Senate Employment, Workplace Relations and Education Legislation Committee

Report on the provisions of bills to amend the Workplace Relations Act 1996

Workplace Relations Amendment (Fair Dismissal) Bill 2002

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

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

Workplace Relations Amendment (Genuine Bargaining) Bill 2002

Workplace Relations Amendment (Fair Termination) Bill 2002

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INTRODUCTION

1.1 On 20 March 2002 the Senate referred to its Employment, Workplace Relations and Education Committee (the Committee) the Workplace Relations Amendment (Fair Dismissal) Bill 2002. The provisions of the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002, the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002, the Workplace Relations Amendment (Genuine Bargaining) Bill 2002 and the Workplace Relations Amendment (Fair Termination) Bill 2002 were also referred to the Committee. All bills propose amendments to the *Workplace Relations Act 1996* (the Act).

1.2 The Workplace Relations Amendment (Fair Dismissal) Bill 2002 was introduced into the Senate on 11 March 2002 after being agreed to in the House of Representatives. The remaining bills were introduced into the House of Representatives on 20 March 2002 with debate adjourned on the same day.

1.3 The Committee received 30 submissions in relation to the bills and held public hearings on 2 and 3 May 2002 in Melbourne. A list of submissions and hearing witnesses are to be found in appendices to the report.

Background to the Bills

1.4 The Act provides the framework for Australia's current workplace relations system and retains and builds on features of the *Industrial Relations Reform Act 1993*. A major change that was introduced in the 1993 Act was a shift from a compulsory arbitration system that disallowed strikes, to an enterprise bargaining system that made strikes lawful provided they were taken to win an enterprise agreement.

1.5 The Act retains and reinforces the primacy of the workplace and the individual enterprise in negotiating conditions of employment. The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

> (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
>
> (aa) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and
>
> (b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and
>
> (c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and

(d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and

(e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and

(f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and

(i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(k) assisting in giving effect to Australia's international obligations in relation to labour standards."[1]

1.6 The second Howard Government identified the need for further evolutionary changes to the workplaces relations system to build on the reforms of 1996. On 30 June 1999 it introduced the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (the MOJO Bill) to achieve that objective. Measures contained in the MOJO Bill included a prohibition on pattern bargaining, the introduction of secret ballots for protected action and an exemption for small business from the provisions of unfair dismissal law. The MOJO Bill did not pass the Senate.

1.7 A series of bills designed to implement some of the specific proposals contained in the MOJO Bill were introduced during 2000 and 2001. These included bills to require secret ballots for protected action, prevent protected industrial action in the case of pattern bargaining and to exempt small business from the operation of the unfair dismissal provisions. Those proposals also failed to pass the Senate, although a small number of other amendments to the Act were passed.

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1 section 3, *Workplace Relations Act 1996*

1.8 In its election 2001 policy statement "Putting Australia's Interest First; More Jobs, Better Future," the Coalition identified a flexible and productive workplace relations system as one of the six pillars of its employment action plan. Each of the five bills referred to the Committee are designed to give effect to this commitment and to promote more employment opportunities through a workplace system based on enterprise bargaining and freedom of choice.

Background to the Bills and Summary of Provisions

Workplace Relations Amendment (Fair Dismissal) Bill 2002

1.9 This is not the first proposal to remove small business from the federal unfair dismissal jurisdiction. Since March 1994 there have been many attempts to wind back the scope of the federal unfair dismissal laws, with most proposals defeated and all attempts to enact a specific small business exemption rejected. This Committee has considered the proposal to exempt small businesses from the unfair jurisdiction on four occasions and this issue has been dealt with in great detail in previous Committee reports. This report will therefore not revisit all of the issues relating to unfair dismissal.

1.10 The unfair dismissal provisions in the Act essentially make provisions for employees who are subject to the provisions to seek redress through the Australian Industrial Relations Commission (the Commission) if their dismissal is unfair (that is harsh, unjust or unreasonable). The 'fairness' of a dismissal relates not only to the grounds or merits of the decision to dismiss, but also the process followed. Some employees who would otherwise come under the Commonwealth jurisdiction are exempt from the unfair dismissal provisions, either because they are not, for example, employed by an incorporated company or because they are in a class of employees specifically exempted, such as employees on fixed term contracts.

1.11 The Act also provides for redress against unlawful dismissal (that is, on prohibited grounds such as discrimination on the basis of race, religion and so on). Claims in relation to unlawful dismissal are relatively few in comparison with claims in relation to unfair dismissal.

1.12 The aim of this bill is to protect small businesses from unfair dismissal claims by excluding small business employees, other than apprentices and trainees, from access to remedies for harsh, unjust or unreasonable termination of employment. A small business employee would still be entitled to apply to the Commission for redress where the termination has been unlawful. The bill applies only to employees who commence employment in a small business after the bill becomes law. Employees working in small businesses before the bill is passed would retain access to unfair dismissal remedies.

1.13 This bill largely reflects measures that were contained in the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. That bill was introduced but not considered before parliament was prorogued for the election. The bill differs in some significant respects from the Workplace Relations (Unfair Dismissals) Bill 1998, which was considered by this Committee in late 1998 and early 1999. The main differences between the 1998 bill and the current bill are, firstly, that the definition of small business has been changed to refer to businesses with fewer than 20 employees. The 1998 bill

would have excluded from the operation of the unfair dismissals provisions those employees working in a business with 15 or fewer employees.

1.14 The second major difference is that the current bill establishes a process to allow the Commission to deal with the jurisdictional issue of whether the employer is a small business as defined by the Act; the Commission would have the discretion to determine this issue without a hearing.

1.15 This bill is intended to ensure that unfair dismissal laws do not unreasonably burden employers when making decisions to employ or dismiss staff.

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

1.16 The Act promotes the principles of freedom of association and freedom of choice. It ensures that employers, employees and independent contractors are free to join, or not to join, an industrial association of their choice and are also protected from victimisation and discrimination regardless of that choice.

1.17 The Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 arises out of a need to address attempts by some unions to require non union members to pay for union activities through the imposition of bargaining service fees. The Committee previously considered a similar issue in the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001. Although this Committee recommended that bill to the Senate last year, the bill was not agreed to, with debate being adjourned on 6 August 2001. A more detailed analysis of the circumstances leading up to the bill's introduction into the parliament last year can be found in the Committee's report on that bill.

1.18 The use of bargaining fees in certified agreements has been the subject of recent legal challenge. In 2000 the Australian Council of Trade Unions (ACTU) Congress endorsed a policy allowing for the imposition of bargaining fees on non-union members for union services in the negotiation of certified agreements. Seeing the use of bargaining fees as a de-facto compulsory union fee, the Employment Advocate (EA) intervened in the certification process of a number of agreements negotiated by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union. The EA's objection in this mater was eventually brought before the Commission and heard by Vice President McIntyre. His honour found that bargaining fee clauses did not contradict the strict letter of the freedom of association provisions in the Act. This was despite their acknowledged coercive intent.

> In my opinion, it (*the bargaining fee*) is there to persuade new employees to join, or to coerce new employees into joining, the ETU. The minimum fee of $500 is substantially more than the ETU membership fee. Further there is little doubt, I think, that the ETU would waive the fee in respect of persons who are or become members. The obligation to pay the fee is therefore unlikely to be required by the ETU of anyone who is a member of the ETU.[2]

1.19 A subsequent judgement of the Federal Court in November 2001 held that a bargaining service fee clause was not a matter pertaining to the relationship between

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2 *Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003*, McIntyre VP, AIRC, 9 February 2001. PR9009919

employers and employees.[3] This decision reiterates the view that bargaining fee clauses in certified agreements do not provide a basis on which unions can legally compel non members to pay such fees. Despite this judgement, the Government considers that the continued presence of bargaining fee clauses in certified agreements, including those negotiated before the Federal court decision, lends them unwarranted legitimacy.

1.20 The bill is consistent with the Federal Court decision in 2001 (which is now subject to appeal in the Full Court). It differs from the previous bill in a number of significant respects. Unlike the previous bill it focuses on conduct that is aimed at forcing people to pay bargaining services fees rather than on regulating the circumstances in which fees could be paid. It operates more directly to make it clear that bargaining services fee clauses in certified agreements are void and provides a mechanism for their removal. It also includes a power to expressly prevent the Commission from certifying an agreement, or amending an existing agreement, that contains a bargaining fee clause.[4]

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

1.21 This bill requires a secret ballot to be held prior to the taking or organising of protected industrial action. The Commission must oversee the ballot process.

1.22 The introduction of secret ballots as a precondition for protected industrial action is designed to ensure that employees who will be affected by protected industrial action are fully consulted in the decision and that the decision is based on a democratic process. The explanatory memorandum sets out the intent of the ballot provisions:

> The new provisions are intended to ensure that protected action is not used as a substitute for genuine discussion during a bargaining period, and to ensure that the final decision to take industrial action is made by the employees concerned.[5]

1.23 The secret ballot provisions should be considered in the context of the significant protection that attaches to industrial action undertaken as a means of advancing claims when negotiating enterprise agreements. Provided unions and employees comply with certain procedural requirements (such as giving notice to the employer of proposed industrial action) and are genuinely attempting to reach agreement on an enterprise agreement, they gain immunity from most forms of civil liability that may arise from industrial action. They are also protected from dismissal or other penalties by the employer as a result of taking part in protected action.[6]

1.24 The requirement for a secret ballot features in several contexts in the workplace relations system. For example, before the Commission can certify an agreement, it must be agreed to by a majority of employees voting in a secret ballot. The Act requires that union

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3 *Electrolux Home Products V AWU* [2001] FCA 1600 (14 November 2001)

4 Smythe, James. Department of Employment and Workplace Relations, *Hansard,* Friday 3 May 2002, p EWRE102

5 explanatory memorandum to Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 p 2

6 Department of Employment and Workplace Relations, Submission number 25, p46

officials be elected through a secret ballot. It also provides the Commission with the power to order a secret ballot as a means of assisting the settlement of an ongoing industrial dispute.

1.25 The Department of Employment and Workplace Relations (the Department), explains the policy rationale for the provisions in this bill:

> Current approval mechanisms for authorisation of industrial action are left to the organisation's rules, and so authorisation may occur at the higher levels of the organisation without reference to the members who will be directly affected. Such a process undermines the intention of the WR Act to ensure that decisions in relation to agreement-making are made at the workplace level. It does not guarantee that employees have the opportunity to participate in the decision making process or, to the extent that they do participate, that they do so freely.
>
> Even in circumstances where members have the opportunity to vote on proposed industrial action, there is no requirement for the ballot to be conducted secretly, leaving open the possibility that members could be pressured into voting in favour of industrial action.[7]

1.26 In outlining the value of the secret ballot process, the Department quotes Professor Niland:

> Concerns are frequently expressed regarding the need for secret ballots, before industrial action is taken to ensure that members can exercise a democratic right. The view is often expressed that the silent and timid majority are outvoted by the industrially militant where open or no votes are taken before industrial action.[8]

1.27 This bill requires that a secret ballot of union members or employees be held as a precondition for protected industrial action. The process requires a union representative or employee to apply to the Commission for an order that a secret ballot be held. Before ordering a secret ballot, the Commission would need to be satisfied that a bargaining period is in place and the applicant is genuinely negotiating to reach an agreement.

1.28 The bill also sets out the procedural requirements for secret ballots for protected action. These include that at least 40 per cent of eligible voters participate in the ballot (the 'quorum') and that more than 50 per cent of the votes cast are in favour of the proposed industrial action.

1.29 This model differs from the previous models that the Government has proposed in relation to secret ballots in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000. This Committee endorsed both those models. However minority reports raised a number of objections, including that the process proposed was an unreasonable impediment to lawful industrial action, contrary to International Labour Organisation (ILO) and had would encourage unions to take more far-reaching industrial action.

1.30 The Government has stated that this bill takes account of reasonable concerns raised during previous inquiries and following consultations with the International Labour Office .

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7 IBID p 47.

8 Professor Niland (1989), *Transforming Industrial Relations in NSW,* Green Paper Volume 1, p101. Cited in Submission 25, the Department of Employment and Workplace Relations p47.

The ballot process proposed in this bill is more streamlined and flexible than its predecessors. In this bill, applicants are able to conduct their own ballots, attendance ballots are allowed in place of postal ballots in specified circumstances and the ballot question has been simplified so that only the nature of the proposed industrial action need be specified and not the precise form and duration of the action and the specific days on which it will occur.

1.31 The bill also contains protection against legal challenges to the validity of a ballot. Further, whereas previous models required that certified agreements had expired before a ballot could be conducted, in this bill the ballot process can commence up to 30 days prior to the expiry date of a certified agreement. This is intended to address concerns about the delays that would occur in negotiating new agreements under previous models.

1.32 The quorum requirement has also been reduced from 50 per cent to 40 per cent of eligible members or employees.[9]

1.33 The Department's submission summarises the contrast between this bill and its predecessors:

> It takes into account key concerns raised before this Committee when considering the SBPA 2000 Bill. It also follows consultation with the International Labour Office, with a view to ensuring that the underlying elements of the model for secret ballots meet Australia's international obligations. A key element was to ensure that the model would not interfere with the capacity of employees to access industrial action when there was genuine support amongst employees for such action.
>
> This approach has resulted in a more streamlined process for applying for and conducting ballots and a more flexible approach to the framing of the ballot question. The procedures enhance the opportunity for participation by employees in the decision to take industrial action while ensuring that the process is simple and quick and does not diminish the capacity for employees to take legitimate industrial action.[10]

Workplace Relations Amendment (Genuine Bargaining) Bill 2002

1.34 This bill is designed to reinforce the emphasis on enterprise bargaining in the Act.

1.35 Since the early 1990s there has been general support for a move towards decentralised, enterprise – level bargaining. This shift has been at both state and federal levels and endorsed by all political parties. In its submission the Department writes:

> Whilst differing approaches were advocated, the need to make enterprise agreement-making part of the system was endorsed by both major political parties, all major employer associations, the ACTU and the majority of individual unions. The widespread acceptance of this need for change reflected the fact that in the more competitive and open international economy that emerged in the 1980s, the capacity for Australia to maximise its economic growth, employment opportunities and living standards required a more flexible labour market.[11]

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9 Smythe, James op cit, p EWRE102.

10 Department of Employment and Workplace Relations, op cit p45

11 IBID, p 59

1.36 The 1996 workplace relations reforms broadened the range of agreement types available including agreements for both union and non-union collective agreement making at the enterprise level as well as individual Australian Workplace Agreements. The agreement-making framework put in place by the Act was also underpinned by a compliance framework which included protection for industrial action taken in support of claims in respect of proposed (single business) agreements. The Act extended such protection to action in relation to agreements reached directly with employees (in contrast to the previous Enterprise Flexibility Agreements arrangements) and to Australian Workplace Agreements. [12]

1.37 There are now more than 41,000 collective agreements formalised in the federal system and over 1.3 million employees covered by federal wage agreements. [13]

1.38 The second reading speech states:

> In reforming the workplace relations system, the government has ensured that Australia has workplace relations arrangements that sustain and enhance our living standards, our jobs, our productivity and our international competitiveness. The government has also promoted a more inclusive and cooperative workplace system where employers and employees are able to make agreements on wages, conditions and work and family responsibilities subject to a safety net of minimum standards.
>
> Australia's system of genuine workplace or enterprise level bargaining has underpinned these achievements. The overwhelming majority of Australian employees in the federal workplace relations system are now employed under enterprise or workplace agreements—whether collective or individual.
>
> Enterprise bargaining has produced benefits for both employees and employers. Employees have gained better wages, more relevant conditions, more jobs and greater workplace participation. At the same time, employers have gained higher productivity, increased competitiveness and lower industrial dispute levels.[14]

1.39 The Government has expressed concern that the gains associated with enterprise bargaining are being placed at risk as a result of attempts by some elements within the union movement to return to industry level bargaining through a process known as pattern bargaining. Pattern bargaining is a process whereby a negotiating party attempts to negotiate across a range of workplaces but does not genuinely bargain at the enterprise level.

1.40 This bill is the third attempt to reinforce the principles of enterprise bargaining and ensure that access to protected industrial action is limited to circumstances where there is genuine bargaining at the enterprise level. The MOJO Bill and the Workplace Relations Amendment Bill 2000 both attempted to restrict access to protected industrial action in cases of pattern bargaining. This Committee's reports on those bills provide detailed discussion of the context and background of the bills. The Committee majority argued in those reports for support for the bills in order to protect and preserve the benefits of enterprise bargaining, including higher productivity and improved wages and conditions.

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12 IBID, p 61

13 Abbot, Tony. MP, *Hansard,* 20 February 2002, p504

14 IBID, p 504

1.41 The purpose of the Workplace Relations Amendment (Genuine Bargaining) Bill 2002 is to reinforce the statutory intent and emphasis of the Act in relation to workplace bargaining and access to protected action. The explanatory memorandum outlines the aim of the bill as being to:

> • provide guidance to the Commission when it is considering whether a party is not genuinely trying to reach agreement with other negotiating parties, particularly in cases of so-called 'pattern-bargaining';
>
> • empower the Commission to make orders preventing the initiation of a new bargaining period, or attaching conditions to any such bargaining period, where a bargaining period has been withdrawn; and
>
> • empower the Commission to order 'cooling–off' periods in respect of protected industrial action where it believes this will facilitate resolution of the issues in dispute.[15]

1.42 A major difference between this bill and its predecessors is that in this bill the emphasis is on the conduct of the negotiating parties at the workplace, rather on the pursuit of common claims and common outcomes across an industry. Whereas the 2000 bill sought to introduce new procedures specifically targeting pattern bargaining, this bill seeks to build on the existing provisions in the Act requiring that negotiating parties seeking the benefit of a bargaining period and access to protected action are genuinely attempting to reach agreement. The bill would provide guidance to the Commission when considering whether a negotiating party is not genuinely trying to reach agreement with other negotiating parties. The Commission will retain its discretion to suspend or terminate the bargaining period where it concludes that the negotiating party is engaging in non-genuine bargaining. Under the 2000 bill, in contrast, the termination of a bargaining period was mandatory once the Commission was satisfied that a union was engaging in pattern bargaining. [16]

1.43 The bill draws on a Commission ruling in October 2000 whereby Justice Munro[17] set down some clear and practical rules for differentiating between legitimate common claims that unions are entitled to pursue and unlawful industrial action in pursuit of industry outcomes. It preserves the right of unions to make common claims across an industry but requires those claims to be genuinely negotiated at the enterprise level.

1.44 The bill would also provide the Commission with a power to order a cooling off period in the case of a protracted dispute. The second reading speech sets out the policy rationale for this proposal:

> The government believes that cooling-off periods should be given statutory recognition because of their potential to refocus negotiations. Accordingly, this bill would give the Commission discretion to suspend a bargaining period for a specified period, on application by a negotiating party. [18]

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15 explanatory memorandum to Workplace Relations Amendment (Genuine Bargaining) Bill 2002, p2

16 Smythe, James op cit, p EWRE102

17 *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors* Dec 125/00 [Print T1982].

18 Abbot, Tony. MP, *Hansard,* 20 February 2002, p504

1.45 Unlike in the 2000 bill, the Commission would have a discretion to order a cooling-off period.

1.46 Finally, the bill would also prevent unions from withdrawing from a bargaining period and then commencing a new bargaining period in pursuit of the same claims, as a tactic to escape the jurisdiction of the Commission. It is intended to address the misuse of bargaining periods that occurred during Campaign 2000, an industry wide campaign by elements of the manufacturing unions.

Workplace Relations Amendment (Fair Termination) Bill 2002

1.47 This bill is the only one in the package that contains matters not addressed in legislation previously considered by this Committee. It is designed to deal with a matter that arose after the conclusion of the last Parliament.

1.48 In November 2001, the Federal Court in the *Hamzy* decision, ruled that regulations that excluded short-term casual from unfair termination remedies were invalid, because they went further than the regulation making power in the Act.[19] The regulations found to be invalid had excluded casuals from accessing termination of employment remedies unless they had been working for their employer on a regular and systematic basis for at least twelve months and had a reasonable expectation of continuing employment with the same employer.

1.49 A consequence of this decision is that casual employees are able to bring an unfair dismissal claim against an employer (unless they are subject to some other exclusion from the provisions, for example during the 3-month probationary period). The Government expressed concern that this decision would suddenly expose employers of many casual employees to the risk of an unfair dismissal claim, contrary to their understanding on engaging those employees, and create great uncertainty. On 6 December 2001, as an interim arrangement, the Government made new regulations that would exclude certain short term casual employees from the unfair dismissal provisions, to the extent allowable under the Act in light of the *Hamzy* decision.

1.50 The regulations introduced on 6 December 2001 excluded those casual employees that were engaged by a particular employer for a period of less than twelve months from the termination remedies under the Act. This is narrower than the previous regulation because there is no requirement that the casual employees must also have been employed on a regular and systematic basis. It would not necessarily exclude those casual employees who are on 'lists' of casuals held by employees and are engaged only intermittently, perhaps for only several days or weeks, but who may have been first engaged more than 12 months previously. It is also subject to a disallowance motion.

1.51 In introducing this bill the Government has stated that its purpose is to restore the casual exclusion that was in place prior to the *Hamzy* decision. In light of *Hamzy,* the bill is also designed to validate the invalid regulations so as to ensure that the rights and liabilities of employers and employees are the same as they would have been if the invalid regulations had been validly made.

1.52 The bill would also insert a new provision into the Act requiring applicants seeking relief under federal termination laws to lodge a $50 filing fee. The fee, which is currently

19 *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589

provided for under regulations, will be indexed annually in line with movements in the Consumer Price Index. The Government considers that the filing fee is an important mechanism to deter frivolous or vexatious unfair dismissal claims, and that indexation of the fee is essential to ensure that it retains the deterrence effect over time.

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

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

DEMOCRATS MINORITY REPORT

Inquiry into the provisions of five Bills amending the Workplace Relations Act:

- ***Workplace Relations Amendment (Genuine Bargaining) Bill 2002***
- ***Workplace Relations Amendment (Fair Dismissal) Bill 2002***
- ***Workplace Relations Amendment (Fair Termination) Bill 2002***
- ***Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002***
- ***Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002***

May 2002

Introduction

I have been a member of the Senate committees reviewing Workplace Relations Act legislation for six years now. With this inquiry, once again I have been struck by the fact that employer and employee organisations have sincere well-argued and persuasive cases – that are inevitably opposed.

How one asks, can they see things so differently, faced with the same circumstances? How is it possible for one clever and informed side to claim that a proposed change is moderate and essential, and the other clever and informed side to say it is extreme and unnecessary? How much is attitude, how much is self-interest?

Matters are poisoned even more by a union view[1] that the Howard Coalition government (or is it any Coalition government?) is anti-worker and anti-union. Unions quite openly view Coalition Government bills with great suspicion. Employer organisations (although less obviously) seem to take the opposite view.

If it is the adversarial and ideological culture and history of WR and traditional Coalition/Labor IR politics that is a problem, the common result seems to be often that neither side of the argument will concede any of their opponents' argument. Consequently submissions frequently overstate the dangers of proposals before us and understate the benefits, or vice versa. Such opposed arguments make deciding the merits of WR Bills harder.

If adversarial advocacy is likely to distort or exaggerate a case, empirical evidence (not assertion) and precedent or experience elsewhere is helpful in evaluating the probable effects of new WR bills.

We have a workplace relations environment characterised by lower unemployment, higher productivity, higher real wage growth, greater export competitiveness and lower levels of industrial disputation. Many factors contribute to that, but the 'big bang' IR federal law changes of 1993/4 and 1996/7 can take much of the credit.

Six years on, those big changes are still being absorbed. Jurisprudence, systems, culture, convention, enforcement and implementation are still being developed. WR law needs to be flexible but certain. Any new WR laws proposed for an Act that that remains complex and difficult need time to settle in, in this highly charged field.

It remains the view of the Australian Democrats that the major changes it supported in 1996 do not require further major change, so soon thereafter. We do accept however that the law does need constant attention with moderate adjustments, since the workplace relations environment is a dynamic one.

This Inquiry has addressed five bills introduced by the Government in 2002.

Two bills would reform unfair dismissal law, and the other three change the treatment of bargaining, introduce additional secret ballots in relation to protected industrial action, and prohibit the collection of union bargaining fees through enterprise agreements.

Together these bills amount to a large set of amendments to Australia's federal WR laws. Submissions to the Committee certainly saw significant consequences flowing from their implementation, or alternatively, the failure to implement them. By and large the intentions in these

[1] Hansard EWRE 15 Thursday 2 May 2002

bills are not new to the Parliament: many of these directions were anticipated in bills that previous Parliaments have considered. There are some significant differences, however.

It is important to consider the current industrial context in Australia; several features are striking. These bills come to us at a time when unemployment, while falling, remains high with over 621,000 Australians looking for work. Underemployment reputedly affects well over a million Australians. It is essential that we continue to take action to reduce this source of social and economic waste. There are those who argue that a heavily deregulated IR environment would deliver many more jobs and much greater growth to Australia. However, the strength of the link between levels of regulation and employment creation remains contentious, as many passages of evidence to this inquiry revealed[2].

At the same time, productivity has been improving. It showed a 3.2 per cent annual increase in each of the years 1997, 1998 and 1999, 1.4 per cent in 2000, while it slowed to 0.1 per cent in 2001[3]. Inflation remains low, while real wages have been growing at a steady rate. After falling during the mid and late 1980s, real wages rose significantly during the later 1990s and have shown continuing but more modest growth in 2000 and 2001[4]. Industrial disputation is at an historic low. Working days lost due to industrial disputes are now the lowest in at least two decades. In the 12 month period ended January 2002 a total of 49 working days were lost per thousand employees. This is a dramatic reduction compared with the 12 month period ended January 1983 (the earliest period available on the ABS database) when the number of comparable days lost was 325.[5]

Simultaneously, our labour market is characterised by rising levels of part-time work, much of which is casual. Many witnesses to this inquiry commented upon the growth in casual employment in Australia (now around 27 per cent of the workforce), pointing to its high level as compared with other industrialised countries. Some witnesses suggested, anecdotally, that employers and employees, particularly young people and mothers, valued this casualisation, while others pointed to the insecurity and restrictions this implied – for access to finance for example, or uncertain irregular income. The rise in casual employment creates a potential new policy focus, with some calling for greater regulation in response, not less.

We do have a workplace relations environment characterised by lower unemployment, higher productivity, higher real wage growth, greater export competitiveness and lower levels of industrial disputation. Unions hotly resist change in the law. The AIRC itself continues to develop principles and practices that advance the intent of the law. Such activity by the AIRC may make specific black letter law changes unnecessary in those areas it has so addressed. In the face of these facts, the necessity, wisdom or the urgency of further workplace relations law reform therefore have to be confronted and justified.

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[2] Some discussion of the macroeconomic effects of bargaining arrangements is provided in Workplace Relations Amendment (Genuine Bargaining) Bill 2002 Digest 125, p. 5.

[3] ABS Australian System of National Accounts, Cat. No. 5204.

[4] ABS Average Weekly Earnings, Cat. No. 6302, ABS Consumer Price Index, Cat. No. 6401.0

[5] ABS Industrial Disputes, Cat. No. 6321.0.

Successive federal Governments have been undertaking significant industrial reforms since at least 1993 as we have discussed in previous reports[6]. The latest changes – to the regulation of federal dismissal laws – occurred in the second half of 2001.

The Australian Democrats intend taking an approach to these five bills that is consistent with our past approach. In reflecting on the 1999 Workplace Relations Legislation Amendment (More Jobs, Better Pay Bill) 1999, (the MOJO bill) we said:

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

These background principles guide our approach to this legislation.[7]

We supported the introduction of the Workplace Relations Act against strong opposition. It is not a perfect Act, but our commitment to it is proven. With the policy independence of being beholden to no single interest, the Democrats look for evidence and convincing argument in support of further changes, particularly in light of the pace and scope of change since 1993, and the relative health of the current system, judged on most relevant indicators.

As usual, the bills considered here will be dealt with by the Australian Democrats in the Senate on their merits.

Workplace Relations Amendment (Genuine Bargaining) Bill 2002

This Workplace Relations Amendment (Genuine Bargaining) Bill 2002 amends the WRA 1996 to direct the AIRC to consider evidence of 'de facto or covert forms of industry-wide bargaining'[8] or 'pattern' bargaining, in determining whether access should be given to protected bargaining. It seeks to further discourage industry-wide bargaining and to reinforce enterprise bargaining. The bill adds to the existing powers to suspend a bargaining period. A 'bargaining period' provides statutory protection to persons engaged in industrial action as part of the effort to achieve a new workplace agreement.

This bill follows in the footsteps of proposals dealing with these issues in the MOJO bill, and the Workplace Relations Amendment Bill 2000 (the 2000 bill), but with significant modifications. It is more moderate than the previous proposals.

At its heart this bill does seek to make it harder to obtain access to protected bargaining periods in specified circumstances.

Negotiated settlements are now key to collective agreement making. Collective enterprise agreements cover about one third of all employees. (The rest are on individual contracts and

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[6] Supplementary Report on the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, Senator Andrew Murray: November 1999, p. 389, main report.

7 Supplementary Report on the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, Senator Andrew Murray: November 1999, p. 389, main report.

[8] Workplace Relations Amendment (Genuine Bargaining) Bill 2002, Bills Digest, No 125, 2001-02, p1.

awards). The current system of industrial relations gives primacy to enterprise bargaining and all federal parliamentary parties support this primacy. Enterprise bargaining and the associated protected action brings with it the accepted risk of disputation and, as we have previously noted, parties to disputation must be given the opportunity to work matters through[9]. The system we now have, by and large, serves Australia well. Unions and employer organisations, and employers and employees, have a growing experience with enterprise bargaining. Clearly the Australian Industrial Relations Commission (AIRC) has also developed principles and practices to deal with the complex and varied bargaining circumstances that come before it.

The fear of manipulated enterprise bargaining (primarily in manufacturing) – manipulated so that as a 'pattern' it would revert to industry-wide bargaining – emerged in 2000. The predictions made at the time the 2000 Bill was brought before Parliament (that the pattern approach of 'Campaign 2000' would result in widespread disruptive and economically destructive industrial action across manufacturing) thankfully largely proved unfounded.

As many witnesses to this inquiry made clear, enterprise bargaining is not necessarily at odds with industry-wide negotiations. The two are not mutually exclusive, and nor are multi-employer site or sector agreements necessarily at odds with efficient and effective industrial outcomes. In some cases, both employers and employees see benefits in having an industry or sectoral standard in mind as they approach bargaining at the enterprise level. Indeed, the federal government itself bargains in a whole-of-government manner in the context of their 'Policy Parameters' that shape bargaining in the public sector and give it a comparable character across different government agencies.

The WRA does allow for some multi-employer agreements but only if certified by the full bench of the AIRC, and where it is in the public interest.

Munro J., in the decision which is said to have provided a basis for aspects of this bill, points to practices on the side of both employers and unions in pursuit of patterned claims[10]. A number of witnesses to this inquiry also made this point. This is not new, nor is it necessarily undesirable. As we noted in 2000:

The Democrats recognise that there is a role for industry level, multi-employer bargaining. This [2000] Committee has received extensive evidence of multi-employer agreements in retailing, media, education and electrical contracting which suit both unions and employers, particularly smaller employers. Indeed, the Democrats insisted on an amendment to the Act in 1996 to allow for multi-employer agreements to be made where the Commission concluded that they were appropriate and in the public interest.[11] What the Act acknowledges is that if that level of bargaining suits both employers and unions, then it should apply. But, the principal emphasis of the 1993 and 1996 Acts remains on collective enterprise level bargaining as the best means of unlocking productivity and hence affording sustainable increases in real wages.[12]

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[9] Supplementary Report on the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, Senator Andrew Murray: November 1999, p. 397.

[10] In Australian Industry Group – and - AMWU (Print T1982, 16 October 2000), Munro J.

11 Workplace Relations Act 1996 sect. 170LC(4)

[12] Senator Andrew Murray, Workplace Relations Amendment Bill 2000, Minority Report, p. 51.

At the time of consideration of that earlier bill, we noted the predictions of high levels of industrial action as the AMWU pursued an industry log of claims ('Campaign 2000'), and pointed out that 'time will tell'[13]. At that time we concluded:

Our best assessment is that there is a problem emerging with changing attitudes of some unions to collective enterprise bargaining that may threaten Australia's record in recent years of rising real wages, employment and productivity. It may be that the current legal framework is adequate to deal with that challenge. The powers of the Commission to suspend or terminate access to protected action in the face of real or impending industrial action in section 170MW may be sufficient to deal with these campaigns…A responsible trade union movement and a responsible employer movement must be supported. The Democrats will continue to support legislation that acts against irresponsible action that materially threatens Australian jobs, industry prospects and Australia's economic performance.[14]

In the event, the record on industrial disputation has continued to improve. The current legal framework has by and large proven itself adequate to deal with the challenges before it.

As I remarked in my Report on the 2000 Bill, strikes and lockouts as a part of the bargaining process are not legal unless under protected action circumstances. There have been incidences of unprotected industrial action – some of them very damaging to Australian employers and employees, like the recent dispute in the vehicle industry in relation to employee entitlements, (see the evidence to this inquiry). It is important to note that strong criticism concerning industrial disputation often relates to *un*protected action disputation, rather than protected action disputation. It is possible that of days lost in disputation that a significant (but to date unknown[15]) proportion of days lost are actually lost in unprotected industrial action. Very heavy penalties are already in the law to address unprotected action. If they are not used it is hardly the fault of the law.

However, this bill addresses protected action processes, not unprotected action.

Overall the level of disputation is at an historical low. There are relatively few prolonged enterprise bargaining disputes. Contrary to popular belief, some of the most protracted have been by employers not unions, through lockouts. On any assessment it appears that to date at least, the parties, including the AIRC, have matured into a system of bargaining (some of which has some pattern to it), which gives primacy to reaching agreement at the enterprise level, and which involves relatively low levels of serious disputation. Current legislation therefore can be said to work well at present, for the most part.

Significantly, Munro J. felt no limitation on the ability or capacity of the AIRC to effectively deal with the matters in this bill, under current law. Referring to the AIRC's existing powers to suspend or terminate bargaining (s. 170MW) he pointed to the necessity to consider the facts of particular cases that may be complex, and arrive at a decision that implemented a 'sensible and practical' resolution. However, he effectively recommended against the unnecessary codification of specific solutions given the complexity of specific situations:

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13 Senator Andrew Murray, Workplace Relations Amendment Bill 2000, Minority Report, p. 53.

14 Senator Andrew Murray, Workplace Relations Amendment Bill 2000, Minority Report, p. 66.

15 Hansard EWRE 106 Friday 3 May 2002

For reasons that relate to the character of different sets of employer negotiating parties, it is undesirable in my view to elevate construction of these provisions into a policy dogma that compels a lopsided application of the associated powers'.[16]

In this light it seems fair to require that the argument for new instructions or power for the AIRC be convincing. Are the genuine bargaining changes necessary? The new Bill gives powers that arguably already exist at least in part, and in practical effect, within the existing Act, although in a less prescriptive manner. As the ACCI put it:

The genuine bargaining bill really makes explicit—or codifies, in a way—some of the principles that the commission is in the process of developing when it is interpreting the current law dealing with protected action. So we do not see the genuine bargaining bill as a major departure or even a major extension of the current statutory framework. It really is building on some of the general propositions in the statutory framework that concern the protected action provisions of the act.[17]

A key challenge is to ensure that any such codification does not introduce unwanted or unexpected new rigidities. Other witnesses argued, for example, that such risks are real, and would constrict the operation of the system, perhaps even preventing its effective operation in relation to some matters.

On the issue of the termination of bargaining periods it is important that unions and employers not manipulate bargaining periods to prevent effective bargaining. Bargaining in good faith - genuine bargaining – is essential. The WRA may need some further emphasis here. However, if the AIRC has effectively acted to discipline such activities already, that would make the case for further strengthening capacities to terminate bargaining not all that vital.

On the issue of cooling off periods, the WRA (s 170MW and 170MV) provides such a mechanism at present. The AIRC can suspend a bargaining period where parties are not genuinely negotiating, are causing significant damage to the economy, or have failed to comply with directions. The argument was put that the bill as currently drafted works in a lopsided way (given that most industrial action is taken by unions not employers) in that it strengthens the AIRC's powers to impose a cooling off period. In practical effect this would mostly impact upon unions (given they initiate most industrial action), while no penalty exists to force an employer to bargain in a timely way, and the capacities of the AIRC to arbitrate there remain very restricted.

There is also the unresolved criticism by the ILO that the existing regime of statutory protection in relation to industrial action does not extend to those engaging in industry bargaining.

In view of the effective operation of the system, it is important that legislators do no harm to a system that functions in a flexible way, and ensures effective enterprise bargaining in line with the objects of the current Act. It would be counter productive to introduce new provisions that cause confusion or legal argument (an example is provided by the phrase 'shows an intention') and which reduce the flexible capacities of the system overall.

It is important that the system facilitate negotiations of the parties, that they be required to bargain in good faith to genuinely reach agreement at the enterprise level, and that no new rigidities or prescriptions be introduced that would impede such bargaining.

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[16] Australian Industry Group – and – AMWU (Print T1982, 16 October 2000, para. 51.

[17] Proof Committee Hansard, Senate Employment, Workplace Relations and Education Legislation Committee, Reference: Workplace Relations Amendment Bills 2002, Friday, 3 May 2002, p. 57.

Clearly, enterprise patterns are not uncommon in many industries, authored both by employer and employee bodies. The TWU pointed to issues that they seek to negotiate at an industry level, often with employers' agreement, like wages in the long haul truck driving industry, while the SDA pointed to employer willingness to engage in negotiations around extended unpaid parental leave, the definition of regular casuals, rostering in relation to family responsibilities and junior rates. While enterprise outcomes may differ, they were concerned that these approaches or intentions would, in the words of Joe De Bruyn of the SDA 'fall foul of the new Bill if passed' and that many employers were willing to negotiate such issues that generated business, community and social benefit.

The case for codifying powers that the AIRC believes it already has (and have not been subject to appeal or legal contest) is weak, especially if it carries the danger of introducing new rigidities of the kind that a number of submissions point to. The powers of the AIRC to terminate protected action where parties do not genuinely bargain, and their capacity to establish cooling off periods, are already extensive, and we see no hesitation in the AIRC's willingness to apply them.

Having said that, it is important to ensure that the parties continue to feel pressure to genuinely bargain in good faith at the enterprise level, and to ensure that coercive or mischievous manipulation of bargaining periods (as Munro J. felt moved to restrain) does not occur.

The AIG pointed to the 'exhaustive' processes entailed. The benefits of a WR system that does require exhaustive testing at law have long been thought to be greater than the costs of such a system. Australia has established a tribunal system that has specific and considerable powers, and is directed to facilitate enterprise bargaining and effective industrial negotiation. Regrettably for those who bear the cost, it may not always be desirable to draw into black letter law every 'sensible and practical' solution arrived at by the AIRC to short cut the process. Instead, it is sensible and practical to ensure that the AIRC has the capacities and punitive powers to ensure its task is done well in the face of constantly changing and complex circumstances, many of which we cannot predict or prescribe.

If, however, specific administrative arrangements can be suggested to assist organisations like AIG in meeting the technical demands of enterprise bargaining, as referred to in their verbal submission[18], then they should be considered.

Workplace Relations Amendment (Fair Dismissal) Bill 2002

Despite rejecting this very proposition in 1996, the Howard Government has since moved a number of times to remove small business from the federal unfair dismissal jurisdiction. The main provision of this Workplace Relations Amendment (Fair Dismissal) Bill 2002 would exempt businesses with fewer than 20 employees from unfair dismissal provisions. Although the bill only applies to persons hired after the amendments come into effect, over time small business employees under federal law, as a class, would be denied access to unfair dismissal protections.

It is not known how many small businesses fall under the federal jurisdiction in the States, although there are 291400 small businesses under federal jurisdiction in Victoria, the ACT and the Northern Territory. When asked for that information with a question on notice, as recently as 11 March

[18] Proof Hansard, 2 May 2002, p.11. The AIG specifically referred to the difficulty of obtaining commission case numbers. The current Bill does not appear to go to this issue.

2002[19], the Government indicated that it needed more time to investigate the data. There are over 1.1 million Australian small businesses according to the ABS.

Some industries are more represented under federal law than others, it seems. For instance the NFF in evidence to the Committee believes that (excluding Victoria, which is wholly federal), 60% of agricultural businesses fall under federal awards, 40% under state awards. Interestingly, (again excluding Victoria), the NFF said that approximately 60% of their unfair dismissal claims experienced were to state jurisdictions, 40% to federal. On the face of it, this could mean that 40% of agricultural businesses falling under state awards are generating 60% of the claims, a sure sign of less stringent state laws. The NFF said that 90% of claims by farm casual employees were under state laws.

Some sources believe that around 600,000 small business employees are affected by federal unfair dismissals law, throughout Australia. As there are over 3 million employees in small business, this would represent up to 20% of all federal state and territory small business employees. The Prime Minister and other ministers have repeatedly claimed that exempting small business (600 000 employees) from federal unfair dismissal laws would deliver 50 000 jobs. This has been shown to be a singularly dubious claim.

The issue of access to unfair dismissal remedies in small business was the subject of greatest discussion in the submissions made to the committee, and continues to generate vigorous disagreement. While we have good data about the incidence of unfair dismissal applications at federal and state level, the debate continues to be confounded by the absence of good evidence about the effects on employees and employers of the six different federal and state regimes of unfair dismissal law.

We have good sites for such research before us. In Tasmania and Western Australia for instance, the absence of many restrictions on unfair dismissal application that apply federally make them good sites for comparison with the more restrictive federal case, yet neither employer nor employee associations could provide the committee with evidence about the effects of these differences.

Similarly, the assertion of the employment-creation effects of removing unfair dismissal access in small businesses remains unproven. This effect and some of the estimates circulating in public debate were questioned by unions and employer associations (for example, COSBOA's President had limited confidence in the claim that 53,000 new jobs would be created through the Bill).

This is a vital point. The Government's case rests on a public interest trade-off. They say the public good would be served by the creation of 53 000 jobs, set against the public harm of removing rights from a little over 2 600 federal small business unfair dismissal applications. Until the evidence exists, the argument that employment will be created by removal of rights from a class of employees based on business size is moot, to put it mildly[20]. Moreover, the removal of these rights remains unacceptable to the Australian Democrats, on human rights and equity grounds.

As we said in relation to the MOJO bill:

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[19] Senator Murray: Question 16 upon notice, 24 January 2002

[20] Hamzy v Tricon International Restaurants trading as KFC (2001), FCA 1589, (16 November 2001)

The Democrats have consistently opposed removing the right to access unfair dismissal provisions, but have always supported improvements to process.[21].

This remains our position, as I have again stated in the Parliament recently[22]. Several factors reinforce our opposition. We note that many employers (and indeed unions) are unsure of whether federal or state law covers them. Many criticisms are consequently singularly ill informed, since complaints about federal law are often in fact based on entirely different state law experiences. Further, the great bulk of unfair dismissals occur under state laws, which this bill will not touch. Frankly, the Government has grossly misled most small businesses. Were this bill to pass, they would wake up in NSW and WA for instance, to the reality that most of them fall under state law, and nothing would have changed.

Improvements to process, in 1996 and 2001, supported by the Democrats, have meant that there has been a significant fall in the number of unfair dismissal applications. The total number of federal cases in 2001 was 8157, down from 15,083 in 1996[23]. Only a small portion of federal unfair dismissal applications are in small businesses. Finally, the important changes made in August 2001 have not yet been analysed for effect, as witnesses indicated to the Committee. Their effects are still in the pipeline. Given that they exempt the great majority of employees in their first 3 months of employment, the reforms were significant, as the Minister pointed out at the time. However, the fact that at least one representative of a peak organisation appearing before this committee had no knowledge of these changes, suggests that education around existing provisions is needed.

The AIG proposed another approach: they suggested extending the current blanket exemption of 3 months to 12 months in small business. However, this will arbitrarily remove the right for a large number of employees and we would oppose it, in line with our test of fairness.

The AIG also suggested removal of some of the procedural constraints on small business, when they are obliged to respond to applications for unfair dismissal. We would consider specific proposals on their merits.

The main challenges for unfair dismissal reform appear to be two-fold: firstly, moving towards some convergence in state and federal approaches[24]; and secondly, taking steps to better inform employers of their real capacities to dismiss employees. Recent surveys strongly suggest that public alarmism about unfair dismissal has fostered misconceptions about what employers can actually legally do to deal with a range of employee misdemeanors. An education program is sorely needed to address this issue. Submissions to this inquiry provide much more support for this step than further legislative change.

The core proposition of this bill is unacceptable to the Australian Democrats. Our views on this matter have been consistently put in detail, on the record. As previously announced, we will oppose this bill.

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[21] Supplementary Report on the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, Senator Andrew Murray: November 1999, main report., p 396.

[22] Hansard, x March 2002.

[23] DIR data supplied to the Committee by Senator Murray.

[24] The NFF for instance in written supplementary evidence indicated that NSW differences to the federal jurisdiction were problematic:"farmers continually raised concerns…"

Workplace Relations Amendment (Fair Termination) Bill 2002

As its main proposition, this Workplace Relations Amendment (Fair Termination) Bill 2002 seeks to put into primary law matters that have been the subject of regulation for the last five years.

The bill would confirm a range of exclusions from unfair dismissal provisions in federal law for certain classes of employee (including limited term employees, probationers, casual employees engaged for a short period as defined, and trainees) that were largely already excluded previously through regulation. The outcome of the Federal Court decision in relation to *Hamzy v Tricon International Restaurants trading as KFC (2001),* FCA 1589, (16 November 2001), and the consequential invalidation of regulations which essentially ensured these exclusions, has led to development of the Bill. The bill would also confirm the continuance of the federal $50 application filing fee that has also been in place for five years.

The Australian Democrats supported these WRA provisions and regulations that have been in place since 1996.

In their submissions to the Committee, employers were concerned at the uncertainty that changes to existing regulations would generate.

Employers were also concerned at a campaign to grant casuals earlier access to federal unfair dismissal provisions than the present 12-month exclusion. The labour market is dynamic. Growth in casual employment has accelerated to reach 27% of all employees. This may not be as relevant in the federal jurisdiction as some submissions believe. Except for Victoria, which falls under federal law, it seems likely that most casuals fall under state law, not federal law, but more data is needed. The ABS indicates that the total number of casual employees in Australia now totals over 2 million.

There appears to be growing attention to the issues affecting workers who may be casual, including in relation to conditions like unpaid parental leave, and their access to permanent employment after certain periods of time. The definitions of casual undoubtedly need refinement and improvement, possibly to reflect the diversity of different types and permanency rates of casual employment in different industries.

There are also obvious differences in the treatment of casuals in relation to unfair dismissal at state level. Casuals are not excluded from access to unfair dismissal provisions in WA and Tasmania. In NSW the exclusion is for 6 months, South Australia for 9 months, and Queensland and the Commonwealth are 12 months. These differences constitute an argument for an agreed national/state approach to this issue, so that the obvious uncertainty, inconsistency and lack of knowledge of rights – on the side of employer and employee – can be addressed and reduced.

Unfortunately we still have no indication about the number of federal employees that are likely to be affected by the continuing exclusion of casuals as defined in the Bill.

On balance, it would seem the most sensible and consistent course would be to preserve the situation of limited exclusions that have existed since 1996. That does not preclude examination of other issues however. For instance the exclusion of casual workers from the unlawful dismissal provisions may need attention.

We believe that the larger issue of the definition of casual employees, and their conditions and bases of employment, deserve serious examination in view of the rapid growth of this less secure form of employment. The committee heard a range of views about the merits of casual work, with

arguments that it facilitated family-friendly flexibility and the preferences of young mobile workers, alongside views that it constrained employees' ability to borrow money or have predictability in their lives. The evidence on these questions still remains largely anecdotal it seems.

On the issue of filing fees, we were concerned in 1996 about the effect these might have on lower income applicants and potential applicants and successfully argued for a process of fee waiver in cases of hardship. This occurs at a very high percentage. We believe that this is appropriate and should continue. In this light we support the setting of a filing fee at its 1996 level of $50, and its indexation, although we remain open minded about the basis of indexation, in view of the AIG's recommendation that it be indexed to average weekly earnings rather than inflation. Four of the six IR jurisdictions presently apply a filing fee.

The Committee hearings were useful for flushing out some further process improvement possibilities. Some of these could perhaps be considered more fully when the bill is debated in the Senate.

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

This Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 will require the conduct of a secret ballot amongst employees as a prerequisite for taking legal protected action during enterprise bargaining. Similar provisions were included in the MOJO bill in 1999, and again in the Workplace Relations Amendment (Secret Ballots for Protected Action) bill 2000. The provisions in the bill are additional to those that already exist in the WRA.

Despite changes to this bill from it's predecessors, my comments in my Minority Report at the time of the inquiry into the MOJO bill, about the proposed additional requirements for secret ballots remain, by and large, relevant. At that time I noted:

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

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

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

This schedule should be opposed outright. It does not add to industrial democracy.[25]

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[25] Supplementary Report on the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, Senator Andrew Murray: November 1999, main report. p. 398

The bill varies in some ways from previous approaches, and is less aggressive. The relevant Bills Digest see these changes as 'subtle' while the ACCI describes them as more significant.

A number of submissions to the committee addressed the issue of secret ballots and a range of significant points arose.

Coercion: Clearly some witnesses believe that coercion of at least some employees occurs, or that some employees perceive that they are under pressure to vote a certain way, in the event of an attendance vote on industrial action. This is not hard to imagine in some circumstances, but there is no indication that it is usual or common. Obviously, if at all possible, such coercion should be prevented where it exists. The Department however, advised the Committee that this was not the prime purpose of the bill.

Mr. Smythe – I do not think the legislation is predicated on the premise that there is intimidation and therefore there must be secret ballots. As you have acknowledged, it is not impossible that there may be intimidation, but I think the simple proposition is, as Mr. Anderson said, that a secret ballot process can most readily guarantee the principle of democracy.[26]

This bill is directed at secret ballots prior to protected action being taken, with consequent disputation occurring. However, as outlined earlier in my remarks on the Genuine Bargaining bill, disputation may well be more common as a result of unprotected action. In evidence to the Committee, the Department indicated that it had no data to separate out the protected action disputation days lost from unprotected action disputation days lost, although it was negotiating with the ABS to ascertain such data in the future. If the purpose of the bill is to encourage employees to take their time and be more considered when taking strike and other actions, the bill will be ineffectual if it is in fact unprotected action strikes that occur.

The Bill imposes a comprehensive and detailed requirement on all unions in relation to protected action, regardless of their past record or responsibility in ensuring an effective and informed employee voice. Admittedly the sample was small, but four unions questioned at the Hearings all indicated there was no impediment at all to employees asking for a secret ballot at the time of any vote, or in introducing rules that required secret ballots in specific circumstances. It is possible that numbers of unions may already have such provisions in their rules.

Given that the WRA already has provisions for secret ballots, if the Government want additional protection to ensure union democracy, it may be that a simpler approach at this stage would be for the WRA to simply require that union rules recorded that secret ballots were possible on request by show of hands at any vote, and themselves detailed the procedures to accomplish that. Procedures could vary from the very comprehensive to putting slips of paper in a box to be counted at the meeting. Those rules could be subject to AIRC review.

The Bill is somewhat arbitrary in terms of the events that it prescribes a secret ballot for. There is no provision requiring a secret ballot in relation to acceptance/rejection of an enterprise agreement, and no requirement in relation to the ending of protected action. A more comprehensive imposition of secret ballots to end disputes would be in danger of increasing the length of disputation rather than reducing it, given the delays it may result in – a point accepted by unions and employer organisations alike.

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[26] Hansard EWRE 107, Friday 3 May 2002

There is no reciprocal obligation upon employers or their organisations to ensure their internal democracy through a secret ballot of an appropriate constituency in relation to lockouts or industrial action by employers. Why should an employer's lockout commencement not be subject to a vote of shareholders, if such is necessary for a vote for employees to strike? If democracy is the object of this bill, then a more even handed approach to the imposition of secret ballots may be called for.

At present pre-strike secret ballots are available to employees under section 136 of the Act, and the Commission can order secret ballots at its discretion under section 135. The mechanisms for such ballots are deliberately not prescribed in the Act in detail, except that they must be conducted 'in accordance with directions given by the Commission'. This discretion may be useful to retain. Certainly the provisions of section 135 and 136 have been seldom used, perhaps suggesting that there may be little real demand from employers or employees for further access to secret ballots, or perhaps because the strike or industrial action is more often taken in unprotected circumstances, so the employees would not be approaching the AIRC anyway.

In 1999/2000, for example, while 9640 applications were made for a bargaining period, only 2 orders for a secret ballot were made, presumably because the AIRC did not judge it would be helpful to do so. Only 12 orders for such ballots have been made since 1996._ In the same period 32957 applications were made for a bargaining period. There does not appear to be a need, certainly as perceived by the AIRC, for ballots to allow members to express views that are seen to be well expressed by existing methods of decision-making.

There does not appear to be any criticism of the AIRC's current methods that it uses to implement the conduct of a ballot 'in accordance with directions given by the Commission'. Their approach gives the AIRC powers to flexibly determine the mechanisms for the conduct of a ballot, rather than prescribe them step by step. The bill in contrast seeks to impose a fairly fixed approach, in all examples of protected action, creating new administrative complexity, cost and (no doubt) legal argument. The potential for delays in implementation, while exaggerated by some, exists. Unions have argued the bill's real intent is to frustrate the timely exercise of employee democracy, and work to reduce (through the burden of administrative complexity) the level of industrial action taken around enterprise agreements.

Instead, the AIRC might be directed to require a ballot in relation to the taking of protected action 'in accordance with directions given by the Commission', and to do so in situations where it perceives that an argument for secret ballots arises, for example where the AIRC has suspicion that members' views are not being properly represented by an association, or where there is historical evidence suggesting that coercion has occurred or might have occurred. There are industries, employers and unions, whose history is known to the AIRC, who might properly take that history into account. In those cases the AIRC might be encouraged to be more likely to impose additional secret ballots, but still at their discretion. This more targeted approach to secret ballots might be less onerous for the parties, less costly, and achieve an increase in democratic voice and decision making in the areas where it is truly needed.

Will more secret ballots across the whole union sector make a difference? The committee was not presented with evidence about whether the outcomes that arise from mandating more secret ballots than we presently have were expected to be different from, say, a show of hands. While UK precedents for such laws were cited, empirical evidence was not led for Australia to expect a change in industrial action that could be expected to flow from the bill. If there were to be, in fact, little

[27] Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 Digest, 2001-02, p. 7.

material difference to the outcome, the cost and complexity of imposing these ballot provisions might turn out to be a waste of private and public resources.

The technical prescription is fairly onerous. The bill generally requires a secret postal ballot although some provision for an attendance ballot exists. It also requires 'a ballot to hold a ballot' and is quite detailed in its requirements.

It is hard to estimate the effect of this Bill on the outcomes of decision making about protected action, or upon the costs it will impose not only on the public purse, and upon the AIRC, but also upon the employers and unions who must compile lists of employees and meet requirements about the conduct of ballots.

The object of the Bill is 'to establish a transparent process which allows employees directly concerned to choose' whether to take industrial action. It is sensible to guard against coercion of employees into protected action that they do not support (remembering that any employee can elect not to join industrial action). However, this object might be approached by a much simpler mechanism that builds upon the WRA's existing provisions.

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

This Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 will prevent collective certified agreements containing requirements that non-union members pay bargaining fees to unions, and will prevent the forced payment of such fees.

The Australian Democrats have considered this issue in the recent past and concluded:

The Australian Democrats support the rights of employees and employers to join or not to join registered organisations. We support the prohibition on duress. This bill addresses the possibility of non-members of unions being forced to pay bargaining fees (fee-for-service as it is also known), which then converts into a kind of compulsory unionism. The Democrats believe that fee-for-service issues must be separated out from issues of freedom of association and a prohibition on duress. Both fee-for-service and freedom of association are principles we support. The question then revolves around enabling legislation and whether this bill is the appropriate vehicle for the resolution of these issues.

The Government has characterised such fees as a form of compulsory unionism and this comprises their main argument for these amendments.

It is hard to see how provisions for bargaining fees should be against the spirit of the WRA and its object of facilitating agreement making. Agreement making is desirable, and if fee-for-service contributes to that, it is to the good. There is also the issue of 'free-riders', by employers on the backs of employer organisations, and employees on the backs of unions.

We consider it fair that those who benefit from agreement making should make a contribution towards its costs, whether employers or employees. This strikes us as a fair principle.

The bargaining fee may represent only a small portion of the real cost of completing an agreement, for instance where that agreement involves union members' foregone earnings through taking protected action.

We see a clear distinction between the notion of compulsory unionism (which we oppose) and a contribution to the costs of bargaining, where the person paying is a direct beneficiary of that bargaining. Such payees are not joining a union, but clearly the fee should not be a substitute for a normal union fee. They are paying for a service. They are not contributing to other activities of the union, or electing to play any role in the activities, policies or other conduct of the organisation, or getting any of the other benefits of a union. They are not union members.

Coercive attempts to force union membership are clearly illegal under the WRA and should remain so.

At that time we noted that a fee-for-service is not at all unusual under industrial relations and bargaining regimes in other countries. In some countries it is imposed. In the US those non-unionists in workplaces where a majority vote to join a union, and who then benefit from bargaining to reach workplace agreements, must generally pay a fee to the union that wins the certification ballot and negotiates the agreement. Allowing workplaces to take a vote on agreements which include provision to charge such a fee, and then where the majority vote in its support, permit its collection, is not out of step with practice in other places. To repeat, it seems fair and reasonable that those who benefit, whether employers or employees, also pay. The ILO view bargaining fees as a legitimate issue for collective bargaining.

One submission stated

…the ACCER does not support the charging of a bargaining fee without the direct consent and authorisation of the non-union member, prior to the negotiation of a certified agreement.[28]

This statement encapsulates some key principles – that the consent has to be direct by the employee affected, [without duress], and prior to the negotiation, not subsequent.

It seems, then, that a series of principles to guide the setting of fees could include:

Advance notice: individuals should know in advance of paying a fee, what that fee will be, and what it purchases (unions and employer organisations would need a 'price/service list');

The fee should be a one-off for the service, not an annual charge;

No coercion: no one should be coerced into paying a bargaining fee. Payment of fees should be entirely voluntary;

No payment, no benefit: however, if a fee is not paid, then it is fair that non-contributory parties should not receive the benefits achieved by bargaining or association efforts. Without this requirement, there will be no inducement for free riders to pay a fee, which is clearly fair where they receive the benefit. This principle is not implied in the current bill;

Fee level: individuals have a right to know in advance the relevant fee, and it should be set at a reasonable level. If it was not below relevant comparable union membership rates (compared on an average annual basis), in the case of union bargaining, there should be suspicion, given that a fee buys less than the full benefits of union membership;

Clear expression in an agreement: the arrangements for such fees should be clearly set out in any agreement

[28]John Ryan, Executive Officer Australian Catholic Commission for Employment Relations

The current bill achieves some of these principles, but prevents others. The Democrats will consider the bill further as it proceeds through Parliament, guided by these principles. We remain open to the possibility that bargaining fees or fee-for-service provisions become part of workplace law, within the principles of freedom of association.

Senator Andrew Murray

APPENDICES

Appendix 1: Key features of Federal and State Termination Laws

Appendix 2: Question on Notice: Unfair Dismissal Applications (No. 1005)

Appendix 3: Question on Notice: Small Business (No. 16)

Appendix 4: Question on Notice: Workplace Relations: Unfair Dismissals (No. 5)

Appendix 5: Federal Unfair Dismissal Cases

APPENDIX 1

KEY FEATURES OF FEDERAL AND STATE TERMINATION LAWS

	Cmwth	NSW	QLD	SA	WA	Tas
Employee able to apply for remedy?	Yes	Yes	Yes	Yes	Yes	Yes
Max time period after termination to apply	21 days	21 days	21 days	21 days	28 days	21 days
Filing Fee	$50.00	$50.00	$46.50	$0.00	$5.00	$0.00
Casuals excluded, for what period?	12 mths	6 mnths	12 mths	9 mnths	No	No
Statutory default probationary period	3 mnths	No	3 mnths	No	No	No
Conciliation before arbitration	Yes	Yes	Yes	Yes	Yes	Yes
Certificate issued if conciliation fails?	Yes	No	Yes	Assess-ment made	No	No
Penalty for disregarding assessment?	Yes	No	No	Yes	No	No
Commission to consider size of business?	Yes					
Penalties against advocates for vexatious claims	Yes					
Requirement to disclose 'no win no fee'	Yes					
Dismiss claims which have no prospect of success?	Yes					
Is salary compensation capped?	6 months remuneration. Limited to $37,600 for non-award employees	6 months remuner ation	6 months average wage	6 months remuner-ation limited to $38,700	6 months remuner-ation	6 months ordinary pay

Note: termination provisions contained in the CCH Australian Employment Legislation at 21 December 2001.

No attempt has been made to include other authority a tribunal might rely on to deal with a matter beyond those prescribed under the particular termination provisions.

WA provisions do not apply to WA employees under WA Workplace Agreements, and new industrial legislation will come into effect in Western Australia post May 2002.

Prepared by Steve O'Neill, Department of the Parliamentary Library for the Senate Employment, Workplace Relations and Education Legislation Committee.

APPENDIX 2

QUESTION ON NOTICE: UNFAIR DISMISSAL APPLICATIONS

(Question No. 1005) Senator Murray asked the Minister representing the Minister for Workplace Relations and Small Business, upon notice, on 26 November 1997:

(1) With reference to an answer to a question on notice asked during the 1997-98 Budget Supplementary Estimates hearings of the Economics Legislation Committee concerning the Industrial Relations portfolio, subprogram 1.2—Legal and Industry:

Can a comparison of the industrial relations systems' nine unfair dismissal jurisdictions in 1997 as compared to 1996 be provided at the earliest date following 31 December 1997.

(2) At the earliest date following 31 December 1997, could details of research undertaken on the number and percentage of unfair dismissal applications which apply to small businesses with less than 15 employees, compared with total unfair dismissal applications for 1997, in all nine unfair dismissal jurisdictions be provided.

Senator Alston—The Minister for Workplace Relations and Small Business has provided the following answer to the honourable senator's questions:

(1) A comparison of unfair dismissal applications in all jurisdictions in 1997 as compared to 1996 is as follows.

State/Territory	Jan-Dec 1996 1	Jan- Dec 1997 a	Combined 1997 Figures as % of				
	Federal	State	Combined	Federal	State	Combined	Combined 1996 Figures 1
New South Wales	4,290	2,186	6,476	1,115	4,558	5,673	88%
South Australia	633	1,240	1,873	273	1,384 2	1,6572	88%
Queensland	512	1,932	2,444	623	1,932	2,555	105%
Western Australia	1,875	918	2,793	271	1,824	2,095	75%
Tasmania 3	360	1143	474	117	3693	486	103%
Victoria 4	5,958	358	6,316	4,527	NA4	4,527	72%
ACT 4	509	NA4	509	260	NA4	260	51%
NT 4	396	NA4	396	277	NA4	277	70%
Total	14,533	6,748	21,281	7,463	10,067	17,530	82%

Notes 1. Federal and State figures are based on calendar months, and incorporate estimates and interpolations, where original data not available. Official and unofficial sources are used.

2. The SA Commission has advised that figures for the months of February, April and June 1997 were inflated by applications lodged on behalf of over 100 workers each month who were made redundant from SAMCorp (a large SA meat processing corporation) in February and April and from Bells (Sizzler) in June.

3. Tasmanian State figures are unofficial only. Official monthly figures are not produced by the Tasmanian Commission. The official total figures for the 1995/1996 and

1996/1997 financial years were contained in the Commission's annual reports for those years.

4. There are no separate Territory unfair dismissal systems, and there has been no separate Victorian unfair dismissal system after 1996.

(2) In relation to Federal unfair dismissal applications, the Australian Industrial Registry is collecting information on the number and percentage of unfair dismissal applications which apply to small businesses with 15 or less employees, for each month from December 1997 to May 1998. This information is being forwarded to Senator Murray. The information relating to applications from 1 December 1997 to 31 January 1998 is as follows.

Registry	Total termination of employment applications lodged	Total employer responses to Industrial Registry's question on employer size	Employers employing 15 or fewer employees	Employers employing 15 or fewer employees as % of total employer responses received
ACT	33	12	9	75
NSW	234	68	19	28
NT	43	18	8	44
QLD	55	29	6	21
SA	42	12	1	8
TAS	16	7	1	14
VIC	810	308	121	39
WA	50	17	1	6
Total	1,283	471	166	35

In relation to State unfair dismissal applications, it is not possible to provide information on the number and percentage of unfair dismissal applications which apply to small businesses with 15 or less employees, as no State collects data on the size of respondents to unfair dismissal applications.

APPENDIX 3

QUESTION ON NOTICE: SMALL BUSINESS

(Question No. 16) Senator Murray asked the Minister representing the Minister for Employment and Workplace Relations, upon notice, on 24 January 2002:

(1)How many small businesses are there in each state and territory.

(2)For each state and territory, how many small business fall under the Federal Workplace Relations Act provisions for unfair dismissal, as opposed to state provisions for unfair dismissal.

http://hyperlink&class=name&xrefid=ld4/Senator Alston —The Minister for Employment and Workplace Relations has provided the following answer to the honourable senator's question:

(1)The following table provides information on the number of small businesses in each State and Territory:

State/Territory	
Number of small businesses	
New South Wales	360 600
Victoria	264 300
Queensland	205 800
South Australia	78 200
Western Australia	116 300
Tasmania	22 700
Northern Territory	9 100
Australian Capital Territory	18 000
Total	1 075 000

Sources: Australian Bureau of Statistics Catalogues 1321.0, 8127.0, 8141.0 and Yellow Pages Special Report on E-Commerce and computer technology July 2001.

Approximately 50% of these businesses are non-employing businesses. 34% of small businesses employ between 1 and 4 people, and 16% employ 5 to 19 people. A total of 3 181 000 people are employed by small businesses in Australia.

(2)Further time is required to obtain from various sources the information needed to answer this question. The information will be tabled when it is available.

APPENDIX 4

QUESTION ON NOTICE: WORKPLACE RELATIONS: UNFAIR DISMISSALS

(Question No. 5) Senator Murray asked the Minister representing the Minister for Employment and Workplace Relations, upon notice, on 20 December 2001:

With reference to the answer to question on notice no.1005 (Senate Hansard, 4 March 1998, p. 421):

(1)Can the Minister provide a table for all unfair dismissal applications under federal and state law for the 2000-01 financial year, for all states and territories, showing federal, state and total amounts on a similar basis to (1) of the referenced question?

(2)Can the Minister provide a table for all small business unfair dismissal applications under federal and state law for the 2000-01 financial year, for all states and territories, showing federal, state and total amounts on a similar basis to (1) of the referenced question?

Senator Alston—The Minister for Employment and Workplace Relations has provided the following answer to the honourable senator's question:

(1)The following table provides information on unfair dismissal applications lodged in Australian jurisdictions between 1 July 2000 and 30 June 2001:

State/Territory			
Applications lodged between 1 July 2000 and 30 June 20011			
	Federal	State	Combined
New South Wales	1,648	4,041	5,689
Queensland	420	1,866	2,286
Western Australia2	398	1,7592	2,157
South Australia	198	1,175	1,373
Tasmania	137	264	401
Victoria3	4,781	n/a	4,781
Australian Capital Territory3	250	n/a	250
Northern Territory3	263	n/a	263
Total	8,095	9,105	17,200

Notes

1 Federal and State figures are based on calendar months, and incorporate estimates and interpolations where original data are not available. Official and unofficial sources are used.

2 Western Australian State figures include both unfair dismissal applications and applications which combine claims of unfair dismissal and denial of contractual benefits.

3 There are no separate Territory unfair dismissal systems, and there has been no separate Victorian unfair dismissal system since 1996.

(2)The Australian Industrial Registry collects information on the number and percentage of unfair dismissal applications that involve employers with 15 or fewer employees. However, this information relates to unfair dismissal applications under the federal Workplace Relations Act 1996 only. As far as the Federal Government is aware, no State or Territory collects data on the size of respondents to unfair dismissal applications. Therefore, it is not possible to provide a table for all small business unfair dismissals under federal and state law for 2000-01 as requested.

The following table provides information on federal unfair dismissal applications, broken down by the State and Territory in which the federal application was lodged. Note that this information is incomplete, as employers provide the data voluntarily. Not all employers respond to the Registry's request for information on employer size - the total number of respondents who provided information on employer size is indicated in the table.

Federal unfair dismissal applications lodged between 1 July 2000 and 30 June 2001				
Registry	Total termination of employment applications lodged	Total employer responses received to Registry's request for information on employer size	Number of responses received from employers employing 15 or fewer employees	Employers employing 15 or fewer employees as % of total employer responses received
New South Wales	1,648	359	97	27.0%
Queensland	420	283	53	18.7%
Western Australia	398	104	37	35.6%
South Australia	198	104	14	13.5%
Tasmania	137	84	23	27.4%
Victoria	4,781	1,357	530	39.1%
Australian Capital Territory	250	90	35	38.9%
Northern Territory	263	145	50	34.5%
Total	8,095	2,526	839	33.2%

APPENDIX 5

FEDERAL UNFAIR DISMISSAL CASES

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : Australia

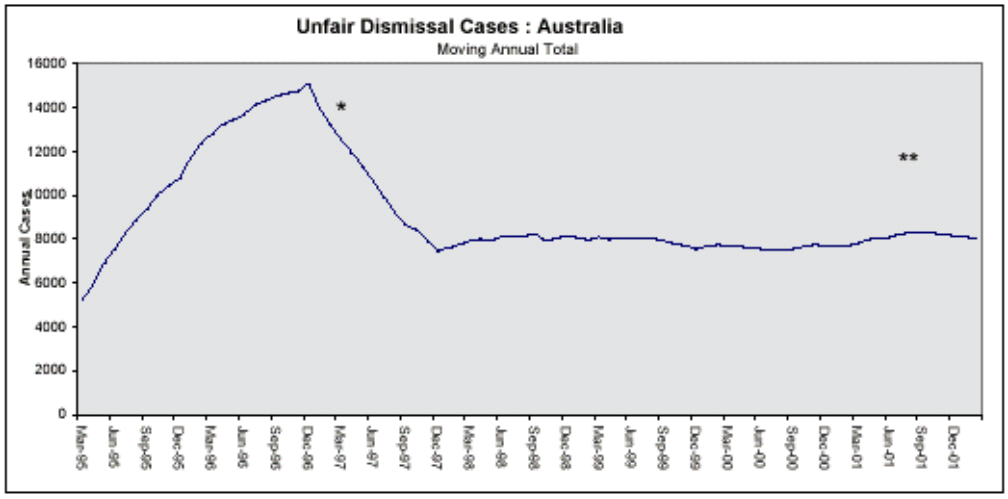
Source:Department of Industrial Relations

*

	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	540	581	535	418	492	354	1511	625	
Feb	572	680	705	618	709	551	1305	613	
March	0	866	755	820	708	547	1235	786	
April	0	705	535	563	666	592	1148	690	1
May	0	709	634	681	597	644	1298	1096	121
June	0	645	624	685	700	533	1207	986	330
July	0	785	615	658	687	712	1427	963	252
Aug	0	690	662	630	609	557	1282	1087	462
Sept	0	577	566	550	682	591	1120	924	440
Oct	0	620	635	539	661	979	1206	1049	373
Nov	0	652	736	634	744	611	1138	1087	703
Dec	0	647	678	745	882	791	1206	830	487
TOTAL	1112	8157	7680	7541	8137	7462	15083	10736	3169

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.

** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support



Moving Annual Total									
Mar-95	5193	Oct-96	14656	May-98	7946	Dec-99	7541	Jul-01	8248
Apr-95	5882	Nov-96	14707	Jun-98	8113	Jan-00	7658	Aug-01	8276
May-95	6857	Dec-96	15083	Jul-98	8088	Feb-00	7745	Sep-01	8287
Jun-95	7513	Jan-97	13926	Aug-98	8140	Mar-00	7680	Oct-01	8272
Jul-95	8224	Feb-97	13172	Sep-98	8231	Apr-00	7652	Nov-01	8188
Aug-95	8849	Mar-97	12484	Oct-98	7913	May-00	7605	Dec-01	8157
Sep-95	9333	Apr-97	11928	Nov-98	8046	Jun-00	7544	Jan-02	8116
Oct-95	10009	May-97	11274	Dec-98	8137	Jul-00	7501	Feb-02	8008
Nov-95	10393	Jun-97	10600	Jan-99	8063	Aug-00	7533		
Dec-95	10736	Jul-97	9885	Feb-99	7972	Sep-00	7549		
Jan-96	11622	Aug-97	9160	Mar-99	8084	Oct-00	7645		
Feb-96	12314	Sep-97	8631	Apr-99	7981	Nov-00	7747		
Mar-96	12763	Oct-97	8404	May-99	8065	Dec-00	7680		
Apr-96	13221	Nov-97	7877	Jun-99	8050	Jan-01	7726		
May-96	13423	Dec-97	7462	Jul-99	8021	Feb-01	7701		
Jun-96	13644	Jan-98	7600	Aug-99	8042	Mar-01	7812		
Jul-96	14108	Feb-98	7758	Sep-99	7910	Apr-01	7982		
Aug-96	14303	Mar-98	7919	Oct-99	7788	May-01	8057		
Sep-96	14499	Apr-98	7993	Nov-99	7678	Jun-01	8078		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : ACT

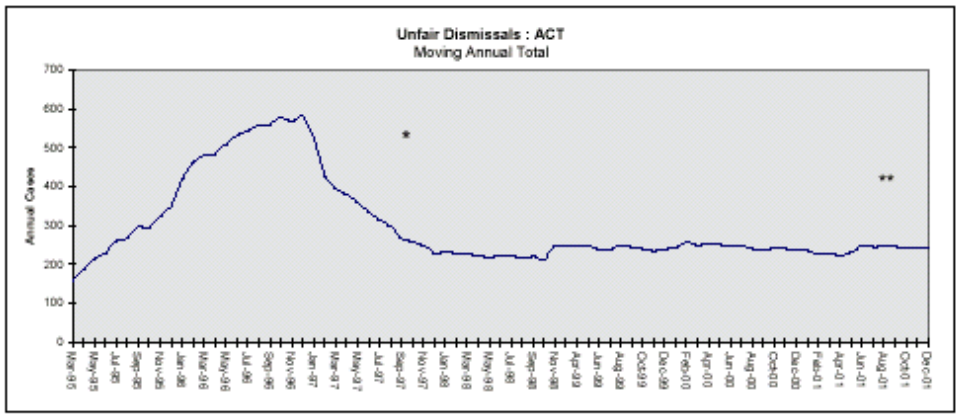
Source:Department of Industrial Relations

*

	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	15	16	16	12	15	11	71	0	
Feb	29	14	23	9	21	24	44	46	
March		24	23	31	19	20	51	32	
April		16	21	16	12	18	31	28	0
May		28	19	22	25	29	52	28	0
June		32	15	18	26	21	45	22	7
July		19	23	24	27	26	45	32	0
Aug		20	19	26	12	21	38	26	20
Sept		17	17	18	24	18	49	46	15
Oct		19	23	21	25	32	40	21	23
Nov		17	18	18	24	22	31	42	14
Dec		21	19	24	19	18	39	24	0
TOTAL	44	243	236	239	249	260	536	347	79

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.

** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support.



Moving Annual Total									
Mar-95	157	Oct-96	578	May-98	218	Dec-99	239	Jul-01	245
Apr-95	185	Nov-96	567	Jun-98	223	Jan-00	243	Aug-01	246
May-95	213	Dec-96	582	Jul-98	224	Feb-00	257	Sep-01	246
Jun-95	228	Jan-97	522	Aug-98	215	Mar-00	249	Oct-01	242
Jul-95	260	Feb-97	424	Sep-98	221	Apr-00	254	Nov-01	241
Aug-95	266	Mar-97	393	Oct-98	211	May-00	251	Dec-01	243
Sep-95	297	Apr-97	380	Nov-98	248	Jun-00	248	Jan-02	242
Oct-95	295	May-97	357	Dec-98	249	Jul-00	247	Feb-02	257
Nov-95	323	Jun-97	333	Jan-99	246	Aug-00	240		
Dec-95	347	Jul-97	314	Feb-99	234	Sep-00	239		
Jan-96	418	Aug-97	297	Mar-99	246	Oct-00	241		
Feb-96	462	Sep-97	266	Apr-99	250	Nov-00	241		
Mar-96	481	Oct-97	258	May-99	247	Dec-00	236		
Apr-96	484	Nov-97	249	Jun-99	239	Jan-01	236		
May-96	508	Dec-97	228	Jul-99	236	Feb-01	227		
Jun-96	531	Jan-98	232	Aug-99	250	Mar-01	228		
Jul-96	544	Feb-98	229	Sep-99	244	Apr-01	223		
Aug-96	556	Mar-98	228	Oct-99	240	May-01	232		
Sep-96	559	Apr-98	222	Nov-99	234	Jun-01	249		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : NSW

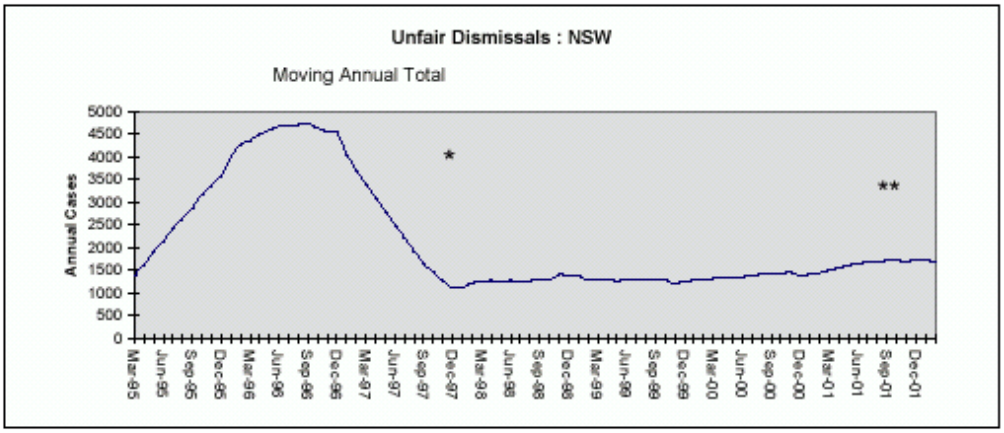
Source:Department of Industrial Relations

*

	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	107	103	78	69	76	57	571	160	
Feb	111	142	111	102	178	78	433	139	
March		195	139	107	124	93	397	309	
April		170	106	92	88	75	366	234	0
May		155	105	98	109	133	410	316	26
June		155	122	104	96	72	371	286	55
July		165	116	93	82	102	386	376	95
Aug		138	136	99	93	78	382	356	149
Sept		124	109	103	126	82	333	305	74
Oct		116	113	101	85	107	286	392	90
Nov		129	141	118	205	100	288	369	183
Dec		129	112	188	121	158	324	314	92
TOTAL	218	1721	1388	1274	1383	1135	4547	3556	764

*The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.

** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support



Moving Annual Total									
Mar-95	1372	Oct-96	4618	May-98	1254	Dec-99	1274	Jul-01	1696
Apr-95	1606	Nov-96	4537	Jun-98	1278	Jan-00	1283	Aug-01	1698
May-95	1896	Dec-96	4547	Jul-98	1258	Feb-00	1292	Sep-01	1713
Jun-95	2127	Jan-97	4033	Aug-98	1273	Mar-00	1324	Oct-01	1716
Jul-95	2408	Feb-97	3678	Sep-98	1313	Apr-00	1338	Nov-01	1704
Aug-95	2615	Mar-97	3374	Oct-98	1285	May-00	1345	Dec-01	1721
Sep-95	2846	Apr-97	3083	Nov-98	1420	Jun-00	1363	Jan-02	1725
Oct-95	3148	May-97	2786	Dec-98	1383	Jul-00	1386	Feb-02	1694
Nov-95	3334	Jun-97	2487	Jan-99	1376	Aug-00	1423		
Dec-95	3556	Jul-97	2203	Feb-99	1300	Sep-00	1429		
Jan-96	3967	Aug-97	1899	Mar-99	1283	Oct-00	1441		
Feb-96	4261	Sep-97	1648	Apr-99	1287	Nov-00	1464		
Mar-96	4349	Oct-97	1469	May-99	1276	Dec-00	1388		
Apr-96	4481	Nov-97	1281	Jun-99	1284	Jan-01	1413		
May-96	4575	Dec-97	1115	Jul-99	1295	Feb-01	1444		
Jun-96	4660	Jan-98	1134	Aug-99	1301	Mar-01	1500		
Jul-96	4670	Feb-98	1234	Sep-99	1278	Apr-01	1564		
Aug-96	4696	Mar-98	1265	Oct-99	1294	May-01	1614		
Sep-96	4724	Apr-98	1278	Nov-99	1207	Jun-01	1647		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : NT

Source:Department of Industrial Relations

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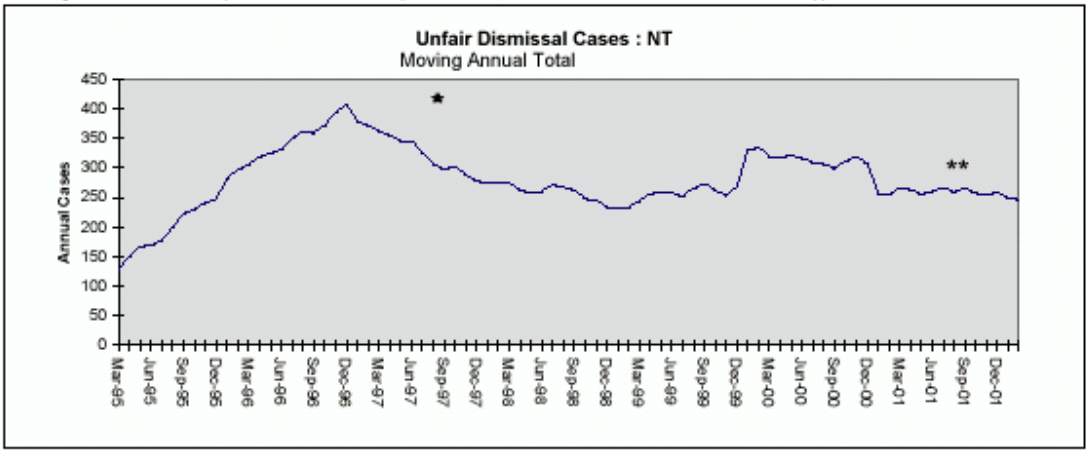
	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	18	27	78	15	16	18	45	12	
Feb	24	27	29	25	24	24	33	16	
March		28	16	31	21	22	32	24	
April		23	26	27	14	26	33	20	0
May		15	23	20	17	22	30	23	4
June		22	17	22	24	21	21	15	13
July		21	15	22	27	16	38	19	11
Aug		16	23	26	13	17	35	24	3
Sept		21	15	22	14	19	28	30	6
Oct		15	23	11	23	36	30	18	10
Nov		23	25	17	25	29	45	23	13
Dec		20	17	29	15	27	37	23	16
TOTAL	42	258	307	267	233	277	407	247	76

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.

** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support



Moving Annual Total									
Mar-95	128	Oct-96	371	May-98	257	Dec-99	267	Jul-01	266
Apr-95	148	Nov-96	393	Jun-98	260	Jan-00	330	Aug-01	259
May-95	167	Dec-96	407	Jul-98	271	Feb-00	334	Sep-01	265
Jun-95	169	Jan-97	378	Aug-98	267	Mar-00	319	Oct-01	257
Jul-95	177	Feb-97	371	Sep-98	262	Apr-00	318	Nov-01	255
Aug-95	198	Mar-97	361	Oct-98	247	May-00	321	Dec-01	258
Sep-95	222	Apr-97	354	Nov-98	245	Jun-00	316	Jan-02	249
Oct-95	230	May-97	346	Dec-98	233	Jul-00	309	Feb-02	246
Nov-95	240	Jun-97	346	Jan-99	232	Aug-00	306		
Dec-95	247	Jul-97	324	Feb-99	233	Sep-00	299		
Jan-96	280	Aug-97	306	Mar-99	243	Oct-00	311		
Feb-96	297	Sep-97	297	Apr-99	256	Nov-00	319		
Mar-96	305	Oct-97	303	May-99	259	Dec-00	307		
Apr-96	318	Nov-97	287	Jun-99	257	Jan-01	256		
May-96	325	Dec-97	277	Jul-99	252	Feb-01	254		
Jun-96	331	Jan-98	275	Aug-99	265	Mar-01	266		
Jul-96	350	Feb-98	275	Sep-99	273	Apr-01	263		
Aug-96	361	Mar-98	274	Oct-99	261	May-01	255		
Sep-96	359	Apr-98	262	Nov-99	253	Jun-01	260		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : Qld

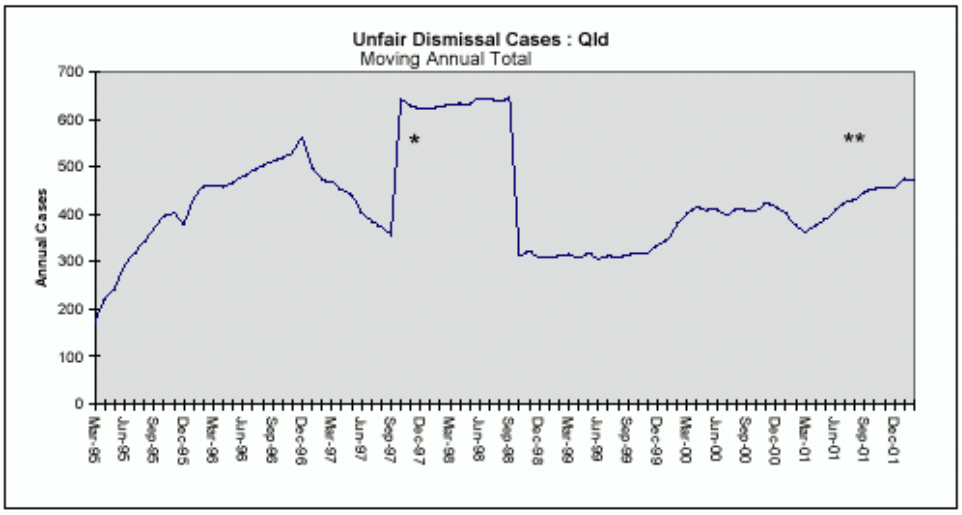
Source:Department of Industrial Relations

*

	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	36	19	32	22	21	22	86	31	
Feb	29	33	59	24	22	17	43	17	
March		45	58	36	32	27	31	27	
April		47	34	22	29	28	45	49	0
May		41	28	34	24	25	36	28	8
June		48	27	25	37	24	62	49	0
July		36	22	34	29	30	47	35	9
Aug		36	30	18	20	27	39	28	4
Sept		41	24	26	22	21	38	29	2
Oct		34	28	29	23	344	58	50	21
Nov		47	46	29	30	24	38	29	24
Dec		31	28	37	20	34	39	5	30
TOTAL	65	458	416	336	309	623	562	377	98

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.

** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support



Moving Annual Total									
Mar-95	173	Oct-96	519	May-98	632	Dec-99	336	Jul-01	425
Apr-95	222	Nov-96	528	Jun-98	645	Jan-00	346	Aug-01	431
May-95	242	Dec-96	562	Jul-98	644	Feb-00	381	Sep-01	448
Jun-95	291	Jan-97	498	Aug-98	637	Mar-00	403	Oct-01	454
Jul-95	317	Feb-97	472	Sep-98	646	Apr-00	415	Nov-01	455
Aug-95	341	Mar-97	468	Oct-98	313	May-00	409	Dec-01	458
Sep-95	368	Apr-97	451	Nov-98	323	Jun-00	411	Jan-02	475
Oct-95	397	May-97	440	Dec-98	309	Jul-00	399	Feb-02	471
Nov-95	402	Jun-97	402	Jan-99	310	Aug-00	411		
Dec-95	377	Jul-97	385	Feb-99	312	Sep-00	409		
Jan-96	432	Aug-97	373	Mar-99	316	Oct-00	408		
Feb-96	458	Sep-97	356	Apr-99	309	Nov-00	425		
Mar-96	462	Oct-97	642	May-99	319	Dec-00	416		
Apr-96	458	Nov-97	628	Jun-99	307	Jan-01	403		
May-96	466	Dec-97	623	Jul-99	312	Feb-01	377		
Jun-96	479	Jan-98	622	Aug-99	310	Mar-01	364		
Jul-96	491	Feb-98	627	Sep-99	314	Apr-01	377		
Aug-96	502	Mar-98	632	Oct-99	320	May-01	390		
Sep-96	511	Apr-98	633	Nov-99	319	Jun-01	411		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : SA

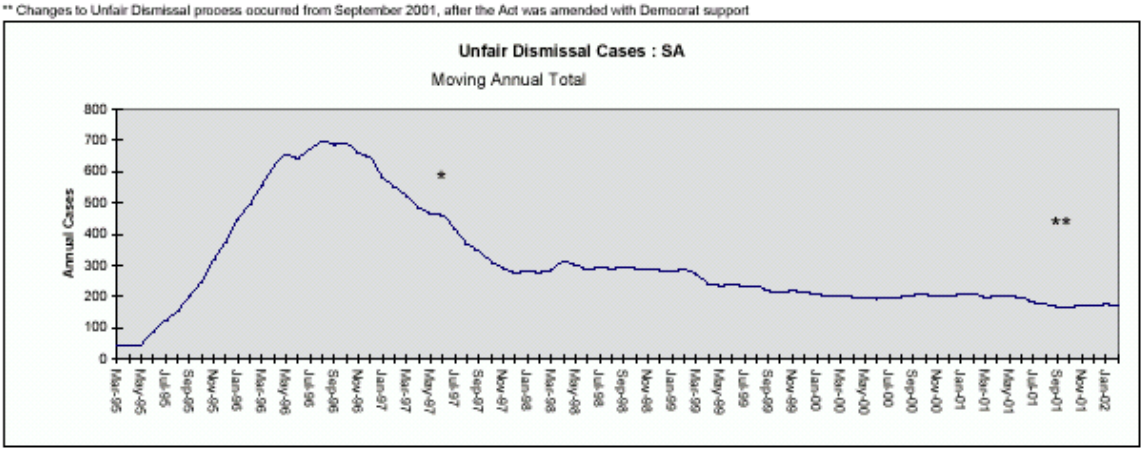
Source:Department of Industrial Relations

*

	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	19	14	5	11	16	6	72	0	
Feb	12	16	14	21	13	20	48	1	
March		13	27	24	40	32	61	0	
April		16	11	18	51	23	62	1	0
May		13	14	14	18	30	47	6	6
June		14	18	23	21	36	41	55	13
July		13	28	24	26	18	65	38	4
Aug		9	15	13	13	18	65	37	8
Sept		10	19	13	30	21	42	52	3
Oct		14	15	13	17	21	58	55	9
Nov		22	14	21	16	22	40	71	0
Dec		16	19	19	23	26	43	58	0
TOTAL	31	170	199	214	284	273	644	374	43

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.

** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support



Moving Annual Total									
Mar-95	44	Oct-96	690	May-98	300	Dec-99	214	Jul-01	181
Apr-95	45	Nov-96	659	Jun-98	285	Jan-00	208	Aug-01	175
May-95	45	Dec-96	644	Jul-98	293	Feb-00	201	Sep-01	166
Jun-95	87	Jan-97	578	Aug-98	288	Mar-00	204	Oct-01	165
Jul-95	121	Feb-97	550	Sep-98	296	Apr-00	197	Nov-01	173
Aug-95	150	Mar-97	521	Oct-98	289	May-00	197	Dec-01	170
Sep-95	199	Apr-97	482	Nov-98	287	Jun-00	192	Jan-02	175
Oct-95	245	May-97	465	Dec-98	284	Jul-00	196	Feb-02	171
Nov-95	316	Jun-97	460	Jan-99	279	Aug-00	198		
Dec-95	374	Jul-97	413	Feb-99	287	Sep-00	204		
Jan-96	446	Aug-97	366	Mar-99	271	Oct-00	206		
Feb-96	493	Sep-97	345	Apr-99	238	Nov-00	199		
Mar-96	554	Oct-97	308	May-99	234	Dec-00	199		
Apr-96	615	Nov-97	290	Jun-99	236	Jan-01	208		
May-96	656	Dec-97	273	Jul-99	234	Feb-01	210		
Jun-96	642	Jan-98	283	Aug-99	234	Mar-01	196		
Jul-96	669	Feb-98	276	Sep-99	217	Apr-01	201		
Aug-96	697	Mar-98	284	Oct-99	213	May-01	200		
Sep-96	687	Apr-98	312	Nov-99	218	Jun-01	196		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : Tas

Source:Department of Industrial Relations

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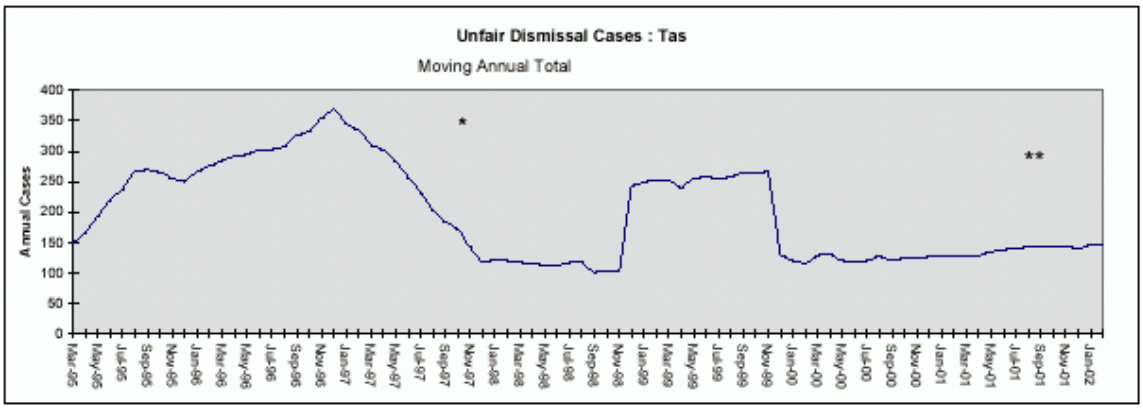
	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	13	7	6	15	8	3	28	12	
Feb	11	10	10	14	10	12	22	13	
March		14	16	3	4	7	32	23	
April		8	5	3	16	17	24	17	0
May		18	12	23	8	12	32	29	1
June		13	10	12	8	8	34	26	0
July		13	10	8	12	7	32	31	13
Aug		18	17	9	5	5	35	31	0
Sept		5	5	13	7	23	41	23	22
Oct		15	14	9	10	7	18	11	15
Nov		10	9	11	7	8	38	17	28
Dec		9	13	9	147	8	33	17	21
TOTAL	24	140	127	129	242	117	369	250	100

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.

** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support



Moving Annual Total									
Mar-95	148	Oct-96	332	May-98	112	Dec-99	129	Jul-01	141
Apr-95	165	Nov-96	353	Jun-98	112	Jan-00	120	Aug-01	142
May-95	193	Dec-96	369	Jul-98	117	Feb-00	116	Sep-01	142
Jun-95	219	Jan-97	344	Aug-98	117	Mar-00	129	Oct-01	143
Jul-95	237	Feb-97	334	Sep-98	101	Apr-00	131	Nov-01	144
Aug-95	268	Mar-97	309	Oct-98	102	May-00	120	Dec-01	140
Sep-95	269	Apr-97	302	Nov-98	103	Jun-00	118	Jan-02	146
Oct-95	265	May-97	282	Dec-98	242	Jul-00	120	Feb-02	147
Nov-95	254	Jun-97	256	Jan-99	249	Aug-00	128		
Dec-95	250	Jul-97	231	Feb-99	253	Sep-00	120		
Jan-96	266	Aug-97	201	Mar-99	252	Oct-00	125		
Feb-96	275	Sep-97	183	Apr-99	239	Nov-00	123		
Mar-96	284	Oct-97	172	May-99	254	Dec-00	127		
Apr-96	291	Nov-97	142	Jun-99	258	Jan-01	128		
May-96	294	Dec-97	117	Jul-99	254	Feb-01	128		
Jun-96	302	Jan-98	122	Aug-99	258	Mar-01	126		
Jul-96	303	Feb-98	120	Sep-99	264	Apr-01	129		
Aug-96	307	Mar-98	117	Oct-99	263	May-01	135		
Sep-96	325	Apr-98	116	Nov-99	267	Jun-01	138		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : Victoria

Source:Department of Industrial Relations

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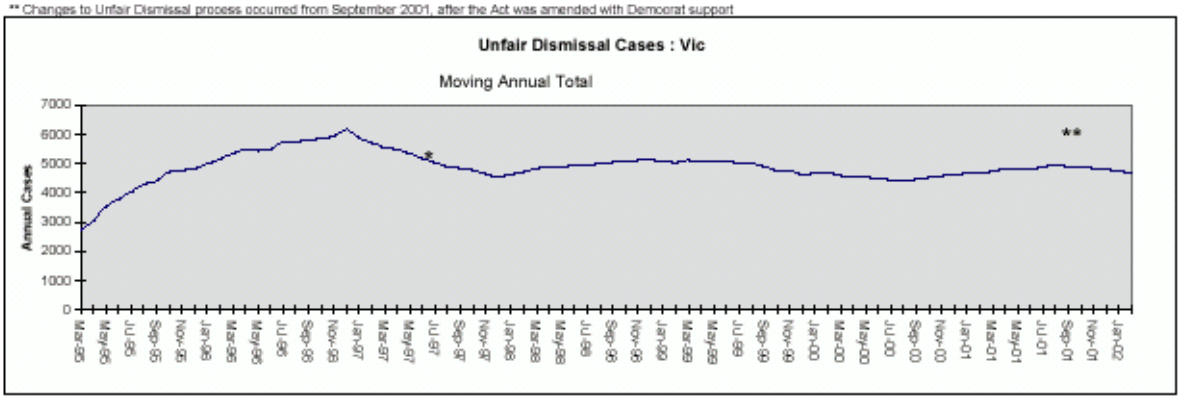
	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	304	357	292	256	326	219	534	371	
Feb	326	411	424	392	423	348	505	350	
March		516	436	539	452	323	481	287	
April		393	303	351	425	389	447	286	0
May		403	408	423	380	388	534	593	70
June		340	383	419	435	328	501	456	213
July		485	360	413	457	487	624	359	95
Aug		414	386	398	430	368	504	498	242
Sept		327	354	321	435	396	448	397	290
Oct		384	386	325	461	422	483	430	116
Nov		377	452	392	403	373	516	440	380
Dec		391	422	398	507	484	592	352	302
TOTAL	630	4798	4606	4627	5134	4525	6169	4819	1708

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats

** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support



Moving Annual Total									
Mar-95	2716	Oct-96	5853	May-98	4864	Dec-99	4627	Jul-01	4905
Apr-95	3002	Nov-96	5928	Jun-98	4961	Jan-00	4663	Aug-01	4933
May-95	3525	Dec-96	6169	Jul-98	4941	Feb-00	4695	Sep-01	4906
Jun-95	3768	Jan-97	5854	Aug-98	5003	Mar-00	4592	Oct-01	4904
Jul-95	4032	Feb-97	5697	Sep-98	5042	Apr-00	4544	Nov-01	4829
Aug-95	4288	Mar-97	5539	Oct-98	5081	May-00	4529	Dec-01	4798
Sep-95	4395	Apr-97	5481	Nov-98	5111	Jun-00	4493	Jan-02	4745
Oct-95	4709	May-97	5335	Dec-98	5134	Jul-00	4440	Feb-02	4660
Nov-95	4769	Jun-97	5162	Jan-99	5064	Aug-00	4428		
Dec-95	4819	Jul-97	5025	Feb-99	5033	Sep-00	4461		
Jan-96	4982	Aug-97	4889	Mar-99	5120	Oct-00	4522		
Feb-96	5137	Sep-97	4837	Apr-99	5046	Nov-00	4582		
Mar-96	5331	Oct-97	4776	May-99	5089	Dec-00	4606		
Apr-96	5492	Nov-97	4633	Jun-99	5073	Jan-01	4671		
May-96	5433	Dec-97	4525	Jul-99	5029	Feb-01	4658		
Jun-96	5478	Jan-98	4632	Aug-99	4997	Mar-01	4738		
Jul-96	5743	Feb-98	4707	Sep-99	4883	Apr-01	4828		
Aug-96	5749	Mar-98	4836	Oct-99	4747	May-01	4823		
Sep-96	5800	Apr-98	4872	Nov-99	4736	Jun-01	4780		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : WA

Source:Department of Industrial Relations

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	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	28	38	28	18	14	18	104	39	
Feb	30	27	35	31	18	28	177	31	
March		31	40	49	16	23	150	84	
April		32	29	34	31	16	140	55	1
May		36	25	47	16	25	157	73	6
June		21	32	62	53	23	132	77	29
July		33	41	40	27	26	190	73	25
Aug		39	36	41	23	23	184	87	36
Sept		32	23	34	24	11	141	42	28
Oct		23	33	30	17	10	233	72	87
Nov		27	31	28	34	33	142	96	61
Dec		30	48	41	30	36	99	37	26
TOTAL	58	369	401	455	303	272	1849	766	299

* The Coalition's Workplace Relations Act commenced 1/1/97, and was passed after amendment by the Democrats.

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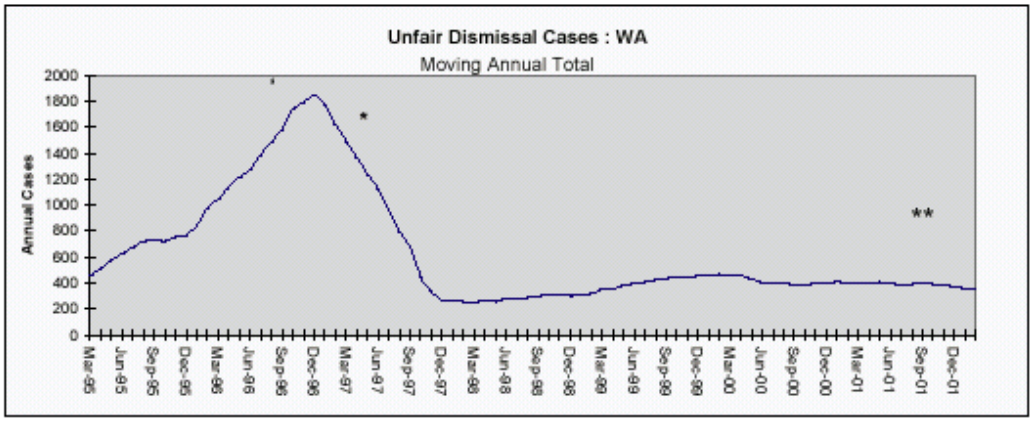

Moving Annual Total									
Mar-95	453	Oct-96	1741	May-98	257	Dec-99	455	Jul-01	389
Apr-95	507	Nov-96	1787	Jun-98	287	Jan-00	465	Aug-01	392
May-95	574	Dec-96	1849	Jul-98	288	Feb-00	469	Sep-01	401
Jun-95	622	Jan-97	1763	Aug-98	288	Mar-00	460	Oct-01	391
Jul-95	670	Feb-97	1614	Sep-98	301	Apr-00	455	Nov-01	387
Aug-95	721	Mar-97	1487	Oct-98	308	May-00	433	Dec-01	369
Sep-95	735	Apr-97	1363	Nov-98	309	Jun-00	403	Jan-02	359
Oct-95	720	May-97	1231	Dec-98	303	Jul-00	404	Feb-02	362
Nov-95	755	Jun-97	1122	Jan-99	307	Aug-00	399		
Dec-95	766	Jul-97	958	Feb-99	320	Sep-00	388		
Jan-96	831	Aug-97	797	Mar-99	353	Oct-00	391		
Feb-96	977	Sep-97	667	Apr-99	356	Nov-00	394		
Mar-96	1043	Oct-97	444	May-99	387	Dec-00	401		
Apr-96	1128	Nov-97	335	Jun-99	396	Jan-01	411		
May-96	1212	Dec-97	272	Jul-99	409	Feb-01	403		
Jun-96	1267	Jan-98	268	Aug-99	427	Mar-01	394		
Jul-96	1384	Feb-98	258	Sep-99	437	Apr-01	397		
Aug-96	1481	Mar-98	251	Oct-99	450	May-01	408		
Sep-96	1580	Apr-98	266	Nov-99	444	Jun-01	397		

Federal Unfair Dismissal Cases

Unfair Dismissal Cases : ACT
Source:Department of Industrial Relations
*

	2002	2001	2000	1999	1998	1997	1996	1995	1994
Jan	15	16	16	12	15	11	71	0	
Feb	29	14	23	9	21	24	44	46	
March		24	23	31	19	20	51	32	
April		16	21	16	12	18	31	28	0
May		28	19	22	25	29	52	28	0
June		32	15	18	26	21	45	22	7
July		19	23	24	27	26	45	32	0
Aug		20	19	26	12	21	38	26	20
Sept		17	17	18	24	18	49	46	15
Oct		19	23	21	25	32	40	21	23
Nov		17	18	18	24	22	31	42	14
Dec		21	19	24	19	18	39	24	0
TOTAL	44	243	236	239	249	260	536	347	79

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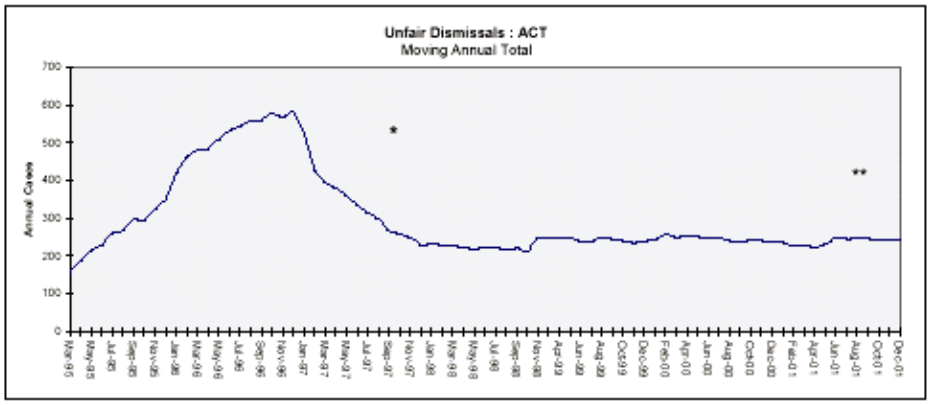
** Changes to Unfair Dismissal process occurred from September 2001, after the Act was amended with Democrat support.



Moving Annual Total									
Mar-95	157	Oct-96	578	May-98	218	Dec-99	239	Jul-01	245
Apr-95	185	Nov-96	567	Jun-98	223	Jan-00	243	Aug-01	246
May-95	213	Dec-96	582	Jul-98	224	Feb-00	257	Sep-01	246
Jun-95	228	Jan-97	522	Aug-98	215	Mar-00	249	Oct-01	242
Jul-95	260	Feb-97	424	Sep-98	221	Apr-00	254	Nov-01	241
Aug-95	266	Mar-97	393	Oct-98	211	May-00	251	Dec-01	243
Sep-95	297	Apr-97	380	Nov-98	248	Jun-00	248	Jan-02	242
Oct-95	295	May-97	357	Dec-98	249	Jul-00	247	Feb-02	257
Nov-95	323	Jun-97	333	Jan-99	246	Aug-00	240		
Dec-95	347	Jul-97	314	Feb-99	234	Sep-00	239		
Jan-96	418	Aug-97	297	Mar-99	246	Oct-00	241		
Feb-96	462	Sep-97	266	Apr-99	250	Nov-00	241		
Mar-96	481	Oct-97	258	May-99	247	Dec-00	236		
Apr-96	484	Nov-97	249	Jun-99	239	Jan-01	236		
May-96	508	Dec-97	228	Jul-99	236	Feb-01	227		
Jun-96	531	Jan-98	232	Aug-99	250	Mar-01	228		
Jul-96	544	Feb-98	229	Sep-99	244	Apr-01	223		
Aug-96	556	Mar-98	228	Oct-99	240	May-01	232		
Sep-96	559	Apr-98	222	Nov-99	234	Jun-01	249		

APPENDIX 1

LIST OF SUBMISSIONS

Submission No.	From/State
1	Mr Adam Johnston (NSW)
2	Recruitment & Consulting Services Association (VIC)
3	Community Public Sector Union - State Public Services Federation Group (NSW)
4	Australian Education Union & the National Tertiary Education Industry Union (VIC)
5	Australian Liquor, Hospitality and Miscellaneous Workers Union (LHMU) (NSW)
6	Shop, Distributive & Allied Employees' Association (VIC)
7	Women's Electoral Lobby National Pay Equity Coalition (NSW)
8	Restaurant & Catering Australia (NSW)
9	Australian Council of Trade Unions (ACTU) (VIC)
10	Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria (VIC)
11	Chamber of Commerce & Industry, Western Australia
12	Rail, Tram & Bus Union (NSW)
13	Victorian Automobile Chamber of Commerce (VACC) (VIC)
14	Council of Small Business Organisations of Australia Ltd (COSBOA) (ACT)
15, 15A	Australian Manufacturing Workers' Union (AMWU) (NSW)
16	Australian Catholic Commission for Employment Relations (ACCER) (NSW)
17	Australian Chamber of Commerce and Industry (ACCI) (VIC)
18	Australian Retailers Association (NSW)
19	Transport Workers' Union of Australia (VIC)

20	National Union of Workers (VIC)
21	Small Business Coalition (ACT)
22	National Farmers' Federation (ACT)
23	Independent Education Union of Australia (VIC)
24	Australian Industry Group (NSW)
25	Department of Employment and Workplace Relations (ACT)
26	Australian Workers' Union (NSW)
27	Construction Forestry Mining Energy Union (CFMEU) (NSW)
28	Association of Professional Engineers, Scientists & Managers (APESMA), Professional Officers Association (Victoria) (POAV) & Managers & Professionals Association (MPA) (VIC)
29	Office of Small Business, Department of Industry, Tourism & Resources (ACT)
30, 30A	Job Watch Inc (VIC)

APPENDIX 2

HEARINGS AND WITNESSES

Thursday, 2 May 2002, Melbourne

Blandthorn, Mr Ian, National Assistant Secretary, Shop, Distributive And Allied Employees Association

Burrow, Ms Sharan, President, Australian Council Of Trade Unions

Cameron, Mr Charles, National Workplace Relations Committee Member, Recruitment And Consulting Services Association

Carrad, Mr Brian, President, Restaurant And Catering Australia

De Bruyn, Mr Joe, National Secretary, Shop, Distributive And Allied Employees Association

Donges, Mr Ian, President, National Farmers Federation

Duffin, Mr Linton Robert James, Federal Legal Officer, Transport Workers Union of Australia

Fisher, Mr Ross, Director, Recruitment And Consulting Services; Chair, Ethics And Professional Practice Committee; Chair, Recruitment Services Superannuation Fund; Member, National Workplace Relations Committee, Recruitment And Consulting Services Association

Harris, Miss Denita, Policy Manager And Industrial Relations Advocate, National Farmers Federation

Rubinstein, Ms Linda, Senior Industrial Relations Officer, Australian Council Of Trade Unions

Smith, Mr Stephen Thomas, Director, National Industrial Relations, Australian Industry Group

Friday, 3 May 2002, Melbourne

Anderson, Mr Alexander John Cairns, Assistant Secretary, Legal Policy Branch (2), Workplace Relations Policy And Legal Group, Department Of Employment And Workplace Relations

Anderson, Mr Peter, Director, Workplace Relations, Australian Chamber Of Commerce And Industry

Bohn, Mr David, Assistant Secretary, Legal Policy Branch (1), Workplace Relations Policy And Legal Group, Department Of Employment And Workplace Relations

Clarke, Ms Tania, National Officer, Australian Manufacturing Workers Union

Durbridge, Mr Robert Stuart, Federal Secretary, Australian Education Union

Hammond, Ms Suzanne Margaret, Industrial Relations Spokesperson, Women's Electoral Lobby And National Pay Equity Coalition

Harris, Mr Christopher Lawrence, Labour Relations Adviser, Australian Chamber of Commerce And Industry

James, Ms Debra, Deputy General Secretary, Independent Education Union Of Australia

Keenan, Mrs Ella Doreen, Chair, Council Of Small Business Organisations Of Australia

Murphy, Mr Ted, National Assistant Secretary, National Tertiary Education Union

Oliver, Mr Dave, Assistant National Secretary, Australian Manufacturing Workers Union

Rolley, Ms Lynne Margaret, Federal Secretary, Independent Education Union Of Australia

Ryan, Mr John, Executive Officer, Australian Catholic Commission For Employment Relations

Smythe, Mr James, Chief Counsel, Workplace Relations Policy And Legal Group, Department Of Employment And Workplace Relations

Spring, Ms Megan, Research Officer, Australian Catholic Commission For Employment Relations

Weston, Ms Susan Margaret, General Manager, Office Of Small Business, Department Of Industry, Tourism And Resources

Yilmaz, Mrs Leyla, Manager, Industrial And Employee Relations, Victorian Automobile Chamber Of Commerce

APPENDIX 3

DOCUMENTS TABLED AT PUBLIC HEARINGS

Date	
2 May 2002	Mr Ian Donges: Supplementary Submission (EWRE p. 27)
2 May 2002	Mr Ross Fisher: Recruitment and Consulting Services Australia Fact Sheet (EWRE p. 28)
2 May 2002	Senator Murray: Correspondence regarding CPA Small Business Surveys (EWRE p. 49)
3 May 2002	Ms Suzanne Hammond: Supplementary Submission (EWRE p. 94)

APPENDIX 4

ADDITIONAL INFORMATION

Accepted as evidence of the inquiry

Received	From	Topic
10/4/2002	Senator Murray	Statistics on Federal Unfair Dismissal Cases - Prepared by Julie Ward
10/4/2002	Senator Murray	Answer to Question on Notice No 16 - Small Business - Senate Hansard, 11 March 2002
10/4/2002	Senator Murray	Answer to Question on Notice No 1005 - Unfair Dismissal Applications - Senate Hansard, 4 March 1998
10/4/2002	Senator Murray	Answer to Question on Notice No 5 of 2002 (W16) - Workplace Relations - Unfair Dismissals - 2001-2002 Additional Estimates Hearing, 20 February 2002
10/4/2002	Senator Murray	Answer to Question on Notice No 5 - Workplace Relations - Unfair Dismissals - Senate Hansard, 13 February 2002
10/4/ 2002	Senator Murray	Research Paper - Comparison of Termination Provisions, 14 January 2002 – by Steve O'Neill - Information and Research Services, Department of Parliamentary Library
12/4/2002	Restaurant & Catering Australia	Additional information to submission No. 8 – Questions on unfair dismissal.
8/5/2002	Australian Industry Group	Answer to question on notice taken at hearing of 2 May 2002
10/5/2002	Transport Workers Union of Australia	Answers to question on notice taken at hearing of 3 May 2002
10/5/2002	Recruitment and Consulting Services	Answers to question on notice taken at hearing of 2 May 2002
10/5/2 002	National Farmers Federation	Answers to question on notice taken at hearing of 2 May 2002
10/5/2002	Department of Employment and Workplace Relations	Answers to question on notice taken at hearing of 3 May 2002