CHAPTER 12

CONCLUSION

Introduction

12.1 This Chapter summarises the main amendments proposed to the WR Act by each major Schedule of the Bill, refers to the substantive discussion of the amendments in other chapters of this report and summarises the Labor Senators' recommendations on each of the main amendments.

Schedule 1 – Objects of the Act

12.2 The Bill would amend the principal object of the Act in several areas:

- Item 1 would reinforce the presumption in favour of State regulation and prevent employees from transferring to the federal jurisdiction. The proposal is discussed in Chapter 7 'The needs of workers vulnerable to discrimination' and Chapter 10 'Victorian workers'.

  The Labor Senators reject the proposed amendment and consider that the federal jurisdiction should remain open to those employees covered by State awards and agreements and the Victorian minimum conditions in Schedule 1A, where the Commission decides that this is appropriate.

- Item 3 would oblige the Commission and the courts to stop any industrial action not taken in accordance with the complex procedures established in the Act and proposed under the Bill for 'protected' industrial action. The operation of the current provisions of the Act regarding industrial action and the proposed amendments in the Bill are discussed in Chapter 6 'Balance and bargaining' and in Chapter 3 'International obligations'. Item 3 would also insert a reference to the proposed system of secret ballots into the principal object of the Act. A substantive discussion of the secret ballot amendments is contained in Chapter 6 'Balance and bargaining'.

  The Labor Senators reject the proposed amendment to the principal object, as we do not support the introduction of secret ballots, or the further restriction of the ability of workers to take industrial action to advance their claims in bargaining. The provisions of the Act restricting industrial action are in breach of Australia's obligations under international labour conventions, and the amendments proposed by the Government would compound these breaches.

- Item 4 would amend the principal object to reflect the proposed dichotomy of voluntary and compulsory conciliation by the Commission, and would provide that the Commission's compulsory arbitration powers are only to be exercised as a last resort. A substantive discussion of the proposals is contained in Chapter 4 of this report 'Standing of the Australian Industrial Relations Commission'.

> The Labor Senators do not agree with the proposal to restrict the Commission's conciliation powers to situations where all parties agree to conciliation. This would simply result in those parties to industrial disputes with greater bargaining power refusing to agree to conciliation. This will create more protracted industrial disputes, which are not beneficial to the national economy or the parties involved.

- Items 2, 5, 6 and 7 would amend the principal object of the Act, and the objects of the Act regarding dispute prevention and settlement, to state that the role of awards made by the Commission is only to provide a safety net of basic minimum wages and conditions, and to ensure that awards do not provide for wages and conditions above the safety net and that the Commission cannot maintain internal relativities in awards. These amendments are considered in Chapter 4 'Standing of the Australian Industrial Relations Commission' and Chapter 7 'The needs of workers vulnerable to discrimination'.

> The Labor Senators reject the proposed amendments regarding the role of awards. The Commission should have the broad discretion to establish and maintain a fair and comprehensive award safety net, which provides sufficient protections and conditions for award reliant employees, and provides a fair and relevant standard against which agreements are tested.

Schedules 2, 4, 5 and 6 – Australian Industrial Relations Commission and Awards

Schedule 2 – Australian Industrial Relations Commission

12.3 The main amendment in Schedule 2 of concern to the Labor Senators is contained in item 18. This amendment would introduce fixed term appointments for Commissioners. A substantive discussion of this amendment is set out in Chapter 4 of this report 'Standing of the Australian Industrial Relations Commission'.

12.4 Other amendments in this Schedule, to change the name of the Commission and to require compulsory retraining programs for Commissioners, are indicative of the Government's general contempt for the Commission.

> The Labor Senators reject the amendment to introduce fixed term appointments to the Commission, as this would undermine the independence of and public confidence in the Commission.

Schedules 4 and 5 – Conciliation and mediation

12.5 Schedule 4 would restrict the ability of the Commission to conciliate industrial disputes to those disputes involving 'allowable award matters' and other limited matters. The Commission would be able to conciliate other matters, but only with the consent of all parties to a dispute and only on a cost recovery basis - the Commission would be required to charge a fee of $500 to provide 'voluntary' conciliation services, in order to allow private sector mediation firms to compete with the Commission. Schedule 5 would formally legislate a role for these private sector mediation firms.

12.6 Chapter 4 'Standing of the Australian Industrial Relations Commission' discusses these proposed amendments in more detail.

> The Labor Senators reject the proposed amendments to restrict the Commission's conciliation powers and to introduce fees for conciliation. Where one party has more bargaining power than another, this would be unfair and could result in protracted industrial disputes. Fees would tend to disadvantage vulnerable workers and would discourage the use of conciliation as a quick, non-legalistic means of resolving disputes. The Labor Senators do not regard the amendments in Schedule 5 as necessary – mediation is already available to those parties who want to use it as an alternative to the Commission's procedures.

Schedule 6 - Awards

12.7 The amendments in Schedule 6 would further reduce the list of allowable award matters in section 89A of the WR Act, and would specifically provide that a range of other matters are 'non-allowable award matters'. Proposed amendments to section 111AAA would also prevent movement of workers under State jurisdictions and Victorian workers into the federal jurisdiction.

12.8 Chapter 4 'Standing of the Australian Industrial Relations Commission' discusses the proposed amendments to cut back awards, particularly in relation to training, long service leave and tallies. Chapter 7 'The needs of workers vulnerable to discrimination' also discusses the proposal to remove training clauses from awards and considers the impact of the proposed amendments on parental leave clauses established under the Commission's Parental Leave Test Case. The particular effects of the proposed amendments to section 111AAA on Victorian workers are discussed in Chapter 10 'Victorian workers'.

> The Labor Senators reject the proposed amendments to awards. It is imperative that the Commission is empowered to maintain a fair, relevant and effective safety net. Many Australian workers continue to rely on awards to set their terms of employment, as they are unable to access enterprise agreements. Arbitrary removal of award provisions seriously disadvantages these workers, who have little opportunity to regain lost conditions through agreements. Also, arbitrarily reducing the contents of awards undermines the no-disadvantage test and reduces the standards against which agreements are tested.
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> The Labor Senators do not agree that section 111AAA should be limited to prevent workers under State jurisdictions or Schedule 1A to the WR Act from seeking federal award coverage. In particular, Victorian employees are working under seriously substandard terms and conditions, and the Commission should have the ability to apply awards, and the federal safety net, to these employees.

Schedule 7 – Termination of employment

12.9 Schedule 7 proposes unfair and unbalanced amendments to the termination and unfair dismissal provisions of the WR Act. The amendments would allow employers to seek punitive costs orders against employees who make unfair dismissal claims, would prevent workers who are forced to leave their jobs as a result of sexual harassment or bullying from seeking compensation for constructive dismissal, and would attempt to limit employees from engaging legal representation where they do not have enough money to cover a lawyer's costs at the time of the claim.

12.10 The amendments would further complicate administrative procedures for employees who make unfair dismissal applications, particularly regarding time limits.

12.11 These amendments are discussed in detail in Chapter 7, 'The needs of workers vulnerable to discrimination' and Chapter 9, 'Job security'.

> The Labor Senators reject the proposed amendments. They would have the effect of preventing low paid and disadvantaged employees from seeking compensation when they are unfairly dismissed, and will therefore promote job insecurity and unfair dismissals. The amendments would also adversely affect women and younger employees who are mistreated at work to the point where they are forced to resign. The Government should be ashamed of the proposals in Schedule 7.

Schedules 8, 9, 11 and 12 – Bargaining and industrial action

Schedule 8 – Certified agreements

12.12 The main amendments that would be made by Schedule 8 are:

- introduction of new mechanisms for certifying agreements without a public hearing and allowing certification by the Industrial Registrar, rather than the Commission. These amendments are discussed in Chapter 4, 'Standing of the Australian Industrial Relations Commission' and Chapter 7, 'The needs of workers vulnerable to discrimination'.

  > The Labor Senators reject the proposed amendments. They would reduce the standing of the Commission, and allow discriminatory agreements to go unchecked, further disadvantaging women and other vulnerable workers.

- allowing certified agreements to be made only covering part of a workplace, and prohibiting multi-employer agreements. These amendments are discussed in Chapter 6 'Balance and bargaining' and Chapter 7 'The needs of workers vulnerable to discrimination'.

  > The Labor Senators reject these amendments. Allowing certified agreements to cover only part of a workplace will potentially lead to discrimination against particular employees or groups of employees. The current requirement that a certified agreement apply to all those employees who could reasonable expect to be covered ensures that groups of workers are not excluded for discriminatory reasons. The amendments will also

> undermine the bargaining power of employees, allowing employers to separate groups of workers with industrial strength and ensure poorer outcomes for those with reduced bargaining power. The amendments to outlaw multi-employer agreements will have negative impacts in major sectors of the Australian economy, including construction and natural resources.

Schedule 9 – Australian Workplace Agreements

12.13 Schedule 9 would considerable alter the procedural requirements for AWAs. AWAs would commence on the day that they were made, rather than after assessment to ensure compliance with the no-disadvantage test. This would mean that AWAs that do not pass the no-disadvantage test could operate for periods of up to 60 days. Schedule 9 amendments would remove the application of the no-disadvantage test to agreements covering employees with a total remuneration package of more than $68,000.

12.14 The Schedule would also provide that AWAs have primacy over certified agreements and awards, and would remove the Commission's involvement in scrutinising AWAs where the Employment Advocate is not certain whether they pass the no-disadvantage test.

12.15 These amendments are discussed in detail in Chapter 3 'International obligations', Chapter 6 'Balance and bargaining' and Chapter 7 'The needs of workers vulnerable to discrimination'.

> The Labor Senators reject the amendments. They will allow unscrupulous employers to abuse AWAs, potentially even allowing employers to circumvent the no-disadvantage test entirely, particularly for short term and casual workers and those on salary packages above $68,000. The amendments would also compound the Government's breaches of international labour conventions relating to collective bargaining, by giving individual agreements primacy over collectively negotiated agreements. The removal of the Commission's role regarding AWAs is a further unwarranted attack on the standing of the Commission.

Schedule 11 – Industrial action

12.16 Schedule 11 contains amendments to various provisions regulating the situations in which industrial action can be taken in support of claims for wages and conditions. The main amendments are:

- to allow employers easier access to section 127 orders, and to prevent employees and unions from obtaining section 127 orders against employers except in the case of unprotected lock outs. This is discussed in Chapter 6 'Balance and bargaining'.

> The Labor Senators reject these amendments. They are unbalanced and would tend to give employers more bargaining power at the expense of employees. The new provisions would require the almost automatic issuing

of an order to stop industrial action, even where it is unclear whether the action is protected or not, and even in cases where industrial action is not occurring, but may occur at some unknown time in the future.

- to prevent employers from paying employees who take industrial action for a whole day, even where the industrial action may have only taken place for a few minutes. This amendment in discussed in detail in Chapter 6, 'Balance and bargaining'.

  The Labor Senators reject this amendment. It is not supported by employers or employees, as it would be unfair and would encourage employees to take longer periods of industrial action.

- to repeal section 166A which requires conciliation by the Commission before an employer can seek common law damages against a union for taking industrial action. This amendment is discussed in Chapter 6 'Balance and bargaining'.

  The Labor Senators reject this amendment. It is not supported by many employers, who value access to conciliation to settle damaging industrial disputes. The amendment would create a more legalistic and less cooperative industrial relations system.

- to require automatic suspension of bargaining periods on application after industrial action has been taking place for two weeks, and to further restrict the circumstances in which the Commission can terminate a bargaining period and arbitrate under section 170MX to settle a dispute. These amendments are discussed in more detail in Chapter 3 'International obligations' and Chapter 6 'Balance and bargaining'.

  The Labor Senators reject the proposed amendments. They would significantly disadvantage employees and unions in negotiations with employers for agreements, and would result in further breaches of Australia's obligations under international labour conventions. The amendments would also prevent employees who are particularly disadvantaged in agreement negotiations from accessing arbitration where their employers are refusing to bargain in good faith.

Schedule 12 – Secret ballots

12.17 Schedule 12 would introduce a complex and prescriptive system of secret ballots that would be required before any employees could take protected industrial action under the WR Act.

12.18 The proposed ballots would require the employees or union proposing industrial action to specify the precise nature, form, dates and duration of any industrial action in an application to the Commission, would prevent any industrial action relating to multi-employer agreements, and would require unions and employees to meet part of the costs for these ballots.

12.19 The proposed amendments are discussed in Chapter 3, 'International obligations', Chapter 6 'Balance and bargaining' and Chapter 7 'The needs of workers vulnerable to discrimination'.

> Labor Senators reject the proposed system of secret ballots. It is very prescriptive compared with other secret ballot systems (such as that operating in the United Kingdom), so much so that it would simply prevent protected industrial action from occurring. The prescriptive nature of the ballots, and the extensive requirements for applications and ballot papers in writing would tend to discriminate against those employees from non-English speaking backgrounds or with limited literacy skills. The amendments would also breach Australia's obligations under international labour conventions.

Schedule 13 – Right of entry

12.20 The Bill would prevent unions from exercising right of entry unless given an invitation in writing from an employee at a workplace who is also a member of the union. These written invitations would automatically lapse after 28 days and would be required regardless of whether the union exercised right of entry to meet with union members or to inspect suspected award or agreements breaches.

12.21 The Commission would also be given wide-ranging discretion to make orders against union officers who 'abuse' the right of entry permit system, but the Bill contains no equivalent provisions for employers who abuse the right of entry permit system.

12.22 These amendments are considered at length in Chapter 6 'Balance and bargaining', and also in Chapter 3 'International obligations'.

> The Labor Senators reject the proposed restrictions on union right of entry. The amendments would hamper unions in their efforts to ensure that employers comply with their obligations under awards and agreements, at a time when the Government is dedicating very few resources to compliance activities. The amendments would also breach Australia's international obligations and would prevent people who are not union members from meeting with union representatives, unfairly restricting their freedom of association rights under the WR Act.

Schedule 14 – Freedom of association

12.23 The amendments proposed in Schedule 14 of the Bill would create a presumption of a closed shop at workplaces which have more than 60% union membership, prohibit union encouragement clauses in awards and agreements and would also prohibit 'restrictive arrangements', such as the Homeworkers' Code of Practice.

12.24 The proposed amendments are considered in Chapter 6, 'Balance and bargaining'.

> The Labor Senators reject the proposed amendments in Schedule 14. The 'closed shop' provisions would discourage union membership, and would potentially create a situation where the Office of the Employment Advocate would investigate and intimidate employees and employers in workplaces with more than 60% union membership. A workplace without 100% union membership is by definition incapable of being a 'closed shop'. The proposed amendments to outlaw union encouragement clauses were rejected by the Australian Democrats in 1996, and should be rejected again. The proposed amendment regarding 'restrictive arrangements' could operate in practice to outlaw cooperative arrangements to ensure decent working conditions for vulnerable employees, such as outworkers.

Schedule 15 – Victorian workers

12.25 The Bill makes some limited technical improvements to conditions for Victorian workers who are covered by the five minimum conditions of employment in Schedule 1A to the WR Act. The Bill would also remove entitlements to sick leave and annual leave for casual and seasonal workers in Victoria. The amendments are discussed in Chapter 10 'Victorian workers'.

> The Labor Senators support the minor technical improvements in Schedule 15, but consider that Victorian employees should have access to federal award safety net standards. The current situation of two different federal industrial relations systems and standards is inequitable.

Schedule 16 – Independent contractors

12.26 The Bill proposes to repeal sections 127A-C of the WR Act, which allow the Federal Court to review unfair and harsh contracts for work that would otherwise by undertaken by employees. The amendments are discussed in Chapter 11 of this report, 'Independent contractors'.

> The Labor Senators reject the proposed repeals. The removal of these sections would allow employers to unfairly engage people to perform work at conditions below award safety net standards, and leave employees with limited or no recourse to review. This amendment would particularly affect some of the most vulnerable workers in the textile clothing and footwear industry.

Recommendation

Labor Senators recommend that the Bill be withdrawn and that the Act should be amended in accordance with the recommendations outlined in the Overview.