CHAPTER 2

CONSIDERATION OF THE ISSUES

General comments

2.1 With the exception of the Workplace Relation Amendment (Fair Termination) Bill 2002, the matters contained in the bills under consideration have been before this Committee before, albeit sometimes in a different form. In two of the bills in particular, the Workplace Relations Amendment (Genuine Bargaining) Bill 2002 and the Workplace Relations (Secret Ballots for Protected Action) Bill 2002, the Government has sought to address concerns raised in the context of previous considerations by the Committee.

2.2 The committee received submissions and heard evidence from a range of organisations, primarily those representing employers and employees, as well as from the Department. Unions were largely opposed to all of the bills, and employers largely supportive (with some minor caveats). The Australian Catholic Commission for Employee Relations (ACCER) criticised aspects of the bills but was open to elements of some proposals, such as that relating to compulsory union fees.

2.3 Evidence in support of the bills came from organisations representing a variety of business sectors, including representatives from agriculture, the manufacturing and construction sector and the service sector as well as the small business sector. Those supportive of the bills considered that they promoted reasonable changes that would address problems or improve the operation of the current system and maintain an appropriate balance between the rights and needs of employees and unions and those of employers.

2.4 Evidence against the bills also came from unions representing workers in a wide range of industries. Opponents of the bill were concerned that they would remove important rights of employees and unions and introduce obstacles to protected industrial action by unions and employees, but not by employers.

2.5 Critics also raised concerns that the bills were not consistent with Australia's obligations under the conventions of the International Labour Organisation (ILO). The Department advised that it was satisfied that the bills would comply with our international obligations. In relation to the bills dealing with access to unfair dismissal provisions, the Department noted that the ILO's Termination of Employment Convention 1988 recognises that it could be appropriate to exclude small businesses and casual employees from termination of employment provisions. It also noted that the secret ballot model was developed after consultation with the ILO to ensure that it met Australia's international obligations.

2.6 While most submitters and witnesses maintained the same positions that they had held in relation to previous bills on these issues, representatives of some employer or business organisations raised some compromise or alternative proposals in relation to the exemption of small business employees from the unfair dismissal provisions. The Committee did not have the opportunity to explore these proposals in detail but considers that they are a

refreshing development. The Committee majority sees this willingness to seek a compromise as an indicator of the importance of the issue for those proposing change.

2.7 While there was little new evidence presented to this inquiry, the Committee noted that there had been a number of developments since it last considered the matters raised in the bills. These included court or tribunal decisions in relation to the exclusion of casual employees, union bargaining fees and pattern bargaining and further surveys and information in relation to the employment effect of unfair dismissal laws on hiring intentions. These were considered during the course of the inquiry. The Committee also heard arguments about the the extent to which proposals in these bills differed from those in previous bills.

Consideration of the Provisions

2.8 This section of the Chapter reviews the evidence presented to the Committee about the provisions of the five bills, and provides the Committee majority's conclusions and recommendations.

Workplace Relations Amendment (Fair Dismissal) Bill 2002

2.9 The Committee notes that the Minister's second speech made it clear that the purpose of the bill is to deal with an unintended consequence of the unfair dismissal laws, which operates to deter small business owners from employing additional staff:

> The basic problem that this bill is designed to address is the fact that the laws do not really stop unfair dismissal so much as institute a de facto system of additional payments for people who are dismissed fairly or unfairly from their employment. This is inelegantly known as `piss-off money' in small business circles. This has been the practical impact of the unfair dismissal regime under which small business has had to operate for the last decade or so. The result of these laws—however well motivated and well intentioned they might originally have been and however sincerely members opposite and elsewhere believe that they are a protection for workers—is that many small businesses are frightened of putting on new staff, and that is a real problem in our economy and a real problem for our society.[1]

Evidence

2.10 The Australian Council of Trade Unions (ACTU) and other unions argued that they could see 'no economic justification for the special treatment of small business particularly where this affects the rights of employees.[2] The ACTU also noted that the absence of any declared financial impact in the proposal as evidence that claims about on the effect on employment growth lacked credibility.[3]

2.11 Unions also expressed concern about the more vulnerable situation of many small business employees, who had low rates of unionisation, and argued that the issue was fundamentally about natural justice and equity.[4]

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1 ACCI, Submission number 17, p7

2 ACTU Submission number 9, p 2

3 IBID p30

4 SDA Submission number p2; 12-14

2.12 The ACCER noted that the dignity of the individual required procedural fairness and natural justice to apply in decisions on termination and suggested that an exemption could disadvantage small business owners by making the sector less desirable for employees.[5]

2.13 Employer representatives and representatives of the small business sector presented their concerns about the adverse effect of the current laws on small business owners and the implications for their hiring intentions.

2.14 The committee heard evidence from Australian Chamber of Commerce and Industry (ACCI) about the results of their Pre-Election Survey, in late 2001, which surveyed more than 2,300 employers across Australia.[6] ACCI submitted that the survey responses demonstrated a high level of awareness and concern amongst employers, including small business, about the operation of unfair dismissal laws. They also submitted that it was that awareness of the risks of unfair dismissal action that affected hiring intentions:

> The sixth most important issue is the unfair dismissals legislation. Business remains deeply resentful of the way in which employees who have been dismissed for cause are able to take actions that require their former employers to pay them large sums of money to finally see them on their way. There are some legitimate cases of unfair dismissal, and that has never been at issue. But this process has now become contaminated in a way that ensures that firms will often be required to defend their actions before a tribunal. The managerial time needed to process and deal with such claims is generally just not worth it to the firm. The result is that unfair dismissal applications are a cost to business that has absolutely no return. It slows growth and makes firms more reluctant to hire. This is a problem that needs final resolution.[7]

2.15 In response to claims from other witnesses and some Committee members that unfair dismissals did not feature among the main concerns of small business in a range of general surveys, witnesses from the ACCI maintained that it was among the most important concerns in relation to industrial relations matters.[8]

2.16 Small business representatives described the burden of an unfair dismissal claim on a small business, both in terms of the financial costs and the time and stress associated with such claims, and how these are more severe for regional businesses:

> Regional areas where these happen are far more relevant, because the only place they can be heard is at a distance, in a lot of cases, from the restaurant. So time is spent in travelling. I am the chef in my business; if I am not there, the business does not operate and so the whole thing closes down. I still have to pay other staff—the permanent staff[9]

> I can quote a case in particular of an unfair dismissal claim being made where it took five months of stress and worry—of writing letters, of consultation and of talking to solicitors—by a small business which employed four people— before the

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5 ACCER, Submission number 12, p.18

6 ACCI, Submission number 17, attachment B

7 IBID, p 12

8 IBID, p 12

9 Carrod B, Restaurant and Catering Australia, *Hansard,* Thursday 2 May 2002 p EWRE 29

> matter was resolved actually to the satisfaction of the employer—but it was five months of stress and worry. That is very common and it frightens the small business person. They already work approximately 80 hours a week.[10]
>
> I spoke yesterday with a business operator who said that his legal advisers advised that, if they were in an unfair dismissal case and they could settle for less than $12,000, they should go ahead and do so because it would be cheaper than going all the way. So I think that 'go away' money concept is there, if not just in the minds of people. It is certainly in their minds and it certainly seems to be happening—at least from what we have heard anecdotally.[11]

2.17 The ACCI contended that the effect of unfair dismissal laws was to provide all dismissed employees, irrespective of whether they had been fairly or unfairly dismissed, with a right to seek redress or compensation, and a requirement for employers to defend such actions. The result is that an employer faces significant costs every time s/he dismisses an employee, whether in accordance with the unfair dismissal laws or not:

> They (*federal unfair dismissal laws*) provide a right for an employee whose employment is terminated to take legal action against their employer in a third party tribunal or court. Unfair dismissal laws create a right to sue, a cause of action. In this sense they do not deal only with unfair dismissals. They can deal with all dismissals. An assertion by an employee that they have been unfairly (or more strictly speaking harshly, unjustly or unreasonably) dismissed is sufficient to expose the employer to the risk of an adverse finding. An employer, once having dismissed an employee, is exposed to the process and the power of the 'system' whether the dismissal was fair or unfair. This is an important point as it bears not only on how employers see the jurisdiction operating, but also on the need to constrain costs and expense once claims are made, and to create some greater certainty or consistency in the independent judgements that are made by conciliators and arbitrators.[12]

2.18 The Committee heard that, as a consequence, some employers are reluctant to dismiss employees who were incompetent or redundant.

2.19 The Committee heard evidence that the burden of unfair dismissal claims falls most heavily on small business where the owner/manager usually carries responsibility for day to day operation of the business including staff management, and generally lacks knowledge and training of personnel management practices and requirements. [13] The Victorian Automobile Chamber of Commerce (VACC) gave the example of the automobile repair industry where most business operators were tradespeople who employed a small number of employees. [14]The Department's submission noted that there are precedents of exempting small business from legislative requirements in a number of areas, in recognition of the fact that they faced a disproportionate compliance burden.

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10 Keenan, Ella. Council of Small Business Organisation of Australia, *Hansard*, Friday 3 May 2002, p 69

11 Weston, Sue. *Hansard*, IBID p103

12 ACCI Submission number 17, p 6-7

13 Keenan, Ella, p EWRE 69

14 VACC Submission number 13, p2

2.20 The Committee also heard evidence from the VACC and the ACCI of the need for procedural improvements to lessen the impact of unfair dismissal laws on all employers, whatever the size of their business.[15]

2.21 Union representatives argued that that the court's decision in the *Hamzy* case was support for the contention that there is no clear link between unfair dismissal laws and employment patterns. The Committee notes, in this context that the decision in *Hamzy* only highlighted the absence of any empirical evidence for the link between employment and dismissal laws. It did not undermine the theoretical arguments or the weight of survey evidence of employers' hiring intentions. The Court's comment is difficult to reconcile with the central arguments put in the case.

2.22 For example, an ACCI survey[16] conducted in 1999 showed that 53.95 per cent of businesses with fewer than 20 persons indicated that they had hired fewer employees because of unfair dismissal laws. Although the survey did not distinguish between state and federal laws, ACCI argues:

> There is no doubt that a myriad of different factors apply which motivate employers to employ or not to employ an employee. Not surprisingly the dominant feature is and always be economic- work requirements based on business needs. But issues of cost and risk are also significant. It is in this context that negative experiences or negative perceptions of unfair dismissal law act as one factor that weighs against decisions to employ.[17]

2.23 Opponents of the bill sought to undermine the value of such surveys by arguing that it was rarely, if ever, clear whether respondents were subject to federal and state laws, and that it was therefore difficult to draw reliable conclusions from the results. The Committee majority accepts that most surveys suffer from this limitation but is of the view that in this instance, such confusion does not detract from the survey results. However, it also notes that, despite the differences between unfair dismissal laws in the different jurisdictions, a feature common to all jurisdictions is that most dismissed employees have the capacity to bring an unfair dismissal claim against their employer. It is that feature - and the associated uncertainty - that, as the ACCI indicated, is of most concern to employers and affects their assessment of the risks of employing additional staff.

2.24 There was also discussion during the hearings about the effect of different Commonwealth and state industrial relations jurisdictions on the scope for this bill to achieve its stated objective. The Bills Digest prepared by the Parliamentary Library estimated that only 25 percent of small businesses would benefit from the proposed changes to the Commonwealth law.[18] A number of witnesses also indicated that many small business owners may not know whether they fall under federal or state laws.

2.25 The partial coverage of federal unfair dismissal laws is, not, however, a good argument to do nothing to alleviate the burden on small business owners. If unfair dismissal is a very real problem for small business, then there are good reasons why that problem

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15 VACC Submission number 13, p2 1 10; ACCI submission number 17. Attachment D

16 ACCI, op cit, p8

17 IBID p 8

18 Bills Digest No 79 2001-02 Workplace Relations Amendment (Fair Dismissal) Bill 2002, p 6

should be addressed, even if only initially for the quarter of small businesses that fall under Commonwealth law benefit. The Committee majority believes that a uniform system across all jurisdictions would serve to maximise the benefits of any Commonwealth small business exemption and that the States should be stimulated to follow this job creation mood

2.26 There was also discussion at the hearing of the estimate that up to 50,000 jobs could be created if small businesses were exempt from unfair dismissal laws. The representative of Council of Small Business Organisations of Australia (COSBOA) which had originally advanced the claim, explained how the estimate had been derived from the responses of 60,000 small businesses to a question on their hiring intentions if they were exempted from unfair dismissal laws.[19] She also emphasised her strong view, as a result of her contact with small business owners, that many were not employing additional staff for fear of unfair dismissal claims. Instead, they were preferring to manage additional workload by employing family members.[20]

Conclusion

2.27 The Committee majority considers that the arguments in favour of an exemption for small business from unfair dismissal provisions remain compelling.

2.28 Those arguments primarily rest on the disproportionate effect of unfair dismissal claims on small business, and the effect on the hiring intentions of small business employers. With an increasing proportion of employment in this sector, and small business as the main source of new jobs in regional areas, the Committee majority believes that we cannot afford to delay in removing this potential obstacle to further job creation.

2.29 The committee majority believes that by removing the burden of unfair dismissal laws on small businesses, more employment opportunities will be created.

Recommendation

2.30 The committee majority commends this bill to the Senate.

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

2.31 In considering this bill the Committee examined the extent to which the use of bargaining fees undermines the principles of freedom of association and freedom of choice.

2.32 Freedom of association is one of the fundamental principles of the Act; a principle strongly supported by this committee, and indeed the wider Australian community:

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19 Keenan, Ella. COSBOA, Hansard, Melbourne, 3 May 2002, p.71

20 IBID p.72

> The Act evinces a clear policy intention that employees should be free to choose whether or not to belong to a union. This policy reflects contemporary community values and attitudes in Australia.[21]

Evidence

2.33 Supporters of the bill argued that the policy intentions of the Act in this area are being undermined by the imposition of bargaining fees in union-negotiated certified agreements. The Australian Industry Group (AiGroup) put their concern to the Committee in this way:

> perhaps the most unfair aspect of the compulsory bargaining fee clauses currently being pursued by trade unions is that they restrict an individual's freedom of choice, and effectively operate by way of financial coercion toward non-union members.
>
> Bargaining fees represent a mere financial variation of the closed shop, and thereby destroy individual freedom of choice.[22]

2.34 Similarly the ACCI argued that the bill is necessary for the proper functioning of the Act and the workplace relations system in general.

> ACCI recognises that the freedom to join, or not to join, a trade union is a fundamental freedom which should be enjoyed by all people in a free and democratic society. It is for this reason that ACCI provided strong support to the introduction of freedom of association legislation in the original *Workplace Relations Act 1996*.
>
> The coercive effect of bargaining services fees is at odds with the views of the Australian community which favour protecting the rights of employees to choose whether they wish to belong, or not belong, to a trade union.
>
> We note that prior to the passage of the *Workplace Relations Act 1996*, preference clauses within awards and certified agreements were permitted by industrial legislation. With the passage of the *Workplace Relations Act 1996*, these clauses have become unlawful. This was a key aspect of the policy imperative behind the passage of the original 1996 Bill and delivered an environment which empowered workers to make choices about whether they wished to belong or not belong to a trade union. [23]

2.35 The ACCER observed that while the use of bargaining fees in certified agreements might not technically contravene the objects of the Freedom of Association provisions of the Act, the amount or structure of the fee charged for the provision of bargaining services may persuade or influence an individual or organisation to join or not to join the relevant industrial association. [24]

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21 Ai Group, Submission number 24, p 47

22 Ai Group, op cit, p 51

23 ACCI, Submission number 17, p77.

24 ACCER, Submission number 16, p 29.

2.36 The committee also heard of examples of bargaining fees imposed under agreements that were in excess of normal union fees, suggesting a coercive intent. One of the examples was in relation to fees charged by the CEPU:

> "The CEPU embarked upon a campaign to secure the payment of compulsory bargaining fees in the electrical contracting industry. After the CEPU applied significant industrial pressure to its members, the National Electrical Contractors Association (NECA) reached a pattern agreement with the CEPU which incorporated a clause prescribing a compulsory bargaining fee. The relevant clause stated:
>
> *"Clause 14.3 Bargaining Agents Fee*
>
> *The Company shall advise all employees prior to commencing work for the Company that a 'Bargaining Agents' fee of 1% of the employees gross annual income or $500 which ever is the greater is payable to the [CEPU annually] . . . "*
>
> Under the standard clause, employees could choose to join the CEPU as a member at the cost of around $300 per annum, or choose not to and be required as a condition of employment to pay the $500 bargaining fee. If they did not pay the $500 fee, then they were subject to disciplinary action from their employer. The fee was only to be levied on new, not existing employees. It was clear that the CEPU would waive the bargaining fee in respect of those who joined its ranks. This standard pattern clause has now been incorporated within hundreds of certified agreements applying to electrical contractors.[25] Similar clauses are being pursued by other unions in the building and construction industry.[26]

2.37 The Ai Group also explained that, whatever the intent of the fees, the reality is that the choice between a bargaining fee or disciplinary action, meant no choice at all for non-union members:

> Under the standard clause, an individual non-union member who does not wish to join the union is faced with a stark "choice": either pay the exorbitant "service fee" levied under the relevant certified agreement, or face the prospect of disciplinary action. Given the choice of a hefty service fee or disciplinary action (possibly including termination of employment), the individual non-unionist is driven towards taking out union membership. This is a draconian and unfair situation for an individual non-union member.[27]

2.38 Opponents of the bill justified the imposition of a bargaining fee as a fee for service on the grounds that it was consistent with the 'user pays' and 'mutual obligation' principles. Unions noted that the capacity to charge bargaining fees was important in the context where the Act prevented them from restricting the benefits of union-negotiated agreements to union members, with the result that non-union members who were employed under a union-negotiated certified agreement, were 'free riders.'[28]

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25 For example, see, eg, *A & L Priddle Electrical Contractors Enterprise Bargaining Agreement 2000-2003* (AIRC A4209 Cas M Doc S7202).

26 Ai Group, op cit p 43

27 IBID p 52

28 ACTU, op cit 58

2.39 Unions also objected to the title of the bill because the bill seeks to address bargaining fees not union membership fees and the title, in their view, implied a coercive approach that was lacking. [29]

2.40 Unions also argued that it was inappropriate for the Government to legislate at this time when the issue of bargaining fees in certified agreements was still before the courts.[30],[31] On the issue of compulsion, most unions argued that the requirement for all employees, whether union members or not, to vote on certified agreements, provided the necessary degree of voluntary consent.[32]

2.41 The Government has made it clear that it does not agree with the view that it is premature or inappropriate to legislate on a matter that is before the courts. The Department has also argued that, whatever the outcome of the current court case, it is important to clarify the status of bargaining fees in certified agreements. While the courts may rule on the enforceability or otherwise of a bargaining fees in certified agreements, legislation would be required to remove relevant clauses from current agreements. It was also necessary to prohibit conduct that would seek to require agreement to such fees.

2.42 The Department argued that the 'free rider' argument did not apply in the case of union-negotiated agreements:

> …. the fact that a non-member receives the same outcomes under a union-negotiated agreement does not mean that the non-member is a free-rider. In an agreement-making process, there is limited likelihood, and no guarantee, that the relevant union will consult with non-members, or will address the specific needs of non-members in negotiations. There is also no guarantee that the outcomes under a union-negotiated agreement would be superior to any outcomes that the non-members might have obtained had they been directly involved in the negotiations for the collective agreement, or had separately negotiated with the employer.[33]

2.43 ACCER also questioned the validity of the 'free rider' argument in a context where non-union members appear to have little scope to negotiate separately with employers if they are negotiating an agreement with the union:

> … a non-member employee does not necessarily intentionally enter into the "free-rider" situation. The current structure of the Act does not appear to legally entitle a non-member employee to choose his or her own external representative in collective negotiations. Only union members may request an industrial association to represent their interests in the negotiation of collective certified agreements. ..Therefore, non-members may effectively be marginalised in negotiations for a collective agreement as they, or their representatives, may not be included in the negotiation process where a union is involved until the certified agreement is to be finalised by a vote of the majority.

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29 CPSU Submission 3, p.8

30 CPSU Submission number 3, p.8

31 LHMU Submission number 5, p 12

32 SDA Submission number 6, p. 4

33 Department of Employment and Workplace Relations, op cit p29

2.44 The Department also gave an example of a case where a union had excluded non-union members from joining with it in the negotiation of an agreement, suggesting that there were elements of compulsion in the bargaining 'service' provided:

> In late September 2001, two employees at a call centre in Victoria wrote to the OEA seeking advice in relation to alleged discriminatory action by the employer against non-union employees at the centre. The complainants alleged that the employer had initially extended an invitation to non-union employees to represent themselves at negotiations for a certified agreement to cover Account Sales staff. The employer, however, subsequently withdrew the invitation when the ASU refused to negotiate if non-union employees were at the bargaining table. The complainants had objected to the ASU claim for a bargaining agents fee clause and sought to be involved in the negotiations for themselves, at least in part so that they could reject claims for the payment of a bargaining agents fee on the basis that they had bargained for themselves. The Department understands that the OEA was successful in obtaining undertakings from the employer in January 2002.

2.45 The Committee notes that the bill does not prevent a non-union employee from freely entering into an arrangement with a trade union to negotiate on their behalf; nor imposing a fee for that service; rather, it prevents collective agreements being used as the mechanism to impose such fees. A similar rule applies in relation to fees imposed by professional industrial advisers involved in providing enterprise bargaining services to companies on a fee for service basis. In addressing a concern on this matter raised by the Ai Group and ACCI, the department explained:

> "I was not aware of the AIG concern but I am aware of a concern that has been raised in other employer association quarters. I understand that they believe that the prohibition on demanding bargaining services fees might, where they have a contract with a non-member for the provision of services, prevent them from enforcing the contract. We believe that that fear is ill-founded: if you have a contract with somebody and they do not pay you, your demand for payment is not a demand for a bargaining services fee; it is a demand for satisfaction of your contract. So, if the AIG concern is the same as the concern I have outlined, we believe it is an unfounded concern."[34]

2.46 The Department informed the Committee that its advice was that such arrangements would remain enforceable under the law of contracts.[35]

2.47 The ACTU also argued that the bill inappropriately restricted the matters that could be contained in bargaining agreements. The Government disagrees with this position, noting that it has committed itself to the principle that employment bargaining issues should be negotiated between employers, employees and their representatives at the enterprise level. This bill clarifies the operation of one aspect of that process. The ACTU's argument also overlooks the broader principles that are under threat if this legislation is not passed, that is the principle of freedom of association.

2.48 The Department also advised that it is the Government's view that the provisions of the bill are not incompatible with ILO principles.

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34 Smythe, James. op cit EWRE 110

35 IBID, p EWRE 110

Conclusion

2.49 This bill is part of the continuing commitment by the Government to workplace reform. It seeks to protect the principle of freedom of association within the workplace. It is the Government's position that demands by unions for bargaining service fees are contrary to this principle and that amendment to the legislation is necessary to achieve that protection.

2.50 In introducing this bill the Government does not seek to restrict lawful negotiating activities of registered associations but rather to ensure that all employees have freedom of choice in making certified agreements.

2.51 The committee majority does not accept the argument that compulsory bargaining fees do not mandate union membership or equate to compulsory membership fees. The evidence before the Committee was that fees have been set at a level where they essentially face non-union members with limited choices: either pay a fee that is a similar or higher level than a union membership fee, face disciplinary action, or join the union.

2.52 Nor does the Committee majority accept that the process for employees to vote on certified agreements provides the necessary degree of consent. Non-union members rarely have any input into the development of a union-negotiated agreement and must accept the majority decision. They also are unlikely to have the opportunity to bargain on their own behalf except in the case of an individual agreement.

2.53 While the principle of 'user pays' is an admirable one, and one that this committee supports, the committee majority can see no application of this principle to bargaining fees imposed under a certified agreement. For the principle to apply, a service must be requested and delivered.

2.54 The committee majority also believes that the union opposition to this bill reflects their concern to compensate for, and protect, their shrinking membership base.

Recommendation

2.55 The committee majority commends the provisions of this bill to the Senate.

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002

2.56 The main philosophical arguments in relation to a secret ballot requirement for protected industrial action were canvassed in the Committee's report on the MOJO Bill and the 2000 bill.

2.57 The major issue under consideration in relation to this bill is whether it is an unreasonable obstacle to protected industrial action.

Evidence

2.58 The Committee heard evidence of the differences between this bill and the models set out in its predecessors (as set out in Chapter One). By and large, employer and business representatives and the Department considered that these changes addressed reasonable concerns with previous models and represented a workable and efficient approach. Union representatives and employer advocates on the other hand considered that the changes were

merely 'cosmetic' and did not address their fundamental concerns with previous models. There were no amendments or suggestions for modifications to the model.

2.59 The Department argued that the main benefit and rationale of the ballot process was to strengthen accountability, transparency and democracy in decision-making in relation to protected industrial action. Its submission noted that the introduction of secret ballots in the UK, while initially resisted by unions, had now been accepted by many unions as having improved democracy. It cited a UK Trade Union Congress paper in 1994 as stating that:

> In recent years there have been encouraging democratic reforms (stimulated it must be said in some cases by the 1984 Trade Union Act) which have ensured that leaders have to become more sensitive and directly accountable to their members, through the imposition of postal ballots for their own elections and before the calling of strikes and other forms of industrial disputation.[36]

2.60 It also noted the prevalence of a similar requirement in other OECD countries, including Japan, Germany, Canada and Ireland. [37]

2.61 Critics of the bill argued that it is an attempt by the government to extinguish the right of employees to protected action.

2.62 A major criticism of unions was that the process for the ballot, including for compiling the ballot roll, was detailed and cumbersome and potentially lengthy.[38] The requirement for unions to pay 20 per cent of the cost of the ballot was also considered unreasonable.

2.63 The ACTU raised concerns that the ballot process could be challenged at several points providing an opportunity for employers to delay and frustrate the process, if they so chose.

2.64 It is difficult to give credence to some of the objections to the perceived complexity of the ballot process and requirements. The model proposed in this bill is significantly more streamlined than in previous versions and also provides more flexibility to unions. The provision for a ballot to occur one month before a certified agreement expires means that even in large or dispersed workplaces, it should still be capable of completion before the expiry of a certified agreement. A simpler process may seem intuitively appealing, but it ignores the realities and complexities of the modern workplace and the risk of legal challenge where eligibility and similar requirements are not tightly specified.

2.65 The Committee also heard that a mandatory pre-industrial action ballot was not necessary, because unions own consultative processes were democratic, and the Commission has sufficient powers under the current Act to require secret ballots where appropriate.[39]

2.66 The Committee accepts that under Australian law unions are required to have democratic structures and principles and that this is an improvement on the situation in some other countries. However this does not mean that the union can be sure that it is necessarily

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36 DEWR, Submission number 25, p.53

37 IBID,p53

38 AEU, NTEU, Submission number 4, p.16-18

39 ACTU, Submission number 9 p.40

reflecting the views of the majority of employees in each workplace on all occasions. Even democratically elected organisations or individuals can stand at odds with those who elected them on some occasions.

2.67 The Committee also notes the existence of the secret ballot powers in the current Act but does not consider this is an argument against having mandatory ballots as a precondition for protected industrial action.

2.68 Employer representatives and the Department highlighted the benefits of secret ballots for improving consultation and democratic processes within unions. In this context, the AiGroup, as an employer representative, outlined how the risk of intimidation or at least 'peer pressure' at mass meetings to decide industrial action meant that the process was not as democratic as it could be:

> If you put it in the context of a mass meeting, it is a fairly intimidatory thing for any individual to stand up at a mass meeting during a strike and put forward a different point of view to the one that is being put forward forcefully by the union official that is running that mass meeting. We are not alleging that union officials in most circumstances are intimidating the individuals in a very overt way but that the whole process is intimidatory. We believe that secret ballots could not be more democratic because people are given the opportunity to express their view without fear or favour.[40]

2.69 On the matter of conformity with international labour standards, the Department also advised that it was satisfied on the basis of its discussions with the International Labour Office, that the secret ballot requirements did not substantially limit the taking of industrial action.[41]

Conclusion

2.70 The committee majority considers that a secret ballot is a fair, and simple process for deciding whether a group of employees should take protected industrial action. It is also an appropriate counterbalance to the significant benefit of protection against civil liability that the Act provides in relation to protected action. The committee majority also believes that the ballot process in the bill will enhance freedom of choice and strengthen the accountability of unions to their members, by guaranteeing a free and democratic vote before protected industrial action is taken. Unions that have consultative and democratic processes have nothing to fear from secret ballots as a precondition for protected industrial action.

Recommendation

2.71 The committee majority commends the provisions of this bill to the Senate.

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40 Smith, Stephen op cit p EWRE 6

41 Department of Employment and Workplace Relations, op cit, p48

Workplace Relations Amendment (Genuine Bargaining) 2002

2.72 The Committee notes that the Government's arguments in support of this bill essentially rest on the benefits of enterprise bargaining and the need to protect the role of enterprise bargaining from union attempts to return to bargaining at an industry level.

2.73 The Government argues that enterprise bargaining has brought significant benefits to the Australian economy. These include significant productivity and efficiency improvements for business, a closer relationship at the enterprise level between employers and employees, and significant real wage increases for employees. It has also been associated with record low levels of industrial disputation.

Evidence

2.74 The Ai Group argued that there was a need for further legislative amendments to prevent unions, particularly in the construction and manufacturing industries, from eroding the gains from enterprise bargaining. With nearly 70 percent of all agreements in these two sectors, any action to undermine enterprise bargaining in those sectors represents a real threat to enterprise bargaining.[42] The Ai Group explained the unions' strategy in 1999-2000, known as Campaign 2000, to undertake industry-wide bargaining, by co-ordinating and standardising its negotiations with 3,000 different enterprises :

> The situation in construction and manufacturing during 1999-2000 highlights the risk. In the construction sector, the CFMEU sent out 3,000 identical bargaining notices and organised industrial action across the industry at a common time in pursuit of a 36-hour week and a 24 per cent wage increase. In manufacturing, the AMWU and the other unions sent out some 1,500 bargaining notices on the same day, and then they sent out notices of protected action in identical terms to hundreds of companies and organised an industry strike. The significant danger is that we could end up with massive industrial disputation across an industry under the premise that that is all about negotiating an enterprise agreement—which is absolutely false.[43]

2.75 The Group explained that why they expected a re-run of Campaign 2000 in the next twelve months:

> In the construction industry, employers in New South Wales, Queensland and other states are very concerned about what might happen later this year when the 36-hour week that was forced upon employers in Victoria is pushed in those other states through campaigns that the unions have already announced. Employers in the manufacturing sector are also very concerned. For the past two years, the AMWU and the CEPU have been quietly pursuing a common expiry date of 31 March 2003. Employers have been resisting the unions' push, but figures from the Department of Employment and Workplace Relations send a clear message about what lies ahead. That data shows that there are 416 agreements expiring in the manufacturing sector on 31 March 2003, 355 of which are in Victoria and 296 of those are in the manufacturing sector. We have 390 agreements expiring in the

42 Ai Group op cit p 17.

43 Smith Stephen, op cit, p EWRE 3

> metals sector in Victoria in the first half of 2003. The situation is as bad as that faced by employers during the unions destructive Campaign 2000[44]

2.76 Unions and some employee advocates argued that the outcome of Campaign 2000, where the Commission terminated bargaining periods on the basis that the union was not undertaking genuine bargaining at the enterprise level, demonstrates that the Commission has sufficient power under the current Act to deal with cases of protected industrial action in the context of non-genuine workplace bargaining.

2.77 On that question, the Ai Group argued that the bill, while a minimalist approach, would nevertheless help to address some of the limitations associated with the current law. The experience of Campaign 2000 showed that, while the Commission may have been able to use its current powers to terminate bargaining periods when it found non-genuine bargaining, the process was not straightforward or simple. [45]

2.78 A strong theme in union submissions and evidence to the Committee was the need for unions to continue to bargain at industry level, for both efficiency and equity reasons. Unions expressed concern that the bill would be unworkable in practice because it would mean that industrial action could be challenged on the basis that unions were bargaining with more than one employer at a time and that pursuit of common claims across an industry or several employers could be in breach of the Act.

2.79 Unions also criticised the absence of a general requirement in the Act for negotiating parties to bargain in good faith.

2.80 The Committee heard evidence that the bill does not prevent unions from lodging common claims across an industry or number of employers and undertaking protected industrial action provided there was genuine bargaining at the workplace level in relation to those claims. As the ACCI submission explains:

> The proposed amendments do not have the effect that a party cannot set an industry bargaining strategy, or even industry goals for agreement making (such as for example setting a goal for industry wage increase outcomes). They do not remove the right to take protected industrial action.
>
> The proposed amendments would however more clearly set out for parties the point at which such goals or strategies can over-step the mark, and can become strictures which mitigate towards outcomes at odds with the objects of the *Workplace Relations Act 1996* set out by Parliament. [46]

2.81 The proposed amendments would also assist the Commission by providing initial guidance on the exercise of its discretion in these cases. The amendments would provide the Commission with Parliament's expectations of bargaining, and Parliament's guidance on when a party has ceased to bargain genuinely, and the prescribed avenues should be further considered[47]The Department in its evidence and submission was emphatic that the bill would not prevent industry bargaining or bargaining with more than one employer. Unions would

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44 IBID p EWRE 3

45 AiG Submission number 24 , p 30

46 AiG Submission number 24, p 33-35

47 ACCI, opcit, p 41

remain free to engage in pattern bargaining - they would only be prevented from undertaking protected industrial action in pursuit of such bargaining.

2.82 The Committee also noted that, under the proposed new provision, the existence of common claims would not be determinative of the whether bargaining was genuine or not; the Commission would retain a discretion to consider whether bargaining was genuine in the terms of the Act, on the facts of the case and taking account of all of the relevant factors.

2.83 The Committee also notes the assessment of the Bills Digest prepared in relation to this bill by the Parliamentary Library, which compared the provisions in this bill with previous bills and noted that the provisions in this bill should be uncontentious.

2.84 Emphasising the uncontroversial nature of the bill, the AiGroup argued that the bill essentially clarifies the rules about genuine bargaining by clearly articulating, in a sensible and practical manner, the decision by Justice Munro in the *Metals* case:

> We are strongly supporting that, because it does clarify the rules that should apply to differentiate common claims and illegitimate industry tactics imposed on enterprises.[48]

2.85 The committee heard evidence about the advantages of cooling off periods. The AiG cited Justice Munro's comments in the *Campaign 2000* proceedings:

> it appears to me in most disputes to be a matter for welcome that the parties resort to what are termed cooling-off periods.....the term cooling-off period I don't think is known to the Act at this stage, although some have sought to have it introduced.....The course of Campaign 2000 litigation before the Commission in all its aspects indicates that the cooling-off periods have in particular instances served some useful purpose in reaching agreement in some instances or at least in allowing the parties to back off from what would otherwise have emerged as dug in positions.[49]

2.86 Union witnesses generally argued that cooling off periods in the bill were unnecessary and would have the sole effect of reducing the effectiveness of industrial action.

2.87 The provision relating to new bargaining periods raised similar issues.

Conclusion

2.88 The committee majority considers that the case has been made for a need to reinforce the provisions of the Act to ensure that unions only have access to a right to protected industrial action where they are genuinely bargaining at the workplace level.

2.89 The Committee majority notes that a previous Labor government tied the right to protected industrial action to enterprise bargaining and considers that this bill is simply seeking to ensure that that connection is maintained and protected. It also notes that this bill represents a minimalist approach and a major departure from previous models, and is disappointed that unions have not recognised the extent to which the Government has addressed concerns with previous bills particularly as this will protect jobs.

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48 Smith, Stephen, op cit p EWRE 10

49 Ai Group, op cit, p 31

Recommendation

2.90 The committee majority commends the provisions of this bill to the Senate.

Workplace Relations Amendment (Fair Termination) Bill 2002

2.91 This Committee heard evidence from a range of union and employer groups in relation to this bill.

Evidence

2.92 On the employer side, several organisations that rely heavily on the use of casual labour, explained how the bill was necessary to ensure that they could continue to operate their normal businesses without fear of falling foul of the unfair dismissal provisions.

2.93 Union representatives emphasised the vulnerable nature of casual employment and the scope for an exemption to be abused and result in churning of employees.

2.94 Employers also agreed with the Department's assessment that the bill should be uncontroversial because it simply restored a provision that had been in effect for almost five years:

> Why should an exclusion that was enacted in 1997 and not subsequently disallowed by Parliament not be allowed to continue?[50]

2.95 They also gave evidence about the uncertainty and loss of flexibility arising from the *Hamzy* decision:

> Employers have lost some of the flexibility which they had available with regard to the use of different forms of employment. Further, employees who work on an irregular basis (often voluntarily due to their lifestyle choices or family responsibilities) may find that they have fewer employment opportunities because of an increased use of contractors at the expense of casual labour as a result of the *Hamzy* decision.[51]

2.96 The Ai Group argued the need for the amendment proposed in this bill in order to restore the concepts of 'regular and systematic' employment and 'reasonable expectation of continuing employment' in the exemptions relating to casual employees: It argued that these concepts are essential inclusions and are fair to both employers and employees. It also explained the consequences if the bill was not enacted:

> It is not uncommon for a company to have a list of persons who may be available to carry out casual work and for the company to use that list from time to time when it needs casual labour. If a casual on the list works for a company irregularly and there is no reasonable expectation of continuing employment then it is unfair for an employer to be exposed to an unfair dismissal claim from such a casual - regardless of whether or not the casual has been on the list and worked for the company on several occasions over a period of more than 12 months.

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50 ACCI, op cit, p 18.

51 AiGroup, op cit p 6

2.97 The National Farmers Federation (NFF) explained that the problems flowing from the *Hamzy* decision would be exacerbated if the regulations enacted in December 2001 are disallowed in the Senate and casual staff have access to unfair dismissal remedies following a three month probationary period:

> NFF believes that the exclusion of casual employees in this manner is essential for the efficient operation of agriculture. It is also essential that the short period not be reduced to anything under the less than twelve months as proposed in the bill.
>
> NFF wishes the Committee to note that the Australian Democrats had previously agreed on these changes and an altered decision now can only damage agricultural interests. A number of sub-sectors of agriculture employ a large number of casual, itinerant workers. These workers often work beyond three months (the new statutory probationary period set out in the Bill) and the Bill deals well with the problems that would be caused if the unfair dismissal laws applied[52]

2.98 Critics of the bill argued that casual workers should not be treated differently from other employees when it comes to termination remedies[53] and that the casualisation of the workforce is undesirable[54].

2.99 Employers argued that this attitude to casual employment was out of touch with the changing social dynamics of the workforce.

> We believe also that employees have changed their mind-set. It is no small accident that 40 per cent of all temporary or casual staff are under 25 years of age. This is the type of employment that young people are seeking today. It gives them the opportunity to experiment with the market, to evaluate different careers in a quick manner. It gives them the flexibility to move in and out of different types of activities to suit the various lifestyles people are adopting these days. We believe that the temporary market these days, the casual market, is not a market of the disadvantaged but rather a market of those that choose a lifestyle and have, within the parameters of the legislation as proposed, the ability to move in and out freely with the support of employers and to exercise their right to take that flexibility.[55]

2.100 The Recruitment and Consulting Services Australia (RCSA) considered that that casualisation of the workforce is a direct reflection of market forces and that it is a market reality that an on-going casual or flexible workforce satisfies the employment requirements of a large number of businesses. This argument was also strongly supported by the NFF who maintained that the seasonal nature of agricultural work creates special employment circumstances in the sector.

2.101 The Committee notes that casuals were first exempted from accessing unfair termination laws in 1994, by the ALP government. The Committee majority considers that the factors that justified an exclusion in 1994, justify restoring the full exemption and validating the regulations that were declared invalid by the *Hamzy* decision.

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52 NFF, Submission number, 22 p 6

53 Shop Distributive & Allied Employers Association, Submission 6, p 3

54 ACTU, op cit, p 2

55 Fisher, Ross RCSA, *Hansard*, Thursday 2 May 2002, p EWRE 28

2.102 All industry groups supported the $50 filing fee as an appropriate deterrent to vexatious claims. The fee however, attracted criticism from the unions. They argued that the fee operated as a barrier to justice, particularly to those who are in a weak financial position.[56]

Conclusion

2.103 The Committee majority considers that a good case has been made for the need to restore the casual exemption to the situation that has applied for almost five years. The Committee majority notes that casual employment is an increasing choice of Australian employees, including those seeking the flexibility to balance work and family or study commitments or simply the variety and freedom that can be associated with temporary work.

2.104 On the matter of the filing fee, the committee majority was not convinced by arguments of the hardship this might cause, particularly in view of the Commission's power to waive the fee in cases of hardship.

Recommendation

2.105 The Committee majority commends the provisions of this bill to the Senate.

Summary

2.106 The five bills considered by the committee present a well considered package of important amendments to the Workplace Relations Act. If enacted the legislation will fulfil commitments made by the governments as part of their election 2001 policy.

2.107 The Committee majority considered that recent developments and information referred to in submissions provided further support for the amendments to the Act contained in this package of bills to either reinforce principles established in the courts or, the case of casual employees, to rectify a problems that had arisen as a result of a court decision.

2.108 The committee majority supports workplace relations reforms that are designed to ensure that Australia has workplace relations arrangements capable of sustaining and enhancing living standards, productivity, international competitiveness and employment.

Recommendation

2.109 The committee majority commends the provisions of the five bills in this package to the Senate.

Senator John Tierney

Chair

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56 ACTU, op cit, p 38