Submission no: 1

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (AWARD SIMPLIFICATION) BILL 2002, THE WORKPLACE RELATIONS AMENDMENT (BETTER BARGAINING) BILL 2003, WORKPLACE RELATIONS AMENDMENT (CHOICE IN AWARD COVERAGE) BILL 2004 AND THE WORKPLACE RELATIONS AMENDMENT (SIMPLIFYING AGREEMENT-MAKING) BILL 2004

ACTU SUBMISSION

April 2004

Contents

OVERVIEW

1. The great bulk of the content of the four bills which are the subject of this inquiry will be familiar to the Committee, having been before the Parliament on at least one occasion, and in some cases two, three or even four times.

2. In light of the repetitive nature of the bills, the ACTU submission unavoidably repeats material put before the Committee at previous inquiries into similar legislative proposals.

3. Taken as a whole, the bills seek to achieve the following:

   - weaken the wages and working conditions of award-dependent workers;
   - initiate another resource-intensive and negative round of award stripping;
   - deny federal award coverage to a greater proportion of employees;
   - further restrict the ability of unions and their members to take lawful industrial action in support of their collective bargaining;
   - further restrict the matters about which employers and employees can bargain;
   - facilitate the operation of AWAs and weaken employee protections;
   - facilitate non-union agreements.

4. While these objectives are consistent with the Coalition's legislative program they have repeatedly failed to be adopted by the Senate.

5. The ACTU urges the Committee to recommend that the four bills not be passed by the Senate.

6. There is an urgent need for industrial relations reform in this country, but the ACTU submits that the Coalition's approach should be rejected in favour of:

   - empowering the Commission to determine fair and relevant award wages and employment conditions;
   - providing for collective bargaining rights consistent with Australia's treaty obligations, particularly in respect of multi-employer bargaining, individual agreements and industrial action;
   - ensuring that unions are able to recruit and represent members freely and effectively.

WORKPLACE RELATIONS AMENDMENT (AWARD SIMPLIFICATION) BILL 2002

THE IMPORTANCE OF THE AWARD SAFETY NET AND THE EFFECT OF REDUCING IT

The award dependent sector

7. The effect of the Award Simplification Bill is to mandate another round of award "simplification" or "stripping" in order to reduce further the entitlements of employees, particularly those who are wholly or mainly dependent on awards.

8. The following table shows the proportion of award only employees in each industry as at May 2002.[1]

Industry	Proportion of Award only Employees
Mining	5.9
Manufacturing	12.5
Electricity, Gas and Water Supply	1.1
Construction	17.1
Wholesale trade	11.7
Retail trade	34.2
Accommodation, cafes and restaurants	61.2
Transport and Storage	16.4
Communication Services	2.4
Finance and Insurance	4.9
Property and Business Services	18.1
Government Administration and Defence	6.0
Education	7.8
Health and community services	30.3
Cultural and Recreational Services	10.9
Personal and Other Services	22.2
Total	20.5

9. The table demonstrates that award only workers are most heavily concentrated in the industry sectors of:

- Accommodation, cafes and restaurants;
- Retail trade; and
- Health and community services

[1] *Employee Earnings and Hours May 2002 Survey* ABS Cat. No. 6306.0 (EEH)

and are least concentrated in the following industry sectors:

- Communication services;
- Finance and insurance; and
- Electricity, gas and water supply.

10. Unpublished data from the preliminary release of the May 2002 EEH[2] shows that the three most award dependent sectors also account for nearly 60 per cent of all award only employees with about a quarter of all such employees in the Retail industry and more than 15 per cent in each of Accommodation, cafes and restaurants and Health and community services.

11. These industries have had growth in output and employment exceeding the all-industry average for the period 1996-2003. Significant increases in productivity have meant real unit labour costs have continued to fall throughout the same period. In the two most award dependent industries (Accommodation, cafes and restaurants and Retail trade) there has been strong growth in profits[3]. The growth in productivity and the growth in output for the most award dependent sectors exceeds the growth in real wages for award workers.

12. The following table[4] shows output has grown by 30 per cent or more and that while productivity growth increases have ranged between 9.1 per cent and 16.6 per cent and profits have increased by more than 80 per cent, real award wages have increased by less than 8.8 per cent.

	Increase in output (%)	Increase in Productivity (%)	Increase in Employ't (%)	Increase in Profits (%)	Increase in Wages[(a)] (%)
Accommod'n, cafes and restaurants	31.2	14.6	28.5	82.1	8.8
Health and community services	29.8	9.1	23.2	na.	8.8
Retail trade	33.8	16.6	16.2	99.0	8.8

a. Increase in wages is real growth in Federal Minimum Wage deflated using all groups CPI. Note for all wage rates above the FMW real increase is less than 8.8 per cent.

[2] ABS Cat. No. 6305.0
[3] ABS Cat. No. 5676.0 does not record profits for Health and community services.
[4] Source: ABS Cat. Nos. 5204.0, 5676.0, 6291.0.55.001.

13. The ACTU submits that there is no economic case for reducing the employment conditions of award dependent employees.

The effect of section 89A

14. A significant number of provisions have been removed from awards since 1997 as a result of the implementation of the award simplification process giving effect to section 89A of the Act. Award provisions removed from one or more awards include:

- Consultation in relation to major workplace change
- Sexual harassment and prohibition on requirements to wear inappropriate clothing (this clause was inserted to prevent bar attendants being required to work topless)
- Minimum and maximum hours for part-time employees
- Prohibition on forcing apprentices under the age of 18 from working overtime
- Ratio of junior to adult employees
- Consultation with employees and unions about redundancy
- Notification to the CES (now Centrelink) of redundancies
- Requirement that employees be given a statement of service on termination
- Prohibition on harsh, unjust or unreasonable termination
- Provision of a first aid kit in the workplace
- Requirement that overtime be offered to permanent employees before employment of casuals
- Requirement to provide staff dressing rooms, meal area, adequate toilets, lockers and heating and cooling devices
- Right of entry
- Requirement to employ sufficient skilled tradespeople to allow for adequate apprenticeship training
- Requirement for employer to consider effect on junior apprentices when employing adult apprentices
- Requirement for training committee to comprise equal number of employee and employer representatives
- Requirement to employ one person trained in first aid
- Provision of boiling water and tea/coffee making facilities
- Trade union training leave, other than directly related to a disputes procedure
- Blood donors leave (this was strongly opposed by the Red Cross)
- Study leave and training, unless directly related to the skill-based classification structure
- Leave to attend industrial proceedings, unless summonsed.
- Ratios of part-time and casual employees
- Requirement to provide protective clothing
- Requirement to provide transport of a certain standard
- Requirement that accommodation provided be suitable

- Entitlement of shop stewards to reasonable time to discuss employment-related matters with employees, other than directly related to disputes procedure
- Disciplinary procedure and code of conduct for dismissals
- Limitations on night shift for juniors
- Clauses prohibiting employees working as contractors
- Leave without pay

15. While there is limited quantitative evidence of how removal of these award provisions has affected employees in practice, it is likely to be extensive, given that, even where agreements are in place, these will not necessarily include the particular entitlements removed from the award.

16. In particular, the removal of ratios of part-time and casual hours to full-time employees, and the removal of minimum and maximum hours for part-time employees is likely to have contributed to the growing casualisation of the workforce, and the growing number of employees who are dissatisfied with their hours of work.

17. The removal of provisions regarding consultation, education and training has sent entirely the wrong message to the workplace in an environment where working cooperatively, and focussing on education and training are vital to our economic position in a competitive world, particularly given the greater attention being given to these issues in Europe, including the UK.

18. While there is value in dealing with these matters at the workplace level, the reality is that in many cases they will not be, and to remove provisions setting out minimum requirements in these areas simply reinforces the idea that they are an optional extra.

19. The ACTU is strongly opposed to any further restrictions on the Commission's arbitral powers under section 89A. Since 1997 employer organisations and unions have devoted enormous resources to the award simplification process, which has achieved, in practice, nothing other than removal of significant award entitlements and a lowering of the safety net.

20. The ACTU submits that the effects of the changes to allowable matters contained in the Award Simplification Bill will be far more serious than was the effect of the enactment of section 89A in 1996.

Skill-based career structures

21. The proposal to remove skill-based career paths from awards amounts to undoing the award restructuring and minimum rates adjustment processes which were conducted under the auspices of the Commission from 1989. The key effects of this process were:

    - To replace hundreds of task-based classifications with structures based on skill-based levels, with clear career paths;

- To provide paths for progression through increased training and skill acquisition;

- To introduce supplementary payments to ensure that all employees were paid an appropriate proportion of the tradesperson's rate;

- To partially address discriminatory treatment of women in relation to over-award payments.

22. Repeal of provisions designed to implement career paths linked to classification structures will also remove significant award entitlements such as:

- Training programs and training leave required for progression through a career structure;

- Provisions in relation to promotion;

- Entitlement to sight records relating to classification and career path;

- Leave to sit examinations.

23. The Government makes it clear that this is its intention by specifying that training or education (except in relation to leave and allowances for trainees or apprentices) is not allowable.

24. Study leave was considered by a Full Bench of the Commission which held:

"*study leave which is directed to the attainment of qualifications which are a prerequisite to progress through an award classification structure may be allowable under certain circumstances pursuant to s.89A(6) as incidental to s.89A(2)(a).*"[5]

25. In the same case the Full Bench also held that a reimbursement of training expenses is allowable pursuant to paragraph 89A(2)(j) - expenses.[6]

26. The proposed changes will particularly affect low-paid employees, who are more likely to be reliant on awards for their wages and conditions. Clear, accessible career paths provide one of the few means available to low-paid employees to obtain higher wages, and employer support for education and training is an important part of that process.

Bonuses

27. The Explanatory Memorandum to the Award Simplification Bill states that "bonuses" is proposed to be removed from the list of allowable matters

[5] *The "Other Like Forms of Leave" Case* Print Q9399 23 December 1998 para 44
[6] *Ibid*

because it is more appropriately dealt with at the workplace, although piece rates is to be retained.

28. This distinction raises an immediate problem of uncertainty, as the two terms are used interchangeably. The *Clothing Trades Award 1999,* for example, refers to a system of "payment by results or other piece work or bonus systems". This uncertainty will lead to lengthy proceedings before the Commission, and could mean that clothing workers would lose their entitlements to bonus payments.

29. The specific inclusion of "bonuses for outworkers" highlights the absurdity of allowing the use of a term for piece work arrangements for clothing workers in their own homes but not for those employed in a factory, a distinction making no sense, especially given recent legislation in state and federal jurisdictions to try and ensure that outworkers receive the same award wages and conditions as their factory-based equivalents.

30. This issue is highlighted by the proposed amendment to paragraph 89A(2)(t) to have the effect that award provisions in awards setting pay and conditions for outworkers are allowable, but only to the extent necessary to ensure that outworkers receive comparable pay and conditions to factory-based workers doing the same kind of work excluding bonuses.

31. The Explanatory Memorandum explains that the purpose of the amendments specifically applying to outworkers is to ensure that:

"outworkers in the clothing industry who are paid in accordance with payment by results systems do not lose access to that form of remuneration."

32. This simply makes no sense, unless it is intended that factory-based workers do lose that access, a conclusion which could only be based on a misunderstanding of the term "piece rates".

33. The word "bonus" is used in other senses in a range of awards: for example, in relation to commission-based payments to sales employees or as rewards for conduct or service, such as attendance bonus, long service bonus and definitions of remuneration for the purpose of calculating leave payment entitlements.

34. The ACTU submits that current award provisions in relation to bonuses have been tested for fairness and their effect on productivity and efficiency in the award simplification process.

35. This proposal is yet another example of the Government seeking to strip the Commission of its discretion to determine award entitlements appropriate to the needs of particular industries.

Long service leave

36. Removal of award provisions in respect of long service leave will affect the entitlements of employees whose award provision exceeds state legislation; for example, some local government employees in Victoria receive leave after ten years' service, rather than the 15 years prescribed in state legislation.

37. In addition, some awards deal with particular aspects of long service leave which reflect the peculiarities of the industry, such as timing of leave in the award covering university academics.

38. Although most employees' long service leave entitlements are sourced through legislation, there are some award provisions which provide significant benefits or protections to employees, which should not be permitted to be lost.

Other like forms of leave

39. The removal of the term "other like forms of leave" will have the effect of removing a number of types of leave from awards, including leave to attend industrial proceedings and training leave for the purpose of enhancement of the dispute settling procedure.

40. It should be noted that in determining the scope of "other like forms of leave" the Commission made it clear that it would take into account the particular circumstances of each award including existing award provisions and the nature of the industry.[7]

Public holidays

41. The ACTU opposes the proposal to prevent the Commission including in an award any public holidays other than those declared by a State or Territory government, for the following reasons:

- It will result in a loss of entitlements, where awards provide for an additional day over the minimum where this is an existing award provision;
- Where state governments declare fewer than 11 public holidays employees could be left with a reduction of the Commission's test case standard;
- In some cases employers could be inconvenienced by replacement of award holidays with days declared in the state. In Victoria, for example, the Commission refused a union application to substitute Melbourne Cup Day for Union Picnic Day. The employers opposed the application because of the large number of casuals employed on Cup Day;[8]

[7] *Ibid* para 45
[8] Print P1349

- Although the Explanatory Memorandum states that the amendment is not intended "to preclude an award from providing for the substitution of different days to be observed as public holidays" it is difficult to see how proposed paragraph 89A(2)(i) could be read as not precluding such an outcome. This would mean that employees would lose their current entitlement to substitute days for a number of public holidays when governments did not declare a substitute, as was the case in Victoria under the Kennett Government in relation to the Christmas/New Year period.

Allowances

42. The proposed limitation in paragraph 89A(j)(i) to allowances in relation to "expenses incurred in the course of employment" would appear to prevent allowances being paid for expenses which are difficult to quantify exactly. The amendment could be read as requiring that employees produce evidence of actual expenses, which could mean producing receipts for food and drink purchased in connection with a meal allowance, or for the cost of preparation of a meal at home which is brought to the workplace. The amendment could also prevent an allowance being paid for use of a private motor vehicle, or for laundering of work uniforms at home, because of the impossibility of precisely establishing the costs actually incurred.

43. It is also proposed to prohibit specifically the inclusion of accident make-up pay in awards. Accident make-up pay has been held by a Full Bench of the Commission to be allowable, a result which should have come as no surprise to the Government, which relied on legal advice to this effect in convincing the Democrats to accept the omitting of accident make-up pay from subsection 89A(2) in 1996. The Commission took statements to this effect in the relevant Parliamentary debates into consideration in coming to its decision.[9]

44. State workers' compensation schemes provide different benefits in each jurisdiction. Whether or not employees will suffer a real loss by removing accident make-up pay from awards will depend on the award provision, the employees' actual pre-injury earnings and the particular state legislation. Some examples of possible disadvantage are:

- In most states, weekly benefits drop significantly after 26 weeks incapacity, so that employees covered by awards providing make-up pay for 39 weeks would lose entitlements;

- In Victoria, weekly payments fall from 95 percent of pre-injury average weekly base pay to 75 percent after 13 weeks incapacity. This means that employees in receipt of award rates of pay only would be disadvantaged in the first 13 weeks, and could lose up to one quarter of their pay in the next 13 to 26 weeks depending on the award provision;

[9] *The Accident Pay Case* Print P1297, 29 May 1997

- In general, employees in receipt of award rates of pay only, with the award rate comprising their actual earnings - the lowest paid - would be most affected by the removal of accident make-up pay from awards, as their compensation payments would be based on the award rate of pay.

Redundancy pay

45. The inclusion of the definition in proposed paragraph 89A(2)(m) would have the effect of requiring the removal from building industry awards of the provision for redundancy payments to be made "where an employee ceases to be employed by an employer, respondant to this award, other than for reasons of misconduct or refusal of duty".[10]

46. This provision was determined following the Termination, Change, Redundancy Test Case in 1984 to meet the specific needs of the building industry and its unique patterns of employment.

47. The ACTU submits that there is no justification for interfering in the arrangements put in place by the Commission at that time.

Notice of termination

48. Although notice of termination is provided for in the Act, some awards do provide for longer periods, particularly in cases of redundancy. Removal of notice of termination provisions would also remove provisions incidental to notice, such as leave to look for alternative employment, also included in awards following the TCR Test Case referred to above.

Jury service

49. Like the removal of paid leave for blood donors, which was removed under the current Act, paid leave for jury service is a public interest issue which should be of concern to the whole community.

50. The ability to draw on the greatest number and diversity of people as potential jurors is vital to the operation of our legal system. Concerns have been frequently expressed that jurors are drawn disproportionately from retired persons and others not in the workforce, leading to the range and number of exemptions being substantially reduced.

51. Requiring employees to negotiate with their employer for paid leave is certain to operate as a disincentive for prospective jurors to serve.

Basic minimum entitlements

52. The restriction in proposed subsection 89A(3) to making awards which contain other than basic minimum conditions will, over time, have the effect of reducing award conditions.

[10] *National Building and Construction Industry Award 2000* cl 16

53. The term "basic" is not defined, but it is clear that the new provision would cover all award conditions, not merely the rates of pay covered by the current subsection 89A(3).

54. The Explanatory Memorandum states:

"This amendment reinforces the objects of ensuring that the awards act as a safety net of basic minimum wages and conditions of employment to help address the needs of the low paid, that awards do not provide for wages and conditions above the safety net and do not operate as a disincentive to agreement making." (underlining added)

55. There are two problems with this "explanation". The first is that the word "basic" is not used to qualify the safety net in the objects of the Act or of Part VI, irrespective of the Government's desire that it do so. The second is that award conditions, by definition, cannot be "above the safety net" as the Commission has determined that the award is the safety net for the employees covered by it.

56. Assuming that "basic" would encompass award conditions which are above the standard in most awards, some examples of provisions which could be at risk (other than those referred to elsewhere in this submission, which could also be at risk pursuant to this provision) are:

- Reimbursement of transport costs when required to work late (hospitality);
- Entitlement to duty-free time at base (long haul air crew);
- Maximum hours of classroom teaching (teachers);
- Pay increments;
- Three weeks' redundancy pay for each year of service (coal industry);
- Sick leave entitlements in excess of 8-10 days per year;
- Six weeks annual leave (journalists);
- Personal emergency leave (CSL pharmaceutical).

57. Enactment of the proposed amendment to subsection 89A(3) would inevitably lead to long arguments before the Commission as to whether a particular award provision was "basic", particularly given that these provisions have survived the award simplification process meaning that they have been found not to impede productivity, efficiency etc.

58. The change is also designed to have an impact on wages, with the Government no doubt hoping that it would assist its annual submissions in the Minimum Wage Cases to the effect that the Commission should award a low increase

and that this should apply only at trade level and below and not to the higher classifications in awards. Lat year the Committee considered another attack by the Government on the wages of low-paid award dependent workers in the *Workplace Relations Amendment (Protection of the Low Paid) Bill 2003*. The ACTU calls on the Committee to reject comprehensively the Government's continuing concerted campaign against low paid workers.

Specified non-allowable matters

59. The proposed new subsection 89A(3A) contains a number of matters which are declared to be non-allowable.

Transfer between locations

60. The prohibition on provisions for transfer between locations will leave unregulated an area which can affect employees' ability to work at all, given the importance of transport issues, as well as the link between travelling time and childcare arrangements, particularly for women.

Training and education

61. The prohibition on provisions covering training and education has been dealt with above in relation to skill-based career paths. It should also be noted that this proposal would also affect training leave for union delegates in implementation of the disputes procedure, which has been held to be allowable.

Recording hours of work

62. The prohibition on provisions in relation to recording hours of work would remove:

- records requirements related to ensuring that annualised salaries were not exploitative (see Hospitality Award);
- regulation of time-keeping procedures, if required, for example, in relation to particular types of work, or job sharing arrangements.

Accident make-up pay

63. Accident make-up pay has been discussed above.

Settling of disputes

64. The proposal to prohibit unions or employer organisations to participate in a dispute settling procedure unless the organisation is the chosen representative of the relevant party is neither necessary nor desirable.

65. The *Metal, Engineering and Associated Industries Award 1998* provides for union involvement in the disputes resolution procedure only on the invitation of the employee concerned.

66. The *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998* provides for the matter in dispute to be discussed between the employer organisation and the union only after senior management and the employee have failed to resolve the matter and prior to it being referred to the Commission. At the earlier stage, the union is involved only if it is the nominated representative of the employee.

67. In the latter case, the Full Bench held:

> *"This part of its submissions was responsive to submissions by the employers and the Joint Governments that, because of the general scheme of the WR Act and in particular s.89A(2), the Commission should not make provision for union representation. As will be apparent from the manner in which we deal with the relevant clauses in the Hospitality Award, it is our view that a role for unions may be included in awards consistent with s.89A. We reject any suggestion that this section deprives the Commission of the power to make provision for, say, a disputes settling procedure which involves a union"*[11].

68. The Full Bench emphasised that its decision took account of the nature of the industry as well as the requirements in relation to matters of detail, obsolete provisions and plain English.

Transfer of employment type

69. A prohibition on award provisions covering transfer from one type of employment would invalidate the standard award provision covering transfer of pregnant employees to a safe job, which is included in the parental leave clause. Some awards contain provisions either protecting employees from unreasonable dangers by setting appropriate conditions, or by providing that employees must transfer in particular circumstances; for example, transfer to alternative employment in inclement weather (glass industry).

70. The provision is presumably also designed to prohibit award provisions allowing casual employees to elect to covert to full or part-time employment after a specified period of time. These provisions have been included in awards in a number of industries, including manufacturing and hospitality, and are critical to address the problem of employers using casual employment as a means of avoiding the obligations which attach to full-time and part-time employment.

71. Prohibiting award provisions which contain direct or indirect prohibitions on employment in particular types of employment or classifications would mean:

[11] *Award Simplification decision* Print 7500 p3

- awards would be required to include provisions for casual and part-time employment, even where this was not appropriate foe the industry;

- awards could be required to include junior rates of pay;

- penalty provisions attaching to certain types of work (eg casuals) or kinds of work could be held to be indirect prohibitions.

72. Around one in four Australian workers are employed on a casual basis, 11.9 per cent of them full-time. 97 per cent of casuals do not have any leave entitlement, although 58.5 per cent have more than 12 months service with their employer, 20.8 per cent more than five years and 9.8 per cent more than ten years.[12]

73. Urgent action is required to stop employers employing casuals on a regular and long-term basis in order to avoid providing leave, notice of termination and other basic entitlements. The Government's proposal is directed at encouraging casualisation rather than attempting to encourage more secure forms of employment.

Incidental matters

74. The ACTU opposes the proposed narrowing of the scope of the incidental matters which can be determined pursuant to subsection 89A(6). The proposal simply limits the ability of the Commission to exercise its discretion to ensure that awards are able to operate effectively.

Exceptional matters orders

75. The ACTU submits that the proposed requirement that an exceptional matters order may only be made by a Full Bench is unnecessary and cumbersome.

A FURTHER AWARD SIMPLIFICATION PROCESS

76. If not for the serous consequences for award-dependent workers it might be thought that the proposal for another round of award simplification was a make-work scheme for unions, employer organisations and the Commission - not that any of these are sitting idle at the moment.

77. As of June 2003 the Commission was able to report that the award simplification review process had been completed in relation to 95 per cent of the 3222 federal awards which required review when the WROLA Act was passed in 1996. The state of play at June 2003 was described as:

• 3050 awards have completed the review process as follows:

- 1164 awards have been simplified;

[12] *Superannuation Arrangement and Superannuation* ABS Cat. 6361.0

- 1461 awards have been set aside or superseded;

- 252 awards have been deemed to have ceased operation; and

- 173 awards have been identified as not requiring review;

• 172 awards were at various stages of the simplification process.[13]

78. The review of over 3,000 awards was a massive task, involving large resource commitments from all parties. As a result of the process, around half the total number of awards were set aside, superseded or deemed to have ceased operation, leaving 1,509 awards which would be the subject of further review process if the Award Simplification Bill was passed.

79. The ACTU submits that the resources of the Commission, as well as of the industrial parties, is much better spent on resolving disputes and serving members than it is in reviewing awards with a view to reducing employment conditions for those with greatest vulnerability and least ability to bargain for better wages and conditions.

EFFECT OF REMOVING AWARD PROVISIONS AND RELYING ON STATE LEGISLATION

80. Further reduction in award conditions will, no doubt, encourage some shift from the federal industrial system to state jurisdictions where this is possible.

81. In some cases workers remaining under federal awards will become entitled to the benefits of state legislation as a result of losing the federal award equivalent. Long service leave is an obvious example.

82. This fragmentation is an problem for employers who operate in more than one state and who will find themselves forced to provide different benefits depending on the industrial jurisdiction of each part of the company's operation.

[13] AIRC Annual Report 2002/2003

WORKPLACE RELATIONS AMENDMENT (BETTER BARGAINING) BILL 2003

EFFECT ON BARGAINING CAPACITY

83. The main thrust of the Better Bargaining Bill is to restrict the ability of unions and their members to take industrial action.

84. These additional restrictions are being proposed in spite of the repeated observations of the International Labour Organisation's Committee of Experts that Australian law does not meet the requirements of Conventions 87 and 98 in respect of collective bargaining and freedom of association, particularly as it concerns the right to strike.

Industrial action before expiry of agreement

85. The proposal is a legislative response to a decision of the Full Court of the Federal Court in the *Emwest* case, in which the Court dismissed an appeal against a decision of a single judge which held that section 170MN of the Act does not prevent the taking of protected action in support of a claim which was not a matter included in the agreement.[14] Section 170MN provides that industrial action must not be taken during the relevant period for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement.

86. In determining the appeal, the Court considered alternative constructions of section 170MN, with the majority concluding:

> *"In the end however, in our opinion, the preferable view is that which permits and encourages flexibility in the bargaining process. Comprehensive agreements may be desirable in some and perhaps most circumstances. But there may be cases when it will be in the interests of good workplace relations to conclude an agreement on some issues and leave less pressing issues for a subsequent agreement. If any certified agreement, however narrow its terms, has the effect that industrial action is prohibited generally in respect of the employment relationship to which it applies the result will be effectively to discourage resort to a possible option for the partial resolution of complex industrial negotiations.*
>
> *"It is of course possible that parties to an agreement may seek to abuse s170MN by confecting some issue not explicitly covered by a certified agreement and using that as a basis for constructing an entitlement to protected action. It may be that in such a case the court would construe the agreement as intended to cover the field of terms and conditions defining the employment relationship in question. Indeed the parties may, as Kenny J*

[14] *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2001] FCA 1334 (18 September 2001) per Kenny J

pointed out, make that intention explicit by the inclusion of a provision that the agreement is intended to be exhaustive of the terms and conditions of the relevant employment relationship."[15]

87. In most situations enterprise agreements are all-encompassing. Accordingly, protected industrial action is effectively ruled out for the life of the agreement. However, there are occasions where the parties find it convenient to have single-issue enterprise agreements, or to specifically agree to leave a matter for resolution during the term of the agreement. The effect of this proposal would be that such agreements would prevent any industrial action occurring in relation to any issue throughout the life of that agreement, even where postponement of bargaining on that issue had been contemplated by the parties prior to the making of the agreement. In this way the proposal would act as an unnecessary fetter on the parties' freedom to bargain and to negotiate site-specific arrangements for particular types of projects.

Cooling-off periods

88. The Better Bargaining Bill proposal for cooling-off periods is the fourth time the idea has come before the Parliament and failed to pass - a similar provision was included in workplace relations bills in 1999, 2000 and 2002.

89. Although the current version purports to do no more than give a discretion to the Commission, the reality is that it can have no effect other than to restrict further the taking of industrial action in the context of a legislative regime which already falls short of international standards.

90. The Government's obsession with industrial action is completely unwarranted. The necessity for such a provision, given that most strikes in Australia are of short duration, should also be questioned. In 2003 there were 642 industrial disputes involving 275,600 employees. Of these, 462 disputes involving 88 per cent of employees were for two days or less. Only 56 disputes, involving 14,800 or five per cent of the employees, lasted for five or more days.[16]

91. The effect of the proposed amendment would be for bargaining periods to be suspended even when the party taking the action has behaved within the law. It should be noted that the Commission already has the power to suspend the bargaining period where a party has not tried or is not genuinely trying to reach an agreement.

92. To provide for suspension of bargaining periods to "cool off" is simply to remove the employees' bargaining strength while leaving the employer free to continue to refuse to negotiate genuinely, or at all.

93. The statement in the Explanatory Memorandum to the effect that the lack of cooling-off periods enables parties to continue industrial action in order to attract the Commission's arbitral power is not factually based. Subsection

[15] *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2003] FCAFC 183 (15 August 2003) per French & von Doussa JJ at paras 37-38
[16] *Industrial Disputes* ABS Cat. 6321.0

170MW(3) permits the Commission to terminate a bargaining period and arbitrate if industrial action is "threatening" to endanger life, etc or cause significant damage to the economy. Once industrial action has commenced, there is no requirement that it actually have the effect and, therefore, continuing the action is not necessary to attract the Commission's jurisdiction, assuming that is the purpose of the action. Stopping the action without arbitration gives the employer what it wants while the employees' claims can be ignored and, for that reason, has been held by the ILO's Freedom of Association Committee to be an unacceptable limitation on the right to strike.

Third parties

94. The ability of the Commission to suspend the bargaining period if the industrial action is threatening to cause significant harm to a third party has the potential to apply to a significant proportion of industrial action. The very nature of industrial action is that there will be some harm to third parties, including proprietors of businesses who are reliant on the business involved in the industrial action. The Federal Court has held that:

"It is inevitable, in my view, that action engaged in directly by unions against very many kinds of employers will, by disrupting the business operations of those employers, also have a direct or indirect impact on the business and other activities of third parties."[17]

95 The Act already provides appropriate relief for third parties in those instances where a bargaining period may be suspended or terminated pursuant to subsection 170MW(3). We note that in those circumstances the rights of employees are protected by providing access to arbitration in the event of a subsection 170MW(3) termination of a bargaining period.

96 To allow anybody claiming to be affected by protected industrial action to apply to the Commission for suspension of the bargaining period is to facilitate involvement in industrial disputes by all kinds of persons, including ideologues, mischief makers and busybodies, while doing nothing to resolve the actual dispute.

97 The factors to be considered by the Commission are entirely directed at the effect of the industrial action on third parties at the expense of the ability of the workers involved to pursue their claims through collective bargaining.

98. While the vehicle components industry is an example of a case where industrial action in one company can affect employers and employees in the large assembly enterprises, that is largely because Australian law prohibits collective bargaining on an industry-wide level.

99. The case for an industry approach to bargaining is particularly strong in the automotive industry. It is precisely because of the existence of "Just in Time"

[17] *FH Transport Pty Ltd v TWU* [1997] 567 FCA per Cooper J

and other "lean production" methods, which leave assemblers and component suppliers highly mutually dependent, that an industrial relations system is required which is similarly integrated.

100. It would seem obvious that the best way to bring industrial stability to the automotive and similar industries would be to ensure that major issues are resolved every three years through industry-wide bargaining. This is recognised by the Productivity Commission:

"The workers' entitlement issue highlights a general principle that should underpin the resolution of workplace issues in this and other industries - namely, that one size does not fit all. While many workforce issues are most effectively resolved at the enterprise level, some are best addressed at either an industry-wide or even national level. The Commission considers that the workers entitlements issue is one in this latter category.

"In this context, a summit involving representatives of automotive firms and the unions has been organised to discuss industrial relations matters and other workplace issues confronting the industry. This summit could provide a circuit breaker to the entitlements issue and a possible means of minimising the extent of disruption in the industry as solutions to the issue are developed."[18]

Claims not pertaining to the employment relationship

101. Schedule 3 of the Better Bargaining Bill would prevent protected industrial action being taken if any of the claims did not pertain to the employment relationship. The issue of whether or not a claim does so pertain is complex, and often cannot be easily determined. Parties engaging in protected action need to be able to make confident and rational decisions. It is inappropriate to make immunity from legal liability dependent on conclusions concerning a technical matter of law.

102. The Full Court of the Federal Court dealt with this issue in a case concerning whether industrial action taken by the AMWU against Electrolux was protected, even though one of the claims at issue was for the payment of a bargaining fee to the union. In holding that the action was protected, the Court stated:

"There are sound policy reasons for reading para (e) literally. Fundamental to Part VIB of the Act is the notion that, within strict and objectively definable limits, organisations, employees and employers are entitled to engage in industrial warfare. We agree with the comment of North J in Australian Paper Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (1998) 81 IR 15 at 18:

[18] Productivity Commission *Review of Automotive Assistance* Position Paper June 2002 p49

"'The purpose of this statutory scheme is to allow negotiating parties, both employer and employee, maximum freedom consistent with a civilised community to take industrial action in aid of the negotiation of agreements without legal liability for that action.'

"If that purpose is to be achieved, a high degree of certainty is essential. If parties are to make rational and confident decisions about their courses of conduct, they need to know where they stand. It would be inimical to the intended operation of Part VIB to interpret s 170ML(2)(e) in such a way as to make the question whether particular industrial action is "protected action", and therefore immune from legal liability, depend upon a conclusion concerning a technical matter of law: whether a particular claim, if conceded, would cause any resultant agreement to fall outside s 170LI(1). As this case demonstrates, that may be a matter about which well-informed people have different views.

"Further, there is usually more than one way of achieving a desired end. If an employer is disposed to concede a claim expressed in language that might create a problem, if repeated in an agreement presented for certification under s 170LI(1), the parties may find it possible to substitute different words. They may even agree on a different methodology."[19]

103. The High Court has reserved its decision on an appeal against the Full Court decision in *Electrolux.*

104. A recent decision of a Full Bench of the Commission held, in common with the Federal Court and contrary to a previous Commission Full Bench, that an agreement can be certified if, taken as a whole, it pertains to the employment relationship, rather than requiring that each provision do so.[20]

105. The effect of Schedule 3 of the Better Bargaining Bill, if enacted, would be that employers could be in a position to obtain Commission orders stopping industrial action simply by alleging that one or more claims did not pertain to the employment relationship. It should be recalled that doubts about claims can take a long time to resolve; for example, superannuation was not held to be an industrial matter until determined to be so by the High Court in 1986.[21]

Protected action and related corporations

106. Schedule 4 seeks to prevent two or more employer corporations who are treated as a single employer for the purposes of agreement-making from being treated as a single employer for the purpose of taking protected action.

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[19] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Limited* [2002] FCAFC 199 (21 June 2002) per Wilcox, Branson & Marshall JJ at paras 92-93

[20] *AFMEPKIU - and Unilever* PR940027 31 October 2003

[21] *Re Manufacturing Grocers' Employees Federation of Australia; ex parte Australian Chamber of Manufacturers* (1986) 160 CLR 341 No. F.C. 86/020

107. This proposed amendment exacerbates the current unacceptable limitations on industrial parties bargaining freely at the level chosen by them. The ILO has repeatedly criticised the inability of parties to take lawful industrial action in support of multi-employer agreements; this amendment closes a small and little-used exception which highlights the unsatisfactory nature of the existing law.

Involvement of non-protected persons

108. Similar to the provision discussed above, this proposed amendment seeks to attack the current ability of unions to organise co-ordinated industrial action by employees each of whom is taking action in support of an agreement which would apply to his or her employment.

109. The fact that bargaining and the taking of protected action is co-ordinated or organised across more than one employer does not mean that there is a lack of preparedness to negotiate different outcomes with each employer. If that was the case, the union could be taken to have not genuinely tried to reach agreement before organising or taking the industrial action or not continuing to genuinely try to reach agreement, with the consequence that the Commission could, on the employer's application, suspend or terminate the bargaining period.[22]

110. The Minister is simply wrong when he claimed in his Second Reading Speech that common claims and negotiations across a range of employers ignores the needs of individual enterprises and their employees.

111. The issue of "pattern" bargaining was extensively dealt with Munro J in the Metals Case[23] which terminated a number of bargaining periods the grounds that the union did not genuinely try to reach an agreement with the other negotiating parties before organising or taking industrial action and was not genuinely trying to reach an agreement at the time of taking the action.

112. In coming to that decision, the Commission made a number of findings.

(i) The Commission has the authority to terminate a bargaining period, even where that bargaining period had been terminated by the union, and another period initiated (para 32).

(ii) The test for whether a party is genuinely trying to reach agreement is whether its conduct evidences a genuine trying to reach an agreement with *the* opposing negotiating party to whom the industrial action or bargaining period is specific (para 43).

(iii) A party which is trying to secure agreement with all, or an entire class of negotiating parties in an industry - *all or none* - is not genuinely

[22] WRA s170MW

[23] *Australian Industry Group - and - Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* Print T1982, 16 October 2000

trying to reach agreement with any individual negotiating party (para 44).

(iv) A common set of demands for conditions of employment or for timing of negotiating rounds and outcomes is not sufficient in itself to establish that a negotiating party is not genuinely trying to reach agreement with the counterpart party (para 46).

(v) However, advancement of such claims in a way that denies individual negotiating parties the opportunity to concede, or to modify by agreement, does not meet the test of genuinely trying to reach agreement (para 49).

(vi) Industrial action taken in relation to separate bargaining periods but at a common time in support of common claims is an issue for subsection 170MW(3) of the Act, and is not required to be dealt with in relation to whether or not the parties are genuinely trying to reach an agreement (para 56).

(vii) Orders can be made under section 170MW in relation to protected or unprotected industrial action (para 58).

113. Munro J also made it clear that common claims and outcomes have a place in the industrial relations system, are not outside the scheme of the Act, and may be pursued by employers as well as unions:

"*Industrial negotiation is usually directed to achieving benefits and rights through some form of agreement about a provision to which the parties are bound. It is not unusual for major corporate employers to attempt to achieve a consistency and sometimes a relative uniformity of outcomes in negotiations affecting workers. For that purpose, benchmark common outcomes, wage increase levels, flexibilities, and freedom from award restrictions may be energetically pursued against union and employee negotiating parties. There is no good reason to doubt that such bargaining agendas will often form part of a corporate plan or strategy pursued across all the corporation's manifestations, or selectively at key sites. Those familiar with the industrial profiles of employer groups would recognise another group of employers who have negotiation objectives more or less imposed upon them. For that group negotiation objectives are effectively controlled by ostensibly external corporations to whom product or services are supplied, or by a parent company, often off-shore. A uniform cost price reduction for goods supplied under contract is one example of a practice in vogue in the vehicle components industry some years ago. It had some characteristics of a direct enforcement effect on enterprise level negotiation objectives. Another set of employer negotiating parties are suppliers of labour as a product or resource. For that group, labour is product in relation to which work can be converted from an employment into a series of contractual propositions about providing a resource, divorced more or less from collective bargaining or even some statutory standards. And finally in this profile, there are government agencies as employers. Such entities are able to assume configurations not relevantly*

distinguishable from any, or all of the types of private sector employer negotiating parties outlined.

"*It would be industrially naive to equate all such employer entities with the stereotypical small business entity which most people would identify with the notion of single business. Under the definition given by the Act to a single business or part of a single business, relatively arbitrary arrangements of workforces may be identified by an initiating negotiating party as the field for a bargaining period. That flexibility may give employers a capacity to select the field of employees to be engaged in collective bargaining. Moreover, for the reasons I have discussed in an earlier decision Re Joy Manufacturing section 170MH Application, some employers may also select their preferred employee negotiating party. <u>It appears that some of the more loudly voiced and caustic criticisms of " pattern bargaining", as practised by unions, are muted or tolerant of corporate practices intended to achieve similar uniformities of negotiating outcome across different workplaces.</u>*

" *Industry-wide demands are often made by unions and sometimes pursued at national level. It is not that character of the demand that may cause offence to the policy embodied in section 170MP and paragraphs 170MW (2)(a) and (b). I see no reason why such claims may not be advanced in a way that involves a genuine effort to have each employer concede the benefit sought. In such cases, the "pattern" character of the benefit demanded, its source, and even the uniform content of it, may be a cogent demonstration that the negotiation conduct is genuinely directed to securing agreement from the other party."* (paras 47-49) (emphasis added)

114. Munro J concluded his decision by stating:

" *I explain the order and declaration in that way because no part of my reasoning should be taken to mean or imply that it is not lawful or industrially proper for the unions to pursue the core conditions objectives of Campaign 2000. However, the Act operates to inhibit the ways in which common conditions can lawfully be collectively bargained for. If the relevant unions are to continue to pursue the core conditions now associated with Campaign 2000, the necessity of doing so in a manner that complies with the single business bargaining focus of the Act must be adequately heeded."* (para 84)

115. The clear conclusion to be drawn from this decision in that the Commission has the power to exercise its discretion in relation to whether or not a particular set of facts and circumstances in a particular case meet the test of genuine trying to negotiate an agreement. The Better Bargaining Bill, rather than confirming that discretion, would have the effect of fettering it. As Munro J put it:

"...The meaning of the words of paragraphs 170MW(2)(a) and (b) is clear for the reasons I have stated. It is the application of that meaning to the facts of particular cases that may be complex. For reasons that relate to the character of different sets of employer negotiating parties, it is undesirable in my view to elevate construction of these provisions into a policy dogma that compels a

lopsided application of the associated powers. The overall object of the Act to providing a framework for co-operative workplace relations which supports fair and effective agreement making should not be taken out of play." (para 51)

116. Neither unions nor employers approach enterprise bargaining with blank minds and empty pieces of paper. Neither group has the resources to do this. The enterprise bargaining process is based on sharing of collective knowledge and experience, and using this in a cumulative way, rather than re-inventing the wheel on each occasion.

117. Unions are not merely a number of groups of workers who relate only to their own workplace. Workers come together in unions because of concerns which they have in common as employees in particular industries, and as participants in the workforce as a whole.

118. It is simply impossible for unions to campaign for improved conditions unless such campaigning can occur throughout an industry, the wider workforce and even the community. This does not mean that unwanted conditions can be imposed on employers and their employees against their wishes. Finally, the employer must agree and the employees must vote; if the union refuses to agree under those circumstances, an agreement can be concluded without union consent.

119. Paid maternity leave, for example, has been a goal of the women's movement for many years. The ACTU and a number of unions have campaigned around this issue, which has been included in many claims for enterprise agreements in a wide range of industries. It is this campaigning which assisted the Finance Sector Union and the vehicle industry unions to achieve paid leave in many of their enterprise agreements. At the end of the day, each agreement was negotiated with each employer, and with some variations, including in the length of the paid leave, but the campaigning was crucial in order for employers to understand the importance of the issue to their employees. The SDA campaign for an extension of unpaid parental leave is another example of the need for unions to be able to pursue common claims in a co-ordinated manner.

120. All the major workplace gains of the last 20 years, including parental leave, superannuation, redundancy pay, training and skill recognition and family leave, were initiated by industry campaigns which resulted in a number of enterprise-based agreements which later were adopted by the Commission for the award system, in whole or in part.

121. Campaigning around common issues is integral to union functioning; to remove that ability would be to make it unacceptably difficult for unions to carry out their most basic role. Although industrial action does not invariably, or even commonly, accompany bargaining, without the ability to take action the process is unacceptably weighted towards the employer.

122. The current inability of employees to engage in multi-employer or industry-wide industrial action or to take sympathy industrial action has been found by the ILO to be unacceptable; this amendment worsens the already existing law.

EFFECT ON AIRC'S DISPUTE-SETTLING CAPACITY

123. A key criticism of the 1997 changes to the Act is that they diminish the ability of the Commission to resolve disputes through conciliation and, where necessary, arbitration, replacing this with a system based on reinforcing employer prerogative with penalties against unions.

124. The enhanced provisions for suspension of bargaining periods, for example, simply shift bargaining power to the employer while doing nothing to deal with the underlying issues of the dispute, other than increasing pressure for a settlement on the employer's terms.

125. Rather than increasing the ability of the Commission to deal with those underlying issues, the stated purpose of these suspensions is to reduce the likelihood of the Commission using its already very limited discretion to terminate a bargaining period and arbitrate in defined circumstances.

126. The narrowly legalistic strategy of the Better Bargaining Bill is directed at increasing the range of industrial action which can be the subject of various penalties.

THE CARING PROFESSIONS

127. The Minister's Second Reading Speech specified health, community services and education as sectors where third parties, such as clients, not directly involved in the dispute, should be able to apply to the Commission for suspension of a bargaining period.

128. This is a spiteful proposal that wrongly suggests that nurses and others caring for vulnerable people would take industrial action without leaving minimum arrangements in place to ensure that the health and safety of their clients and patients are not at risk.

129. Nurses, teachers and other similar professionals do not take industrial action lightly. On the rare occasions when they do, it is invariably in the interests of their patients and students. Issues like nurse/patient ratios and class sizes are as much about decent service standards as they are about working conditions for the employees involved.

130. The unfortunate fact is that industrial action has been responsible for establishment of some key standards in these areas, without which health, education and community services would be inferior to current operations. To give rights to third parties seeking to oppose industrial action, but none to the many thousands of patients and parents who support the union efforts to improve services is hypocritical in the extreme.

131. It also ignores the fact that the Minister is free to apply to the Commission to suspend or terminate a bargaining period in circumstances where health and safety is at risk. In most cases the Commission will terminate rather than suspend the bargaining period because it recognises that simply stopping the action does not resolve the dispute, while termination allows the Commission to arbitrate the issues in question and ensure an outcome that is fair to all parties.

132. The ILO's Freedom of Association Committee has held that it is acceptable to restrict or even prohibit strikes in essential services, but only if arbitration is available as a compensatory mechanism. Interestingly, although health is held to be an essential service, education is not.[24]

THE PARAMETERS OF BARGAINING

133. A number of provisions of the Better Bargaining Bill are directed at interfering with the ability of the bargaining parties to choose the level of bargaining and the issues about which they bargain.

134. The proposed amendments to sections 170ML concerning related corporations and 170MM in relation to acting in concert will, if passed, further fragment the bargaining process.

135. The amendments dealing with the content of claims for an agreement and bargaining during the term of a certified agreement mean that parties would not be able to bargain over issues which might arise between them, nor over issues which they might agree to place aside while an agreement is negotiated and, by mutual agreement, deal with at a later time.

[24] ILO *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th edition Geneva 1996 paras 540-553

WORKPLACE RELATIONS AMENDMENT (CHOICE IN AWARD COVERAGE) BILL 2004

136. The main, if not the only purpose of the Choice in Award Coverage Bill, and its 1998 and 2001 predecessors, is to stymie the efforts of the SDA to achieve federal award coverage for Victorian retail employees.

137. Events have overtaken the Bill since the SDA served its log of claims on 35,000 Victorian employers in June 1998.

138. The SDA succeeded in having a dispute found in respect of 24,422 employees in July 2000[25] and an award covering around 18,000 employees was made in January 2003.[26]

139. A key consideration for the Full Bench in those cases was the inadequacy of the safety net provided for those employees by Schedule 1A of the Act. However, it is expected that the overwhelming majority of Victorian employees not currently covered by federal awards, including in the retail industry, will, in the next 12 months or so, become entitled to the benefits of common rule awards based on relevant federal awards as a result of the passage of the *Workplace Relations (Improved Protection of Victorian Workers) Act 2003*.

140. Having said that, the ability to rope employers into federal awards remains a necessity in all states to ensure that as many employees as possible are covered by awards. The proposed section 101A is designed to make that process as difficult as possible for no reason other than to allow new employers, those who deliberately change their corporate structure and those who resign from employer organisations to avoid being roped into the federal jurisidiction.

Substituted service

141. Proposed paragraph 101A(c) contains a requirement that each employer be individually served with a notice stating the time and date of hearing. Currently the Commission can make orders for "substituted service" which does not require the union to, at considerable expense, notify the hearing date and time when other methods can be issued to ensure that this information is brought to the attention of the relevant employers.

142. It should be noted that each of the employers involved is aware that that the union is seeking a dispute finding because they must be individually served with the initiating log of claims and informed that if they do not respond the union will notify the Commission.

[25] *Shop, Distributive and Allied Employees Association - and - $2 And Union* Print S8449
[26] *Shop, Distributive and Allied Employees Association - and - $2 And Union* PR926620

143. In the Victorian retail industry case the original order for substituted service included faxes to each employer organisation, advertisements in all daily newspapers and registered mail to some specified employers. On appeal, and in the circumstances of the particular case, the order was amended to provide that each employer be notified by ordinary post of the time and date of the hearing.[27]

144. The ACTU submits that the Commission should maintain its current discretion to determine the appropriate means to ensure that the date and time of the hearings comes to the notice of relevant employers, rather than have one method mandated in legislation.

Content of the log of claims

145. The ACTU opposes the provision in proposed section 101A preventing the Commission from finding the existence of a dispute if a single claim is outside jurisdiction. The current manner of dealing with such claims is to sever them from the log; that is, they are not included in the finding of dispute.

146. This proposal has no policy basis other than to force a union to go through the expensive and time-consuming process of re-serving the log of claims. It will make the process more complex rather than less so.

147. It needs to be understood that a union may not know whether a claim is outside jurisdiction until this has been determined by the Commission and, in some cases, appeal processes. There is no practical point to the proposal; if a claim is outside jurisdiction the dispute finding excludes it, so that it cannot be included in any subsequent award.

148. This proposal increases the incentive for employers to challenge provisions of logs of claims, knowing full well that an invalid claim would not result in an award provision, but simply because it could lead to the invalidation of the entire dispute finding process.

149. Similar considerations apply in relation to claims that might contravene the freedom of association provisions in Part XA or to so-called "objectionable" provisions.

Small business

150. Proposed new section 101B provides that an employer who has notified the Commission that it employed less than 20 employees in the day of the service of the log cannot be made party to a dispute finding unless it employs at least one union member.

151. Incredibly, given the number of employers who may be potential parties to one dispute finding (35,000 in the case of the SDA log of claims), the Commission is required to be satisfied that each such employer who notifies

[27] *Shop, Distributive and Allied Employees Association - and - $2 And Union* Print S5116

the Commission did in fact employ less than 20 employees on the specified day.

152. To add to the difficulty, casuals are included in the count only if they have been employed on a regular and systematic basis for at least 12 months, a criterion which is not always easily determined.

153. The Explanatory Memorandum attempts to overcome the apparent complexity of the provision by stating that it is intended that the employer's statement to that effect that it employed less than 20 employees would be accepted as prima facie evidence that this was the case unless contrary evidence was provided.

154. Relevant unions would be given a list of employers who had claimed that they were small businesses in order that such evidence could be brought.

155. It is neither practical nor desirable for unions to be required to carry out the type of investigation which would be necessary to ascertain the precise number of employees employed by an employer on a particular day.

156. Although proposed section 101C purports to prevent the employer from discovering the identity of any union members amongst its employees as a result of its process, the certificate from the Registrar may have the effect of informing the employer for the first time that it does employ one or more union members.

157. In a small business, it would not be difficult for the employer to work out the identity of any union member and deal with the person accordingly. It would be natural for an employer wishing to avoid federal award coverage to feel angry with a union member who could be seen as the cause for the business to be included in the Commission proceedings. This provision would also be a strong incentive for some small businesses to ensure that no union members are employed.

158. Leaving aside the practicality of the proposal, it should also be asked why employees should be required to subsidise their small business employers through exclusion from the federal award system. There is no evidence that small business in general has less capacity to provide decent pay and conditions for its employees, or that the "level playing field" should be lifted for small as opposed to larger business through lower wages and conditions.

159. Excluding small business from the award system would be an incentive, not only to avoid union membership, as submitted above, but also to manipulate corporate structures to ensure that businesses remained below the threshold level.

WORKPLACE RELATIONS AMENDMENT (SIMPLIFYING AGREEMENT-MAKING) BILL 2004

AUSTRALIAN WORKPLACE AGREEMENTS

160. The ACTU has very serious concerns about the current operation of the system for AWAs. Individual agreements, by their nature, tilt the balance of rights away from employees towards employers.

161. The proposed changes to the AWA provisions are designed to make it easier for employers to obtain approval for individual agreements, including those which exploit the employees covered by them.

Operation before approval

162. Allowing AWAs to operate prior to being approved for existing employees (and before a filing certificate is issued for new employees) will mean employers, knowingly or otherwise, will be able to employ staff on terms and conditions which do not meet the no-disadvantage test, or in circumstances where the agreement has not been adequately explained, or other process-related requirements have not been met.

163. In such a case, the amendments would mean that an employee could be employed under the AWA which did not meet statutory requirements for 21 days. In the event that the employer did not apply for approval, or approval was refused by the Employment Advocate, a process which would take up to some weeks, especially if there were concerns, the Bill does not provide for any remedy for the employee other than taking legal action in a competent court. While the EA is also empowered to seek a recovery of a shortfall on the employee's behalf, there is no guarantee that this will be done. The well known reluctance of Workplace Relations inspectors to commence legal proceedings in relation to award and agreement breaches points to the likely limitations in this approach.

164. While only a minority of employers are likely to deliberately structure employment around the possibilities opened up by this change to the operation of AWAs, the potential for gross exploitation is not one which the Committee should find constitutes an acceptable risk.

165. In some industries, employers will employ employees for the 21 days or even longer, knowing that rapid turnover and employee ignorance will protect them from any consequences.

166. The ACTU submits that there is no need to make it easier for AWAs to be in effect prior to approval, or for extending the time for making applications from the present 14 days. The changes do not seem to be justifiable on the basis of any delays or inefficiencies in the OEA. The OEA 2002/3 Annual Report states that 80 per cent of AWAs were finalised within 20 days.

Cooling off periods

167. The proposed cooling-off period for AWAs is a recognition of the difficult position in which individual employers are placed when "offered" an AWA by an employer or a prospective employer. However, the ACTU submits that the cooling-off period should be in addition to the existing protections (in themselves inadequate) not as a substitute.

168. Removal of the requirement in paragraph 170VPA(1)(e) that the employer must offer an AWA in the same terms to all comparable employees will mean that employers will be able to use AWAs to discriminate between employees in an unjustifiable and unacceptable manner.

CERTIFIED AGREEMENTS

169. The purpose of the proposed amendments relating to certified agreements is to facilitate the making of non-union agreements and the exclusion of unions from collective bargaining.

Extended agreements

170. The proposal for agreements operating for up to five years is designed to apply to non-union agreements and is clearly directed at assisting employers prevent union-initiated bargaining.

171. There is no practical reason to justify allowing for extended agreements, as there is nothing now to prevent an agreement continuing in operation past its nominal expiry date if all parties are content for this to occur. Similarly, if the parties wish to vary the agreement, for example by adjusting a wage rate, this can be done easily.

172. The proposal for extended agreements was initiated by the Australian Mines and Metals Association, members of which have fought hard to drive unions from the industry in the name of "flexibility". Five year non-union agreements would take AMMA members past the first term of a Labor Government, which is committed to improving the collective bargaining rights of unions.

Hearings

173. In relation to certification and variation of agreements "on the papers", the ACTU would not be concerned if this was accompanied by improved intervention rights for unions with concerns about the agreement's compliance with process requirements or the no-disadvantage test.

174. However, the Simplifying Agreement-making Bill seeks to weaken a range of other safeguards in the Act.

Variation of agreements

175. The ACTU is opposed to the proposal to allow for the variation of non-union agreements without employees being given notice of the variation, access to the variation or an opportunity for their union to meet and confer with the employer about the variation and having the agreement explained to them, so long as the Commission is satisfied that no employee suffers detriment as a result.

176. The result of this process could well be a substantial change to the agreement which is not brought to the attention of employees or their unions, and which is determined by the Commission without a hearing.

177. Similarly, the ACTU is opposed to the proposal to limit the ability of organisations bound by a non-union agreement to intervene in proceedings concerning variation of the agreement.

178. The ACTU submits that non-union agreements can easily be used by employers as a mechanism to disadvantage employees and deprive them of their rights to bargaining collectively and to have union representation, and great care needs to be taken that this is not the case.