SUBMISSION
BUSINESS COUNCIL OF AUSTRALIA

to

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

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

The BCA is not a party to proceedings under the Workplace Relations Act 1996. Rather it is a non-partisan organization that transcends individual corporate interests and aims to provide business leadership to build a better society. This submission is made in the context of its objective to contribute directly to strategic and practical public policy formulation that promotes a competitive economic environment in which business succeeds and supports national social and economic objectives, including employment growth, low inflation, social cohesion and individual well being.

This includes protections for those who would not otherwise achieve fair employment outcomes and means of addressing unfair treatment. The vision of the BCA also includes –

"We want to grasp the opportunity for all Australians to enjoy quality of life and standards of living which are amongst the highest in the world. We want jobs for all who can work, support for the disadvantaged and a fair go for everyone. We want to be a community of Australians, united in our diversity, proud of our achievements, creating wealth and work for all." [1]

28 August 2000

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[1] BCA *New Directions* Discussion Paper No.1, March 1999.

EXECUTIVE SUMMARY

1. The Business Council of Australia (BCA) is strongly supportive of the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000 which supports the broader policy directions of –
   - Addressing the economic and social cost to Australians from our relatively high incidence of working days lost due to disputation under the existing dispute-based workplace relations system;
   - Workplace related agreement making taking place in non-adversarial environments and through a consensual and constructive approach that recognizes common interests in the performance of the enterprise or workplace.

2. The focus of the Bill is to introduce new provisions to the Act requiring unions and employees to conduct secret ballots before taking industrial action. Such industrial action will not have protected status under the Act unless a secret ballot has been carried.

   This precondition will not apply following the cessation of the suspension of a bargaining period, unless the industrial action proposed varies from protected action previously authorised by a ballot (Item 22).

3. This BCA submission focuses more at the policy level, rather than at the operational level. Many of the suppoerting reasons for these reforms were outlined in the relevant BCA submission to the Committee in respect of the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*.

4. From a strategic policy perspective, the BCA advocates that the future emphasis in workplace relations reforms should be on initiatives that structure the workplace relations system so it will encourage industrial outcomes that develop workplaces that are both nationally and internationally competitive and enhance personal achievement and satisfaction of individuals at work.

5. The main focus should be encouraging high performing workplaces with more and more employees accepting responsibility for negotiated workplace agreements that provide for rewarding, fair and flexible arrangements. Also it should be on creating higher levels of employment.

SUPPORTING ARGUMENT

6. The BCA strongly concurs with the policy objective of supporting workplace related agreement making taking place in less adversarial environments. Procedures for agreement making should allow for greater opportunity for open communication before recourse to protected industrial action is available.
7. Industrial action should not be used as a substitute for genuine discussions.

   Strike ballots deal with the effects rather than the causes of conflict. The commencement of industrial action can often result in the escalation of conflict. That is, strikes can be more like "throwing petrol on the fire", than acting as a "pressure valve". Therefore industrial action should not be commenced prematurely.
8. The final decision to take protected industrial action should be made by the employees directly affected.

   As employees who take strike action are not entitled to pay during strikes (s.187AA) it is appropriate that these are undertaken only with their prior approval. Employees should not be directed to undertake action that results in their loss of pay. Such decisions should be taken in a fair and democratic manner.
9. Secret ballots are more democratic than other options for triggering protected industrial action. In the 1989 NSW Green Paper on Transforming Industrial Relations in NSW, Professor Niland stated that –

   > "Concerns are frequently expressed regarding the need for secret ballots before industrial action is taken to ensure that members can exercise a democratic right. The view is often expressed that the silent and timid majority are outvoted by the industrially militant where open or no votes are taken before industrial action."[2]

   On the other hand there is the view that the balloting process is seen as a vote of confidence or no confidence in the union. In these circumstances members will be inclined to vote in support of the union irrespective of their views on the issue in dispute.

10. Employees who are requested or directed by a union to engage in industrial action may apply to the Commission for a ballot to find out whether members support the proposed action (s.136). This also occurs before the event.

11. At present industrial action will be protected only if it is authorised by union officials in terms of s.170MR, eg according to the rules of the union. However the existing legislation contains no requirement of how industrial action must be authorised under union rules. It is likely that the rules of a union will provide for the initiation of industrial action by means other than in accordance with the Bill.

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[2] Transforming Industrial Relations in NSW: A Green Paper, John Niland (1989), Vol 1, p.101, para 5.6.

12. The August 1998 Ministerial Discussion Paper *Pre-industrial action secret ballots* provided information on the process of undertaking secret ballots before strike action, including advice of international experience. The assessment of the UK arrangements supported the process, with appropriate adjustments for Australian circumstances.

13. The provisions sought are generally similar to the arrangements proposed in Schedule 12 (Secret ballots for protected action) as contained in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, with the following modifications –

    (a) Omitting references to industrial action in support of "pattern bargaining";

    (b) Ensuring that strike ballots do not override the requirement to comply with Commission orders in relation to negotiation (before engaging in industrial action) (Item 20);

    (c) Reference to the existing titles of the Industrial Registry and Industrial Registrar.

14. In its November 1999 majority report the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, after weighing up the various submissions, concluded –

    "10.71 A majority of the Committee agrees that legislation should be introduced to require secret ballots prior to protected industrial action. This will ensure that it is employees, and not their union officials, who decide whether industrial action is necessary to further claims for a workplace agreement.

    Recommendation

    10.72 That the amendments to require secret ballots in order to take protected industrial action be enacted."

REFORMS SUPPORTED

15. For the above reasons the BCA supports a secrets ballots regime that provides for a fair, effective and simple process for determining whether a group of employees want to take industrial action. Whilst it does not wish to make submissions on issues of detail, the BCA does support the following thrusts of the scheme proposed in the Bill –

    (a) Where an application for the ballot is not made by a union, the employees should have the option of appointing an agent to make the application to the Commission (proposed s.170NBB(4)).

        Similar arrangements are also proposed for initiating a bargaining period or giving notice of protected industrial action (Item 17).

        This could be suitable, for example, where employees want to remain anonymous from their employer.

(b) The Commission generally having to determine applications as far as possible within 4 working days (proposed s.170NBCA(1)). Also the Commission being required to grant applications when the eligibility and procedural matters prescribed in proposed s.170NBCF(4) are met, including that the applicant has been genuinely negotiating to reach an agreement.

(c) Ballots to be undertaken by the Australian Electoral Commission or other nominated ballot agent approved by the Registrar and authorised by the Commission (proposed s.170NBE). Ballots are to be by postal vote unless the Commission is satisfied the alternative method ensures secrecy and a fair and democratic ballot (proposed s.170NBCI(2)). Attendance votes are to be taken outside working times (proposed s.170NBCI(3)).

(d) Requiring the applicant for the ballot to be financially responsible for 20% of reasonable and genuine costs (as determined by the Registrar) (proposed s.170NBFA).

(e) To be carried, at least 50% of eligible voters must participate and 50% of the votes cast must be in favour (proposed s.170NBDD). This represents 25% or more of eligible voters (union members, or as the case may be employees, who will be covered by the proposed agreement).

    Which employees are eligible to vote depends on who applies for the ballot order. If a union applies only those employees who are union members and who would be subject to the agreement being negotiated can vote. If a group of employees applies for the ballot order, all employees who would be subject to the proposed agreement will be eligible to vote.

(f) Various provisions relating to the secrecy of the identity of parties, the security of votes, various procedural matters and penalties for non-compliance with Commission orders or directions (Items 17, 23, 24 & 25).

16. Of course, in order to prevent or settle industrial disputes the Commission will still have a discretion to order secret ballots to find out the attitudes of union members (s.135(1)). This will continue to apply at no cost to the parties. This might apply, for example, to a dispute that does not involve industrial action.

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30 August 2000

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

Dear Sir

Attached is the submission of the Business Council of Australia to the Inquiry in respect of the *Workplace Relations Amendment (secret Ballots for Protected Action) Bill 2000.*

The BCA would like to circulate copies to its member companies as soon as possible. Therefore it would be appreciated if early approval could be given to its public release of the submission.

A point of contact is Colin Thatcher (03) 9610 4211, colint@bca.com.au.

Yours sincerely

Colin Thatcher
Assistant Director

30 August 2000

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

Dear Sir

Attached is the submission of the Business Council of Australia to the Inquiry in respect of the *Workplace Relations Amendment (Termination of Employment) Bill 2000*.

The BCA would like to circulate copies to its member companies as soon as possible. Therefore it would be appreciated if early approval could be given to its public release of the submission.

A point of contact is Colin Thatcher (03) 9610 4211, colint@bca.com.au.

Yours sincerely

Colin Thatcher
Assistant Director

SUBMISSION

BUSINESS COUNCIL OF AUSTRALIA

to

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO

WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2000

The BCA is not a party to proceedings under the Workplace Relations Act 1996. Rather it is a non-partisan organization that transcends individual corporate interests and aims to provide business leadership to build a better society. This submission is made in the context of its objective to contribute directly to strategic and practical public policy formulation that promotes a competitive economic environment in which business succeeds and supports national social and economic objectives, including employment growth, low inflation, social cohesion and individual well being.

This includes protections for those who would not otherwise achieve fair employment outcomes and means of addressing unfair treatment. The vision of the BCA also includes –

"We want to grasp the opportunity for all Australians to enjoy quality of life and standards of living which are amongst the highest in the world. We want jobs for all who can work, support for the disadvantaged and a fair go for everyone. We want to be a community of Australians, united in our diversity, proud of our achievements, creating wealth and work for all." [1]

28 August 2000

[1] BCA *New Directions* Discussion Paper No.1, March 1999.

EXECUTIVE SUMMARY

1. The Business Council of Australia (BCA) is strongly supportive of the broad policy directions of the *Workplace Relations Amendment (Termination of Employment) Bill 2000,* namely –

   - The regulatory regime being structured, so far as is possible, to limit scope for litigation sponsored by uncertainty and ambiguity;

   - To ensure a reasonable balance between the interests of employees and employers, given the concern that the current regime remains process rich, time consuming, risks the diversion of scarce resources and may potentially disrupt otherwise stable relationships within an enterprise.

2. The BCA supports an unfair dismissal process that –

   - delivers equitable outcomes, after balancing the rights of employees and employers, as well as those seeking work;
   - takes account of all of the circumstances surrounding the dismissal;
   - focuses on dealing with genuine claims, and diverts away from the system those that are vexatious, frivolous or otherwise without merit;
   - operates in a manner that is administratively efficient and limits the potential for unintended consequences;
   - is readily accessible and does not intimidate persons whose services have been terminated;
   - operates without undue cost, formality and technicality;
   - does not encourage an employer to make a commercial settlement when there are reasonable grounds for defending an application; and
   - does not operate in a manner that negatively impacts on employers' hiring intentions, particularly in respect of the unemployed or job creation.

3. The difficulty in achieving the right balance of various factors is evidenced by the fact that since the federal legislation first introduced the entitlement in 1994 it has been amended on four separate occasions.

4. The Bill is not about fundamental structural reform. It is an issue specific reform, based on recognition of clear problems requiring legislative attention.

5. This BCA submission focuses more at the policy level, rather than at the operational level. Supporting reasons for these reforms were outlined in the relevant BCA submission to the Committee in respect of the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, although there have been several modifications to that bill.

6. From a strategic policy perspective, the BCA advocates that the future emphasis in workplace relations reforms should be on initiatives that structure the workplace relations system so it will encourage industrial outcomes that develop workplaces that

are both nationally and internationally competitive and enhance personal achievement and satisfaction of individuals at work.

7. The main focus should be encouraging high performing workplaces with more and more employees accepting responsibility for negotiated workplace agreements that provide for rewarding, fair and flexible arrangements. Also it should be on creating higher levels of employment.

SUPPORTING ARGUMENT

8. The BCA believes that the reconstitution of the unfair dismissal jurisdiction under the *Workplace Relations Act 1996* has been beneficial for Australia's workplaces. It included –

    - measures designed to deter claims being pursued without justification, including the nominal filing fee, and provision in limited circumstances to award costs;
    - an obligation on the Commission to more actively seek to resolve matters during the conciliation phase, including a requirement to indicate an assessment on the merits of the claim;
    - the removal of the role of the Court;
    - the introduction of the "fair go all round" concept that more holistically balanced the merits of the reasons for dismissal and the process followed. It also allowed for the effect on the viability of the business to be considered; and
    - restoration of the authority of State jurisdictions previously overridden by the federal jurisdiction unless they had an "adequate alternative remedy".

9. However as with all regulatory regimes, and especially those that impinge upon the efficiency of the labour market, there is a case for continuing review and refinement of the unfair dismissal machinery to ensure both its effective application over time and the appropriate alignment of priorities. The BCA believes that the current arrangements still fall short of the mark of good public policy.

10. In making this submission the BCA is informed by of –

    - The Discussion Paper prepared by the federal Department of Employment, Workplace Relations and Small Business (DEWRSB) on the first twelve months operation of the unfair dismissal provisions of the Workplace Relations Act 1996;
    - The December 1998 Report of DEWRSB on the *Twelve Months Review Of the Federal Unfair Dismissal Provisions* (referred to below as "DEWRSB Review");
    - Certain submissions made to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into *the Workplace Relations Amendment (Unfair Dismissals) Bill 1998* and the resulting report;
    - The November 1998 compendium of supporting materials issued by the federal Minister for Employment, Workplace Relations and Small Business on *Unfair Dismissal: impact on business and hiring intentions*;
    - Certain submissions made to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into the *Workplace*

Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and the resulting report.

11. The Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee on Consideration of the Provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 found that evidence provided by employer and employee organisations indicated there may be deliberate time wasting and cost pressure put on applicants or respondents for tactical reasons.[2]

12. In respect of the Inquiry of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee into the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* the majority report recommended the proposed amendments.

13. The BCA is aware of the controversy surrounding the *OECD Employment Outlook:June 1999* which contained a chapter (Chapter 2) on Employment Protection Legislation (EPL) and Labour Market Performance as this relates to the OECD's 10-point Jobs Strategy.[3] The OECD media release of 13 July 1999 that clarified the issue included -

> "…employment protection legislation does affect the structure of employment and unemployment, as is made clear in this same chapter of the Outlook.
>
> …the Outlook…..findings reinforce and elaborate on the earlier conclusions of the Jobs Study. For example, some of the cross-country comparisons indicate that aggregate employment rates for the working-age population are on average lower in countries with stricter EPL than in countries with relatively lax EPL. Prime-age males appear to be protected in countries with stricter EPL while the negative effects of EPL on overall employment appear to be concentrated among women, youths and older workers. Importantly, the empirical results highlight the fact that in countries with stricter EPL, fewer workers may lose their jobs in any given year, but those who do become unemployed have a greater probability of remaining without a job for longer than a year.
>
> It is on the basis of findings like these that OECD will continue to recommend that countries with relatively strict EPL which have a serious problem of long-term unemployment and/or relatively low overall employment rates, should consider relaxing their employment protection as part of a comprehensive policy to improve labour market outcomes."

14. The focus of the Bill is modifications to reinforce disincentives to speculative and unmeritorious unfair dismissal claims, introduce greater rigour into the processing by the Commission of such claims, and to remove unnecessary procedural burdens that unfair dismissal applications place on employers.

15. It is noted that a number of changes have been made to comparable provisions in Schedule 7 of the *Workplace Relations Legislative Amendment (More Jobs, Better Pay) Bill 1999* and which were the subject of the November 1999 Report of this Committee.

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[2] Refer to Minority Report of Senator Andrew Murray: Australian Democrats

[3] Refer www.oecd.org//sge/min/97study.htm.

16. Because of the modesty in the policy shift of the proposed legislative amendments, the Bill does not represent a fundamental change in the existing equilibrium between the rights of employers and employees.

    The reforms do not derogate from the remedies available when dismissals are unlawful or harsh, unjust or unreasonable.

    That is not to say the amendments will not have a desirable practical effect. However the reforms are not a regulatory signal that would effect a change in management conduct, other than those that might impact at the very margin positively on hiring policy.

17. In considering minimum statutory safeguards it must be borne in mind that responsible employers are very conscious of the impact on company performance of high rates of turnover and of the associated disruption to service provision or production.

    Also they are conscious of the cost imposts of rehiring and the losses incurred by failing to capture the returns on investments in employee skills. Therefore termination of employment decisions are very much a last resort.

REFORMS SUPPORTED

18. To enable the period that workplace productivity is disrupted whilst applications are unresolved to be contained within reasonable limits, ensuring that matters are dealt with expeditiously by –

    (a) restricting the acceptance of late applications (Items 12 & 36).

    (b) including a new express provision that the Commission may dismiss an application if the employee fails to attend a proceedings (after giving the applicant a reasonable opportunity to be heard) (Clause 170CIB – Item 30).

    (c) preventing multiple applications in respect of the same termination (Item 39).

19. To guard against claims being perceived as being pressed for ulterior reasons, ensuring that the Commission is aware when applicants' representatives have been engaged on a contingency fee "pay if you win' basis (Items 1 & 30).

    This proposal is somewhat similar to a recommendation of Senator Andrew Murray in the above mentioned 1998 minority report to the effect that cases being conducted on a "no win, no fee" basis should be made a matter of public record.

20. Another amendment that supports this objective is the provision for penalties for prescribed advisers who encourage a dismissed employee to pursue an unfair termination application where there was no reasonable prospect of success (Item 40).

    This proposal is somewhat similar to another recommendation of Senator Murray in the 1998 Report concerning instances when either party in a proceedings is, in the opinion of the Commission, abusing the process, deliberately wasting time or deliberately applying cost pressures. In those circumstances it was recommended that the Commission be given power to award costs against those advising the applicant or respondent. These costs should be specifically precluded from recovery from the client.

    There is case law that indicates that courts may order a legal representative (or possibly an industrial advocate) to pay costs. However this is relatively rare as it appears to be limited to instances of serious professional misconduct.

21. To improve the procedural processes prior to arbitration proceedings –

(a) Item 12 enables issues of jurisdiction to be determined according to a time frame that minimises costs and inconvenience for the parties where no jurisdiction exists.

The nature of the principal remedy (i.e., reinstatement) means that applications must be time-sensitive.

(b) In the conciliation process the Commission will be required in its certificate to indicate whether or not it considers on the balance of probabilities that the application is "likely to succeed". (Item 13) Where such an indication is given, the Commission must invite further information. If after this process the Commission concludes that the application has a substantial prospect of being unsuccessful at arbitration, the application must be dismissed (Item 14).

The above mentioned 1998 minority report of Senator Murray recommended that a greater onus be placed on the Commission to establish at the conciliation stage the merits of an employer's or employee's case.

At present, where the Commission is satisfied that all reasonable attempts to settle the matter by conciliation are (or likely to be) unsuccessful, it –

- *must* issue a certificate to that effect (s.170CF(2)(a));
- *must* indicate it's assessment of the merits of the application (s.170CF(2)(b));
- may recommend the applicant not pursue any ground of the application (s.170CF(2)(c)).

However there is a tendency for members of the Commission not to make a firm conclusion about the merits of a case in its conciliation certificate where the facts are in dispute. The finding from conciliation might be along the lines of - "without hearing all of the evidence, it is not possible to come to a concluded view on the merits of the case".

(c) Widening access to costs orders (with the provision for costs to be prescribed by Regulations under a schedule) (Item 31-33). Also providing the Commission with discretion in exceptional circumstances to require an applicant to lodge an amount as security for any costs that might be awarded (and vary such arrangements)(Item 34).

Costs can be awarded against both employees and employers (refer Item 33). The above mentioned 1998 minority report of Senator Murray recommended that parties be warned that the conciliation conference advice might prejudice such an order for costs in circumstances where –

- parties ignore the Commission's advice that is subsequently upheld; or
- the matter is not settled by agreement within a reasonable but short period;
- the matter is subsequently contested and lost by the party which ignores such advice.

This arrangement is not unusual. For example, under the NSW Workplace Injury Management and Workers Compensation Act 1998, the Compensation

Court can impose subsequent cost penalties on a party who has unreasonably failed to cooperate at the conciliation stage.[4]

22. Explicitly excluding from the grounds of termination of employment, circumstances where a demoted employee does not incur a "significant reduction" in remuneration. (Item 9). Also to make it clear that independent contractors are not eligible under Division 3 (Termination of Employment) of the *Workplace Relations Act 1996* (Item 8) which applies to "employees" within the general meaning of the term under the legislation. By not leaving these areas to case law, persons will be better placed to make appropriate decisions about pursuing applications.

    The DEWRSB Review found that despite the seemingly clear pronouncements of the law in respect of what constitutes a "termination at the initiative of the employer"[5] there has been a lack of uniformity in the approach of various industrial commissions and courts.

23. Under the Bill, the Commission, in determining unfair dismissal applications, will have regard to the human resource procedures followed in the context of the size of the business unit. (Item 26).

    This should not be viewed in terms of giving fewer rights to workers in small business versus those in other sectors, as all applications should be based on findings on whether or not the termination was harsh, unjust or unreasonable. Rather the amendment should ensure that the processes to ensure fairness can vary amongst enterprises and that diversity in practice is recognised in taking account of procedural fairness.

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[4] Refer s.115.

[5] As contained in the decision of the Full Court of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995).