AUSTRALIAN CATHOLIC COMMISSION FOR EMPLOYMENT RELATIONS

Submission to the
Senate Employment, Workplace Relations, Small Business and Education Legislation Committee
Inquiry into the
Workplace Relations Amendment Bill 2000

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CATHOLIC SOCIAL TEACHING

In commenting upon the *Workplace Relations Amendment Bill 2000* (the Bill), 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 Teaching include papal documents (known as encyclical letters), documents of the Second Vatican Council (1962 - 1965) and statements of local, regional and international Bishops.

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

The Church does not profess to favour one industrial system over another; however, it believes that it is the dignity of the person that 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 the individual, Catholic Social Teaching promotes several fundamental rights relating to the employment relationship.

The employment relationship

Work is considered to be one of 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 commodity within the market place.

Pope John Paul II has stated that:

"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 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.

In addition, the role and influence of the *indirect employer* is perceived to be necessary to the development of the employment relationship:

[1] Bishops' Committee for Industrial Affairs. *Industrial Relations - The Guiding Principles* (1993) page 1.
[2] John Paul II *Laborem Exercens* (1981) St. Paul Publications page 10

"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 must be recognised that at certain times, and in certain situations, either the employer or the employee may exploit or coerce the other party. At such times an independent third party may provide opportunities for the just settlement of disputes.

In some instances, it may be necessary for an independent 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 towards to other party.

It may also 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 wider community.

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.

"Let it be granted … that worker and employer may enter freely into agreements and, in particular, concerning the amount of the wage; yet there is always underlying such agreements an element of natural justice, and one greater and more ancient than the free consent of contracting parties, namely, that the wage shall not be less than enough to support a worker who is thrifty and upright."[5]

The role of trade unions in representing workers in the negotiation of such agreements has been recognised over the last one hundred years by Catholic Social Teaching in various Papal encyclicals.

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'." [6]

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

[3] *Laborem Exercens.* op cit page 4
[4] ibid. p. 1
[5] Pope Leo XIII *Rerum Novarum* (1891) St. Paul Publications paragraph 63.
[6] *Industrial Relations - The Guiding Principles.* op.cit. page 3

purposes that are external to the immediate employment relationship, is not considered to be appropriate.

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.

WORKPLACE RELATIONS AMENDMENT BILL 2000

The Bill will amend the *Workplace Relations Act 1996* to:

- define pattern bargaining (that is, bargaining where unions seek common terms and conditions across a number of employers, regardless of the circumstances of the individual businesses concerned), and provide defined consequences where pattern bargaining occurs (in particular, the termination of the relevant bargaining period, so that industrial action is no longer protected);

- enhance the effectiveness of the power of the Australian Industrial Relations Commission to issue orders that unlawful industrial action cease or not occur;

- provide access to cooling off periods in respect of protected industrial action; and

- protect rights to pursue common law remedies in response to unlawful industrial action in Supreme Courts without additional litigation in the form of anti-suit injunctions being sought from or issued by the Federal Court.[7]

The Minister for Employment, Workplace Relations and Small Business has stated that the fundamental thrust of the Bill is designed to ensure that "*agreements between employers and employees at the workplace level have primacy over the intervention of third parties.*"[8] In terms of an analysis of the Bill, it would appear to introduce two independent and distinct changes to the current Act. One concerns the issue of *pattern bargaining* while the other concerns the taking of *protected industrial action*. Furthermore, the Bill appears to be skewed towards preventing unions and employees from undertaking collective bargaining on an industry or multi-employer basis. It does not appear to place the same prohibition on employers undertaking pattern bargaining.

Enterprise Bargaining

In *Centesimus Annus*, Pope John Paul II has made the following statements about the interrelationship between government, the economy, employers and workers:

"The State…has the task of safeguarding the prerequisites of a free economy, which presumes a certain equality between the parties, such that one party would not be so powerful as practically to reduce the other to subservience.

… society and the State must ensure wage levels adequate for the maintenance of the worker and his family, including a certain amount for savings."[9]

The ACCER accepts that, ideally, any industrial relations system should enable employers and employees to jointly agree to the method by which they regulate the wages and conditions of employment. Such choice is promoted in the principal objects of the *Workplace Relations Act 1996*,

[7] Hon P Reith MP *Explanatory Memorandum* *Workplace Relations Amendment Bill 2000* page1
[8] Hon. P Reith MP *Workplace Relations Amendment Bill 2000 Second Reading Speech* (2000).
[9] Pope John Paul II *Centesimus Annus* (1991) St. Paul Publications pp.32 –33.

which states that employers and employees should be able to "*choose the most appropriate form of agreement for their particular circumstance…*".[10]

In other parliamentary and tribunal submissions, the ACCER has raised concerns about the present system of enterprise bargaining.[11] While the ACCER agrees that enterprise bargaining can be used as an effective means of establishing the terms and conditions of employment at *particular* workplaces, it is not believed to be necessarily suitable for all. Furthermore, enterprise agreements can, but do not necessarily, address such matters as productivity and flexibility. In fact they may not represent any more than a confirmation of new pay rates and conditions without any attendant regard for matters of productivity, innovation or the needs of the enterprise. Pertinently, there is not a requirement under the Act for productivity or flexibility to be achieved through enterprise agreements.

Church sponsored and community agencies have a charitable origin, altruistic charter or church affiliation. They do not exist to make a profit. As such, they have only limited capacities to cross subsidise and minimal cash flows to cover shortfalls or decreases in funding.

Employers receiving government funding or subsidies do not automatically receive additional funding for variations in rates of pay for employees. In fact, they are sometimes directed to negotiate within predetermined limits on the salary outcomes of any enterprise agreement. Thus, if government grants and subsidies are not adjusted to meet the impact of periodic changes in rates of pay, such increases are invariably financed through redundancies or reduction in working hours or services.

While enterprise bargaining does not necessarily hold the same attraction for not-for-profit employers, this does not mean that they are not taking responsibility for their own industrial relations. It may be unnecessarily time consuming and costly for similar enterprises, undertaking similar work, to establish separate enterprise agreements, especially where the organisation seeks to bargain on a industry wide level to ensure equity in its outcomes to its employees and in its delivery of services. For example, this is found in parts of education, where a large number of schools may act in cooperation with each other and not in competition, as they are not equipped to bargain individually and they seek to achieve mutual outcomes.

Therefore, it is contended that employment agreements should not be legislatively confined to the individual or enterprise level.

Pattern Bargaining

The definition of pattern bargaining proposed in the Bill would mean "*a course of conduct or bargaining, or the making of claims, being a campaign, or part of a campaign, that involves seeking common outcomes in respect of wages and/or other employment entitlements.*"[12] Further, the Australian Industrial Relations Commission (AIRC) must be satisfied that two elements exist:

- the conduct, bargaining, or making of claims is part of a campaign that extends beyond a single business; and

[10] *Workplace Relations Act 1996* section 3(c)
[11] ACCER Submission to the Senate Inquiry into the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* and the ACCER Submission to the 1999/2000 AIRC Safety Net Review Case.
[12] *Workplace Relations Act 1996* section 10.

- the conduct, bargaining, or making of claims is contrary to the objective of encouraging agreements to be genuinely negotiated between parties at the workplace of enterprise level.

Such provisions would appear to be contrary to the principal object of the Act, which enables *"employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for in this Act."*[13] The amendments introduced by the Bill appear to restrict the ability of employers and employees to choose the most appropriate form of agreement for their particular circumstances.

The ACCER supports employers and employees *freely* forming any type of agreement, whether at an individual, enterprise, industry or national level.

Currently, certified agreements within an industry may be very similar. It is understood that some employers and employees agree to pay the "industry average" in regards to wages, and so determine similar agreements to each other. While there does not appear to be any detailed analysis of agreements within each industry as to their *pattern*, it may be unlikely that many organisations differentiate themselves in a significant manner, with respect to wages and conditions, from their immediate competitors. This may be due to issues concerning market rates of pay and the retention of employees, as much as any concerted effort by unions to develop industry agreements.

Furthermore, it is not only unions who may engage in *pattern bargaining*, as seems to be implied by the Explanatory Memorandum, but employers also. The thrust of the amendments are directed at trade unions, which are characterised as having little or no regard for the interests of their members or the workplaces in which they are employed.[14]

However, there may be other dynamics influencing the workplace. The Second Reading Speech of the Minister for Employment, Workplace Relations and Small Business cites the recent Budget Papers:

"The strongest productivity growth in the private sector has also been in those industries dominated by enterprise bargaining – mining, finance and insurance and manufacturing."[15]

This is an interesting assertion, as these industries would have relatively high levels of trade union membership. It would be instructive to understand whether there is a similarity in enterprise agreements within these industries or if single businesses have been able to develop agreements based on their own needs. Additionally, it would be informative to know if the employees and their unions have presented essentially the same set of claims at each individual workplace.

Furthermore, it would not be unrealistic for a corporate employer to seek common outcomes for its various subsidiary business enterprises so as to prevent inequity through differing industrial conditions, to encourage loyalty, to foster mobility and to avoid administrative complexity. It may be feasible for an employer in a particular industry to seek to pay the industry rate of pay to its employees and to obtain productivity improvements through a cooperative approach to change and improvement during the normal course of business.

Additionally, in the not-for profit sector, where funding is received from government or where funding is derived from community donations, enterprises may not receive the funding with which to bargain

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

[14] Hon. P Reith MP Speaking Notes *Ongoing Reform In The New Workplace*, Address to the Industrial Relations Society of NSW 19 May 2000.

[15] Budget Strategy and Outlook 2000-01 Budget Paper No.1.

for increases over and above industry standards or averages. Further, government funding arrangements are often based on industry averages. This is particularly pertinent to welfare and education. For sectors such as independent education, the ability to produce outcomes other than that of the government system is limited by the system of funding, in that it is based on a national average of employment costs. In general, funding is received from government by a central agency and distributed to individual employers on a needs basis to ensure equity of opportunity for students. Further, in some instances, the bargaining parameters of community welfare service organisations may be predetermined by the relevant government funding body, which in turn may create a pattern of bargaining in that sector.

The Bill proposes to insert section 170MP(1A), which effectively disallows *an organisation of employees* from genuinely bargaining if such bargaining is undertaken at an industry level. This seems to particularly discriminate against *employee* organisations. In some respects, this appears to be a skewed understanding of the realities of industrial practice. Even where an association of employees may lodge a claim, it may be the case that the employer will point to industry precedent and practice as a defence or counter- position to what it perceives to be an excessive claim. It is interesting to note that the Australian Centre for Industrial Relations Research and Training (ACIRRT) is recently reported as claiming that employers, rather than unions, have led the way in pattern bargaining.[16] Further, it is not necessarily the case that all employers have supported the amendments to prohibit *pattern bargaining*.[17]

In some industries, such as education, it may be appropriate for *central* employer and employee organisations to bargain on behalf of their members. In fact, it may be inappropriate in terms of the funding arrangements for bargaining to be undertaken at the enterprise or individual school level. Accordingly, these employers and employees have had access to *multiple-business agreements*.

Indeed, the Bill is unclear as to the relationship and consequences, if any, between the amendments to prohibit *pattern bargaining* and the current section 170LC, as it applies to *multiple-business agreements.* The definition of *pattern bargaining* appears to be so broad as to encompass any form of *multi-business agreement*, which have been used legitimately by some employers and their employees. The definition is in the negative, in that the AIRC is to be *"satisfied that the entitlements being sought are of such a nature that they are not capable of being pursued at the single business level."*[18] There is not one mention of *multiple-business agreements* in the Second Reading Speech by the Minister, in the Explanatory Memorandum or in the Bill itself. However, in the *Explanatory Memorandum*, it is stated that the *"mere convenience or desire of a party to negotiate issues not of that character [single business level] on a multi-employer or industry wide basis would not suffice."*[19] While this may mean that *multi-business agreements* will continue, it is difficult to gauge the intended impact of the legislation on such agreements. The only practical example given to clarify what would constitute a legitimate claim across more than one business concerns the implementation of Full Bench national standards or Test Case decisions of the AIRC.

[16] John Buchanan *ACIRRT Wages 2000 Outlook Conference.* As reported in *Workplace Express* 19 May 2000.
[17] Senate Employment, Workplace Relations, Small Business and Education Legislation Committee *Report of the Senate Inquiry into the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* page.249
[18] *Workplace Relations Amendment Bill 2000* section 170 LG 2 (b).
[19] *Explanatory Memorandum* op.cit. papragraph 15 under "Item 6 After section 170LG".

Protected Industrial Action

As in the previous submission made to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into the *Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999*, the ACCER does not support the introduction of the requirement for orders stopping industrial action within 48 hours. It is believed that time constraints could compromise the procedural fairness when determining whether the industrial action is *protected* or *unprotected.* While the section does make allowances for circumstances in which the AIRC cannot determine the application for an order under section 127, it *requires* the AIRC to make an interim order to stop industrial action. In which case the outcome may be the same, as if an order had been made - the industrial action has been stopped. In 1997/98, the proportion of industrial disputes for a duration of up to and including two days (48 hours) was 79.2% of all industrial disputes.[20] In circumstances where the industrial action is consequently found to be *protected* the industrial power of the striking party may have been significantly reduced by the interim order.

Additionally, the time constraints placed on the AIRC to make either orders, or interim orders, 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.

Section 170MWA of the Bill outlines the power of the AIRC to suspend a bargaining period to allow for a "cooling off period". 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. While there may be a genuine need for the negotiating parties to "cool off", such a provision should not be used as a means of negating the right of employees to take industrial action as a genuine last resort. Therefore, the ACCER would support such a provision only when the application for a "cooling off period" was part of a considered process of dispute resolution.

There appears to be a developing paradox in the conduct of enterprise bargaining where the professed "legal" right to take industrial action is being eroded by legislation. Unfortunately, enterprise bargaining is constructed on a foundation that allows the parties to resort to adversarial means, with a restricted role for third party assistance in the resolution of disputes. This can engender outcomes that are inimical to the best interests of employers and employees. However, the ACCER does not advocate the diminution of the right of employees to seek to negotiate on a collective basis, either at the workplace level or the industry level. Rather, the ACCER contends that if the AIRC was given a proper role to assist the parties in the negotiation of enterprise agreements and it possessed effective disputes settling powers, there would be little need for the parties to resort to industrial action or legal remedies. The AIRC would thereby provide the mechanism for the protection of the rights of either employers or employees who are being coerced into an agreement not of their choice.

[20] Hon. P Reith. *Industrial disputes in Australia - experience under the Workplace Relations Act 1996* April 1999. page 4.

CONCLUSION

The ACCER contends that the *Workplace Relations Amendments Bill 2000* does not uphold the right of employee or employers to freely choose the type of industrial agreement that would regulate their workplace. In effect, it seeks to rectify what it perceives to be one abuse of the focus upon workplace bargaining - *pattern bargaining* - by restricting this right. Further, it seeks to remove the right of employees to take protected industrial action in pursuit of such bargaining, which is considered to be a denial of the basic right of employees to take industrial action as a genuine last resort.

In addition, the amendment of section 127 to require the AIRC to issue orders stopping industrial action within 48 hours of an application being made under that section would compromise procedural fairness and reduce the discretionary power of the tribunal.

The introduction of "cooling off periods" is offered qualified support, but only if it does not compromise the right of workers to take industrial action as a genuine last resort. Again, the ACCER calls into question the adversarial inclination of enterprise bargaining.

At another level, the amendments require further clarification with respect to *multi-business agreements*. As such, the Bill should not be passed until the issue of *multi-business agreements* is clarified and, if necessary, amended. In the not for profit sector, where common outcomes are generally sought by the parties for certification as *multi-business agreements*, the amendments would create uncertainty about the ability of the parties to commence negotiations for a *multi-business agreement*, while the prohibition on the taking of industrial action would constitute a denial of the basic right of employees to take industrial action as a genuine last resort.

In any event, employers and employees should not be constrained in their choice of agreement mechanisms or their scope. Nor should they be coerced into an agreement not of their choice. In this respect, the role of the Australian Industrial Relations Commission should be enhanced but not to the extent that its dispute settling powers are reduced or are not able to be utilised.