CHAPTER 1

BACKGROUND TO THE LEGISLATION

1.1 On 16 August 2000 the Senate referred to its Employment, Workplace Relations, Small Business and Education Legislation Committee this package of bills amending the *Workplace Relations Act 1996*. The bills had been introduced separately into the House of Representatives on each of the four sitting days in the last week of June 2000.

1.2 The Committee received 37 submissions in relation to this package of bills. It held a public hearing on 31 August 2000. A list of submissions and witnesses at the hearing are to be found in appendices to the report.

Pragmatic means to principled ends

1.3 The Coalition government's 1998 workplace relations election policy contained commitments to further legislative reform. These were intended to be implemented through the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999. As this Committee described in its report on that bill tabled in November 1999 the process of workplace relations reform has been evolutionary, with the beginnings of a new focus on workplace agreements noted as far back as 1987. *The Industrial Relations Reform Act 1993* was a precursor to the *Workplace Relations and Other Legislation Amendment Act 1996.* The More Jobs Better Pay Bill made further proposals but did not pass the Senate. Minister Reith has described to the House of Representatives the reported indications that the Democrats would support several technical and procedural amendments presented in acceptable legislative form. These four bills are intended to implement only a small proportion of the measures that were contained in the More Jobs Better Pay Bill, but they contain important provisions in line with the policy principles itemised in the next paragraph. The Committee notes that the Government has therefore taken a pragmatic measure to ensure the maintenance of its principled stance on workplace reform and in pursuing its electoral undertakings.

1.4 The four bills contain policy elements which underpin the current act. These policy elements include:

- the workplace relations system should recognise a more direct relationship between employers and employees operating together in the workplace;

1.5 the workplace relations system must acknowledge Australia's place in a global economy and the importance of maintaining a competitive economy;

- a fair go for both employers and employees;
- genuine freedom of association and a choice of representation; and
- a simplified and more accessible system that puts the interests of workers and businesses ahead of the system's institutions.

Provisions of the legislation

Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000

1.6 The Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000 deals with procedural and technical amendments to the approval processes for Australian Workplace Agreements (AWAs). The improvements which are proposed draw on the experience of employers and employees over the first three years of the operation of the Act. The amendments provide for speedier agreements to be made. A proportion of AWAs are refused registration by the Employment Advocate because employees sign AWAs prematurely. A new provision gives employees a 'cooling off' period in which to withdraw from an AWA.

1.7 Australian Workplace agreements have become one of the most successful innovations which have characterised the shift from central awards to local enterprise agreements in the changing workplace culture. By 1999 AWA approvals have been averaging 3000 per month, and as at 31 July 2000 over 118,000 AWAs have been approved. They have extended to all industry groups. Ninety per cent of AWAs are made for private sector employees. Employers with fewer than 20 employees account for 41 per cent of all employers making AWAs, although most AWAs are still concentrated in larger businesses employing over 100 people.

1.8 The experience, over the past three years, of dealing with AWAs has highlighted the need to improve the efficiency with which they are negotiated and approved. Unless these improvements are made, the Government is concerned that the Office of the Employment Advocate may find it difficult to maintain and improve on the current service standards it either sets for itself, or which is stipulated in the act. The complexity of current statutory procedures for the making and approval of AWAs has been criticised by employers. In particular, there has been some criticism of the degree of formality involved, especially by employers without HRM specialist knowledge. Complaints have also been made that AWAs don't come into effect as soon as the parties have reached agreement.

1.9 The rights of employees are subject to greater protection under amendments proposed in this bill, with changes to the Employment Advocate's power to allow the legal pursuit of breaches of the act by employers and to allow the Employment

Advocate to take action on behalf of employees in need of protection. As the Employment Advocate's submission noted:

> It is quite common for the Employment Advocate to be criticised for failing to take legal action in cases alleging duress and other breaches despite the fact that the Employment Advocate has no legal power to do so under the current Act. The proposed provisions means that employees will not have to bear the burden of seeking orders as is the case under the current Act, but they may request that the Employment Advocate act on their behalf. Indeed, in the cases where the employee is unwilling to pursue the matter whether out of fear or other reasons, the Employment Advocate may act independently of a request under the proposed provisions.[1]

1.10 Amendments proposed in this bill, several of them supported by submissions from the Office of the Employment Advocate, are summarised as follows:

- simplification and acceleration of approval processes to allow AWAs to take effect from the date of signing, with the addition of a 'cooling-off' period to safeguard employee rights;

- strengthening the power of the Employment Advocate to initiate proceedings to recover penalties and underpayments on behalf of an employee, in respect of breaches of AWAs;

- removal of the provision for AWAs to be referred to the Australian Industrial Relations Commission for the application of a public interest test, for purposes of streamlining, and because this provision is so rarely necessary;

- more expeditious processing of the AWAs for high income earners;

- removal of the requirement for employers to offer identical AWAs to employees who may be doing comparable work, a practice which takes no account of the possibility of rewarding individual performance;

- removal of any legislative nexus between AWAs and any certified agreements, awards or other industrial instruments that may be operating in a workplace so that the parties have greater choice; and

- repeal of provisions enabling protected action to be taken in the negotiation of an AWA as they are not relevant to the negotiations of individual as distinct from collective agreements.

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000

1.11 The Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000 provides for secret ballots becoming a precondition for accessing protected

1 Submission No 10, Office of the Employment Advocate, pp. 5-6.

industrial action. Protected action is available only in respect of single business certified agreements, and a decision by employees to take industrial action in pursuit of a new agreement should take place only after a deliberate decision by enterprise employees.

1.12 It has become clear that changes to secret ballot provisions introduced into the current act under section 135 have had limited success. Currently, the existing secret ballot provisions are infrequently used, and often after industrial action has already commenced. In the first three years of the life of the act only 9 applications have been made to the Industrial Relations Commission for a secret ballot under the provisions of section 135 of the act. The Commission has demonstrated on some occasions an approach of last resort rather than dispute prevention and settlement.[2]

1.9 At the core of the problem lies the fact that decisions about industrial action are generally taken at an organisational level rather than a workplace level, even though unions will dispute this contention. In 1995 an Australian Workplace Industrial Relations Survey showed that among unionised workplaces with more than 20 workers, unions failed to consult employees in relation to collective agreement negotiations at 27 per cent of workplaces. Evidence given to the Committee at its 1999 hearings on the More Jobs Better Pay Bill pointed to the incidence of 'wild cat' strikes resulting from the inadequate provisions of the current act. Disruptive action had occurred and was concluded before employers could take legal counter-measures.[3] The Committee accepts the government's argument that pre-industrial action ballots would strengthen the accountability and responsiveness of unions to their members, give individual employees the appropriate and necessary freedom to choose and prevent the inappropriate use of protected action by unions in pursuit of pattern bargaining outcomes.

Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000

1.10 The Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000 provides for the further simplification and modernisation of awards. Tallies, based on labour inputs rather that product outputs, are not standard provisions across awards, being restricted to meat industry employees. Picnic days are not standard provisions across awards and may be regarded as a relic of past industrial award practice. The intent of the legislation is to make the existence or retention of picnic days or tally provisions subject to local enterprise agreement rather than as an allowable matter under an award.

1.11 Amendments proposed in this bill are intended to emphasise the changed role of awards within the Workplace Relations Act. Awards are intended to provide a genuine safety net of minimum wages and conditions. This has resulted in a

2 Submission No. 23, Department of Employment. Workplace Relations, and Small Business,p.138

3 Senate EWRSBE Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999,* November 1999, pp.110-111

considerable reduction in the number of allowable matters. Tallies and picnic days are anomalous allowable matters, and were listed for report in the More Jobs Better Pay Bill.

1.12 The industrial issue of tallies is inextricably linked with productivity in the meat industry. Tallies, being based on imputs rather than outputs, are claimed to impede productivity. A 1998 report of the Productivity Commission into the meat industry processing sector noted Australia's declining share of the world meat market, due, historically, to the fact that meat processing has been insulated from competitive pressures. The report noted recent improvements in productivity, due in large part to the Workplace Relations Act, but that more could be done. The most important single reform recommended was a move away from the highly restrictive tally systems and replace them with time worked, or payment based on factors such as yield and quality.

1.13 In September 1999 the Australian Industrial Relations Commission handed down a decision on tallies which was noted in the report of this Committee on the More Jobs Better Pay Bill 1999. In its decision, the Commissioner decided to delete the tally provisions from the meat industry award because they were not operating as minimum rates as required by the act. The Commissioner also commented that the tally provisions in the meat industry award had fallen into disuse because of its complexity – the tally provisions are over 50 pages long – and because of the conceptual difficulties involved in their application. The award provisions were exceedingly complex and seriously out-of-date.[4] The result is that employers have attempted to move outside the tally system through both formal and informal arrangements with employees.

1.14 Picnic day award provisions present the same kind of anomaly as tallies, although the point at issue is far less complicated. The Australian Industrial Relations Commission determined in 1994 and 1995 that there would be ten public holidays across Australia, with an additional public holiday specific to each state. The standard allows for the possibility of an entitlement to a union picnic day where it is taken in lieu of a state-specific holiday provided for in the minimum entitlement.

1.15 The amendment bill intends that union picnic days be subject to local agreement at the workplace level, particularly as it is not relevant to the majority of workers who are not members of unions. New provisions will ensure that union picnic days do not come within the scope of allowable award matters.

Workplace Relations Amendment (Termination of Employment) Bill 2000

1.16 The amendments proposed in this bill have their origins in Schedule 7 of the 1999 More Jobs Better Pay Bill and in the Workplace Relations Amendment (Unfair Dismissals) Bill 1998. Some changes have been made in response to comments made by the Australian Democrats in the Senate and in minority reports tabled by this Committee. The Workplace Relations Amendment (Termination of Employment) Bill

4 ibid., p.79

2000 addresses a number of procedural and technical deficiencies that have become evident during the four years in which unfair dismissal provisions have been tested.

1.17 The bill contains a range of provisions intended to reinforce disincentives to speculative and unmeritorious unfair dismissal claims. The bill also removes unnecessary jurisdictional and procedural burdens that unfair dismissal applications place on employers. A crucial weakness in the current act, intended for correction in these amendments, has been the united scope it gives to 'forum shopping' between federal and state jurisdictions. The bill will also extend rights under unfair dismissals provisions to a class of employees employed under agreements made under the old Industrial Relations Act, and who were inadvertently denied their rights under the current act. Two other provisions provide relief to employers: a right of employers to apply for an application to the Industrial Relations Commission to have an application for unfair dismissal dismissed at any stage of proceedings; and, that employees may only make one application of an unfair dismissal claim. The more important provisions of the bill are hereon described.

Prevention of forum shopping

1.18 'Forum shopping' occurs when aggrieved former employees, having lost a case in one jurisdiction attempt to find redress in another. The current act allows employees under federal awards to apply for a state unfair dismissal remedy, where state legislation permits. Amendments to the act which are proposed in this bill will prevent a person from applying for a remedy in two different jurisdictions. The Government believes, and the Committee concurs, that forum shopping can undermine the authority of legislation and result in inconsistent judgements where it is successful.

Exclusion of contractors from provisions of the act

1.19 Recent decisions of the Federal Court and Australian Industrial Relations Commission have highlighted legal differences on the issue of whether independent contractors may seek a remedy against unfair dismissal under these provisions. The Federal Court has taken a broad definition of the term 'contractor', to bring it within the scope of employee. The Commission has preferred a narrower definition. This amendment defines employee in terms that fit the Commission's definition.

Unmeritorious claims

1.20 Evidence was put to the Committee that some aggrieved former employees abuse process by making of ambit claims. This some times involves the employment of legal representation by such employees on a contingency fee basis. The Committee notes the inclusion in the bill of measures intended to reduce the incentives to pursue unmeritorious or vexatious claims. In light of the common experience of employers preferring to 'cut their losses' with a settlement at the conciliation stage, these include amendments which place the onus on the Industrial Commission to make a funding at the conciliation stage and prevent applications in respect of harsh or unreasonable termination from proceeding to arbitration where the Commission is satisfied that an applicant's claim has no substantial prospect of success. Amendments also provide

more powers to the Commission to award costs against parties where circumstances warrant.

Other provisions

1.21 In addition, the Committee notes the following provisions:

- Discouragement of the use of legal advice on a contingency fee basis for the purposes of promoting vexatious action;

- Additional power to the Industrial Commissioner to dismiss applications for unfair dismissals where an applicant fails to attend a proceeding;

- Amendments to make the award of costs more readily available in regard to vexatious claims;

- A requirement that the Commission have regard for the size of an employer's operation in determining whether a termination of employment was harsh, unjust or unreasonable; and

- Precluding the Federal Court from awarding compensation for shock, humiliation and distress arising from the manner of termination.

Conclusion

1.25 In summary, the legislation package represents both a technical adjustment to the Workplace Relations act and a clarification of policy to be implemented under the act. The amendments arise from the experience of both employers and employees, as well as agencies responsible for administering the act, over the past three years. Many of the amendments described in the previous section tighten the legislation by rendering more explicit the original intentions of the act. These are intended to make provision for changes consistent with principles set out in paragraph 1.3.