LABOR SENATORS REPORT

SUMMARY

1.1 Labor senators oppose each of these Bills, all but one of which are simply recycled versions of bills that the Senate has previously not supported.

1.2 A common thread linking three of the bills - the Workplace Relations Amendment (Compulsory Union Fees) Bill 2002, the Workplace Relations Amendment (Genuine Bargaining) Bill 2002 and the Workplace Relations (Secret Ballots for Protected Action) Bill 200s - is that they reflect an underlying ideological agenda of marginalising unions and reducing their capacity to bargain and organise effectively for working people. They will also have the unfortunate, and not necessarily unintended, consequence of fostering a more adversarial and less co-operative relationship between employers and unions.

1.3 The other two bills - the so-called 'Fair Dismissal' and 'Fair Termination' Bills - are concerned with removing a fundamental employment protection from the most vulnerable employees in the Commonwealth jurisdiction, ostensibly to remove a potential source of risk for employers and increase employment opportunities.

1.4 Labor senators believe that the Bills are also a reflection of the Government's ideologically driven workplace agenda, which rests on and perpetuates negative stereotype of unions and employees more generally. We believe that there are more constructive approaches that would promote productivity, cooperative workplace relations and employment growth, without sacrificing important principles or the rights of Australian workers.

Workplace Relations Amendment (Fair Dismissal) Bill 2002

Introduction

1.5 This Bill would abolish the right of small business employees to seek reinstatement or compensation in the Australian Industrial Relations Commission following unfair dismissal. A measure along this lines has been rejected six times by the Senate since 1996.

1.6 No new evidence or arguments in support of the exemption have been presented in the intervening period. At the same time, the evidence and arguments previously used in support of the employment effect of the exemption have been largely discredited. In addition, changes to the unfair dismissal provisions introduced in August 2001 have undermined the case for an exemption based on the disproportionate burden of unfair dismissal claims on small business. The Department's submission and the Government's supporting arguments lacked any real assessment of the extent to which those amendments have reduced the procedural burden of unfair dismissal applications on employers.[1] While it will be some time before there is any sound empirical evidence of the effect of those changes, statistics of unfair dismissal claims in Victoria, which falls under the Commonwealth laws, suggest a trend

1 Explanatory memorandum, *Workplace Relations (Termination of Employment) Bill 2000*, Introduction

towards declining application rates since August 2001.[2] This Bill is essentially the same as the Bill most recently rejected by the Senate – with the exception that this Bill is now expressed to apply to businesses with fewer than twenty, rather than fifteen, employees.[3] Despite the fact that the Labor Party and the Democrats have made it clear that they would continue to oppose a blanket exemption, particularly in the absence of compelling evidence of the need or net social benefit, the Government has refused to consider constructive amendments to the Bill to improve unfair dismissal procedures and reduce costs for participants in the unfair dismissal process.

1.7 The Government's motives in persisting with a proposal that is so clearly unacceptable to the Senate in its current form, and in introducing the Bill in the first week if the first session of a new Parliament are clearly political. Indeed the Government has made it clear that it intends to use this Bill to provide the trigger for a double-dissolution of Parliament, should that suit its purposes during the life of this Parliament. At the same time, there is marked Government inaction on a host of other matters of greater concern to small business. In light of this, Labor senators question the sincerity of the Government's commitment to making sound legislation or to improving small business' capacity to increase employment.

Employment effect of an exemption - assessing the evidence

1.8 The Government has repeatedly claimed that exempting small business from the unfair dismissal laws will create up to 53,000 jobs.[4] While this claim has been qualified in the fine print of some more recent Government statements, it remains the argument featuring most prominently in media statements and is obviously the key message that the Government is seeking to convey. However repetition and reinforcement cannot convert a bald assertion into a fact.

1.9 Claims about the employment effect of the exemption have never been supported by sound evidence. This was most recently and tellingly highlighted in the Federal Court case of *Hamzy v Tricon (Hamzy)* in late 2001, where the government's own expert witness on workplace relations and employment matters, Professor Mark Wooden, conceded that:

- there has not been any direct research on the effects of introducing unfair dismissal laws;
- the growth in employment in the 1990s had been at its strongest when the unfair dismissal laws were at their most protective; and
- the driving force behind employment growth is clearly the state of the economy and not the existence or non-existence of unfair dismissals law.[5]

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2 Statistics on Federal Unfair Dismissal cases prepared by Senator Murray (see Minority report).

3 *The Workplace Relations Amendment (Small Business and Other Measures) Bill 2001*, which would have also exempted small businesses from the unfair dismissal regime, defined small business as one with less than 20 employees. That Bill lapsed before it was considered by the Senate.

4 Early Election Warning: PM promises fight on unfair dismissal, Melbourne Herald Sun, 15 April 2002, p.8; The Hon Tony Abbott MP, Minister for Employment and Workplace Relations, Second reading speech for the *Workplace Relations Amendment (Fair Dismissal) Bill 2002*.

5 2001] FCA 1589 (16 November 2001) at http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1589.html

1.10 While the *Hamzy* case involved issues relating to the dismissal of a casual employee, the general arguments and findings about the employment effect of unfair dismissal laws apply irrespective of whether the jobs in question are casual or permanent. The Department indicated that it is exploring research into the link between unfair dismissal laws and employment.[6] However this begs the question as to why the Government is proceeding with legislation in the absence of sound empirical evidence.

1.11 Professor Wooden's evidence is also consistent with the results of surveys of small business, including the Yellow Pages Survey, which the Government has consistently relied on as evidence of the 'need' for an exemption. The February 2002 Yellow pages survey indicates that the most important barrier to small business employing additional staff was a lack of sufficient work.[7]

1.12 Significantly, during the public hearings into this Bill, the representative of the Council of Small Business Associations (COSBOA), which originally advanced the estimate that 50,000 jobs could be created as a result of the exemption, advised the Committee that, in her view, it was unrealistic to expect any significant increase in employment in small business in the Bill was enacted:

> **Senator GEORGE CAMPBEL**L—I have a couple of questions, Mrs Keenan. Your organisation, through its former chief executive director, Mr Bastion, is credited with the claim that 50,000 jobs could be created if these unfair dismissal laws were not in place. That has been indexed by the current minister to 53,000, but essentially that claim came out of your organisation. What was the research done by your organisation to establish the veracity of that claim?
>
> **Mrs Keenan**—During the implementation of the new tax system we had a call centre, and as part of the process of that call centre—in which we made 60,000 calls to individual small businesses—one of the questions asked as part of the questionnaire was whether, under the unfair dismissals act, the owner-operator of that business believed that, if the unfair dismissals bill were passed, they would employ more people. The figures taken from the survey, taken on that 60,000 and extrapolated out, were that that would be the number of people who would employ more. *I have doubts about that. I have serious doubts about that. I do not necessarily believe that we are going to see a massive increase in employment in small business. I do not believe it will work that way. I believe it will make employment in small business more secure, but I do not believe that there will be a massive blow-out of new employment.*[8] (Emphasis added).

1.13 The representative of the ACCI also acknowledged that no one factor determines whether an employer will engage additional staff, but that the overriding factor is whether there is a commercial need.[9]

1.14 Surveys of small business also indicate that concerns about unfair dismissal are declining and that the concerns that do exist are largely based on misperceptions. In

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6 Submission 25, DEWR, p.18

7 Yellow Pages - Business Index - Small and Medium Enterprises, February 2002, p.13

8 Mrs Ella Keenan, Chair, Council of Small Business Organisations of Australia, *Hansard,* Melbourne, 3 May 2002, p.71

9 Mr Peter Anderson, ACCI, Melbourne, *Hansard, 3* May 2002, p.64

November 1997, 9 per cent of small business respondents considered that employment conditions (including, but not limited to, unfair dismissal) were impediments to employing additional staff; but in February 2002, this had declined to 5 per cent. [10]

1.15 Unfair dismissal laws also ranked low among small business concerns in a recent CPA Australia survey of small business, with greatest single concern being the New Tax System, including the GST and associated paperwork (33 per cent).[11]

1.16 The CPA Australian March 2002 survey of small business employment found that a lack of work and the difficulty in finding and recruiting staff with the appropriate skills and motivation were the main impediments to job creation. Only five per cent of all respondents nominated unfair dismissal laws as the major impediment[12].

1.17 That survey also found that small business views about the effect of unfair dismissal laws rest on some major misunderstandings. Almost a third of all small businesses surveyed reported that the unfair dismissal laws prevent them from dismissing staff, even if their business is struggling or the employee is stealing from them.[13] Only 58 per cent of all small businesses were confident that they knew how to employ staff in accordance with the legislation and only 30 per cent of these were very confident. [14] In light of these findings, CPA Australia concluded that:

> These perceptions are as much a barrier to employment as the operation of the law. The Government in any strategy to assist small business, should address misinformation and lack of awareness.[15]

1.18 Labor senators accept that there is concern within members of the small business community about unfair dismissal laws and are open to changes that would address those concerns without sacrificing the fundamental rights of employees. We also believe that much of that concern that exists in the sector is not only based on misunderstanding but has been deliberately fuelled by the Government's continuing fear campaign, of which this Bill is the most recent manifestation. The representative of COSBOA advised that Committee that:

> Over the last three years a number of employers, because of the publicity, the discussion and all that is going on, have said to me: ' I really have a problem in that I cannot afford to have an unfair dismissal case against me. … [16]

1.19 The Minister's second reading speech contributed further to this fear campaign by highlighting cases where business had found it hard to dismiss incompetent or redundant staff.[17]

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10 Yellow Pages - Business Index - Small and Medium Enterprises, February 2002, p.13; November 1997, p.6

11 CPA Australia, Small Business Survey, July 2001

12 CPA Australia, Small Business Survey Program, Employment Issues, March 2002, p.5

13 CPA Australia, Small Business Survey Program, Employment Issues, March 2002, p.4

14 Ibid.

15 Ibid.

16 Mrs Ella Keenan, COSBOA, *Hansard*, Melbourne, 3 May 2002, p.72

1.20 Exempting small businesses in the Commonwealth jurisdiction from unfair dismissal claims is unlikely to affect the large majority of Australian small businesses that operate under state laws. [18]The Department acknowledged this, but added that the Government would encourage the states to adopt a similar exemption.[19]

1.21 The Committee also heard that many small businesses do not know whether they fall under Commonwealth or state jurisdictions, where the majority of unfair dismissal claims originate. Changes to Commonwealth unfair dismissal law are therefore unlikely to affect their perceptions of 'risk' and could create even greater uncertainty. As the representative of COSBOA acknowledged, the differences between state laws 'causes tremendous confusion',, and development of uniform national principles would help overcome this.[20] The representative of the ACCI also acknowledged the jurisdictional problem and flagged the benefits of more uniform laws.

Other effects

1.22 As well as overstating the benefits of the exemption, the Government ignores the likely adverse effects. It ignores the fact that employees would be discriminated against in relation to a fundamental protection, simply on the basis of the size of their employer's business (and or location). Protection against unfair dismissal should form part of the fundamental employment rights that are available to all employees, once they have satisfactorily completed a probationary period of employment. A Bill that would remove this protection from a large - and growing - component of the workforce would result in the development of a two-tier labour market and further marginalise the employees of small business.

1.23 There are also sound economic - including employment-related - arguments against the Bill. For example, a small business exemption would:

- reduce the employment security of many employees of small business, which would in turn affect their consumption and investment;
- undermine trust and co-operation in the workplace, making it more difficult to manage workplace change and boost productivity;
- discourage people from seeking employment in the small business sector where they would enjoy "second-class" rights;[21]
- leave small businesses vulnerable to protracted and expensive common law litigation, increasing costs and uncertainty.

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17 The Minister for Employment and Workplace Relations, The Hon. Tony Abbottt MP, Second reading speech, *Workplace Relations Amendment (Fair Dismissal) Bill 2000*, Second reading speech, 20 February 2002.

18 Mr Peter Anderson, ACCI, *Hansard*, Melbourne, 3 May 2002, p.63

19 Submission 25, DEWR p. ; Mr James Smythe, DEWR, *Hansard*, Melbourne, 3 May 2002, p.105

20 Mrs Ella Keenan, COSBOA, *Hansard,* 3 May 2002, pp.70-71

21 Mr John Ryan, ACCER, *Hansard,* Melbourne, 3 May 2002, p.94

A better alternative

1.24 Labor senators believe that, instead of excluding small business employers and employees from the system, the Government should be examining ways to improve the operation of the unfair dismissal system for all participants. The representative of the Australian Chamber of Commerce and Industry (ACCI), while advocating an exemption as a preferred approach, recognised that 'there are respectable arguments on both sides' [22] and put forward some arguments for modifications that would be of general assistance:

> …there are differences in views within the business community itself about the operation of the small business exemption. Obviously, businesses which are just outside the boundaries of the small business exemption see no particular benefit to their business as a consequence of the passage of the small business exemption. We set out the reasons that there is a specific case for the small business exemption and why we support it, but the additional matters that we also identify are matters which would have application across all businesses… [23]

1.25 Practical measures that could improve the system and merit further consideration might include:

- increasing the emphasis on reinstatement as the primary remedy, to reduce the incentive to litigate purely for compensation;
- reducing the legal costs of conciliating and settling a matter;
- regulating paid agents before the AIRC, to ensure ethical standards of conduct;
- facilitating electronic means of communication, to assist businesses in rural and regional areas;
- disseminating an information package on sound recruitment and dismissal practices, produced in consultation with State and Territory Governments;
- establishing indicative time-frames from the determination of matters;
- enabling a common application to be brought on behalf of employees who were dismissed at the same time or for related reasons.

1.26 These would address some of the concerns raised during the inquiry, including by employer groups, about a range of problems including unethical behaviour by agents. The representative of the Victorian Automobile Chamber of Commerce told the Committee:

> …we see too many times genuine applicants being mistreated by agents who promise them things and who do not have any experience; agents who charge them well in excess of what they should and so on. Applicants are luck to walk away with $50 when agents are walking away with $2,000, and things like that… there really is a need to improve the system, not just for the employers but for the applicants and Commission as well.[24]

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22 Mr Peter Anderson, Australian Chamber of Commerce and Industry, *Hansard*, Melbourne, 3 May 2002, p.59

23 Ibid. p.58

24 Mrs Leyla Yilmaz, Victorian Automobile Chamber of Commerce, *Hansard*, Melbourne, 3 May 2002, p.59

Conclusion

The Government likes to claim that unfair dismissal laws are an example of "the cure being worse than the disease". This is more apt to describe its proposed small business exemption. Labor senators believe that a more constructive approach could improve the operation of the system to the benefit of all parties.

Workplace Relations Amendment (Compulsory Union Fees) Bill 2002

1.27 Labor senators condemn the Government for the misleading title of this Bill. It is not a Bill about 'compulsory union fees'. If that were the case, that phrase could be expected to appear at least once in the text of the Bill. Rather, the Bill refers only to 'bargaining services fees', which are defined to specifically exclude union membership dues. Labor senators can only speculate that the motive for such a misleading title is to create an impression within the broader community that unions are engaging in unethical and unlawful practices such as charging compulsory union fees.

1.28 Labor senators believe that the proposal in this Bill is premature and inappropriate because it seeks to pre-empt a matter that is still before the courts. The legal status of bargaining fees included in certified agreements will be considered by the Full Federal Court in the case of *Electrolux v AWU*, listed for hearing on 27-28 May 2002. As a matter of general principle, Parliament should not pre-empt deliberations of the courts except in exceptional circumstances. There are no compelling circumstances justifying legislation in this case, because the Federal Court at first instance held that bargaining fees are not a matter pertaining to the relationship of employer and employee, and, as a result, protected industrial action cannot taken over an enterprise agreement which includes bargaining fees.

1.29 The Government's rhetoric in support of this Bill is intended to promote the myth that bargaining fees in enterprise agreements are being forced on employees without their consent. This is not correct and would not be possible under the relevant legal framework. The *Workplace Relations Act 1996* requires that include that all employees who will be subject to an enterprise agreement must have ready access to a proposed agreement for at least 14 days beforehand, that employers must take reasonable steps to ensure that the terms are explained to employees, and that a valid majority of employees voting have genuinely agreed to the agreement. The Commission has specified that 'genuine agreement' requires both informed consent and an absence of coercion (*Re Toys 'R' Us (Australia) Pty Ltd Enterprise Flexibility Agreement 1994*, Print L9066, 3 February 1995, per Ross VP).

1.30 This Bill is also inconsistent with the Government's stated philosophy of removing third party involvement in the enterprise bargaining process. In this case, the Government, as a third party, is seeking to intervene in the bargaining process to dictate the matters that can be subject to enterprise bargaining and preclude employees and employers from agreeing on a legitimate method of funding the bargaining process.

1.31 The approach taken in relation to the matter of bargaining fees in certified agreements is also inconsistent with the Government's approach to negotiation of AWAs (s 170VK). An employee can appoint a union as their bargaining agent in relation to an AWA and nothing precludes the union from charging a fee in respect to such an arrangement. And yet the Government would seek to prevent employees from agreeing by a majority vote to a collective agreement that includes bargaining fees.

1.32 At the same time, the Government also opposes unions from striking agreements that restrict the benefits of their negotiated agreements to financial members of the union. On 8 March the Employment Advocate applied to the Federal Court for the removal from several certified agreements of a clause providing insurance for union members. He argued that the clause is contrary to the Act because it extends the benefit of insurance cover to employees who are union members, instead of all employees.

1.33 In view of that position it is quite hypocritical for the Government to effectively outlaw the charging of a bargaining service fee for time incurred by a trade union in negotiating a collective agreement that necessarily must apply to all workers in an enterprise.

1.34 The Government argues that bargaining fees are inconsistent with freedom of association. If this were correct, bargaining fees would be prohibited by the International Labour Office (ILO) principles and standards, which are founded on core principles such as freedom of association. In contrast, bargaining fees are permitted by the ILO and in countries such as the United States, Canada, Switzerland, Israel and South Africa, which are also known for their adherence to principles of freedom of association.

1.35 There are a number of other objections to the proposal. The provision is drafted so broadly that it effectively precludes even voluntary contributions to the cost of bargaining and unreasonably service fees being charged for a range of advocacy services by either unions or employer organisations. Indeed, both the Australian Industry Group and the Australian Chamber of Commerce and Industry expressed concern that the Bill would prevent them from charging employer organisations service fees in relation to advice and other assistance in relation to enterprise bargaining. [25]

Conclusion

1.36 Labor senators oppose this Bill which is misleadingly titled and simply designed to prevent unions from charging fees to cover the costs they incur in undertaking enterprise bargaining services. Such a restriction is inconsistent with the objectives of the Act in promoting agreement making between parties and allowing parties to determine the most appropriate form of agreement. Labor senators can only speculate that the underlying intention is to reduce the capacity for unions to bargain effectively on behalf of their own members and Australian employees more generally.

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

Background

1.37 This is the third attempt by a Howard Government to amend the *Workplace Relations Act 1996* to require secret ballots of union members (and/or employees) as a precondition for protected industrial action. Labor and Democrat senators rejected the proposals in the 1999 and 2000 bills.

25 Submission 24, Australian Industry Group, pp.59-60; Mr Peter Anderson, ACCI, *Hansard*, Melbourne, 3 May 2002, p.57

1.38 The Minister asserted that this Bill addresses the reasonable concerns raised in relation to the previous bills,[26] in particular concerns that the processes required for approval and conduct of a secret ballot represented an impediment to legitimate industrial action. The Department's submission argued that the process in this Bill is simple, quick and more streamlined than that in previous bills.[27] Departmental witnesses before the Committee emphasised the scope for a ballot to be initiated one month before the conclusion of a certified agreement as one of the major improvements over previous models.[28]

1.39 Despite these assurances, this Bill retains the fundamental features (and defects) of its predecessors, and would prevent protected industrial action unless it has been approved by a majority of employees in a secret ballot in which a quorum of employees have voted. The practical effect would be to make protected industrial action at best ineffective and at worst impossible.

Impediment to legitimate industrial action

1.40 As the Democrats noted in their report on the MOJO Bill '…industrial disputation is an essential part of the bargaining and market process'.[29] The ILO requires that the conditions required for lawful industrial action should be reasonable and not place a substantial limitation on taking industrial action.[30]

1.41 The ballot process proposed in this Bill is an impediment to industrial action, being both cumbersome and potentially lengthy (as the bill's length of 35 pages suggests), with scope for a ballot proposal to be challenged on a number of points. The ACTU identified the key obstacles as follows:

> Employers and others wishing to delay the action will be able to argue a number of issues before the Commission, such as the validity of the bargaining period and whether or not the union has genuinely tried to reach agreement. In addition, procedural issues, such as who should conduct the ballot, the roll and the timetable are all issues for debate which can be used for delay.[31]

1.42 The National Tertiary Education Union (NTEU) gave some examples of the difficulties and delays that could arise before eligible voters could even be identified in the education sector:

> In highly casualised large and decentralised employers such as many of those in education, it may well take weeks for an employer to compile a list of all employees who were employed "on the day" of the ballot order…in higher education, there is no centralised system of recording which of (say) 3000 casuals were employed "on the day" the ballot was ordered.[32]

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26 Second reading speech, *Workplace Relations (Secret Ballots for Protected Action Bill 2002)*

27 Submission 25, Department of Employment and Workplace Relations, p.45

28 Mr J Smythe, DEWR, *Hansard*, Melbourne, 3 May 2002, p.45

29 Democrat senators' report Consideration of the provisions of the *Workplace Relations Legislation Amendment Act (More Jobs, Better Pay) Bill 1999*, p.397

30 Submission 25, DEWR, p.48

31 Submission 9, ACTU, p.42

32 Submission 4, NTEU, p.14

1.43 Witnesses from the Department of Employment and Workplace Relations suggested that they would not expect delays of that nature to be the norm, but it appeared that they had not undertaken any assessment of this factor.[33]

1.44 Senator Murray questioned whether a simpler process, such as a secret ballot of attendees at a meeting called to consider industrial action, might well achieve the stated objective. The Department's advice was that the simpler process used in the United Kingdom - which ironically is promoted by the Government as in many ways a model for Australia - has been subject to extensive litigation.[34] Indeed, Government claims that the legislation passed by the Blair Government in the UK in relation to Secret Ballots ignores critical differences between the legislation and the extent to which the model in this Bill is far more restrictive. [35]

Absence of any demonstrated need

1.45 The Government has never sought to demonstrate the existence of the problem that the Bill is supposed to address.

1.46 The AIRC presently has a discretion to order a ballot on any question if it would help resolve a dispute. At times it has declined to use this to order a pre-strike ballot where it was obvious that employees favoured taking industrial action (for example, *South Burnett Beef Pty Ltd v AMIEU,* 1 February 2001, PR900825). A Ministerial Discussion Paper Pre-industrial action secret ballots (August 1998) concluded that the Commission appears to be using ballots strategically to progress dispute resolution, particularly where the parties have reached a stand-off in negotiations.

1.47 Nor is there any evidence that current levels of industrial disputation require additional legislative controls. Enterprise bargaining and employment insecurity and enormous levels of personal debt have seen levels of industrial disputation fall to their lowest level since recording began.[36]

1.48 The Department's submission argued that secret ballots would enhance democratic processes[37] and the Minister has asserted that the bill will enhance freedom of choice for workers and ensure that protected action is a genuine choice of workers concerned.[38] This implies that current arrangements are defective in this regard and indeed the Bill, like its predecessors, is based on an assumption of intimidation of employees by union officials or the mass of members at meetings. Although the Department argued that the Bill was not predicated on the assumption of intimidation,[39] the Minister's message is otherwise when he argues that the Bill would:

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33 Mr Alex Anderson, DEWR, *Hansard,* Melbourne, 3 May 2002, p.111

34 Mr James Smythe, DEWR, *Hansard*, Melbourne, 3 May 2002, p.107

35 Submission 9, ACTU, pp.2, 15

36 ABS, 6321.0 Industrial Disputes, Australia

37 Submission 25, DEWR, p.48

38 The Hon Tony Abbott MP, Minister for Employment and Workplace Relations, Second reading speech, House of Representatives,

39 Mr James Smythe, DEWR, *Hansard*, Melbourne, 3 May 2002, p.107

> …ensure that the right to take industrial action is not abused by union officials pushing agendas unrelated to the workers at the workplace concerned.[40]

1.49 No convincing evidence was presented to support insinuations of intimidation. The representative of the ACCER advised the Committee that his organisation had not seen any evidence of coercion or intimidation in the taking of industrial action.[41]

1.50 As the Department's submission notes, the *Workplace Relations Act 1996* requires that protected industrial action by a union is duly authorised in accordance with the organisation's rules. [42] Commonly, those rules require consultation with employees before a decision is taken on industrial action. The ACTU endorses pre-strike votes and as a matter of practice unions hold them. Union officials are held accountable to their members under the detailed provisions governing trade unions in the *Workplace Relations Act*. The representative of the AMWU explained that that union's consultative processes meant that the union's rules could be altered to require secret ballots if the majority of members supported such an arrangement.[43]

1.51 There was no evidence that employees or union members - as opposed to employers - were dissatisfied with this form of consultation. Where secret ballots have been used in Australia in previous times, they have almost invariably resulted in decisions to proceed with industrial action,[44] suggesting that the problem of bullying union officials or intimidatory meetings is imagined rather than real.

1.52 The model proposed in this Bill will also fail to ensure that decisions on industrial action actually represent the views of those workers who will be affected by the action. In the tertiary education sector, where there is a very high rate of casual employment, many of those eligible to vote in a ballot may no longer be employed when industrial action is taken, while many of those who will be employed when action will take place will not be employed - or eligible to vote - at the time of the ballot.[45]

1.53 Government members of the Committee also put forward the view that secret ballots are appropriate because they reflect the Australian culture of participative democracy, resting on the use of secret ballots to elect a government every three or four years. [46]

1.54 While superficially appealing, there is a major flaw in this argument. If secret ballots are necessary and appropriate to ensure democratic decision-making and full consultation and are a distinctively Australian approach to collective decision-making, then surely they are equally appropriate for decisions by unions or employees to *lift* industrial action and by *employers* to initiate protected industrial action, such as lockouts of employees. However employers and the Department both argued that, in these cases, the principle of secret ballots

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40 The Hon Tony Abbott MP, Minister for Employment and Workplace Relations, Second reading speech, House of Representatives,

41 Mr John Ryan, ACCER, *Hansard*, Melbourne, 3 May 2002, p.97

42 Submission 25, DEWR, p.46

43 Mr Dave Oliver, AMWU, *Hansard*, Melbourne, 3 May 2002, p.79

44 Senator Campbell, *Hansard*, Melbourne, 2 May 2002, p.8

45 Submission 4, AEU and NTEU, p.16

46 Senator Tierney, *Hansard*, Melbourne, 2 May 2002, p.19

should not apply because, in both cases, it would not be practical. The representative of the Australian Industry Group argued that requiring a secret ballot as a precondition for lifting industrial action would not be sensible because it would delay the conclusion of action which was often economically damaging for employers and employees.[47] This practical consideration apparently overrode any principle about the potential for intimidation of those employees who may prefer to continue with industrial action rather than accept a negotiated settlement recommended by union officials.

1.55 The question of a ballot of shareholders before employers undertook protected industrial action was also dismissed purely on the grounds of practicality.

1.56 The double standard that applies to the Government's pursuit of the principle of democratic consultation in relation to protected industrial action, and the complexity of the process proposed, suggests that the real motivation for this Bill can only be to place obstacles in the path of unions and employees wishing to take protected industrial action.

1.57 The Government claims inaccurately that its measures have the approval of the ILO. If the Government relies for this proposition on a letter from the ILO to the Department dated 9 October 2000, this is untenable.

Conclusion

1.58 Labor senators oppose this Bill as contributing nothing to improved industrial relations or industrial democracy. In reality, it is simply intended to make it more difficult for employees to take industrial action. Paradoxically the complexity of the process is likely to encourage more industrial action because there would be a strong incentive for unions that have completed the complex requirements for a ballot - and are then liable for 20 per cent of the cost - to proceed with agreed industrial action, notwithstanding any constructive developments in the negotiation process. This complex and costly process would also encourage unions to seek agreement for the broadest possible industrial action, because short, sharp action would no longer be cost effective.

Workplace Relations Amendment (Genuine Bargaining) Bill 2002

Introduction

1.59 This Bill recycles several proposals rejected by the Senate in 2000. It remains narrowly focused on introducing obstacles to protected industrial action, suspending and terminating bargaining periods and restricting the scope for unions to pursue industry-wide or multi-employer agreements. The title of the Bill is a misnomer because it would do nothing to facilitate genuine bargaining and the resolution of industrial disputes.

1.60 Labor senators strongly support enterprise bargaining, which remains a key feature of the Labor Party's industrial relations policy. However we believe that workplace bargaining is not incompatible with the pursuit of improved wages and conditions at the industry level and multi-employer agreements. A combination of workplace bargaining and industry bargaining is common practice in contemporary Australia, being the most sensible

47 Mr Stephen Smith, Australian Industry Group, *Hansard,* Melbourne, 2 May 2002, p.7

and preferred approach for many employers and employees, particularly in sectors such as education.[48]

The 'genuine bargaining' provisions (s170MW(2A))

1.61 The proposed s170MW(2A) purports to provide guidance to the Commission on matters that would tend to indicate whether a party to enterprise bargaining negotiations is genuinely seeking to reach agreement. The Government claims that this provision draws on the decision of Munro J in the *Metals* case decision in 2000 and reinforces the Commission's ability to end protected industrial action if unions are not genuinely bargaining about their claims at the workplace level.[49]

1.62 There are several fundamental objections to this argument. First, there is no indication that the Commission has any need of such guidance. On the contrary, Munro J's decision in the *Metals* case is clear evidence that the Commission has sufficient power and discretion under the existing Act to intervene where it believes that genuine bargaining is not taking place.[50]

1.63 Second, it is misleading to assert that the provisions in s170MW(2A) are consistent with the *Metals* case decision. S170MW (2A) and the supporting information is based on an assumption that pattern bargaining - or the pursuit of common claims against more than one employer - is inconsistent with genuine bargaining at the workplace level.[51] However Munro J made it clear that pattern bargaining is practised by employers as well as unions, and is a legitimate industrial strategy. The submission from the ACTU highlighted the relevant aspects of Munro J's decision:

> It is not unusual for major corporate employers to attempt to achieve a consistency and sometimes a relative uniformity of outcomes in negotiations affecting workers….It appears that some of the more loudly voiced and caustic criticisms of " pattern bargaining", as practised by unions, are muted or tolerant of corporate practices intended to achieve similar uniformities of negotiating outcome across different workplaces. …Industry-wide demands are often made by unions and sometimes pursued at national level. It is not that character of the demand that may cause offence to the policy embodied in section 170MP and paragraphs 170MW (2)(a) and (b). I see no reason why such claims may not be advanced in a way that involves a genuine effort to have each employer concede the benefit sought. In such cases, the "pattern" character of the benefit demanded, its source, and even the uniform content of it, may be a cogent demonstration that the negotiation conduct is genuinely directed to securing agreement from the other party." (paras 47-49) [52]

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48 Submission 4, NTEU-AEU, pp.6-12; Submission 23, IEU, p.3; Submission 6, SDA, p.6

49 The Hon Tony Abbott, MP, Minister for Employment and Workplace Relations, Second reading speech, *The Workplace Relations Amendment (Genuine Bargaining Bill) 2002*

50 Submission 9, ACTU. p.5

51 The Hon Tony Abbott, MP, Minister for Employment and Workplace Relations, Second reading speech, *The Workplace Relations Amendment (Genuine Bargaining Bill) 2002*, 20 February 2002, argued that the Bill was necessary because : '…elements within the union movement have attempted to orchestrate a return to industry level bargaining through a process known as pattern bargaining.'

52 Submission 9 ACTU, p.7

1.64 The Bill appears to be designed to fetter the Commission's discretion by introducing a presumption that certain bargaining approaches are inconsistent with genuine bargaining. The AMWU, along with other unions and employee advocates appearing before the Commission, expressed concern that, under this Bill, they could be construed as not genuinely bargaining if they had the mere intention of reaching agreement with more than one employer. [53] The NTEU expressed concern that the Bill would also prevent them from pursuing minimum or floor wage outcomes.[54]

1.65 The Women's Electoral Lobby saw the Bill as inhibiting bargaining that would assist women in achieving greater equity in wages and conditions. [55] In the view of the Australian Catholic Commission for Employment Relations (ACCER), the Bill had the potential to inhibit the development of multi-employer agreements, which were important for the Catholic school system. [56] ACCER also identified a philosophical objection to the Bill, as s seeking to elevate workplace bargaining as the only acceptable form of agreement making at the expense of promotion of cooperative and harmonious relations and allowing parties determine the type of agreement that best met their needs.[57]

1.66 Curiously, despite the Minister's characterisation of pattern bargaining as an 'outdated, 'one size fits all'' approach to agreement making,[58] the Government, as an employer, engages in pattern bargaining, in particular by setting 'policy parameters' on workplace arrangements to apply across departments and agencies. As the Senate Finance and Public Administration References Committee found in its October 2000 report:

> Rhetoric about the decentralised environment of the Workplace Relations Act in which agency heads have flexibility to negotiate terms and conditions to suit their workplace has been misleading. The reality is that, while agencies have greater flexibility, the Government is the ultimate employer and has in place policy parameters and guidelines to protect its policy interests.[59]

1.67 A further objection to this Bill is that it adopts an inappropriately narrow and unbalanced approach to the requirement for 'good faith' bargaining. In proposed s170MW(2A)(d) and (e), the factors that the Commission should take account of in determining whether a negotiating party is genuinely seeking to reach agreement, are whether the party refuses to meet or confer or to respond to the other party's proposals. Labor senators consider that these factors are the core tests or principles of 'good faith' bargaining. However under this Bill these principles only need be considered if and when an application has been made to the Commission to suspend a bargaining period in order to curtail or prevent protected industrial action. The result is that, in practice, the requirement for good faith bargaining will only apply to unions and only in cases where the union is considering or undertaking protected action.

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53 Mr Dave Oliver, National Officer, AMWU, *Hansard*, Melbourne, 3 May 2002, p.75

54 Mr Ted Murphy, NTEU, *Hansard,* 3 May 2002, p.88

55 Submission 7, WEL Pay Equity Coalition, p.2

56 Mr John Ryan, ACCER, *Hansard*, Melbourne, 3 May 2002, p.97

57 Submission 16, ACCER, p.8

58 The Hon Tony Abbott, MP, Minister for Employment and Workplace Relations, Second reading speech, *The Workplace Relations Amendment (Genuine Bargaining Bill) 2002*

59 Senate Finance and Public Administration References Committee, op cit, October 2000, pp.15–20.

1.68 If the Government genuinely wished to promote 'good faith' bargaining, a more even-handed and effective approach would be to restore the Commission's power to direct all parties - whether employer, union or employee - to bargain in good faith. As it stands, under the existing Act and these proposed changes, employers who refuse to bargain in good faith will face no effective sanctions (except in the relatively rare instances where they wish to undertake protected industrial action). The AMWU representative gave an example of a case where an employer refused an offer by the conciliating Commission to arbitrate a difficult dispute and the union had no recourse.[60]

Limitations on new bargaining periods (s170MWA)

1.69 Proposed s170MWA is apparently aimed at situations where a party peremptorily terminates a bargaining period in order to deprive the Commission of jurisdiction to hear an application under s170MW. The Government has made no attempt to demonstrate the need for such a provision. Although the AiG argued in its submission that this was a tactic employed by unions during Campaign 2000[61], evidence to the Committee indicated that, if that were the case, there was no evidence that the Commission had been unable to deal effectively with it.

1.70 The submission from the ACTU indicated that in the *Metals Case,* Munro J considered a situation where unions terminated bargaining periods with a number of employers under section 170MV, apparently in order to institute a 'cooling-off' period, and then reinstated bargaining periods with much the same claims, with the same employers, a short time later. Munro J used the powers currently available to the Commission under s170MW(10) to terminate the bargaining periods.[62]

Cooling off periods - s170MWB

1.71 The proposed s170MWB, which provides the power for the Commission to suspend bargaining periods where it considers that this would be appropriate in terms of assisting in resolution of the dispute, is also unnecessary. The Government suggests that this provision would assist in the resolution of industrial disputes.[63] However industrial disputation is at the historically low levels, suggesting that there is little practical need for additional powers to intervene in disputes. In addition, the Commission has a range of powers under current s170MW to suspend or terminate a bargaining period and the Government has not demonstrated that these powers are insufficient or that the Commission has failed to use them when appropriate.

1.72 There is also an absence of complementary measures that could make a genuine contribution to the resolution of differences. As the ACTU commented:

> the cooling off period concept is a misnomer. It is not really a cooling off period, because all it does is again stop workers taking industrial action while allowing employers to maintain their position. They are not required to bargain in good

60 Mr Dave Oliver, AMWU, *Hansard*, Melbourne, 3 May 2002, p.83

61 Submission 24, Australian Industry Group, p.33

62 Submission 9, ACTU, p.22

63 The Hon Tony Abbott, MP, Minister for Employment and Workplace Relations, Second reading speech, *The Workplace Relations Amendment (Genuine Bargaining Bill) 2002*

> faith; they are not required to consider claims; and there is no ability for anyone to deal with the underlying issues of the dispute.[64]

1.73 Given the absence of any evidence of the need for these additional powers, and their unbalanced nature Labor senators can only conclude that the real purpose of this provision is to encourage the Commission to intervene more frequently to suspend or terminate protected industrial action. The inevitable result would be to undermine the scope for effective industrial action and with that, the bargaining power of unions and employees.

Conclusion

1.74 Labor senators oppose this Bill as being both unnecessary and an inappropriate and heavy-handed restriction on bargaining between employers and employees.

Workplace Relations Amendment (Fair Termination) Bill 2002

Introduction

1.75 This Bill moves a number of exclusions from the unfair dismissal laws contained in the Regulations into the Act, makes the filing fee for unfair dismissal claims permanent and indexes the fee.

1.76 The proposal in the Bill to exclude from the unfair dismissal system casuals with less than 12 months regular and systematic employment and a reasonable expectation of continuing employment, is a regressive measure.

1.77 Labor senators do not believe that the Government's argument that this proposal simply restores an exemption that applied before the Full Federal Court decision in Hamzy in November 2001 found that the regulation was invalid, provides a sound reason for supporting the Bill.

1.78 It is not correct to argue that the regulation was found to be invalid on purely 'technical' grounds. The court held that the regulation extended beyond the powers prescribed in the Act for the making of regulations in relation to casuals. Those powers relate to casuals employed for a short period. A regulation that meant that a casual employee who had worked for an employer for 10 years or more could in some circumstances meet the definition of being employed for a "short period" - for example, where the casual had been employed frequently but not on a regular pattern - was found to be beyond what had been envisaged in the Act.

1.79 The decision in Hamzy highlighted the discrepancy between the principle of excluding short term casuals (consistent with the principles of the ILO Convention on Termination) and the previous regulation and this Bill. It provides an appropriate opportunity to re-assess the criteria for excluding casuals from this fundamental employment protection.

1.80 More than a quarter of all jobs in Australia are now characterised as 'casual'. This rate is extremely high by international standards. Casual employment is also increasingly diverse, ranging from 'true casual' work, which is often irregular, intermittent or for short

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64 Ms Linda Rubenstein, ACTU, *Hansard*, Melbourne 2 May 2002, p.17

periods to full-time ongoing employment, which is permanent in all but name (and perhaps entitlements and security). In recent years full-time casual employment has increased more rapidly than part-time casual employment,[65] suggesting a trend of substitution of casual for permanent jobs.

1.81 The growth of casual employment, in substitute for permanent employment, has profound social consequences. While it may provide flexibility to employers, left unchecked it threatens social cohesion by increasing poverty and insecurity, particularly among young and female workers who make up the majority of casual employees. It usually precludes an individual from obtaining finance for a significant purchase such as a family home, locking a whole class of employees out of the property market with the consequent inter-generational effect of preventing accumulation of an asset base of any significance. It can also affect decisions on family formation.

1.82 The Committee also heard evidence that a number of employers were now recognising that excessive reliance on casual employment has harmful effects for their businesses' productivity and efficiency.[66]

1.83 In determining an appropriate period of exclusion, it is important to strike a balance between the legitimate need of some businesses for short-term casual labour, and the need to ensure that unfair dismissal laws do not provide an artificial incentive to hold employees as casuals rather than offering them more secure employment.

1.84 Labor senators believe that a 12 month exclusion fails to strike such a balance. If a casual employee has a reasonable expectation that they will be employed for 12 months or more, this raises the question of why the employment has only been offered on casual basis. The 12 month exclusion of casual employees from the unfair dismissal laws may be playing some role in the employer's decision to offer such ongoing employment on a casual rather than permanent basis. This is an undesirable consequence.

1.85 The Committee also heard evidence of concerns that the combination of the 12 month exclusion - which excludes casual employees from protection against unlawful, as well as unfair, termination - and the extension of maternity leave to casuals with more than 12 months employment, could result in employers 'churning' casuals every 12 months, particularly if they became pregnant.[67]

1.86 Labor senators consider that it is not necessarily inappropriate for the exclusion to be greater than the 3 month probation period which applies to other employees. In general, the appropriateness of the period will depend on the individual workplace and the nature of the industry. A 6 month exclusion which can be reduced by agreement between an employer and employees in an award or a certified agreement, strikes an appropriate balance.

1.87 Another effect of this Bill is the exclusion of employees on fixed term contracts. Under the legislation introduced by the Labor government, this exclusion only applied to contracts of up to 6 months duration. Such a limitation struck an appropriate balance

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65 Kryger T, Statistics Group, APL, Casual Employment, 24 August 1999, Table: Casual employees as a proportion of the total workforce (and whether full or part-time and male or female).

66 Mr Joe De Bruyn, SDA, *Hansard*, 2 May 2002, p.50

67 Ibid. p.45

between the need for short-term labour, and the need to avoid providing an incentive to use fixed term contracts to circumvent unfair dismissal legislation.

1.88 The courts have taken a sensible approach to this provision, holding for example that a series of fixed term contracts or a contract with a power to termination would not necessarily be covered by this exclusion. There is danger in disturbing wording that has been sensibly construed by the Courts, however, the operation of this provision should continue to be monitored to ensure it is not being abused.

1.89 Labor senators do not believe that the filing fee should be prescribed in primary legislation. Inclusion of the fee in an Act would be an extraordinary precedent, preventing the Government from being required to regularly report to Parliament on the effect of the fee. Regular review of the effect of such fees is important because they are blunt instruments for deterring vexatious claims with the potential to act as a barrier to justice. The Committee heard that the current level of the fee could represent 15 per cent of the wages of some employees.[68]

Conclusion

1.90 Labor senators oppose this Bill on the grounds that it would deny fundamental rights to a large and increasing proportion of the Australian workforce.

Senator George Campbell **Senator Kim Carr**

68 Mr Brian Carrad, Restaurant and catering Australia, *Hansard*, Melbourne, 2 May 2002, p.29