business alone.

> I heard a speaker give evidence today that he did not understand what that concept meant, and speaking entirely as a lawyer, I think the judges will be very troubled by that concept. It does not draw at all on any accepted standard of industrial law, it has no history in Australian industrial relations…
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> Virtually any industrial provision is capable of being pursued at the enterprise level. I cannot see in law a basis upon which to distinguish wages from superannuation or leave to separate out allowances from redundancies.[13]

2.17 The SDA argued that:

> It would appear from the Association's experience in the industrial relations environment, that every claim made by the Association on any and every employer, is a claim that is capable of being pursued at the single business level.
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> …
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> Even though employers may be of the view that it is preferable to deal with the claims jointly, or in a uniform manner, it is equally clear that for the purposes of proposed section 170LGA(2), claims made by unions which seek improvements in wages and employee entitlements are always claims capable of being pursued at the single business level. This must be so because at the end of the day it is the employer at the single business level who has to agree to the claims made. [14]

2.18 The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) notes that there are situations where:

> …claims are *best* made across the industry to ensure consistency across the industry, but they are also *capable* of being pursued at the single business level. [15]

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12 Written response from DEWRSB to question on notice at hearings into the Workplace Relations Amendment bill 2000, 26 May 2000.

13 Mr Kevin Bell QC, *Hansard*, 29 May 2000, p. 118.

14 Submission No. 8, Shop and Distributive Allied Employees Association, pp. 7-8.

15 Submission No. 9, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, p. 3.

2.19 The notes that follow section 170LGA(2) give little guidance on the likely interpretation of the concept 'capable' but merely repeat the test contained in the sub-section itself.

**The submissions employer organisations to the current inquiry**

2.20 The submissions of several of the employer organisations that have provided submissions to the current inquiry have been vague in relation to the likely operation of the provisions relating to pattern bargaining.

2.21 In hearings of the Committee on Friday 26 May 2000, the Business Council of Australia (BCA) was asked which unions were those that, in their view, had successfully made the transition to enterprise bargaining. The BCA responded that some of the unions that had successfully made the transition were the NUW, AWU, SDA and ASU. The BCA was not aware that all of those unions had made submissions to the Committee's inquiry critical of the scope of the bill, particularly in relation to its likely impact on what is currently the standard practice of negotiating at least some conditions across more than one enterprise.[16]

2.22 The BCA was questioned by Senator Murray on the meaning of the phrase 'not capable of being pursued in a single business'. Senator Murray asked the BCA 'Could you give any example of claims by unions that might fail that test and claims by unions that might pass that test? Shall I prompt you?' The BCA responded 'It might assist me. I had not given any detailed thought to that.'[17] This is surprising, given that the meaning of this phrase is central to the scope of the bill.

2.23 Ai Group proposed a definition to the previous inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999. It was noted in evidence given on 26 May 2000 that the definition in the current bill differs from that proposed by the Ai Group earlier. The Ai Group responded:

> And we argued very strongly – and I think we have a different view to the minister about this – that there should be in difficult circumstances the opportunity for site agreements where it is the wish of the employer and the employer sees that as the best way of dealing with a major development project.
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> We also have a view about the Email situation. It is a single business in terms of the definition in the act. The fact that it has many sites around Australia and it negotiated an agreement covering those sites was quite in conformity with the definition of single business within the current legislation. Our view has not changed here. We did not draft the definition that is now before us; we are saying we support it because it really embraces the principles and spirit of what we put on the previous occasions.[18]

2.24 It appears that the Ai Group have embraced a flawed bill in their enthusiasm to curb Campaign 2000.

2.25 The submission provided by the Australian Chamber of Commerce and Industry (ACCI) gives little guidance on the interpretation of the proposed clauses in relation to

16 *Hansard*, 26 May 2000, p. 2.

17 *Hansard*, 26 May 2000, p. 4.

18 Mr Robert Herbert, *Hansard*, 26 May 2000, p. 36.

pattern bargaining. The submission seems to be guided more by ACCI's ideological stance than its support for the particular provisions of the bill.

2.26 Some employer groups have pointed to the potential for bargaining across more than one enterprise where both the employer and employee agree. This does not reflect the reality of the bargaining process. While it is theoretically possible under this bill for bargaining to occur across more than one enterprise when both the employer and the employee agree, the scope of this bill makes it virtually impossible for meaningful negotiation to occur since the employer can wield the veto given to it under this bill as a bargaining weapon. Even where the employer may prefer to participate in pattern bargaining, this bill inappropriately skews the strength of the parties' relative bargaining position in favour of employers.