



NSW.ACT

Deregulation or Re-regulation?

A position paper on the proposed changes to the Workplace Relations Act 1996

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Overall Position

When taken as an inter-related whole, the BSR cannot support the Amendment Bill as it stands. Rather than providing for a fairer, more cost effective and simpler system we see the structural changes and a number of other amendments shifting the focus to a more legalistic and costly system. We nevertheless concede that some changes would be desirable. Some of these are indicated throughout this paper while others are outlined under 'more appropriate directions for reform'.

Pope Leo xiii in Rerum Novarum in 1891 warned

Let it be granted then that worker and employer may enter freely into agreements and, in particular, concerning the amount of the wage; yet there is always underlying such agreements an element of natural justice, and one greater and more ancient than the free consent of contracting parties, namely, that the wage shall not be less than enough to support a worker who is thrifty and upright. **If, compelled by necessity or moved by fear of a worse evil, a worker accepts a harder condition, which although against his will he must accept because the employer or contractor imposes it, he certainly submits to force, against which justice cries out in protest.**^[1]

The context from which we speak

The Board for Social Responsibility in this paper draws on its experience not only as a social justice agency of the Uniting Church, but also as both direct and indirect employer. It directly employs some 200 people at several sites, in a variety of occupations. The NSW Synod's Employee Relations Service is located within the Board for Social Responsibility, and has oversight of thousands of employees, including approximately 10000 in Uniting Ministry with the Aging. The Employee Relations Service has provided a number of the comments in this paper.

Major objections to Amendment Bill and proposals

Changes to the AIRC and its powers

The change of name from the Australian Industrial Relations Commission to the Australian Workplace Relations Commission is a significant change. As a direct employer of workers at multiple sites, and an organisation responsible for the oversight of multiple small employers, we must oppose this focus on the individual workplace. That is, we oppose both the name change, and the shift in focus that the government seeks to enhance through this change.

Additionally, the BSR considers the renaming of the Commission to be an unnecessary expensive waste, not only as it relates directly to the operation of the Commission but indirectly through requiring consequential changes to other legislation.

We are not opposed to structural changes to the Commission and Registry per se, if it can be demonstrated that this is in the best interests of the efficient management of the Commission. We are, however, concerned about reducing the tenure of members of the AIRC to fixed term appointments of up to 7 years. We feel this reduces the independence of the Commission.

The removal and limitation of AIRC powers gives cause for greatest concern. *More Jobs, Better Pay* states an intention to "remove the entrenched role of third parties and enable employers and employees to use the system to their

mutual benefit." Yet these amendments do not have an equal impact on all third parties, namely unions, employer associations, the AIRC and the government. The emphasis is on reducing and limiting the role of unions and the AIRC while at the same time imposing the government's agenda through a number of very proscriptive provisions and extending the power of employers to impose individual contracts. The amendments to the powers of the AIRC seem to be based on the erroneous assumptions that the AIRC goes beyond its role as an independent arbiter, and that this is unnecessary in that there is equal bargaining power between employees and employers.

The BSR cannot support the changes in respect of conciliation and mediation. It is hard to conceive how a costly voluntary conciliation process, where the Commission is unable to make an order or award or compel a person to do anything, could possibly be effective or provide an improvement on the existing system [Part VA - Voluntary Conciliation]. It actually limits early intervention. The mediation process adds another cost and another layer of complexity in determining where responsibility for varying disputes lie. Additionally, it will be more difficult to gain the confidence of both parties as to the independence of a private mediator. The relationship between a mediator and a multi-site employer is likely to be different to that between the mediator and employees in a dispute at one site (i.e. the employer is more likely to have an ongoing relationship with the mediator). The provision of mediation services as an alternative to the AIRC, and other limitations to conciliation powers, e.g. to allowable award matters, constitutes a serious reduction in the role of the AIRC and replaces the comprehensive, independent arbiter role with a fragmented and costly approach.

It is also disturbing that the limitation to these powers is to be made retrospective [transitional provisions p.57] and waste the time and resources already spent towards settlement of a dispute.

We also strongly object to further limitations in the role and powers of the AIRC with respect to awards, safety net adjustments, AWAs, boycotts and

independent contractors. Each of these issues will be addressed separately.

Awards

The Regulation Impact Statement (p.7) states that "employers and employer organisations support the further simplification of awards". There is little evidence to suggest such support other than by the Australian Chamber of Commerce and Industry (ACCI). By Mr Reith's own admission, there has not been a take up of the flexibilities which are currently available and the take up rate for award simplification was almost nil after 2 years. This was in spite of the government's concerted efforts and considerable liaison and encouragement to employers and employer associations.

It needs to be stated that a range of employees, other than those on minimum wages still rely on awards for their terms and conditions of employment. Equally, awards are relevant to employees on agreements and AWAs, in two ways: they provide the basis of the 'no disadvantage test'; and they provide the balance of terms and conditions for non-comprehensive agreements. Some organisations have made agreements which deal with specific flexibilities which were not possible under the award while relying on the award for the remaining terms and conditions. This has proven particularly cost effective for small business not wishing to engage in protracted bargaining over a full range of terms and conditions. Changes imposed through award simplification have created uncertainty and costs in re-negotiating workplace agreements, as well as costs in the simplification process.

Awards have been changed from their role of providing fair conditions and a fair return for work to that of a safety net.

To encourage the shift to workplace agreements, the award system has been designed to wind down over time, becoming less relevant as years go by. This has been achieved primarily by the 'minimum safety net' concept of awards which has been adopted under the Act. This new role for awards will have a flow-on effect for workplace agreements. Whilst the 'no disadvantage test' will render a fair result today, in a few years time with

awards becoming less a measure of fair conditions and rates of pay, the 'no disadvantage test' may lose some of its effectiveness in rendering protection to employees. (Joe Catanzariti and Mark Baragwanath, *The Workplace Relations Act: a user friendly guide*, Manly: Newsletter Information Services, 1997 p.40).

If awards contain fewer items, and operate at less generous levels, their relevance as instruments to help protect workers covered by agreements will be substantially eroded. The inability of rates of pay in awards to be updated to reflect outcomes in agreements leaves those without bargaining power with a diminishing return for their labour. Over time it will also provide an incentive for unscrupulous employers to take advantage of reduced terms and conditions by refusing to re-negotiate or to enter into the agreement stream.

For the government, award simplification has not happened fast enough or been sufficiently extensive. The current amendments are a direct attack on the outcomes to date in the award simplification process and the 'living wage' cases.

The government had a number of opportunities to put submissions before the Commission on the application and interpretation of the WR Act with respect to award simplification [Award Simplification Test Case before a Full Bench - hospitality award; APS award simplification and rationalisation; leave matters referred to a Full Bench; Paid Rates Review before a Full Bench; and s.109 Review of 54 single commissioner award simplification decisions]. Not all of the outcomes the government objected to were arbitrated decisions. Some resulted from negotiations and agreement between the parties. The proscriptive amendments to awards will deliver Mr Reith his desired outcome, over-riding independent or negotiated outcomes.

The current round of amendments represent a dramatic reduction in protection and conditions for all workers. Mr Reith wants to limit the role of the AIRC even in its most basic function of determining the 'living wage' (or safety net adjustments - SNAs). Yet by his own

admission the recent living wage decisions have not been excessive. In fact the latest figures show a significant decline in wages growth and that Australia can well afford the more than modest increases which have flowed from the living wage decisions. The effect and interaction of some of these amendments are:

89A(2)(a) - removal of skill-based career paths from awards. This is a contradiction for a government that wants us to become the 'can do' workforce. But in effect it is related to changes to 88B(2) and the insertion of 88C and the desire to limit the extent to which SNAs apply. The government has argued that SNAs should not apply across all classifications in awards but be restricted to those on salary up to C10 in the Metal Industry Award. The MTIA argued for broader application to maintain relativities related to training and skills. The Commission justified its support of the MTIA's application on the basis that skill-based career paths was an allowable matter. A broader application is also necessary for equity and justice. Workers who are not minimum wage employees and do not have the bargaining power to negotiate an agreement will have little if any opportunity for a wage increase.

89A(2)(d) - removal of tallies and bonuses. This constitutes a direct attack on the meat industry, which is currently being targeted by the government for reform.

89A(f) - removal of long service leave. The rationale is that this is covered by independent legislation, both federal and state, and is an unnecessary duplication. Nevertheless, there are some awards which provide conditions in excess of that in external legislation and removal would be a reduction in benefits.

89A(g) - part of this amendment makes a necessary clarification to 'cultural' leave but it closes off some leave entitlements which the Commission have granted under 'other' in the existing wording.

89(a)(2)(i) - reduces public holidays related to unions, i.e. union picnic day, bank holiday.

89A(2)(j) - indicates a number of items not to be considered allowances. These are items the Commission has ruled as

allowances, whose removal from awards would reduce an entitlement, i.e. income. This amendment will leave some employees worse off in terms of income.

Similar comments could be for amendments to 89A(2)(m), (n), (q) and 89A(3) - i.e. they represent proscriptive changes to over-ride decisions and will result in loss of entitlements and protection for employees, including the ability of an employer to change the type of employment from full-time to part-time or casual.

89A(6) - This amendment is particularly significant. The current application of 89A(6) allows for matters incidental to an allowable matter to be included in order to give effect to the entitlement. Take annual leave for example. If it were to say an employee is entitled to 20 days leave per year and nothing else then it is at the discretion of the employer as to when and how that leave can be taken and does not necessarily provide for pro rata payment or employee needs for the use of the leave. The removal of 89A(6) for anything other than machinery provisions, as proposed, would make awards nothing more than a set of minimum conditions and provide no protection or flexibility for employees.

While there are some legitimate concerns with respect to the serving of a log of claims, s.101A will not bring about the required balance, rather it severely limits the capacity to serve a log of claims. In instances where there are amendments to time limits [such as log of claims, CAs, AWAs, industrial action, etc] they are all in favour of employers - extending the notice employees and unions have to give while reducing that for employers.

There are a number of changes (objects, 111AAA(1-4), s.530, s.170VQ(4)) to ensure that AWAs or individual state contracts prevail over awards and agreements. However, federal award coverage will not be able to operate to the exclusion of state individual contracts. There should be an option to get award protection. In effect the changes are an attempt to expand individual contracts by limiting freedom of choice.

Certified Agreements

While we can sympathise with the need to provide a simple and efficient administrative system for the notification and filing of certified agreements, we are not sure that the proposed amendments will not disadvantage a section of the workforce. The changes take no account of the time lags involved in notifying employees of agreements if they are part-time, spread over a number of sites, or are shift workers. An administrative change we would like to recommend is that the coding of agreements be similar to that of awards, i.e. replacement agreements keep the same reference code and are consolidated in the same way as amendments to awards. It appears that a number of third, fourth and later generation agreements consist of amendments to one or two clauses only, and over time a workplace may have to refer to several agreements in order to access all terms and conditions.

There are adequate opportunities for flexibility in agreements under the current system, a point which is easily substantiated from the Department's database (WAD). The continual call for flexibility as a justification for more changes cannot be justified. Flexibility has become a code word for increased casualisation of labour, extended working hours, broken shifts without adequate compensation, absorption of overtime and shift penalties, and greater employment insecurity. It is an excuse for management to demand more from workers, rather than managing more effectively.

s.170LU(8) - This is forcing the use of AWAs alongside a collective agreement in the one workplace, irrespective of the employees' wishes. New employees will not automatically come under established collective agreements. They need never be informed of prevailing terms and conditions and can be offered lower wages and conditions - if they say no they will not be employed. Over time, this will lead to reduced conditions for all workers. This breaches basic rights of freedom of choice and equal pay for equal work.

s.179MB(2) - provides the possibility of overriding transmission of business protections for workplaces covered by agreements. This seems ill considered in the face of a number of recent breaches

which have resulted in workers losing the entitlements which they had earned over a longer period (eg Oakdale miners). We are seeking increased protection not reduced protection.

AWAs:

The BSR cannot support the ill-considered amendment which removes the requirement for employers to offer identical AWAs to comparable employees. Whereas the stated purpose of workplace relations changes is to encourage a more co-operative ethos at the workplace, this recipe of 'divide and conquer' will create distrust and ill-feeling among employees. It goes against the basic right of equal pay for equal work.

Equally, we are unable to support the amendment which ensures that AWAs are not excluded by awards made under s.170MX. This change would allow AWAs to be introduced alongside awards which were made because agreement could not be reached. If workers have not had the bargaining power to gain a collective agreement, how are they going to be in an adequate position to negotiate a fair AWA or resist coercion into an AWA? Amendments to s.170VQ, ensure that a certified agreement, in existence and operating beyond the starting date of an AWA, does not prevail over an AWA to the extent of any inconsistencies. When all of the amendments relating to awards, agreements and AWAs are put together they represent a strong push in favour of AWAs over other forms of employment regulation, rather than a balance which allows complete freedom of choice. Such encouragement of the use of AWAs over the award or collective bargaining system will undermine and erode the protections for low paid workers who have little bargaining power.

Reducing the compliance requirements in filing AWAs reduces employee protection. For example, removing the requirement for an employer to lodge a statutory declaration confirming that necessary procedures have been followed, eliminates employer accountability and makes it more difficult to prove coercion.

Removal of s.170VZ, 170W, 170WA removes some functions from the AIRC and makes the Office of the Employment

Advocate (OEA) the final arbiter in all matters concerning AWAs. This does not allow for any independent scrutiny in cases of ambiguity. The OEA is both adviser, judge and prosecutor. It is difficult to understand this change. Previously, the AIRC only had a role in cases of ambiguity. That seems only natural, given their experience and knowledge of workplace relations and the awards which underpin AWAs. They would be best placed to determine complex matters which may be in dispute prior to signing an AWA.

The change in definition to relevant award (s.170X) also weakens protection for employees, especially with the removal of the AIRC function. There is no longer a requirement for the relevant award to reflect the employment conditions of comparable persons engaged in the same kind of work. This breaches equity and natural justice. There is nothing to stop the one award, of minimum conditions and rates of pay, being applied to every person entering an AWA.

Limited immunity for industrial action has also been removed (Division 8).

Unfair Dismissal/Termination of Employment

Unfair dismissal amendments increase the burden on employees with additional costs, reduced timeframe for applications, and limitations on circumstances where a case can be argued for unfair dismissal. This is posed as necessary to 'ease the burden that unfair dismissal applications impose on employers'.

There is an assumption that the burden falls more heavily in one direction than another. Additionally, this added burden which is being placed on all employees, will disadvantage the 'legitimate' applicant as well as those Mr Reith sees as making frivolous claims.

s.170CDA - is unfairly skewed against an employee making it difficult to gain a remedy when a forced resignation is really an unfair dismissal. The employee must establish the intent of the employer in order to succeed in establishing a prima facie case, whereas the employer only has to establish doubt of his intent on the balance of probabilities.

s.170CE(8) & 170CP(7) - limit circumstances for claims outside the time period. The changes are unreasonable given that many employees do not find out about their rights and entitlements until after the time period for lodging an application has lapsed.

s.170CJA - posting of a security may hinder the ability of an employee to undertake legitimate action. It is most likely that someone seeking a remedy for unfair dismissal is still unemployed and in a weak position to be able to afford the impost of a security.

There should be no reduction in the access to unfair dismissal provisions for 'casual' employees. There is an increasing incidence in the use of the term 'casuals' as a means of avoiding all sorts of obligations which attribute to permanent employees, such as redundancy and termination provisions. The AIRC and the Court have taken the view that an employee is not casual for the purposes of unfair dismissal provisions if they have been employed on a regular or systematic basis. There is no limit to casual employment under the WR Act. An employee can work 50 hours a week on a regular basis for the one employer and still be termed and paid as a 'casual'. If the amendments with respect to award simplification were successful, there would be nothing to stop an employer changing the status of an existing permanent employee to 'casual'. Casual workers are among the weakest in the workplace in terms of bargaining power and all efforts should be made to provide adequate protection to this rapidly increasing sector rather than worsening their position.

Likewise, there should be no exclusion for small business from 'unfair dismissal' provisions of the Act. Given that the majority of businesses in Australia fall into the category of small business, the government's intention would appear to exclude a large section of Australian workers. This would have the effect of creating a 2-tier employment system which discriminated against those employed in the small business tier. The current legislation has been successful in reducing the number of frivolous claims while s.170CF(2)(b) and CFA(1) & (2) provide for further discouragement to frivolous claims.

s.170CG(4) - is open to particularly harsh and discriminatory abuse. There is no test against an employer's 'operational requirements' and it would be possible for an employer to temporarily close a business, sack workers (say a unionised workforce), and re-open later. There are no checks and balances with this provision.

Industrial Action/Right of Entry/Freedom of Association

As stated earlier, the intent to remove the 'entrenched role of third parties' has been translated to mean the AIRC and unions. Not only does there appear to be to us no additional fetter on employer associations to prevent a repeat of the role of the National Farmers' Federation in the MUA dispute, but the amendments as a whole give greater freedom and power to employers and their associations. The limitations, with respect to unions, seem to directly contravene ILO convention 98 on collective bargaining, which clearly recognises that workers' organisations have an important role to play. Other changes simply appear to be anti-union and to be contrary to the UN and ILO human rights instruments that recognise the special role of unions in protecting workers' rights.

The BSR objects to the removal of the Commission's jurisdiction to deal with disputes about boycotts. This is yet another limit to the powers of the AIRC and could result in varying aspects of a single dispute needing to be heard in different jurisdictions - adding complexity and costs.

s.127(3C) - prohibits the Commission from making an order against an employer under 'lock out' provisions if it is the "employer's belief that the locked out employee's employment had been terminated." How can the integrity of such a provision be tested? This appears to be an open invitation for an employer to use this provision as a loophole to avoid 'lock out' provisions.

While it is in everyone's interests to avoid strikes where just pay and conditions can be achieved without them, we do not support the government's extension of limitations on the right to strike, given that

is existing approach has been questioned by the ILO as inconsistent with the relevant conventions. The restriction of protected action for pattern bargaining is discussed below.

s.170MW - suspension of bargaining period (cooling off periods). This provision acts as an unnecessary restriction on the right to strike and an incentive to employers to do nothing towards reaching agreements. In no way does it facilitate co-operative workplace relations.

Changes to the right of entry provisions for unions seem destined to restrict the right to organise, as well as limit the possibility of any general inspections of work sites. It is ridiculous to limit access by unions to assess known and detailed breaches which have been notified 24 hours in advance. An employee may seek the assistance of a union because they suspect breaches but are unsure of the break-up of the pay and conditions they receive. Union organisers have traditionally provided a 'watch dog' function that has helped to reduce the incidence of 'sweatshops' and other forms of exploitation in the workplace. Unless the government implements an effective alternative inspection system, the right of entry provisions, as they exist within the WR Act, should remain. It is not enough to rely on workers making complaints to the Department (DEWRSB) and the OEA. Very few complaints are made while employees are in current positions. The high level of unemployment and the unequal bargaining power means that employees are afraid to make complaints. Additionally, the department only takes complaints so far, even where breaches are clearly evident. If an employer refuses to accept the advice of the department and compensate for breaches the aggrieved employee is left to pursue the matter on their own through the courts. Clearly there is need for an effective system of protection to employees during their actual employment. While Mr Reith, in his meeting with church representatives referred to the enquiries received by the department, he made no reference to an effective, proactive inspection system.

... the Employment Advocate - in order to be fully successful - will have to play an active role, rather than relying on a complaints mechanism to enliven its

involvement in a particular case. If it fails to take a proactive, investigative and educative role, many breaches of the Act will be left unchallenged. (Joe Catanzariti and Mark Baragwanath, *The Workplace Relations Act: a user friendly guide*. Manly: Newsletter Information Services 1997, p.46)

The results under the current freedom of association provisions indicate that they are adequate and provide a measure of protection for all parties. The MUA dispute was an example of where the provisions were used to protect employees against discrimination by an employer on the grounds of union membership. Likewise, the success of the OEA in action against unions has provided employers with protection against coercion and closed shop arrangements.

The BSR does not hold the same confidence that there is a balance in the amendments to the freedom of association provisions.

Independent Contractors

The Discussion Paper stated an intent to "legislate to ensure that the distinction between employees and independent contractors is clearly defined and that independent contractors, many of whom are small businesses, are not regulated as employees by the workplace relations system". What this has translated to is a removal Sections 127A, 127B, 127C and other related items with respect to independent contractors [Schedule 16 of Amendment Bill]. At the meeting on July 1, Mr Reith made two assurances with respect to concerns raised by the BSR.

Firstly that this amendment is only intended to remove AIRC jurisdiction over truly independent contractors, and will not change the situation regarding those 'contractors' who are really employees, e.g. the garment industry. However, there has been no addition to give clarification to the distinction between employees and independent contractors leaving workers vulnerable to this growing trend in other industries, e.g. the building industry. Additionally, the exploitation of workers under so-called 'contract' arrangements has taken on a new and more complex dimension, that of pyramid contracting. It is the recognition that many so-called

independent contractors who are, in effect, employees, that has provided the basis for ending the outrageous and unconscionable exploitation of home workers in the garment industry in Australia. Any amendments regarding whether a person is an employee or a genuine independent contractor should maintain the criteria used in the garment outworker case and ensure that they are applied more widely. The aim should be to provide adequate protection to employees in order to reduce the tendency to use 'independent contractors' as a means of avoiding obligations to meet award rates of pay and other conditions.

Secondly, that the 1996 amendments to the Trade Practices Act with respect to small business and unconscionable conduct would provide 'bona fide' independent contractors with comparable protection. The BSR is not convinced that this is the case. The current provisions of the WR Act provide explicit tests for unfairness and explicit remedies. We also consider it is inappropriate to be moving such matters out of the workplace relations jurisdiction into a less accessible, more costly and complex area of litigation.

Pattern Bargaining:

The Amendment Bill uses 'pattern bargaining' as a criterion for termination of the bargaining period (170 MWG) and for dismissing an application for a ballot (170NBCD). While section 170LG indicates some actions that are not pattern bargaining, no definition is provided for what is pattern bargaining. Paragraph 170LB(2)(a) limits the scope for site agreements and therefore pattern bargaining.

The Discussion Paper assumes that pattern bargaining is only at the instigation of unions, and is a result of a misuse of their power. Pattern bargaining can have benefits for all parties and is currently the only means available to provide a 'pseudo industry agreement'. The MTIA have publicly stated that they see the benefit of an industry agreement in the same way they have been covered in the past by an industry award. Such agreements would reduce the cost of negotiation, reduce administrative and payroll costs, and take wages out of competition for business and

staff, so business can compete in the market place on innovation etc rather than worker exploitation. Industry agreements could offer the same benefit as awards in terms of providing for standard training and skill transfer between employers. There is a lot of rhetoric surrounding the Amendment Bill about providing flexibility to meet market requirements. At the moment pattern bargaining provides the flexibility that employer associations, such as the MTIA, seek with respect to an industry agreement. Rather than providing for that expressed need the Amendment Bill seeks to close off the current means of acquiring the same end result, i.e. pattern bargaining.

Section 298BA will include the following definition of a restrictive agreement:

restrictive agreement or arrangement means a written agreement (other than an industrial agreement) or arrangement that requires a person to provide the same, or substantially the same, terms or conditions of employment or engagement (other than excluded terms or conditions) to some or all of the person's employees or independent contractors that work at a workplace or in an industry as are provided to another person's employees or independent contractors who also work at that workplace or in that industry.

This appears to undermine the human right to equal pay for equal work.

Youth Wages

Maintenance and extension of age-based youth wages ignores the situations where younger workers have the same competency as older workers. It goes against the principle of equal pay for equal work and is a form of age discrimination, which goes against one of the objects of the WR Act. The government's universal approach to youth wages also goes against its overall emphasis on the individual workplace.

The claim is that youth wages will reduce youth unemployment, and we note the recent AIRC report which supports this proposition. While this may happen, it is most likely to occur through labour substitution (employing cheap young workers rather than older workers) rather

than employment expansion (the creation of new jobs).

If the basis of youth wages are that young workers are less experienced and less skilled, then employers should be required to provide training for young workers to acquire specific competencies. Current research indicates that entry level jobs, without training, do not provide a stepping stone to a more secure future, rather the low paid remain in the insecure secondary labour market. There has been an enormous shift away from training in the workplace, with the burden falling on the individual and the community rather than the employer who gains the benefits. The best and most relevant training is that which is complemented with on the job experience and the perpetuation of junior rates, unlinked to skills and experience, provides no incentive for change. A skills and experience based salary provides a responsibility for the employer and an incentive to the employee (a mutual obligation is established). Once an employer has invested in an employee in this way it also provides a better opportunity for an ongoing relationship of mutual benefit.

Care also needs to be taken if a universal youth wage is to be introduced to ensure that trainees and apprentices, who have wages discounted in the first instance because of a training component in the job, are not forced to accept a double discount. Additionally, youth wages would need to be matched by a social security supplement to ensure that employees receive a living wage.

Superannuation

The BSR cannot support the proposal to remove superannuation from awards because it is covered by other legislation. The inclusion of superannuation in a number of awards preceded legislation and resulted from trade-offs for lower wages or lesser conditions. For example, the intermittent nature of employment in the building industry resulted in the development of an industry superannuation scheme. The contribution rates for a number of these exceed the minimum requirements of superannuation legislation. The removal of such provisions would ignore the history of past

negotiations and could result in loss of conditions for existing employees or differential treatment for new employees who would automatically revert to minimum conditions under separate legislation.

More jobs, better pay?

The economic rationale of the proposals set out in the Discussion Paper *More Jobs, Better Pay* and the Amendment Bill is highly questionable. It is true that some industries need new work practices to take account of changing technology. But the need for efficient use of technology and other assets needs to be matched with the need for workers to function as part of society. An increasingly frenzied society, in which there are no recognised times when it is the norm to be not working, carries immense social costs which translate, eventually, into economic costs related to health, family breakdown, crime and so on.

There is no empirical evidence that the amendments will reduce unemployment, a point Mr Reith admits in his letter to the Prime Minister about unemployment (December 1998). AWIRS and *Changes at Work* research found employers felt the biggest barrier to increased employment was insufficient demand and access to funds, not workplace relations issues. Lower wages can be counterproductive, since wages are not only a cost of production but also the source of demand. Reduce wages, and you can reduce demand. Most of Australia's GDP is for domestic consumption. Lowering the safety net lower demands for our own goods and services.

All the ills of the economy, as evidenced by unemployment, cannot be blamed on the system and third parties such as unions and the AIRC. The vacancy rate is far exceeded by the unemployment rate. Therefore, it cannot just be a lack of appropriate education, high wages or bad work practices or a social security system that provides a disincentive to work. Rather it is a failure of the market system. That is, the market is not 'perfect' and will never, of itself, be able to provide the fair, equitable and efficient distribution of resources.

The AIRC provides a crucial role in balancing the needs of competing interests in the workplace relations market to ensure the weak are not exploited, or power abused. It is beyond question that less powerful workers end up worse off under individual contracts. One need only look at what has occurred with outworkers in the garment industry. Many subcontractors in other industries also receive wages well below the relevant award, without any of the protections such as workers' compensation, annual leave, sick leave etc. The abuse of power was amply demonstrated when Patricks restructured so that employees - without their knowledge - became employees of a labour hire company, and Patricks tried to avoid paying wages due to workers for work they had already done.

Unions also have a role to play and are not a barrier to flexibility and increased productivity. Departmental research, in *AWIRS* and *Changes at Work* indicates that unions actually assist with workplace reform and productivity. It was an Accord with unions which saw the introduction of certified agreements and it was union workplaces which instigated reforms under previous legislation. However, unions do not have the power or monopoly in the workplace that Mr Reith often implies. In fact they represent only a minority of the workforce.

There is a growing number of people with too much work, i.e. unpaid overtime, while there are many unemployed. If managers can rely on unpaid overtime they have no incentive to manage better, to be innovative in their means of production which would create more jobs. Workers are continuing to be penalised for doing nothing wrong. They are paying the price for becoming more efficient and productive. With the promise of increased stability and security of work for a wider section of society, workers and unions embraced reform and gave up part of their share of the returns from work, increasing the profit share. It was expected that this would translate into an increase in productive investment, necessary to generate jobs. But greed and managerial excesses have been the outcome. While wages and conditions of productive workers (the ones producing and providing the goods and services) is continually

being eroded, nothing is being done about managerial excesses which continues to increase the costs of overhead and therefore the cost of production.

Human rights issues

The following articles from the Universal Declaration on Human Rights are relevant.

Article 23

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

Everyone, without any discrimination, has the right to equal pay for equal work.

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The implications of these rights have been spelled out in a number of ILO conventions. The ILO monitoring committee has questioned the current *Workplace relations act* in relation to the ILO convention on collective bargaining, and the convention on the right to organise. The proposed amendments will move further in the direction which contravenes these conventions.

The Committee notes that protected industrial action may be taken only during a bargaining period in negotiations for a certified agreement; thus, the subject-matter of industrial action is limited in scope to those matters that may be covered by a certified agreement, namely, matters pertaining to the relationship between an employer and employees in a single business or part thereof (section 170LI). The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organisations to promote and protect their economic and social interests. The Committee notes further that the Act prohibits industrial action with the aim of coercing an employer to make payments in relation to periods of industrial action...and that industrial action can lose protected status if it involves a demarcation dispute...which also, in the view of the Committee, excessively limit the subject-matter of a strike. (ILO Observation 1998)

The ILO committee also expressed concern about the ability to terminate or suspend a bargaining period, thus making industrial action no longer protected, and about the prohibition of sympathy action.

The committee recalls in this regard that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided that initial strike they are supporting is lawful...

The Committee also expresses concern a number of provisions which limit strike action.

The Committee recalls that prohibiting industrial action that is threatening to cause significant damage to the economy goes beyond the definition of essential services accepted by the Committee...as does the reference in the context of cancellation to industrial action affecting trade, commerce or the provision of a public service.

The Committee hopes that the Government will indicate in its next report measures taken or envisaged to amend the provisions of the Workplace Relations Act referred to above, to bring the legislation into conformity with the requirements of the Convention.

The proposal "to further emphasise the unacceptability of unprotected industrial action by amending the objects to refer to the Commission's role in preventing and stopping such conduct" seems inconsistent with the right to strike. The same can be said of several related proposals (¶¶72 ff of the Discussion Paper) which would widen the circumstances in which the AIRC can make orders against industrial action and in which strike pay is unlawful. The use of common law remedies against strikes also seems to contravene the right to strike.

The convention on collective bargaining is contravened by the legislative and policy emphasis on workplace agreements, ie individual contacts between employers and each employee. While there may be arguments for enterprise agreements, ie agreements at the level of the enterprise rather than across an industry, there are real problems with expecting each employee, as an individual, to negotiate a contract with their employer. While the rhetoric is that workplace agreements are for small and medium employers, the evidence suggests that the Government wants individual contacts even on large sites such as Federation Square, the construction of which is expected to employ 700 people.

One of the objects of the WRA is "respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin." The BSR agrees with this object. The problem is that the government's encouragement of AWAs, i.e. individual agreements, undermines the principle of non-discrimination. The government proposes allowing employers to offer different AWAs to comparable employees, i.e. employees doing the same work. This will become a vehicle for discriminatory practice, since the workers

who are most likely to be discriminated against on the grounds named in the act are usually those who have least power in the bargaining relationship.

Another object of the WRA is "assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers". Again, the BSR agrees with this object. The problem is that if employers can offer different AWAs to employees doing comparable work, those who seek hours of work or some other condition that helps them meet their family responsibilities are likely to find themselves offered different AWAs from workers who will fit in with employer hours. There is substantial evidence, e.g. from the 1995 Australian Workplace Relations Industrial Relations Survey, of work intensification, with employees being required to work the hours that employers want, without regard to family responsibilities (or other human needs). This trend has continued since that survey. This development would be inconsistent with two objects of the Act.

The move to more flexibility in working hours disadvantages women, since there are no matching changes in provision of child care.

Deregulation or re-regulation

As Braham Dabscheck comments in *Australian labour law reform: consequences and prospects*^[2], the *Workplace Relations Act* is not about deregulation (a reduction in regulation), but is a lengthy act which changes the nature of regulation. The purpose is no longer to protect employees who lack power in negotiation, but rather to protect "the market". It does not adopt a neutral stance towards the nature of negotiations, but is intended to discourage the involvement and effectiveness of unions in the negotiation process. It discourages reliance on awards, by limiting the allowable matters in awards, so that all other matters have to be a matter of negotiation.

More appropriate directions for reform

Bringing workplace relations legislation in line with ILO conventions

The *Workplace Relations Act* needs to be amended to resolve the problems indicated by the ILO in its recent observations.

Employee protection against employer insolvency

Recent insolvencies such as Patricks, Cobar Mines, Oakdale Colliery, Woodlawn Coal mine, the Grafton meat processing and packing company, Bells and Jardine Pacific, GD Engineering, Austral Pacific Buses, Rockhampton Nursing Homes, Mt Schank Abattoirs, Exicom, and Mighty Foods, have highlighted the fact that employees may fail to receive their proper entitlements, in spite of the priority afforded to them under Bankruptcy and Corporate law. While this priority places them ahead of unsecured creditors, employees have a lower priority than secured creditors. It has been estimated that some 3000 workers have been affected, with entitlements totalling \$30 million.

According to an article in the *Sydney Morning Herald* on July 6, 1999, a recent survey showed "that one quarter of the companies surveyed had made no provision for accrued benefits."

Government action must focus on ensuring employees receive their entitlements. Punitive action against employers who fail to fulfil their obligations does nothing for employees who are deprived of income they have earned.

As a matter of public policy, employees are entitled to have confidence that their entitlements are protected regardless of the financial state of their employer. The best proposal seems to be that an appropriate guarantee facility should be created which is not reliant on the availability of assets of the employer, as provided for in Part III of the ILO convention 173 Convention concerning the Protection of Workers' Claims in the event of the Insolvency of their Employer. We believe that experience in the building

industry shows that only a small levy would be required, and that it can be a win-win situation for both employers and employees, since gradual provision for long term entitlements is far less disruptive of cash flows in business than sudden major payouts. Guarantee facilities work well in many other industrialised nations, with the levy typically being a manageable 0.5% of the payroll. However, our Employee Relations Service is further considering various proposals in the public debate, and may comment further at a later date.

In addition, to the problems of insolvent companies, there have been cases of companies being deliberately restructured to eliminate workers rights and entitlements. Legislation should be enacted to ensure that workers rights are protected in company restructuring, sales of businesses, and takeovers.

This paper was prepared by Ann Wansbrough and Narelle Penman in consultation with the Board for Social Responsibility and in accordance with the minutes of the June 1999 meeting.

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