

# 6. CONDUCT



## 6.1 CONSULTATION

### ACCI POLICY PRINCIPLES:

ACCI's employee consultation policy emphasises the human resource benefits of consultative mechanisms where these are developed at a workplace level and entered into voluntarily by employers and employees.

ACCI policy specifically includes objectives for "the encouragement of participative management approaches".

Recent workplace relations changes have encouraged consultation at the workplace level and increased the level of consultation between employers and employees.

ACCI's policy of decentralism has positive outcomes with respect to consultation.

### POLICY AUDIT & ANALYSIS:

- The far greater emphasis on workplace level bargaining under the *Workplace Relations Act 1996* has led to a significant increase in the level and quality of formal and informal consultation between employers and employees.
- Whilst attitudinal change has driven increased participative consultation in the workplace, the system itself is a powerful driver of incentives (or disincentives) to consult, negotiate and bargain.
- Bargaining is still hindered by the uninvited intervention of third parties and the ability of third parties to have unwarranted influence over the enterprise bargaining process. Scope for these outcomes must be further reduced.
- Further legislative reforms focused on bargaining at a workplace level are required. Whilst genuine consultation and attitudinal change cannot be legislated for, the structure of the bargaining system is a key determinant of workplace consultation.
- Support should be given to consultation between employers and employees in its myriad forms, whilst acknowledging that consultation does not lend itself to prescriptive approaches.
- Bargaining agendas dominated by third parties or parties other than those at the workplace will not result in meaningful or productive consultation if the interest of the workplace employer and employees are not being directly reflected in discussions. Further legislative change is necessary to improve genuine workplace level bargaining.

### RECOMMENDATIONS:

**Objective 1: The bargaining system needs to be reformed to limit opportunities for unwanted third-party intervention, subject to the principles of freedom of association.**

**Objective 2: Genuine workplace bargaining conducted on a consensual and participative basis should be promoted by governments, industry and trade unions as an effective way of producing mutually beneficial workplace outcomes.**

## 6.2 DISPUTE SETTLEMENT

### ACCI POLICY PRINCIPLES:

“Where the Commission undertakes voluntary arbitration on an agreed basis or in the other limited circumstances in which arbitration might take place there should be statutory remedies to enforce the decisions and processes of the Commission.

Procedures should be prescribed or adopted for the settlement of industrial disputes. These procedures should emphasise the desirability of resolution being achieved at workplace level, rather than through tribunals or courts, and without recourse to industrial action.”<sup>63</sup>

### POLICY AUDIT & ANALYSIS:

- Dispute resolution procedures exist in awards and certified agreements.
- Scope for compulsory arbitration has been reduced by *Workplace Relations Act 1996*, (discussed above). However, it is not limited to the extent required by ACCI policy.
- The workplace relations system still encourages the making and finding of disputes.
- Roping in processes still lead to ‘paper disputes’ in order to produce award responsiveness.
- There are insufficient remedies to deal with protracted disputes within bargaining periods.
- There is also a need to recognise that disputes over demands for more (eg higher wages, increased employment benefits) are different to disputes over work practices and existing employment arrangements.
- There is a necessity for options to be included in the *Workplace Relations Act 1996* which limit the damage that can be caused by protracted disputes and encourage the parties to seek negotiated outcomes.
- Where disputes result in unlawful industrial action, there should be access to quick and effective legal remedies.
- Dispute finding processes related to roping in of businesses to federal awards should be abolished and the award system should be reformed so that it is no longer based on dispute settlement. This is achievable through a revised use of commonwealth constitutional powers and in a harmonised national workplace relations system.
- The system should encourage the parties to seek voluntary mediation to resolve issues where possible (discussed above).
- Greater use of alternative dispute resolution (ADR) style models should be considered. This should include an emphasis on less adversarial models of dispute settlement, including through industrial tribunals adopting successful/best practice approaches from other court and tribunal jurisdictions.
- Examination should be given to further reduction of compulsory arbitration.

### NOTES

<sup>63</sup> ACCI Labour Relations Policy

**RECOMMENDATIONS:**

**Objective 1: The system should provide greater options to deal with intractable disputes.**

**Objective 2: Paper disputes should be removed from the system.**

**Objective 3: Greater scope should be made within the system for voluntary mediation and other forms of alternative dispute resolution.**

## 6.3 INDUSTRIAL ACTION

### ACCI POLICY PRINCIPLES:

“Industrial action should be prohibited during the life of an award or agreement. It would be desirable to fix 'negotiation' periods of 30 or 60 days during which the parties would be required to undertake negotiations and would be bound to any existing commitments. If during that period they agree to arbitration, there should be a peace obligation and any previous award or agreement should be extended until it is replaced by the arbitrated outcome.

Legislation should place substantial restrictions and limitations on industrial action. Secondary action should be prohibited through the Trade Practices Act 1974, and common law remedies should be available. There must be sufficient remedies against and protection of businesses from unlawful industrial action, and absolute protection of employers from industrial action relating to union membership or coverage.

There should be an absolute prohibition on industrial action in essential services. Industrial action which is designed to effect an alteration in established rights, that is, the terms of an existing award or agreement.

Where the Commission undertakes voluntary arbitration on an agreed basis or in the other limited circumstances in which arbitration might take place there should be statutory remedies to enforce the decisions and processes of the Commission.

Procedures should be prescribed or adopted for the settlement of industrial disputes. These procedures should emphasise the desirability of resolution being achieved at workplace level, rather than through tribunals or Courts, and without recourse to industrial action.”<sup>64</sup>

### POLICY AUDIT & ANALYSIS:

- Industrial action is prohibited during the life of an award or an agreement (however the 2001 decision of the Federal Court in *Emwest*<sup>65</sup> raises the possibility of lawful industrial action being taken during the life of an agreement – against the parliamentary intention).
- Strike pay was rendered unlawful by the *Workplace Relations Act 1996*.
- Secondary boycott remedies are now contained in sections 45D and 45E of the *Trade Practices Act*. The restoration of these secondary boycott remedies has

been a very effective contribution to historically low level of industrial disputation since the operation of the *Workplace Relations Act 1996*.

- The *Workplace Relations Act 1996* also contains remedies for unlawful industrial action (s.127). However employers have expressed dissatisfaction with delays and difficulties in seeking relief under s.127, and the two tiered process of obtaining a s.127 order from the AIRC and then having to issue separate legal proceedings in the Federal Court to enforce such orders.
- Under the *Workplace Relations Act 1996*, levels of disputation have declined and the

effectiveness of remedies for industrial action has been strengthened. However there is still a problem of protracted industrial action within bargaining periods which is not adequately addressed by s.170MW.

- In addition, the combination of manipulation of enterprise bargaining through common expiry dates in agreements in some industry sectors, and the effect of re-interpretation of legislative provisions in two Federal Court decisions in 2002 (the *Emwest* and the *Electrolux* cases <sup>66</sup>) may have substantially altered the legal basis upon which protected industrial action can be taken in Australia. These changes have distorted not only the original parliamentary intention of Labor and Coalition governments in the 1990s, but have also compromised the essential balance between the rights and interests of employers, employees, unions and the broader community in relation to the right to strike.
- Industrial action is an extreme industrial weapon that should only be used as a last resort within the bargaining system. There should be no unfettered right to take industrial action. Recent extensions of the right to strike in Australia must be reversed. The intended boundaries to the right to strike laws when first created in 1993 and 1996 should be restored.
- It should only be possible to take protected industrial action within the context of genuine bargaining over proposed enterprise agreements and after all alternative approaches have been exhausted.
- The law does not, nor should it, compel the taking of industrial action. Almost all agreement making should proceed on a consensual basis without strikes or the threat of strikes being used as a coercive tool.
- There should be no scope for protected industrial action to be taken in support of

industry wide pattern bargaining that is not accompanied by genuine workplace bargaining.

- There should be no scope for protected industrial action to be taken in support of demands or claims that do not pertain directly to the employer/employee relationship – that is, only claims for wages and employment conditions between employers and employees.
- There should be no scope for protected industrial action to be taken by a party to an enterprise agreement during the life of that agreement. Agreements once made, should be adhered to – including the forgoing of access to protected action during the life of agreements.
- Industrial action should only take place with the genuine consent of employees, preferably by effective secret ballot.
- Remedies designed to end unlawful industrial action must be capable of being sought promptly and effectively. Delays in the granting of injunctive relief are unacceptable.
- Current provisions within the *Workplace Relations Act 1996* that deal with unlawful industrial action were intended to provide an expeditious process compared to previous approaches. However, this has not occurred in practice and employers have experienced various difficulties in accessing these remedies.

#### NOTES

<sup>64</sup> ACCI Labour Relations Policy

<sup>65</sup> *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2002] FCA 61 (6 February 2002)

<sup>66</sup> *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited* [2002] FCAFC 199 (21 June 2002)

**RECOMMENDATIONS:**

**Objective 1: Industrial action should be minimised, and the “right to strike” limited to negotiating new agreements and access to protected action limited within clearly defined boundaries.**

**Objective 2: Remedies for unlawful industrial action must be readily accessible and effective.**

**Objective 3: Agreements, when struck, must be adhered to. Once made, agreement parties must forgo access to protected industrial action during the life of agreements.**

## 6.4 FREEDOM OF ASSOCIATION

### ACCI POLICY PRINCIPLES:

“The right of Australians to freely associate or not associate with unions and employer organisations is genuinely protected.”<sup>67</sup>

### POLICY AUDIT & ANALYSIS:

- With the passage of the *Workplace Relations Act 1996*, preference clauses and compulsory unionism were prohibited.
- Freedom of association is protected under Part XA of the *Workplace Relations Act 1996*. The Employment Advocate is empowered to investigate and assist in enforcement of contraventions of Part XA.
- Freedom of association provisions have proved complex and difficult to enforce. However, it must be remembered that freedom of association provisions are of recent origin. As the behaviour of the parties within the system changes, and as time passes, it will be necessary to evaluate the effectiveness of the current approach to regulating freedom of association and make changes where appropriate.
- Some judicial interpretations of freedom of association provisions have been inconsistent with the intent of the Parliament when introducing the legislation.
- Some trade unions have developed a series of indirect coercive mechanisms designed to

undermine genuine freedom of association. These include ‘union encouragement clauses’ and bargaining fee clauses. The Federal Government has attempted to address the threat to freedom of association through introducing the *Workplace Relations (Compulsory Union Fees) Bill 2002* into the Parliament, but to date it has failed to pass due to a stalemate between the Houses of Parliament.

- Some unions have misused freedom of association provisions to stifle attempts to introduce workplace reforms. Stricter tests should be introduced for situations where parties seek to establish that workplace restructuring has breached freedom of association provisions.
- Freedom of association provisions should not be used to limit the agreement-making options of employers and employees.
- The reverse onus of proof in Section 298V should be amended so that the burden of proof is consistent with other sections of the *Workplace Relations Act 1996*.

### NOTES

<sup>67</sup> ACCI Labour Relations Policy

**RECOMMENDATIONS:**

**Objective 1: A genuine freedom of association framework needs to be maintained, which includes measures prohibiting compulsory union bargaining fees and union encouragement requirements. Section 298V should be amended to provide a burden of proof that is consistent with other breaches of the Act.**

**Objective 2: Workplace restructuring should not be impeded by the freedom of association provisions, except where a clear breach of the law is found to have existed.**

**Objective 3: The approach taken to freedom of association in Part XA of the *Workplace Relations Act 1996* has proved to be complex. There is a need for redrafting and simplification of these provisions.**

## 6.5 VICARIOUS LIABILITY

### **ACCI POLICY PRINCIPLES:**

ACCI has raised concerns with federal and state governments and policy makers at the piecemeal extensions of employer liability or liability for employee actions. The extent of vicarious liability can have implications for business costs and viability.

### **POLICY AUDIT & ANALYSIS:**

- Employer liability for the actions of employees arises from the common law, and has been codified or altered in issue specific legislation (eg criminal statute and health and safety legislation).
- There needs to be greater acknowledgement that it is reasonable for employers to have only limited liability for some of the actions of employees. These issues should form part of more comprehensive tort reform. Appropriate limits on an employer's duty of care are relevant to the public debate about the duty of care more generally.
- It is important to ensure that concepts of vicarious liability are kept within proper limits

and that the legal obligation of employers for the actions of their employees is not extended beyond justifiable boundaries. There needs to be greater recognition of the economic costs of vicarious liability and its impact on employers.

- Issues concerning public liability also have some implications for vicarious liability and for employer exposure to risk.
- There has not been a co-ordinated policy approach by governments to the issue of vicarious liability.
- Any changes that result in increased levels of risk exposure and potential costs for employers should be resisted.

### **RECOMMENDATION:**

**Objective 1: Employer liability for the actions of employees must be kept within reasonable limits and should not impose unreasonable obligations on a business.**