PART 3: WORKPLACE RELATIONS AMENDMENT (CHOICE IN AWARD COVERAGE) BILL 2004

OVERVIEW

3.1 The Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 (formerly Workplace Relations Amendment (Choice in Award Coverage) Bill 2002) ("the CAC Bill") was introduced into the House of Representatives on 13 November 2002. The CAC Bill was debated and passed by the House of Representatives with Government amendments on 11 February 2004 and introduced into the Senate on 1 March 2004. The CAC Bill was referred to the Senate Employment, Workplace Relations and Education Standing Committee on 3 March 2004.

3.2 The Committee has raised three principal issues for consideration concerning the CAC Bill which are dealt with in turn in the final section of this Part:

- importance of the award safety net; and
- effect of restricting the award safety net; and
- inconsistency of this Bill with the Government's approach in the Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2003

These issues are dealt with at paragraphs 3.29 – 3.46.

Summary of current provisions

3.3 The system of dispute settlement and prevention in Part VI of the WR Act is underpinned by paragraph 51(xxxv) of the Commonwealth Constitution which gives the Parliament the power to make laws with respect to:

> *"conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."*

This paragraph sets limits on the Commission's powers to settle disputes by making awards. Before the Commission can arbitrate a dispute, the parties must demonstrate that an industrial dispute exists in fact and that it is an interstate industrial dispute.

3.4 Section 99 of the WR Act requires an organisation or an employer to notify the relevant Presidential Member of the Commission or a Registrar as soon as it becomes aware of the existence of an alleged industrial dispute.

3.5 Section 101 of the WR Act requires the Commission, when notified of an alleged industrial dispute, to make a finding of fact as to whether an industrial dispute actually exists before it can proceed to exercise its conciliation and arbitration powers to prevent and settle that dispute.

3.6 Over the years, the practice of serving 'logs of claim' has developed to provide evidence of the existence of an industrial dispute. Windeyer J described this practice in *Ex parte Professional Engineers' Association*:

> *"The dispute here is a 'paper dispute'. To permit the creation of a malady so that a particular brand of physic may be administered must still seem to some people a strange way to cure the ills and*

ensure the health of the body politic. But the expansive expositions by this Court of the meaning and effect of par. (xxxv), especially in the Burwood Cinema Case (1925) 35 CLR 528 and in Amalgamated Engineering Union v Metal Trades Employers' Association (1935) 53 CLR 658 have brought a great part of the Australian economy directly or indirectly within the reach of Commonwealth industrial law and of the jurisdiction of the Commonwealth industrial tribunal. The artificial creation of a dispute has become the first procedural step in invoking its award making power."

3.7 High Court decisions have confirmed that the service of a log of claims by one party and refusal to accept the claims by the other party is prima facie evidence of the existence of an industrial dispute for the purposes of the Commission's conciliation and arbitration jurisdiction. For example, *R v Blakely; Ex parte Association of Architects, Engineers, Surveyors and Draftsmen of Australia* (1950) 82 CLR 54 per Latham CJ at 69, and *R v Heagney; Ex parte ACT Employers' Federation* (1976) 10 ALR 459 per Mason J at 469.

3.8 Despite its general importance to the federal conciliation and arbitration jurisdiction, there is currently little regulation of the log of claims process.

- Rule 5 of the Commission rules states, in part, that a form in Schedule 1 of the WR Act must be used if it is applicable.
- Form R4 of Schedule 1 of the WR Act is the applicable form for the notification of an alleged industrial dispute under section 99 of the WR Act. Form R4 should be lodged with the Registry, together with documents that attest to the proper service of the log of claims. There is currently no time constraint between service of the log of claims and notification of the alleged dispute.
- Once a log of claims has been notified, the Commission lists the matter for hearing and advises the Registry.
- The notifier of the dispute is required to serve a copy of the notice of hearing and an information sheet, at Form R5 of Schedule 1 of the WR Act, on all alleged parties to the dispute.
- The Commission when listing a log of claims dispute usually seeks to allow 10 clear working days' lead time to give all parties notice of the hearing.

Reason for amendments

3.9 The current arrangements do not provide businesses with appropriate and sufficient information or time to respond to logs of claims. Small businesses are being inappropriately roped-into Federal awards.

Summary of amendments

3.10 Various provisions of the CAC Bill formed part of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999 and the Workplace Relations Amendment (Small Business and Other Measures) Bill 2001.

3.11 The CAC Bill proposes amendments to Part VI (Dispute Prevention and Settlement) of the WR Act so that businesses that receive a log of claims are in a position to adequately respond to it.

3.12 These amendments are directed towards:

- providing all businesses that receive a log of claims with more information about their rights regarding, and the process involved with, a log of claims;
- restraining the ability of the AIRC to find an industrial dispute against an employer employing fewer than 20 people and which does not employ a member of the organisation serving the log of claims; and
- requiring the Commission to seek the views of small businesses that have notified it.

3.13 The CAC Bill reflects the Government's policy that businesses need more information and notice when served.

Proposed changes to the WR Act

3.14 New section 101A would provide that where an alleged industrial dispute is based on the service of a log of claims by one party, which has not been agreed to by the other party, the Commission is not able to find under section 101 that an industrial dispute exists unless:

- when it was served, the log of claims was accompanied by a notice containing information prescribed by the Workplace Relations Regulations;
- at least 28 days elapsed between the day the log of claims was served and the day the dispute was notified to the Commission under section 99;
- at least 28 days before the day fixed for the initial Commission proceedings in relation to the dispute, the party who served the log of claims provided each other party to the dispute with a notice specifying the time and place fixed for those proceedings; and
- the log of claims does not include any demand requiring conduct that would contravene the freedom of association provisions in Part XA; for objectionable provisions to be included in an award or agreement; or that does not pertain to the employment relationship.

3.15 New section 101B is directed towards employers in small business. It applies where an organisation of employees has notified an alleged industrial dispute under section 99 of the WR Act. Its effect is limited to businesses who employ fewer than 20 people.

3.16 Before making any findings under section 101 in relation to the dispute, the Commission would be required to give each notified employer a notice in writing requesting that it advise the Commission if it employed fewer than 20 people on the day it was served with the log of claims. The Commission could not make a finding of dispute against an employer that notified it that the employer employed fewer than 20 people on the day it was served with the log of claims unless:

- the Commission was not satisfied that the employer employed fewer than 20 people on the service day; or
- the Commission is satisfied that the employer employed a member of the organisation serving the log of claims.

3.17 Before making an award in relation to the dispute the Commission is to give each notified employer, determined to be a party to the dispute and who the Commission is satisfied employed fewer than 20 people on the day it was

served with a log of claims, a notice in writing inviting the employer to make written comments on the proposed award.

3.18 New section 101C ensures that the Registry can issue a certificate on application by an organisation of employees to confirm that an employee of the employer is a member of the organisation of employees serving the log of claims. The certificate would not identify any of the employees concerned, only the organisation and the employer.

POLICY RATIONALE

3.19 The measures in the CAC Bill will protect businesses and their employees from unwanted third party interference and allow small business to choose the most appropriate industrial instruments for their business.

3.20 The proposed amendments would ensure that demands made through the 'paper dispute' process are matters over which the Commission may exercise jurisdiction. The amendments will require parties to more carefully consider the demands made in a log of claims and to devote greater attention to the drafting of logs of claims. The amendments will prevent the Commission and the parties wasting time and money dealing with claims for matters that could not be included in an award.

3.21 The need for parties to demonstrate that a dispute stretches across State borders to invoke the Commission's jurisdiction, and attempts to 'rope in' new employers and employees to a federal award, has led to the situation where logs of claims are served on vast numbers of employers. Often, many of those served with a log of claims will have had no previous dealings with the federal workplace relations system. This Bill aims to give businesses more opportunity to understand and participate in the dispute finding process.

> In 1998, the Shop Distributive and Allied Employees' Association (SDA) served a log of claims on 35,000 separate retail employers in Victoria. Many of these employers were small businesses, with no prior experience with federal award regulation and, consequently, no idea of how to respond to the log of claims served on them.
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> Hundreds of businesses were inappropriately served in the exercise including businesses that already had federal award coverage; had no employees; or had closed or changed the nature of their business. Of the 17 000 businesses that were included in the final roping in exercise 15 000 were unrepresented by any employer organisation and the majority of these businesses employed fewer than 20 people.

3.22 Many businesses struggle to respond to the log of claims in the time made available, which can be as little as 2 weeks. The CAC Bill will ensure that more adequate time frames are in place so that businesses are able to participate more effectively in the dispute process. Each party to an alleged industrial dispute would need to be served with a log of claims at least 28 days before the dispute was notified to the Commission under section 99 of the WR Act, and each party would also need to be given at least 28 days notice of the first hearing of the dispute. This will give parties, particularly small

employers, more time to obtain professional advice about the claims and prepare a response to the claims.

3.23 The log of claims process is not well understood by all employers, particularly employers in small business. Because of the way in which many logs of claims are expressed, their practical significance can be misunderstood and overlooked by employers that are unfamiliar with the process.

3.24 The defence of a log of claims is a particular burden for small business. For example:

- small business owners may have to close their business to attend a Commission hearing;
- small businesses usually have no dedicated HR manager or specialist staff with expertise to advise on the log of claims;
- legal costs represent a higher proportion of business earnings and accessible capital for small business;
- small business employers do not have the time or resources to become experts in employment law;
- unplanned expenses can threaten the viability of the business and the jobs of those working for the business.

3.25 The Parliament has recognised that small business need to be treated differently to recognise their special characteristics. For example:

- the *Income Tax Assessment Act 1997* provides exceptions and special rules for small business taxpayers, for example in relation to depreciation of plant and eligibility for Capital Gains Tax concessions;
- the *Fringe Benefits Tax Assessment Act 1986* exempts benefits related to small businesses providing car parking;
- the *A New Tax System (Goods and Services Tax) Act 1999* in relation to the registration threshold, the tax period, bases of accounting and electronic lodgement;
- the *Privacy Act 1988,* in relation to the application of that Act to small business operators; and
- the *Affirmative Action (Equal Employment Opportunities for Women) Act 1986*, excludes employers with fewer than 100 employees from its operation. In his second reading speech, then Prime Minister Hawke acknowledged that small business did not have the capacity to undertake the full responsibilities imposed by that legislation. A similar exemption applies under the *Equal Opportunity for Women in the Workplace Act 1999*.

3.26 In the workplace relations context, the Commission in the 1984 *Termination, Change and Redundancy Test Case* held that employers with fewer than 15 employees should be exempt from the test case redundancy and severance pay provisions. In its most recent TCR decision, the Commission while removing the exemption for small business did make different provision for redundancy payments for employees of small businesses. The entitlements were capped at 8 weeks – half that for employees of larger businesses.

3.27 As the following examples demonstrate the current log of claims process impacts more acutely on small business. The Department has received emails,

letters and phone calls from employers, particularly small business employers, who have been served with logs of claims and related dispute notifications that they find confusing, costly to answer and sometimes irrelevant to their business.

- Several hundred licensed post office (LPO) agencies were served with a log of claims by the CEPU which wanted a federal award for workers who were historically covered by State awards. The Department was contacted by managers concerned that the LPOs would not be represented in Commission hearings. The LPOs were not aware that they would in such circumstances have a right to be heard at an Commission hearing.
- A plant nursery was served with a log of claims by the SDA. The SDA sought to rope the business into the *Airport Concessions Award*. The award was of no relevance to the plant nursery, however, the owner had to seek advice on how to respond to the log of claims.
- A number of small winery operators with no employees were served with log of claims by the Australian Workers Union (AWU). The AWU sought to 'rope' the wine operators into a Federal wine making award.
- A couple running a company that had no employees were perplexed to receive a log of claims from the Australian Municipal Clerical and Services Union (ASU). Understanding and making enquiries about the claim proved costly. The couple were concerned about the inability to recover their costs for this from the union.
- The National Union of Workers served several employers with a log of claims, aimed at roping them in to the *Rubber, Plastic and Cable Making Industry – General award 1998* . The Department received calls from employers who were confused about their need to respond and the relevance of the award to their workplace.
- Local members of Parliament in Queensland received letters from employers concerned about logs of claims that had been served by the Textile Clothing and Footwear Union of Australia (TCFUA). The TCFUA demanded each employer pay and observe (within 7 days) a number of outlandish claims. While ambit claims are commonplace, for employers unfamiliar with the process they can be quite daunting. In this instance the TCFUA log included claims for a 25 hour week; 50 days compassionate leave; 12 weeks annual leave; shift penalties of quadruple time; and allowances of several hundred dollars per week. The claim included matters that, arguably, would not pertain to the employment relationship or would constitute objectionable provisions. These aspects of the claim included absolute preference for union members in employment, retention and re-employment; and restrictions on the use of contract employment. One employer who stated his employees were already paid at over award rates felt bullied while another was entirely baffled by the claim and the process involved.

3.28 Where a log of claims is served with a view to notifying the Commission of an alleged industrial dispute in relation to the log, such a log of claims should only include demands in respect of matters that may be included in an award or agreement under the Act. Specific legislation was required to remove preference clauses from agreements and awards and this has met with some success. However, objectionable provisions or matters that do not pertain to

the employment relationship should not be able to form part of a log of claims in the first place.

PRINCIPAL ISSUES THE COMMITTEE HAS RAISED FOR CONSIDERATION

Importance of award safety net

3.29 The amendments proposed in the CAC Bill need to be considered within the context of Australia's current workplace relations system. The overwhelming majority of Australian employees in the federal workplace relations system are now employed under enterprise or workplace agreements – whether individual or collective. Awards still play a significant role in providing a safety net of fair wages and conditions for employees. As at May 2002, around one in five employees (20.5%) were solely reliant on awards for pay setting arrangements. For small business, with fewer than 20 employees, award reliance was at one in four employees (26.1%).

3.30 The Government is committed to awards operating as an appropriate safety net of fair minimum wages and conditions. In a devolved workplace relations system the focus of an employees' actual wages and conditions should be on agreement making between the employer and employee at the enterprise or workplace level.

3.31 The CAC Bill does not alter the award as a safety net of fair minimum wages and conditions of employment. The CAC Bill is intended to help businesses respond when a log of claims is served on them. The CAC Bill responds to concerns raised by employers, particularly in small business, who are not well informed about the award safety net and the process of award making. The Victorian Retail case demonstrated the need for the Commission to be informed of the circumstances of businesses who are parties, or being 'roped-in' as parties, to awards.

Effect of restricting award safety net

3.32 The CAC Bill is not an attempt to restrict the award safety net. The Government is committed to awards operating as an appropriate and genuine safety net and rejects the contention that the safety net will in any way be restricted by the passage of this Bill.

3.33 Awards still directly govern wages and conditions for employees. While direct award reliance continues to fall (from 23.0 % of all employees in May 2000 to 20.5% in May 2002), the award safety net continues to play an indirect role, through the operation of the no disadvantage test.

3.34 The CAC Bill proposes amendments to the process associated with logs of claims to:

- remove from logs of claims demands that would not be able to be included in an award by operation of certain provisions of the WR Act, for example objectionable provisions within the meaning of section 298Z.
- alter the powers of the Commission in relation to its role in finding an industrial dispute. The effect of this is to give businesses – particularly

small businesses – greater opportunity to participate in the dispute finding process.

3.35 These amendments are directed at ensuring that the Commission is informed of the circumstances and needs of small business. The award safety net, while providing an effective safety net of minimum terms and conditions of employment, is not necessarily the most appropriate industrial instrument for all businesses served with logs of claims.

3.36 In the Victorian retail case, many employees and employers served with the log of claims were 'award free'. Under the WR Act, employers and employees can utilise a range of alternative industrial instruments for their workplace. The award safety net is supplemented by federal and State legislative minima. The most recent data on award coverage from the ABS Employee Earnings and Hours Survey May 2002, showed almost 40% of employees rely on collective agreements for pay setting arrangements and 20% rely on awards. The remaining 40% have individual agreements including many who rely on some minimum terms and conditions in an award but also receive over award benefits that have been agreed with their employer.

Inconsistency of this Bill with Government's approach in the Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2003

3.37 There is no inconsistency between the measures in the present Bill and those in the recently enacted *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* (the IPVW Act).

3.38 The CAC Bill is concerned with the dispute finding stage of the award making process. The CAC Bill would:

- provide all businesses that receive a log of claims with more opportunity to respond to a log of claims;
- restrain the ability of the Commission to find an industrial dispute against an employer employing fewer than 20 people and which does not employ a member of the organisation serving the log of claims; and
- require the Commission to invite certain businesses to make written comments on the proposed award.

3.39 The IPVW Act provides that, from 1 January 2004, the Commission will be able to declare an existing federal award to be 'common rule' in Victoria. For example, an existing federal award that applies to specified employers in the hairdressing industry could be declared to apply to all hairdressing businesses in Victoria. Under transitional provisions contained in the IPVW Act the earliest a common rule can commence operation is 1 January 2005.

3.40 A declaration of a common rule will not be a mere formality – it will require the presentation of a sound case as to why an entire industry, including small businesses within the industry, should be bound by the common rule. An award which is declared to be a common rule will apply on an industry wide basis, unless the Commission specifically exempts an employer.

3.41 Importantly, given that an application for a common rule involves an entire industry there is far greater likelihood that a wide range of concerns held by businesses will be taken into account. In contrast, a business served with a log of claims stands alone. A business served with a log of claims is forced to put

forward arguments as to why its business should not be made a party to the dispute or run the risk of being made a party to the dispute and having terms and conditions of employment set by an award made in settlement of that dispute.

3.42 Consistent policy objectives are evident in both the CAC Bill and the IPVW Act. In particular:

- the views of small businesses will be taken into account by the Commission when determining a common rule application and, due to the provisions of the CAC Bill, when it makes a finding of an industrial dispute; and
- the CAC Bill introduces similar procedural requirements as applies in an application for a common rule.

Small businesses

3.43 Both the CAC Bill and changes brought about by the IPVW Act would affect small business. Where the Commission hears an application for a common rule it must consider the implications of the award applying across an entire industry. In assessing the common rule application the Government is of the view that the Commission ought to have regard to small businesses within that industry.

3.44 The CAC Bill introduces changes to the dispute finding processes of the Commission and in particular provides for the different treatment of small businesses. The Government believes that small business is vital to the economy and will, where appropriate, support and introduce measures designed to help small business prosper.

Consistent procedural requirements

3.45 The CAC Bill requires that notification of an industrial dispute occur at least 28 days after the log of claim is served. In addition, at least 28 days before the day fixed for the initial proceedings in relation to the dispute the initiator is to serve a notice specifying the time and place fixed for the proceedings. The CAC Bill proposes procedural requirements to give businesses adequate time to understand and obtain advice about the log of claims.

3.46 Under the IPVW Act, the Commission must publish public notices which detail the common rule application and invites all interested parties to appear before the Commission. The public notice provisions provide similar protection to small business as are afforded under the CAC Bill. For example, during the first 12 months of the operation of the common rule provisions in Victoria, when it is anticipated the majority of applications for common rules will be made, there is a statutory requirement that the notices be published at least 28 days before the relevant hearing. This period is identical to that established by the CAC Bill.