Senate Employment, Workplace Relations and Education Legislation Committee Inquiry

Workplace Relations Amendment (Genuine Bargaining) Bill 2002

Workplace Relations Amendment (Fair Dismissal) Bill 2002

Workplace Relations Amendment (Fair Termination) Bill 2002

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

12 April 2002

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The ACCER is an organisation established by the Australian Catholic Bishops' Conference and supported by the Australian Conference of Leaders of Religious Institutes. Its Terms of Reference are to provide the Conference and Catholic Church organisations with advice, research, and advocacy on matters affecting employment in the Australian workplace, within the context of Catholic Social Teaching.

The Catholic Church in Australia is an employer engaged in diocesan and parish administration, pastoral care, education health and aged care and community services sectors.

As well as being an employer, the Catholic Church is an advocate for balance and justice in the employment relationship between the employer and the employee.

The ACCER bases its submission on the principles espoused by Catholic Social Teaching. A fundamental principle of Catholic Social Teaching is that work affirms, enhances and expresses the dignity of those that undertake it. The dignity of the individual should therefore be at the core of the employment relationship.

Within the context of the dignity of each individual, Catholic Social Teaching promotes several elementary principles. Notably, it promotes work as being one of the principal means by which people seek personal fulfilment, dignity and make their contribution to the common good. In this respect, people should not be treated like any other resource or commodity in the market place. Any system of employment relations should therefore promote and encourage close co-operation and mutual trust between employers and employees.[1]

Further, the employment relationship may require the intervention of the *indirect* employer (the *State*). Pope John Paul II identifies that "the indirect employer substantially determines one or other facet of the labour relationship, thus conditioning the conduct of the direct employer when the latter determines in concrete terms the actual work contract and labour relations."[2]

[1] Bishops' Committee for Industrial Affairs, *Industrial Relations - The Guiding Principles,* August 1993, page 5.
[2] Pope John Paul II, *Laborem Exercens; On Human Work,* St Paul Publications, Homebush, 1981, para. 17.

Further, Pope John Paul II declares that the role of the *indirect* employer is not to absolve the employer from his own responsibility to employees, but rather to draw attention to the whole network of influences that condition the employer's conduct. In this respect, the *indirect* employer may establish policy to guide the conduct of employers.

Pope John Paul II states that a policy is correct "when the objective rights of the worker are fully respected."[3] Additionally, the *indirect* employer may consider it worthwhile to establish a code of minimum terms and conditions of employment based on the respect and dignity for the individual engaged at a workplace, in order to minimise exploitation and coercion of employees.[4]

Such principles of Catholic Social Teaching have application to each of the Bills before the Committee.

The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* seeks to insert into the *Workplace Relations Act 1996* (the Act) a number of factors that the Australian Industrial Relations Commission (the AIRC) will need to consider when terminating a bargaining period on the grounds that one party is not genuinely trying to reach an agreement. "Pattern bargaining" is one of the factors proposed as indicating that a party is not genuinely trying to negotiate an agreement.

While the ACCER supports the principle of genuine bargaining, the presumption that "pattern bargaining" cannot be genuine is not accepted. In some industries it may be appropriate for employee and employer representatives to bargain on behalf of their members at an industry level.

Further, the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* seeks to amend the Act to provide "cooling off" periods. The ACCER supports such an amendment as a means of enabling the parties to reconsider their respective positions during negotiations, as long as the AIRC is able to also utilise effective disputes settling powers, such as arbitration.

[3] Pope John Paul II, *Laborem Exercens; On Human Work*, St Paul Publications, Homebush, 1981, para. 17.
[4] Bishops' Committee for Industrial Affairs, *Industrial Relations - The Guiding Principles*, August 1993, page 5.

Finally, the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* proposes to require the AIRC to inform the negotiating parties that they may voluntarily submit matters for mediation or conciliation. The ACCER expresses concern over the practical operation of this provision.

The *Workplace Relations Amendment (Fair Dismissal) Bill 2002* seeks to amend the Act to exempt small businesses (employing less than 20 employees) from the unfair dismissal provisions in the Act and by requiring the AIRC to order that an unfair dismissal application made by an employee engaged by a small business is not valid if it relates to a small business. The ACCER does not support the proposed amendment, as it would create an injustice and an imbalance in the employment relationship.

The *Workplace Relations Amendment (Fair Termination) Bill 2002* proposes to insert new provisions into the Act to exclude certain classes of employees from the operation of the termination of employment provisions.

In principle, the exclusion of certain classes of employee from the termination of employment provisions of the Act is accepted by the ACCER if such employees do not have a true expectation of *ongoing* or *further* employment. In this respect, a stipulated period of time should not be the main threshold for determining these matters.

The *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002* seeks to amend the Act to require a secret ballot as a precondition for the taking or organising of protected industrial action.

The ACCER supports secret ballots but as only one example of a democratic process for determining whether or not to take industrial action. The requirement of the Bill to conduct a secret ballot before any protection industrial action may be undertaken appears to be inconsistent in principle, given that a secret ballot is not to be required to lift or cease the industrial action. Further, the process for undertaking the secret ballot would appear to impede the ability of employees to take industrial action rather than protect their democratic rights.

The *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002* seeks to prohibit the inclusion in a certified agreement of any provision requiring non-union members

to pay a trade union for bargaining services. In this respect, the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002* seeks to amend the certified agreement and freedom of association provisions of the Act.

The ACCER contends that the charging of a fee for the provision of bargaining services does not necessarily contravene the principles of freedom of association. In this respect, the ACCER does not oppose a trade union or employer association from charging a fee for services related to the bargaining of a certified agreement as long as such a fee is agreed to in advance. However, the ACCER does not support the charging of a bargaining fee without the direct consent and authorisation of the non-union member.

WORKPLACE RELATIONS AMENDMENT (GENUINE BARGAINING) BILL 2002

The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* (the Bill) seeks to amend the *Workplace Relations Act 1996* (the Act) by inserting matters which the Australian Industrial Relations Commission (the AIRC) will be required to consider when determining whether a negotiating party is genuinely trying to reach an agreement with other parties for the purposes of section 170MW of the Act.

These matters include:

- whether the conduct of a party to negotiations could be described as "pattern bargaining"; or
- whether the conduct of a party includes refusing to meet or confer with the other negotiating parties; or
- whether the conduct of a party to the negotiations indicates a refusal to consider or respond to proposals made by the other negotiating parties.

ACCER Commentary

The Explanatory Memorandum of the Bill states that, "no single factor is determinative of the issue and it is open to the Commission to take other factors into account."[5]

This appears to be at variance with the effect of the Bill, wherein it is stated that the existence of *one* or more of the matters mentioned above would tend to indicate that the first party is not genuinely trying to reach an agreement with the other negotiating parties.[6]

[5] *Workplace Relations Amendment (Genuine Bargaining) Bill 2002*, Explanatory Memorandum, page 6.
[6] *Workplace Relations Amendment (Genuine Bargaining) Bill 2002 section 170MW(2A)*

The ACCER considers *genuine* bargaining to occur where the parties have genuinely or sincerely presented or are presenting their respective positions to each other and are prepared to properly consider the point of view of the each party. In this context, the ACCER would agree that a refusal to meet or confer or to respond to proposals at the initial instance is not a genuine attempt to bargain or respond to a request for bargaining. In this respect, the ACCER concurs with the thrust of proposed sections 170MW(2)(d) and (e) which identify the refusal of a party to meet or confer with the other negotiating parties, or the refusal of a party to consider or respond to proposals made by other negotiating parties as being indications of whether genuine bargaining is taking place. However, the matter becomes problematic because it may be genuine for an employer or employees to state that, for many different reasons, they do not wish to engage in bargaining. This matter then becomes entangled with the emphasis on enterprise bargaining as the major determinant of wages and conditions and the concept of "good faith" bargaining, which does not exist as an explicit provision in the Act. How are these to be reconciled in an environment where there may be totally different perspectives and priorities?

Further, it would appear negotiations must occur at the workplace or enterprise level in order for the parties to be engaged in genuine bargaining. However, the principal objects of the Act state that employers and employees should be able to "*choose the most appropriate form of agreement for their particular circumstance…*".[7] Consequently, the Bill, by effectively making enterprise bargaining the only form of genuine bargaining, would narrow the ability of employers and employees to choose the "most appropriate form of agreement".

On other occasions, the ACCER has raised concerns about the emphasis on enterprise bargaining to address such matters as conditions of employment, productivity and flexibility.[8] There is not a requirement under the Act for productivity or flexibility to be achieved through enterprise agreements. Accordingly, enterprise bargaining may not be more than a confirmation of new pay rates and conditions – even at a workplace level - without any attendant regard for matters of productivity, innovation or the needs of the enterprise.

[7] *Workplace Relations Act 1996* section 3(c)
[8] 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.

Furthermore, the ACCER contends that bargaining at the industry level does not necessarily result in "non-genuine" bargaining. The catalyst for the initial Bill regarding "pattern bargaining" – the *Workplace Relations Amendment Bill 2000* - was the foreshadowed "Campaign 2000", which focused on an industry log of claims in Victoria in the Metal, Engineering and Manufacturing Industries. Indeed, the issue of pattern bargaining at industry level was examined in detail in the hearings related to "Campaign 2000". In *Australian Industry Group and Automotive, Foods, Metals, Engineering, Printing and Kindred Industries and others*, the Commission noted that:

Industry-wide demands are often made by unions and sometimes pursued at national level. It is not that character of the demand that may cause offence to the policy embodied in section 170MP and paragraphs 170MW(20(a) and (b). I see no reason why such claims may not be advanced in a way that involves a genuine effort to have each employer concede the benefit sought….But the advancement of such claims in a way that denies individual negotiating parties opportunity to concede, or to modify by agreement, cannot satisfy the test established by the Act.[9]

The Commission went on to conclude that the "party initiating bargaining about such common claims must be genuinely trying to reach agreement with the other negotiating party."

Pertinently, the Commission stated that:

For reasons that relate to the character of different sets of employer negotiating parties, it is undesirable in my view to elevate construction of these provisions [paragraphs 170MW(2)(a) and (b)] *into a policy dogma that compels a lopsided application of the associated powers. The overall object of the Act to providing a framework for co-operative workplace relations which supports fair and effective agreement making should not be taken out of play.*[10]

"Campaign 2000" dissolved as a threat to the future of enterprise bargaining as the AIRC terminated the bargaining periods, using the framework and provisions of the existing legislation.

[9] Australian Industry Group and Automotive, Foods, Metals, Engineering, Printing and Kindred Industries and others (C Nos. 36641 and 23106 of 2000) page 14 of Decision.
[10] Ibid. pp14-15.

In reality, certified agreements within a particular industry may be very similar, although negotiated individually at the workplace level. This may arise through some employers and employees agreeing to pay and receive an industry standard or the "going rate" in regards to wages and conditions of employment. Even where a union lodges a claim, it can 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 from its employees and their representatives.

Concerns regarding the recruitment and retention of employees may inhibit employers from deviating too far from the industry standard. Additionally, 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 through an enterprise agreement but to obtain productivity improvements through a cooperative approach to change and improvement outside of the industrial bargaining process. Therefore, it is not only unions who may engage in *pattern bargaining* but employers also, including where they seek to introduce industry "best practice" arrangements.

In the not for profit sector, where funding is dependent upon either government or private donations or benefactors, organisations may not have the financial ability to bargain for increases above award rates of pay, let alone over and above industry standards or averages. Indeed, government funding arrangements have been often based on industry standards, wherein an award rate of pay is used as the factor point for program funding.

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.

In some instances, the relevant government funding body may predetermine the bargaining parameters of community welfare service organisations by specifying the wage outcome parameters. In this sense, pattern bargaining may be encouraged, albeit unintentionally, by the funding arrangements of federal or state government departments.

Moreover, in some industries, such as education, it may be most appropriate for the *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 workplace level. Accordingly, these employers and employees must have access to *multiple-business agreements*, whether these are considered to be pattern bargaining agreements or not. While the ACCER assumes that *multi-business agreements* will continue, it is difficult to gauge the intended impact of the Bill on such 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.*

As a matter of principle, the ACCER supports employers and employees *freely* forming any type of agreement, whether at an individual, enterprise, industry or national level.

Cooling Off Periods

The Bill proposes to empower the AIRC to order "cooling off" periods in respect of protected industrial action to facilitate the resolution of a dispute. "Cooling off" periods could be initiated upon application of a negotiating party where protected action is being taken and it is considered appropriate by the AIRC, having regard to the benefits to the negotiating parties, the duration of the action, whether suspending the bargaining period would be contrary to public interest and any other matters considered by the AIRC to be relevant, given the circumstances.[11]

ACCER Commentary

The ACCER supports the clarification of the powers of the AIRC to order "cooling-off' periods. It might be beneficial in certain circumstances for the parties to "cool off" or withdraw from negotiations for a specified period of time, in order to reconsider their respective position in the dispute.

[11] *Workplace Relations Amendment (Genuine Bargaining) Bill 2002*, section 170MWB.

In this context, the ACCER notes that the AIRC has existing powers under section 170MW to suspend or terminate bargaining periods. In particular, section 170MW(2)(b) enables the AIRC to suspend or terminate a bargaining period where industrial action is being threatened or taken by a party it considers "is not genuinely trying to reach an agreement with the other negotiating parties".

In this respect, the existing section 170MW(1) may be enhanced by explicitly including "cooling off periods" as an alternative to *suspension* or *termination* of the bargaining period.

It is contended, however, that such periods be utilised truly as "cooling off" periods. That is, it is not used as a means of interrupting the industrial action of one party as a tactical manoeuvre by the other party. In this respect, the Bill is deficient if the current grounds for arbitration remain restricted to the endangering of life, personal safety, health or welfare of the population or the cause significant damage to the Australian economy or part of it.[12] Unless the "cooling off" period can be followed at some stage by arbitration processes, it is difficult to see what a "cooling off" period will achieve in the ultimate resolution of the dispute. Interestingly, the Commission in terminating the respective bargaining periods in *Australian Industry Group and Automotive, Foods, Metals, Engineering, Printing and Kindred Industries and others*, was not persuaded to allow a 'cooling-off period' without termination of the bargaining period. Rather, it took the view that *the order will allow an effective and unequivocal cooling-off period, free of bargaining periods …That will not preclude negotiation or agreement*[13]

As a matter of principle, the ACCER supports the use of "cooling-off periods" in so far as this only occurs where a party is not genuinely trying to reach agreement with the other but is using its industrial strength to coerce the other party into submission; it is used as an enhancement of the powers of the Commission to ensure that the legitimate interests of the party in a weaker industrial position are protected; and that the AIRC can exercise effectively its powers of dispute settling, especially arbitration, as appropriate to the circumstances at hand.

[12] *Workplace Relations Act 1996 section 170 MW (3).*
[13] Australian Industry Group and Automotive, Foods, Metals, Engineering, Printing and Kindred Industries and others (C Nos. 36641 and 23106 of 2000). p.20

Mediation

The Bill proposes to require the AIRC, if it has made an order to suspend or to extend the suspension of a bargaining period to allow for a cooling-off period, to inform the negotiating parties that they may voluntarily submit the matters at issue to an agreed mediator for the purposes of mediation or to the AIRC for the purposes of conciliation.

ACCER Commentary

The ACCER is concerned as to the practical operation of this provision. The different models and attributes ascribed to both conciliation and mediation can blur or confuse the differences between the two processes. This was acknowledged in the Ministerial discussion paper on Mediation in 1998.[14]

In this respect, the difference between mediation and conciliation appears to be the involvement of the AIRC or a private mediator. In its submission 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 pointed to this distinction.[15]

The parties currently have the ability to involve a third party, whether that is a private mediator, facilitator or conciliator in the negotiations for a certified agreement. Therefore, the continuing or further role of the AIRC is unclear if the outcome of private mediation is not accepted by either one of the parties. Again, there does not appear to be a mechanism to resolve that possible deadlock.

As a matter of principle, the ACCER supports the use of mediation. The introduction of an external third party to mediate in an industrial dispute may be necessary and be of benefit if the parties cannot achieve an outcome by negotiation or discussion between themselves. However, the ACCER does not support private mediation as a **formal** or **structural** alternative to the role

[14] The Honourable Peter Reith, *Approaches to dispute resolution: a role for mediation?* AGPS, Canberra, 1998, page 1.
[15] See page 17 - 19.

of the AIRC. This does not preclude the existing use of private mediation. The ACCER would argue 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 AIRC. 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.

WORKPLACE RELATIONS AMENDMENT (FAIR DISMISSAL) BILL 2002

The *Workplace Relations Amendment (Fair Dismissal) Bill 2002* (the Bill) seeks to amend the *Workplace Relations Act 1996* (the Act) to exempt small businesses (employing less than 20 employees) from the unfair dismissal provisions in the Act and by requiring the AIRC to order that an unfair dismissal application made by an employee engaged by a small business is not valid if it relates to a small business.

The proposal would not affect existing employees and would not exclude new employees from making claims for unlawful dismissal. Trainees and apprentices will be unaffected.

ACCER Commentary

In deciding whether a termination of employment was harsh, unjust or unreasonable the AIRC must have regard to, among other matters:

- the degree to which the size of the employers undertaking, establishment or service would likely to impact on the procedures followed in effecting the termination;[16] and
- the degree to which the absence of dedicated human resource management specialists or expertise would be likely to impact on the procedures followed in effecting the termination.[17]

It is to be noted that the provisions requiring the AIRC to consider the size of the business undertaking and the degree to which the absence of dedicated human resource management specialists or expertise affected the termination of employment commenced on 30 August 2001.

[16] *Workplace Relations Act 1996* (Cth) s. 170CG(3)(da).
[17] *Workplace Relations Act 1996* (Cth) s. 170CG(3)(db).

In its submission to the Senate Inquiry into the *Workplace Relations Amendment (Termination of Employment) Bill 2000*, the ACCER supported the proposed amendments to consider the size of the business undertaking and the absence of dedicated human resource specialists. In this regard, the ACCER contended that it was unrealistic to expect the same degree of *procedural documentation* from a small business as from a larger enterprise, especially when the small business might not have in-house employment advisors. However, the ACCER maintained that the principle of *procedural fairness* should apply to all organisations, irrespective of the size of the employer.

The current provisions of the Act require an employer to institute *procedural fairness* in that the employee involved is to be informed of the reason for their termination of employment and is to be given a reasonable opportunity to respond to any allegations. Such requirements are consistent with maintaining the dignity of the individual and accepting that human beings are not functional entities to be dispensed with at the first sign of dissatisfaction with their work.

In a recent matter in the AIRC, Grainger C., in considering the provisions relating to the consideration of the size of the business, stated that:

No employer should ever consider that the provisions of s. 170CG(3)(da) could be used as a shield behind which to hide when they had engaged in conduct which is improper, belligerent and bullying. Commonsense courtesies of conduct ought to exist in any workplace, whatever the size of the employer's undertaking, establishment or service…[18]

In the same decision, Grainger C commented on the provision relating to the degree to which the absence of dedicated human resource management specialists or expertise would impact on the procedures followed in effecting a termination of employment, that:

once again … no employer should ever consider that the provisions of s. 170CG(3)(db) could be used as a shield behind which to hide when they had engaged in conduct which is improper, belligerent and bullying. Whether a company employs dedicated human resource management specialists or not, any person who employs others to work for their undertaking, establishment or service should extend to those employees an appropriate degree of courtesy even when

[18] *Sykes v Heatly Pty Ltd t/as Heatly Sports*, Grainger C, PR914149, 06.02.02 at 22.

implementing something as difficult and unpleasant as the termination of a person's employment.[19]

The ACCER contends that the question of whether a termination of employment was "fair" or "unfair" is - and should continue to be - dependent on the individual facts and circumstances of each case and not to turn the size of the business into a threshold point for assessing the validity of an aplication.

Laborem Exercens states "work bears a particular mark of man and humanity, the mark of a person operating within a community of persons. And this decides its interior characteristics; in a sense it constitutes its very nature"[20] In this regard people should not be treated like any other resource or commodity in the market.

The Minister, in the Second Reading Speech for the Bill, stated that "dismissal laws have an important role in providing a safety net for employees but they need to be made fairer for both employers and employee and should be improved where they still prevent jobs being created."[21]

However, the exemption of small business from the termination of employment provisions will not provide a safety net for those employees engaged by a small business. The fairness and balance of the exemption is also questioned. How is it fair to remove an employee's protection from the harsh, unjust or unreasonable termination of employment because they work for an employer of a certain size? Where is the balance or equity that allows employers who engage less than 20 employees to be exempt from the termination of employment provisions whereas those who employ 20 or more people are not?

Moreover, the Government appears to be proposing this exemption on the basis that it would increase employment opportunities in the small business sector.[22] Indeed, the Minister claims that "if one in twenty small business employers in Australia took on an additional employee because of a changed legislative framework for unfair dismissal, then an extra 53,000 jobs

[19] *Sykes v Heatly Pty Ltd t/as Heatly Sports*, Grainger C, PR914149, 06.02.02 at 21.
[20] Pope John Paul II, *Laborem Exercens; On human work*, St Paul Publications, Homebush, 1981, page 10.
[21] Second Reading Speech *Workplace Relations Amendment (Fair Dismissal) Bill 2002*
[22] Second Reading Speech *Workplace Relations Amendment (Fair Dismissal) Bill 2002.*

would result."[23] There appears, however, little empirical evidence to support such a claim. Indeed, as noted in Senator Murray's Minority Report on the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, in the period "that Queensland small business were exempt from state unfair dismissal provisions, no extra jobs were created."[24] Moreover, it would not be unreasonable for employees to question the balance of this approach where their current right to protection from unfair dismissal is to be exchanged for the creation of jobs. If employees are to be asked to give up their rights on the basis of job creation, then there needs to be a corresponding guarantee that jobs will be created by such small businesses and that when they are created, that these forsaken rights will be restored at some time in the future.

It is true that proceedings for Termination of Employment comprise a significant proportion of the applications made to the AIRC. The Annual Report of the AIRC 2000/01 indicated that there were 8,109 applications for relief in respect of termination of employment made under section 170CE of the Act for that year. However, the data does not identify the number of applications made by small business.

While surveys have been carried out of small business in respect to identifying the main impediments to the engagement of employees, with varying degrees of opinion about whether unfair dismissal laws are an obstacle, the real reasons may be found in other factors. There appears to be confusion about the ability of employers to terminate employees, either during a probationary period or later in the employment relationship. More important factors may be a lack of skilled, motivated and reliable applicants seeking employment with small businesses, which may be perceived by some applicants as not offering career paths, professional development or adequate conditions of employment.

It is possible that the exemption of small business from the unfair dismissal provisions of the Act could exacerbate the difficulty in attracting employees to work for small business. The insecurity or instability of employment brought about by the exemption may act, in effect, to deter skilled, motivated and reliable people from working for small business.

[23] Second Reading Speech into the *Workplace Relations Amendment (Fair Dismissal) Bill 2002.*
[24] Senator A.Murray, Minority Report *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, November 1999, page 396.

In addition, the provisions requiring the AIRC to consider the size of a business undertaking and the effect that the absence of specialist human resource management specialists may have on termination of employment processes commenced only as recently as August 2001. The AIRC has had limited opportunity to consider the practical effect of these amendments, with very few decisions handed down about these provisions since their introduction.[25] It, therefore, may be premature to suggest that the current provisions still need to be improved so that they are "made fairer for both employers and employees."[26]

The ACCER contends that a balance has already been achieved in that both employers and employees are already to be provided with a "fair go all round", and with the recent special consideration given to small business employers. All businesses, no matter what their size, are required to treat employees with courtesy and respect. This is consistent with the fundamental principle of Catholic Social Teaching, which requires a foundation of mutual respect and dignity in the employment relationship between employer and employee.

In this regard, the exemption of small business from the unfair termination of employment provisions of the Act is not supported by the ACCER, as it would create injustice and an imbalance in the employment relationship between employers and employees.

[25] Search of decisions contained on the AIRC website as at 04.04.02
[26] Second Reading Speech into the *Workplace Relations Amendment (Fair Dismissal) Bill 2002.*

WORKPLACE RELATIONS AMENDMENT (FAIR TERMINATION) BILL 2002

The *Workplace Relations Amendment (Fair Termination) Bill 2002* (the Bill) seeks to amend the *Workplace Relations Act 1996* (the Act) to:

- insert new provisions into the Act excluding certain classes of employees from the operation of the termination of employment provisions and repeal existing regulations that exclude certain classes of employees from the operation of the termination of employment provisions;
- change some of the current provisions to exclude certain classes of employees from the operation of the termination of employment provisions, in particular to restore provisions excluding casual employees engaged for a short period ('short-term casual employees');
- validate the operation of regulations, purporting to exclude short-term casual employees from the termination provisions, that were declared invalid by the Federal Court. The validating provisions would operate from the time that the invalid regulations were purportedly made, to the time when the new provisions to exclude short-term casual employees from the termination of employment provisions commence; and
- insert new provisions into the Act requiring a fee to be paid when termination of employment applications are lodged, and providing for this fee to be indexed annually in line with movements in the Consumer Price Index.

The Bill identifies that a casual employee is taken to be engaged for a short period, unless:

- the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and

- the employee, has or but for a decision by the employer to terminate the employee's employment, would have had, a reasonable expectation of continuing employment by the employer.

ACCER Commentary

In principle, the exclusion of people engaged in different classes of employment from the termination of employment provisions of the Act is accepted, if such employees do not have a true expectation of *ongoing* or *further* employment. This may include employees engaged under a contract for service and casual employees but would depend on the actual facts of the arrangement of such employment.

The ACCER would like to note its concerns about the misclassification of employees as either "long term" or "short term" casual employees. The practice of engaging casual employees over a long period of time can contradict the commonly accepted understanding of what is meant to be a "true" casual employee; that is, an employee engaged on a *short tem, irregular* and *uncertain basis.* In this respect, two classes of casual employees have come to be recognised. In the decision of the Full Bench in *Ryde-Eastwood Leagues Club Ltd v Taylor* 1995[27] it was stated:

> *It is apparent that two classes of employee colloquially described as 'casual' can readily be identified in the organisation of industrial relationships. The first class refers to those employees who are truly casual in the sense that there is no continuing relationship between the employer and employee. The second class is where there is a continuing relationship which amounts to an ongoing or continuing contract of employment.*

It is acknowledged that there has been, and will continue to be, difficulty in determining whether employment is "regular and systematic" or if there is a "true expectation" of "ongoing" or "further" employment. Such terms are open to interpretation. However, there is a sufficiently developed body of law to assist the parties when determining the jurisdiction of

[27] AILR ¶ 5-010

the AIRC in such matters, including as applicable the decision of Moore J in *Reed v. Blue Line Cruises Limited (1996)* 73 IR 420 and the Full Bench of the Australian Industrial Relations Commission in *Graham v Bluesuits Pty Ltd t/as Toonagabbie Hotel.*

In respect to the proposed amendment to require a person lodging a termination of employment application to pay a fee, the ACCER would note that employees are currently required to pay a fifty dollar ($50) filing fee to lodge an application for relief in respect of termination of employment. The ACCER maintains that the charging of any fee should be kept to a minimum, so as to enable accessibility to the protection of the Act. In a very real sense, it cannot be assumed that, after an employee is terminated, he or she is able to immediately obtain further employment or has sufficient savings to meet even their everyday expenses in the absence of employed income.

WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTED ACTION) BILL 2002

The *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002* (the Bill) proposes to amend the Act by establishing preconditions for the taking or organising of protected industrial action by employees and their representative, or employers. In particular, the Bill proposes to require protected industrial action to be preceded by a secret ballot process as a means of approving the taking of industrial action.

Where a union makes an application for a secret ballot, only union members whose employment would be covered by the proposed amendment would be entitled to vote in the ballot. Where employees seeking a non-union agreement apply for a secret ballot, all employees would be entitled to vote in the ballot. (In any case, employees covered by Australian Workplace Agreement whereby the nominal expiry date has not passed, would not be entitled to vote.)

Further, only those eligible to vote could take industrial action.

The Bill proposes also to introduce procedural requirements relating to ballots. In particular, industrial action would only be protected if at least 40% of eligible voters participate in the ballot and if more than 50% of the votes cast are in favour of the proposed industrial action taking place.

ACCER Commentary

Currently, under the Act, the AIRC has the power to order a secret ballot where it is considered to be helpful in preventing or resolving an industrial dispute.[28] Further, section 136 enables

[28] *Workplace Relations Act 1996* (Cth) section 135.

union members to request the ARIC to order a secret ballot in relation to proposed industrial action.

The requirement of the Bill to conduct a secret ballot before any protection industrial action may be undertaken appears to be inconsistent in principle and practice, given that a secret ballot is not to be required to lift or cease the industrial action.

In essence, the proposed amendments outlined by the Bill would reduce the right of workers to take genuine industrial action.

The Catholic Church teaches that the right to strike or to withdraw one's labour is a basic right of every employee:

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'.[29]

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 of coercion, duress or intimidation of the worker to take or not to take industrial action. The Church considers it to be appropriate to strike only when all other avenues of a proper process have been exhausted or where the withdrawal of labour, or any other type of industrial action, is in proportion to the justice of the claim.

As a matter of principle, the ACCER supports a democratic process at the workplace to determine whether or not to take industrial action. However, secret ballots are only <u>one</u> example of a democratic process that may be used at the workplace.

The procedural requirement proposed by the Bill, that fifty per cent of votes cast must be in favour of the taking of industrial action, if at least forty per cent of eligible voters participate in the ballot, may result in only a small number of employees in a secret ballot determining whether to take industrial action. This is compounded further where non-unionists are present in a workplace but are not entitled to vote because the union is the applicant for the secret

[29] Pope John Paul II, *Laborem Exercens,* Homebush, St Paul's Publications, 1981, page 10.

ballot. In its submission to the Senate Inquiry into the *Workplace Relations Amendment (More Jobs, Better Pay) Bill* 1999, the Australian Council of Trade Unions presented an example of two ways in which the requirement for a fifty per cent voter turnout can have opposite outcomes:

Two examples should be considered, both involving workplaces of 100 employees. In the first, 49 employees in the ballot vote, all in favour of strike action. In the second, 50 employees vote, 26 of then in favour of strike action. In the fist example, strike action would not be authorised, while in the second it would, even though it would appear that there was substantially more support for the strike in the first example.[30]

These two examples could be applied with minor adjustment to the proposed provisions of the Bill for a forty per cent eligible voter participation. In addition, a third example might be considered. Once again, it could involve a workplace of one hundred employees, seventy of whom are union members and thirty are not. The union applies for a secret ballot. Only union members may vote. Thirty union members vote in a secret ballot, and of those votes cast, sixteen are in favour of industrial action. Under the proposed provisions of the Bill, strike action would be authorised, even though only a small number of employees affected by the agreement actually determined the outcome.

The Minister, in the Second Reading Speech for the Bill, stated that:

a secret ballot is a fair, effective and simple process for determining whether a group of employees at a workplace want to take industrial action.[31]

Further, the Minister concluded that "secret ballots will not impede access to lawful protected action, but will simply provide a mechanism to ensure that protected action is a genuine choice of the employees involved."[32]

[30] Taken from: Senate Employment Workplace Rleations, Small Business and Education Legislation Committee *Consideration of the provisions of the Workplace Relations Amendment (More Jobs, Better Pay) Bill 1999*, November 1999, pages 256-257.
[31] Second Reading Speech *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002.*
[32] Second Reading Speech *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002* .

The aforementioned examples, however, appear to demonstrate that the processes proposed by the Bill for secret ballots do not necessarily determine whether industrial action is "a choice of the employees involved."

Finally, the Bill makes the Commonwealth liable for eighty per cent of the cost of the ballot, which is to be paid directly to the ballot agent by the Commonwealth. The applicant is responsible for the balance. As a matter of fairness, the ACCER considers that if the Commonwealth determines that secret ballots – without any other allowable options - are to be conducted for the taking of industrial action, it should pay the cost. Otherwise, it may be impractical financially for a union or employees to apply for a secret ballot because of the cost requirement. It is not simply unions who may seek to take industrial action, but it is feasible that non-union workplaces and their employees may have cause also to resort to industrial action.

At another level, the focus on secret ballots may be missing the point. 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. 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.

WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2002

The *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002* (the Bill) seeks to amend the certified agreement and freedom of association provisions of the Act to prohibit the inclusion in a certified agreement of a provision requiring non-union members to pay a trade union for bargaining services.

The amendments proposed by the Bill would apply equally to fees for bargaining services imposed by trade unions or by employer associations.

ACCER Commentary

The ACCER does not oppose the ability of a trade union or employer association to charge a fee for services relating to a bargaining or certified agreement, *as long as that fee has been freely agreed to by the individual employee*.

Individuals and organisations choose to join or not to join an industrial association for a variety of reasons. Therefore, while an individual or organisation may be willing to pay a fee for the provision of bargaining services, they may not be willing to support, through formal membership, the other activities of the industrial association.

As a matter of detail, the ACCER notes an apparent imprecision in the title of the Bill. The Bill identifies "union fees" as being the type of fees to be prohibited. This appears to be inconsistent with its contents, as:

- it addresses fees or levies "for the provision of bargaining services"; and

- the Explanatory Memorandum states "the amendments proposed in Schedule 1 of this Bill would apply equally to fees for bargaining services imposed by trade unions or by employer associations."[33]

It is suggested that the tile of the Bill be amended to reflect the fact that its subject is the payment of "bargaining service fees" to industrial associations and not the payment of union membership fees through payroll deduction or direct banking arrangements .

The Bill proposes amendments to the provisions of the Act relating to Freedom of Association. In commenting upon the provisions of the Bill, the ACCER contends that the charging of a fee for the provision of bargaining services does not necessarily contravene the principles of freedom of association. Rather, it is the wording and the practical effect of such particular clauses in a certified agreement that may or may not contravene such principles.

The provision of bargaining services by an industrial association to a non-member may be likened to the establishment of a contract for services. That is, the non-member would be required to consent to the services before they are delivered. Where a fee for the provision of bargaining services is imposed, by way of a certified agreement or other statutory workplace agreement, the employee has not consented to the provision of the service prior to the service being delivered.

Historically, a trade union has had the ability to obtain an award against an employer concerning employees who are not their members but *who are eligible to join*. This has occurred on the basis that the trade union has a legitimate interest in ensuring that the conditions of employment of members are not undermined by employers being able to hire other non-union members on lesser conditions. Such a principle also pertains to the negotiation of a certified agreement. Indeed, anti-discrimination provisions of the Act and other relevant legislation require an employer to treat equally both union and non-union members in the determination of the terms and conditions of employment.

[33] *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) bill 2002*, Explanatory Memorandum, page i.

Therefore, the industrial reality is that where a union has obtained benefits for its members through the negotiation of a certified agreement, such benefits are passed on to non-members in the same workplace.

Thus, on the face of it a "free-rider" situation appears to be created. That is, the union has provided bargaining services solely to members but non-member employees have benefited from those services. This leads then to a moral question as to whether non-member employees should be making a contribution to the industrial association who has represented the "workforce" in negotiations with the employer.

However, a non-member employee does not necessarily intentionally enter into the "free-rider" situation. The current structure of the Act does not appear to legally entitle a non-member employee to choose his or her own external representative in collective negotiations.[34] Only union members may request an industrial association to represent their interests in the negotiation of collective certified agreements.

Therefore, non-members may effectively be marginalised in negotiations for a collective agreement as they, or their representatives, may not be included in the negotiation process where a union is involved until the certified agreement is to be finalised by a vote of the majority.

Fees charged by industrial associations for the provision of bargaining services during workplace negotiations do not necessarily contravene the objects of the Freedom of Association provisions of the Act. The demand for a fee for bargaining services provided - in itself - does not automatically remove the right of the individual or organisation to join or not to join the industrial association.

However, the amount or structure of the fee charged for the provision of bargaining services may persuade or influence an individual or organisation to join or not to join the relevant industrial association. For example, this might occur where the fee charged for bargaining services is greater than the membership fee for that organisation.

[34] Both sections 170LJ and 170LK of the Act allow for the involvement of a "organisation of employees" who may represent a "member" of the organisation. Organisation within the Act is defined as "an organisation

On 12 October 2001, a decision of the Full Bench of the AIRC relating to union bargaining fees was handed down.[35] In its decision, the Full Bench found that the inclusion of a clause relating to a Bargaining Agents Fee in a certified agreement was not an "objectionable clause" under section 298Z of the Act.

A subsequent decision of Merkel J in the Federal Court[36] found that although the payment of a bargaining agent fee purports to relate to a union's bargaining activities for employees, it was not considered to be a "matter pertaining to the relationship of employer and employee" for the purposes of section 170MI of the Act and for the taking of protected industrial action.

This decision implies that future certified agreements made under Part VIB, Division 2 of the Act cannot include clauses requiring the payment of bargaining agents fees as such clauses are not "matters pertaining to the relationship between … an employer … and employees.[37] It is noted that this decision is subject to appeal.

As a matter of principle, the ACCER does not support the charging of a bargaining fee without the direct consent and authorisation of the non-union member, prior to the negotiation of a certified agreement.

registered under this Act" (section 4). Thus, where it is an organisation of employees who is representing a member, it is normally a trade union.

[35] *Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000 - 2003 and Other Agreements,* PR910205, Giudice J, Kaufman SDP and Whelan C.

[36] *Electrolux Home Products Pty Ltd v Australian Workers Unions,* [2001] FCA 1600 (14 November 2001).

[37] *Workplace Relations Act* 1996 (Cth) s. 170LI