Submission no: 3

Senate Employment Workplace Relations & Education Legislation Committee

2004 INQUIRY INTO

Workplace Relations Amendment (Award Simplification) Bill 2002

Workplace Relations Amendment (Simplifying Agreement Making) Bill 2002

Workplace Relations Amendment (Choice in Award Coverage) Bill 2002

Workplace Relations Amendment (Better Bargaining) Bill 2002

CEPU SUBMISSION

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Introduction

1. This is not the first time the Government has sought to make these changes to the Workplace Relations Act. This Bill reintroduces provisions previously introduced and rejected by the Senate in 1999 via the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*. As this Bill was then referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee and the subject of a majority and minority report, many of the arguments for and against the changes will be familiar to this Senate Committee. Here we are again. The same amendments, the same players, the same arguments and the same disregard by the Government for the merit of our arguments.

2. In general we adopt the submissions of the ACTU to this Committee concerning the current crop of changes to the *Workplace Relations Act* sought by the Government. Our Submission to this Committee concentrates on a few specific changes of particular concern to our members.

Workplace Relations Amendment (Award Simplification) Bill 2002

The proposal to scrap skill based career paths from awards

3. The Government proposes to amend the WR Act to reduce the scope of allowable award matters by amending s.89A(2) of the WR Act to exclude among other things, "skill based career paths". It also seeks to make provisions dealing with training and education non-allowable award matters. New subsection 89A(3A) is a list of non-

allowable matters. Included on this list is "training and education (except in relation to leave and allowances for trainees and apprentices." This means among other things, that matters pertaining to training and education, such as participation in training activities, leave for training or study purposes and fees (except in relation to leave and allowances for trainees and apprentices) do not come within the scope of allowable award matters.

4. Likewise the Government tried and failed to make these changes with the 1999 Bill. The arguments against doing this are the same as they were in 1999 and in view of the current chronic skills shortage, even more compelling than they were then.

5. In 1999 there were compelling arguments put against the removal of skill related career paths from awards and the making of training and education non-allowable award matters. Despite these compelling arguments the Majority of the Senate Committee resolved that training and skill development are best resolved at the workplace level. No in depth argument in support of this proposal was made. Neither was an analysis of the arguments against this proposal attempted. Yet the proposal has the potential to do much damage.

6. It should be noted that the Government is also trying to introduce these same proposed changes under the Building and Construction Industry Improvement Bill 2003 (BCII Bill) and the Senate References Committee is currently examining this diminution of the allowable matters with respect to the building and construction industry.

7. We also opposed this change with respect to the building and construction industry and note that the arguments against are the same across all industries. The Government must also be of this view. By introducing these changes to the scope of allowable matters via the Award Simplification Bill and earlier incarnations of this Bill, the Government is clearly of the view that the issue is not specific to the building and construction industry.

8. Under the heading "Parties Views" in the *Explanatory Memorandum* to the *Award Simplification Bill*, the only views taken into account in considering these changes are those of the Australian Chamber of Commerce and Industry. But the ACCI make no specific mention of the proposal to scrap skills based career paths and the provisions regarding training and education. They are only quoted as saying *"the award system continues to have too great a role vis a vis agreements*."[1] The views of no other party are quoted here or taken into account despite the fact that when this same proposal was put by the Government in 1999 the voices in opposition were loud and came from both sides of the fence. Unions and major employer groups were united in their opposition to the proposal. For instance, the Ai Group stated:

> *"Ai Group does not agree that this matter is more appropriately dealt with exclusively at the workplace or enterprise level. A number of significant awards have been restructured in such a manner as to encourage employees to undertake training based on approved industry training packages and acquire additional skills for which they will be rewarded by being classified at a higher level … the answer would not appear to us to lie in scrapping skill based career paths from awards."*[2] *[emphasis added]*

9. The arguments against deserve some intelligent examination; they do not deserve to be dismissed and categorised as the same self serving predictable argument. The ramifications are too important. Arguments against these changes do not just come from union ranks. Many employers have argued against these changes. This broad based opposition should prompt the view that there may be something in these opposition arguments.

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1 Explanatory Memorandum , *Workplace Relations Amendment (Award Simplification) Bill 2002* at p.3

2 Australian Industry Group and Engineering Employers Association, South Australia, Submission 392, pp22-23 as quoted by the Senate Employment Workplace Relations, Small Business and Education and Legislation Committee in its Report "Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, November 1999 at p.209

Why does the Government want to make these changes?

10. The reason given by the Government for reducing the scope of allowable award matters in the current *Award Simplification Bill* before this Legislation Committee is the same reason it gave with respect to the building and construction industry and is exactly the same reason it gave with respect to the 1999 Bill. Namely, that; *"… these matters are more appropriately dealt with at an enterprise or workplace level and, if regulation by industrial instrument is necessary, by a certified agreement or an Australian Workplace Agreement (AWA)."*[3]

11. One downside of the growth of enterprise bargaining has been the simultaneous decline in the support in the award system for ongoing training and skills acquisition. This decline will continue of we sever the link between classifications and wages from training and education and career paths. Why does the Government want to do this? The evidence clearly supports the view that the further we remove these matters from the award system, the decline in our skills base worsens.

12. Retaining these provisions in awards poses no threat to enterprise bargaining and enterprise agreements. It makes sense to keep these provisions in broad based safety net awards which cover industries rather than individual enterprises. There is no evidence to show that maintaining these provisions in awards will impede enterprise productivity. In fact, it could be that the acquisition of a broad skills base and encouraging ongoing training is more important to productivity in long run than any short term measure that focuses in the current needs of an enterprise.

13. Sometimes we need to look beyond the micro level of an enterprise and its current needs to the bigger picture. Individual enterprise needs change over time but the overall need of a society to skilled and properly trained workers does not change. The required mix may change but not the underlying need for workers with portable and transferrable skills.

3 *Explanatory Memorandum*, ibid

14. In the Government's slavish devotion to enterprise bargaining the wider needs of industry, community and individual workers are being ignored. It's time to question that devotion to the needs of individual enterprises. We need to be confident that there is some consistency to the training undertaken by workers at various levels in their career path. We need to be able to reassure workers they will be rewarded for ongoing training and education. They need to see a result that takes them somewhere for the effort of ongoing training. The Government's proposal will remove from the view of workers both the path and the means to progress up that path. For reason set out below, some of these provisions will never be translated into enterprise agreements. They will simply be lost.

WHAT ARE THE ARGUMENTS AGAINST THIS PROPOSAL

Training & skill formation has been supported by the award system

15. In Australia for most of the twentieth century almost all aspects of training were prescribed in industrial awards. The award system prescribed rules on formal indentures, recruitment, numbers, proportions of apprentices to skills tradesmen and apprentice wages and conditions[4]. In this way; *"training and skill formation has been historically coupled to the industrial relations system in Australia through the award system."*[5]

16. The Government now talks as if the award system is somehow counterproductive to training and skills acquisition when in fact the opposite is true. In this context, Hall and others have noted; *"International commentators … are intrigued by the resilience of the apprenticeship system in Australia into the early 1990s, noting that a strong award*

4 Gospel H (1994) "The Survival of Apprenticeship Training in Australia" 36 *Journal of Industrial Relations* 1, pp.37-56 at p41

5 Dr Toner P (2003) *Declining Apprentice Training rates: Causes, Consequences and Solutions, Research Paper* prepared for VET Conference organised by Group Training Australia and the Dusselldorp Skills Forum, Sydney, July 2003, p.19 quoting Roan A and Lafferty G (2001) "Skills, Training and Workforce Bargaining – the Implications of Australian Workplace Agreements", paper presented at *The AWA Experience: Evaluating the Evidence*, University of Sydney, 7 September, p.7

system and trade union support had helped its survival."[6] However, perceptively, he also stated; *"At the present time the Australian apprenticeship system is under severe strain and stands at a crossroads in terms of its future development."*[7] A contributing reason for this has been the move to enterprise bargaining with the subsequent award stripping.

AIRC Supports retention of skill based career paths in awards

17. The claim that matters regarding skill based career paths and training should be left to the enterprise level, was made by the Howard Government to the Full Bench of the AIRC in the 1997 *Safety Net Review case*[8]. The Government argued that:

> *"…Matters associated with classification relativities* [skill based career paths] *should be left for determination by the parties at the enterprise level."*

However, the Full Bench at that time rejected the Government's claim and stated:

> *"If an award system is to be fair, then it is no answer …to leave it to workplace agreements to establish appropriate relativities …. Furthermore, the provision of skill-based career structures in awards is a significant way in which employees are encouraged to improve their skills, contribute to higher productivity and advance to higher wages."* *[emphasis added]*

6 Hall R, Bretherton T and Buchanan J (2000) *The Growth of Non Standard Work and its Impact on Vocational Education and Training in Australia*, NCVER at p.24 quoting Gospel H (1994), op cit, pp.37-56 at p51, emphasis added.
7 Gospel (1994) ibid p.37
8 Australian Industrial Relations Commission, (1997) *Safety net Review – Wages*, April, Print P1997 at p.72

Weaken No-disadvantage Test

18. Scrapping skill based career paths and training matters from awards, will weaken the no disadvantage test by which enterprise agreements are measured against the relevant award. By reducing the number of conditions and entitlements in awards, the Government is effectively reducing the matters that need to be taken into account with respect to the no disadvantage test. As a result of the first round of award stripping, agreements are already being assessed against a lower safety net standard of pay and conditions. Further reducing the allowable matters will make the no disadvantage test weaker. Deleting the training and career path provisions from awards will make any such provisions in enterprise agreements automatically an improvement on the award regardless of their quality of usefulness.

Erosion of award safety net

19. Protections guaranteed under the award safety net will be lost, with many employees unlikely to possess the industrial strength necessary to persuade employers to include equivalent provisions in their enterprise agreement. Removing these provisions from awards is a windfall gain for employers. Because there is no requirement that these provisions be picked up in agreements, employees are back to square one having to bargain for their old conditions all over again, trading off productivity or other benefits to gain access to entitlements that have already been the subject of trade offs.

20. Some of these provisions may never be translated into enterprise agreements, especially in sectors of industry where the workforce has less bargaining power. These provisions will be lost. Keeping these provisions in safety net awards ensures they are available to all employees irrespective of their relative industrial muscle.

Trap low paid workers in low paid jobs

21. The proposal will have an adverse impact on the ongoing training, education and career paths of all workers. It has the potential to trap low paid workers in low paid jobs as training opportunities for such workers to improve their skills are cut off. As the ACTU noted in 1999; *"Clear accessible career paths provide one of the few means available to low paid employees to obtain higher wages."*[9]

Crucial to maintaining award link to higher wages & career path

22. By removing training and education from the list of allowable matters, the operation of the *Award Simplification Bill* will hinder skill acquisition and inhibit ongoing training. Throughout their working career CEPU members and other electrical and electronic workers undertake regular update and additional training to both keep their skills current and to upgrade their skills. They work in areas where technological innovation is rapid and on-going training is essential. Being compensated for that training is an incentive to undertake the training. Training is inextricably linked to their career path. It is the main way of achieving higher pay rates.

23. The Electrical Contracting Industry Award is an important vehicle for the skill formation of electrical and electronic workers. Some 75% of electricians are trained in the electrical contracting industry. This is in jeopardy by the operation of the *Award Simplification Bill*. CEPU members rely on the award provisions to identify their career path and the means to progress up that path.

24. Skills based career paths have played an important role in encouraging our members to undertake further vocational training. Had these career paths not been evident in

[9] ACTU Submission No 423 at p.82 quoted by the Senate Employment Workplace Relations, Small Business and Education and Legislation Committee in its Report "Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, November 1999 at p.211

awards, many employees might not have aspired to further training. It is crucial that the link between higher wages and a career path created by ongoing training is maintained. It will create a situation where the award will contain a classification structure but no detail on how employees can progress through the structure by reference to training requirements and acquisition of skills.

25. The result will be a mish mash of training outcomes and inconsistent standards applied to move workers up the career path. The casualty will be certainty, consistency and uniformity. This is one matter which simply cannot and should not be applied at an enterprise level.

26. Employers, especially smaller employers, rely on the award training provisions to know what skills are required, which training package is appropriate for the training, and to offer an incentive to their employees to undertake ongoing training and apply that additional skill in their employment. As stated above, the rationale for removing skills and training from the list of allowable matters is that it is more appropriate to deal with training at a workplace level. This is a ludicrous proposition for the majority of employers. As also already noted, much of industry is dominated by small employers who lack the time, resources or expertise to become training experts.

The proposal in the Bill contradicts the national training reform agenda

27. The CEPU has invested a lot of time and expertise over the last decade in the national training reform agenda which has led the Commonwealth, with the cooperation of the States, to establish a national training framework with nationally recognised skills and qualifications. The Government has established its own Australian National Training Authority (ANTA) to support and further progress these training initiatives. National training packages have been developed with the aim of developing a standardised training framework. For instance, clause 15.11 of the Electrical Contracting Industry Award provides that training undertaken under the award must be in accordance with

the national electrotechnology training packages. This is the key to ensuring that broad based and portable skills are developed.

28. It is unbelievable to us that the same Government now seeks to remove skill based career paths from the national awards that complement the national system. All this work will be undone if the Government persists with the proposal to remove skill based career paths and provisions regarding training and education from awards. If current award career path and award training provisions are not retained our members skill base will be eroded and Australia's future skill needs will not be satisfied.

29. Enterprise bargaining has introduced many gains for industry. However, career paths, skills acquisition and training are not areas that lend themselves to enterprise bargaining. *They are National, or at the very least State based matters, which lend themselves to a common not an individual enterprise approach.* This prompts the CEPU to argue that the Government should again adopt the conclusion of the AIRC Full Bench quoted above and leave skill based career structures in awards.

Will encourage growth of industry and even enterprise specific skills

30. Leaving the negotiation of such matters to the enterprise level is neither realistic or workable. If decisions are made at an enterprise level by the employer then apprentices and other skilled workers will only be trained in the skills needed at that enterprise. The ability to transfer skills across industries will be reduced as the skill base narrows.

31. Broad based skills will disappear, leading to a reduced ability of skilled workers to cope with technological change. The result will be a less flexible workforce with narrow and employer specific skills. This is not in the interests of the individual employee who may become trapped in specific industries nor is it in the interests of industry itself as it finds it harder and harder to employ properly trained skilled workers.

Individual employers & employees lack skills to deal with technical training matters

32. Skills acquisition and the training necessary to support career paths are highly technical matters requiring specialist educators and curriculum experts. To expect individual employers and employees to make sense of this national training framework and negotiate changes at a workplace level flies in the face of commonsense.

33. The electrical contracting industry, like so many industries, is dominated by small employers who lack the resources, skills and expertise to implement changes to career paths. Equally, employees are unlikely to possess the knowledge and skills necessary to position themselves for career advancement.

Award system helps maintain strong & broad based skills base

34. As noted above, time has proven the worth of the award system in helping to maintain a strong skills base. Already, the weakening of the award system in favour of enterprise bargaining has been accompanied by the severe skills shortage we now face. Further eroding the award system by removing skills based career paths and training and skills from the list of allowable matters will exacerbate this chronic skills shortage.

35. So bad is the current skills shortage that there was a recent Senate Inquiry into the matter undertaken by the Senate References Committee.[10] The Inquiry was prompted by *"… industry concerns about persistent, widespread skill shortages over the past decade and concerns about future shortages resulting from … a serious erosion of the skills base."*[11] The proposal to remove skills, training and education from the list of allowable award matters will only exacerbate the huge skills shortages already being experienced.

[10] Senate Employment, Workplace Relations and Education References Committee (2003) *Bridging the Skills Divide*, November
[11] Senate *Bridging the Skills Divide* (2003) p.2

36. It is ironic that over a decade ago commentators were predicting that the weakening of the award system would lead to this skills shortage. As far back as 1993[12] it was predicted that enterprise bargaining would contribute to the decline in the apprenticeship system.

37. This is reflected in a recent study[13] of Australian Workplace Agreements (AWAs), which promote bargaining at an individual level, which found that 153 AWAs or 71.6% of the sample contained no reference to training, which the authors interpreted as indicating "*a lack of importance accorded to training in many agreements*." Secondly, 30.7% of AWAs with training provisions had very limited content related to training. Typically this content consisted of one or more sentences along the lines of *"undertaking training as directed*". Moreover, only 8 of the 153 AWAs with training provisions (however superficial) specified that training could occur during working hours. This leads Dr Philip Toner to conclude; *"there is prima facie evidence that industrial relations changes have contributed to reduced training rates."*[14]

38. This evidence from this study of AWAs reinforces our view that once skill based career path and training provisions are removed from safety net awards, they will not re-emerge at the enterprise level in enterprise agreements. In many instances, especially non-union areas, these provisions will simply disappear.

39. We believe the award system, with its clearly defined career paths and provisions for training and skills formation, has cushioned the labour market from the full impact of the spread of enterprise bargaining on the apprenticeship system. Removing 'skill based career paths' and expressly excluding 'training and education' from the list of allowable matters is ill conceived. A better approach to the current crisis would be to

12 See for instance, Curtain R., (1993) *Has the Apprenticeship System a Future? The impact of labour market reform on structured entry- level training* Department of Employment, Education and Training as quoted by Toner p.19

13 Roan A and Lafferty G (2001) "Skills, Training and Workforce Bargaining – the Implications of Australian Workplace Agreements", paper presented at *The AWA Experience: Evaluating the Evidence*, University of Sydney, 7 September

14 Toner (2003) op cit, p.19

leave the awards intact while well conceived policies are debated. There is no imperative to remove these provisions from awards now without some other substitute mechanism being put in place.

40. The rationale behind the Bill, that these training matters are more appropriately dealt with at an enterprise or workplace level and if necessary, by an EBA or AWA, is wrong. We agree with ACIRRT who says in some circumstances a shift to firm specific training can result in workers being trained only *"to acquire the minimum competencies to get the job done*".[15] A decade ago it was predicted *"if competencies are narrowly defined and acquired more off the job they may undermine the well-rounded skill base of the best traditional apprenticeships*."[16]

41. Training workers in minimum firm specific competencies is not only bad for the individual as it militates against portability, transferability and flexibility but it is also bad for industry. It is bad for industry because it does not create a pool of skilled labour with common core competencies.

42. What the Government hopes to achieve by removing the current safety net with respect to training matters is not clear. Presumably the proposal is in response to a perception that it will remove union influence over the training agenda; that by getting rid of union involvement the Government will somehow solve the training crisis; that unions are to blame for market rigidities and inflexibility with respect to training. From where we stand the more the training system has been geared to the needs of individual employers, the more the skills shortage has worsened.

43. In the mid 1990s employers and the Government took the view that the award system was a market impediment imposing constraints on growth and profitability. They wanted flexibilities which were in theory being restrained by the operation of the award system. Yet the market reality is that employers want fully trained and competent

15 ACIRRT (2002) *Renewing the Capacity for Skill Formation: The Challenge for Victorian Manufacturing,* A Report for the Manufacturing Industry Consultative Council, p.38

16 Gospel H (1994) "The Survival of Apprenticeship Training in Australia" 36 *Journal of Industrial Relations* 1, pp.37-56 at p54

tradespeople not partly trained people with sector specific and even firm specific skills. This was the experiment of the late 1990's and it failed miserably.

44. In response to the weakening of the award system and the reduced role of unions, industry has not capitalised on the opportunity to take control of the training agenda in any meaningful way to create a substitute system which facilitates skills formation. They have filled the vacuum created by the increasing skills gap by increasing their use of labour hire and outsourcing, leading one researcher to conclude; *"reduced union influence and a reduced share of the workforce covered by industry based awards has also facilitated management use of labour hire and casual and part time employment."*[17]

In summary, why should we keep these provisions in awards?

45. Retaining the training provisions, skill based career paths and the related classification definitions in awards, makes the system:

(a) transparent and certain - everyone knows what is involved in advancing up the career path and there is no disagreement about the appropriate training required. It also creates an incentive for employees to advance up the career path.

(b) enforceable – if there is a problem with an employer refusing to recognise the training and skills of an employee, the aggrieved party has an impartial party available to hear his/her grievance (the AIRC).

(c) transportable – employees skills are recognised from employer to employer; it guards against employer specific training which is not transportable.

46. We agree with the views of the ACTU who in 1999 stated; *"Do we really believe that …. undoing all of the effort and the work by all parties which went into establishing*

[17] Toner, op cit

career structures and the associated processes are going to make Australia a better place?[18]

47. We urge this Senate Committee to reject these changes to allowable award matters.

Choice in Award Coverage Bill 2004

48. Proposed s.101A of the *Choice in Award Coverage Bill* in part relates to the notice and information requirements for logs of claims. This provision was first introduced in the *Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999*. It did not pass the Senate and was reintroduced in the Small Business Bill which fell foul of the 2001 federal election. This present Bill is identical to Schedule 6 of the 2001 Bill.

49. The *Choice in Award Coverage Bill* amends the *Workplace Relations Act* to:

- place conditions on the service of logs of claims including content and the timing of notice and the addition of "prescribed information"; and

- limits the Commission's capacity to make dispute findings for employers with less than 20 employees unless an employee is a member of the union.

50. It should be noted that despite the emphasis on roping in awards, the actual legislative provision does not distinguish between logs of claims served for the purposes of roping in employers to federal awards and other logs of claims. That is, the provisions apply to all logs of claims served on any employer.

[18] ACTU Evidence, as quoted by the Senate Committee in its Report "Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, November 1999 at p.209.

Logs of claims and "Prescribed information"

51. Logs of claims and the service of logs is a legally technical area. Some of the more "ridiculous" aspects of log service have evolved from the arguments of lawyers seeking to impede or delay the dispute finding and hence award making process. Because of this, the service of a log of claims on an employer can be a confusing and even alarming process.

52. The reason for the confusion and alarm is that a log of claims is an ambit list of 'demands' which must envisage wages and conditions into the future. An ambit log of claims is served is to avoid constant re-service of a log. Ambit which may seem "outrageous" today will not be so in years to come. For instance, our 1972 log of claims sought rates of pay of $250.00!! Once the ambit "runs out", that is it goes beyond $250.00, the union has to re-serve that employer with the log of claims and letter of demand.

53. Ambit is important not just to the making of an award but to its variation. If a union makes application to the Commission to incorporate a safety net increase or a test case decision into an award, there must be sufficient ambit in the log to allow the Commission to deal with the matter.

54. To alleviate this alarm, s.101A proposes that a log of claims served on an employer must be accompanied by a notice of prescribed information. The objective of the Government in introducing this proposal is to; *"provide all businesses with more information about their rights and the processes involved with roping in claims."*[19] The purpose of this requirement is to ensure that employers being served with a log of claims are provided with basic information about the process and their rights and obligations.

[19] Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 *Revised Explanatory Memorandum*, at p.2

55. In the absence of any detail as to what the prescribed information will be (it will be prescribed in the regulations), we infer that the Government intends that an explanatory information sheet will be appended to the legal documents being served on an employer. This information will presumably explain in layman's language information about the process and the employer's rights and obligations at the time the log is served. In theory this seems a good idea. In fact we have toyed with this idea over time but baulked at it in practice because we did not want to give rise to potential legal arguments about the "genuineness" of our log service on an employer.

56. A log service can fail if it can be proved the union is not genuinely advancing the claims set out in the log[20]. Any admission along the lines of reassuring an employer that we are simply complying with a complex legal process to attract the federal jurisdiction of the Commission is sufficient to fault our dispute finding. Normally the Commission will find that the service of a log, despite creating what is called a paper dispute (in that there is not a real industrial dispute on foot in the sense that the man in the street would understand it) is a genuine industrial dispute. However, as a result of a number of cases, most notably the SPSF case in 1993[21], lawyers exhibited a predisposition to argue the genuineness of every log of claims served after that case. Even if the log service was found to be genuine (which it usually was) the tactic was successful in delaying the finding of a dispute and hence the making of an award (or the roping in to an award) and imposing on the unions considerable costs in defending arguments over genuineness.

57. It became a standard part of the initial arguments and much time and resources were spent in defending frivolous claims from lawyers backed by huge corporate resources. The game waned and the practice was eventually abandoned as objection after

[20] R v Gough & Anor; Ex parte BP Refinery (Westernport) Pty Ltd (1966) 114 CLR 384
[21] Re SPSF & ors; ex parte State of WA & ors (1993) 67 ALJR 577

objection to a log service failed to be faulted by the Commission due to a lack of genuineness. But the whole exercise made the unions wary of deviating from the tried and true practices.

58. With specific reference to our union, the High Court in the SPSF case, specifically approved our log of claims which has made us reluctant to change anything with respect to log service for fear of sparking another round of spurious and resource wasting legal arguments.

59. It is true that employers, especially small employers, will be served with logs of claims and not understand the process. So on the face of it, the proposal to add "prescribed information" which demystifies the process may seem a good thing. But we are wary of changing anything about the process which has the potential to reopen the legal can of worms. Every change or deviation to the standard process of log service carries the potential for lawyers to again embark on an exercise of frustration and delay as they argue over the contents of the prescribed information notice and whether it compromises the genuineness of the process by explaining the process. Because quite clearly the process is a device used to attract federal jurisdiction to create federal award coverage. But we cannot say this. Everyone has to pretend that an ambit log of claims is not a device; that the union is genuinely pursuing the claims in the log now.

60. For this reason, we warn the Senate Committee to exercise caution when considering what may seem a reasonable proposition especially without any real indication as to the detail of the "prescribed information".

Content of the log of claims

61. The CEPU opposes the provision in proposed s.101A preventing the Commission from finding the existence of a dispute if a single claim in the log is outside the

Commission's jurisdiction. Currently, if a claim in the log is outside jurisdiction the Commission severs those claims from the log and they are not included in the finding of the dispute.

62. By faulting a log service because of a single claim outside jurisdiction, the Bill will encourage lawyers on behalf of employers to challenge provisions of logs as a matter of course in much the same way they did after the SPSF case. This mischief will be motivated by a desire to delay and frustrate an already difficult legal process. As an invalid claim cannot result in an award provision it is common sense to simply sever a provision found to be outside jurisdiction. There is no good practical reason to upset this practice.

63. In addition, with respect to some claims, a union may not know whether a claim is outside jurisdiction until its validity has been tested by the Commission or the appeal processes. If it is found to be invalid, then the dispute finding excludes it and the parties move to the next stage of the proceedings. This proposal will send the parties back to stage 1 to re-serve the log of claims in an expensive and time consuming process that has nothing to do with award making or dispute resolution.

The proposal will make the process even more complex than it currently is.

Employers of less than 20 employees exempt

64. The Bill seeks to constrain the roping in of small business employers to federal awards. Small business employers are defined to employ 20 or less employees.

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

66. If "small business' is defined to be up to 20 employees, nearly 90% of employers in the electrical contracting industry are small business. This would leave a handful of such employers outside the scope of the proposed changes and potentially able to easily avoid award coverage.

Provisions will entrench two tiered wages system

67. We believe the proposed provisions will entrench a two tiered system whereby employers of 20 or less employees can avoid paying fair wages and conditions at the expense of larger employers. Larger employers pay at least the award safety net and usually are party to enterprise agreements containing rates and conditions that are superior to the basic award entitlements. Allowing small employers to avoid paying the same rates and entitlements will create and entrench a system of "haves" and "have nots". Further it will encourage employers to look at creating corporate structures which employ a maximum of 20 employees simply to avoid award and agreement obligations.

68. In addition, it ensures that employees of small employers who are already a vulnerable section of the workforce are deprived of the basic protection afforded by award coverage. In the event of dismissal, underpayment, denial of leave and so on these employees will have no minimum safety net to call on.

Employees should not have to cross subsidise profitability

69. In addition, we question why the employees of small business should cross subsidise the profitability of their employer by not being paid basic minimum conditions of employment such as overtime penalty rates contained in federal awards. We are talking about minimum safety net standards here, not anything extraordinary by way of rates of pay and conditions of employment. There is no reason why small employers should not receive at least the award minimums.

70. If an employer is so strapped that he or she cannot compete if they have to pay fair and decent safety net rates and conditions, the viability of that business has to be questioned. Perhaps they should vacate the field to a competitor who is able to pay the rates and conditions. This is a fairer and more level playing field for the employers.

71. We believe the provision is discriminatory because it encourages employers to ensure no union members are employed if they wish to avoid federal award coverage. As the ACTU points out it would be natural for an employer not wishing to be party to a federal award to be angry with an employee who bobbed up as a union member who was seen to be the cause for that employer being made party to the award.

Registrar's certificate

72. New s.101C provides that the union can apply to the registrar for a certificate certifying that an employee is a member. The certificate identifies the employer but is supposed to ensure employee confidentiality by not identifying the specific employee/s. Although proposed s.101C is supposed to prevent the employer from discovering the identity of an union members among its employees it would not be difficult in a small business the find this out. Further, the certificate from the Registrar would inform the employer for the first time he or she does actually employ union members which could be something an employee wanted to be kept confidential for obvious reasons.

Additional notice requirement for Commission

73. Proposed s.101B(4) requires the Commission, before making an award in relation to the dispute, to give notice in writing inviting each party to the dispute and who the Commission is satisfied employ less than 20 employees, to make comments on the proposed award. According the *Revised Explanatory Memorandum* the rationale for s.101B(4) is to require the Commission to inquire as to the views of all small business employers affected by the making of the award, rather than only attending to the views

of employers who appear or are represented at hearings. This provision is not practical or necessary.

74. Employers are given plenty of opportunity to inquire as to the nature of the proceedings. They first receive the letter of demand and log of claims by certified mail, which means they have to actually sign for the documents. Once the time has elapsed during which they should respond or reject the log they are served with a notice of hearing of the matter, again by certified mail. This hearing notice is the Commission's official notification to the union about the matter, so it comes on Commission letterhead and is clearly an official document.

75. If employers choose to ignore the matter or do not understand what the documents are about it is a simple matter to find out. If they fail to pursue the matter in the first place, it is unlikely they will pursue it after receiving a notice from the Commission. Putting the onus on the Commission to chase these people for their views is an unusual legal proposition to say the least.

76. If small business received similarly 'confusing' documents from say the Taxation Office, they would not ignore them and throw them in the bin but follow up and find out what is going on. Small business people do not presumably leave their brains at home. Why is it that with respect to industrial proceedings that people who otherwise seem capable of running a business are devoid of basic commonsense and are seen to need special consideration which will only frustrate and delay the proceedings.

77. Currently, if an employer does not employ union members they can simply notify the Commission and be struck off the list to be made party to the award. There is no need for extra obligations to be imposed on the Commission to chase these people up.

78. The Senate should reject these unnecessary and onerous obligations being imposed on the Commission.

Better Bargaining Bill 2003

79. Our submission adopts the views of the ACTU with respect to this Bill and so focuses on two aspects of the Better Bargaining Bill. Namely, industrial action before the expiry of aqreement and cooling off periods.

Industrial action before the expiry of the agreement

80. In most cases enterprise agreements will be all inclusive. Thus, for the most part, protected industrial action is ruled out for the life of the agreement. It is the exception rather than the rule where the parties may find it necessary to leave a matter aside for later discussion during negotiations for an enterprise agreement. For reasons of expediency it may suit the parties to certify the agreement, rather than leave a vacuum, and in effect 'come back later' to negotiate outstanding matters. It is hard to see what the argument against allowing for this possibility is about and in fact, the argument in favour has the support of the Full Court of the Federal Court. In the *Emwest case*[22] the Court dismissed an appeal against a single judge which held that protected action was not precluded by the Workplace Relations Act to advance a claim for matter not included in an agreement. This Bill is a legislative response to the *Emwest case.*

81. The majority of the court concluded that allowing for this eventuality permitted and encourages flexibility in the bargaining process. They agreed that there may be cases *"when it will be in the interests of good industrial relations to conclude an agreement on some issues and leave less pressing issues for subsequent agreement.*" However, the Government was not happy with the findings of the Full Federal Court and wants to remove this flexibility from the system.

22 Emwest Products Pty Ltd v AMWU [2001] FCA 1334, 18 September 2001, per Kenny J.

82. Why the Government is so worried about this possibility is not clear. The Full Federal Court noted that a party could abuse the process by confecting some issue not explicitly covered by an agreement and using this as the basis for constructing an entitlement to protected action. However, in such a case the Court said it could step in and see the action for what it was and construe the agreement as intending to cover the field. The net result would be no protected action for the 'confected' issue. The Court also pointed out that the parties could make the intention to cover the field clear at the time of certifying the agreement by including a provision in the agreement which states that the agreement is intended to be exhaustive.

83. We believe the Government is overreacting to the result in Emwest. Given this safeguard against abuse of the system, it is hard to see why the Government needs to do anything in this area. This proposal is designed to fetter the parties freedom to bargain in a manner that bests suits the needs of the situation.

Cooling Off Periods

84. This is the fourth time the proposal for cooling off periods has come before parliament and failed to pass. A similar provision was included in workplace relations bills in 1999, 2000 and 2002. The Government is nothing if not persistent.

85. This version gives the Commission discretion to order 'cooling off' periods. The result is a further fetter on the right to take protected industrial action. As the ACTU points out, most strikes are of short duration, so this obsession on the part of the Government to building in cooling off periods seems an overreaction. With respect to the Building and Construction Industry Improvement Bill 2003, the Government seeks to implement a similar provision except it wants to make such periods mandatory.

86. According to the *Explanatory Memorandum* to this Bill, "cooling off periods can play a valuable role in the negotiation process and would allow parties, in specified

circumstances, further time to negotiate without the pressure of continued industrial action."[23] In reality removing the pressure of industrial action is likely to stall negotiations. There will be no need for the employer to press for a resolution of outstanding matters. This provision will in practice protract negotiations rather than speed their resolution.

87. Providing for suspension of bargaining period to "cool off" removes the employees' only leverage at what could be a crucial time in negotiations. It will deprive the employees of bargaining power while leaving the employer free to continue to refuse to negotiate.

88. The effect of this proposal is to allow bargaining periods to be suspended even when the party taking the action has acted lawfully. This seems neither fair nor reasonable. The Commission already has power to suspend the bargaining period where a party has not tried or is not genuinely trying to reach agreement and this should be sufficient fetter on the right to take protected action.

89. Section 170MW of the *Workplace Relations Act* already provides scope for the Commission to impose a cooling off period in defined circumstances such as when industrial action is seen to be threatening the national economy. There is no need to extend this power to any lawful bargaining situation.

[23] *Workplace Relations Amendment (Better Bargaining) Bill 2003* Explanatory Memorandum p.1