WORKPLACE RELATIONS AMENDMENT (AUSTRALIAN WORKPLACE AGREEMENTS PROCEDURES) BILL 2000

WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTION ACT) BILL 2000

WORKPLACE RELATIONS AMENDMENT (TALLIES AND PICNIC DAYS) BILL 2000

WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2000

LABOR SENATORS' REPORT

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Pragmatic 1. *Dealing with matters with regard to their practical requirements or consequences.* ***2***. *Treating the facts of history with reference to their practical lessons.* ***3.*** *Hist of or relating to the affairs of a nation* ***4.*** *(also pragmatical)****a****. concering pragmatism* ***b.*** *meddlesome.* ***c.*** *dogmatic.*[1]

1.1 Pragmatic means to principled ends these Bills are not.

1.2 The four bills that this report addresses are simply remnants of the Government's failed Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999 (hereinafter referred to as the MOJO Bill). The MOJO bill was itself subject to inquiry by this Committee, and as such the provisions have already received detailed consideration. The current inquiry did not reveal any new evidence of any significance supporting the passage of these bills.

1.3 The Government Senators suggest in their selective and cursory report that the underlying reason for salvaging the provisions of these Bills from the wreckage of the MOJO Bill was "the reported indications that the Democrats would support several technical and procedural amendments presented in acceptable legislative form".[2] Simply put, the possibility of Democrat support was the reason for the introduction of these Bills.

1.4 However, in his Supplementary Report on the MOJO Bill, Senator Andrew Murray did not indicate any interest in these particular provisions. On our reading of his report, Senator Murray seemed supportive of proposals to: improve access for 700,000 award free Victorian workers to the federal awards system; remove prohibitions for the payment of strike pay; and require the Employment Advocate to be more "even handed" in approving AWAs. None of these matters have been addressed in these four Bills, or in the other two Bills dealing with the Workplace Relations Act introduced by the Minister since the tabling of the Report.

1.5 These Bills seem destined to fail from the time they were introduced. There is nothing pragmatic in that.

1.6 A good principle to underpin industrial relations is "a fair go all round". The Government Senators' report claims this principle is one of the underpinning policy elements of these Bills. We didn't invent the phrase, and neither did the Government

1 *The Australian Concise Oxford Dictionary* (3rd ed.) 1997. Oxford University Press: South Melbourne, p. 1053.

2 Government Senator's report, p.1.

Senators – it arises from years of judicial consideration. As noted in the Parliamentary Library's Bills Digest on one of these bills:

> The principle was expounded in an unfair dismissal case involving staff of the NSW branch of the Australian Workers Union in 1971, and a key element of the 'fair go all-round' approach was that the tribunal should not have its discretion fettered, as Justice Sheldon then commented:
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> > In my view, the use of the old adjectives, with their overtones from other jurisdictions, tends to distort this basically simple approach in that they can be strained to mean that an employer can be less than fair in exercising his right to dismiss and yet stand outside the permissible area within which an industrial authority in its discretion may act
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> > …
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> > The less fetters there are on the discretion the better…but it is all-important that it should be exercised soundly. The objective in these cases is always industrial justice and to this end weight must be given in varying degrees according to the requirements of each case to the importance but not he inviolability of the right of the employer to manage his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order of reinstatement is made.[3]

1.7 We believe that principle to be as relevant today as ever. Over the course of this report, the failure of these four Bills to meet this most basic test of industrial fairness is dealt with. Many measures seek to remove discretion from the Australian Industrial Relations Commission (the Commission). We do not seek to accuse the Government senators of being unprincipled – we encourage them to re-examine their principles as they apply in the area of industrial relations – and see if they are equitable and provide for a "fair go all round". In our view, they do not.

Workplace Relations Amendment (Termination of Employment) Bill 2000

1.8 This Bill substantially replicates Schedule 7 of the MOJO Bill with a number of changes in accordance with concerns raised by the Australian Democrats.[4] In Labor's Minority Report on the MOJO Bill, we indicated that we did not support the amendments contained in Schedule 7 on the basis that the proposals would:

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3 Department of the Parliamentary Library, *Bills Digest No. 31 2000-01: Workplace Relations Amendment (Termination of Employment) Bill 2000*, September 2000, p. 10.

4 Submission No. 23, Department of Employment, Workplace Relations and Small Business, p. 11.

- cut off claimants from sources of financial and legal support;
- force them to represent and defend their own interests;
- make the system more complicated;
- make settlement more legalistic, and;
- tilt the balance of influence in unfair dismissal cases squarely and thoroughly to the side of the employer.[5]

1.9 During the course of this inquiry it became obvious that although minor amendments to the provisions were made, no attempt was made to address genuine concerns raised during the course of the previous inquiry. The proposed changes from the MOJO Bill merely tinkered at the edges.

1.10 Labor Senators concluded in their MOJO Bill report that there was little evidence and justification to support the Government's changes. At the outset Labor Senators believe that additional evidence to justify the Government's proposals was not forthcoming from this inquiry.

Jurisdictional Provisions

Forum Shopping

1.11 Labor Senators note that a number of items are proposed on the basis of preventing the "scope for forum shopping".[6]

1.12 Yet, as was pointed out by the Independent Education Union, these provisions may have some serious unintended consequences:

> The IEU believes this is also the case with Section 170 HBA which prevents a second application being made in relation to the same termination. Within the non-government sector, the employing authority of a very large number of schools and other educational institutions would be unknown to those who work in them. In some cases, it is a private company, in others the parish priest, in others, the Roman Catholic Bishop of a particular diocese, or the Board of an Independent school. This issue of "who is the employer" has been the subject of rigorous legal argument in the industry and it is quite likely that staff would not know the correct employer respondent. For an

[5] Labor Senators' Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, November 1999, p. 358.

[6] Submission No. 23, Department of Employment, Workplace Relations, Small Business and Education, p. 14.

> application to be dismissed because the wrong employer has been mistakenly notified and a second application is not permitted is grossly unfair. The right to have your case heard on a matter as important as the termination of employment should not depend on such a narrow technical issue.[7]

1.13 For this reason the provisions relating to preventing forum shopping cannot be supported as they are currently drafted.

Eligibility

1.14 Labor Senators note that the provisions attempting to limit the scope of eligible employees for the purpose of a termination application are justified on the basis that "decisions by the Federal Court and the Commission have given rise to issues concerning the broad scope of the termination of employment provisions".[8] This Bill attempts to restrict independent contractors and demoted employees from accessing the termination provisions.

1.15 As we noted in the MOJO Bill inquiry "the broadening of categories of employees who are ineligible will lead to a grossly unjust and unfair system."[9] No evidence presented to this inquiry has led us to a different conclusion on these issues.

Discouraging Unmeritorious Applications

1.16 A number of provisions are directed towards preventing a party pursuing "unmeritorious claims" or engaging in "conduct that is merely designed to put pressure on the other party to settle irrespective of the merits of the case".[10]

1.17 The Bill attempts to deal with the issue in a number of ways.

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[7] Submission No. 29, Independent Education Union of Australia, p. 6.

[8] Submission No. 23, Department of Employment, Workplace Relations and Small Business, p. 18.

[9] Labor Senators' Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, November 1999, p. 348.

[10] Submission No. 23, Department of Employment, Workplace Relations and Small Business, p. 21.

Conciliation Certificates

1.18 The Bill proposes a number of amendments designed to prevent an employee from proceeding to arbitration where the Commission is satisfied that an "applicant's claim does not have a substantial prospect of success".[11]

1.19 An additional provision to that included in the MOJO Bill gives the applicant an opportunity to provide further information in support of their application, in the event that the Commission certifies that the application is not likely to succeed.

1.20 The Commission is already obliged under the Act to issue a certificate assessing the merits of an application at the conclusion of conciliation. The Commission will consider the certificate on the question of costs if the matter proceeds.[12]

1.21 Labor continues to oppose these provisions and are not convinced that the additional change providing a right to the applicant to present further information overcomes our initial objection. That is, that it is inappropriate at the conciliation phase to invest the Commission with the power to dismiss an application. The merits of an application can only be made after an assessment of all of the evidence. The Shop, Distribute and Allied Employees' Association (SDA) submission pointed to an example where an applicant was advised at conciliation that they had little prospects of success, yet succeeded when the matter proceeded to arbitration.[13] It appears that Australian Chamber of Commerce and Industry (ACCI) is also familiar with such cases.[14]

1.22 As was noted by Mrs Yilmaz of the Victorian Automobile Chamber of Commerce (VACC):

> very few conciliators will actually give you a position on whether or not the application is likely to be successful.[15]

1.23 It is interesting to note that the majority of employer submissions received supported these amendments, with the exception of Australian Industry Group (AIG), who considered that "the mechanisms proposed in the relevant subsections may frustrate rather than promote" the objective of introducing greater rigour into the processing of 'unfair dismissal' applications.[16]

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[11] Submission No. 23, Department of Employment, Workplace Relations and Small Business, p. 23.

[12] Submission No. 22, Australian Council of Trade Unions, p. 15.

[13] Submission No. 21, Shop, Distributive & Allied Employees' Association, pp. 5-6.

[14] Mr Hamilton, *Hansard*, Canberra, 31 August 2000, p. 16.

[15] Mrs Yilmaz, *Hansard*, Canberra, 31 August 2000, p. 54.

[16] Submission No. 37, Australian Industry Group, pp. 8-9.

1.24 The potential for this provision to increase costs was also recognised by a number of other submissions.[17]

Dismissal where the Applicant Fails to Attend

1.25 The Bill proposes to give the Commission power to dismiss an application where the applicant fails to attend a proceeding. In some cases the applicant may have a very good reason for failing to attend and they should be provided with the opportunity to respond before having the application dismissed.

1.26 Another objection to this provision is that it applies to applicants only – not to respondent employers who fail to appear. As Mrs Yilmaz readily agreed in her evidence, she was aware of occasions where the employer did not appear at a proceeding.[18]

Costs

1.27 The provisions relating to costs in this Bill do not differ from those contained in the MOJO Bill. As Labor indicated in our earlier report, we cannot support these provisions in their current form.

Regulating the Role of Advisers

1.28 One of the reasons the Government justifies provisions regulating the role of advisers is the perception that advisers are encouraging applicants to pursue unmeritorious claims. However, the only evidence pointing to such allegations was contained in submissions and evidence from employer organisations. In contrast, it must be remembered that applications had fallen by 49% as a result of the Government's amendments to this area of the law.[19] Also, as was noted by the Victorian Bar:

> There is no evidence that the Commission is being flooded by spurious unfair termination claims. The available statistics demonstrate that of the 926 unfair termination cases arbitrated by the Commission from 31

[17] Submission No. 22, Australian Council of Trade Unions, pp. 14-16; Submission No. 21, Shop, Distributive and Allied Employees' Association, p. 3; Submission No. 28, Slater and Gordon, p. 6.

[18] Mrs Yilmaz, *Hansard*, 31 August 2000, p. 53.

[19] Labor Senators' Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee *Consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, November 1999, p. 351.

December 1996 to 25 June 1999, 662 were decided in favour of the employee and 264 were decided in favour of the employer.[20]

1.29 Of greater concern are allegations, by employers and/or their representatives, of professional misconduct of legal professionals in the manner in which cases are conducted.[21] As was pointed out professional bodies, such as the Law Society, as well as the Courts regulate the conduct of its professionals.[22] Complaint mechanisms exist for investigation and action against a lawyer acting in the manner alleged in a number of the employer submissions. There was conflicting evidence as to whether employers had availed themselves of such mechanisms.[23]

1.30 In any event, the evidence of Mrs Yilmaz was that she was not "hopeful of any outcome" if such a complaint was raised.[24] It is extraordinary that a number of serious allegations of professional misconduct by the legal profession raised by Mrs Yilmaz's organisation, and used as the basis of justifying a number of provisions in this Bill, have not been referred to the appropriate body for investigation.

Contingency Fee Arrangements

1.31 The Bill proposes to require a representative from either side to disclose the nature of their cost arrangement to the Commission. Senator Murray has been an advocate of requiring "no win no fee" arrangements to be a matter of public record.[25] However, as has been indicated, it is difficult to see what bearing those matters will have on the merits of the application.[26] Contingency and no win no fee arrangements result from escalating legal costs and the inaccessability of the legal system.[27] It is inappropriate that they somehow reflect on the merits of the application. These provisions are not supported.

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[20] Submission No. 35, Victorian Bar Inc., pp. 4-5.

[21] Mr Hamilton, *Hansard*, 31 August 2000, Canberra, pp. 17–19; Mrs Yilmaz, *Hansard*, 31 August 2000, Canberra, pp. 49–51, 53.

[22] Slater and Gordon Submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee inquiry into the provisions of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, p. 16.

[23] Mr Hamilton, *Hansard*, 31 August 2000, Canberra, p. 18, where he said he thought that he had heard that complaints had been made; cf: Mrs Yilmaz, *Hansard*, 31 August 2000, Canberra, p. 53, where she said that she was not aware of any circumstances where the matters had been raised with professional bodies.

[24] Mrs Yilmaz, *Hansard*, 31 August 2000, Canberra, p. 53.

[25] Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee *Consideration of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998*, February 1999, p. 24.

[26] Submission No. 28, Slater and Gordon, p. 8.

Penalty Provisions for Advisers

1.32 The Bill proposes that the Federal Court may, on the application by an applicant, respondent or Minister, award a penalty against an adviser for encouraging the pursuit of an unmeritorious or speculative action. These provisions differ slightly from the MOJO Bill amendments – as the definition of adviser is narrowed to include only those advisers engaged for a fee or reward and not volunteers.

1.33 One concern relates to the reverse onus of proof which would "require the representative to vet an applicant's claim", thus placing the "representative in an untenable position."[28]

1.34 Another concern is the Minister being granted *locus standii* under the provisions to make an application for a penalty. Surely it is up to the parties to determine whether it is appropriate to make a penalty application, having regard to how the proceedings were carried out.

1.35 Labor cannot support the provisions as they currently stand.

Additional Criteria for Deciding Unfair Dismissal Applications

1.36 A number of provisions are designed to "assist in reducing … special burdens" on "certain types of businesses, especially small business".[29]

Termination on the Ground of Operational Requirements

1.37 These provisions will prohibit the Commission's jurisdiction from finding a termination was unfair if the employer can establish that the termination was effected because of the employer's operational requirements, unless there are exceptional circumstances. The inclusion of exceptional circumstances has been added from the provisions as they appeared in the MOJO Bill.

1.38 As Labor Senators noted in our previous report, this "contravenes the right to contest the fairness of termination by workers, and opens the way to exploitation and injustice for employees".[30]

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[27] Submission No. 28, Slater and Gordon, pp. 7-8.

[28] Slater and Gordon Submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee "Consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, p. 14.

[29] Submission No. 23, Department of Employment, Workplace Relations and Small Business, p. 35.

1.39 The inclusion of "exceptional circumstances" does not alleviate our concerns in relation to these provisions. We cannot support the amendments.

Size of Employers Establishment

1.40 These provisions direct the Commission, in an unfair dismissal, to have regard to the size of the employer's undertaking, establishment or service and any likely impact thereof on the procedures followed in effecting the termination.

1.41 The Government is of the opinion that the burden of dealing fairly with an employee fall more heavily on small business, as they do not have the same access to "legal expertise".[31]

1.42 We rejected in our previous report that issues of fairness in the workplace, and particularly in relation to the manner in which an unfair dismissal is carried out, should not be conditional upon the size of the employer's business. All workers are entitled to justice and fairness. These provisions also ignore the hardship and burden faced by an unfairly dismissed small business employee.

1.43 These provisions are not supported.

Time Limits

1.44 These provisions restrict the matters the Commission and the Federal Court can take into account when deciding an out of time application for both unfair and unlawful terminations. The Government seeks to curtail the "more generous" approach to extending the time limit which they perceive has been taken by the Commission and the Court since the 1996 amendments.[32] The time limitation was amended from the pre-1996 limit of 14 days from the date written notice was given to the post-1996 limit of 21 days from the termination taking effect.

1.45 As was pointed out by Slater and Gordon in their submission to the MOJO Bill inquiry, the 21 day time limit is "a major disadvantage to unfairly dismissed employees", in terms of becoming aware of their rights and assessing whether to

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[30] Labor Senators' Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee *Consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, November 1999, p. 356.

[31] Submission No. 23, Department of Employment, Workplace Relations and Small Business, p. 35.

[32] Submission No. 23, Department of Employment, Workplace Relations and Small Business. p. 36.

proceed.[33] This is compounded when the employee is from a non-English speaking background or regional area.

1.46 Against this background it should be noted that many other actions in civil courts have much longer time limitations.

1.47 These provisions are not supported.

Compensation for Shock, Humiliation and Distress

1.48 These provisions seek to prevent the Commission and the Federal Court from including in any damages amount, a component by way of compensation for shock, distress, humiliation, or other analogous hurt, caused by the manner in which the employee's employment was terminated. These provisions do not differ from those set out in the MOJO Bill.

1.49 The Government did not intend the inclusion of any such amount in a termination application.[34]

1.50 The Industrial Relations Court set out the circumstances in which damages will include an amount for shock humiliation or distress should be included:

> There is an element of distress in every termination. To ensure compensation is confined within reasonable limits, restraint is required. But in this case there were unusual exacerbating circumstances that make it appropriate to include in the compensation an allowance for the distress unnecessarily caused to Ms Burazin. These circumstances include Ms Burazin having to suffer the humiliating experience of being escorted from Blacktown's premises by the police. Having regard to these circumstances, the compensation assessed by the trial judge should be increased by the sum of $2000, to $5000.[35]

1.51 The circumstances in which such damages will be awarded require "exacerbating circumstances". There has been no evidence to suggest that this is inappropriate nor that the inclusion of such damages is an affront to justice. Considering that such damages must not, combined with the other damages assessed, exceed the total amount of compensation payable under the Act, then it is difficult to sustain the Government's objections.

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[33] Slater and Gordon Submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee inquiry into the provisions of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999, pp. 18-19.

[34] Submission No. 23, Department of Employment, Workplace Relations and Small Business, p. 37.

[35] *Burazin v Blacktown City Guardian Pty. Ltd.* (1996) 142 ALR 144 (a case decided under the pre 1996 laws, but the principles have been adopted as applicable under the 1996 Workplace Relations Act – see *Liu – and – Coms 21 Limited* Print S3571).

1.52 These provisions are not supported.

Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000

1.53 As already discussed these amendment have been dealt with in detail in 1999 during the inquiry and report into the MOJO Bill, consequently it is not the intention of the Labor Senators to reproduce the evidence and findings of that process. It is important to note that the Labor Senators are of the opinion that the deficiencies identified in that process remain in the current bill.

1.54 Of particular concern to the Labor Senators is that the Employment Advocate, Mr Jonathon Hamberger did not appear before the Committee to makea case for these changes. During the 1999 inquiry Mr Hamberger appeared before the Committee but did not make a case for the changes and in fact said on transcript:

> I just did not feel it was appropriate for me or my officers to advocate particular amendments. That is really an issue for the government and for the minister.[36]

1.55 It appears that the absence of Mr Hamberger from this inquiry is an endorsement of that view. His written submission on this occasion also fails to address a number of relevant matters.

1.56 The Committee has been reliably informed that it was the Department's initiative to drop the Office of the Employment Advocate from the Committee's witness list. This information carries particular weight given the Department and the Minister's previous form with respect to Senate Committee practice. Were it the case that such interference in the conduct of a Senate committee inquiry took place, it is most improper and does not enhance the case to extend the Office of Employment Advocate's powers.

1.57 Ms Lynn Tacy, Deputy Secretary of the Department confirmed that this Bill enhances Mr Hamberger's powers as Employment Advocate at the expense of the Australian Industrial Relations Commission.

> **Senator CARR**—So the interpretation I am putting to you would be correct: more discretionary power would be given to the OEA at the expense of current circumstances where that discretion is with the commissioner?
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> **Ms Tacy**—Yes, because the OEA would be responsible in effect for testing all AWAs.
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> **Senator CARR**—Yes, so it is actually a proposed reduction in the powers of the commission.
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> **Ms Tacy**—Yes, it is making the OEA responsible for all elements of the testing of AWAs.[37]

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[36] Mr Jonathon Hamberger, *Hansard*, Canberra, 28 October 1999, p. 487.

1.58 The issue of public confidence in the Office of the Employment Advocate was canvassed in the 1999 Minority report, and no new evidence has been put to the Committee to refute the conclusions of the Labor Senators that:

> Overall the Labor Senators were not persuaded that the OEA has not undertaken its role in a biased manner. In any event, lack of public confidence in the impartiality of the OEA would be enough to dissuade employees from attempting to seek redress through this office.[38]

1.59 This conclusion has been confirmed and strengthened by the 11 August 2000 decision of Senior Deputy President Harrison concerning AWAs in the security industry. The Department's discussion of this case, where AWAs had been approved by the Employment Advocate originally and then subsequent AWAs referred to the AIRC was unconvincing – particularly as no Departmental officer before the Committee had read the case. Public confidence cannot be expected to exist in an organisation that conducts its operations in secret. Justice must not only be done but must be **seen** to have been done.

1.60 The *Workplace Relations Amendment (AWA Procedures) Bill 2000* is substantially the same as the provisions of the MOJO Bill that dealt with AWAs. They may be summarised as:

- provide for AWAs to take effect on the date of signing or, if later, the date specified in the AWA as the commencing day, or, in the case of a new employee, the date the employment commences;
- permit employees to sign AWAs at any time after receiving a copy of the information statement prepared by the Employment Advocate and an explanation of the effect of the agreement;
- permit an employee party to an AWA that provides for remuneration of $68,000 per year or less to withdraw consent within a cooling-off period;
- remove the requirement relating to offering identical AWAs to comparable employees;
- simplify the approval process by:
    - consolidating the existing assessment of filing requirements and approval requirements into a one step approval process;
    - removing the requirement that the Employment Advocate refer AWAs to the Australian Industrial Relations Commission where there is concern that the AWA does not pass the no-disadvantage test – the Employment

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[37] Ms Lynne Tacy, *Hansard*, Canberra, 31 August 2000, p. 58.

[38] Labor Senators' Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee *Consideration of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, November 1999, p. 233.

Advocate would apply the no-disadvantage test in all cases (subject to principles which may be developed by the Commission); and

- providing a more streamlined process for AWAs that provide rates of remuneration in excess of $68,000 per year;

- amend the provisions dealing with the relationship between AWAs and certified agreements and awards made under subsection 170MX(3) of the WR Act; and
- remove the limited immunity available in respect of industrial action taken in support of a claim for an AWA.

1.61 These issues have been dealt with in great detail in the 1999 Minority report and only selected aspects will be dealt with in this report.

Commencement Date

1.62 The legislation proposes that AWAs are to take effect from the date of signing or a later agreed date or, in the case of, new employees, the date employment commences. The AWA stops operating on the earlier of the expiry of 60 days from signing if no application has been made to the Employment Advocate, the day a refusal notice is issued, it is terminated or another AWA starts to operate.

1.63 What this may mean is that an unapproved AWA may operate in excess of 80 days before it is approved.

> **Senator CARR**—Thank you. I would appreciate it if you would. I am interested to get the time lines here because it is feasible, from what you have told me, that within the employer advocate's guidelines for there to be a period of up to 80 days and for that to still meet the guidelines—isn't that so? It is 60 days for the employer to notify and at least another 20 days, and still be within these voluntary guidelines—is that correct?
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> **Ms Tac**y—Yes, the 60 plus 20—[39]

1.64 Ms Tacy is being optimistic as a further 8 per cent of AWAs take longer than 20 day to approve. Labor Senators believe that a potential 80 day delay in assessing an agreement is a totally unacceptable outcome.

1.65 Of major concern to Labor Senators is the fact that in this 'never-never land' that employees may find themselves in where they are subject to an agreement that has not been through any approval procedures is that the Department failed to adequately answer a question as to what protections were in place for employees prior to approval of the AWA after which time the dispute resolution procedures would presumably apply.

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[39] Ms Lynne Tacy, *Hansard*, Canberra, 31 August 2000, p. 59.

> **Senator CARR**—Can you help me here? What protection is there for workers in these circumstances if there is a dispute with their employer during that 80 days?
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> **Ms Tacy**—They have to agree in the first place. An AWA is an agreement so they have signed the agreement before it takes effect. There is a cooling off period when they can withdraw that consent. Within that 20 working days the sorts of processes that the OEA has involves checking genuine consent and they are also obviously checking other aspects.
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> **Senator CARR**—In that 80-day period—and you are talking 20 but I am saying, and I think you have agreed, that it is possible for it to be at least maybe 80 days—what protections do workers have in those circumstances in the case of a dispute with their employer?[40]

1.66 No convincing evidence was provided to the inquiry in either submission or in the hearings that persuaded the Labor Senators that the proposed changes to AWA approval procedures were either necessary or could be entrusted to the Employment Advocate.

Signing of AWAs

1.67 The Labor Senators believe that the changes to allow employees to sign AWAs immediately will increase the possibility of undue pressure being brought to bear on employees particularly those in vulnerable positions. The ability to access independent advice before signing is particularly important given the lack of review mechanisms for AWAs after being lodged. During the 1999 MOJO Bill inquiry a number of serious allegations were made concerning the manner in which the Office of Employment Advocate has undertaken its statutory role. Convenience was the primary reason given to justify the proposed changes. Labor Senators are not convinced that administrative convenience is a sound reason to remove what little protections currently exist for employees under the Act.

No NDT for AWAs in excess of $68,000

1.68 The issue of waiving the 'no disadvantage test' for AWAs that have salary packages in excess of $68,000 does not appear to have any logical rationale. Under questioning the Department advised that this figure had been chosen, as it was "the figure that was originally in the legislation for termination of employment".

> **Senator JACINTA COLLINS**—I do not think it answers the question about the impact on workers' bargaining position but I can understand why you do not want to answer that. Moving on then to some other aspects of the AWAs bill: the figure of $68,000 has been chosen as that cut-off for the no disadvantage test. On what basis was that figure chosen?

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[40] Ibid.

> **Mr Leah**y—That is the figure that was originally in the legislation for termination of employment.
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> **Senator JACINTA COLLIN**S—And it is not indexed there either, is it?
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> **Mr Leah**y—Yes, it is indexed there.
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> **Senator JACINTA COLLIN**S—So why is it not proposed to be indexed here?
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> **Mr Leah**y—That was a government decision.
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> **Senator JACINTA COLLIN**S—Just more inconsistency.
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> **CHAI**R—Policy, Senator Collins.
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> **Senator JACINTA COLLIN**S—I am not pursuing it, Chair. The officer was welcome to say that it was not for him to answer. I note that the recovery of underpayments is to be made in an eligible court: won't this impose time and cost burdens on employees who have been underpaid, and isn't it more appropriate for this function to be undertaken by the Industrial Relations Commission?[41]

1.69 The justification is obviously flawed. Even if Labor Senators were to accept that employees with a salary package of $68,000 were entitled to less protection than other workers there is no justification for not indexing the amount. Currently indexation has increased the unfair dismissal figure to $71,200. By any measure the proposal in this bill is flawed.

Offering identical AWAs to comparable employees

1.70 Labor Senators believe that the proposal to remove the requirement that an employer must make available AWAs in similar terms to comparable employees would provide an opportunity for employers to discriminate between employees. The current provisions do not require that AWAs be all the same merely that comparable employees have access to the same terms and conditions of employment. No evidence was presented that persuaded the Labor Senators that there was a real need for this to be altered.

1.71 Alternatively, the inflexibility with which the OEA applies the current provisions is highlighted by their database AWARIS where:

> Most of the employment conditions data are indicative rather than actual, because these data are collected from the first AWA approved with each employer. All later AWAs from an employer are assumed to contain the

[41] Mr Barry Leahy, *Hansard*, Canberra, 31 August 2000, p. 69.

> same provisions as this first AWA and are entered into the database as such...[42]

Simplify AWA approval process

1.72 Labor Senators believe that any simplification of the AWA approval process cannot be supported if it comes at the expense of the limited means of review that currently exist. The fact that neither submission from the Employment Advocate addressed the need for increased powers and that Labor Senators were unable to question a representative from the OEA has not persuaded Labor Senators that these amendments are necessary. The issue of the need for a transparent process was addressed by the ACTU. This is particularly apt given the apparent conflict of interest of the OEA promoting and adjudicating on AWAs identified during the 1999 inquiry process.

> **Senator JACINTA COLLINS**—Ms Rubinstein, you raised the other issue: if discretion is to go down to the level of the Employment Advocate, how is public interest addressed?
>
> **Ms Rubinstein**—It would be addressed by the Employment Advocate.
>
> **Senator JACINTA COLLINS**—With no transparency?
>
> **Ms Rubinstein**—The reason why it was referred to the commission was to have that way of looking at things. There is no doubt that the Employment Advocate is under enormous pressure to produce numbers of AWAs. The Employment Advocate's performance is judged by the government in relation to the number of AWAs that are approved. With the best will in the world, that is very difficult pressure for an individual to be under, and it would be very difficult to resist. The commission's current involvement, while inadequate, is at least some independent break on that process of pressure.[43]

1.73 The AIG also expressed concern that an appeal mechanism is necessary for reasons of fairness and natural justice.[44]

1.74 Proponents of the need for simplification of the process have only attempted to remove the small amount of safeguards that currently exist. There is no significant case for simplifying the approval process.

1.75 Labor Senators note this point is highlighted in the recent report *Agreement Making in Australia under the Workplace Relations Act: 1998 and 1999*:

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42 Department of Employment, Workplace Relations and Small Business and the Offie of the Employment Advocate, *Agreement Making in Australia under the Workplace Relations Act: 1998 and 1999*, 2000, p. 75.

43 Ms Linda Rubinstein, *Hansard*, Canberra, 31 August 2000, p. 39.

44 Submission No. 37, Australian Industry Group, p. 6.

> The low incidence of AWA refusals (because of failure to meet the Additional Approval Requirements under s.170VPA of the Act) suggests that the provisions are generally operating as intended and employers are aware of their obligations under the WR Act.[45]

and:

> Two per cent of AWAs were refused approval in 1998 but less than 1 per cent in 1999…by far the most common reason for refusal of an AWA was a failure to meet the number of days required fro the employee to hold an AWA before signing. The proportion refused for this reason increased significantly in 1999 (from 51 to 85 per cent)_ but it should also be noted that the absolute numbers involved is far less (29 per cent fewer AWAs were refused approval for this reason in 1999 than in 1998). The quite technical nature of the provision (para 170VPA(1)(b) of the WR Act) can create inadvertent breaches. It seems, however, that employers and employees have both become more knowledgeable about AWA requirements and are thus less likely to breach them.[46]

Relationship between AWAs and certified agreements and awards made under subsection 170MX(3) of the WR Act

1.76 No convincing evidence was provided during the inquiry process that persuaded Labor Senators that the proposed changes were either desirable or necessary. Given the relatively small number of agreements and awards certified under s. 170MX, and the bitterness often associated with such decisions, it is not considered appropriate to allow for these awards or agreements to be set aside through the use of AWAs.

Remove the limited immunity available in respect of industrial action taken in support of a claim for an AWA

1.77 It is considered that the right to access protected action by employees is a fundamental right. The removal of this right, for even the small proportion of the

45 Department of Employment, Workplace Relations and Small Business and the Offie of the Employment Advocate, *Agreement Making in Australia under the Workplace Relations Act: 1998 and 1999*, 2000, p. 5.

46 Department of Employment, Workplace Relations and Small Business and the Offie of the Employment Advocate, *Agreement Making in Australia under the Workplace Relations Act: 1998 and 1999*, 2000, pp. 78-79.

work force covered by AWAs would be of concern to the Labor Senators. The Department of Employment, Workplace Relations and Small Business claimed that:

> these provisions enabling protected action to be taken in the negotiation of AWAs, as they are not relevant to the negotiation of individual as distinct from collective agreements.[47].

1.78 It is noted that the Department has given no justification as to why the ability to access protected action is not relevant to the negotiating process. Further the removal of this right to a class of employees may once again be contrary to Australia's international obligations.

1.79 In addition the Department further justifies the removal of these provisions because:

> The AWA industrial action provisions appear to have been used only in very rare circumstances.[48]

1.80 While Labor Senators agree that the use of protected industrial action by employers to force employees onto AWAs is not a practice that should be encouraged, the justifications given in the submission by the Department are fallacious and could just as easily be applied to provisions concerning secret ballots which are also not often invoked.

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

1.81 The issue of compulsory secret ballots for strike action was canvassed at length in the Committee's inquiry into the MOJO bill. No additional evidence has been provided to this inquiry that invalidates the findings of the Labor Senators in their minority report to that inquiry.

1.82 The Department in its submission has effectively criticised the Australian Industrial Relations Commission for the manner in which it has approached decisions relating to secret ballots. In particular an application by the management of Denso Manufacturing to order a secret ballot which was subsequently denied by Watson SDP is used as evidence to support the proposed amendments. It appears that the Department is now adopting the same tactics as the Minister and ignoring the fact that the Act provides the discretion to the Commission order a secret ballot to assist in the prevention or settlement of a dispute. Clearly Watson SDP did not consider that a ballot would have assisted in this particular case. We also note that this was an employer application regarding a ballot amongst employees!

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[47] Submission No. 23, Department of Employment, Workplace Relations and Small Business, p 54.

[48] Ibid.

1.83 As justification for these proposed amendments the Department in its submission has cited the experience of the United Kingdom. The Minister has also consistently claimed the UK experience as justification for his policy on secret ballots. When questioned about the UK experience by the Committee, Mr Hamilton of the Australian Chamber of Commerce and Industry noted that:

> Firstly, the legal context between Britain and Australia, in this area, apart from the common law, is very different. We have a lot of provisions about democratic control of the internal affairs of trade unions, which, as demonstrated by the disastrous Scargill experience in Britain, was simply lacking. So there is a strong element of democratic control, and always has been.[49]

1.84 Mr Hamilton recognised two issues that the proposed amendments ignore. Firstly that there is a vast difference between British and Australian industrial relations laws and secondly that Australian trade unions are democratic organisations whose rules are regulated by the *Workplace Relations Act.*

1.85 There are considerable differences between the proposed amendments and the British model this is supported by the Department, in evidence before the Committee Ms Tacy said:

> I acknowledged earlier that there was some significant differences.[50]

The ACTU in its submission states:

> While the UK system is unacceptably complex and technical, and does lead to a great deal of litigation, it is not as rigid or restrictive as that proposed in the Bill.[51]

1.86 It is disingenuous of the Minister and the supporters of these amendments to ignore the acknowledged differences between the British model and the proposed Australian laws.

1.87 The issue of democracy is also quoted as justification for these amendments. Labor Senators note that the principle of democracy could be extended to employers contemplating industrial action or lock-outs. When this was put to the Department the negative response was unconvincing.

> **Senator JACINTA COLLINS**—I note that you quote in paragraph 27 the ACCI submission to the 1999 inquiry. The rationale that is quoted about democratic processes could be greatly extended, couldn't it? For example, you could give shareholders the right to vote before employers undertake industrial action such as lockouts or even secret ballots to end strikes.

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[49] Mr Reg Hamilton, *Hansard*, 31 August 2000, Canberra, p. 20.

[50] Ms Lynne Tacy, *Hansard*, 31 August 2000, Canberra, p. 65.

[51] Submission No. 22, Australian Council of Trade Unions, p. 8.

> **Ms Tacy**—A single employer entity making a decision about lock-outs is a bit different from a number of different individuals taking industrial action.
>
> **Senator JACINTA COLLIN**S—What is the difference?
>
> **Ms Tacy**—One is a single employer entity.
>
> **Senator JACINTA COLLIN**S—And the other is a group of single workers.
>
> **Ms Tacy**—Yes, but they are all making individual decisions about whether to support collective action.[52]

1.88 Labor Senators are not advocating the extension of secret ballots to shareholders however it is noted that lock out actions can have an adverse affect on shareholder earnings through falling dividends and, therefore, using the same logic that proponents for these proposals use share holders could also claim the right to be consulted prior to actions which may affect their financial position.

1.89 As the issues of quorum and the 'electoral role' were addressed at length in the 1999 Minority report it is not intended to repeat them here, except to note that these issues remain as major concerns to the Labor Senators. Labor Senators support the current secret ballot provisions as balanced and reasonable for the parties to a dispute.

Tallies and Union Picnic Days

1.90 The issue of meat tallies was dealt with at length during the Committee's inquiry into the MOJO Bill. The conclusion of the Labor Senators, which was supported by Senator Andrew Murray, was that this issue was best dealt with by the Australian Industrial Relations Commission. This finding has been justified by the Full Bench decision of 1 September 2000. Labor Senators maintain that the appropriate forum for dealing with the issue of tallies is the AIRC. The AIRC has now determined the matter in one Award and established a process which should progress expeditiously. This process, unlike the provisions in the Bill, will also ensure that appropriate safeguards established by the Commission are maintained.

1.91 The issue of union picnic days was also addressed during the 1999 inquiry. The justification by the proponents of these amendments is the fallacious claim that unions account for only 20 per cent of the workforce.

> **Senator FERRIS**—But we are saying that there is still a choice. Given that union membership is now around 20 per cent of the workplace, you are saying that those people should not have a choice about continuing to work on that day if they want to, by saying, 'We

52 Ms Lynne Tacy, *Hansard*, 31 August 2000, Canberra, p. 67.

> don't particularly want a public holiday for that day, we'd prefer to work.' You are imposing a situation on 80 per cent of a workplace which may be non-unionised.[53]

1.92 Senator Ferris is not correct in her assertion, according to the Australian Bureau of Statistics union density currently stands at 26 per cent of the workforce. However to take Senator Ferris' reasoning to its logical conclusion other public holiday must surely be in danger of attack by this Government. In 1950 the Gallup poll found that 23 per cent of Australians went to church weekly – in 1997 this figure had fallen to 18 per cent. ABS statistics indicate that in 1947 35 per cent of Australians went to church within a fortnight by 1983 despite changing the question to a monthly measure church attendance was down to 28 per cent.

1.93 Similarly support for the Monarchy in Australia according to the Morgan poll has dropped from 77 per cent in favour of a Monarchy in June 1953 to 38 per cent in favour of a Monarch in November 1999. On this basis the Queen's Birthday holiday would have to be in danger.

1.94 No one is seriously contemplating the removal of Christmas, Easter or the Queen's Birthday as public holidays despite the fact that the reasoning used by Senator Ferris is just as valid.

1.95 Labor Senators conclude that the amendments are based on an ideological agenda and not the facts.

1.96 The facts include issues such as that picnic days often apply with respect to non-union members or enterprise picnic days. They form part of the Commission's public holiday's test case and these matters should remain with the Commission.

1.97 Finally we note caution expressed by AIG that application and hearings associated with this exercise may result in the wastage of significant resources to no practical benefit. This is particularly concerning given the serious funding constraints faced by the Commission.

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[53] Senator J Ferris, *Hansard*, 31 August 2000, Canberra, p. 12.

Conclusion

1.98 In summary these bills represent a rehash of matters addressed during the inquiry into the Workplace Relations Amendment (More Jobs Better Pay) Bill 1999. There has been no new evidence of any significance promoting the measures contained in these bills, accordingly Labor senators recommend that the bills be rejected.

…….. ……

Senator Jacinta Collins **Senator Kim Carr**