Submission to the Senate Inquiry into the Workplace Relations Legislation Amendment Bills 2002

by the Australian Liquor, Hospitality and Miscellaneous Workers Union

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Equity and Fairness in Industrial Relations

April 2002

Introduction

The LHMU is a diverse union representing many tens of thousands of low-paid workers who require both a strong union and a fair industrial system to protect their rights.

Our Union has membership and industrial coverage across a range of sectors and industries, including in hospitality and tourism, community services and health, contracting services such as cleaning, catering and security, and in manufacturing. Because of our diversity of industrial coverage, the LHMU is well placed to address the impact of the proposed package of Bills on various groups of workers in different sectors of the workforce.

An effective industrial relations system must:

- Give genuine protection to the weakest in the workforce by creating equality in outcomes and in entitlements for workers;

- Give teeth, rather than lipservice to anti-discrimination guarantees that protect young workers, women and other workers with family responsibilities, workers from non-English speaking backgrounds, casual workers and other groups in a workplace from unfair interference with their legitimate rights, in particular to organise collectively.

In our view the proposed Bills should be rejected.

Our submission is focussed on particular areas of our industrial expertise. Where appropriate we have used case studies to show the impact of the Bills on our members.

We support the ACTU's submission on the matters under review, and in particular issues raised by the ACTU in relation to the Genuine Bargaining Bill, and the Secret Ballots for Protected Action Bill.

We deal with each of the Bills in turn.

'Fair' Dismissal Bill

The exemption of small business from the unfair dismissal provisions in the Workplace Relations Act (the Act) will further weaken the industrial rights of workers in the small business sector - a sector which provides particular employment opportunities for women and young people.

Our submission below addresses the impact of these changes on child care workers, and on workers in contracting industries.

The Bill will further weaken the industrial rights of workers in small business … especially women and young workers

Child Care

The child care sector is made up of a number of different types of services, namely

- centre based long day care
- outside school hours care
- family day care
- occasional care
- and preschool

59,500 staff and 12,700 caregivers were involved in providing care for 577,500 children in Commonwealth funded services in 1999[1]. Most of these workers are employed in long day care services and 45% of workers are employed in private centres.

Child care workers are already well behind other workers in terms of pay and conditions of employment. This Bill will place them at a further disadvantage.

Child care is a low paid, female occupation, characterised by high worker turnover. More recently, the industry is failing to attract or keep qualified staff and there are skill shortages in most states.

Child care is typical of most small businesses. Employee relations - particularly in private child care - is at best unsophisticated. There is a high number of unfair dismissal applications by child care workers - in our experience many of these are determined in the worker's favour. Many more dismissals go unreported because of low levels of unionisation in the sector.

Child care is typical of small business employment … it is also a low paid female occupation …. employee relations are at best unsophisticated … and the number of successful unfair dismissal applications is high

[1] Department Family and Community Services 1999 Census of Child Care Services. These are the latest figures. Caregivers refer to carers who provided family day care in their own homes.

Case Study 1

Miranda[2] is expecting her first child. She has been employed full time at a Canberra child care centre for 12 months. After her appointment, she agreed to undertake a child care traineeship. She undertook study and attendance at TAFE in her own time. She was due to complete her traineeship on the day she was sacked.

The day she was dismissed, Miranda had queried the deduction from her salary of $200 which was alleged to be an overpayment made by her employer. Miranda did not dispute the overpayment but sought more reasonable terms for repaying the amount. She indicated to her employer that she would be seeking the advice of the Union.[3]

Miranda has recourse to the AIRC and has made an unfair dismissal application. The matter is listed for conciliation shortly. Should the amendments to the Act take effect, Miranda and workers like her will be able to be dismissed at the whim of their employer without any right of redress.

Case study 2

Alex worked for a small business operator. She is an after school care child care worker aged 52. She has worked for her employer for six years. Five years into her employment, Alex was asked to sign a new job description which included a range of additional duties. She felt that this went beyond the scope of what was reasonable, and sought an opportunity to have the Union represent her in discussions with her employer. She was sacked.

On her behalf, the Union filed an unfair dismissal application, seeking reinstatement.

Although the matter did not proceed to hearing, Alex got her job back and a sum of $2000. She had been out of work for some 5 months between her dismissal and her reinstatement. The company refused to pay her for wages lost and in the end, Alex settled for the amount of $2000 and her job back as she felt that as a mature aged worker, her future labour market prospects were limited.

Alex would now be unemployed had the proposed amendments to the Act been in place.

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[2] Names of applicants and other personal details have been amended to protect confidentiality

[3] Interestingly, we have identified an equivalent *underpayment* of wages made to Miranda over the same period and are seeking as part of her unfair termination to settle this matter and recover Miranda's deducted $200.

Case study 3

Kelly is a qualified child care worker aged 24 years, employed at a private centre for two years. Kelly was sacked by the Centre owner in March 2001, and made an application for unfair termination. Her application was delayed by three months after her former employer failed to file evidence or respond to directions of the Commission. After initially accommodating several of these delays, and considering legal precedent, the Commission heard Kelly's application. She did not seek reinstatement, but a finding was made that her termination was harsh and unfair and she was awarded compensation of $5000.

The incident resulting in Kelly's termination was a minor one – she had taken a personal phone call while at work. Whilst on the phone, a child in her care bumped his head and was attended to by another staff member. An incident report form was completed which was signed by his parent when the child was picked up later that day.

Kelly's boss alleged that in taking the phone call, she had neglected her duties. She was not given an opportunity to respond to the incident that resulted in her termination. Kelly had never had any prior warnings. The Commission found Kelly to present as a truthful witness and said that even if she had not taken the personal phone call she would have been required to answer the phone and possibly write information down as parents frequently contacted the Centre during working hours. The Commission did not agree that the incident was at the level of "neglect", and considered her employer "over-reacted to this minor incident".

Lucky for Kelly, she works under a state award in NSW where her access to make an application to the Commission is unchallenged. If the amendments take effect, and Kelly were to work under a federal award Canberra, WA, NT, Victoria or parts of Tasmania, she could have been dismissed freely for this minor incident.

We have noted the high number of applications by our Union in child care. The examples we have presented are typical ones in an industry comprising predominantly small businesses.

The LHMU would like to see the level of unfair dismissals in child care and in similar industries decrease.

This should occur through a greater emphasis on industrial relations by employers, and a better awareness of legal and statutory obligations to their employees, and not through the measures sought by the federal Government to remove worker's access to legal remedies.

We would like to see the number of unfair dismissals decrease … but not by removing worker's right to a legal remedy

Contracting industries

The LHMU has noted in a previous submission to the Senate on industrial relations reforms that contracting industries such as cleaning, security and catering are highly competitive where labour costs comprise a large proportion of overall operating costs. Companies who can gain an advantage in labour costs – through increased flexibilities or employment practices – can gain a market edge over their competitors. For this reason, most companies support a level playing field in industrial relations as it provides a fair basis upon which tendering can operate.

In contract cleaning, small businesses are highly competitive and will be able to use the amendments to gain flexibilities in employment practices and a market advantage over their larger competitors

In contract cleaning there are over 90,000 employees employed in just under 6000 contract cleaning businesses throughout Australia.

At the end of June 1999, there were 3,374 businesses in the industry with employment of less than five persons – they accounted for 57% of all businesses in the industry but only 9% of industry employment and 11% of industry income. At the other end, 2% of businesses employed 100 people or more accounting for 55% of industry employment.[4]

In 1999, the operating profit margin of the cleaning services industry was **7.3%.** This varied by size of business. Smaller businesses (5-9 employees) recorded a profit margin between 21.6% and 17.1%. Those with 100 employees or more recorded a margin of 2.9%.

The average labour costs per employee for the industry was **$15,200**. This was higher amongst businesses employing 100 persons or more ($16,100) and significantly less for those employing between 5-9 persons ($11,800)[5]. This difference is partly explained by the difference in profits between large and small companies noted above. In our experience it would also be attributed to the poorer compliance by smaller businesses to workers compensation and other statutory payments on behalf of employees, or company structures which minimise those costs, and also to the fact that a number of small companies are owner / family operated.

The amendments will place small business further outside the regulated industrial relations system, and entrench a second rate employment

The extent to which small business 'need' or desire the legislative changes posed is questionable. In a recent study released by CPA Australia, only 5% of small businesses nominated unfair dismissals as the main impediment to hiring new staff.

In essence the amendments will place small business further outside the regulated industrial relations system, and result in a second rate employment market for

[4] Australian Bureau of Statistics, Cat 8672.0 Cleaning Services Industry Australia

[5] ibid

employees of small business. This will have both a personal effect on employees, and also a market effect in contracting sectors. It will also result in inconsistent industrial arrangements between the Commonwealth and states.
The amendments should be rejected.

market for employees

'Fair' Termination Bill

The increasing casualisation of the workforce has been an issue of concern to Unions and to the LHMU in particular.

While many casual workers are so by choice, there is an increasing number of others for whom this is the only type of employment on offer. In hospitality this is certainly the case.

The increasing casualisation of the workforce means that casual workers need all the legal and industrial protection possible....

The Hospitality sector is growing at an amazing rate. From 1986 to 1997 the workforce doubled.

But the jobs created are in the main:

- low houred
- low paid
- short term
- casual.

Bar attendants, kitchenhands, housekeepers, laundry workers, apprentice chefs, porters and receptionists need all the legal and industrial protection possible.

The Courts have recognised the changing nature of work and the legal right of casual workers - so too should the Government

"I have been in my casual job for 17.5 years and you would think they could offer me permanent or part time. As I say, I'm casual and there is no hours for me this week and none in my usual job since 2 months. I have to change departments all the time to try and make hours.[6]"

Casual Food and Beverage Attendant

The proposed amendments stem from a view by the Government that an avenue to legal redress which has been opened up by the federal Court should be firmly closed. We do not agree.

We believe that in establishing certain rights for casual workers to access unfair dismissal laws, the Courts have recognised the changing nature of work and the legal rights of casual workers.

We believe the measure for casual employment

The Courts have been able to clearly distinguish between " true casuals" and other workers who are described as casuals, but who work regularly and for long periods with their employer. This prevents

[6] LHMU Working Time Survey, 1999

employers from using casualisation as a way to avoid obligations which would otherwise accrue to permanent employees.

should be six, not twelve months

The LHMU believes that six months is a more appropriate measure for casuals accessing unfair dismissals, not twelve months.

Filing fees

Any proposal to increase the filing fee from the current amount of $50.00 will provide a barrier to low income workers from making applications to the Commission.

The Committee should reject this amendment.

Genuine Bargaining Bill
and
Secret Ballots for Protected Action Bill

The Bills fly in the face of the Principal object of the Act.

We deal with these bills together, because of our view that each of them is intended to restrict the rights of workers to engage in effective bargaining over their wages and conditions of employment.

The Bills fly in the face of one of the Principal objects of the Act, to ... " *ensu(re).. that the primary responsibility for determining matters affecting the relationship between employers and employees at the workplace or enterprise level" .*

Genuine Bargaining Bill

Pattern bargaining is merely 'benchmarking' by both workers and employers to achieve broadly comparative bargained outcomes in competitive labour or product markets.

In a bargaining system, such as the one encouraged by the current legislative regime, it is a both logical and unavoidable that workers will formulate common claims – either intentionally or unintentionally. Often this occurs by workers being informed of what others in their own or other industries are achieving through bargained outcomes. As they rightly should be.

Employers also engage in pattern bargaining, as they rarely want to move too far from their competitors on labour costs, or will seek to emulate the latest fad in employment practices – be it loaded or rolled up rates, common changes in flexibilities or working patterns or practices. In our experience this is common in both manufacturing and in the hospitality industry.

Pattern bargaining is merely 'benchmarking' by both workers and employers to achieve broadly comparative bargained outcomes in competitive labour or product markets.

In... bargaining... logs of claims ...have some context to both the industry and the workplace –

Within a bargaining environment, logs of claims are developed which have some context to both the industry and the workplace – and it is this point that the federal Government seems to so completely misunderstand. For although common claims can be developed and bargained across workplaces, inevitably local issues will still form a significant part of the bargaining process and an important part of the outcomes in agreement making.

In LHMU industries which are very labour price sensitive, the inability to bargain across an industry has been a major deterrent to bargaining taking place

[7] These matters were extensively canvassed by us in our submission to the 1999 Senate Inquiry.

– we support *more*, not less industry bargaining for the simple reason that employers will not stray too far from a level playing field, and will seek to minimise competition over the big ticket items – such as wages.

One of the most problematic areas where pattern bargaining occurs is through non-Union agreements. There are a number of agreements often driven by common external consultants who tout their services within or across industries. They offer employers the chance to introduce an agreement which cut penalties and reduce wages. The security industry is a case in point and the Committee should investigate the number of 'pattern bargained' non union agreements within this sector which are detrimental to workers. Applications to certify these agreements are often made in different jurisdictions to avoid the scrutiny of particular Commissioners, and Unions are prevented from intervening in the agreement certification process.[7]

Cooling off periods

It is difficult to conceive how these amendments will operate in practice in an industrial environment where the Commission is deliberately constrained from being actively involved in the bargaining process. It is also unclear how they sit with existing 170MW provisions which allow the Commission to terminate or suspend a bargaining period only where specific criteria are met.

The amendment is best characterised as providing a stop gap measure for employers to have legally protected industrial action suspended without having to go through the rigours of section 170MW and without a corresponding duty being imposed on them as employers to bargain in good faith.

It is our view that the amendments, if passed, will result in employers using cooling off periods to undermine the effectiveness of industrial action.

The amendments are a stop gap measure to be used by employers without having to comply with the rigours of section 170MW

Secret Ballots for Protected Action Bill

According to the ACTU, this Bill will add 30 pages to the current Act, and the process of completing a secret ballot will be so complex as to nullify any right to take protected action by employees. We observe that this may well be the intention of the federal government in proposing the amendments.

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...Again the amendments suffer from a fundamental misunderstanding of what happens in bargaining....

Again, the amendments suffer from a fundamental misunderstanding of what happens in bargaining, and an old fashioned and out dated view of the role of the Union official in the process. The federal government obviously learnt their industrial relations in the 1970s!.

The process of bargaining today is inclusive of delegates and workers in both the formulation of the claim, and the strategy undertaken to achieve it. The decision to engage or not to engage in industrial action is taken in full consultation of the workforce, and by the workers themselves.

In our experience, there is a high level of participation and ownership by workers in the bargaining process. As a consequence, in a number of cases, workers are not unwilling to engage in industrial action against the advice of the Union. This is not surprising given the fact that workers in many industries have for several years been in an industrial system which supports bargaining as a primary means to set their wages and conditions of employment and they rightly know how to achieve something from it.

The amendments .... are designed to undermine the flow of the bargaining process.

The LHMU believes unions have nothing to fear from the amendments. It is not for this reason that we oppose them, but for the fact that they will further obscure and limit worker's rights to engage in a fair and open bargaining by introducing complex legal hurdles which are designed to undermine the flow of the bargaining process. This is an important point because the more obstacles to it running smoothly, the more chance there is that industrial action becomes protracted and relationships break down.

In WA, pre-strike ballots were never used

We refer the Committee to the Report of the Western Australia parliamentary Standing Committee in relation to the introduction of Bills in 1997, including the operation of pre-strike ballots[8]. It was noted that despite the availability of pre-strike ballots in WA, they had never been used.

Non-government members of that Committee identified an

[8] Report of the Standing Committee on Public Administration in relation to the Labour Relations Legislation Amendment Act 1997 and Labour Relations Legislation Amendment (No. 2) Bill 1997; Report 11.

important distinction between the UK system of secret ballots and the form proposed in Western Australia – namely that unlike in WA, or Australia, balloting in the UK is used to make industrial action lawful. Several other matters were identified by the Committee, including the administrative difficulties associated with ballots, the cost to Unions of undertaking ballots, complexities due to multi-union coverage in some industries or sites, and most importantly the fact that ballots were not conducive to harmonious industrial relations or prompt dispute resolution.

These comments are pertinent to the current federal amendments. In particular, the lawfulness of industrial action is already determined by existing legislative requirements in the Workplace Relations Act which go to " protected action" . The introduction of an additional secret balloting process will only make bargaining more complex, confusing for workers, and place an additional stage in the process on employee parties.

Industrial action is used by both sides to the bargaining process – eg, observe the use of the protracted lock out by employers over recent years. On this point, we note that no amendment is proposed that a secret ballot of shareholders be held prior to an employer engaging in a lock out of employees.

There is no .... secret ballot of shareholders to be held prior to an employer engaging in a lock out of employees.

Prohibition of Compulsory Union Fees Bill

The decision about whether or not union benefits are provided to non members without those non-members contributing is an important issue amongst many of our members, and it is increasingly becoming an issue which is being raised by workers at workplaces during bargaining.

It is significant that this issue is being raised in circumstances (agreement making) where the Union is providing a service which will benefit the general workforce population. In our view it is appropriate for workers to place this issue on the bargaining agenda. For too long, Unions have provided services to employees who gain the benefits of the outcomes, but do not contribute to the process.

The prohibition contained in the amendments to the Act is placing a limit on what issues workers can raise during bargaining. It is an undemocratic involvement in the rights of workers to set their agreements, and of Unions to organise.

For too long, Unions have provided services to employees who gain the benefits of the outcome, but do not contribute to the process.

Final remarks

The Minister for Workplace Relations and Small Business was recently reported to have said:

> "My hope is that chief executives will make [industrial relations] their principal interest rather than leaving it in the hands of the so-called industrial specialists. I mean, its great that we've got specialists, but War is too important to be left to the Colonels – the Generals need to be involved as well".[9]

Its not about "war", Mr Abbott - its about fairness.

For many Australian working people and their families, industrial relations impacts directly on their livelihood, on their ability to earn a living wage, on their legal right to bargain, or to approach an independent tribunal if they are dismissed and feel their treatment has been unfair, and to have that matter independently determined. In this, workers are supported by their fellow workers, and by their unions. Its not about " war" , its about fairness.

For some companies, their relationship with their employees is important. The fact that they do not always embrace or vigorously pursue the federal government's somewhat zealous desire to declare war on their workforce is an indication that they value that relationship. Unfortunately for many workers, employers will take up opportunities to shift the power balance in their favour and use amendments such as the ones proposed to do so.

The Australian parliament should look to measures to revitalise and strengthen our industrial relations system and provide a better standard of living and job security for our community. This would include:

- An active, strengthened role for the AIRC;
- National legislation to protect worker's entitlements and support for schemes for portability of leave;
- Greater attention to policies to assist casual, part time and contingent workers;
- A strengthening of " good faith" bargaining obligations for employers and employees.
- Paid maternity leave and other policies to assist women and workers with family responsibilities.

The Australian parliament should look to measures to revitalise and strengthen our industrial relations system .... not one that make it harder for workers.

The proposed Bills do little to contribute to a more effective industrial relations system. They will make it harder for workers.

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[9] Comments by Tony Abbott, MP following a speech to the HR Nicholls Society 23/3/2002

They should be rejected.