PART 2: WORKPLACE RELATIONS ACT (BETTER BARGAINING) BILL 2003

OVERVIEW

2.1 The Workplace Relations Amendment (Better Bargaining) Bill 2003 (BB Bill) was introduced to the House of Representatives on 6 November 2003. The BB Bill was debated by the House of Representatives on 16 and 17 February 2004. It was passed on 17 February 2004. The BB Bill was introduced to the Senate on 4 March 2004 and referred to the Senate Employment, Workplace Relations and Education Legislation Committee for consideration.

2.2 The Committee has raised four principal issues for consideration in referring the BB Bill. These issues are the:

- effect on bargaining capacity of employees and unions;
- effect on capacity of AIRC to assist parties to settle disputes;
- particular effect on caring professions named in the Minister's second reading speech; and
- effect on capacity of negotiating parties to decide the appropriate parameters of their bargaining.

2.3 These issues are dealt with in turn in the final section of this Part, from paragraph 2.140 onwards. The earlier sections of this Part provide a summary of the provisions in the BB Bill and explain its overall policy rationale.

Existing bargaining framework

2.4 The principal object of the WR Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia. Relevantly to the BB Bill, the WR Act intends to achieve this object by:

- ensuring that the primary responsibility for determining matters affecting the employment relationship rests at the workplace or enterprise level; and
- providing a framework of rights and responsibilities for employers, employees and unions which supports fair and effective agreement making.

2.5 The requirements for making and certifying agreements are found in Part VIB of the WR Act. Part VIB also establishes the bargaining framework within which negotiations for a certified agreement are to be conducted.

2.6 In general, the focus of Part VIB is on facilitating the development of agreements at the single business level. There are certain exceptions to making agreements at the single business level, including where:

- two or more employers carry on a single business, project or undertaking as a joint venture or common enterprise;
- two or more corporations are related to each other for the purposes of the *Corporations Act 2001*; and
- the Full Bench of the Commission believes that allowing multiple businesses to enter into a single agreement will be in the public interest.

2.7 Certified agreements are most commonly made under Division 2 of Part VIB of the WR Act. Division 2 agreements are made between employers who are constitutional

corporations and their employees or an organisation of employees (unions). Section 170LJ of Division 2 provides for the making of agreements between employers and unions. Section 170LK of Division 2 provides for the making of agreements directly between employers and employees. Section 170LL of Division 2 allows for the making of agreements between employers and unions to apply to a new business of an employer where there are as yet no staff employed (Greenfield's Agreements).

2.8 Agreements may also be made under Division 3 of Part VIB. Division 3 agreements are made to resolve an industrial dispute or situation. Division 3 agreements are far less common than Division 2 agreements.

2.9 Agreements are certified by the Commission in accordance with the requirements of Division 4 of Part VIB. For an application to be made to the Commission for the certification of an agreement, there must be an agreement about matters pertaining to the employment relationship.

2.10 During the negotiations for a certified agreement, it is possible for employers and employees to take protected action in support of their claims.

2.11 Protected action is industrial action which is subject to a very broad legal immunity. Protected action is only available when industrial action is taken in accordance with the requirements of the WR Act and for the purposes of bargaining for a certified agreement. It protects the parties taking the industrial action from civil penalties. In doing so, it removes the rights of parties who may be affected by the industrial action to seek remedies which would normally be available. Division 8 of Part VIB of the WR Act sets out the requirements that must be met for industrial action to be protected.

2.12 Access to protected action depends upon the existence of a valid bargaining period. It is possible for a bargaining period to be suspended or terminated by the Commission in certain limited circumstances. When a suspension or termination of a bargaining period occurs, any industrial action taken during the suspension or after the termination is unprotected action.

2.13 Division 8 also sets out other requirements which must be met by a party in order for it to take protected industrial action. For example, negotiations directed at genuinely reaching agreement must precede the taking of industrial action, or else the action will be unprotected.

2.14 Once an agreement has been certified, the parties should seek to resolve their differences through the agreement's dispute resolution clauses. The WR Act requires all certified agreements to include a dispute resolution clause. This provides the most appropriate mechanism for dealing with disputes arising during the term of an agreement. The Government considers that it is not appropriate for parties to an agreement to rely upon industrial action as a means of resolving disputes outside the bargaining process.

Proposed changes

2.15 The amendments in the BB Bill will ensure that protected industrial action provisions operate effectively and as intended.

2.16 The BB Bill proposes to amend Part VIB of the WR Act to:

- prohibit all industrial action by employees and employers covered by a current certified agreement or an award made under subsection 170MX(3) of the WR Act;

- allow either party negotiating a proposed agreement to seek a 'cooling-off' period during which the bargaining period is suspended and protected industrial action cannot be taken;
- allow a directly affected third party to apply for the suspension of a bargaining period where industrial action is threatening to cause that party significant harm. Where the bargaining period is suspended, protected industrial action cannot be taken;
- clarify that protected action is not available in support of a claim that does not pertain to the employment relationship;
- clarify that protected action cannot be taken where the proposed agreement is being made with two or more related corporations under paragraph 170LB(2)(b); and
- clarify that protected action is only available where employees take industrial action against their own employer.

2.17 Some of the changes proposed by the BB Bill are similar to previous Government proposals to amend Part VIB of the WR Act. These previous proposals sought to:

- prohibit all industrial action by employees and employers covered by a certified agreement or an award made under subsection 170MX(3) of the WR Act[1];
- allow for cooling-off periods during the negotiations for a certified agreement; and
- clarify that protected action is only available where employees take industrial action against their own employer.

SCHEDULE 1 - PROHIBITION AGAINST INDUSTRIAL ACTION DURING CURRENT AGREEMENT

Current provisions

2.18 Currently, section 170MN of the WR Act provides that an employee or union covered by a certified agreement or an award made under subsection 170MX(3) must not take industrial action 'for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement or award'.

Reason for amendment

2.19 To clarify the operation of section 170MN following certain court decisions. The purpose of section 170MN is to ensure that industrial action should only be protected when it takes place during a properly notified bargaining period and must not take place before the nominal expiry date of a certified agreement, or a 170MX(3) award.

Proposed changes

2.20 Schedule 1 of the BB Bill proposes to prohibit all industrial action by employers, employees and their representative organisations covered by a current certified agreement or a 170MX(3) award.

2.21 The BB Bill would amend section 170MN to make it clear that an employee, union or union official is prohibited from organising or engaging in any industrial action before the nominal expiry date of a certified agreement or a 170MX(3) award.

[1] Under subsection 170MX(3), the Commission may make an award after terminating a bargaining period.

2.22 Similarly, an employer would be prohibited from locking out its staff until the nominal expiry date of the relevant certified agreement or 170MX(3) award.

2.23 The BB Bill would clarify that industrial action should not be taken or organised during the life of a certified agreement.

2.24 These amendments were previously introduced in MJBP. The MJBP amendments have been replicated for this Bill.

Policy rationale

2.25 The Government's policy intent is that employers and employees are entitled to certainty once they have settled the terms and conditions of employment by making and certifying an agreement. They should not be exposed to the disruption of industrial action during the life of the agreement.

2.26 The Government considers that all industrial action during the course of a certified agreement should be prohibited, not just industrial action in support of claims against the employer. The current prohibition in section 170MN is to be clarified to reflect this intent.

2.27 From February 2003 until March 2004, there have been 368 applications to the Commission to stop or prevent industrial action under section 127 of the WR Act. Due to the nature of the information provided in the applications, it is not possible to establish whether the industrial action was taken during the life of a current agreement in all of these cases. However, in a more detailed assessment undertaken by the Department during August and September 2003, at least 70% of the applications for section 127 orders were made where there was a current certified agreement in place.

2.28 There are three main types of industrial action taken during the course of a certified agreement. These are industrial action:

- in support of claims outside the current certified agreement;
- unrelated to the employment relationship; and
- taken over the terms and conditions in a current certified agreement.

<u>Emwest – industrial action in support of claims outside the current agreement</u>

2.29 On 7 February 2002, Kenny J of the Federal Court delivered her decision in *Emwest Products Pty Ltd v Automotive, Food,* Metals*, Engineering, Printing and Kindred Industries Union*[2]. Kenny J found that protected action can be taken during the life of a certified agreement, if the action is being taken in pursuit of matters not covered by the current agreement. Kenny J's decision was subsequently upheld by a Full Bench of the Federal Court on 15 August 2003 in *Australian Industry Group v Emwest* (*Emwest*)[3]. The Full Federal Court held that protected action is available where a claim is being made for terms and conditions outside the current agreement.

2.30 The decisions of the Federal Court in *Emwest* are inconsistent with the underlying policy intention of providing certainty to parties who have settled the terms of their agreement. The amendments proposed in Schedule 1 of the BB Bill are intended to ensure that the section 170MN operates as originally intended.

[2] [2002] FCA 61.
[3] [2003] FCAFC 183.

2.31 Subsequent to *Emwest* there has been a range of cases which have examined the ability of a party to a certified agreement to take industrial action in support of claims outside the terms of the agreement.

2.32 For example, in December 2003, Australia Post employees took industrial action over redeployment undertaken by Australia Post. Australia Post sought an interlocutory injunction to prevent the industrial action. The application was based on section 170MN. The Federal Court found that the clause in the certified agreement on which Australia Post was relying in relation to redeployment was a statement of objectives or principles and not part of the terms and conditions of employment. Wilcox ACJ dismissed the application ruling that action was being taken to advance claims on terms and conditions that were not part of the current certified agreement. He also stated "I think a party should be regarded as deprived of the right to take such action only where it is clear that the subject matter of the dispute is resolved by a term of the relevant certified agreement".[4]

Thiess - industrial action unrelated to the employment relationship

2.33 The proposed amendments to section 170MN provide a broader prohibition than is necessary to address the decision in *Emwest*. The amendments are also intended to address situations such as that which arose in the Federal Court decision in *Thiess Contactors Pty Limited v Construction, Forestry Mining and Energy Union*[5].

2.34 In *Thiess*, the Federal Court found that the prohibition on industrial action under section 170MN is limited to action taken for the specific purpose of advancing claims against the employer in respect of the employment of employees subject to the certified agreement or subsection 170MX(3) award. It found that the purpose of the stoppage was to protest a demarcation, rather than relating to the negotiation of a fresh agreement. Therefore, the industrial action was found to not fall within the prohibition of section 170MN.

2.35 Since the decision in *Theiss* there has been a number of incidents where employees covered by a current certified agreement have taken industrial action in support of matters that are outside the employment relationship. Examples of such incidents are below.

2.35.1 In *Transfield Constructions Pty Ltd v AMWU,* employees from Transfield engaged in industrial action by refusing to cross a picket line preventing construction work on the plant. The Transfield employees were covered by a current certified agreement. Both the Commission and the Federal Court held that, on the balance of probability, the industrial action was undertaken in order to place pressure on the operator of the gas plant to renounce AWAs it had made with its staff. As such, the action taken by the union and employees of Transfield was unrelated to their employment.

2.35.2 In *Esso v AWU & Ors*[6]*,* employees of Esso Australia took industrial action when they refused to cross a picket line established by employees of contractors who provided services to Esso. The industrial action of the contractors' employees was protected as it was taken in the course of negotiating a new certified agreement. However, Esso employees were covered by a current certified agreement.

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[4] Australian Postal Corporation **v** Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2003] FCA 1563 (5 December 2003)

[5] (unreported, 13 April 1999)

[6] PR936678

2.35.3 In *Master Builders' Association of NSW and CFMEU*[7] union members left their workplaces to attend a rally against the Royal Commission into the Building and Construction Industry.

2.35.4 In *Master Builders' Association and CFMEU*[8] , the CFMEU organised a series or rallies and stop work meetings in Melbourne Sydney and Canberra in opposition to Building and Construction Industry Improvement Bill 2003.

2.35.5 In late 2000, the CFMEU called a strike in mines in Queensland and NSW in protest against the intention of BHP to agree to a reduction in coal prices. Certified agreements covering the sites were in place.[9]

2.35.6 Up to 500 NSW Rail Corporation maintenance workers covered by a certified agreement took part in a 24 hour strike on 8 March 2004. The strike was taken in protest at regulations passed by the NSW Parliament which provided for drug and alcohol testing of rail workers. The regulations were announced by the NSW Government as a result of the Waterfall train disaster.[10] Appendix 1 contains further examples of industrial action unrelated to the employment relationship.

2.36 The conduct in these examples would not breach section 170MN in its current form. In some of these cases it was possible for the employer to obtain section 127 orders and common law remedies against the industrial action. However, providing a remedy based on section 170MN in these circumstances would make it easier for parties against whom the industrial action is taken to obtain relief. Rather than undertaking the 2-step process of obtaining a section 127 order from the Commission and then a Court injunction, they could go directly to the Court for a penalty or injunction under section 170MN.

2.37 Section 127 orders are a discretionary remedy. There is no requirement for the Commission to make a section 127 order even if it finds that the industrial action is unprotected action. In contrast, section 170MN provides a direct prohibition. If the Court finds the industrial action falls within the definition of the section it can order an injunction or a penalty directly.

2.38 It would be unhelpful to amend the WR Act in response to the decision in *Emwest* without also responding to the decision in *Thiess*. Doing so would prohibit industrial action which was related to the employment relationship while allowing industrial action which was unrelated to the employment relationship. Not only would this be anomalous, it would undermine the policy intent of the WR Act that parties operating under a certified agreement should be able to rely upon their arrangement as settled during a current agreement. Parties to an agreement should not have access to the privilege of protected action during bargaining for an agreement and then take industrial action to disrupt the workplace once the bargaining is over and the agreement is made.

<u>Industrial action taken over terms and conditions in current certified agreement</u>

2.39 Many applications for section 127 orders are brought where industrial action is being taken over terms and conditions of employment in the current certified agreement. On the face of it, it would appear that such industrial action is already prohibited by section 170MN in its current form. However, decisions from the Court have narrowed the scope

[7] PR921925
[8] PR939102
[9] BHP Steel (AIS) Pty Ltd v CFMEU [2000] FCA 1853 (15 December 2000)
[10] PR944325

of the prohibition in section 170MN based on the words "for the purpose of supporting or advancing claims against the employer".

2.40 Ascertaining a breach of section 170MN involves the characterisation of the industrial action. If it is characterised as being taken in support of a claim against the employer, it will be prohibited under section 170MN. If it is characterised as industrial action for some other purpose, it escapes the prohibition.

2.41 Parties taking industrial action during the course of a certified agreement may characterise the purpose of the industrial action as being because of something other than a claim against the employer, for example, to protest a breach of a certified agreement.

2.42 For example, in the *Walker*[11] dispute employees who were covered by a current certified agreement took industrial action. The agreement required the company to set up a trust fund for employee entitlements if there was no national scheme for the protection of those entitlements. The company did not set up the trust fund because it said that it was not required under the agreement given the introduction of the Government's General Employee Entitlements and Redundancy Scheme. In an application for a breach of section 170MN before the Court, it was argued that the industrial action was not taken in support of claim against the employer, but in response to a breach of the agreement by the employer.

2.43 The case of *Australian Customs Service v Community and Public Sector Union*[12] is another example where a party sought to re-characterise a dispute. In this case the applicable certified agreement contained a 'comprehensive agreement' clause, which was designed to prevent the bringing of further claims against the employer during the life of the agreement. However, the agreement also contained a clause dealing with 'Working Arrangements and Remuneration Reviews', which specifically referred to the establishment of appropriate conditions, remuneration and working arrangements at the ACS container facilities. On this basis, the CPSU argued that the agreement was not closed in relation to this matter and that employees could take protected action to advance claims for the payment of an allowance.

2.44 Alternatively some industrial action taken during a current agreement is in protest against the manner in which an agreement is implemented.

2.45 For example, in April 2003, employees of *Electrolux Home Products* took industrial action despite being bound by a current certified agreement. The industrial was taken to protest the wearing safety goggles which the company had issued for occupational health and safety reasons.[13] (For further examples of industrial action taken over terms and conditions in current certified agreement see Appendix 2).

2.46 It is the Government's view that all industrial action during a current certified agreement should be prohibited. Instead of taking industrial action, parties should seek to use the mechanisms provided by the WR Act which are designed to assist parties in resolving issues regarding the terms and conditions of employment.

2.47 The WR Act provides that all certified agreements must include dispute resolution procedures. Such dispute resolution procedures should be the primary mechanism for resolving conflict between employers and employees. The parties may also seek

[11] Walker Australia Pty Ltd and AFMEPKIU No. S112 of 2002, transcript of proceedings, 30 April 2002, paras 6-30 to 9-10.
[12] C2003/6894 & C2003/6971
[13] *C2003/426 S.127(2) Application Electrolux Home products Pty and AMWU, Sydney 7 April 2003*

remedies under section 178 and 179 of the WR Act for the breach of an agreement or may go to the Federal Court for the interpretation on an agreement under section 413A of the WR Act.

2.48 Also, parties may negotiate new terms to be included in agreements if they identify a gap in an agreement. They may include these terms in an agreement by varying the agreement under section 170MD of the WR Act[14].

Prohibition against organising industrial action during the life of an agreement

2.49 Currently, section 170MN provides that from the time a certified agreement or subsection 170MX(3) award comes into operation until its nominal expiry date, an employee or union must not engage in industrial action.

2.50 In *Australian Paper Ltd v CEPU & Ors*[15] the Federal Court refused to grant an injunction to restrain the respondents from organising industrial action because of the operation of section 170MN. North J commented that the applicants' case was significantly weakened by the fact that section 170MN did not prohibit the organising of industrial action, merely the taking of such industrial action.

2.51 The Government's intention is that the provision should apply to the organising of industrial action. The proposed amendment would clarify this intention.

SCHEDULE 2 – COOLING-OFF PERIODS AND THIRD PARTY SUSPENSIONS

Current provisions

2.52 Under section 170MW of the WR Act, the Commission has the power to suspend a bargaining period on a number of grounds including:

- where a party taking industrial action does not comply with Commission directions or recommendations;
- where industrial action is threatening to endanger the life, personal safety, health or welfare of the population or a part of it, or to cause significant damage to the Australian economy or an important part of it; and
- where there is no reasonable prospect of parties reaching agreement and the negotiating employees are of a kind previously covered by a paid rates award.

2.53 While a bargaining period is suspended under these provisions industrial action which would otherwise have been protected will be unprotected.

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[14] An example of this is *AG2004/1867 170MD(2) application by Detagna (T/as Edwards Dunlop Paper) Victoria 4 March 2004*. The company and the NUW agreed to vary the certified agreement to clarify arrangements for payment of accrued long service leave as part of the redundancy arrangements. *AG2004/1020 170MD(2) application by Raytheon and employees to vary the agreement re: salary sacrifice clauses. South Australia 28 January 2004.* This variation sought to formalise a verbal agreement which had been made during the certified agreement negotiations to introduce salary sacrifice for employees. The proposed variation was made available to all employees, employees were given 14 days to consider the variation. The variation was then put to a secret ballot. 26 of 44 ballots were returned. All returning votes were in favour of the variation. AG2003/10694 Theiss Pty Ltd to vary the Southland Mine agreement by inserting a stand down clause. Sydney 29/12/03

[15] [1998]

Reason for amendment

2.54 The current provisions provide for the suspension of bargaining periods in only limited and specified circumstances. In addition, there is no scope for directly affected third parties to put a case to the Commission for relief from the industrial action of others where this action could cause significant harm.

Proposed changes

2.55 Schedule 2 of the BB Bill provides two new mechanisms to suspend a bargaining period for a certified agreement. These are cooling-off periods and third party suspensions.

Cooling-off periods

2.56 Proposed new section 170MWB would give the Commission the discretion to suspend a bargaining period. This would occur where a party to the negotiation applies for such a suspension on the basis that it will benefit the parties to have a cooling-off period during the negotiations. During the cooling-off period protected industrial action cannot be taken.

2.57 When deciding whether to order a cooling-off period, the Commission would be required to have regard to:

- whether the suspension would assist the parties to resolve the matters at issue;
- the duration of the industrial action; and
- the public interest and the objects of the Act.

Third party suspensions

2.58 Proposed new section 170MWC would give the Commission the discretion to suspend a bargaining period for a specified time where industrial action taken by a negotiating party is threatening to cause significant harm to a third party. An application for a third party suspension would be brought by, or on behalf of, a party who is directly affected by the industrial action. The Minister could also bring applications.

2.59 The Commission would have to be satisfied that there is a threat of significant harm before ordering a third party suspension. When deciding whether the industrial action could cause significant harm to a person, the Commission would be required to consider the extent to which:

- the action affects the interests of a third party who is an employee (for example, another employee who is covered by a separate certified agreement from the one being negotiated);
- the third party is particularly vulnerable to the effects of the action;
- the action threatens to:
    - damage the ongoing viability of a business carried on by the third party;
    - disrupt the supply of goods and services to a business carried on by the third party;
    - reduce the third party's capacity to fulfil a contractual obligation; or
    - cause other economic loss to the third party.

2.60 Amendments to the WR Act to introduce cooling-off periods were previously introduced by the Government in MJBP, WRAB 2000 and WRA(GB) 2002.

Suspension of a bargaining period

2.61 During the period when a bargaining period is suspended under either the cooling-off or third party provisions negotiating parties could voluntarily undertake mediation or conciliation of the matters at issue.

2.62 Both cooling-off periods and third party suspensions must for a period which the Commission considers is appropriate. The Commission can extend the suspension period but can only do so once.

2.63 Industrial action taken during a cooling-off period or a third party suspension would not be protected action.

Policy rationale

2.64 The WR Act establishes an industrial environment which supports negotiations between employers and employees at the workplace level to determine mutually beneficial employment arrangements.

2.65 However, currently the WR Act provides for the suspension of bargaining periods in only limited and specified circumstances. Standing to make an application for the suspension of a bargaining period is limited to negotiating parties and in very limited circumstances to the Minister or by the Commission's own motion.

2.66 The cooling-off measures proposed in the BB Bill would allow bargaining periods to be suspended to assist parties to resolve the issues in dispute between them. The third party suspension measures would allow a third party who is threatened with significant harm to seek to suspend the bargaining period. Both cooling-off periods and third party suspensions are discretionary measures for the Commission.

2.67 The cooling-off and third party measures proposed by the BB Bill are intended to assist parties to focus on bargaining and to create a better balance between the interests of negotiating parties and third parties in the bargaining process.

Cooling-off periods

2.68 Currently, the Commission is not able to suspend a bargaining period in all situations where a cooling-off period may be warranted. This is because the discretion in section 170MW applies to a limited range of circumstances and, in the case of subsection 170MW(3), requires a high threshold to be met.

2.69 However, it appears that some members of the Commission see the merits of using the existing section 170MW provisions as the basis for granting an informal cooling off period to provide a circuit breaker where industrial action is being taken during the bargaining process.[16]

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[16] In the *Gordonstone Coal Case* (P2285) the Commission suspended the bargaining period for a period of 6 weeks under subsection 170MW(2). The Commission found that the union did not try to reach an agreement prior to taking the industrial action. The Commission noted that "the union sought to clothe itself in protected action" despite paying "scant or no attention to formalising negotiations and actually getting involved in negotiations".

In *TWU and Carpentaria Pty Ltd* (P4890) the Commission suspended the bargaining period, under subsection 170MW(2), in order to allow the parties to genuinely confer and reach agreement. The parties were also directed to report back on a fortnightly basis to the Commission.

In *Greyhound Pioneer Case* (P1237) under paragraph 170MW(3)(a), the Commission on its own motion directed the parties to confer as well as ordering the cancellation of planned industrial action. The bargaining period was suspended for 7 days. In ordering the suspension, the Commission found that planned industrial action "threatens

2.70 The amendments proposed by Schedule 2 of the BB Bill would provide the Commission with the discretion to order a cooling-off period where the Commission considered that it would assist parties to resolve the issues between them.

2.71 This would provide a mechanism for the Commission to break a deadlock during a dispute and assist parties to reach a negotiated outcome. During industrial disputes, antagonisms can become entrenched and parties may often lose sight of their original objectives. In these circumstances, parties may persist with industrial action even though this aggravates the situation, rather than assisting parties to reach an agreement. In these circumstances a cooling-off period would be useful to give parties a break from the pressure of protected action. During this break parties may re-evaluate their circumstances and resolve the dispute. To ensure this measure is not abused, a cooling-off period could only be extended once.

Case study 1 – Geelong Wool Combing

The dispute at *Geelong Wool Combing* (GWC) which ran for approximately a year prior to the company going into liquidation is an excellent example of a situation where cooling-off periods may have assisted parties.

In October 2002, GWC had been negotiating for a new certified agreement with the TCFUA. A key element in the negotiations was that the company sought to introduce the flexibility to implement a 5 day week instead of the current 24hour, 7 day week roster. The company reported it was facing a significantly altered business environment due to the drought and a global fall in wool prices.

Having decided that negotiations for the new agreement had reached an impasse the company locked out employees on 28 April 2003. Employees and the union organised a picket outside the site.

On 5 May 2003, the TCFUA obtained a Federal Court injunction on the basis that the company did not comply with the notice requirements for a lock out under the WR Act. Goldberg J held that there was a prima facie case that the lock out amounted to coercion in contravention of section 170NC of the WR Act.

Subsequently, the company issued a new notice and locked out employees from 11 May 2003. The company said that it was prepared to cease the lock out if employees would agree to a new roster. A new picket was organised outside the site. The company responded with an application under section 170NC of the WR Act for coercion against the union and employees.

In July 2003 Finkelstein J of the Federal Court ordered an interim injunction in favour of GWC in response to the picket. He found that although GWC had only a weak case for coercion, there was a prima facie case that some of the picketers had engaged in illegal conduct while picketing.

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the viability of the Company, and therefore threatens the welfare of part of the population, specifically the employees, shareholders and creditors."

More recently, in the *Campaign 2000 Case*, the AMWU had initiated an industry wide bargaining period in which it sought to introduce standard conditions into certified agreements across the metals industry. The Commission found that the taking of industrial action against employers in an 'all or none' manner did not amount to genuinely seeking agreement with employers. The Commission exercised its discretion under subsection 170MW(2) to terminate the bargaining period. In addition, the Commission made a declaration under subsection 170MW(10) for a de facto cooling-off period whereby the parties were not to be allowed to initiate new bargaining periods for a specified period.

The lock out continued until 1 October 2003 when the company closed its Geelong operation. This closure resulted in 115 employees losing their jobs.

In these circumstances the availability of a cooling-off period may have assisted parties to resolve the issues between them without needing to resort to litigation in the Court, which may not be the best way of resolving the matters in issue between the parties.

If the cooling-off measures in the BB Bill had been in place, GWC employees or the TCFUA could have sought a cooling-off period to interrupt the lockout. Once employees had returned to work, it may have been easier for the parties to shift their focus away from the lockout and the picket and refocus on the question of making an agreement which met the needs of the parties. Had this happened it is possible that the employers may not have had to close the site, with the job losses that flowed from this.

2.72 A range of employer groups have advocated the need for cooling-off periods, to assist with ensuring better outcomes from the bargaining process. In submissions to the inquiry into the Workplace Relations Amendment Bill 2000 (WRAB 2000), the BCA, AiG and ACCI all supported the concept of the introduction of a "cooling-off period". More recently, in the context of consultation regarding the draft BB Bill, AiG and ACCI reiterated their support for these measures.

2.73 The AiG in particular has argued that, under the current provisions, "while access to protected action is facilitated, relief from it in the absence of a settlement of the claims between the parties is very difficult and can only be achieved on very narrow grounds under the Act."[17] The AiG has advocated the use of cooling off periods and recommended they would be particularly useful in cases where industrial action is threatening the viability of the business directly concerned and/or where industrial action has been protracted and costly. The AiG has also advocated that cooling off periods would assist with creating a better environment for settling enterprise bargaining negotiations.

Third party suspensions

2.74 Currently, under the WR Act, third parties who are directly affected by industrial action are able to apply for an order under section 127 to stop or prevent the industrial action. However, subsection 170MT(1) of the WR Act prevents the application of a section 127 order to protected action. Therefore, at present, there is no remedy under the WR Act for third parties who are affected by protected industrial action.

2.75 The proposal in the BB Bill to allow directly affected third parties to apply to the Commission for the suspension of a bargaining period would have the effect of providing such a remedy. Should a third party successfully apply for the suspension of a bargaining period, industrial action which would otherwise have been protected will be rendered unprotected during the term of the suspension. Should a party take further industrial action during the suspension period, a directly affected third party would be able to apply for a section 127 order at this point.

2.76 The proposed section 170MWC would give third parties that are directly affected by industrial action or the Minister the ability to apply to the Commission seeking the

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

suspension of the bargaining period. Under the proposed provision, applicants would need to show that the industrial action was threatening to cause significant harm.

Case study – Victorian Power Dispute

For example, in February 2004 unions at six Victorian electricity distribution and transmission companies took protected action by way of bans on repairs to faults that affected commercial premises. As a result, a number of factories employing up to 600 people were left without electricity for periods ranging up to 24 hours. Also, a suburban shopping centre was blacked out for approximately 24 hours. During the black-outs many of these businesses could not trade. The businesses also lost stock valued in the thousands of dollars. Many of these businesses were small traders.

Under the existing provisions of the WR Act, the factories and businesses were unable to stop the industrial action and protect their interests. As the action was protected, the only real option available was suspending the bargaining period. However, third parties are currently unable to apply for such a suspension.

Had the new subsection 170MWC been available during the Victorian power industry dispute, the affected businesses could have applied to suspend the bargaining period on the basis of the significant harm they were suffering. This would have rendered any industrial action during the suspension period unprotected and could have made the unions subject to sanctions. It could have prevented the relatively significant losses which occurred to a number of small business owners who lost stock as a result of the power company employees refusal to repair faults.

In the Victorian power dispute, the lack of an accessible mechanism to ensure third parties were not inappropriately affected by the industrial action led the Victorian Government to threaten the workers and unions with criminal sanctions under Victorian essential services legislation. Under this legislation the Victorian Government could have issued directions to the parties requiring them to continue the supply of power or face criminal penalties. Such penalties are clearly not an appropriate enforcement mechanism to be used against employees taking industrial action in pursuit of a new certified agreement and who have otherwise complied with the terms of the WR Act.

2.77 Under section 170MW, the negotiating parties have standing to bring an application for the suspension of a bargaining period under subsections 170MW(2) – (7). Also, the Commission acting on its own motion and the Minister may bring an application to suspend a bargaining period under subsection 170MW(3). There is no ability for third parties affected by protected action to bring proceedings under section 170MW.

2.78 The policy rationale underlying the existing standing requirements recognises that the negotiating parties should generally be responsible for the conduct of the negotiations except where doing so has a serious negative effect on parties outside those negotiations. This is intended to balance the interests of negotiating parties with the interests of members of the wider community.

2.79 Currently, the suspension and termination provisions in section 170MW provide a mechanism which can provide relief when industrial action is adversely effecting innocent third parties. However, although subsection 170MW(3) takes into account the effect on third parties, its operation is limited to where protected industrial action is threatening the life, personal safety, health or welfare of the population or a part of it, or where it may cause significant damage to the Australian economy, or a part of it. This is

a very high threshold which does not recognise the full range of circumstances where protected action may give rise to significant harm to innocent third parties.

2.80 Since the WR Act came into force, it has become apparent that there are circumstances where protected industrial action may be causing significant harm to parties outside the negotiations, in circumstances where the threshold requirements of subsection 170MW(3) would not be met.

2.81 For example, in 2000, academic staff at the University of Western Sydney (UWS) placed protected bans on issuing student results until late December. This meant that UWS would be unable to distribute marks to students until after Christmas 2000, causing difficulties for some students in obtaining employment. The UWS applied to suspend the bargaining period under s. 170MW(3)(a). The UWS argued that the ban on issuing marks threatened the students' welfare. In *University of Western Sydney*[18] Lawson C found that there was direct evidence of hardship to students. He said that using innocent third parties as bargaining chips was morally and ethically wrong and urged the academic staff to lift the bans. However he declined to suspend the bargaining period because he found that the negotiations for the completion of the proposed agreement would not, at the time, be assisted by a suspension.

2.82 This illustrates that the suspension provisions under subsection 170MW(3) tend to focus on the needs and interests of the negotiating parties. The proposed amendment to introduce third party suspensions recognises that third parties may also be seriously affected by the industrial action of the negotiating parties. In these circumstances, the third parties should have access to a remedy.

2.83 There are a number of instances in the automotive industry where protected industrial action taken during bargaining have raised issues of harm or the threat of harm to third parties. In some of these situations, the threat may not have met the threshold requirements of subsection 170MW(3). In other situations, such as the *TI automotive* dispute described below, the Commission did suspend the bargaining period. However, access to this remedy was dependent upon the negotiating parties, the Minister or the Commission of its own motion seeking the suspension. There was no avenue for the affected third parties to obtain the remedy directly. Two examples of protected action within the automotive industry which had potentially significant effects on third parties are detailed below.

2.83.1 In *Henderson's Automotive (SA) Pty Ltd*[19], between July and August 2003, the employer was negotiating AWU and AMWU were negotiating a new certified agreement with, an automotive component manufacturer. The unions imposed work bans to support their claims regarding the protection of employee entitlements. The work bans resulted in production at Mitsubishi stopping because of disruption to supplies from Henderson's. Similarly Holden was contemplating standing down employees when the dispute was resolved.

2.83.2 As a result of the *TI Automotive*[20] dispute (Kilburn SA), parts supply to Mitsubishi and Holden was threatened. Mitsubishi estimated that disruption of supply would have cost $6.5 million in lost revenue and $410,000 in foregone wages for every day that supply was disrupted. Holden estimated that any production stoppage

[18] Dec 1518/00 Print T4415

[19] PR935979

[20] PR937333

would result in the company losing $23 million in sales for each day of disruption. Holden also stated that any stoppage would lead to the standing down of 515 employees who would lose wages totalling over $1 million each day. In this instance, the Commission suspended the bargaining period. The Commission found that the potential loss of income to employees in the South Australian automotive industry did constitute a threat to the welfare of part of the population under section 170MW(3).

2.84 The BB Bill provisions ensure the rights of negotiating parties are balanced with access to remedies for third parties who experience harm as a result of protected industrial action.

2.85 The Commission would be required to take into consideration whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of the WR Act. This is to ensure that the rights of negotiating parties to take protected action are appropriately balanced against the broader welfare of the community. In considering whether the harm caused to a third party is significant the BB Bill provides that the Commission may have regard to a range factors. These factors are set out in proposed subsection 170MWC(2). They are the extent to which:

- the action affects the interests of an employee who is not a negotiating party;
- the person is particularly vulnerable to the effects of the action;
- the action threatens to:
  - damage to the ongoing viability of a business; or
  - disrupt the supply of goods and services to a business; or
  - reduce the person's capacity to fulfil a contractual obligation; or
  - cause other economic loss to a person; and
- any other relevant matter.

2.86 The purpose of the provisions is not to detract from the existing rights of employees to take industrial action, but simply to provide the Commission with a discretionary remedy to address the impact of industrial action on the welfare of third parties. To emphasise this, the BB Bill only provides for a suspension rather than termination of the bargaining period. The suspension will provide breathing space for affected third parties to put in place alternative arrangements in light of the industrial action. To ensure this measure is not abused, the suspension must be for a period the Commission considers appropriate and the suspension cannot be extended more than once.

2.87 In the course of consultation regarding the proposed measures, the AiG has indicated it strongly supports amendments to balance the right of affected parties to seek relief from significant harm resulting from the industrial action by others.

2.88 The proposal in Schedule 2 of the BB Bill to allow third parties to apply for the suspension of a bargaining period would provide a better balance between the interests of negotiating parties and those of the wider community. This is consistent with the principle of fair and effective agreement making in the WR Act.

SCHEDULE 3 – CLAIMS NOT PERTAINING TO THE EMPLOYMENT RELATIONSHIP

Current provisions

2.89 Agreements are certified by the Commission in accordance with the requirements of Division 4 of Part VIB. For an application to be made to the Commission for the certification of an agreement, there must be an agreement about matters pertaining to the employment relationship.

2.90 Section 170ML provides that industrial action taken to support claims made in respect of the proposed agreement is protected action. Section 170LI of the WR Act provides a threshold requirement for the certification of agreements under the bargaining framework. Section 170LI requires that for an application to be made to the Commission for the certification of an agreement, there must be an agreement in writing about matters which pertain to the employment relationship.

Reason for amendment

2.91 To clarify the scope of section 170ML (that it should only be possible to take protected action in support of a claim about a matter which pertains to the employment relationship), following certain court decisions.

Proposed changes

2.92 Schedule 3 of the BB Bill proposes to clarify that protected action cannot be taken in support of a claim that does not pertain to the employment relationship.

2.93 This would be achieved by amending section 170ML by inserting a new subsection. Section 170ML identifies the types of industrial action which are capable of being protected action and therefore have immunity from civil penalty. New subsection 170ML(6A) would provide that the entitlement to protected action described in subsections 170ML(2) and (3) would not apply where the industrial action is being taken in support of a claim that does not pertain to the employment relationship.

2.94 The ability to take industrial action, free from the threat of civil proceedings, when negotiating a certified agreement recognises the generally accepted principles of collective bargaining. These principles are that if parties engage legitimately in the agreement making process as set out by the WR Act, they may exercise the privilege of protected industrial action in pursuit of their claims.

Policy rationale

2.95 It is the policy intention of the WR Act to give primary responsibility for workplace relations to people at the enterprise and workplace level. The privilege of protected industrial action is intended to extend only to the negotiation of matters pertaining to that employment relationship during a properly notified bargaining period.

2.96 The intention of current section 170ML is to describe the circumstances in which protected industrial action may occur. The underlying policy intention of the section is to define the circumstances to which the privilege of protected industrial action will apply**.**

2.97 The ability to take protected action under section 170ML is, for the purpose of bargaining for certified agreements, intended to be constrained by section 170LI. This means that it

should only be possible to take protected action in support of a claim about a matter which pertains to the employment relationship.

2.98 The limits placed by section 170LI on the ability to take protected action were called in to question in the Federal Court case of *AFMEPKIU v Electrolux Home Products Pty Limited (Electrolux)*.

2.99 At first instance, in *Electrolux*[21], the Federal Court determined whether union demands for bargaining agent fees to be included in a certified agreement could be supported by protected action. The key issue was whether such fees pertain to the relationship between an employer and employees within the meaning of 170LI of the Act. A single justice of the Federal Court held that the clause did not pertain to the employment relationship. Therefore, as it could not be validly included in certified agreements, it could not be supported by protected action. The Government agrees that this is the proper interpretation of the provisions.

2.100 The unions appealed this decision and the Commonwealth intervened in the appeal to support the original decision. The Full Bench of the Federal Court[22] allowed the appeal, finding that in order for industrial action to be protected it is only necessary to show that the underlying claim is 'genuinely made in respect of the proposed agreement however optimistically or even misguidedly'. The Court also found that such a claim may be made irrespective of whether 'its embodiment in an agreement will give rise to a problem in obtaining certification'.

2.101 The outcome of the Court decision is that there is no objectively definable limit on the claims in respect of which the unions, employers and employees may take protected action. Protected action could be taken in relation to matters which could never be incorporated in the resulting certified agreement. This is inconsistent with the policy of confining the privilege of protected action to the conduct in pursuit of a certified agreement.

2.102 Among the matters which could be the subject of protected action as a result of the *Electrolux* decision are claims :

- for an employer not sell a product such as coal or a car for less than a certain price;
- for an employer or employee to contribute to a political party or charity;
- for employees to buy the employer's product or invest in the employer's business;
- for employers to curtail investment or development for political, social or environmental;
- for bargaining agent fee clauses (but refer paragraph 2.103);
- for union notification clauses where an employer must provide details of employees to the union to enable the union to approach them regarding membership; and
- for clauses requiring contractors to employ their employees under federal certified agreements made with a specified union.

2.103 In *Electrolux* the disputed matter was an attempt by the union to have bargaining service fees included in the certified agreement. This arrangement would have required both union and non-union employees to pay an annual fee to the union in recognition of the union's role in negotiating the agreement. Bargaining service fees are now expressly prohibited as a result of measures contained in the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003*.

[21] 2002] FCAFC 199.
[22] [2002] FCAFC 199.

2.104 The amendments to section 170ML by Schedule 3 of the BB Bill would clarify that protected action should only be available to parties seeking leverage in the negotiation process for a certified agreement. The Government's view is that to allow this privilege to be used to support claims that should not be included in an agreement and should not be enforceable under the WR Act because they are outside the intended scope of the WR Act serves no useful purpose. The changes in Schedule 3 would ensure that protected action is not used to gain leverage for matters that may not be included in the agreement.

2.105 The amendment does not concede in any way that the decision of the Full Bench of the Federal Court is correct. The decision of the Full Bench of the Federal Court has been appealed to the High Court which heard the appeal in December 2003 but has not yet handed down its decision**.**

2.106 There is uncertainty with respect to whether an agreement may be certified if it contains a matter which does not pertain to the employment relationship. There are two conflicting Full Bench decisions of the Commission. In *Atlas Steels*[23], the Commission found that it was not possible for an agreement to be certified if it contained a non pertaining matter. More recently, in *Unilever North Rocks*[24]*,* the Commission has held that it is possible for such an agreement to be certified as long as the agreement overall pertains to the employment relationship. The Full Bench in Unilever Rocks preferred to follow the obiter dicta of the Full Federal Court in Electrolux, than previous Full Bench Commission decisions.

SCHEDULE 4 – PROTECTED ACTION AND RELATED CORPORATIONS

Summary of current provisions

2.107 Paragraph 170LB(2)(b) of the WR Act provides that 2 or more corporations may be treated as a single employer for the purposes of making and certifying agreements. The corporations involved must each be:

- related to each other for the purposes of the *Corporations Act 2001*; and
- carrying on a single business.

2.108 The purpose of paragraph 170LB(2)(b) is to provide a mechanism through which members of a corporate group would be able to simplify and synchronise their agreement making processes by entering into an agreement as if they were a single business. Paragraph 170LB(2)(b) is an exception to the overall policy of bargaining at an enterprise level which recognises the benefits which may be gained by allowing members of a corporate group to enter into a single agreement.

Reason for amendment

2.109 Amendments are proposed to reinforce the primacy, under the WR Act, that is afforded to bargaining at the level of the workplace or the individual. The Act is focused on bargaining at the single business level and the Government does not consider that access to protected industrial action is appropriate outside this window.

[23] PR917092
[24] PR935410

Proposed changes

2.110 Schedule 4 of the BB Bill proposes to clarify that protected action cannot be taken in pursuit of an agreement which will treat two or more related corporations as a single business, under section 170LB(2)(b).

Policy rationale

2.111 The WR Act's provisions on industrial action balance the rights of employers, employees and representative organisations to facilitate the negotiation of single business certified agreements.

2.112 The amendments would insert a new subsection 170ML(3A) into section 170ML. Section 170ML identifies the types of industrial action which are capable of being protected and therefore have legal immunity from civil action. The new subsection 170ML(3A) would provide that the entitlement to take protected action does not apply where the action is taken in pursuit of an agreement with a number of related corporations under paragraph 170LB(2)(b).

2.113 As yet, paragraph 170LB(2)(b) has been little used. The Department was only able to identify a limited number of agreements, approximately ten[25], which are currently in place on the basis of this provision.

2.114 However, as the current provision allows for protected action between employees of different workplaces, it is potentially open to misuse.

Case study – MEAA v North Coast News

This provision was considered by the Commission in August 2002 when the MEAA initiated bargaining periods with 13 regional newspapers. As the newspapers were related companies, the MEAA sought to rely on paragraph 170LB(2)(b) and treat the newspapers as a single business.

In *MEAA v North Coast News*[26], a Full Bench of the Commission found that on the proper construction of paragraph 170LB(2)(b) the employer's consent is not a prerequisite for treating related corporations as a single business for bargaining purposes. In addition, the Full Bench found that where a bargaining period is initiated for related corporations, industrial action will be protected as long as it otherwise meets the requirements of the WR Act.

The effect of the *MEAA v North Coast News* decision is that unions can launch bargaining periods against related corporations as a single business in order to seek one certified agreement with all the corporations. As such unions may be able to engage in protected action against all the related corporations at the same time.

2.115 Paragraph 170LB(2)(b) was never intended to provide an avenue through which protected industrial action could be taken to support agreements covering more than one employer.

2.116 To allow such industrial action would be inconsistent with the other parts of the WR Act and the object of Part VIB which provides that protected action cannot be taken to support agreements covering more than one employer, even if they are related. For example, section 170LC provides for the creation of agreements covering multiple businesses

[25] It is difficult to identify 170LB(2)(b) agreements as all agreements are certified under either section 170LM or section 170LS. Agreements based on 170LB(2)(b) can therefore only be identified by analysing transcripts of proceedings before the Commission.

[26] PR928033 (10 March 2003)

where such agreements are in the public interest. However, protected action is not available to support such agreements.

2.117 To allow industrial action under paragraph 170LB(2)(b) and section 170LC would also be inconsistent with section 170MM which aims to provide a general prohibition against employees taking industrial action in concert. To allow such industrial action would be inconsistent with the principal objects of the Act, which focus on agreement making at the enterprise level.

2.118 Schedule 4 of the Bill would amend the Act to remove access to protected action when seeking a single business agreement for related corporations. This would ensure that there is consistency within the Act between the different forms of agreements which are capable of covering multiple employers.

2.119 The changes contained in Schedule 4 would not prevent employers and employees taking protected action against the individual corporations. Employees would remain able to notify bargaining periods against their individual employer. They would be able to take protected industrial action in support of negotiating a certified agreement with their individual employer. However, it would be unlawful for the employees to take action in concert with employees in related corporations or any other business.

2.120 Removing protected action, but leaving in place easier access to certification for related companies, recognises that such agreements can be more efficient and convenient for both employers and employees. It also reflects the original intent of the section.

2.121 Prohibiting the taking of industrial action directed at all members of the corporate group may remove a significant factor deterring corporate groups from using the provision.

SCHEDULE 5 –PROTECTED ACTION AND INVOLVEMENT OF NON-PROTECTED THIRD PERSONS

Current provisions

2.122 Currently, section 170MM of the WR Act provides that industrial action will not be protected action if it is taken in concert with a person who is not a 'protected person'. Protected persons are defined as organisations or employees who are specified in a notice initiating a bargaining period.

Reason for amendment

2.123 Under the current provisions two or more employees are able to take protected industrial action in concert as long as all the employees are subject to a bargaining period. There is no requirement that all employees must be involved in the same negotiations. Simultaneous negotiations in different workplaces allows groups of employees to coordinate their industrial action. This has resulted in coordinated industry campaigns, particularly in the manufacturing sector, that apply undue pressure on the negotiating process.

2.124 Coordinating industrial action among different groups of employees is a tactic of pattern bargaining that effectively circumvents the workplace focus of agreement making under the WR Act. The Bill will clarify that the only employees able to take protected industrial action in concert are employees of the same employer seeking the same agreement.

Proposed changes

2.125 The BB Bill would repeal the current section 170MM and replace it. The new section 170MM would make it clear that where two or more groups of employees who will be subject to separate certified agreements notify bargaining periods against their employers, any industrial action taken or organised in concert by them will not be protected.

2.126 This would clarify that industrial action in pursuit of a certified agreement is only protected where it is organised and taken by organisations and employees who are parties to the bargaining process for that certified agreement. As a result, industrial action would not be protected where employees take industrial action in pursuit of a certified agreement and the action is taken in concert with other employees who are seeking a separate agreement.

2.127 The new section 170MM will achieve this by linking the ability of parties to take industrial action in concert to the specific certified agreement being negotiated.

2.128 Schedule 5 would also clarify the intended operation of section 170MM by changing the heading of the section. The new heading would make it clear that industrial action will not be protected action if it involves persons who do not have protected status in relation to the same bargaining process.

2.129 These amendments were previously introduced in the MJBP Bill.

Policy rationale

2.130 The WR Act fosters an inclusive and cooperative workplace system where employers and employees make agreements on terms and conditions of employment at the level of the workplace or the individual. The Government considers this system enhances living standards, jobs, productivity and Australia's international competitiveness. Integral to that system is a right to take protected action but that right should be limited to legitimate negotiation.

2.131 The clear intention for section 170MM in the WR Act is that protected action should only be available to employees to support the negotiation of a certified agreement with their own employer.

2.132 However, there are concerns that current section 170MM may be interpreted to mean that there is no requirement that all the organisations or employees involved in industrial action must be involved in the negotiation of the same certified agreement.

2.133 The new section 170MM would clarify that industrial action taken in concert with parties not directly involved in the same bargaining process will render the industrial action unprotected. The new section would prevent industrial action across entire industries. Such industrial action is not properly focused on genuine enterprise level bargaining. Ensuring that protected action can only be taken by those to be covered by a proposed certified agreement is consistent with the overall focus of WR Act. It would place responsibility for determining workplace arrangements with the employees and employers directly involved in the bargaining process.

2.134 The BB Bill would also amend the title of section 170MM. The current title, 'Industrial action must not involve secondary boycott' is misleading. This term is associated with provisions in the *Trade Practices Act 1974* that apply to conduct in trade or commerce targeted against a third party to place pressure on another party. Removal of the reference to secondary boycotts will avoid potential confusion created by the highly technical

definition of this term and the number of exclusions in the context of employment relationships. The Government's intent is to ensure that the operation of section 170MM is not limited to conduct which is normally considered to be a secondary boycott. The section is meant to apply in any situation where protected persons pursuing a certified agreement engage in industrial action in concert with persons or organisations that do not have a direct interest in that specific certified agreement.

2.135 Recent industrial action in the education sector provides good examples of situations where the new section 170MM would prevent inappropriate coordinated industrial action.

2.136 On 2 March 2004, Victorian teachers took 24 hour state-wide industrial action. The action involved the AEU and the VIEU and their members against the respective employers. Each union and its members was involved in a separate bargaining process with the relevant employer. Under the proposed new section 170MM, the action would have been incapable of being protected action. This is because even though each group of teachers was negotiating an agreement directly with their employer, they were taking industrial action in concert with persons outside their proposed agreement.

2.137 In a similar case, in October 2003, the NTEU organised sector-wide industrial action affecting the majority of Australian universities. This action was portrayed by the union as protected industrial action. Under the new section 170MM the action would have been incapable of being protected as each university is an individual employer with its own certified agreement.

2.138 Of course, the new section 170MM will have a broader application than merely the education sector. An example of its more general application could be the recent dispute involving subcontractors of Esso. In this case several subcontractors were renegotiating their certified agreements with employees. The employees of the subcontractors took industrial action against their direct employers and also picketed Esso. If the Commission were to find that the employees of the different subcontractors were taking action in concert their industrial action would be rendered unprotected as a result of the fact that the employees were pursuing separate certified agreements.

2.139 The proposed changes to section 170MM will remove ambiguities in the legislation. The changes will ensure that industrial action will be prohibited which is clearly inconsistent with the underlying policy of the WR Act of encouraging bargaining at the workplace level and only allowing industrial action which supports such bargaining.

PRINCIPAL ISSUES THE COMMITTEE HAS RAISED FOR CONSIDERATION

Effect on bargaining capacity of employees and unions

2.140 Currently, under the WR Act employers and employees have access to protected action to support bargaining for a certified agreement. The legal immunity associated with protected action prevents employers and third parties adversely affected by the industrial action from seeking certain remedies that would otherwise be available against the industrial action, including:

- dismissal of the employees on the basis of their participation in the protected action;
- damages for breach of the employment contract; and
- injunctions to prevent further industrial action.

2.141 The legal immunity arises so long as the party wishing to take protected action properly initiates a bargaining period and fulfils other procedural requirements, including giving adequate notice of the proposed industrial action.

2.142 To be protected, industrial action can only be taken within the context of the bargaining framework as provided by the WR Act. It is not intended that the disruption incurred by industrial action should be free from legal consequences when it occurs outside that framework.

2.143 The Government considers that the requirements for obtaining protected status under the WR Act are reasonable. Few avenues exist for the protected status to be removed. While it is currently possible for the Commission to suspend or terminate the bargaining period in certain circumstances, the Commission retains a discretion as to whether to do this.

2.144 The BB Bill aims to refine the operation of protected action provisions of the WR Act by:

- providing greater clarity to the protected action provisions of the WR Act; and
- allowing the Commission the discretion to order short term suspensions of the bargaining process in limited situations.

2.145 The measures contained in the BB Bill would apply to all parties in the workplace. That is, employees and employers as well their respective representative organisations.

2.146 In relation to the measures in the BB Bill which would allow the Commission to order a cooling-off period by suspending a bargaining period, such an order could be requested by employers, employees or representative organisations.

2.147 As noted earlier, all workplace parties would retain broad access to protected action. All parties would also have access to the new measures. Employees and unions have previously sought relief under section 170MW by applying for the suspension or termination of a bargaining period. For example, in the case of *CPSU v Australian Protective Services*[27] the CPSU sought the termination of bargaining periods due to a break down in negotiations.

2.148 The BB Bill would mean that in a case like *Geelong Wool Combing,* where the employees were locked out between 9 May 2003 and 1 October 2003, the employees or the relevant union could have requested a cooling off period. This would have allowed the employees to return to work, the business to better assess the ongoing viability of its operations and the two parties an opportunity to return to the negotiating table. Instead, Geelong Wool Combing closed its plant making 115 workers redundant in a regional area.

2.149 The cooling off provisions of the Bill could also be used by employers. In submissions to the inquiry into WRAB 2000 the BCA, AiG and ACCI all supported the concept of the introduction a cooling-off period.

2.150 The provisions of the BB Bill would provide the Commission with the discretion to suspend a bargaining period where the industrial action is threatening significant harm to a third party. These provisions would equally affect all parties to the industrial action. Should the Commission exercise its discretion to temporarily suspend the bargaining period, employees will not be able to enforce work bans and would be required to return to work. Similarly, employers would not be able to lock out staff and would be required to allow them to return to their work.

[27] Print T3458

2.151 The provisions increasing the Commission's powers to suspend a bargaining period have been intentionally designed to minimise disruption to the ability of the negotiating parties to take protected action. It is for this reason that the Commission can only suspend, rather than terminate, the bargaining period. The Commission would also need to seek to ensure that the suspension is for a period appropriate to achieve its objective. Further, any suspension to the bargaining period would be limited by the fact that the Commission could only extend the suspension period once. The ability to suspend a bargaining period would also be a discretionary power of the Commission.

2.152 The other measures proposed in the Bill which clarify the intended operation of protected action also apply equally to both employers and employees. These measures refine existing limitations on protected action to ensure that the integrity of enterprise level bargaining is maintained and to ensure that only matters relating to the employment relationship are the subject of protected action.

2.153 For example, the clarification of the requirement for protected action to only be taken in support of matters which pertain to the employment relationship would apply to both employer initiated lockouts and employee initiated industrial action. The result of the proposed amendment would be that where an employer is negotiating in an attempt to require employees to purchase its goods or shares, the employer will not be able to support these negotiations with a protected lockout. Similarly, if employees are attempting to get their employer to agree to make payments to their union or to provide details of all new employees to the union, the employees will not be able to take protected action in support of such claims.

Effect on capacity of AIRC to assist parties to settle disputes

2.154 The WR Act provides the Commission with a range of powers it can use to assist parties to settle various disputes. Part VI of the WR Act provides that the Commission can refer a dispute for conciliation or, if conciliation would not appear to be possible, seek to deal with the dispute by arbitration. Section 102 of the Part VI makes it clear that conciliation is to be encouraged and that the Commission is empowered to do everything right and proper to assist the parties to reach agreement.

2.155 In relation to the agreement making processes of the WR Act, Part VIB imparts the same powers on the Commission with one exception. While a valid bargaining period is in existence section 170N provides that the Commission may not exercise its arbitration powers. However, subsection 170NA(1) confirms that the Commission may exercise its conciliation powers in relation to the agreement making process. None of these provisions is altered by the BB Bill.

2.156 Preventing the Commission from exercising its arbitration powers during the negotiation process recognises that a principal objective of the WR Act is to ensure that employers and employees take primary responsibility for their industrial affairs, including the making of industrial agreements. The Government considers that the fundamental thrust of the WR Act is that the primary role for agreement making should be left to the parties themselves. Giving the Commission the general power to resolve differences between the parties during the agreement making process, or to supervise the manner in which negotiations are conducted, would undermine this.

2.157 The Commission has recently reaffirmed the principle that the negotiating parties are the most appropriate parties to arrange the conduct and content of their negotiations. In

CPSU v Sensis[28] the Full Bench found that there is no power under the WR Act for the Commission to resolve differences between employers and employees during the agreement making process. Specifically the Full Bench stated:

'The Commission's role is facilitative. In carrying out that role it should remain neutral about the form of agreement while attempting to protect the rights of each party. It is a part of the scheme that employees who so choose may be represented in negotiations by their union: s. 170LJ , 170LK(4) and (5), 170LL and 170LN. Any directions the Commission makes should protect that right. The Act also provides that an employer may seek to make an agreement directly with its employees. In making directions the Commission should also protect that right. The power to make directions should not be exercised so as to pre-empt the right of either party to seek the type of agreement which it prefers.'

2.158 The BB Bill will assist the Commission in its role of assisting negotiating parties to resolve matters of difference between the parties. The BB Bill will achieve this by providing Commission with the power, through Schedule 2, to temporarily suspend the relevant bargaining period. Such a suspension will provide an opportunity for the parties to reassess their bargaining positions and to participate in further discussions without the threat of imminent industrial action.

2.159 While the Commission has previously sought to provide a term of cooling-off under existing provisions of the WR Act, the BB Bill will provide the Commission with an explicit power to make such an order.

2.160 The Commission would also be assisted by other schedules of the BB Bill which clarify the ability of parties to take industrial action. Clarifying the ability of parties to take industrial action aims to reduce the number of proceedings which come before the Commission requiring interpretation of the protected action provisions of the WR Act. Preventing inappropriate industrial action through clarifying the operation of protected action will allow the Commission to more appropriately focus its resources.

2.161 Those measures in the BB Bill which ensure parties do not take inappropriate industrial action will also serve to reduce the confusion and frustration which is created by such action. Reducing the incidence of inappropriate industrial action will also assist the Commission by reducing the agitation of the parties which occurs before they come before the Commission. Having parties before the Commission who are able to objectively discuss their situation should lead to a more rapid resolution of disputes.

Particular effect on caring professions named in the Minister's second reading speech

2.162 The proposed amendments in relation to suspension of bargaining periods balances the rights of employers, employees, representative organisations and the community. The Government's objective in its proposed amendments to the suspension of bargaining periods is to provide effective legal remedies to those who suffer significant harm from industrial action.

2.163 The proposal to provide for the application for a suspension by third parties is directed at ensuring the WR Act is better balanced with regard to the rights of negotiating parties to take protected industrial action and the welfare of others in the community. Under the provisions third parties who are directly affected by industrial action are able to make application to the Commission to suspend a bargaining period. The Commission may by

[28] AG2002/5996 & C2003/1990

order grant the application if the Commission considers that the action is threatening to cause significant harm to any person (other than a negotiating party).

2.164 Currently, the WR Act provides no avenue for third parties to put a case before the Commission to seek respite from protected industrial action that is causing them significant harm. Under subsection 170MW(3) of the WR Act the Commission may suspend or terminate a bargaining period where industrial action is threatening to endanger the life, the personal safety or health, or the welfare, of the population or part of it, or to cause significant damage to the Australian economy or an important part of it. However, third parties have no standing in relation to this provision, with applications being limited to negotiating parties, the Minister or the Commission acting on its own initiative.

2.165 The suspension by third parties provision also aims to produce a more balanced WR Act by providing the Commission with expanded scope to consider the impact of industrial action on the welfare of third parties when making decisions about continued access to protected action. However, in reaching such decisions the Commission is expected to take into account the views of the negotiating parties as well, with this reflected in the proposed amendment that the Commission must not grant an order unless it has given the negotiating parties the opportunity to be heard.

2.166 The range of situations that it is anticipated may be relieved by the suspensions by third parties provision are reflected in the proposed subsection 170MWC(2):

(a) if the person is an employee – the extent to which the action affects the interests of a person as an employee

(b) the extent to which the person is particularly vulnerable to the effects of the action;

(c) the extent to which the action threatens to:

(i) damage the ongoing viability of a business carried on by the person; or
(ii) disrupt the supply of goods and services to a business carried on by the person
(iii) reduce the person's capacity to fulfil a contractual obligation; or
(iv) cause other economic loss to the person;

(d) any other matters that the Commission considers appropriate.

2.167 The Minister's second reading speech provides as an illustrative example that the clients of health, community services and education systems and other businesses, may be third parties who are not directly involved in an industrial dispute, but may be impacted upon or harmed by industrial action.

2.168 Examples of where this provision would have proved useful for effected third parties to put a case to the Commission for respite from industrial action include in *Anglo Coal (Moranbah North Management) Pty Ltd* PR937502 (5 September 2003), where the CFMEU took protected action that banned work to move a long wall. Moranbah North Management (MNM) argued that these bans increased the risk of a roof or floor in the mine collapsing or coal particles combusting.

2.169 There have also been a number of situations where protected industrial action taken during bargaining have raised issues of harm or the threat of harm in the automotive industry. In some of these situations, the threat may not have met the threshold requirements of subsection 170MW(3). In other situations, such as the threat posed by the TI automotive dispute where Ford came close to standing down 5000 employees (estimated cost of $640,000 a day) and production at Toyota and Holden was threatened,

the Commission did suspend the bargaining period. However, access to this remedy was dependent upon the negotiating parties, the Minister or the Commission of its own motion seeking the suspension. There was no avenue for the effected third parties to obtain a remedy.

2.170 These provisions of the Bill, like the other provisions in the Bill, are not specifically directed at any particular group of employees and will apply equally to all employees and employers covered by the WR Act.

Effect on capacity of negotiating parties to decide the appropriate parameters to their bargaining

2.171 Schedule 5 of the BB Bill will ensure that protected action cannot be taken in pursuit of matters that do not pertain to the employment relationship. Government policy is that non-employment matters should not be incorporated into certified agreements. It is inappropriate for matters outside the employment relationship to be included in an agreement certified and enforceable under the WR Act. This is especially so, given that penalties apply for non-compliance with the terms of a certified agreement. Given this, it would also be inappropriate for industrial action to be taken in support of non-employment pertaining matters.

2.172 There are a number of conflicting recent decisions which address the questions of:

- whether non-employment pertaining matters are capable of being validly included in a certified agreement; and
- whether pursuit of such matters during the agreement making process are capable of being supported by protected action.

2.173 In an effort to resolve confusion surrounding these questions the Minister has intervened in a High Court appeal from the Federal Court decision in *AFMEPKIU v Electrolux Home Products Pty Limited* [2002] FCAFC 199 (*Electrolux*).

2.174 The introduction of the amendments in Schedule 5 in no way concedes that the decision of the Full Federal Court in *Electrolux* is correct.

2.175 These amendments would make it clear that negotiating parties are free to negotiate on any matter they wish so long as the matters relate to the employment relationship between the parties. Without such a requirement there will be no objectively determinable limits to the range of matters that could be pursued by a party to the negotiations. Discussion of the types of non-employment pertaining matters which the BB Bill would clarify are incapable of being pursued with the support of protected action are discussed at paragraph 2.102.

Appendix 1 – Examples of industrial action unrelated to the employment relationship

Example 1 In March 2004, ABC staff at the Southbank facility in Melbourne voted to take strike action for 24 hours. The industrial action interrupted services to local and regional radio, Radio Australia and TV News. The industrial action followed an unauthorised stop work meeting called by the MEAA and CPSU about the decision by News & Current Affairs to introduce a Sydney produced national sports segment Monday-Friday into the 7pm National News. On 15 March 2004 the Commission issued section 127(2) orders declaring the industrial action to be unlawful and directing that it cease immediately.[29]

Example 2 University of Sydney staff went on strike for 24 hours on 7 October 2003, in response to the University's decision to defer signing a Heads of Agreement with the NTEU, in order to assess the Higher Education Workplace Relations Requirements. The strike was considered protected action. Despite the stoppage and contrary to NTEU claims, a number of classes went ahead. Higher education unions endorsed a sector-wide campaign, commencing with a national 24 hour strike of staff at all Australian universities on 16 October 2003. The industrial action was political protest action but was portrayed as related to bargaining in an effort to ensure it was protected. The NTEU wrote to universities seeking guarantees from Vice Chancellors that they would not comply with the Higher Education Workplace Relations Requirements.

Example 3 On 17 September 2003, teachers in NSW, Victoria and Western Australia took part in a 24 hour strike which the AEU termed as a 'National Day of Action'. The strike was organised to oppose what the AEU claimed was collusive behaviour by state Labor governments to cap wage increases to 3% per annum and to focus public attention on issues such as looming teacher shortages and class sizes.

Example 5 The ACTU called for mass meetings to be held on 24 November 1999 in support of Campaign 2000. Certified agreements covered most of the employees. A section 127 order was made for the proposed meetings to not occur and naming three union officials as responsible for providing written notice to AiG to cancel the meetings. AiG did not receive notice from the unions and sought and received an injunction from the Federal Court which required the named respondents to carry out the order. Merkel J found that although the unions were not guilty of contempt, the officials were because of their failure to provide the required notice to AiG. There was no evidence that after the service of the orders the respondents took any steps to respond to the order and to provide notice. Two of the officials were fined $20,000. They subsequently announced through the media that they would not pay the fines. The other official was found to be in contempt but no penalty was awarded him because he took a lesser role and apologised.[30]

[29] PR9445443

[30] *Australian Industry Group v AMWU (12 May 2000)*

Appendix 2 – Examples of industrial action taken over terms and conditions in a current agreement

Example 1 In February 2004, ABC staff took industrial action with the effect that the 1pm Radio News Bulletin was unable to be broadcast by a number of networks in NSW. The industrial action resulted from CPSU claims that the employer had misapplied the unsatisfactory performance measures contained in the certified agreement in its attempts to improve the performance of a member of its administrative staff.

Example 2 In January 2004 the Carlton & United Brewery sought to stop industrial action in the form of stop work meetings occurring across all shifts. The key issue being the process for review of electronic funds transfer allowance. The company estimated that continuing industrial action as proposed would result production losses cumulating to a cost of 100,000 cartons. Ives DP accepted union undertakings to cease industrial action and attend a conciliation conference on the matter.[31]

Example 3 In November 2003 Total Corrosion Control made four applications for section 127 orders over a period of 4 months. On each occasion there was a total withdrawal of labour, and failure to notify the industrial action. Employees took unprotected action for 48 hours from 11 November 2003. The issue was to do with non-payment of an entitlement. Total Corrosion Control was one of several contractors that made an oversight in the non-payment. It rectified the situation and made the payment. The union endorsed the company's actions, however the employees engaged in industrial action anyway.[32]

Example 4 Regardless of a current agreement being in place, several wildcat strikes and unauthorised stop work meetings took place over May and June 2003 at Sydney Airport disrupting up to 4000 passengers. The TWU claims related to proposed restructure and potential redundancies at Qantas. Orders were sought in response to what Qantas believed was a pattern of industrial action which had been taken by members of the TWU who are employed at Qantas. The Commission issued a six week s.127 order on 1 July 2003. The order was complied with.[33]

Example 6 In spite of a two month old certified agreement being in place a strike was held over the issue of excessive overtime at Yallourn Power Station. Subsequently another strike commenced over a number of claims including reclassification. The Commission made a recommendation the industrial action cease. ABB lodged a section 127 application on the same day. Neither CEPU nor ABB communicated the Commission's recommendations to the employees. Hamilton DP considered issuing a qualified order which would have allowed the order to be cancelled if the parties reached agreement. An unqualified s127 order was issued against CEPU, one of its organisers and the individual employees on strike in order that the employees 'are able to act on an informed basis… about the

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[31] *C2004/1271 Carlton & United Brewery & LMWHU s.127 application Melbourne, 21 January 2004*

[32] *C2003/292 Total Corrosion control Pty Ltd & AMWU s.127 application. Perth, 12 November 2003.*

[33] *C2003/3915 – s.127(2) Qantas Flight Catering and TWU re industrial action at Mascot Sydney, 1 July 2003*

potential consequences for them of breach of the order". The unions swore affidavits that they recommended the workers return to work which the workers ignored. On 16 August 2002 Finkelstein J of the Federal Court issued interlocutory orders that named the striking ABB employees and ordered them to return to work.[34]

Example 7 In March 2002 in the context of a recently signed certified agreement covering offshore work on the Tasmanian gas pipeline project, industrial action was taken in support of claims for increased base hourly rates, safety equipment, choice of superannuation, meal breaks and on shore accommodation. On 15 March 2002 industrial action commenced which the employer claimed had potential to cause layoffs of employees on other sites. On 20 March 2002 Harrison SPC made an s127 order to cease industrial action. However, employees refused to return to work despite recommendations by union. The Federal Court issued interlocutory injunctions against individual employees lodged by employer. The injunction was withdrawn by Mermaid when it agreed to accept Commission's recommendations. Subsequently, the Commission found there was a "Bass Strait standard" and increased the base hourly rate, paid training, paid travelling time between home and designated muster point.[35]

Example 9 As Anzac day in 1999 was falling on a Sunday, the Victorian branch of the CFMEU made a claim for a substitute holiday on the following Monday. The Master Builders Association of Victoria (MBAV) and VECCI refuted the claim on the basis that the CFMEU should observe the commitment in the current certified agreement for no extra claims and that Anzac Day had been excluded from the IRC's 1994 test case decision on public holidays. The MBAV supported by AiG obtained a section 127 order which declared the campaign unprotected industrial action and included a notice requirement that the order only applied to those workers who advised their employer that they intended to take the Anzac day off. According to the CFMEU, 50,000 employees took the Anzac Monday off.

[34] *ABB Australia Pty Ltd v CEPU* (2 August 2002) (PR920886)

[35] AMWU & Ors v Mermaid Labour and Management Pty Ltd PR911017 (17 April 2002)