



NSW Government

Inquiry into the provisions of the Workplace Relations Amendment (Protecting the Low Paid) Bill 2003

by the

**Senate Employment, Workplace Relations
and Education Legislation Committee**

NSW Government Submission

April 2003

Executive Summary

The *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003* proposes to amend the *Workplace Relations Act 1996 (Cth)* to provide that the needs of low paid employees be the primary consideration in making national safety net wage adjustments, as well as in the ongoing role of federal awards.

The NSW Government generally declines to make submissions to Senate Inquiries into Bills that concern the shape or form of the federal industrial relations system. However, the present Inquiry concerns a Bill that is of great concern to the NSW Government, firstly as a regular intervener in safety net wage review proceedings, and, secondly as a party to State Wage Case proceedings which consider the flow on of national safety net wage adjustments.

The NSW Government believes that the *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003* provides a significant point of departure from the current comity between the federal and State systems, particularly as they both relate to wage fixing.

The NSW Government believes that the differences between the two systems are likely to create new and unprecedented wage pressures and industrial disruption in the NSW industrial relations system.

On the basis of these concerns, we submit that the Bill be rejected in its entirety.

1. Introduction

1.1 This is the NSW Government's Submission to the Senate Inquiry Into the *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003*.

1.2 The NSW Government generally declines to make submissions to Senate Inquiries into Bills that concern the shape or form of the federal industrial relations system. However, the present Inquiry concerns a Bill that is of great concern to the NSW Government, firstly as a regular intervener in safety net wage review proceedings, and, secondly as a party to State Wage Case proceedings which consider the flow on of national safety net wage adjustments.

1.3 The structure of this submission is as follows:

1. Introduction;
2. Summary and analysis of the provisions of the Bill, including the key assumptions underlying the Bill;
3. Specific concerns about the provisions of the Bill;
4. Conclusion

2. What Does The Bill Do?

2.1 The bill proposes to amend the *Workplace Relations Act 1996* (Cth) to change the criteria to which the Australian Industrial Relations Commission is to have regard when considering variations to the award safety net. The bill was introduced after submissions were made by the ACTU and the Labor State and Territory Governments to the 2003 Minimum Wage Case. If passed before the AIRC hands down its decision, the bill contains retrospective provisions that would require the AIRC to assess the submissions before it on the basis of the new criteria.

2.2 The Bill attempts to achieve this aim by proposing three amendments to the *Workplace Relations Act*. These are as follows:

(i) Section 3(d)(i)

Section 3 of the *Workplace Relations Act* sets out the principal objects of the Act. The Bill proposes to amend the current s3(d) as follows:

'...3 The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

.....

(d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the

workplace or enterprise level, upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment, primarily to address the needs of the low paid'

The proposed amendment is underlined.

(ii) Section 88A(d)

Section 88A contains the Objects of Part VI of the *Act*, which sets out the powers of the Commission, relevantly including the power to make and vary awards. The proposed amendment to s88A(d) is as follows:

'88A The objects of this Part are to ensure that:

.....

(d) the Commission's functions and powers in relation to making and varying awards are performed and exercised in a way that:

(i) encourages the making of agreements between employers and employees at the workplace or enterprise level; and

(ii) uses a case-by-case approach to protect the competitive position of young people in the labour market, to promote youth employment, youth skills and community standards and to assist in reducing youth unemployment; and

(iii) recognises that the primary role of awards is to address the needs of the low paid....'

(The proposed amendment is underlined)

(iii) Section 88B(2)

At present, s88B(2) of the *Workplace Relations Act* requires the AIRC to ensure that a safety net of fair minimum wages and conditions is established and maintained, having regard to three criteria:

- (a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;
- (b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;
- (c) when adjusting the safety net, the needs of the low paid.

The bill would delete paragraph (c) and replace it with the following:

- (c) when adjusting the safety net:
 - (i) as a primary consideration, the needs of the low paid, including their need for employment; and
 - (ii) the employment prospects of the unemployed; and
 - (iii) the capacity of employers to meet increased labour costs.

2.3 Further insight into the aims of the Bill may be gained from both the Minister's Second Reading Speech and the Explanatory Memorandum.

The Explanatory Memorandum states that:

'...REGULATION IMPACT STATEMENT – WORKPLACE RELATIONS AMENDMENT (PROTECTING THE LOW PAID) BILL 2003

Problem:

....

3. When adjusting the award safety net, there is a need for the Australian Industrial Relations Commission (the Commission) to give greater regard to the effect of its decisions on the encouragement of agreement making and the employment prospects of the low paid and unemployed.

4. A particular problem is the extension of safety net adjustments to middle and high wage earners. Giving annual increases to higher paid employees fails to provide an appropriate incentive for these employees to enter into workplace agreements. Recent decisions suggest that the Commission continues to see a role for the award system in determining the wages and salaries of middle and high wage earners even though these employees are increasingly entering into wage agreements with their employers and are less reliant on award based wage increases...'

No specific recent decisions of the Commission are cited.

2.4 Similarly, the Minister's Second Reading Speech states that:

'...It is the intention of the Workplace Relations Act 1996 that awards should provide a safety net of fair minimum wages and conditions without discouraging agreement making for award workers above that safety net. The federal workplace relations system is now firmly focused upon the setting of wages and conditions of employment at the enterprise level. Agreement making gives employers and employees the opportunity to increase the productivity and competitiveness of

Australian enterprises. This in turn ensures a stronger and more resilient economy with healthier employment prospects. In this way agreement making at the workplace level offers rewards for employees, employers and for Australia as a nation.

A key part of the principal object of the Workplace Relations Act is that actual wages should, as far as possible, be determined by bargaining at the workplace or enterprise level. A central feature of the legislative framework is the Australian Industrial Relations Commission's role in encouraging bargaining. Decisions of the commission on the adjustment of rates of pay in awards need to be consistent with and reinforce the safety net role of awards. This is important to ensure genuine safety net standards, to encourage agreement making and to meet overall economic objectives....' (Minister for Employment and Workplace Relations Second Reading Speech Commonwealth Parliamentary Hansard 11777 13 February 2003)

2.5 In addition, in his speech in reply to proposed Opposition amendments to the Bill, the Minister states:

'... This bill is designed to address some issues which have emerged in the safety net wage cases—or the national wage cases, as some prefer to call them—over the last few years. The first problem is that the wage rises granted by the commission have, in the government's view, extended too far up the wage scale. Generally speaking, wage rises granted by the commission have flowed through to all awards. It is the government's contention that many people on award wages are comparatively well paid—certainly, some of them are earning average weekly earnings or more—and it is our contention that the safety net wage case should focus precisely on the safety net and that it should not be something which automatically flows through to people earning significantly above basic award earnings, sometimes double or even triple basic award earnings....' (Commonwealth Parliamentary Hansard 12286 5 March 2003).

2.6 At this point, it is also worth noting that the Bill makes a particular assumption about the relationship between employment and the magnitude of safety net wage adjustments. This relationship is encapsulated by the Minister in his speech in reply, as follows:

'... The second issue is that the government believes that, in making its decisions—and this is not a criticism of the commission; it is simply an observation—the commission has paid insufficient attention to the employment needs as opposed to the income needs, as they might be supposed to be, of low-paid workers. In the end, the best thing you can do for a low-paid worker is to ensure that he or she can keep his or her job. In the end, the best thing you can do for an unemployed would-be worker is to try to maximise the number of jobs that he or she can reasonably hope to get. The sad but blunt truth is that, in many cases,

one man's pay rise can cost another man his job.... The government, as far as is humanly possible, wants the Industrial Relations Commission to be conscious of this when it makes safety net wage case adjustments... (Commonwealth Parliamentary Hansard 12286 5 March 2003).

2.7 In summary, the Bill is aimed at addressing the following two perceived problems:

- The provision of previous safety net wage rises to higher paid employees, thus removing incentives to bargain at the workplace level; and
- A negative relationship between safety net pay rises and employment.

2.8 The Bill seeks to achieve this aim by:

- Narrowing the purpose of the award safety net to addressing the needs of low paid workers (s3(d)(i) amendment);
- Narrowing the role of awards to instruments which primarily address the needs of the low paid (s88A amendment);
- Narrowing the range of issues to be considered by the Commission when making safety net adjustments, by making the primary consideration the needs and employment prospects (current and prospective) of the low paid (s88B amendment).

2.9 The provisions relating to safety net adjustments mean that the Bill is squarely aimed at Living Wage Cases. Indeed, Section 4 of the Bill provides that it will apply “.. *to proceedings... on or before the commencing day (of the Bill) if the Commission has not finished dealing with the dispute before that day...*”. The Bill is thus aimed to apply to the Living Wage Case currently before the Commission, although the present Committee process may frustrate this aim.

3. Specific Concerns About The Bill

3.1 The NSW Government's concerns are based on the observation that the Bill, if passed, will create significant differences between the NSW and federal industrial relations systems, particularly as they relate to wage fixing. In the NSW Government's submission, these differences are in turn likely to create uncertainty and conflict in the State system.

3.2 Differences between the two systems are of concern because of the terms of Section 50 of the *Industrial Relations Act 1996* (NSW) which provide that the Industrial Relations Commission of NSW (the NSW Commission) ‘...*must adopt the principles or provisions of the National decision for the purposes of awards and other matters under this Act...*’ unless the Commission is satisfied that the national decision “...*is not consistent with the objects of this Act or that there are other good reasons for not doing so...*’ (Quotes from s50(1)). Given that the objects of the NSW Act do not include an emphasis on the effects of minimum wage rises on employment levels or on

the capacity of employers to pay, changes at the federal level may make it less likely that the NSW Commission will consider itself compelled to adopt a national wage case increase. This will of course depend on the submissions and evidence put before the NSW Commission.

3.3 The substance of any national decision will depend firstly on the relevant provisions of the *Workplace Relations Act* being applied, and secondly on the guidelines and principles applied by the AIRC in reaching its decision. In this sense, the provisions of the *Workplace Relations Act* which the Bill seeks to amend are of particular relevance, as are the practical effects of the Bill on the AIRC's function as an independent wage-fixing tribunal. Any inconsistencies between a particular national decision and the Objects of the NSW Act could therefore be expected to arise in one or both of these areas. These two areas are therefore examined in more detail in succeeding paragraphs.

3.4 Creating Differences Between the Commonwealth and NSW Acts

With regard to assessing potential differences between the relevant provisions of the Commonwealth and NSW Acts, the proposed amendments to the Commonwealth Act have already been set out at para 2.2 above. By contrast, the Objects of the *Industrial Relations Act 1996* (NSW) provide that:

'..3 Objects

The objects of this Act are as follows:

(a) to provide a framework for the conduct of industrial relations that is fair and just,

.....

(e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments...'

Award-making powers are set out at Section 10 of the NSW Act:

'...10 Commission may make awards

The Commission may make an award in accordance with this Act setting fair and reasonable conditions of employment for employees...'

The Commission's discretion is framed by Section 146, and relevantly, s146(2), which says:

146 General functions of Commission

(1) The Commission has the following functions:

- (a) setting remuneration and other conditions of employment,
- (b) resolving industrial disputes,
- (c) hearing and determining other industrial matters,

- (d) inquiring into, and reporting on, any industrial or other matter referred to it by the Minister,
- (e) functions conferred on it by this or any other Act or law.

(2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:

- (a) the objects of this Act, and
- (b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.

Comparison with the amendments proposed by the Bill (see Section 2 above) indicate that the extent of divergence between the federal and NSW systems would be significant if the Bill were passed.

3.5 Creating Different Approaches To Wage-Fixing

3.5.1 In terms of the guidelines and principles informing future AIRC decisions, the NSW Government has two major concerns:

- The Bill proposes a narrow focus for future safety net adjustments, making the primary factor to be taken into consideration the needs and employment prospects of the low paid; and
- The Bill proposes a fundamental contraction of the award safety net to accommodate low paid employees only.

Each of these concerns is elaborated below.

Narrowing The Focus of Safety Net Decisions

3.5.2 The Bill aims to make the primary consideration for the Commission when making safety net adjustments '*...the needs of the low paid, including their need for employment...*' (Proposed s88B(2)(c) of the WR Act). As pointed out in paras 2.6 - 2.7 above, implicit in this is the assumption that there is a negative relationship between safety net wage rises and employment.

3.5.3 In the NSW Government's submission, this provides for an unacceptable narrowing of the matters to be considered by the Commission. At present, the Commission considers a wide range of matters before making safety net adjustments, not the least of which is the needs of the low paid, consistent with the current Objects of the Act, and s88A in particular (see para 2.2 above). A moment's examination of the 2002 Decision indicates that the matters considered by the Commission were:

- Economic Considerations and Current Economic Conditions
- Indicators of Recent Past Economic Activity, including Economic Growth, Private Business Investment, Trade, Prices and Wages, The Labour Market, and Productivity;
- Sectoral Developments;
- The Immediate Economic Outlook;

- The Cost of the ACTU Claim;
- The Economic Effects of Safety Net Adjustments; and
- The Needs of the Low Paid and Living Standards Generally.

3.5.4 Whilst the Bill does not appear to necessarily exclude the full range of these matters, it provides that just one of them, the needs of the low paid, based on the assumption of a negative relationship between wage rises and employment, be given primacy above all others, despite the fact that the veracity of this assumption is still a matter of considerable debate before the AIRC (see 2002 Decision paras [108] and [123] – [125], for example).

3.5.5 As it stands, the Commission is able to consider a wide range of relevant matters, and hear the submissions made to it by the industrial parties – employer associations, unions, Commonwealth and State Governments, social welfare groups, and so on. As one of these parties, the Commonwealth is entitled to press its point of view on the Commission, as it has indeed done, and continues to do. It is clear that the issues which form the motivation for this Bill (see quote from Minister’s speech in reply at paras 2.5 and 2.6 above) are well within the compass of matters which the Commission can deliberate on, as shown by the 2002 Decision, for example (see 2002 Decision paras [87], [96] – [98], [104], [108], [123] – [125]). As such, there appears to be no fair or rational reason restricting the operation of this system in the manner proposed by the Bill.

3.5.6 Not only would this narrow the focus of future decisions, it would appear to lead to a number of serious practical problems. If there is a relationship between safety net wage rises and employment, what is the precise nature of this relationship? How should the Commission have regard to the needs of the low paid in the context which the Minister frames it (see para 2.6 above)? No specific view on this point has been advanced in any of the material supporting the Bill.

Reducing The Role of Awards

3.5.7 The changes to Section 3(d) proposed by the Bill suggest a substantial contraction of the role of awards. The Objects of the Act are to provide that the purpose of the award safety net is ‘...*primarily to address the needs of the low paid...*’, and the Objects of the Division governing the making and varying of awards ‘...*(recognise) that the primary role of awards is to address the needs of the low paid...*’ (Proposed s88A). Awards are thus envisaged as being instruments for the low paid, rather than having unqualified application as at present.

3.5.8 It appears that this change is intended to maximise the number of employees with incentives to bargain, however the factual basis of the proposition that safety net wage rises constitute a disincentive to bargain is questionable.

3.5.9 If this analysis is correct, the Bill would engender a fundamental change in role of awards. The original intention of *the Workplace Relations Act 1996* was ostensibly that awards would provide a safety net for all employees in the federal system, underpinning the bargaining processes at the heart of the system. By contrast, the Bill appears to envisage that awards are no longer relevant to employees involved in bargaining, a fundamental and far-reaching change in the structure of the federal system. Very little is said about this potential effect of the Bill in the accompanying material.

3.5.10 In addition, there appear to be a number of practical issues that arise. If the Bill passes in its present form, how will the low paid to whom awards are to apply be specifically identified? Will it be a matter of pay rates, classifications, transfer payments, or all three and then more? Who will be called upon to so identify the characteristics of this class of employees? Will awards cease to apply to employees not considered to be low paid? If so, what will the process for so varying awards be? How will parties and the Commission apply the no-disadvantage test during bargaining processes?

3.5.11 Once again, no clue as to what the answers to these questions might be can be gained from the Bill or the accompanying material.

Consequences

3.6 To close the discussion on this point, both the differences in the relevant provisions of the Commonwealth Act and the NSW Act (para 3.4 above), as well as differences in the way that the AIRC arrives at its decisions (paras 3.5.1 – 3.5.11 above) would provide the NSW IRC with a sufficient basis for concluding that future national decisions are inconsistent with the Objects of the *Industrial Relations Act 1996 (NSW)*. This would then provide the basis for the NSW Commission not adopting the principles and provisions of the national decision, and open the way for different wage outcomes in the NSW system.

3.7 Creating Different Wage Outcomes

3.7.1 Against the background set out above then, the likely scenario of concern to the NSW Government is that if, as appears to be the Government's intention, the Bill leads to federal wage outcomes unacceptable to trade unions, higher outcomes may be sought from the State system, with unions seeking more in the State Wage Case than was obtained in the national case. Another possible scenario could be that unions attempt to run State Wage Cases prior to the national case, with the aim of putting pressure on the AIRC to deliver a decision consistent with State outcomes.

3.7.2 As pointed out above at paras 3.3 and 3.4, there appear to be no jurisdictional impediments to the NSW Industrial Relations Commission awarding pay rises higher than those available in the federal system, especially if the objects of the Commonwealth Act become inconsistent with those of the NSW Act.

3.7.3 The effects of higher wage outcomes in the NSW system could be considerable, given the wide application of State common rule awards.

3.7.4 If these concerns are borne out, the Bill is likely to lead to confusion and uncertainty for employers and employees in the NSW system, as well as possible industrial disruption. This cannot be in the interests of either employers or employees, and least of all the low paid employees at whom the Bill is ostensibly targeted.

4. Conclusion

In summary, the NSW Government believes that the *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003* provides a significant point of departure from the current comity between the federal and State systems, particularly as they both relate to wage fixing.

The NSW Government believes that the differences between the two systems are likely to create new and unprecedented wage pressures and industrial disruption in the NSW industrial relations system.

On the basis of these concerns, we submit that the Bill be rejected in its entirety.