**SUBMISSION OF**
**THE SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION**
**TO THE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE INQUIRY**
**INTO THE WORKPLACE RELATIONS AMENDMENT (AWARD SIMPLIFICATION) BILL 2002**

**The Association is strenuously opposed to the provisions of this Bill. This Bill is driven by a policy imperative of trying to remove as many safety net entitlements as possible from workers covered by federal awards.**

The key change introduced by this Bill is the attempt to move away from the concept of having awards act as a safety net of fair minimum wages and conditions of employment to a situation where awards will provide only basic minimum entitlements. Whilst this change may not appear to be great, it is, however, a significant alteration in terms of the fundamentals of the award system.

The key amendment being sought by the government is to amend the provisions of Section 89A(3) from the current wording: "*The Commission's power to make an award dealing with matters covered by subsection 2 is limited to making a minimum rates award",* to, "*The Commission's power to make an award dealing with matters covered by subsection 2 is limited to making a minimum rates award that provides for basic minimum entitlements*".

Awards are no longer intended to be fair minimum safety nets. Rather, awards are intended to provide only basic minimum entitlements.

The government has not sought to alter Section 88A which specifies the objects of the award system as including in 88A(b) that, "*Awards act as a safety net of fair minimum wages and conditions of employment".*

Rather than directly attack the objects of Part VI of the Workplace Relations Act the government has sought to redefine what constitutes a safety net of fair minimum wages and conditions of employment by adding the requirement that awards in future must only provide for basic minimum entitlements.

There is no imperative for "basic minimum entitlements" to actually be fair or to be a safety net of fair minimum wages and conditions of employment. What

the government is doing with this legislation is giving lip service to the concept that awards will be a genuine safety net of fair minimum wages and conditions of employment as is specified in Section 88A, but ensuring that in reality awards are reduced from the current notion of a safety net of fair minimum wages and conditions of employment and down to a level of providing for basic minimum entitlements only.

The detailed amendments to Section 89A(2) and the insertion of proposed new 89A(3) as well as the other amendments to Section 89A all disclose a carefully calculated and well crafted attempt to strip away current safety net entitlements of employees.

The government has previously stated, in relation to the More Jobs Better Pay Bill, that the prime purpose of agreement making is to regulate actual terms and conditions of employment and that awards do not have that function, rather they have the function of providing the safety net of minimum wages and conditions of employment.

In reality, agreements made under the Workplace Relations Act do not need to provide for the actual terms and conditions of employment, rather the entire structure of the Workplace Relations Act in relation to agreement making is that agreements made under the Workplace Relations Act provide nothing other than minimum wages and conditions of employment.

The last round of award simplification which saw awards stripped back to the 20 allowable matters currently provided for in Section 89A(2) succeeded in reducing the value of the award as providing a safety net of fair minimum wages and conditions of employment, however, that same exercise did not guarantee that matters stripped from awards by the award simplification process were regained by employees through enterprise agreement making. Rather, what has actually happened is that as the value of awards has decreased then the value of agreements has correspondingly declined.

One of the key determinants for having the Employment Advocate approve an AWA or the Australian Industrial Relations Commission approve an enterprise agreement is that the agreement passes the no disadvantage test provided for in Part VI(E) of the Workplace Relations Act. In particular, at Section 170XA

the Act provides for when an agreement will pass the no disadvantage test and the key determinant of the no disadvantage test is that the agreement "on certification would not, on balance, result in a reduction in the overall terms and conditions of employment of the employees" under a relevant award of the Australian Industrial Relations Commission or of a state industrial authority.

Award simplification, both as introduced in 1996 and as proposed to be further expanded by this Bill, seeks to do no more than reduce the value of awards for the purposes of the no disadvantage test. Thus the key outcome of award simplification and the reduction of the value of awards back to providing basic minimum entitlements is to lower the bar for agreement making. This means that agreements will be able to be made by employers with employees containing less than they currently do. The reduction in awards back to basic minimum entitlements will, in our very strong submission, lead to enormous pressures on workers to agree to agreements which have a downward trend in terms of wages and conditions of employment.

Awards simplification does not promote enterprise bargaining over matters which are not contained in awards but rather promotes enterprise bargaining only over the mix of matters that remain in awards. Employers have no legal obligation to provide for any term or condition of employment not required to be provided by an award of the Australian Industrial Relations Commission. Once awards are reduced back to basic minimum entitlements, they will no longer act as a safety net of fair minimum wages and conditions of employment. The losers will be Australian workers, the winners will clearly be employers who can, through the guise of award simplification, achieve significant reductions in the terms and conditions of employment they provide to their workers either through the operation of the award system or through enterprise bargaining processes based upon a stripped back award system.

**The Association would urge, in the strongest possible terms, that the Senate reject this Bill.**

**SUBMISSION OF**
**THE SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION**
**TO THE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE**
**INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENTS (BETTER BARGAINING) BILL 2003**

**The Association expresses its very strong opposition to this proposed Bill as it appears to be yet another attempt by this government to significantly amend the Workplace Relations Act to create further imbalances in relation to the bargaining position of workers and employers.** This Bill seeks to significantly strengthen the ability of employers in the bargaining process and to significantly to weaken the position of workers and their organisations.

The proposal here is designed to ensure that unions have no capacity whatsoever to take any form of protected industrial action during the life of a certified agreement.

The real difficulty with this provision is that it significantly enhances the power of an employer in relation to certified agreements. One feature of the government's industrial relations changes in the Workplace Relations Act is that with award simplification and the reduction of what were core award conditions, unions are obliged, in many instances, to have enterprise agreements deal with core conditions which were previously dealt with by the award system.

**What has eventuated is that certified agreements are often truly and genuinely being seen, and being treated as, minimum conditions of employment only.**

Whilst the Emwest decision certainly recognised the ability of unions to pursue action and pursue agreement making in relation to matters not previously contained in the certified agreement, **the proposed amendments will considerable strengthen the hands of employers in treating certified agreements as merely minimum conditions of employment**

The proposed amendments to the Workplace Relations Act through the introduction of new Section 170MWB and 170MWC have a superficial attractiveness to them. However, both proposed new provisions are extremely offensive It is very clear that the superficial attractiveness of these provisions lies in the ability of the government to proclaim that providing a cooling off period during bargaining processes may encourage the parties to focus more clearly on the outcome of agreement making rather than on the industrial action taken to achieve the outcome. Additionally, the ability to protect innocent third parties clearly has a resonance in the broader community's concerns about the impact of protected industrial action.

Unfortunately the proposed amendments are so one-sided that they will achieve nothing other than strengthening the hands of employers in bargaining processes, as well as strengthening the hand of employers generally by effectively being able to preclude the taking of industrial action where a third party employer may be damaged. It would be very easy in this sense for effective collusion between employers, or through employer organisations, to create the necessary dynamics to invoke a termination of the bargaining period under proposed Section 170MWC.

If the parliament is genuinely concerned about introducing and providing for some balance in the bargaining processes over workplace enterprise agreements, then significant changes would need to be made to proposed Sections 170MWB and 170MWC. In particular, if a cooling off period is to be approved by the Parliament, then in our very strong submission, the introduction of the cooling off period should carry with it a requirement for the Commission to compulsorily conciliate matters between the parties and in the absence of agreement, allow either party to seek compulsory arbitration of the matters in dispute under existing Section 170MX.

Equally, if the parliament is concerned to protect the interests of third parties through the introduction of proposed Section 170MWC, then in the Association's very strong submission, there would be need to be incorporated into that Section a requirement that once the bargaining period has been terminated, that matters in dispute between the employer and the worker or the worker's organisation must be resolved through Section 170MX (conciliation and or arbitration).

The current structure of 170MWB and 170MWC with a provision which enables only voluntary submission to conciliation and/or mediation where either a cooling off period is enforced or where the bargaining has been terminated, is grossly inadequate in protecting the bargaining power of workers.

Both proposed 170MWB and 170MWC are predicated on the right of an employer to simply refuse to submit to any form of conciliation or mediation or arbitration if a bargaining period has either been terminated under 170MWC or a cooling period off period has been enforced under 170MWB. Without any incentive whatsoever for an employer to continue to either conciliate, mediate or even meet with the workers, then the effective bargaining position of the employers has been significantly increased and enhanced by these proposed legislative provisions and correspondingly the bargaining position of workers has been significantly decreased and undermined.

**Proposed Sections 170MWB and 170MWC can only have any justification whatsoever if they are accompanied by clear, unambiguous powers of conciliation and arbitration being given to the Australian Industrial Relations Commission to resolve issues in dispute between the parties in circumstances where either a cooling off period if forcibly imposed on the parties or where the bargaining period has been forcibly terminated because of the threat of injury to a third party. Clearly this is not proposed by the government.** Resolution of outstanding issues must be contained within the legislation for the legislation to have any merit whatsoever.

The proposed amendments to Section 170ML are justified in the explanatory memorandum on the basis that - "*This item clearly sets out the policy intention that protected action is not able to be taken in relation so matters that do not pertain to the employment relationship.".* It is clear from the explanatory memorandum that the government's proposal to amend Section 170ML is in direct consequence to the Electrolux decision of the Full Court of the Federal Court of Australia which held that protected industrial action could be taken in relation to a claim that is genuinely made in respect of the proposed

agreement, regardless of whether the claim pertained to the employment relationship.

It is clear, in the Association's submission, that the government has a totally misplaced view of the nature of enterprise bargaining between employers and workers. The whole structure of the Workplace Relations Act is predicated upon the concept that industrial disputes can only exist in relation to matters pertaining to the relationship between employers and employees and that agreements can only be made in relation to matters pertaining to relationship of employers and employees. However, as the High Court has clearly identified in the Social Welfare Case, the Constitutional concept of an industrial dispute is significantly wider than merely being a matter pertaining to the relationship of employers and employees. Workplace relations, in their totality, go far beyond the mere relationship of an employer as an employer and an employee as an employee. The role of unions introduces elements into that relationship which simply expand the relationship beyond that of an employer and an employee.

Equally there are matters which affect the interests of workers which do not directly fall within the very narrow definition of the relationship of an employer and employee. All these matters should properly be able to be pursued through enterprise bargaining, to ensure that enterprise agreements genuinely meet all of the needs of employers and employees so as to provide for productive workplaces in Australia.

It is clear, in the Association's submission, that the government is hell bent on limiting as far as is possible, the contents of matters that can be dealt with by the Australian Industrial Relations Commission under its industrial dispute settling powers, as well as significantly limiting the capacity of employers and employees to have wide ranging, effective enterprise agreements dealing with all matters falling in the general concept of an industrial dispute as found by the High Court in the Social Welfare Case.

There simply cannot be any logical reason for the proposed amendments to Section 170ML. The justification is merely and solely that it is a policy

position of the government, not that there is an inherent industrial issue that needs to be addressed, or that there is any inherent weakness within the current provisions of the Workplace Relations Act or in the approaches of the courts to the interpretation and application of the Workplace Relations Act.
The Association strongly urges the Senate to reject proposed amendments to Section 170ML.

The government proposes to amend the Workplace Relations Act by the insertion of a new provision at 170ML(3A). The Association strongly objects to the insertion of this new provision on the basis that it is totally misconceived and is unnecessary. An examination of the explanatory memorandum indicates that the government has a misconception about the current operation of the Workplace Relations Act.

In the explanatory memorandum the government makes the statement that, *"Protected action is not available in relation to a proposed multi business agreement."*. This statement is simply not true. Protected industrial action under the current provisions of 170ML is available against any employer against whom an organisation of employees is seeking to negotiate an enterprise agreement.

In a proposed multi business agreement where there is more than one individual employer, then quite clearly, under the structure of the existing provisions of Section 170ML, an organisation of employees is entitled to take protected industrial action against each of the employers that it is seeking to negotiate an agreement with.

Proposed Section 170ML(3A) cannot, of itself, prevent an organisation of employees taking protected industrial action pursuant to Section 170ML(2) against each employer that the organisation of employees is seeking to have involved in a multi business agreement.

Proposed Section 170ML(3A) is specifically limited to circumstances where two or more related corporations are considered to be a single business for the purposes of 170LB(2)(b) of the Workplace Relations Act. The purpose of 170LB(2)(b) is to enable related corporations to be treated as a single business for the purposes of enterprise bargaining purposes. Given that most modern

corporations will have structures where the head company has a number of related corporations conducting different aspects of the business, then it makes sense to treat related corporations as a single business for the purposes of enterprise bargaining.

If it does make sense to treat related corporations as a single business for the purposes of making an enterprise agreement, there appears to be no logic whatsoever in then specifying that in the process of gaining or concluding an agreement, that an organisation of employees is not, for the purposes of taking protected industrial action, able to treat two or more related corporations within the one business entity as a single employer.

The only conclusion that can properly be drawn from the government's proposal to insert 170ML(3A) into the Workplace Relations Act is that it is attempting to give large corporations that are made up of a number of related entities, the benefit of accessing enterprise bargaining when it suits them, but protecting those same entities from any form of protected industrial action by specifically having a dual standard within the Workplace Relations Act.

If, on the government's own approach it is proper to treat related corporations as a single business for the purpose of making an enterprise agreement, then that same logic should dictate that the related entities are a single employer for the purposes of taking protected industrial action. To do otherwise is inconsistent and can only be justified on the basis of creating special protections for employers to resist employee organisations taking protective industrial actions against related corporations who are attempting to have a single enterprise agreement for more than one related entity within a corporate group.

Proposed Section 170ML(3A) cannot prevent an organisation of employees taking protected industrial action against a number of related corporations that are seeking to be treated as a single employer under 170LB(2B). All that proposed Section 170ML(3A) will achieve is to introduce a requirement that where a number of related entities in a corporate group are seeking to have a single enterprise agreement cover them all, and are seeking to utilise the benefit of the approach of 170LB(2B) then where the employee organisations seek to takes industrial action, they must initiate the protected industrial action against each specific related entity in that group. In other words, it

might increase the amount of paper work that an organisation of employees will have to undertake in order to take protected industrial action, but it cannot, under any circumstances, remove the right or the capacity of the organisation of employees in taking protected industrial action against related corporations who are seeking to use the benefits of 170LB(2B).

**The Association would urge the Senate to reject this proposed amendment.**

**SUBMISSION OF**
**THE SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION**
**TO THE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION**
**LEGISLATION COMMITTEE OF THE SENATE**

**IN RELATION TO**
**THE WORKPLACE RELATIONS AMENDMENT**
**(CHOICE IN AWARD COVERAGE) BILL 2004**

In the explanatory memorandum to this Bill, the Bill is described as having three purposes –

1. Providing all business with more information about their rights regarding, and the processes involved with, roping in claims;

2. Restraining the ability of unions to rope small business which employ no union members into the federal jurisdiction;

3. Requiring the Commission to enquire into the views of unrepresented small business employers potentially affected by a roping in claim.

However, it is very clear from any examination of the Bill that it actually goes further. **Proposed new Section 101A does not seek to limit itself to ensuring that employers have sufficient information concerning logs of claims, rather it seeks to significantly constrain unions in making logs of claims** and sets up a scenario whereby unions can only access the Commission if they serve logs of claims made in accordance with Section 101A.

**To the extent that the explanatory memorandum asserts that the Bill has, as one of its three key aims, "*providing more businesses with more information about their rights regarding, and the processes involved with roping in claims*" the Bill does not actually achieve this at all.** The only mention within the Bill about giving information to employers is a reference in proposed Section 101A(a) which would require unions when sending a log of claims to an employer to attach to that log of claims a notice containing information of the kinds prescribed in the regulations. In other words, the Act itself does not necessarily provide a guarantee of further information being given to employers about their rights - this would be the role of a notice that will be developed by the regulations. If parliament was genuinely concerned to ensure that employers were advised of their rights in

relation to matters arising from service of the letter of demand and log of claims upon them then the legislation itself should provide the details of the notice.

The structure of Section 101A(a) means that there is no legislative requirement for the regulations to actually prescribe information which will provide businesses with more information about their rights regarding, and the processes involved with, roping in claims. As the legislation would merely require a union to attache the prescribed notice to a log of claims it is possible that the prescribed notice could deal with any matter whatsoever. There is no guarantee whatsoever in the structure of this Bill, that any genuine, independent, meaningful information will be given go employers about their rights regarding, and the processes involved with, roping in claims.

The overall rationale behind the introductions of proposed Section 101A and 101B are clearly misconceived. Proposed Section 101A seeks to control trade unions in their service of letters of demand and logs of claims on employers. This approach pre-supposes that an industrial dispute will only exist if there is compliance with proposed Section 101A. Such is clearly not the case.

Where a union complied with proposed Section 101A and served a log of claims that only contained matters which were capable of giving rise to an industrial dispute within the meaning of the Workplace Relations Act, and where it made certain that it did not notify the Commission of an alleged industrial dispute until at least 28 days after the log of claims was served, and where it specifically attached to its log of claims a notice required by proposed Section 101A (a) then it would appear, on a prima facie basis, that the union was doing nothing more than serving a letter of demand and log of claims so as to attract the jurisdiction of the Commission. It would be open to any employer to immediately challenge the genuineness of the letter of demand and log of claims, and the legislation proposed would strengthen an employer's argument that the dominant purpose of serving the letter of demand and log of claims in accordance with proposed Section 101A was in order for the union to attract the jurisdiction of the Commission.

Thus, in our submission, it would appear that proposed new **Section 101A will significantly limit the capacity of the Commission to deal with**

**industrial disputes because industrial disputes that have been generated in compliance with the procedural requirements of Section 101A can, and will, be able to be challenged as being non-genuine as their prime or predominant purpose was to access the jurisdiction of the Commission. Proposed Section 101A would be nothing other than a recipe for vastly increased litigation over the service of letters of demand and logs of claims.**

Proposed new Sections 101A and part of proposed new Section 101B deal with the powers of the Commission in relation to making a finding of dispute. However, even if proposed Sections 101A and 101B were introduced, a limitation or constraint on the Commission making a finding as to the existence of an industrial dispute, does not of itself preclude the Commission dealing with the industrial dispute.

**It is possible and quite proper for the Commission to deal with a dispute by conciliation and/or arbitration without making a formal finding under Section 101.**

There is no case law which has interpreted the Conciliation and Arbitration Act or Industrial Relations Act or Workplace Relations Act so as to absolutely require the making of a finding as to the existence of an industrial dispute before the Commission is able to deal with the industrial dispute.

The existence of an industrial dispute is a question of fact and the dispute exists once the log of claims has been served and it has not been acceded to. The dispute does not come into existence on the formal making of the finding under Section 101, but in fact pre-exists the finding, and the lack of a formal finding under Section 101 cannot remove the existence of an industrial dispute which exists as a matter of fact.

Further, it is already provided for in the Workplace Relations Act for the Commission to deal with industrial disputes prior to, and separate from, making a finding as to an industrial dispute under Section 101.

Section 100 of the Workplace Relations Act provides as follows:

> 100 (1) *"Where an alleged industrial dispute is notified under Section 99 or the relevant presidential member otherwise becomes aware of the existence of an alleged industrial dispute, the relevant presidential member shall, unless satisfied that it would not assist the prevention or settlement of the alleged industrial dispute, refer it for conciliation by himself or herself or by another member of the Commission."*

100(2) "*If the presidential member does not refer the alleged industrial dispute for conciliation:*

> *(a) the presidential member must publish reasons for not doing so; and*
>
> *(b) the Commission must deal with the alleged industrial dispute by arbitration."*

As can be seen, Section 100 is predicated on the basis that even before a finding as to the existence of an industrial dispute is made by a member of the Commission, the Commission is to deal with the "alleged industrial dispute" by conciliation and by arbitration.

Thus it is clear Section 100 provides that prior to a formal finding being made under Section 101 the Commission is required to deal with an industrial dispute that exists by conciliation and by arbitration. Any reference to an industrial dispute with individuals, Part 6 of the Workplace Relations Act is a reference to an industrial dispute that exists even where no finding has been made under Section 101. Any argument to the contrary would be inconsistent with the very specific wording of Section 100 and would also be inconsistent with the general scheme of the Act. It clearly appears that the primary purpose of the finding is twofold. Firstly, it is designed to invoke the privative provisions of Section 101(3) of the Act as well as providing a basis for any other member of the Commission to deal with the industrial dispute without having to satisfy themselves as to the existence of the dispute. In other words, a formal finding as the existence of a dispute by one member of the Commission simply allows the matter to be progressed before other members of the

Commission without them having to go through the process of satisfying themselves as to the existence or otherwise of the industrial dispute.

In the absence of Section 101 a dispute can be dealt with by any member of the Commission, but without formal findings by one member then when another member becomes involved in attempting to settle, or partially settle, the dispute by conciliation and/or arbitration, the second member would be required to satisfy themselves as to the existence of the dispute. The formal finding process allows for a more procedurally efficient operation of the Commission, but a finding under Section 101 does not act as a condition precedent to the exercise of the Commission of its powers in relation to industrial disputes.

What this means, in relation to the Bill, is that non-compliance with Section 101A and non-compliance with Section 101B, subsections 1, 2 and 3, may prevent the Commission making a formal finding as to the existence of a dispute under Section 101, but non-compliance with proposed Sections 101A and subsections 1, 2 and 3 of proposed Section 101B cannot deny the Commission jurisdiction to deal with an industrial dispute by conciliation and arbitration.

Proposed Section 101B (3) is extremely objectionable, in that it seeks to deliberately deny jurisdiction to the Commission where an employer employs less than 20 people and where no employee is a member of the organisation that serves the letter of demand and log of claims on the employer. It has been a feature of the Australian Industrial Relations system since the early 1900's for unions to serve letter of demand and log of claims on employers employing members of the organisation as well as on employers employing persons who are not members of the organisation.

Each time this issue has become before the High Court since 1935, the answer has been the same and that is **it is quite proper for unions to service letters of demand and logs of claims on employers who do not employ union members as this is an essential aspect of unions acting to ensure common conditions across industry sectors and it is quite proper for the**

**Commission to make awards covering employers who do not employ union members.**

Given that the current award system provides nothing more than an fair safety net of wages and conditions of employment, then when unions serve letters of demand and logs of claims on employers who do not employ union members and subsequently seek to have awards made against such employers, the unions are, in fact, seeking from the Commission, no more than that the employers be required to pay the absolute minimum safety net wages and conditions of employment as established by the Australian Industrial Relations Commission.

**What the government clearly seeks to do in relation to proposed Section 101B is to create a sub-class of employees who will not be protected by awards of the Commission. This will occur first by a process of trying to deny the Commission the ability to make a finding of dispute in relation to some classes of employers and then by providing in the proposed Section that the Commission must not make an award against an employer if the employer does not employ members of the organisation who served the letter of demand and log of claims.**

**There is, therefore, a very clear and deliberate intention to create different standards of employment between those persons who are members of unions and those who are not. The difference in standards is to allow employers who employ non-union labour only to have the benefit of less than the safety net wages and conditions of employment established by the Australian Industrial Relations Commission.**

**The Bill should be rejected.**

**ATTACHMENT A**

**The Legal Nature of Industrial Disputes**

It is important, in our submission, for the Senate to understand very clearly the approach of the High Court to dealing with industrial disputes.

Firstly, there is a very clear difference between what is meant by the term 'industrial dispute' in the Constitution and what is meant by that term in the Workplace Relations Act. As the High Court said in the Social Welfare case, *the definition of industrial dispute in the Workplace Relations Act is significantly narrower than the term as used in the Constitution.* For Constitutional purposes an industrial dispute has its normal meaning, in an industrial relations environment, whereas under the Workplace Relations Act an industrial dispute is limited to those matters specifically contained within the definition of industrial dispute in Section 4 of the Act.

The key difference in these two approaches is that an industrial dispute under the Workplace Relations Act is limited to matters pertaining to the relationship of employers and employees. Whereas, any matter relating to the industrial relationships between workers unions and employees, can be comprehended by the term industrial dispute within the Constitution.

Secondly, an industrial dispute can be generated by a written demand. A written demand is often referred to as a paper dispute. However, as the High Court has made clear on many occasions, a paper dispute is nevertheless a real dispute. The notion of a paper dispute was clearly described by Mason CJ, Dean and Gaudron JJ in the SPSF case where in paragraph 5 they said, "*However, the Constitution in Section 51 (xxxv) speaks of 'industrial disputes' not industrial disturbances*' ". *Leaving aside questions that may arise with respect to the parties to a dispute, its subject matter and interstatedness, all that is necessary to constitute an industrial dispute is disagreement as to the terms and conditions that should, in fact, apply as between employer and employee. Obviously, a disagreement of that kind may come about as the result of a written demand and, thus, there is nothing inherently artificial about a 'paper dispute'.*

The three Justices went on to say, "*It is sometimes said that a 'paper dispute' must be a 'genuine dispute'. That means no more than written demands must be genuine demands."* And further on, the three Justices said, "*Given the*

*doctrine of ambit and given that there is nothing inherently artificial about written demands, 'or paper disputes', it will not often be the case that a written demand with respect to the wages or conditions of employees will be other than a genuine demand. Generally speaking, and whether the question falls for decision in this Court or in the Commission, a demand, as to wages or conditions of employees made by an organisation of employees and authorised by its rules and in accordance with its procedures, will be treated as a genuine demand unless it is only fanciful or unless it appears that demand was made merely to dress up some other claim which, on its own, would not constitute a dispute as defined in Section 4(1) of the Industrial Relations Act 1988."*

In the same case, Toohey J, who agreed with the majority decision, said, "*It has been said that the expression 'genuine dispute' is tautologous. And so adheres in the sense that 'either there is a dispute as to find in Section 4 (1) of the Act, or there is not'. The use of the qualifier 'genuine end' has crept into the language of industrial law, no doubt so as to put a brake on the service of demands which are not in truth sought by the members of the union in question and which seek merely to attract the jurisdiction of the Commission."*

And further on, Toohey J said, "*While the expression 'genuine dispute' may be tautologous, the term 'genuine demand' is not necessarily so. It does serve the purpose of focusing attention on the reality of the demand made and the motive with which it is made. If the demand is not genuine, in the sense described, failure to accede to it does not give rise to an industrial dispute."*

In Attorney General for Qld v SDP Riordan et or ,[1197] HCA 32, Brennan CJ and McHugh J summarised what Mason CJ, Dean and Gaudron JJ had said in re SPSF ex parte A-G for WA, (1993) 178 CLR 249 (the SPSF case) in the following terms: "*The theory of paper disputes with which these cases are concerned is that, on non-accession to a log of claims, there exists or there is evidence of an actual dispute between the parties on whose behalf a log of claims is served and the parties on whom the log is served and who did not accede to the claims, the claims that are not acceded to being the matters in dispute."*

Thirdly, a union who serves a log of claims and letter of demand in order to attract the jurisdiction of the Commission, is clearly not initiating a genuine

demand and therefore there can be no industrial dispute created. (*Caledonian Collieries Ltd et or v. Australasian Coal and Shale Employees Federation [No. 2.]* (1930) 42 CLR 558.)Given the difference between the Constitutional notion of industrial dispute and the Workplace Relations Act notion of industrial dispute, it has been a common feature for letters of demand and logs of claims of trade unions to contain matters which are within the constitutional sense of an industrial dispute but are not within the narrower definition of industrial dispute in the Workplace Relations Act.

This has been dealt with by the Commission and the Courts through the simple expediency of excising those claims which are not covered by the Workplace Relations Act from the formal finding of an industrial dispute. Thus where a union's log of claims includes a claim for the provision of payroll deductions facilities for the payment by union members of their union contributions, such a matter is an industrial dispute within the meaning of the Constitution but is clearly not capable of being part of an industrial dispute for the purposes of the Workplace Relations Act. This is as a result of the very clear decision in the Alcan case. Nevertheless, unions consistently include claims for payroll deductions facilities in logs of claims served on employers.

There are other matters which unions make claims on employers which cannot fall within the definition of industrial dispute within the Workplace Relations Act. The Commission has had no difficulty in the past in simply excising such claims from its formal finding as to the matters that are in dispute.

The legal validity of unions serving logs of claims on employers who do not employ union members has been reiterated by the High Court on many occasions. The High Court first dealt with this issue in 1935 and on each occasion since then, has reaffirmed its decision that it is quite proper for unions to serve letter of demand and log of claims on employers who do not employ union members and for the Commission to make awards in relation to those employers.

In a recent decision in 1993 in *Re Finance Sector Union of Australia Ex parte Financial Clinic (Vic) Pty Ltd and Others [1993]* 178 CLR 352, the High Court again reaffirmed its previously held position. In the joint judgement of Mason CJ, Dean, Toohey and Gaudron JJ, they said:

*"8. It was held in Metal Trades Employers Association v. Amalgamated Engineering Union ("the Metal Trades Case"" ((3) (1935) 54 CLR 387.) that the wages and conditions on which employees who are not members of a union are or may be employed may be the subject of an industrial dispute between a trade union and employers, or between a trade union and an organisation of employers. The principle on which that decision rests was stated by Dixon J in R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Kirsch ((4) (1938) 60 CLR 507, at p 537) as being "that the interest which an organisation of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms". That statement was accepted as authoritative by the Court in R. v. Kelly; Ex parte State of Victoria ((5) (1950) 81 CLR 64, at p 82. See also Reg. v. Graziers' Association of N.S.W.; Ex parte Australian Workers' Union (1956) 96 CLR 317, per Dixon CJ, McTiernan and Kitto JJ at p 326; Reg. v. Moore; Ex parte Graham (1977) 138 CLR 164, per Gibbs J at 176; Reg. v. Cohen; Ex parte Attorney-General (Q.) (1981) 157 CLR 331, per Gibbs CJ at p 337, per Wilson J at p 347).*

*"9. It is now common for trade unions to make demands on employers with respect to the wages and conditions of members and non-members alike. And since the Metal Trades Case, awards have regularly been made in settlement of claims of that kind in terms which bind employers in respect of all employees, whether or not members of the union party to the award in question.*

Further, Justices Brennan, Dawson and McHugh, in the same decision, also restated the underlying principles in the following terms:

*"18. The ability of a union demand to give rise to an industrial dispute with respect to the terms and conditions of employment of non-unionists is undoubted for the reason given by Latham CJ in Metal Trades Employers Association v. Amalgamated Engineering Union (" the Metal Trades Case") ((31) (1936) 54 CLR 387, at pp 402-403.): "There does not appear to be*

> *any reason in principle for denying that the terms upon which non-unionists may be employed may be as much the subject matter of an industrial dispute as the question whether non-unionists shall be employed at all. Unionists may be concerned and apprehensive with respect to any matters which may affect the terms upon which their employers can afford to employ them. If other employers are at liberty to employ non-unionists at lower rates of wages, the competitive efficiency of employers employing unionists may be seriously prejudiced, and the continued employment of the unionists may be jeopardised. Employers of unionists may take the same view." The principle on which the decision in the Metal Trades Case rests was said by Dixon J in R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Kirsch ((32) (1938) 60 CLR 507, at p 537) to be this: "(T)he interest which an organisation of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms." ((33) Followed in Reg. v. Cohen; Ex parte Attorney-General (Q) (1981) 157 CLR 331, at pp 336-337, 347-348.)"*

Justice Dixon, in the King v. The Commonwealth Court of Conciliation Arbitration and Others Ex parte Kirsch 1938 60CLR 507 said, in addition to the comments quoted above, that one of the reasons for supporting the proposition that unions have a right to serve letters of demand and logs of claims on employers who do not employ union members and that the Commission can make awards in relation to such employers was – "*to be found in the interest of an organisation in, so to speak, securing and maintaining standards or terms and conditions of employment for all so that they should not be lost to the members present and future whom it represents."*

ATTACMENT B
A BRIEF OVERVIEW OF THE RECENT SDA LOG

The Association notes that in the explanatory memorandum to this Bill, specific reference has been made to a recent exercise by the Shop, Distributive & Allied Employees' Association where we served a letter of demand and log of claims upon 35,000 employers in Victoria. This matter, which commenced by the service of the letter of demand and log of claims in mid-1998 ultimately concluded in early 2003, with the roping-in of some 17,000 employers into the SDAEA Victorian Shops Interim Award 2000.

**Rather than act as a justification for this Bill, the actions of the SDA in initiating a letter of demand and log of claims on 35,000 employers prove the absolute lack of any justification or need for this Bill**. The SDA was aware that a letter of demand and log of claims served upon 35,000 employers in Victoria would generate some concern amongst small business employers. Of its own volition, the Association ensured that we sent out with a letter of demand and log of claims an accompanying letter explaining, broadly and briefly, the purpose of the letter of demand and log of claims and the possibility that an award could ultimately be made against each and every employer so served. A copy of this letter is attached.

The SDA's action in sending an explanatory letter with the letter of demand and log of claims was done of its own volition and out of a genuine concern to ensure that employers were informed. It was not done in order to merely comply with a statutory requirement. In that sense, therefore, it was not possible for employers to challenge the genuineness of the letter of demand and log of claims simply because an explanatory letter had been attached to it. However, exactly the opposite result would occur if a union sent out an explanatory letter because of compliance with proposed Section 101A.

It should also be noted that the employers in the SDA's exercise were probably the most informed group of employers in Australia as to the conduct of proceedings before the Commission. Not only did the SDA, of its own volition, send an information letter with the original letter of demand and log of claims, but notices were placed in all major newspapers in Victoria when the matter

was first called on before the Commission. As a result of challenges at various steps along the way, both as to procedural matters and substantive matters, the Commission directed, on two separate occasions, that the Association notify employers directly by personal service of proposed hearings and the intentions of proceedings.

In addition, the Commission itself notified employers directly on at least one occasion, of a proposed course of action by the Commission. The hearings spread over four years and during that time, the Liberal government in Victoria undertook a survey of employers to gauge their level of opposition to the approach adopted by the SDA.

Notwithstanding receiving numerous letters, being contacted by federal and state governments, and being made aware at every step along the way as to the procedures that were being undertaken in relation to the letter of demand and log of claims and the making of an award, some employers are still contacting the Association asking for explanations of the matter.

In one particular case recently, a consultant contacted the SDA with a request that a particular employer be removed from the award respondency list on the basis that they were not properly operating in our industry. The consultant explained that the employer had been a member of an employer organisation, had consulted the employer organisation over the original service of the letter of demand and log of claims by the Association and had been told by the employer organisation not to worry about it.

As a result, the employer was subsequently found to be part of an industrial dispute and was roped into the Victorian Shops Award. Once the employer got separate independent advice from another industrial relations consultant, they found that their original employer organisation had been totally wrong and certainly wrong in terms of giving advice to ignore what the SDA was doing. The Association happily agreed with the request for removal from the award of this particular employer.

It can be seen, therefore, from this one example that sometimes, no matter how much information is given to small business employers, they still will either not listen to it, not take notice of it, or where they go and talk to

registered employer organisations who are supposed to be familiar with the processes, they will be given wrong advice.

# IMPORTANT INFORMATION FOR EMPLOYERS

26 June 1998

Dear Retailer,

The Shop, Distributive & Allied Employees' Association (SDA) is seeking to establish effective award coverage for the entire Australian retail industry.

This is consistent with the SDA's commitment to the protection and improvement of employees' wages and conditions in the industries it covers, a role it has performed successfully and responsibly since 1908.

If you are a Victorian retailer you will be aware that, in the past, such protection was usually achieved by regular updating of awards made by the Employment Relations Commission of Victoria, covering most retail employers in Victoria, or by negotiating an award or certified agreement with major national retailers operating in Victoria.

In most cases, the SDA successfully reached agreement through negotiation with employers or through an award of the Australian Industrial Relations Commission.

However, recent legislative changes, both State and Federal, now require us to serve many Victorian retailers with a Log of Claims and a Letter of Demand in order to look after our members' interests.

In 1996 the Government of Victoria abolished the State industrial relations system. This meant that Victorian employee organisations, including the SDA, who wished to protect the interests of their members had to serve every employer with a separate Log of Claims and Letter of Demand. The Federal Government agreed to this.

Therefore, you and many other retail employers are now being served with a Log of Claims and Letter of Demand.

The Letter of Demand allows a set period for you to accept what is sought in the Log of Claims. If you do not comply within that period, an industrial dispute exists between the SDA and your company, which the Australian Industrial Relations Commission, is then empowered by law to investigate and resolve.

The SDA is always willing to enter into arrangements appropriate to the needs of a particular enterprise, where these are industrially fair and safeguard and advance the interests of SDA members and employees eligible for membership of the Shop, Distributive &Allied Employees Associatiion.

We enclose the names of employer organisations and legal advisors in Victoria who may be advising other retailers on their response to the SDA's Log of Claims and Letter of Demand, in case you wish to contact them. A 24 hour facsimile number is also available for your responses to the Letter of Demand **(03) 9620 – 5076**.

If you are a retailer in another State your local Retail Traders Association may be ready to assist you with advice.

Yours sincerely,

JOE DE BRUYN

NATIONAL SECRETARY-TREASURER

Encl:

1.1 IMPORTANT!

The names and addresses of a number of

## SOME EMPLOYER ORGANISATIONS AND ADVISORS IN VICTORIA

The following employer organisations or firms are experienced in industrial matters and are considered likely to be advising other Retailers on their response to the SDA log of claims and letter of demand:

Retail Traders Association of Victoria
2nd Floor
104 Franklin St
MELBOURNE VIC 3000
Ph: (03) 9326 – 5022
Fax: (03) 9329 – 7814

Victorian Employers' Chamber of Commerce and Industry
50 Burwood Road
HAWTHORN VIC 3122
Ph: (03) 9251 – 4333
Fax: (03) 9819 - 3676

Mr. Jeff Gordon
Cargord P/L
(Industrial Relations Advice, Advocacy and Mediation Services)
60 Walker St
CLIFTON HILL VIC 3068
Ph: 0418 990 150
Fax: (03) 9486 – 7297

Metal Trades Industry Association of Australia
509 St Kilda Road
MELBOURNE VIC 3000
Ph: (03) 9280 – 0111
Fax: (03) 9280 - 0199

Hardware Association of Victoria
180 Whitehorse Road
BLACKBURN VIC 3130
Ph: (03) 9877 – 2999
Fax: (03) 9877 – 6663

Mr. Gordon Henderson
Industrial Advocate
PO Box 82
RINGWOOD VIC 3134
Ph: (03) 9870 – 9027
Fax: (03) 9879 - 1799

Australian Chamber of Manufactures
380 St Kilda Road
MELBOURNE VIC 3000
Ph: (03) 9698 – 4111
Fax: (03) 9699 – 1729

Workplace IR Services
127 Charman Road
MENTONE VIC 3194
Ph: (03) 9585 – 1050
Fax: (03) 9515 - 3350

Corrs Chambers Westgarth
Lawyers
600 Bourke Street
MELBOURNE VIC 3000
Ph: (03) 9672 – 3000
Fax: (03) 9602 – 5544

Dunhill Madden Butler
Solicitors
575 Bourke Street
MELBOURNE VIC 3000
Ph: (03) 9235 – 0235
Fax: (03) 9235 – 0299

Minter Ellison
Solicitors
Level 23, Rialto
525 Collins Street
MELBOURNE VIC 3000
Ph: (03) 9229 – 2000
Fax: (03) 9229 – 2666

Phillips Fox
Lawyers
120 Collins Street
MELBOURNE VIC 3000
Ph: (03) 9274 – 5000
Fax: (03) 9274 – 5111

Adams Lawyers and Consultants
Level 2
253 Lonsdale Street
MELBOURNE VIC 3000
Ph: (03) 9662 – 4788
Fax: (03) 9663 – 2323

Gary Katz & Associates
71A Burwood Road
HAWTHORN VIC 3122
Ph: (03) 9819 – 9099
Fax: (03) 9819 - 2022

**SUBMISSION OF**
**THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION**
**TO THE EMPLOYMENT WORKPLACE RELATIONS**
**AND EDUCATION LEGISLATION COMMITTEE**
**INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT**
**(SIMPLIFYING AGREEMENT MAKING) BILL 2004**

**The Association is, and remains, opposed to the concept of individual agreements as represented by Australian Workplace Agreements in the Workplace Relations Act**

In particular the Association is of the view that the current process for having separate procedures for the filing and the approval of AWAs is at least a basic protection for workers who otherwise have little protection in relation to the making of AWAs.

The broad secrecy provisions surrounding the making and approval of AWAs is and remains a matter of extreme concern. The process of simplifying agreement making in relation to AWAs is objectionable. If AWA's are to remain then rather than simplify procedures the Parliament of Australia should ensure that AWAs are absolutely transparent and in particular that the process for approving AWAs is totally transparent and available for public scrutiny.

Whilst the Association is opposed to this Bill in relation to AWAs, **we do note that there are two proposed amendments which make some marginal improvements on the position in relation to AWAs.**

Firstly, the Association draws attention to the proposed change to introduce into the Workplace Relations Act by **the proposal to have a cooling off period** in relation to AWAs.

The introduction of the cooling off period and the consequences that would flow from that are an improvement over the current provisions especially in relation to AWAs made by new employees.

Currently the Workplace Relations Act provides in s.170VF(2) that an AWA may be made before the commencement of employment and an AWA that has been made before the commencement of employment will be approved by the

Employment Advocate where the employee was given a copy of the AWA at least five days before the employee signs the AWA. (See s.170VPA(1)(b)).

The combined effect of s.170VF(2) and 170VPA(1) is that it is quite permissible for an employer to require a prospective employee, as a condition for getting a job, that they enter into an AWA. As long as the prospective employee received a copy of the proposed AWA at least five days before they signed it, then they can sign the AWA before they commence employment. Workers are therefore able to be forced into AWAs as a condition of commencing employment.

Whilst this position has been challenged, the authorities show that it is not coercion or duress to require a perspective employee to enter an AWA as a condition on being given a job.

The proposed amendments, in particular proposed s.170VBA(5) and s.170VCA, arguably remove some of the most objectionable and obnoxious aspects of the operation of existing provisions of 170VF(2) and 170VPA.

This amendment arguably means, that in the case of the new employee, an employer may still require an employee to enter into an AWA as a condition on being offered a job. However, by providing a statutory right of a cooling off period with the right to withdraw consent the Workplace Relations Act would, arguably, at least provide that an employee (entering into an AWA), would have the protection of being able to withdraw their consent to the AWA without their employment being able to be lawfully terminated.

This is so simply because under the existing provisions of s.298K and s.298L it is illegal for an employer to refuse to employ a person because the person is entitled to the benefit of an industrial instrument.

How this would work in practice appears reasonably clear. Where a person applies for employment and the employer indicates that the person will be employed in a particular job, but only if the employee agrees to an AWA prior to commencing employment, and where the perspective employee signs the AWA, then an employment contract would have been completed and the person would be entitled to insist upon being employed.

The proposed amendments to the Workplace Relations Act would, after the employee had entered into a contract of employment, entitle the employee to withdraw their consent to the AWA during the cooling off period. Where the person did withdraw their consent to the AWA during the cooling off period the employer would still be bound to offer employment to the person even though an AWA would not be in place.

For the employer to refuse to employ the person on the basis that they had withdrawn their consent to the AWA would in fact be punishing the person for exercising their statutory rights under proposed s.170VBA(5) and s.170VCA.

A refusal by an employer to employ a person who exercises their rights to withdraw consent from an AWA would be conduct which would breach s.298K and s.298L. This is so because where an employee withdraws their consent from the AWA, on the basis that they would prefer to rely upon the industrial instrument which would otherwise would apply in the absence of the AWA, then they are claiming the benefit of the industrial instrument.

The AWA stream within the Workplace Relations Act is objectionable in itself. However, these changes (the process of making AWAs by allowing workers a genuine opportunity of a cooling off period and **the ability to withdraw consent**) do arguably, for new employees marginally improve the overall current situation.
The introduction of a cooling off period with the *absolute* right for the worker to withdraw their consent from the AWA will, the Association believes, give new employees some opportunity to consider the impact of an AWA on their terms and conditions of employment.

**However these changes do nothing to help existing employees who are offered AWA's by their employer**. For most employees these changes offer no relief at all from the disadvantages of AWA's. The odious nature of AWA's remains and they should be totally rejected.

Another proposed amendment is s.170WKD which will provide the Employment Advocate with the power to revoke approval of an AWA that he has previously approved.

**It is a positive move for the power to revoke approval of AWAs to be specifically provided for within the Workplace Relations Act. However the proposed change does not go far enough and leaves in place a number of problems.**

However, whilst it is commendable that this provision be inserted into the Workplace Relations Act, there is a clear concern that that the Association has about revocation of the approval of AWAs. The primary concern of the Association is that the amendments do not make clear that there is any capacity for a party to an AWA, or a bargaining agent acting on behalf of the party to an AWA, to make an application to Employment Advocate for him to revoke approval of AWAs.

In the Association's view, if this amendment was to be adopted then it should be accompanied by an explicit provision that any party to an AWA, or an bargaining agent acting on behalf of a party to an AWA, may make application to the Employment Advocate for the Employment Advocate to revoke approval of an AWA, an extension agreement, a variation agreement or a termination agreement made in relation to an AWA.

And further that where such an application is made, that the Employment Advocate must give both parties to the AWA a reasonable opportunity of making submissions to the Employment Advocate on the application for revocation.

Finally the Act should provide that where an application for revocation has been received and dealt with by the Employment Advocate, the Employment Advocate is obliged to issue a decision on the revocation application and is obliged to give a copy of the decision to both parties to the AWA.

Whilst proposed s.170WKD is silent on this issue it would be presumed that the only time that the Employment Advocate could revoke approval for an AWA is where the AWA did not at first instance meet the statutory requirements for approval. In other words revocation of approval of the AWA is not a discretion at large for the Employment Advocate, but can only occur where the

Employment Advocate is satisfied that the original approval was not properly given or that the AWA should not have been approved due to non compliance with one of the requirements for approval.

These changes are inadequate and further amendments are required to be incorporated into s.170WKD to ensure that the grounds upon which revocation may occur are specifically identified.

The Association notes that a major argument for introducing a series of changes to the processes for making Certified Agreements is to simplify and speed up the process for these Agreements.

However, the Association is extremely concerned that **the removal of the automatic process of having a public hearing for the certification of an Enterprise Agreement is a retrograde step.**

The Association has consistently complained about the processes involved in making AWAs on the basis they are secretive and not subject to public scrutiny.

Whilst the proposed changes to the Workplace Relations Act procedures for dealing with Certified Agreements do permit public hearings, this is done by way of an exception rather than as the rule. In the Association's very strong view the normal rule for the making of any Certified Agreement, under the Workplace Relations Act, should be a public hearing. It simply is not a burden on employers or organisations of employers or workers to attend public hearings for the purposes of certification of an Enterprise Agreement.

The current procedures of the Workplace Relations Act are that on approval, if an agreement fails the no disadvantage test, the Commission must give the parties an opportunity of amending the agreement or giving relevant undertakings to the Commission before the Commission approves or refuses to certify the agreement.

The Association is not opposed in principle to extended agreements. However, in regard to extended agreements, should they be provided for, a proper re-assessment capacity should be instituted. Any party to an extended agreement or the Commission should have the capacity to institute re-assessment proceedings. **As soon as the Commission determines, on reassessment, that the extended agreement will fail the no disadvantage test then the parties should be given an opportunity to either amend the agreement or give relevant undertakings. Failing the giving of such undertakings, or the amendment of an agreement within a very short period of time, then the agreement should terminate immediately**.

This would act as a protection for employees on extended agreements.

The Association sees no merit in and does not support the remaining amendments proposed by the Government in relation AWAs.

The Association would urge the Senate to reject the proposed amendments Bill. Even where there is arguably some merit to the proposals put forward they are inadequate and do not over-ride the overwhelmingly negative impact the passage of this Bill would have.