SUBMISSION OF
SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION
TO
WORKPLACE RELATIONS AMENDMENT
(TERMINATION OF EMPLOYMENT) BILL 2000

LATE APPLICATIONS CONCERNING TERMINATION OF EMPLOYMENT MATTERS

A key objectionable amendment being made to the termination of employment provisions, relates to the repeal of existing Section 170CE(8) and the insertion of new sub-sections 170CE(8) and (8A). The Government intends, through this proposed amendment to Section 170CE to significantly tighten the circumstances in which a late application for a termination of employment matter can be dealt with by the Commission.

At the present time there is a wealth of case law, both in the Commission and through the various Courts, which deal with the circumstances in which the Commission should accept a late application of a termination of employment matter. This case law has been developed over a number of years through numerous late applications having been filed before the former Industrial Relations Court and before the Industrial Relations Commission.

The case law has ensured that only in those circumstances, where it is reasonable and fair in all of the circumstances, should a late application be entertained by the Commission. The case law has given effect to the prime obligation on the Commission and the Courts in relation to termination of employment matters and that is to ensure a fair go all round.

The Coalition Government's proposals to amend Section 170CE(8) and to introduce a new Section 170CE(8A) will impose an extremely onerous test for an employee seeking to make a late application.

USING CONCILIATION PROCEEDINGS TO EXTINGUISH EMPLOYEES' RIGHTS

A serious defect and inequity created by the Coalition Government's proposed changes to the termination of employment provisions, concerns a number of changes to be introduced, all of which have a common element.

The Coalition Government intends to amend Section 170CEF(2) to insert a provision that will require the Commission, at the conclusion of a conciliation in relation to an unfair dismissal, to issue a certificate indicating the applicant's likelihood of success if the matter proceeded further.

The subsequent amendments that the Coalition Government proposes to make, in particular the proposed 170CF(3), (4) and (5), provide that wherever the Commission, at the conclusion of the conciliation, issues a certificate which states that in the Commission's view, the applicant is not likely to succeed at an arbitration, then the applicant has no right whatsoever to proceed to arbitration.

The effect of these several amendments is to give to the Commission at the conciliation stage, the power to effectively terminate an employee's right to proceed against an employer for a claimed unfair dismissal.

The worst feature of these changes is that an employee's rights to take an action against an employer on the grounds of an unfair dismissal will be extinguished before the employee has an opportunity of leading any evidence to the Commission.

The Senate must understand that at a conciliation proceeding, the conciliator, (who is not likely to be a sitting Commission member) proceed on the basis of submissions made from the bar table by the employee or their union or advocate, and from the employer or their representative.

At the conciliation hearing, the conciliator does not conduct a full hearing at which sworn evidence is taken.

Currently the intention of the conciliation process is to avoid further litigation and costs to be incurred by the parties. It is expected that both parties submit a brief, yet accurate, version of events. There is little opportunity to present documentation and currently, conciliators will not want to peruse any documentation. The conciliator will issue a certificate after the conciliation (in some cases the conciliator does not hear from any party but only reads the

application). The certificate states what the conciliator believes are the merits or not of the case. This does not preclude parties going to arbitration.

The danger of the proposed amendment is that either or both parties will not present a true argument in the hope that they will either get a certificate which will support them, or order them to discontinue.

Conciliators are not sitting members of the Commission. The majority are retired Federal and State Commission members.

The conciliation hearing relies primarily, if not solely, on the assertions of the respective advocates or applicant and respondent, to the Commission.

This means that truthfulness, accuracy and merit are not tested nor assessed in this process.

If the proposed amendment is passed then in conciliation the whole case (all details surrounding dismissal, and leading up to dismissal, witness evidence and documentation, plus arguments) would need to be presented.

The time period for a single conciliation is 1.5 hours. This is flexible, but it allows enough time for the parties to currently outline the case and then for some negotiating/bartering. If the amendment goes through, then more time would need to be allotted. A Commission member would be required to hear it. This will no doubt further delay the matter.

If the intention of the proposed amendment is to try to reduce arbitrations, then the conciliation process needs to be examined as well as the conciliators.

The real effect of the proposes changes will be that the advocate who can spin the best story, even if it is a pack of lies, will inevitably succeed in having a certificate issued which expresses the applicant's likelihood of success or failure in their favour. In other words, if the employer can throw enough mud at the employee at the conciliation hearing, and concoct a better story, there is every likelihood that the member of the Commission will issue a certificate saying that the employee is not likely to succeed if the matter goes to arbitration.

Lies, Lies and more Lies

The Association has been involved in several conciliation conferences concerning unfair dismissal applications where the member of the Commission has expressed a view that the applicant employee was not likely to succeed if the matter went to arbitration. In most instances, this view is formed simply on the basis of how the employer was able to colour their assertions and submissions to the member of the Commission. The views expressed by members of the Commission had nothing to do with whether or not there was any evidence which could support the **coloured** version being presented to the Commission by the employer.

The Association has, on several occasions, continued to pursue matters to arbitration even where a member of the Commission, at the conciliation stage,

had expressed very strong views that the employee was not likely to succeed at arbitration.

In several of these cases, the Association has either had the matter determined in favour of the applicant or, at the very least, during the arbitration proceedings the employer has settled.

In one case the Employer Advocate rang the Association's representative the day after the conciliation conference to apologise for the fact that at the conciliation the employer representative was under instructions to "*do a job*" on the applicant, even though the employer representative knew that what was being put to the Commission was a highly **coloured** version of events that ignored the justice of the case. At arbitration the employee won his case and was reinstated.

The proposed changes to termination of employment make a mockery of the Government's assertion that it will provide a genuine forum for employees to have tested their assertions that they have been terminated harshly, unjustly or unreasonably.

As the very notion of conciliation precludes the consideration of sworn evidence, the Government, by its changes, is aiming to prevent employees from having an effective opportunity of testing their assertions through the introduction of sworn evidence on their own behalf and through the proper testing, often by way of cross-examination, of evidence introduced by the employer.

Conciliation is not Arbitration

To allow conciliation to extinguish an employee's legal rights is a gross attack on the concept of due process. So fundamental is the notion of due process, that the Association is of the view that, should these changes be introduced by the Senate and the Parliament, the matter of whether or not a member of the Commission at a conciliation stage can extinguish the rights of an employee without having considered sworn evidence will invariably have to be tested in the High Court.

Contingency Fee Agreements and Unmeritorious Applications

The **Association supports** the proposal to introduce proposed Section 170CIA dealing with contingency fee arrangements.

In the Association's view, these provisions effectively deal with the "ambulance chasers" who have cropped up in the termination of employment jurisdiction over recent years.

However, whilst the provisions relating to "costs arrangements" and contingency fee agreements are expressed in terms which have equal application to employer and employee representatives, the same cannot be said of the proposed amendments concerning Unmeritorious and Speculative Proceedings in the new proposed subdivision G of Division 3 of Part VIA.

These provisions have been drafted so as to apply only to workers.

The amendments, whilst making it an offence for an employee to make or pursue an unmeritorious application, do nothing to address the issue of

employers making unmeritorious applications or running unmeritorious delaying tactics, or defences to a termination of employment application.

It is this total lack of balance in relation to unmeritorious or speculative proceedings which should lead the Democrats, and indeed the whole Senate, to throw out the proposed amendments.
A close examination of proposed Section 170HE makes clear how one-sided the Bill is.

Whilst an adviser to an employee cannot encourage an employee to make an application that the adviser is aware has no reasonable prospect of success, there is nothing to prevent an adviser to the employer encouraging the employer to make applications or adopt arguments which the adviser is aware have no reasonable prospect of success. The fact that unreasonable defences are pursued should come as no surprise to the Senate given the celebrated case of Justice Callinan when he was at the bar.

In his Second Reading Speech the Minister, Mr. Reith, argued that, "*Amendments in the Bill will remove the scope for forum shopping by potential applicants.*"

The difficulty with this proposition is that it is only true in relation to some potential applicants. Proposed Section 170CCA is interestingly titled "*Division to cover the field in certain cases*". As the title of the Section makes clear, it is only in certain cases that the Commonwealth Act will cover the field. Whilst the Minister is arguing that the Bill will remove the scope for forum shopping by potential applicants, this is not true of all potential applicants. Proposed Section 170CCA merely complicates the issue by excluding some potential applicants from being able to access state law, whilst leaving in place the capacity of some potential applicants to access state law.

This is brought about by the fact that proposed 170CCA(2) provides an exclusive federal jurisdiction only in relation to federal award employees who are either employed by constitutional corporations or employed as waterside

workers, flight crew etc. What this means in practice is that federal award employees who are employed by non-constitutional corporations, i.e. a sole trader or a partnership will continue to have access to the state law if they are otherwise excluded from the federal law.

The practical consequences of this provision is that a casual employee with less than 12 months service employed by a constitutional corporation will, by virtue of the operation of the Workplace Relations Act, not have access to the federal jurisdiction in relation to a claim of unfair dismissal and equally will be excluded from having access to any provisions of any law of the state in relation to unfair dismissal.

However, a casual employee with less than 12 months service employed by a non-constitutional corporation or business will be excluded from having access to the federal unfair dismissal provisions but will have access to any provisions of a law of the state covering unfair dismissals.

Even if only some employees are going to continue to have access to state laws where they are otherwise excluded from federal laws, then equity should demand that all employees who may be excluded from federal laws should have access to the state laws. The Senate is urged to reject the specific provisions of Section 170CCA.

Proposed Section 170CD(1A) will define an employee to exclude a person who is engaged under a contract for services. The essential purpose of this proposal is to exclude independent contractors from having access to unfair termination provisions. The real difficulty with this approach of the federal government is that the courts and the Commission have often had to struggle with the problem as to whether or not a person is an employee or an independent contractor. Often work is contracted out to persons when in fact all of the indications of the nature of the relationship between the worker and the person offering work is that of an employer and an employee, even though a contract may be titled as a contract for services and the status of the worker titled that of an independent contractor.

The arbitrary exclusion of persons employed under contract for services from the unfair dismissal jurisdiction, may make it more difficult for the Commission and the courts to have proper regard to the reality of the nature of the relationship.

In a recent decision, a Full Bench of the Australian Industrial Relations Commission in Sammartino v Mayne Nickless, struggled with the dichotomy that exists under common law between employees and independent contractors. The Full Bench made it very clear the enormous difficulties that workers who provide nothing other than their labour find themselves in when they are categorised as performing work under a contract for services.

The Full Bench decision drew attention to decisions of the federal court and academic writings which stress the need for the area of employee versus contractors to be re-examined, especially in the light of the growth of what are known as "dependent contractors".

Even though a contract for services may be entered into, it is often the case that the worker supplying labour is dependent totally on the person offering the work. In such a circumstance, it is a fallacy to refer to the worker as an independent contractor when they are totally dependent upon the work offered to them. The concept of 'dependent contractor' makes clear that workers who, under a contract for services, are selling nothing other than their labour would be treated the same as employees.

The Senate is urged to reject the proposed Section 170CD(1A) and in fact is urged to amend the legislation so as to have an employee include a dependent contractor.

A particularly obnoxious provision of the Bill is the proposed Section 1760CD(1B) which will exclude persons who have been demoted from effectively utilising the unfair termination provisions of the Workplace Relations Act. A demotion will not be considered to be termination of employment if - (a) the

demotion does not involve a significant reduction in the remuneration of the demoted employee, and (b) the demoted employee remains employed with the employer who effected the demotion.

The obnoxious aspect of this provision is that firstly it allows an employer to demote an employee without the employee having an automatic right to claim that there has been an effective termination of employment. In contract, the unilateral demotion of an employee would constitute a breach of contract and would be actionable in the common law courts. If a demotion can give rise to a common law contract action, then equity should require that a demotion initiated by the employer should give rise to an application by the employee for a harsh, unjust or unreasonable termination of employment and an appropriate remedy.

The critical aspect of the definition of demotion is that it deals only with the concept of remuneration. Therefore, if there is no significant reduction in the remuneration of the demoted employee, then the employee is not entitled to take an action under the unfair dismissal provisions of the Workplace Relations Act.

What this hides is the fact that in many demotions, remuneration which may be the sum total of wages and other ancillary benefits, can be retained but that effectively the employee suffers greater harm or injury through the loss of status, the loss of functional reporting responsibilities, the loss of supervisory roles, etc. None of these matters are matters which fall within the concept of remuneration, yet they are critical aspects which go to the nature of the employer/employee relationship.

It is clear therefore that proposed Section 170CD(1B) would allow employers to inflict significant injury on employees without the employees having the right of an unfair dismissal application.

In support of proposed Section 170CEA the Minister, Mr. Reith, in his Second Reading Speech said, "*To help ensure the efficient processing of claims, the Bill*

confirms the Commission may hear applications by the respondent to have an application dismissed for want of jurisdiction at any time."

However, it is apparent to the Association, that Section 170CEA goes much further than helping to ensure the efficient processing of claims. In the Association's view, it is clear that Section 170CEA is a powerful new weapon in the armory of employers who will seek to delay, frustrate or draw out applications made genuinely by employees. There is nothing within Section 170CEA which will prevent an employer from making an unmeritorious or speculative application in relation to a jurisdictional issue. Nor can the employer be the subject of any punitive costs if the employer moves for dismissal on the grounds of jurisdiction even though the employer or the employer's advisor knows that such an application has no reasonable chance of success.

If Section 170CEA is to have any efficacy and equity, then costs should attach to any respondent who moves for the dismissal of an application on the jurisdictional ground when that application has no reasonable chance of success or where that application is made simply to delay or frustrate the application by the employee.

The Bill repeats a theme often proclaimed by the Government, namely that small businesses should be protected from employees making unfair dismissal claims. Whilst the Government has sought, on several occasions, to exempt small businesses from all of the operation of the unfair dismissal jurisdiction, in this Bill the Government makes a particular claim in relation to protecting small businesses. Proposed Section 170CG(3) (da) proposes to require that the Commission has to consider, in relation to whether the dismissal was harsh, unjust or unreasonable, "*the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting termination*".

The Minister, in his Second Reading Speech, argues that this provision is necessary because small businesses do not have the same human resources as

large businesses. Given that small businesses have the same access to employer organizations and legal and other advisors as any medium or large business, it is surprising that only in the area of unfair dismissals does the Minister assert that small business lacks the capacity to do the right thing.

In the Association's very strong submission, this proposed provision in the Workplace Relations Act is nothing other than an attempt to defeat the legitimate claims by workers who have been unfairly dismissed by small businesses.

In the Association's very strong submission, small businesses should not be differentiated from any other businesses when it comes to the need to act fairly, justly and reasonably in relation to an unfair dismissal. The issue of procedure goes to the notion of the principles of natural justice and the Commission has sufficient flexibility and discretion to adjust its decision making to take into account the realities that currently occur in any business. However, at the end of the day there are fundamental aspects of the principles of natural justice which should not be able to be removed simply because a business is a small business.

Small businesses require fair and equitable treatment when they deal with larger corporations. So much has been proven by the fact that the Government introduced the fair trading provisions into the Trade Practices Act specifically to protect small businesses from unfair conduct by larger corporations. If it is good enough for small business to be the recipient of fair treatment, then it also must be good enough for small businesses to be the dispensers of fair treatment.

Proposed Section 170CG(3)(da) removes from small businesses the obligations that they seek to impose upon everyone else, namely fair treatment and equitable treatment.

Proposed Section 170CG has been supported by the Minister in his Second Reading Speech, on the basis that operational requirements is equated with

redundancy. The difficulty with this proposition is that proposed Section 170CG has not been drafted so as to limit it to redundancy situations. Rather, the very breadth of the term 'operational requirements' means that employers will be able to effectively hide behind the cloak of 'operational requirements' to justify dismissals and thus be excused from facing a claim for an unfair dismissal.

The structure of Section 170CG means that an application by an employee will not be able to be considered by the Commission unless the circumstances are exceptional. Given that neither the term 'exceptional' or 'operational requirements' are clearly defined within the Bill, it must be considered that such a provision will invariably work to the disadvantage of employees.

As the Commission already has an overriding obligation to apply a fair go all around in relation to any unfair dismissal before it, there appears to be no justification whatsoever for the presence of proposed Section 170CG. Any issues relating to operational requirements which would give rise to a justified or fair termination of employment, are already adequately able to be dealt with by the Commission under the existing provisions of the Workplace Relations Act.

Proposed Section 170CG adds nothing to the Workplace Relations Act in terms of making the process fairer but adds everything in relation to giving an unfair advantage to employers against employees that they have unfairly dismissed from their employment.

Proposed Section 170CH(7A) removes from the Commission the capacity to give compensation to employees for matters such as compensation for shock, distress or humiliation or other analogous hurt which has been caused by the way in which the employee was terminated from their employment.

It appears that the Government is aiming to protect employers from the consequences of their own action. The concept of awarding compensation for shock, distress, humiliation or other like hurt, has only come about because of

some of the horrendous ways and manner in which employers have effected a termination of employment. If an employer not only seeks to act unfairly but also to add injury to the unfairness by creating shock, distress or humiliation to an employee so terminated, then the employer should be required to pay compensation for that shock, distress, humiliation or other analogous hurt.

If, as proposed Section 170CH(7A) would provide, that an employer can only be held accountable for the strict unfairness of a termination, it will, in our view, encourage employers to be even more brutal in the manner in which they terminate employees than they already have been. If employees are protected absolutely from any order for compensation for shock, distress, humiliation or other analogous hurt caused by the employer to the employee as a result of the way in which the termination was carried out, this will be nothing other than a green light to employers who wish to act in such an unconscionable and inhumane manner.

The Senate is urged to reject this provision.

Proposed Section 170CJA is an extremely one-sided provision which only applies to an employee. If the concept of security for costs is to be incorporated into the Workplace Relations Act then it should be a provision which applies equally to both sides.

Given the propensity of employers to adopt any possible course of action or tactic which may delay the finalisation or settlement of an unfair dismissal claim or which may put such pressure on the employee so as to have the employee withdraw their claim, then a provision as to security of costs against an employer may go a long way to streamlining unfair dismissal processes before the Commission.

SUBMISSION OF
THE SHOP DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION
TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE ON THE
WORKPLACE RELATIONS AMENDMENT
(TALLIES AND PICNIC DAYS) BILL 2000

The Shop, Distributive & Allied Employees' Association expresses its very strong opposition to this proposed Bill and we urge the Senate to reject the Bill in its entirety.

This Bill deals with only two matters, namely the removal from the current list of allowable award matters in Section 89A of the Workplace Relations Act of two specific existing allowable matters, namely tallies and picnic days.

In his second reading speech, the Minister, Mr. Reith, supported the removal of tallies from the list of allowable award matters on the basis that "t*he award based tally systems which operate exclusively in the meat processing sector are a major disincentive to productivity and efficiency in that sector"* and, "*the removal of tallies from awards is long overdue and has been widely advocated within industry and by policy makers across the political divide."*

The real difficulty with the Minister's justification for the removal of tallies from the list of allowable award matters is that the Minister has focused on the existence of tallies in one industry only i.e. meat processing, and has sought to use that to justify removal of tallies as an allowable award matter across all industrial disputes that may come before the Australian Industrial Relations Commission.

The Association does not have tally systems operating in any federal or state retail awards to which we are a party. The Association does not support the concept of tallies for the retail industry. However, having said that, the Association is still intractably opposed to the removal of tallies as an allowable matter in Section 89A.

It is important for the Senate to understand the ramifications of removal of tallies from the list of existing allowable award matters. Whilst the Minister has

focused upon the use of tallies in the meat processing industry where tallies are part of the award system for the purposes of remunerating workers, equally tallies as an allowable award matter can be used to prevent the abuse of tally system in an award. The Association does not want to see the introduction of tally based work in the retail industry. Awards of the Australian Industrial Relations Commission that relate to the retail industry have a comprehensive classification structure which is based upon well established and arbitrated relativities between existing classifications inside each award and with the key benchmark classification of the tradesmen in the metal industry award.

The retail industry awards use very broad descriptors for the work for each classification, for example, in the Shop, Distributive & Allied Employees' Association (Victorian Shops) Interim Award 2000, an award which has been simplified by the Commission pursuant to the provisions of the Workplace Relations Act 1996, the definition of the key classification of shop assistant is expressed as follows:

> *"Retail Worker Grade I means a shop assistant, a sales person, an assembler, a demonstrator, a ticket writer, a window dresser, a merchandiser and all others."*

A generic classification such as this is designed to enable a shop assistant to perform all of the functions that are usually or normally associated with being a shop assistant in the retail industry without the need to specify each individual function with any particularity. When applied to retail workers in supermarkets, it can be seen that a critical function of a shop assistant in a supermarket is to operate the cash register system. The normal function of a shop assistant working on a cash register in a supermarket is to scan through the items purchased by the customer and then to take the payment from the customer.

Whereas former technology required a shop assistant to key in the price of each product that was being purchased by the customer, modern technology for point of sales systems requires that the shop assistant scan the bar code of each product which automatically generates the price of each product as an

item on the cash register. It is this process of scanning which is the main function of a shop assistant employed on a cash register in a supermarket.

Under existing federal awards in the retail industry, a Retail Worker Grade I is paid a weekly or hourly rate regardless of whether or not there is a heavy volume of customers going through the cash registers. The payment is determined for the skill of the job and is to be applied when the shop is busy just as much as when a shop is quiet. There is no requirement on a shop assistant to meet any specified target of work output in order to be paid the award required wages and conditions of employment.

One feature that has started to emerge in the retail industry is the introduction by employers of expected scan rates for employees employed on point of sale terminals. Employers have introduced the concept of a scan rate in order to increase the output of each employee employed on the cash register. This is predominantly a feature of supermarkets.

At the present time, if any employer seeks to use a scan rate as a means of either pressuring a worker to work harder, or to discipline or caution a worker about poor performance, the matter can be appropriate dealt with under the disputes resolution procedures of the relevant awards, and ultimately, be referred to the Australian Industrial Relations Commission for conciliation and/or arbitration. If the dispute is serious enough, the Commission has the ability at the present time to make binding orders exercising its arbitral functions in relation to a dispute over scan rates.

It should be appreciated by the Senate that the concept of scan rates is identical to the concept of tallies. In fact the term "tally" would incorporate scan rates. If tallies, as an allowable award matter, was removed from the jurisdiction of the Commission, the Association would have no capacity to take a matter involving a dispute over scanning rates at a point of sale in the supermarket to the Commission for arbitration. Whilst the Commission would still be able to exercise its conciliation functions in relation to such a dispute, the Commission would not be entitled to arbitrate in relation to such a dispute.

The Association does not want scan rates to be used as a form of controlling method of payment for shop assistants, or to be used as a defacto means of setting unfair workload requirements for shop assistants which are inconsistent with the current classification system in the award and which are inconsistent with the normal expectations of the value of work of a shop assistant. If tallies are removed as an allowable award matter, then employers would be able to use and impose scan rates on shop assistants without fear that the matter could be subject to arbitration by the Australian Industrial Relations Commission.

Whereas the Government is keen to remove tallies as an allowable matter so as to remove from the meat processing industry the concept of payment based around tallies, the Association is keen to keep tallies within the list of allowable award matter so as to prevent employers from introducing tallies into the retail industry by stealth.

There should be no misunderstanding - scan rates are tallies. The concept of a tally is not a concept limited solely to the meat processing industry. As a subject matter, tallies include all forms of work where inputs, rather than outputs, are measured. In the retail industry, inputs are the scanning of items through a cash register, the output is clearly the conclusion of a sale with the customer.

A real difficulty with the approach of the Government in removing the concept of tallies from the list of allowable award matters is that it does not prevent the existence of tallies as a method of control of work and remuneration.

The only limitation that will occur from removing tallies from the list of allowable award matters is that the Australian Industrial Relations Commission will not be able to arbitrate in relation to such matters.

Given the concerns of the Association as outlined above in relation to the possibility that tallies can be forced upon workers in the retail industry, then, in our very strong submission, if the Senate was minded to support the Government by removing tallies from the list of allowable award matters, it should, as a natural consequential measure, insert a provision into the

Workplace Relations Act which prevented any employer from introducing any form of tallies in relation to any work covered by any award of the Australian Industrial Relations Commission.

If the Commission is to be denied the capacity to regulate work based upon tallies or the introduction or imposition of tallies on workers, then employers should be prevented from utilising any form of tally based system of work in conjunction with any work which is covered by an award of the Commission.

The second aspect of this Bill is the intention of the Government to remove picnic days from the list of allowable award matters. The Association is opposed to the reduction of picnic days from the list of allowable award matters.

Awards of the Australian Industrial Relations Commission covering the retail industry, do have reference to picnic days within them. In particular, the ACT picnic day is a key public holiday which applies to the entire retail industry in the Australian Capital Territory.

The effect of removing picnic days from the list of allowable award matters would be to effectively reduce existing award entitlements of ACT employees by one day.

A number of awards of the Australian Industrial Relations Commission refer to picnic days in the context of the Public Holidays Test Case provisions. In these awards, picnic day is invariable taken as the 11th day which is the entitlement of all employees under federal awards.

Where the 11th public holiday has been generically referred to as picnic day, it is not a day limited only to union members, or only to those who attend a union picnic. It is, in fact, a provision which guarantees all employees under the respective award the 11 public holidays, determined by the Australian Industrial Relations Commission, as being the minimum entitlements for all employees under federal awards.

Removal of picnic day from these awards would have the effect of initially removing the 11th public holiday from such employees. Whilst this may be able to be recovered by having the Federal Commission issue a new public holiday test case decision renaming the 11th public holiday under these awards, the complexity associated with such a course of action is sufficient to justify the Senate not touching the current list of allowable award matters.

Given that the entire issue of public holidays is heavily constrained by the Australian Industrial Relations Commission in terms of its public holidays test case decisions, it is clear that the existence of picnic days as an allowable award matter is not an invitation to unions to simply seek additional paid days leave under any award. Access to picnic days in any event would be constrained by the application of the public holidays test case decisions of the Australian Industrial Relations Commission.

In the Association's submission, the Senate is urged not to amend the Workplace Relations Act to remove picnic days from the list of allowable award matters as such a course of action will create uncertainty, may lead to real disadvantage being suffered by workers, and would in any event create significant additional workload for the Australian Industrial Relations Commission, employer organisations, and unions in order to correct all awards so as to maintain the value of the public holidays test case decision issued by the Australian Industrial Relations Commission.

Submission of the
Shop Distributive & Allied Employees Association
to the Senate Employment Workplace Relations
Small Business and Education Legislation Committee
Inquiry into the Workplace Relations Amendment
(Secret Ballots for Protected Action) Bill 2000

The Association is opposed to this Bill in its entirety. The most damning aspect of this particular Bill is its extreme one sidedness.

The Minister in his Second Reading speech in arguing for a more democratic process to be introduced into decision making concerning the taking of protected industrial action, noted that "this will ensure the protected industrial action is not used as a substitute for genuine discussions during a bargaining period." And that, "these measures will improve the quality of Workplace Relations in our community".

Quite clearly the Minister is concerned to introduce a 'grass roots' level involvement in any decision taken in relation to protected industrial action. If the Minister and the Government are serious in extending the democratic processes relating to the taking of protected industrial action to the grass roots level, then it would appear that it is necessary and absolutely essential in order to maintain a balanced perspective on the taking of protective industrial action, that employers are also subject to the same secret ballot provisions.

There have been numerous examples where employers have been prepared to take protected industrial action in the form of lock out of workers. Some of these lock outs have been of extensive duration, example, O'Connors Meatworks in Victoria and Joy Manufacturing in NSW.

Where an employer is a corporation or partnership, then there should be an absolute obligation on the employer to test, through a democratic process, the views of its constituent stake holders to see whether or not they support the taking of protected industrial action against employees.

This is one of the areas where, if it is good enough to impose a condition on workers, then its good enough to impose exactly the same condition on employers.

It would appear that the Government believes that Chief Executive Officers of major corporations which may have large shareholders can effectively be a law unto themselves and be the decision maker for and on behalf of their constitutents. It would appear that the Government takes the view that shareholders of corporations have no right to have a say in relation to such serious issues as the taking of protected industrial action by a corporation against its workers.

If however the Government is concerned to promote democratic processes in relation to the taking of protected industrial action and to ensure that the taking of protected industrial action is not used as a substitute for genuine discussions during the bargaining period, then it would appear that placing the same secret ballot obligations on employers as will be placed on employees will encourage employers to genuinely try to reach agreement on a matter in dispute, and will also genuinely promote discussions in the bargaining period between the employer and the employees and their representatives.

Given that the Bill is structured as a one sided piece of legislation, the Senate is urged to reject the Bill in its entirely. Until such time as there is equality of obligation on employers and employees in relation to the taking of protected industrial action, we would urge the Senate to reject such politically partisan legislation as is this Bill.

SUBMISSION OF
SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION
TO
WORKPLACE RELATIONS AMENDMENT
(AUSTRALIAN WORKPLACE AGREEMENTS PROCDURES) BILL 2000

The Association opposes all aspects of this Bill and urges the Senate to reject the Bill in its entirety.

The Coalition Government has retained Australian Workplace Agreements (AWAs) but have made significant changes to the current legislative regime. The Minister, in his second reading speech, identified one of the key changes in the proposed Bill when he said, "The current filing and approval processes for AWAs would be amalgamated to ensure a much simpler and speedier formalisation process". If this was the sum total of the changes proposed by the Government, the changes would probably be non-contentious. However, in streamlining and amalgamating the filing and approval processes, the Government has gone significantly further than making mere administrative changes to the processing of AWAs.

Removing The Requirement Of An Employer To Sign A Statutory Declaration

A critical change introduced by the Government in the proposed changes to the Workplace Relations Act will positively encourage employers to be less than honest in their dealings with workers in making Australian Workplace Agreements.

Currently the Act provides in Section 170VO(1)(b) that every AWA that is filed with the Employment Advocate must be accompanied by a statutory declaration

made by the employer.

The purpose of the statutory declaration is to require the employer to state under oath that the employer has complied with the provisions of the Act in making an agreement with the worker, in particular, that the worker has been given the information statement prepared by the Employment Advocate.

The proposed changes in the Bill remove any requirement whatsoever on the employer to make any declaration under oath that the employer has acted in conformity with the Workplace Relations Act when making an Australian Workplace Agreement with the employee.

The Government, in removing the requirement on an employer to file a statutory declaration, merely argues that this is part of the process to streamline the current filing and approval processes. However, it can be seen that the removal of a current requirement to have an employer declare on oath that the employer has complied with the requirements of the Workplace Relations Act, removes a significant protective provision for the employee in the Australian Workplace Agreement making processes.

Having removed the requirement that an employer file a statutory declaration attesting to the compliance with the Act, the Government proposes to replace the statutory declaration requirement with a significantly watered down requirement for the provision of information to the Employment Advocate. In the proposed Section 170VC(3)(b), the Government proposes that the AWA should be accompanied by "any other information the Employment Advocate

requires, by notice published in the gazette, for the purpose of performing his/her functions".

This new proposed provision will leave it solely to the Employment Advocate to determine what, if any, additional information will be required for the purpose of approving AWA's.

There is no requirement on the Employment Advocate to require any additional information.

Given the track record of the Employment Advocate, and the overall general secrecy of AWA processes, one can have no confidence that the Employment Advocate will require the employer to declare under oath she/he has complied with all the provisions of the Australian Workplace Relations Act.

This measure would appear to be a desperate attempt by the Coalition Government to increase the utilisation of AWA's on the basis that it removes from employers the obligation to make declarations under oath that they have acted in compliance with the Act when entering into AWA's with their employees.

The double standards applied by the Government in relation to AWA's can be seen by the fact that there is an exact opposite approach in relation to certified agreements.

The current practice of the Australian Industrial Relations Commission in certifying agreements is to require very detailed statutory declarations to be filed by parties to an agreement. Whilst the current provisions of the Workplace Relations Act do not specify the requirement for a party seeking to have an agreement certified to file a statutory declaration, this matter is dealt with in the Rules of the Australian Industrial Relations Commission. In fact, the Australian Industrial Relations Commission not only requires a statutory declaration but has gone to extraordinary lengths to specify the detail required to be contained in a statutory declaration.

The current rules of the Australian Industrial Relations Commission, have as a form, the format for a statutory declaration that must be filed by an employer and a union in relation to having an agreement certified by the Australian Industrial Relations Commission.

Clearly the Government proposes one rule for certified agreements and another rule for AWA's. In fact, it can be seen that the Coalition Government intends to remove the last effective constraint upon employers in making AWA's. Given the secret nature of AWA's and the fact that the work of the Employment Advocate is beyond scrutiny, the only feature of the current AWA making process which can give any confidence to any member of the public or the Parliament that employers are acting honestly and fairly is the requirement that an employer must file a statutory declaration with the AWA.

Taking away the statutory declaration requirement is effectively giving a green light to employers to do as they please in breaching the terms of the Workplace

Relations Act when making agreements with their employees.

There is simply no legislative provision in the proposed Bill which will guarantee that employers have complied with all provisions of the Australian Workplace Relations Act prior to making an application for the approval of an AWA.

Penalty provisions which are designed to punish an employer who lies to the Employment Advocate **are quite illusory** given that such penalty provisions can only apply, if an employer is caught out. Given the track record of the Employment Advocate, it is our very strong submission that the Employment Advocate will never chase up and prosecute employers simply because they have not acted in accordance with Workplace Relations Act when making AWA's with their employees.

In his second reading speech, the Minister explained the effective operation of these provisions when he said, "*This will mean that pending approval by the Employment Advocate there is a presumption that the AWA meets all the statutory tests*". This presumption that the AWA meets all statutory tests should not be allowed to be the hallmark of the operation of the Employment Advocate. Given the secrecy in which the Employment Advocate operates to approve AWA's, there should be no automatic presumption that an employer has acted in conformity with the requirements of the Workplace Relations Act in making an AWA.

The Minister does not suggest that the same presumption should apply to the making of certified agreements. Given that certified agreements can only be

processed where appropriate declarations are made by employers and unions, the conclusion must be drawn that the Minister wishes to make the presumption of regularity in relation to AWA's in order to deliberately hide the fact that irregularities either have consistently occurred in the past, or will occur in the future under the proposed changes to the Act.

In our very strong submission, these changes to AWA provisions should be strongly resisted by the Senate.

IT LOOKS AND OPERATES LIKE AN AWA, BUT IT IS NOT AN AWA

Importantly, by streamlining the approval process, the Coalition Government has made a significant change in relation to the commencement of operation of AWAs. In consequence of the proposal that there no longer be two separate processes of filing and approval, the Government has sought to simplify the effective operation of AWAs by allowing an AWA to commence operation from the date it is signed but before it is approved..

This, in itself, may appear to be unremarkable, except for **one critical issue**.

An AWA should be required to meet the no disadvantage test as well as any other statutory requirement before it becomes legally operative.

However, the Government's approach is to put the 'cart before the horse', namely to provide that an AWA will become legally operative from the date it is signed or from the date the employment commences, even though that AWA has not been sighted or approved by the Employment Advocate.

The new proposed Section 170VBD creates **two dangerous new concepts**.

Firstly, that an AWA can operate without having been the subject of any scrutiny by the Employment Advocate for compliance with the statutory requirements of the Act.

Secondly, and even more insidiously, an AWA can have legal operation for a period of at least 60 days even if the AWA is never the subject of an application to the Employment Advocate, or it is ultimately rejected by the Employment Advocate.

This second insidious new concept arises through the operation of Section 170VBD(d). This particular new provision has the effect of allowing an AWA to commence operation from the date it is made and to continue to operate for a period of at least 60 days, even if at the end of that 60 days no application is made by the employer to the Employment Advocate for approval of the AWA.

The real effect of Section 170VBD will be to create an entirely new class of legally binding instruments, i.e. documents titled AWAs but which are never the subject of any compliance with any of the statutory provisions for Australian Workplace Agreements, and which have not been sighted or approved by the Employment Advocate.

The effect of proposed Section 170VBD will be to allow an employer and an employee to make an agreement which may fail the no disadvantage test of the

Act and which may fail all the statutory requirements for approval of an AWA, yet still give the employer the benefit of a legally enforceable and binding instrument against an employee for a period of at least 60 days.

Given the very high casualisation of employment within the retail sector, it can be seen that such an instrument would be a massive boon to employers as a way of both avoiding their obligations under existing awards, as well as never having to meet the no disadvantage requirements imposed upon approved AWAs.

Casual or short term employees employed for a period of up to 60 days will be able to be employed under instruments which by virtue of Section 170VBD will be legally enforceable even though they are never sighted or approved by the Employment Advocate and even though they may be in total breach of the no disadvantage test of the Workplace Relations Act.

It must be assumed, and we do so, that it is the clear intention of the Minister and the Howard/Reith Coalition Government to create this new instrument as a means of giving an unfair advantage to unscrupulous employers in forcing new employees into AWAs which will never see the light of day and/or which would never pass the no disadvantage test if sighted by the Employment Advocate.

New proposed Sections 170VED(4), 170VEE(2) and 170VEJ have the combined effect of allowing a variation agreement to have legal operation of at least sixty days even where they variation agreement to an AWA is never made the subject of an application to the Employment Advocate. Similar to our submissions in

relation to Section 170VBD, it can be seen that the operation of 170VED(4), 170VEE(2) and 170VEJ will allow an instrument called a variation agreement to have legal effect for at least sixty days even if it otherwise would fail all of the statutory tests for a variation agreement and where it is never even the subject of an application to the Employment Advocate.

An important issue in relation to both the operation of proposed Section 170VBD and the combined operation of 170VED(4), 170VEE(2) and 170VEJ is that it will be possible for an employer and an employee to make AWAs or variation agreements each sixty days. These documents, called either an AWA or a variation agreement, will nevertheless have legal effect for a period of sixty days, notwithstanding that they may fail all of the statutory requirements for approval as an AWA or as a variation agreement. It is clearly possible for employers to simply make multiple sequential AWAs or variation agreements.

The cumulative effect of such multiple sequential AWAs or variation agreements will be to enable the employer to avoid totally the operation of the statutory requirements for making AWAs or variation agreements. Given that the document called an AWA or variation agreement will have legal effect, it means that in accordance with the provisions relating to the effect of AWAs in relation to State awards and State laws, these non approved, or never filed AWAs or variation agreements will nevertheless have the legal effect of excluding awards and State awards, even though the so-called AWA or variation agreement has never been the subject of a formal application to the Employment Advocate or has met the statutory requirements for approval.

When does an Employee get a Copy of their AWA?

Another critical failure in the proposed changes to the legislation concerning AWAs, is that under the guise of streamlining the process for making and approving an AWA, the Government has significantly changed the responsibilities upon employers in relation to information and documentation they must give to employees who are to become parties to an AWA.

The new proposed Section 170VBA provides for the making of an AWA. Importantly, there is a significant change from the existing legislation.

The key change in making an AWA under the proposed 170VBA is that **there is no requirement on the employer to give the employee a copy of the AWA for a reasonable period before the employee signs the AWA**.

The present AWA provisions require that the employee be given either 14 or 5 days notice of the intention to make the AWA and at that time must be given a copy of the AWA. Under proposed 170VBA(3) there is no requirement whatsoever on an employer to give an employee a copy of the proposed AWA before signing the AWA. In fact, the operation of proposed 170VBA(3) allows an employer to give the employee a copy of the AWA after the employee has signed the AWA. There isn't even a requirement that the copy of the AWA be given to the employee at the time of signing the AWA.

The only requirement in the new proposed legislative regime is that at some time prior to the employer making an application to the Employment Advocate, that a copy of the AWA be given to the employee.

Given our earlier submission in relation to the operation of Section 170VBD, it can be seen that **an employer can utilise the operation of 170VBD and 170VBA(3) to create a legally binding instrument against the employee without the employee ever having been given a copy of that legally binding instrument**.

Even where the employer has every intention of making an application to the Employment Advocate for the approval of an AWA, the proposed legislative regime makes no requirement on the employer to give the employee a copy of the AWA prior to the employer making the application to the Employment Advocate. So much for informed agreement making and for obtaining genuine consent from employees and ensuring that employees freely and genuinely choose to make AWAs. As so often occurs at the present time, the employees, especially new employees, will sign and make AWAs simply because if they don't enter into an AWA they will not be employed.

On top of this pressure on persons seeking employment will be added the fact that **the employer will not even be obliged to give the prospective employee a copy of the AWA prior to, or even at the time the employee signs the AWA**.

No Genuine Cooling Off Period

Whilst Section 170VBA(6) and (7) provide for a cooling off period, such a cooling off period is clearly a farce. It is absolutely unrealistic to expect the average employee to withdraw their consent to an AWA once they have signed it. This is

especially so both in those circumstances where entering into an AWA was a condition of being given a job and where the employee doesn't even have a copy of the AWA to take away and get advice on it.

It is clear in our submission that the notion of a cooling off period is nothing other than a cute, political and legislative device to enable employers to avoid any obligation of giving the employee a copy of the AWA at a reasonable period prior to making the AWA.

If the Government was genuinely concerned at streamlining the process for making AWAs, it should have no difficulty with ensuring that a streamlined process was based upon genuine information and genuine consent. The greater the detail of information given to employees prior to making an AWA, the fairer the process would be.

PROPOSED CHANGES TO THE WORKPLACE RELATIONS ACT IN RELATION TO AGREEMENTS THAT DO NOT MEET THE NO DISADVANTAGE TEST

Currently the Australian Industrial Relations Commission can approve AWA's or certified agreements that would otherwise fail the no disadvantage test where, in the opinion of the Commission, certifying the agreement is not contrary to the public interest. Whilst the public interest is not specifically defined within the Workplace Relations Act the current provision of Section 170LT(4) provides, "an example of the case where the Commission may be satisfied that certifying the agreement is not contrary to the public interest is

where making the agreement is part of a reasonably strategy to deal with a short term crisis in, and to assist in the revival of, the single business or part".

In relation to the process adopted by the Commission for approving AWA's or variations to AWA's where the AWA or variation would not otherwise pass the no disadvantage test, a note is attached respectively to Section 170VPG(4) and 170VPH(4) which in each case is identical to the wording of Section 170LT(4). Thus, clearly, it is the intention of the Parliament that for the purposes of applying a public interest test to approving a certified agreement or an AWA which would otherwise not pass a no disadvantage test, that regard should be had to short term business crisis or assisting in the revival of a single business or a part.

It is reasonable to infer that there is not a wide and very general open ended public interest test which can be applied to approving agreements or AWA's which would otherwise not pass a no disadvantage test.

In the proposed Bill, it is intended that the Commission will have no role in relation to approving AWA's which would otherwise not pass the no disadvantage test. The Bill provides, in proposed Section 170VCB and 170VCC that the Employment Advocate will have the capacity to approve an AWA which otherwise does not pass the no disadvantage test if the Employment Advocate is satisfied that it is not contrary to the public interest to approve the AWA, and where the Employment Advocate determines that public interest test in accordance with principles established by the President of the Australian Industrial Relations Commission.

Interestingly, **the proposed Section 170VCC and 170VCB do not include any notion that the public interest test is to be applied on the basis of assisting in the alleviation of short term crisis in a business. It would appear that it is the government's intention to allow the Employment Advocate a much wider ranging public interest test than is currently available**.

If the Parliament is to give power to the Employment Advocate to approve AWA's which would otherwise fail the no disadvantage test, the discretion of the Employment Advocate **must** be limited in the same way as the AIRC current discretion is limited.

In the Association's very strong submission, if it is the Parliament's intention (rather than merely the Minister's) that either certified agreements or AWA's, which would otherwise fail the no disadvantage can be approved because the approval is necessary to assist in overcoming a short term business crisis, then **there should be a very clear legislative provision limiting the life of such AWA's or certified agreements**.

In the Association's submission, wherever an agreement, either certified or AWA, is approved on the basis of the Commission or the Employment Advocate exercising a discretion to approve an AWA which would otherwise fail the no disadvantage test because of a short term business crisis, the period of operation of the agreement should be limited to no more than is absolutely necessary to test whether or not the agreement will assist in overcoming the

short term business crisis. At the present time, there is no prohibition on an agreement operating for a full three year period even though the agreement fails the no disadvantage test and has been approved solely for the purpose of overcoming the short term business crisis.

The critical difficulty with the current provision, and also with the proposed changes, is that an agreement can continue to operate for longer than is necessary to overcome the short term business crisis. A short term business crisis may be able to be resolved within say for example a one year period, however, the agreement, once approved by the Commission, pursuant to the Commission using its public interest test to overcome a short term business crisis, then the agreement can continue for a maximum period of three years which is allowed by the Act.

Given that a short term business crisis or measures designed to assist the survival of a failing business can have an indeterminate time frame, the Act should provide a maximum time limit on the operation of any agreement which has been approved by the Commission utilising its public interest powers to approve an agreement which would otherwise fail the no disadvantage test where approval is part of a reasonable strategy to deal with the short term crisis in and to assist in the revival of a business.

In the Association's submission, the maximum period in which an agreement should be allowed to operate in such circumstances should be for one year. There should be a legislative provision that at the end of the one year period of operation of such an agreement, the agreement ceases

to operate absolutely. There should be no need or requirement for any application to be made to the Commission to have the agreement terminated. The agreement should cease to operate by legislative prescription.

Where a short term business crisis is for a period longer than a year then there should be a capacity for employers and employees to make a second agreement following the first. However, such agreement being a new agreement, should be subject to separate scrutiny by the Commission and also be subject to the same one year maximum period of operation.

The importance in the Association's submission of placing a maximum period on the operation of any agreement which is approved under the short term business crisis provisions, is that employees will be genuinely protected from any potential misuse of these provisions once the short term business crisis has been overcome. The current provisions, and even the proposed provisions of Section 170VCB and VCC, are open to significant abuse by having agreements approved under the public interest test continue well beyond the conclusion of those factors which justified the utilisation of the public interest test.

When Is A Bad AWA In The Public Interest?

Another key aspect of the Government's proposed streamlining of the approval process of AWAs is to remove any involvement of the Industrial Relations Commission in approving AWAs which would otherwise not meet the no disadvantage test.

The new proposed Sections 170VCB(6) and (7) deal with the procedure to be applied by the Employment Advocate in approving AWAs which would otherwise not pass a no disadvantage test. The Employment Advocate, under those provisions, will be able to approve an AWA which would otherwise not pass a no disadvantage test if the Employment Advocate is satisfied that it is not contrary to the public interest to approve the AWA. In deciding the public interest, the Employment Advocate must apply principles developed by the President of the Industrial Relations Commission.

New proposed Section 170VCC provides that it is the President of the Commission who is to establish the principles which the Employment Advocate will apply.

There are two important criticisms of the Government's proposals in relation to this matter.

Firstly, if principles are to be established which relate to the application of public interest, then such principles should be established by a Full Bench of the Commission. It is the norm that principles which guide the Commission are developed not by the President alone, but by Full Benches of the Commission. That has been the norm during the entire life of the Australian Industrial Relations Commission and its predecessors.

It is novel and dangerous, in our submission, to give the power to establish principles to a single member of the Commission, even if that member is the President. The real strength of Full Bench consideration of establishing

principles has been borne out time and time again in relation to such important issues as principles concerning national wage case increases etc.

The **second** criticism relates to the application by the Employment Advocate of principles established by the Commission. Even if a Full Bench of the Commission establishes principles, it would not be proper, in our submission, for the Employment Advocate to apply those principles in secret. If the Employment Advocate is given the power to approve an AWA which would otherwise fail the statutory requirements of the Act and where the Employment Advocate can only approve that AWA on public interest grounds, such decision and consideration must be public.

Nothing will more undermine the public confidence in the office of the Employment Advocate than that he purports to be acting in the public interest, but does so in secret and behind closed doors.

If it is important enough to give the discretionary power to the Employment Advocate to approve AWAs which fail the statutory tests where approval of the AWA is in the public interest, the public has the right to know that the Employment Advocate has properly applied the principles established by the Australian Industrial Relations Commission.

There must be, in our submission, a requirement on the Employment Advocate when applying a public interest test to an otherwise failed AWA for the Employment Advocate to have a public hearing and to issue written reasons for his decision on the application of a public interest test.

AWA's and Successor Employers

A further matter of concern in relation to the new legislative regime for AWAs, is the new proposed Section 170VDD(3) which allows for the setting aside of an AWA in relation to a successor employer. If it is deemed acceptable that an AWA can, by order of the Employment Advocate, not apply to a successor employer, then the application to the Employment Advocate for the setting aside of that AWA must be able to be made by both the employee and the employer. To give the employer, and only the employer, a right to apply to have an AWA set aside under Section 170VDD is unreasonable and unjust. If an application can be made to set aside an AWA in relation to a successor employer then both parties to the AWA should be given the right to make that application. Proposed Section 170VDD(3) should be amended to ensure that an employee has an equal right to the successor employer to make an application to the Employment Advocate to have the AWA set aside.

TERMINATING AWA's

Whilst the Government asserts that its changes in relation to AWAs is to streamline the processing of AWAs, it is interesting to note that in relation to the termination of an AWA, where the termination is in accordance with the terms of an AWA, the Government has introduced new legislative provisions which are more onerous and more technical than the existing provisions. When comparison is made between the existing Section 170VM(6) and proposed Sections 170VEP and 170VEQ, it can be seen that the new process for terminating an AWA is significantly more onerous and more technical than the existing provision.

The effect of the proposed new Sections 170VEP and 170VEQ will be that it will make it extremely difficult for employees to have an AWA terminated even in accord with the termination provisions of the AWA. Whilst most employers will have no difficulty complying with 170VEP and 170VEQ, it must be assumed, and properly so, that the average employee will find it extremely difficult to comply with the onus and technical provisions of Section 170VEP and 170 VEQ in order to have and give effect to a termination provision that exists in an AWA.

In the Association's submission, Sections 170VEP and VEQ are designed to create an additional burden for employees whilst giving a deliberate benefit to employers. This will arise because if employees find it difficult to have an AWA terminated, then the employer will be given the benefit of having an AWA continue in operation, even though an employee may not wish it to do so.

In the Associations submissions, the Workplace Relations Act should be amended to provide that an AWA terminates absolutely, without any parties needing to do anything to initiate termination, on its nominal expiry date.

The nature of Australian Workplace Agreements is such that the individual agreement should terminate automatically in accord with a legislative provision requiring termination on the nominal expiry date.

There is nothing to prevent an employer and employee making a new AWA.

Additionally it must be remembered that the nominal expiry date can be

extended by agreement to a date no more than 3 years after the commencement date of the AWA.

PROTECTED INDUSTRIAL ACTION REMOVED

Another major issue in relation to the Government's approach to the revamping of the AWA provisions of the Workplace Relations Act is its approach to the abolition of the existing provisions of Division 8 of the AWA section of the ACT. Division 8 provides for protected industrial action taken by employees who are negotiating or parties to an AWA.

The Government has argued that there is no need for protected industrial action in relation to AWAs because of their individual nature. However, this argument disguises the reality that many employers are offering multiple AWAs to a large number of existing employees, all at the same time. In this context therefore, AWAs can be seen to be defacto collective arrangements. Workers, whilst being individually bound to an AWA, should have the ability to take protected industrial action in relation to their employer, on any matter concerning the negotiation of an AWA. It is not incompatible with the regime of the Act to provide protected industrial action for employees who are to become parties to an AWA.

In fact, the removal of Division 8 and the removal of protected industrial action from employees who are negotiating an AWA places such employees in a particularly disadvantageous position, viz-a-viz employees negotiating a collective agreement.

There appears to be no element of fairness or equity underpinning the Government's approach to removing protected industrial action from employees in relation to AWAs.

In his Second Reading Speech, the Minister, Mr. Reith, said in support of this measure: *"The AWA industrial action provisions appear to have rarely been threatened, let alone used."* Even if these provisions have rarely been used, the principle underlying the provisions justifies their continued presence in the Act.

In addition to the specific provisions of the Government's proposed changes to the Workplace Relations Act concerning AWAs, there are at least two other issues which need to be addressed by the Senate.

BARGAINING AGENTS

Firstly, the notion in both the current and the proposed legislative provisions concerning AWAs is that any employee is entitled to appoint a bargaining agent for the purposes of negotiating an AWA. However, this notional right that employees have is worth little or nothing if employees are not made aware of their ability to appoint a bargaining agent well before the process of negotiating an AWA commences.

There is no provision, either in the existing provisions of the Act or in the proposed Bill, which requires an employer to advise an employee, or new employee, that the employee is entitled to appoint a bargaining agent prior to any negotiation or making of an AWA. Whilst reference to the appointment of bargaining agents is contained in the current documentation provided by the

Employment Advocate, this is not a provision of the Act, but is merely an outcome of the documentation prepared by the office of the Employment Advocate.

In the Association's submission, there should be a legislative requirement that every employee is to be advised, in writing by the employer, at least a reasonable period before the employer proposes to make an AWA that the employee is entitled to appoint a bargaining agent for the purposes of negotiating and making an AWA.

In our submission a reasonable period would need to be of sufficient duration to enable the employee to properly consider an appointment of the bargaining agent. At the absolute minimum, the period of notice should be the five or fourteen days which currently applies to the making available of an AWA to an employee before an AWA is to be made.

Unfair Or Unconscionable Conduct V Coercion Or Duress

The second issue which we urge the Senate to consider, is in relation to the issue of coercion and duress in relation to AWAs.

Whilst the existing and proposed legislative provisions make it illegal for an employer to coerce or apply duress to an employee in relation to the making of an AWA or in relation to appointment of a bargaining agent, these terms "coercion", "duress" and similar terms have such specific legal meanings that it is difficult to prosecute employers who would otherwise simply act

unconscionably or unfairly.

In the Association's very strong view, there is an urgent need for a legislative provision requiring that an employer not act unfairly or unconscionably in offering, negotiating, or making an AWA or a variation or termination agreement.

The concepts of unfairness are clearly understood both at law and generally within the community. All small business people are well familiar with the unfair trading provisions and the recent changes to the Trade Practices Act concerning unfair conduct. Similar concepts should be incorporated into the provisions concerning AWAs. Limited legal definitions of coercion and duress should be replaced by a more readily and widely understood concept of unfairness. (See Part of this Submission - "Putting Fairness Back Into the Industrial Relations System" and Attachment 10.)

Where employers act unfairly in offering, negotiating, or making an AWA, that of itself should be grounds for the refusal of the AWA and for allowing an employee, who has been the subject of such unfair treatment, to seek compensation.

THE BIASED ROLE OF THE EMPLOYMENT ADVOCATE

In this and in previous submissions to the Senate on Bills proposing changes to the Workplace Relations Act, the Association has made adverse comments about the Employment Advocate.

The Association, in its dealings with the Office of the Employment Advocate and through its dealings with employers who have been pressured by the Employment Advocate in relation to union encouragement clauses, is in no doubt as to the bias of the Employment Advocate and his office in relation to AWA's.

That bias is clearly in favour of an employer who wants AWA's and that bias is clearly against any worker who complains of unfair or unlawful conduct by the employer in relation to an AWA.

In our submission the cumulative effect of (1) the proposed changes to the Workplace Relations Act in relation to AWA's, together with (2) the secrecy surrounding the processes of the Employment Advocate and together with (3) the overtly partisan and biased role of the Employment Advocate will deliver one outcome, and only one outcome, entrenching the disadvantage suffered by workers forced to work under Awa's.

This Bill should be rejected.