28 August 2000

Mr.John Carter
Secretary
Senate Employment, Workplace Relations, Small Business
And Education Legislation/References Committee
Parliament House
CANBERRA ACT

Dear Mr.Carter, *ACCI Submission to Senate Committee Inquiry into Four Bills to Amend the Workplace Relations Act 1996*

I enclose the ACCI submission to this Inquiry.

I would be grateful for the opportunity to appear before the Committee to speak to this submission.

Yours faithfully,

Reg Hamilton
Manager, Labour Relations

ACCI Submission to Senate Employment, Workplace Relations, Small Business and Education Inquiry into Four Bills to Amend the Workplace Relations Act 1996:

- the *Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill* 2000;
- the *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill* 2000;
- the *Workplace Relations Amendment (Tallies and Picnic Days) Bill* 2000;
- the *Workplace Relations Amendment (Termination of Employment) Bill* 2000.

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ACCI Submission to Senate Employment, Workplace Relations, Small Business and Education Inquiry into Four Bills to Amend the Workplace Relations Act 1996

Introduction

The federal Government has introduced into Parliament the following Bills:

- the *Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill* 2000;
- the *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill* 2000;
- the *Workplace Relations Amendment (Tallies and Picnic Days) Bill* 2000;
- the *Workplace Relations Amendment (Termination of Employment) Bill* 2000.

Most of the provisions contained in these Bills are drawn from the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill* 1999.

ACCI was and is generally supportive of these proposed amendments. ACCI would also have supported for example the reintroduction of provisions of the 1999 Bill which sought to streamline certified agreement procedures.

This submission, and the overall ACCI approach to regulation of the labour market, is based on the ACCI *Labour Relations Policy*, which has been repeatedly circulated to members of Parliament since its formulation in 1992. A copy is again attached. This policy was developed through meetings of most of Australia's largest employer associations.

This submission is made on behalf of ACCI members, a list of which is also attached. These Bills were discussed at the July 2000 meeting of ACCI General Council, held in Brisbane, and it was confirmed that ACCI should support them.

The *Workplace Relations Amendment (Termination of Employment) Bill* 2000.

The federal unfair dismissal system has been the subject of repeated reviews and debate since its introduction with the *Industrial Relations Reform Act* 1993. These systems are inherently in need of regular review, because they do have the potential to be misused for speculative or unjustified claims as a means of placing pressure on an employer to settle, and this is not the intention underlying the scheme.

To date there have been about five major legislative overhauls of the federal scheme undertaken by the ALP, Australian Democrats and Coalition, and the present Bill proposes another fundamental overhaul. As part of that overhaul the Bill appears to implement the following recommendations which were put to Government by ACCI during development of the 1996 Bill:

> *'1. Confine scope of applications to persons within the federal jurisdiction.*
>
> *11. There should be right to argue lack of jurisdiction at the start of the process, ie. in the AIRC proceedings.*
>
> *18. Repeal s.170EA(3)(b) to make the 14 day time limit a clear and unambiguous limit, and provide that it should only be extended in exceptional circumstances.*

ACCI has also frequently called for the codification of so-called constructive dismissal rules. ACCI submitted to the DEWRSB 1998 review of unfair dismissal laws that:

> *The concept of constructive termination has a role to play in unfair dismissal matters, but there are occasions on which such a concept appears to have been used to excess. ACCI would recommend consideration of a definition of constructive termination, which closely ties the concept to circumstances in which it is appropriate, ie. where there has been real duress or coercion of an employee to resign rather than be terminated.*

In its submission to the same 1998 review ACCI called for amendments to be made to protect the integrity of AIRC unfair dismissal proceedings from problems arising from contingency fees and the role of legal practitioners. Suggestions made by ACCI included AIRC powers to award costs against legal practitioners.

ACCI accepts that the Australian Democrats will impose a test that changes proposed must not reduce actual rights, but must instead deal with operational problems and abuses.

ACCI believes that a fair minded examination of the current system and its operation should support all or most of the amendments which have been proposed by ACCI.

Remedies Under State Legislation

The Bill proposes [s.170CCA] to introduce restrictions on access of federal award employees to remedies under State legislation. ACCI submits that this is appropriate. Employees covered by federal awards are within the federal jurisdiction, and the federal unfair dismissal scheme should regulate their conduct. Exposing employers to both the federal and State laws does run the right of exposing the employer to 'double jeopardy', or at least the potential for results to occur which are not intended by the federal scheme. Access to State remedies is simply not necessary, given the comprehensive nature of the federal unfair dismissal scheme.

Extensions of Time a Problem

Limiting the AIRC discretion to extend the time in which unfair dismissal applications may be lodged (the applicant must establish that it would be equitable, that there is an acceptable reason for the delay in lodging a claim, that the applicant took some action to contest the dismissal within the 21 days, that prejudice would not be caused to the respondent by an extension of time) [s.170CE(8), p.5]. This addresses a major problem for employers.

ACCI submits that there are good grounds for restricting the ability of employees to seek extension of time within which to lodge application. ACCI submits that it would be appropriate to replace the current test of whether or not it would be unfair not to extend time [s.170CE(8)], with a test of whether it would be equitable.

The application of the current test as outlined in *Telstra-Network Technology Group v. Kornicki*, suggests that the Commission determines whether there is an acceptable reason for the application being out of time, and if there is merit in the applicant's case, a set of tests which are relatively easy to meet. For example, in *Clark v. Ringwood Private Hospital*, the appeal bench [Ross VP., Drake DP and Deegan C.] overturned a decision of Watson SDP and granted an extension of time in circumstances where the application was 48 days late and the delay arose from the actions of the applicant's representative. The starting point for the Bench was that the out of time provision under s.170CE(8) was more generous to applicants than previously existed under s.170EA(3)(b). One second best option would therefore be to restore the earlier provision, which was simply a power to extend with no stated test.

The key amendments that are required are to ensure that the merit of the claim should not be a ground for extension, and that strong grounds, perhaps exceptional circumstances, should be required for extension.

In addition, the Commission should be expressly prevented from proceeding to hear merit arguments before it has issued an order granting an extension of time application, if the application is out of time. ACCI strongly supports the proposed amendments.

Jurisdictional Problems May Be Argued At Any time

The Bill would enable respondents to argue jurisdictional problems at any time (if the respondent moves for a dismissal of an action on jurisdictional grounds the AIRC must deal with the motion before taking any other action) [s.170CEA]. This again is sensible. There are too many instances where a claim is outside jurisdiction, outside the power of the federal Commission to deal with, and yet the employer is required to participate in what are invalid proceedings. This is a sensible provision which would simply confine federal proceedings to those situations where federal jurisdiction existed.

Test for Arbitration

The Bill provides that before a matter can go to arbitration the AIRC must find on the balance of probabilities that it is likely to succeed [s.170CF(3), p.7 etc.]. Again, this is consistent with the objective which should be shared

by all to 'filter out' inappropriate claims, and to focus the federal system on claims where merit actually exists, or an arguable case actually exists. There are a variety of approaches to the filtering test that could be taken, for example that there is a prima facie or arguable case, but this test is stronger and will therefore provide more of a filter. Nobody supports an unfair dismissal system which operates simply or often as a means of mounting speculative claims. This is a proposal which will focus proceedings more on claims where an actual case exists.

Widening Access to Costs.

The Bill would widen access to costs, including enabling a penalty to be imposed by the Court on an adviser acting for an applicant if an adviser encouraged an applicant to pursue an application in which it should have been apparent should not have been pursued (s.170HE, p.18)**.**

Representatives to Disclose Contingency Fee Arrangements

ACCI submitted to the 1998 DEWRSB review of the federal unfair dismissal laws that:

> *However, there is in ACCI's view a need for further changes. As with workers compensation and other systems, changes occur in the behaviour of the parties over time which can threaten the viability of an existing system, and which require the system to be rebalanced. One important change has occurred in recent years, which has it appears had a significantly deleterious effect on the operation of the system, and has substantially contributed to the gradual increase in numbers of applications which appear to be occurring.*
>
> *Some firms of solicitors are promoting their services through advertising[1] and other means, offering contingency fees which they colloquially refer to as 'no win no fee', and are then using the need for small business in particular to quickly settle claims to extract compensation offers in the conciliation phase. It has to be emphasised that these compensation offers are being extracted*

[1] An example of an advertisement lodged by a prominent legal firm, headed 'No Win No Fee - Sacked' appeared in the Herald Sun of 10 September 1997, at p.3. It states in the body of the advertisement: 'If your boss has: no good reason to sack you; or never said you might lose your job, you can come to us for help. 'X Solicitor Firm', 'Experts in Employment Law'

regardless often of the merits of the case, and are based on the special cost pressures that these proceedings cause for small business.

There are instances of solicitors not being properly prepared for conciliation, as they are appearing only to extract a settlement, instances of solicitors appearing without the applicant as they are otherwise engaged (eg. 'at work'), and without being fully instructed, and solicitors appearing with no knowledge of the area as they specialise in other areas (eg. family law). In some cases legal firms are charging up to $1,200 to represent an employee during the conciliation phase, and the cost of the legal representative is itself a hindrance to settlement of the claim. The matters are often resolved by the employer agreeing to pay legal costs as part of the settlement sum, often by way of direct payment to the solicitor's office. A 'lottery' mentality appears to exist in some legal firms, with solicitors simply answering that 'money' is being sought, without being able to name a figure or to detail how a particular proposed figure was arrived at.

One obvious response would be to restrict access to legal practitioners in the conciliation phase, the phase during which pressure is applied by legal practitioners and consultants. Another would be to restrict use of contingency fees in this area of legal practice, if it is possible to so restrict their use. Contingency fees are regulated through State and Territory legislation, but access to the tribunal could be conditional on certain approaches being taken to legal fees.

Another possible approach to the problem would be to provide the Commission with greater scope to award costs where legal representation is involved. The greater scope could be to allow costs to follow the result, the usual rule, or could be subject to special tests such as unnecessarily prolonging proceedings, use of contingency fees and other conduct to encourage claims to be made. Even where legal representation is not involved it would be appropriate to provide for costs to follow the result, or to follow the result 'in appropriate circumstances'.

The Bill seeks to provide firstly for more transparency about contingency fees by requiring their disclosure [s.170CIA, p.12], secondly by prohibiting advisers from encouraging employees from pursuing claims with no

reasonable prospect of success [s.170HE, p.18], and by enabling the AIRC to award costs in a wider range of circumstances [s.170CJ(2) etc.p.14].

It should be noted that in the matter of *McKenzie and McDonald Murholme v. Meran Rise Pty Ltd* [Print S4692] of 7 April 2000, a Full Bench of the AIRC headed by Guidice J, President, found that there was a need to widen the scope of the existing costs provision in s.170CJ because legal technicalities prevented an award of costs against solicitors involved in the matter. Foggo C. of the AIRC had at the first instance awarded costs against the employee and their legal representatives, and the Full Bench found that there was no legal power to award costs. ACCI respectfully suggests that the Senate should have regard to an AIRC finding about a deficiency in the current legislation.

AIRC Power to Dismiss if No Attendance by Applicant

The Bill would specifically enable the AIRC to dismiss an application if there is no attendance by an applicant [s.170CIB], and prevent new applications being lodged if an application is withdrawn [s.170HBA].

A Withdrawn Matter Cannot Be Refiled

The Bill proposes to preventing a matter which has been withdrawn being refiled. This is an appropriate response to the *Sushila Wilson v. NT Credit Union Limited* proceedings [U.No.80211 of 1998 and U.No.80227 of 1998] in which an employee withdrew an application for alleged unfair dismissal and then refiled in relation to the same termination. An employee alleged unfair dismissal, the matter was settled at a conciliation conference with the employee filing a valid Notice of Discontinuance (Form R23), the employer paid the amount agreed, the employee changed her mind and returned the cheque by mail and filed a second application in respect to the same termination outside the 21 day period. This caused substantial procedural costs to the employer, and the proposed amendment is an appropriate response to this. There has to be finality in these settlements.

The VACC has provided the following **case studies**, which provide a real illustration of the need for the changes proposed in the Bill:

CASE STUDY 1 – Lodgement Out of Time, s.170CE(8), p.5

Section 170CE(8) would be a greatly welcomed inclusion in the amendments.

When respondents consider their chances in succeeding in an objection to a 170CE application which is lodged out of time, previous decisions of the Commission are always factored in.

Unfortunately, previous cases will discourage them from raising an objection. The application often proceeds to conciliation and settled on the basis of the high cost of proceeding. There is a very real perception that the AIRC will accept many out of time applications and respondent's feel there is little use in challenging the delay in lodgement.

In one particular case, the respondent was a small body repairer, and the applicant was a panel beater. The applicant lodged the applicant 16 days out of time. It is important to note that the applicant was holidaying at the snow for ten days between termination of employment and submitting his application.

Because of a previous experience, the respondent thought it was no use in challenging the time delay, because he could not afford time away from his business. Of equal concern was the great risk of losing the objection and increasing the applicant's cost - which of course is always of consideration to an applicant when attempting to settle a matter.

CASE STUDY 2 – Arguing Jurisdiction – s.170CEA, p.6

The retail motor industry endorses the proposal of 170CEA "Motions for dismissal of application for want of jurisdiction"

An applicant lodged an application pursuant to Section 170 CE of the Workplace Relations Act 1996 despite serving a period of statutory probation as defined by the industry Award. The employee had been in his position for eight days, and demanded $5000 for pain and suffering. The statutory probationary period was brought to the attention of the applicant but he still refused to discontinue the matter.

This left the respondent, who was a small body repair business, with no alternative but to take it to a jurisdictional hearing. Consequently, 20 hours of preparation time for the hearing was taken to create witness statements and outline of contentions, as direction by the AIRC. On the day prior to the hearing the solicitor lodged a Notice of Discontinuance, only on the condition that the applicant would not be pursued for costs.

The VACC believes that by having at its disposal a provision such as that proposed by s.170CEA in the Bill, a respondent's time and costs will be significantly reduced because of the ability to have the matter struck out early for want of jurisdiction. This will be an especially powerful section in the case of 'black and white' cases such as the above, where little witness evidence is necessary.

CASE STUDY 3 – Dismissal if Failure to Attend – s.170CIB, p.13

The respondent was a small retail automotive parts business and the applicant was a store worker. The applicant failed to attend work for eight weeks and then lodged an application pursuant to section 170CE of the Act.

The conciliation conference was listed in August 1999. The respondent attended the conference, leaving his business short staffed for this time. The respondent's representative also attended. The conciliator was present, and a solicitor for the applicant attended.

The applicant, however, failed to attend proceedings that he had instigated. The applicant's solicitor was then forced to continually ring the applicant for instructions during the conference. This resulted in a very disjointed conference and an incomplete perspective from the applicant. Consequently, the matter could not be resolved in the first conference.

The applicant then elected to have his matter taken to a second conciliation conference before a member of the Commission. Again the applicant failed to attend, citing illness as the reason. Unfortunately, a member of the respondent's staff had seen the applicant working at a retail outlet that morning. This matter is still afoot and resolution looks unlikely, given the applicant's failure to attend his own proceedings.

CASE STUDY 4 – Advisers Encouraging Unmeritorious Applications – s.170HE, p.17

The inclusion of this section to the Act will encourage the reduction of "punters" in the area of unfair dismissals, and will assist curb those solicitors who have turned unfair dismissal claims into an industry.

In one particular instance, the respondent's human resources manager was told by the applicant, three days prior to conciliation, that he wished to withdraw his application. However, the applicant stated that he was advised by his solicitor that he was obligated to proceed with the matter under the engagement agreement with the solicitor.

The applicant was distressed by this direction from the solicitor but proceeded with the matter out of intimidation.

The introduction of such a section will alleviate the pressure on the AIRC by decreasing the number of applications which are clearly pushed or promoted by the applicant's legal representative or adviser. This will assist in expediting matters for those applicant's with bona fide claims by removing speculative cases which operate on a 'no win no fee' arrangement.

CASE STUDY 5 – Redundancy – s.170CG(4), p.11

The respondent was a dealership in country Victoria and the applicant was a motor mechanic. A downturn in the respondent's business occurred from July 1998 to September 1998, of which the employees were advised. During August and September, strategies were implemented to deal with this and several left and were not replaced.

During the Victorian gas crisis, the business found it necessary to make further staff redundant in October 1998, including the applicant. The company paid the mechanic severance pay and notice as per the industry award, and advised him they would call on him on a casual basis whenever they could. Two weeks later, the company advised him they had casual work, which was declined by the applicant.

One week later, the applicant lodged an applicant under section 170CE of the Act, alleging that the dismissal was unfair because the company had used

an unfair procedure to effect the redundancy. We note that the applicant accepted that the redundancy itself was genuine.

During the conference the company, to avoid litigation, offered to pay a further $4,000. This was rejected by the solicitor for the applicant, and requested $12,000. The solicitor refused to settle because, after his fees were taken out, there would be little left for his client.

On advice, the company proceeded to hearing. At the hearing the Commissioner, after listening to the witness evidence, went into conference and counselled the parties in his chambers. The outcome of this was a settlement of $5,500 which amounted to legal costs of $4000 and $1500 for the applicant.

It is evident that such time and costs in these circumstances, could be spared by this proposed amendment to the *Workplace Relations Act* 1996. The respondent could have avoided the proceedings altogether, given they had reasons of genuine redundancy to terminate the employment of the applicant.

The *Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill* 2000

Employers have an obvious interest in obtaining more flexible and easy to use procedures for the approval of Australian Workplace Agreements ('AWAs'). ACCI strongly supported the introduction of Australian Workplace Agreements in 1996, and has strongly supported employers considering use of AWAs as an option for industrial relations reform or arrangements in their workplaces, along with other options such as non-union or union certified agreements, State registered agreements, or informal agreements. This support has included publicising AWAs in the ACCI *Quarterly Reports on Federal Enterprise Agreements*, and circulation of 'how to do it' manuals on development of enterprise agreements. Along with this support for AWAs ACCI has also been critical of what it sees as the excessive complexity of the procedures for approval of AWAs. The above Bill would remove some of that complexity while retaining essential equity protections for employees, and ACCI is therefore supportive of it.

ACCI also respectfully offers the following three case studies which in ACCI's view illustrate the need for less complexity in AWA approval procedures.

The Proposed Changes

- An AWA will commence from when it is signed by the parties. Employers will have 60 days to file for approval of an AWA or the Employment Advocate can extend that period, in place of the current 21 days, enabling large employers developing large numbers of AWAs to keep them and file them all simultaneously. This is a highly desirable added flexibility [s.170VC, p.10];

- The 5/14 day periods in which an employee must have a copy of an AWA before signing are replaced by 'cooling off' periods of the same time period, i.e. 5 days for new employees and 14 days for existing employees. A cooling off period is a period in which the employee can withdraw from the agreement. There is no cooling off period for employees earning more than $68,000. It should be noted that the 5 and 14 day requirements mean that the Employment Advocate has to refuse AWAs where both the employer and employees are keen that they be approved. Even if the

employee has been involved in developing the AWA over a period of months, they still currently have to wait for 14 days after being given the final version of the agreement. If – in their enthusiasm – they sign it too quickly, the Employment Advocate is required to refuse approval. A cooling off period after signature still gives the employee time to get outside advice if they wish, without penalising the majority of employees [s.s.170VBA(7), p.8].

- AWAs which provide for remuneration in excess of $68,000 will be held to automatically pass the no-disadvantage test unless the employee applies to have the test performed, similar to the unfair dismissal exemptions [s/170VCB(2), p.12]. This proposed statutory provision is simply application of the same approach in the area of Australian Workplace Agreements;

- The Employment Advocate may approve an AWA that fails to meet the no disadvantage test [s.170VCB(6), p.13] i.e. this function is transferred from the AIRC to the Advocate, although the President of the AIRC can form principles to guide this Advocate function. The current approach is procedurally more complex than it should be, because it requires an agreement to be transferred from one institution (the Employment Advocate) to another (the Industrial Relations Commission). It would be desirable for this procedural complexity to be ended by enabling the Employment Advocate to perform the full range of testing functions;

- The requirement to offer AWAs on comparable terms to other employees is removed. This requirement can be very limiting, because a considerable amount of assessment by employers is essentially based on decisions about personal attributes and contribution and their value to an organisation, something which is difficult to put in a formula or to 'prove'. This requirement can therefore be in practice difficult to apply. ACCI also notes that this provision has the potential to deter employers from making arrangements to deal with the particular needs (eg. family responsibilities) of one employee.

- There is no right to take industrial action in pursuit of an AWA. This right has it appears not been exercised; in any event the taking of industrial action appears to be more of a 'collective' approach than is at all usual in AWA discussions.

CASE STUDY 1

In relation to the limitations resulting from the current requirement to offer AWAs on comparable terms to other employees, the CCIWA has provided ACCI with details of the advice they were forced to give a member employer. In June 1999 CCIWA was approached by one of its members for advice on the option of allowing employees who wanted it, to cash out accrued annual leave. Employees in question were subject to federal awards and agreements. These awards and agreements did not provide the option of cashing out annual leave whilst the employment continued.

The employer has a large number of employees and wished to consider the option of allowing those employees who were interested to cash out their leave. CCIWA advice included the following:

> ‘. *The Awards provided an entitlement to take annual leave with pay;*
>
> . *At common law, there is no automatic entitlement to a cash benefit in lieu of annual leave and it is likely that awards would be interpreted in the same way;*
>
> . *Cashing out annual leave under the federal awards may leave [employer's name deleted] susceptible to claims from employees wishing to take their annual leave.*
>
> . *This may result in [employer's name deleted] paying an employee twice for the annual leave entitlement.'*

The advice to the employer was that there were four options to resolve the situation, either to seek to amend the awards through the AIRC which was likely to be opposed and involve arbitration, and consequently be a major exercise. Alternatively, enter into agreements with unions providing for cashing out of annual leave with individual employee's consent. Again, this is a major exercise particularly given the employer has little involvement with the union in the professional areas where employees originally raised this issue.

The final two options were to enter into either Australian Workplace Agreements or Part 2A *Collective State Workplace Agreements* under the Western Australian legislation. In both of these cases, by virtue of the provisions of the *Workplace Relations Act* 1996 the AWAs or State

Workplace Agreements would have to be offered to all comparable employees.

This process again was a major one for a large employer to embark upon to meet the needs and requests of a small minority of employees who had expressed interest in cashing out annual leave. Consequently the employer has not progressed this option and those employees wishing to cash out annual leave, often employees who have over a long period of time accrued a substantial bank of leave, are unable to do so.

CASE STUDY 2

The Business Council of Australia has provided the following **case study** from Telstra on the use of Australian Workplace Agreements, which provides strong support for streamlined timeframes (ie. removal of the different time periods), removal of the requirement to offer AWAs in the same term to all comparable employees, and a less onerous process of filing AWAs:

1. The Telstra Environment

Telstra is transitioning toward an organisation whose managers are fully accountable for both the output and well being of our staff members. Corporate principles, processes and systems have been redesigned to assist line managers to manage our people well. These changes reflect a move away from the traditional third party industrial model.

The simplification of Awards is progressing. Almost all policies and procedures effecting employment conditions have been streamlined to give managers the discretion they need to responsibly manage their teams.

2. AWAs in Telstra

In this context Telstra started offering individual contracts via Australian Workplace Agreements (AWAs) to all staff members in middle management roles in October 1997. AWAs have been accepted by over 3,500 of these staff members, representing 95% of those offered.

Telstra is now beginning to offer AWAs to staff members in team leader and operational roles in the company. It is possible there may be up to 15,000 Telstra staff members employed on AWAs by December 2000.

Telstra's AWAs specify conditions of employment such as hours of work, leave provisions, superannuation and remuneration. The mutual obligations of Telstra (represented by the manager) and the individual are also addressed. A commitment is given by the manager to provide role clarity, communication, fairness, and behaviour worthy of respect and trust. An undertaking is required of the staff member to work within their skills and ability, work flexibly, participate in continuous improvement and be accountable for their performance.

AWAs align with Telstra's emphasis on the direct employment relationship between the manager, as the company's representative, and the staff member. However, the use of AWAs has introduced a level of bureaucracy and complexity that conflicts with the company's drive for a simplified management framework.

3. Scope for lmprovement in AWAs

Timeframes

We would like to see a streamlined process for offering contracts. Both managers and staff members find the different time periods (14 days, 5 days, 21 days) a source of confusion and are frustrated if an error in the dates means they need to repeat the process. Some managers fail to understand the significant administration that must occur after the staff member has accepted the contract and by the time this is brought to their attention the required time has lapsed. In fact Telstra is now putting significant resources (nine people full time and more than twenty people part time) into tracking AWAs through the process to ensure the requirements of the Workplace Relations Act are met.

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.

Staff members find the maximum period of three years for an AWA confusing and disturbing. Some believe they have been converted to a 'fixed term' employment and are convinced that their employment will conclude at the end of the three years. A typical grievance is "as the contract is for three years only I should be paid a premium for the short term of employment".

Comparable Employees

The requirement to offer AWAs in the same terms to all comparable employees is a source of frustration to staff members. They seek to individualise their contract to suit their relationship with their employer and their personal requirements in and outside of the workplace. One of the most frequent complaints Telstra receives from staff members is the inability to tailor their AWA.

We receive criticism from staff members that the AWA “'is not an individual contract but a mass contract with different people's names on it”. In one line of business fifteen comparable staff members were offered AWAs. Four accepted the contracts. Eleven wanted to tailor the contract to align with their personal requirements. They rejected the AWA because they did not have this flexibility. One staff member complained "These are not individual contracts. People who have asked for minor alterations have been told it cannot be changed. It is a sham. 1 was sceptical when the government tried to sell AWAs as individual contracts. 1 am even more sceptical now".

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 in the same terms to all comparable employees. They were required to re-negotiate back to standard terms and the positive spirit associated with the offer of AWAs in this workplace was severely effected.

Filing and Approval Process

We would also like to encourage a less onerous process of filing AWAs with the Office of the Employment Advocate (OEA) and receiving approval. Managers are required to complete forty-five questions in a Filing Application that comes in two parts. This requirement, multiplied over the 15,000 AWAs Telstra will potentially offer, is a significant investment of resources.

The approval process adds at least three to four weeks to the finalisation of the individual contract. Staff members question why the process is so long and bureaucratic and are not placated when we advise them that much of the process is not prescribed by Telstra. In all other aspects of work we are encouraging staff members to challenge complexity and undertake continuous improvement. The AWA process stands as a contradiction to this direction.

The cumbersome nature of the filing applications often leads managers to delegate the paperwork to a personal assistant or other support person. This person is often not fully aware of the process and timeframes and so the paperwork can fail to meet the requirements of the WR Act. Telstra now has teams of people dedicated to the processing of the paperwork required by the Office of the Employment Advocate (OEA).

4. Conclusion

AWAs align with Telstra's emphasis on the prime relationship between manager and staff member. However, AWAs involve a level of bureaucracy and complexity that conflicts with the company's drive for a simplified management framework. Telstra supports the simplification of timeframes and a streamlined filing and approval process for AWAs. Increased flexibility in the comparable terms requirement is also encouraged. AWAs have been a beneficial tool allowing Telstra to enter into a direct relationship with individual staff members. Continuous improvement to improve the flexibility and maturity of this relationship would be extremely welcome.

CASE STUDY 3

The Service Sector Corporation, a very large corporation providing services, and which wishes to maintain its anonymity, (the Corporation) has been a long-standing supporter of the availability of individual employment contracts. The Corporation has found that such arrangements encourage one-on-one relationships between the managers and employees and foster a sense of belonging to the organisation. Individual agreements also provide employees with greater choice in the management of their own remuneration and conditions of employment and give the company greater flexibility. Whilst the Corporation's award provides some scope for individual contracts, these arrangements remain primarily Award linked and limited in their scope and application.

Accordingly, the Corporation welcomed the reforms introduced in the *Workplace Relations Act 1996* and has offered Australian Workplace Agreements (AWAs) to a number of different groups of Corporation staff, including to all of its x managerial level employees. As at August 1999, nearly xxxx employees had voluntarily accepted AWAs.

Current difficulties

The Corporation has been pleased with the additional flexibilities that have been achieved with the introduction of AWAs. Nevertheless there are a number of features of AWAs that have reduced their attractiveness. Undoubtedly the major difficulties experienced by the Corporation's business units have been related to the complex and cumbersome administrative procedures associated with the filing and approval process. For example:

(a) In addition to a number of other requirements, each time the Corporation files an AWA for an employee two separate Employment Advocate forms need to be completed by hand. These forms comprise 45 questions in all. For the majority of AWAs the answers to many of the questions are identical.

The Employment Advocate has developed an ‘electronic’ version for one of these forms. This version reduces (slightly) the time required to complete the form. Nevertheless, the form still needs to be completed for each agreement filed with the

Employment Advocate and the second form can only be completed by hand, The two of then have to be sent via the mail to the Employment Advocate.

(b) Although AWAs are individual agreements, it seems overly bureaucratic to require an individual approval for a generic AWA that has been approved many times in the past. The Corporation, for example, has approximately x identical AWAs approved for its managerial level employees. Not one of these has ever failed the no-disadvantage test. Each time another employee accepts one of these AWAs, however, the Corporation must submit the same detailed information and go through the same approval process.

(c) Difficulty has also been experienced with the requirement to issue AWAs five days (new employees) and fourteen days (existing employees) prior to them being signed. These requirements, and the legislation regarding the commencement date of AWAs, make the offering procedure confusing and difficult to administer in practice. For example, to enable a new employee to commence their employment with the Corporation on an AWA the following steps must be taken:

(i) the employee must be provided with a copy of the AWA for at least five days before it is signed;

(ii) the AWA must be explained to the employee after they receive it and before it is signed;

(iii) the employee then has to sign the AWA and return it to the Corporation at least a couple of days before employment is commenced;

(iv) the business unit must then prepare the filing documentation and forwards this, along with the AWA, to the Employment Advocate;

(v) the Employment Advocate then needs to issue a filing receipt at least a day before the employee commences work.

Given these onerous offer and filing requirements some of the Corporation's line managers have questioned the value of going through the process. In addition to the difficult the process places on the business, managers have also expressed concern about the impact of this confusion, complexity and potential recruits in an increasingly competitive employment market.

Comments on the proposed reforms

The reforms proposed to AWAs in the discussion paper released by the Federal Minister for Employment, Workplace Relations and Small Business would significantly reduce the complexity associated with the offering and filing of AWAs. While some of the details of the proposals are unclear, the thrust of the amendments in the discussion paper suggest significant changes to the existing processes. The paper proposes "*.. amalgamating the current filing and approval processes for AWAs to ensure a much simpler and more streamlined process*". It is also proposed to remove the requirement for employees to have the agreement for the 5/14 day period (this will be replaced by a 5/14 day cooling period) and to allow for the AWA or variation agreement to take effect from the date it is signed.

These changes would significantly simplify the processes for the Corporation's business units and increase the attractiveness of AWAs. If enacted, an employee would be able to be shown the contract, sign it and have it commence all on the one day without the complications and filing requirements under the existing scheme.

The Corporation would also be very interested in electronic lodgement of AWAs. We note that it is proposed to remove the requirement for employers to complete a Statutory Declaration and understand that this would allow for the electronic filing of the AWA. This would have the capacity to simplify the filing process even further. Other proposals, such as removing the requirement to offer AWAs to all comparable employees, and the automatic passing of the no disadvantage test for AWAs providing remuneration over a certain amount, are supported by the Corporation and would similarly increase flexibility.

Further possibilities?

One change, not canvassed in the discussion paper, that would also simplify the AWA process, would be to streamline approval where an employer offers a large number of identical AWAs to employees. That is, it would seem reasonable that where an employer offered AWAs in the same terms to employees and the agreement has been "comprehensively" approved by the Employment Advocate, a fast-track approval process should be available.

Summary

The changes to AWAs proposed in the Reform of Workplace Relations Discussion Paper should increase the overall attractiveness of AWAs. The amendments will provide for a simpler filing and approval process and will allow for greater flexibility in the use of AWAs whilst still providing protection for employees. Despite these changes, employers will have to continue to provide detailed information for individual AWAs even where a large number of identical agreements have been previously approved. We recommend that consideration be given to a fast tracking approval process for such AWAs.

The *Workplace Relations Amendment (Tallies and Picnic Days) Bill* 2000

Deletion of Allowable Matters

The matters to be deleted from the range of allowable matters is '*tallies'* [s.89A(2)(d)].

Specific Prohibitions

The bill extends the range of specific prohibitions against certain matters being included in awards to include:

- *union picnic days;*
- *tallies;*

With respect to ***union picnic days***, ACCI does not support provision for union picnic days. These are not public holidays. There are already an extensive set of public holidays currently provided for.

With respect to ***tallies***, ACCI supports the submissions of the National Farmer's Federation on this issue. These are an inputs based measure (ie. counting volume of product before processing) as opposed to an outputs based measure (the actual productive output), and are therefore inappropriate in a genuine safety net.

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

The Bill proposes the introduction of a qualification on the current bargaining period provisions to the effect that industrial action is not protected unless authorised by a secret ballot [s.170MQ, p.8], and an accompanying scheme to enable this qualification to be implemented in practice.

This sort of approach is in ACCI's submission supported by a fair examination of the community interest and the interests of employers. The community interest is in ensuring that industrial action, when it occurs, is not action taken lightly. It is not in the community interest for industrial action to occur as a matter of course. Similarly, the interest of employers is in minimising damaging industrial action and in providing appropriate restrictions on industrial action.

Industrial action can be extremely damaging, it is rarely if ever an appropriate first resort, and even those who support protection for taking industrial action do so with ambivalence. No-one believes that the taking of industrial action is the best way to resolve disputes, it is only ever defended as a 'necessary evil', as a resort where necessary and where discussions and negotiations have not led to a settlement.

It is highly desirable that industrial action not occur unless due democratic processes have been undertaken. Parliament has taken the decision to enable employees to take 'protected' industrial action and in so doing to breach the ordinary contract of employment obligations to work as directed, and possibly to inflict substantial financial and other damage on the business of their employer. This is not something to be viewed lightly. The Parliament and community are entitled to expect that access to protected action should be conditional on appropriate procedures being followed, and on appropriate restrictions on protected action. For example the AIRC should be given the power to suspend or terminate bargaining periods for 'cooling off' or because the dispute is intractable and is damaging the employer's business.

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