SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO:

- **WORKPLACE RELATIONS AMENDMENT (TALLIES AND PICNIC DAYS) BILL 2000**
- **WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTED ACTION) BILL 2000**
- **WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2000**
- **WORKPLACE RELATIONS AMENDMENT (AUSTRALIAN WORKPLACE AGREEMENTS) BILL 2000**

SUBMISSION OF THE NATIONAL UNION OF WORKERS

25 AUGUST 2000

WORKPLACE RELATIONS AMENDMENT (TALLIES AND PICNIC DAYS) BILL 2000

The Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000 should be rejected for the following reasons:

1. Removing picnic day as an allowable public holiday will reduce award public holiday entitlements from 11 to 10 days.
2. Alternative public holidays are able to determined at the workplace under the existing award provisions.
3. It is ideologically selective to attack union picnic day.
4. Union picnic day is as relevant and justifiable as a public holiday as other public holidays.

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1. Removing picnic day as an allowable public holiday will reduce award public holiday entitlements from 11 to 10 days.

The Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000 proposes to include union picnic days and tallies as non-allowable matters for the purposes of section 89A.

The effect of making union picnic days non-allowable would be to reduce the public holiday entitlement of workers covered by awards that include picnic day. Instead of the 11 standard public holidays determined by the Australian Industrial Relations Commission, these workers would receive only 10.

Attached is a copy of the public holiday clause from a typical federal award that contains picnic day as a holiday, the Storage Services – General – Award 1999. This award clause is consistent with the Commission's Public Holidays Test Case standard. All workers covered by the award, whether union members or not, are entitled to the union picnic day public holiday.

If this day is to be deleted, no alternative day will apply, leading to a reduction from 11 to 10 public holidays. Workers covered by awards with a union picnic public

holiday will be penalised by one public holiday by the Bill, merely because one of their public holidays is called "union picnic day". Other workers will suffer no reduction in comparison.

2. Alternative public holidays are able to determined at the workplace under the existing award provisions.

The standard public holiday award clause also provides for the facility for an employer and a majority of employees to take an alternative day in lieu of any of the specified standard public holidays. Substitution agreements can also be made involving individual employees.

3. It is ideologically selective to attack union picnic day.

Other standard public holidays in awards include Queens Birthday. How many Australians pay any regard to the Queen or the royal family on the Queens Birthday public holiday? All workers are entitled to that holiday (which is not the Queens Birthday), even republicans. Similarly, non-Christians are entitled to the Easter and Christmas holidays. Even the anti-union Peter Reith would be entitled to Labour Day if he were to be covered by the award.

It is therefore ideologically, theologically and politically selective to argue that the union picnic day public holiday should be removed because not all workers are union members and that the day is somehow more anachronistic than other public holidays.

4. Union picnic day is as relevant and justifiable as a public holiday as other public holidays.

The selective approach that is taken by the Bill to picnic day is outlined above. It is also illustrative of the point to consider if an alternative public holiday to picnic day was to apply (and the Bill does not propose one), what would it be?

It is reasonably common for Melbourne Cup Day to be chosen as an alternative day, at least in Victoria. However only about 100,000 people actually go to the Cup and many people have no interest in the horse race (which lasts for only 3 minutes). Would this day be less anachronistic? (In fact many employers do not support Melbourne Cup Day over union picnic day, which is held on a Monday. Melbourne

Cup Day is the first Tuesday in November. A holiday on the Tuesday often means there are productivity problems on the Monday.)

The thousands of union members and their families who attend the NUW's picnic days do not think that the day is anachronistic. Below is a summary of the annual NUW Victorian Branch picnic day. Also attached is a selection of photos from this years picnic day and the poster that was distributed to advertise the day amongst the Union's membership.

NUW VICTORIAN BRANCH UNION PICNIC DAY

When?	Picnic Day is traditionally held in the last week of January each year during the school holidays. From 2001 it will be held in the September school holidays.
Where?	The Picnic is held at Moonee Valley Racecourse, but this venue is subject to change.
Who attends?	Members of the Union from all of the industries where Picnic Day is included in Awards, including Warehousing, Pharmaceuticals, Milling, Oil, etc.. Also in attendance are members families (wives, husbands and children) along with many other guests (employers, members of the Commission etc)
Activities	There are a range of activities for both children and adults. For children there are foot races, giant slides, merry go rounds, pony and camel rides, football kicking and ball throwing games. For adults there are activities such as a Forklift Driving competition, and individual and relay foot races. Most activities attract prizes. There is also a band playing during the day.
Attendance	Depending on the weather, each year between 2000 and 5000 people attend the Picnic.

Refreshments	For all people who attend the Picnic, there are a range of refreshments provided by the NUW, including Ice Cream, Fruit, Chocolate, Fairy Floss, Drinks etc..
The Future	The NUW is proposing significant changes to the Picnic next year to make it more attractive including footy, netball and soccer clinics, showbags, clowns, face painting etc.

STORAGE SERVICES – GENERAL – AWARD 1999 [S1062]

PUBLIC HOLIDAYS CLAUSE:

31. PUBLIC HOLIDAYS

31.1 Prescribed public holidays

An employee shall be entitled to holidays on the following days:

31.1.1 New Year's Day, Good Friday, Easter Saturday, Easter Monday, Christmas Day and Boxing Day;

31.1.2 The following days, as prescribed in the relevant States, Territories and localities: Australia Day, Anzac Day, Queen's Birthday and Eight Hour's Day or Labour Day; and

31.1.3 Union Picnic Day in lieu of Melbourne Cup Day.

31.2 Public holidays falling on a Saturday or Sunday

31.2.1 When Christmas Day is a Saturday or a Sunday, a holiday in lieu thereof shall be observed on 27 December.

31.2.2 When Boxing Day is a Saturday or a Sunday, a holiday in lieu thereof shall be observed on 28 December.

31.2.3 When New Year's Day or Australia Day is a Saturday or Sunday, a holiday in lieu thereof shall be observed on the next Monday.

31.3 Additional public holidays

Where in a State, Territory or locality, public holidays are declared or prescribed on days other than those set out in 31.1 and 31.2, those days shall constitute additional holidays for the purpose of this award.

31.4 Substitution of public holidays

31.4.1 By agreement between the employer and a majority of employees in the workplace or a section or sections of it, an alternative day may be taken as the public holiday in lieu of any of the prescribed days.

31.4.2 At the request of an employee, an employer and individual employee may agree to the employee taking another day as the public holiday in lieu of the day which is being observed as the public holiday in the enterprise or relevant section of the enterprise.

31.4.3 An agreement pursuant to 31.4.1 or 31.4.2 shall be recorded in writing and be available to every affected employee and the Union.

31.5 Public holidays - penalty rates

31.5.1 Double time shall be the rate for all work done on Union Picnic Day. Double time and a half shall be the rate for all work done on New Year's Day, Australia Day, Good Friday, Easter Monday, Labour Day, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day and Boxing Day:

31.5.2 Provided that if any other day is by Act of Parliament or Proclamation, substituted for any of the above named holidays, the special rate shall only be payable for work done on the day so substituted.

31.6 Rostered day off falling on a public holiday

31.6.1 An employee who by the circumstances of the arrangement of his/her ordinary hours of work is entitled to a rostered day off which falls on a public holiday prescribed by this clause, shall be granted an alternative day off to be determined by mutual agreement between the employer and the employee.

31.6.2 If mutual agreement is not reached then clause 9 - Procedures for the avoidance of industrial disputes, of this award shall apply.

31.7 Absence before or after a public holiday

Where an employee is absent from his or her employment on the working day before or after a holiday or a rostered day off without reasonable excuse or without the consent of the employer, he or she shall not be entitled to payment for such holiday.

WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTED ACTION) BILL 2000

The NUW submits that the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000 should be rejected for the following reasons:

1. **There are existing provisions in the legislation for secret ballots. No case can be made that the existing provisions are ineffective. In addition, the existing provisions are rarely used, establishing that there is little or no demand for secret ballots.**
2. **The employees who engage in industrial action must as a matter of practice, support it. The idea that, in a time when workers are free to join or leave unions as they please, workers are either compelled to take action against their will or are too weak minded to make their own independent decisions is insulting to Australian workers.**
3. **If unions are to be required to undertake secret ballots prior to industrial action, the same requirements should be imposed on employers.**
4. **The secret ballot procedure proposed is unduly protracted, restrictive, inflexible, bureaucratic and expensive.**

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1. **There are existing provisions in the legislation for secret ballots. No case can be made that the existing provisions are ineffective. In addition, the existing provisions are rarely used, establishing that there is little or no demand for secret ballots.**

The table below sets out the applications that have been made under section 135, the section of the Act empowering the Commission to order secret ballots. There have apparently been no applications for ballots under section 136, the section of the Act under which members of organisations can apply to the Commission for a ballot.

1995-96	1996-97	1997-98	1998-99
1	2	6	1

Source: AIRC Annual Report

Only 1 reported decision of the Commission relating to section 135 appears to have been issued in 1999-2000.

These provisions have operated for many years without controversy. No case can be made for their amendment.

Furthermore, despite the obvious lack of demand for the current secret ballot provisions, the Bill proposes to make secret ballots mandatory to authorise all protected industrial action (unless the action is in response to an employer lock-out). Existing practise demonstrates that there is no justification for this requirement.

As the submissions from the "Second Wave legislation inquiry" showed, these provisions add nothing to industrial democracy but have great potential to impede legitimate action on the part of workers, lengthen disputes and generate significant new levels of litigation.

2. The employees who engage in industrial action must as a matter of practice, support it. The idea that, in a time when workers are free to join or leave unions as they please, workers are either compelled to take action against their will or are too weak minded to make their own independent decisions is insulting to Australian workers.

The concept of a ballot in itself is not an objectionable requirement. Within the NUW (and all unions generally) industrial action is only taken with the authorisation of the membership involved. It is simply a fact of life that industrial action cannot be organised, let alone effectively organised, unless the employees who are to implement the action support it. It is the employees who take the action.

It is sheer paranoid fantasy and insulting to believe that, like sheep, Australian workers can be directed this way and that in accordance with the dictates of "all-powerful" union officials.

3. If unions are to be required to undertake secret ballots prior to industrial action, the same requirements should be imposed on employers.

Unions are already democratic organisations. Union officials are answerable to their members in elections, as are politicians. Unions are also answerable in the sense that workers are free to leave a union with whom they do not agree (a level of accountability not enjoyed by politicians). In addition, a committee of management of the organisation or someone authorised by a committee to approve the particular action must approve protected industrial action before it commences (section 170MR). The Bill proposes a further layer of accountability.

It is worthwhile noting the different treatment of unions and corporations. Both are capable of lawfully engaging in industrial action. However, there is no requirement for shareholders or even directors to be balloted before employers are able to initiate industrial action against employees. In fact, no approval whatsoever of shareholders or directors is required.

If unions, which are far more democratic and accountable than corporate management, are required to conduct secret ballots before initiating industrial action why are employers to be treated differently? Clearly corporate governance lags well behind democratic unionism. Nevertheless, no proper rationale exists for the different requirements imposed on the respective parties ability to take protected industrial action.

4. The secret ballot procedure proposed is unduly protracted, restrictive, inflexible, bureaucratic and expensive.

With respect to unions, a secret ballot procedure only becomes objectionable if the procedures are unduly protracted, restrictive, inflexible, bureaucratic or expensive. The procedures proposed by the Government are all of these. In considering the points raised below it must be borne in mind that any failure to follow these procedures or any technical defect in their execution will ultimately lead to any resulting industrial action being unlawful, exposing the workers and their union to dismissal, fines and damages claims.

- There is a two tiered set of requirements. A ballot is not automatic. The workers involved must first seek the permission of the Commission even to have the right to consider whether or not to engage in action. A ballot can then be held according to the specified procedures. The employer is entitled to make submissions and oppose the authorisation of the ballot. This is certainly a peculiar type of democracy where an employer is given rights to object to workers even being given an opportunity to express a view.

- The application is required to include an extensive list of details. Many of these details are simply unnecessary for an effective authorisation procedure (for example, if 5 additional days specific notice is subsequently required of the planned action, why would these details need to be included at the time of seeking the authorisation to implement the action?). Others are "unknowable" at the time they are required. The specificity of the information required in the fluid and changing environment of an industrial dispute is impracticable – and designed to be so.

- Employers may allege that the union is engaging in pattern bargaining. This application must then be referred to the President for separate determination. An application must be dismissed if pattern bargaining is found. The capacity for delay in the entire process is obvious.

- If the Commission is satisfied of a specified range of matters, a ballot will be ordered.

- The ballot must be a postal vote (although an application can be made for a different form of ballot) conducted by the Australian Electoral Commission or a private body included on a register maintained by the Registrar. This is inconsistent with the industrial parties being responsible for their own affairs.

- The ballot paper is required to contain a range of information, including a statement that there is no requirement on the voter to take industrial action

regardless of the result of the ballot. Advice must also be included about the role of the Employment Advocate if pressure has been used in respect of the vote or the taking of industrial action. The objective of this gratuitous information in undermining the legitimacy of collective action is obvious.

The procedure contemplated is likely to extend over a minimum of at least 6 weeks and probably months. The effect of this delay in the ability of workers to implement effective industrial action is also obvious - and intended. It is biased and unjustifiable.

Not only is the proposed procedure unwanted, unnecessary and designed to be practically unworkable, the applicant union is liable for the cost of the ballot! Workers have to pay for the privilege of being forced to have a secret ballot to make a decision about their own affairs. The Commonwealth will reimburse only 80% of "reasonable and genuine" costs (as determined by the Registrar).

The legislation is silent on the means in which industrial action is brought to an end. If a secret ballot is warranted to implement the action, surely the same considerations demand a secret ballot to consider its cessation?

WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2000

A range of amendments is proposed that will make it more difficult for employees to succeed with an unfair dismissal claim. In the context of the legislation, these erosions of the protections workers have against arbitrary or unfair dismissal can be seen as part of the pattern of erosion of workers rights and protections generally.

The most objectionable provisions in this Bill are those provisions that require the Commission to provide an indication on the balance of probabilities of the likely success of an unfair dismissal claim. The Commission is to be required to do this following conciliation, ie without a proper hearing and without hearing evidence. The effect of a certificate issued by the Commission setting out its opinion is to deprive an applicant of the right to pursue a claim.

It is simply unjust to deprive applicants of rights without affording them an opportunity of a proper hearing.

The inevitable consequence of this proposal will be that claimants will be forced to approach every conciliation as if it was a final hearing, produce evidence and run a full case. The practical implications of this on efficient Commission process and the costs for the parties are patent.

WORKPLACE RELATIONS AMENDMENT (AUSTRALIAN WORKPLACE AGREEMENTS) BILL 2000

Under this Bill, AWAs are to be even easier to make and are to be given even greater precedence over awards and certified agreements. Scrutiny of AWAs by the Employment Advocate under the current provisions is already of questionable effectiveness. The Commission has found that the Employment Advocate has approved AWAs that failed the "no disadvantage test" (see Print S9090, SDP Harrison 11 August, 2000).

The reductions in the level of scrutiny of AWAs by both the EA and the Commission and the reductions in the protection for workers that are proposed by this Bill are a cause of great concern and mean that it should be rejected.

The changes that are of most concern include:

- An AWA must be approved even if the requirements in relation to the making of applications and/or the contents of an AWA are not met, if the Employment Advocate is satisfied that this will not disadvantage either party. The Advocate gives overriding priority to the approval of AWAs and fails to properly protect the interests of workers.

- There is to be no requirement that AWAs be offered in the same terms to comparable employees. Employers will be free to discriminate between employees and will be free to progressively try to bid down wages and conditions through the selective application of AWAs to individual employees.

- There is to be no independent Commission scrutiny of AWAs with the Employment Advocate having the power to approve AWAs in all cases. The Employment Advocate can approve agreements that do not even pass the no-disadvantage test if he considers that approval would not be contrary to the public interest. As the Commission has found, the Employment Advocate has failed to

properly perform his functions and has approved AWAs that fail the no disadvantage test.

- AWAs are to start operating from the date that they are signed. No application for approval need be made for up to 60 days after this. If the AWA is subsequently not approved and the employee did not receive proper entitlements under the AWA, the employee has to sue the employer to recover any compensation.

- AWAs for employees with remuneration over $68,000 are virtually automatically approved and are not checked against the no-disadvantage test.