Department of Employment and Workplace Relations

SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

Inquiry into the

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

Submission by the Department of Employment and Workplace Relations

18 April 2002

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1. Outline of Submission

The Department's submission addresses the five bills that the Committee is considering conjointly. These bills are the:

- 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; and
- Workplace Relations Amendment (Fair Termination) Bill 2002.

2. The bills were referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee (the Committee) for consideration on 20 March 2002.

3. The Department's submission addresses each of the bills in the order in which they were introduced into the Parliament. The submission sets out the relevant background, policy rationale and intended operation of the proposed amendments for each of the bills.

4. The bills presently before the Committee draw to varying extents on earlier bills. The Department's submission therefore draws on its previous submissions to the Committee and, where appropriate, compares and contrasts the provisions of each of the current bills with the provisions of earlier bills.

5. In identifying developments or refinements made to earlier provisions, the Department also identifies changes that have been introduced by the Government in order to address particular concerns raised before this Committee when considering the previous bills.

OVERVIEW

6. The Department has previously outlined in its submissions to the Committee the key principles underpinning the Workplace Relations Act 1996 (WRA 1996). The following principles are particularly relevant in relation to the five bills currently under consideration:

- a job creating workplace relations system;
- a more direct relationship between employers and employees;
- a fair go for all;
- genuine freedom of association and choice of representation; and
- a simplified and more accessible system that puts workers and businesses first, not the system's institutions.

7. The Government's key aims in relation to the five bills are to amend the WRA 1996 to reinforce the above principles by:

- protecting small businesses from the costs and administrative burden of unfair dismissal claims and creating small business employment opportunities by exempting small businesses with under 20 employees from the unfair dismissal laws;

- further upholding the principle of freedom of association by preventing the imposition of compulsory fees on employees who are not members of a union;

- preventing unnecessary strikes, enhancing freedom of choice for employees and strengthening the accountability of unions to their members by requiring secret ballots to be held before the right to strike can be lawfully exercised;

- reinforcing the benefits of workplace bargaining by enhancing and clarifying the powers of the Australian Industrial Relations Commission to promote genuine workplace bargaining and settle industrial disputes; and

- restoring previous termination arrangements for casual employees and making the filing fee for termination claims a permanent arrangement in order to deter frivolous or vexatious claims but allow the efficient handling of genuine claims.

2. Workplace Relations Amendment (Fair Dismissal) Bill 2002

BACKGROUND

Federal legislation regulating termination of employment was first introduced by the *Industrial Relations Reform Act 1993*, which inserted new provisions into the *Industrial Relations Act 1988*. The Act prohibited an employer from terminating an employee's employment unless there was a valid reason connected with the employee's capacity or conduct or based on the operational requirements of the business (section 170DE). A reason was deemed not to be a valid reason if, having regard to the employee's capacity and conduct and those operational requirements, the termination was harsh, unjust or unreasonable (unfair dismissal). Specific prohibition was also made of dismissal on certain prescribed grounds (unlawful termination), including sex, race, membership or non-membership of a union, age, disability and religion (section 170DF).

2. Section 170EA allowed an employee to apply to the Industrial Relations Court of Australia for a remedy in respect of a termination of employment. Some categories of employees (eg those undertaking a qualifying or probationary period, short-term casual employees and fixed-term employees) were excluded from making an application to the Court.

3. Amendments were made by the *Industrial Relations and other Legislation Amendment Act 1995* to require preliminary conciliation by the Australian Industrial Relations Commission (the Commission) before allowing the parties to elect to pursue a claim in the Commission (by arbitration) or the Court.

4. The termination of employment provisions were amended by the *Workplace Relations and Other Legislation Amendment Act 1996* and now form part of the *Workplace Relations Act 1996* (WR Act). Section 170CE of that Act allows certain employees whose employment has been terminated at the initiative of their employer to apply to the Commission for a remedy in respect of that termination. The grounds upon which an employee can apply are that the termination was harsh, unjust or unreasonable (unfair dismissal) or that the termination was unlawful (for instance, the termination was for a prohibited reason, or the employee was not given the required notice).

5. If an employee lodges a claim alleging both unfair and unlawful termination, and the claim is not settled by conciliation, the employee must elect to either pursue the unfair dismissal claim through arbitration by the Commission, or to have the unlawful termination claim heard by a Court. As under the Industrial Relations Act, certain categories of employees are excluded from the operation of the termination of employment provisions.

6. The *Workplace Relations Amendment (Termination of Employment) Act 2001*, which came into effect in August 2001, made further important changes to the legislation, designed to improve the operation of the provisions (including for small business). Some of the key changes introduced by this Act include that:

- new employees have to be employed for three months before they can bring an unfair dismissal claim (this period can be increased or decreased by written agreement in advance of the employment);

- the Commission must take into account the different sizes of businesses when assessing whether their dismissal procedures were reasonable;

- there is greater scope for costs to be awarded against parties who act unreasonably in pursuing or defending claims;

- penalties have been introduced for lawyers and advisers who encourage parties to make or defend unfair dismissal claims where there is no reasonable prospect of the claim or defence being successful (up to $10,000 for a company, $2000 for an individual); and

- lawyers and advisers must now disclose whether they are operating on a 'no win – no fee' or contingency fee basis.

7. The Government considers that further amendments are needed to specifically address the negative impact of unfair dismissal legislation on small businesses, through an exemption from unfair dismissal legislation in relation to new employees.

Small Business Exemption

8. On 24 March 1997, the Prime Minister announced the Government's intention to exempt businesses with 15 or fewer employees from the operation of unfair dismissal laws in respect of new employees until they have been continuously employed for 12 months[1]. Regulations to give effect to this commitment were made on 30 April 1997 (SR No. 101 of 1997). On 26 June 1997, the Senate disallowed these regulations.

9. On the same day, the Government introduced the Workplace Relations Amendment Bill 1997, which would have excluded all new employees of businesses with 15 or fewer employees from federal unfair dismissal laws.

10. This Bill was passed by the House of Representatives on 27 August 1997, but rejected by the non-Government parties in the Senate on 21 October 1997. The Bill was reintroduced to the House of Representatives, where it was again passed on 3 March 1998. However, the Bill was again rejected in the Senate on 25 March 1998.

11. The Government's 1998 election policy on workplace relations, *More Jobs, Better Pay*, included a commitment to exempt small businesses from unfair dismissal laws and to introduce a qualifying period of employment before new employees of all businesses could make unfair dismissal claims. The policy stated that '[a] re-elected Coalition Government will have a fresh electoral mandate to implement this measure as a matter of high priority.'[2]

12. Following its re-election, the Government introduced the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 on 12 November 1998, to exempt businesses with 15 or fewer employees from federal unfair dismissal laws.

13. In *More Time for Business*, the Government undertook to review the new unfair dismissal provisions of the WR Act 12 months after their introduction. This review was published in December 1998.

14. In relation to small business, the review recommended that the Government note that changes made to the unfair dismissal laws in 1996 had 'not alleviated the concerns of small

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[1] *More Time for Business*, page v.

[2] *More Jobs Better Pay*, page 22.

business about the impact of unfair dismissal laws upon them.'[3] In its response to the review, the Government highlighted its commitment to exempt small business from the operation of the unfair dismissal laws, and reiterated its view that the proposed measure was a job creation initiative and that it had a mandate to introduce the changes.

15. Pending passage of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, to give immediate effect to the Government's election commitments, the Government made regulations to exempt small businesses from unfair dismissal laws on 17 December 1998 (SR No. 338 of 1998). The Senate disallowed these regulations on 16 February 1999.

16. The Workplace Relations (Unfair Dismissals) Bill 1998 was passed by the House of Representatives on 2 December 1998. The Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee on the same day for inquiry and report. The Committee tabled its report in the Senate on 15 February 1999. The majority report recommended that the exemption of small business from unfair dismissal laws be supported.[4]

17. The Bill was defeated in the Senate on 14 August 2000. The Bill was reintroduced to the House of Representatives, where it was passed without amendment on 6 March 2001. The Senate again rejected the Bill on 26 March 2001.

18. On 20 August 2001, the Government introduced the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. This Bill would have exempted small businesses employing fewer than 20 employees from unfair dismissal laws. The Bill was not considered by the Parliament before the 2001 election was called and the Bill lapsed.

POLICY RATIONALE

19. Prior to the 2001 federal election, the Coalition again made policy commitments to exempt small businesses from the operation of the unfair dismissal provisions of the WR Act:

> Unfair dismissal claims continue to be a significant concern for small business. The Coalition is committed to removing this job-destroying burden from small business…A re-elected Coalition Government will pursue a full exemption from unfair dismissal claims for small business employers. The Coalition has introduced legislation into Parliament to secure a full exemption for all small businesses with less than 20 employees from unfair dismissal claims when employing new staff…[5]
>
> The Coalition believes that more needs to be done to take employment red tape off small business. Unless we do so, small business will not get a fair deal from the workplace relations system. The Coalition will: exempt small businesses from unfair dismissal laws when employing new employees…[6]

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[3] *Twelve Month Review of Federal Unfair Dismissal Provisions*, page 9.

[4] *Majority Report: Consideration of the Provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998*, Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, page 29.

[5] *Getting on with Business – Small Business Moving Ahead*, page 21

[6] *Choice and Reward in a Changing Workplace*, page 31

20. The Workplace Relations Amendment (Fair Dismissal) Bill 2002 (WRA (FD) Bill 2002) is designed to give effect to these policy commitments, and is intended to alleviate the burden on small business of technical and procedural requirements associated with unfair dismissal laws, in order to generate increased employment in the small business sector.

Profile of Small Business

21. There are around 1,075,000 non-agricultural small businesses (that is, private sector businesses with fewer than 20 employees) in Australia, employing over 2.2 million employees. Around 50 percent of non-agricultural small businesses do not have employees.[7]

22. Non-agricultural small businesses constitute around 96 percent of all non-agricultural private sector businesses and 47 percent of all non-agriculture private sector business employment. Employment growth in the non-agricultural small business sector has averaged 3.1 percent per annum between 1983–84 and 1999–2000, compared with 2.8 percent for all private sector non-agricultural businesses.[8]

23. Small businesses are distributed across Australia generally according to population. In 1999–2000, most States and Territories recorded similar proportions of non-agricultural private sector small and larger businesses. The main exceptions were Victoria with a slightly lower incidence of small businesses (25 percent) than larger businesses (28 percent), while New South Wales had a higher incidence of small businesses (34 percent) than larger businesses (30 percent). Between 1983–84 and 1999–2000, growth in the number of small businesses was highest in the Northern Territory (8.4 percent per annum), Western Australia (4.6 percent per annum) and Queensland (4.4 percent per annum).[9]

24. Over 60 percent of non-agricultural small businesses operate in the Property and Business Services, Construction, Retail Trade, or Personal Services industries. Compared to larger private sector businesses, small businesses are more likely to be in the Construction, Personal and Other Services, and the Transport and Storage Services industries, and less likely to be in the Manufacturing, Wholesale Trade, Accommodation, Cafes and Restaurants, and Education industries. Between 1983–84 and 1999–2000, growth in the number of small businesses was highest in Property and Business Services (6.7 percent per annum), Education (6.6 percent per annum), Health and Community Services (6.0 percent per annum) and Personal and Other Services (4.6 percent per annum). [10]

25. Employing non-agricultural small businesses typically have fewer than 5 employees, with the principal owner present in the workplace. Ninety four percent of small businesses are non-unionised compared to 62 percent of larger private sector businesses.[11]

26. The 1995 Australian Workplace Industrial Relations Survey (AWIRS 95) collected data from workplaces with five or more employees and classified as ‘small businesses’ those workplaces that had 5 to 19 employees, operated in the private sector and were not part of a

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[7] Australian Bureau of Statistics, *Small Business in Australia, Update 1999-2000*, (ABS Product number 1321.0.40.001), table 1.1

[8] Ibid., tables 1.1 and 3.1

[9] Ibid., tables 3.1

[10] Ibid., table 2.1

[11] Department of Employment, Workplace Relations and Small Business, 1999, *A Portrait of Australian Business – Results of the 1997 Business Longitudinal Survey*, Ausinfo, Canberra, p22

larger organisation. Amongst other findings, data from AWIRS 95 indicate that, in non-agricultural small businesses with 5 to 19 employees, the principal owner was more likely to be present in a non-unionised workplace.[12]

27. In addition, the AWIRS 95 survey found that, in non-agricultural small businesses with 5 to 19 employees, 69 percent of employees worked full-time, with two-thirds of these being men. Women employed in small businesses, like their counterparts in larger workplaces, were more likely to be part-time than full-time and more than twice as likely as men to be employed on a casual basis.[13]

28. The small business sector is responsible for a large proportion of jobs in Australia, and increased employment in small business will improve the outlook for the Australian economy. It is Government policy that regulation of small business should be minimised in order to alleviate the administrative burden on small business, reduce costs, improve small business confidence and increase small business employment growth.

Why should small businesses be exempted from unfair dismissal laws?

29. The *Workplace Relations Act 1996* sets out the matters that the Commission is required to consider in deciding whether a dismissal was harsh, unjust or unreasonable (subsection 170CG(3)):

> *In determining…whether a dismissal was harsh, unjust or unreasonable, the Commission must have regard to:*
>
> *(a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and*
>
> *(b) whether the employee was notified of that reason; and*
>
> *(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and*
>
> *(d) if the termination related to unsatisfactory performance by the employee—whether the employee had been warned about that unsatisfactory performance before the termination; and*
>
> *(da) the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and*
>
> *(db) the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination…*

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[12] Morehead, A., Steele, M., Alexander, M., Stephen, K. & Duffin, L. 1997, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Addison, Wesley, Longman Australia Pty Limited, South Melbourne, p302

[13] Ibid.

30. Paragraph 170CG(3)(e) also allows the Commission to have regard to any other matters that it considers relevant. The Commission therefore has a wide discretion to consider any other matters in determining whether a dismissal was unfair. Over time, the Commission has developed principles and approaches to determining 'fairness' in particular factual situations. Many of these decisions and principles have resulted from cases involving larger employers. Although the Commission is an arbitral body, rather than a judicial body, the Commission still follows previous decisions to ensure consistency of approach. This means that some of the Commission's approaches to determining whether a termination of employment was fair originally developed from particular cases involving larger enterprises, and may not necessarily be appropriate for smaller businesses.

31. For instance, decisions of the Commission have required employers to develop policies on specific employment issues, such as the use of employer resources by employees, if employers want to dismiss employees for abusing these resources. Other decisions have set out particular procedural requirements for selecting employees for redundancy, and requirements that must be followed before an employee can be dismissed for failing or refusing drug tests. These principles may not be appropriate for a small business.

32. The large body of case law that has developed, particularly since 1994, at times imposes significant procedural requirements on employers. However, small business employers generally do not have the time or resources to fulfil formal procedural requirements. On the other hand, larger businesses often employ human resource managers or even whole human resource departments with particular expertise in employment law and the ability to undertake formal procedural requirements.

33. Defending an unfair dismissal claim places relatively greater burdens and costs on small businesses than on larger businesses. There may be several Commission hearings involved in an unfair dismissal claim (for instance, two conciliation conferences, and an arbitration hearing). There may also be preliminary jurisdictional hearings where the employer objects to an application – for instance because it has been made out of time, or where the employee making the claim is potentially excluded by the Regulations.

34. Because many small business owners run and manage their own business, attending even one Commission hearing may require the employer to close the business for a day, and the time and costs of defending a claim through to arbitration can be substantial. Also, as noted in More Time for Business[14], '[l]ack of time and resources for elaborate staff management processes means any proceedings are likely to be disproportionately complex because of the employer's need to rely on oral evidence instead of documents'.

35. The Victorian Automobile Chamber of Commerce gave the following evidence to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee in 1999:

> Small business such as those we represent generally are employers who work their way up through the trades themselves. They run a small shop, perhaps a panel beating shop or something like that, where they are actually out there doing the work

[14] More Time for Business, page 31.

> alongside their staff. There really is no one there to run or manage the business while they are absent…[15]

36. In addition, the costs of engaging legal representation impact differentially on small businesses. Many small businesses may find it difficult to stay in operation when substantial unplanned expenses arise.

37. The fact that high legal costs can impact significantly on business earnings means that many small business employers are reluctant to defend even unmeritorious unfair dismissal claims, and instead prefer to settle the claim as quickly and cheaply as possible.

38. Mr Grant Poulton from Australian Business Limited gave the following evidence to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee in 1999:

> Of the 248 matters that we dealt with [during 1998] I would estimate that at least three quarters were settled without regard to the question of merit, of relative strength. They were settled on the basis that – and it is good, commercial, pragmatic advice – it was going to cost X dollars; it could be got out of for a figure somewhat less than X to settle it. Colloquially it is known as 'piss off' money. You get an awful lot of applicants who will try it on in the sure and certain knowledge that they will obtain something. And that is a reflection of a system which is distortionary.[16]

39. The Government has itself received many representations from small business employers about the legal costs of unfair dismissal claims. The following generic examples draw upon those representations.

Example 1: Downturn in business

An employer had been forced to terminate the employment of a permanent employee due to a significant downturn in business caused by external factors.

The employee brought an unfair dismissal claim. The employee's solicitor requested a settlement of over $5,000. The employer attended a conciliation conference, but the employee's solicitor failed to attend, so the matter was referred for arbitration by the Commission.

The employer spent many hours preparing to defend the claim to this point. However, after receiving advice from its solicitor that it would cost between $10,000 and $15,000 to prepare and present a defence at arbitration, the employer considered settling the case regardless of the merits of the claim, and the fact that the employer couldn't see that they had done anything wrong, because the time and legal costs to the business had been so large.

[15] Senate Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, *Hansard,* Mrs Leyla Yilmaz, 7 October 1999, EWRSBE 187.

[16] Majority report, Senate Employment Workplace Relations, Small Business and Education Legislation Committee Inquiry into the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, p 24.

Example 2: Small business closure

A long-standing small business, which employed between six and ten people, began to run into difficulties. The employer believed that had he been able to dismiss one employee he would have been able to keep the business running. However, he was afraid to dismiss anyone because he feared unfair dismissal proceedings being brought, having heard similar stories from other small business operators.

The employer believed that it would have cost him more than $20,000 to defend an unfair dismissal claim, and that he was unable to keep the business going facing this level of legal costs. Consequently, he decided to close the business, resulting in the loss of at least six jobs instead of just one.

Example 3: Claim by casual employee

The owners of a small store settled an unfair dismissal claim made by a casual employee, who had only worked an average of five hours a week, and was believed to probably be excluded by the Regulations from making an unfair dismissal claim.

The employee lodged a claim, then sought $1000 in settlement of the claim. The employer incurred about $1000 in legal costs in defending the claim, but at this point decided that it would be more cost efficient to pay the employee $1000 to settle the claim.

Example 4: Dismissal for poor performance

A small business owner received an unfair dismissal application made by a former employee who had been dismissed for poor work performance, following repeated training.

The company agreed to a settlement of the claim in order to avoid incurring further legal costs and disruptions to the business. The settlement cost the company thousands of dollars. Subsequently, the employer decided to engage new staff only on a casual basis.

Example 5: Misconduct

An employer had difficulty in establishing when an employee would attend for work due to excessive non-attendance. The employee also stole from the business.

Following three written warnings, the employee's employment was terminated. The employee claimed unfair dismissal and unlawful termination. There were a number of conciliation hearings and the employer incurred over $5,000 in legal fees as well as many hours obtaining statements from other employees. The employer sought to settle the claim rather than defend it, in light of the costs and stress involved and the disruption to the business.

40. The Government's policy position is that small businesses should be exempted from unfair dismissal laws, at both federal and State level, in order to protect small businesses from the costs and administrative burden of unfair dismissal claims, improve business confidence and increase employment opportunities. There is a clear perception among many small business owners that unfair dismissal laws make it very difficult to legitimately dismiss staff, even where performance is unsatisfactory or there is a downturn in business and the employer does not have enough work for their employees. In addition, small business owners perceive that the unfair dismissal laws hamper job creation because small businesses are reluctant to put on additional staff during peak periods. This means that many Australians miss out on work and experience and the Australian economy does not operate to its full potential.

41. If small businesses were exempted from unfair dismissal laws, small business owners may be more confident about employing, and more willing to risk putting on additional employees. There is considerable support in the small business community for the proposed small business exemption from unfair dismissal laws. The Department's submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee's inquiry into the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998 sets out details of this support (see pp 18 – 20).

42. The Department has produced many publications and information sheets, and provides free termination of employment seminars to the public. Publications by the Department include: *Managing Workplace and Termination Issues - A practical guide for employers*[17], and *The Workplace Relations Act 1996: A Guide for Microbusinesses*[18], and *Hiring or Firing: Are you complying?*[19].

43. In addition, the regional offices of the Department regularly conduct free seminars for employers about the operation of the termination of employment provisions of the WR Act. These seminars have been held at a number of suburban and regional centres and have been attended by many small business employers. A hotline was also established (with telephone calls from all areas charged at local call rates) to provide information about the changes to the termination of employment provisions in August 2001.

44. Despite information services being widely available, small business concerns about unfair dismissal remain. It is not possible to provide a simple list of all procedural requirements that small businesses must follow when dismissing an employee. Unfair dismissal has become a complex and detailed area of law by virtue of a multitude of Commission decisions addressing particular fact situations. Unless small businesses employ human resource experts, or engage external consultants each time they need to dismiss an employee, small business owners need to consider the possibility of an unfair dismissal claim whenever they dismiss an employee.

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[17] AGPS, 1997

[18] Department of Workplace Relations and Small Business, Canberra, 1998

[19] Department of Employment, Workplace Relations and Small Business, Canberra, 1999. Revised edition published in 2001.

45. Also, as outlined above, some employees may make speculative unfair dismissal claims, in the hope that the employer will be reluctant to spend a large amount of money on the legal costs associated with defending an unmeritorious claim, and would prefer to give the employee some money to settle the claim cheaply. Further Government information and education services will not address this problem.

Why should small businesses and their employees be treated differently?

46. Unfair dismissal laws have a disproportionate impact on small businesses, compared with larger businesses, for a number of reasons:

- there is usually no dedicated HR manager or person with specialist expertise in employment law working in a small business - the owner of the business usually manages employment relationships;
- relationships are managed in a less formal way than in large businesses;
- small businesses do not have the time or expertise to represent themselves in unfair dismissal proceedings, which can necessitate being away from the workplace for some time – this difficulty may be compounded when the small business is located in regional or rural Australia;
- engaging external legal representation represents a significant larger proportion of business capital and earnings for a small business.

47. Small businesses do not have access to the same financial and human resources as larger businesses. Unplanned legal expenses and attendances at hearings away from the workplace can threaten the viability of small businesses and the jobs of those working for them.

48. The purpose of the proposed small business exemption from unfair dismissal laws is to allow small businesses to grow, and to create new jobs. The aim of the Bill is not to remove employee rights. For this reason, the Bill would only apply to new jobs, where employees are engaged after the commencement of the Bill. Existing employees would not be affected, and new employees would be aware of the small business exemption from unfair dismissal laws before they accepted employment.

49. It is also important to note that the Bill would not remove the rights of small business employees to take action against their employer where it is alleged that an employer dismissed them unlawfully. Most commonly, unlawful termination claims relate to dismissal on illegal grounds, for instance, where an employer dismisses someone because of their age, sex, race, disability, or union membership, or where an employer dismisses someone without giving them notice of termination as required by the legislation.

50. The Bill would not allow employers to dismiss people illegally, or to dismiss them without giving notice or paying compensation in lieu of notice. Rather, the Bill would simplify procedural requirements for lawfully dismissing an employee with appropriate notice.

51. For instance, where a small business experienced a downturn in business, the employer would be able to let an employee go without the possibility of the employee making an unfair dismissal claim, provided that the employer complies with notice requirements, and

provided that the employer does not select the employee for redundancy on discriminatory grounds – for instance because the employee is a woman, or is a member of a particular religious group or is not a union member.

52. In this way, federal laws that provide fundamental employment protection would remain the same for both small business employees and other employees. On the other hand, the procedural standards that have been established by the Commission over time for 'fair' dismissal of employees, in many cases generated by cases involving large employers, require that an employer has adequate financial and human resources to follow those procedures. Businesses that have those financial and human resources would continue to be required to follow these procedures. Businesses that do not have those resources would no longer be penalised for technical mistakes in procedures adopted when dismissing employees.

53. There are many existing examples of when legislation differentiates between small and larger businesses. These include:

- the *Income Tax Assessment Act 1997* provides exceptions and special rules for small business taxpayers, for example in relation to depreciation of plant and eligibility for Capital Gains Tax concessions;
- the *Fringe Benefits Tax Assessment Act 1986* exempts benefits related to small businesses providing car parking;
- the *A New Tax System (Goods and Services Tax) Act 1999* in relation to the registration threshold, the tax period, bases of accounting and electronic lodgement;
- the *Privacy Act 1988,* in relation to the application of that Act to small business operators;
- the *First Corporate Law Simplification Act 1995* in relation to financial reporting requirements.

54. Also, the Australian Banking Industry Ombudsman Scheme differentiates between small and larger businesses in relation to eligibility for ombudsman support.

Why does the Bill define a small business as one with fewer than 20 employees?

55. The Bill would exempt all businesses with 'fewer than 20 employees' from unfair dismissal laws. The definition of a small business in the current Bill is consistent with that in the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001. Earlier Government measures to exempt small businesses from unfair dismissal laws would have defined a small business as one with '15 or fewer employees'.

56. The Government made an election policy commitment in 2001 to exempt small businesses with fewer than 20 employees from unfair dismissal laws.[20] The change in the definition of a small business was made in response to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee report on the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998. The report noted that

[20] *Getting on with Business – Small Business Moving Ahead*, page 3.

the Bill had been criticised because it contained a different definition of a small business to that used in the Australian Bureau of Statistics' surveys.[21]

57. The definition of a small business contained in the current Bill (fewer than 20 employees) is consistent with the definition of a small business used by the Australian Bureau of Statistics.

58. There is no information available to accurately indicate how many additional employees in the federal unfair dismissal jurisdiction would be affected by the change in definition from '15 or fewer employees' to 'fewer than 20 employees'. However, an estimate can be extrapolated from the Australian Bureau of Statistics' Survey of Employment and Earnings.[22] For Australia as a whole, in November 2000, businesses with 15 or fewer employees employed 27.7 percent of non-agricultural wage and salary earners, while businesses with 16 to 19 employees employed 2.6 percent of non-agricultural wage and salary earners.

59. Data from the Australian Industrial Registry indicates that during the 2000 calendar year, there were 7613 federal unfair dismissal applications. Thirty-four percent of respondents who provided information on employer size indicated that they employed 15 or fewer employees (representing 2588 unfair dismissal claims).

60. Making the assumption that the number of unfair dismissal applications is directly proportional to the total number of employees, the Survey of Employment and Earnings data above suggest that businesses with fewer than 20 employees will be party to approximately 37 percent of total federal unfair dismissal applications. This equates to around 2817 applications for the 2000 calendar year (or approximately an additional 229 claims that could be excluded if the Bill was passed).

Proposed new process for dismissing unfair dismissal claims against small businesses

61. The Bill contains provisions that would allow the Commission to reject an unfair dismissal application made against a small business without holding a hearing. These provisions complement the proposed small business exemption by providing a simple and inexpensive means of having unfair dismissal applications discontinued where they are made against small business employers.

62. As outlined above, there is evidence that small businesses settle unfair dismissal claims rather than go to the expense of attending hearings and engaging legal representation. If the Bill is passed, and small businesses are exempted from unfair dismissal laws, the Commission will have no jurisdiction to deal with unfair dismissal claims made by small business employees. In these circumstances, the small business owner should not have to waste time and money attending a hearing at which the claim will be rejected for jurisdictional reasons.

63. Therefore, the Bill would allow the Commission to dismiss an application made by a small business employee 'on the papers' where it is clear that the Commission does not have jurisdiction to hear the claim due to the small business exemption.

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[21] Page 17.

[22] Australian Bureau of Statistics, unpublished data from the December quarter 2000 Survey of Employment and Earnings.

64. The Commission would be able to seek further written information from the applicant and the employer if, for example, the Commission was not sure whether the employer employed less than 20 employees. However, if the Commission was not sure whether the small business exemption applied, then the Commission would be able to hold hearings and take evidence necessary to decide this point.

65. If the Commission decided that it did not have jurisdiction to hear a claim against a small business employer, this decision would not be subject to appeal. Allowing appeals against these decisions would defeat the purpose of allowing the Commission to dismiss claims without holding a hearing. The threat of an appeals process would give employees making speculative claims additional leverage to force a small business employer to settle the claim, in the same way that the threat of proceeding to arbitration does at present.

66. The Government is confident that the Commission would exercise the proposed power to dismiss unfair dismissal applications without a hearing carefully, and would only use this power when it was satisfied that the application was clearly outside of its jurisdiction.

Surveys and statistics supporting a small business exemption

67. Small business representatives regularly tell the Government that the prospect of unfair dismissal claims discourages them from hiring employees. A number of studies have supported these views by indicating that concerns about unfair dismissal claims are a factor affecting small business employment decisions.

68. While most of the evidence of the link between unfair dismissal laws and employment in the small business sector is drawn from attitudinal surveys, and the sample size and questionnaire design of these surveys differ, the majority of the findings indicate that small business employers would be more likely to employ new staff, and more likely to employ staff on a permanent basis, if they were not concerned about the prospect of unfair dismissal claims.

69. Much of this evidence was summarised in the Department's submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee's Inquiry into the provisions of the Workplace Relations Amendment (Unfair Dismissals) Bill 1998. Rather than reproduce that evidence here, the Committee is referred to the Department's earlier submission[23]. This section will cover only surveys undertaken since that time. The findings of these later surveys support the earlier studies, and suggest that the potential for unfair dismissal claims continues to impact on small business staffing decisions.

70. In early 1998, a survey of members of the Australian Chamber of Manufacturers (ACM) was jointly conducted by the ACM and Deakin University. This survey involved the distribution of 2000 questionnaires to respondents in the south-eastern States of Australia. The initial mail-out was followed up by telephone calls to prompt identified non-respondents.

71. The researchers applied factor analysis to identify significant critical issues and deterrents to further employment in smaller firms (those with less than 300 staff) in the

[23] Submissions to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee – Inquiry into Workplace Relations Amendment (Unfair Dismissals) Bill 1998, vol. 3, submissions 13-21, January 1999, pp. 80-84.

manufacturing sector, with particular attention directed to legislation and associated direct and indirect costs.[24]

72. The researchers noted two limitations of the ACM study. Firstly, the geographical restriction to the south-eastern States, and secondly that it did not allow for 'open ended' questions. They concluded, however, that:

> 'Our findings indicate small firms are concerned with the influence of legislation on employment related issues. Deterrents to staff employment included financial outlays in terms of indirect costs relating to employment and the direct costs of downtime. In addition, the human resource management issues associated with training and maintaining the necessary skills and harmonious workplace relations are of concern. Expertise is currently outsourced, albeit at a cost. Unfair dismissal legislation and the associated implications for the small business were also highlighted as employment deterrents'.[25]

73. In February 2001, Sweeny Research, on behalf of the Victorian Trades Hall Council, conducted a telephone survey of 400 small business owners and operators. The survey found that unfair dismissal laws ranked as the lowest concern out of 11 issues affecting small business (behind the GST, Government regulations, labour costs, rent/leases and other overheads, labour skill availability, other taxation issues, market for product, interest rates, vocational training, and industrial relations generally). Nevertheless, 39 percent of respondents said that unfair dismissal laws affected their businesses.

74. In November 2001, the Australian Chamber of Commerce and Industry (ACCI) released the results of a survey that had been mailed to members by ACCI's affiliated organisations. Some 2,500 firms responded to the survey (a response rate in excess of 20 percent). The report of the survey, published in the *November 2001 ACCI Review*, found that small businesses ranked unfair dismissal laws as the fifth most important problem facing them. Unfair dismissal laws were ranked behind:

- frequency and complexity of changes to tax laws and rules, level of taxation, telecommunication costs, and complexity of government regulations.

75. However, unfair dismissal laws were ranked ahead of:

- superannuation guarantee, cost of compliance with government regulations, energy costs, penalties for failure to comply with government regulations, workers' compensation payments and payroll tax.

76. In March 2002, CPA Australia released the results of its *Small Business Survey Program on Employment Issues*. CPA Australia surveyed 600 small businesses (defined as independently owned and operated businesses employing fewer than 20 employees) and 105 Certified Practicing Accountants (CPAs) drawn from CPA Australia's membership database. The survey was conducted by telephone and participants were selected at random across all States and territories and in both regional and metropolitan areas. The survey specifically

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[24] Jean Raar, Eric Smith, Kath Cummings, "Critical Factors Influencing Employment: A Study of Small Manufacturing Firms in South-East Australia".

[25] Ibid, pp. 24. The indirect costs to which the conclusions refer included Workcover premiums, superannuation contributions, payroll tax, leave loadings and fringe benefits tax. The 'cost of downtime' included legal fees and the replacement of short-term staff associated with dismissals.

dealt with the influence that various factors, including unfair dismissal laws have on the hiring intentions of small businesses.

77. Key findings of the survey were that:

> 'Almost a third of small businesses believe that they cannot dismiss staff, even if their business is struggling or the employee is stealing from them, under the unfair dismissal laws. The same number of businesses believe that employers' always lose unfair dismissal cases if a dispute arises. Only 58 percent of small businesses are confident they know how to dismiss staff under the legislation and of these only 30 percent are very confident. Sixty-two percent of small business and 81 percent of accountants believe that unfair dismissal laws require them to follow complex process.'

78. The researchers commented that 'these perceptions are as much a barrier to employment as the operation of the law' and went on to suggest that more needs to be done to educate small business employers. As noted in this submission, however, small business concerns persist despite the Government having undertaken a number of educational initiatives.

79. The CPA Australia survey also found that small businesses were employing more casuals and contractors despite a belief that they were not as valuable to their business as full-time employees. The reasons for hiring casuals over permanents included varying business income and work, and to reduce costs. However, 30 percent of small business respondents and 44 percent of CPAs cited a desire to avoid unfair dismissal issues as a reason for employing casuals.

80. When asked to nominate for themselves the main impediments to hiring staff, five percent of small business respondents and 16 percent of CPAs nominated the unfair dismissal laws as a primary issue. Other important impediments nominated included lack of skilled, experienced or motivated applicants, slowing economy, and cost of non-wage elements in an award.

81. In a recent decision, *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589, the Federal Court commented about the lack of empirical data supporting a link between unfair dismissal laws and employment growth. It should be noted, however, that in this decision, the matters before the Court concerned the exemption of casual employees from termination of employment laws and not the exemption of small business employees from unfair dismissal laws.

82. The Court made some general observations, however, saying that:

> In the absence of any evidence about the matter, it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven. It may be accepted, as a matter of economic theory, that each burden that is placed on employers, in that capacity, has a tendency to inhibit, rather than encourage, their recruitment of additional employees.[26]

[26] [2001] FCA 1589, paragraph 70.

83. Many other countries have introduced employment protection laws and have adopted measures to suit the special needs and characteristics of small business. Examples of these special measures are provided at paragraph 88 below. The Department has sought international empirical data on the effects of employment protection legislation on employment growth. However, there appears to be no reliable international data available.

84. The Department is seeking assistance from academic researchers and the Australian Bureau of Statistics to further establish the impact of the dismissal laws on Australian small businesses.

International precedents for a small business exemption

85. The Department of the Parliamentary Library's Bills Digest on the Fair Dismissal Bill states that: "Critics and opponents of the Bill might argue that the proposed (small business) exclusions are out of step with relevant overseas practice and potentially at odds with Australia's international treaty obligations."[27]

86. The International Labour Organization's Termination of Employment Convention, 1982 (which is reproduced in Schedule 10 of the WR Act) recognises that it could be appropriate to exclude small businesses from the termination of employment legislation. It provides that:

> In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them *(emphasis added)*.[28]

87. The International Labour Organization's Committee of Experts made the following observations about this part of the Convention:

> During drafting of the Convention, it was considered that a certain amount of flexibility was required, in particular to allow member States to exclude certain categories of workers to whom it was particularly difficult to extend certain aspects of the protection afforded by the Convention. The examples mentioned in this context include workers employed in small enterprises or family enterprises, managerial staff, workers who have reached the normal age of retirement, agricultural workers, apprentices, seafarers and domestic workers. Instead of seeking to determine the categories whose coverage presented difficulties for exclusion to be justified, it was considered preferable to include in the Convention a provision allowing, in general terms, the exclusion of limited categories of employed persons in respect of which special problems of a substantial nature might arise…In several countries, the provisions of labour legislation or those relating to termination of employment do not

[27] Workplace Relations Amendment (Fair Dismissal) Bill 2002, Bills Digest No. 79 2001-02, Department of the Parliamentary Library, 2002, pp 8-9.

[28] Termination of Employment Convention, 1982, Article 2, paragraph 5.

> apply to small enterprises employing fewer than a specified number of workers… (*emphasis added*), [29]

88. As the Committee of Experts points out, other countries have recognised that unfair dismissal laws have a disproportionate impact on small businesses, and have adapted employment protection legislation to suit the special needs and characteristics of small business.

- In Austria, termination of employment legislation does not apply to employees working in a business that employs fewer than five people.
- In Germany, between 1996 and 1999, unfair dismissal laws did not apply to businesses employing fewer than 10 employees. The German legislation was changed in 1999 to reduce the size of businesses excluded from unfair dismissal laws. Since 1999, unfair dismissal laws in Germany have not applied to businesses employing fewer than five people.
- In the Republic of South Korea, termination of employment laws do not apply to businesses employing fewer than five employees.
- In Italy, special informal unfair dismissal laws apply to companies that employ 60 or fewer employees in total, and to businesses employing fewer than 15 employees in a particular business unit.

SUMMARY OF PROVISIONS

89. The WRA (FD) Bill 2002 would amend the WR Act to exempt small businesses from unfair dismissal claims.

90. The WRA (FD) Bill 2002 would prevent employees who work in a small business from making an unfair dismissal claim.[30] It would not affect the ability of these employees to make unlawful termination claims (for instance, where an employee alleges that they have been dismissed for a discriminatory reason – sex, race, disability, etc).

91. Only new employees of small businesses would be affected by the legislation – existing employees (those employees whose employment commenced before the provisions of the WRA (FD) Bill 2002 commence) would not be affected.[31]

92. Apprentices and trainees would not be affected by the small business exemption, as they are specifically excluded from the exemption.[32] Apprentices and trainees in small, medium and large businesses would have the same access to termination of employment remedies as is currently the case (note that some apprentices and trainees are already excluded from the termination of employment provisions under the Workplace Relations Regulations 1996).

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[29] *Protection Against Unjustified Dismissal: General Survey on the Termination of Employment Convention (No. 158) and Recommendations (No. 166) 1982*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 82nd Session, 1995.

[30] Fair Dismissal Bill, Schedule 1, item 2 – proposed subsection 170CE(5C).

[31] Fair Dismissal Bill, Schedule 1, item 6.

[32] Fair Dismissal Bill, Schedule 1, item 2 – proposed subsection 170CE(5D).

93. The WRA (FD) Bill 2002 would only exempt small businesses with less than 20 employees from unfair dismissal claims. In working out whether an employer employs less than 20 people, the employee whose employment has been terminated is counted.[33] Casual employees are not counted, unless they have been working for their employer on a regular and systematic basis with the employer for at least 12 months.[34]

94. The WRA (FD) Bill 2002 would require the Commission to make an order that an unfair dismissal application is not valid where it is satisfied that the application has been made against an employer that is a small business.[35] If a termination of employment claim relates to both unfair dismissal grounds and unlawful termination grounds, then the Commission would dismiss the claim so far as it relates to the unfair dismissal ground – the unlawful termination claims would continue to proceed as normal.

95. The Commission would be authorised to reject unfair dismissal applications against small businesses without holding a hearing if the Commission is satisfied on the material before it that the unfair dismissal claim relates to a small business, and the Commission does not have jurisdiction to deal with the claim. In deciding whether or not to hold a hearing, the Commission would be required to take into account the costs to the small business employer's business of attending a hearing.[36] The Commission would also be able to seek further information in writing from the parties to an unfair dismissal claim to assist it in determining whether the Commission has jurisdiction to deal with the claim.[37]

96. Where the Commission decided that an unfair dismissal claim was not valid as it related to a small business employer, no appeals against that decision would be permitted.[38]

97. A comparison of the provisions of the WRA (FD) Bill 2002 and earlier instruments to exempt small business from unfair dismissal laws is at Appendix 2A.

[33] Fair Dismissal Bill, Schedule 1, item 2 – proposed paragraph 170CE(5C)(a).

[34] Fair Dismissal Bill, Schedule 1, item 2 – proposed paragraph 170CE(5C)(b).

[35] Fair Dismissal Bill, Schedule 1, item 3 – proposed subsection 170CEB(1).

[36] Fair Dismissal Bill, Schedule 1, item 3 – proposed subsection 170CEB(2).

[37] Fair Dismissal Bill, Schedule 1, item 3 – proposed subsections 170CEB(3) and (4).

[38] Fair Dismissal Bill, Schedule 1, items 4 and 5.

Appendix 2A

Comparison of the Workplace Relations Amendment (Fair Dismissal) Bill 2002 and earlier instruments to exempt small business from unfair dismissal laws

Between 1997 and 2001, the Government introduced three Bills and two sets of amending regulations to exempt small businesses from unfair dismissal laws. This section of the submission compares the provisions of these earlier Bills and regulations with the current proposals for a small business exemption contained in the WRA (FD) Bill 2002.

Workplace Relations Regulation 1997 (SR No. 101 of 1997)
Section 170CC of the *Workplace Relations Act 1996* provides that the regulations may exclude specified classes of employees from the operation of the termination of employment provisions in Division 3 of Part VIA of the Act. Subparagraph 170CC(1)(e)(ii) of the Act provides that regulations may be made to exclude employees where the application of the provisions would cause substantial problems because of the 'size or nature of the undertakings in which they are employed'.

On 30 April 1997, amendments were made to the Workplace Relations Regulations to include a new regulation 30BAA, which would have exempted small businesses from unfair dismissal laws with effect from 1 July 1997. The proposed small business exemption would have:

- excluded employees working in a business with **15 or fewer employees** from the operation of the unfair dismissal provisions;
- only applied to employees who were employed after the commencement of the regulation (**new employees**);
- only operated in relation to the **first 12 months** of a new employee's employment with that employer;
- preserved the ability of small business employees to seek a remedy for **unlawful termination** of employment.

Workplace Relations Amendment Bill 1997
The Workplace Relations Amendment Bill 1997 was first introduced on 26 June 1997. The proposed small business exemption would have:

- excluded employees working in a business with **15 or fewer employees** from the operation of the unfair dismissal provisions;
- only applied to employees who were engaged after the commencement of the Bill (**new employees**);
- preserved the ability of small business employees to seek a remedy for **unlawful termination** of employment.

The exclusion proposed by this Bill differed from the earlier regulation in a number of respects, most notably that:

- the exclusion of new employees was to be **permanent**;
- the exclusion would not apply to **apprentices**; and
- in determining whether a business has 15 employees, the employee whose employment was terminated was counted, but **casual employees** would not have been counted unless they had been employed on a regular and systematic basis for at least 12 months.

As mentioned, small business employees retained the ability to seek a remedy in respect of unlawful termination of employment. In addition, small business employers to whom the exemption was to apply would have remained subject to other provisions of the *Workplace Relations Act 1996* prohibiting termination of employment, including the prohibitions against dismissal on the grounds set out in section 298K, and prohibitions against dismissal of employees engaged in protected industrial action relating to certified agreements or Australian workplace agreements (sections 170MU and 170WE, respectively).

Workplace Relations Amendment (Unfair Dismissals) Bill 1998
The Workplace Relations Amendment (Unfair Dismissals) Bill 1998 was first introduced on 12 November 1998. The proposed small business exemption contained in this Bill would have:

- permanently excluded employees working in a business with **15 or fewer employees** from the operation of the unfair dismissal provisions (in determining whether a business had 15 employees, the employee whose employment was terminated was counted, but **casual employees** would not have been counted unless they had been employed on a regular and systematic basis for at least 12 months);
- only applied to **new employees** who were engaged after commencement of the Bill;
- preserved the existing ability of **apprentices** working in small businesses to make unfair dismissal claims;
- preserved the ability of small business employees to seek a remedy for **unlawful termination** of employment.

In this Bill, trainees were excluded from the proposed small business exemption, in addition to apprentices.

As was the case with the Workplace Relations Amendment Bill 1997, employees affected by the small business exemption would still be able to seek a remedy in respect of dismissals in contravention of:

- the freedom of association provisions of the WR Act (Part XA); and
- the prohibitions against dismissal of employees engaged in protected industrial action in the context of negotiating a certified agreement or Australian workplace agreement (section 170MU and section 170WE).

Workplace Relations Amendment Regulations 1998 (No. 2) (SR No 338 of 1998)
The Workplace Relations Amendment Regulations 1998 (No. 2) were made in the same terms as the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, to give the earliest possible effect to the exemption for small business, while the Government pursued the passage of the Bill through the Parliament. The Workplace Relations Amendment (Unfair Dismissals) Bill is described above.

Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001
The Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill was introduced on 30 August 2001. This Bill was not considered by the Parliament before the 2001 election was called.

Schedule 2 of the Bill proposed to exempt small businesses from unfair dismissal laws in the *Workplace Relations Act 1996*. Similarly to the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, the small business exemption would have:

- only applied to **new employees** who were engaged after commencement of the Bill;
- preserved the existing ability of **apprentices and trainees** working in small businesses to make unfair dismissal claims;
- preserved the ability of small business employees to seek a remedy for **unlawful termination** of employment, and to seek remedies for dismissals that contravened the freedom of association provisions or section 170MU and 170WE of the *Workplace Relations Act 1996*.

The provisions of the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001 differed from the earlier Bill in the following respects:

- employees working in businesses with **fewer than 20 employees** would have been permanently excluded from the operation of unfair dismissal laws, rather than employees working in businesses with 15 or fewer employees (however, in the same way as the earlier Bills, to work out how many employees were employed by a business, the terminated employee was counted, but casuals were not counted unless they had been working for the employer on a regular and systematic basis for at least 12 months);
- the Bill established a process allowing the Commission to dismiss unfair dismissal claims made against small businesses, and to dismiss frivolous and vexatious claims, or claims lacking in substance against small businesses, **without holding a hearing**;
- if the Commission decided to dismiss an application because it related to a small business, the Bill would have **prevented appeals** against this decision.

Workplace Relations Amendment (Fair Dismissal) Bill 2002
The provisions of the WRA (FD) Bill 2002 are very similar to the provisions of Schedule 2 to the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001.

The proposed small business exemption would:

- apply to permanently exclude employees of businesses with **fewer than 20 employees** from the operation of the unfair dismissal provisions (in working out how many employees are employed by a business, the terminated employee is counted, but casuals are not counted unless they have been working for the employer on a regular and systematic basis for at least 12 months);

- only apply to **new employees** engaged after the commencement of the Bill;

- preserve the existing ability of **apprentices and trainees** working in small businesses to make unfair dismissal claims;

- preserve the ability of small business employees to seek a remedy for **unlawful termination** of employment, and to seek remedies for dismissals that contravene the freedom of association provisions or section 170MU and 170WE of the *Workplace Relations Act 1996*.

As with the 2001 Bill, the WRA (FD) Bill 2002 would establish a process for the Commission to order that an unfair dismissal claim that relates to a small business is not valid, and authorise the Commission to make such an order without holding a hearing. There would be no appeal rights against such an order. Unlike the Workplace Relations and Other Legislation Amendment (Small Business and Other Measures) Bill 2001, however, there is no specific provision in the WRA (FD) Bill 2002 allowing the Commission to dismiss applications made against small businesses that are frivolous, vexatious or lacking in substance.

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

BACKGROUND

The Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 (WRA (PCUF) Bill 2002) would amend the certified agreement and freedom of association provisions in the *Workplace Relations Act 1996* (WR Act). The proposed amendments would address clauses in certified agreements that purport to require payment of bargaining services fees and conduct designed to compel persons to pay bargaining services fees. The proposed amendments would apply to fees for bargaining services imposed by trade unions or by employer associations.

2. The Government considers the WRA (PCUF) Bill 2002 to be a necessary but reasonable measure to address attempts by some unions to require non-union members to bear a cost for union activities through the imposition of bargaining services fees. Such fees are typically stated to relate to costs incurred in negotiating certified agreements with employers.

3. The Government's policy position is that industrial associations should not be able to impose compulsory fees for unsolicited and often unsubstantiated services. Industrial associations should be subject to the same standards as ordinary businesses, which are prevented by fair trading legislation from providing unrequested services and then demanding payment for those services.

4. The Government considers that bargaining services fee clauses in certified agreements restrict choice and undermine the principle of freedom of association. By creating a financial disincentive to non-membership, these fees might act to coerce individuals to take out or retain union membership, in conflict with the right of individuals to make a free choice about union membership. Bargaining services fees also compel individuals to associate, through financial contribution, with a union when they may have no desire to do so.

5. Unions argue that the legislation requires them to negotiate on behalf of all employees in a workplace and that therefore employees who are not union members but who nonetheless benefit from the unions' efforts in negotiating agreements should be obliged to contribute financially for the benefit they receive, even if they have not asked for the benefit.

6. The Government considers that the unions are not seeking 'bargaining services fees', but rather compulsory union fees because they are intended to compel employees to join a union.

7. Demands for 'bargaining services fees' are in conflict with the Government's policy that individuals have the right to choose whether or not to join an industrial association and the right of individuals to equal treatment before the law irrespective of the choice made. The WRA (PCUF) Bill 2002 is the Government's response to attempts by some unions to undermine freedom of association and to circumvent the protections afforded by the provisions of the WR Act.

POLICY RATIONALE

8. The principles of freedom of association and freedom of choice are promoted by the WR Act by protecting the freedom of individual employers, employees and independent

contractors to choose whether to join (and participate in) an industrial association or not to join an industrial association, and by providing protection from victimisation and discrimination irrespective of the choice exercised.

9. The *Conciliation and Arbitration Act 1904* (C&A Act) included from its commencement provisions protecting an individual's right to join an industrial association (employer association or union). The C&A Act prohibited an employer from dismissing an employee because the employee was a member or officer of a union or entitled to the benefit of an industrial agreement or award. The C&A Act also prohibited employees from ceasing work because their employer was a member of an employer organisation. Over time these provisions in the C&A Act were extended: for example, in 1914 new provisions were introduced to proscribe conduct resulting in injury or prejudicial alteration to employment by employers in order to provide a remedy for discriminatory action that fell short of dismissal.[39]

10. The Coalition's 1996 workplace relations policy, *Better Pay for Better Work*, contained a commitment to legislate to ensure protection against discrimination on the basis of both membership and non-membership of a union. The policy stated '... we totally reject compulsory unionism. Just as employees should be free to join a union, so should they be free to not join. These are fundamental civil liberties.'[40]

11. In giving effect to this policy, Part XA of the WR Act provided, for the first time in federal industrial relations legislation, protection from discrimination and victimisation on the basis of non-membership of an industrial association. Although there was provision under the C&A Act and the *Industrial Relations Act 1988* for conscientious objectors (retained under the WR Act), this did not amount to broad legislative recognition of the freedom not to join an industrial association. In his second reading speech introducing the Workplace Relations and Other Legislation Amendment Bill 1996, the then Minister for Industrial Relations, the Hon Peter Reith MP, identified the principle of freedom of association as being '…[a]mong the fundamental principles underpinning the government's industrial relations policy'.[41]

12. Over time there has been a shift in the workplace relations system: whereas preference in employment to union members was once an accepted part of the system, now such provisions are prohibited as being contrary to freedom of choice.

13. The freedom of association provisions are contained in Part XA of the WR Act, which consists of seven divisions:

- Division 1 sets out the objects and definitions of the Part;
- Division 2 details the application of the Part, which draws on a range of constitutional powers;
- Division 3 proscribes a range of conduct by employers (and principals that engage independent contractors) where that conduct is engaged in for one of a number of

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[39] *Commonwealth Conciliation and Arbitration Act (No. 2) 1914* (No 18 of 1914).

[40] *Better Pay for Better Work*, paragraph 2.3.

[41] The Hon. Peter Reith MP, Minister for Industrial Relations, Workplace Relations and Other Legislation Amendment Bill 1996, *Hansard*, 23 May 1996, p1302.

listed prohibited reasons. The Division also contains a prohibition against inducing an individual to cease membership of an industrial association;

- Division 4 prohibits employees and independent contractors from ceasing work for a range of reasons, including that their employer or principal is a member of an industrial association;
- Division 5 prohibits specified action by industrial associations against employers, employees, members, and independent contractors;
- Division 6 sets out the remedies available for breaches of Part XA;
- Division 7 contains a number of miscellaneous provisions, including section 298Z which provides for the removal of clauses from certified agreements where those clauses are found to be 'objectionable provisions'. The section defines an 'objectionable provision' as a clause that requires or permits conduct which would contravene Part XA.

Developments in compulsory union fees

14. In recent years, some unions have sought to impose compulsory union fees via the inclusion in certified agreements of clauses that purport to oblige employees to pay a fee for services in relation to the negotiation of certified agreements.

15. The original impetus for pursuing such fees appears to have arisen from the exposure of certain Australian unions to practices in other jurisdictions such as Canada and the United States. In a newsletter circulated in March 2001, the Victorian Branch of the Electrical Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU), the Electrical Trades Union (ETU) indicated that it first encountered the concept of 'bargaining agents fees' during an invitational tour by ETU delegates to the United States:

> *ETU Officials were invited to the United States in 1996 to meet with representatives of the International Brotherhood of Electrical Workers (IBEW) to discuss the US companies who had acquired much of Victoria's newly privatised electricity network. This was an important opportunity to investigate the nature of these employers and how they interact with their employees and the Unions….We learned that Bargaining Agent's Fee Clauses and similar arrangements have been vigorously policed in the US, by both the National Labour Relations Board and the courts.*[42]

16. Further momentum for such fees came with the adoption of a formal policy position on bargaining services fees by the Australian Council of Trade Unions (ACTU). In late June 2000 the ACTU Congress endorsed[43] the following policy:

> *Provision should be made for certified agreements to include a term providing that a specified negotiating fee be deducted from the wages of all employees covered by the*

[42] Electrical Trades Union *Bargaining Agent's Fee* (http://www.etu.asn.au/members/agentsfee.html)

[43] WorkplaceInfo; 'ACTU endorses fee for service'; 29 June 2000

agreement to be forwarded to the relevant union, with such fee to be offset against union dues if paid by the employee.[44]

17. In May 1999 the New South Wales Government released an issues paper, one aspect of which canvassed a proposal to provide for the inclusion in enterprise agreements of clauses '…requiring employers to impose a service fee payable to the relevant union on non-union employees working under a union negotiated enterprise agreement.'[45] The proposal was not included in the amending Bill.[46]

Compulsory union fees and freedom of association

18. The Government considers that bargaining services fee clauses in certified agreements restrict choice and undermine the principle of freedom of association, by compelling individuals to associate, through financial contribution, with a union.

19. By creating a financial disincentive to non-membership, these fees may also act to coerce individuals to take out or retain union membership, conflicting with the right of individuals to make a free choice about union membership.

20. In *Employment Advocate re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000 - 2003 and other Agreements,* McIntyre VP found that where bargaining services fees exceed the amount charged by unions as membership dues, they may have a coercive intent.[47] In the subsequent appeal, the Full Bench of the Commission indicated that it agreed with McIntyre VP's assessment of the situation.[48]

21. Even where a bargaining services fee does not exceed 'nominal' union dues, such a fee could still provide a financial incentive to take out or retain membership where the fee is in excess of the 'effective cost of union dues' (for example, union members may receive discount vouchers for goods and services, lowering the effective cost of union membership). Even where a bargaining services fee is not in excess of the effective cost of union dues, such a fee may still act to coerce a person to take out or retain union membership by imposing a cost for non-membership.

22. The Federal Government is not alone in its opposition to compulsory union fees. The Department's submission to the Committee's inquiry into the 2001 Bill outlined concerns raised by Ministers in the ALP Governments of Victoria and Western Australia about union strategies to use bargaining fees to increase membership (paragraphs 29 and 32).

23. The Queensland Government's *Industrial Relations Act 1999* contains provisions that prohibit employers, principals and industrial associations from engaging in discriminatory conduct because a person has not paid a fee to an industrial association. Like the present Bill, the Queensland Act prevents the Queensland Industrial Relations

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[44] Australian Council of Trade Unions *Industrial Legislation Policy 2000* (http://www.actu.asn.au/vunions/actu/article.cfm?objectid=55210CB8-F0A6-486B-974EBD9E1D05A3B5).

[45] Item 10, Department of Industrial Relations, *Issues Paper - Proposed Amendments to the Industrial Relations Act 1996*, New South Wales, 5 May 1999.

[46] *Industrial Relations Amendment Bill 2000* (NSW).

[47] PR900919, 9 February 2001, per McIntyre VP at paragraph 15.

[48] PR910205, 12 October 2001, paragraph 26.

Commission from certifying agreements that contain provisions that are inconsistent with the freedom of association provisions of that Act.

Does the 'user-pays' analogy apply?

24. It has been argued that bargaining services fees or bargaining agents fees represent a 'user pays' approach to service delivery consistent with other areas of public policy.

25. The 'user pays' analogy is a false one - users can only be required to pay for services they have requested or consented to receive. User pays involves an exchange that is freely entered into by willing and properly informed parties. In contrast, bargaining services fees are intended to be imposed upon an individual without the individual's consent. Compulsory fees for an unsolicited and often unsubstantiated service do not constitute 'user pays'.

26. The Government's policy is that industrial associations should be subject to the same standards as ordinary businesses, which are prevented by fair trading legislation from providing unrequested services and then demanding payment for those services. Section 64 of the *Trade Practices Act 1975 (Cth)* prohibits corporations from asserting a right to payment for unsolicited goods and services:

> *(1) A corporation shall not, in trade or commerce, assert a right to payment from a person for unsolicited goods unless the corporation has reasonable cause to believe that there is a right to payment.*
>
> *(2A) A corporation shall not, in trade or commerce, assert a right to payment from a person for unsolicited services unless the corporation has reasonable cause to believe that there is a right to payment.*

There are mirror provisions in all State and Territory fair trading legislation (except Tasmania). Copies of each of these provisions were included in the Department's submission to the Committee's inquiry into the 2001 Bill.

Cost of negotiating on behalf of non-member employees

27. Unions have argued that in certified agreement negotiations they have no choice but to bear the costs of negotiating on behalf of non-member employees. However, 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.

28. In some cases unions actively attempt to prevent non-members from being involved in certified agreement negotiations. The Department's submission to the Committee's inquiry into the 2001 Bill referred to a case involving a manufacturing business in Minto, NSW. In that case, non-members demonstrated that they were prepared to bear the costs of their own representation only to find that the union refused to participate in negotiations if the non-union representative was involved.

29. The union was seeking to impose a $500 'bargaining agents fee' on the non-union employees, even though at least some of those employees had rejected union representation and were seeking to represent themselves in negotiations. The employer subsequently told the non-members that they could not be represented in negotiations because of the AMWU's unwillingness to deal with them and that the agreement would be solely negotiated by the AMWU. The Department understands that OEA subsequently obtained undertakings not to exclude the non-union representatives from the negotiations.

30. 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.

31. Another argument used in support of compulsory union fees is that fee clauses contained in certified agreements approved by a majority of employees represent the outcome of a democratic process. The focus of the freedom of association provisions of the WR Act, however, is on the individual, as is borne out by section 3 which provides that:

> *The principal object of the '…Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:…*
>
> *(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.'*

32. Section 298A provides that Part XA 'has these objects:

> *(a) to ensure that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations; and*
>
> *(b) to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations.'*

33. This was noted by the Full Federal Court in *BHP Iron Ore Pty Ltd v Australian Workers' Union*[49] which commented that:

> *It has to be borne in mind, in construing s 298K, that it proscribes conduct by "**an employer**" directed to **"an employee"** or **"other person"** (emphasis added). That use of the singular suggests that the alleged injury or alteration of position has to be examined in the light of the circumstances of each individual employee. (It is not the point that in the interpretation of statutes, the singular ordinarily includes the plural; here we are concerned with the indications of legislative intention to be discerned*

[49] [2000] FCA 430 (7 April 2000).

from the actual language used.) It is also significant that the conduct struck at by each paragraph of s 298K is expressed by an active verb: "dismiss", "injure", "alter the position", "refuse to employ", and "discriminate". That implies that the proscription is essentially against an intentional act of the employer directed to an individual employee or prospective employee.[50]

34. In view of this focus on individual freedom of choice in relation to union membership, the Government does not consider it appropriate that the operation of the freedom of association provisions be negated by a majority vote which results in the imposition of the will of the majority on individuals who are not and do not wish to become, associated with a union.

35. Moreover, the certified agreements provisions of the WR Act recognise that, irrespective of majority agreement, not all matters are appropriate for inclusion in certified agreements. For example, subsection 170LT(2A) prohibits the Commission from certifying an agreement where it is satisfied that the agreement contains provisions that contravene the freedom of association provisions of the Act (Part XA).

36. During second reading debate on the 2001 Bill, comparisons were made between the imposition of compulsory union fees and the fees charged by the governing bodies of the medical and legal professions in order for doctors and lawyers to practice.[51] However, such a comparison fails to recognise that industrial associations are collective organisations formed for the purpose of advancing their members' industrial conditions: they have no regulatory functions.

37. Law societies and surgeons' colleges, on the other hand, are primarily regulatory bodies responsible for setting professional standards, ensuring that their members meet those standards, hearing complaints against their members and administering funds to cover damage to members of the public resulting from professional negligence on the part of their members. There is a strong public interest in ensuring that people are protected from dishonest and negligent professionals – hence why society requires these professionals to contribute to compulsory regulatory schemes.

Appropriateness of legislation while matter sub judice

38. The WRA (PCUF) Bill 2002 does not purport to deal with matters that are sub judice. The core legal issue in the *Electrolux* litigation is whether protected industrial action can be taken in pursuit of claims that do not pertain to the employment relationship. The WRA (PCUF) Bill 2002 does not address that issue; conversely, the outcome of the *Electrolux* litigation will not achieve the results that the WRA (PCUF) Bill 2002 will achieve.

39. The question of whether a so-called bargaining agent fee is a matter that pertains to the employment relationship is a related issue, but it is not the core legal issue. Furthermore, as the facts of the case meant that the issue of such fees was considered only in the context of protected action, the judgment does not answer the question of the status of so-called bargaining agent fee clauses in agreements already certified. Given the factual context of *Electrolux*, it is unlikely that this question will be answered in the appeal.

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[50] ibid, at paragraph 35 per Black CJ, Beaumont and Ryan JJ.

[51] *Hansard* (House of Representatives), 28 June 2001 at 28841 per the Member for Brisbane, the Hon Arch Bevis MP.

40. Legislation is therefore required to implement the Government's policy that bargaining services fee clauses not be included in certified agreements, and to the extent that they exist in agreements already certified, to provide a mechanism for their removal.

41. The Government agrees with the findings of Merkel J in the matter of *Electrolux Home Products Pty Ltd v Australian Workers Union* in which His Honour held that a bargaining agent's fee was not a matter pertaining to the employment relationship, on the basis that it is consistent with High Court authorities about analogous clauses. Further information on the judgment is at Appendix 3A.

42. It should be noted that, in his judgment, Merkel J noted the similarities (in terms of their relevance to the employment relationship) between bargaining agent fees and the payment of union dues by union members. His Honour referred to the judgments of the High Court in *R v Portus; Ex parte Australian and New Zealand Banking Group Limited* (1972) 172 CLR 353, and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96. These authorities stand for the proposition that the provision by employers of a facility for payroll deduction of union dues is not matter that pertains to the employment relationship.

43. As well, the judgment of Merkel J did not address the broader freedom of association implications of so-called bargaining agents fees, although his Honour noted that:

> 'In concluding that the bargaining agent's fee claim does not pertain to the requisite relationship it has not been necessary to consider whether the claim contravenes the freedom of association provisions in Part XA of the Act…and whether, as a consequence, an agreement with such a term cannot be certified….in the present case the claim being pursued by the unions, notwithstanding its form in the draft agreement, is for payment of the fee by non-union members. There are substantial difficulties about the involuntary and discriminatory aspects of such a claim. However, as those matters were not the subject of argument in the present case I say nothing further about them than that I doubt that those difficulties can be overcome by altering the form of the claim, or by phrasing it so as to appear non-discriminatory, when it is plain that, if acceded to, the claim is intended to operate in a discriminatory manner against non-union employees.'[52]

44. Nor will the broader freedom of association implications be addressed in any judgment on appeal. Consequently, legislation remains necessary to address coercive and misleading conduct associated with demands for bargaining services fees, to ensure that bargaining agent fee clauses are not included in certified agreements, and to ensure that clauses in existing agreements can be removed.

45. The Government believes that the need for legislation is clear, given attempts by some unions to require payment of non-consensual fees. Data from the Department's Workplace Agreements Database (WAD) suggests that significant numbers of bargaining services or bargaining agents fee clauses are being included in federal certified agreements.

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[52] [2001]FCA 1600, para 47.

Some 361 (or approximately 5.4 percent) of federal agreements certified in 2001 contained bargaining services fee clauses.[53]

- The majority of these clauses appear to be the standard ETU clause, which was the subject of the EA's s298Z application. As discussed previously, these clauses purport to require payment of a fee well in excess of standard union dues, suggesting that a coercive intent underlies them.

Overseas experience

46. In the second reading debate on the 2001 Bill and the Senate Inquiry into the 2001 Bill, analogies were drawn between bargaining agents' fees and 'agency shop' arrangements operating in other nations such as the United States[54] and Canada.[55] Agency shops are among a number of 'union security' arrangements operating in the United States, Canada, South Africa, Israel and Switzerland.

47. The quite substantial differences between the Australian workplace relations system and the systems of these other nations make comparisons inappropriate. Further information on international provisions is at Appendix 3B.

SUMMARY OF PROVISIONS

48. The measures proposed in the WRA (PCUF) Bill 2002 would address clauses in certified agreements that purport to require payment of bargaining services fees, as well as conduct designed to compel people to pay such fees. However, the present Bill addresses concerns raised during consideration of the 2001 Bill by making it clear that voluntary payments can be made to industrial associations.

Definition of 'bargaining services' and 'bargaining services fee'

49. Item 3 of the WRA (PCUF) Bill 2002 would define the term 'bargaining services' to mean services provided by or on behalf of an industrial association (ie a trade union or an employer association) in relation to the negotiation, making, certification, operation, extension, variation or termination of an agreement under Part VIB of the WR Act.

50. Item 4 of the WRA (PCUF) Bill 2002 would define the term 'bargaining services fee' as a fee, however described, payable to an industrial association or to someone else in lieu of an industrial association wholly or partly for the provision of bargaining services. Membership dues are specifically exempted from the definition.

51. The WRA (PCUF) Bill 2002 will not prevent an industrial association and a non-member from entering into arrangements for the provision of bargaining services, provided there is no coercion or misrepresentation involved. Nor will it stop any non-member from offering a voluntary contribution for 'bargaining services', provided there is no coercion or misrepresentative conduct.

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[53] The Department began coding for bargaining services fees for agreements certified since the start of 2001. At the time of writing, the WAD contained data on agreements certified up to December 2001.

[54] *Hansard* (House of Representatives), 28 June 2001 at 28862 per the Member for Lalor, Julia Gillard MP.

[55] Senate Employment, Workplace Relations, Small Business and Education Legislation Committee; Prohibition of Compulsory Union Fees Bill 2001; Labor Senators' report, page 15.

52. Membership dues are specifically excluded from the scope of the present Bill (as they were with the 2001 Bill).

53. The concept of 'non-compulsory fee', which was in the 2001 Bill, has not been included in the present Bill.

Prohibition on discriminatory or injurious conduct

54. The WRA (PCUF) Bill 2002 is similar to the 2001 Bill in that it will prohibit:

- employers and others from engaging in discriminatory or injurious conduct against a person, because he or she has refused to pay, or does not propose to pay, a bargaining services fee; and
- an industrial association from encouraging or inciting others to take discriminatory action against a person because he or she has refused to pay, or does not propose to pay, a bargaining services fee.

55. More specifically, item 6 of the WRA (PCUF) Bill 2002 would prohibit employers and others (eg persons who engage independent contractors) from engaging in discriminatory or injurious conduct (eg dismissal or refusal to employ) against a person, because he or she has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.

56. Existing subsections 298K(1) and (2) of the WR Act prohibit employers and others from engaging in certain conduct where the conduct is engaged in for a 'prohibited reason', or for reasons that include a prohibited reason. There is a list of prohibited reasons set out in subsection 298L(1). The amendment would insert into this list the new prohibited reason that a person has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.

57. Item 7 of the WRA (PCUF) Bill 2002 would prohibit an industrial association from taking, or threatening to take, action that has the effect of prejudicing a person in his or her employment or possible employment, and from advising, encouraging or inciting another person to take such action, if the reason for the action or conduct is that the person has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.

58. Section 298Q currently prohibits conduct by industrial associations in order to coerce a person to join in industrial action or to dissuade or prevent the person from seeking a secret ballot under an industrial law. The amendment would prohibit conduct in relation to bargaining services fees and extend the prohibition to conduct designed to target third parties. For example, a union might threaten an employer that union members will not work with another employee because that employee has not paid a bargaining services fee.

59. The 2001 Bill also proposed to prohibit the above types of behaviour for the prohibited reason that a person had paid, agreed to pay, or proposed to pay, a 'non-compulsory fee'. The 2002 Bill does not include the concept of 'non-compulsory fee'; as a consequence, it also does not include those grounds.

60. Item 8 of the WRA (PCUF) Bill 2002 would prohibit an industrial association from encouraging or inciting others to take discriminatory action against a person because he or she has refused to pay, or does not propose to pay, a bargaining services fee.

- For example, this amendment would prohibit an industrial association of employees advising a principal contractor not to engage a subcontractor because the subcontractor had previously refused to pay a bargaining services fee.

61. The WRA (PCUF) Bill 2002 will confirm the legal position on the status of bargaining services fee clauses by making clear on the face of the statute that they have no effect, through the amendment of section 298Y to make clear that a clause in a certified agreement is void to the extent that it requires payment of a bargaining services fee (item 11).

62. The focus of existing section 298Y is on making void clauses requiring or permitting conduct that would contravene the freedom of association provisions of the WR Act. The proposed amendment extends the focus beyond conduct, to make void clauses in certified agreements to the extent that they require payment of a bargaining services fee, irrespective of any conduct.

63. Unlike the 2001 Bill, the present Bill will provide an explicit mechanism for the removal of such clauses by extending the definition of 'objectionable provision' in subsection 298Z(5) so that it includes 'a provision of a certified agreement that requires payment of a bargaining services fee'. This amendment would allow the Commission to remove these clauses on application by a party to the agreement or the EA.

64. The Government believes that is important to provide the power to remove these clauses. Although unenforceable, the continued presence of such clauses in certified agreements can give rise to a false perception of legitimacy and provide a foundation for misrepresentations about a person's liability to pay such a fee.

65. Item 1 of the WRA (PCUF) Bill 2002 also proposes to amend subsection 170LU(2A) to explicitly prevent the Commission from certifying or varying an agreement that contains a provision requiring the payment of a bargaining services fee. This will ensure a straightforward approach to the certification of agreements in such circumstances.

Additional prohibitions on conduct

66. The WRA (PCUF) Bill 2002 proposes three additional prohibitions, not contained in the 2001 Bill, on industrial associations, or their officers or members.

67. Item 9 of the WRA (PCUF) Bill 2002 would prohibit an industrial association from demanding a bargaining services fee (whether the demand is made orally or otherwise) from another person. It is possible to conceive of situations where demands for bargaining services fees take on a coercive or intimidatory character. The WRA (PCUF) Bill 2002 would prevent this type of conduct.

68. Item 10 of the WRA (PCUF) Bill 2002 would prohibit an industrial association from taking action (or threatening to take action) against a person with intent to coerce that person, or another person, to pay a bargaining services fee.

69. This proposed amendment would prohibit such action as strikes, or threats of strikes, with the aim of coercing a person to pay a bargaining services fee. The amendment would also capture third-party conduct where, for example, an industrial association of employees might take action against an employer to force an employee who is not a member of the association to pay a bargaining services fee.

70. Item 11 of the WRA (PCUF) Bill 2002 would prohibit a person making a false or misleading representation about another person's liability to pay a bargaining services fee. This proposed amendment would prevent industrial associations from making representations, in any circumstances, to the effect that a person has an obligation or liability to pay a bargaining services fee.

- An example of the type of representation that this amendment is designed to address is a leaflet previously circulated by the Queensland Branch of the TWU. The leaflet advised that non-members would be charged a $400 annual fee for each year that an 'enterprise bargaining agreement' negotiated by the union operates. The leaflet advised '…all non-union workers currently receiving the benefits of the work done by the TWU to join today – avoid the fee – and take advantage of the many benefits available to members of the TWU.' A copy of this flyer is attached at Appendix 3C. The letter clearly suggests that the fee is payable unless union membership is taken out.

71. A comparison between the 2001 and 2002 Bills is at Appendix 3D.

Appendix 3A

OEA's application to have bargaining agent fee clauses removed from agreements and subsequent developments

In February 2000 the Commission certified 236 agreements negotiated between electrical contractors and the Victorian ETU. The agreements each contained a clause stipulating that:

> *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 per annum which ever is the greater is payable to the ETU on or prior to the 16th December each year.*
>
> *The relevant employee to which this clause shall apply shall pay the 'Bargaining Agents Fee' to the ETU in advance on a pro-rata basis for any time which the employee is employed by the company. By arrangement with the ETU this can be done in two instalments throughout the year.*[56]

The fee is significantly in excess of annual ETU membership dues of approximately $350 for members employed at trade qualified level.[57]

The clause expresses the bargaining fee as an obligation on all employees, in order to avoid the prohibitions on directly discriminating on the grounds of union membership or non-membership in the freedom of association provisions of the WR Act.[58] However, in practical terms, the clause is directed at non-members. An article by ETU Secretary, Dean Mighell about bargaining agent fees (which was available on the ETU website at the time of writing) states that the union '…will consider actively discriminating in favour of its members and waive any fee'[59]. Mr Mighell was previously reported as stating that '…while the minimum $500 fee applied to all employees, the union chose to waive the fee for union members'.[60]

The Employment Advocate (EA) unsuccessfully sought leave to intervene in the certification proceedings for the ETU agreements before Senior Deputy President Williams. Subsequently the EA made application for the removal of the compulsory union fee clauses on the ground that they were 'objectionable provisions' under section 298Z of the WR Act.

In February 2001, the Commission handed down its decision on the EA's 298Z application. McIntyre VP found that the clause did require or permit conduct by the employer of at least one of the types described in s298K(1), as it required or permitted the employer to take action against an employee who fails to pay the fee to the ETU, eg. disciplinary action or dismissal. However, despite finding that the clause was there '…to persuade new employees to join, or to coerce new employees into joining the ETU',[61] McIntyre VP held that the clauses were not objectionable, because in his view, the conduct would not be carried out for a reason prohibited by Part XA of the WR Act.

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[56] *Employment Advocate re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000 - 2003 and other Agreements*, PR900919, 9 February 2001, per McIntyre VP at paragraph 1.

[57] Electrical Trades Union *Bargaining Agent's Fee* (http://www.etu.asn.au/members/agentsfee.html)

[58] Electrical Trades Union *Bargaining Agent's Fee* (http://www.etu.asn.au/members/agentsfee.html)

[59] Electrical Trades Union *Bargaining Agent's Fee* (http://www.etu.asn.au/members/agentsfee.html).

[60] 'Reith attacks union fee plan' *The Age*, 1 July 2000.

[61] *Employment Advocate re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000 - 2003 and other Agreements*, PR900919, 9 February 2001, per McIntyre VP at paragraph 15.

The EA subsequently appealed to the Full Bench of the Commission. The then Minister for Employment, Workplace Relations and Small Business intervened in that appeal on behalf of the Commonwealth to make submissions on the correct interpretation of Part XA. On 12 October 2001, the Full Bench handed down its decision. It held that the clause was not objectionable because it did not, on its face, require or permit conduct in contravention of Part XA. This was because the clause was expressed to apply to all employees, not only those employees who were not members of the ETU. In do doing, the Full Bench noted the conceptual difficulty involved in applying section 298Z, as it requires speculation as to the possible conduct that might arise under a clause, and speculation as to the possible reasons for that conduct.

In addition, the Full Bench cast doubt on the capacity of the Commission to remove such clauses from agreements in the absence of any conduct in contravention of Part XA having occurred pursuant to them.[62] The Full Bench, however, did note that the bargaining services fees in question, if waived for union members and enforced against non-members, would provide a substantial financial incentive for new employees to join the union.[63]

On 23 May 2001, while the EA 298Z matter was under appeal, the Minister for Employment, Workplace Relations and Small Business, the Hon. Tony Abbott MP, introduced the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 (the 2001 Bill) into the House of Representatives. The 2001 Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee for report. The 2001 Bill was before the Senate at the time Parliament was prorogued for the Federal election.

The 2001 Bill would have amended the freedom of association provisions in Part XA of the WR Act to prohibit:

- industrial associations from requiring non-members to pay fees for 'bargaining services', except where the non-member has agreed in writing to pay a fee in advance of the bargaining services being provided (such a fee was defined in the WRA (PCUF) Bill 2002 as a 'non-compulsory fee');
- certain discriminatory or injurious conduct towards a person because he or she refused to pay a fee claimed for bargaining services, or because he or she has paid, or proposes to pay, a non-compulsory fee; and
- industrial associations from encouraging or inciting others to take discriminatory action against a person because he or she refused to pay a fee claimed for bargaining services, or because he or she has paid, or proposes to pay, a non-compulsory fee.

At the time, it was thought that an effect of these amendments would be that the Commission:

- would be required to refuse to certify an agreement if it was satisfied that it contained a provision that would require or purport to require non-members to pay a fee to an industrial association for bargaining services; and

[62] PR910205, 12 October 2001; paragraphs 33 and 34.

[63] PR910205, 12 October 2001, paragraph 26.

- would have the power to remove such clauses from agreements under s.298Z on the basis that they required or permitted conduct in contravention of Part XA.

There is now doubt as to whether the amendments would have operated in the manner intended, given that the Full Bench had expressed doubts as to the capacity of the Commission to remove such clauses from agreements in the absence of any conduct in contravention of Part XA having occurred. In that case, the Full Bench acknowledged the possibility of future contravening conduct eg if the union waived the obligations under the fee clause in respect of its members, and the employer subsequently took adverse action against a non-member who refused to pay the fee. The Full Bench did not consider that there was sufficient connection between the clause (which did not on its face require or permit conduct in contravention of Part XA) and the potential conduct to enable it to be removed under section 298Z.

The WRA (PCUF) Bill 2002 will address this issue by amending the definition of 'objectionable provision' in section 298Z to include clauses that provide for the payment of a bargaining services fee. The Commission will be able to remove these clauses from agreements, irrespective of whether on their wording they require or permit conduct in contravention of Part XA, and irrespective of whether any conduct has occurred or is likely to occur.

In the Coalition's 2001 workplace relations election policy (released in October 2001) the Government confirmed its commitment to introducing legislation to prohibit trade unions involved in workplace bargaining from imposing a compulsory fee on non-union employees.[64] As well, on 14 November 2001, Merkel J of the Federal Court handed down his judgment in the matter of *Electrolux Home Products Pty Ltd v Australian Workers Union*[65], in which he held that bargaining agent fees were not matters pertaining to the employment relationship. Therefore, industrial action taken by the unions in support of claims for a certified agreement that included a claim for a bargaining agent fee was not protected action under section 170ML of the WR Act.

Although Merkel J held that not every term of a proposed agreement had to pertain to the employment relationship, he expressed the view that '…a substantive, discrete and substantial matter that did not pertain to the requisite relationship' could not be included in claims for a proposed agreement under Division 2 of Part VIB of the WR Act.[66] A bargaining agent fee clause was such a matter.

His Honour also added that if a proposed agreement included a 'substantive, discrete and substantial matter' as described above, the agreement might not be able to be regarded as an agreement in accordance with Division 2, and therefore might not be capable of certification.

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[64] *Choice and Reward in a Changing Workplace*; pages 7 and 30.

[65] [2001]FCA 1600

[66] Section 170LI of the WR Act requires that, for an application for certification to be made under Division 2 of Part VIB, there must be a written agreement about matters pertaining to the relationship between:

- an employer who is a constitutional corporation or the Commonwealth; and
- all persons who, at any time the agreement is in operation, are employed in a single business, or part of a single business, of the employer and whose employment is subject to the agreement.

An appeal to the Full Federal Court against the judgment of Merkel J has been listed for hearing on 27 and 28 May 2002.

Appendix 3B

International provisions

In the second reading debate on the 2001 Bill and the Senate Inquiry into the 2001 Bill, analogies were drawn between compulsory union fees and 'agency shop' arrangements operating in other nations such as the United States[67] and Canada.[68] Agency shops are among a number of 'union security' arrangements operating in the United States, Canada, South Africa, Israel and Switzerland.

The quite substantial differences between the Australian workplace relations system and the systems of these other nations make comparisons inappropriate.

In the United States, Canada and Israel, unions can gain exclusive representation rights in respect of particular bargaining units where they have a majority of the workers in that bargaining unit as members. In the Australian federal jurisdiction, in contrast, unions do not have exclusive bargaining rights; the WR Act provides for both individual and collective bargaining. Within the collective bargaining stream, there are alternatives to single union representation - employers may conclude agreements directly with employees under section 170LK or with more than one union under section 170LJ.

In the United States, Canada and Israel, unions winning exclusive representation rights also have a counterbalancing duty of fair representation imposed upon them. That is, they have a responsibility to fairly represent the interests of all employees in the bargaining unit regardless of their membership status. No such requirement exists in the Australian federal workplace relations system.

It is worth noting that in the United States, Canada, Israel and South Africa, agency shop fees may be no more than the membership fees paid by union members. In the United States, the quantum of bargaining fees has been refined over time through statute and case law so that such fees can only be enforced to the extent that they relate to the bargaining activities of unions. Although there is no formula mandated for the calculation of the quantum of bargaining fees, unions must be able to defend their fee if challenged by a non-member.

Although federal legislation in the United States makes provision for agency shops, it also permits such arrangements to be made unlawful by State law. 'Right to Work' legislation that over-rides the federal legislation and makes the enforcement of agency shops illegal has been enacted in 21 State jurisdictions. Right to work legislation takes precedence over union security legislation and prevents employees from being dismissed because they refuse to join, or pay fees to a union.

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[67] *Hansard* (House of Representatives), 28 June 2001 at 28862 per the Member for Lalor, Julia Gillard MP.

[68] Senate Employment, Workplace Relations, Small Business and Education Legislation Committee; Prohibition of Compulsory Union Fees Bill 2001; Labor Senators' report, page 15.

Appendix 3C

Queensland TWU Flyer

Fax From : 87552493366

TRANSPORT WORKERS' UNION OF AUSTRALIA
QUEENSLAND BRANCH
ABN: 60 519 893 130

11 Alexandra Place
MURARRIE QLD 4172
Telephone: (07) 3890 3666
Toll Free: 1800 804 533
Fax: (07) 3890 1105
Email: lwo@qld.twu.com.au

All correspondence to:
HUGHIE WILLIAMS
BRANCH SECRETARY
PO BOX 452
CANNON HILL
QLD 4170

"TWU WORKING FOR ITS MEMBERS"

FEE FOR SERVICE

The TWU have reached the stage where we are <u>not</u> prepared to work for <u>non-union</u> workers any longer.

If a worker chooses not to be a member, expect not to be taking advantage of any gains made by the union in your workplace.

If EBA's are put in place, and wage increases are put in place, workers who choose not to be members have two choices 1) pay the fee, or 2) don't get the increase.

The fee charged will be $400 per non-union member, per year of the EBA.

In both business, and government, terminology commonly referred to as **"mutual responsibility"** is used to describe the responsibility of one party to another. If those who are not members of the TWU wish to take advantage of the hard work done by the TWU to ensure they continue to have better pay and conditions, they have a **"mutual responsibility"** to pay for the service rendered.

TWU members are fed up with irresponsible "hangers on" taking the benefits of union membership without contributing in any way to the strength and viability of the union.

Note: TWU members have nothing to fear from this policy change, they pay their fee for service by paying union dues.

The TWU would advise all non-union workers currently receiving the benefits of the work done by the TWU to join today – avoid the fee – and take advantage of the many benefits available to members of the TWU.

Authorised by Hughie Williams – Branch Secretary – Transport Workers Union – Queensland Branch

Appendix 3D

Comparison between 2001 and 2002 Bills

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001

The 2001 Bill would have:

- **prohibited** an industrial association from **demanding or receiving** a fee for bargaining services from a person who was not a member of the association, except where the employee has agreed in writing to pay a fee in advance of the bargaining services being provided (defined as a 'non-compulsory fee'). Non-compulsory fee' was defined as: a fee or levy payable wholly or partly for the provision of bargaining services if:

  – the fee or levy is payable to an industrial association or to someone else on behalf of an industrial association; and

  – the person who is liable to pay the fee agrees, in writing and before the bargaining services are provided, to pay the fee or levy.

- **prohibited** employers and others from engaging in **discriminatory or injurious conduct** against a person, because or he she has refused to pay a bargaining services fee, or because he or she has paid or proposes to pay, such a fee (whether or not the fee is a non-compulsory fee);

- **prohibited** an industrial association from **encouraging or inciting** others to take discriminatory action against a person because he or she has refused to pay a bargaining services fee, or because he or she has paid, or proposes to pay, a bargaining services fee (whether or not the fee is a non-compulsory fee).

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

The WRA (PCUF) Bill 2002 proposes to:

- amend section 298Y to make clear that **bargaining services fee clauses** in certified agreements are **void**;

- extend the definition of 'objectionable provisions' in subsection 298Z(5) so that it includes 'a provision of a certified agreement that requires payment of a bargaining services fee'. This would allow the **Commission to remove these clauses** on application by a party or the EA;

- amend subsections 170LU(2A) and 170MD(7)(e) to expressly **prevent the Commission** from **certifying or varying** an agreement that contains an 'objectionable provision';

- **prohibit** a person making a **false or misleading representation** about another person's liability to pay a bargaining services fee;

- **prohibit** employers and others from engaging in **discriminatory or injurious conduc**t against a person, because he or she has refused to pay a bargaining services fee, or because he or she has paid or proposes to pay, such a fee;

- **prohibit** an industrial association from **encouraging or inciting** others to take discriminatory action against a person because he or she has refused to pay a bargaining services fee, or because he or she has paid, or proposes to pay, a bargaining services fee;

- **prohibit** an industrial association from **demanding** a bargaining services fee (whether the demand is in writing or otherwise) from another person.

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

BACKGROUND

The Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 (the WRA (SBPA) Bill 2002) provides for a new requirement that proposed industrial action be approved by participating employees in a ballot in order for the action to be 'protected action' under the *Workplace Relations Act 1996* (WR Act). The WRA (SBPA) Bill 2002 establishes a process for conducting the ballot that is overseen by the Australian Industrial Relations Commission (the Commission).

2. The principal issue for consideration by the Committee as recommended by the Selection of Bills Committee is the 'extent to which enactment would diminish capacity for legitimate industrial action'.

3. Introduction of pre-industrial action ballots is part of the Coalition's election commitment outlined in 'Choice and Reward in a Changing Workplace'. Models for pre-industrial action ballots were included in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (MJBP Bill 1999) and the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000 (SBPA Bill 2000).

4. Both of these Bills were considered by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. In the Senate Committee minority reports on these bills criticisms were raised that secret ballots would be an impediment to unions taking legitimate industrial action and would open up the prospects of longer disputes and litigation. [69]

5. The WRA (SBPA) Bill 2002 has further developed and refined earlier models. 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.

6. 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.

7. Key elements of the new streamlined model are as follows:

- enabling an application for a ballot to be made up to 30 days before the nominal expiry date of any existing certified agreement – this means that unions will be able to complete their ballot process before the nominal expiry date of an agreement and take protected action as soon as the agreement expires (the WR Act allows protected action to take place only after the nominal expiry date has passed). Also there is

[69] EWRSBE Committee Report on the provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, (Democrat Senator's Report), page 398.

scope under the Bill to extend, by mutual consent, the thirty day period for which the secret ballot remains valid;

- requiring the Commission to act as quickly as practicable in dealing with an application for a ballot – as far as reasonably possible, within 2 working days;
- providing for a quorum of 40 percent (previous models required 50 percent);
- availability of an attendance ballot, where it would be more efficient and expeditious than a postal ballot;
- enabling applicants to run their own ballots, provided they are advised by an authorised independent advisor to ensure the integrity of the ballot;
- requiring that the ballot approve the nature of the proposed industrial action without the need to nominate the precise form and nature of the proposed action or the specific day or days on which the industrial action will occur. A requirement in earlier models that a prescribed statement be included has been removed – this model will require only that the ballot paper include a statement that the vote is secret and the voter is free to choose whether or not to support the proposed industrial action;
- protection against legal challenge to the validity of the ballot or the ballot process – a Court challenge will generally only be allowed where the secrecy of the ballot has been compromised, where a person has acted fraudulently or provided misleading information to the Commission or where there has been an irregularity that has affected the outcome of the ballot. This will avoid costly and disruptive challenges to the ballot process that would inevitably result in delay in the taking of protected action. Those who apply for a ballot, however, will be able to appeal to a Full Bench of the Commission if they are unhappy with the way the Commission has in the first instance, dealt with their application; and
- providing for the Commonwealth to pay 80 percent of the reasonable costs of the ballot directly to the relevant service provider on presentation of the relevant costs to the Industrial Registrar within a reasonable time after the completion of the ballot.

Current process for approval of industrial action

8. The *Workplace Relations Act 1996* (WR Act) provides significant protections for employees and unions organising industrial action in order to advance their claims in respect of a single business certified agreement. This protection is subject to certain procedural requirements (such as giving notice to the employer of proposed industrial action) and limited to situations where there has been a genuine attempt to reach agreement. Unions and employees complying with these requirements gain immunity from most forms of civil liability that may arise from the industrial action (section 170MT). In addition, employers are prohibited from dismissing or injuring an employee in his or her employment wholly or partly because the employee has taken protected action (section 170MU).

9. At present, there is a requirement that industrial action organised by a union must be duly authorised in accordance with the organisation's rules in order to attract protection (section 170MR). Their rules may require endorsement by members of any proposed action,

however, there is no an explicit requirement in the WR Act that members participate in the decision or formally vote to approve the taking of industrial action.

10. Existing provisions in the WR Act give the Commission the discretion to order secret ballots in relation to industrial action, however, these provisions are rarely used and generally ballots are only ordered when industrial action is ongoing, that is, after industrial action has already commenced. Ballots in these circumstances therefore serve a different purpose to approval ballots of the sort provided for in the WRA (SBPA) Bill 2002.

11. Details of the existing arrangements for secret ballots to be conducted under the WR Act are at Appendix 4A.

POLICY RATIONALE

12. 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.

13. 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.

14. This problem was acknowledged by Professor Niland in the 1989 NSW Green paper, *Transforming Industrial Relations in NSW*; he stated:

> *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.*[70]

15. A more general problem in relation to union consultation in agreement-making was highlighted by the results of the 1995 Australian Workplace Industrial Relations Survey which shows that, among unionised workplaces with 20 or more employees, unions failed to consult employees in relation to collective agreement negotiations at 27 percent of workplaces.

16. The proposals for compulsory secret ballots as a pre-condition to accessing protected action were supported by the Australian Chamber of Commerce and Industry in their submission to the Senate Inquiry into the SBPA Bill 2000 which stated: 'It is highly desirable that industrial action not occur unless due democratic processes have been undertaken'.[71]

17. The Australian Industry Group expressed concern in its submission on the MJBP Bill 1999 that compulsory secret ballots may make some disputes harder to resolve, but if

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[70] Niland, J. (1989) *Transforming Industrial Relations in New South Wales*, Green Paper Volume 1, p101.

[71] ACCI Submission to the Senate Employment Workplace Relations, Small Business and Education Inquiry into Four Bills to Amend the *Workplace Relations Act 1996*. Page 24.

overseen by the Commission then secret ballots were considered an appropriate precondition for the taking of protected industrial action.[72]

18. The introduction of a statutory link between protected action and secret ballots would provide twofold protection for employees and union members:

- the union members or employees who would be directly affected by, and involved in, the proposed industrial action would be able to decide for themselves whether industrial action is warranted; and

- union members and employees would be able to express their view, away from union or peer pressure, through the mechanism of a secret ballot.

19. The proposal to introduce pre-industrial action ballots is consistent with the provisions applying to the approval of certified agreements. Just as an agreement must be approved by a valid majority of the employees who will be subject to the agreement, so there would be a requirement that industrial action be authorised by those employees or union members who will be most affected by it.

20. Full participation in decision-making about industrial action by the employees most directly affected is critical. It is those employees who will, if industrial action proceeds, lose pay and potentially risk deterioration in their relationship with their employer (noting that section170MU of the WR Act provides employee protection against dismissal on the grounds of engaging in protected action). Employees may also be detrimentally affected in the longer term by industrial action that results in economic losses to their employer.

21. In addition to enhancing freedom of choice for employees, the introduction of pre-industrial action ballots would strengthen the accountability and responsiveness of unions to their members by encouraging meaningful consultation. As has been observed in the UK the use of ballots, once incorporated into unions' consultative processes, may extend beyond the authorisation of industrial action and enhance democratic processes within unions more generally.

Compliance with International Labour Standards

22. The minority report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee in its consideration of provisions in the MJBP Bill 1999 expressed concern about whether the model for secret ballots in that Bill raised issues about Australia's compliance with ILO standards.

23. In general the International Labour Office considers that the prerequisites for rendering industrial action lawful should be reasonable and not place a substantial limitation on taking industrial action. The International Labour Office accepts that a requirement for a secret ballot prior to taking industrial action does not of itself contravene ILO principles and standards on freedom of association.

24. The approach taken in developing the model contained in this Bill was developed following consultation with the International Labour Office with a view to ensure that the underlying elements of the model for secret ballots meet Australia's international obligations.

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[72] Australian Industry Group and EEASA submission to the Senate Inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.

These underlying elements include access to ballots by way of application to an independent tribunal, statutory presumption of the validity of a ballot approved by the independent tribunal, expeditious consideration of applications for a ballot, payment of a substantial part of the reasonable costs of a ballot by the Commonwealth.

25. The Government believes that the proposed system of secret ballots is appropriate for Australian conditions and that it meets international standards.

26. Secret ballots have been integrated into the approval process for industrial action in many other countries without resulting in a diminished capacity for employees to take legitimate industrial action. This is discussed further at Appendix 4B.

27. The policy rationale underpinning the WRA(SBPA) Bill 2002 is based on democratic principles and aims to ensure that when employees do engage in industrial action they have not been threatened or intimidated into supporting action that they do not feel is in their best interest. While the provisions in the WRA(SBPA) Bill 2002 will eliminate protected industrial action that does not enjoy the genuine support of the employees involved, it will not diminish their capacity to take legitimate industrial action.

SUMMARY OF PROVISIONS

28. Following is a summary of the practical aspects of a secret ballot process under the WRA(SBPA) Bill 2002.

Who may apply and when?

29. Applications for a secret ballot must be made to the Commission. The application for a ballot can only be made when a bargaining period is in place and not more than 30 days before the last occurring nominal expiry date of any relevant certified agreements (see proposed section 170NBB).

30. The following people may apply for a ballot:

- If an organisation of employees initiated the bargaining period – that organisation; or
- If any employee or employees initiated the bargaining period – any employee whose employment would be subject to the proposed agreement (note that any such application requires the support of a prescribed number of employees) (see proposed section 170NBB).

31. Proposed section 170MJA provides that if an employee wishes to remain anonymous, they may appoint an agent to initiate the bargaining period, represent them during the application for a ballot and provide notice to the employer of industrial action. The Bill makes it an offence (subject to a number of exceptions) for a person to disclose information that will identify another person as someone who has appointed an agent (see proposed section 170MJB).

What must be included in an application?

32. Proposed section 170NBBA requires that the application for a ballot include the question(s) to be put in the proposed ballot, including the nature of the proposed industrial action and the details of the types of employees who are to be balloted. Certain other material

must accompany the application, eg the notice initiating the bargaining period (see proposed section 170NBBB).

Determination of application

33. The Commission must, as far as is reasonably possible, determine all applications within 2 working days after the application is made (see proposed section 170NBCA). The Commission may notify the employer of the application (see proposed section 170NBC). The applicant and other parties (including the employer) may make submissions to the Commission relating to the ballot (proposed section 170NBCB).

34. Proposed section 170NBCC gives the Commission wide powers to issue directions on the application of any aspect of the conduct of a protected action ballot. This can be at the Commission's own motion or following a request for such directions from a party or relevant employee. A civil penalty applies where a person who is subject to such an order fails to comply with it (see proposed section 170NBCQ and proposed amendments to section 170ND at item 26).

35. The application must not be granted unless the Commission is satisfied that the applicant has genuinely tried, and is still trying, to reach agreement with the employer (see proposed section 170NBCF).

What is to be included in the order?

36. Proposed section 170NBCI sets out the matters that must be included in an order for a secret ballot.

37. A postal ballot is to be the default method, but another method may be used if the Commission is satisfied that it is more efficient and expeditious than a postal ballot. If the ballot is an attendance ballot, then the order must specify that the vote must take place in non-working hours (i.e. before or after work or during breaks).

38. The Commission also has the discretion, in exceptional circumstances, to:

- Reduce the quorum for the vote below 40%
- Order that the period of notice prior to taking industrial action be increased from 3 days up to a maximum of 7 days.

39. The President of the Commission may develop guidelines setting out appropriate timetables for the conduct of ballots (see proposed section 170NBCJ).

40. The Commission has various powers to require information relevant to preparing the roll of voters. There are provisions in the Bill covering who must be included on the roll (i.e. who is entitled to vote) and for the inclusion or removal of persons from the roll (see proposed sections 170NBCK – 170NBCN).

What is required for a ballot to approve action?

- At least 40% of the relevant employees must vote (or a lesser percentage ordered by the Commission) and more than 50% of the votes must approve the action.

- The action must commence within a 30-day period beginning on the later of either the date of the declaration of the ballot or the latest nominal expiry date of any existing certified agreements.

41. The 30-day period may be extended once if both the employer and applicant jointly agree (see proposed section 170NBDD).

Who can be a ballot agent?

42. The Commission may appoint the Australian Electoral Commission (AEC) or another person as the authorised ballot agent. However, the non-AEC person must meet certain criteria before they are appointed (eg that they are capable of ensuring that the ballot is fair and democratic (see proposed section 170NBE).

43. If the applicant seeks to be the ballot agent, or nominates a person who is not sufficiently independent of the applicant, then the applicant must also nominate an authorised independent adviser. The authorised independent adviser must also meet certain criteria before the Commission can appoint them, including that they are capable of giving the ballot agent advice and recommendations directed to ensuring the ballot will be fair and democratic (see proposed section 170NBEA).

44. Following a ballot, both the ballot agent and independent adviser must forward a report to the Industrial Registrar on the conduct of the ballot. The report must set out any complaints or irregularities in relation to the conduct of the ballot (see proposed section 170NBDCA).

Ballot Cost

45. The Commonwealth will be directly liable to the ballot agent for 80% of the reasonable ballot costs provided that the applicant, within a reasonable time, notifies the Industrial Registrar of the cost of the ballot and the Industrial Registrar determines the reasonable ballot cost (see proposed sections 170NBF, 170NBFA).

Limits on challenge

46. The Bill limits when an order for a ballot or the result of a ballot may be challenged in a Court. In order for an order or ballot to be challenged, there would generally need to be a contravention of the secret ballot provisions that amounts to more than technical breach or that involved fraud or misleading the Commission. With a potential challenge to a ballot result, the irregularity must also have affected the outcome of the ballot (see proposed sections 170NBGBA and 170NBGBB).

47. Protection is also provided for a person who, organises or participates in industrial action on the basis of a ballot that purportedly approves the action but which is subsequently demonstrated to not have validly authorised the ballot (see proposed section 170NBGB).

48. A comparison of the key provisions between the 2000 Bill and the WRA (SBPA) Bill 2002 is at Appendix 4C.

Appendix 4A

Secret Ballot provisions currently available in the WR Act

Secret ballots are currently used in many contexts within the federal system, including to: endorse enterprise agreements; elect union officials; and effect amalgamations and withdrawal from amalgamations.

Some changes to the secret ballot provisions of section 135, for the approval of agreements or industrial action, were introduced in 1996, to reflect the stronger focus of the WR Act on enterprise-level bargaining, and the appropriate linkage between protected action and pre-industrial action ballots; however, secret ballots are still used infrequently to gauge employee attitudes towards industrial action, and generally only after considerable disputation has already occurred. The Commission's statistics indicate that between the commencement of the WR Act on 1 January 1997 and 3 June 2001 only 10 applications were made under section 135 for a secret ballot.

Currently the Commission has the power to order that secret ballots be held: to test union members' attitudes in relation to an industrial dispute; to test union members' or employees attitudes in relation to industrial action; and for the approval of proposed certified agreements.

The particular circumstances in which the Commission may currently order that a secret ballot be conducted are specified in Division 4 of Part VI of the WR Act as follows:

- where the Commission is dealing with an industrial dispute concerning a registered organisation, and feels that the prevention or settlement of the dispute may be helped by a ballot of the organisation's members (subsection 135(1));

- where industrial action is being taken or is threatened, impending or probable and the Commission considers that a ballot of members might help stop or prevent the action, or help settle the matters giving rise to such action (subsection 135(2));

- where the Commission is not satisfied that the majority of employees have genuinely consented to a certified agreement (subsection 135(2A));

- where industrial action is being taken or is threatened, impending or probable in relation to a bargaining period and the Commission considers that a ballot of employees might help stop or prevent the action, or help settle the matters giving rise to such action (subsection 135(2B)); or

- where members of that organisation have been requested to engage in industrial action and an application has been made for a secret ballot by at least the prescribed minimum number of relevant affected members (section 136).

The Commission's power to order a pre-industrial action secret ballot (including on application by members of an organisation) is discretionary.

In most cases the results of secret ballots conducted under these provisions are used to inform the Commission in any conciliation or arbitration proceedings; however, where the ballot relates to the taking of industrial action in pursuit of a certified agreement (under subsection 135(2A)), a majority vote against industrial action means that any industrial action taken will not attract protection from civil immunity (section 170MQ).

Appendix 4B

Secret ballots – the international experience

Secret ballots have been integrated into the approval process for industrial action in many other countries without resulting in a diminished capacity for employees to take legitimate industrial action.

In the United Kingdom, compulsory pre-strike ballots introduced by the Thatcher government are well-established, and were retained in the Labour Government's *Employment Relations Act 1999*.

Union leaders have acknowledged that requirements for secret ballots for elections and for authorisation of industrial action have assisted in improving democracy within unions. For example, a paper Commissioned by the UK Trade Union Congress in 1994 stated:

> *In recent years there have been encouraging internal 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 own members, through the introduction of postal ballots for their own elections and before the calling of strikes and other forms of industrial disputation.*[73]

Despite changes to the legislation that require that unions meet the full cost of conducting ballots, balloting has become far more widespread in the UK than the law requires. In addition to pre-industrial action balloting, union positions on proposed settlements and employers' last offers are often determined through balloting[74].

In Japan both the right to strike and the requirement for pre-industrial action secret ballots flow from the Constitution of Japan.[75] In Germany, law regulating industrial action is almost exclusively judge-made law and the pre-industrial action secret ballot requirement resulted from a 1971 Federal Labour Court decision.[76] Legislation mandating pre-industrial action secret ballots has also been introduced in Canada and Ireland since 1990. Following legislative reforms at the provincial level during the 1990s, all Canadian jurisdictions (federal and all 10 provincial jurisdictions) now provide for some form of secret ballot vote prior to the commencement of a strike.[77] In Ireland the *Industrial Relations Act 1990* required that within 2 years of the Act being passed, the rules of every trade union had to contain a provision requiring a secret ballot before the union could organise, participate in, sanction or support strike or other industrial action with immunity from civil actions.[78]

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[73] Taylor, T. (1994) *The Future of Trade Unions*, Andre Deutsch Limited, Great Britain, pp220-221.

[74] Undy, R., Fosh, P., Morris, H., Smith, P. and Martin, R. (1996) *Managing the Unions: The Impact of Legislation on Trade Unions' Behaviour*, Clarendon Press, Oxford, p205.

[75] Hanami, T. and Komiya, F. (1999) Japan, *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer Law International, London.

[76] Weiss, M. and Schmidt, M. (2000) Federal Republic of Germany, in *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer Law International, London.

[77] Arthurs, H., Carter, D., Fudge, J., Glasbeer, H., Trudeau, G. 1993 *Labour law and Industrial relations in Canada.* Fourth edition, Klewer/Butterworths, The Netherlands.

Carter, D. England, ., Etherington, B., Trudeau, G. 2001 'Canada' in *International Encyclopaedia for Labour Law and Industrial Relations*

[78] Redmond, M. S. 1996, 'Ireland', *International Encyclopaedia for Labour Law and Industrial Relations*, vol. 8, pp 187-197.

Levels of industrial action

During the 1980s and 1990s the international trend, particularly across OECD countries, was towards lower levels of industrial action. Isolating the cause of changes in levels of industrial disputation is difficult and in most cases there may have been a number of contributing factors, including economic and structural change as well as legislative reform. The evidence linking pre-industrial action secret ballots provisions specifically with reduced levels of industrial action is quite limited. Table 1 below compares working days lost per 1000 employees for countries that have pre-industrial action secret ballots with Australia and the OECD average for 1990-1999.

In the U.K. the introduction of pre-strike ballots in 1980 coincided with a substantial reduction in industrial disputation. Although there were a range of other factors at work in the reduction of disputation levels, the reduction has been so significant that researchers acknowledge that the Thatcher Government's legislative reforms, of which pre-industrial action secret ballots were one part, were partially responsible for the decline.[79]

Ireland experienced a similar decline in levels of industrial action over the 1980s and 1990s. It is not possible to assess the contribution, if any, of the secret ballot regime to the decline, but it would appear that the most significant decline in levels of industrial action pre-dates the introduction of mandatory secret ballots as the downward trend started in 1986.[80]

The introduction of mandatory pre-industrial action secret ballots in all Canadian jurisdictions during the early 1990s has not appeared to temper the level of industrial action to any real extent. Although, it could be argued that the level of industrial action might have been higher, had mandatory ballots not been introduced. The dispute figures for Germany do not include 'warning strikes' called during negotiations in order to exert pressure on employers and to accelerate proceedings. This tactic has been widely used since the 1970s and accounts for most industrial 'disputes' in Germany.[81] A range of factors including culture, enterprise unions, and corporate management has been used to explain the low dispute figures for Japan. For example, strike action is not the most typical act of dispute as Japanese unions have favoured a range of tactics developed to embarrass management into conceding to union claims.[82]

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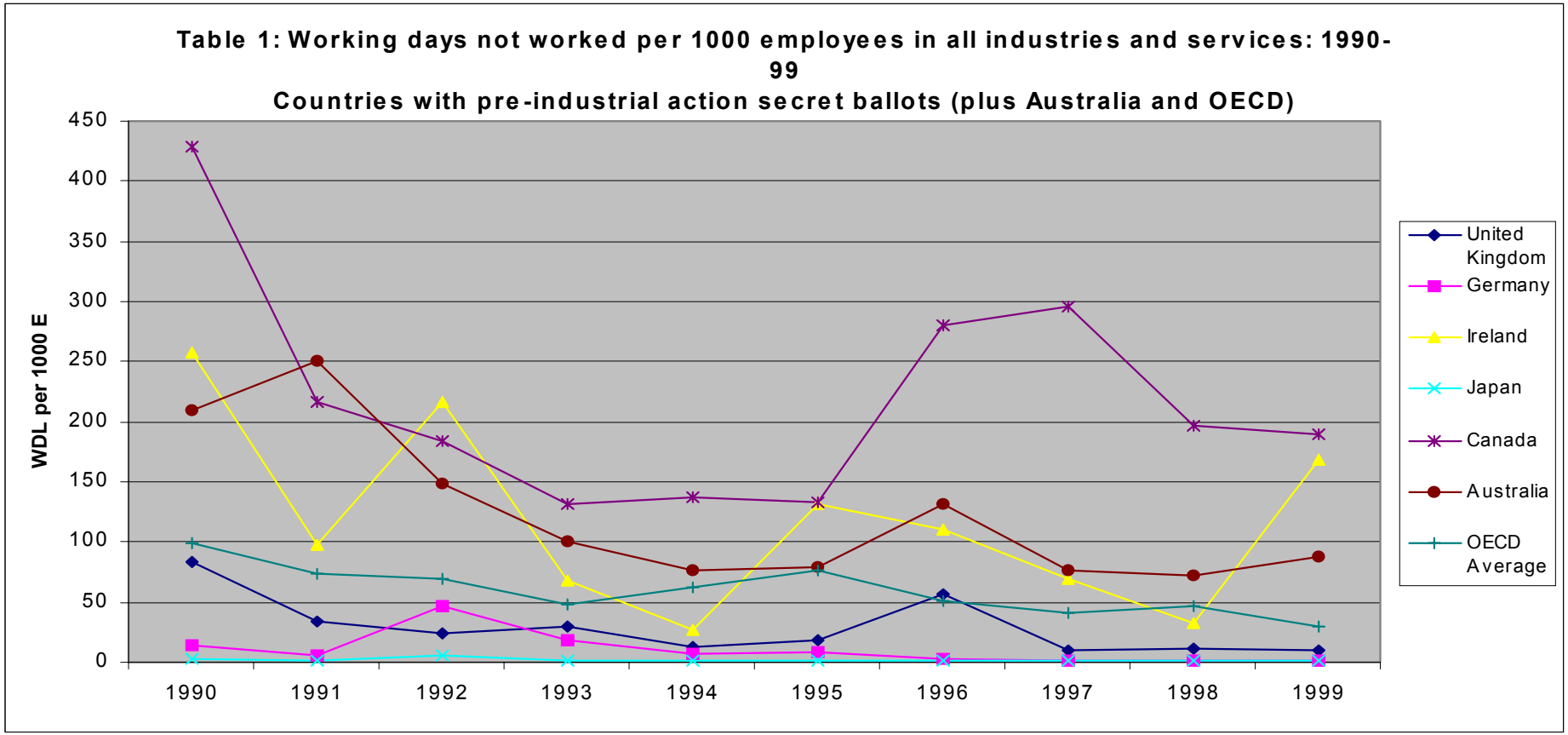
[79] See for example Elgar, J. and Simpson, R. The Impact of the Law on Industrial Disputes in the 1980s: Report of a Survey of Printing Employers, Centre for Economic Performance, Discussion Paper No.194, 1994

[80] Redmond, M. S. 1996 *Op cit.*

[81] Weiss, M. and Schmidt, M., 2000 *Op cit*.

[82] Hanami, T. and Komiya, F. 1999 *Op cit.*



Labour Market Trends, June 2001, Government Statistical Service (UK), p196.

Note: Comparisons between different countries' industrial disputes statistics need to be used with great caution as disputes statistics are compiled using widely differing definitions and methods of data collection. For example, in Australia a dispute is included in the official statistics if it causes the loss of ten or more working days; in the UK, a dispute is counted if it involves at least 10 workers stopping for at least 1 day, or if 100 working days are lost.

Appendix 4C

Comparison between the key provisions of the 2000 Bill and the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002.

Following discussions with the International Labour Office, a number of modifications were made to the earlier models so that the model provided for in the WRA (SBPA) Bill 2002 would be consistent with key principles discussed with the International Labour Office. These changes greatly streamline and simplify the process of applying for and conducting a ballot and deliver more flexibility to those wanting to take industrial action. They also take into account key concerns raised before this Committee when considering the 2000 Bill. The changes are outlined below.

Information to be provided by ballot applicants

- The 2000 Bill required a range of material to be included in and to accompany the application, including a proposed ballot timetable, the voting method, the proposed questions, which had to include the precise nature and form of the proposed action and the exact day or days on which the action would occur, the nominated ballot agent and the types of employee to be balloted.

- The WRA (SBPA) Bill 2002 reduces the material to be included in the application – applicants only have to include the ballot question, the types of employees to be balloted, the nominated ballot agent. Further requirements may be outlined in Rules made by the Commission. [170NBBA].

- The 2000 Bill also required that an application be accompanied by declarations that the industrial action is not in support of claims to include a provision which would breach the freedom of association provisions of the Act and a written notice showing that the application has been properly authorised.

- The WRA (SBPA) Bill 2002 requires the same accompanying material as that required by the 2000 Bill. [170NBB]

Prerequisites for the Commission making a ballot order

- The 2000 Bill included a range of matters that the Commission had to be satisfied about before it could make a ballot order. These matters included a range of things that were provided for by other provisions in the Bill (for example the appropriateness of the ballot agent), and some independently prescribed matters such as satisfaction there are not sufficient grounds to accept a submission that the applicant has not genuinely tried to reach agreement with the employer.

- The WRA (SBPA) Bill 2002 has deleted most of these requirements, which are provided for through other operative provisions in the current Bill. The sole remaining matter about which the Commission must be satisfied is that the applicant has (and is continuing to) genuinely tried to reach an agreement with the employer. [170NBCF]

When an application can be made

- The 2000 Bill required that an application could not be made unless a bargaining period was in place and the nominal expiry date (NED) of any current certified agreement had passed.

- The WRA (SBPA) Bill 2002 still requires a bargaining period to have been notified, but the Bill allows applications to be made up to 30 days before the end of the NED of the certified agreement. This means that unions will be able to complete their ballot process and take protected action as soon as the agreement expires, although protected action can only take place once this date has passed and appropriate notice was given. [170NBB(1A)]

- To expedite the ballot process, the requirement for the Commission to deal with an application for a secret ballot has been reduced from 4 days to 2 days, or, where this is not reasonably possible, as quickly as practicable. [170NBCA(1)]

Ballot Question

- The 2000 Bill required a large amount of detail in the ballot question. For example, it had to outline the precise nature and form of the industrial action and nominate a specific day on which the industrial action will occur. It also had to include a prescribed statement about the ballot.

- The WRA (SBPA) Bill 2002 removes some of these elements, reducing the amount of detail in the question. The ballot paper no longer requires the prescribed statement – now all that is required is that the ballot state that the vote is secret and the voter is free to choose whether or not to support the proposed industrial action. [170NBDA]

Conduct of Ballot

- The WRA (SBPA) Bill 2002 does not require a register of ballot agents. Instead, the Commission will have the power to appoint a ballot agent who is either the Australian Electoral Commission or any other fit and proper person. [170NBE]

- The 2000 Bill required the person conducting the ballot to be a registered ballot agent who met certain criteria. The WRA (SBPA) Bill 2002 also contains a new initiative which allows applicants (including unions) to conduct ballots themselves. However, in this instance, there will be an additional requirement for an authorised independent adviser who will oversee the conduct of the ballot.

  – The authorised independent adviser must be a person who can satisfy the Commission that he or she is sufficiently independent of the applicant and is capable of providing advice and recommendations to the ballot agent that are directed towards ensuring the ballot is fair and democratic. An authorised independent adviser will also need to be appointed if the ballot agent is a person who is not sufficiently independent of the applicant. [170NBE, 170NBEA]

- The WRA (SBPA) Bill 2002 also contains a new requirement that the authorised ballot agent and the authorised independent adviser provide a ballot report to the

Industrial Registrar after the ballot has been conducted. The report will include irregularities or complaints received regarding the conduct of the ballot. The report may be taken into account by the Commission in future decisions to appoint ballot agents. [170NBDCA]

- The 2000 Bill had a strond preference for postal ballots. Similarly, the WRA (SBPA) Bill 2002 will favour a postal ballot, but the Commission will be able to order a different voting method if that method is more efficient and expeditious. This would enable an on-site ballot to occur quickly when necessary. [170NBCI(2)]

Quorum requirements

- The 2000 Bill required a quorum of 50% of eligible voters.
- The quorum in the WRA (SBPA) Bill 2002 has been reduced to 40%.

When industrial action can occur

- The 2000 Bill required applicants for a ballot to nominate the exact day or days on which protected action was to occur in the application for a ballot and in the ballot question. In addition, 3 days notice had to be given of the protected action.
- The WRA (SBPA) Bill 2002 no longer requires that a day is nominated for the industrial action, either in the ballot application or in the ballot question. The industrial action will be protected action provided that it commences within 30 days after the results of the ballot approving the action have been declared and the required notice is given (required notice is usually 3 days but may be up to 7 days if the Commission determines that exceptional circumstances exist to warrant a longer period of notice. [170NBDD]

Cost of a ballot order

- The 2000 Bill required ballot applicants to pay 80% of the reasonable ballot costs, which could be reimbursed by the Commonwealth.
- The WRA (SBPA) Bill 2002 places liability for 80% of the reasonable ballot costs directly on the Commonwealth. This payment will be made directly to the ballot agent so that the applicant will not have to find 100% of the ballot cost up-front. [170NBF, 170NBFA]

Protection against Court action

- The 2000 Bill did not restrict Court challenge to secret ballots.
- The WRA (SBPA) Bill 2002 limits the ability of a person to challenge an order for a ballot or a ballot result in the Courts. A challenge will generally only be allowed where the secrecy of the ballot has been compromised, where a person has acted fraudulently or provided misleading information to the Commission or where there has been an irregularity that has affected the outcome of the ballot. This will avoid costly and disruptive challenges to the ballot process that may otherwise delay the taking of protected industrial action. [170NBGBA, 170NBGBB]

5. Workplace Relations Amendment (Genuine Bargaining) Bill 2002

BACKGROUND

The Workplace Relations Amendment (Genuine Bargaining) Bill 2002 (WRA(GB) Bill 2002) proposes amendments to strengthen the provisions of the *Workplace Relations Act 1996* (the WR Act) that emphasise genuine negotiation at the workplace level. Part of the principal object of the WR Act is "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" (paragraph 3(b)). The WR Act provides a limited right to engage in protected industrial action in the negotiation of single business agreements. This approach is broadly the same as that introduced by Labor in the *Industrial Relations Reform Act 1993* when the notion of "protected action" was first introduced. Such protected action is contingent, among other things, on the relevant parties initiating a bargaining period and making a genuine attempt to reach agreement with the other party. These provisions are aimed at reinforcing the emphasis on genuine enterprise and workplace bargaining.

2. Since the early 1990s there has been general support for moving the focus of the industrial relations system away from centralised determination of wages and conditions through industry and occupational level awards to the setting of wages and conditions through agreements reached at the enterprise and workplace level. This shift has occurred at both the federal and state level. In the federal system this change has also involved the development and maintenance of an award safety net of minimum wages and conditions of employment.

3. 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.[83] 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. As the OECD noted:

> *The highly centralised industrial relations system has hampered sound workplace employee relations as well as constraining the development of management skills to deal directly and productively with key features of industrial relations - especially the introduction of new and more efficient work practices. A consensus has emerged that faster progress in labour market reform is badly needed, and that the shift to more decentralised, enterprise-level bargaining holds out the best chance.*[84]

4. It also reflected a broadly based recognition that productivity improvement was required to underpin sustainable increases to wages, conditions and living standards.

5. The first attempts to accommodate the need for workplace level agreements in the federal workplace relations system occurred at the end of the 1980s. When the *Industrial Relations Act 1988* came into effect in March 1989, it made provision (under section 115) for

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[83] Such Government/employer/union agreement on the move to enterprise agreement-making was, for example, noted by the COMMISSION in its April 1991 National Wage Case decision (Print J7400, p. 24) and reflected in the Statement of Agreement at Appendix D of that Decision.

[84] *OECD 1991-1992 Economic Survey*, p.86.

the Commission to certify agreements with outcomes that were not consistent with national wage fixing principles. However, little use was made of these provisions in practice. Moreover, in its April 1991 National Wage Case decision, the Commission rejected calls to provide scope within its wage fixing principles for formalised enterprise bargaining.[85]

6. In October 1991, the Commission took the historic step of introducing an enterprise bargaining principle which allowed for the approval by the Commission of enterprise agreements subject to a number of requirements including a public interest related test that any wage increase had to be based '….on the actual implementation of efficiency measures designed to effect real gains in productivity.'[86] In its decision, the Commission also determined that it would be inappropriate for it to arbitrate in cases involving enterprise bargaining, although it would conciliate where necessary.

7. In its October 1991 decision, the Commission recognised the increasing need for providing scope for flexibility in working arrangements at the enterprise level as well as the involvement of the direct parties in determining the most suitable working arrangements. The Commission stated:

> *Although the concerns expressed in our April decision have not been allayed, we are satisfied that a further and concerted effort should be made to improve the efficiency of enterprises. In all the circumstances confronting us, we are prepared, on balance, to determine an enterprise bargaining principle. (p.3)*
>
> The Enterprise Bargaining Principle would *"place the primary responsibility for achieving successful enterprise bargaining results on the direct parties". (p.5)*

8. When reviewing this decision two years later, the Commission acknowledged that a key reason for the introduction of its enterprise bargaining principle was the widespread acceptance that it was necessary to provide scope for working arrangements to be determined at the enterprise level.

> *The approach of the Commission, in recent years can be seen from the brief summary of the evolving principles and their purpose. There were and are, three key parts to that approach which was directed towards the achievement of a rational and equitable wage system based on accommodating both a national framework of minimum award rates and a primary focus on enterprise bargaining …*
>
> *The third was the introduction of an enterprise bargaining principle. This principle was introduced to further devolve to the parties at enterprise level the prime responsibility for industrial relations outcomes. Such devolution was not merely an end in itself. It was accepted by all as necessary in order to ensure that Australian industry is as efficient, productive and competitive as possible in the longer term interests of all.*[87]

9. Despite the introduction of the Enterprise Bargaining Principle, there was continuing concern that the spread of enterprise bargaining was very slow, and that the take-up of the certified agreement option provided for by the legislative framework was very limited. In

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[85] National Wage Case April 1991 (Print number J7400).

[86] National Wage Case October 1991 (Print number K0300).

[87] October 1993 (Print K9700), pp13-14

1992, further legislative changes were made to the *Industrial Relations Act 1988* with the intention of further promoting the use of agreement making. The Commission's public interest test was abolished for single business enterprise agreements and instead the Commission was required to certify such agreements subject to a number of procedural and fairness tests.

10. The *Industrial Relations Reform Act 1993* sharpened the focus on enterprise level bargaining and introduced a limited right to engage in protected action in support of such bargaining.[88] Protected action was made available only for the single business level. In addition, protected action was limited to circumstances where there was a genuine attempt to reach agreement at the enterprise level. In 1994, following an application to terminate a bargaining period in the oil sector of the transport industry, the Commission found that:

> *In my view the material which has emerged here is sufficient at least prima facie to persuade me that the TWU in reality wants a common result across the oil industry in terms of wages and is prepared to take industrial action to ensure that outcome at an industry level. Such an objective appears to me to be inconsistent with the whole statutory scheme in relation to 'protected action'. Protected action under the Statute is only available in relation to a single business or part of single business.*[89]

11. The objects of the WR Act were specifically amended in 1996 to increase the emphasis on agreement making and make it the focus of the overall workplace relations system. In addition, the 1996 legislation 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 WR 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. Employers and employees have clearly embraced workplace bargaining in the past decade. More than 41,000 collective agreements have been formalised under the federal system alone, with thousands more under state bargaining systems. Over 1.3 million federal employees are covered by current federal wage agreements including those on one of the 222,000 individual agreements made since March 1997. Agreements made directly between employers and their employees, with limited third party involvement, are increasingly being used as a vehicle for better wages and flexible and innovative employment conditions and work practices.

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[88] The initiatives contained in the new legislation had already been foreshadowed by the then Prime Minister, the Hon. Paul Keating in early 1993. See Speech to the Institute of Directors, Melbourne, 21st April 1993. See also Prime Minister Paul Keating, Speech to The International Industrial Relations Association Sydney, 31st August 1992, "A New Charter for Industrial Relations in Australia" This policy goal and the importance of the break with centralised arrangements was reiterated by the then Minister for Industrial Relations, the Hon. Laurie Brereton MP, in the second reading speech for the Industrial Relations Reform Bill 1993.

[89] Print L7029

POLICY RATIONALE

13. The WRA(GB) Bill 2002 has been designed to reinforce the statutory intent and emphasis of the WR Act on workplace bargaining and access to protected action associated with genuine bargaining at that level.

14. This Bill will amend 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 where it believes this will facilitate resolution of the issues in dispute.

Schedule 1 – bargaining periods

15. The WR Act emphasises the primacy in the system of agreement making at the workplace and enterprise levels. It also provides for a limited right to engage in industrial action or to lock out employees in the negotiation of single-business agreements. For industrial action or a lockout to attract protected status, ie immunity from certain civil liability and, for employees, protection from victimisation, it must take place during a bargaining period, which is initiated by a party giving written notice to each other party and to the Commission about the party's intention to reach an agreement and the matters proposed to be included in the agreement. Industrial action or a lockout must also meet other conditions to be protected, including that it has been preceded by a genuine attempt to reach agreement, and notice must be given to the relevant party about the proposed industrial action.

16. This is broadly the same regime that applied under the previous legislation and is aimed at allowing for a right to strike in cases of genuine enterprise and workplace bargaining. Thus it applies to the pursuit of single business, and not multi-employer, agreements, as was the case in the previous legislation. The WR Act did however extend the capacity to take protected action to certified agreements reached directly with employees (it did not apply to the previous Enterprise Flexibility Agreements) as well as to individual Australian Workplace Agreements.

17. Nevertheless, while a key object of the WR Act is to give primary responsibility for agreement making to employers and employees at the enterprise and workplace levels, the pursuit of industry-wide claims on an all or none basis has continued in some industries.

18. Workplace bargaining has assisted economic growth because wages and conditions are determined by genuine workplace negotiations by employees and employers with outcomes based on local knowledge and circumstances and mutual interests. However, elements within the union movement have attempted to orchestrate a return to industry level bargaining through the process known as pattern bargaining. Unions use pattern bargaining to conduct their negotiations across a range of employers or an industry and do not genuinely

negotiate at an enterprise level. This form of bargaining ignores the needs of employees and employers at the workplace level. It represents an outdated, one-size-fits-all approach to workplace relations reminiscent of the old centralised system where union officials attempted to dictate their agenda to both employers and employees. This discredited approach works against the goal of an inclusive and cooperative workplace relations system that sustains and enhances our living standards, our jobs, our productivity and our international competitiveness.

19. The bill draws on the decision of the Commission in the *Campaign 2000 Case*[90] where the Commission drew a distinction between unions making common claims across a number of employers and unions refusing to genuinely bargain at the workplace level.

20. The pre-emptive withdrawal of bargaining periods has been adopted as a tactic to deny the Commission jurisdiction to deal with pattern bargaining. The proposed legislation would provide the Commission with jurisdiction to make orders attaching conditions to or preventing new bargaining periods irrespective of whether the bargaining period at a workplace had been withdrawn.

Schedule 2 – cooling-off periods

21. Under existing provisions as an alternative to terminating a bargaining period, the Commission has the power to suspend a bargaining period (and thus reverse the protected status of industrial action) on a number of grounds including: that a party taking industrial action is not complying with Commission directions or recommendations, that industrial action is threatening to endanger the life, personal safety, health or welfare of the population or a part of it, or to cause significant damage to the Australian economy or an important part of it, or, for parties who have customarily been covered by paid rates awards, there is no reasonable prospect of their reaching an agreement. It appears that in practice some members of the Commission have used the existing section 170MW provisions in a small number of cases as the basis for granting an informal 'cooling off period' to provide a circuit breaker during the bargaining process.

22. In the *Gordonstone Coal Case*,[91] the Commission effectively ordered (using subsection 170MW(10)) a suspension of the bargaining period for 6 weeks, to provide an opportunity for the parties to address their differences. (The Commission noted that "the union sought to clothe itself in protected industrial action" despite paying "scant or no attention to formalising negotiations and actually getting involved in negotiations"[92]).

23. In another case, involving the TWU and Carpentaria Pty Ltd,[93] the Commission ordered a suspension of the bargaining period, on application by the employer, in order to allow the parties to genuinely confer and reach agreement. The parties were also directed to report back on a fortnightly basis to the Commission.

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[90] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors* [Print T1982].

[91] Dec 745/97, P2285

[92] Dec 745/97, P2285

[93] Dec 1084/97, P4890.

24. In the *Greyhound Pioneer Case*[94], the Commission on its own motion directed the parties to confer as well as ordering the cancellation of planned industrial action. The bargaining period was suspended for 7 days.[95] In ordering the suspension, the Commission found that planned industrial action "threatens the viability of the Company, and therefore threatens the welfare of part of the population, specifically the employees, shareholders and creditors."[96]

25. More recently, in the *Campaign 2000 Case*, Munro J ordered that the AMWU (and the relevant employers and employees of the employers) not be allowed to initiate new bargaining periods for a specified period.

26. During protracted disputes, antagonisms can become entrenched and parties can often lose sight of their original objectives. Cooling-off periods allow negotiating parties to take a step back from industrial conflict and refocus on reaching a resolution that works for both the business in question and the employees concerned.

27. Currently the Commission does not have the specific ability to order a cooling-off period in the case of a protracted dispute. As previously mentioned, the Commission has used the provisions of section 170MW to order de facto cooling-off periods, to provide a circuit breaker in particularly difficult bargaining disputes. However, the Commission is not able to do this in all situations where a cooling-off period may be warranted because the basis upon which an order may be made under section 170MW requires a very high threshold to be met and is not directed at the specific purpose of providing a cooling off period.

28. This bill, therefore, would give the Commission discretion to suspend a bargaining period for a specified period, on application by a negotiating party. If the Commission orders a cooling-off period (or extend one already ordered) it must inform the parties of the availability of mediation and conciliation to assist them in resolving the dispute.

29. A range of employer groups have advocated the need for a "cooling-off" or dispute free bargaining periods, to assist with ensuring better outcomes from the bargaining process. In submissions to the inquiry into the Workplace Relations Amendment Bill 2000 (WRAB 2000), the BCA, AiG and ACCI all supported the concept of the introduction a "cooling-off period".

30. The AiG in particular has argued that, under the current provisions, "while access to protected action is facilitated, relief from it in the absence of a settlement of the claims between the parties is very difficult and can only be achieved on very narrow grounds under the Act."[97] The AiG has advocated the use of cooling off periods and recommended they would be particularly useful in cases where industrial action is threatening the viability of the business directly concerned and/or where industrial action has been protracted and costly. The AiG has also advocated that cooling off periods would assist with creating a better environment for settling enterprise bargaining negotiations

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[94] Dec 544/97, Print P1237.

[95] A second suspension was subsequently ordered by the Commission later during the same bargaining period (1362/97, Print P6598).

[96] Dec 544/97, Print P1237

[97] Submission by AIG to the Minister for Workplace Relations and Small Business on *The Workplace Relations Act 1996, Some Proposals for Change, p15.*

SUMMARY OF PROVISIONS

Schedule 1- bargaining periods

31. The aim of the proposed subsection is to provide guidance to the Commission by clarifying the meaning of 'not genuinely trying to reach an agreement' within the context of paragraph 170MW(2)(b), rather than changing it. The factors the Commission will be required to consider, when deciding whether to suspend or terminate a bargaining period because a party is not genuinely trying to reach agreement with the other negotiating parties (to the particular bargaining period), include:

- If the party's conduct is indicative of an intention to reach agreements' with other persons (eg on an industry-wide basis), rather than to reach agreement specifically with the other negotiating parties.
- If the party's conduct is indicative of an intention to reach agreement with all or none of the persons in an industry, rather than to reach agreement with just the other negotiating parties.
- If the party's conduct is indicative of an intention primarily to reach agreement with someone other than the negotiating parties.
- If the party's conduct is indicative of a refusal to meet or confer with the other negotiating parties.
- If the party's conduct is indicative of a refusal to consider or respond to proposals made by the other negotiating parties.

32. This list is not exhaustive; no single factor will be determinative, but in exercising the power to suspend or terminate a bargaining period the presence of any will tend to indicate that the party is not genuinely trying to reach agreement. However, ultimately this is a matter for the Commission to determine. The Commission is not obliged to suspend or terminate a relevant bargaining period even if it concludes that the behaviour of a negotiating party is such that it is not genuinely trying to reach agreement.

33. The Commission will also be empowered 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.

34. A former negotiating party may apply for an order relating to a new bargaining period and, in cases where industrial action may endanger life or the Australian economy, the Minister for Employment and Workplace Relations may also apply or the Commission may issue the order on its own motion. This provision parallels existing paragraph 170MW(8).

35. Before an order to prevent the initiation of a new bargaining period or to attach conditions to a new bargaining period can be made, the Commission must give the former negotiating parties an opportunity to be heard and consider that it is in the public interest to make the order. Orders to prevent the initiation of, or impose conditions on, a new bargaining period are available in circumstances where there has been a failure to genuinely try to reach agreement or other circumstances specified in section 170MW, eg a threat to the Australian economy.

Schedule 2 - cooling-off periods

36. The Commission will be empowered to suspend a bargaining period for a specified cooling-off period where it would be beneficial to all negotiating parties because it would assist in resolving the matters at issue. The orders may only be issued on application by a negotiating party while protected action is being taken.

37. Before ordering a cooling-off period, the Commission must also consider the duration of the protected action, the public interest, the objects of the Act, and any other the Commission considers to be relevant; it must also give negotiating parties an opportunity to be heard.

38. When the Commission orders a suspension of the bargaining period to allow for cooling-off, it must advise the parties that they may voluntarily submit to private mediation or to conciliation by the Commission.

39. A cooling-off period is to be for a specified period that the Commission considers appropriate. The Commission may grant only one extension of the cooling-off period on application by a negotiating party. The period of the extension is also a specified period that the Commission considers appropriate. In considering whether to grant an extension, the Commission must have regard to the same matters as it considered when making the initial cooling-off order. Additionally it must consider whether the negotiating parties genuinely tried to reach agreement during the period of the initial suspension. Before granting an extension, the Commission must give the negotiating parties an opportunity to be heard. At the time of granting an extension, the Commission must advise the parties that they may voluntarily submit to private mediation or to conciliation by the Commission.

40. Industrial action taken during a cooling-off period will not be protected.

41. A comparison between the provisions of the WRAB 2000 and the WRA(GB) Bill 2002 is at Appendix 5A.

Appendix 5A

Comparison between the provisions of the WRAB 2000 and the WRA(GB) Bill 2002

The WRA(GB) Bill 2002 was drafted taking into account suggestions that were raised in the Senate inquiry into WRAB 2000.

Schedule 1 – bargaining periods

- WRAB 2000 focussed on pattern bargaining, which is a particular form of non genuine bargaining. The Workplace Relations Amendment (Genuine Bargaining) Bill 2002 (Genuine Bargaining Bill) deals with other forms of non-genuine bargaining, such as failing to meet and confer, as well as pattern bargaining.

- Unlike WRAB 2000, which focused on the pursuit of common claims and common outcomes across an industry, the Genuine Bargaining Bill focuses on the conduct of the negotiating parties at the workplace level.

- WRAB 2000 contained a definition of 'pattern bargaining'; the Genuine Bargaining Bill does not use that expression but identifies factors indicative of non-genuine bargaining, including circumstances that may give rise to situations of pattern bargaining (e.g.bargaining across an industry).

- WRAB 2000 provided that where the Commission determined that pattern bargaining was occurring, it was obliged to order the termination of the relevant bargaining period. The Genuine Bargaining Bill leaves the determination of whether behaviour indicative of non genuine bargaining is occurring to the Commission and the Commission retains an overall discretion to determine whether to suspend or terminate bargaining period even if it concludes that relevant behavior is occurring or has occurred.

- Under WRAB 2000, the Commission was required to have particular regard to the views of the employer negotiating party to the proposed agreement when determining whether claims are not capable of being pursued at the enterprise level (the latter description relates to the process of determining whether pattern bargaining as defined in WRAB 2000, existed). Under the Genuine Bargaining Bill, the views of all parties will be considered in relation to questions of genuine bargaining.

- WRAB 2000 applied to pattern bargaining engaged in by unions, whereas the Genuine Bargaining Bill covers non-genuine bargaining engaged in by any negotiating party (union, employer, employees).

Schedule 2 - cooling-off periods

- The cooling-off provision in the Genuine Bargaining Bill is similar to a provision that appeared in WRAB 2000, except that it gives the Commission discretion as to whether to suspend the bargaining period for this purpose, whereas before it would have been compelled to do so.

- The criteria for suspension under the Genuine Bargaining Bill are more detailed. There is a mandatory requirement for protected action to be underway before the

suspension can be ordered. Additional factors have also been added, requiring the Commission to take into account the duration of the protected action, the objects of the Act and any other matters it considers relevant.

- Under the Genuine Bargaining Bill, only one extension of the cooling-off period is possible, whereas under WRAB 2000 there was no limit to the number of extensions that could be granted.

- The Genuine Bargaining Bill contains a new provision, proposed subsection 170MWB(6), under which the Commission must, if it orders a cooling-off period or a extension of a cooling-off period, inform the negotiating parties that they may seek private mediation or conciliation by the Commission.

6. Workplace Relations Amendment (Fair Termination) Bill 2002

BACKGROUND

The Workplace Relations Amendment (Fair Termination) Bill 2002 (WRA (FT) Bill 2002) proposes to:

- introduce new provisions into the *Workplace Relations Act 1996* (WR Act) excluding certain classes of employees, including short-term casuals, from the operation of the termination of employment provisions, and repeal the existing regulations on the same subject;

- modify the provisions excluding certain classes of employees from the operation of the termination of employment provisions. In particular, the Bill will restore provisions excluding casual employees engaged for a short period, ie less than twelve months, following the decision of the Federal Court that the regulations that purported to exclude these employees were invalid (*Hamzy v Tricon International Restaurants t/as KFC* [2001] FCA 1589);

- validate the operation of regulations, purporting to exclude short-term casual employees from the termination provisions, that were declared invalid by the Federal Court in *Hamzy*;

- introduce a permanent, indexed, filing fee for the lodgement of termination of employment applications into the WR Act and repeal the existing regulations on the same subject. The filing fee is intended to discourage frivolous and vexatious claims, while ensuring that genuine termination of employment applications can be dealt with efficiently.

POLICY RATIONALE

(a) Casual Exclusion

2. The majority of casual employees work on a part-time basis,[98] and many work very few hours each week.[99] The incidence of casual employment is much higher among young people than any other group.[100] Casual employment is concentrated in particular industries, especially retail trade; accommodation, cafés and restaurants; cultural and recreational services; and agriculture, forestry and fishing.[101]

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[98] Australian Bureau of Statistics (ABS), *Forms of Employment Survey* (Cat. 6359.0), which indicates that in August 1998 there were 1,486,900 self-identified casual employees (excluding owner managers of incorporated enterprises). Of these, 71.9% worked fewer than 35 hours per week (ie. part-time hours).

[99] In the Productivity Commission's *The Diversity of Casual Employment* Research Paper (2001), Murtough and Waite estimate that 52.1% of all casual contract employees worked 19 or less hours per week. Of these, about half worked less than 10 hours per week (ie approximately 25% of the overall population of self-identified casuals), while the remaining half worked between 10-19 hours per week.

[100] ABS, *Forms of Employment Survey* (Cat. 6359.0) shows that, as at August 1998 (a) self-identified casual employees aged 15-19 made up 62.5% of all employees between those ages and that persons in this age group comprised 23.3% of all casuals; and (b) self-identified casual employees aged 20-24 made up 29.1% of all employees between those ages and that persons in this age group comprised 17.6% of all casuals.

[101] Ibid.

3. Casual employment has been responsible for the majority of employment growth in recent times. A table is attached at Appendix 6A which shows that:

- between 1984 and 1990, 35.1 percent of the growth in total employees was due to growth in casual employment
- between 1984 and 2001, 52.6 percent of the growth in total employees was due to growth in casual employment; and
- between 1990 and 2001, 70.1 percent of the growth in total employees was due to growth in casual employment.

4. In 1994, the Federal Government made regulations under the *Industrial Relations Act 1988* (as amended by the *Industrial Relations Reform Act 1993*) which excluded certain categories of employees, including short-term casual employees, from accessing federal termination of employment provisions.

5. Casual employees were entitled to access termination of employment remedies if they:

- had been 'engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a six month period', and
- 'but for the decision by the employer to terminate the employee's employment, would have had a reasonable expectation of continuing employment by the employer'.

6. In 1996, the Government extended the qualifying period from six to twelve months. The casual exclusion remained otherwise unchanged.

7. In March 1997 a disallowance motion in the Senate, moved by the Australian Labour Party, was defeated by the Government with the support of the Australian Democrats.[102]

8. On 16 November 2001, in *Hamzy v Tricon International Restaurants*,[103] the Full Court of the Federal Court of Australia declared the regulations invalid on technical legal grounds. The parts of the regulation that concerned the Court had been in place since 1994.

The Hamzy decision

9. Mr Hamzy was employed as a casual employee at a Kentucky Fried Chicken restaurant, but his employment was terminated after seven months.

10. He applied to the Australian Industrial Relations Commission (the Commission) for relief, alleging that his dismissal was both unfair and unlawful. The Commission dismissed his application on the grounds that he was excluded from the jurisdiction because he was a short-term casual employee.

11. Mr Hamzy appealed to the Full Bench of the Commission arguing that the regulations excluding casuals with less than 12 months employment were invalid as they exceeded the regulation-making power in section 170CC of the WR Act. The Full Bench

[102] Senate Hansard, 26 March 1997, page 2580.

[103] [2001] FCA 1589.

referred the question of the legal validity of the regulations to the Federal Court pursuant to subsection 46(1) of the WR Act.

12. Paragraph 170CC(1)(c) provides that regulations may be made to exclude from some or all of the termination of employment provisions of the WR Act, 'employees engaged on a casual basis for a short period'.

13. Paragraph 30B(1)(d) of the WR Act purported to exclude casual employees engaged for a short period from both unfair dismissal and unlawful termination remedies. Subregulation 30B(3) deemed all casual employees to be employed for a short period unless the employee concerned was engaged by an employer on a 'regular and systematic basis' for at least 12 months and 'had a reasonable expectation of continuing employment'.

14. The Full Court of the Federal Court found the regulations excluding casuals to be invalid because they went further than allowed by the regulation-making power in section 170CC.

15. The Full Court held that the definition of short-term casual employee provided by the regulations could potentially exclude from access to a remedy employees who were not in fact short-term casual employees.

16. The Full Court's decision did not find that it is impermissible at law to exclude short-term casuals from the termination provisions. Rather the Court found that the manner in which the regulations sought to achieve this was ineffective. The Full Court did not rule on whether 12 months was a 'short period' and therefore within the regulation making power.

Response to the Hamzy decision

17. The Australian Hotels Association (the AHA) said the decision threatened thousands of jobs in the hospitality industry:[104]

> 'Casual employment is at the cornerstone of flexible workplace practices and, for industries that experience significant peaks and lows, it is an essential tool in successful business management,' Mr Mulcahy said.
>
> 'The erosion of the flexibility of casual employment will simply hurt the chances of many young Australians to get their first break into the workforce.
>
> 'Industry uncertainty is the last thing we need at present. The only thing it can bring is job insecurity, while it will drive many employers to simply stop hiring casuals.
>
> 'The hospitality industry has already been hard hit by the global travel crisis and had our problems exacerbated by the collapse of Ansett and the general economic outlook.

[104] "Action needed on unfair dismissal laws". Press release, Mr Richard Mulcahy, AHA National Executive Director, 21 November 2001.

> 'Employment is already down in our industry, which employs more than 250,000 Australians, and the effects of this judgement could be absolutely disastrous.'

18. He called on the Government to act swiftly, and with the support of the Senate, to fix the problem.

19. In response to the *Hamzy* decision, the Government made new regulations in a form consistent with the Federal Court decision.

20. The new regulations, which commenced on 7 December 2002,[105] exclude casual employees engaged by a particular employer for a short period, that is, 'if the occasions on which the employee works for that employer under an engagement occur within a period of less than 12 months'.

21. The requirement for the employee to be engaged on a regular and systematic basis and have a reasonable expectation of continuing employment is no longer included. The effect of this is that a larger number of casual employees are potentially able to access termination remedies than was previously the case.

22. However, as the Minister for Employment and Workplace Relations, the Hon Tony Abbott MP, noted in his second reading speech on the Bill, the Government considers the regulations to be only a temporary solution. The Bill is intended to offer a permanent solution by reinstating in the Act the exclusion as it stood in the regulations before the Federal Court decision in *Hamzy*.

23. If the Bill is passed, the regulation will cease to have effect.

Why have an exclusion for casuals?

24. The exclusion is designed to ensure that short term casual employment is a viable employment option for employers and employees.

25. The fact that such an exclusion may be appropriate is expressly recognised in the International Labour Organisation's Termination of Employment Convention (ILO Convention No. 158), which allows ratifying states to exclude certain categories of employees from access to termination remedies, including workers engaged on a casual basis for a short period.[106]

26. Traditionally, employers have used short-term casual employees as a way of balancing peaks and troughs in workloads. A range of Australian Bureau of Statistics data supports this view, including that:

- approximately one-third of all casuals do not work regular hours; and
- 44 percent of casuals described their working pattern as 'casual/relief' work.[107]

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[105] Statutory Rules 2001 No. 323

[106] Article 2, paragraph 2(c).

[107] ABS, *Survey of Employment Arrangements and Superannuation* (ABS.cat. No. 6361.0) May 2000.

27. If the legislative scheme does not recognise this, then employers may be reluctant to employ staff to meet fluctuations in demand, leading to reduced labour-market flexibility with implications for employment.

28. The legislative scheme should ensure that employers are not discouraged from taking on temporary staff to address short-term business needs.

29. This is reflected in the objects of the WR Act - paragraph 3(a) makes pursuit of high employment an objective of the WR Act.

30. As illustrated earlier, casual employment has been a significant source of jobs creation since at least the mid-1980s.

31. Casual employment also serves a broader purpose, which the Government considers should be encouraged – it provides a means for employees (particularly young workers) to establish a presence in the labour market. In many industries, casual employment represents an entry point into the general workforce for those without substantial prior experience.

32. Casual employment also provides a means for young people to earn money to support full-time study (nearly one quarter of all casuals are full-time students).[108]

33. Given that an exclusion period has been in place since early 1994, businesses have developed their employment practices to take account of this exemption. A change to this exemption would place an additional burden on employers, particularly small businesses, by requiring a reorganisation of employment practices.

34. It could be expected that the removal or limiting of the current exemption on casuals would impact particularly in sectors which by their nature place special reliance on casual employment; for example, over half the employees in the Accommodation, Cafes and Restaurants sector are employed as casual workers.[109]

35. The exemption means that employers can continue to have the flexibility offered by short-term casual employment without having to be concerned about the prospect of dismissal proceedings where the job is only for a limited period.

Scope of the exclusion – long term v short term casuals

36. The termination of employment provisions in the WR Act seek to strike an appropriate balance between the rights of employers and employees, ensuring a 'fair go all round'. In striking this balance, the legislation recognises that it may be appropriate to exclude certain categories of employees from access to some or all of the termination of employment provisions.

37. Successive Governments have considered it appropriate to exclude from the operation of the provisions casual employees who are employed on an irregular or non-systematic basis, with no expectation of on-going employment. Such employees are also generally paid loadings instead of receiving certain entitlements such as sick leave or holiday pay.

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[108] The Forms of Employment Survey (ABS 6359.0). 24.4 percent of all casuals are studying full-time and aged under 25.

[109] ABS, *Survey of Employment Arrangements and Superannuation* (No. 6310.0 2001).

- Seasonal workers are a good example. A seasonal worker may work day-to-day at different locations for different employers at different times of the year with no expectation of ongoing and/or regular employment. Typically, these workers are paid as casuals and are not entitled to annual leave, sick leave or public holidays but instead have a loading incorporated into their pay in lieu of these other entitlements.

38. However, Governments have accepted that access to remedies in respect of termination of employment should be available to employees who, whilst being paid as casuals and receiving a loading, may appropriately be considered 'continuing' casuals, in the sense that they have an ongoing association with the one employer and a reasonable expectation of continuing employment. This type of work is not typically casual in the sense of it being 'temporary' or 'short-term'.

- ABS data indicates that many casuals have been with their current employer for lengthy periods of time. Over half have been with their current employer for more than one year; around 24 percent have been with their current employer for 3 or more years; and 5 percent have been with their employer for 10 years or more.[110] It should be noted that not all of these long-term casuals will necessarily have been engaged on a regular basis.

39. When the exclusion was first introduced in 1994, the qualifying period was six months. In 1996, the Government amended the regulations to require casuals to work for their employer for a minimum period of twelve months' regular and systematic employment before being able to make dismissal applications.

40. This change ensures that only those casual employees who are truly 'continuing' casuals are able to access a remedy. As noted above, a significant proportion of casual employees fall into this category.

41. The change addresses the fact that the often limited weekly hours, or particular work arrangements, of some casual employees may make it difficult for an employer to properly assess an employee's performance in a period substantially less than twelve months.

42. A motion to disallow the twelve-month exclusion was defeated with the support of the Australian Democrats. In debate, the Australian Democrats' Industrial Relations spokesman, Senator Andrew Murray, said the regulations were about balance and judgement:[111]

> 'At this stage, we think the balance is about right in the amended regulation and we are going to leave it at that. But the minister has agreed, at our request, to review these regulations after twelve months and we will need to look at the empirical evidence then.'

43. A review[112] was established the following year and sought submissions. The question of whether there should be a casual exclusion attracted only limited comment. Only

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[110] Ibid.

[111] Senate Hansard, 26 March 1997, page 2577.

[112] *The Twelve Month Review of Federal Unfair Dismissal Provisions*. Report by the Department of Employment, Workplace Relations and Small Business, including Federal Government responses to the review, December 1998.

one submission dealt specifically with the issue of a casual exclusion,[113] and none addressed the duration of any such exclusion.

44. The Queensland Government introduced a twelve-month exemption in its legislation that is almost identical to the exclusion proposed in this Bill.[114] The exclusion was first included as part of the former Government's *Workplace Relations Act 1997 (Qld)*, and was retained in the *Industrial Relations Act 1999(Qld)* after the new Government reworked Queensland's industrial relations laws.

45. The Australian Chamber of Commerce and Industry (ACCI), has called on the Parliament to enact this Bill, so as to continue the 12-month exclusion for casuals.[115]

> 'Enacting the Government's legislation unamended does no more than retain the status quo that has applied for five years,' Mr Lyndon Rowe said.
>
> '…any lesser period than a 12-month exclusion for casual employees … will have increased, not decreased, the burden of unfair dismissal laws on employers.'

Validating the operation of the invalid regulations

46. The Bill will validate the past operation of the regulations declared invalid by the Federal Court in the *Hamzy* decision.

47. The provisions will declare, as far as possible, that the rights and liabilities of employers and employees are the same as they would have been had the invalid regulations been validly made (and as if the replacement regulations made after the Federal Court's decision, which contained a more limited casual exemption,[116] had not been made).

- A similar declaration was inserted into the *Corporations Act 2001* following the High Court's decision[117] invalidating the Corporations Law scheme.

48. The validating provisions will prevent casual employees who had their employment terminated after the invalid regulations were purported to have been made (31 December

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[113] 'Job Watch's Submission to the Review of Unfair Dismissal Laws', 22 July 1998 recommended that no casual employee should be excluded from the unfair termination provisions (p 6). It is also worth noting that whilst the submission from the Australian Chamber of Commerce and Industry did not deal directly with the casual exclusion, it did submit that all employees should be exempted from termination remedies for the first year of employment, except for prohibitions on discriminatory termination (ACCI Submission to Federal Government's Unfair Dismissal Laws,' 22 July 1998, p 11). The ACTU referred to the benefit the casual exclusion gave to small business but did not comment on the appropriateness of the exclusion (ACTU Submission to the Review of the First Twelve Months' Operation of the Unfair Dismissal Provisions of the *Workplace Relations Act 1996*, 22 July 1998, p 5).

[114] Section 72 of the *Industrial Relations Act 1999 (Qld).*

[115] "12 Month Unfair Dismissal Exemption For Casuals Is Essential For Jobs". Press release, Mr Lyndon Rowe, Acting Chief Executive, 14 March 2002.

[116] The current regulations prevent a casual employee from bringing an action unless the employee had worked for the employer over a twelve-month period. The new provisions would prevent a casual employee from bringing an action unless the employee had worked for a particular employer on a regular and systematic basis for a sequence of periods over twelve months, and has an expectation of continuing employment.

[117] *R v Hughes* [2000] HCA 22.

1996) from now seeking to bring late applications for a remedy. Decisions will be unaffected, however, where a casual employee has already made an application for a termination remedy and the application is finally determined by a court or the Commission before the validating provisions commence.

- This will avoid confusion and costs associated with 'unravelling' Commission decisions, and will avoid potential constitutional problems associated with legislative interference with the exercise of judicial power.

49. The High Court has previously approved the approach of validating rights. For example, in the case of *R v Humby; Ex parte Rooney*,[118] the High Court upheld the validity of provisions in the *Matrimonial Causes Act 1971* (Cth) which sought to declare valid, the rights, liabilities and obligations contained in invalid orders (the orders had previously been held by the High Court to be invalid because they were made by a Master of the SA Supreme Court, rather than a judge of the SA Supreme Court).

50. The validating provisions in the WRA (FT) Bill 2002 would have the effect of amending the law as it applies to the entire period since the *Hamzy* decision.

- This Bill restores the law to what it was commonly understood to be until the *Hamzy* decision.

- It also seeks to ensure that the same rules apply after that time (including from 7 December 2001 when the narrower casual exemption commenced) until this Bill commences.

51. The Government believes this legislation is necessary to avoid confusion and to ensure that a consistent regulatory regime is in place, which is easy for both employers and employees to understand.

52. Otherwise, three different sets of rules would be in operation in quick succession in relation to:

- the period up until the *Hamzy* decision on 16 November 2001;

- the three weeks from 16 November 2001 to 6 December 2001 (immediately before the new regulation commenced); and

- the period from 7 December 2001 until this Bill commences.

53. It is not possible to determine how many employees will be effected by the validation provisions, although it is unlikely there would be many, given the relatively short periods of time involved, and the fact that any new employees would normally have had to have served a qualifying period (usually of three months)[119] before being able to bring a termination action.

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[118] (1973) 129 CLR 231.

[119] Under section 170CE(5A), which came into effect in August 2001, all employees must serve a qualifying period of employment of three months, unless it is determined in advance by written agreement between the employer and employee, to shorten or lengthen the period, or waive the period altogether.

54. The number of employees who could be affected is further limited by the fact that under the WR Act, an employee has 21 days within which to lodge an application for a termination remedy – although the Commission does have discretion to accept a late lodgement.

55. The Government indicated its intention to restore the full scope of the casual exemption soon after the *Hamzy* decision was handed down. In a doorstop interview on 21 November 2001,[120] Minister Abbott said:

> 'The Government will be taking urgent action to restore the policy intention of the Government so we will be moving swiftly to make new regulations which restore the Government's intentions, which are to generally exempt casual employees, certainly short term casual employees from the operation of the unfair dismissal laws.'

56. The full scope of the casual exclusion cannot be restored by regulation. That can only be done by legislation.

(b) Permanent Filing Fee

History of the filing fee regulation

57. The requirement for a filing fee commenced on 31 December 1996. Subregulation 30BD(1) imposed the $50 filing fee, and subregulation 30BD(2) provided for waiver of the fee in cases of hardship.

58. On 5 March 1997, Senator Sherry (ALP) gave notice that he intended to move a motion to disallow (among other regulations) subregulations 30BD(1) and (2). As the result of an agreement between the Government and the Australian Democrats, the Government amended regulation 30BD to provide for the refund of the lodgement fee in the case of early discontinuance, and to insert a sunset clause on the operation of the filing fee (the original sunset date was 30 June 1998).

59. In addition, the Government agreed to conduct a review of the operation of the filing fee, as part of a broader review of the unfair dismissal provisions of the WR Act. The sunset period was extended to 31 December 1998 to allow the review to be completed. The review report was released on 17 December 1998. The Government proposed, in its response to the review, an increase in the filing fee from $50 to $100.

60. On 17 December 1998, the Government made Workplace Relations Amendment Regulations 1998 (No. 3), which, amongst other things, removed the sunset clause, and increased the fee to $100. This accorded with the Coalition's workplace relations election policy, *More Jobs, Better Pay*, which was issued in September 1998.

61. These regulations were disallowed on 16 February 1999 by the Senate, which had the effect of ending the filing fee from 31 December 1998.

62. Regulation 30BD was remade, with effect from 24 March 1999, reinstating the $50 filing fee, with a sunset date of 31 December 1999. Regulation 30BD(4) was later amended with effect from 22 December 1999 to extend the sunset date to 31 December 2000.

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[120] Media Monitors Transcript, Doorstop interview, 21 November 2001 (Slip ID S00005518164).

63. Regulation 30BD was again amended with effect from September 2000 to provide for a sunset date of 31 December 2003.

64. The Workplace Relations Amendment Regulation 2000 (No. 3) sought to remove the sunset clause, but this regulation was disallowed by the Senate on 27 June 2001. Therefore, the 2003 sunset date still stands.

65. The Government has subsequently re-iterated its intention to make the filing fee a permanent requirement, and also promised to index the amount annually in accordance with the CPI.[121]

66. Government policy is that a permanent filing fee will discourage frivolous, vexatious and speculative claims which impose a burden on the system, making it harder for employees with genuine complaints to get a timely hearing, and imposing unnecessary and unfair costs on employers having to reply to them.

67. Furthermore, to ensure that employees with limited means are not prevented from lodging applications, merely because they cannot afford the filing fee, the Registry has a discretion to waive the fee in cases of serious hardship.[122]

68. Indications are that about ten percent of applicants have their fee waived. According to information provided by the Australian Industrial Registry[123], in the calendar year 2000, a total of 762 applications were made for a waiver, with only 45 refused. For the first five months of the calendar year 2001, 380 applications were made, 23 were refused.

69. This compares with an estimated 7,613 termination of employment applications lodged for the calendar year 2000, and an estimated 3,541 applications lodged for the first five months of the calendar year 2001.

70. A filing fee would represent a small, but appropriate contribution on the part of employees, towards the costs of unfair dismissal proceedings. Other jurisdictions have similar fees.[124]

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[121] *Choice and Reward in a Changing Workplace*, Coalition workplace relations policy platform, Election 2001.

[122] Regulation 30BD(2)

[123] Answer to a question on notice to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, 2001-2002 Budget Estimates Hearing- 4 –5 June, 2001. The following table was provided in answer to the question:

Applications for Waiver - Applications for relief in respect of termination of employment

Calendar Year 2000	ACT	NSW	NT	Q'ld	Tas	WA	SA	VIC	Total
total applications made	42	103	66	8	10	21	23	489	762
applications refused	4	6	2	0	1	3	5	24	45

Calendar Year 2001 to May 2001	ACT	NSW	NT	Q'ld	Tas	WA	SA	VIC	Total
total applications made	8	49	26	6	4	9	9	269	380
applications refused	0	5	2	0	1	1	1	13	23

[124] For example the NSW IRC filing fee is $50; the Queensland IRC filing fee is $46.50; and the Federal Court of Australia filing fee is $50 for applications in respect of unlawful discrimination applications under section 46PO of the *Human Rights and Equal Opportunity Act 1986* and for unlawful termination applications under section 170CP of the WR Act.

71. The fee has been in place almost continuously since 1996 and the Government believes that this is an ample period of time in which to assess the measure, including whether it unfairly prevents employees with limited means from making applications.

72. The Senate Standing Committee on Regulations and Ordinances has expressed reservations on a number of occasions about the repeated imposition of a sunset clause. (One of the key principles that the Committee applies when assessing regulations is whether the regulation has certainty of meaning and operation.)

73. For example, in a letter dated 16 March 2000, the then Chair of the Committee, Senator Helen Coonan, wrote to the then Minister for Employment, Workplace Relations and Small Business, the Hon Peter Reith:

> 'The Committee is of the view that to continue to extend the sunset clause may be a breach of Parliamentary propriety and would therefore appreciate your advice as to whether consideration has been given to making the application fee a permanent provision of these Regulations.'

74. In responding to this query, Minister Reith noted that the Government had always intended to make the filing fee permanent, as it was an important measure aimed at discouraging frivolous and vexatious claims, whilst helping to ensure that genuine termination of employment cases were dealt with efficiently.[125]

75. During debate in the Senate on Workplace Relations Amendment Regulations 2000 (No. 3) on 27 June 2001, the Australian Democrats acknowledged that the Government had attempted to remove the sunset clause in response to the Committee's concerns.[126]

76. Senator Murray also acknowledged during debate that the filing fee served a useful purpose.

> 'The filing fee is instrumental in the discouragement of frivolous and vexatious claims and ensures that genuine termination of employment applications are dealt with efficiently.'

SUMMARY OF PROVISIONS

(a) Casual Exclusion

77. New section 170CBA (to be inserted by item 1 of schedule 1) would exclude short-term casual employees from the termination provisions of the WR Act. The exclusion reflects that in place in the WR Regulations before the Federal Court decision in the *Hamzy* case.

- A casual employee will be taken to be engaged for a short period, and therefore excluded from the termination provisions unless the employee has been engaged by their employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and the employee has, or would have had, a reasonable expectation of continuing employment with the employer.

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[125] The Government has also taken other steps, for example, measures in the *Workplace Relations Amendment (Termination of Employment) Act 2001*, which came into operation in August last year.

[126] *Senate Hansard*, 27 June 2001, page 25241

78. The Bill also moves the other existing exclusions (currently in the regulations) into the WR Act, thus consolidating all the provisions in one location, and making it easier for employers and employees to quickly ascertain their rights and responsibilities. These are also contained in new section 170CBA.

79. The classes of employees are:

- employees engaged for a specified period of time (unless the purpose, or a substantial purpose, of this arrangement was to avoid the employer's obligations under the termination provisions – this reflects existing subregulation 30B(2) of the WR Regulations);
- employees engaged for a specified task (unless the purpose, or a substantial purpose, of this arrangement was to avoid the employer's obligations under the termination provisions – this reflects existing subregulation 30B(2) of the WR Regulations);
- employees who are on probation (as long as the length of the probation period is 3 months or less, or reasonable having regard to the particular employment);
- trainees who are employed under particular types of traineeship agreements, or who are employed under a traineeship for a specified period; and
- non-award employees who earn more than the rate calculated in accordance with the formula in the WR Regulations.

80. The Bill also makes necessary minor alterations to these exclusions.

- For example, a potentially confusing reference to a 'qualifying period of employment' has been removed from the exclusion for employees on probation (currently in regulation 30B(1)(c)). Following amendments made by the *Workplace Relations Amendment (Termination of Employment) Act 2001*, the WR Act provides a general three month qualifying period for all employees (including probationers) unless a longer or shorter period is agreed in writing in advance. The use of the phrase 'qualifying period' in the specific context of probationary employment is no longer necessary and could have proved confusing.

81. Other changes are necessary to keep the provisions relevant and up to date. For more details, see Appendix 6B.

82. Item 4 of the Bill will also validate the operation of the invalid regulations by providing that, as far as possible, the rights and liabilities of employers and employees are the same as they would have been had the invalid regulations been valid all along – and as if the regulation made after the *Hamzy* decision had never been made.

83. Those casual employees whose cases had been determined by a court, or by the Commission, are specifically protected by the Bill and they will be unaffected by the validation provisions.

(b) Permanent Filing Fee

84. New section 170CEAA would require a person lodging a termination of employment application with the Australian Industrial Registry to pay a fee.

85. This section lists the applications in respect of which a fee is payable (applications made under subsections 170CE(1), (2), (3) and (4) of the WR Act). The amount of the fee is $50 if an application is lodged during the first financial year in which the provision commences.[127] If an application is lodged in later financial years, the fee would be indexed to reflect CPI adjustments during the previous year (with reference to the March quarter).

86. The proposed section 170CEAA will also provide that an Industrial Registrar may exempt an applicant for relief from termination of employment from paying the fee, if the fee would cause that person serious financial hardship.

87. Likewise, the Industrial Registry must refund any fee paid for lodging a termination of employment application if the application is discontinued at least two days before the first proceedings in the Commission relating to that application are scheduled to begin.

[127] Section 22 of the *Acts Interpretation Act 1901* provides that the term 'financial year' means a period of 12 months beginning on 1 July.

Appendix 6A

Trends in Employment – Permanent and Casual Employees 1984 to 2001

Year	Permanent employees	Casual employees	Total employees	Casual Density
1984	4509.9	848.3	5358.2	15.8%
1985	4625.7	887.3	5513.0	16.1%
1986	4704.1	979.3	5683.4	17.2%
1987	4791.0	1075.6	5866.6	18.3%
1988	4949.0	1152.9	6101.9	18.9%
1989	5199.4	1298.0	6497.4	20.0%
1990	5293.8	1271.8	6565.6	19.4%
1991	5037.2	1280.0	6317.3	20.3%
1992	4919.8	1415.0	6334.8	22.3%
1993	4888.4	1435.0	6323.4	22.7%
1994	4976.7	1549.1	6525.8	23.7%
1995	5229.0	1653.3	6882.2	24.0%
1996	5220.9	1841.2	7062.1	26.1%
1997	5176.6	1795.5	6972.1	25.8%
1998	5298.7	1946.1	7244.8	26.9%
1999	5372.6	1931.6	7304.2	26.4%
2000	5598.3	2097.3	7695.6	27.3%
2001	5654.6	2117.6	7772.2	27.2%

Source: ABS Cat. No. 6310.0 for columns 1 to 3. Column 4 calculated by dividing column 2 by column 3.

Contributions to employment growth by type of employment were calculated as follows:

- growth from 1984 to 2001 - this was calculated by subtracting the number of employees in each of the columns 1, 2 and 3 for 1984 from the respective number of employees for 2001;
- contribution to growth from 1984 to 2001 - this was calculated by dividing the growth from 1984 to 2001 in columns 1, 2 and 3 by the total employment growth from 1984 to 2001 in column 3 and recording the result as a percentage;
- growth from 1984 to 1990 - this was calculated by subtracting the number of employees in each of the columns 1, 2 and 3 for 1984 from the respective number of employees for 1990;
- contribution to growth from 1984 to 1990 - this was calculated by dividing the growth from 1984 to 1990 in columns 1, 2 and 3 by the total employment growth from 1984 to 1990 in column 3 and recording the result as a percentage;
- growth from 1990 to 2001 - this was calculated by subtracting the number of employees in each of the columns 1, 2 and 3 for 1990 from the respective number of employees for 2001; and

- contribution to growth from 1990 to 2001 - this was calculated by dividing the growth from 1990 to 2001 in columns 1, 2 and 3 by the total employment growth from 1990 to 2001 in column 3 and recording the result as a percentage.

Appendix 6B

Minor Alterations to Simplify or Update Exclusions

In addition to restoring the full scope of the provision excluding 'short-term' casual employees from termination of employment remedies, the WRA (FT) Bill 2002 will make minor amendments to simplify or update the exclusions applying to other categories of employees. These changes are as follows:

- The exclusion for probationary employees will be simplified. The reference to "qualifying period of employment" in the probationary exclusion will be removed. This phrase could cause confusion, given that it appears in a different context elsewhere in the Act — section 170CE(5A), which requires all employees, whether probationers or not, to complete a qualifying period of employment with their employer before making an unfair dismissal application.

- The exclusion for trainees will be updated. The meaning of "traineeship agreement" will be amended to reflect updates to the national training wage award. References to NETTFORCE will also be removed because this traineeship organisation has been wound up and no longer operates.

- The exclusion for seamen will be removed, because the Maritime Industry Seagoing Award 1983 is no longer in force. Seamen are subject to a new system of engagement.

The other excluded categories of employees have no changes to their definitions, but are also to be relocated from the WR Regulations into the WR Act. These exclusions are:

- The exclusion for employees engaged under a contract of employment for a specified period, or for a specified task.

- The exclusion for 'daily hire employees'.

- The exclusion for 'non-award employees'.

- The exclusion for employees on the basis of excessive rates of remuneration. The calculation of the excessive rates of remuneration is provided for in the WR Regulations, as before.

- The exclusion for certain categories of employees from the operation of sections 170CL (Employer to notify Centrelink of termination of employment) and 170CM (Employer to provide notice of termination of employment), and from Subdivision D (Applications for severance allowance) and Subdivision E (Employer failure to consult with trade unions about terminations).

Another change proposed by the WRA (FT) Bill 2002 is consequential to the relocation of exclusion provisions in the WR Regulations into section 170CBA of the WR Act.

- Section 170CC will be amended to provide only for the exclusion of additional categories of employees by regulation at a later time.

Abbreviations and acronyms

ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
ACM	Australian Chamber of Manufacturers
ACTU	Australian Council of Trade Unions
AEC	Australian Electoral Commission
AiG	Australian Industry Group
Commission	Australian Industrial Relations Commission
AMWU	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (known as Australian Manufacturing Workers' Union)
ASU	Australian Municipal, Administrative, Clerical and Services Union (known as Australian Services Union)
AWIRS 95	1995 Australian Workplace Industrial Relations Survey
BCA	Business Council of Australia
C&A Act	*Conciliation and Arbitration Act 1904*
CEPU	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
CPA	Certified Practicing Accountant
EA	Employment Advocate
ETU	Electrical Trades Union
ILO	International Labour Organisation
ILO Convention No. 158	International Labour Organisation's Termination of Employment Convention
MJBP Bill 1999	Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999
NED	nominal expiry date
OEA	The Office of the Employment Advocate
OECD	Organisation for Economic Co-operation and Development

SBPA Bill 2000	Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000
TCR	termination, change and redundancy
TWU	Transport Workers' Union of Australia
WAD	Workplace Agreements Database
WR Act	*Workplace Relations Act 1996*
WRA (FD) Bill 2002	Workplace Relations Amendment (Fair Dismissal) Bill 2002
WRA (FT) Bill 2002	Workplace Relations Amendment (Fair Termination) Bill 2002
WRA (GB) Bill 2002	Workplace Relations Amendment (Genuine Bargaining) Bill 2002
WRA (PCUF) Bill 2002	Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002
WRA (SBPA) Bill 2002	Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002
WRAB 2000	Workplace Relations Amendment Bill 2000