Australian Catholic Commission for Employment Relations
(ACCER)

Submission to the
Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry
into the
Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999

16 September 1999

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1. INTRODUCTION

In May 1999, the Minister for Employment, Workplace Relations and Small Business released a discussion paper, '*The continuing reform of workplace relations. Implementation of More Jobs, Better Pay'*.

'The continuing reform of workplace relations' developed the 1998 election policies of the Federal Government on industrial relations. It also drew upon other Ministerial discussion papers and commissioned research on labour market reform.

On the 30th June 1999, the Minister introduced the *Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999* (the Bill) and its explanatory memorandum into Parliament.

On 11 August 1999, the Bill was referred to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee for examination.

'The continuing reform of workplace relations' stated that the overall approach of the reform program is to *reflect* the principles currently underpinning the Workplace Relations Act 1996 and to ensure their *more widespread application*.

In particular, it indicated four principles as the basis of the reforms. They were:

(a) the workplace relations system should recognise a more direct relationship between employers and employees and be relevant to modern Australia;

(b) a fair go for all;

(c) genuine freedom of association and choice of representation; and

(d) a simplified and more accessible system that puts workers and businesses first, not the system's institutions.

It contended that the detailed implementation of these principles would assist in increasing productivity through the reduction of regulation and an increase in flexibility in the labour market. In turn, these were seen as important for the achievement of sustained economic and employment growth and improved living standards.

Accordingly, the Principal object of the *Workplace Relations Act 1996* (the Act) is to be amended to reflect and reinforce the reform agenda. This would include an emphasis on the *proper* safety net role of awards; a reference to the role of both the Australian Industrial Relations Commission (AIRC) and the Federal Court in *preventing and stopping* unprotected industrial action; and the recognition of a role for *mediation* as an option to be available for dispute resolution.

In essence, the stated intent of the reform of workplace relations is to enable business, especially small business, *to thrive and create employment*.

The structure of this submission is to make comment on both the *Workplace Relations Act 1996* and the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* within the framework of the Bill.

2. CATHOLIC SOCIAL TEACHING

In commenting upon the *Workplace Relations Act 1996* and the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, the Australian Catholic Commission for Employment Relations (ACCER) draws upon Catholic Social Teaching.

Catholic Social Teaching is a set of principles and teachings based on Christian values, which aim to bring about a good and fair society for the benefit of all.

Official texts establishing Catholic Social Teachings include papal documents (known as encyclical letters), documents of the Second Vatican Council (1962-1965) and the statements of local and regional conferences of Catholic Bishops.

Some of the principles, which are most directly relevant to an Australian industrial relations context, are found in ***Industrial Relations - The Guiding Principles*** (the Guiding Principles), which was published by the Bishops' Committee for Industrial Relations in 1993.

These are the principles against which the ACCER assesses the *Workplace Relations Act 1996* and the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.*

The Church believes that these principles are compatible with the objectives of achieving greater productivity, efficiency, flexibility, competitiveness and sustained employment and economic growth. Indeed, it believes that these objectives are of short-term benefit only if they are not underpinned by these principles.

In essence, the Church does not profess to favour one system of industrial relations over another.

A fundamental principle of Catholic Social Teaching is that work affirms, enhances and expresses the human dignity of those that undertake it. Therefore, upholding the dignity of every person should be at the core of any industrial relations system.

The Guiding Principles state that the Catholic Church holds firmly "the right of citizens to work and the primacy of dignity of each human person, which must be recognised in all laws, particularly in laws governing economic strategies and industrial relations."[1]

Within the context of the dignity of each person and their respective needs Catholic Social Teaching promotes several fundamental principles:

The right to work

Work is considered to be the principal means by which people seek personal fulfilment, dignity and make their contribution to the common good. Therefore, people should not be treated like any other resource or commodity in the market place.

Laborem Exercens states that:

[1] Bishops' Committee for Industrial Relations Industrial Relations - The Guiding Principles (1993) p.1

"work bears a particular mark of man and humanity, the mark of a person operating within a community of persons. And this mark decides its interior characteristics; in a sense it constitutes its very nature."[2]

The ACCER supports the development of a direct relationship between employers and employees at the workplace. The relationship between the employer and the employee should be one of mutual respect and dignity, with both parties working together to achieve the objectives of the business and security of employment.

Furthermore, the role and influence of the *indirect employer* is seen as necessary to the development of the employment relationship:

"Apart from governments,… courts, tribunals and other institutions which shape the legal framework and the manner in which the employer/employee relationship is regulated…must also act justly and must recognise freedom of association."[3]

It is recognised that, on occasions, the relationship between the employer and the employee may not be harmonious and that they may not be able to resolve matters of difference. An independent third party may be required to assist the bodies to settle such differences in a fair and just manner.

Therefore, any industrial legislation should not act to the exclusion of third parties in the employment relationship, whether those third parties are unions, employer associations, private mediators, industrial tribunals or courts, or governments.

In some instances it may be necessary for an industrial tribunal to intervene in the employment relationship, in order to protect the social and economic considerations and interests of the community.

It may be also necessary for such a tribunal to intervene in order to provide balance to the bargaining relationship between the two parties, especially where one party is able to use its industrial strength as a means of intimidation against the other.

The right to just wages

"Every family has the right to sufficient income through work. Workers have the right to just minimum wages and to just and safe working conditions."[4]

In this context the employer has a moral obligation to provide a just wage. This is considered to be a wage that takes into account the needs of the individual and their family, and not just that individual's value within the labour market. Catholic Social Teaching does not regard the welfare system to be a means of substitution for a just wage.

"In circumstances of exploitation and coercion, the indirect employer must provide opportunities for the just settlement of disputes. They may also think it wise to set down a code of minimum

[2] John Paul II Laborem Exercens. (St Paul Publications 1981) p.10
[3] Industrial Relations - The Guiding Principles op.cit p.4
[4] Ibid. p. 1

standards of wages and conditions based on respect for the dignity of each human person engaged in the workplace and cognisant of the needs of the worker and his or her dependents."[5]

As such the award system, being a statutory minimum for wages, should be maintained and continued to ensure that wages do not drop to such a level that it becomes impossible to sustain a decent standard of living. However, the setting of a statutory minimum wage by governments or industrial tribunals should not be a substitute for the moral obligation of employers to pay a just wage.

The right to form associations

The right of employers and employees to form trade unions and employer associations is considered to be the proper and legitimate exercise of the right to freedom of association.

The right to freedom of association is considered to be a fundamental freedom of a just society.

Laborem Exercens states that the purpose of trade unions is to defend the vital interests of employees.[6] "They are…*a mouthpiece for the struggle for social justice*, for the just rights of working people in accordance with their individual professions."[7] In this context the organisations must act in the interests of their members and within the guidelines of the law.

Compulsion to join or not to join an industrial organisation is considered to be a breach of the right of individuals to choose whether and how they will exercise their right to freedom of association. In exercising their right to join or not to join an industrial organisation, employees and employers should not be harassed, victimised, intimidated, or otherwise influenced in their decision.

The right to strike

The right to strike or to withdraw one's labour is considered to be a basic right of every individual. It is recognised by Catholic Social Teaching as being legitimate in proper conditions and within just limits:

"In the case of industrial disputes, the right to strike must only be used as a last resort and in proportion to the issue. It is an 'extreme means'**.** "[8]

Therefore, it is considered appropriate to strike only when all other avenues of a proper process have been exhausted and where the withdrawal of labour, or other type of industrial action, is in proportion to the justice of the claim. The taking of sympathy action, or using industrial action for political purposes that are external to the immediate employment relationship, is not considered to be appropriate.

[5] Industrial Relations - The Guiding Principles. op.cit. p.5
[6] Laborem Exercens. op.cit.p. 81.
[7] Ibid. p.83
[8] Industrial Relations - The Guiding Principles. op.cit. p. 3

The right to withdraw one's labour should exist without the threat of personal sanctions or criminal charges being laid against the worker and without the threat, coercion, duress or intimidation of the worker to take, or not to take, the industrial action.

In addition to the right to withdraw one's labour, workers also have "the right to refuse any activity to which they morally object, and to refuse to carry out duties which they genuinely believe to be dangerous to their health or to the safety of themselves, other workers and the community."[9]

However, for workers undertaking essential services, special arrangements should be made in order to guard against the withdrawal of these essential services from the community.

When an issue arises where withdrawal of labour in the essential services is warranted, there is an obligation on the employees to exercise restraint, while there is also a parallel obligation to ensure that grievances are dealt with *speedily and justly* by the direct employer and by the indirect employer. In such a case the indirect employer may be an industrial tribunal, government or court.

The right to form a family

Laborem Exercens states that:

"work constitutes a foundation for the formation of family life, which is a natural right and something that man is called to."[10]

Therefore, it is believed that the two areas of work and family life must support each other in such a way that work becomes a condition to make it possible to found a family. At one level, the family requires the wages which workers generally earn by undertaking work. At another level, family life requires something other than material resources. The time and care that parents are able to give their children is an essential element of a strong family life in which children develop as human beings and learn to take their place in society.

Furthermore, the duties of parenting should not be regarded as the responsibility of women alone. To this extent, it is important that *family-friendly* policies are implemented in the workplace to support family life and to build a healthy society.

The right to adequate rest

Every worker has the right to adequate rest. The employment relationship must take account of this right.

"Respect for human dignity requires that working conditions, including the length of shifts and the length of a week's work, be such as to protect the health and well-being of workers and to recognise their obligations to their family and the wider community."[11]

[9] Industrial Relations - The Guiding Principles. op.cit. p. 3
[10] Laborem Exercens op.cit. p. 41
[11] Industrial Relations - The Guiding Principles op.cit. p. 2.

The recognition of the need for people to rest, to undertake personal development, to engage in cultural activities and religious belief and to take time with their families is also an important requirement in the respect for human dignity and the establishment of humane working conditions.

THE *WORKPLACE RELATIONS LEGISLATION AMENDMENT (MORE JOBS, BETTER PAY) BILL 1999*

The Government intends that the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* will "entrench the benefits of structural reform, further develop a flexible and adaptable labour market, and encourage employment growth."[12]

ACCER Commentary

The ACCER believes, *to a qualified degree*, that the current industrial relations system in Australia is accessible and flexible in its application to workers and employers, while providing some measure of protection or access to remedies for the vulnerable members of the labour market.

Employees may have access to the industrial relations system through:

- the assistance of unions or other advocates, if they so choose;
- the ability to file unfair dismissal claims in the industrial commissions (for a fee);
- the ability to negotiate, either individually or collectively, with the employer at the enterprise; and
- the assistance of employment tribunals if they cannot resolve matters at the workplace.

Employers have access to the industrial relations system through:

- the assistance of employers associations, if they so choose;
- the ability to bargain with employees either collectively or individually;
- the choice of several forms of workplace agreement, or the ability to initiate their own form of agreement if they so choose; and
- the ability to introduce a third party, such as an industrial commission or an independent mediator, to assist in settling grievance procedures with employees.

The ACCER is supportive of any improvement to the current system where this would assist employers and employees to develop a mutually beneficial relationship based on the recognition of each others rights, their obligations to each other and their contribution to the common good of society.

SCHEDULE 1 - Object of the Workplace Relations Act

[12] *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.* Explanatory Memorandum Financial Impact Statement

The current Principal object of the *Workplace Relations Act 1996* (the Act) is to provide *a* framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia.[13]

This Schedule intends to amend and supplement the Principal object by reflecting the amendments that would be made by the various Schedules of the Bill. These would include:

- stipulating that the workplace relations framework provided by the Act should enable employers to choose the jurisdiction most appropriate for the regulation of their particular employment relationship;

- emphasising the role of awards made under the Act as providing a safety net of basic minimum wages and conditions of employment;

- indicating that this safety net does not require every allowable award matter to be included in each award made under the Act;

- indicating that awards should be primarily for the protection of the low paid;

- indicating that awards should not provide for wages and conditions above that safety net;

- recognising that unprotected industrial action is inconsistent with the purposes of the Act;

- indicating that the Commission's powers should only be used as a last resort;

- creating a distinction between compulsory and voluntary conciliation; and

- recognising the role of mediation in dispute resolution.

ACCER Commentary

The ACCER supports the objective of *cooperative* workplace relations, which *promotes the economic prosperity and the welfare* of the community. However, it is believed that any reform of the labour market should embrace the principles of fairness, justice and equity to ensure the dignity of employees and employers.

'The continuing reform of workplace relations' stated that the further reduction in regulation of the labour market should be undertaken in the belief that *reduced regulation contributes to greater productivity and competitiveness* in the market. This was considered to be important for continuing economic and employment growth and increasing the living standards of Australians. It stated also that the reformed industrial relations system in Australia would make the system more accessible, especially for small businesses, with the reforms reducing costs and barriers to the operation of business.[14]

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[13] *Workplace Relations Act 1996 (Cth)* section 3

[14] The continuing reform of workplace relations: Implementation of *More Jobs, Better Pay*. May 1999 Hon P Reith MP. p.1

The belief that reduced regulation contributes to greater productivity and competitiveness would appear to be based on the assumption of an association between high profits and labour market flexibility, which would lead to higher wages. The belief would appear to be based also on the assumption that the most successful company producing the goods and services will attract the best labour and that flexible wage outcomes will "price people into jobs", thereby decreasing unemployment.

It may be argued that this is not a valid assumption, as higher profits may not necessarily flow to wages or to the creation of employment. Employers may prefer to retain the profits or to undertake capital investment, instead of investing in labour.

Further, it would be employees who possess specialised skills or skills that are in high demand within the labour market, who would have greater bargaining power and job security within a deregulated framework of industrial relations.

Given this, the further reduction of regulation in the labour market may:

- amplify existing trends towards the growth in precarious employment, with the employment of people on a casual or contractual basis;

- increase wage dispersion;

- develop a low pay sector among full time workers, resulting in the development of a class of *working poor* employees;

- create a significant fragmentation of workplace arrangements, resulting in employees being required to work more hours per week at times outside of the traditional hours of work. The resultant effect of this may be increased absenteeism and an increased number of workers compensation claims for stress related illnesses.

These trends may have significant social costs, including an increased strain on the immediate family. In particular, those affected may include particular groups of workers, especially women, migrants, the young, and unskilled or semi-skilled workers. Flexibility and labour market efficiency are only of value if they promote human wellbeing and the good of the community. These are instruments and are not absolutes or ends in themselves.

The ACCER believes that "there is a particular need to protect the well being of those in the working community whose educational qualifications and level of skills place them in a vulnerable position."[16]

Therefore, the protection of vulnerable workers must be maintained in any industrial relations system as a social obligation. Such protection should include:

- the setting of fair and just minimum terms and conditions of employment;

- a strong and independent industrial relations tribunal;

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[15] *Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999.* (2nd Reading Speech). 30th June 1999 Hon P Reith MP .

[16] Industrial Relations - The Guiding Principles op.cit. p.5

- the ability to undertake industrial action as a genuine last resort, without fear of criminal prosecution or retribution; and

- the freedom to join or not to join industrial organisations.

The ACCER also has strong reservations about the substitution of enterprise bargaining over the award system. The ACCER believes that an enterprise agreement is one model of determining the wages and conditions of the workplace and improving productivity and efficiency. That is, an enterprise agreement might not be appropriate to every workplace. Furthermore, the ACCER has strong reservations about the adversarial nature of enterprise bargaining, especially when one party may use its industrial strength to intimidate the other party.

It believes that agreements should be underpinned by a *fair and just* safety net of awards that protect the terms and conditions of employment for all workers. It is strongly suggested that the award system or some other *fair and just* system of minimum standards of employment must be maintained to:

- protect vulnerable workers when undertaking bargaining;

- provide fair and just minimum terms and conditions of employment of work for those organisations and employees not seeking to or able to enter into bargaining; and

- be used as a cooperative starting point for parties to develop enterprise agreements.

The ACCER believes that the maintenance of comprehensive awards does not hinder the ability of employers and employees to develop innovative enterprise agreements. The present *no disadvantage test* permits the introduction of other approaches to workplace conditions and practices. This has already been demonstrated in some of the agreements that have been registered before the *simplification* of awards process has been completed.

In terms of industrial negotiation, the reduction of award matters provides one party with an *increased* bargaining position to the disadvantage of the other party. The ACCER does not believe that this is conducive to cooperative industrial relations.

Generally speaking, the language of *bargaining periods* and *protected industrial action* has the potential to engender outcomes that consist of short-term trade-offs and lingering dissatisfaction.

SCHEDULE 2 - Renaming of the Australian Industrial Relations Commission etc and restructuring of the Commission

This Schedule would amend the operation of the Australian Industrial Relations Commission (the AIRC). It proposes to:

- rename the AIRC as the Australian Workplace Relations Commission (the Commission);

- change the existing structure of the Commission by removing the distinction between the offices of Vice President, Senior Deputy President, and Deputy President and renaming all Presidential members (except for the President) 'Vice President';

- enable the appointment of members of the Commission for fixed terms;

- enable the appointment of acting Commissioners;

- require the President of the Commission to develop a training and professional development program for members and require members to participate in the program;

- rename the Australian Industrial Registry as the Australian Workplace Relations Registry;

- allow persons employed in the registries of State industrial tribunals to be appointed as Deputy Workplace Relations Registrars;

- require the Commission and the Registry to have greater regard for the needs of employers, employees and organisations, and to provide user-friendly systems and procedures;

- enable the President to have greater control over the administration of the Registry; and

- require the President's annual report to report on the performance and efficiency of the Commission and the Registry.

ACCER Commentary

The ACCER believes in a strong and independent tribunal to ensure the protection of vulnerable workers and the principles of fairness, equity and justice for every party involved in the employment relationship. This is compatible with the principle of the right to a just wage and the intervention of *the State* to ensure that employer and employee obligations are upheld.
The ACCER believes that the development of a new system or set of principles and objectives may be required to ensure the independence and integrity of the tribunal. There is a perception that the focus of the Commission, when dealing with industrial action, is to effect the resolution of the *actual* industrial dispute and not to primarily determine the objective merits of the issues. That is, it may be seen as more important to cease the conflict than to make a judgement based on the rights and wrongs of the respective parties. This may lead to situations where *inappropriate behaviour* is condoned or is even rewarded through the need *to give a party something* to appease it for settling the industrial action.

The ACCER believes the Commission is and can be an appropriate independent body and as such its role should not be diminished in any way. The role of the Commission should be the maintenance of a fair and just award safety net, the prevention and settlement of all industrial disputes, the certification of individual and collective enterprise agreements and the protection of

[17] *Workplace Relations Act 1996* section 20

vulnerable parties in the employment relationship. It needs to be given the power to carry out these functions.

The ACCER contends that the renaming of the Australian Industrial Relations Commission is significant. It is not a mere cosmetic change. It reflects a vision of a reduced and narrow role for this body. It is a movement away from a concern with the common good of society to the primacy of market-driven workplace arrangements.

If the Commission is to be renamed, then the ACCER suggests that it be titled the *Australian Employment Relations Commission (AERC)*. This would reflect the true social and economic role of the Commission in being of assistance to employers and employees and to the wider community.

The proposed amendments requiring the Commission and the Registry to have greater regard to the needs of employers and employees and to provide user-friendly services are supported by the ACCER. It is important for any service-oriented organisation to be accessible to the needs of its users.

A tribunal should be held accountable for its performance through the use of relevant and reliable reporting standards. Obviously, the detail of the performance criteria, measures and targets will need to be carefully developed so that they are not unrealistic or inappropriate. Importantly, such performance requirements should not affect the integrity and impartiality of the Commission or the Registry.

It is considered to be appropriate for the members of the tribunal to participate in professional development and on going training in order to maintain the full range of skills necessary for the effective performance of the member's duties under the Act. Indeed, the existing Act[17] provides that it is the duty of each member of the Commission to *keep acquainted with industrial affairs and conditions*. The Commission should be a body that ensures its members are given full opportunity to keep abreast of all developments relevant to the conduct of an industrial relations tribunal. However, the language of the drafted amendment contains an unfortunate implication that members of the Commission need to be compelled to undertake the intended development programs.

The proposal to introduce *fixed term* appointments of Commissioners is viewed with concern. Currently, subsection 16 (1) of the Act provides that a member of the Commission holds office until the member resigns, is removed from office or attains the age of 65 years.

The use of fixed term appointments has been proposed as *an option that could be used to meet short-term increases in its workload.*[18] The Bill proposes that a Commissioner *may be appointed for a period of seven years but is eligible for re-appointment*. Unless it is intended that appointments be for a period of *up to* seven years, this appears to be a relatively long period in order to meet a short-term increase in workload.

It has been suggested that the argument against the fixed term appointment of Commissioners is weakened by the fact that Justice O'Connor was appointed for a fixed term under the *Industrial Relations Amendment Act 1994*. However, it is understood that this was at the request of Justice

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[18] Improving access and service delivery: administration of the AIRC and the Registry. Hon P Reith MP (July 1998) p.12

O'Connor. As such, it applied only to the first President of the Commission after the commencement of that amendment Act and it does not apply to the appointment of subsequent Presidents of the Commission. [19]

Renewable fixed term appointments may raise the questions about the fairness of the terms of engagement of Commissioners and about the perception of users about the integrity of appointments to the Commission. A Commissioner on a seven year fixed term contract would have some degree of expectation about the renewal of the appointment at the end of the period. However, it is not clear as to the basis for the reappointment of a Commissioner who has been engaged on a fixed term contract. This may lead to concerns about the criteria for the reappointment of Commissioners.

Fundamentally, the ACCER contends that the argument about the tenure of Commissioners is about the independence of the Commission. It is acknowledged that the Government of the day has the right to appoint the President or a Commissioner, in the event of a vacancy or workload requirements. However, without the establishment of objective selection criteria and process, appointments will remain susceptible to criticisms of political allegiance. The maintenance of the independence and integrity of the Commission is integral to its effective operation.

The amendment to provide for further harmonisation of the industrial relations systems at both the State and Federal levels is supported, as this should reduce duplication of services, allow better use of resources and enable easier access to services.

SCHEDULE 3 - Employment Advocate

This Schedule would extend the definition of the term 'AWA' to include a proposed AWA.

ACCER Commentary

The current provisions of the Act require that the identity of parties to Australian Workplace Agreements (AWAs) be kept confidential. The effect of the amendment would be to extend this prohibition on the disclosure of 'protected information' to include a *proposed* AWA.

The ACCER suggests that the confidentiality requirements of AWAs foster an unnecessary element of suspicion about the content of such agreements. As with Certified agreements, AWAs are to be tested for *no disadvantage* against a designated award. As such, there is no discernible reason for AWAs to be exempted from the public record requirements that apply to the parties for Certified agreements.

[19] Ibid. p.24

SCHEDULE 4 - Conciliation

This Schedule proposes amendments to the Act that:

- compulsory conciliation by the Commission should only be available in relation to matters where arbitration can be used;
- the Commission should be conferred with express powers of voluntary conciliation;
- the basis for voluntary conciliation by the Commission being available in respect of a wider range of matters on payment of a fee; and
- in giving effect to these principles, the amendments propose to distinguish between compulsory conciliation and voluntary conciliation in the Act.

ACCER Commentary

"Australia has a long and proud history of settling industrial disputes and promoting co-operation by its almost unique system of arbitration and conciliation. Over the years this system has helped to defend the rights of workers and promote their well being, while at the same time taking into account the needs and the future of the whole community."[20]

The ACCER supports the use of conciliation and arbitration for the resolution of industrial disputes.

Furthermore, the ACCER believes that the Commission should have power to deal with all aspects and the various types of industrial disputes. It is of particular concern that the limitations on the arbitral powers of the Commission would prevent it from intervening in disputes that may impact on the wider community. In *Rerum Novarum*, Pope Leo XIII stated that:

"strikes affect not only the owners and the workers themselves, but also commerce and the public interest….The best and safest remedy…is to use the authority and influence of the State to forestall and prevent their happening, by removing in good time the causes which give rise to conflict between the owners and workers."[21]

The historical system of industrial relations was established to assist not only the parties at the workplace, but to ensure the protection of community standards and rights and to enforce obligations. While it is true that many grievances or disputes are initially local in nature, they have the capacity to create precedent and injury to other parts of industry and society. Australian society has accepted that industrial relations has a social and economic impact beyond the individual workplace. It has been prepared to support the existence of independent tribunals to assist the parties in meeting their obligations to each other and to society, without the impediment of cost or access. As such, the cost of the system has been seen as a social obligation and benefit. Accordingly, the ACCER does not support the introduction of voluntary conciliation on a fee for service.

[20] Pope John Paul II during his visit to Australia in 1986.
[21] *Rerum Novarum* paragraph 56.

It is acknowledged that the fee required for the use of conciliation services may be wavered if the Commission is satisfied that the payment of the fee would cause hardship to a party. Even so, the introduction of a fee for service for voluntary conciliation is believed to contradict the principle of fairness and the provision of justice, as voluntary conciliation may be available in reality to those parties that can afford it, or that are able to prove financial hardship. The basis of payment may create further conflict, as it will have to be negotiated between the parties. Where the fee for voluntary conciliation is to be shared equally between the parties, the cost of the conciliation may be proportionally greater for employees, especially where a union is not involved in the discussions.

Finally, this proposal would appear to ignore situations where one party seeks the assistance of the Commission but the other party will not agree to voluntary conciliation because of its industrial strength. This scenario could not only apply to employees, but also to employers.

SCHEDULE 5 - Mediation

This Schedule proposes to insert a new part into the Act to provide for the voluntary use of private mediators by parties to an industrial dispute as an alternative or supplement to the processes provided by the Commission.

It is stated that "the use of mediation in industrial disputes reflects the need for employers and employees to take responsibility for their own disputes within the workplace. Mediation by an independent third party will assist resolution of workplace issues when parties are unable to resolve them by discussion and negotiation between themselves."[22]
The Schedule would provide a single, national accreditation scheme for workplace relations mediators.

The Schedule also proposes to establish the office of the Mediation Adviser, who would oversee and facilitate the use of mediation to resolve workplace disputes.

ACCER Commentary

The ACCER supports the *general principle* of mediation. The introduction of an external third party to mediate or conciliate in an industrial dispute may be necessary and be of benefit if the parties cannot achieve an outcome by negotiation or discussion between themselves.

Further, it is acknowledged that mediation is an option *currently* available to employers and employees.

It can be argued that the primary difference between mediation and conciliation is the voluntary nature of mediation, compared to the forced nature of conciliation. That is, both parties voluntarily decide to undertake mediation to resolve the dispute. However, when in conciliation, one party forces the other party into the process. While there are many different models of conciliation and arbitration, the real difference is that a conciliator can present views and make

[22] *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.* Explanatory Memorandum p.39

recommendations, whereas the role of a mediator is to guide the parties in resolving the matter. That is, a true mediator has "no role in advising the parties on the content of the dispute, its resolution, likely settlement, or likelihood of success at the next stage (if any)."[23]

As acknowledged by the recent Ministerial discussion paper on mediation, the line between mediation and conciliation is often blurred.[24] The paper states that mediation "may be regarded and used as one of the tools of conciliation to be applied in particular circumstances depending on the needs of the parties". It is acknowledged in the Ministerial discussion paper that the Commission would at times act as a mediator in the process of conciliation and a number of federal agreements provide for mediation as part of their dispute settlement procedures. Indeed, the Explanatory Memorandum argues that it is appropriate to charge a fee for voluntary conciliation because "these matters could also be resolved by mediation by private sector mediators".[25] Further, "the prescribed model dispute settlement procedure contained in the regulations for Australian Workplace Agreements that do not include such procedures provides for mediation".[26] If this is the case, it must be questioned as to why the Government wishes to or needs to introduce mediation into industrial relations legislation

Given these facts, the ACCER believes that it is not necessary to legislate for mediation as an alternative approach to dispute resolution.

Furthermore, given that the Commission is *not* to be able to provide formal mediation services, there is a real danger that the formalisation of mediation may result in the displacement of the conciliation function of the Commission. Thus the strength and expertise of an independent tribunal to resolve industrial disputes might be diminished into the future.

The ACCER believes that if mediation is to be formally introduced into the industrial relations system, it should be maintained and supported by an industrial tribunal, such as the Commission. This would ensure the neutrality and impartiality of mediators. Further, it would ensure a high degree of quality control in the selection of mediation personnel, standards and process.

It is suggested that the Government is, in effect, reducing the power and influence of the Commission through the introduction of formalised private mediation. The marginalisation of the Commission is opposed. It is important to maintain an independent and strong third party that prevents and settles industrial disputation through the processes of conciliation and arbitration. This is to ensure that fairness, equity and justice are available to both employers and employees. Furthermore, the proposed establishment of a private mediation regulatory body, together with the Office of the Employment Advocate, would appear to create a greater degree of bureaucracy and costs for the parties than those incurred by access to one independent tribunal.

The Schedule does not propose to provide for the *arrangement* of mediation; that is, who may use it, its purposes, its cost or the enforcement of its outcomes. These matters are to be resolved by the parties through the use of contracts or any other arrangements that may be chosen.

It is believed that this may impinge on the fairness, equity and justice of the industrial relations system in Australia. In reality, the use of mediation may be confined to only those parties that

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[23] Improving access and service delivery: administration of the AIRC and the Registry Hon P Reith MP (July 1998) p.19

[24] Approaches to dispute resolution: a role for mediation? Hon P Reith MP (August 1998) p.1

[25] Explanatory Memorandum op.cit. p.24

[26] Ibid. p.2

may be able to afford it, or the outcomes may be unfairly weighted towards the party with the greater industrial bargaining power. On this latter point, a mediator might be more concerned with or be required only to assist in preventing or ceasing the threatened or actual industrial action rather than in examining the merits of the respective positions of their parties.

The Ministerial discussion paper made reference to the *Bell Report*, which noted that:

"Small business operators say that AIRC hearings are held at unsuitable times and locations, its proceedings and documentation are too formal, and legal representation is essential in order to participate in the process". Mediation is claimed to offer "a means of resolving disputes informally, quickly and locally".[27]

This appears to beg the issue. Why cannot the Commission offer services, including mediation, at the workplace? In fact, it does provide services at or close to the workplace, be it in the form of conciliation or arbitration. Alternatively, it may be appropriate in some circumstances that the parties do discuss their problems away from the workplace. Sometimes, distance is needed in order to gain objectivity about the real issues and the true dimension of the differences between the employer and the workforce.

SCHEDULE 6 - Awards

This Schedule proposes amendments to the award system to:

- ensure that awards act as a safety net of basic minimum wages and conditions in respect of appropriate allowable award matters to help address the needs of the low paid;

- ensure that awards do not provide for wages and conditions that are above the safety net; and

- enable employees and employers to choose the most appropriate jurisdiction of regulation for the regulation of their particular employment relationship.

The proposed amendments provide for further simplification of awards, set out new requirements in relation to logs of claims, widen the circumstances in which the Commission is required to cease dealing with an industrial dispute, widen the range of agreements that will displace the operation of a federal award and provide for the acceleration of the process of cancelling obsolete awards.

ACCER Commentary

Among other obligations, the current Principal object of the Act is "to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment" [section 3(d) (ii)].

The proposed amendment in this Schedule would amend the Principal object by substituting:
"to ensure that awards act as a safety net by providing basic minimum wages and conditions of employment in respect of appropriate allowable award matters to help address the needs of the low paid".

[27] Approaches to dispute resolution: a role for mediation? Hon P Reith MP (August 1999) p.4

The ACCER believes that the award system is required to maintain *fair and just* minimum conditions and standards at the workplace for all employees. This means that the award system should not be reduced to a set of *basic* conditions, which would diminish the living standards and working conditions for those employees under the award system.

Accordingly, the primary focus of the award simplification process should be for the removal of ambiguity and arcane language, for the inclusion of relevant community and industrial test case standards, and for the removal of obsolete provisions.

There are issues of justice and practical difficulties associated with the current and proposed simplification of awards. For example, the existing rates of pay in many awards based on both internal and external relativities of skills and competencies. The removal of skill based career paths from the list of allowable matters will create a vacuum for those employers and employees who utilise the award system for the setting of appropriate rates of pay for each employee. Additionally, the removal of skills based career structures from the award has the potential to disrupt the internal relativities between the various classifications in each award. This in turn will lead to grievances about the appropriate rate of pay for work to be performed.
The removal of long service leave from the list of allowable award matters ignores the fact that some awards provide currently for better terms than those that are to be found in State or Territory legislation.

The ACCER offers qualified support for the widening of the range of agreements that displace the operation of federal awards. It believes that the parties must freely choose these arrangements and the terms and conditions of employment must be comprehensive, just and fair. These should be equal to or greater than the terms and conditions provided for in the award safety net.

The proposal contained in the Bill providing for the provision of an information sheet with a log of claim is supported. In fact, this is currently provided in the *Rules* of the Commission.

The ACCER supports the introduction of longer periods of notice in respect of the initial listings of logs of claims. This would enable the employer to seek appropriate and timely advice about its response to the log of claims.

SCHEDULE 7 - Termination of Employment

The proposed amendments to the Termination of Employment provisions of the Act would:

- prohibit employees who come within the scope of section 170CC of the Act from pursuing a remedy for an unfair dismissal under any other law. Currently, employees engaged on probationary periods, short-term casual employment, and fixed term contracts are prohibited from obtaining a remedy under the Act by the Regulations; [28]

- narrow the circumstances in which an application for an extension of time may be accepted. Additionally, extensions of time will not be allowed for the late lodgement of a notice of election to proceed to arbitration for an unfair dismissal;

[28] *Workplace Relations Act 1996 (Cth)* section 170CC

- confer power on the Commission to prevent an applicant for an unfair dismissal remedy proceeding to arbitration unless the Commission certifies that the applicant is likely to succeed;

- require the Commission to take into account the size of the employer's organisation or business and the impact of the unfair dismissal procedures;

- prevent unmeritorious claims, prevent claimants from making two applications in relation to the same termination of employment and prevent forum shopping in relation to termination of employment claims; and

- limit the Commission's jurisdiction to find that a termination of employment is unfair where the employer can establish that the termination was required on operational grounds.

ACCER Commentary

The exclusion of genuine probationary, casual and fixed term employees is accepted currently as a matter of principle, in that such employees do not have an expectation of *ongoing* or further employment. Given this, the amendment to exclude such employees from accessing a State unfair dismissal remedy is consistent with this existing principle.

The proposed changes to the current expression 'termination at the initiative of the employer' would change the test for *constructive dismissal*. The amendment would require a *clear* indication that the employee would have been otherwise dismissed or that there was a subjective intention on the part of the employer to cause the employee to resign. It would require also that an applicant establish a *prima facie* case and that the employer would then have to show that it did not intend for the employee to resign as a result of the employer's conduct. This would appear to be a significant reduction of the scope of the current test. It may be difficult to determine in the first instance that a constructive dismissal has *clearly* occurred. An employer could use discrete forms of pressure or coercion over a period of time to cause an employee to resign without directly stating that this is the intention of the conduct.

It is believed that applications for extension of time should be heard before the merits of the case are examined. However, applicants who are genuinely unaware of their rights until later than the prescribed twenty-one days for lodging an application should not be excluded from access to the unfair dismissal provisions.

The amendment to require Commissioners to issue a Certificate to indicate the likely success of an unfair dismissal application at arbitration is considered to be contrary to the principle of natural justice. Conciliation does not necessarily involve a full hearing of evidence. Significantly, it was intended that this procedure would occur under the current legislation. It has proven to be unworkable because the parties do not come to conciliation to have the case tried but to seek a resolution of the application. A party can attend a conciliation conference and simply maintain that it is not prepared to reach a settlement with the other party. In these circumstances, a Commissioner is not always able to predict the likely outcome if the application proceeds to arbitration.

The ACCER supports the requirement to take into account the size of the employer's business when examining the procedures followed in the termination of an employee. As an example, the

Explanatory Memorandum states that the Commission should take into account the fact that a small business does not have a human resources function. This recognises the reality of different workplaces. It is misguided to expect the same degree of *procedural documentation* from a small business as from a larger enterprise, especially when the former would not have in-house employment advisers. However, the principle of *procedural fairness* should apply, irrespective of the size of the employer. That is, the employee should be advised of the allegations, be given opportunity to fully respond, be given opportunity to seek independent advice and for the employer to exercise due consideration of the responses of the employee. While it is not a part of this Bill, the ACCER does not support the proposed exemption of small business from the unfair dismissal provisions of the Act.

The ACCER believes that *forum shopping* needs to be prevented. That is, an applicant should not be able to make two applications in relations to the same termination of employment.

The amendment to limit the Commission's jurisdiction to find that a termination of employment is unfair in *valid* redundancy cases is not supported. While the employer will be required to establish that the redundancy was genuine, the amendment removes the ability of the Commission to order reinstatement or the payment of compensation to an unfairly dismissed employee. In some instances, the selection of employees for redundancy may be open to legitimate challenge. This can occur where the selection criteria are poorly developed or are not rigorously applied by the employer. It is noted that the amendment would allow for applications based on a discriminatory ground to be brought before the Federal Court.

SCHEDULE 8 - Certified Agreements

The new provisions are intended to make agreement making easier and more widely accessible, to reduce the formality and cost involved in having an agreement certified, and to prevent unwarranted interference by third parties in agreement making. These objectives would be achieved by

- streamlining the process of certifying agreements by providing for applications for certification to be made to the Workplace Relations Registrar, as an alternative to applying to the Australian Workplace Relations Commission;

- providing that, in cases where an application is considered by the Commission, no formal hearing should be held unless it is necessary in the circumstances;

- providing a mechanism for "switching" from the section 170 LJ stream of agreement making (agreements with employee organisations) to the section 170 LK stream (agreements with employees) in circumstances where a valid majority of employees has approved an agreement but the union which purportedly made the agreement (or all such unions) claims it did not validly execute the agreement;

- removing the entitlement of employee organisations to prevent the extension of section 170 LK agreements, while still retaining a role for such organisations where requested by a member;

- removing limitations on agreements which apply to part of a single business, and strengthening the definition of 'single business' (by removing the reference to 'common

enterprise') to prevent multiple-employer agreements being certified as single business agreements; and

- prohibiting the certification of agreements which purport to restrict the use of Australian Workplace Agreements, making void any such provisions in existing agreements, and providing a mechanism for the removal of such clauses.

ACCER Commentary

The ACCER supports the streamlining of the requirements for the certification of agreements, provided that the basis of the agreement making process will be fair and just, and that no party will be disadvantaged by the amendments.

The ACCER does not support the removal of the definition of common enterprise and believes that multi-employer agreements should be allowed.

On the one hand, the removal of the term *common enterprise* may result in large organisations, or organisations that form part of a group, being broken up into smaller parts for the sake of enterprise bargaining and agreement making. This may lead to differences in the wages and conditions of similar groups or categories of employees, which in turn has the potential to create disharmony and dissatisfaction among employees at the one organisation.

While it is recognised that *pattern bargaining* may create difficulties in some industries, it should be noted that some parties might seek to bargain in this manner, as it might be the most appropriate approach for their particular industry or workplace. This is particularly relevant to the not for profit sectors of health, education and welfare where employers have been concerned with the delivery of community services rather than with the creation of profit. As such, they do not engage in *anti-competition practices* by seeking consistency across these industries in the wages and conditions of their employees. Such an approach to employment matters is consistent with their philosophical approach to the delivery of services. Furthermore, in some areas, where the funding arrangements are centralised for all employers, it would appear unnecessary and impractical for individual enterprise bargaining to occur.

The prohibition of Certified Agreement (CA) clauses from restricting the use of an AWA would result in an AWA being in force at the same time as a CA. The ACCER does not support this alteration, as it is believed that these changes would subvert the creation of collective agreements and create disharmony in the workplace.

It is believed that agreements should be scrutinised by an independent third party to ensure that the minimum terms and conditions of employment are met, and that neither party is being unfairly disadvantaged by the agreement. This scrutiny should occur even where the parties have not raised issues of concern or have not identified reductions in the current terms and conditions of employment.

SCHEDULE 9 - Australian Workplace Agreements

Australian Workplace Agreements (AWAs) are to be improved to:

- provide for AWAs to take effect on the date of signing or, if later, the date specified in the AWA as the commencing day, or in the case of a new employee, the date the employment commences;

- permit employees to sign AWAs at any time after receiving a copy of the information statement prepared by the Employment Advocate and an explanation of the effect of the agreement;

- permit an employee party to an AWA that provides for remuneration of $68,000 per year or less to withdraw consent within a cooling-off period;

- remove the requirement relating to offering identical AWAs to comparable employees;

- simplify the approval process;

- amend the provisions dealing with the relationship between AWAs and certified agreements and awards made under subsection 170MX(3) of the Act; and

- remove the limited immunity available in respect of industrial action taken in support of a claim for an AWA.

ACCER Commentary

The removal of the requirement for employers to offer identical AWAs to comparable employees may result in a reduction of the general conditions of employment that prevail in a workplace. It may result also in indirect or hidden discrimination against employees in the workplace. It is believed that flexibility in working hours and performance reward systems are already available without adopting this approach.

The Bill presumes that an AWA will meet all of the statutory tests with the introduction of the provision that AWAs and variation agreements will be able to take effect from the day they are signed or from the date that the employment relationship commences.

This streamlined approach may create problems if the AWA does <u>not</u> pass the No Disadvantage Test, but it has been in use by the parties for a period of time. Problems may exist as to the type of deficiencies that exist in the agreement and as to whether one party has been unfairly or inequitably treated. This may be complicated where the increases to salaries and conditions of employment are based on the introduction of new work practices, competencies and workplace flexibility. (There does not seem to be a similar proposal for Certified Agreements to be able to take effect from the date of signing.)

Employees who earn over $68,000 will not have entitlement to a cooling off period. Such an AWA is assumed to have passed the No Disadvantage Test as a matter of law, as a statutory declaration must be filed.

Upon examination of award *rates of pay*, it was found that only a minority of awards contained an actual rate of pay that exceeded $68,000. It is assumed that the definition of *remuneration* would be that used for the purposes of termination of employment.

In order to provide a just and fair industrial relations system, employees signing an AWA should receive the same protection. That is, the agreement should be subject to the same tests, no matter what the income level of the employee. This amendment would appear to assume that an employee who earns more than $68,000 is better equipped than other employees when bargaining with their employer. This may be the position in many circumstances, but not in every case. A glut of certain skills might exist for employees in some positions.

Concerns are raised as to the power of the Employment Advocate in directing the parties to modify an AWA, and to ensure that the minimum terms and conditions of a designated award are maintained. It might be possible for the employer to withdraw from the process at that stage and to attempt to implement the proposed terms as a common law contract.

The amendment repealing protected industrial action when negotiating an AWA is not supported. While it is acknowledged that it might be an unusual occurrence for an individual employee to take protected industrial action, nevertheless this could arise in some circumstances. This provision also creates an inconsistency in the legislation as protected industrial action is allowed during the bargaining of a certified agreement.

SCHEDULE 10 - Relevant and designated awards

This Schedule would provide for the Commission and the Employment Advocate to designate awards on their own initiative where no application has been made for an award to be designated for the purposes of the no-disadvantage test.

ACCER Commentary

The ACCER supports the inclusion of this provision; however, it believes that the Commission and the Employment Advocate, for the purposes of applying the no disadvantage test, should verify that the most appropriate award has been designated in all applications. It might not be feasible in every case to expect that a small business or its employees would be able to determine the appropriate award for the No Disadvantage Test.

SCHEDULE 11 - Industrial Action

This Schedule would:

- strengthen the Commission's powers to stop or prevent unprotected industrial action and lockouts, including by empowering the Commission to make orders preventing industrial action and lockouts where there has been such action in the recent past and there is a reasonable possibility of further unprotected industrial action or unprotected lockout;

- introduce a requirement for the suspension and termination of bargaining periods in defined circumstances to allow for a cooling off period, in which issues may be settled without recourse to industrial action, and refine the Commission's powers to suspend or terminate a bargaining period on other grounds;

- make changes to how and when protected industrial action may be taken;
- increase access to State and Territory courts for remedies in respect of unprotected industrial action; and
- improve the operation of the 'strike pay' provisions.

ACCER Commentary

The level of industrial disputation in Australia is at a historical low. In 1998, "the number of working days lost per thousand employees was the lowest since at least 1913".[29] The level of industrial disputation would appear to have been declining significantly from the mid-1980s onwards.

While it is appreciated that the current industrial disputation record of the construction and coal sectors is of concern to the Government, the solution should not involve the reduction of the rights of employees. In fact, it is stated that:

"Much of the industrial action taken in these industries in 1998, for example, was of a political nature relating to coal prices and the award simplification process. The legislation provides employers in these industries the scope to respond to these circumstances."[30]

The rationale presented for further reform to ensure that illegitimate industrial action does not occur is that some employers "have been concerned that short, sudden stoppages are difficult to respond to under the current provisions."[31] It is not certain that the proposed amendment to require the Commission to hear an application for an order to stop unprotected industrial action within 48 hours of it being made will meet the requirements of these employers. In 1997/1998, the proportion of industrial disputes for a duration of up to and including two days (48 hours) was 79.2% of all industrial disputes.[32]

Furthermore, the amendment would result in the Commission being required to issue orders to stop the industrial action *unless* it falls within the definition of *protected* industrial action. If this has not been determined within the 48-hour period, it would be required to issue an interim order to stop or to prevent the taking of the industrial action. The time constraints could compromise the procedural requirements for determining whether the industrial action is *protected* or *unprotected* industrial. This may result in the improper resolution of disputes, as the determination of orders would be without regard to the circumstances that have led to the taking of industrial action.

Currently, the Federal Court exercises the power of enforcing section 127 orders. It is intended to amend the Act so that State Supreme Courts would also have the power to enforce section 127 orders. This would appear to be inconsistent with the stated intention to prevent *forum shopping* in other parts of the Bill.

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[29] Industrial disputes in Australia - experience under the Workplace Relations Act 1996 Hon P Reith MP (April 1999) p.4
[30] Ibid. p.10
[31] Ibid. p.11
[32] Ibid. p.5

The amendment to allow the Commission to issue orders to stop industrial action on the basis of a past history of industrial action is not grounded in due process and natural justice.
The ACCER offers qualified support for the amendment that would prohibit the taking of industrial action during the life of a certified agreement, including Enterprise Flexibility Agreements, made prior to the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996.* Any prohibition should apply only to those matters contained within the agreement. This is supported on the basis that such agreements were certified on the basis of genuine consent and on the understanding that the terms of the certified agreement were to stand for a specified period of time. This is an important issue about the *integrity* of any agreement to be made between employers and employees. Each should honour the terms of any agreement made and should only be released from such an agreement if the other party consents or the agreement has expired or it is subject to renegotiation during the life of the agreement.

The amendment to remove the right of the Commission to deal with boycotts is not supported by the ACCER. It is believed that boycott disputes are industrial in their genesis and the Commission is considered to be the appropriate body to handle these disputes.

The amendments to restrict access to industrial action in pursuit of common outcomes across a number of workplaces require further clarification with respect to multi-employer agreements. In the not for profit sector where common outcomes are generally sought by the parties for certification as multi-employer agreements, such a restriction would create a denial of the basic right of employees to take industrial action as a genuine last resort. In any event, as previously stated in the commentary on Schedule 8 *Certified agreements*, the parties should not be constrained in their choice of bargaining mechanisms or their scope.

The ACCER supports the prohibition on the payment of employees undertaking industrial action. However, there are concerns about the application of the prohibition of payment for the whole of each working day in which any industrial action, however limited, occurs. It is contended that such a system would create confusion as industrial action may not be explicit and may not be taken by all workers in the same manner. It would be grossly unfair to "dock" the pay of workers who might perform their full range of duties for the majority of the normal working day but who refuse to perform a certain task for a remainder of the required hours of work.

The increase in the notification period for industrial action is seen as reasonable, as the 3-day time frame places constraints on the employer or employees to respond properly to the seriousness of the threatened industrial action. The extension of time allows the parties to reconsider their position in relation to the matters for negotiation and not just to the pending dispute. The current time frame places time constraints on the union or employer to fully notify all employees of the ceasing of any action, especially in a shift work environment.

It is agreed that, in certain circumstances, the parties to a dispute may require a "cooling off" period, in order to reconsider their respective positions. Therefore, it is believed that the Commission should have the power to order a cooling off period.

Furthermore, the current grounds for the Commission to suspend a bargaining period appear to be too limited in their current application and do not take into account the potential damage to the business operations of the immediate workplace. There is little to be gained from enterprise bargaining if the process itself significantly affects the long-term viability of the business and the employment security of employees. On the other hand, employees may need the intervention of

the Commission to suspend a bargaining period where the employer has taken significant action against the workforce.

The support of the ACCER for a more considered or measured approach to the taking of industrial action is based on the principle that the *right to strike* is to be used as a last resort and it is within just limits. The existence of an independent tribunal, which is able to offer a process of conciliation and arbitration to employers and employees, is therefore critical in ensuring that industrial action is found to be unnecessary or is used as a true last resort. If this is not to be the case, then the amendments would appear to be impediments to the taking of industrial action by employees. Rather than advocating a just and fair industrial relations system, some of the amendments appear to encourage an adversarial, legalistic and punitive approach to the conduct of industrial relations. The use of the legal system will not necessarily resolve the underlying reasons for the industrial action. The courts have demonstrated a great reluctance to determine industrial issues and they have usually applied the law in a strict legal sense.

SCHEDULE 12 - Secret Ballots for Protected Action

This Schedule proposes to introduce new preconditions for the taking or organising of protected industrial action by employees and organisations of employees. In order to be protected action under the provisions of the Act, it is proposed that industrial action must be proceeded by a secret ballot process overseen by the Commission.

ACCER Commentary

Under the current Act, the Commission has the power to issue a secret ballot where it may be helpful in preventing or resolving an industrial dispute.[33] Members of unions may request the Commission to order a ballot be held in relation to proposed industrial action. This provision has rarely been invoked.

The ACCER supports a democratic process at the workplace to determine whether or not to take industrial action. This should be free from coercion and duress.

Secret ballots are <u>one</u> example of the democratic process that may be used in a workplace. However, it may be argued that the use of secret ballots prior to the taking of industrial action is unnecessary if there are other means of democratic expression, which have been freely chosen by the workforce.

Further, it is arguable that a ballot does necessarily demonstrate genuine support for industrial action, due to other discrete forms of intimidation that may occur in the workplace. Indeed, the Bill recognises this fact itself by emphasising that the conduct of secret ballots is to be *fair and democratic*. In reality, a secret ballot may not be any more democratic than a meeting held at the workplace to determine the suitability of industrial action.

It is believed that the provision requiring a secret ballot *before* industrial action is not consistent, given that a secret ballot is not required to *lift* or *cease* the industrial action. If the logic for secret ballots is to be accepted at its face value, it is valid for there to be a concern about the

[33] *Workplace Relations Act 1996* section 135(2A)

process for the making of a decision to *lift* or *cease* industrial action. It is possible that intimidation might occur at a later point in a dispute in order to *continue* the industrial action.

The ACCER believes that the amendments are designed to reduce the right of workers to take genuine industrial action. There appears to be little justification for the amendments.

SCHEDULE 13 - Entry and inspection of premises by organisations

This Schedule proposes to introduce new requirements for entry to premises by union officials and employees.

The proposed amendments build on the current permit system, by introducing a requirement that, as a prerequisite to exercising right of entry to a workplace, a union have a written invitation from an employee who is a member of that organisation.

Provision is also made for the variation and revocation of permits where there is evidence of breach or misconduct with respect to the exercise of powers granted by such permits.

ACCER Commentary

In principle, unions should have the right of entry into any workplace as long as suitable notice and a clear explanation for entering the workplace has been given to the organisation. Union entry into the workplace should be based on mutual respect between the union and the organisation. It should not be necessary for an employee to write to the union, or to be a member of the union, for a union official to enter the workplace.

Current provisions of the Act allow permit holders to enter workplaces to investigate possible breaches of the Act or relevant awards or agreements. It is believed that this provision should remain. However, the employer should be notified of the detail of the suspected breach before the union enters the workplace. To ensure that the right of entry provisions are not abused, it is reasonable that there exists a right of entry procedure or process, with the revocation of a permit being allowed if the procedures are constantly not followed. The duration of the revocation of the permit should fit the dimension of the breach.

The employer should not hinder unions from legitimately entering the premises. On the other hand union entry into the workplace should not negatively effect, interrupt or disturb the operations of the business.

In effect, this amendment may inhibit unions from recruiting new members at some workplaces, especially small business or new worksites.

SCHEDULE 14 - Freedom of association

This Schedule proposes amendments to give the freedom of association provisions in the Act a wider coverage by:

- extending the existing provisions to cover a broader range of conduct and prohibited reasons;

- providing for the removal from certified agreements and awards of provisions which encourage or discourage union membership, or which indicate support for unionism or non-unionism;

- prohibiting the establishment or maintenance of union closed shops at workplaces and businesses; and

- orders dealing with contravention of the freedom of association provisions may be made to the State Supreme Courts and the Federal Court.

ACCER Commentary

In principle, the ACCER does not support any steps that contradict the existing freedom of association principles, or any legislation that may prevent the legitimate activities of industrial organisations. Legislation should not create an environment in which membership of an industrial organisation is actively encouraged or discouraged.

The ACCER supports the removal of preference or encouragement clauses from certified agreements and awards. Compulsion or coercion to join or not to join an industrial organisation is considered to be in breach of the right to freedom of association. It is the free choice of the organisation or employee as to whether they join or do not join an industrial organisation.

The proposed definition of a closed shop is not supported by the ACCER. The Bill proposes to define closed shops as being a workplace where 60% or more of the employees, doing the same kind of work or belonging to the same class of employees, are members of the same union and that union membership is an expressed or implied condition of employment or engagement. In reality, this may well be the free choice of employees to join or not to join the union. As it is understood traditionally, a closed shop arrangement would not permit *any* employment or engagement of persons who did not become members of the union. Therefore, if there was less than 100% union membership among those who are employed or engaged in a particular workplace or business, then it would appear difficult to contend that there is a closed shop in existence. Certainly, the presence of 60% union membership would indicate that union membership is not being implemented as an expressed or implied condition of employment or engagement.

SCHEDULE 15 - Matters referred by Victoria

This Schedule proposes changes to the provisions referred by Victoria to the power of the Commonwealth. These provisions relate to the clarification and compliance of Schedule 1A of the Act, which details minimum conditions of employment.

The Schedule proposes also to insert a model stand down provision for Victorian employees who are not employed under Federal awards or agreements. This provision would be used to stand down employee in certain circumstances where such a provision is not contained in the contract of employment.

This provision would allow an employee's wage to be reduced because of strikes, breakdowns of machinery or any other stoppage of work for which the employer cannot be held reasonably responsible.

ACCER Commentary

The ACCER does not believe that these statutory minimum conditions are sufficient to provide workers with fair and just standards of employment. Therefore, it is believed that such statutory provisions should be supplemented by a safety net of comprehensive terms and conditions of employment based on the previous state awards.

In the context of the present legislation, the ACCER supports the amendments to clarify that annual leave and sick leave are cumulative. Further, the ACCER supports the amendments to enable inspectors from the Department of Employment, Workplace Relations and Small Business to enter workplaces to ensure compliance with the minimum conditions of employment contained in the Act or with contracts of employment.

The stand-down amendment is considered to alter the contract of employment in a manner that may breach the contractual obligation of the employer to provide work if the employee is ready and available to work. While such a provision is commonplace in many awards, it does not mean that it necessarily should apply to all employees. As such, this form of intervention in the terms of employment of these employees would appear to be inconsistent with the amendment to remove the power of the Commission to examine the employment terms of independent contractors. This provision is not supported by the ACCER.

SCHEDULE 16 - Independent contractors

The Bill proposes to repeal sections 127A - 127 C, which now confer jurisdiction on the Federal Court of Australia to review contracts for services made by independent contractors.

ACCER Commentary

The ACCER believes that independent contractors should have access to an appropriate jurisdiction for the review of the fairness of contracts for services.

4. SUMMARY: ACCER KEY POINTS

In this submission to the Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into the *Workplace Relations Legislation Amendment (Better Jobs Better Pay) Bill 1999*, the ACCER:

- supports the development of a direct relationship between employers and employees at the workplace. The relationship between the employer and the employee should be one of mutual respect and dignity, with both parties working together to achieve the objectives of the business and security of employment for employees.

- believes that the role and influence of the *indirect employer* is necessary to the development of the employment relationship.

- supports any improvement to the current system where this would assist employers and employees to develop a mutually beneficial relationship based on the recognition of each others rights, their obligations to each other and their contribution to the common good of society.

- supports the objective of *cooperative* workplace relations, which *promotes the economic prosperity and the welfare* of the community. However, it is believed that any reform of the labour market should embrace the principles of fairness, justice and equity to ensure the dignity of employees and employers.

- believes that any industrial legislation should not act to the exclusion of third parties from the employment relationship, whether those third parties are unions, employer associations, private mediators, industrial tribunals or courts, or governments.

- believes that there is a particular need to protect the well being of those in the working community whose gender, nationality, age, educational qualifications and level of skills place them in a vulnerable position.

- believes in a strong and independent tribunal to ensure the protection of vulnerable workers and the principles of fairness, equity and justice for every party involved in the employment relationship.

- contends that the renaming of the Australian Industrial Relations Commission reflects a vision of a reduced and narrow role for this body. It is a movement away from a concern with the common good of society to the primacy of market-driven workplace arrangements.

- suggests that the confidentiality requirements of AWAs foster an unnecessary element of suspicion about the content of such agreements.

- fully supports the power of the AIRC in dealing with all aspects and types of industrial disputes.

- does not support the introduction of voluntary conciliation on a fee for service.

- believes that it is not necessary to legislate for mediation as an alternative approach to dispute resolution.

- supports the award system to maintain fair and just minimum conditions and standards at the workplace.

- believes that the amendment to require Commissioners to issue a Certificate to indicate the likely success of an unfair dismissal application at arbitration is contrary to the principle of natural justice.

- supports the requirement to take into account the size of the employer's business when examining the procedures followed in the termination of an employee.

- does not support the amendment to limit the Commission's jurisdiction to find that a termination of employment is unfair in *valid* redundancy cases.

- supports the streamlining of the requirements for the certification of agreements, provided that the basis of the agreement making process will be fair and just, and that no party will be disadvantaged by the amendments.

- does not support the removal of the definition of common enterprise and believes that multi-employer agreements should be allowed.

- believes that employees signing an AWA should receive the same protection, no matter what the income level of the employee.

- does not support the amendment repealing protected industrial action when negotiating an AWA.

- believes that the Commission and the Employment Advocate, for the purposes of applying the no disadvantage test, should verify that the most appropriate award has been designated in <u>all</u> applications.

- believes that the use of a past history of industrial action is not grounded in due process and natural justice.

- does not support the amendment to require the Commission to hear an application for an order to stop industrial action within 48 hours of it being made, or to issue an interim order to stop or to prevent the taking of the industrial action.

- offers qualified support for the amendment that would prohibit the taking of industrial action during the life of a certified agreement, including Enterprise Flexibility Agreements, made prior to the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996.*

- does not support the amendment to remove the right of the Commission to deal with boycotts.

- is concerned about the application of the prohibition of payment for the whole of each working day in which any industrial action, however limited, occurs.

- believes the existence of an independent tribunal, which is able to offer a process of conciliation and arbitration to employers and employees in all types of disputes, is critical in ensuring that industrial action is found to be unnecessary or is used as a true last resort.

- agrees that the current grounds for the Commission to suspend a bargaining period appear to be too limited in their current application and do not take into account the potential damage to the business operations of the immediate workplace.

- believes that the introduction of compulsory secret ballots are designed to reduce the right of workers to take genuine industrial action.

- believes unions should have the right of entry into any workplace as long as suitable notice and a clear explanation for entering the workplace has been given to the organisation.

- supports the removal of preference or encouragement clauses from certified agreements and awards.

- does not support the proposed definition of a closed shop.

- supports the amendments to Schedule 1A to clarify that annual leave and sick leave are cumulative.

- does not support the stand-down amendment for Victorian employees.

- believes that independent contractors should have access to an appropriate jurisdiction for the review of the fairness of contracts for services.