LABOR SENATORS' REPORT

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CHAPTER 1

OVERVIEW

1.1 The *Workplace Relations Act 1996* was a major departure from the manner in which the Commonwealth had regulated industrial relations since 1904. In 1996 the Senate undertook a major inquiry resulting in a majority report rejecting the Government's legislation. Subsequently the Government and the Australian Democrats came to agreement on a range of amendments enabling the legislation to pass the Senate and return to the House of Representatives. In final consideration in the House on 21 November 1996 Minister Reith claimed that the legislation would provide for;

> ... a fair go for all so that the system is appropriately balanced and delivers benefits for both employees and employers...[1]

1.2 The submissions and witnesses involved in the current inquiry demonstrate there is little evidence to support Minister Reith's claims. In spite of this the Government has proposed another massive set of amendments less than three years after the original Act was passed.

Economic Considerations

1.3 The Government's case is essentially that the 1996 legislation has delivered the economic gains promised by the Minister and that the proposed amendments are evolutionary and necessary for the further operation of the Act. The Government's case was presented by the Department of Employment, Workplace Relations and Small Business (DEWRSB). To a degree the major employer groups who made submissions and appeared before the Committee shared this view. It is important to note however, that there is not consensus, even amongst the supporters of further change, as to the degree or detail of change needed.

1.4 The issues put forward by DEWRSB in its submission may be classified in one of three ways. Firstly as operational or technical issues, secondly ideological issues and finally 'second bite' issues – those that were considered and rejected in 1996.

1.5 Evidence provided by DEWRSB is problematic in two senses: firstly it was selective; and secondly there are concerns as to how the data actually addressed the terms of reference in relation to the period that the data actually purports to cover. Much of the data presented actually related to the early 1990s well before the operation of the 1996 legislation.

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[1] The Hon. Peter Reith MP, 21 November 1996, House of Representatives, *Hansard,* p. 7217.

1.6 Evidence was received from a wide range of academics, community organisations, individuals and unions in opposition to the proposed amendments. This evidence demonstrated that the 1996 Act has had wide ranging and serious negative social impacts that, when foreshadowed by the Opposition in 1996, were ignored by the Government. In 1996 the then Labor Shadow Minister for Industrial Relations, Bob McMullan, said:

> We believe that this bill will probably not deliver anything like the economic benefits which it seeks, but it will definitely deliver the social costs which we fear- the social costs for individuals and families, the social costs for our society as a whole.[2]

1.7 Detailed evidence was heard demonstrating that since the inception of the 1996 Act there has been a range of negative outcomes including:

- the award simplification process which has resulted in the loss of entitlements;
- growth in employment which has been slower than the preceding three years and is tempered by a growth in precarious employment – in particular full-time casual work and temporary employment;
- a poor outcome in reducing the numbers of the very long term unemployed;
- widespread fear of and growing job insecurity;
- the increasing incidence of loss of employee entitlements due to insolvency; and
- the continued increase in hours of work in turn impacting negatively on the balance between work and family life.

1.8 In addition there has been a widening of income inequality, in particular wages growth per hour being less for part-time and casual workers than full-time workers. Income inequality has also seen a widening gender gap in over award payments. In a range of industries many of Australia's most vulnerable workers – in the most precarious forms of employment and on the lowest wages – have experienced wage cuts, particularly through the loss of financial compensation for non-standard working hours.

1.9 The labour market and economic system in the period 1996 to 1999 has, when compared with the previous 3 years and with similar economic growth rates, failed to generate the same employment outcomes. Indeed, the average annual growth of employment in the period February 1993 to February 1996 was 3.1 per cent, while the average annual growth rate in employment in the period February 1996 to October 1999 has been just 1.76 per cent. As a result the average monthly employment generated in the period February 1993 to February 1996 was over 20,000 compared with an average of just over 12,000 jobs per month in the period February 1996 to October 1999.

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[2] The Hon. Bob McMullan MP, 30 May 1996, House of Representatives, *Hansard*, p. 1826.

Conclusions

1.10 Labor Senators conclude:

- evidence provided to support the bill has little statistical economic validity;
- overall employment growth post 1996 has weakened;
- full time employment growth post 1996 has weakened; and
- the rate at which the long term unemployed has reduced has slowed since 1996.

Australia's International Obligations

1.11 Australia is one of the original members of the International Labour Organisation with a long standing reputation for leadership in this field. It is of concern that following enactment of the 1996 Act the Australian Government was called to account for identified breaches of ILO Conventions 87 and 98. The Government's culpability is all the greater in view of the Majority Report on the Workplace Relations and Other Legislation Amendment Bill 1996 that flagged potential breaches of these conventions.[3]

1.12 The overwhelming balance of evidence in this inquiry shows the provisions of this Bill will put Australia further out of step with the international community, and make us again the subject of an embarrassing review by the relevant ILO bodies. The Department of Employment, Workplace Relations and Small Business advised that dialogue is ongoing on the 1996 Act. However the mere fact that the Government has sought to argue with the Committee of Experts is not evidence that Australia is not in breach of our international obligations.

1.13 Labor Senators note the slow pace and seemingly intractable nature of the ongoing dialogue between the Australian Government and that body, and lack of any commitment by the Government to take remedial action.

1.14 In light of the evidence presented and the findings of the Committee of Experts the Labor Senators conclude that the 1996 Act contravenes Australia's international obligations as a member of the International Labour Organisation. The enactment of further legislation of this kind is likely to exacerbate Australia's contravention and is particularly ill advised.

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[3] Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996, Senate Economics References Committee, August 1996, pp. 231-43.

Recommendation

Labor Senators recommend amendments to the Act to ensure Australia is able to meet its international obligations regarding labour standards.

Standing of the Australian Industrial Relations Commission

1.15 Much of the evidence received by the Committee in both submissions and in hearings went to the proposed changes to the Australian Industrial Relations Commission (AIRC). The historical role of the Commission and the often judicial background of previous Commissioners has been important in establishing public confidence in the AIRC as an institution.

1.16 The view that the Commission is not a judicial body but rather a tribunal exercising executive arbitral powers in the same manner as courts was not challenged by any evidence presented to the Committee. The requirement to exercise these functions in a quasi-judicial manner is demonstrated by the role of the Commissioners to hear evidence, apply legislative provisions and legal precedents, and make binding decisions affecting the rights of parties. It is therefore essential to ensure that the Commission is free from improper influence and that public perceptions of its independence are maintained. Public confidence in the Commission is essential to ensure acceptance of the Commission's decisions.

1.17 The Government's proposals to alter the AIRC were widely criticised in many submissions and during inquiry hearings. The proposal to limit Commissioner's terms of appointment was criticised for compromising the Commission's independence. The Labor Senators conclude that even the perception that the Commission is not independent would do it damage in the eyes of the public. The Labor Senators do not support the erosion of the Commission proposed in the Bill.

1.18 Evidence was considered concerning the proposal to institute private mediation to act as a supplementary dispute resolution service to the AIRC. The Labor Senators see no merit in the proposal to create a regulated mediation system. The fact is that private mediation has always been available. However, parties have generally had confidence in the Commission for the resolution of disputes.

1.19 Many witnesses discussed the removal of the discretion of the Commission with regard to the making of awards to settle disputes. Despite the Government's rhetoric about bargaining in the workplace, a large proportion of Australian workers remain dependent on the award system for their terms and conditions of employment. The award simplification process and the limitation on the Commission to make awards within the 20 allowable matters provided for in the 1996 act has seen the most disadvantaged workers further disadvantaged. These workers are those who depend on the award to set their total terms and conditions of employment.

Recommendation

Labor Senators recommend amendments to the Act:

- **to provide a greater role for the AIRC in prevention and settlement of industrial disputes and to act in the interests of fairness and in the national interest;**
- **to provide the Commission with the power to arbitrate on all employment-related matters in order to ensure that employees have the protection of effective awards which provide fair and relevant terms and conditions of employment; and**
- **discretion be provided to the Commission to arbitrate in cases where negotiations to conclude an agreement have failed within a reasonable period.**

Awards

1.20 Submissions and witnesses drew on the experience of the initial round of award simplification to strongly criticise the proposed amendments as further reducing basic terms and conditions. Labor Senators also note the removal of long service leave, notice of termination and superannuation (which is the subject of another bill) will have a negative impact on vulnerable workers.

1.21 Several witnesses commented on the removal of 'skill based career paths' as an allowable matter and the specific removal of 'training and education' as an incidental allowable matter as particularly short-sighted.

1.22 The removal of leave for the purposes of serving on a jury was seen in the same light as the 1996 Act's removal of Blood Donor leave and Defence Force leave from awards as an attack on community values. Following the removal of blood donor leave from awards, evidence presented to the Committee demonstrated a considerable reduction of blood supplies in Victoria and the ACT. These provisions cast doubt on the sincerity of comments by the Prime Minister exhorting corporations to embrace a

> …new social coalition of individuals, business, government, charitable and welfare organisations - each contributing their unique resources and expertise to directly tackle problems.[4]

1.23 It is apparent that without the compulsion of an award, some businesses seem to be unwilling to adopt Mr Howard's principles with respect to providing the opportunity for employees to undertake valued community activities. This should not have been an unexpected result.

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[4] John Howard, The 1999 Hollingworth Trust Lecture On Youth Unemployment, "Opportunities For Australian Youth", Melbourne, 10 June 1999.

Recommendation

Labor Senators recommend:

- **while a system of workplace-based collective bargaining should be retained, alternative options for workers to maintain and achieve decent wages and conditions should be as readily available through the award system, and through enterprise or industry-based arrangements; and**
- **the AIRC be empowered to make awards without limitation on content to facilitate the settlement of industrial disputes.**

AWA's and the Employment Advocate

1.24 The powers of the Employment Advocate and the administrative approval procedures stand to be enhanced by the Bill. It is regrettable that the Employment Advocate chose to, if not ignore, then only peripherally address the terms of reference for this inquiry in his written submission. The written submission outlined the activities of the Office of Employment Advocate (OEA) since inception. In effect the only deficiency that the Employment Advocate identified with the 1996 Act was that complaints were received regarding the statutory delays placed in the Act.[5]

1.25 In making this point the Employment Advocate has ignored an important function that the statutory time limits perform. First, the time period allows employees the opportunity to seek independent advice in private and away from the workplace. The Labor Senators see this as extremely important. The lack of review or mechanisms for appeal after approval of an AWA requires that employees be given every opportunity to make an informed decision whether or not to sign documents.

1.26 The second reason is closely associated with the first point. The ability to take an AWA away from the workplace for a period of time, whether advice is sought or not, lessens the opportunity for employees to be placed under duress to sign. The Labor Senators are of the opinion that any diminution of this ability would only lead to an increase of cases of duress in regard to AWAs.

1.27 The Office of Employment Advocate has a dual role of administering AWAs and also assisting in the compliance aspects of the Act. Throughout the inquiry process a great deal of evidence alleged bias on the part of the OEA staff in dealings with regard to freedom of association issues and lack of diligence in investigating claims of duress by employers.

1.28 While the Employment Advocate has provided a response to the allegations made in this process, they are primarily an unsupported rejection of the claims. The Employment Advocate has failed to effectively refute the evidence placed before the inquiry of serious bias in the OEA's operations.

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[5] Submission 328, The Employment Advocate, vol. 10, pp. 2006-7.

1.29 The Labor Senators conclude that there is a conflict of interest inherent in the roles the OEA undertakes. Further there is a widespread general lack of public confidence in the OEA, particularly with respect to impartiality that impinges on the credibility of the OEA.

Recommendation

Labor Senators recommend that the OEA be abolished.

In addition to the abolition of the OEA, Labor Senators recommend the following general amendments to the Act with regard to AWAs:

- **the protection from duress to new employees offered AWAs needs to be provided. This protection must be in the same terms as that currently provided for existing employees, and should provide that employees are not to be treated as new employees in cases of transmission of business;**
- **a prohibition should prevent the offering of AWAs as a means of undermining collective agreement making;**
- **the registration and approval of individual agreements should reflect the transparency and accountable processes that are applied to certified agreements; and**
- **on application by any interested party, any decision made with respect to AWAs or award designations must be subject to independent review by the AIRC.**

Balance and bargaining

1.30 A number of the Bill's provisions relate to issues of balance and the ability of participants to bargain. Evidence as to the affect of the 1996 Act on the ability of employees to effectively organise and bargain demonstrates the difficulties currently faced by workers.

1.31 The 1996 changes to the powers and role of the Commission in conjunction with the limitation on matters that may be inserted into awards, and the limited ability for employees to influence the form of agreement offered, has impacted negatively on the bargaining position of workers and unions.

1.32 Perhaps the most stark example of the advantage that employer's currently hold is a case reported by Australasian Meat Industry Employees Union (AMIEU) – G&K O'Connor's Meatworks in Pakenham in Victoria. Employees have been locked out of the premises for 8 months for refusing to accept wage cuts of between 10 and 17½ per cent. The employer unilaterally refused to negotiate and then instituted industrial action which was described by O'Connor's own counsel as 'fairly unsophisticated' and by Justice Spender as 'a baseball bat lockout'. This lockout has now become the longest lockout in Victoria since the Great Depression. Despite

repeated attempts in both the AIRC and the Federal Court the union has been unable to resolve the dispute due to the intransigence of the employer.

1.33 The promotion of 'choice', which the Government has consistently claimed is available for both employers and employees, was seriously questioned by many of the participants. Evidence detailed the 'take it or leave it' nature of offers of non-union certified agreements and AWAs. It was also apparent that some employers flatly refused to negotiate with unions or employees for the introduction of s.170LJ certified agreements. The lack of any requirement to 'bargain in good faith' has resulted in the wishes of the majority of staff simply being disregarded.

1.34 The current Act has allowed employers to ignore the objects of the Act. It is a cause of serious concern that the Commonwealth and former Victorian Governments have been in this group. An example brought to the attention of the Committee was the actions of the Department of Employment, Workplace Relations and Small Business where a majority of workers in the Department are union members who sought to be covered by a further union agreement. The Departmental Secretary refused to negotiate a s.170LJ certified agreement even though his department is directly responsible for the administration of the WR Act.[6] This situation illustrates the unbalanced nature of the current Act where there is no real choice available to employees.

1.35 The DEWRSB example is far from isolated. The situation in Victoria for state public servants was described as:

> …in Victoria … it has been impossible to get a promotion without agreeing to an AWA..[7]

1.36 The Labor Senators consider such actions as a form of 'economic duress'. This deliberate action to refuse to negotiate demonstrates the imbalance in the employment relationship and a misuse of managerial powers that is contrary to the intention of both s.3(c) and s.170WG of the WR Act.

1.37 In addition the Commonwealth and Public Sector Union (CPSU) identified the Commonwealth Department of Finance and Administration and the new Commonwealth Government agencies of Employment National and the Australian Prudential Regulatory Authority as having instituted policies of not negotiating collective agreements. Staff are required to enter into AWAs in order to improve their terms and conditions of employment above the base provided for in out of date agreements.

1.38 It is evident that refusal to negotiate when a clear preference for the form of agreement has been made demonstrates contempt for the principle to 'bargain in good faith'. The Labor Senators believe that this principle is a fundamental requirement of

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[6] Evidence, Wendy Caird, Sydney, 22 October 1999, pp. 227-8.

[7] Evidence, Brian Jardine, Sydney, 22 October 1999, p. 229.

any bargaining process and should be accommodated and encouraged within the industrial relations structure.

Recommendation

Labor Senators recommend that:

- **all parties be required to conduct negotiations in good faith; and**
- **in cases where employees have provided a clear indication of the type of agreement to be adopted, employers be required to negotiate in good faith to conclude an agreement of that type.**

Industrial Action

1.39 There are a range of proposals in the Bill that deal with various aspects of industrial action, many of these amendments were put forward in 1996 and rejected by the Parliament. The evidence presented to the Committee demonstrates that these proposals will severely limit industrial action and will fundamentally reduce the rights and ability of workers to be able to effectively negotiate an agreement.

1.40 The evidence presented by DEWRSB regarding industrial action is that the duration of disputes is declining and compliance functions are generally successful in dealing with unprotected action.

1.41 Industrial action is a recognised and legal part of a negotiation process and may be undertaken by both employers and employees. Industrial action is not an end in itself, however Labor Senators recognise that disputes during a negotiating process are an inevitable part of a robust democracy.

1.42 Of concern to the Labor Senators is that the Bill continues to unfairly skew the system away from the interests of Australian workers and harmonious workplaces. The imbalance in the industrial relations system was commenced with the 1996 Act which removed the ability of the Commission to exercise arbitral powers to resolve intractable disputes.

1.43 The evidence presented during the inquiry has demonstrated that this bill will not assist in the reduction of disputation. This bill promotes disharmony in the workplace, lengthens disputes, adds cost to the negotiating process and generates social disharmony, which is inimical to long term economic growth.

1.44 The Labor Senators question the logic behind the Government's belief that making s.127 orders automatic will act to prevent unprotected action from being taken. The automatic nature of a s 127 order is unlikely to affect the willingness to engage in unprotected action.

1.45 It is more likely that the motivation behind the Government's amendments relate to criticisms levelled against Federal Court decisions.

1.46 This issue was directly addressed in an open letter from 80 eminent industrial relations solicitors and barristers, including three QCs;

> The Minister proposes to require the Federal Court to act promptly in dealing with the enforcement of s.127 orders. There is, however, nothing to suggest that the Federal Court has acted in anything other than a prompt and efficient manner in dealing with such enforcement proceedings.
>
> The Federal Court has arranged its business so as to hear s.127 proceedings at very short notice and has been willing to hear such proceedings outside of normal sitting hours. Raising a doubt about the Federal Court's willingness to deal expeditiously with the enforcement of s.127 orders would seem to have more to do with providing a justification for providing employers with a right to choose between issuing enforcement proceedings in the Federal Court or State Supreme Courts. It may also have something to do with the Minister's desire to get even with the Federal Court because of the decisions made by the Court during the course of the waterfront dispute.[8]

1.47 Labor Senators concur with this view and reject the Government's proposals as inappropriate.

Secret Ballots

1.48 The assumption made by the Government in pursuing this matter is that industrial action is ordered by union bosses and not authorised by the members who actually go on strike. The Labor Senators reject this narrow minded ideological view that has been promoted in the absence of effective supporting evidence.

1.49 The Minister has consistently claimed that secret ballots exist in the United Kingdom as a justification for this proposal. Such claims are disingenuous as the system proposed in this bill is considerably more prescriptive and overly bureaucratic.

1.50 The provisions proposed are unrealistically complex as well as unnecessary and unworkable. The provisions will increase the time associated with taking protected industrial action and will place a financial burden on unions and ultimately their members.

1.51 It is apparent that this proposal is more about placing obstacles to prevent the taking of any industrial action than responding to a real need. Currently within Division 4 of the 1996 Act the Commission has the power to order a secret ballot on application from affected members. It is significant that applications to the Commission for secret ballots have been rare.

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[8] "A critical analysis of the Reith Proposals" by over 80 of Australia's Leading Industrial Barristers and Solicitors, 2 July 1999

1.52 Under the Western Australian system unions are required to conduct a secret ballot prior to engaging in industrial action. It is significant to consider the comments by the Western Australian Trades and Labour Council that the legislative provisions requiring secret ballots for industrial action in Western Australian have never been used:

> …Employers are not interested in using the provisions, employees are not interested in using the provisions and, certainly, there has been no attempt by either the government or any interested party as defined under the state legislation to trigger a secret ballot process in spite of industrial action occurring.[9]

1.53 The proposal to introduce secret ballots is disincentive to employees to engage in industrial action. In addition the Bill inserts what can only be described as a punitive provision to withhold at least an entire days pay from employees regardless of the duration of the industrial action. There is general agreement between unions and employers that this provision will encourage an escalation of disputation as there will no incentive for employees to return to work after a stop work meeting or short stoppage.

Right of Entry

1.54 The Minister describes the 1996 changes to the industrial relations laws and the current Bill as an attempt to de-regulate the labour market. Such claims are made despite evidence of an overall increase in bureaucratic regulation for unions.

1.55 Labor Senators find particularly disturbing the proposals to severely limit a union's ability to investigate award and agreement breaches on behalf of members. In the period between the commencement of the WR Act and 30 June 1999, the Government received 12,951 allegations of non-compliance with awards and agreements. Of these, it was determined that a breach had occurred in 8,270 cases. When confronted with this data during the Committee's inquiry, the Department advised that it had prosecuted the employers involved in 11 cases, while the employees were forced to prosecute breaches themselves in 752 cases.[10] These statistics demonstrate that the Government has seen fit to abrogate its responsibilities to investigate and prosecute award breaches.

1.56 It is evident that the changes to right of entry will impact adversely on employees who are most vulnerable in the workplace. The proposed amendments to require a written invitation from a union member at the workplace prior to exercising right of entry will act as a considerable disincentive for vulnerable employees to seek assistance.

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9 Evidence, Ms Stephanie Mayman, Perth, 25 October 1999, p. 307.

10 Submission no. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2060

1.57 Disadvantaged workers are already the most likely to be affected by award or agreement breaches. The evidence from the TCFUA concerning attempts by the union to investigate possible award breaches demonstrates the difficulty already faced by unions to assist vulnerable employees. The fundamental imbalance of the bill is demonstrated here with no equivalent proposals being put forward to assist unions and employees gain redress when employers deny access to premises and records.

1.58 The Government has comprehensively failed to provide a case for this change. There is no evidence of widespread abuse of the current right of entry provisions. The claims made in both submissions and hearings relate to primarily one industry.

1.59 Employer groups admit that provisions currently exist in the WR Act to deal with abuses of right of entry. There has been very little use of the current provisions of the Act, which leads to the obvious conclusion that the vast majority of incidences where unions exercise their right of entry is done without abuse. In the absence of any demonstrated need by either the Government or employers the Labor Senators reject the need for repressive right of entry provisions that would deny protection to thousands of the most vulnerable workers in Australia.

Freedom of Association

1.60 Considerable evidence was received addressing the aspects of the freedom of association provisions of the Bill. The Government has sought to add union encouragement clauses to the range of provisions that are not allowed to be inserted or to remain in awards or certified agreements. This issue was considered at length in the 1996 inquiry. Ultimately the Commonwealth Attorney General's Department produced advice upholding the legality of union encouragement clauses. This is another case of the Minister having a second bite on an issue that has already been rejected.

1.61 No evidence was presented to the Committee that demonstrated that the clauses that currently exist and are legal have been used to breach the freedom of association provisions of the Act. The Department supplied no information showing the prevalence of union encouragement clauses or the existence of any union discouragement clauses in agreements.

1.62 The Labor Senators find no reason to support the prohibition of union encouragement clauses and reject these amendments as ideologically driven

1.63 The other major amendment concerning freedom of association is to prohibit the existence of closed shops and to effectively define a closed shop as a workplace with 60% or greater union membership.

1.64 Many witnesses were genuinely confused about how the closed shop provisions would be implemented by the Government. Confusion centred around whether the Office of the Employment Advocate would commence investigations of workplaces where there was evidence of more than 60% unionism, or whether this

would not occur until there was some additional evidence that a closed shop was being established or maintained at the workplace.

1.65 Concerns were also raised as to how the Employment Advocate would establish the level of union membership in a workplace that was under investigation. Labor Senators find that these concerns are exacerbated by the lack of public confidence in the impartiality of the Office of Employment Advocate.

1.66 Adding to concerns of bias in these provisions is the fact that there is no converse presumption that an enforced non-union shop exists if union membership was below a certain rate. This issue was raised by several witnesses as an indication that the provisions were, in reality, designed to prevent effective unions from organising:

> The provision could possibly be theoretically justified if there was a converse proposition, so that if a workplace did not have 40 per cent union members then the same presumptions applied. You could then intellectually justify that sort of measure. But, without the converse proposition, the measure has to be seen for what it is—that is, an attack on workers' ability to be in unions.[11]

1.67 The Labor Senators conclude that this provision is designed to create an environment in which the investigative processes themselves become anti-union and act as a deterrent on union membership. This conclusion is supported by the arrangements by which prosecutions launched by the Office of the Employment Advocate require a ministerial direction coupled with the evidence. That raises serious questions about the OEA's ability to undertake investigations in a non-partisan manner.

1.68 Given the opposition of many employers to these provisions, it is unlikely that the Employment Advocate will receive much encouragement to launch campaigns for union reduction in large and well-managed firms. Unscrupulous employers will use the 60 per cent membership clause to incite an investigation for the purpose of intimidating unionists and potential unionists. Labor Senators have no confidence that the Employment Advocate would not collude in this practice.

Needs of workers vulnerable to discrimination

1.69 Many of the provisions of this bill will have far reaching consequences for vulnerable and disadvantaged workers. Evidence presented to the Committee demonstrated that, in practice, many employees are still disadvantaged, and the provisions of the WR Act introduced in 1996 have exacerbated the problem.

1.70 Thirty years after the first federal case on equal pay, equal remuneration for work of equal value has not yet been achieved for women. Decentralisation of

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[11] Evidence, Mr Lloyd Freeburn, Melbourne, 7 October 1999, p 73.

industrial relations in Australia appears to be having a negative impact on pay equity, although many academics cautioned that they are simply unable to produce concrete findings due to a paucity of data on agreements.

1.71 The HREOC submission provides a detailed critique of the current equal remuneration provisions of the Act and how they have operated since 1996.[12] HREOC have made several recommendations to improve these provisions, including:

- allowing equal remuneration applications to be heard by a Full Bench of the Commission;
- ensuring that the Commission, in determining equal remuneration applications, can consider remuneration matters not limited to 'allowable award matters' in section 89A(2); and
- allowing the Commission to develop principles for equal remuneration applications, that provide a default mechanism to establish work value in the absence of agreement between the employer and affected employees, and specify that differential rates of pay for male and female employees for work of equal value establishes 'discrimination based on sex' for the purposes of the WR Act.

1.72 The Labor Senators concur with these recommendations.

1.73 The Sex Discrimination Commissioner in evidence drew the Committee's attention to the fact that it was possible for her to intervene in proceedings before the Commission relating to discriminatory provisions in awards and agreements. However the Sex Discrimination Act does not allow her to intervene in the Employment Advocate's consideration of AWAs.[13] This is an issue of concern to the Labor Senators as evidence provided to the Committee demonstrated that AWAs are being used in an exploitative manner and serious questions were raised as to the efficacy of the no disadvantage test.

1.74 The issues of awards are discussed elsewhere, however the Labor Senators conclude that the current award system does not provide adequate protections for low paid workers. The limitation of allowable award matters proposed in this Bill will further marginalise vulnerable workers by not providing adequate protection through a fair and effective safety net.

1.75 Evidence presented by HREOC to the Committee raised concerns about the impact of award simplification on women. Labor Senators note that the current award simplification provisions requiring the removal of directly discriminatory provisions, is flawed as this does not address the issue of indirectly discriminatory provisions in awards. An indirectly discriminatory provision could include those allowing changes in rosters and hours with little or no notice, which can have a very detrimental affect

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12 Submission no. 472, Human Rights and Equal Opportunity Commission, vol. 23, pp. 5819-24.

13 Evidence, Commissioner Susan Halliday, Sydney, 26 October 1999, p. 378.

on women with caring responsibilities. The high profile Steggles Chicken case this year is an example of how this may occur.

1.76 Labor Senators concur with HREOC recommendation that this issue should be addressed by allowing the Commission and the parties to awards to deal comprehensively with the issue of eliminating discrimination in awards.[14]

1.77 The Labor Senators note that the fairness and effectiveness of awards is not limited to an assessment of safety net wage increases passed on by the Commission. The award simplification exercise, reducing awards to a core of 20 allowable award matters, has resulted in the loss of substantive terms and conditions of employment, which workers in a disadvantaged bargaining position have little hope of regaining in agreements.

Recommendation

The Labor Committee members recommend that HREOC's proposed amendments as detailed above be adopted.

Work and Family

1.78 The Committee notes that a considerable body of evidence was presented regarding work and family. Many submissions to the Committee dealt specifically with the impact of the WR Act on women, who still tend to have primary responsibility to care for children and elderly family members. The evidence presented in these submissions is not encouraging. Overwhelmingly the witnesses and submissions indicated that the ability to manage both work and carer responsibilities had deteriorated under the deregulated environment promoted by the WR Act, particularly through the deregulation of hours of employment.

1.79 The reason that workers were actually worse off is primarily the initial round of award simplification. In effect the Government arbitrarily cut terms and conditions of employment, this in turn 'lowered the bar' for the no disadvantage test. The Government's approach to further limiting and reducing the awards in this Bill will have the same result. Arbitrary reductions in allowable award matters and the limiting of the scope of safety net wage increases will not only affect award workers, but will also reduce the standard against which agreements and their provisions are tested.

1.80 Evidence presented also demonstrated that agreements reached under the WR Act were often more likely to trade off family friendly conditions that had previously been available to workers.

1.81 Concern is also expressed for what may be described as sham family friendly arrangements. These are provisions that, at face value, appear to operate to allow employees flexibility to balance work and family. However, these provisions will

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[14] Submission no. 472, Human Rights and Equal Opportunity Commission, vol. 23, p. 5801.

often be worded in a manner that allows them to be implemented by employers to the disadvantage of workers with family responsibilities. In such cases it is the practical application of the provisions when workers seek to access them that becomes the crucial test, not merely the words themselves.

Recommendation

Labor Senators recommend that:

- **transparency and review mechanisms for all forms of agreements be provided to ensure work and family provisions deliver their stated outcomes. Provisions such as flexible hours or spread of ordinary time should be closely examined to ensure that work and family responsibilities for current and future staff are enhanced; and**
- **priority also be given to the development of model Award and agreement provisions to assist employees balance work and family responsibilities.**

Job Security

1.82 The nature of employment in Australia has been transformed over the past 20 years, and especially over the past three years. The most significant element in this transformation has been the decline of what could be called traditional lifelong, standard full-time employment and its displacement by more insecure forms of employment such as casual, part-time, fixed term and other forms of contingent work.

1.83 Evidence to the Committee demonstrates that the pace of this change has picked up considerably over the past 10 years. Insecure or precarious forms of employment have grown at almost 10 times the rate of growth in standard employment. From August 1989 to August 1999, the number of casual employees in Australia rose by 69 per cent and the number of other employees by 7 per cent.[15] Between 1996 and 1998 alone, the number of full-time casual employees rose by 10.5 per cent and part-time casual employees by 3.6 per cent.[16] One in four Australians is now in casual employment.[17]

1.84 The extraordinary rate of growth of casualisation in Australia can be linked to various developments such as globalisation of the economy, corporate restructuring, development of new technology and new forms of work organisation. It can be linked also to labour market deregulation, which was the basic area of concern to the Committee.

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15 Submission 473, Queensland Government, vol. 23, p. 5947.

16 Evidence, Dr Barbara Pocock, Canberra, 28 October 1999, p. 516.

17 Submission 496, Dr Barbara Pocock, vol. 24, p. 6191.

1.85 A wide range of evidence to the Committee demonstrates that neither the Act nor the Bill will alleviate the growing casualisation of the Australian workforce. In fact both the Act and the Bill seem to be deliberately designed to encourage what the Government euphemistically refers to as 'flexibility' but in reality has been a major contributor to this growth in casualisation. A flexible working environment must be to the benefit of both employers and employees. However, the evidence presented to the Committee demonstrates that due to the fundamental imbalance of the Act, flexibility has often worked for employers at the expense of employees. Of concern to the Labor Senators is that the likely long term effect of both the Act and the Bill will be to further aggravate negative social and economic consequences for families, individuals and the broader community.

> The proposals in this Bill take no account of this and other changes; instead they are likely to *increase* the growing number of Australians that are outside the protective capacity of agreements or awards and denied the genuine possibility of union membership and the capacity to bargain collectively.[18]

1.86 The evidence presented to the Committee demonstrated the close connection between the apprehension and insecurity in the labour force, and economic change which has brought about (among other things) the extraordinary growth in Australia of precarious employment. It is incumbent on the Government to manage this change so that the consequences of change can be anticipated and managed.

1.87 The Labor Senators conclude that the Government has failed to deal with the consequences of the 1996 Act which has lead to a growing feeling of insecurity in the workforce and further that the Bill will aggravate these feelings.

Victorian Workers

1.88 Submissions and evidence from Victoria received by the Committee have shown that effectively two classes of workers exist in that State. Employees whose terms and conditions are set by Federal awards which provide the limited protection of s.89A, allowable award matters, and those who are covered by the minima in Schedule 1A of the WR Act, which includes a mere five conditions of employment.

1.89 The Labor Senators conclude that while some benefits for Victorian employees do exist in Schedule 15 of the Bill (eg employers would no longer be able to force their employees to work 70 hours a week for 38 hours pay, and the Department would at least have powers to prosecute breaches of the minimum conditions), this is clearly inadequate.

1.90 The Labor Senators are particularly concerned that the Bill would actually further disadvantage Victorians working under Schedule 1A. Proposed amendments

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18 *ibid*.

which will exempt some types of employees from entitlements to annual leave and sick leave are without merit.

1.91 It is important to note that of the approximately 300 submissions received from private citizens opposed to the Bill, more than half of these submissions were from Victorians. The Labor Senators believe that as a first step in providing minimum protection for Victorian workers the opportunity should be made available for all Victorian workers to be able to access federal award coverage.

1.92 It is unfair and inequitable that some Victorian employees have to work under Schedule 1A conditions, while others (generally union members) have access to the federal award safety net. The Commonwealth Government ignores this injustice at its own peril, because it is clear that Victorian employees are fed up.

Independent Contractors

1.93 In keeping with a consistent theme of this bill the proposal to repeal sections 127A-C is another attack on the most vulnerable workers. Evidence was received from community groups, churches, law firms, State Governments and unions that rejected the need for these amendments. The Government has failed to demonstrate why one of the few protections available to contractors should be removed.

1.94 The Labor Senators conclude that the removal of the ability of the Federal Court to review contracts for 'work' would simply open up a loophole for unscrupulous employers to avoid the terms of employment established under awards and agreements, by artificially contracting out work normally performed by employees. This would encourage the use of precarious forms of employment at the expense of permanent employment.

1.95 The Labor Senators reject any move to limit the rights of all vulnerable workers.

Conclusion

1.96 Overall the Labor Senators conclude that the evidence provided to the Committee demonstrates that the *Workplace Relations Act 1996* is regressive and has had serious and far reaching negative social impacts particularly on the most disadvantaged Australian workers. In addition there is a paucity of evidence to support the need to extend further de-regulation on the labour market as proposed in this bill.

1.97 Labor Senators do not claim to come to the above issues without preconceptions. But the evidence that came before the Committee was overwhelming. In particular the opinions of the ordinary people who sent in submissions opposing this Bill, condemning the changes of 1996 for the damage it had done to their work, their health, their family lives, their friends and their community. Also, eminent persons such as Professors' Hancock, McCallum and Isaacs; academics like Drs' Peetz, Pocock and Hall; and the community groups, lawyers, unions, public servants

and employers. Some employers made a real effort to leave political allegiances aside, and deal with the issues before us in a dispassionate and thoughtful manner. Notable for their constructive contributions were the Australian Industry Group, the Victorian Automobile Chamber of Commerce and the Australian Catholic Centre for Employment Relations.

1.98 Unfortunately, the majority report does not reflect much of the evidence. This is unfortunate for those who made an effort to contribute to the Committee's Inquiry. The inability to deal honestly and constructively with the thoughtful contributions of so many people and organisations does no credit to the majority or to the Senate and the Parliament.

1.99 Perhaps the best example of this assertion is in the different treatment by the reports of the issue of work and family. How we balance the competing demands of our working lives with our personal lives is one of the most difficult issues confronting us as individuals and as a society. There was significant evidence put before the Inquiry as well as a much wider continuing debate within the community and the media on this matter. That it only merited five paragraphs in the majority report is disappointing.

1.100 This unfortunate pattern is repeated throughout the majority report. Where the evidence is problematic for the Government case, it is either ignored, misconstrued or conclusions drawn in the absence of any support in the evidence.

1.101 In some ways, the majority report serves as an analogy for the manner that this Government deals with industrial relations. Where the issue is the bargaining power of workers, prescription reigns – when the union can see employees, how, where, when they can take industrial action, under what circumstances, for what reason, how long and the list goes on. When it comes to the bargaining power of capital, or employers, the Minister wants flexibility and choice. Choice, but not mutual choice, and little care for the position of vulnerable workers.

Report Structure

1.102 For convenience the Labor Senators have structured the remainder of the report in the following manner. The next 10 chapters involve substantive discussion reflecting the Committee's terms of reference. Within each of these policy areas the impact of the 1996 legislation, and the probable impact of the proposed amendments are examined. Finally **the conclusion sets out, schedule by schedule, our concerns with the Bill.**

Recommendation

Labor Senators recommend that the Act should be amended in accordance with the recommendations set out above, and consequently that the Bill be withdrawn.