SENATE EMPLOYMENT WORKPLACE RELATIONS SMALL BUSINESS & EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO

THE WORKPLACE RELATIONS AMENDMENT (GENUINE BARGAINING) BILL 2002

SUBMISSION BY

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WORKPLACE RELATIONS AMENDMENT (GENUINE BARGAINING) BILL 2002

The SDA is totally opposed to this Bill.

The amendments proposed by the Workplace Relations Amendment (Genuine Bargaining) Bill 2002 are to amend the *Workplace Relations Act 1996* (the WR Act) to:

- "provide guidance to the Australian Industrial Relations Commission (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of a new bargaining period, or attaching conditions to any such bargaining period, where a bargaining period has been withdrawn; and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 to facilitate resolution of the issues in dispute."

In respect of "providing guidance" to the Commission, the amendments in effect will require the Commission to consider, when determining whether a party is not genuinely trying to reach agreement, whether the conduct of a party shows:

(a) an intention to reach agreement with other employers in the industry rather than just with the employer who is party to the particular bargaining period;

(b) an intention to reach agreement with all employers in the industry or none;

(c) an intention primarily to reach agreement with a person other than the employer party to the bargaining period;

(d) a refusal to meet or confer with the employer;

(e) a refusal to consider or respond to proposals made by the employer.

In respect of point (a) this requirement could, on our judgement, be applied to any situation where a union made a claim upon more than one company. It may well be the intention of the union to reach agreement with a particular employer but the fact that a common claim is served would be interpreted as an indication of failing to meet the requirements of sub-section 170MW(2)(2A)(a) of the Workplace Relations Act.

Under this provision it would not matter whether the employer and the union were genuinely negotiating. It would not matter that the union genuinely wanted to reach agreement with the employer concerned. The mere fact that a common claim had been served would allow the Commission to determine that the union was in contravention of the requirements of the proposed amended Act.

The amendment is driven by ideology. It ignores basic industrial relations realities.

In July 1998 the SDA served a Letter of Demand and Log of Claims on approximately 35,000 employers.

The Letter of Demand and Log of Claims was served as part of a campaign initiated by the Association to improve the wages and working conditions of employees.

Whilst the July 1998 log of claims exercise was the largest undertaken by the Association it was but one of many which the Association has undertaken in the past and will undertake in the future.

The mere service of this Letter of Demand and Log of Claims on more than one employer would inevitably be interpreted by the Commission, should

this amendment be successful, as pattern bargaining simply because the union has embarked upon a campaign which involves a course of conduct in which common claims for improved wages and conditions of employment are sought from more than a single business.

In other words the mere act of service of a Letter of Demand and Log of Claims upon more than one employer would be pattern bargaining as defined in the proposed Bill.

In the case of the Association's 35,000 Log the Bill, if enacted, will prevent the Association from ever taking protected industrial action against any one of the 35,000 employers.

Further, should the Association seek to initiate a bargaining period against any one of the 35,000 employers, that employer will have the right to apply to the Commission for either a suspension of the bargaining period or the termination of the bargaining period.

Pursuing Claims for Employee Benefit

The Association has been at the forefront of seeking to make workplaces more family friendly. In pursuit of this the Association in recent years, has sought such matters as parental leave for casuals, the right of women on maternity leave to take longer than twelve months off work, paid Family Leave, paid Pre-natal Leave and rostering provisions which have regard to employees' family responsibilities. A number of employers in the retail industry have been prepared to agree to such demands.

The making of these type claims when seeking enterprise agreements with more than one employer clearly discloses both a course of conduct by the Association as well as being indicative that that course of conduct forms part of a campaign that extends beyond any single business. The campaign being to improve the entitlements of employees in relation to family related matters.

Notwithstanding the social desirability of the union making these claims, and the desire of our members to make these and other claims, it is clear

that at least within the context of the proposed Bill the Commission would be satisfied that the course of conduct embarked upon by the Association in making such claims upon more than one employer, would form part of a campaign that extends beyond a single business. As such the making of the claims, irrespective of their desirability or the willingness of employers to agree to them would leave the Association in contravention of the Act.

Under the current regime of "20 allowable matters" the Commission is not permitted to allow certain items into awards, eg Blood Donor Leave, Reserve Defence Force Leave. To overcome this enormous difficulty the SDA pursues such claims in enterprise bargaining agreement negotiations by making claims on companies. It would be further restriction and undermining of employees' rights and entitlements if they couldn't receive such basic benefits in their award nor could they get them in their agreement because if a claim was made it would fall foul of the proposed pattern bargaining amendment. It would therefore appear that having not been satisfied with limiting awards to a bare minimum of 20 matters, the Government now seeks to minimise and restrict the number of issues an enterprise bargaining agreement can address.

It would appear from the Association's experience in the industrial relations environment, that every claim made by the Association on any and every employer is a claim that is capable of being pursued at the single business level. Even where the Association may embark upon a formal campaign to pursue a common wage claim or a common employee entitlement across a number of employers or in a sector of the industry, it is clear to the Association that the claims made are all capable of being pursued at the single business level.

Nevertheless it may also be the case that there is genuine merit in pursuing the claim with more than one employer.

From the Association's experience there are no claims that the Association has ever made that could be properly characterised as being a claim that is "not capable of being pursued at the single business level". At the end of the day it is the employer at the single business level who has to agree to the claims made. On this basis, therefore, the claims made upon an employer

and agreed to or resisted by an employer, are done so by the employer on the basis of their capacity to deal with the claims at the single business level.

The passage of the amendment would make enterprise negotiations more difficult and cumbersome.

Even where claims were socially desirable and industrially and economically reasonable they could fall foul of the Act.

Degrees of Difference

The proposed Bill, if passed into legislation, will create an inordinate amount of confusion and will create a huge burden on the Commission and Courts as parties argue and interpret the application and meaning of the proposed Bill.

One such issue the SDA envisages is the ability to differentiate between claims or to "lump" claims together and call them pattern bargaining. It is unclear to what degree claims need to be exactly the same, or cover the same issue, to be deemed to form pattern bargaining.

An example of this can be shown using the manner in which the SDA has claimed Natural Disaster Leave from various employers. At this time the SDA has claimed against different employers the following examples for Natural Disaster Leave:

(a) 5 days paid Natural Disaster Leave;
(b) Unlimited time off work to deal with emergencies such as bushfire, flood and cyclones;
(c) Employees with children be allowed to return home to care for children during a Natural Disaster;
(d) Employees being alloyed time off to care for children and protect their property in the event of bushfire, flood etc.

Each of these claims is different but the same, depending on what perspective is taken. These examples show the wording is different but all deal with the issue of Natural Disaster Leave, the amount of leave is different

but leave for employees is sought, the qualifications to receive leave are different but the outcome is Natural Disaster Leave.

Depending on how the proposed legislation is applied and interpreted, these examples of claims could either be permitted on the strict test that none of the claims are the same and do not form an identical pattern or at the other end, the claims are deemed to be pattern bargaining as the claims deal with the same key issue – Natural Disaster Leave, and therefore form a similar pattern. It is about degrees of difference.

Degrees of difference and differential will become a key argument. If a union makes a claim for a wage increase (and at least 98% of SDA logs of claims have surprisingly made such a claim!), then are such claims deemed to form pattern bargaining or if the claims ask for different wage increases e.g. $25, 2.5% or 3%, then they will be different by degrees and therefore not part of pattern bargaining.

Implications for Bargaining

It is clear that the purpose of the legislation is to enable employers to get the benefit of asserting that bargaining claims made by unions fall within the definition of pattern bargaining. As such employers could require the Commission to rule that the union was in contravention of the Act and that the employers did not need to address the claims upon them.

The real effect of the operation of proposed amendments can be seen when viewed in terms of how the Association has conducted bargaining in a number of areas. The Association has been successful in having several multiple employer certified agreements made in sectors of the retail industry.

The Association has certified agreements which have been made with multiple employers. In one case the employers are small independent supermarkets and in another small independent hardware retailers. These employers are small business persons who have sought to negotiate a multiple employer agreement with the Association on the basis that it was the only way in which they could effectively bargain and apply in an

affordable way their limited resources to the process of making an enterprise agreement.

In each case the Association made similar, if not identical, claims for both wages and employee entitlements on each and every employer who was to be subject to the proposed enterprise agreement. The pursuit of common wage and employee entitlements in the bargaining process, clearly constituted a course of conduct and was part of a campaign which extended beyond a single business. Equally, each claim made as to wages and employee entitlements, was a matter that was capable of being dealt with and pursued at the single business level.

The key reason why these matters were pursued and resulted in a multiple employer agreement was that the employers were of the view that they could only effectively engage in an enterprise bargaining process if it was done through a group representative who had the capacity to bargain for and on behalf of each of the employers in the group.

The agreements, certified by the Commission, were welcomed by the employers concerned as it gave them an enterprise agreement which, whilst a multiple employer agreement, was designed to effectively deal with the issues impacting upon their individual business.

This amendment could actually disadvantage small independent employers by effectively preventing them from engaging in enterprise bargaining, at least in a way that they feel they have some control over the outcome.

As a consequence of having engaged in a campaign which involved a course of conduct which clearly constitutes pattern bargaining, even where the employers concerned have been happy to proceed to negotiate an agreement then where the Association has made the same claim upon other small independent businesses who have not sought to be involved in the multiple employer certified agreements, those other businesses would have no difficulty in establishing that the Association has engaged in pattern bargaining.

The consequences that flow from this for the Association is that where there are employers who have not already entered into enterprise agreements with the Association but against whom the Association has made claims and is seeking to pursue claims with an individual employer, the Association would, under the proposed amendments, be effectively precluded from initiating a bargaining period against that employer and from taking any protected action in relation to the claims made simply because of the fact that the Association would have been caught by the amendments, in dealing with a large number of independent employers in the making of a multiple employer certified agreement.

The effect therefore of the proposed amendments will be to give employers the luxury of being able to totally thwart the legitimate activities of the Association in seeking to enter into enterprise bargaining negotiations with employers and to initiate bargaining periods and to use the processes of the Commission and of the Act in relation to that bargaining period.

It is clear from the proposed amendments that the Government intends to use the concept of pattern bargaining to defeat the possibility of employees engaging in any form of protected action.

The Bill provides that the Commission may order that a new bargaining period cannot be initiated and/or that a bargaining period and hence protected action may be suspended. The Bill also proposes to introduce the concept of a "cooling off period" when a bargaining period has been initiated.

Without considering the merits as to whether or not initiatives to allow a bargaining period to be suspended is or is not helpful in allowing the parties to negotiate, the Association is of the very strong view that the **compulsory** ordering of a **suspension** of a bargaining period is **objectionable** in the extreme.

If "cooling off" periods have any merit whatsoever, then they can only be of use where the Commission forms the view that it will genuinely assist the parties to negotiate by having the formal bargaining period suspended. The requirement in the proposed amendment that the Commission must, in a compulsory sense, suspend the bargaining period where the requisite

elements of proposed Section 170MWA(1) have been met, removes a fundamental discretion from the Commission and effectively constrains the Commission in the exercise of its functions.

Merely because the suspension of a bargaining period would be beneficial because it would assist the negotiating parties to resolve matters at issue, does not of itself logically lead to the conclusion that the bargaining period must be suspended. The Commission may form a view that a suspension of the bargaining period could be beneficial, but equally form the view that it is not necessary to suspend the bargaining period.

If the Commission is to have the power to suspend a bargaining period on the basis that such action may assist parties to negotiate a settlement then the Commission must also be given the power to be able to order parties to negotiate in good faith. The Commission must also be given the power to conciliate or arbitrate any dispute and to issue appropriate orders.

Under current provisions of the Act where an organisation has properly initiated a bargaining period the effect of a suspension can be equally achieved through the Commission engaging in effective conciliation between the parties as well as formally suspending the bargaining period. The difficulty with the approach proposed in Section 170MWA is that once the bargaining period is suspended, then the Commission does not have the capacity to conciliate in relation to the bargaining period, nor does any party have the capacity to take any form of protective industrial action.

CONCLUSION

The Association makes the very strong submission that it would appear that the government is using a sledge hammer to crack a walnut when it proposes to introduce "cooling off" periods amongst parties engaged in genuine bargaining processes.

The real effect of the proposed amendments will be to bring about the termination of a bargaining period. The critical consequence that flows from this is the union which had originally initiated the bargaining period no longer has access to the conciliation processes, nor to the provisions relating

to the taking of protected industrial action, nor to the possibility of having an award made.

In the Association's very strong view, the combined effects of the proposed amendments will be to effectively remove from unions, the possibility of having any form of effective bargaining processes and the capacity to have the Commission conciliate in relation to bargaining or to make awards or to allow unions to take any form of protected industrial action.

Whilst the Shop Distributive Association has only infrequently had cause to take protected industrial action or to initiate bargaining periods, it is clear to the Association that the proposed amendments will remove from the Association any effective right to initiate bargaining periods against employers and to seek to take protected industrial action against those employers.

At the end of the day it is the employer who will not readily bargain with the Association who will have recourse to the provisions of Section 170MWA and Section 170MWB as a means of defeating a union's attempt to initiate a bargaining period and thus preventing the union from taking any form of protected industrial action.

It must be borne in mind that the Association has not had to use either the initiation of a bargaining period nor the taking of a protected industrial action to achieve the remarkable record of success in entering into Enterprise Bargaining Agreements which have been certified by the Australian Industrial Relations Commission. The Association has over 90% of its membership covered by Certified Agreements made either under the Workplace Relations Act or under equivalent State provisions. The vast bulk of these are agreements are certified under the Workplace Relations Act.

In almost all of the exercises where the Association has achieved enterprise agreements with the employers, it has not had to utilise the provisions of the initiation of a bargaining period or the taking of protected industrial action. However, having said that, to deny the Association the ability to initiate a bargaining period and to take protected industrial action, strikes at the heart of the principles of fair and equitable bargaining.

It is clear, in the Association's view, that the "pattern bargaining" proposals are not designed to bring a degree of equity or fairness into the bargaining process. Rather the proposals are designed to skew the bargaining process totally in favour of those employers who do not wish to bargain with unions and to prevent unions from exercising fundamental rights to take protected industrial actions for the purposes of pursuing genuine, collective bargaining arrangements with employers.

The proposed Bill is ill thought out. It is biased and will serve to hinder genuine enterprise negotiations. It should be rejected.