DEMOCRAT SENATORS' REPORT

SUPPLEMENTARY REPORT ON THE WORKPLACE RELATIONS LEGISLATION AMENDMENT (MORE JOBS, BETTER PAY) BILL 1999

SENATOR ANDREW MURRAY: AUSTRALIAN DEMOCRATS: November 1999

1 Introduction

Workplace Relations reform often generates great passion from unions of employers, and unions of employees, and individual workers and employers. This is also reflected in the ranks of politicians, particularly if they come from those unions of employers and employees.

The *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (WRLAB) is notable for having drawn great passion from unions of employees, but relatively little from their employer counterparts. It does not seem to be a bill that has excited employers as much as previous industrial relations legislation.

The Democrats are beholden to neither unions nor business. Our policies are strongly supportive of a fair balance between the rights of unions and employers, and of ensuring a strong award safety net, particularly for workers in a disadvantaged bargaining position. We support access to the independent umpire in the Australian Industrial Relations Commission, we support productivity-based enterprise bargaining where employers and employees genuinely wish to bargain, and promoting industrial democracy.

These background principles guide our approach to this legalisation.

This bill is part of a process, the third in a row. This is the third wave of workplace relations legislation.

The first wave, with probably the greatest assault to date on the arbitral powers of the AIRC, was Labor's Brereton reforms of 1994. These laws severely restricted the capacity of the Commission to vet enterprise agreements if they met the global no disadvantage test. As a forerunner to allowable matters, Labor's reform blue print in the 'Working Nation' White Paper in 1994 envisaged awards being pared back to eight to ten core conditions, and enterprise agreements becoming the principle means for advancing industrial causes.

The second wave was the Coalition's Reith reforms of 1996, which picked up Labor's 'Working Nation' blue print, and threw in some old-fashioned Coalition anti-union sentiment. It produced an overhaul of the award system, the introduction of freedom of association, the regulation of industrial action and secondary boycotts, and it proposed Australian Workplace Agreements. The Democrats insisted on more than 170 amendments to this bill to shift it from an anti-union bill to a more even handed reform. Our intention was to allow for more flexibility in conditions upwards and sidewards, but not downwards in terms of reducing wages and conditions.

This Committee has been asked to look at the effectiveness of the 1996 reforms, and it is worth restating some of the evidence on the efficacy of the 1996 reforms. In doing so, it is instructive to use the five tests that Labor's shadow industrial relations spokesperson set down in Parliament in 1997:

Industrial disputation:
First, he asked, will there be fewer disputes than under the previous regime?

The answer is yes. The average number of days lost fell from 61.5 days per 1000 employees per month in Labor's last two years to 41.5 days per 1000 employees now.

Employment:
Two, will there be more jobs?
In the last eighteen months of the Labor government, 124,000 new jobs were created, of which 43,600,or 35%, were fulltime jobs. In the eighteen months of the Coalition Government following the 1996 Workplace Relations Act, 290,000 new jobs were created, of which 150,000 or 52%, were full time.

Wage outcomes:
Three, will the distribution of wage outcomes and benefits be fairer after than before?

Answer, yes and no. In the last two years of Labor, real wages increased by 0.9% and 0.3% respectively, compared to increases of 4.2% and 2.5% respectively in the last two years.

National Wage Case Increases awarded by the AIRC under the new Act for the lowest paid over the last three years have totalled $36 a week, 50% more than the $24 a week awarded in the last three years of the Labor Government. Despite these real increases at the bottom end, the ABS reports that the distribution of income in Australia grows more unfair each year. This unacceptable trend remains unchanged from Labor's years.

Productivity:
Again, more good news. In the two years to June 1996, under the old Act, labour productivity rose by an average of 1.7% a year. In the last two years under the new Act, productivity has risen by 3.4% a year.

Outcomes:
Five, will the overall wage and salary outcomes be more consistent with a low inflation, low interest rate environment than the outcomes of the present system?

Answer, yes. It is well known that all of this – rising employment, rising real wages, rising productivity, has come in a period of low inflation and low interest rates.

So, on the key economic criteria set by Labor for the 1996 law, it has been clearly a success in delivering better economic outcomes. That is evidenced by higher real wages, employment and productivity.

In contrast, it should be noted that union membership continues to fall, from 50% of the workforce when Bill Kelty took over the ACTU in 1982, to 40% by 1992, to 31% by 1996 and down to 28% by 1998. Only one in five private sector workers are now union members.

Interestingly, the decline in union membership is slowest among women, with membership falling 6.5% over the last four years, compared to the 13.6% fall in membership of men.

Dealing with a few other points. The Office of the Employment Advocate has been criticised for its policing of freedom of association claims. It is to be noted that the freedom of association provisions the Democrats agreed to in 1996 were tested and were crucial to the legal victories of the MUA during the waterfront dispute last year.

It should also be noted that the International Labor Organisation has criticised the 1996 law's restriction on industrial action, arguing that they breach ILO conventions on collective bargaining. Labor's 1993 legislation also breached ILO conventions.

On an operational level, the problem with federal unfair dismissals so complained about by employers under Labor's laws has been largely resolved. Claims are down by 50% in the Federal system under the 1996 Act.

The Australian Industrial Relations Commission has asserted its independence. Sometimes unions have been pleased with the results, sometimes employers and sometimes neither. That is the function of an umpire - to make decisions without fear or favour. Some examples are its rejection of Minister Reith's low Safety Net wage increase offers, and its decisions on the Coal Industry and Tallies.

The award simplification process appears to be proceeding smoothly, with around 50% of all Federal awards either simplified, set aside or deleted, and a further 30% currently being reviewed by the Commission. It has been a time-consuming process, but there have been some good results. The Metal Industry Award, for example, has been reduced from 447 pages to 202 pages, with 132 clauses deleted and 7 related, but unnecessary, awards, set aside.

This is a standard that the Federal Parliament itself can never hope to reach. Minister Reith's third wave workplace relations bill ‘simplifies’ the law by increasing its length by at least 50%.

The Democrats do not believe that a strong or compelling case has been made out on the need for major further reform. The 1996 reforms, whilst not all positive in their effects, have, in a macro sense, assisted in delivering higher real wages, higher productivity, higher employment, and National Wage Case safety net increases, while also assisting in reducing industrial disputation.

Yet, those reforms are not yet fully bedded down. In particular, the enormous undertaking of award modernisation and simplification is only half completed.

Many important provisions of the new Act are yet to be tested in the courts or by the Full Bench of the Commission.

The Democrats are not opposed to improvements and technical changes to the Act. But it is just too soon for major change. We are also prepared to consider clearly identified operational deficiencies in the Act. Some are indeed addressed in the Government's bill, while others have been raised in submissions to the Committee.

However, in many respects the 1999 bill goes much further than the 1996 bill. Amongst other things, the bill proposes a further watering down of the scope of awards (and another round of award simplification when the current one is incomplete), restrictions on access to the Commission's arbitral powers, reductions in the vetting of enterprise agreements, restrictions on access to industrial action and the ability of unions to organise, recruit and represent members. The Democrats do not believe that a case has been made out for such broad ranging changes.

Following the major changes introduced by Ministers Brereton and Reith in the space of a few years, we believe further changes to the Act should be evolutionary. They should be specific and limited, not wholesale and general.

This bill as it stands is too harsh, too regressive and too unfair to attract our support in its current form.

In this minority report, I deal with the amendments in the bill schedule by schedule. My comments make it clear that the vast majority of the major provisions in the bill are unacceptable to the Democrats, while many of the remaining parts of the bill are likely to need substantial amendment to remove harsh, repressive or unnecessary additions.

2 'Just say no' or 'Just say yes'

There has been a strong 'just say no' campaign waged on this bill by the unions, and a weaker 'just say yes' campaign waged by a few employer organisations. During my time in the Senate the Australian Democrats have been subject to a number of 'just say no' or 'just say yes' campaigns, by absolute opponents or absolute supporters of proposed Government legislation. At times the Government itself, the Executive, have been guilty of the 'just say yes' mantra, and the Opposition, the Executive-in-waiting, have been guilty of the 'just say no' chant.

At its worst such attitudes deny the right of the people at large, through their parliamentary representatives, to consider matters on their merits.

At the heart of such demands is a denial of the duty of parliamentarians, particularly Senators, to examine all legislation on its merits. At the heart of such demands is a desire to bypass parliamentarians altogether, both in their representative capacity, and in their responsibility capacity.

These sorts of demands are foreign to the two decades of Australian Democrat tradition of responsible and democratic Senate review. Every Government, whatever its philosophy, whatever its proposal, has the right to put its legislation forward and to have it properly considered by Parliament.

There are a number of business groups who have been at the forefront of demanding that the Senate be a rubber stamp. Indeed, some submissions from business have been to the effect that this bill should be rubber-stamped without amendment or due consideration of the merits. On the other side the unions have recommended that the bill be rejected in full without amendment or due consideration of its merits.

The ACTU, for effective campaigning reasons, have promoted the 'just say no' campaign, with a demand that the WRLAB be rejected at the second reading - in other words before any schedule, any clause, can be voted on. This demand has been taken up by some members of the parliamentary wing of the Union movement, the Labor party.

In this report, I propose to consider the merits of the various aspects of the WRLAB. The Democrats party room will determine our final position, assisted by this report.

My conclusions on the merits of each schedule highlight the most serious of the flaws of the bill. My overall conclusion is that major provisions of the bill should be rejected as harsh, unfair, unbalanced and unnecessary. The analysis highlights that, of the acceptable schedules and clauses left, quite a number in my view would need substantial amendment and modification to form the basis of good law. It is evident that only a minority of clauses are non controversial.

3 WRLAB overview

The Inquiry has convinced me that a number of schedules have very little merit overall, and should be rejected outright.

Schedule	Subject
1	Objects
4	Conciliation
5	Mediation
6	Awards
8	Certified Agreements
9	AWA'S
12	Secret Ballots
16	Independent Contractors

There are five Schedules of relatively low importance (except No 15), which are worthy of due consideration. In its submission, the ACTU, despite its 'just say no' campaign, did not even comment on these five schedules of WRLAB. I can only conclude that this is because these schedules either contain good legislation for employees, (Schedule 15 contains clauses which materially and beneficially assist Victorian employees), or are quite modest in effect. These Schedules are:

3	Employment Advocate
10	Relevant and Designated Awards
15	Victoria

17 Miscellaneous Amendments
18 Amendments of other Acts

The remaining Schedules have major provisions that should be rejected, and other clauses, which need amendment. These schedules nevertheless retain substance worth considering further.

2 The AIRC
7 Termination of Employment
11 Industrial Action
13 Right of Entry
14 Freedom of Association

4 Schedule 1: Object of the Workplace Relations Act

This Schedule, in my view, detrimentally alters the direction of the *Workplace Relations Act* (WRA). In addition, any view of the Objects of the Act should await the outcome of discussions and determinations between the Government and the International Labour Organisation (ILO), whose Committee of Experts have made some criticisms of the WRA, which need resolution.

5 Schedule 2: Renaming of the Australian Industrial Relations Commission etc. and restructuring of the Commission

Much of this schedule deals with the renaming and restructuring of the Commission and Registry. While I do not personally see the need for a name change (to the Australian Workplace Relations Commission, and the Australian Workplace Relations Registry), it is a measure that has not generated much heat. The Government also intends to restructure the Commission, in a manner that appears acceptable.

The Democrats should not, however, agree to give members of the Commission fixed terms of limited tenure. As has been clearly shown in this Government's life, controlling the appointment process, controlling the dismissal process, and putting employees on short-term contracts, results in a significant and regrettable loss of independence. We opposed the loss of tenure of the Clerks of the two Houses of Parliament (which was supported by the Labor party and the Coalition), and we oppose the way in which senior bureaucrats have been made subject to political control. This attempt to put Commissioners on limited tenure should also be opposed.

Consideration should be given to the now standard Democrat amendment that appointments, (to the Commission in this case), be made on merit. Democrat Senators have now attempted to have this amendment accepted for numerous Government appointments, in many bills. Even the majoritarian British Parliament could accept such a principle. No doubt the Coalition and the Labor party will distinguish themselves by voting against this yet again. I will not detail the case for

this proposed amendment here, because I have detailed it in other Reports, most recently for the Corporations and Securities Committee.[1]

6 Schedule 3: Employment Advocate

The seven clauses of this Schedule are relatively modest and technical in nature, and only one may be of concern.

Addressing this Schedule may provide the opportunity to address a number of amendments needed to the WRA itself, as suggested by witnesses. For instance, the ACTU want the Employment Advocate to examine proposed agreements to ensure they properly consider work and family responsibilities, and in particular whether flexible hours provisions contravene the no disadvantage test, if they result in disadvantages to employees with family responsibilities.

Several unions have complained that the Employment Advocate is less than even handed in dealing with Freedom of Association rules, targeting unions for allegedly inappropriate recruiting behaviour, but doing little to prevent de-unionisation strategies by employers. It may be appropriate for the Act to be amended to require the Advocate to be even handed in these matters.

7 Schedule 4: Conciliation

The Australian Industry Group (AIG), the ACTU, and other key witnesses are opposed to this Schedule, and I agree with them. The existing system of conciliation is accessible, relatively uncomplicated, and is widely supported by experienced practitioners of industrial relations.

8 Schedule 5: Mediation

Union input on this Schedule was weak, and of all the witnesses the AIG gave the most detailed critique. The AIG do not support the Schedule, and their alternative proposal deserves serious consideration, and actually increases the power of the Commission in this area.

The Government proposes setting up an alternative regime to that of the AIRC. I do not recommend supporting that proposal. Mediation should be built into the existing system, build on the strengths of the existing system, and where legislated for, should be publicly funded. That obviously does not preclude the existing and continuing use of private mediation.

[1] Senator Andrew Murray, Australian Democrats, 'Supplementary Report on the Corporate Law Economic Reform Program Bill', 1998, 5.

9 Schedule 6: Awards

This is one of the least attractive schedules in the bill. It has the effect of watering down the award safety net and launching a further round of award changes when the current exercise of award simplification is only half complete. In 1997, there were 3197 federal awards. As at 31 October 1999 359 awards had been simplified, a huge number (1245) had been set aside or deemed to have ceased operation, 1172 were undergoing simplification, and 363 were still to begin simplification.

I oppose this Schedule. There are very few clauses worth considering, and a number of the Government's proposals are frankly regressive.

However, one of the clauses that would otherwise be worth considering, (although it would need substantial amendment), concerns the practice of serving logs of claims to initiate paper disputes. These can frighten the life out of small business, quite unnecessarily.

Much has been made of the fact that awards still contain anomalies in them. For instance, I agree there is little to justify keeping union picnic days in awards. However, the fact is that the award simplification and modernisation process begun under the WRA is only half way through. There is little point proposing further rationalisation, simplification, or amendment until that process is bedded down, and its consequences fully understood.

As it is, it is regrettable that Labor and the Coalition have already this year made a major regressive change to awards by entrenching discriminatory wage rates for Australian adults under the profoundly unfair system known as youth rates. How Australians who are legally adults above the age of 18 years can be obliged to accept lower wages for doing adult work still amazes me.

10 Schedule 7: Termination of Employment

The Democrats have consistently opposed removing the right to access unfair dismissal provisions, but have always supported improvements to process. There are clearly still problems associated with time, cost and process issues, and the SDA submission for instance, gave support to some of the clauses in the bill.

The evidence of the Queensland Government added further to debunking the myth propagated by COSBOA, the ACCI and the Government that taking away unfair dismissal provisions will create significant numbers of jobs for small business. In the years that Queensland small business were exempt from state unfair dismissal provisions, no extra jobs were created.

I agree with Jobwatch that certain categories should in fact be added to those who can access unfair dismissal provisions – such as trainees on registered training agreements. I am also concerned that probationary periods be properly integrated into the Act's provisions.

A significant number of clauses need amendment, but some should be rejected completely, such as those concerned with constructive dismissal, and those which provide unnecessary further restrictions for small business operational requirements. While this Schedule seeks to attend to some of the procedural problems with the conciliation phase of unfair dismissals and compensation agreements, the proposals in some respects go too far to reduce the rights of the parties and would need significant amendment.

11 Schedule 8: Certified Agreements

Although there are a few technical amendments that are supportable, and a number of clauses that could be considered if amended, on balance it is better to oppose this Schedule altogether, than attempt to gut it. A large number of provisions are objectionable and would reduce the protections for employees.

12 Schedule 9: AWA's

There are a number of positive matters dealt with in this Schedule, such as better provisions for recovering money due to employees, but the major changes proposed are regressive in that they seek to reduce the level of scrutiny of AWAs by the Employment Advocate and the Commission, and water down the protections for employees. I recommend the Democrats oppose the Schedule.

13 Schedule 10: Relevant and Designated Awards

While aspects of this schedule are essentially technical in nature, some of the clauses would need amendment. In particular, the revised and more restrictive definition of the relevant award clause would need to be opposed.

14 Schedule 11: Industrial Action

In my view, it is difficult for the Government to advocate a much greater tightening up of this area of industrial disputes, when it is simultaneously boasting that Australia has the lowest level of industrial disputation in eighty years.

Industrial disputation is an essential part of the bargaining and market process, and parties to disputation must be given the opportunity to work matters through. The system we now have seems, by and large, to serve Australia well.

This schedule is about seeking to restrict access to industrial action and increase access to penalties in respect of such action. As such, it seeks to respond to what, in an objective sense, is a non-existent problem. Section 127 does not need to be changed. The existing section 127 provides a strong deterrent to disruptive industrial action, and the Government has failed to make out a case that the provisions are not working and need these reforms. Nor has the Government made out a case for extending the notice period for industrial action from 3 to 5 days, or for broadening

the already too broad definition of prohibited strike pay. Indeed, I believe that the current definition of strike pay needs to be revised to move to a less restrictive approach.

In terms of the provisions on dealing with pattern bargaining, I note that the ACTU and the AIG have made a number of constructive comments in dealing with pattern bargaining which are worth further consideration, although the amendments as they stand go too far.

15 Schedule 12: Secret ballots for protected action

This Schedule introduces a rigorous secret ballot regime for industrial action. As a principle, the Australian Democrats are generally strongly supportive of direct democracy. Democrats are also strongly supportive of the democratic protections afforded by secret balloting processes. These are available under the WRA. At present pre-strike ballots are available to employees under section 136 of the Act, and the Commission can order secret ballots at its discretion under section 135. And of course, elections of union officials are by secret ballot. The provisions of section 135 and 136 have apparently been rarely used, suggesting that there maybe little real demand from employers or employees for further access to secret ballots.

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

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

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

16 Schedule 13: Entry and inspection of premises by organisations

This Schedule seeks to replace the right of entry provisions inserted by the Democrats and replace it with a variant of the right of entry scheme we rejected in the 1996 bill. It is an unnecessary and unacceptable impediment on the rights of unions to meet and recruit members, and as such is contrary to the general principle of freedom of association. The Democrats support unionism, whether of employees or employers. Collective representation is effective representation.

The Schedule also contains provisions to deal with breaches of the right of entry scheme by union officials. Evidence from the Master Builders Association indicates that intimidation and unacceptable behaviour still bedevil the practice of entry and inspection of premises.

It is vital for industrial democracy and good workplace practice that search and entry provisions are retained, but better practice is desirable. Unions are in a unique position, since they are the only private sector bodies allowed search and entry rights by law. Unions need to adopt best practice in search and entry as exemplified by the best of the Government authorities that have this power. As a start in this direction, I believe a code of practice on search and entry ought to be developed by the Commission, in conjunction with employer and employee organisations.

17 Schedule 14: Freedom of association

In the context of the WRA, freedom of association is a fundamental guarantee of the right of employees to join or not to join employee organisations. Resistance to this principle, which at its extreme wishes to force employees to be members of unions, indicates an authoritarian and conformist attitude best associated with by gone days of fascism and communism. Modern resistance to the *practice* in Australia however, often reflects a fear that this principle is being perverted to encourage employees *not* to join unions. That, in its turn is anti-democratic, and contrary to the best interests of working people.

There is nothing wrong, (and much that is right), with union encouragement clauses being included in agreements. Better workplace practices, greater equity, and better productivity often result when workplaces have strong union representation. The fact that some strong unions can also behave badly and counter-productively in some workplaces does not negate the general point.

Some of the clauses in this Schedule advance the principle of freedom of association and others retard it.

Many unions have expressed concerns that the Employment Advocate has been less than even handed in the application of freedom of association provisions, targeting union recruiting activities more heavily than deunionisation activities by employers. Were this Schedule passed in full, I believe that it would have the effect of tilting the freedom of association provision more heavily against the rights of unions to organise effectively. The proposed new closed shop rule is particularly offensive in this regard.

There are a small number of clauses in the schedule which appear to be technical in nature. But other clauses, such as the new list of prohibited reasons in section 298BA appear narrower than the current protections for legitimate union activities, and as such should be viewed sceptically. I am also not readily encouraged to allow the moving of the jurisdiction for these provisions from the specialist judges of the Federal Court to the more generalist State courts.

In short, while some provisions of the Schedule might be acceptable, the schedule as a whole needs drastic surgery.

18 Schedule 15: Matters referred by Victoria

Although there are a couple of clauses which would affect Victorian employees negatively, and should be opposed, and some that need amendment, this Schedule is essentially beneficial to the interests of Victorian employees because it expands the rights of Industrial Inspectors and broadens out access to minimum conditions. As such, the schedule has much to recommend it. Indeed, I would go further to suggest that the Federal Government should be now discussing with the Victorian Government means of improving access of the 700,000 award free Victorian workers to the Federal awards system, and this schedule might need to be amended further to achieve such a goal.

19 Schedule 16: Independent contractors

These seven clauses overturn provisions which presently confer jurisdiction on the Federal Court to review contracts for services made by independent contractors.

The Democrats supported the passage of these provisions in 1992 and opposed their removal in 1996. They should be retained, and the Schedule opposed.

20 Schedule 17: Miscellaneous amendments

No submissions have been received on this Schedule. These clauses are mostly technical, facilitative, or uncontroversial.

20 Schedule 18: Amendments of other Acts

This Schedule includes another name change, which I see no point in refusing. Other clauses are mostly technical, facilitative, or uncontroversial.

Senator Andrew Murray