ACCI SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT BILLS (GENUINE BARGAINING, FAIR DISMISSAL, FAIR TERMINATION, PROHIBITION OF COMPULSORY UNION FEES) 2002

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1. Background – Dismissal / Termination Bills 2002

Background

[1.1] These two Bills were introduced by the federal government into the parliament in February 2002.

[1.2] Both Bills concern the operation of federal unfair dismissal laws, as provided for in Part VIA of the *Workplace Relations Act 1996*.

[1.3] In broad terms, the policy effect of the *Fair Dismissal Bill* is as follows:

> To exclude new employees employed by businesses of less than 20 staff from being able to take unfair dismissal proceedings under the Commonwealth Act;

[1.4] In broad terms, the policy effect of the *Fair Termination Bill* is as follows:

> To make the existing $50 lodgement fee for applications a permanent, legislated and annually indexed requirement; and
>
> To provide that a casual employee who has not worked for an employer on a regular and systematic basis for a period (or periods) of at least 12 months and who does not have a reasonable expectation of continuing employment with that employer is ineligible to make an unfair dismissal claim under the Commonwealth Act; and
>
> To exclude in the terms of the Act itself the categories of employees who are currently excluded by regulations made under the Act.

ACCI Position on the Bills

[1.5] ACCI supports the passage of both the *Fair Dismissal Bill* and the *Fair Termination Bill*, on the basis outlined in this submission.

[1.6] ACCI advocates a number of additional legislative and administrative measures to improve the operation of the unfair dismissal system in the Commonwealth Act, as outlined in this submission.

Unfair Dismissal Laws – An Employer Perspective

[1.7] The Commonwealth unfair dismissal system was first established in 1993. In general terms, the 1993 laws have been subject to two important subsequent variations – in 1996 and in 2001. Aside from those variations there has been almost continuous debate at a public, political and legislative level over the operation of these laws.

[1.8] The 1993 law established, for the first time, a national jurisdiction. Until then, for the previous 20 or so years States had established unfair dismissal laws, which had a significant but restricted coverage due to the interaction of dual federal/State industrial systems and related constitutional constraints. Until 1993 federal law only regulated issues related to dismissal of employees in a limited and indirect manner (eg. through the award based conciliation and arbitration system).

[1.9] The 1993 Commonwealth law can be seen as a major turning point in employer attitudes to unfair dismissal laws. The 1993 law expanded access to

the unfair dismissal system across workplaces (more employers were exposed to more claims or the risk of claims). And the substance of the 1993 law was significantly more burdensome on employers than had previously been the case in State jurisdictions. That the 1993 laws were based (in a constitutional sense) on the external affairs power and an international convention that was ratified by the Commonwealth without the concurrence of the States only added to the public controversy surrounding the 1993 laws.

[1.10] The 1996 changes sought to ameliorate this position, largely by making amendments under the concept of a 'fair go all round'. Most of the 1996 amendments (at least those that were passed) were designed to remove the harshest features of the 1993 laws.

[1.11] However, it is apparent that since the 1996 changes employer dissatisfaction with unfair dismissal laws has, in general terms, not abated – although it is recognised that there has been improvement to some degree. The changes, which have been made, have been, in part beneficial. The law is obviously less extreme than it was in 1993. But in saying this, employers are not of the view that the balance of interests between employers and employees is properly established by the current system. The core characteristics of the system remain, and changes that have been made have been primarily directed at the rules that operate within the jurisdiction, and not to the jurisdiction itself.

[1.12] Even if one accepts for the purposes of argument that the 1996 amendments were good enough at the time, it is now six years since those amendments were made. There is obviously a need for ongoing policy attention to an area of public policy as important (yet difficult) as unfair dismissal laws. Case decisions continue to alter the application of the law, and in some areas have departed from or expanded its legislative intent. Opportunistic advisers and

consultants advertise for and issue proceedings challenging terminations which in the past may not have been litigated. The increased cost of litigation bears more and more heavily on employers as they weigh up the costs of defending claims against the costs of settlement, even where dismissal has been warranted. Often out of court settlements in the thousands of dollars are paid by an employer for commercial reasons, reflecting – in that employer's view – a flawed system. And as new cases continue to be filed and more decisions made the differing or subjective approaches of individual conciliators and arbitrators to similar facts creates uncertainty when dismissing staff or when assessing the merits of or claims that are lodged. The 2001 amendments were timely, but do not go far enough in dealing with these outstanding issues.

[1.13] Aside from these practical considerations there are systemic issues of concern. We continue in Australia to have multiple unfair dismissal jurisdictions – one Commonwealth (certain federal employees, plus Victoria and the Territories) and five state systems (certain employees in NSW, Qld, WA, SA and Tasmania). One of the structural problems with unfair dismissal laws in Australia is the lack of coherence in the interaction of these laws. Although not at this point in time ACCI policy, a case exists for at least an open examination of whether a coherent harmonised structure for unfair dismissal laws in Australia is desirable. That concept is however beyond the parameters of these Bills – but is not a matter that should be ignored by policy makers, or go unmentioned in this submission.

[1.14] It is due to the multiplicity of federal and State unfair dismissal laws that it is often difficult to separate attitudes of employers between federal laws as distinct from State laws. This should not be a surprise – in circumstances where so-called legal and industrial experts find it difficult to resolve questions of

jurisdictional interaction it is not unexpected that many employers will not distinguish between federal and State industrial respondency.

Unfair Dismissal Laws and Employment

[1.15] In designing or amending unfair dismissal laws, high on the list of factors to balance, in policy terms, is the burden that unfair dismissal laws have on employers, as against the rights that such laws create for employees.

[1.16] Unfair dismissal laws are one species of so-called job protection laws. From an employers perspective, there are a number of important factors to consider in the legislative framework. These include:

- Eligibility to make claims;
- Fairness in the process of dealing with claims;
- Fairness in outcomes (conciliated or arbitrated);
- Cost of defending claims; and
- Impact of the system on jobs and hiring intentions.

[1.17] This latter point has been the subject of much public controversy in recent years. But it is only one of a number of policy factors that need to be taken account of. For example, even if it is thought that there is no connection or no proven connection between unfair dismissal laws and hiring intentions (a point of view we do not share) it remains the case that policy makers must still ensure that there are sensible eligibility rules, that the process of dealing with claims is fair and expedient, that the outcomes are (so far as possible) just, that the remedies are appropriate (and not excessive), and that the burden of defending claims is not unreasonable.

[1.18] Employer attitudes to unfair dismissal laws are a reflection of two factors:

- Actual experiences by employers (under federal or State laws); and
- Perceptions about the operation of such laws.

[1.19] There are obviously a variety of views amongst employers about just what changes ought to be made to unfair dismissal laws, as there are amongst the community generally. Many of the employer views are a reflection of personal experiences either in the unfair dismissal system, or in terminating and employing staff. Those views range from those that advocate no such laws, to those that simply seek a stronger recognition of employer interests in the operation of such laws. And there are many points of view in between, as can be expected.

[1.20] In supporting changes to unfair dismissal laws employers are not arguing that employees ought to be dismissed capriciously or for no good and valid reason. Indeed, it is as much in an employers interest that staff in whom an investment has been made are retained and add value to the business, as it is for the employee to remain in a job which provides income and career development. It is not uncommon for employers when discussing unfair dismissal laws to make the point that their business suffers when a good performing employee in whom they have invested time and money for training and skill development leaves to either another company or to pursue other interests – and that the employer can do little if anything to recoup that loss.

[1.21] In considering the policy balance required in unfair dismissal laws it is important to recognise what unfair dismissal laws intrinsically do. They provide

a right for an employee whose employment is terminated to take legal action against their employer in a third party tribunal or court. Unfair dismissal laws create a right to sue, a cause of action. In this sense they do not deal only with unfair dismissals. They can deal with all dismissals. An assertion by an employee that they have been unfairly (or more strictly speaking harshly, unjustly or unreasonably) dismissed is sufficient to expose the employer to the risk of an adverse finding. An employer, once having dismissed an employee, is exposed to the process and the power of the 'system' whether the dismissal was fair or unfair. This is an important point as it bears not only on how employers see the jurisdiction operating, but also on the need to constrain costs and expense once claims are made, and to create some greater certainty or consistency in the independent judgements that are made by conciliators and arbitrators.

[1.22] In assessing appropriate responses to calls for changes to unfair dismissal laws the views of employers who have had claims as well as those who have a perceived view about such laws are equally valid. This is because, at the core of the policy considerations is the issue of risk. If employers know or believe that there is a negative risk associated with the employment of a person then that is a factor which weighs against that employment. The decision not to employ or to be less inclined to employ because of the presence or operation of unfair dismissal laws is of equal practical impact whether the decision is based on an employers actual experience in the jurisdiction or their perceptions of how the jurisdiction operates.

[1.23] ACCI believes that there is a strong connection between unfair dismissal laws and the hiring intentions of employers. That connection should not be overstated, nor understated. It is not something that lends itself to empirical proof, or disproof for that matter. But its validity as a proposition is based in the

fact that employers take risk and cost into account in making business decisions – including decisions to employ.

[1.24] There is no doubt that a myriad of different factors apply which motivate employers to employ or not to employ an employee. Not surprisingly the dominant feature is and will always be economic - work requirements based on business needs. But issues of cost and risk are also significant. It is in this context that negative experiences or negative perceptions of unfair dismissal laws act as one factor that weighs against decisions to employ.

[1.25] As one employer who had experienced two unfair dismissal claims (albeit under State laws) told this Senate committee in 1999:

> *" Are you more cautious as a result of this or were you always cautious about your procedures for taking on staff?"*
>
> *"We have always been quite cautious with respect to taking on staff but as a result of our recent experiences we have become more so."*
>
> *"In terms of offering jobs to new staff would this change in our legislation make a difference to the way you are prepared to hire staff?"*
>
> *"Yes, we would certainly put on more people. At the moment every person you put on now is a potential litigation waiting to happen. We are terrified – and we have only had two experiences. You only have to talk to your peers to find out that they have had many of the same experiences. We could put on and would have put on two straightaway, but at the moment we are resisting that at all costs and we are working our other staff as much overtime as we can."*
>
> *(Mr B. Tonkin, Senate Committee Hansard, 29th January 1999)*

[1.26] And another who had experienced a claim under Commonwealth laws:

> *"I just cannot see the sense in trying to build a business with 5, 10, 15 or 20 employees where you can be bankrupted or beaten around the head at a*

moments notice because one of them does not like you. This year I was planning to hire two people full time. Those people will now not have jobs. In my business – and I have discussed this with other people and it is quite common – I am going to employ information technology wherever possible to minimise labour and I am also going to outsource my tasks which I cannot perform myself. So two people will remain unemployed as a result of these laws…"

(Mr. C. Maloney, Senate Committee Hansard, 29th January 1999)

[1.27] There is also a different – but related aspect to the connection between unfair dismissal laws and employment. Unfair dismissal laws (depending on their content) can also operate as a disincentive to terminate a non-performing employee, and replace that employee with a more satisfactory staff member. In this way unfair dismissal laws operate as a brake on business efficiency, rather than employment per se. From an employers perspective, that is no less important a consideration.

[1.28] In 1999, ACCI, as part of its *Survey of Investor Confidence*, asked the following question to more than 2300 employers across Australia:

"Question: Has unfair dismissals legislation had any effect on employment decisions in your business during the past twelve months?

(a) It has had no effect on employment decisions

(b) I have employed fewer employees because of this legislation."

[1.29] The results were as follows:

Table 1

**FULL SURVEY RESULTS –
EFFECT ON EMPLOYMENT**

	%
No effect on decisions to employ	**60.3**
Fewer people have been employed	**39.7**

Table 2 – EFFECT OF UNFAIR DISMISSAL LEGISLATION BY SIZE OF FIRM

FULL SURVEY RESULTS – EFFECT ON EMPLOYMENT

Number of employees	1 to 19	20 to 99	100+
	%	%	%
No effect on decisions to employ	**46.1**	**52.3**	**71.8**
Fewer people have been employed	**53.9**	**47.7**	**28.2**

[1.30] From Table One it can be seen that 39.7% of respondents reported that fewer persons had been employed in their businesses because of unfair dismissal laws. This is not inconsiderable. Table Two indicates that 53.9% of businesses with 1 to 19 employees (ie small business) indicated that they had 'hired fewer employees because of the legislation'.

[1.31] In considering this survey we indicate that it was a nation-wide survey and survey respondents would have been referring to both State and Commonwealth unfair dismissal jurisdictions when forming a response. For reasons explained earlier in this submission that is not at all surprising. It makes the survey no less relevant for present purposes. It is indicative of employer attitudes and consistent with other material that points in the same direction.

Given that the core characteristics of both the federal and State systems are very similar, and that there have been many dual appointments of Commission members (including members hearing unfair dismissal cases) in federal or State systems, it would be wrong to discount the survey on the basis that it would have reflected attitudes to both federal and State systems.

[1.32] ACCI's *Pre-Election Survey* (completed prior to the 2001 federal election) gives a similar picture. It was a survey of more than 2,300 employers across Australia. Again, respondents would have been referring to both State and federal unfair dismissal jurisdictions when forming their responses.

[1.33] The survey results demonstrate a high level of awareness and concern amongst employers, including small business, at the operation of unfair dismissal laws. Obviously the greater the awareness and concern then the greater the perceived employment risk and connection to hiring intentions.

[1.34] The results of the *2001 Pre-Election Survey* are available for businesses generally, and for small business in particular. Details are attached – business generally at Attachment A and small business at Attachment B.

[1.35] The 2001 results indicate that for businesses generally unfair dismissals were the sixth most important area of concern out of 63 policy issues. It was the most important industrial issue. In commenting on this result the ACCI Review observed:

> *"The sixth most important issue is the unfair dismissals legislation. Business remains deeply resentful of the way in which employees who have been dismissed for cause are able to take actions that require their former employers to pay them large sums of money to finally see them on their way. There are some legitimate cases of unfair dismissal, and that has never been at issue. But this process has now become contaminated in a way that ensures that firms will often be required to defend their actions before a tribunal. The managerial time needed to process and deal with*

> *such claims is generally just not worth it to the firm. The result is that unfair dismissal applications are a cost to business that has absolutely no return. It slows growth and makes firms more reluctant to hire. This is a problem that needs final resolution."*

[1.36] In relation to small businesses the results of the *2001 Pre-Election Survey* were that small businesses indicated that the unfair dismissals legislation was the fifth most critical issue confronting them in today's operating environment – one ranking higher than for businesses generally – and again the highest ranking industrial issue. In rural/regional Australia, the survey found that the issue of unfair dismissals was the second most critical issue confronting small business proprietors.

[1.37] As mentioned earlier, the connection between unfair dismissal laws and the hiring intentions of employers is not something that lends itself to empirical proof, or disproof. However these survey results are indicative of attitudes held by private employers towards unfair dismissal laws in Australia. They are provided for the information and attention of members of the Senate committee. They add weight to the case or continuing unfair dismissal law reform.

2. Workplace Relations Amendment (Fair Dismissal) Bill 2002

The Fair Dismissals Bill 2002

[2.1] ACCI supports the *Fair Dismissals Bill* as one of a suite of measures which, in totality, would improve the operation of the federal unfair dismissal system.

[2.2] The proposal in the Bill to broaden the categories of excluded employees to include certain persons employed by small business is not new. Arguments for and against have been well identified in previous submissions to the Senate by numerous parties, including ACCI, during the period 1997 to 2001. There is no need to re-traverse that ground. We attach to this submission, at Attachment C, a copy of an extract of the July 1998 ACCI submission to the federal Department of Employment, Workplace Relations and Small Business in its review of Commonwealth unfair dismissal laws. That submission still provides a useful summary of the grounds on which ACCI has supported the exemption proposal.

[2.3] In supporting the *Fair Dismissals Bill 2002* ACCI notes the following:

- That the Bill would not exclude from the jurisdiction unfair dismissal claims against an employer by persons currently employed in small business, should they think they are unfairly dismissed; in this way the Bill seeks to create a link between new employment and the hiring risks to employers associated with unfair dismissal claims (discussed above);

- That the Bill would not exclude scope for new employees employed by small businesses from exercising rights under the Act for unlawful dismissal (eg notice periods on termination, discrimination based termination);

- That the definition of small business for the purposes of this Bill is more closely aligned (but not identical) to the ABS definition of small business;

- That defined categories of exclusion from unfair dismissal laws have always been a feature of the design of such laws;

- That categories of exclusion, by their very nature, involve arbitrary limits;

- That other areas of public policy in employment law distinguish between employers of different sizes (eg equal opportunity/affirmative action law, redundancy law);

- That other areas of public policy take into account the differing commercial circumstances between businesses large and small (eg fair trading, trade practices law);

- That the international treaty on which the Commonwealth unfair dismissal law was based (ILO 158 reproduced at schedule 10 of the *Workplace Relations Act*) itself provides a policy basis to exclude *"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 the nature of the undertaking that employs them****." (emphasis added);*

- That the federal parliament has accepted, in its August 2001 amendments, the principle that operational circumstances of businesses to manage termination issues may vary according to the size of the business;

- That the small business sector is a labour intensive part of the economy on which much of the employment growth in the past decade has been built.

[2.4] ACCI recognises that the government proposal to exempt newly employed persons in small business from federal unfair dismissal laws has not to date found favour with a majority of senators.

[2.5] Notwithstanding this, we continue to support the Bill, for the reasons outlined. We emphasise though that the *Fair Dismissals Bill* is not the full extent of matters that need to be considered in assessing the structure and operation of Commonwealth unfair dismissal laws. It is axiomatic that an employer which is just beyond the size criteria specified in the Bill is not affected, one way or the other, by the Bill. Yet those employers, as do employers generally, have additional matters of a policy nature that require attention. We have already mentioned the interaction of federal unfair dismissal laws with the multiple State systems. There are others.

[2.6] In order to assist consideration of the *Fair Dismissal Bill* (and for that matter the *Fair Termination Bill*) ACCI has included in this submission a series

of measures which remain outstanding from an employers perspective, and which require policy attention. These are outlined below.

[2.7] These additional measures are presented in a constructive way in an attempt to break through some of the gridlock that has characterised the unfair dismissal debate in recent years. The August 2001 amendments have given employers encouragement to advance these measures, recognising that some potential for unfair dismissal reform does exist. The ACCI proposals have been the subject of consultation with members, and have the benefit of applying to employers generally irrespective of business size. They should be considered on the merits. They stand as matters which are capable of being advanced by way of amendment to either the *Fair Dismissal Bill* or the *Fair Termination Bill*.

[2.8] The additional suggestions, if passed, would go a long way to restoring what employers see as a fair balance of interests between stakeholders in this area of policy. Indeed, one advantage of these additional measures is that the more the balance of interests between employers and employees is set right by changes to detail and process then the more this is likely to ameliorate some of the concerns of employers - concerns which have underscored the case for a small business exemption.

3. Workplace Relations Amendment (Fair Termination) Bill 2002

The 12-month casual exclusion

[3.1] The position advocated in the *Fair Termination Bill* with respect to the eligibility of casual employees is a fundamental issue for ACCI and its members.

[3.2] The *Fair Termination Bill* would provide that a casual employee who has not worked for an employer on a regular and systematic basis for a period (or periods) of at least 12 months and who does not have a reasonable expectation of continuing employment with that employer is ineligible to make an unfair dismissal claim under the Commonwealth Act.

[3.3] This proposal reflects an overall balance in the interests of employees and employers in the unfair dismissal laws. As noted above, excluded categories of employees have always been part of the design of unfair dismissal laws.

[3.4] Nor is the specific proposal new. Far from it. Enacting the government's legislation unamended does no more than retain the status quo that has applied for the past five years. It is a proposal to restore into federal law the position which applied from 1997 to November 2001 prior to the Federal Court decision in *Hamzy v Tricon.*

[3.5] Indeed, whilst it is usually the case that the party advocating changes to legislation carries the onus of establishing why the change should be made, the peculiar circumstances which have created the need for this legislative amendment (a court invalidation of regulations) require the question to be put

this way – why should an exclusion that was enacted in 1997 and not subsequently disallowed by the parliament not be allowed to continue?

[3.6] The exclusion was removed (and the previous regulation declared invalid) by the Federal Court for technical, not policy reasons. It would be wrong to use last years Federal Court decision to water down the 12-month exclusion. In any event, it is for the government and the parliament, not the courts, make public policy on unfair dismissal laws. Court decisions are not a substitute for balanced public policy on an issue as important as unfair dismissal laws.

[3.7] If any lesser period than a 12-month exclusion for casual employees is decided then the parliament would have increased, not decreased the burden of unfair dismissal laws on employers. That would be a ridiculous outcome, given that the unfair dismissal debate should be about reducing the problems that these laws create for fair-minded employers. There is no case whatsoever for the burden of federal unfair dismissal laws to be expanded.

[3.8] A watering down of the five year old law will add more risks and deterrents to the employment of staff, in this case casuals. For the past five years an employer could employ a casual and not be at risk of a federal unfair dismissal claim during the first 12 months of employment. If casuals are now to be given the right to sue employers for unfair dismissal during the first 12 months of employment then the parliament would have expanded, not reduced, the negative impact of unfair dismissal laws on business.

[3.9] In the view of employers, those that advocate a less than 12 month exclusion need to explain clearly to all employers why it is intended to increase the right of casual employees to sue employers for unfair dismissal.

[3.10] In considering the *Hamzy* decision we note that the conclusion of the Court was based on the finding that the wording of the previous regulation could have meant that, in theory, a casual employee employed for many years could have been excluded from the jurisdiction. In those circumstances the Court held that a regulation making power which allowed exclusions for casuals employed for a "short period" could not, in law, allow the making of the regulation that could have had the opposite effect. Hence the regulation was invalidated. We emphasise that the finding of the Court was not that a 12-month period of exclusion of a casual employee was an invalid period or not a "short period".

[3.11] In considering the amendments proposed by the Bill we note that the ILO convention on which these provisions have historically been drawn specifically contemplates the exclusion of *"workers engaged on a casual basis for a short period"* (Article 2, ILO Convention 158).

[3.12] A 12-month period of exclusion, having regard to the nature of casual employment and the significant rights and burdens which unfair dismissal laws create is not inappropriate. Service industries, which employ substantial numbers of casual employees, would be exposed to greater risks in employing persons should the 12-month exclusion be wound back. The parliament would, if it failed to make the amendment sought, be sending a very negative signal to business.

[3.13] It should also be borne in mind that the Queensland Industrial Relations Act 1999 excludes casuals whose engagements have been for less than 12 months (s.72(7)). This is an endorsement under a State industrial relations system, by the Beattie State Government, of the principle that a 12 month exclusion for casual employment is not inappropriate.

[3.14] Indeed, from an employer perspective an amendment, if any, which should be made to the exclusion that has applied for the past five years is to define casual employees for the purpose of the exclusion with some greater certainty. One option would be to apply the same definition of a causal employee that applies for other purposes of that employees employment (eg a definition which reflects the definition in their award or agreement).

[3.15] We make a final point on this matter. Some suggestions have been made in the debate on this matter to the effect that there ought to be a right for an employer and an employee to agree to a lesser period of exclusion than that provided for in the relevant law. That is a proposition which cuts both ways. Should there be a right to reduce the period of exclusion by agreement there should be a concomitant right to extend the period by agreement. If there is a logical basis for one, then there is a logical basis for the other.

The $50 Filing Fee

[3.16] ACCI supports measures to make the $50 filing fee permanent, to legislate for its imposition and to index the amount.

[3.17] The practical value of pre-lodgement and pre-hearing requirements (such as filing fees, time limitations) should not be underestimated. They are necessary parts of the overall balance of interests that these laws should be seeking to provide. A filing fee is on step which can help deter frivolous or vexatious claims, and conveys to the applicant some concept of the seriousness of the step being taken – that is to commence legal action against their former employer. It is from that legal action that consequences flow for both employer and employee, not the least of which are costs – from an employer's perspective – of considering the claim and defending oneself against it.

[3.18] ACCI has previously supported the filing fee being set at $100 (and indexed). We maintain that view. The Bill should be amended to that effect. A figure of $100 more realistically conveys a sense of proportion at the consequences of the legal proceedings that have been issued.

[3.19] ACCI also supports the proposal that the filing fee be indexed. We would however prefer that the indexation be based on movements in average weekly earnings (AWE) rather than the CPI. AWE is used for the indexation of other monetary limits in the jurisdiction.

[3.20] In assessing the proposals about the filing fee ACCI notes that the government does not intend to remove the existing discretion of the Registrar to consider waiver of the whole or part of the fee in cases of hardship. There appears to have been a significant use of this discretion in recent years and its continuation adds weight to the case for setting the filing fee at a more realistic level, and giving it permanence, given that the 'hardship discretion' removes the potential for unfairness in particular cases.

Additional Policy Matters

[3.21] As mentioned above, ACCI advances a number of additional proposals for amendment to the unfair dismissal system (Attachment D).

[3.22] These proposals would have the effect of rectifying other deficiencies that employers continue to identify with the operation of the law. In total, they would have the effect of balancing up the system to more adequately reflect its 1996 objective of providing a 'fair go all round'.

In summary these proposals are:

- Amend statutory objects to express the 'fair go all round' concept;
- Improve the prospects of resolution at conciliation conferences;
- Limit automatic access to arbitration following conciliation;
- A tighter test of what is an "unfair dismissal";
- Relieving the burden of procedural fairness by making the reason(s) for dismissal the paramount consideration;
- Preventing, so far as possible, excluded employees from making similar claims against the employer under other Acts or laws;
- Extending the qualifying period to the first six months of employment;
- Increasing the filing fee to $100;
- Extending unfair dismissal claims based on genuine redundancy;
- Limiting the scope for constructive dismissal claims (that is, resignation based claims);
- Requiring the consideration of business size and the presence/absence of a human resource manager to apply to all dismissals, not just those for "unsatisfactory performance";

- Providing a schedule of legal/representative fees, and provide for costs orders to be generally available against solicitors, not just parties;

- Not permitting extensions of time in cases of failure by an applicant' representative;

- Requiring the Commission to conduct its hearings expeditiously;

- Requiring a dismissed employee to have a statutory obligation to mitigate loss and declare all earnings, and require reinstatement and back wages orders to be discounted by the earnings, redundancy pay, social welfare payments or workers compensation payments the employee is entitled to keep;

- Orders for payment of compensation not to include non-economic loss (pain, suffering, hurt feelings);

- For smaller businesses:

    - Longer qualifying period for small business (9 or 12 months);

    - Lesser procedural requirements (valid reason plus opportunity to explain);

    - Family members to be excluded from claims;

    - Flexibility in the time and location of conferences.

Summary

[3.23] The Commonwealth unfair dismissal system has been the subject of repeated reviews and debate since its introduction in 1993. It remains a contentious area of public policy, especially within the employer community. We have not yet achieved a satisfactory policy balance between the rights of dismissed employees and the burdens imposed on employers. In any event, this is an area of law that is in need of ongoing review and attention given the potential for decisions and practices to alter the statutory purpose and intent.

[3.24] The *Fair Dismissals Bill 2002* and the *Fair Termination Bill 2002* are supported. They will, if enacted, improve the operation of the Commonwealth unfair dismissal system. They should be part of a suite of measures that are made to the law. There are other measures, which could be in addition or as alternatives, which should also be pursued.

4. Workplace Relations Amendment (Genuine Bargaining) Bill 2002

Schedule 1

[4.1] The AIRC can suspend or terminate a bargaining period under Part VIB, Division 8 of the *Workplace Relations Act 1996*. Section 170MW of the Act allows the Commission to suspend or terminate a bargaining period if various circumstances set out in s.170MW(2)-(7) exist.

[4.2] The amendments contained in Schedule 1 of the *Genuine Bargaining Bill* would provide further guidance on the suspension or termination of a bargaining period in particular cases where a party "*is not genuinely trying to reach an agreement with other negotiating parties*" (s.170MW(2)(b)).

[4.3] The Explanatory Memorandum indicates that:

> *"The aim of the proposed subsection is to provide guidance to the Commission by clarifying the meaning of 'not genuinely trying to reach agreement' within the context of paragraph 170MW(2)(b) rather than changing it"*[1]

[4.4] The various factors to be listed under proposed s.170MW(2A) are for consideration only, they are not proposed on a determinative basis, nor would they reduce the Commission's capacity to determine such issues subject to its consideration of Part VIB, Division 8 of the *Workplace Relations Act 1996*. The Commission's consideration would also continue to be guided by:

[1] *Workplace Relations Amendment (Genuine Bargaining) Bill 2002, Explanatory Memorandum, p.6*

- The objects of the Workplace Relations Act 1996 (s.3).

- The onus of proof on a party seeking to suspend or terminate a bargaining period.

- The operation of s.110(c), which indicates that the Commission shall act according to equity, good conscience and the substantial merits of each case.

[4.5] The explanatory memorandum (paragraph 6) clearly sets out that "*No single factor is determinative of the issue, and it is open to the Commission to take other factors into account*".

[4.6] The explanatory memorandum (paragraph 7) also makes it clear that even where the Commission concludes that a party is undertaking the conduct set out in one or more of the proposed new subsections, it will not be obliged to suspend or terminate the bargaining period. As indicated, the Commission will be able to take this into account in balancing considerations in the exercise of its discretion.

Pattern Bargaining

[4.7] Proposed subsections 170MW(2A)(a)-(c) address what is termed pattern bargaining.[2]

[4.8] Pattern bargaining does not appear to be the sole application of the proposed amendments, with subsections (d) and (e) in particular not necessarily

[2] Explanatory Memorandum, page 6, paragraph 3.

requiring a pattern bargaining scenario to become relevant (e.g. refusal to meet with negotiating parties, and refusal to consider or respond to proposals).

[4.9] In the context of the current system, ACCI supports genuine bargaining for workplace level agreements (be they AWAs certified agreements, or some other form of agreement), which reflect the priorities, aspirations and needs of employees and employers in workplaces.

[4.10] ACCI provided examples of pattern bargaining in its submission on the 1999 Bill, including examples from the construction industry to augment those from the manufacturing industry in Campaign 2000. ACCI understands there is no reason to conclude that pattern bargaining has diminished, nor that its pervasive-ness in some industries does not continue. This is an ongoing concern in workplaces, particularly for employers who want to genuinely negotiate with their employees about working relations in their workplaces.

[4.11] The proposed amendments appear very valid additions to the *Workplace Relations Act 1996* to assist the Commission in the exercise of s.170MW(2)(b) and to assist parties in their use of this provision. ACCI finds it difficult to believe that any party could argue against the proposed protections, which are designed to ensure parties bargain genuinely, and meet the conduct requirements set out in the proposed amendments.

Proposed subsection 170MW(2A)(a).

[4.12] This proposed consideration addresses situations in which a party's conduct is found by the Commission to indicate an intention to reach agreement only on an industry basis, and not on the basis of a specific workplace /enterprise.

[4.13] In short, this would come into consideration solely where a party would not bargain as conceived under the *Workplace Relations Act 1996*, and where a party was acting directly at odds with the principal object of the Act (s.3(d)(i), (b) and (c))

[4.14] This would not be a value judgement of an employer. The new subsection empowers the Commission to examine the conduct of parties and to determine whether this is consistent with the aims of the *Workplace Relations Act 1996*. It would be an exercise of the judgement of the Commission, and provides the Commission with substantial discretion.

Proposed subsection 170MW(2A)(b).

[4.15] This proposed consideration would see the Commission consider cases in which a party is bargaining on a one or all basis – and will not negotiate for any outcome which differs from what it has pre-determined as appropriate.

[4.16] It appears logical that in such cases, a party is not bargaining genuinely and is not meeting the standards for the system set out in the principal object for the legislation. This is certainly not workplace relations.

[4.17] These provisions are framed in regard to the conduct of parties. A failure of the party proposing the agreement to properly consider a counter proposal from a responding party would appear to be particularly relevant in this regard.

Proposed subsection 170MW(2A)(c).

[4.18] Scope is also proposed to guide the Commission in addressing conduct which indicates that a party is in reality seeking an agreement to apply to some party other than the one which it is nominally negotiating with.

[4.19] This appears a very clear cut example of when a party would not be genuinely bargaining with the party it is nominally bargaining with.

[4.20] It is also worth noting at this point that there are existing avenues under the *Workplace Relations Act 1996* for the making of multiple business agreements where appropriate.

Proposed subsection 170MW(2A)(d).

[4.21] The proposed amendments are not restricted to pattern bargaining. A more general consideration is the extent to which a party may have refused to meet or confer with another party.

[4.22] Again, it is difficult to conceive of a situation in which a failure to meet or confer with someone from whom you seek concessions (through the making of an agreement) could be anything other than a failure to genuinely bargain with them.

[4.23] ACCI finds it difficult to see that Parliament could continue to endorse situations in which a party could continue to enjoy statutory protection designed to encourage bargaining, when it will not even meet with a counterpart sincerely seeking to bargain.

Proposed subsection 170MW(2A)(e).

[4.24] Another more general consideration is the extent to which a party refuses to even consider or respond to proposals made by its negotiating counterpart.

[4.25] Again, it is difficult to conceive of a situation in which a failure to consider or respond to proposals from someone from whom you seek concessions (through the making of an agreement) could be anything other than a failure to genuinely bargain with them.

[4.26] ACCI finds it difficult to see that Parliament could continue to endorse situations in which a party could continue to enjoy statutory protection designed to encourage bargaining, when that party will not even consider or respond to proposals from its counterpart.

[4.27] The Commission would be considerably assisted by a statutory direction to consider such matters in determining if a party is genuinely bargaining. At their heart, these provisions appear designed to address situations where a party or parties are not in fact bargaining at all, save that they may have pursued the formalities necessary to protect their planned lock out or strike.

[4.28] Where these reforms had the effect of not allowing a party to continue to pursue an non-genuine approach that party would appear to only have the choices of (a) not bargaining and remaining with the safety net, or (b) genuinely bargaining on a workplace basis. This appears likely to have substantial benefits for workplaces.

Source of Amendments – Upholding the Commission's Decision

[4.29] The source of the proposed considerations is a decision of the Commission[3]. The Commission has determined the range of considerations proposed for determining how genuine bargaining should be assessed under s.170MW(2)(b).

[4.30] The Commission already determines matters under this section, in relation to both strikes and other employee action, and lock outs by employers[4]. This has included consideration of submissions that parties:

- Were pursuing industrial action for purposes other than bargaining.
- Pursuing industrial action without meeting the affected party.
- Not considering proposed amendments to agreements.
- Were pursuing protected action based on their pursuit of / opposition to the making of other forms of agreement (e.g. AWAs).
- Were pursuing agreements that could not be certified by the Commission.
- Were using protected action as a form of punishment rather than for the purpose of making an agreement.

[3] *Australian Industry Group v AMWU and Ors [Print T1982]*
[4] *Craig Schroeder and ors v Conroys Port Pirie Abattoir [Print T2914]*

[4.31] In *Ansett v Australian Licensed Aircraft Engineers Association* [Print S4783] (2000), Commissioner Wheelan examined an application under s.170MW(2)(b), and in particular whether there was a prospect of agreement. She had to determine a range of evidentiary matters, including whether there had been or was still a prospect of parties reaching agreement. The proposed amendments would allow the Commission to look to the conduct of parties in making such a decision. Again, it appears that the amendments, which are a codification of an AIRC decision, would assist the Commission and parties in the ongoing determination of such matters.

[4.32] Commissioner Wheelan made two further observations in this decision, which are in no way diminished by the proposed amendments:

- The exercise of the discretion to suspend or terminate a bargaining period "*must be considered in the context of the objects of the Workplace Relations Act 1996*". The proposed amendments would assist with this task, and would themselves be assessed in the context of the principal object.

- "*The power to suspend or terminate a bargaining period is a special power only available in one of the exceptional circumstances set out in section 170MW. It is appropriate that very careful consideration be given to the exercise of such a discretion.* The amendments would assist the Commission in making this careful consideration in relation to one of the s.170MW matters. (s.170MW(2)(b)).

Proposed Section 170MWA – New Bargaining Periods

[4.33] ACCI also supports the proposed new section regarding the capacity to enter new bargaining periods where earlier bargaining was withdrawn under s.170MV(b).

[4.34] It is appropriate that where an initiating party has not been able to meet its ends through a period of bargaining, and has been forced to discontinue its efforts, that the responding party have some relief from further bargaining for some period. It is in essence important that parties play by the decisions made in bargaining.

- A successful rebuff to a union claim for an agreement, either based on employer resilience, or lack of support from employees, or both, is the will of the workplace. The system should support such decisions having some ongoing effect, and not allow a rebuffed union to simply recommence its efforts to disturb the clear will of majority parties straightaway.

- Similarly, an employer should not be able to commence locking employees out shortly after ceasing to take such action on the basis that it was unsuccessful. Again, the will of the workplace must be accepted for some appropriate period.

[4.35] The Commission should have scope to make orders to this effect. This appears consistent in particular with the following objects of the *Workplace Relations Act 1996*:

> *"3(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and*

3(c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and

3(d) providing the means:

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

[4.36] The intention set out in the explanatory memorandum of ensuring "*negotiating parties do not manipulate bargaining periods to deny the Commission jurisdiction under section 170MW while also taking advantage of the Workplace Relations Act 1996's statutory immunities for protected action"* is valid and important.

[4.37] The proposed provision would enshrine capacity for all affected parties to be heard. The proposal is again underpinned by an express consideration of the public interest. This is a balanced provision which would primarily serve to further empower the Commission to address the appropriate application of the privilege of taking protected action.

Responses to Issues Raised Regarding the 1999 Bill

[4.38] Proposals to address abuses of protected action through pattern bargaining have previously been considered by Parliament. In assessing these proposals ALP and Democrat Senators raised various issues. ACCI believes that the current proposal meets these concerns, and should be passed by the Senate.

Scope of Proposed Amendments

[4.39] Senator Murray concluded in regard to measures to address pattern bargaining in the 1999 *More Jobs, Better Pay Bill,* that they *"go too far"*.[5]

[4.40] There are significant differences between the 1999 and 2002 propositions, including principally:

- The 1999 Bill sought to introduce dedicated provisions to address the excesses of pattern bargaining. The 2002 amendments would see the AIRC address pattern bargaining in the context of its existing power to determine whether a party is genuinely trying to reach an agreement (s.170MW(2)(b)).

- The 2002 amendments provide the Commission with matters to consider in exercising its discretion. They both rely on, and empower, Commission discretion in the determination of issues. This appears to be different to s.170MWG proposed in 1999.

- The proposals are not solely about pattern bargaining. The excesses of pattern bargaining are only a subset of the matters the Commission will be encouraged to have regard to in exercising its discretion under s.170MW(2)(b).

ALP Senators – Defining Pattern Bargaining

[4.41] In the 1999 report on the *More Jobs, Better Pay Bill*[6], ALP Senators noted a supposed lack of precision in the definition of pattern bargaining. This was the introductory criticism of the then proposal. On this occasion, ACCI notes that:

[5] 1999 report – p.398
[6] 1999 report, p.248-50[6.59]

- Proposed s.170MW(2A) does not rely on a definition of pattern bargaining, but rather on the Commission's assessment of particular conduct and intentions.

- These factors are for the Commission to determine under the proposed amendments. To the extent that the proposals would rely on any definition of pattern bargaining, the Commission will do the defining, guided, but not constrained by a statutory direction from Parliament.

ALP Senators – Scope to Pursue Like Conditions

[4.42] In the 1999 report on the *More Jobs, Better Pay Bill*[7], ALP Senators concluded that the effect of then proposed s.170LG would be to preclude union action for common clauses across an industry. Examples cited were pursuit of paid maternity leave, or a common pay outcome.

- Proposed s.170MW(2A) is differently constructed to the 1999 proposals. Where proposed s.170LG and s.170MWG would have taken certain actions to be pattern bargaining, the current proposal would empower the Commission to look to the intention of parties in advancing their claim.

- Were, in the ALP Senators 1999 example, a union to be willing to negotiate on at least some matters beyond the wage increase or maternity leave, they may not on balance be taking action which could lead the Commission to suspend or terminate their bargaining period.

[7] 1999 report, p.248-50 [6.60]

- There may also be scope to negotiate on quantum, timing, application etc of matters advanced at an industry level, which would again be arguable in support of a non-pattern approach.

- We have already set out our consideration that the existence of an industry bargaining agenda, or priority issues for inclusion in agreements is not prima facie evidence of pattern bargaining. What is important is the conduct of an applicant party where a respondent party seeks to actually negotiate.

- These factors are for the Commission to determine. To the extent that the proposals would rely on defining pattern bargaining, the Commission will do the defining, guided, but not constrained by Parliament. Once again, AIRC discretion appears the hallmark of the current proposal.

ALP Senators – Proper Consideration

[4.43] In the 1999 report on the More Jobs, Better Pay Bill[8], ALP Senators concluded that there was no proper analysis of concerns regarding pattern bargaining, and in particular no assessment of the scope of this phenomenon beyond Campaign 2000.

- The current proposal does not require such a consideration. It is setting out issues for the Commission to consider in the exercise of its discretion under an existing provision of the Act.

- Were the ALP Senator's implicit suggestion that pattern bargaining is not a widespread concern correct, then the Commission would have the discretion to consider this. The Explanatory Memorandum[9] makes clear that even

[8] 1999 report, p.248-50 [6.62]
[9] p.7, para 7.

where the matters in s.170MW(2A) are made out, the Commission can still on balance not exercise its power under s.170MW(2)(b).

- If an employer brought forward a sham or inflated concern regarding pattern bargaining, a union would have scope to argue this, and could on merit have the Commission decline to act under s.170MW(2)(b).

- If the 1999 observation were valid, few claims would come before the Commission based on pattern bargaining.

ALP Senators – Employer Views

[4.44] In the 1999 report on the *More Jobs, Better Pay Bill*[10], ALP Senators highlighted that some employers may see benefits in like agreements across an industry.

- This is valid in some cases. Simply agreeing to a proposal from another party is one form of negotiation, and can be the genuine position of the employer, particularly where proposals are reasonable, contain no ambit, and have been advanced based on a genuine recognition of industry circumstances.

- The point is that an employer should not be precluded from genuinely seeking to engage in other forms of negotiation, even where a union may have a preference for a common outcome, and a majority of industry counterparts may have signed up to the model. Negotiation in the commonly

[10] 1999 report, p.248-50 [6.63]

understood sense of the word should be possible and should be supported by the system.

- ACCI could not accept that the scenario described in [6.63] of the 1999 Committee report would apply in a majority of cases. It is not a sound basis to address most instances of pattern claims, which employers do not want to agree to implement.

- To the extent that the observation at [6.63] of the 1999 Committee report regarding employer pattern bargaining was in any way valid, it does not possibly describe the majority of cases in which pattern bargaining is relevant. It simply beggars belief to suppose that employers are pattern bargaining to anywhere approaching the extent of unions.

- There is no discrimination under the proposed provisions between union and employer pattern bargaining, nor more relevantly in relation to employers and unions failing to "genuinely try to reach an agreement" under s.170MW(2)(b). The Commission would under the proposed amendments be able to address conduct by either party equally.

ALP Senators – International Comparisons

[4.45] In the 1999 report on the More Jobs, Better Pay Bill[11], ALP Senators note that no other country prohibits pattern bargaining:

- The proposed amendments would not prohibit pattern bargaining. They provide scope for the Commission to address bargaining conduct where relevant to suspending or terminating a bargaining period under an existing

[11] 1999 report, p.248-50 [6.65]

statutory capacity. Nothing in the proposal would stop employers agreeing to common outcomes.

- That no other country was formally identified as prohibiting pattern bargaining is not particularly illuminating. No other country has Australia's hybrid bargaining / arbitral system, and no other country (save perhaps New Zealand) embarked on Australia's unique 20th Century approach to industrial relations.

- There are many elements unique to particular national labour relations systems. This is not inherently an objection to the making of particular national labour laws.

ALP Senators – Productivity

[4.46] In the 1999 report on the More Jobs, Better Pay Bill[12], ALP Senators note the evidence of Professor Issac regarding so called economic benefits of pattern bargaining.

- The popularity of enterprise bargaining since the 1980s, and the (probably) billions of dollars which Australian business has spent in pursuit of competitive and productivity advantage through bargaining makes this a very difficult proposition to endorse.

- Uniformity of pay and conditions no longer forms part of Australian society's expectations, to the extent that it ever did.

[12] 1999 report, p.248-50 [6.66]

- Such an assessment is no longer open to the Australia. We have a bargaining system, which in broad terms is supported by all parties. The clock will not be wound back, and competition between enterprises will, and must, be based on a broad range of factors including, but not limited to management. The competitive model proposed by Professor Issac is little more than theoretical.

- To the extent that the perspective were valid, employers would agree to union proposals, or would move to collective industry negotiations and then the consent certification of pattern agreements. This is not precluded by the proposed amendments. The Genuine Bargaining Bill is not inconsistent with any employer concluding that a pattern approach is best for their business.

Conclusion – Schedule 1

[4.47] The proposed amendments do not have the effect that a party cannot set an industry bargaining strategy, or even industry goals for agreement making (such as for example setting a goal for industry wage increase outcomes). They do not remove the right to take protected industrial action.

[4.48] The proposed amendments would however more clearly set out for parties the point at which such goals or strategies can over-step the mark, and can become strictures which mitigate towards outcomes at odds with the objects of the *Workplace Relations Act 1996* set out by Parliament.

[4.49] The proposed amendments would also assist the Commission by providing initial guidance on the exercise of its discretion in these cases. The amendments would provide the Commission with Parliament's expectations of bargaining, and Parliament's guidance on when a party has ceased to bargain genuinely, and the prescribed avenues should be further considered.

[4.50] The economic gains of the bargaining system arise out of tailoring conditions to meet specific workplace requirements and genuine employee preferences. This is retarded by the use of protected action in cases of pattern bargaining.

Schedule 2

[4.51] The *Genuine Bargaining Bill* seeks to vary Part VIB, Division 8, of the *Workplace Relations Act 1996* to create an additional, specific capacity to allow the AIRC to suspend a bargaining period, and thereby protected action, based on a set of defined considerations.

[4.52] The proposed amendments would allow the AIRC to order that, where industrial action is occurring, parties should cool off and resume normal work for a temporary period. Where the AIRC considers it relevant, this would allow an additional opportunity to resolve issues in dispute, including through the AIRC offering its services in the form of mediation or conciliation.

[4.53] The proposed amendments would allow the AIRC an additional opportunity to contribute to the resolution of a small proportion of highly contended negotiations, which have already escalated into industrial action, without recourse to further industrial action for an appropriate period (to be determined by the Commission).

[4.54] ACCI supports this proposal as an additional measure to allow the system to better address some of the most contested cases of bargaining, which can escalate into protracted, costly and very damaging industrial action. Various cases under the existing Part VIB, Division 8 of the *Workplace Relations Act 1996*, including those outline below, highlight an artificial narrowness in the circumstances in which the Commission can presently order an effective cooling off in cases of industrial action.

[4.55] It appears to ACCI that cooling off will be a relevant approach in some cases, and that the Commission should have a capacity to pursue such an

approach where appropriate. Cooling off has been applied by the Commission under the existing Part VIB, Division 8 of the *Workplace Relations Act 1996* in some instances. However, after 5 years of the operation of these existing provisions, it appears that the circumstances in which the Commission can adopt this approach are inappropriately narrowed by the existing provisions.

[4.56] It appears that there should be an avenue for the Commission to pursue cooling off short of the very high tests set out in s.170MW. As a matter of policy, it appears inappropriate that the level of detriment set out in the current Act needs to be reached prior to the Commission being able to set parties on an alternative path. There should be scope for cooling off orders to contribute to the resolution of disputes, and to the making of productive and mutually beneficial agreements, short of the existing circumstances set out in s.170MW.

[4.57] There is also no recognition in the current provisions of the difference between terminating and suspending a bargaining period. The proposed amendments would create an additional capacity for the AIRC to suspend a bargaining period where it believed this was appropriate and would assist in the resolution of the dispute, short of the circumstances set out for the termination of a bargaining period. The proposal would provide one more option for the Commission when undertaking its traditional role of preventing and settling disputes, where supported by parties.

[4.58] It should also be noted that the proposed amendments would merely facilitate an additional avenue for the suspension rather than termination of a bargaining period. Industrial rights are not proposed to be diminished.

Industrial Action

[4.59] This proposal is grounded in the importance of preventing and resolving disputes, which has been one of the hallmarks of the Australian labour relations system:

- Enabling the AIRC to prevent and settle disputes is embodied in the principal object of the *Workplace Relations Act 1996*.[13]

- The importance of preventing and settling industrial disputes is also recognised in the Australian Constitution.[14]

[4.60] It is well understood that industrial action has declined from the levels which characterised the Australian system in previous decades.

Australian Industrial Disputes 1960-2000[15]

[4.61] More recent data also indicates that industrial disputes have continued to decline based on various aggregate measures:

[13] Section 3(h).
[14] S.51(xxxv)
[15] ABS – Australia Now, Statistical Summary, Industrial Disputes (Downloaded from www.abs.gov.au, 10 April 2002)

Australian Industrial Disputes 1999-2001[16]

	1999	2000	2001
Industrial Disputes (Total)	731	698	675
Employees Involved	461 100	325 400	225 700
Working Days Lost	650 500	469 100	393 100
Working Days Lost (per 1000 employees – 12 months to Dec)	87	61	50

[4.62] This is just measured industrial action, ACCI understands that there have long been levels of industrial action which were not recorded in the formal data. The primary point remains unaltered however. Examining relative performance using such standard measures, indicates that measured industrial action has declined, but remains a significant and costly problem for Australian workplaces and society.

Protracted Disputes – There Are No Winners

[4.63] The evolution of Australian workplace relations, supported in particular by reforms since 1996, appear to have reversed very high levels of industrial action in this country. However, whilst overall levels of industrial action may have fallen, the impact of industrial action in particular workplaces is undiminished.

[4.64] Industrial action, particularly where protracted, is not only detrimental to employers, markets, industries and regions, but also to employees who go

[16] ABS - Industrial Disputes (Cat no 6321.0) – December 2001, Tables 1 and 4.

without pay[17]. Strikes and lockouts break the interdependence of employee and employer, and deprive both the benefits received from the employment relationship. This is no small matter, and is not a sound outcome of a workplace relations system.

[4.65] ACCI understands that the protracted forms of industrial disputes to which cooling off may be relevant are amongst the most damaging, and are those which it is most incumbent upon a contemporary workplace relations system to avoid. Cooling off orders may be particularly relevant in these cases.

Scope of the Proposed Orders

[4.66] The proposed new cooling off orders would be considered by the AIRC only on request of parties where industrial action is already being taken in respect of a proposed agreement (s.170MWB(1)(b)).

[4.67] The proposed amendments would neither ban industrial action, nor diminish the role of protected action under the *Workplace Relations Act 1996.* Rather, they would ensure that in the limited minority of cases in which continued protected action was not assisting in resolving issues in dispute, and was contrary to the public interest, the AIRC could assist parties through an additional cooling off period.

[4.68] It appears to ACCI that in most cases where protected action has preceded the making of agreements since 1994/1996, this would continue to be an accessible option without recourse to cooling off orders. Protected action would continue to operate in the first instance, and parties would only have

[17] Section 187AA, *Workplace Relations Act 1996*.

cause to go to the AIRC for such an order where disputes were extended or were not making progress towards resolution.

The Role of the Commission

[4.69] Protraction suggests that industrial action is not leading to a negotiated outcome within the extant bargaining process. Some other approach is clearly required, and the system should provide this to assist parties where appropriate.

[4.70] This proposal would expand the role of the AIRC in addressing disputes which have degenerated into a protracted lock out or strike, and allow the AIRC to assist parties in resolving issues between them without recourse to further industrial action.

[4.71] The proposal appears to increase the role of the AIRC in particular in the prevention of industrial disputes.

[4.72] The amendments clearly rely on the AIRC's discretion, and create a further capacity to address disputes based on the Commission's consideration of particular disputes. This is consistent with the formulation of the current provisions for the termination or suspension of bargaining periods, which the Federal Court has found to rely on the discretion of the Commission:

> *"Whether conduct or action is threatening to endanger something or cause significant damage to something will require consideration of the possible or likely effect of the conduct or action and consideration of whether that possible or likely effect is deleterious or harmful. That a process of evaluation arises in the context of s 170MW(3) is all the more apparent from the terms in which the subject matter that might be affected by the conduct or action is identified. It includes the welfare of the population and an important part of the Australian economy.*

> *Neither of these matters is susceptible of rigid or even clear definition. Nor ordinarily would the effect of conduct or action on them be capable of measurement in any quantitative sense. Necessarily the formation of the opinion that the circumstance identified in s 170MW(3) exists will involve evaluation and judgement. It involves a process of evaluation similar to that undertaken by the Commission when assessing whether there is an impending or probable industrial dispute. In making that assessment the Commission can do no more than form a view rather than determine, as a matter of fact, that a situation is likely to give rise to an industrial dispute: see Attorney-General (Qld) v Riordan (1997) 146 ALR 445; 71 ALR 1173 at 1186 per Gaudron and Gummow JJ; see also Victoria v Commonwealth (1996) 187 CLR 416 at 497; 138 ALR 129. [ALR at 11 ll 16-34]"*[18]

[4.73] The Explanatory Memorandum notes that the AIRC already has such scope to establish cooling off periods under s.170MW, but this can only be invoked in defined and limited circumstances due to the construction of the present s.170MW.[19]

[4.74] We agree with the Explanatory Memorandum that the cooling off periods would play a valuable role in the negotiation process in the minimum of cases where they would be relevant, and would provide a further opportunity to negotiate:

- Without the instant presence of industrial action clouding an ability to resolve matters in dispute.
- With ongoing recourse to industrial action to pursue their position should the cooling off order not resolve the matters at issue.
- With the assistance of the Commission where appropriate.

[4.75] The proposed amendments appear a valid extension of the approach which already appears in Part VIB, Division 8 of the *Workplace Relations Act 1996*, and to create an additional avenue for the Commission to assist parties in the resolution of disputes where appropriate.

[18] [(1999) 159 ALR 1], Cited in [Print R4597]

[4.76] The proposal is also clearly analogous with the well established practice of the Commission of issuing advisory and non binding orders in relation to industrial action. This includes established use of recommendations to cool off and pursue negotiation rather than industrial action. The proposed amendments would merely provide the Commission with the power to have parties cool off, suspend their industrial action, and consider the Commission's recommendation.

[4.77] The analogy to a circuit breaker or pressure valve before the very worst outcome, protracted industrial action, come to pass, appears very apt.

Protecting the Public Interest

[4.78] The proposed new provision relies on the a public interest test, and the AIRC will only have scope to make cooling off orders where it is determined that this would be consistent with the public interest. The test is broad and would provide the Commission with considerable and appropriate discretion.

[4.79] An assessment of the public interest is a well established part of the work of the AIRC. It is already an express consideration exercised in relation to the making of orders in diverse areas such as:

- Granting leave to appeal to a Full Bench (s.45).
- Flow on of terms of agreements into awards (s.95).
- Terminating a Certified Agreement (s.170MH).
- In the making of awards (s.170MX).
- Approval of AWAs (s.170VPH)

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- Victorian minimum wages orders (s.502).

[4.80] The proposed cooling off orders are a balanced proposition which would expand the AIRC's role in addressing the minority of industrial disputes which appear set to have greatest detriment to employers, employees and society. The operation of the public interest test will ensure that wider considerations of rights and interests can be taken into account by the Commission.

[4.81] Were a proposal for a cooling off to be contrary to the public interest, or the rights of employees would be unjustly compromised, the Commission would have the power to refuse to make such an order.

[4.82] There is also a direction in proposed s.170MWA(1)(c)(i) that the AIRC consider the consistency of any cooling off order with the objects of the *Workplace Relations Act 1996*. These objects include:

- Section 3(a) *"encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market".*

- Section 3(b) *"ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level".*

- Section 3(c) *"enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act".*

- Section 3(d)(i) *"providing the means for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards".*

- Section 3(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".*

- Section 3(h) *"enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration".*

[4.83] Again, this provides an additional built in protection for balance in the making of cooling off orders, and for organisations, individuals and employers to argue against the making of such orders where they believe their actions in pursuing industrial action, are consistent with what the Parliament has set down as the appropriate guiding principles for the workplace relations system.

Previous Bills

[4.84] There was a previous proposal to allow the AIRC to make cooling off orders, contained in the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (More Jobs, Better Pay Bill).

[4.85] ACCI supported the proposed reforms on the last occasion. We consider that the principle of providing the AIRC with an appropriate capacity to make cooling off orders is a sound one, and that the Commission's capacity to address instances of protracted and intractable industrial action should not be restricted to those which currently appear in Part VIB, Division 8, of the *Workplace Relations Act 1996* since 1996.

[4.86] There are clear differences between the proposal on this occasion, and that advanced in 1999, including:

[4.87] Discretion: The 1999 *More Jobs, Better Pay Bill* sought to set circumstances in which the AIRC must order the suspension of a bargaining period (s.170MW(1)). In contrast, the 2002 *Genuine Bargaining Bill* would see the Commission provided with discretion to suspend a bargaining period (use of the word "may" in proposed s.170MWA(1)).

[4.88] Assisting Outcomes The *2002 Genuine Bargaining Bill* only allows for suspension of a bargaining period where the AIRC considers that "suspending the bargaining period would be beneficial to the negotiating parties because it would assist in resolving the matters at issue" (s.170MWA(1)(c)(i)).

[4.89] Activation The *1999 More Jobs, Better Pay Bill* provided that suspension came into force after 14 days (s.170MW(1)(c)). In contrast, the 2002 *Genuine Bargaining Bill* does not set any automatic approach to when suspension becomes relevant. Instead, the AIRC is provided with discretion, and could determine that it is appropriate to suspend a bargaining period either before or after 14 days of action. No blanket approach is proposed, and the extent to which suspension is consistent with the public interest will differ from case to case.

[4.90] Public Interest

The 2002 *Genuine Bargaining Bill* does not seek to define the issues which the AIRC must consider in assessing the public interest as was proposed in the 1999 Bill (s.170MWC(7)). The AIRC will be able to determine public interest considerations with regard to these issues and any other issues its considers relevant, consistent with established approaches to determining the public interest.

Responses to Issues Raised Regarding the 1999 Bill

[4.91] The More Jobs, Better Pay Bill was subject to detailed consideration by this Committee during 1999/2000. ALP and Democrat Senators reported on various provisions of the 1999 Bill. This included comments on the previous proposal for cooling off orders. Various issues arising from these reports are addressed in the proposed 2002 legislation, including through different proposals for amendment on this occasion.

[4.92] The changes in the Bills, and the importance of the issues of principle involved, will allow Senators the opportunity for the due consideration of the Bill, as highlighted by Senator Murray in his report into the 1999 Bill.[20] The Senate is not invited to rubber stamp this Bill, nor to either "just say no" or "just say yes".

[4.93] The merits of the proposition that the Australian labour relations system should integrate an effective capacity for cooling off, the balanced terms of the

[20] pp.392-393

2002 Bill, and the continuing failure of the system to properly address intractable disputes, should see these amendments pass the Senate on this occasion.

Overview – Fairness and Balance

[4.94] The Democrat Senator's report contained the following passage:

> *"This bill as it stands is too harsh, too regressive and too unfair to attract our support in its current form."*

[4.95] This was not a conclusion which ACCI could agree in relation to the 1999 Bill. However, Senators should be even less inclined to reach such a conclusion in relation to the present proposal. There are major changes to the proposal which whilst continuing to integrate the principal benefits of cooling off within the workplace relations system, do so based on, for example, a greater role for the AIRC, greater AIRC discretion, and an express consideration of the public interest.

The Role of the AIRC

[4.96] The Democrat Senator's report on the *More Jobs, Better Pay Bill* contained the following passage on the role of the AIRC:

> *The Australian Industrial Relations Commission has asserted its independence. Sometimes unions have been pleased with the results, sometimes employers and sometimes neither. That is the function of an umpire - to make decisions without fear or favour. Some examples are its rejection of Minister Reith's low Safety Net wage increase offers, and its decisions on the Coal Industry and Tallies.*[21]

[4.97] This is precisely the role proposed for the AIRC in relation to cooling off orders. The present proposal rests on the discretion of the Commission, and on its independence for their proper operation.

[4.98] The ALP Senators' report on the 1999 Bill[22] contained an outline of a submission from Professor Ronald McCallum, foundation Professor in Industrial Law at the University of Sydney and Special Council in Industrial Law to Blake Dawson Waldron. Professor McCallum made the following submission:

> *"On the other hand, schedules 11 and 12 of the Bill seek to establish a new and a rather rigid form of enterprise bargaining which not only truncates the freedom of the parties but which diminishes even further the discretionary powers of the Commission.*
>
> *...*
>
> *Automatic cooling off periods are mandated in the bargaining process which will truncate meaningful bargaining (see, for example, proposed sections 170MW-170MWI). While the Australian Industrial Relations Commission does have a role to play in this process, the provisions are drafted in such a manner that the Commission has very little discretion to delay or to modify the prescriptive rules laid down in these two schedules.*
>
> *...*
>
> *In my judgement, this bargaining process, if enacted into law, would not operate to enable the parties to exert economic pressure upon one another which is the essence of collective bargaining."*

[4.99] These are again not views which ACCI could endorse. However, Professor McCallum's views are also rendered even less sustainable by the proposal currently before the Senate. The current proposal would create a greater rather than lesser role for the AIRC, and would operate subject to a public interest test, and based on the AIRC's belief that cooling off would assist in the resolution of matters in dispute. Rather than restricting the discretion of the Commission, the current provisions appear to rely upon the exercise of this discretion for their operation.

[21] p.391
[22] [6.35], p.17

Overall Level of Industrial Action

[4.100] The Democrat Senators' report on the 1999 More Jobs, Better Pay Bill, concluded that:

> *In my view, it is difficult for the Government to advocate a much greater tightening up of this area of industrial disputes, when it is simultaneously boasting that Australia has the lowest level of industrial disputation in eighty years.* [23]
>
> ...
>
> *"Industrial disputation is an essential part of the bargaining and market process, and parties to disputation must be given the opportunity to work matters through. The system we now have seems, by and large, to serve Australia well."* [24]

[4.101] It is true that industrial disputes have fallen from this historically high levels which characterised Australian labour relations throughout the era of compulsory arbitration, and the historic primacy of the award system. However:

a. Industrial action continues to be too high in Australia, and to have a damaging impact on employers, employees, workplaces and workplace relations. ACCI cannot agree that existing levels of industrial action are satisfactory given the negative impact of this action.

b. The protected action regime does not imply that industrial action will become a matter which cannot be addressed by policy/legislation. It does not appear appropriate that employers and industries affected by industrial action can be abandoned by the system simply because bargaining is nominally underway, without regard to the detriment to the public interest.

[23] p.397
[24] p.397

c. There are cases in which industrial disputation ceases to be an essential part of the bargaining process – and becomes a major symptom of negotiation breakdown, and a hindrance rather than help to resolution. Additional scope for the AIRC to assist parties where appropriate appears a very valid addition to the system in the minority of such cases where it will be relevant.

d. Examples such as those cited above indicate that protracted and intractable bargaining in some cases is not assisted by ongoing industrial action.

e. It does not appear that interruptions to commercial and public activities serve Australia well. There needs to be some scope to address the most damaging instances of industrial action short of the existing provisions set out for the termination of a bargaining period.

Triggering of Cooling Off Periods

[4.102] In their 1999 report, the ALP Senators stated:

> *"Labor Senators are concerned about the proposed requirement for the Commission to impose a mandatory 'cooling off period' by suspending a bargaining after industrial action had been taking place for 14 days"* .

[4.103] The previously proposed s.170MW(1)(c) does not appear in the current proposal. Instead, the proposed s.170MWAprovides the AIRC with discretion as to the making of cooling off orders, including ((1)(c)(ii)) the extent to which the duration of the action taken should inform that making or not making of an order sought. The proposal is for the AIRC to assume an additional a discretionary power rather than mandatory obligation. This is a balanced protection of the rights of both employee and employer.

[4.104] At [6.50] of their previous report ALP Senators outlined some of the periods of notice etc which operate in cases of protected action. The Senators stated that *"Given the extensive time periods already involved in (initiating a bargaining period, notice of action etc) it is difficult to imagine anyone needing a cooling off period"*.

[4.105] This misunderstands the contribution which the cooling off period can play in the resolution of disputes, and that it may be a relevant approach, even after extensive negotiations. It is not the case that once industrial action is embarked upon that it should become a fait accompli, nor that there may not be sound public interest grounds upon which parties should be encouraged to pull back from damaging industrial action. The appended case studies all involve protracted bargaining.

[4.106] At [6.51] of the 1999 report, ALP Senators question whether cooling off periods would actually assist in the resolution of issues. This is in our submission a consideration which is inherently met in the drafting of the 2002 proposal. Proposed s.170MWA(1)(c)(i) would ensure that such orders would only be available where the AIRC is considers that suspension of the bargaining period would "be beneficial to the negotiating parties because it would assist in resolving the matters at issue".

[4.107] It is also not the case that the proposed cooling off orders would weaken the bargaining position of employees or employers [6.51], nor force an agreement. There is to be a public interest test administered by the AIRC which would allow any party concerned about such a possibility to argue this in support of not making an order.

Conclusion

[4.108] Whilst protected action forms a part of the contemporary workplace relations system, the impact of protracted and intractable industrial action

continues to be as damaging as it ever was, if not more so, to work, working relationships, and to outcomes for individuals.

[4.109] The concerns expressed by various Senators in relation to the 1999 legislation have been addressed either through different proposals for amendment on this occasion, or through the holistic consideration of the role which cooling off orders can play under the *Workplace Relations Act 1996* outlined above.

[4.110] This is a different Bill. However, it still seeks to pursue a highly valid goal; the better settlement of disputes and avoiding protracted industrial action. ACCI urges the Senate to pass the Genuine Bargaining Bill.

Case Studies

[4.111] A number of cases were cited in ACCI's 1999 submission on the *More Jobs, Better Pay Bill 1999* in support of the previous proposal for cooling off periods.

[4.112] The *Workplace Relations Act 1996* was not amended to allow the AIRC proper capacity to order a cooling off where appropriate on this previous occasion.

[4.113] The case studies therefore continue to illustrate the subset of cases of industrial action for which the current processes do not adequately provide for the settlement of disputes, and in which additional scope for cooling off is warranted.

CASE STUDY 1

Ambulance Services Victoria (ASV) – Metropolitan Region and Australian Liquor, Hospitality and Miscellaneous Workers Union (ALHMWU) (C No. 31986 of 1998) [Print Q0506]

[4.114] The employer (Ambulance Services Victoria) made an application under s.170MW of the Workplace Relations Act 1996 for the bargaining period currently in force between itself and the ALHMWU to be terminated.

[4.115] The employer's application was based on arguments with respect to s.170MW(3)(a) which provides for suspension or termination of a bargaining period if industrial action that is being taken to support or advance claims in respect of the proposed agreement is threatening to endanger the life, the personal safety or health, or the welfare, of the population or of part of it.

[4.116] Industrial action commenced on 30 March 1998 and the application by the employer was heard on 5 May 1998. The union's industrial campaign consisted of the following:

a. On 30 March 1998 bans commenced on all general maintenance duties outside of all ambulance vehicles;

b. On 2 April 1998 imposing bans on the ASV refurbishment program with relation to ambulance vehicles;

c. On 7 April 1998 imposing bans on the completion of patient care records and other paperwork.

[4.117] The approach taken by the Commission, consistent with an earlier Full Bench decision which considered the meaning of s.170MW, was to require the employer to provide actual detailed evidence of the harm that the bans had caused, rather than allowing the Commission's decision to be based on the potential for the situation to cause harm or endanger people's lives. Since the employer could not provide this evidence, the application was refused.

[4.118] A different set of statutory tests would have led to a better outcome of the proceedings. Most pertinently, the proposed public interest test in s.170MWA(1)(c)(iii) may be relevant in allowing the AIRC to assist with the resolution of such an important, and potentially damaging, dispute.

CASE STUDY 2

Coal & Allied Operations Pty Ltd and Construction, Forestry, Mining and Energy Union (CFMEU) (C No. 33540 of 1997) [Print P2012]

[4.119] This case involved an application by the employer to terminate a bargaining and the employer relied on the grounds established in s.170MW(2) of the *Workplace Relations Act 1996*. Section 170MW(2) provides the Commission with the power to terminate a bargaining period if it can be established that one of the parties has not, or is not, genuinely seeking to reach agreement with the other party.

[4.120] Proceedings commenced on 10 June 1997. At that time, the parties had been negotiating for approximately two years concerning a certified agreement to cover the employer's operations.

[4.121] Negotiations once again broke down at the beginning of June. On 2 June 1997 the company informed the union that it decided to offer Australian Workplace Agreements (AWAs) to five employees. These employees were already being engaged on an alternative working arrangement and the purpose of the AWAs was to formalise these working arrangements. The union expressed their opposition to AWAs being offered to company employees and informed the employer on 5 June 1997 that, as a consequence, it would commence industrial action.

[4.122] The company applied for the bargaining period to be terminated on the basis that the union was not seeking to genuinely reach agreement and the proposed industrial action related to extraneous issues (namely, the union's opposition to the offering of AWAs to certain employees).

[4.123] The Commission rejected the company's application; the Commission held that the evidence did not support the company's

contention that the industrial action was being undertaken about an extraneous issue or for an ulterior purpose. The Commission also did not believe the issue of the offering of AWAs was completely extraneous to the negotiations for a certified agreement.

[4.124] Given the seeming intractability of the dispute, and ongoing economic damage that such industrial action can cause, the AIRC should have been provided with an additional capacity to address the appropriateness of continued industrial action for some limited period. A cooling off order may have provided an additional factor which could have assisted in the resolution of this dispute.

CASE STUDY 3

CitiPower Pty and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) (C No. 34311 of 1997) [Print P3359]

[4.125] CitiPower and the CEPU had been negotiating a certified agreement since 12 February 1997. On 9 May 1997 some CitiPower employees refused to carry out certain duties. In response, the employer directed the employees to work as directed or receive no pay. As a consequence of these events CEPU members at CitiPower went on strike.

[4.126] The employer applied for the bargaining period between itself and the CEPU to be terminated under s.170MW(3) of the *Workplace Relations Act 1996* and proceedings commenced in the Commission on 9 July 1997.

[4.127] The employer argued that industrial action being engaged in by the union constituted a serious threat to the continuity of the electricity supply of certain areas of Melbourne and therefore endangered the life,

the personal safety or health, or the welfare, of the population or part of it. CitiPower was able to identify the particular ways in which the union's actions were putting the continuity of the electricity supply at serious risk.

[4.128] As in the first decision, the Commission in this case required that the employer provide more evidence of an actual situation, such as, e.g., the collapse of the power grid, before it would grant an application under s.170MW. The Commission was unable to conclude that the industrial action constituted a threat of the necessary kind and the employer's application was rejected. Again a different set of statutory tests would have produced a different outcome, and would have allowed the AIRC an additional capacity to consider the extent to which such industrial action would have been consistent with the interests of the community, and with the resolution of the ongoing dispute between parties.

CASE STUDY 4

CitiPower Limited (C No. 34819 of 1997) [Print P3792]

[4.129] This application by CityPower relied on the grounds laid out in s.170MW(2) of the *Workplace Relations Act 1996* which provide the Commission with the power to terminate bargaining periods if one of the negotiating parties has not, or is not, genuinely seeking to reach agreement.

[4.130] CitiPower argued that the bargaining period should be terminated because the CEPU were engaged in industrial action which was in support of a CEPU demand that CitiPower terminate the contracts of certain contractors whom CitiPower had engaged to provide services to it during recent industrial action. CitiPower believed that compliance with union demands would breach Part XA of the *Workplace Relations Act 1996*

(which contains provisions concerning freedom of association) and s.45E of the Trade Practices Act 1974.

[4.131] The Commission refused to grant the employer's application. In summary, the Commission held that it was impossible at that time to conclude that the issue of contractors was the only outstanding issue between the parties.

[4.132] The intractable nature of bargaining of some negotiations, the costs of protracted industrial action, and the impact on the economy and parties continues to be demonstrated by cases under Division 8, Part VIB, of the *Workplace Relations Act 1996*.

CASE STUDY 5

Group 4 Securitas Pty Ltd and Australian Liquor, Hospitality and Miscellaneous Workers Union (BP 2001/2900), Print [PR906950]

[4.133] This 2001 case saw industrial action in relation to airport security services, which the company believed could threaten endanger life, security and/or the economy.

[4.134] After some months of negotiation, protected action was notified. The employer made an application that this action should be terminated or suspended. In considering this application, and the dispute more generally, the Commission determined that the parties had scope to resolve the matter by negotiation and refrained from progressing the employer application.

[4.135] However, the employer was forced back to the Commission as industrial action was pending, despite the Commission's clear understanding that parties would be negotiating. Such industrial action would have been contrary to undertakings made to the Commission.

[4.136] The Commission recommended against industrial action. This recommendation which was ignored, with employees walking off the job without notice. Employees again walked off the job when the agreement was put to them following a recommendation by the Commission and parties.

[4.137] The Commission assessed the threat of the industrial action to the economy and to personal safety, health and welfare. The Commission was compelled to restrict its consideration only the very limited matters currently set out in the Act, and could not have regard to the conduct of the employer, employees and unions in trying to reach an agreement.

[4.138] The Commission could not find that a $1-$5 million per day loss to Ansett would have a significant impact on the Australian economy. This was particularly interesting given the impact which the collapse of Ansett ultimately had on the economy as a whole.

[4.139] This case provides another illustration of the limitations of the Commission's current power to address instances of damaging and protracted industrial action. Despite very real economic loss, the closeness of parties to resolution of an agreement, and an apparent breaching of undertakings, the Commission was forced to address this case purely on the basis of the existing Part VIB, Division 8 of the *Workplace Relations Act 1996.*

[4.140] Despite what was clearly an extensive Commission involvement in this matter on an ongoing basis, the Commission was closely restrained in its capacity to properly address the resolution of this issue, and particularly in its ability to prevent industrial action. The Commission could not order cooling off in this case, despite the facts appearing to indicate that this may have been relevant at a number of points.

[4.141] The Commission concluded with the following observation on the dispute:

> *[46] In my view there is room for further negotiation on the proposed agreement. Both employers and employees in circumstances such as they are in this case need to acknowledge that some compromises may be necessary in a proposed new era of their employment relationship. Employees may need to come to terms with the loss of some hitherto cherished award conditions while fathoming the more advantageous terms that go as a trade off for what may have been inflexible work arrangements. Meanwhile, some employers may not appreciate that some short term gains do not always mean long term benefits.*

[4.142] The amendments proposed would have provided the Commission with further opportunities to address such issues with parties, particularly where the parties to choose to access the assistance of the Commission under proposed s.170MWA(6). This would appear to be of significant assistance in such circumstances.

CASE STUDY 6

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Newtronics Pty Ltd (C No. 35461 of 1998) Print [Q4299]

[4.143] In this 1998 case the Commission did suspend a bargaining period for 9 days in what appeared to be a quasi injunctive prescription based on arguments

raised regarding provisions of the *Workplace Relations Act 1996* largely unrelated to protected action (coverage and demarcation issues). In short, the Commission temporarily halted the process due to a jurisdictional argument raised by one party.

[4.144] The Commission refused however to further suspend the bargaining period despite ongoing concerns regarding demarcation and union coverage. This principle issue was not resolved, and appears to not have been within the power of the employer to resolve. However, the Commission could not make an order to suspend the industrial action.

[4.145] The Commission appeared to be limited by the provisions of the existing s.170MW, and indicated the following in reaching its conclusion:

> *"I am not satisfied that there exists a sufficient basis upon which I should act to further suspend the bargaining period on the basis of s.170MW(4), pending the determination of the substantive issue as to the CEPU coverage of Newtronics' employees."*

[4.146] However, there was clearly a matter which was ongoing concern to the Commission, and which the Commission would have been able to explore further under the proposed provision. The decision concludes with recommendations to parties:

a. That industrial action cease.

b. That the union refrain from membership activities giving rise to the demarcation dispute.

c. That the company enter negotiations with one of the unions concerned.

[4.147] These issues could have been better addressed under the proposed amendments. This case appears to illustrate that the existing Division 8, Part VIB of the *Workplace Relations Act 1996* may not provide scope for the AIRC

to address some instances of industrial action which come before it. Additional scope for cooling off orders may have been of further assistance in this case, and allowed the Commission to further pursue the approaches recommended to parties.

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

[5.1] ACCI supports the Bill.

[5.2] It is important to ensure that the right to take protected industrial action, a right which was only granted with the passage of the *Industrial Relations (Reform) Act 1993*, is used responsibly and only with the genuine support of a valid majority of employees.

[5.3] Within a labour relations system based on bargaining industrial action should be a concept operating in defined circumstances only. It is not desirable due its damaging economic effects, both to businesses, employees, and the economy at large. An acceptance of protected action does not remove the requirement that the workplace relations system and the parties within that system minimise the negative consequences that industrial conflict has on both employers and employees.

[5.4] Within the Australian workplace relations system, industrial action is part of the process of bargaining. It is important that there are safeguards within the system that ensure that protected action is directed toward that purpose and only occurs in situations where genuine bargaining is also taking place. Protected action is relevant and desirable only to the extent that it supports the bargaining system and thereby results in workplaces which are more efficient, productive and capable of delivering higher wages to employees.

[5.5] The Bill will introduce greater accountability and involvement for individual employees or union members in the process of deciding whether industrial action should take place. It is only right that industrial action only take place with the support of a majority of relevant employees in contemporary

Australia. This is clearly consistent with the objects of the *Workplace Relations Act 1996*, in particular subsections 3(a)(i), 3(b) and 3(g).

[5.6] We believe the Bill will also encourage increased consultation between employers and employees on workplace issues about which bargaining is taking place.

[5.7] As stated, protected action, within the Australian workplace relations system, is a mere 9 years old. It is therefore a recent legislative development. We must be willing to refine, adapt and amend the legislative provisions governing industrial action in the light of the experience of how industrial action is used in practice. It is not a matter of putting a system in place and leaving it for all time, but rather developing and reviewing that system to ensure that the workplace relations system is functioning properly and that fundamental policy objectives are being achieved.

Specific provisions in the Bill

[5.8] Some of those who gave evidence to the Senate Committee hearing into the Bill introduced in 2000 regarding secret ballots characterised the Bill as over-formalised and unworkable. We note that the new Bill takes a far less prescriptive and more flexible approach in respect of secret ballots and has also been amended to ensure consistency with ILO standards. The Bill provides far greater discretion for the Australian Industrial Relations Commission with respect to determining how and if a secret ballot is to take place.

[5.9] A new section 170NBA(1) states as the object of the new Division 8A:

> *"The object of the Division is to establish a transparent process which allows employees directly concerned to choose, by means of a fair and democratic secret ballot, whether to authorise industrial action supporting or advancing claims by organisations of employees, or by employees."*

[5.10] ACCI is strongly supportive of this object; we fail to see how anyone could oppose such an object.

[5.11] The Bill does not formalise the particular procedure that must be followed with respect to the conduct of a secret ballot. It gives discretion to the Australian Industrial Relations Commission to do this and for the parties to make submissions about how the ballot should best be held. The proposed section 170NBCI(2) makes it clear that a ballot does not necessarily need to proceed by way of a postal vote. The President of the Australian Industrial Relations Commission is also granted power to make rules about the conduct of secret ballots (section 170NBBA(3)).

[5.12] Likewise, section 170NBFA makes clear that the holding of ballots for industrial action will not financially inconvenience those seeking to engage in protected action. The provisions empower the Industrial Registrar to make an assessment of the expenses reasonably and genuinely incurred by the applicant and remits 80% of that cost to the Commonwealth. The Bill does not seek to be financially disadvantageous to individuals or associations who seek to access protected action.

[5.13] ACCI previously stated that we think that such a reform, as proposed in the Bill, would lead to increased consultation. We believe that the current Bill will lead to increased consultation in two key areas:

a. Consultation within groups of employees, or employees and their representatives;

b. Consultation between employers and employees.

[5.14] The propositions that support this contention are straightforward. By requiring the consent of a valid majority of employees before protected action can take place (section 170NBDD), secret ballots will require that those seeking

endorsement of industrial action to consult with the relevant employees about the details of the proposed action, the purpose of the action, and how the action helps achieve the ultimate bargaining objective. It must be recognised that industrial action has costs for employees, and that this makes their consent essential.

[5.15] Failure to communicate or listen to employees would normally result in industrial action failing to gain requisite support. This is not say that there is not currently consultative processes prior to industrial action taking place; but the Bill would strengthen the obligation for consultation. To the extent that industrial action has the genuine support of employees, this Bill would have no effect whatsoever.

[5.16] The Bill also requires that at least 40% of the relevant group of employees must vote, for the vote to be considered valid. However it also provides the Australian Industrial Relations Commission with discretion to vary this figure (section 170NBDD(3)). We would submit that the 40% threshold is not onerous and that if less than 40% of the valid employees chose not to participate, the outcome will not be representative of the wishes of a majority of employees, and the issue is not sufficiently important to enough employees to warrant its approval by the Australian Industrial Relations Commission in the form of a ballot order.

[5.17] The second level of consultation would be between employees directly, or industrial associations representing employees, and employers. Section 170NBBC would require a notice of the application for a secret ballot to be provided to an employer within 24 hours of it being lodged with the Australian Industrial Relations Commission. This notification would act as a 'warning light' to employers that a serious issue exists within the workplace over which employees are considering taking industrial action. The notification of possible action may provide in many cases an impetus for renewed discussion and

compromise on particular issues so that industrial action can be avoided. The best approach to the resolution of industrial issues is of course one which does not involve industrial action, and amendments to the current framework which encourage resolution of disputes without recourse to it must be supported.

[5.18] The Bill would also restrict the granting of an order for a secret ballot to be held to situations where an applicant is genuinely bargaining with the other party. Section 170NBCF will require the Australian Industrial Relations Commission to approve a secret ballot only in circumstances where the applicant has and is genuinely trying to reach agreement with the other party. This is as it should be.

[5.19] The reason industrial action is protected within the current industrial framework is to provide employees with an extreme industrial option within the bargaining process. It should be not protected for any other purpose, and this Bill is a necessary and appropriate brake on the ability of applicants to access protected action under the Act. The bottom line is that protected action should not be an end in itself. It ought to be structured in a way that does not compromise business viability, nor undermine the shared interests of employers and employees.

[5.20] The Bill also provides protections to employees against discrimination or disclosure in respect of applying for an order for a secret ballot to take place. Section 170NBG requires that the Australian Industrial Relations Commission may not disclose information which may allow a person to be identified as an applicant who is represented by an applicant's agent, an employee who directly applied or a person whose name appears on the roll of voters for a protected action ballot. This requirement is also extended by 170NBGA to individuals.

[5.21] As stated, it is not necessary within the framework established by the Bill that an employee needs to directly make an application for a protected action

ballot. The Bill allows this to be made by an agent acting on that person's behalf. These provisions help ensure that the anonymity of persons making applications is protected, where this is sought by the applicant.

Conclusion

[5.22] ACCI strongly supports the Bill.

[5.23] The Bill provides improved accountability for protected action and extends democratic processes to the province of industrial action. This is a welcome development. Protected industrial is a relatively new concept within the Australian workplace relations system and as such it should be open to amendment and refinement in order to ensure that protected action fulfils its primary policy purpose of contributing to the bargaining system. This Bill will fine-tune protected action to ensure that it fulfils its primary purpose and furthers the objects of the *Workplace Relations Act 1996*.

[5.24] The current Bill provides a workable framework for a system of protected action proceeding by secret ballot. It vests considerable discretion with the Australian Industrial Relations Commission and is not overly prescriptive. It will provide an impetus for increased consultation between employers, employees, and industrial associations, and contains appropriate protections for individuals seeking to apply for a protected action ballot from disclosure and, thereby, discrimination.

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

[6.1] ACCI supports the proposed amendment to the *Workplace Relations Act 1996* (the Act). The amendment is necessary to:

a. Protect the principles of freedom of association which are a primary object of the Act (section 3 (f));

b. To provide an appropriate legislative response to a practice which has emerged in the last few years, and could not have been reasonably anticipated prior to the passage of the *Workplace Relations Act* in 1996.

[6.2] ACCI would characterise the Bill as remedial and necessary for the proper functioning of the *Workplace Relations Act 1996* and the workplace relations system in general.

[6.3] ACCI recognises that the freedom to join, or not to join, a trade union is a fundamental freedom which should be enjoyed by all people in a free and democratic society. It is for this reason that ACCI provided strong support to the introduction of freedom of association legislation in the original *Workplace Relations Act 1996*.

[6.4] In his second reading speech, the Hon Peter Reith MP, then Minister for Employment and Workplace Relations said the following:

> *"I now turn to address the key issue of freedom of association and the role of registered organisations under the bill. Among the fundamental principles underpinning the government's industrial relations policy, are the principle of freedom of association—including the choice whether or not to be in a union or employer organisation—and the principle that all Australians be treated equally before the law."*

[6.5] Coercion should have no place in determining whether people choose to join or not join an industrial association. The coercive effect of bargaining services fees is at odds with the views of the Australian community which

favour protecting the rights of employees to choose whether they wish to belong, or not belong, to a trade union.

[6.6] We note that prior to the passage of the *Workplace Relations Act 1996*, preference clauses within awards and certified agreements were permitted by industrial legislation. With the passage of the *Workplace Relations Act 1996*, these clauses have become unlawful. This was a key aspect of the policy imperative behind the passage of the original 1996 Bill and delivered an environment which empowered workers to make choices about whether they wished to belong or not belong to a trade union.

[6.7] The emergence of bargaining services fee clauses within certified agreements is clearly an attempt to re-establish a mechanism which coerces workers into joining trade unions against their will.

[6.8] This legislation is urgently required to preserve the freedom of association measures introduced in the original Act.

What has changed?

[6.9] As stated above, since the passage of the *Workplace Relations Act 1996*, some trade unions have sought to include 'bargaining services fee' provisions into certified agreements. An example is the clause examined in the *Employment Advocate re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003 and other Agreements* [Print PR900919]:

> *"Subclause 14.3 according to its terms obliges:*
>
> - *the employer to advise all employees prior to commencing work for it that a bargaining agents fee of 1% of the employee's gross annual income or $500 per annum, whichever is the greater, is payable to the ETU on or prior to 16 December each year; and*
>
> - *the employee to pay the fee to the ETU (in the manner or manners specified)."*

[6.10] In 2000, the ACTU adopted a policy that non-union members should be charged on a fee-for-service basis wherever they benefit from union activity, and that this should be reflected in bargaining agents fee clauses in agreements. It is likely that a wider range of unions, in a wider range of industries will therefore

pursue such clauses, unless their use is prohibited. The ACTU's policy makes passage of this legislation imperative.

[6.11] As noted, bargaining fee provisions have been the subject of legal action:

a. On 9 February 2001, McIntyre VP *(Employment Advocate re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003 and other Agreements* [Print PR900919]) found that such clauses were not able to be removed from certified agreements as objectionable provisions under section 298Z of the *Workplace Relations Act 1996*, despite finding that these clauses amount to coercion of non-members to join the relevant union.

b. This decision was confirmed on appeal (Giudice J, Kaufman SDP and Whelan C), 12 October 2001 (PR910205).

[6.12] The decisions recognise that the discriminatory action does not take place at the level of the insertion of the provision for a bargaining services fee into agreements itself. It takes place when the bargaining fee is waived for union members. In Employment Advocate re *Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003 and other Agreements* [PR900919]) McIntyre VP made the following observation at paragraph 15 of his decision:

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

[6.13] When the Senate previously considered legislative proposals to address this issue, the matter had not been settled before the Australian Industrial Relations Commission. This is no longer the case. The decision of the Full Bench is based on technical grounds and does not adequately respond to the threat to freedom of association that bargaining services fees pose. The Parliament must therefore act.

[6.14] ACCI attaches, for the information of Committee members, the current membership fees for ETU members (Attachment E). The fee of $500 is well in excess of current fee levels. Therefore:

a. Bargaining fee provisions have the capacity to act in a discriminatory manner with respect to non-union employees.

b. The levying of a compulsory fee against non-union members is a clear financial penalty for those employees who choose not to join trade unions.

[6.15] Even where fees were less than current trade union membership fees, they would still constitute a financial penalty for workers, which is attracted on the basis that they have chosen not to belong to a trade union.

Specific provisions in the Bill

[6.16] ACCI supports all provisions in the Bill, subject to a further amendment which we propose below.

[6.17] The amendments will prevent the certification or varying of agreements which contain provisions requiring the payment of a bargaining services fee, making clear that such clauses within agreements are void, extending the definition of 'objectionable provision' to include 'a provision of a certified agreement that requires payment of a bargaining services fee', prohibits employers and others from engaging in discriminatory conduct against a person because they do not propose to pay a bargaining services fee, prohibits an industrial association from demanding a bargaining services fee, coercion with respect to bargaining services fees and the making of false or misleading representation about another person's liability to pay a bargaining services fee.

[6.18] All these provisions are necessary to restore the effective operation of the freedom of association provisions of the Act.

[6.19] The Bill specifically exempts membership dues (in respect of membership of an industrial association) from the Bill's operation (Schedule 1(4)). This ensures that the Bill will not interfere with the legitimate activities of industrial associations in regard to their ability to collect membership dues.

[6.20] The Bill cannot in any sense be said to impinge on the legitimate activities of trade unions in any way. It simply prevents coercion of workers from joining, or not joining, an industrial association.

[6.21] It is important that the Bill does not have the unintended effect of preventing an industrial association from invoicing or enforcing payment of a fee with respect to a normal commercial arrangement involving the provision of bargaining services to another party. Our analysis of the Bill is that there may be doubt over the lawfulness of making a demand for payment in such circumstances. Accordingly, we suggest that amendments be made to ensure that enforcement with respect to consensual, contractual arrangements agreed prior to the provision of such a service are not prohibited.

Criticisms of the earlier Bills addressing compulsory union fees

[6.22] A similar, but not identical Bill, was introduced addressing compulsory union fees in 2001. At that time it was not supported by either the Labor Senators or Australian Democrats Senators and both groups presented a range of criticisms of the Bill.

[6.23] ACCI have addressed these criticisms at some points in our submissions, but we will also address them directly.

[6.24] The concerns of the Labor Senators could be summarised thus:

1. The Bill will further marginalise union involvement;
2. The Bill is premature as an appeal is currently before the Full Bench of the Australian Industrial Relations Commission;
3. Bargaining agency fees are permitted by ILO conventions;
4. The Bill constitutes an form of interference with collective bargaining;
5. Bargaining services fees can be likened to a sign-on bonus.

[6.25] We do not believe that the Bill marginalises trade unions in any way. As we have stated, the Bill is remedial. It merely seeks to maintain the current legislative framework with respect to freedom of association. It must be

remembered that bargaining services fees only emerged after preference clauses were made unlawful within awards and agreements. There is no accident about this. The aim of bargaining services fee provisions within agreements is to place a form of financial coercion on employees who choose not to join unions.

[6.26] When the Bill was previously considered by the Senate, a conclusive ruling by the Australian Industrial Relations Commission had not occurred on this matter, and it was the subject of a current hearing. The decision has now been handed down and in ACCI's submission does not adequately address the threat to freedom of association that bargaining services fees represent.

[6.27] The Bill interferes with collective bargaining no more and no less than current provisions which prohibit preference clauses within agreements. It is important not to mischaracterise the way that these clauses operate. They compel employees to pay a fee for a service that they have neither sought nor authorised. Nor does it provide employees with any choice about the bargaining agents that they may avail themselves of, or for that matter, the industrial outcomes reached on their behalf.

[6.28] Likewise, whilst bargaining services fees may have been found by the ILO to not contravene freedom of association principles per se, in the current context they are being used as coercive tools to encourage non-union members to join unions. This is the clear finding of VP McIntyre in *Employment Advocate re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003 and other Agreements* [Print PR900919].

[6.29] Bargaining services cannot in any way be likened to a sign-on bonus. Some of the key distinctions are:

a. in the case of a sign-on bonus, the employee 'signs on', i.e. freely agrees to enter into the agreement;

b. the bonus is a positive inducement to join, rather than a financial penalty for not joining.

[6.30] The Australian Democrats' Senators concerns are focused on the issues of free riding and fee for services. We have addressed these issues above. This is not a situation where employees are presented with any kind of freedom of

choice about their representation in industrial negotiations. The services fee is imposed on them, whether they wish to have the union act on their behalf or not.

[6.31] We contend that bargaining services fees should be considered within the particular industrial context within which it arose. And that is, as a means of coercion non-union members into joining unions, and inflicting financial penalties where they choose not to do so. Analogies with fee for services or 'free riding' are incorrect. There is no element of agreement between the employee and the industrial association purporting to provide the bargaining nor is any choice provided to the employee with respect to selection of a bargaining agent. Many of the aspects of a normal commercial arrangement are missing.

[6.32] The Bill is remedial and required if the *Workplace Relations Act 1996*'s freedom of association provisions are to remain effective. We therefore urge all Senators to support the Bill.