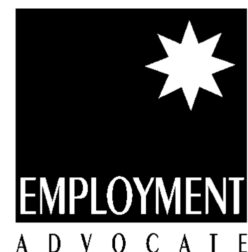
SENATE INQUIRY INTO THE *WORKPLACE RELATIONS AMENDMENT (AUSTRALIAN WORKPLACE AGREEMENTS PROCEDURES) BILL 2000*

THE SUBMISSION OF THE OFFICE OF THE EMPLOYMENT ADVOCATE

28 August 2000



Mr John Carter
Secretary
Senate Employment, Workplace Relations, Small Business
and Education Legislation Committee
S1.61 Parliament House
CANBERRA ACT 2600

Dear Mr Carter

Re: Submission to Inquiry into the
Workplace Relations Amendment
(Australian Workplace Agreements Procedures) Bill 2000

I am pleased to enclose my submission to the Inquiry. I trust that members of the committee will find the material contained in the submission of assistance.

If you have any questions or require further information please do not hesitate to contact Mr John Burnett on (02) 9246 0535, fax (02) 9246 0536 or e-mail john.burnett@dewrsb.gov.au

Yours sincerely

JONATHAN HAMBERGER
Employment Advocate

Introduction

This submission is limited in scope to certain of the provisions contained in the Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000.We consider that these provisions :

- are the most important, from the point of view of employers and employees
- will either maintain or enhanceemployee protection when compared to the current Act ; and
- are essentially improvements of a technical nature based on the experience of employees and employers from the first three years of the Act, as reported to the OEA.

Having limited our submission to the criteria above, we will comment on three broad areas which are interrelated.

- the change from a required number of days before signing an agreement to a ‘cooling off’ period
- the changes in the date of effect provisions and the consolidation of the Filing Requirements and the Additional Approval Requirements
- the changes to the Employment Advocate’s powers to allow the legal pursuit of breaches of Part VID.

The change from a required number of days before signing an agreement to a ‘cooling off’ period

The current Workplace Relations Act 1996 requires the employee to have the agreement either 5 (for new employees) or 14 days before he or she may sign the agreement and then only takes effect after the filing receipt has been issued (new employees) or upon approval of the AWA (existing employees). Under proposed sections 170 VBA and VBB, the new arrangements would remove the need for the issue of separate filing receipts and effectively merge the current filing requirements and additional approval requirements processes into a single streamlined application for approval, while providing employees with a ‘cooling off’ period during which they can withdraw from the AWA.

The intent of the original provisions was to allow the employee the time necessary to seek additional advice and to determine whether they genuinely wished to enter into the agreement. Although the intention is appropriate , the particular construction of the provision has created significant, though unintended, problems.

The current provisions are inconsistent with the widespread practice of offering employees a job, and the commencing them in employment the next day, or shortly thereafter. When combined with the time it takes to file AWAs with the OEA, and the need to issue filing receipts, the current provisions effectively mean that employers cannot commence new employees on AWAs until at least a week has elapsed since the job offer. This is a very significant disincentive to the use of AWAs by small business in particular. Where employers and new employees do choose to make AWAs nevertheless, it means that the employee is effectively forced to wait at

least a week before he or she can start the job. This is often resented by the employee as well as the employer.

Secondly, it often happens that both employees and employers inadvertently breach the current required number of days before signing provisions. Employees who are eager to begin work under their AWAs often do not appreciate that failure to wait the required number of days will result in the refusal of the AWA – even though both parties are keen for the AWA to be approved - and thus create an even longer delay before it is to come into effect. In effect, the current provision actually prevents those employees who are the keenest to commence employment under the AWA from doing just that, as they are the employees most likely to sign prematurely. Of AWAs refused, the highest proportion (61%) are due to the employee prematurely signing the AWA.

The proposed provision for a 'cooling off' period in no way changes the original intention of the Act while addressing the unintended difficulties of the current arrangements. It still allows the employee an equal amount of time in which to consider his or her decision. In addition, the loss of the required days provision does not lessen the ability of an employee to negotiate an agreement.
The current provision in the Workplace Relations Act is modeled on a provision prescribing a similar period between receipt of a certified agreement and the vote to accept or reject the same. However, a collective vote is different from an individual signing an agreement.Due to the individual nature of AWAs, a 'cooling off' period is quite practical, in a way that would simply not be practical with a collective decision.e. A 'cooling-off' period is common provision in many contracts. It allows the individual a set period of time to consider the ramification of the transaction and, if the contract is found to be undesirable, the party may withdraw with no ill effect. It is indeed preferable in that it allows the employee a sort of "trial period" in which to work under the AWA terms and conditions. This may allow the employee to make a more informed decision due to their actual experience of work under the AWA whereas the current arrangement effectively requires the employee to make the same decision in a vacuum.

The changes in the date of effect provisions and the consolidation of the Filing Requirements and the Additional Approval Requirements

Under 170VBD, Period of operation of AWA, of the Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000, an AWA for an employee starts operating on the later of the AWA date (that is, the date on which the employer and employee sign the AWA or, if they sign on different dates, the later of those dates); or the day specified in the AWA as the starting day; or if the employee is a new employee—the day the employment commences. This is different from the current Workplace Relations Act 1996 which requires the employee to have the agreement either 5 (for new employees) or 14 days before he or she may sign the agreement, and then the agreement only takes effect at the earliest after the filing receipt has been issued (new employees) or upon approval of the AWA (existing employees).

Most employers and employees, in practice expect to be able to implement the agreement from the date of signing. In fact, despite the provisions of the Act, the OEA understands that many employers and employees commence working under the provisions of the AWA before the AWA is given legal effect. This may lead to an inadvertent breach of the award because the employer starts paying under the AWA as soon as it is signed often in circumstances where this is exactly what the employee wants. Employers, both large and small, see the combined effect of the date of effect and the required number of days before signing provisions as a cumbersome burden to their staffing operations. Indeed, there have been a number of employers and employees who have complained that this requirement interferes unnecessarily in the agreement making process wherein the Office of the Employment Advocate ironically becomes a sort of third party obstacle to the speedy conclusion of a successful employee-employer negotiation.

So long as the employer is required to lodge the AWA within a reasonable timeframe and there exists a mechanism to address any shortfalls, the proposed changes to the date of effect should pose no threat to the continuing protection of employees, and in many cases would be clearly advantageous.

The changes to the Employment Advocate's powers to allow the legal pursuit of breaches of Part VID

The proposed provision balances the needs of employees and employers to speedily enter into their new flexible arrangements with the need for employees to be protected. Indeed, subsections 170VXA, VXB, and VXC, Compensation for shortfall in entitlements, would allow the Employment Advocate, or an authorised officer, on the employee's behalf to recover any shortfall from the employer in an eligible court. This includes the total value of the entitlements to which the employee became entitled under the AWA for the period it was in operation; and/or the total value of the entitlements to which the employee would have been entitled for that period (if the AWA had not been made) under the relevant award in respect of the employment to which the AWA relates. Thus, if the AWA fails the no-disadvantage test the employee may seek compensation for the shortfall during the period between the signing of the AWA and its refusal by the Employment Advocate.

While employees can currently take action to recover any such shortfall, the ability of the Employment Advocate to take the action on their behalf would clearly enhance employee protection.

In addition, under proposed subsection 170VV(3), the Employment Advocate would be allowed to make an application for an order under section 170VV, Civil Penalties, that relates to an AWA or ancillary document. Under the current Act, only the parties to the agreement may make such an application – the Employment Advocate may only investigate such alleged breaches or provide legal assistance. It is quite common for the Employment Advocate to be criticised for failing to take legal action in cases alleging duress and other breaches despite the fact that the Employment Advocate has no legal power to do so under the current Act. The proposed provisions means that employees will not have to bear the burden of seeking orders as is the case under the current Act, but they may request that the Employment Advocate act on their behalf.

Indeed, in the cases where the employee is unwilling to pursue the matter whether out of fear or other reason, the Employment Advocate may act independently of a request under the proposed provisions.

Again this represents a clear enhancement of protection for employees.