SENATOR ANDREW MURRAY

Workplace Relations Amendment Bill 2000

Minority Report

This bill contains four main proposals, which are presented as a modified version from the earlier omnibus bill rejected by the Democrats late last year. These four main proposals cover the definition of pattern bargaining, the Commission's power to make orders that unlawful industrial action not occur, to provide for cooling off periods, and to protect rights to pursue common law remedies.

The Government has brought these amendments forward because they believe that they are necessary to properly regulate enterprise bargaining in the light of the major industrial campaigns likely to commence with the expiry of several hundred collective enterprise agreements on June 30 2000.

The Democrats have said that this ten-page *Workplace Relations Amendment Bill 2000* should be considered on its merits and therefore referred the bill to this Committee. Compared to the three-month Inquiry for the 300 page omnibus bill last year, the reporting timeline for this bill is short, because these proposals, (albeit now changed), were considered in that longer Senate Inquiry last year. Secondly, because of the Government's concern about common expiry dates for enterprise agreements on June 30 and the consequent planned industrial action announced by some unions. The bill was referred on 11 May for report by 5 June and the quality and depth of the submissions meant that this matter was able to be well considered by us.

In this Minority Report I will obviously deal principally with the legislation. I do however want to first deal with the representativeness of the protagonists in industrial relations matters.

In contrast to the political parties in the Senate, who because of compulsory and near-proportional voting can legitimately claim to represent nearly all Australians, the unions and employer organisations do not even represent a majority of businesses and employees. There was sometimes a sense that witnesses felt they have a special claim. They may do, but it is limited. It is the Senate which in reviewing workplace relations legislation, must legislate for all Australians, bearing in mind that employer and employee organisations only represent some Australians.

The best estimates for the representation of businesses by employer organisations seems to be about 30%. 70% of businesses are not represented by them. There is no organisation that speaks for that 70%, which makes their needs difficult to assess.

Union figures are more precise. According to the Australian Bureau of Statistics, in 1999 unions represented 1,878,200 employees, or 25.7% of all employees. This is down from 40.5% of employees in 1990.

Less than 20% of private sector workers are in unions. So the strident and continuous claims by the union movement in submissions to the Senate, that they 'represent the workers', is just not true. 80% of private sector employees are not members of unions. As valuable and as

desirable as unions may be, the Senate has to recognise that unions do not and cannot speak for the majority of workers. Unfortunately, there is no organisation that does speak for the majority of non-union workers, which makes the Senate's task very difficult. They are truly a 'silent majority.'

That means that in considering IR legislation the Senate has to contemplate how the legislation fits in with a post-union society. It has to consider not just the partisan desires of unions of employers and unions of employees, representing the minority, but to try and consider the rights and needs of the vast majority of employees and businesses who are not members of those organisations. With respect to this Bill, one of those prime considerations has to be the potential effects on third parties of industry-wide industrial action initiated by a minority of workers.

Enterprise Bargaining:

At the core of the debate around this bill is the role of collective enterprise bargaining. Since 1993, Federal workplace relations legislation has expressly encouraged enterprise bargaining. The Labor Government's 1993 legislation had cross-party support. According to their evidence to this committee, enterprise bargaining was also backed by the ACTU. The 1993 Act had the objective of:

> "encouraging the use of agreements, particularly at the workplace or enterprise level."[1]

This was further emphasised in the 1996 *Workplace Relations Act*, with the objective of

> "ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level."[2]

Leader of the Opposition Kim Beazley, in his recent statement on industrial relations, highlighted the importance of these changes in modernising the economy

> "The introduction of enterprise bargaining under Labor played a central part in our strategy for modernising Australian industry."[3]

Enterprise bargaining was initially embraced by the union movement. While many unions have pursued - with employer support - agreements at an industry level, the vast bulk of agreements, even under Labor's Act, were at the enterprise level. From 1994 to 1995, the proportion of agreements covering a single workplace jumped from 20% to 62%, and probably rose further under the 1996 Act.[4] The increasing emphasis on enterprise bargaining since 1993 has put emphasis on linking wages to improvements in productivity. Productivity since 1993 has grown at twice the rate of the 1980s,[5] although other factors (eg. technology, lower tariffs, training, downsizing) have also contributed to this. In 1995, 62 per cent of managers reported that enterprise agreements had improved workplace productivity, with

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[1] Industrial Relations Act 1987 sect. 170LA(1)(b)

[2] Workplace Relations Act 1996 sect. 3(b)

[3] Kim Beazley, Inaugural Fraser Lecture, Canberra, 31/5/00 p.5

[4] Department of Industrial Relations "Enterprise Bargaining in Australia Annual Report" AGPS June 1996 p.41

[5] Department of Industrial relations " 19967 Report on Agreement Making' AGPS June 1998 p. 21

gains being greatest the longer the agreement was in place.[6] Since 1996, labour productivity picked up even more, allowing for increases in real wages without rising unemployment, inflation or industrial disputes. This has been a good outcome for Australia - a 'win' for workers, employers, the unemployed and for Australia. In considering further legislative changes, the gains won since 1996 must not be lost and further improvements should be made.

What is at issue in considering this Bill, is that some elements of the union movement wish to move away from enterprise bargaining. As AMWU National Secretary Doug Cameron put it:

> "The AMU recognises a role for enterprise bargaining but it is a limited role. There is a role for pattern and industry bargaining to make it stronger."[7]

The Democrats recognise that there is a role for industry level, multi-employer bargaining. This Committee has received extensive evidence of multi-employer agreements in retailing, media, education and electrical contracting which suit both unions and employers, particularly smaller employers. Indeed, the Democrats insisted on an amendment to the Act in 1996 to allow for multi-employer agreements to be made where the Commission concluded that they were appropriate and in the public interest.[8] What the Act acknowledges is that if that level of bargaining suits both employers and unions, then it should apply. But, the principal emphasis of the 1993 and 1996 Acts remains on collective enterprise level bargaining as the best means of unlocking productivity and hence affording sustainable increases in real wages.

Workplace Relations Performance Before and After 1996:

Indicator	Under Labor's pre-1996 Act[9]	Since the 1996 Act[10]
Industrial disputes	61.5 days lost per 1000 employees per month	41.5 days lost per 1000 employees per month
Employment	124,000 new jobs (35% full-time)	290,000 new jobs (53% full-time)
Real Wages	Increased by 1.2%	Increased by 6.8%
Minimum Wages Increases	Increased by $16 p.w.	Increased by $24 p.w.
Labour productivity	Increased by 1.7% p.a.	Increased by 3.4% p.a.

The 'Right to Strike'

[6] DIR 1996 p. 130

[7] D.Cameron Hansard 26/5/00 p.44

[8] Workplace Relations Act 1996 sect. 170LC(4)

[9] In the last two years of the Act, except employment which is measured in last eighteen months, using ABS data

[10] In the first two years of the Act, except employment which is measured in first eighteen months, using ABS data

Throughout this hearing, unions have been emphatic that their ‘right to strike’ needs to be defended. But what is the 'right to strike'? Up until 1993, the 'right to strike' in Australia was never absolute. It existed unless the Commission ordered a union to stop the strike, and was subject to the right of employers to seek common law damages against strikers.

In 1993, as part of the enterprise bargaining amendments, the then Labor Government did two things. First, it reduced the capacity of the AIRC to intervene in industrial disputes about enterprise bargaining. And second, it introduced the notion of ‘protected action’ - industrial action, (which included strike action), that could be taken with considerable immunity from civil liability - during the bargaining period preceding the making of an enterprise agreement. Permitted strike action for employees was matched by the employer’s version of strikes, lock-outs. But, it should be emphasised that the ‘right to strike’, even under Labor's 1993 amendments, never existed beyond a bargaining period for a single employer.[11] The 1996 act continued to recognise the notion of ‘protected action’ in a ‘right to strike’ in the making of single-employer enterprise agreements. The 1996 Act, like Labor's 1993 Act, expressly prohibits industrial action in the pursuit of a multi-employer agreement.[12]

The Australian Democrats supported these 1993 and 1996 restricted extensions to the legal ‘right to strike’.

‘Protected action’ means that the parties to the dispute are allowed to take industrial action without facing punitive fines and legal action, which is available under the law if industrial action occurs outside a bargaining period. The Australian Democrats support and will continue to support the right to use ‘protected action’ in this way at the enterprise level.

The ACTU has argued emphatically that any further restriction on the ‘right to strike’ would be a further breach of international law regarding enterprise bargaining,[13] even though it acknowledges that no such right is explicitly referred to in the conventions or the Constitution of the ILO.[14] Its affiliate, the Victorian Trades Hall Council adamantly:

> "…reiterates our support for the legal right to strike and to take industrial action in accordance with international law."[15]

International law, in terms of the United National International Covenant on Economic, Social and Cultural Rights, provides for:

> "…the right to strike, **provided it is exercised in conformity with the laws of the particular country."**[16] (emphasis added)

In Australia, since 1993, the laws of Australia have restricted the 'right to strike' in two ways:

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[11] Industrial Relations Act 1987 sect. 170PA(2)

[12] Workplace Relations Act 1996 sect. 170LC(6)

[13] ACTU submission p. iii

[14] ibid p.8

[15] VHTC sub. P.13

[16] Art. 8 para. 1(d)

- If the strike is in pursuit of an enterprise agreement, there is no restriction unless the AIRC concludes that a party is not genuinely bargaining or the strike threatens the national economy (section 170MW);

- If the strike is about any other matter, then an employer can seek orders of the AIRC to stop the strike and apply for an injunction if the AIRC order is not complied with by the union (section 127).

The only strikes which are effectively illegal are secondary boycotts, other than those about employment, environmental or consumer issues (see Trade Practices Act).

Pattern bargaining, the principle focus of this short ten-page bill, is distinguished not so much by common claims, but by the common expiry date of large numbers of enterprise agreements, which are a principal means of collective bargaining in Australia. At an expiry date, protected action ensues. So when hundreds of enterprise agreements expire at the same time, industrial action could simultaneously occur across hundreds of enterprises, including lengthy strike action. An entire industry can therefore be brought to its knees by a minority. The weakest will fold, and employers as a whole be forced to comply with union demands. This situation of the simultaneous expiry of collective enterprise agreements has not faced Australia before.

Whether this scenario could or will develop in any industry, is of course strongly disputed by union witnesses. In that respect, if the Bill fails, time will tell.

The Australian Chamber of Commerce and Industry expressed their concern this way :

> "The parliament has to again ask itself this question: is it in the public interest to have a labour relations system which provides protected action for damaging industry level campaigns of industrial action? The answer given in 1993 by parliament, an answer that was not changed in 1996, was that it is not in the public interest. The ALP, Australian Democrats, and Coalition parties have been consistent in their recognition of the very real damage to the economy and the nation that will result from providing protection and therefore scope for providing for industry level campaigns of industrial action."[17]

Those who support this kind of industry-wide industrial action argue that it is a legitimate method of achieving worker demands against much stronger employers, and that there are strong international and domestic precedents which argue for a preference for industry-wide action over enterprise-focussed action. They argue that the militancy of widespread strike action is just part of a union's legitimate armoury.

However, such comparisons pay insufficient attention to Australia's much more comprehensive IR system than many countries enjoy. Australia is unusual worldwide in its provision of a collectively arbitrated award system, operating as a fairly comprehensive safety net. The combination of an independently arbitrated minimum national wage case, a modernised simplified and comprehensive award system, the flexibility of collective enterprise agreements, and individual agreements (mostly common law instruments) have been part of an environment which has delivered good real wages and productivity growth in Australia in recent years. It has not however halted a growing disparity between the lowest

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[17] ACCI submission P.16

and highest paid. Nor has it yet delivered the best possible conditions of employment. Collective bargaining remains the best weapon for employees as a whole to advance their wages and conditions claims.

How then to balance the needs for unions of employers and unions of employees to pursue their legitimate objectives? How then to balance the need for flexibility, and the protection of the non-union sector, both employees and employers, with the need to ensure that productive industry-wide collective action is preserved, at least at its present levels? The phenomenon of pattern bargaining, as expressed in the Campaign 2000 model, may challenge the current legislative framework, introducing, for the first time in Australia's history, a 'right to strike' without interference by the AIRC, to take 'protected action' across an entire industry, simply because common dates of expiry of enterprise agreements have been contrived. Whether individual employers were at the time of signing an enterprise agreement aware that the unions were using common dates, is at issue. If they were aware, then common expiry dates are as much an employer responsibility as a union one.

The Government and employers claim that this bill merely refines the current legislative framework by clarifying the scope of 'protected' action for enterprise bargaining, and improving access to the AIRC to prevent other action. The unions emphatically disagree. Because Labor is the political wing of the unions and therefore often compromised in considering these issues, it falls to the Democrats to sift through the rhetoric and ideology and to try to find the best policy outcome that:

- Supports the rights of unions to organise and take industrial action within the confines of Australian law;
- Promotes improvements in productivity and lower levels of industrial disputation necessary to improve wages without rising inflation or unemployment;
- Allows employers and employees to agree on the most appropriate level of agreements - whether it is industry or enterprise level, with a preference towards enterprise level as the best means of promoting productivity and industrial democracy;
- Ensures that the AIRC has appropriate powers to be even-handed in its treatment of employers and employees and ensure that the party with the weaker bargaining position is not treated harshly or unfairly.

This approach is consistent with the longstanding principles and policies of the Democrats to promote a more co-operative workplace culture, which are summed up in one of the party's objectives in our Constitution, which commit the party and its membership:

> "To be even handed to employee and employer, and reconcile their real interests by encouraging industrial democracy and other appropriate forms of co-operation"[18]

Items 6, 7, 10 & 13 :Pattern Bargaining:

This bill proposes to make it clear that 'protected action' can only be taken in respect to enterprise agreements by allowing employers to approach the AIRC to have a bargaining period terminated if a union is seeking the same agreement from more than one employer (i.e.

[18] Australian Democrats National Constitution objective 3.5

pattern bargaining). In the case of agreements sought from more than one employer, industrial action would not enjoy ‘protected’ status which has only applied to enterprise-specific strikes since 1993, and would remain subject to AIRC orders as it has been since 1904.

Union Views:

The unions are emphatically opposed to these provisions. and assert that the provisions would be the end of industrial action and industry-level bargaining. Many unions gloss over the fact that the right to protected action since 1993 has not applied to multi-employer agreements and was only intended to support single-enterprise agreements. The SDA submission, for example argues (incorrectly in my view) that the bill will outlaw protected action altogether[19], and argues that this would preclude its current strategy of achieving multi-employer agreements and flowing these on[20], even though the submission later concedes that the union "…has only infrequently had cause to take protected industrial action or initiate bargaining periods."[21] The ACTU, for example, claims that:

"The effect of the proposed section 170LG would be to include as pattern bargaining any campaigning across an industry for improved wages and/or conditions by employees in that industry."[22]

Similarly, given the proposed restrictions on access to protected action require an objection by an employer to be triggered, the evidence from the Independent Education Union, which has negotiated common agreements with Catholic schools for some years, is also overstated.[23] Yet, in evidence to the Committee the union's secretary acknowledged that these agreements were by and large achieved without recourse to protected action. However they obviously fear that some employers who were formerly cooperative might feel empowered by this Bill to take objection action in future.

It is my view that the legislation does not do anything of the sort, as the provisions seek only to deal with claims which are "not capable of being pursued" in the enterprise.

Unions have made valid points about the merits of industry-level agreements and negotiations. However, the evidence has been unclear about the extent to which protected action has been engaged in to achieve these outcomes. They have also expressed concern that the provisions are unbalanced, applying only to unions engaging in pattern bargaining (and not employers) and requiring the AIRC to have particular regard to the views of employers. They have argued that the breadth of the provisions are such that virtually all industrial action would no longer be protected if it flowed from a common log of claims, as most do.

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[19] SDA submission p. 2-4

[20] ibid p.9-10

[21] ibid p.13

[22] ACTU submission p.3

[23] IEU submission pp.8-9

Employer Views:

Employers have expressed concern that the common expiry dates of hundreds of enterprise agreements will be used to defeat the purpose of protected action which is enterprise-level negotiation. No employer group sought to rule out industry-level agreements. The concern was only that such agreements should only be allowed where they suited both employers and employees. The ILO General Survey on freedom of association and collective bargaining also made the point that the parties "…are in the best position to decide the most appropriate bargaining level."[24] The employers argue that being able to pursue protected industrial action for common claims across multi-employers effectively defeats the clear intent of the *Industrial Relations Act 1993* and the *Workplace Relations Act 1996*, that such action is only protected for enterprise agreements. As the ACCI asserted:

> "The AMWU, CEPU and CFMEU in particular are now actively pursuing campaigns to bring enterprise bargaining to an end and force a return to the system where industry wide outcomes occur through one standard union sanctioned agreement, irrespective of employers' or the workforces' requirements or capacity to pay."[25]

The AIG expressed its concern as follows:

> "The Metal Trades Federation of Unions in Victoria are now gearing up to misuse the protected action provisions in up to 1000 manufacturing companies which have been forced to concede an expiry date of their agreements for 30 June this year. They intend to use the same approach as with the building industry, establish a pattern in one or two companies or in the industry sector and then force an industry-wide settlement while using protected action as the bargaining tool. They then intend to follow the same approach in other states next year and of course in other industries. This would be disastrous for the manufacturing industry. It would severely damage competitiveness, drive investment away and cost jobs. Protected action was never designed for the purpose of pattern bargaining…"[26]

It should be pointed out that the AIRC does not have the power to arbitrate or make orders about protected action - the right of the AIRC to intervene however has always existed in respect of non-protected action such as industry-wide strikes, going right back to 1904. Under this Bill, the Commission would be less able to intervene in industry-wide strikes if protected action is manipulated to extend industry-wide. (However they would still have the power under section 170MW to end a bargaining period). This would be a major change in Australian industrial relations law.

What is clear from both sides is that there is confusion and disagreement about what the provisions actually mean. I now propose to outline how I see the provisions fitting together.

Section 170LGA (1):

This is the first definitional paragraph which establishes that pattern bargaining means a course of conduct or bargaining "that the Commission is satisfied forms part of a campaign

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[24] ILO 1994 General Survey on freedom of association and collection bargaining, cited in ACTU submission p.8

[25] ACCI submission p.12

[26] Bob Herbert AIG, Evidence 26/5/00 p.32

that extends beyond a single business and (which) is contrary to the objective of encouraging agreements to be genuinely negotiated between parties at the workplace or enterprise level."

It requires a decision by the AIRC, NOT the employer or the Minister, for conduct to be found to be pattern bargaining. It must be part of a campaign, although importantly (and in contrast to the current section 170MW power to suspend a bargaining period) a campaign need not actually involve industrial action. Importantly too, the Commission must find that it is contrary to the objective of encouraging agreements to be genuinely negotiated at the enterprise level.

As I read this, this does not preclude a union filing a common log of claims on dozens of employers. Indeed, this is made abundantly clear by the express preclusion in sub-clause 170LGA(3). A bargaining period has to start somewhere. What it requires is that the union has to be prepared to genuinely negotiate on that log of claims in respect of the enterprise. That is not terribly dissimilar to the Commission's existing power in section 170MW(2)(b) to suspend a bargaining period where a party is "not genuinely trying to reach an agreement with the other negotiating party", a provision which was also included in Labor's 1993 Act (section 170PO(10(a)). In this respect, the provision merely builds on the powers that the Commission has had since 1993 to suspend bargaining periods and deny access to protected action. The new requirements are to look for evidence of a campaign in exercising those powers. The want of actual or threatened industrial action probably should, however, be a relevant factor.

Section 170LGA(2) & (3)

Having only allowed for a bargaining period to be suspended if a party is not genuinely negotiating at an enterprise level in subclause (1), subclause (2) also requires that the Commission must be 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."

If all of the entitlements are found to be capable of being pursued at the enterprise level, then the claim is deemed to be pattern bargaining. This is a very important provision. The Explanatory Memorandum says:

> "The emphasis in this provision is on the way in which claims are pursued, rather than the merits of the entitlements being sought. In determining whether or not it is satisfied that the entitlements being sought are of such a nature that they are not capable of being pursued at the single business level, the Commission will not be considering the merits of those entitlements…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."[27]

The BCA argued that these provisions would not prevent a common log of claims still giving rise to protected action:

[27] Explanatory Memorandum p.4-5

> "The log might be the same but it is very rare that the log is not preceded by a range of discussions. Those discussion tend to suggest what is really being pursued at that enterprise….You cannot just look at the written document. You have to examine the claim as a whole - that is, what goes behind the claim, the negotiations and so forth."[28]

The ACTU expressly rejected this view, arguing that the existence of a common log and a campaign was all that was needed.[29] Its affiliate, the SDA, went further. While arguing that "every claim made by the Association on any and every employer is a claim capable of being pursued at the single business level",[30] it then argues that if an employer can deal with the claim at an enterprise level, then the claim is knocked out as a pattern bargain.[31] Mr de Bruyn of the SDA summarises it as:

> "My reading is that, if the commission is satisfied that the claims can only be pursued in an across-the-board way, you can avoid the termination of the bargaining period. If the claim can be pursued at the single business level - and we say that is the case for any claim - the Commission must terminate the bargaining period."[32]

It is certainly concerning that two senior players can come up with directly opposite views of the wording of a piece of legislation. This is partly the case of ambiguous and unclear drafting of the provision, with effectively three double negatives in a paragraph.

Having read the clause very carefully, I have concluded that the union view of the clause is probably the more accurate. In this respect, the Government's proposed restrictions on pattern bargaining in this bill go much further than that proposed in last year's More Jobs, Better Pay omnibus bill, which provided an exception to the pattern bargaining provision if the entitlements were "appropriate" to the single business. It is difficult to see how any common log of claims, irrespective of the union's intention of using it as the starting point by bargaining in each enterprise, could not be caught up by this provision.

Applying the test to "all of the entitlements" appears to suggest each entitlement needs to be tested separately, the words "campaign" and "pursued" appear to have no established meaning, and the total absence of viewing the merits and looking only at process appears to make evidentiary provisions rather difficult.

The Commission would have a major role to play in the understanding of this clause, as the primary source of interpretation.[33]

The legislative notes:

The legislative notes draw attention to the exclusions sought by the AIG in its model pattern bargaining clause. While not making these into full legislative exemptions, it does draw specific attention to them in terms of how the AIRC will apply the test. The notes deal with:

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[28] Mr G Smith, BCA evidence 26/5/00 p.8

[29] Evidence Ms Linda Rubenstein ACTU 26/5/00 p.27

[30] SDA submission p. 7

[31] ibid p.8

[32] Mr de Bruyn evidence 26/5/00 p.77

33 Mr Smythe evidence 29.5.2000 Hansard p.125

(a) claims for multiple employers on a particular worksite or project;

(b) claims that reflect the wording of the previous certified agreement;

(c) claims that reflect the terms of the award.

Legislative notes have been a recent development used to assist in the interpretation of complex legislation. They were first used in the *Industrial Relations Act in 1993* to the new enterprise agreements, and have been used extensively ever since. They provide a very strong guide to the Commission and the Courts on matters to which the Commission should take account, but cannot add to the actual intent of the legislation.

It should be noted that the AIG model clause also deals with the issue of enterprises that were in the same corporate entity or a related corporate entity.[34] Given the concerns raised by several unions about the definition of "single enterprise", particularly by the FSU and the IEU, this issue might need to also be specifically addressed. The issue of related Government employers (e.g. all Federal Government agencies) where the Government is likely to be pursuing common outcomes, also needs to be considered.

170LG(4):

This sub-clause, which requires the Commission to give particular attention to the views of the employer, was much criticised by the unions as failing to give balance to the provision and reducing the discretion of the Commission. Even the AIG was reluctant to strongly support the provision in its evidence, as the test did not appear in its model clause. On this basis, it is hard to defend such a tilting of the playing field being presented in legislation, and employee's views (both union and non-union) should be properly heard.

170LG(5):

The provision allows the pursuit of national standards determined by a Full Bench to not be deemed to be pattern bargaining. The unions made the point that national standards are usually first developed in key industry sectors and then pursued through test cases and this provision would provide little real benefit to them. It does no harm however.

170MWB:

This provision requires the Commission to terminate the bargaining period if an applicant (the employer) shows that a union has been engaging in pattern bargaining. It should be pointed out that this provision only applies to that particular employer and the circumstances of that employer - it does not defeat the whole claim.[35] Neither the Minister nor employer peak bodies have standing to initiate the powers of the Commission.

The provision goes further than the current powers of the Commission to suspend a bargaining period under 170MW because it removes the Commission's discretion to not end the period even if the claim is found to be pattern bargaining. The provision also allows the Commission to set conditions on a union to re-instigate a new bargaining period.

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[34] AIG submission on the "More Jobs Better pay" Bill p. 50

[35] See MBA submission

Also, the provision only applies to pattern bargaining by unions. Pattern bargaining by employers, which all employer groups freely admitted they engaged in, is not picked up by the provision. However, unions still have the power to seek a suspension of the bargaining period if an employer is not genuinely trying to reach agreement, under section 170MW.

This provision was heavily criticised by unions as being unfair and unbalanced as it did not apply to employers (only to unions). These criticisms have some merit. The fact that it removes a Commission discretion on whether a bargaining period is terminated is also a matter worthy of further consideration.

Final assessment:

In summary, the assertions made by the unions about this bill have in many respects, been rather exaggerated and assume certain attitudes being adopted by the Commission in the future. The Democrats conclude that, if this bill were passed:

- Industry-level bargaining would still be perfectly legal where employers and unions so desire it, with access to industrial action on exactly the same basis as has been available to unions since 1904;

- Access to legally protected industrial action would continue to be available for genuine enterprise bargaining as it has since 1993, but there is a legal question mark about whether this would extend to common logs of claims even where the union is prepared to pursue genuine enterprise-level negotiations on it;

- The power of the Commission to suspend bargaining periods where unions and employers are not genuinely trying to reach agreement that has existed since 1993 would continue, but with a further proviso that where a union is found to be engaging in pattern bargaining even in the absence of industrial action the Commission must terminate the bargaining period.

The provisions are unbalanced in that they principally deal with the concerns that employers have with union performance on enterprise bargaining, and do not deal with the real concerns that unions have with employer abuses of the current law. These include for instance:

- The insistence by the Federal Government on universities and public service departments pursuing a certain pattern of bargaining that, if pursued by the unions, would have breached these provisions;[36]

- The creation of standard AWAs by the Office of the Employment Advocate and the pursuit of these as standard bargaining mechanisms across industry;[37]

- Failure to address concerns from the ILO about restrictions on collective bargaining.[38]

These are serious criticisms in terms of the balance of this bill.

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[36] See CPSU and NTEU submissions

[37] See CFMEU submission;

[38] See ACTU submission.

The precautionary principle would dictate that if one can avoid a serious economic and industrial problem one should. The key question is whether this bill is urgently needed to deal with Campaign 2000 in Victoria. The Democrats note that drafting problems have been identified with this bill, and its overall lack of balance in dealing comprehensively with both sides concerns about enterprise bargaining processes. We note that the MTFU and the VTHC are of the view that bargaining in Victoria will be orderly. We note that key unions such as the AMWU have taken a clear policy decision to move away from enterprise bargaining despite the clear legislative intent of Parliament since 1993 that such bargaining is to be encouraged. We also note the concerns of the AIG and ACCI about industrial action and the damage done economically to the building industry by the pattern bargaining dispute about the 36 hour week. We note the submissions of the Victorian Government, which argued:

> "The Victorian Government would prefer to see disputes dealt with wherever possible in a co-operative, consultative and inclusive way. Where it is necessary for the Commission's powers to become involved in a constructive way, it ought to be as unfettered as possible."[39]

Given the Victorian Government does not seem to share the concern of employers about Campaign 2000 and its effect on the Victorian economy, the question is whether we in turn should be reluctant to rush these provisions forward as proposed by the Federal Government. However the Victorian government are unequivocally opposed to pattern bargaining :

> "I should state that the Victorian government does not support pattern bargaining. It does support outcomes which parties freely agree to, to suit their particular circumstances. But the definitions….. I find to be somewhat narrow."[40]

It is also noteworthy the equally urgent and worrying issue of pattern bargaining by employers being actively promoted by the Federal Government in the higher education sector and elsewhere which is not dealt with in this bill. We think if pattern bargaining is to be dealt with in this Bill, it cannot leave this issue out.[41]

In summary the chief criticisms of 170LGA have been that it is too wide, too difficult to understand, too ambiguous, biased to employers, and that it sweeps into its ambit practical routine effective bargaining processes that should be left alone. It is also criticised because virtually all claims are presently capable of being decided at the single business level, which would mean that present accepted practices of industry bargaining would be seriously circumscribed. A further criticism is that the Commission's discretion does not include assessing the merits of the claims, or their reasonableness.

However valid these criticisms may be they do not address the essential problem the Parliament faces - whether for the first time in Australian industrial history industry wide strike action could be made lawful as a result of the contrived expansion of protected action for single-enterprise agreements into multi-enterprise industry wide protected action.

The current Act in section 170MW provides powers to the Commission to suspend or terminate bargaining periods in certain circumstances. These are:

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[39] Mr Fary on behalf of the Victorian Government Hansard 29/5/090 p.89

40 Mr Fary evidence 29.5.2000 Hansard P.89

[41] "Unis refused funds for failing the Reith exam" SMH 27/5/009

- That a party has organised or is organising industrial action and is not genuinely trying to reach agreements with the other party (section 170MW(2)(a) and (b));
- That industrial action is being taken which threatens:

  (a) to endanger the life, personal safety or health, or the welfare of the population or part of it; or

  (b) to cause significant economic damage to the Australian economy or an important part of it (section 170MW(3)).

In the case of 170MW(3), the Commission has the power to fully arbitrate the merits of the dispute. In the case of 170MW(2), the Commission may set conditions on the initiation of a new bargaining period.

These are substantial powers. Read subject to the object of facilitating the making of agreements for a single business (section 170L), arguably they may be sufficient to deal with the issue of pattern bargaining. The DEWRSB submission referred to a number of instances in which the Commission had ordered the suspension of bargaining periods under section 170MW. In the eighteen months to 30 June 1999, there were 141 applications made under section 170MW, of which 20 were granted, 11 refused, 66 withdrawn and 42 still outstanding. This highlights that the Commission is making effective use of its existing powers in this regard.[42]

The question is whether these powers are sufficient. In my view, the law needs to ensure that access to protected industrial action is not abused beyond the intention of Parliament that it should apply to actual enterprise bargaining. The amendments proposed by the Government may go too far in restricting the actions of unions, but it could be equally validly argued that the current provisions of section 170MW do not go far enough.

That conclusion of mine means that an amendment of some sort is required. The present amendment does not, however, do the job.

Items 1 & 3: Technical matters

These are amendments to include old industrial agreements under the 1993 Act in the definitions of certified agreement, are technical in nature and are not opposed in any submissions. These amendments should be supported.

Item 2: Section 127

This amendment makes it clear that section 127 orders prohibiting industrial action do not apply to protected industrial action. This is a technical amendment and should be supported.

Item 4-5: Section 127 orders:

These amendments reduce the discretion of the AIRC in dealing with applications for orders to prevent unprotected industrial action by saying the Commission MUST (not "may") issue

[42] DEWRSB submission pp.32-3

orders, and, if the Commission cannot deal with a matter within 48 hours, to require it to issue an interim order preventing the industrial action until the full application is determined.

The Government and employers argued these amendments were necessary because the Commission is taking too long to deal with some section 127 orders and is not moving to prevent industrial action. The record shows that employers are having resort to section 127 orders in ever greater numbers, rising from 106 in the first six months of 1997 to 335 applications in 1998-99.[43] Figures produced to the last Inquiry showed that only 14.8% of applications result in orders.[44] And of those, only 9% were refused. More up to date figures presented to this Inquiry by the Department show that 53% of applications on which determinations were made were resolved within 2 days of the first hearing date, 72 per cent within a week and 28 per cent later than a week.[45] In general the Commission has refused applications only where the action is protected, or in exceptional circumstances such as where the action is related to health and safety.[46]

The Democrats have always supported ensuring the Commission has adequate powers to deal with industrial action and have its orders enforced. However, the proposed changes to make section 127 orders mandatory do not add to the Commission's powers - rather they diminish them by reducing the Commission's discretion.

On the issue of interim orders, the Democrats agree that these issues need to be decided quickly, as is already required in section 127(3). The issue of interim injunctions does raise a number of serious legal issues, and certainly would have the effect of rendering unprotected industrial action almost impossible to sustain. It would effectively make section 127 orders mandatory and immediate. While we acknowledge that employers suffer from delays in the issuing of section 127 orders, we also acknowledged that union campaigns will also be disadvantaged by interim orders. Balancing these interests is a difficult matter. It may be appropriate to give the Commission the discretion to issue interim orders if the hearing is likely to be lengthy, balancing the rights of both parties. Such an approach would seem more reasonable than a mandatory 48 hour rule.

Item 4 should be rejected. With regard to Item 5, if it were to be supported, it would need to be amended, firstly to extend the 48 hours to 72 hours using the precedent of Section 166A, and secondly qualified by a note indicating that this is an exceptional power that must only be used if the Commission considers that it will likely result in the resolution of the dispute.

Items 8-9: Workers involved in disputes:

These provisions seek to restrict access to industrial action with an employer only to those workers who will be covered by an agreement. The ACTU has opposed these provisions as preventing employees of an employer in an enterprise taking sympathy action with their work colleagues, and as adding further legal complexity to ‘protected action’ by giving employers another ground to attack it.[47]

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[43] AIRC Annual report 1998-99 p.45

[44] DEWRSB submission on the More Jobs, Better Pay Bill, cited in the report at page 251

[45] DEWRSB submission p.9

[46] ACTU submission p.16

[47] ACTU submission p.18

The Democrats believe that protected action in the enterprise should not be affected in this manner. The proposed amendments clarify the operation of the existing provisions, but tighten it up. It is desirable to keep protected action at the enterprise free of further constraints, unless protected action becomes an industry-wide device, in which case our opposition to these amendments would need to be reconsidered.

Item 11: Jurisdiction of the Federal Court:

This section seeks to do a number of things: clarify that the Court can determine what is protected action, and prevent the Court from issuing anti-suit injunctions in respect of industrial action.

Witnesses principally argued against the effects of one clause. The ACTU argues the anti-suit clause in clause 170MTA(2) is an attack on the jurisdiction of the Federal Court and:

> "…must be seen in the context of the sustained vilification of the Federal court which has accompanied its decisions since the MUA case in 1998….Item 11 is an unprecedented attack on the power of the Federal Court to protect its jurisdiction, a power which would remain part of the inherent jurisdiction of every other court."[48]

This view was supported by other legal witnesses.

The Democrats essentially agree with this assessment. The ability of a Court to grant ‘anti-suit’ injunctions is part of the inherent jurisdiction of a court, an issue confirmed by the High Court. As we understand it, the Federal Court uses the power sparingly, and uses it to prevent ‘double jeopardy’ for unions of having orders and injunctions under Federal Law, and common law damages claims under State law.

However, we do see some merit in allowing for a capacity for a determination to be made as to whether action is protected or not (proposed clause 170MTA(1) and (3)). However, given the rising costs of litigation associated with workplace relations, we would prefer if possible that this determination is made in the first instance - or fully - by the Commission rather than the courts, if this does not breach the separation of powers. Unless further good contrary argument is provided to me, I would suggest that Items 11(1) and (3) should be passed. Items 11(2) and (4) should be rejected.

Item 12: Giving the Commission the power to order a cooling off period:

Item 12 proposes a new clause 170MWA that allows the Commission to order the suspension of a bargaining period (and access to protected action) if the Commission considers that suspending the bargaining period would be beneficial to assist the negotiating parties to resolve the matters at issue.

This power would be in addition to the power of the Commission to suspend a bargaining period under section 170MV where parties are not genuinely negotiating, failed to comply with directions, endanger health or welfare, or cause significant damage to the economy.

The unions have argued that the 170MWA is unnecessary as the Commission already has broad powers under section 170MW to suspend bargaining periods which it has used on

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[48] ACTU submission pp.18-19

occasion as a cooling off device. The ACTU argued that the discretion provided under this section was illusory as:

> "If the Commission were to consider that ending industrial action, so weakening the bargaining position of the union, would assist to resolve the dispute, albeit on the employer's terms, it would be mandatory to suspend the bargaining period."[49]

The ACTU pointed out that few industrial disputes in Australia last very long, with 72 per cent of employees taking action for one day or less and only 1.44 per cent involved in disputes lasting five days or more. Its submission pointed out that the cooling off provision would allow an employer to seek to have the bargaining period suspended even before action was taken, effectively killing off protected action as a weapon available to unions. They believe that the Commission would be almost obliged to grant such an application, mindful of the objectives of the Act "..to prevent and settle industrial disputes."[50]

The AIG strongly supported this provision as did other employer groups "….in order to preserve their businesses and create a better environment for settling enterprise bargaining negotiations."[51]

This section raises difficult issues. On the one hand, promoting a better bargaining environment is consistent with longstanding Democrat policy. But, on the other hand, effective denial of the right to strike during collective enterprise bargaining would make it extremely difficult for unions to operate effectively. Further, employers have not made out a case that the objectives which they seek cannot be achieved through the provisions of the existing section 170MW, particularly 170MW(2)(b). Indeed, the evidence suggests that the Commission is starting to use these provisions effectively. While the Democrats support the intent of promoting bargaining periods, given the concerns raised by the unions, item 12 might fail the test of balance.

However the notion of a cooling off period is inherently attractive. It may be better to look at further refinement of the existing section 170MW to encourage the Commission to use cooling off periods more, particularly where one party is not genuinely trying to reach agreement with the other.

Conclusion:

Dealing with this bill has not been easy. The Democrats have sympathy with the intent of some aspects of the bill in terms of encouraging better outcomes for enterprise bargaining. But, as a package, the bill is clearly slanted unfairly towards the interests of employers, and would need amendment in this respect.

The Democrats are prepared to support legislative changes that improve collective enterprise bargaining and encourage fair and productive outcomes. This bill contains a number of provisions that may improve the operation of bargaining but fails to address genuine issues that have been raised by witnesses from a union perspective.

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[49] ACTU submission p.17

[50] Workplace Relations Act section 3(h)

[51] AIG submission p.22

The Democrats, in assessing industrial relations legislation are not driven by vested interests, ideology or rhetoric. Assessing the facts has been particularly difficult on this bill because of the over-blown claims by some unions in their submissions, and the often predictable assertions of some employer groups. Our best assessment is that there is a problem emerging with changing attitudes of some unions to collective enterprise bargaining that may threaten Australia's record in recent years of rising real wages, employment and productivity. It may be that the current legal framework is adequate to deal with that challenge. The powers of the Commission to suspend or terminate access to protected action in the face of real or impending industrial action in section 170MW may be sufficient to deal with these campaigns. It should be noted that in contrast to the proposed 170LGA, 170MW applies equally to actions by employers and unions. Employers have not properly addressed the technical issue of why section 170MW is inadequate, just as unions have not adequately addressed the key policy issue of preventing a dangerous abuse of protected action.

A responsible trade union movement and a responsible employer movement must be supported. The Democrats will continue to support legislation that acts against irresponsible action that materially threatens Australian jobs, industry prospects and Australia’s economic performance.

Recommendations:

From the above analysis it is clear that the Bill has major flaws. Consequently the Australian Democrats are faced with four possibilities in dealing with this Bill:

- Accept the view that there is no urgent need to pass the Bill, assess the actual effects of campaigns using common expiry dates for enterprise agreements, assess whether existing law can deal with such campaigns, and then consider the Bill at a later date this year.

- Split the Bill, so that the pattern bargaining clauses are dealt with as above, but the remainder of the Bill is dealt with this month.

- Deal with the Bill this month, with a view to rejection.

- Deal with the Bill this month, and attempt to amend it significantly.

The Democrats Party Room will need to consider these alternative options, based on an examination of the Majority and Minority Reports and the politics and policy issues surrounding this Bill.

My analysis indicates that a significant part of the Bill should be rejected, and much of the rest of this Bill cannot pass in its present form.

Senator Andrew Murray