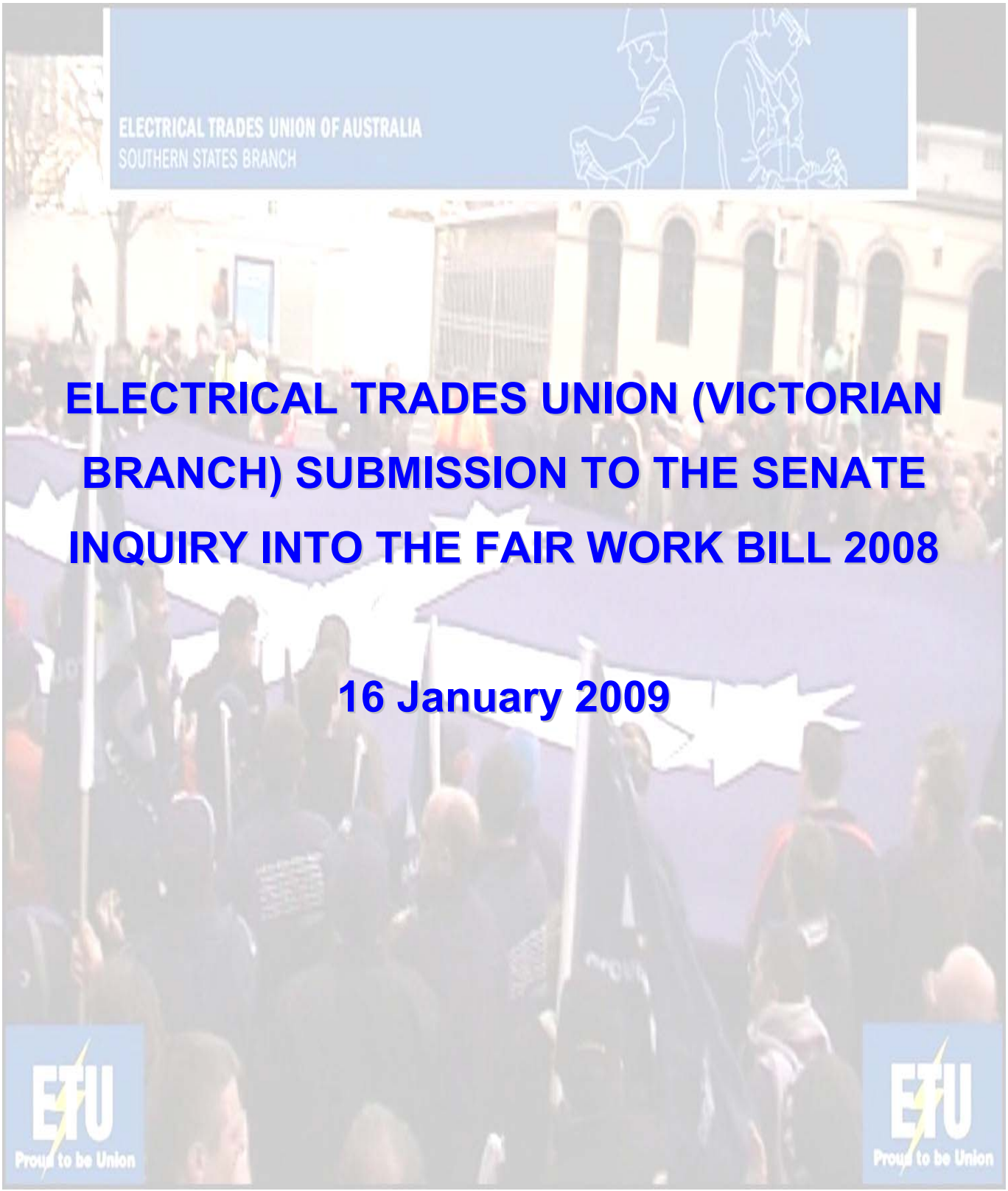

ELECTRICAL TRADES UNION (VICTORIAN BRANCH) SUBMISSION TO THE SENATE INQUIRY INTO THE FAIR WORK BILL 2008

16 January 2009

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PART 1 - INTRODUCTION AND SUMMARY

1. Nature of the operations of The Victorian Branch of the ETU ("the ETUVIC")

1.1. The ETUVIC currently represents approximately 17,000 members. Unlike the union movement generally, our membership has consistently increased from approximately 7000 in 1995. This membership growth is an indication of the high regard in which the ETUVIC is held by workers in our industry. It is a reflection of the fact that the ETUVIC is a progressive organization which has successfully looked after the interests of its members.

1.2. ETUVIC members are employed in industries such as electrical contracting (construction), power distribution and tree-clearing, labour hire, data cabling and communication, lifts, transport, manufacturing, vehicles, maintenance (eg hospitals, educational institutions, hospitality), switchboard manufacturing and installation, apprentices in all electrical occupations and group training organizations, registered electrical contractors and renewable technologies.

1.3. the ETUVIC has lead the way with advancing employment rights and conditions for ETUVIC members in areas such as:

1.3.1. work-life balance (36-hour week in electrical contracting and other industries);

1.3.2. industry and enterprise bargaining;

1.3.3. innovative industry income protection and severance schemes for electrical workers and their families, which are supported by

industry employers and protect workers' entitlements without recourse to government funding;

1.3.4. the development of training to up-skill and re-skill electrical workers, particularly in the construction industry;

1.3.5. providing members with strong representation on OHS worksite safety and training; and

1.3.6. developed a wide range of benefits for ETUVIC members and their families, for example, emergency transport cover, health insurance, trades insurance, mortality benefit, energy discounts.

1.4. The ETUVIC participates in:

1.4.1. supporting apprentices in TAFE by providing awards and apprentice recognition;

1.4.2. supporting charitable & community organisations, such as Open Family, EJ Whitten Foundation and numerous community groups;

1.4.3. progressive political and community campaigning to effect social change;

1.4.4. government initiatives, such as employment projects;

1.4.5. Building Industry Consultative Council;

1.4.6. industry superannuation board representation;

1.4.7. international worker and union campaigns and the development of international worker unity, such as exchanges with the International Brotherhood of Electrical Workers (USA), AMICUS (UK), EPMU (NZ)

1.4.8. EPIC Industry Training Board - serving and working in partnership with Victoria's Electrotechnology, Printing and Information Technology &Telecommunications industries.

1.5. The ETUVIC has established and promotes:

1.5.1. EEIT (Electrical and Electronic Industry Training Ltd) - to provide training and services in curriculum development and career path development; to encourage safe work practices in the electrical industries; to cooperate actively with private and public sector or bodies in Australia and overseas; and to provide training and services directly or as a consultant to business, government and unions.

1.5.2. An awareness of environment matters within the electrical industry and is in the process of establishing a 'green electrician' program.

1.6. The ETUVIC has achieved:

1.6.1. a strong and effective voice for electrical workers and safety in electrical industries;

1.6.2. a public awareness, recognition and promotion of electrical trades and industries;

1.6.3. strong industrial agreements;

1.6.4. the promotion of 'Australian-made' products; and

1.6.5. the promotion of mature-age and apprenticeship ratios in industrial agreements.

2. The ETUVIC calls for the complete repeal of the amendments made by the Workplace Relations Amendment (Work Choices) Act 2005, otherwise known as Work Choices.

3. The ETUVIC also calls for the urgent and immediate repeal of the Building and Construction Industry Improvement Act (2005 (Cth) (BCII Act) which controls the employment of workers in the building and construction industry, and in effect employees of other industries which are suppliers to the building and construction industry. Whilst the FWB purports to cover all employees in a national system under one federal law, the BCII Act superimposes laws which go beyond the provisions of the FWB and maintains discrimination against construction industry workers, thereby creating two classes of workers. Until such time as the BCII Act is repealed, the Labor Government will be retaining the Howard Government's anti-worker and anti-union industrial relations legislation.

4. The ETUVIC is opposed to the Fair Work Bill 2008 ("the FWB") in its current form for the following reasons:

4.1. The FWB has **not** "ripped up Work Choices" and doesn't reinstate the rights Australian workers lost as a result of Work Choices (see Part 2);

4.2. The FWB is in breach of Australia's International Obligations and ILO Conventions (see Part 3);

4.3. The FWB is inconsistent with strong and clear prior statements made by ALP MP's, including Prime Minister Rudd and Deputy Prime Minister Gillard (detailed throughout Part 5);

4.4. The FWB is worse in fundamental aspects than the 1996 version of the Workplace Relations Act introduced by the former minister, Peter Reith, and passed over the vehement opposition of the ALP (see Part 4).

5. In Part 5 of these Submissions, we detail our arguments as to the deficiencies of the FWB in relation to the following particular areas of concern to us:

5.1. Restrictions on the Legitimate Right to Withdraw Labor

5.1.1. Compulsory ballots for protected action;

5.1.2. Industry bargaining and negotiations – pattern bargaining;

5.1.3. Provisions requiring a minimum 4 hour deduction of pay for any industrial action;

5.1.4. Provisions allowing no pay to workers while bans are in place;

5.1.5. Powers to suspend ability to take protected industrial action, ie. Minister's power to suspend; suspension where there is third party harm; and suspension for cooling off.

5.2. Right of Entry

5.3. Restrictions on the Content of Agreements

5.4. In addition to the above, we agree and support the concerns set out at Part 3 of the ACTU Submissions dated 9 January 2009.

PART 2 – ALP'S PROMISE TO "RIP UP WORK CHOICES"

6. The foundation of the ALP's election campaign in the 2007 Election was the promise to "rip up Work choices".

7. The following table sets out the repeated statements of the ALP to "rip up Work Choices":

Date:	Name of ALP MP:	Location:	Statement:
2007/05/30	Anthony Albanese MP (2008 Minister for Infrastructure , Minister for Transport and Regional Development , Minister for Local Government , Leader of the House)	Hse Reps - Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 Second reading	… But let us be clear: Labor remains totally opposed to the Prime Minister's extreme Work Choices laws. There is nothing … before us that will stop Labor abolishing Work Choices …
2005/11/28	Sen Carol Brown (2008 Senator Tas)	Senate – Workplace Relations Amendment (Work Choices) Bill 2005 Second reading	… Under these laws union officers can be fined $33,000 for seeking a range of ordinary and sensible measures to protect workers - $33,000 for asking an employer to include in an enterprise agreement provisions to: remedy unfair dismissal, include unions in dispute resolution … It is as extreme as it is offensive. …And the 19th century is where we will stay on IR until … we return a Labor government to tear these laws up …

Date:	Name of ALP MP:	Location:	Statement:
2005/12/01	Sen Stephen Conroy (2008 Deputy Leader of the Government in the Senate , Minister for Broadband, Communications and the Digital Economy)	Senate – Workplace Relations Amendment (Work Choices) Bill 2005	… Labor have pledged to rip up this legislation, and that is exactly what will do after the next election …
2005/11/10	Annette Ellis MP (2008 Member for Canberra)	Hse Reps - Workplace Relations Amendment (Work Choices) Bill 2005 Second reading	… This bill deserves one action – to rip it up … And that is exactly what we on this side of the chamber plant to do at the first available opportunity …
2007/06/19	Sen Michael Forshaw (2008 Senator NSW)	Senate – Workplace Relations Amendment (A Stronger Safety Net) Bill 2007	… The truth is that this as a major, major problem within the Work Choices legislation … it can only ultimately be solved by throwing the legislation out …
2007/05/30	Julia Gillard MP (2008 Deputy Prime Minister , Minister for Education , Minister for Employment and Workplace Relations , Minister for Social Inclusion)	Hse Reps Workplace Relations Amendment (A Stronger Safety Net) Bill 2007	… Work Choices has to go.

Date:	Name of ALP MP:	Location:	Statement:
2007/03/27	Julia Gillard MP	Hse Reps Matters of Public Importance Economy	We have here today the first anniversary of Work Choices. I will make this prediction: there will never be a second anniversary of Work Choices, because there are only two possibilities after the next election. Either Labor are elected and these laws are swept away … or we can see this country re-elect the Howard government.
2005/11/10	Alan Griffin MP (2008 Minister for Veterans' Affairs)	Hse Reps - Workplace Relations Amendment (Work Choices) Bill 2005 Second reading	At the next election if we are elected we will kill this bill. The bill that is before the house today will be killed. We will rip up this bill and throw it in the bin where it belongs.
2007/06/18	Sen Steve Hutchins (2008 Senator NSW)	Senate – Workplace Relations Amendment (A Stronger Safety Net) Bill 2007	… the only way to ensure a consistent fair go in the workplace is to get rid of this Government and its extreme IR laws with it.
2005/11/30	Sen Joe Ludwig (2008 Minister for Human Services , Manager of Government Business in the Senate)	Senate – Workplace Relations Amendment (Work Choices) Bill 2005 Second reading	… what will the Labor government do with this nice little package that the government has delivered for us? Tear it up!
2005/11/30	Sen Anne McEwen (2008 Senator SA)	Senate – Workplace Relations Amendment (Work Choices) Bill 2005 Second reading	… we cannot wait for the day that Labor Prime Minister … tears up this legislation and throws it in the bin. And there will be a queue of Labor senators ready to throw the match that will incinerate it.

Date:	Name of ALP MP:	Location:	Statement:
2005/12/01	Sen Kerry O'Brien (2008 Senator TAS)	Senate – Workplace Relations Amendment (Work Choices) Bill 2005	… I will join my Labor colleagues in voting against this bill and I will work to elect a … Labor government that will consign these laws to the dustbin of history.
2007/05/30	Brendan O'Connor (2008 Minister for Employment Participation)	Hse Reps - Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 Second reading	… Work Choices is fundamentally flawed. It is unfair and unnecessary …
2005/03/14	Brendan O'Connor (2008 Minister for Employment Participation)	Hse Reps - Workplace Relations Amendment (Right of Entry) Bill 2004	I can only say to those people who will be adversely affected by its enactment that Labor will one day … have the opportunity to prevent this bill and … revoke it if it becomes law.
2005/11/10	Nicola Roxon (2008 Minister for Health and Ageing)	Hse Reps - Workplace Relations Amendment (Work Choices) Bill 2005 Second reading	In Government, Labor will tear up these laws – there is nothing good about them.
2007/05/30	Wayne Swan (2008 Treasurer)	Hse Reps - Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 Second reading	… there is nothing in these amendments that diminishes our resolve to repeal Work Choices …
2005/11/10	Maria Vamvakinou (2008 Member for Calwell	Hse Reps - Workplace Relations Amendment (Work Choices) Bill 2005 Second reading	… Mr Speaker, this Government's disgraceful IR changes introduced in 1996 need to be un-wound …Labor is proud to be a political movement born from the trade union movement …

Date:	Name of ALP MP:	Location:	Statement:
2007/06/18	Sen Penny Wong (2008 Minister for Climate Change and Water)	Senate – Workplace Relations Amendment (A Stronger Safety Net) Bill 2007	… The only way to do that (to bring back fairness) is the Labor way – by ripping up Work Choices … … Let's be clear: under Labor, Work Choices will go – lock, stock and barrel. There is no fixing this legislation; it is rotten to the core.
2/2/07	Kevin Rudd MP (2008 Prime Minister)	SMH Article: I'll kill Work Choices: Rudd	Amid claims he's softening the federal opposition's workplace policy, leader Kevin Rudd said today Labor would throw existing industrial relations laws "in the bin". "We, as the alternative government, are as one in terms of removing these laws, getting rid of these laws and throwing them in the bin."
11/2/07	Julia Gillard MP	**Gillard reaffirms Opposition's plan to dump WorkChoices Act** Australian Broadcasting Corporation Broadcast: 11/02/2007 Reporter: Barrie Cassidy Insiders speaks to Deputy Opposition Leader Julia Gillard.	**Transcript** JULIA GILLARD, Deputy Leader of the Opposition: Good morning, Barrie. BARRIE CASSIDY: Let's be clear on WorkChoices, if elected you'll throw out the legislation, the whole lot, and start again. JULIA GILLARD: Yes, we'll repeal the so called WorkChoices Act and we will have a whole new act.
14/10/07	Kevin Rudd MP	**Opening Statement by Federal Labor Leader Kevin Rudd** **Media Statement**	..if I'm elected to become the next Prime Minister of Australia I will ratify Kyoto, I will prohibit the construction of nuclear reactors in this country. I will abolish Workchoices.

Date:	Name of ALP MP:	Location:	Statement:
13/2/08	Julia Gillard MP	**Gillard moves to scrap WorkChoices** ABC News	Ms Gillard says it is an election commitment and she is calling on the Opposition to support it. "It is now time for members in this place to respect and represent the key message from the Australian people," she said. "No more WorkChoices, no more workplace agreements, no more unfairness, complexity and confusion."
26/3/07	Julia Gillard MP	The World Today – Hockey, Gillard debate Workchoices	ELEANOR HALL: Julia Gillard, you are vowing to rip up the Government's IR laws, but the Prime Minister and you've just heard the minister are warning that to reverse a major reform like this would send a negative signal to world markets as well as to other people in the economy, have you considered that? JULIA GILLARD: Of course, we've considered all aspects of our promise to get rid of these laws. And these laws aren't only bad for working families, they're actually bad for the economy.
27/4/07	Kevin Rudd MP	'My name's Kevin': Rudd opens Labor conference ABC news	"I intend to throw out Mr Howard's WorkChoices laws lock, stock and barrel, because I believe we can build long-term prosperity without throwing the fair go out the back door."
14/11/07	Kevin Rudd MP	Rudd promises responsible spending 7:30 report transcript	KEVIN RUDD: If elected, we will abolish work choices.
19/2/08	Kevin Rudd MP	Coalition rolls over on AWA's 7:30 report transcript	KEVIN RUDD, AUSTRALIAN PRIME MINISTER: Everyone knows what we stood for, we would abolish WorkChoices and AWAs.

Date:	Name of ALP MP:	Location:	Statement:
14/11/07	Kevin Rudd MP	Courier Mail Kevin Rudd unveils Labor's education nation (downloaded 14/1/08)	"If elected, we will abolish Workchoices", Mr Rudd said.
14/10/07	Kevin Rudd MP	SMH Rudd fights in his corner	Mr Rudd said his campaign platform included…. Abolishing WorkChoices….

7.1. From the above comments, an Australian voter in the 2007 election would quite reasonably expect the ALP to remove all aspects that were introduced by Work Choices.

7.2. It was the promise to "rip up Work Choices" that resonated in the ears of the Australian voter. That is the mandate the ALP has from the Australian people.

7.3. The mandate is not the Forward with Fairness document as now claimed by the ALP. The reliance on Forward with Fairness is a sleight of hand. Forward of Fairness is a document:

7.3.1. that was amended and changed numerous times;

7.3.2. that only an industrial practitioner would understand;

7.3.3. would not have been read by 99% of the population prior to the election; and

7.3.4. that was amended shortly before the election because of pressure by business lobby groups.

7.4. Australian workers would be horrified to learn that Work Choices has **not** been ripped up and that the following laws, that were **first** introduced by Work Choices and had no place in Australia's industrial relations landscape prior to Work Choices, have been retained in the FWB:

7.4.1. Compulsory Protected Action Ballots;

7.4.2. Prohibitions on pattern bargaining;

7.4.3. Wide scope for Employers and Third Parties to stop "protected" industrial action;

7.4.4. No discretion for Commission in dealing with orders to stop industrial action;

7.4.5. No unfair dismissal rights for employees who have been made redundant;

7.4.6. Lesser and ineffective unfair dismissal rights for employees in small businesses;

7.4.7. No right of entry terms in agreements;

7.4.8. A right of entry permit scheme that requires union officials to satisfy a number of onerous requirements before getting a permit; and

7.4.9. A right of entry scheme that allows employers to designate where union officials can meet with employees.

PART 3 –BREACH OF AUSTRALIA'S INTERNATIONAL OBLIGATIONS AND ILO CONVENTIONS

8. Appendix 1 to these submissions is a report commissioned by the ETUVIC on whether the FWB complies with Australia's international obligations.

9. The report details how the following areas of the FWB are in breach of the ILO Conventions:

   9.1. provisions which give primacy to enterprise level agreements and which restrict the level at which bargaining can occur;

   9.2. provisions which limit the contents of agreements;

   9.3. provisions which give insufficient protection to unionised workers who take industrial action in support of their rights under the conventions;

   9.4. provisions imposing limits on unions' rights to organise;

   9.5. provisions which restrict the right to strike beyond the limits permitted by the conventions;

   9.6. provisions which remove protection of industrial action in support of:

      9.6.1. multiple business agreements;
      9.6.2. pattern bargaining;
      9.6.3. sympathy strikes;
      9.6.4. matters that are not 'permitted';
      9.6.5. strike pay.

   9.7. provisions which prohibit industrial action in case of danger to the economy, including through the introduction of compulsory arbitration at the initiative of the Minister;

   9.8. the penalties imposed for engaging in 'unprotected' industrial action;

   9.9. the secret ballot provisions;

9.10. allowing employers to by-pass unions and make and reach agreements directly with employees, even where a union exists at the workplace; and

9.11. new restrictions on industrial action in situations of ‘economic harm’.

PART 4 - COMPARISON WITH THE 1996 WORKPLACE RELATIONS ACT

10. The true extent of the deleterious impact of FWB can be seen when its provisions are compared with the provisions of the 1996 version of the Workplace Relations Act ("the 1996 Act") introduced by the former minister, Peter Reith, and passed over the vehement opposition of the ALP.

11. We see that purely comparing the FWB with the post Work Choices version of the Workplace Relations Act is not sufficient, because Work Choices is a very low base to start off from. In reality, it is no great feat to merely improve on Work Choices.

12. It is matter of extreme concern and regret that the 1996 Reith Act is far better than the FWB in a number of fundamental aspects. The following table sets this out.

Issue	**Fair Work Bill**	**Workplace Relations Act 1996 (Reith's Legislation)**
RIGHT OF ENTRY	 • Prohibits employers and Unions agreeing to any other form of right of entry. • Allows employer to place restrictions on where employees and Unions meet. • Restricts Union Officials from getting a right of entry permit where they have previously breached an industrial law	 • A union official could examine non-member records. • The Union and employer could agree on their own right of entry requirements. • No restrictions on where to meet. • No restrictions on Union officials getting a right of entry permit

Issue	Fair Work Bill	Workplace Relations Act 1996 (Reith's Legislation)
INDUSTRIAL ACTION	 • Requires lengthy and costly compulsory secret ballot and other hurdles prior to industrial action. • Prohibits pattern bargaining. • Protected industrial action can be suspended and terminated where causing harm to third party. • Allows no discretion for FWA to refuse an order stopping all industrial action, even if the employer has acted reprehensively; • Requires FWA, if FWA has not determined the matter within 2 days, which occurs in nearly all cases, to make an order stopping all industrial action, without any chance for the Unions to defend themselves; • Allows FWA to make an order stopping industrial action without any requirement to actually specify the action being taken. Therefore, the order always covers conduct that is wider than the conduct actually occurring.	 • No secret ballots prior to protected industrial action; • No prohibition on pattern bargaining. • No ability to suspend and terminate protected industrial action where causing harm to third party. • Commission could exercise a discretion to refuse an order stopping industrial action • Commission was not required to issue an order stopping industrial action within 2 days. Rather, Unions and workers had the chance to present their case and natural justice was afforded to them.
INDIVIDUAL AGREEMENTS	 • Every Award and Agreement is required to allow an employer and employee to individually contract out of its terms.	 • Unions could collectively bargain to prohibit employers doing individual agreements.
UNFAIR DISMISSAL	 • Doesn't allow employees who were made redundant to bring an unfair dismissal; • Doesn't allow employees who were employed for less than 6 months to bring an unfair dismissal. • Gives very limited unfair dismissal rights for employees employed in a small business of less than 15 employees.	 Full unfair dismissal rights to employees who were: • employed in a small business; • made redundant; • employed for more than 3 months.

Issue	Fair Work Bill	Workplace Relations Act 1996 (Reith's Legislation)
STRIKE PAY	 • Keeps requirement to deduct 4 hours pay where an employee takes industrial action, even if it is a 5 minute stop work meeting.	 • **NO** 4 hour deduction concept.

PART 5 – FAIR WORK BILL: MAJOR AREAS OF CONCERN

In this Part, we detail a selection of the key concerns in respect of the FWB that the ETUVIC seeks to highlight and draw to the attention of the Senate Committee. There are many other concerns the ETUVIC has with the FWB, however, we believe that they are adequately addressed in the submissions of the ACTU and the CEPU (National Office) that have been submitted to the Senate Committee.

13. Restrictions on the Legitimate Right to Withdraw Labour

13.1. Introduction

13.1.1. The FWB maintains the restrictions and harsh penalties introduced by Work Choices in respect of the withdrawal of labour. The right to withdraw labour is effectively non-existent under the FWB.

13.2. The nature and reasoning of the right to withdraw labour

13.2.1. The right to withdraw labour is a fundamental element of a balanced and fair system of collective bargaining.

> *"The free man may withdraw his labour. He enters into a voluntary agreement with someone else in which he agrees to carry out some specified work in return for a specified amount of pay. If there is disagreement between them he may freely withdraw his labour. This is a most essential right, the right of every citizen, of every worker, to associate with others and withdraw his labour, to go on strike."*[1]

[1] Davidmann, M. "The Right to Strike"

13.2.2. The ILO Committee of Experts made a key statement on the right to strike on the application of Conventions and Recommendations (CEACR): ILO (1983):

"The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers."[2]

13.2.3. The right to withdraw labour is a fundamental human right.

"The phenomenon of the strike is one of the crucial problems of contemporary industrial relations because it lies at the very core of the legal regulation of industrial conflict. The strike is basic to the distribution of power between capital and labour, and also forms part of the problem of the autonomy of groups and their relationship to the State. ...Since the late 1940's...a basic consensus emerged, albeit slowly and somewhat grudgingly. ***The social partners' freedom of recourse to concerted activity gained recognition as an essential element of industrial relations without which freedom of association could***

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[2] ILO (1983) Freedom of Association and Collective Bargaining?, ILO Conference, 69th Session, Report 111 (Part 4B) (Geneva), para 200. ILO (1996) Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO 4th edition Geneva. ILO (1998, 1999, 2000, 2003) Reports of the Committee of Experts on the Application of Conventions and Recommendations.

not exist. Freedom of association is a fundamental human right...Hence the freedom to strike has emerged as an essential tool for the implementation of such a basic freedom as freedom of association"[3] (Underlining added)

13.2.4. The employment relationship is inherently weighted in favour of employers. An employer can refuse to engage an employee or to pay beyond a particular price for their labour without harming their business, with creates an important economic advantage over an employee who cannot survive without employment.

13.2.5. An employee, without any right to industrial action, can only opt to find alternative employment, which is only a feasible option in limited circumstances. The result is that without access to the ability to withdraw their labour in a collective manner an employee can do little more than beg for improved conditions.

13.2.6. As such, industrial action is the principle means through which employees are able to redress the bargaining imbalance with their employer and improve their working conditions.

13.2.7. By placing unreasonable burdens on an employees' access to industrial action renders a system of industrial bargaining entirely ineffective as an employer can dictate the negotiations without any repercussions. Without access to lawful industrial action an employee is little more than a servant to employer interests.

[3] Ben-Israel R (1988) International Labour Standards: The Case of Freedom to Strike. Deventer: Kluwer

13.3. Set out below in turn are the restrictions that unfairly impede Australian workers legitimate right to withdraw their labour.

14. Compulsory Ballots for Protected Action

14.1. Introduction:

14.1.1. In 2005, for the first time in Australia's history, the Howard Government via Work Choices introduced the requirement for a secret ballot to be conducted of members prior to the taking of industrial action.

14.1.2. However, this was not the first time Howard had tried to introduce the Ballot Scheme. It was actually the third time.

14.1.3. Back in 2000 and 2002, the Liberal Party introduced the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000 and the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002. It was voted against both times by the ALP.

14.2. Has the ALP fulfilled its promise to "rip up Work Choices"?

14.2.1. No.

14.2.2. The ALP has included the same ballot scheme in its entirety as was contained in Work Choices.

14.3. What has the ALP previously said about Protected Action Ballots?

14.3.1. Prior to the FWB, the ALP had taken a very strong stance against Protected Action Ballots.

14.3.2. The ALP had voted against a Protected Action Ballot scheme on 3 occasions in respect of the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000, the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 and Work Choices.

14.3.3. In addition, ALP MPs, including Julia Gillard, made statements in Parliament strongly criticizing Protected Action Ballots when speaking in opposition to the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000 and the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002.

14.3.4. Julia Gillard made the following statements *(Hansard, 30/8/2000, WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTED ACTION) BILL 2000 - Second Reading Ms JULIA GILLARD)*:

"if this bill is properly analysed, there is nothing benign about it. Rather, it is ***a strident attempt to completely disarm workers and their unions in the collective bargaining process.****"*

…

"That is what happens through this piece of legislation simply by the ***imposition of a technical, time consuming and costly ballot process on unions and workers if they seek to engage in industrial action."***

…

"So we see a tipping of the scales where, once again, workers and their unions face additional hurdles. Employers do not face those hurdles. They want a bargaining arrangement under which workers in weakened industrial structures and with weakened bargaining powers meet employers whose hands have been strengthened."

…

*"**The whole psychology and methodology of disputes will be affected by this kind of system, so they will become bigger, more bitter and less easy to resolve.** The overseas experience shows that **secret ballot provisions lead to lengthier industrial disputes.** There is no reason not to expect the same result here."*

…

*"In terms of our theories of representative democracy, there is **no reason why**—and the minister has not advanced a reason why—**the decisions of those democratically elected leaders, in relation to matters involving the union and union membership, are not legitimate decisions**.*

*Democracy also has a participative side, and the **culture of trade unions has been to use meetings and participative forums to make decisions about the taking of industrial action. This enables workers to hear each other's views—it enables debate, and out of that can emerge a consensus. This minister has given no clear explanation as to why this is an inappropriate structure**."*

…

*"I say in conclusion that this parliament has already rejected this minister's **nightmare vision** of the industrial future by rejecting the second wave of industrial relations legislation**. It is time to***

reject that vision again by rejecting this bill.*"* (Underlining added)

14.3.5. It is noteworthy that Ms Gillard refers in the above passage to the "tipping of the scales" against workers. Strangely and without explanation, these days she does not see the scales as tipped. Her new mantra is that the balance is right. But, this inquiry must find out what has changed since her earlier remarks in the above extract.

14.3.6. This inquiry must also find out from the Rudd government why the secret ballot provisions of FWB:

14.3.6.1. do not completely disarm workers and their unions in the collective bargaining process, in exactly the same was as the previous Howard government legislation;

14.3.6.2. do not impose a technical, time consuming and costly ballot process on unions and workers if they seek to engage in industrial action, in exactly the same was as the previous Howard government legislation;

14.3.6.3. do not, in exactly the same way as the previous Howard government legislation, accept the decisions of democratically elected union leaders, in relation to matters involving the union and union membership, as legitimate decisions;

14.3.6.4. do not, in exactly the same way as the previous Howard government legislation, accept the culture of trade unions which has been to use meetings and

participative forums to make decisions about the taking of industrial action. Just as Ms Gillard in opposition accused the then Minister of giving no clear explanation, she too has given no clear explanation as to why this is an inappropriate structure for authorizing industrial action;

14.3.6.5. do not, in exactly the same way as the previous Howard government legislation, give employers the bargaining arrangement which they want and under which workers in weakened industrial structures and with weakened bargaining powers meet employers whose hands have been strengthened.

14.3.7. The deficiencies of the secret ballot system identified by Ms Gillard in the above extract, remain in the FWB. For the same reasons that she articulated in that passage, this inquiry should find they are inappropriate and unsatisfactory and should be excluded from the legislation.

14.3.8. Julia Gillard has not been alone in the ALP about speaking out against the Protected Action Ballot scheme. Mr Hatton MP, now retired, made the following statements when speaking in opposition to the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 in Parliament:

"When you go to the core of this in terms of a justification, this is about being anti-union and trying to stop people in the workplace from taking protected action"

…

***"It is about putting inflexibility into the industrial relations system, not trying to make it easier to work or any better**."*

…

*"I go to the other key point the ACTU makes, which again is fairly balanced. **They say that secret ballots really have very little to do with democratic functioning**—although so much is made of that within the comments of the minister—and that they have:*

> *... **everything to do with restricting the right to strike**."*

…

"They will not have an even and balanced approach to it; they will just have a partial and ideological one."

14.4. How has the Protected Action Ballot scheme worked under Work Choices?

14.4.1. Delay Tactic

14.4.1.1. As warned by Ms Gillard and the ALP previously, the Protected Action Ballot scheme has been used as a delaying tactic by employers.

14.4.1.2. Although the conducting of the Ballot is itself a delaying process, extra delay and expense is caused by the fact that the Protected Action Ballot scheme requires that there be a full Commission hearing, involving the employer, just to ask for a Ballot to be conducted.

14.4.1.3. Why do we need this hearing and why does the employer need to be involved?

14.4.1.4. Other than imposing delays, there is no reason advanced for the involvement of the Commission in formal session, in the taking of a ballot of union members. It is interesting that the role of the Commission is being reduced in many areas where its participation might assist the resolution of disputes, but it is retained in this area where it adds to delay and expense.

14.4.1.5. If the policy was to determine the views of the employees, then there is no role for the employer in the process.

14.4.1.6. Employers exploiting the Protected Action Ballot scheme occurred in a recent matter between the ETUVIC and the employer, Bilfinger Berger.

- The ETUVIC lodged a ballot order application on 1 July 2008.

- The matter was listed for hearing on 10 July 2008. At the hearing, the employer, via its hired Barrister and instructing Partner from the large law firm Arnold Bloch Liebler, made arguments against the Order that any reasonable industrial practitioner would recognise as overly technical.

- On 14 July 2008, SDP Watson found in favour of the ETUVIC and issued the ballot order ([2008] AIRC 119).

- The employer then appealed the matter (C2008/2640) and sought a stay of the order. This was heard by VP Watson who then issued a stay of the order.

- In nearly all stay order cases dealing with a ballot order, the balance of convenience will always be in the favour of the employer, and therefore, the employer will in nearly all cases get a stay order, despite having a very weak case.

- So with the stay order, the Ballot Order is put on hold until the appeal is heard and determined.

- The appeal was heard on 12 August 2008 and the Full Bench reserved its decision.

- On 7 October 2008, over **3 months** after lodging the application, we received the Full Bench decision which, predictably, rejected the employer's appeal outright.

- As result of this long delay, complications arose regarding the original Ballot Order which was stayed by VP Watson. The Ballot Order

contains dates which set out when the Ballot opens, closes etc. As a result of the long delay, these dates all passed.

- One might then naturally say, that could be fixed by varying the dates. However, as a result of section 469 of the Workplace Relations Act, this could not be done.

- So in effect, we had a secret ballot scheme which states it is to be processed within 2 days, but employers, as detailed above, can delay it for numerous months, and then when the employers' overly technical appeal arguments are finally dealt with, the Ballot Order is expired, and the union and workers have to start again.

14.4.1.7. This example shows that employers will do anything they can to delay protected industrial action. Therefore, all possible hurdles should be removed, as employers and their lawyers will find ways to exploit the hurdles for their own purposes.

14.4.2. Lawyers, QC's, Barristers, Solicitors

14.4.2.1. The application for a Protected Action Ballot has become a fertile feeding ground for employers' Lawyers, QC's, Barristers, and Solicitors;

14.4.2.2. In numerous hearings, the Employer has spared no expense, engaging the full arsenal of lawyers to try anything to avoid the possibility of industrial action.

14.4.2.3. We have undertaken a cursory examination of Protected Action Ballot cases and the following table shows the extensive legal representation engaged by employers:

Case	**QC or SC Barrister**	**Barrister**	**Law Firm**
Minister for Employment and Workplace Relations v ANF (PR971973)	H Dixon SC	B. Mueller	Firm not named in decision
CEPU v Siemens Ltd	M McDonald SC	M Rinaldi	Blake Dawson Waldron
CFA v UFUA (PR973841)	F Parry SC	C O'Grady	Firm not named in decision
CEPU V SIlcar (BP2008/347)	F Parry SC	NA	EMA Legal
Program Maintenance Services v CFMEU [2007] AIRCFB 620	T Ginnane SC	J D'Abaco	S Eichenbaum, Mcpherson & Kelly

Case	**Barrister**	**Law Firm/ Solicitor**
AMWU V Quality Maintenance Services Pty Ltd (PR980464) & (PR980436)	N Harrington	Firm not named in decision
LHMU (WA) v CSBP Limited (PR976150)	J Blackburn	Blake Dawson Waldron
AMWU v Rail Corporation New South Wales (RailCorp) (PR982025)	G. Hatcher	Firm not named in decision
CEPU v aiAutomotive Pty Ltd [2008] AIRC 331	R Manuel	Firm not named in decision

AMWU v IBM Australia Limited [2008] AIRC 934	S Meehan	Ms Richardson (Solicitor)
AMWU v Radio Rentals Limited (PR973782)	A Short	Firm not named in decision
Tyco Australia Pty Ltd v CEPU (PR974317)	B J Mueller	Blake Dawson Waldron
AMWU v Visypak Operations (PR974415)	S Wood	Firm not named in decision
AMWU v Downer EDI Rail Pty Ltd [2008] AIRC 1060	C Murdoch	Franklin Athanasellis Solicitors
AMWU v P & H Minepro Australasia [2007] AIRC 233	T Casperz	Deacons
NUW v Vopak Terminals Australia [2007] AIRC 315	RS Warren	Firm not named in decision
TWU v National Jet Systems [2007] AIRC 850	A Gotting	Firm not named in decision
ANF v Tweddle Child & Family Health Services (PR979298)	S Moore	Corrs Chambers Westgarth
Michael James Canning v Fremantle Port Authority (PR981189)	T Caspersz	Firm not named in decision
FSU v Police Assoication Credit Co-operative (PR973505)	G McKeown	G Ashworth
CFMEU v Thiess Pty Ltd ((PR974390)	A Morris	Firm not named in decision
AMWU v Racing NSW [2008] AIRC 609	S Prince	Firm not named in decision
CEPU v Biulfinger Berger [2008] AIRC 119	M Follet	Arnold Block Liebler
Bilfinger Berger v CEPU [2008] AIRCFB 763	M Follet	Arnold Block Liebler
CPSU v Telstra Corporation Limited [2008] AIRC 874	S Wood	Freehills
Heinemann Electric v CEPU	R Dalton	Freehills

14.4.2.4. Again, why do we need full legal hearings just to ask permission to conduct a Ballot and why does the employer need to be involved?

14.4.3. Technical Legal Arguments:

14.4.3.1. As a result of the way the legislation is drafted, employers, through their lawyers, have and will run all sorts of technical legal arguments in order to delay and frustrate industrial action.

14.4.3.2. Further, employers, through their lawyers, attempt to reprise every word uttered in negotiations as part of the hearing of the application for a Protect Action Ballot.

14.4.3.3. The employer's lawyers have, and will continue to, delve into every nook and cranny to try and find some technical reason to stop the Commission granting the Protected Action Ballot. Such arguments have included for example:

- The name of the employer on the Bargaining Period is spelt wrong.
- The section referred to on the Bargaining Period is wrong.
- As the proposed agreement covers two divisions of the one employer (even though they are all electricians), the Bargaining Period is invalid.
- The Union hasn't genuinely tried to reach agreement as it didn't provide the employer with

a document it indicated it would (this is despite the fact that the parties had met many times and the relevant document would not have changed the fact that the parties were still far apart).

14.4.3.4. Why does the legislation place so many hurdles in front of purely getting permission to conduct a Ballot and therefore allow the above technical arguments to be run?

14.4.4. Unnecessary

14.4.4.1. The flawed, but relied upon policy behind the introduction of compulsory Protected Action Ballot prior to taking industrial action is based on the misconceived and ideological premise that unions coerce their members to take industrial action.

14.4.4.2. In reality, it is extremely rare for members to not approve the taking of industrial action. We have undertaken an examination of the results of ballots over the last 4 months from the records on the Australian Industrial Relations Commission website, and out 59 protected ballot actions conducted between 10 September 2008 to 7 January 2009, only 1 was unsuccessful.

14.4.4.3. This clearly demonstrates the truth of what Ms Gillard said in the extract above, ie. that the decision making

processes of union leaders accurately reflect the wishes of its members.

14.4.4.4. With such an overwhelming approval by members, there is no real utility in retaining the Protected Action Ballot scheme and thereby:

- spend taxpayers and unions' money on funding the cost of the Ballot:
- spend taxpayers money on funding the Commission to have the unnecessary Protected Action Ballot application hearings;
- have employers and Unions incur the cost of engaging Lawyers, QC's, Barristers, Partners, Solicitors;
- waste the Commission's time with the unnecessary Protected Action Ballot application hearings;
- delay Australian workers exercising their fundamental right to take protected industrial action.

14.5. How does the FWB compare with Mr Reith's 1996 Act in respect of Compulsory Protected action ballots?

14.5.1. The 1996 Act contained no requirement to have a Protected Action Ballot.

14.5.2. Accordingly, the 1996 Act was far superior for Australian workers in this respect.

14.6. Conclusion on Compulsory Protected action ballots:

14.6.1. To use the words of the ALP politicians referred to above, Protected Action Ballots are:

14.6.2. a strident attempt to completely disarm workers and their unions in the collective bargaining process;

14.6.3. a technical, time consuming and costly ballot process on unions and workers;

14.6.4. a tipping of the scales where, once again, workers and their unions face additional hurdles;

14.6.5. a process which will cause disputes to become bigger, more bitter and less easy to resolve;

14.6.6. unnecessary as there is no reason why the decisions of those democratically elected union leaders, in relation to matters involving the union and union membership, are not legitimate decisions;

14.6.7. about being anti-union and trying to stop people in the workplace from taking protected action;

14.6.8. about putting inflexibility into the industrial relations system, not trying to make it easier to work or any better.

14.6.9. In addition, as we have detailed, the Protected Action Ballot provisions in the FWB are:

14.6.9.1. In breach of the ILO Conventions;

14.6.9.2. In clear breach of the ALP's promise to "rip up Work Choices";

14.6.9.3. Unnecessary and unwarranted.

14.7. Recommendations on Compulsory Protected Action Ballots:

14.7.1. Based on the above, the Protected Action Ballot provisions should be removed entirely from the FWB.

14.7.2. However, if, contrary to our submission, the requirement to have a Protected Action Ballot is maintained, then at the very least, the ballot process should be one that is internal within the union concerned, and one that does not involve the Commission or the employer. Unions have secret ballots for other processes, and this should be no different. The ballot could be conducted by the AEC, and the result conveyed by the AEC to the employer and the Industrial Registry.

14.7.3. There should be no hearing, no hurdles to jump over, no ability for the employers to intervene and object and no lawyers.

14.7.4. All these things were included by Howard in Work Choices to give employers extra weapons to delay and frustrate Australian workers ability to take protected action. They do not have, and never had, anything to do with the publicly announced basis for introducing the Protected Action Ballot scheme which was to get the views of the employees on whether or not they wanted to have access to protected action.

15. Industry Negotiations and Bargaining / Pattern Bargaining

15.1. Introduction:

15.1.1. Pattern bargaining is a term that has a wide variety of meanings, and unfortunately, the media, Liberals and employers make a practice of using it as an emotive term of denigration, without actually knowing what it means or stands for.

15.1.2. We urge the inquiry to set aside the hysteria and hype associated with the term, and instead, look at this issue from a logical and rational standpoint and examine what is a reasonable and acceptable view on industry negotiations and bargaining.

15.1.3. The fact is that pattern bargaining, or more accurately, industry negotiations and bargaining, is and has been a beneficial process for both employers and employees.

15.2. The ETUVIC experience of industry negotiations and bargaining:

15.2.1. In the Electrical Contracting Industry in Victoria, every 3 or so years, the industry parties, being the National Electrical Contractors Association and the ETUVIC meet and negotiate a template agreement intended to be recommended to the industry by both parties. The template agreement is then individually entered into by the ETUVIC with each willing employer in the industry and voted upon and approved by the employees of the employer.

15.2.2. The table below gives an indication of the number of pattern workplace agreements, which are in exactly the same terms, it has done with employers in the electrical contracting industry,

following negotiations and agreement of the pattern agreement with the relevant Employer Organisation.

Year:	Number of Pattern Agreements entered into between the ETUVIC and employers in the Electrical Contracting Industry
2000-2003	1200 Approximately
2003-2005	780 Approximately
2004-2007	700 Approximately

15.2.3. It is clear that despite the presence of these pattern agreements, the economy has boomed and unemployment has remained low.

15.3. Have the ALP maintained their promise to "rip up Work Choices"?

15.3.1. The answer to this is clearly no!

15.3.2. The FWB maintains all the prohibitions on pattern bargaining that were introduced and contained in Work Choices.

15.4. What does the FWB do in respect of pattern bargaining?

15.4.1. The FWB maintains the prohibitions on pattern bargaining as were introduced and contained in Work Choices.

15.4.2. As Work Choices did, the FWB defines pattern bargaining as the act of the Union and employees of a particular employer seeking terms and conditions at the same time that the Union is seeking common terms and conditions on behalf of other employees at another employer. (see s.412 of FWB)

15.4.3. This is an amazingly broad and inexact definition, especially considering its potential effect on unions and Australian workers, which could be millions of dollars of damages and penalties.

15.4.4. For example, it is universally common in workplace agreements to have a clause that incorporates the relevant award. Based on this definition, if a union seeks a clause that incorporates the same award independently with two different employers, then by the definition in the FWB, they are prima facie pattern bargaining. Or if the union seeks the same overtime penalties clause with two different employers, then by the definition in the FWB, they are prima facie pattern bargaining.

15.4.5. Such a result is ridiculous, but clearly open on the wording of the statute.

15.4.6. By reason of falling within the definition of pattern bargaining, the union and the workers have to jump over extra hurdles (set out at section 412(3) of the FWB) that other workers don't, in order to be able to take protected industrial action.

15.4.7. It is time to remove this artificial and unnecessary definition and prohibition that was created solely by Work Choices. Instead all workers should be treated the same regardless of whether or not they are seeking common terms and conditions at the same time as other workers. We will detail this point further in our recommendations.

15.5. Is the FWB better than Reith's 1996 Act in respect of pattern bargaining?

15.5.1. No. The FWB is much worse than Peter Reith's 1996 Act in respect of pattern bargaining.

15.5.2. In the 1996 Act, there was no prohibition on pattern bargaining.

15.5.3. Despite the fact that there was no prohibition on pattern bargaining in the 1996 Act which operated between 1996 and 2005, the economy still boomed and unemployment decreased. This demonstrates that it is the economy that is the controlling force, and not specific industrial prescriptions like this one.

15.6. What has the ALP said previously about pattern bargaining?

15.6.1. The ALP has previously been very vocal in its support for pattern bargaining.

15.6.2. In 2000 and 2002, the Howard Government attempted to introduce Bills prohibiting pattern bargaining in similar terms to that in Work Choices and retained in the FWB.

15.6.3. Numerous Labor MP's spoke out against the Bill in support of pattern bargaining, including the current Prime Minister, Kevin Rudd *(Hansard, 1/6/2000, House of Reps, Workplace Relations Amendment Bill 2000, Second Reading)*:

> *"The bill is deeply ideological, in the sense of Minister Reith's abiding hatred for organized labour and everything that it stands for.*

It was organized labour and collective bargaining that gave rise to basic industrial safety measures, to basic wages and conditions, and – dare I say it – to basic human dignity. None of these things would have come about had we not had the active role of trade unions, something from which all workers, unionists and non-unionists alike, have benefited for more than a century.

… the bottom line is that what we have seen with this government is the systematic, sequential watering down of basic industrial conditions and protections over the period of the last four years, which is, of course, why Minister Reith is determined to do everything in his power to eliminate the power of unions and to ultimately eliminate unions themselves.

There is a daily diatribe against trade unions.

On the content of the bill, what we seen in this piece of legislation before us is the ideology of the H.R. Nicholls Society writ large. Up until now pattern bargaining has been possible for organizations representing both employers and employees.

… if the Senate passes it in its current form, pattern bargaining will be available only for organizations of employers, no longer for organizations of employees. This neat little rewriting of the balance underscores this government' commitment to fairness, that is, unions out, corporations in – Minister Reith's definition of basic social justice. *How, specifically, does the minister do this in*

the bill? He defines pattern bargaining, that bargaining where unions seek common terms and conditions across a number of employers, as not eligible for definition; as protected action under the act and therefore unlawful. He requires the commission to terminate a bargaining period if current or threatened industrial action is defined as pattern bargaining, resulting in any further action no longer being protected and allowing the employer access to court proceedings.

… First, companies and their representatives remain free to pattern bargain; secondly, they will not just be free to do so, but will in many cases, actively be encouraged to do so …

… name a single additional OECD country, another OECD jurisdiction, where organised labour is prevented by statute from engaging in industry wide or multi-employer bargaining.

*…**The bottom line is that what we have, on the basis of some basic scrutiny, is not only bad law but bad economics. It is bad law because it explicitly favours one interest group over another, it is bad law because it is a breach of basic international labour standards and, therefore, international law …***

… Have any of those opposite participating in this debate actually had the gumption to advance the economic argument as to why the efficiency of the Australian economy would be improved by this measure and by how much? If it is so important in terms of your definition of greater

international competitiveness, then where is the case? Where is the quantitative case? It is simply not in existence." (Underlining added)

15.6.4. The Workplace Relations Minister, Julia Gillard, joined Mr Rudd, in speaking out against the introduction of prohibitions on pattern bargaining (*Hansard, 31/5/2000, Julia Gillard, House of Representatives, Workplace Relations Amendment Bill 2000, Second Reading)* and stated:

*"**Pattern bargaining is viewed as a circumstance where employers or unions pursue industrially similar objectives across a range of similar workplaces. When you say it like that it does not really seem in any way odd, does it? In fact, it seems to stand up to scrutiny that, with some site specific variations, workers engaged in similar enterprises, doing similar work, would by and large enjoy similar wages and conditions. That seems an intuitively correct proposition from our ordinary experience of life in the labour market**. Or perhaps it is made clearer if you put it the other way round and say, 'Wouldn't it be a very odd result if workers doing similar work in very similar enterprises' – clothing machinists, say, who sew up ladies fashion wear – ' were paid wildly differently or treated wildly differently? … I think most people would look at that circumstance and say, 'It's not only an odd result; it's also an unfair result …' And yet what this legislation is telling us is that from the workers' side it is inappropriate, it is wrong, indeed it is unlawful, for workers engaged in similar enterprises, doing similar work, to bargain collectively for broadly similar outcomes, but it is all right for*

employers to do it. Interestingly, when you look at this legislation not one part of the prohibition against pattern bargaining is directed at employers; it is all directed at workers, at unions. Employers are left alone.

We know that employers pattern bargain. We know that there are employer industrial organizations. We know that employers in industries meet and confer and come up with broad strategies as to what they want to industrially pursue across their workplaces. And that is okay – that kind of pattern bargaining by employers is okay.

… Pattern bargaining under this legislation is not protected industrial action, so if you engage in conduct like that you do not have the protections for industrial action that are offered in other circumstances under our industrial law and you will be liable to all of the sanctions, fines and penalties that the law can throw against you … What it is clearly about is breaking down the bargaining units – the way in which workers can bargain – to smaller and smaller units. This government does not want workers using the collective strength to bargain industry wide. It wants to break down the collective unit that workers can use to the smallest possible fragment – and the smallest possible fragment, as defined by this legislation is a single enterprise.

… ***This legislation is so offensive that you only need to look to Pinochet's Chile to find an industrial equivalent.***

… Campaign 2000 is the pursuit by a number of unions in the Victorian manufacturing sector of a framework agreement. It does not preclude in any way site-specific deals being done under a broad framework agreement. The framework agreement being pursued deals with matters like long service leave, trust fund protection for workers' entitlements, training standards, portability of skills, and the like – matters which undoubtedly have industry-wide ramifications. ***It should seem not a problem in any way that for those sorts of conditions that have industry wide ramifications there ought to be an industry-wide process of bargaining. What is wrong with that?*** *Of course, there is a common wage claim too. That cannot be denied. There will be a common percentage wage claim. But then one wonders why in this environment employers – who already have at their disposal a piece of legislation in the Workplace Relations Act which strengthens their hand considerably and gives them fundamental advantages – cannot meet that industrial challenge using current tools.*

… If you are actually in this new environment bargaining for an outcome and doing well at getting the outcome, then we are going to change the rules to make it more difficult for you to do well …

… ***And what we have is legislation like this driving downwards the ability of workers to bargain by driving downwards the bargaining units which they can use, so they cannot use industry wide bargaining units, cannot use multisite bargaining units, cannot use a combination of workplaces as bargain units. What they***

have to do is just bargain within the single business. It seems to me that, really, than cannot be defended in any way, shape or form as a fair framework, *particularly when the strictures against pattern bargaining are being applied only on the trade union and worker side and not on the employer side."* (Underlining added)

15.6.5. George Campbell (Senator NSW 1997-2007) on 23 September 2002 said the following in Parliament:

"Prohibiting pattern bargaining has not been an issue internationally simply because no other comparable country imposes the types of restrictions on industry-wide and multi-employer bargaining and agreement making that apply in Australia. ***These restrictions have been the subject of ILO criticism on a number of occasions.***

There may be situations where a number of employers in the same industry prefer to deal collectively with the union and to have, as far as possible, uniform wages and conditions within the industry, while allowing certain variations to meet the circumstances of particular firms. Competition and profitability would then be based on managerial performance.

I might add that one of the most outspoken advocates against pattern bargaining has been the Australian Industry Group. *Yet the Australian Industry Group has admitted, in hearings before the committee on several occasions, that is actively pursues pattern bargaining agreements in the building and construction industry. The*

group's view is that, where it suits it, it will engage in the process and, where it does not suit it, it will not. You cannot have the best of both worlds ... The reality is that, if employers are forced to complete on labour costs, the effect is simply to keep driving these down until they reach a floor below which people will not work. The effect of labour costs competition is also to put stress on safety - something of key importance in both building and transport.

The argument that pattern bargaining is a threat to productivity growth is unsustainable, and no evidence has been produced to sustain that argument. There is no evidence to suggest any concordance between the presence of pattern bargaining and the level of unemployment or the productivity growth rate across OECD countries." (Underlining added)

15.6.6. Senator Trish Crossin said the following in Parliament on 23 September 2002:

"Negotiation in genuine or pattern bargaining arrangements in this country is sometimes required. *There is a degree of commonality across industries, but that does not mean that there is an absence of genuine bargaining, and that is a key issue that this government fails to understand.*

Therefore, it does make a lot of sense that there be some form of pattern bargaining – there is a common claim and there would be, to some degree common outcomes. Again, it does not mean that there would be a lack of intent to

genuinely bargain or a lack of goodwill on behalf of the trade union members and officials to ensure that you could get the best possible outcome not only for the people you represent but for that industry. ***This government continues to confuse the issue of commonality across industries with a lack of genuine will to achieve a good outcome.***"
(Underlining added)

15.6.7. Senator Penny Wong, who is the current ALP Minister for Climate Change and Water, said the following strong words in support of pattern bargaining on 24 September 2002:

"It is not uncommon practice, as a matter of industrial relations in many industries, for agreements to be commenced with a common claim or for aspects of claims served on employers to contain common clauses. *This is not an unusual state of affairs and, despite the government's protestations to the contrary,* ***it does not lead to industrial anarchy. Often it is simply a matter of practicality or what is appropriate in the circumstances.***

…

It appears that some of the more loudly voices and caustic criticisms of pattern bargaining as practiced by the unions are muted or tolerant of corporate practices intended to achieve similar uniformities of negotiating outcome across different workplaces.

In other words, there are those in the government who criticize unions for seeking to progress industry-wide claims, but when there is a similar set of common demands or a common position is taken by an employer

group – as has been documented in the metals case and in others – those criticisms are somewhat muted. *One would note that the legislation as it is currently drafted has unions specifically in mind.*

It is a bill clearly aimed to weight rules which currently govern bargaining against unions. It seeks to diminish the powers of workers and their unions to bargain. *What is the ultimate objective? It is bargaining Reith and Abbott style. As has been commented on in another speech, it is an approach to bargaining which is, 'Please Sir, can I have some more?'"* (Underlining added)

15.6.8. Senator Gavin Marshall also said the following in Parliament in support of pattern bargaining on 24 September 2002:

"The Workplace Relations Amendment (Genuine Bargaining) Bill 2002 seeks to prohibit the use of pattern bargaining – a process by which common claims are sought across an array of workplaces within the same industry. It is a bargaining strategy currently utilized by many employers, unions members and even the federal government itself. ***Pattern bargaining has been responsible for the setting of industry-wide standards of occupational health and safety, comparative wage justice, equal pay for men and women, parental leave, the 38-hour week and superannuation. In recent years, industry-wide bargaining has seen the introduction of income protection insurance and improvements to long service leave. Moreover, it sets standards across industries that provide consistency and stability for employers and***

workers alike on issues such as the use of casual labour, outsourced contracting and redundancy standards. Could this be the reason the government is seeking to forbid it? I suggest it probably is.

This government supports a race to the bottom for wages and conditions and rejects fairness and equity within industry sectors. What is so unreasonable about suggesting that what one group of workers receives in pay and conditions in one workplace should be mirrored in another workplace where that group of workers undertakes the same work using the same skills?

Employers in the non-government education industry agree. In fact, these employers support and engage in pattern bargaining and have not expressed any concerns about common outcomes or any desire for different outcomes across schools and educational institutions.

It may be unnecessarily time consuming and costly for similar enterprises, undertaking similar work, to establish separate enterprise agreements, especially where the organization seeks to bargain on an industry wise level to ensure equity in its outcomes to its employees and in its delivery of services.

Industry-wide bargaining has the effect of protecting businesses that do not seek to exploit their employees by undercutting decent workplace standards. *Many small businesses use multiple employer agreements on the basis that they are the only way in which they, as small*

businesses, can effectively bargain and apply in an affordable way their limited resources to the process of making an enterprise agreement. ***Industry-wide bargaining remove the instability created for end users when every one of their suppliers potentially has an industrial dispute during the life of their agreements, each expiring at different times.***

While the government sees fit to use pattern bargaining in its negotiations, it seeks to impose unequivocal restrictions of use by trade unions of the same procedure. The bill is just another example of an antiworker government.

A common set of demands for conditions of employment, or for timing of negotiating rounds and outcomes is not sufficient in itself to establish that a negotiating party is not genuinely trying to reach agreement with the counterpart party.

Even where employers agreed that claims were socially desirable and industrially and economically reasonable, they could fall foul of the act. ***It is ill thought out and it should be rejected."*** (Underlining added)

15.6.9. ALP Senator, Michael Forshaw, said the following in support of pattern bargaining in Parliament on 24 September 2002:

"This means that if employees at X company are seeking to negotiate certain claims and employees at Y company are also seeking to negotiate the same claims and they are all

members of the same union, that cannot possibly be true enterprise bargaining and, therefore, should be outlawed. ***That of course attacks the collective nature of trade union representation in industries and across various employers.***

Of course, that is not an ability that this government seeks to restrict for employers. Constantly, in this country, employers and their organization adopt positions uniformly across the industry, or even nationally, to oppose certain initiatives and certain claims in the industrial relations field.

Apparently this government believes it is all right for employers to adopt uniform positions, to go out there and argue and be supported by the government to oppose claims, but when unions seek to pursue initiatives across an industry that has to be outlawed. That is the great hypocrisy of this government's approach. There is one rule for unions and employees and an entirely different rule for employers. For employers, it is open slather.

It is ultimately dictators who attack collective bodies – whether it be trade unions, churches or political parties – to get their way. I would at least hope that one day this government might recognize that trade unions play a very constructive role in democracies around the world, and indeed are often fighting for the restoration of democracy."
(Underlining added)

15.6.10. As can be seen by the above statements by ALP politicians, including current Ministers, the ALP is clearly aware of the benefits and importance of industry demands and negotiations, and that there is no legitimate basis to specifically prohibit pattern bargaining.

15.6.11. We urge this inquiry to examine how the same prohibitions on pattern bargaining in 2000 and 2002, differ from those that are now in the FWB were stated in Parliament, and how the FWB prescriptions are no longer:

15.6.11.1. So extreme that it is “Pinochet” like;

15.6.11.2. “deeply ideological” and is from the ideology of the “HR Nicholls society”;

15.6.11.3. an indication of “hatred” towards organized labour;

15.6.11.4. undefendable “in any way, shape or form as a fair framework”;

15.6.11.5. about “unions out, corporations in”;

15.6.11.6. “bad law because it explicitly favours one interest group over another, it is bad law because it is a breach of basic international labour standards”;

15.6.11.7. “great hypocrisy”;

15.6.11.8. “another example of an antiworker government”;

15.6.11.9. supporting “a race to the bottom for wages and conditions and rejects fairness and equity within industry sectors”

15.7. Where in this legislation has Mr Rudd and Ms Gillard addressed the shortcomings which they so earnestly identified in the 2000 and 2002 Howard legislation? The answer is that they have not been addressed.

15.8. This inquiry must deal with those shortcomings. Otherwise, the pattern bargaining restrictions remain as unjustifiable in 2009 as they were in 2000 and 2002.

15.9. Conclusions in respect of Industry Negotiations and Bargaining

15.9.1. The FWB maintains all the prohibitions on pattern bargaining that were introduced and contained in Work Choices.

15.9.2. Industry demands and negotiations are a valid, effective and efficient bargaining process, as agreed by Mr Rudd, Ms Gillard and other ALP politicians in the extracts set out above.

15.9.3. There is no evidence to suggest any concordance between the presence of pattern bargaining and the level of unemployment or the productivity growth rate across OECD countries.

15.10. Recommendations in respect of Industry Negotiations and Bargaining

15.10.1. The Government should remove from the FWB the prohibition on pattern bargaining and accordingly remove the definition of pattern bargaining. The protections afforded by section 170MP under Reith's 1996 Act, which required a party to genuinely try and reach agreement prior to taking protected industrial action, gave the necessary protection to employers.

15.10.2. A clear example of this protection is found in the decision of Justice Munro in *AIG v AMWU & Ors* (Print T1982), which dealt with the bargaining issues in what was called Campaign 2000.

15.10.3. In effect, Campaign 2000 was a situation where common demands were formulated for the manufacturing industry. As detailed below, Justice Munro found nothing wrong with this.

15.10.4. The problems arose from the fact that such demands were sought on the basis that until all employers in the manufacturing industry agreed to the demands, the Unions would not agree on any deal with any employer, even if a particular employer was willing to agree to such demands. This concept is called the "all or none" approach. Accordingly, the Unions in Campaign 2000 sought to take protected industrial action against all employers in the manufacturing industry until every employer had agreed to the common demands.

15.10.5. The case dealt with the application of the principle that protected industrial action could only occur if the parties had genuinely tried to reach agreement.

15.10.6. Justice Munro held that the all or none approach did not satisfy the requirement of genuinely trying to reach an agreement:

> *"[44] Does it follow that, if in truth the respondent negotiator is trying to secure agreement with all, or an entire class of negotiating parties in an industry - all or none - the respondent negotiating party is not genuinely trying to reach*

agreement with any individual negotiating party in the industry or class? In my view, it does."

15.10.7. Therefore, as can be seen, there is no need to add any extra requirement to prohibit the "all or none" approach. The existing requirement that a party genuinely try and reach agreement prior to taking protected industrial action is sufficient protection.

15.10.8. What Work Choices did, and what FWB has maintained, is prohibiting legitimate industry standards being sought, something that Justice Munro thought entirely lawful and legitimate.

15.10.9. Firstly, and quite correctly, Justice Munro refuses to tag the concept of seeking common or industry demands with the term "pattern bargaining" for the following reason at [46]:

"I do not use the expression "pattern" to describe such demands. The notion of pattern demands or pattern bargaining lacks precision. It also has a partisan pejorative content."

15.10.10. Justice Munro's comment is consistent with our earlier proposition that the Government needs to move away from the sensationalism that goes with the inexact phrase, pattern bargaining.

15.10.11. Secondly, Justice Munro talks about the legitimate concept of common demands, and details how it is common for employers to engage in such conduct:

"[47] Industrial negotiation is usually directed to achieving benefits and rights through some form of agreement about a provision to which the parties are bound. ***It is not unusual for major corporate employers to attempt to achieve a consistency and sometimes a relative uniformity of outcomes in negotiations affecting workers.*** *For that purpose, benchmark common outcomes, wage increase levels, flexibilities, and freedom from award restrictions may be energetically pursued against union and employee negotiating parties.* ***There is no good reason to doubt that such bargaining agendas will often form part of a corporate plan or strategy pursued across all the corporation's manifestations, or selectively at key sites.*** *Those familiar with the industrial profiles of employer groups would recognise another group of employers who have negotiation objectives more or less imposed upon them****. For that group negotiation objectives are effectively controlled by ostensibly external corporations to whom product or services are supplied, or by a parent company, often off-shore. A uniform cost price reduction for goods supplied under contract is one example of a practice in vogue in the vehicle components industry some years ago.*** *It had some characteristics of a direct enforcement effect on enterprise level negotiation objectives. Another set of employer negotiating parties are suppliers of labour as a product or resource. For that group, labour is product in relation to which work can be converted from an employment into a series of contractual propositions about providing a resource, divorced more or less from collective bargaining or even some statutory standards. And finally in this profile,*

there are government agencies as employers. Such entities are able to assume configurations not relevantly distinguishable from any, or all of the types of private sector employer negotiating parties outlined.

[48] It would be industrially naive to equate all such employer entities with the stereotypical small business entity which most people would identify with the notion of single business. Under the definition given by the Act to a single business or part of a single business, relatively arbitrary arrangements of workforces may be identified by an initiating negotiating party as the field for a bargaining period. That flexibility may give employers a capacity to select the field of employees to be engaged in collective bargaining. Moreover, for the reasons I have discussed in an earlier decision Re Joy Manufacturing section 170MH Application, some employers may also select their preferred employee negotiating party. ***It appears that some of the more loudly voiced and caustic criticisms of "pattern bargaining", as practised by unions, are muted or tolerant of corporate practices intended to achieve similar uniformities of negotiating outcome across different workplaces."***
(Underlining added)

15.10.12. Lastly, Justice Munro talks about the legitimate and common concept of common demands:

"[49] 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(2)(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.***

…

*[54] For much the same reasons as I have already stated****, I do not accept the proposition that a commonality of claims in separate bargaining periods is sufficient in itself to justify a finding of a circumstance*** *under paragraph 170MW(2)(a) or (b) exists. That consideration may be an element in reaching a conclusion that the respondent negotiator is not genuinely trying to reach an agreement with the counterpart negotiator. However,* ***it does not in my view compel that finding****.*

[55] ***Nor do I accept the AiG's formulation to the effect that the only permissible agreement is one confined to benefits about matters that are narrowly "the needs of the employees in the enterprise".*** *That formulation imposes restrictions not expressed in the Act. If adopted it would unduly restrict the legitimate use of bargaining periods.* ***Many significant employee benefits, for instance maternity leave, accrued rights protection, and severance pay are evolutions of national policies pursued by unions at all available negotiation levels."***
(Underlining added)

15.10.13. In summary, Justice Munro has held as follows:

15.10.13.1. "Pattern Bargaining" is not a useful term to use as it is to loose and uncertain.

15.10.13.2. Taking industrial action against multiple employers until every employer has agreed, is not genuinely trying to reach agreement. If an employer accedes to the common claim, then no industrial action should be taken against them.

15.10.13.3. There is nothing illegitimate or improper about making industry wide demands, as long as you let employers agree to the demands should they so wish.

15.10.13.4. The making of industry wide demands has brought about many of the standard entitlements we expect today.

15.10.14. So as you can see, the approach to pattern bargaining taken in Work Choices and now maintained in the FWB is based on incorrect assumptions and a biased ideology.

15.10.15. the ETUVIC accepts that the "all or none" approach is not acceptable and we do not seek that such an approach be allowed in the FWB.

15.10.16. However, unions making industry wide demands is a legitimate practice, and that protected industrial action should be allowed to be taken in support of such demands by employees of the employers who have **not** acceded to the claims.

15.10.17. Obviously, where the employer accedes to the industry wide demands, no industrial action should be able to be taken against them.

15.10.18. Therefore, to allow this to occur, all the FWB needs to do is go back to Reith's 1996 legislation. It should delete the specific provisions relating to "pattern bargaining" and apply the "genuinely trying to reach agreement" test that is applied to all other cases.

15.10.19. With such a scheme in place, employers are protected from the "all or none" approach, however, unions and employees can bargain for industry standards where they have genuinely tried to reach agreement.

15.10.20. Once all the hysteria is removed from the debate about pattern bargaining, and one actually assesses what the actual conduct is, the pre-Work Choices system is entirely fair and appropriate.

15.10.21. In addition to the above, we seek to recommend some new processes to deal with industries where it is common for employers to do common agreements.

15.10.22. Firstly, the FWB should allow access to multi-employer agreements where a Union and the relevant employers agree.

15.10.22.1. There is no reason not to allow Unions and multiple employers agree to the one document if they decide to do so.

15.10.22.2. We do not submit that employees could take protected industrial action in support of a demand that an employer be party to a multi-employer agreement,

but rather that once an agreement is struck, it may be administratively easier for a number of employers to sign onto the one document where their agreements are in the same terms.

15.10.22.3. But again we stress, it would only be done by consent of both parties, and where the majority of employees of **each** employer approve the agreement.

15.10.22.4. This would reduce the number of agreements that need to be assessed by the relevant Government departments.

15.10.22.5. Such a system is consistent with the following statements of Julia Gillard in Parliament (*Hansard, 31/5/2000, Julia Gillard, House of Representatives, Workplace Relations Amendment Bill 2000, Second Reading)*:

> ***"Pattern bargaining is viewed as a circumstance where employers or unions pursue industrially similar objectives across a range of similar workplaces. When you say it like that it does not really seem in any way odd, does it? In fact, it seems to stand up to scrutiny that, with some site specific variations, workers engaged in similar enterprises, doing similar work, would by and large enjoy similar wages and conditions. That seems an intuitively correct proposition from our***

***ordinary experience of life in the labour market**. Or perhaps it is made clearer if you put it the other way round and say, 'Wouldn't it be a very odd result if workers doing similar work in very similar enterprises' – clothing machinists, say, who sew up ladies fashion wear – ' were paid wildly differently or treated wildly differently? … I think most people would look at that circumstance and say, 'It's not only an odd result; it's also an unfair result …"*

"…It should seem not a problem in any way that for those sorts of conditions that have industry wide ramifications there ought to be an industry-wide process of bargaining. What is wrong with that?" (Underlining added)

15.10.23. Secondly, the FWB should allow industry parties, such as NECA and the ETUVIC, to negotiate and make multiple employer agreements on behalf of their respective members, subject to approval of the relevant employees.

15.10.23.1. Again, the ETUVIC submits that multiple employers should be allowed to appoint an employer Organisation to negotiate on their behalf for a multiple employer agreement. Obviously this doesn't prevent the employer from doing a single employer agreement with the Union should it wish to do so.

16. Restrictions on, and Ability to Terminate, Protected Industrial Action

16.1. Introduction

16.1.1. Further limitations on the legitimate right to withdraw labour are contained in sections 423 to 426 of the FWB.

16.1.2. These provisions allow the employer, Minster or third parties to have protected industrial action suspended or terminated.

16.2. Has the ALP fulfilled its promise to “rip up Work Choices”?

16.2.1. No.

16.2.2. Work Choices first introduced provisions (section 433) which allowed for the suspension of Australian workers’ ability to take protected industrial action for the reason that such action was causing harm to a third party.

16.2.3. At section 426 of the FWB, the ALP has included the same provision mentioned above that was introduced by Work Choices.

16.2.4. Work Choices first introduced provisions (section 432) which allowed for the suspension of Australian workers’ ability to take protected industrial action for the purposes of cooling off.

16.2.5. Again, at section 425 of the FWB, the ALP has included the same provision mentioned above that was first introduced by Work Choices.

16.2.6. From the above, it is clear that the ALP has broken its promise to "rip up Work Choices" and instead, the ALP has maintained the widening of employers' powers to suspend and terminate protected industrial action that was first introduced by Work Choices.

16.3. Is the FWB better than the 1996 Act in respect of a 3rd party's or the employer's ability to terminate or suspend protected industrial action?

16.3.1. No. The FWB is much worse for Australian workers than Peter Reith's 1996 Act in respect of the termination and suspension of protected industrial action.

16.3.2. In the 1996 Act, there was no ability for 3rd parties or employers to terminate or suspend protected industrial on the basis of:

16.3.2.1. A cooling off period; or
16.3.2.2. Harm to a 3rd party.

16.3.3. Australian workers would be horrified that the ALP has given big business more weapons against Australian workers than Reith did in his 1996 legislation.

16.4. Recommendations

16.4.1. The ability to get an order suspending or terminating protected industrial action for the purposes of cooling off or where there is harm to a 3rd party should be entirely removed from the FWB.

16.4.2. 3rd Party Harm:

16.4.2.1. With the ever increasing practice of outsourcing workers and using contractors, the likelihood of harm to a 3rd party when Australian workers take industrial action is inevitable, and accordingly, shouldn't be able to be used as a reason for stopping legitimate protected industrial action.

16.4.2.2. For example, at Bluescope Steel in Westernport, Hastings, until 3 years ago, all the electricians were employed directly by Bluescope Steel. Therefore, if they took protected industrial action and were causing harm to Bluescope Steel, which is the obvious aim of the action, section 433 would not have applied as Bluescope Steel was not a 3rd party.

16.4.2.3. However, 3 years ago, like many other manufacturers have done, the electricians were overnight terminated and transferred and outsourced to the electrical contractor Silcar. Following the transfer, the same electricians continued to perform the electrical maintenance on the site, the only change being their employer was now Silcar.

16.4.2.4. Following the transfer, if the employees decided to take protected industrial action, and such action caused harm to Bluescope Steel, then Bluescope Steel would now be able to suspend the protected industrial action. This is by reason of the fact that they were now a 3rd party, even though the employees are doing the same work, in the same way, at the same place.

16.4.2.5. There is no need to include this prohibition.

16.4.2.6. Section 424 of the FWB allows employers to stop protected industrial action where the action endangers the life, the personal safety or health, or the welfare, of the population or of part of it.

16.4.2.7. The above provides more than enough protection for employers and Businesses, and accordingly, there is no need for section 426.

16.4.3. In respect of the ability to suspend industrial action for a cooling off period, again, this is purely about providing extra weapons to employers and business to restrict Australian workers' attempts to get a fair deal from their employer.

16.4.4. Julia Gillard said the following in opposition to a Bill introduced by the Howard government in 2000 seeking to introduce the concept of a cooling off period (*Hansard, 31/5/2000, Julia Gillard, House of Representatives, Workplace Relations Amendment Bill 2000, Second Reading)*:

> "So instead of a fair bargaining system letting everybody use their strengths to get to the best possible outcome they can – and employers do use their strengths in that setting; they do things like lock workers out when unions or workers are in combinations where they are using their strengths, which might be the withdrawal of their labour through strikes or other forms of industrial action – **this provision (cooling off periods) in this legislation allows employers to get that halted, to get the necessary reprieve, which means that**

they can then go back into the field strengthened by the fact that the industrial action against them was forced off. This is another quite nakedly biased provision in this bill, all about making sure that when workers bargain they do not get to do that with the industrial strengths that they would otherwise have available to them. They are fundamentally weakened, and once fundamentally weakened are then sent out into the field to bargain …" (Underlining added)

16.4.5. This inquiry must establish how the criticisms voiced by the Deputy Prime Minister, are overcome by the FWB.

16.4.6. We submit that the criticisms are valid and significant, and that the FWB produces the same outcomes as the legislation referred to in the above extract.

16.4.7. This inquiry should recommend the removal of these provisions from the legislation.

17. Orders preventing Industrial Action

17.1. Section 418 and 420 provide the employer with a very broad, fast and unfair process to stop Australian workers from exercising the right to withdraw their labour.

17.2. These sections:

17.2.1. allow no discretion for FWA to refuse the order, even if the employer has acted reprehensively;

17.2.2. require FWA, if it has not determined the matter within 2 days, which is the case in nearly all cases, to make an order stopping all industrial action, without any chance for the unions to defend themselves;

17.2.3. allow FWA to make an order stopping industrial action without any requirement to actually specify the action being taken. Therefore, the order always covers conduct that is wider than the conduct actually occurring.

17.3. Has the ALP fulfilled its promise to "rip up Work Choices"?

17.3.1. No.

17.3.2. Work Choices introduced new provisions which:

17.3.2.1. Removed any discretion the Commission had to refuse an order to stop industrial action, even if the employer had acted reprehensively;

17.3.2.2. Required the Commission to make an order stopping alleged industrial action if the matter was not determined within 2 days, irrespective of whether the Union and workers have had a chance to defend themselves.

17.3.2.3. Allowed the Commission to make an order stopping industrial action without any requirement to actually specify the action being taken.

17.3.3. The FWB has maintained these same provisions in sections 418 and 420.

17.3.4. Accordingly, the ALP has broken its promise to “rip up Work Choices”.

17.4. Is the FWB better than the 1996 Act in respect of provisions dealing with orders stopping industrial action?

17.4.1. No. The FWB is much worse for Australian workers than Peter Reith’s 1996 Act in respect of orders stopping industrial action.

17.4.2. In the 1996 Act:

17.4.2.1. the Commission could exercise a discretion to refuse an order stopping industrial action;

17.4.2.2. the Commission was not required to issue an order stopping industrial action within 2 days. Rather, Unions and workers had the chance to present their case and natural justice was afforded to them.

17.4.3. In contrast, the FWB:

17.4.3.1. maintains the removal by Work Choices of any discretion the Commission had to refuse an order to stop industrial action, even if the employer had acted reprehensively;

17.4.3.2. maintains the requirement introduced by Work Choices, that the Commission must make an order

stopping alleged industrial action if the matter was not determined within 2 days, irrespective of whether the Union and workers had a chance to defend themselves.

17.4.3.3. allows the Commission to make an order stopping industrial action without any requirement to actually specify the action being taken.

17.4.4. Australian workers would be horrified that the ALP has given big business more weapons against Australian workers than Reith did in his 1996 legislation.

18. Restrictions on Pay During Industrial Action

18.1. Payments for periods of Protected Industrial Action

18.1.1. Section 470 of the FWB provides that for protected industrial action, the payment to be withheld is for the total duration of industrial action, except where the industrial action is a partial work ban or an overtime ban.

18.1.2. Where the action is a partial work ban the discretion is given to the employer to make payment in full. Alternatively an employer may issue a notice indicating that it will reduce the employees pay partially or in full.

18.1.3. Where the payment is reduced partially an employee has the ability to apply to FWA to challenge the portion of the reduction.

18.1.4. Confusingly, where the employer issues a notice indicating they are withholding the employee's entire payment, the employee has no ability to bring an application to FWA.

18.1.5. The scheme of payments for periods of protected industrial action in the FWB will only serve to encourage the escalation of industrial action during bargaining for new agreements.

18.1.6. By giving the employer the unilateral right to refuse payment where employees are engaged in a protected partial work ban, the FWB is effectively handing employers the right to override an employee's lawful right to engage in moderate forms of industrial action.

18.1.7. The result of these provisions will be that employees will be forced by an employer into escalating their protected industrial action to a complete stoppage of work, thus nullifying any attempt to engage in industrial action in a restrained manner. Instead of an employee performing a majority of duties and placing a ban of a limited scope, thus minimizing the impact of the industrial action, employees will end up been compelled into going out the gate.

18.1.8. The ETUVIC cannot see any benefit in having legislative provisions that actually force employees to engage in more damaging forms of industrial action. The intent of the FWB should be to ensure employees have access to a broad scope of industrial action outside of complete stoppages of work.

18.2. Recommendations

18.2.1. The ETUVIC recommends the repealing of provision permitting the employer to completely refuse payment where the employees are engaged in a partial work ban.

18.3. Payments for periods of Unprotected Industrial Action

18.3.1. Where the industrial action engaged in is unprotected within the meaning of the Act, s.470 of the FWB requires employers to deduct a minimum of 4 hours pay.

18.3.2. This means that for a 10 min stoppage an employee will lose 4 hours of pay. In practice this has meant employees are more likely to elect to take 4 hours off rather than work for no pay. Thus the effect of this provision has been to increase time lost to unprotected industrial action rather than reduce it.

18.3.3. It also means that an employee can lose pay for time already worked, which has not been affected by industrial action. It is reprehensible that an employer can lawfully withhold payment for periods where an employee has performed their full duties.

18.3.4. However, where the unprotected industrial action is a refusal to work overtime, then the section does not apply. The refusal to work overtime cannot however be in conflict with an employees obligations under a modern award, enterprise agreement or contract of employment, otherwise the minimum 4 hour deduction applies.

18.3.5. Therefore, if an employee was to refuse to work overtime when requested by an employer in accordance with the terms of their enterprise agreement, and this was not protected industrial action, then an employer must deduct 4 hours pay from the employee. Thus an employee could be asked to work 10 mins overtime, refuse, and lose 4 hours pay for **time already worked**.

18.3.6. This places employees in a position where refusing to work overtime can have serious ramifications for their pay for hours worked, and requires an employee to understand the potentially complex interaction of their obligations under an award or enterprise agreement before being able to refuse overtime.

18.4. Recommendations

18.4.1. The ETUVIC recommends the immediate repealing of the requirement to deduct a minimum of 4 hours pay for unprotected action.

18.4.2. Crucially, no evidence has been produced by the ALP which would indicate the benefits under WorkChoices of requiring a minimum of 4 hours deduction of pay for unprotected industrial action. By contrast, the ETUVIC experience of the effect of the minimum 4 hour deduction is that employees will stop work for 4 hours (rather than maybe only 10 mins) because they don't want to work for no pay.

18.4.3. The ETUVIC also recommends that in respect of a failure to work overtime, s.470(4)(b) should apply to unprotected industrial action. The extension of this provision to unprotected industrial action will mean that where the employee has refused to perform overtime the period of industrial action will be the period of overtime only and not hours already worked.

18.5. Has the ALP fulfilled its promise to "rip up Work Choices"?

18.5.1. No.

18.5.2. The ALP have re-enacted the requirement introduced under the Work Choices legislation to deduct a minimum of 4 hours pay for employees engaging in unprotected industrial action.

18.5.3. Again Australian workers would be horrified to learn that the ALP would retain a critical element of the Work Choices legislation which allows an employer to not pay an employee for hours they have worked.

18.6. Is the FWB better than the 1996 Act in respect of provisions dealing with orders stopping industrial action?

18.6.1. No.

18.6.2. The 1996 legislation did not provide for a mandatory deduction of 4 hours for periods of industrial action.

19. Right of Entry

19.1. The FWB contains provisions that:

19.1.1. prevent parties from having terms in their agreement relating to right of entry;

19.1.2. detail a right of entry permit scheme that requires union officials to satisfy a number of onerous requirements before getting a permit;

19.1.3. allows the employer to designate where union officials can meet with employees.

19.2. In 2004, the Howard Government attempted to introduce provisions to this same effect.

19.3. In 2004, the ALP opposed the provisions. In doing so, the current Prime Minister spoke out vehemently about such provisions *(Hansard, 14/3/2005, Kevin Rudd MP, House of Reps, Workplace Relations Amendment (Right of Entry) Bill 2004)*:

> *"It will no doubt be argued that we no longer have the sweated trades and that unions no longer need to have a right of access to workplaces.* ***But the main reason so many abuses of the rights of workers have been stamped out is that trade unions have been vigilant over many decades – and vigilance can only be exercised, in many cases, through direct access to the workplace where the abuses are taking place.*** *To suggest that the right of entry should be abolished or heavily restricted because the abuses which the right of entry was designed to remedy no longer take place is like saying that we should abolish health inspections because there have not been any outbreaks of cholera in recent years.*
>
> *The bill before the House significantly restricts the ability of union representatives to enter workplaces. Among other things, it specifies that a union official or employee cannot be granted a right of entry permit unless they are a fit and proper person. The bill then defines who is, in the government's opinion, a fit and proper person. In other words, the government seeks to dictate who may or may not represent a trade union in carrying out its legitimate function of representing employees.* ***Any person who has been fined for a breach of any of the government' myriad restrictive industrial laws will not be deemed to be a fit and proper***

person … and will not be able to carry out their duties. Under the bill, neither Nelson Mandela nor Mahatma Gandhi would be a fit and proper person to visit a workplace on behalf of a trade union.

The bill also places new requirements on union officials seeking to enter premises. It requires that an entry notice be in a prescribed form, that it be given to an employer prior to entry and that it specify the intended date of entry and the purpose for which entry will occur. It must also give details of any suspected breach or whether recruitment is the purpose of the entry. This is one of the most significant restrictions contained in the bill. It means that unions can enter a workplace only to investigate a specific breach of an industrial law or instrument which has been reported to them and not to determine whether industrial laws or awards are being complied with generally. ***It ignores the reality that certain work forces who may be working in totally substandard conditions may be either unwilling or unaware of how to notify their relevant union to complain.***

It is a way of preventing abuses, not just of responding to them when they have already occurred. It is clear that the overall purpose of these restrictions is to deny unions the ability to exercise any kind of preventive or supervisory role in defence of the interests of their members or of employees in general.

There are other features of the bill as well: … a provision giving employers the right to tell union officials where they may conduct interviews with their members or other employees and what route they must take to reach that interview location; … ***a provision prohibiting the Industrial Relations Commission from***

certifying industrial agreements which contain right of entry provisions.

But where, after nine long years in office, is the quantitative data that establishes that the current rights of entry are an impediment to business or to the overall economy? The answer is that there is none. *None has been provided by this government. We are to imagine that it exists.*

One of the purposes of the bill is to prevent unions recruiting – in particular, to prevent employees in the rapidly growing service sector of the economy from joining unions.

The construction industry is a dangerous industry where there is, on average, a workplace fatality every week. This is an industry where building workers, some of them teenagers are regularly killed or crippled because of unsafe work conditions. In these conditions, it is no surprise that unions are vigilant in protecting the lives of their members. They are dealing with some of Australia's most dangerous workplaces. *But to argue that the situation in the construction industry justifies new, significant restrictions on the right of entry across all workplace is without rational foundation.*

*In the absence of any economy-wide data presented to parliament on the impact of the current rights of entry, the parliament can only conclude that this bill is about politics – not economics****. It is about ideology beyond mere politics alone.***

The government resents the public advocacy role in which unions engage in defence of their members and, more broadly,

<u>of nonmembers and those who cannot argue their case properly in the broader economy.</u> *" (Underlining added)*

19.4. Again, the above quote is not taken out of context, nor is it a statement by Mr Rudd that has been made on the run. It is a pre-prepared well thought out statement made in the Australian Parliament on the record.

19.5. Once again, we are owed an explanation as to why, apart from Mr Rudd coming to power, the position on right of entry is different now than it was in 2004.

19.6. Once again, it is not a matter of "getting the balance right", because if the balance regarding right of entry was not right in 2004, how is it said to be right in 2009.

19.7. Where, in 2009, is the quantitative data that Mr Rudd called for in 2004 to justify the right of entry restrictions?

19.8. Where in this legislation has Mr Rudd addressed the shortcomings which he so earnestly identified in the 2004 Howard legislation? The answer is that they have not been addressed.

19.9. This inquiry must deal with those shortcomings. Otherwise, the right of entry restrictions remain as unjustifiable in 2009 as they were in 2004.

20. CONCLUSION

20.1. The concerns we have set out above, and the arguments we have raised in respect of these concerns, are largely, not arguments that we have created.

20.2. Rather, the arguments we have made are the same ones that the current Prime Minister, Deputy Prime Minister and other ALP politicians have made in Parliament, when in opposition, in response to the Howard's Government's attempts to introduce the very provisions that are now contained in the FWB.

20.3. The inquiry must examine how provisions can be included in the FWB, that were previously described by the abovementioned people as:

> *"so offensive that you only need to look to Pinochet's Chile to find an industrial equivalent"*
> *"the ideology of the H.R. Nicholls Society writ large"*
> *"(a) nightmare vision of the industrial future"*
> *"a strident attempt to completely disarm workers and their unions in the collective bargaining process"*
> *"deeply ideological, in the sense of Minister Reith's abiding hatred for organized labour and everything that it stands for"*
> *"bad law because it explicitly favours one interest group over another, it is bad law because it is a breach of basic international labour standards"*

20.4. We urge the inquiry not to accept the government's basic response that the balance is right because both employers and unions are complaining.

20.5. How can the balance be right when the very same provisions that were described as "*a strident attempt to completely disarm workers and their unions in the collective bargaining process"* are still in the FWB in their entirety?

20.6. Of course employers are complaining. For the last 3 years, they have had the benefit of the most anti-union and anti-worker legislation in Australia's history. They are going to cling to as much of that legislation as possible and do anything possible to maintain it. However, we urge the inquiry not to be fooled that by reason of their complaining, that the right balance involves maintaining significant parts of Work Choices and provisions that have been described by Ms Gillard as "*so offensive that you only need to look to Pinochet's Chile to find an industrial equivalent"*, and by Mr Rudd as "b*ad law because it is a breach of basic international labour standards*."

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Dean Mighell

Victorian Branch Secretary

Electrical Division

CEPU