

Victorian Council for Civil Liberties

**Submission to the Senate Employment, Workplace Relations,
Small Business and Education Committee**

**Inquiry into the Workplace Relations Legislation Amendment
(More Jobs, Better Pay)
Bill 1999**

1. Introduction

- 1.1 The Victorian Council for Civil Liberties ("VCCL") is an independent non-government organisation established in Melbourne in 1936. The VCCL is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the rights and freedoms recognised by international law.
- 1.2 The VCCL raised its concerns in an earlier submission on the Workplace Relations Bill 1996 ("WRB"). These concerns primarily focused on two aspects of the new legislation and can be broadly summarised as follows:
- (i) the dismantling of a federal industrial relations system which, overall, maintained an equitable balance between employers and employees and its replacement with a model which clearly seeks to give greater power to the employer at the expense of the rights of the employee.
 - (ii) secondly, potential breaches of international conventions to which Australia is a signatory.
- 1.3 Since that submission the current legislation has been determined by the Committee of Experts of the International Labour Organisation to be in breach of Australia's obligations under Convention No 98 (Right to Organise and Promotion of Collective Bargaining) and No 87 (Freedom of Association and Protection of the Right to Organise).
- 1.4 In defiance of these international conventions the Government's Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 will further undermine Australia's commitment to its international obligations and result in a progressive decline in economic bargaining power away from employees and in favour of employers.

2. Awards and Agreements

- 2.1 As pointed out in *A Critical Analysis of the Reith Proposals*, paper by 80 of Australia's Leading Industrial Barristers and Solicitors, the weakening of the award system and the corresponding promotion of Australian Workplace Agreements ("AWA") has two main aims: first, it elevates the role of individual over collective bargaining, and secondly, it removes industrial negotiations from the public to the private sphere.
- 2.2 In relation to the first point, the claim that a decentralised system emphasising individual agreements 'provides better opportunities for employees to access

enhanced wages and living conditions' rests on an erroneous premise. It assumes the existence of a level playing field between employers and employees, in addition, it also fails to recognise or understand the disparity between salaried and wage earners. The bulk of employees fall within the latter group and unlike their salaried counterparts are often placed in vulnerable and weaker positions when negotiating with powerful employers. A situation made more precarious due to the current trend in downsizing, contract and part-time work where workers quite often have no stable relationship with an employer.

- 2.3 In this context, the undermining or abolition of collective bargaining will not lead to greater conditions for workers. It is more likely to generate a downward harmonisation of wages and conditions for workers as has been demonstrated in other western economies where economic and industrial reform has instituted high levels of job insecurity, downward flexibility of wages and low costs for employers. The result has been a large shift in economic bargaining power away from employees.
- 2.4 Collective bargaining was introduced to address the imbalance in bargaining positions between employers and employees. As in the WRB, the provisions in the proposed amendments seek to undermine this principle by encouraging employers to bypass workers' organisations and seek to negotiate directly with the employee. These provisions are in breach of Article 4 of the ILO Convention No 98 which states that measures shall be taken where necessary, to promote the machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulations of terms and conditions of employment by means of collective agreements.
- 2.5 Furthermore, it is also intended that AWAs are no longer referred to the Australian Industrial Relations Commission ("AIRC") for assessment, likewise, Certified Agreements ("CA") can be approved on the basis of documents submitted without the need for formal hearings. This clearly undermines the important role of an independent arbitrator to ensure fair minimum wages and conditions and assess whether an employee is disadvantaged by an agreement. This proposal coupled with the fact that only basic minimum conditions need be included; that the terms of an AWA would override inconsistent terms in a collective CA even whilst the latter is operative; that the onus is now placed on the employee to initiate court action for compensation for the value of any entitlements not received under an AWA; clearly demonstrates that the new proposals are heavily weighted in favour of employers rather than aimed at producing fair and equitable outcomes for both parties.

3. Freedom of Association

- 3.1 Article 22(1) of the International Covenant on Civil and Political Rights states that 'Everyone shall have the right to freedom of association with others, including the right to form trade unions for the protection of their interests.
- 3.2 Likewise, Article 8(1) of the International Covenant on Economic, Social and Cultural Rights which deals with fundamental aspects of freedom of association for trade unions states:

The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organisations;
- (c) The right of trade unions to function freely subject to limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

3.3 The VCCL is concerned that the proposed amendments disregard Australia's commitment to the above conventions. The proposed amendments severely restrict a union's ability to enter a workplace. It is proposed that entry will only be permitted where a union member has had a written invitation from a member which will cover a period of 28 days, any extension beyond 28 days will require an additional invitation. This will limit a union's ability to investigate serious breaches of industrial law, health and safety conditions, and wage records. In addition, there is also a possibility that although a member can request confidentiality the procedure one must follow makes it easier to identify the union member who issued the invitation thus opening them up to the prospect of persecution by the company.

3.4 It is clear that the proposals are designed to curtail union involvement in the workplace as is the requirement prohibiting or maintaining a 'closed shop'. An interesting aspect of the proposed amendments is that they are designed to deal with only one side of the equation. Whilst closed shops are prohibited, there is nothing in the legislation dealing with a situation in which an employer demonstrates a closed shop mentality by only employing non-union members. A remedy for an employer generated closed shop is equally necessary as demonstrated in the Patrick Stevedores' case where the employer intentionally sacked the unionised workforce in a clear attempt to replace them with non-unionised employees.

3.5 A fair and equitable system requires that both parties be treated equally not one party at the expense of the other. In accordance with the international conventions, the issue is not whether the workforce is unionised or not, the issue is that employees have a right of freedom of association and a right to protect their interests in relation to industrial and employment issues. The Australian government is a signatory to those conventions as such it should refrain from interfering or attempting to control employee representative

organisations. The right to freedom of association requires the unrestricted right of access of unions to employees within the workplace.

4. Termination of employment

4.1 Australia is a signatory to The Termination of Employment Convention, 1982 (No.158). That convention obliges ratifying States to establish, in conformity with the instrument, the grounds upon which a worker can be terminated from employment. It states that an employee may not be terminated by the employer unless there is a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking. Union membership, filing a complaint against an employer, acting as a workers' representative, amongst others, are not valid reasons for termination.

4.2 Furthermore, Article 8(1) states:

A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

Article 9(1) states:

The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

Article 9(2) states:

In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

- (a) the burden of proving the existence of a valid reason for the implementation as defined in Article 4 of this Convention shall rest on the employer;
- (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

4.3 The Government's proposed amendments stand in direct contrast to these international conventions. First, the interpretation of the word '*casual*'. The ILO convention makes it clear that a Member may exclude *workers engaged on a casual basis for a short period*. The Minister whilst acknowledging this convention berates the AIRC for not interpreting employees employed on a regular or systematic basis as casual thus bringing them within the auspices of unfair dismissal legislation.

- 4.4 In an economic climate where shrink, merge, downsize and restructure are occurring at an unprecedented pace and more and more people are forced into jobs on a casual or contract basis - entirely as a result of Government policies - a broad definition of the word 'casual' will see many people excluded from a right to a remedy in the event of unfair dismissal. Any definition of casual needs to be aware of the new economic context and the changing nature of work. Furthermore, employees who work on a regular or systematic basis are not *workers engaged on a casual basis for a short period*. The problem is not the interpretation of the AIRC but rather the Minister's interpretation.
- 4.5 In addition, it is proposed to increase the filing fee from \$50 to \$100 along with changes to the awarding of costs - broadening the circumstances where costs can be awarded against applicants. Taken together these changes act as a real barrier to a dismissed worker irrespective of the merits of the claim. A worker who has been unfairly dismissed, who is not generating an income, is not sure where his/her next income is coming from, who is not in a position to engage legal counsel is clearly in a disadvantaged position under these proposals. They are heavily weighted against employees. This is further demonstrated by the fact that the applicant's advisors can also have costs awarded against them but nowhere does it apply to employers or their advisors. The imposition of a cost barrier is in breach of the requirement that a terminated employee be entitled to an avenue of appeal regarding the dismissal as is shifting the onus of the burden of proof from the employer to the employee.

5. Conclusion

- 5.1 The VCCL feels that the WRB and the proposed amendments undermine Australia's commitments to its international obligations. This view has already been confirmed by the finding of the ILO Committee of Experts. Australia, by ratifying these conventions has chosen to be bound by them. Australia diminishes its own standing in the international community by choosing arbitrarily that it will only partially comply with these commitments. However, as a civil liberties and human rights organisation, VCCL's main concern is that those in the workforce who have little or no bargaining power are not placed in a more vulnerable position due to the Government's proposed changes.

Liberty Victoria - Victorian Council for Civil Liberties

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