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

BY CPSU, THE COMMUNITY & PUBLIC SECTOR UNION, STATE PUBLIC SERVICES FEDERATION (SPSF) GROUP

The State Public Services Federation (SPSF) Group of CPSU, the Community and Public Sector Union, represents the industrial interests of over 100,000 employees of State Governments in departments, agencies, statutory authorities, instrumentalities and State owned corporations, including universities. While most of these are within the jurisdiction of the various State industrial tribunals, two major groups of our members are within the Federal jurisdiction. These are:

- Employees of the Crown in right of the State of Victoria; and
- General staff in universities.

This submission deals with two of the Bills the subject of the Committee's Inquiry, the *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill* 2000 and the *Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill* 2000. It is our submission that both these Bills are so deeply flawed that they should not be passed. This is not to imply that we support the passage of either of the other Bills as they stand or as amended. Rather, they deal with subject matter on which others, who would be more directly affected, are better qualified to speak and, being conscious of the time constraints under which the Committee is operating, we do not wish merely to echo what others might say. In particular, we support the submission of the Australian Council of Trade Unions on any matter not dealt with in this submission.

With respect to the Secret Ballots Bill, we believe, in summary that it would:

- introduce such a complicated and over-formalised regime of balloting as a precondition for employees or their unions being able to take protected action that its practical effect would be to increase, rather than reduce, industrial disputation; and

- impose on unions requirements that have no counterpart in the requirements imposed at present by the Act on employers. Indeed, the Bill is directed solely at employees and their unions; and

- undermine the objective of the Act to enable protected action to take place under certain conditions as well as undermining genuine freedom of choice as to whether or not to join a union and, if so, what kind; and

- introduce a new and potentially dangerous type of quasi-criminal offence, the commission of which is entirely a matter of the defendant's state of mind.

With respect to the AWA Procedures Bill, we believe, in summary, that it would further disadvantage employees as against employers by:

- removing even the limited role that the Australian Industrial Relations Commission has at present under the Act; and

- enabling a situation whereby an employee may have to work for a period in excess of two months under an AWA that ultimately is found to fail the no-disadvantage test; and

- effectively exerting a downward force on wages and conditions by making AWAs operate to the exclusion of certified agreements in most circumstances.

Our reasons for these conclusions follow.

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

This Bill essentially rejigs certain proposals in the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill* 1999. It proposes a complicated and highly formalised regime of secret ballots before protected action could take place. The requirements which the Bill would impose are so rigid and prescriptive that, once a ballot were to endorse industrial action, the union or the group of employees would usually go ahead with it regardless. The industrial action would have to take place on a particular day or dates or between particular dates and, if that opportunity is foregone, the whole balloting process will have to start again.

The experience of this union, operating in less fettered circumstances, is that opportunities for conciliation will often arise after the members have authorised industrial action. The union has been able to call off or defer the industrial action to enable further negotiations to take place. That would not be possible under the Bill's proposals.

An example was a 24-hour stoppage called in August last year by a vote at a mass meeting of members of this and other unions employed by Pacific Power in New South Wales. The issue was Pacific Power's unilateral variation of salary maintenance provisions for staff identified as excess. Protracted negotiations had failed to resolve the issue to the satisfaction of the employees. The unions gave

sufficient notice of the intention to strike for Pacific Power to notify a dispute to the Industrial Relations Commission of NSW. A compulsory conference before Harrison DP (who also holds a dual appointment to the AIRC) led to Pacific Power modifying their position sufficiently for the unions to form the view that negotiations should resume. On the morning the strike was due to take place, a mass meeting was held at the gates of Eraring Power Station and the union representatives reported developments to the members. At the conclusion of the meeting, the employees went in the gates and commenced work, rather than continuing with the stoppage. Employees at other locations then commenced work. Negotiations are still continuing about this issue but no further industrial action has taken place.

Conversely, an example from the power industry in New South Wales illustrates the dangers of overly rigid or complicated procedures to authorise industrial action. Recently, power plant operators (PPOs) voted to strike in support of a demand. Because PPOs are 24-hour, 7-day shift workers, the ballot to conduct the strike was conducted over five shifts. It could only be reversed by a ballot of all five shifts. Although management put proposals that may have averted the stoppage, it went ahead for no reason other than there was not enough time to conduct a ballot over all shifts.

The Bill would also tip the balance very much in favour of employers and against employees or their representative organisations. Unions or groups of employees would have to go through the formalities of a ballot before protected action could be taken. There is no counterpart requirement for an employer proposing to lock out employees. In addition, in the case of a union, the proposed action would have to be authorised by a committee of management of the union or someone delegated to do so by the committee of management [proposed subsection 170NBBB (2)], as well as being approved by a valid majority of the members in the workplace.

Employers, on the other hand, would only have to give notice [subsection 170MO(3)]. There would be no requirement for employers to follow any other procedures. In the case of a public company, for example, there would be no requirement that the lockout be authorised by a general meeting of members or by such a meeting as well by the board of directors or an officer of the company authorised by the board of directors.

The only small concessions to employees or their organisations are that a ballot would not be required if the industrial action were to be in response to a lockout by the employer [proposed subsection 170MQ(e)] or was a continuation of action previously authorised by a ballot before the bargaining period was suspended or terminated [proposed subsection 170MWE].

An example of how onerous the Bill's proposals are for employees is found in the proposed section 170NBBB. This proposed section specifies a list of types of

material or information to accompany an application for a protected action ballot. One of these, pursuant to the proposed subsection 170NBBB(4), is that the applicant for a ballot would be required to make a declaration to the effect that the contemplated industrial action is not in support of claims that would breach the "Freedom of Association" provisions of the Act. This is a penal provision, which in itself is extraordinary. Certainly, there is no parallel in any provision of the Act or of the Bill as it applies or would apply to employers.

But it is also a most unusual penal provision, in that the offence would not be making a statement that is materially false or misleading either knowingly or recklessly as to whether it was false or misleading. By way of comparison, if we look at offences under the Corporations Law, subsection 1308(2) of that statute makes it an offence to make or authorise the making, in a document required to be submitted to the ASIC, "a statement that to the person's knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in a particular respect". In other words, it is a necessary element of that offence that the statement actually be materially false or misleading, as well as the person making the statement knowing that. Similarly, subsection 1309.

In the *Workplace Relations Act* 1996 itself, there are a number of penal provisions where it is a necessary element of the offence that the representation made is false: see, eg, false representation of appointment as an inspector [s304], false representation of appointment as an authorised officer [s304A], false representation as to membership of an organisation [s337], and false representation as to authorisation to collect money [s340]. Indeed, s307 as it stands makes it an offence to include in an application for a secret ballot under the existing provisions of the Act "a statement that is to the person's knowledge false or misleading in a material particular".

In contrast, the offence of contravening the proposed subsection 170NBBB(4) would simply be making a statement in the required declaration "reckless as to whether the statement is false or misleading in a material particular". This means that it is at least conceivable that:

- an officer of a union,
- or an employee of the relevant employer,
- or a number of such employees,
- or the agent of that employee or those employees

could be prosecuted successfully if it could be established that any statement made in providing the material or information required by the proposed subsection 170NBBB was made recklessly as to whether it might be false or misleading in a material particular, without the statement actually being false or misleading in a material particular.

As well, the Bill proposes to repeal the present s307 and insert a new s307 and s307A. These substitute for the offence, in relation to an application for a secret ballot, "making a statement that is to the person's knowledge false or misleading in a material particular" the offence, in relation to a protected action ballot, a statement "reckless as to whether the statement is false or misleading in a material particular". So, under the proposed ss307 and 307A also, it would be possible, even though in normal circumstances unlikely, for a person to be convicted for making a statement that was true and not materially misleading if, in making it, it could be established that the person had been "reckless".

In our view, these proposals represent a potentially dangerous extension of liability for prosecution based solely on the defendant's state of mind, if it were no longer to be a necessary element of the offence that a statement actually be materially false or misleading.

Another onerous provision, particularly for individual employees or groups of employees but also for smaller unions of the kind now allowed by the Act, is the proposed s170NBF, which would impose on the applicant for a ballot the cost of conducting it. This is mitigated to some extent by the proposed s170NBFA, which would require the Commonwealth to reimburse 80% of the reasonable ballot cost. But it would still provide a huge deterrent to other than large and well-resourced unions running protected action ballots. This runs directly contrary to and undermines what the Government consistently has claimed are three of the objectives of the Act:

- to make it practicable for employees to exercise freedom of choice as to whether or not to belong to a union and, if they choose to be a member of a union, what sort of union they join; and

- to enable employees, even if they choose not to members of a union, to effectively engage in enterprise bargaining with their employers; and

- in aid of the second above, to provide for industrial action, either by the employees acting on their own account or through a union or unions or by the employer, to be lawful under certain conditions.

In summary, this union believes that the Act as it stands, while not perfect, makes adequate provision for secret ballots to be conducted in appropriate circumstances, and with reasonable flexibility. The Bill, in contrast, would:

- establish an onerous, highly formalised, unwieldy and costly regime for conducting ballots;

- in practice, increase the likelihood of serious and protracted industrial action, rather than decrease it;

- seriously undermine the provision in the Act for employees or their organisations to take protected action, as well as undermining other objectives of the Act; and

- introduce a potentially dangerous new type of offence which would potentially expose officers of unions or individual employees or their agents to a new type of criminal liability, based on state of mind alone.

WORKPLACE RELATIONS AMENDMENT (AUSTRALIAN WORKPLACE AGREEMENTS PROCEDURES) BILL 2000

The one positive feature we can find in this Bill is that it would provide a cooling-off period for employees who sign AWAs and whose remuneration is not greater than $68,000 per annum. Against this, the Bill would:

- remove any role for the Australian Industrial Relations Commission in the approval of AWAs, other than for the President establishing principles to guide the Employment Advocate in determining whether approval of an AWA is not contrary to the public interest;

- make an AWA operative either on signing or on a date specified in the AWA or on commencement of employment, rather than when approved;

- allow an employer up to 60 days to apply for approval; and

- make an AWA operate to the exclusion of any certified agreement that would otherwise apply to the employee's employment, with certain very limited exceptions.

With respect to the first dot point above, the function of the Commission in relation to AWAs is already extremely limited. At present, the Employment Advocate must refer an AWA to the Commission if he thinks it might not meet the no-disadvantage test. The Commission must then determine whether or not it does. No-one other than the Employment Advocate may refer the AWA to the Commission. For example, even an employee, who may have felt some pressure to enter into an AWA and who later comes to feel that he or she is worse off on balance, cannot apply to the Commission to scrutinise the AWA.

The Bill proposes that the Employment Advocate determine whether or not the no-disadvantage test is met, without any opportunity for review by, for example, an employee who now has second thoughts about the deal they are getting, or any scope for the Employment Advocate to refer doubtful cases.

With respect to the second and third dot points above, the effect of these would be that an AWA may be operative for between two and three months and then be refused approval by the Employment Advocate because it does meet the no-disadvantage test. This is mitigated to some extent by the proposed section 170VX, which would enable an employee to recover the shortfall between what they were getting under the AWA and what they were entitled to under the applicable award. Nevertheless, it could mean lengthy periods for employees having to work under sub-standard working conditions and/or for sub-standard pay.

If there are any serious problems of delays in AWAs being approved, these should be addressed by providing more adequate staffing for the Office of the Employment Advocate, rather than by trying to amend the approval processes in a manner which only has the potential to disadvantage employees and further tip the balance in favour of employers.

With respect to the last dot point above, this proposal only further enhances the potential for AWAs to disadvantage to employees. At present, a certified agreement in most circumstances prevails over an AWA, to the extent of any inconsistency. A certified agreement is made either with a union or unions or with the employees collectively. It would therefore normally be made in a situation in which the bargaining power of the parties is more evenly matched than when an individual employee is bargaining with an employer. The limited exception to this would be a very small employer. However, there would rarely, if ever, be a certified agreement covering an employer small enough not to be in a position of superior bargaining power with respect to most individual employees.

On balance, therefore, we see this Bill has further placing employees at a disadvantage and further tipping the scales in favour of employers and against employees.