# SUBMISSION
# BUSINESS COUNCIL OF AUSTRALIA

**to**

# SENATE EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

# INQUIRY INTO
# WORKPLACE RELATIONS AMENDMENT BILL 2000

The BCA is not a party to proceedings under the Workplace Relations Act 1996. Rather it is a non-partisan organization that transcends individual corporate interests and aims to provide business leadership to build a better society. This submission is made in the context of its objective to contribute directly to strategic and practical public policy formulation that promotes a competitive economic environment in which business succeeds and supports national social and economic objectives, including employment growth, low inflation, social cohesion and individual well being.

This includes protections for those who would not otherwise achieve fair employment outcomes and means of addressing unfair treatment. The vision of the BCA also includes –

> *"We want to grasp the opportunity for all Australians to enjoy quality of life and standards of living which are amongst the highest in the world. We want jobs for all who can work, support for the disadvantaged and a fair go for everyone. We want to be a community of Australians, united in our diversity, proud of our achievements, creating wealth and work for all."* [1]

19 May, 2000

[1] BCA *New Directions* Discussion Paper No.1, March 1999.

## EXECUTIVE SUMMARY

1. The Business Council of Australia (BCA) is strongly supportive of the Workplace Relations Amendment Bill 2000 which supports the broader policy directions of –

   - Workplace-related agreement making taking place in non-adversarial environments and through a consensual and constructive approach that recognizes common interests in the performance of the enterprise or workplace.
   - Providing a sense of urgency in dealing with disputes, so as to limit the extent of industrial action once it occurs and assist parties to resolve the issues in dispute without protracted litigation and formality.
   - Effective disincentives for unprotected industrial action without the perception of tolerance for industrial action that is unlawful (and not immune from civil liability for damages).

2. The Bill is not about fundamental structural reform. Rather it provides a small and important number of initiatives to enhance the achievement of some of the original policy objectives of the Workplace Relations and Other Legislation Amendment Act 1996. The Bill is an issue specific reform based on recognition of clear problems requiring legislative attention.

3. The focus of the Bill is pattern bargaining. However whilst the making of across-the-board, industry or multi-employer claims is contrary to the intention of genuine enterprise or workplace bargaining and is not supported by the BCA, there is nothing in the Bill to prevent such claims being made. Rather the Bill is about preventing unions accessing, in the context of a pattern bargaining approach, rights to protected industrial action that from as far back as 1993 have been intended to be associated with genuine enterprise or workplace based bargaining.

4. From a strategic policy perspective, the future emphasis should be on reforms that structure the workplace relations system so it will encourage industrial outcomes that develop workplaces that are both nationally and internationally competitive and enhance personal achievement and satisfaction of individuals at work.

   The main focus should be encouraging high performing workplaces with more and more employees accepting responsibility for negotiated workplace agreements that provide for rewarding, fair and flexible arrangements. Also it should be on creating higher levels of employment.

5. As we look to the future the BCA advocates that other important elements of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 which would have these outcomes (and provide a basic safety net) also be progressed. These, and supporting reasons, were outlined in the relevant BCA submission to the Committee.

## INTRODUCTION

6. The Business Council of Australia (BCA) has consistently advocated an enterprise focus to workplace relations, where wages and conditions of employment are genuinely negotiated between parties at the workplace or enterprise level.

   It is strongly supportive of the 1996 workplace relations reforms and the policy directions of the Workplace Relations Amendment Bill 2000 (referred to as "the Bill"). The current Bill is primarily seen as addressing some of the problems that have been exposed since the passage of the 1996 amendments.

7. It is appropriate to consider the move to enterprise bargaining that has occurred during the last decade in the context of the 1993 report of the BCA Employee Relations Study Commission chaired by Professor Fred Hilmer. One of the major findings of that Commission, from comparing in considerable depth Australia's enterprises with their overseas counterparts, was that "the situation facing the average Australian enterprise is that it is about 25 per cent below best practice in terms of productivity broadly defined…."[2].

   This conclusion was in line with estimates of the relative productivity performance of different economies prepared as part of a wider OECD study.[3] In that study labour productivity (GDP per hour worked) in the Australian economy in 1992 was estimated to be only 78 per cent that being achieved in the US economy.

8. Labour productivity increases in recent times have been strong in relation to GDP growth, with assistance from the 1996 workplace relations legislative reform package. Whilst the gap may have narrowed somewhat, there can be little doubt that Australia has a long way to go to make up the previously identified margin.

   Further workplace relations reform has the potential to contribute to this shortfall whilst maintaining the sense of fairness that is demanded by our Australian ethic of a fair go.

9. During the 1990's federal governments of both political persuasions have recognised the benefits of deregulating the industrial relations system by focussing on the enterprise. This was part of a general micro economic structural reform program to dismantle Australian protection that included tariff reduction, financial market deregulation, competition policy, and the privatisation of certain government services.

   Without these changes it is arguable that much of Australia's traditional industries (including manufacturing) could not have survived the globalising price and other influences that have pervaded the business environment, with resulting negative affects for the economy and our standard of living. "*To the extent that protection took some of the blame for*

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[2] Hilmer, FG & Ors, Working Relations: A Fresh Start for Australian Enterprises (1993) p.92.

[3] See Maddison, A., Monitoring the World Economy, 1820-1992, OECD, Paris, 1995.

*Australia's economic problems, then arbitration, arguably, had to take some of the blame with it.*"[4]

10. Enterprise bargaining has been extremely important for Australia and Australian business. While many companies were slow to start it is now the entrenched way for most companies to deal with their employees, with more than 80% of all federal award employees covered by agreements. This is in a variety of forms - through collective (Certified) agreements or individual agreements (AWAs) or a combination thereof. In the case of smaller companies, it can involve less formal arrangements underpinned by the basic award safety net.

11. The enterprise focus has been important for the transformation of companies and their ability to compete in global markets. There has been a significant amount of change for companies to contend with as businesses have been reshaped and restructured so as to survive the rigors of international competition. The process has been essential, although in some cases difficult. The overall outcome however has been significantly improved productivity and performance. For employees, enterprise bargaining has delivered real wage increases that could not have been realized in the pre-enterprise bargaining system.

12. The enterprise focus has also created a more co-operative culture of workplace relations between employers and employees, as all have been encouraged through the agreement-making process to assess issues of competitiveness, productivity, employment security and vocational education and training.

    For many companies, success in building better relationships with employees has been a factor in enhancing their customer relations and an overall competitive advantage.

13. Australians now generally accept that our economic success depends directly on the competitiveness and productivity of our nation's individual enterprises. Our standard of social well being and our quality of life also depend on our economic performance as a nation.

14. The BCA submission to the Committee on the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 canvassed trends in wages growth, male/female wage differentials, earnings inequality, work and family arrangements, working hours, job security, productivity and industrial disputation. It concluded that there is no reason not to assume that the reforms to the Australian workplace relations system introduced by the 1996 legislation had contributed to the positive outcomes.

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[4] Dawkins, *P The Economic Effects of Deregulation and Decentralisation of Wage Determination*", Journal of Industrial Relations, DECEMBER 1998, Vol 40 No4, p.657.

15. Therefore the BCA strongly recommends against consideration of any moves that might represent a "slippage" backward towards a more centralized and regulated workplace relations system. That would not be a progressive option for employers or employees – let alone the unemployed.

    The BCA (which represents the chief executives of approximately 100 of Australia's largest companies) emphasizes the need to continue labour market reform to facilitate the development of workplaces that are both nationally and internationally competitive and enhance personal achievement and satisfaction of individuals at work.

16. This BCA submission supports legislative measures to –

    (a) discourage the incidence of "pattern bargaining" (ie, bargaining where unions seek common terms and conditions across a number of employers, regardless of the circumstances of the individual businesses concerned) through measures that ensure supporting industrial action is unlawful and the relevant bargaining period is terminated;

    (b) enhance the effectiveness of the Australian Industrial Relations Commission's (the Commission's) power to issue timely orders that unlawful industrial action cease or not occur;

    (c) protect rights to pursue common law remedies in response to unlawful industrial action in Supreme Courts without additional litigation in the form of anti suit injunctions being sought from or issued by the Federal Court; and

    (d) provide access to cooling off periods in respect of protected industrial action. This will assist more open communication before recourse to further protected action is available

    The arrangements outlined in (b) and (c) will ensure that the courts can take action in a manner that is effective in stopping or preventing unlawful industrial action.

## PATTERN BARGAINING

*17.* The BCA is strongly supportive of the initiative to prevent industrial action in the context of pattern bargaining (as defined in Item 6), by providing that –

- where the Australian Industrial Relations Commission (AIRC) finds that a union is engaging in pattern bargaining it must terminate the bargaining period. Also where the Commission considers it to be in the public interest it may restrict the ability of a negotiating party or an employee to initiate a new bargaining period (Item 13);
- a union is taken not to have genuinely tried to reach an agreement with the relevant employer if it was engaged in pattern bargaining (Item 10).

These have the effect that industrial action in support of pattern bargaining will be unprotected at law in terms of s.170MT (Immunity Provisions).

18. Before addressing the supporting arguments, it must be emphasised that whilst the making of across-the-board, industry or multi-employer claims is contrary to the intention of genuine enterprise or workplace bargaining and is not supported by the BCA, there is nothing in the Bill to prevent such claims being made.

    Rather the Bill is about preventing unions, in the context of a pattern bargaining approach, accessing rights to protected industrial action that from as far back as 1993 have been intended to be associated with genuine enterprise or workplace based bargaining.

19. A principal objective of the *Workplace Relations Act 1996* is to ensure that the primary responsibility for determining matters rests between employers and employees at the workplace or enterprise level (s.3(b)).

    Notwithstanding this there is relatively little in the legislation that discourages unions from attempting to achieve uniform settlements across industries – whether by means of industrial action or otherwise.

20. Enterprise bargaining is about determining wages and conditions by genuine negotiation at each enterprise or workplace through participation by management, employees and their representatives, with outcomes based on local circumstances and mutual interests.

21. On the other hand pattern bargaining is the practice whereby unions pursue common demands across multiple employers or an industry. The essential problem is that there is a commonality of outcomes resulting from a refusal of the union involved to genuinely bargain with the employer to meet the circumstances of the particular enterprise or workplace. Agreements that do not vary by enterprise or workplace, by definition, do not alter according to the variety of their different circumstances, including in relation to performance, efficiency, prospects, views and wishes of the employer and employees concerned. The resulting agreements are by their very nature inflexible and are sub-optimal in their results.

22. A key rationale for enterprise bargaining is that of promoting discussions and agreement on local circumstances, including using agreements to rectify problems and promote prospects, and this key rationale is defeated by a pattern bargaining approach.

23. For some unions the process of enterprise bargaining has been a challenge because it required a new approach to representing their members and has been a resource intensive process. These have resisted making the transition and now argue for a return to the old ways of central outcomes, unfortunately still driven by outdated concerns with “comparative wage justice” and how enterprise bargaining can be “coordinated”. Some within the union movement describe their approach

to bargaining as “coordinated flexibility” and seeks to characterise the more effective enterprise approach as “fragmented flexibility”.[5]

Many unions have however, successfully made the change to enterprise bargaining and will continue to follow this approach wherever they can. The proposed provisions should not adversely affect those unions.

24. Experience has shown how pattern bargaining is accompanied by industrial action that manipulates the right to enterprise bargaining by “misusing" the statutory protections for industrial action that can be taken in support of genuine enterprise bargaining.

25. Therefore contrary to s.3(b) of the Act, pattern bargaining has the effect of undermining the objective of ensuring that the primary responsibility for determining industrial outcomes rests between employers and employees at the workplace. It is designed to return industrial outcomes to a more centrally controlled approach.

Such an approach is retrograde and damaging to economic interests.

26. Examples of pattern bargaining are the AMWU and CEPU’s “Campaign 2000” where there is a serious threat, for example, to the motor vehicle manufacturing industry, given its reliance on component manufacturers that are caught up in the proposed industrial action. A previous example was the campaign of the CFMEU, CEPU and AMWU involving widespread industrial action in the Victorian building industry.

The effect of pattern bargaining was highlighted in the August 1999 report of the Productivity Commission on *Work Arrangements on Large Capital City Building Projects*. This found that industry/trade and project agreements largely determine work arrangements, with subcontractors who employ 90% of labour on a project having limited control over remuneration levels. Also wage increases are above the economy –wide average and payments are made for ill-defined productivity allowances.

**27.** Research by the National Institute of Labour Studies, Flinders University of South Australia found that almost 50% of workplaces with union agreements indicated strong similarities with other agreements in the industry. By comparison, non-union agreements are more likely to be tailored to the needs of the enterprise, with just 19% of workplaces with non-union agreements indicating that their main agreement closely resembled other agreements in the industry.[6]

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[5] Hawke, A & Wooden, M (September 1997) *The Changing Face of Australian Industrial relations,* The Transformation of Australian Industrial Relations Project, Discussion Paper Series No 1, National Institute of Labour Studies, Flinders University, Adelaide,p.39.

[6] Wooden M (March 1999) *The Changing Nature of Bargaining Structures and the Consequences for Management and Trade Unions,* The Transformation of Australian Industrial Relations Project, Discussion Paper Series No 7, National Institute of Labour Studies, Flinders University, Adelaide, p.32.

## CESSATION OF UNLAWFUL INDUSTRIAL ACTION

28. The BCA supports various provisions of the Bill to enhance the effectiveness of the existing legislation to prevent unlawful unprotected industrial action. These are outlined below.

29. The Bill requires the Commission to make orders that unprotected industrial action on the part of employees or a lockout on the part of an employer stop, not occur and not be organised (Items 2, 3 & 4).

    The current provisions provide a discretion for the Commission to make orders when unlawful action is occurring. This creates some sense of oxymoron in that, at law, unlawful action should be tolerated. In a decision dated 26 February 1997 Re Southcorp Australia Pty Ltd (Print N8922) the Commission indicated that not all industrial action which is not protected must automatically be the subject of orders under s.127 and noted "*The inclusion in s.127 of the word "may" would not have any work to do if this was the case*"(p.7).[7]

30. Also the Bill requires the Commission (as far as practicable) to hear and determine applications within 48 hours – or make an interim order to stop the industrial action or prevent it occurring until the application is determined unless this would be contrary to the public interest (Item 5).

    In supporting this, the BCA is mindful of the fact that dispute proceedings are complex and delays can occur for a variety of reasons. However delays of s.127 orders have in some cases had the negative consequences of extending the period during which business are exposed to unprotected industrial action.

31. In addition the Bill excludes from the immunity of protected action union members whose employment is not to be covered by the certified agreement being negotiated (Item 8).

    This is contrary to the policy objectives behind the 1996 Act and is in response to circumstances unions have sought to involve all their members who are employed by an employer negotiating an agreement in taking industrial action, irrespective of whether the employee would be subject to the proposed agreement.

32. The effect of a similar tightening of the present secondary boycott provisions (Item 9) will be that industrial action will not attract immunity if it is taken in concert with any person or union that is not protected in respect of the action being taken – that is, it is not action solely in pursuit of a specific agreement by those who it is proposed will be subject to that agreement.

33. The proposed provisions will expressly confer jurisdiction on the Federal Court to determine whether industrial action is protected and, if so, whether the industrial action is covered by the immunity provided by the Act (Item 11).

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[7] See also Coal & Allied Operations v Automotive, Food, Metals, Engineering, Printing & Printed Industries Union (1997) 73 IR p.311.

Also, although the Federal Court already has such jurisdiction, questions have arisen in the operation of the Act whether its jurisdiction is exclusive of the jurisdiction of State or Territory Courts. The proposed amendments will clarify that the Federal Court's jurisdiction in respect of these matters is not exclusive (proposed s.170MTA(4)).

This should assist with accessibility and could result in a reduction in delays in having matters determined.

## ANTI-SUIT ACTIONS

34. It has become a recent practice of the Federal Court, particularly in Victoria, to issue injunctions against the Supreme Courts to prevent unlawful industrial action being subject to legal action where common law torts (such as trespass, conspiracy to injure and the like) have been breached. This has meant that the traditional right to seek common law remedies in major disputes has effectively been ruled as the exclusive domain of one Court. This was not the intention of the 1996 Act.

35. These anti-suit injunctions serve only to delay or frustrate relief properly being obtained, add significant legal costs and result in inappropriate, unnecessary and undesirable competition between courts.

36. The proposed provisions (Item 11), which are supported, will protect existing rights to pursue common law remedies in response to unlawful industrial action in Supreme Courts without additional litigation in the form of anti-suit injunctions being sought from or issued by the Federal Court (proposed s. 170MTA(2)(c)).

## COOLING OFF PERIODS

37. Section 170MW of the *Workplace Relations Act 199*6 provides the AIRC with a discretion to suspend a bargaining period (and therefore remove immunity of protected industrial action) under prescribed circumstances.

However where those circumstances do not exist disputes involving protected industrial action can become protracted.

38. The Bill requires the AIRC to suspend upon application by a negotiating party (thereby rendering industrial action unprotected at law) if it is satisfied this would assist the negotiating parties to resolve disputed matters and a suspension would not be contrary to the public interest.

Such suspension orders must be for a specified period that the Commission considers appropriate.

Similar to the situation with existing s.170MW, such a suspension will not be a ground for leading to compulsory conciliation and arbitration under s.170MX.

39. This reform is supported. It will encourage the parties to settle the matters at issue between them without recourse to further industrial action. It could act as a circuit breaker in protracted disputes.