CHAPTER 2

CONSIDERATION OF THE ISSUES

General comments

2.1 The Committee has noted in previous reports that the most vociferous opposition to bills come from organisations and individuals opposed to modernising change. Such was the case with the New Tax System. It is also evident in the opposition of trade unions to this legislation which is intended to tidy up loose ends of the Workplace Relations Bill. The amendments proposed in this package of bills is intended to make the legislation work more effectively. The changes proposed are entirely consistent with the broad policy intentions of the parent act and follow logically the path already traced in that act.

2.2 Evidence submitted by organisations which have seen benefit from the current legislation support the proposed amendments. Opponents of the original legislation are equally opposed to improvements made to it, presumably on the grounds that anomalous or otherwise deficient provisions identified over the three years of its operation should remain in force not despite of, but because of these defects. The perpetuation of unintended consequences in the law has the purpose, it would seem, of creating difficulties for governments and their supporters and should not therefore be lightly amended. The Committee majority regard this view as an abuse of the Senate's role to review legislation on its merits, and of a legislative committee's role in securing workable legislation aside from broader policy considerations.

2.3 For the most part, therefore, the evidence dealt with in this chapter presents a range of views about the importance of having these bills passed by the Senate.

Evidence

Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000

2.4 The Committee received evidence, including case studies, from the Australian Chamber of Commerce and Industry which highlighted the need for the amendments proposed in relation to the administration of Australian Workplace Agreements (AWAs). Although there is strong support for AWAs in the private sector it appears that the process of implementing AWAs is seen as unnecessarily bureaucratic. Some of the technical provisions intended to protect employees have turned out to be hindrances to employment, or are now considered, with the benefit of experience, to be of no real benefit to employees who made AWAs. These comments relate particularly to time delays in having AWAs approved. The ACCI submission gave an instance of the difficulties presented by timeframes:

> A recent and not isolated case occurred where a manager recruited twenty three recruits with the intention of offering them AWAs. However, the

> manager was not aware of the timeframes required by the WR Act. The recruits had already commenced when the offer of the AWA was made. They had to be employed under Award conditions for several weeks until the offer was made and fourteen days had elapsed. Both the manager and the recruits found this situation convoluted and absurd. We receive regular complaints from managers that the timeframes associated with offering AWAs makes rapid recruitment difficult.[1]

2.5 The Committee also received evidence of support for the amendments which remove the requirement for employers to offer identical AWAs to employees who may be doing comparable work. ACCI advised the Committee that one of the most frequent complaints received by Telstra from staff members is their inability to tailor their AWAs. The complaint was that an AWA 'was not an individual contract but a mass contract with different peoples' name on it. Employees at Telstra were known to reject AWAs because there was no flexibility to align the contract to their own needs. Staff morale has been damaged in some workplaces because of the limitations posed by current legislation. As ACCI reported:

> Recently a manager negotiated with the staff members in his team and agreed to alter some of their AWAs to suit their mutual needs. The parties were distressed when they were advised that this contravened the WR Act, and the manager was required to offer the same terms to all the comparable employees. They were required to renegotiate back to standard terms and the positive spirit associated with the offer of AWAs in this workplace was seriously affected.[2]

2.6 The overly bureaucratic nature of the current arrangements for filing and approving AWAs has also been described in the ACCI submission. One large corporation explained that each time it files an AWA for an employee two separate forms need to be completed by hand, each form comprising 45 questions, which can only be transmitted to the Employment Advocate by post. The corporation believes that it is overly bureaucratic to require an individual approval for a generic AWA that has been approved many times previously.[3]

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

2.7 In its majority report on the More Jobs Better Pay Bill 1999, the Committee concluded that legislation was needed to require a secret ballot prior to protected industrial action, in order to ensure that employees in the workplace, rather than union officials from outside, could decide whether matters were serious enough to warrant industrial action. The Committee majority remains convinced of this view.

---

1 Submission No.9, Australian Chamber of Commerce and Industry, p.17

2 ibid.

3 ibid., p.18

2.8 The submission from the Business Council of Australia strongly supported the amendments in this bill on the grounds that industrial action should not be seen as a substitute for genuine discussions; that final decisions to take protected action should rest with employees directly affected; and that employees should not be directed to undertake action that results in loss of pay.

2.9 The Business Council submission also points out that strikes are seen as votes of confidence in union leadership. There is an understandable reluctance to stay out of a strike regardless of how an employee may feel about an issue. The BCA believes that the secret ballot clause is likely to encourage employees to consider the merits of the cause of action rather than consider the more extraneous issue of whether to support the union out of feelings of 'solidarity'.[4]

2.10 The importance of secret ballot provisions in workplace relations law was highlighted in a submission to the Committee from Denso Manufacturing Australia. The company lodged an application pursuant to section 135 on 16 August 2000 to encourage a secret ballot among its employees as part of its negotiation with the AMWU under the shadow of Campaign 2000. The purpose of the secret ballot was to measure the resolve and the view of the company's employees to its proposals. The company was unable to secure a direction from the Australian Industrial Relations Commission for a secret ballot, for the likely reason – though this was not given – that the Commission regarded secret ballots as a last resort. As the Denso submission described it:

> During our negotiations, the union has refused to engage in a secret ballot of their members, preferring to use a show of hands when voting. The show of hands approach can be intimidating to employees who may wish to view their opinion in favour of the company proposal or against a union position. It is this form of intimidation that prevents people from voicing their true opinion at union mass meetings. Unions do not prefer secret ballots because it may limit their psychological influence when key decisions are being voted on.[5]

2.11 Master Builders Australia also supported the bill, referring to the lack of adequate provisions in current legislation when dealing with a recent dispute in the Victorian building industry. In this dispute the CFMEU claimed to have issued 2853 separate bargaining notices in Victoria. Most of those employers had also been served with notices of intention to take industrial action. MBA claims that by acting in this way, the CFMEU would have been able to take protected industrial action against employers in circumstances in which: employees at the workplace were never consulted; where no negotiation between the CFMEU and employers had been held;

---

4 Submission No.32, Business Council of Australia, p.1-3

5 Submission No.12, Denso Manufacturing Australia, p.1

and, where the object was to enforce a pattern bargaining arrangement between the union and all employers.[6]

2.12 The Committee considered arguments put by unions like the CPSU/SPSF,[7] and supporting comment from academic workplace relations authority Mr Keith Hancock[8] that restricting the scope for industrial action would reduce the bargaining powers of unions and make last-minute compromises (on the expectation of strike action) less likely. The Committee majority does not believe that industrial action taken under the new laws would be less likely to result in a resolution of the dispute. The Committee majority notes that the Australian Industry Group (Ai Group), formerly sceptical of the value of secret ballots, now agrees that this process, overseen by the Industrial Relations Commission is an appropriate precondition for the taking or organising of protected industrial action.[9] The Committee majority believes that the bill will make union leadership more accountable to their members. For this reason alone it commends the support of the Senate to this bill.

Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000

2.13 The Committee notes in its consideration of the evidence on this bill that there remains in the Workplace Relations Act an accumulation of obsolete provisions. It notes that they remain despite previous efforts at modernisation. The issues of tallies and picnic days are textbook examples of residual industrial practices which appear to have no justification for remaining in existence apart from their appeal to union conservatism. They appear in this package of amending legislation as rallying points for nostalgia. The Committee found evidence given in defence of the retention of these practices particularly unconvincing.

2.14 The Committee noted evidence submitted by the Australasian Meat Industry Employees Union that claims for the inefficiency of the tally system were erroneous given that Australia Meat Holdings, the largest meat processor, uses tallies in establishing balanced teams for the slaughtering and boning of beef, thus ensuring properly distributed work as the sides of beef move down the processing chain.[10] It was argued that tallies bring their own kinds of efficiencies to bear on meat production. The National Farmers' Federation denied that tallies were inherently efficient, and that the reality was exactly the reverse. The National Farmers' advised the Committee that the issue of whether tallies continued in individual abattoirs was not the point at issue. What was at issue was the retention of tallies as an allowable award matter.

---

6 Submission No.13, Master Builders Australia, p.1-2

7 Submission No.8, Community and Public Sector Union & State Public Services Federation Group, p.2

8 Submission No.4, Mr Keith Hancock, p.3

9 Submission No.37, Australian Industry Group, p.14

10 Submission No.25, Australasian Meat Industry Employees Union, p.7-8

> If agreement is reached about a tally system that suits a particular meatworks in order that production can be guaranteed to reach a minimum…then that is a function of enterprise bargaining. What we are talking about is eliminating tallies from the safety net, the tally system as reflected in the award which has, in the evidence of the Commission, not properly changed for 30 years. …What we are talking about is taking them out of the safety net.[11]

2.15 Tallies were described as a constraint on inputs: a system where the benefits of new technology, introduced to increase productivity, do not flow to those making the investment because of the formulae in the meat industry processing award. The Australian Industrial Relations Commission has described tallies as unfair and as a drag on productivity, but there was no indication that the Commission would scrap the tally system. This would best be achieved through legislation.

2.16 The Committee also heard that time was running out for the tally system. Ultimately the meat processing industry would have to become world competitive, or there would be two consequences. The first would be an increase in the export of live-stock bound for off-shore abattoirs. The second would be that local abattoirs that were now competitive would increase their business and others would close. The Productivity Commission has advised that there was a 30 per cent overcapacity in the industry.[12]

2.17 Like the tallies issue, that of picnic days appears relatively minor compared to matters which are the subject of other amendment bills in this package. Their importance is only diminished because of the relatively small numbers of people affected by their provisions. Picnic day is only an issue when its existence as an allowable matter gives a small minority of unionists an additional public holiday over and above the standard entitlement. The amendment proposed will not itself result in the demise of picnic days. Such a day would remain provided it was negotiated as a workplace agreement.

2.18 Evidence from The ACTU and individual unions suggests that removing picnic days as an allowable matter would be tantamount to abolishing the Good Friday holiday because of the decline in religious observance.[13]The amendment is seen as a symbolic 'cultural' attack on unions. The Committee cannot see any basis for this, and points to the obvious distinction that can be drawn between public holidays which are commonly observed across the whole community, and which are officially recognised, and those which are observed by particular groups. Thus, the day of the Chinese New Year and the feastday of the Epiphany are significant days for particular cultures without being recognised as public holidays The Committee heard evidence that:

---

11 Mr Richard Calvar, *Hansard*, Canberra, 31 August 2000

12 ibid.,

13 Submission No.22, Australian Council of Trade Unions, p.22

> The lack of significance of union picnic day is highlighted by the fact that under the National Building and Construction Industry Award, which applies in all States of Australia, a union picnic day is only recognised as a public holiday in New South Wales and Western Australia. Even then there is a provision which allows for an employer to hold a regular picnic for their employers on some other day other than union picnic day and that day may be taken as a holiday in lieu of the union's picnic day. The status of the union's picnic day is thereby further diminished. Quite simply, union picnic day is only in the award in relation to New South Wales to bring that State into line with the number of public holidays which exist in other States covered by the award.[14]

2.19 All of the unions appearing before the Committee opposed this amendment, even though it no longer applied to their members. The Committee noted the strong opposition from the Construction, Forestry, Mining and Energy Union (CFMEU) but rejects its claim that there is any particular merit in claims that picnic days are 'family days', or that they 'serve as a rare opportunity for building workers from across the state to gather and socialise.'[15] If there is merit in such claims, the Committee believes that it can be tested at the level of enterprise bargaining.

Workplace Relations Amendment (Termination of Employment)Bill 2000

2.20 The unfair dismissal provisions of the current act, which have been the subject of two other inquiries by this Committee over the past twelve months, continue to be a matter of concern to small business. During this inquiry, the Committee received representations on this issue from a number of employer organisations, notably the Australian Industry Group, the Australian Business Council, the Australian Chamber of Commerce and Industry and the Victorian Automobile Chamber of Commerce.

2.21 The submission from the Australian Chamber of Commerce and Industry (ACCI) dealt quite fully with a number of provisions subject to amendment in this bill. ACCI gave strong support to the provision of restricted access of federal award employees to remedies under state legislation. It was argued that exposing employers to both federal and state laws was to place them in 'double jeopardy', or at least had the potential to subject employers to state remedies which could not have been anticipated under federal laws.[16]

2.22 According to the Victorian Automobile Chamber of Commerce (VACC) the high number of unfair dismissals claims in Victoria presents a misleading picture of the problem. VACC evidence was most persuasive and should put an end to claims by those opposed to government reforms that there is no evidence to justify these sensible measures. VACC gave evidence of a multitude of cases where they have had first hand experience of difficulties with the jurisdiction. Very few matters proceed to a

---

14 Submission No.13, Master Builders Australia, p.2

15 Submission No.6, Construction, Forestry, Mining and Energy Union, p.50

16 Submission No.9, Australian Chamber of Commerce and Industry, p.3

hearing. The majority of cases are settled during conciliation at the insistence of the respondent because of the time and cost involved in settling a claim.[17] Relatively few claims have any merit basis, being intended for the most part to 'try out' the system for compensation. Interesting evidence was also given by VACC in relation to inflated costs of proceedings before the Commission: an issue addressed in the amendment bill in relation to curbing the role of advisers and the disclosure of contingency fee arrangements.

2.23 In Victoria the practice has grown for legal firms to solicit business from dismissed employees, whom they represent at up to $1200 for each appearance before the Commission. In the event of a successful claim against an employer, only a very small proportion of damages is retained by the applicant. Most goes to the legal firm. The Committee is satisfied that proposed amendments will curb the enthusiasm of legal firms chasing business from vexatious or unmeritorious litigators.

2.24 Another problem identified by the Victorian Automobile Chamber of Commerce is the number of claims that are lodged out of time with the Australian Industrial Relations Commission. These claims are costly and time consuming to an employer as it appears to be the view of the Commission that out of time applications should be allowed in most circumstances. The Committee agrees that the Commission appears to have exercised an overly wide discretion in allowing out of time claims. The act prescribes a period of 21 days in which applications must be filed. In one case, the Commission allowed a lapse of 267 days between a termination and a decision to lodge an application.[18] The Committee notes that the bill will tighten the test for accepting out-of-time applications.

2.25 The Committee heard compelling evidence in support of amendments allowing the Industrial Commission to dismiss an application where the applicant does not attend proceedings. There have been cases where an employer has been obliged to attend proceedings, often at great personal inconvenience and to the detriment of his or her business, and where an applicant has not appeared, giving no good reason for failure to do so. There have been cases where resolution has not occurred because of an applicant's lack of cooperation, or where the system is abused by an unscrupulous applicant. As a VACC representative told the Committee:

> In the instance we have at the moment, the employer has taken the whole day out to prepare witness statements. He has gone through excessive cost to ensure that his other witnesses are available for an arbitration hearing that is due to commence on Monday. We now have the lawyers frantically ringing to try and resolve the matter at the last minute. What happens if they simply withdraw? And it was without merit – another case of where the applicant had physically assaulted another employee. …It has been twice for conciliation. It is now scheduled for arbitration. The employer has been

17 Submission No. 24, Victorian Automobile Chamber of Commerce, p.4

18 Kamsteeg v. Telstra [Print Q3902] Submission No. 24, Victorian Automobile Chamber of Commerce, p.5

> involved in the preparation of this case, in appearances before the Commission, and it just really is unfair. …There should be a process through which this situation can be rebalanced. …a lot of employers are very concerned about the effects of receiving an unfair dismissal claim and how they will cope in defending it. It puts them off engaging employees.[19]

2.26 This evidence brings into focus the main purpose of this amendment, which is to rebalance the operation of the jurisdiction to ensure a fair go all round and to remove hindrances to employment which the jurisdiction creates. Over the past two years the Committee has taken evidence on termination of employment issues on three separate occasions. On each occasion the evidence pointed to the difficulties faced by small business, particularly single employer operations, in managing termination processes involving unmeritorious claimants. The bill does not substantially alter rights of access to the jurisdiction, rather, it makes sensible changes to prevent the jurisdiction being brought into disrepute by unmeritorious or vexatious claimants.

Conclusion

2.27 The four bills considered by the Committee present a modest and well-considered package of important amendments to the Workplace Relations Act. The intention of the legislation is to ensure that current legislation works more effectively in the light of three years of experience which employers, employees and other interested parties have had. Few if any submissions devoted any space to criticising the substance and principles of the Workplace Relations Act. Its supporters are critical of some of its detail, and the Committee majority is largely satisfied that the problems which have been identified are properly amended in these bills. This legislation contains most of the substance of the so-called second wave legislation considered by the Committee late in 1999. The report on the far more extensive More Jobs Better Pay Bill provide a more detailed summary of evidence on a wider range of issues than is to be found in this report.

2.28 The passage of these four bills will see a quite marked improvement in the operations of the act and would lead to much greater efficiencies in both its administration and in the consequences of its application to the workforce and to industrial productivity. The Committee majority is sometimes struck by the fascination with which opponents of workplace reform have for the forms and traditions of the old industrial relations regime, with all its residual complications and restrictions, and the prevailing notion that workplace relations represent some kind of final outcome rather than being a facilitative framework for employers and employees. The outcome from good workplace relations legislation is improved employment growth and higher productivity. It is noteworthy that in none of the evidence given to the Committee by trade union representatives were these matters mentioned.

---

19 Mrs Leyla Yilmaz, *Hansard*, Canberra, 31 August 2000

Recommendation

2.29 The Committee majority recommends the Senate pass all four bills without amendment.

John Tierney

Chair