UTLC SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE INTO FOUR WORKPLACE RELATIONS BILLS

August 2000

INTRODUCTION

The UTLC supports the ACTU submission opposed to the four Bills. The UTLC position remains as it was in opposing the *More Jobs, Better Pay Bill* "the 1999 Bill".

The S.A. Industrial Relations system is regarded by politicians from all political parties to be a strength and an attractor of investment and jobs for our State. This is not only with our low industrial disputes record but the degree to which industrial parties can cooperate in difficult times under current inadequate legislation and participate in our institutional framework. As we argued in much greater depth in our UTLC submission in 1999, such good industrial relations is put under threat by the proposals from Minister Reith. Unions and workers were involved in disputes and large rallies in protest last year. We also pointed out that the good framework of the SA State based jurisdiction with common rule awards protecting the lowest paid involves not having AWA's that have been rejected twice by the SA Parliament for good reasons. The passage of the Reith Bills would again put negative political pressure on the SA jurisdiction and if enacted would severely undermine our SA IR system.

The UTLC provided a deal of evidence that refuted the assertion that the Reith proposals would create jobs but rather the reverse would be more likely. We believe these Bills are the wrong strategic direction for our small regional labour market with the highest levels of casual and more precarious workers. More workers would join the ranks of the poor. They would not be productive for our struggling economy.

The UTLC agrees that the introduction of the Bills is a political stunt, aimed at putting pressure on and discrediting Senators whose position on these proposals is already known.

Peter Reith's tone is unashamedly party political, particularly towards the Democrats.

The UTLC like the ACTU urges the Committee to reject the Bills. They are not in the interests of South Australia's good industrial relations record and the interests of lower paid South Australian workers, (see our earlier 1999 submission.)

WORKPLACE RELATIONS AMENDMENT (AUSTRALIAN WORKPLACE AGREEMENTS PROCEDURES) BILL 2000

CURRENT OPERATION OF AUSTRALIAN WORKPLACE AGREEMENTS

The UTLC supports the ACTU arguments as they impact into South Australia as we have very serious concerns about the current operation of the system for AWAs. *(As stated above for very good reasons the SA Parliament including independents and the Democrats have twice rejected the AWA scheme into our State based system.)* Individual agreements, by their nature, tilt the balance of rights away from employees towards employers.

While research on AWAs has been limited, and, as of 31 July 2000, only 118, 231 had been approved, covering 2,332 employers, there does appear to be serious reason to believe that in many cases they have been used to disadvantage employees. *(See also UTLC 1999 submission on Casino in SA and in the meat industry.)*

The content of AWAs

The *1997 Report on Agreement-making under the Workplace Relations Act* [National Institute of Labour Studies, 1998] (the NILS report) was not able to provide information about wage increases in AWAs. Around a quarter of the AWAs included performance pay arrangements, compared to seven per cent of Certified Agreements. This probably reflects the fact that nearly one quarter of employees covered by AWAs were managers and administrators, who make up 5.2 per cent of the workforce.

There is evidence, including from the recent *Work and Family: State of Play* report, that AWAs are more likely than Certified Agreements to contain flexible hours provisions which allow for greater employer control over hours, and greater ability to change these on a day to day basis. This is of great concern to unions in SA.

In *Australia at Work* ACIRRT reported that an examination of 25 individual contracts under Western Australian legislation had found nominal pay rates unchanged:

"...but working time arrangements were profoundly changed. These changes included: abolition of penalty rates, no minimum call-in times and overtime paid at a single rate." (p114)

Similar patterns were found from research into 116 Victorian individual contracts, while the ACIRRT Working Paper reported that 69 per cent provided for no wage increase (compared to 45.3 per cent of non-union agreements and 19.9 per cent of union agreements). The analysis also found that AWAs were far more likely to contain hours provisions with monetary implications, such as ordinary hours greater than 39, overtime at a single rate, time off in lieu of

overtime at ordinary time, averaging of hours, ordinary time worked Monday to Sunday and ordinary hours within a spread of more than 12 hours per day.

Although some limited research has been published, there is a serious problem with information about AWAs, a concern expressed by HREOC in the *Pregnant and Productive* report:

"HREOC considers more, and more regular, information could be published detailing trends and outcomes of AWAs approved by the Office of the Employment Advocate in relation to pregnancy and family responsibilities." (para 8.92)

The negotiating process

The evidence is overwhelming that AWAs are rarely, if ever, the subject of real negotiations between the employer and the individual employee. The most common practice is for identical AWAs, possibly with different wage rates, to be provided to employees on a "take it or leave it" basis.

The motivation for AWAs was demonstrated in a recent finding by the Federal Court that an employer had breached subsection 298K(1) of the Act by requiring employees to sign an AWA as a precondition to being employed, with the purpose being to deny those employees the benefits of the collectively negotiated EBA. [*Maritime Union of Australia v Burnie Port Corporation* [2000] FCA 1189 (24 August 2000)]

The AMWU, the SDA, the LHMU, the AMIEU and the ASU put evidence before the inquiry into the 1999 Bill on the "take it or leave it" approach adopted by employers in relation to pressuring employees to sign sub-standard AWAs. (Submissions No. 424, pp15-19; No. 414, Attachments 4-6; No. 326, pp70-76; No. 521, Part 2; No. 391, pp714**.** *See also the UTLC 1999 submission relating particularly to women workers and case studies in the SA Meat industry.)*

This evidence presents an incontrovertible case that AWAs are currently being used to a very significant extent to impose reductions of wages and conditions on employees, either through pressure or by taking advantage of employees' ignorance of their rights.

The NILS report found that 93.5 per cent of employees party to an AWA were not represented by a bargaining agent. The report stated in relation to this issue:

"One of the main concerns raised in the consultation process related to the limited number of sources of independent advice to employees regarding individual agreement-making. This was of particular concern for new and young employees…..Concern was also expressed that individual employees felt restricted in their ability to consult with trade unions in the negotiation of AWAs. In cases where the advice of a bargaining agent was sought, it was argued that should their advice suggest the AWA was deficient or failed the 'no-disadvantage' test, an employee would be required to sign it in order for the Employment Advocate to consider the agreement. This is likely to impact most often on new employees who would be required to sign an AWA in order to gain employment.

"In part, the constraints employees felt in their ability to make changes to the provisions contained in an AWA may explain why the majority of employees did not seek the assistance of a

bargaining agent. In contrast the employer was more likely to use a bargaining agent in the formation of the agreement, most commonly a consultant, who was used for 16 per cent of employees covered by an AWA." (p52)

When considering balance in negotiations, it should also be noted that while small employers might use consultants, larger employers were likely to have direct access to sources of expertise from directly employed HR professionals.

While the Act prohibits duress in connection with AWAs, conduct which might be thought of as duress is not covered. In particular, the Act does not specifically prohibit making a wage increase or a promotion conditional on the employee signing an AWA, while the Explanatory Memorandum which accompanied the 1996 Bill stated that the prohibition on duress "would not prevent an employer from offering employment on the basis that the employee enter into an AWA".

It is perhaps not widely understood that the Employment Advocate takes the view that in a case of transmission of business, an employee of the former employer is a new employee for the purpose of section 170VA, and can be required to sign an AWA as a precondition for continuing employment, making the transmission of business provisions in the Act virtually irrelevant.

AWAs are frequently offered in the public and private sector as the only means by which employees can obtain a wage increase, a promotion, or some other benefit. This type of conduct is clearly inconsistent with the principles of collective bargaining; it means that if employees do not accept the AWA they will be disadvantaged in their employment as compared with employees doing the same work who do sign, arguably a form of duress.

THE PROPOSED BILL

The proposed changes to the AWA provisions are designed to make it easier for employers to obtain approval for individual agreements, including those which exploit the employees covered by them.

Employees with remuneration over $68,000

The UTLC supports the proposal for a cooling-off period for all employees who sign AWAs, not just for those earning over $68,000. [s170VBA(6)] It is employees on lower wages who might be assumed to possess less understanding of their legal rights, who have less bargaining power, are more likely to have limited literacy or English and are less likely to have sought independent advice before signing.

On the other hand, the UTLC is opposed to the proposal to deem these AWAs to have satisfied the no-disadvantage test, seemingly in exchange for the cooling-off period. [s170VCB(2)]

Cooling-off periods apply in relation to a number of kinds of contracts, ranging from real estate to hire purchase, yet these contracts are still required to meet statutory and common law

requirements. The UTLC cannot accept that one form of protection should be traded off for another.

Period of operation

Allowing AWAs to operate prior to being approved for existing employees (and before a filing certificate is issued for new employees) [s170VBD] will mean employers, knowingly or otherwise, will be able to employ staff on terms and conditions which do not meet the no-disadvantage test, or in circumstances where the agreement has not been adequately explained, or other process-related requirements have not been met.

In such a case, the amendments would mean that an employee could be employed under the AWA which did not meet statutory requirements for 60 days, or longer if the employer applied for approval by the end of that period. [s170VC] In the event that the employer did not apply for approval, or approval was refused by the EA, a process which would take up to some weeks, especially if there were concerns, the Bill does not provide for any remedy for the employee other than taking legal action in a competent court.

While only a minority of employers are likely to deliberately structure employment around the possibilities opened up by this change to the operation of AWAs, the potential for gross exploitation is not one that the Committee should find constitutes an acceptable risk.

There is simply no need to make it easier for AWAs to be in effect prior to approval, or for extending the time for making applications from the present 14 days. The changes do not seem to be justifiable on the basis of any delays or inefficiencies in the OEA. In the period from July 1998 to January 1999 more than 80 per cent of AWAs were approved within 20 days, with this figure close to 100 per cent in the last two months of the period. The introduction of electronic lodgement of applications has also assisted in efficient processing of applications.

The proposed 60 day period within which an application for approval must be made is excessive, and should be compared with the requirement that applications for certification of a collective agreement be made within 21 days of the employees' vote.

No-disadvantage test

The UTLC submits that it is important that the EA be required to refer cases where there is concern about whether the no-disadvantage test has been complied with, including the application of the public interest exception, to the Commission. A number of such cases have been referred to the Commission, which has produced reasons for decisions which are important in maintaining at least a little confidence in the integrity of the system.

Approval of AWAs

The proposed new subsection 170VCB(5) requires the EA to approve an AWA where requirements such as those relating to genuine consent and explanation of its effect have not been met, so long as neither party is disadvantaged. The UTLC submits that in a secret approval

process in which there is pressure on the EA to approve as many agreements as possible (Mr Hamberger predicts one in ten employees might soon be covered by AWAs in the autumn 1999 issue of *The Advocate* – the OEA newsletter) it is likely that AWAs will be approved in spite of serious deficiencies in the process.

Comparable employees

Removal of the requirement in paragraph 170VPA(1)(e) that the employer must offer an AWA in the same terms to all comparable employees will mean that employers will be able to use AWAs to discriminate between employees, possibly indirectly on grounds such as sex.

Effect of an AWA

The proposed amendments to section 170VD would result in the total destruction of collective bargaining and collective representation.

Allowing an AWA to operate to the exclusion of a certified agreement prior to the latter's expiry date [s170VD(4)] means that certified agreements would remain relevant only as long as this met with the wishes of the employer. Such a change would mean that the employer could purport to make a certified agreement with a union, to which the employees had given their genuine consent, and that the very next day the employer could begin to offer AWAs to new employees and existing employees who were susceptible to pressure. These AWAs could provide wages and conditions lower than those set out in the certified agreement, even though the award-based no-disadvantage test was complied with. Such a situation would put enormous pressure on employees covered by the certified agreement who did not wish to sign an AWA, and wished to continue to be collectively represented.

Similarly, the proposal for AWAs to operate to the exclusion of awards made pursuant to section 170MX makes the latter provision irrelevant. In the case of the paid rates circumstance under subsection 170MW(7), the purpose is to give these employees access to an arbitrated collective arrangement in cases where their employer, generally a government, will not negotiate an agreement, although the provision has also been used by the South Australian state government where it has been unable to reach agreement with unions. To allow an employer to simply continue to offer identical AWAs to those which were on offer prior to the making of the arbitrated award is to make the whole process a nullity.

WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTED ACTION) BILL 2000

THE CURRENT SECRET BALLOT PROVISIONS

The UTLC finds it strange that these proposals are being pursued at a time when in SA industrial action remains very low. The issue of secret ballots is only one for the politics of the Minister, not the industrial parties.

The UTLC supports the right of union members to vote on whether or not to take industrial action, and believes such votes are generally taken. It should be noted that a number of unions routinely use secret ballots prior to taking industrial action.

The UTLC notes that secret pre-strike ballots are available when requested by employees under section 136 of the Act.

It is also possible under section 135 for the Commission to order that a secret ballot be conducted if it considers that this would be helpful in resolving a dispute, if industrial action is pending, or to ascertain whether an agreement has been genuinely made.

Although there is no specific provision for an application for a secret ballot to be made by an employer party to the dispute, another affected party or the Minister, there is no bar on any of these persons making submissions to the Commission that a ballot should be ordered.

In a Ministerial Discussion Paper *Pre-industrial action secret ballots* published in August 1998, the authors found that very few secret ballots had been ordered by the Commission, and that where these had occurred they had generally been to ascertain employees' attitudes to particular issues, rather than their views in relation to industrial action. The report concludes:

"The Commission appears to be using ballots strategically to progress dispute resolution, particularly where the parties have reached a stand-off in negotiations." (p3)

There is no evidence in the Discussion Paper of the Commission refusing applications by employers, or anybody else, for ballots to be conducted in relation to the question of taking industrial action.

In Western Australia, which has legislated for compulsory secret pre-strike ballots, there has not been one application for a ballot since 1 January 1998, when the legislation came into effect. This is in spite of applications being able to be made by an employer or employer organisation, as well as by a union or union member. The Minister also has the power to issue a certificate that a ballot would be in the public interest, whereupon the Commission must order it to be held. The Discussion Paper notes, in relation to WA:

"There have already been a number of apparent breaches of the Act." (p15)

The June 1999 report of the non-Government members of the Public Administration Committee of the Western Australian Legislative Council into the *Labour Relations Legislation Amendment Act* 1997 reported confirmation by the Western Australian Industrial Relations Commission that the legislation had not been used as at 9 June 1999, 17 months after proclamation. (p30)

The UTLC submits that existing provisions are generally unutilised, not because they are difficult to access, but because in the face of an actual dispute, parties and other affected persons have not taken the view that a ballot would be effective in preventing industrial action or resolving the dispute.

It is interesting to note that the Bill proposes to remove the Commission's discretion under section 135(2B) to order a secret ballot in the case of unprotected action; this is part of a general thrust by the Government to create a legislative framework in which legal action is the only possible response by employers to unprotected legal action, rather than encouraging the use of Commission processes to resolve the dispute which has given rise to the industrial action.

In this context, the Government's proposals for a system of compulsory secret ballots cannot be seen as anything other than an attempt to further restrict the ability of Australian unionists to take protected industrial action, bearing in mind that this right is already more restricted than in most other developed countries.

The Minister's refusal to consider secret ballot requirements to call off a strike is conclusive evidence that this proposal has nothing to do with democratic functioning, and everything to do with restricting the right to strike. Further evidence is provided by the lack of any support for proposals such as compulsory secret postal shareholder votes on issues such as takeovers, or whether or not a company should lock-out its employees.

THE BILL

The process

The process for obtaining and implementing an order for a secret ballot set out in the Bill adds additional time-consuming complexity to the taking of protected industrial action, reflected in the 35 pages which would be added to the Act if the Bill was to be passed. The UTLC submits that the process would be of such complexity that it would nullify any practical right to take protected action.

Although proposed section 170NBCA provides that the Commission must act as quickly as possible when it receives an application for a ballot order, and, as far as possible, must determine an application within four days of its being made, employers and others wishing to delay the action will be able to argue a number of issues before the Commission, such as the validity of the bargaining period and whether or not the union has genuinely tried to reach agreement. In addition, procedural issues, such as who should conduct the ballot, the roll and the timetable are all issues for debate which can be used for delay.

With the potential of appeals, which would presumably delay the holding of a ballot, it is impossible to predict how long the period between the application for a ballot and its commencement would take, but weeks and even months is a certainty.

To this must be added a period of around three weeks for the Electoral Commission or the private ballot agent to actually conduct a postal ballot, followed by three days notice to the employer before the action can take place.

The ballot paper and subsequent action

The question on the ballot paper proposed in the Bill must include the precise nature and form of the proposed action, the day or days on which it is proposed to take place and its duration. This limits the scope of the authorisation provided by a ballot in a totally unacceptable way, with the effect of restraining the ability to take protected action in practice.

The content of the ballot paper should be contrasted with the equivalent provisions of UK law. The requirements of the system are set out in a Code of Practice *Industrial Action Ballots and Notice to Employers* issued by the Secretary of State for Trade and Industry pursuant to section 203 of the *Trade Union and Labour Relations (Consolidation) Act* 1992, with the authority of Parliament. Under the UK system of pre-strike ballots, the ballot paper must include one of these two questions:

Are you prepared to take part in a strike?

Are you prepared to take part in industrial action short of a strike?

Both questions can be asked and, if both are carried, this allows for a later decision to be made about the form of action to be taken.

It should be noted that there is no requirement for the ballot question to provide any more detail about the type of action, nor must it include a commencement date for the action or its proposed duration. The ballot operates as a general authority to one or more persons, who may be union officials or workplace delegates, to make a call for industrial action at some time after the ballot. The current requirement is for the first call for industrial action to be made not less than four weeks from the date of the ballot; the Blair Government has introduced legislation to increase this to eight weeks with the consent of the employer.

Once a ballot agreeing to industrial action has been carried, the union may decide to authorise or endorse industrial action, which may be continuous or discontinuous. Employers must be given seven days notice of the date or dates on which action is intended to commence.

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.

In particular, unions are not tied to a type and duration of action specified in the ballot paper, but are able to make decisions about action subsequent to a ballot, on an ongoing basis, so long as notice is given to the employer.

Under the system proposed in the Bill, a union would have to go through the whole ballot process each time it wishes to take industrial action. For example, a ballot might be held for one week's industrial action, which the union hoped would convince an employer to negotiate more realistically. Following the industrial action, further negotiations might take place, and break down once again. In this situation the union would have to wait weeks, if not months, before it could again take industrial action.

The ballot paper must also include statements in relation to the secrecy of the ballot, the prohibition on forcing or pressuring a voter to vote in a particular way, and the availability of the Employment Advocate to give advice and assistance. [s170NBDA]

While these statements may not be especially objectionable, the same cannot be said about another statement to be included on the ballot paper, to the effect that there is no requirement for the voter to take industrial action, even if a majority vote for it, and that it is illegal to be paid wages while engaged in industrial action. At the very least, the statement should also say that if the voter takes industrial action pursuant to the ballot, no legal action can be taken by the employer against such action.

The quorum

The Bill proposes that in order to authorise industrial action, a quorum of at least 50 per cent of eligible voters must cast a vote, of which more than 50 per cent must approve the action. [s170NBDD]

The UTLC submits that it is inequitable to require a quorum, and asks the Committee to note that no quorum for voters is required under the UK legislation. (Ministerial Discussion Paper p17)

The ILO Freedom of Association Committee has held that while:

"the obligation to observe a certain quorum.....may be acceptable...........The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises". [Freedom of Association Digest, 4th (revised) edition, paras 507&510]

The Western Australian report referred to above says in relation to quorum requirements in a voluntary system of voting

"....each failure to exercise the capacity to vote has the effect of an arbitrary determination of that failure to vote as a 'no' vote.

"The right to abstain from a voluntary vote is a democratic right which is widely practiced in Australian society......

"The broad purpose of section 97C of the Act is to provide a mechanism to determine whether union members wish to engage in a form of industrial action or not. It is inevitable that in most cases some members will want to strike, others will not, and others will not want to make a decision either way. A ballot should be able to reflect that range of opinions, and our administrative processes should facilitate a fair expression of those views." (p47)

Although the Western Australian legislation to which these comments are addressed requires a higher quorum than the Bill, the principles are the same. There is simply no justification to require more than a simple majority of valid votes case, the system which applies,

not only in the UK system of pre-strike ballots, but in the election of UK politicians, and the President of the United States. If the quorum requirements in the Bill were to operate in the US, there would not have been a validly elected President.

Two examples should be considered, both involving workplaces of 100 employees. In the first, 49 employees in the ballot vote, all in favour of strike action. In the second, 50 employees vote, 26 of them in favour of strike action. In the first example, strike action would not be authorised, while in the second it would, even though it would appear that there was substantially greater active support for the strike in the first example.

Cost of the ballot

The long-standing principle in Australia is that where the Government determines who shall run a ballot, it pays the costs, as is the case with union elections. It is completely unfair to impose requirements on private organisations to have ballots run by a government body, and then require the organisation to pay the costs.

The Western Australian regulations provide that costs associated with the ballot are reimbursed by the Registrar to the entity conducting the ballot.

The Bill, on the other hand, proposes that unions would be reimbursed only 80 per cent of costs, which the ACTU believes is totally unacceptable.

Conclusion

In his Second Reading Speech on the Bill the Minister put great emphasis on the position of the Australian Democrats in support of direct democracy and secret balloting processes. The Minister does not go on to acknowledge Senator Murray's finding in relation to the 1999 Bill that these processes are currently available under sections 135 and 136 of the Act, and his conclusion that:

"However, the new provisions pose great dangers of actually escalating conflict, lengthening disputes, and making for more litigation. (see submissions from Professors Isaac and McCallum) The committee heard evidence concerning the poorly designed Western Australian secret ballot laws, forced through their compliant upper house before the Coalition lost control over it. They have been an utter failure.

"In short, the provisions of this Schedule add little to industrial democracy and add greatly to impediments to unions to undertake legitimate industrial action, while opening up the prospect of longer disputes and litigation.

"This schedule should be opposed outright. It does not add to industrial democracy."

WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2000

The existing termination of employment provisions are far too complex, involving a number of discrete stages, in which there is excessive scope for jurisdictional points to be argued, directing attention and resources away from the substantive issues of the termination. However, these are not issues, which have any general effect on employment or the economy, although the Government attempts to link restriction of rights in relation to termination with job creation, a link which simply does not exist. (*See also references from academics in the UTLC 1999 submission.)*

In his minority report to this Committee's Inquiry into the *Workplace Relations (Unfair Dismissals) Bill 1998*, Senator Murray conclusively demonstrated that:

- The relatively small number of unfair dismissal applications, particularly from employees of small business meant that this could not possibly be a major problem in respect of employment;

- Surveys showing small business concern about the issue were characterised by loaded questions and confusion between federal and state legislation;

- No evidence supported the claim that abolition of unfair dismissal laws would create employment.

Senator Murray's report asserted strongly that fair laws in relation to termination is a human rights issue, and that the concept of "a fair go all round" contained in the 1996 amendments to the Act, gave the Government what it wanted in respect of unfair dismissal.

Senator Murray did express some concerns about the existing system:

"There do appear to be problems, which this bill does not address, concerning the Commission and its operation…..There are also claims concerning the way the legal system is operating. It is in the interests of all parties concerned with unfair dismissal, if the Commission's processes are made as quick and inexpensive as is consistent with the needs of justice, and if the process of law does not become manipulative."

The UTLC would support measures which would make access to the unfair dismissal jurisdiction quicker, simpler and less legalistic, but not if this would involve any diminution of employees' rights to challenge an unfair or unlawful termination.

As Senator Murray put it:

"It is neither fair nor right to deny essential protection to employees against rogue employers."

THE BILL

The Bill's proposals in relation to termination of employment are entirely focussed on restricting applicants' access to a remedy for unfair treatment, rather than to providing more efficient and effective procedures to ensure that the Government's stated objective of "a fair go all round" is achieved in practice. In large part, the proposals are attempts to overturn decisions of the Commission with which the Government disagrees.

Eligibility

The proposed new section 170CCA would have the effect of preventing employees coming within the scope of the Act from seeking a remedy for unfair dismissal under state legislation, even though, in practice, they were denied a remedy under the Act under any of the exclusions in the Act and the Regulations. *(Note the SA jurisdiction pioneered unfair dismissal from the Dunstan years and despite some amendments has stood the test of time with some easier processes. In no way can it be linked to employment issues.)*

In a recent decision [*City of Mandurah v Hull* (2000) WASCA 216], the Western Australian Industrial Appeal Court held that a federal award employee could apply for a remedy under the state legislation. In finding that there were no grounds for concluding that the state parliament "did not intend to legislate for the benefit of all employees in Western Australia who are unfairly dismissed," Anderson J stated:

"Of course, there is nothing to stop a State legislature from expressly confining access to statutory remedies for unfair dismissal to employees whose conditions of employment are fixed by State awards or agreements or by the common law. But such legislation is prima facie discriminatory and an intention to legislate in such a manner should not be implied too readily."

The Court distinguished the Western Australian case from the NSW case of *Moore v Newcastle City Council; Re The Civic Theatre Newcastle* [(1997) 77 IR 210] which held that federal award employees were not able to apply for a remedy under state legislation. Anderson J also commented that the decision in *Moore* had been "persuasively criticised".

The UTLC submits that this proposal represents an unwarranted intrusion into an area of state legislation; it is open to a state government to legislate to either include or exclude federal award employees from the scope of its unfair dismissal legislation, but this should not be done for it by the Federal Government.

Independent contractors

The UTLC opposes the proposed new subsection 170CD(1A) which would exclude independent contractors from a remedy in relation to termination of employment.

Presumably this proposal is a response to a suggestion by Finkelstein J in *Konrad v Victoria Police* [Federal Court, 9 August 1999] that the ILO Convention, which the termination of employment provisions put into effect, is not limited to the "unsettled, and in some respects outdated, common law meaning of 'employee'". Finkelstein J then discussed a number of North

American decisions which have extended the definition of "employee" beyond its common law meaning in applying employment law to "dependent contractors" such as newsboys and owner-drivers.

It should be noted that a Full Bench of the Commission has declined to adopt the *Konrad* dicta by accepting an independent contractor as an "employee" for the purposes of an application under subsection 170CE(1). [*Sammartino – and – Mayne Nickless Express* Print S6212]

Rather then continuing to leave the issue to the courts and the Commission, the Government is intent on continuing to narrow the scope of the provisions. The approach to independent contractors who have been unfairly dismissed is completely inconsistent with the Act's provisions in relation to freedom of association which do extend to contractors.

Demotion of employees

The UTLC opposes the proposed new subsection 170CD(1B) which would exclude employees who were unfairly demoted, from claiming a remedy, even though the demotion also involved a wage decrease (albeit not a significant decrease) and in effect amounted to a termination of employment.

Applications out of time

The principles currently applied by the Commission in determining applications for extension of time were established in *Kornicki – and – Telstra Network Technology Group* (Print P3168) and can be summarised as follows:

- Prima facie, the time limits should be complied with.

- Primary consideration should be given to whether there is an acceptable explanation for the delay and the merits of the substantive application.

- Depending on the circumstances of the case, regard may be had to: Whether the applicant actively contested the decision to terminate; Prejudice to the respondent caused by the delay.

The effect of the proposed amendment to 170CE(8) would be to alter the current requirement to show that it would be unfair to reject an application to a positive finding that it would be equitable to do so.

The proposed new section 170CE(8A) somewhat narrows the criteria to be considered by the Commission.

Similarly unfair is proposed repeal of subsection 170CF(8). The UTLC can see no reason to remove an employee's ability to apply for an extension of time to lodge an election to proceed either in the Commission or the Court. It is submitted that the criteria relating to such an

application should be the same as those applying to an application for an extension of time to lodge the application itself.

The UTLC opposes section 170HBA, which prohibits a second application being made in relation to the same termination. The effect of this would be that if an applicant mistakenly applied for a remedy against the wrong employer (and employees do not always know the identity of the employer, as the MUA case showed), which means the application would be struck out, a second application correctly naming the employer could not be made.

Dismissal for want of jurisdiction

The UTLC opposes proposed new section 170CE, the effect of which would be to permit employers to use jurisdictional objections to delay proceedings and place additional financial and psychological pressure on employee applicants.

Commission certificates

The proposal to prevent applicants from proceeding to arbitration if the Commission has certified that the claim in respect of harsh, unjust or reasonable termination is unlikely to succeed will have the effect of transforming initial conciliation proceedings into mini-hearings, rather than genuine opportunities for the parties to reach agreement and avoid litigation.

With the right to arbitration at stake, applicants will have no choice other than to put their evidence before the Commission, and insist that the proceedings be conducted in a judicial manner. The result will be the opposite of what is intended; that is, an earlier commencement of the legal proceedings, with consequent hardening of positions.

In the inquiry into the 1999 Bill, the law firm Maurice Blackburn Cashman said of this proposal:

"The Commission's assessment of the merits of the applicant's case must be made without the benefit of hearing evidence under oath from the witness box. Clearly, the Commission's ability to make such an assessment will depend on the evidence produced. In our experience, the factual positions of the parties at conciliation are often polarised. If applicants stand to lose their entitlement to elect to go to arbitration their advisers will have a duty to effectively run a trial at the conciliation conference which will prove the applicant's claim on the balance of probabilities.

"This approach guarantees that the costs involved for both parties proceeding to conciliation will increase dramatically. The focus will also inevitably move away from the current objective of conciliation to settle the matter in a relatively non-legalistic and informal settlement process.

"In our experience, the accessibility of the current conciliation process provides applicants with an opportunity to confront their grievances with the employer and come to terms with the fact of the termination. we see this process as critical to an effective resolution of the matter.

"The proposed amendment will inevitably result in conciliations becoming more legalistic and adversarial as arguments on the merits of the applicant's case become the central focus of proceedings. This

threatens to marginalise the key layers in the conciliation process, that is, the employee and the employer themselves. With the focus likely to move away from pragmatic options for settlement of the matter, conciliators in the Commission will take on an entirely different role in the process. We anticipate that the proposed amendments will result in fewer claims settling prior to arbitration. Both parties stand to incur significantly increased legal costs." (Submission No. 477, pp12-13)

There is a very substantial difference between this proposal and recommendation 5(a) of Senator Murray's report on this Committee's inquiry into the *Workplace Relations Amendment (Unfair Dismissals) Bill* 1998. After stating a belief that "there may be deliberate time wasting and cost pressure put on applicants or respondents for tactical reasons", Senator Murray recommended:

"A greater onus needs to be placed on the Commission to establish at the conciliation stage the merits of an employer or employee's case, and to provide preliminary advice accordingly. That might include a warning that in any subsequent award of costs, or decisions as to orders, such preliminary advice might prejudice such costs or orders if the parties ignore advice which is subsequently upheld, or if the matter is not settled by agreement within a reasonable but short period, or if the matter is subsequently contested, and lost by the party which ignores such advice."

The Commission currently has an obligation under section 170CF to issue a certificate at the conclusion of conciliation in which it must indicate to the parties its assessment of the merits of the application.

The Commission has had regard to certificates given pursuant to subsection 170CF(2) in determining applications relating to costs. In *Cooms v Australian Meat Holdings* (Print P2337) the Commission stated:

"Parties who ignore adverse assessments in certificates do so knowing that the peril they are likely to face is a claim for costs. When such claims are made the existence of an adverse assessment in the certificate is a factor to which the Commission must attach considerable weight."

The proposal in the Bill does nothing to address any problem of alleged time wasting or cost pressure; in fact it does the opposite, by requiring preparation of affidavits and other evidentiary material prior to commencement of conciliation.

The potential for unfair results is also clear. The SDA put evidence before the inquiry into the 1999 Bill of a case where the conciliator had expressed a view to the effect that the applicant should not proceed with the case. Nevertheless, the applicant elected to proceed to arbitration, whereupon, on testing of the evidence through cross-examination, a settlement was achieved based on reinstatement and full backpay. This result, for a young person employed by a fast food chain, could not have occurred if this proposal was enacted. [Submission No. 414, Attachment 12)

Considerations in arbitration

The UTLC is opposed to proposed new paragraph (da), which requires the Commission to take into account the degree to which the size of the business would be likely to impact on the

procedure followed in effecting the termination. This implies that small business cannot be expected to carry out fair procedures in respect of termination of employment. *SA is essentially a small business State and the impact on employees would be most unfair.*

The UTLC questions the commonly accepted wisdom that special assistance to small business, beyond the fair application of our system of economic regulation, including the promotion of competition, is justified on the basis that, first, small business is a good thing in itself and, second, that this will be of assistance in creating employment

Certainly it is correct that there has been a modest increase in the employment share of small business. Between 1983/4 and 1996/7 the proportion of employees in businesses with fewer than 10 employees increased from 22.6 per cent to 26 per cent, and in businesses with fewer than 20 employees from 34.4 per cent to 37.7 per cent. Employment in small business grew by 373.1 per cent between November 1996 and August 1998, while employment in large business fell by 137.5 per cent in the same period. [ABS Cat. 6248.0]

A paper produced for the then Industry (now Productivity) Commission [Revesz J & Lattimore R *Small Business Employment* August 1997] argued that although growth in small business employment has been at the expense of larger business, it should not be inferred that this is because small business creates jobs. The economy is seeing a fall in business size as large enterprises outsource or peel off some of their functions. Privatisation and outsourcing in the public sector has simply meant a transfer of employment to small businesses performing the same functions. Structural changes in employment, with a shift away from large manufacturing and the public sector to the service sector, traditionally dominated by small business enterprises, is also a significant factor.

Simply because jobs occur in small business is no more an argument for special assistance than is an argument to prop up big business to stop it destroying jobs.

Successful special pleading by small business simply leads to a distortion of enterprise structures, as companies continue to take advantage of these beneficial conditions.

In his report to this Committee when it examined the *Workplace Relations Amendment (Unfair Dismissals) Bill* 1998, Senator Murray found that the federal unfair dismissal laws were not oppressive for employers, and that small business was actually underrepresented in unfair dismissal cases. In conclusion, Senator Murray stated:

"Many of the employee relationship problems small business have continue to be those related to owner/manager skills, training and experience in managing people."

This proposal is part of the Government's crusade in support of its view that small business cannot be expected to meet reasonable standards of fairness towards employees. The Senate has refused to accept this view in relation to other legislation, and the UTLC urges the Committee to recommend that the same position be taken in relation to this proposal.

The UTLC also opposes proposed subsection 170CG(4) which provides that a termination on the grounds of operational requirements is taken not to be harsh, unjust or unreasonable. This would exclude all employees terminated allegedly for redundancy, whether or not the circumstances were fair to that employee. A redundancy typically involves two decisions; first, that retrenchments will be made and, second, which employees will have their employment terminated. If the second decision is made on grounds which are unfair, an employee should have a right to a remedy.

Shock, distress or humiliation

The proposed new subsection 170CH(7A) is another example of the Government's desire to reduce the Commission's discretion in relation to unfair dismissal, and many other matters. Given the limitation under subsection 170CH(7) on compensation exceeding six months remuneration, there cannot be an issue of excessively high compensation resulting from consideration of shock, distress or humiliation caused by the manner of the termination.

This proposal would appear to be a response to the decision of a Full Bench of the Commission in *Liu – and – Coms 21 Limited* (Print S3571) which held that there was power to award compensation for shock, distress or humiliation, although an appeal against such an award was upheld on the basis of the facts of the case itself. The Full Bench adopted the approach of the Industrial Relations Court in *Burazin v Blacktown City Guardian Pty Ltd* [(1996) 142 ALR 144], in which the Full Court concluded:

"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 $2,000, to $5,000."

Contingency fee arrangements

It is difficult to see what is gained by requiring parties' legal representatives to declare whether they are engaged on a "no win, no fee" basis. Such arrangements are neither illegal, nor contrary to the codes of conduct of the legal profession. They are not secret, with a number of firms widely advertising that these arrangements are available in relation to a range of proceedings, of which unfair dismissal is only one.

The only effect of requiring a declaration at the commencement of proceedings would be to create a perception that there was something untoward about such arrangements when, in fact, they enable applicants, who are not generally in a strong financial position, having just lost their employment, to have access to legal representation when this would not otherwise be the case.

This is the view of the Law Council of Australia, which stated in its submission to the inquiry into the 1999 Bill that:

"Increasing restrictions on Legal Aid funding have imposed an increasing burden on practitioners to facilitate access to justice. Contingency fees serve that purpose. In at least one jurisdiction, contingency fees are given statutory recognition: see s.186 Legal Profession Act 1987 (NSW).

"The Law Council considers that the proposal in relation to contingency fees and costs agreements will probably have the effect of restricting or impairing the quality of parties' access to justice." (Submission No. 468, p6)

The UTLC is aware of some regional areas of Australia where legal firms require upfront payments before they will represent an applicant in an unfair dismissal case, with the effect that many unfair dismissals remain unchallenged.

The thinking behind this proposal seems to be that lawyers under such an arrangement have an interest in unnecessarily prolonging proceedings, even involving weak or unmeritorious cases, because it is only if there is a settlement or a decision in the applicant's favour that there is any possibility of being paid.

The reality is somewhat different. Law firms operating on a "no win, no fee" basis have an interest in declining cases which are weak or unmeritorious, and regularly do so. There is also no interest served by prolonging proceedings without strong reason to believe that a positive outcome is likely.

Concerns about the constitutionality of the proposal have been raised by Slater & Gordon Solicitors. (Submission No. 412, p17)

The UTLC opposes this proposal.

Costs orders

The proposal to amend section 170CJ to provide that costs may be awarded against an applicant to whom it should have been reasonably apparent that there was not a substantial prospect of success, or against any party on a number of other grounds, is objectionable on two grounds; first, because it will operate as a disincentive to employees to pursue their claims irrespective of their merit and, second, because it effectively provides that an applicant has no right to pursue a case unless there is a substantial prospect of success, presumably determined by the Commission after the event. The proposal to allow the Commission to require applicants to lodge security for costs would act as an even further disincentive to sacked employees to pursue their case, as few would be prepared to stake their house, car or termination pay in the event that they are ordered to pay the employer's costs, irrespective of the strength of the case.

The Commission already has the power to issue costs orders against parties who make applications without reasonable cause and/or act unreasonably in connection with the

proceedings. The Commission has proved itself prepared to make these orders in roughly equal numbers against applicants and respondents.

Orders against advisers

The proposal for fines for representatives who encourage unmeritorious or speculative proceedings, with the onus on the representative to prove that this did not occur once a prima facie case has been made out, is an outrageous interference in the relationship between representatives, whether they be lawyers, union officials or other persons and their clients or members.

In no other court or tribunal, do advisers face the threat of fines for giving advice, nor are they required to make an independent assessment of the facts of a case other than the instructions received from their client. The proposal can have no other intention than to discourage lawyers and union officials from assisting applicants in proceedings related to alleged unfair dismissals.

The UTLC submits that the considerations raised by the Law Council of Australia in its submission (No. 468) should lead the Committee to recommend that the Senate not pass this proposal. In summary, these considerations are:

- While a case may not appear winnable on the law as it currently stands, law is a process of continuous development and there should not be a prohibition on suggesting new interpretations to tribunals;

- Where a client is advised that a case should not proceed, but wishes to do so, there are cost orders available for vexatious or unreasonable claims;

- There will be situations where advisers are forced to disclose what ought to be confidential communications with clients, whether or not these are subject to the law of legal professional privilege;

- There is no evidence that unmeritorious claims are made in spite of the availability of cost orders against applicants.

WORKPLACE RELATIONS AMENDMENT (TALLIES AND PICNIC DAYS) BILL 2000

TALLIES

While the Minister, in his Second Reading Speech, claims that award-based tally systems operate exclusively in the meat processing sector, this is not necessarily the case.

In at least two submissions made to the Committee in relation to the 1999 Bill, concern was expressed that the removal of tallies could have a, possibly unintended, effect on the Commission's powers outside the meat industry.

The Australian Workers' Union explained that piecework formulas for shearers are based on a "tally" of a set number of sheep per week. (Transcript 8 October 1999, p149)

The Liquor, Hospitality and Miscellaneous Workers' Union gave evidence about disputes in hotels about the number of rooms (Tallies or "dargs") allocated to room attendants, and expressed concern that removal of tallies from subsection 89A(2) would strip the Commission of jurisdiction to resolve these disputes, which are essentially about work overload. (Submission No. 326, pp20-21)

Material about the operation and history of the tally system can be found in the AMIEU submission to the inquiry into the 1999 Bill (Submission No. 521)

In relation to the current meat industry award provisions, the Industrial Relations Commission finished hearings on 23 August in relation to outstanding matters arising from its decision last year to remove detailed tally provisions from the Federal Meat Industry (Processing) Award 1996 and to replace these with a facilitative provision for an "incentive payment system".

The Commission has determined most of the issues relating to the conditions applying to such an incentive payment system, including the process for agreeing to its introduction and for varying or withdrawing from it. It has reserved its decision on a "non-reduction" provision to ensure that employees are not excessively disadvantaged by the removal of tally provisions.

Following this final decision, which is expected shortly, the Commission will then review each award in the meat industry in line with the 1999 decision and its implementation:

"A number of our conclusions in this case about the provisions of Appendix 3 will apply equally to similar provisions in many other awards. However, we must qualify that observation in relation to some awards. We expect that our general findings would be widely applicable. Findings and conclusions based on the detailed provisions of the FMIP Award and its operation may need to be considered carefully against the detail of a particular award before being applied. Subject to that qualification, we would expect applications to vary those provisions to be dealt with in accordance with this decision, subject to some important reservations we now mention.

"We were told that some tally provisions have been updated and are not subject to the deficiencies identified in this application. Where it can be demonstrated that this has occurred and the provisions are in active use, the case for the deletion of the provisions might not be compelling, depending on the circumstances overall……….

"In any simplification proceedings concerning other federal awards in the industry a party which seeks to retain the tally provisions will bear the onus of demonstrating that those provisions do not include deficiencies of the type in Appendix 3, and that it is appropriate that the award retain a prescriptive tally system. Unless the Commission is satisfied on those two issues, the tally provisions are to be deleted and

replaced by provisions dealing with incentive systems along the lines which we have provisionally determined in this case, and will finalise in due course." (Print R9075, paras 149-151)

In relation to the meat industry, there are two major concerns which flow from the proposed deletion of tallies from subsection 89A(2).

First, although the word "tally" is not used in the Commission's draft incentive payment clause, the incentive system used in meatworks is overwhelmingly based on "inputs, rather than outputs", the phrase used by the Minister to define tallies in his Second Reading Speech. This fact could lead to an interpretation that the protections contained in the incentive payment facilitative provision would not be allowable.

Second, the effect would be to remove existing tally provisions from other meat industry awards without the process determined by the Commission and described above.

The Minister cannot have it both ways. On one hand, he welcomes the Commission's decision, as in the Second Reading Speech, and on the other hand seeks to remove the Commission's jurisdiction in order to "expedite the modernisation of these awards".

The UTLC submits that the Commission has adopted principles and a process for dealing with tally provisions, and should retain its jurisdiction to complete the award simplification process.

PICNIC DAY

The proposal to remove union picnic days from awards reflects nothing other than the Government's ideological obsession with unions. The issue of relevance, raised by the Minister in his Second Reading Speech has a peculiar lack of logic, given general observance of the Queen's Birthday holiday in a country with majority support for a republic, and of a number of Christian festivals of no relevance to the growing non-Christian proportion of the population.

Picnic days have been provided for in awards since the 1920s, and are part of our industrial relations history and tradition. Fewer unions hold picnics now than in the past; *in SA one large annual picnic day in the building industry at Christmas is still widely supported and popular and overall is regarded by industry as beneficial.* Picnics are held by a number of unions, particularly in the building industry, the meat industry, local government and by the NUW. These events are of great significance to the thousands of workers and their families who attend in order to celebrate unionism, their industry or occupation, family and community.

Falling church attendances and a crisis in church membership is not used as a rationale for abolishing the holidays which coincide with Christian festivals, which are considered to be part of the nation's history and tradition. The UTLC submits that there is no justification for treating picnic days any differently.

In its submission to the Committee in relation to the 1999 Bill, the Commonwealth reported that around one third of all federal awards contain a picnic day provision, including 40

of the top 100 awards. While most awards provide for picnic day as a substitute for a state-designated holiday (such as Melbourne Cup Day) it is an additional day in a minority of awards. (Submission No. 329, p292)

The Commission has, in its Public Holidays Test Case (Print L4534) determined that the standard number of holidays will be ten, plus an additional day determined on a state, local or other basis. The Full Bench held, in relation to the additional day:

"We do not intend our accommodation of State-determined holidays above the safety net standard to be the basis of double-counting, achieved by identifying the additional day in some other manner. For example, we envisage that in Victoria the additional day which is part of the safety net standard will normally be Melbourne Cup Day or a local equivalent. If the additional day is a union picnic day, this will be in lieu of Melbourne Cup Day." (p20)

In the relatively small number of cases where awards provide for union picnic day over and above the standard number of holidays, the result of enacting this provision may be a reduction in total entitlement to holidays. The UTLC submits that this would be particularly unfair to the employees covered by those awards.

In general, however, the effect would be to require a substitute day to be determined, involving inconvenience to employers and a need for some 750 awards to be brought before the Commission for variation.

Based on the Test Case decision referred to above, it could be assumed that the additional day in Melbourne would be Cup Day, with its local equivalents in the rest of Victoria. It should be noted that employers in the hospitality industry vigorously opposed a union application to substitute Cup Day for Picnic Day. if the union had been successful, employers would have been required to pay penalty rates to the large number of casuals employed on Cup Day, one of the busiest days in the year for the industry. As Picnic Day falls on a relatively quiet day, most casuals are not rostered to work, and therefore receive no payment at all. The Commission refused the union's application. (Print P1349)

Substitution of picnic days would also inconvenience enterprises employing persons under both federal and state awards, given that a large proportion of state awards contain provision for picnic days, which is also a legislated holiday in the ACT.

The award simplification process has given employers, unions and the Commission the opportunity to examine the continued relevance of picnic days in awards. The issues involved should be left to the parties and the Commission to resolve, rather than encouraging the Minister in making cheap political points about an entitlement about which there has been no evidence of employer or employee concern.

CONCLUSION

The UTLC urges the Committee to recommend that the Senate not pass the Bills.