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a submission by the Victorian Trades Hall Council
to the Senate Employment, Workplace Relations,
Small Business and Education Committee

More Jobs, Better Pay

...for lawyers

prepared for the VTHC by the
Union Research Centre on Organisation and Technology

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Executive summary

The major features of this submission are:

- The official statistics which the Government uses to defend the Workplace Relations Act 1996 (WRA) do not show that it has delivered 'more jobs and better pay'. The official statistics actually show that employment growth is highest among full-time casuals, and that more and more part-time workers are finding their jobs unsatisfactory. By weakening the power of the Australian Industrial Relations Commission to regulate these forms of employment, the WRA 1996 has contributed to the deterioration of employment security in the Australian labour market.

- The official statistics also show that better pay is delivered not by the Government's 'reforms', but by the very trade unions that the Government wishes to marginalise if not eliminate.

- Contrary to the claims of the Prime Minister that no Australian worker would be worse off, the case studies presented here show that workers have been profoundly disadvantaged by the WRA 1996. This is especially true in Victoria, where approximately 40-45% of the workforce have their minimum entitlements determined by the 5 conditions nominated by Schedule 1A of the Act. Several of the case studies show that even these minimum conditions are breached, and the absence of effective remedies leaves workers powerless to enforce their nominal rights under the legislation. Further, the case studies show that in the absence of effective enforcement by regulatory bodies, the best protection available to workers is trade union membership. The legislative amendments proposed by the Government will further constrain union organising and remove a number of provisions of the WRA 1996 that unions have employed to defend the interests of their members.

- This submission addresses the effect of a further round of award-stripping on Victorian workers. It further critiques the Government's proposals in terms of their consequences for union organising and calls on the Committee to amend the Workplace Relations Act to bring it into conformity with the Conventions of the International Labour Organisation, to which Australia is a signatory.

More jobs, better pay? What the statistics really show

> *Well, our legislation has provided for more jobs, higher income for low income people and has actually reduced casualisation, rather than increasing the casualisation. The casualisation that we have seen in the Australian economy by and large occurred under the system that we inherited from Labor and the reforms that we have introduced can be demonstrated by official ABS figures to show a better outcome then what is was when we took over.* (Reith 1999a).

The Government justifies the so-called 'second wave' of industrial relations legislative reform in terms of what it believes to be improved labour market outcomes, as measured by official statistics.

This rationale however is founded on a selective and shallow interpretation of ABS data, and also ignores the limitations of ABS data collection, particularly with respect to the experience of casual employees.

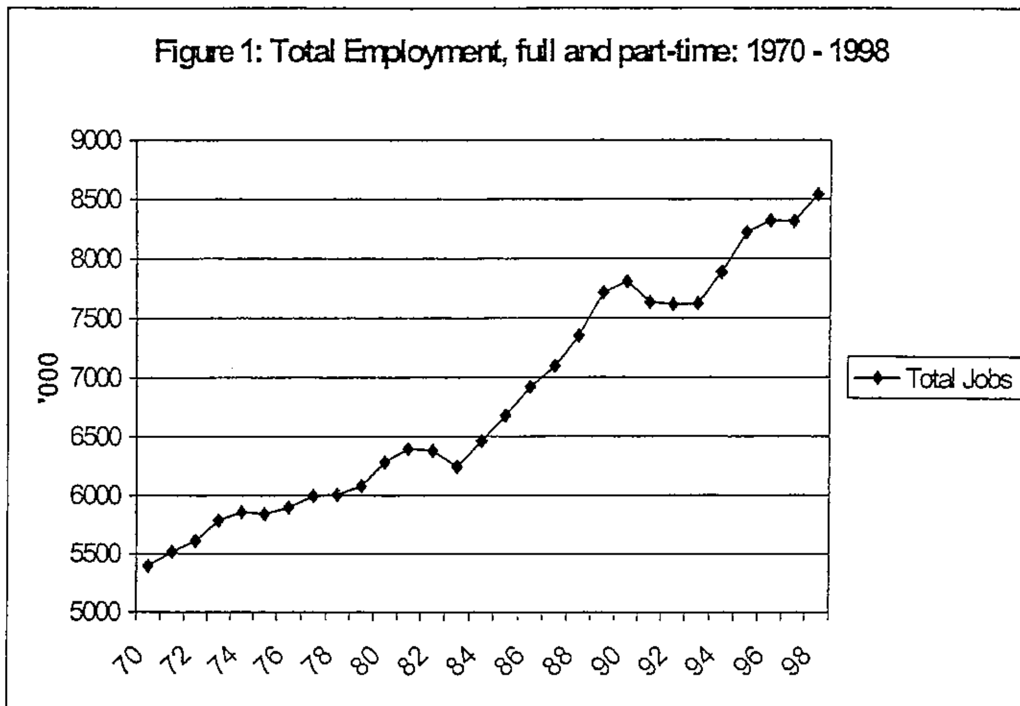
We shall consider these issues by reviewing the official statistics and related research literature with respect to employment trends and earnings growth.

Employment

The Government makes much of its claim that unemployment is now at its lowest level since 1990, but it should be noticed that the most dramatic recovery in terms of employment growth after the 1990-91 recession took place between 1992 and 1996. Employment grew by 702,100 jobs between August 1992 and August 1996, at an annual rate of 175,525 jobs. In contrast between August 1996 and August 1998, employment grew by 216,200 jobs, at an annual rate of 108,100 jobs[1]. Significantly, full-time employment grew by just 92,500 jobs between 1996 and 1998, at an annual rate of 46,250, compared to annual growth of 121,000 full-time jobs between 1992 and 1996 (ABS 6203).

The attention of the Committee is also drawn to the fact that during the 1980s, at a time when the Australian economy was allegedly burdened by an inflexible centralised industrial relations system, annual employment growth averaged 152,670 jobs. In the eight years to 1998, following the progressive deregulation of the labour market by both Labor and Coalition governments, annual employment growth has averaged just 90,975 jobs (ABS 6203).

[1] Data to August 1999 was not available from the Australian Bureau of Statistics at the time of writing, and will be considered by the Victorian Trades Hall Council in its oral evidence to the Committee.



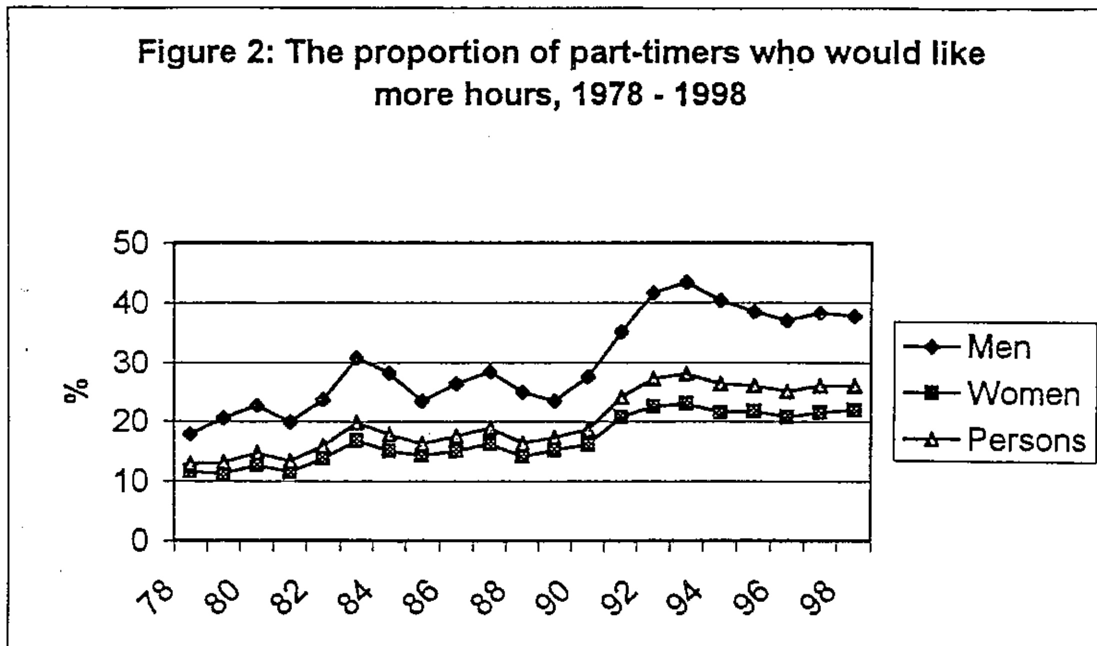
Source: ABS, *Labour Force Australia*, Cat. No. 6203.0 (August)

The Quality of Employment

Aggregate employment outcomes are one measure of labour market performance, but the *quality* of the jobs created is equally pertinent in deliberations over public policy. On this score, it is increasingly obvious from official statistics that the *types* of jobs being created by the Australian labour market are inadequate.

This phenomenon can be examined in a number of ways. First, is the growth in part-time employment providing jobs that meet the needs of workers?

A number of ABS series provide evidence that more and more people find that the available part-time work is insufficient. Figure 2 shows the proportion of part-time workers who would prefer more hours. In twenty years, the proportion of people in this category has roughly doubled, such that now 580,000 part-time workers are working fewer hours than they would prefer. This represents a large pool of underemployment, which grew by 11% between 1996 and 1998 (ABS 6203).

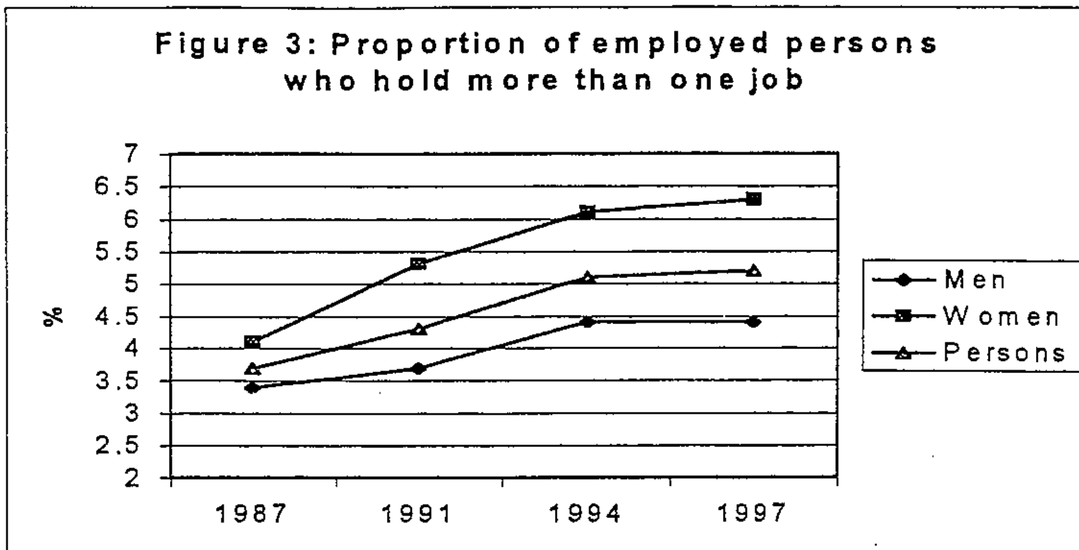


Source: ABS, *Labour Force Australia*, Cat. No. 6203.0 (August)

Other data sources suggest a high level of satisfaction among part time workers with their jobs. Thus the 'second best' source of workplace data – the Australian Workplace Industrial Relations Survey (AWIRS) – found in 1995 that 70% of part time workers were satisfied with their jobs, compared to 9% who were dissatisfied (Morehead, Alexander, Stephen, Duffin 1997: p. 287). However, for the purposes of policy-making in relation to the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, these findings have limited utility for two reasons. First, the last AWIRS was undertaken in 1995, prior to the introduction of the WRA 1996. Second, the data collection methodology in the main survey of AWIRS is confined to workplaces with more than 20 employees, and does not include contractors, agency workers and outworkers, the very people most vulnerable to the effects of labour market deregulation.

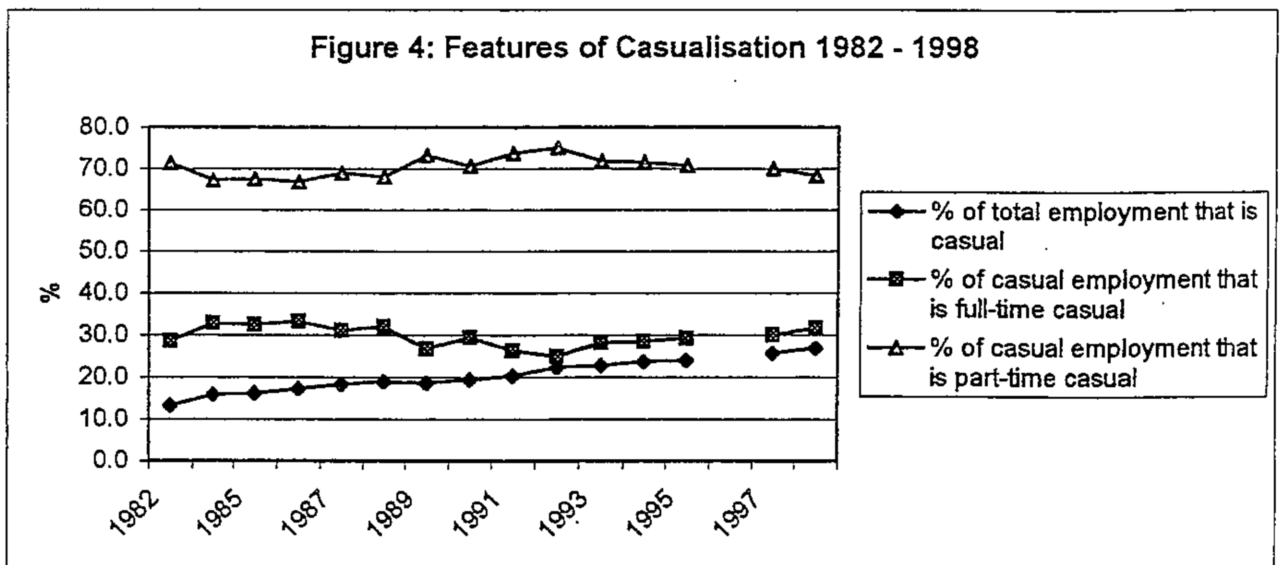
Another perspective on the adequacy of jobs is provided by the growth in multiple job holders. Data on multiple job holders is depicted in Figure 3. It is not possible to establish *why* workers are increasingly working more than one job, since ABS do not collect such preference data. We posit however that the fragmentation of full-time employment into insecure casual and part time jobs is prompting people to work more than one job to 'make ends meet'. Although the proportion of workers holding more than one job appears low (roughly 4.5% of all employees), this still represents 435,600 people (ABS 6216).[2]

[2] The last date for which ABS have data on multiple job holders is 1997.



Source: ABS, *Multiple Job Holding* Cat. No. 6216.0

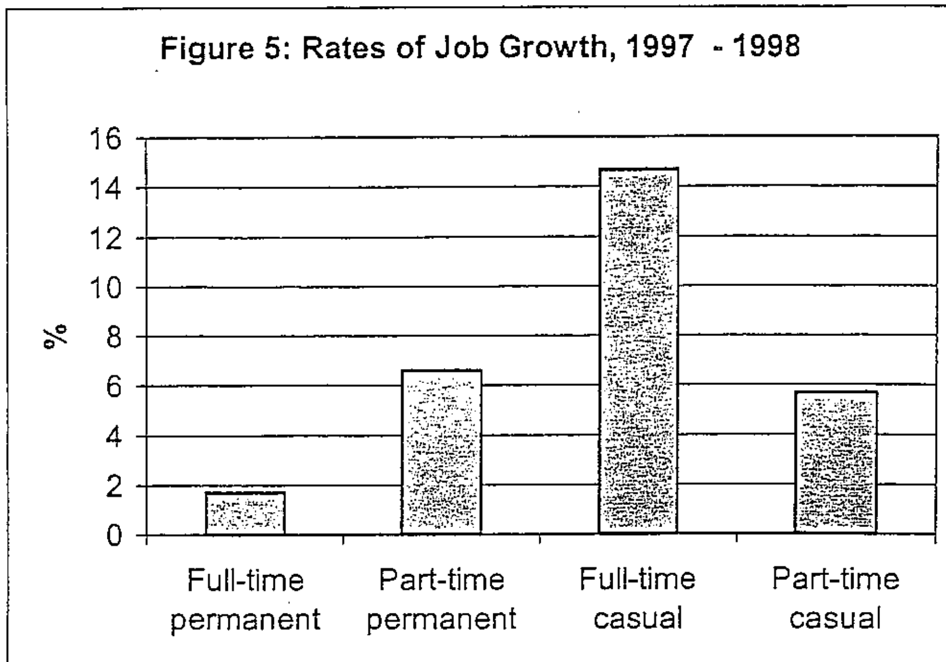
As many commentators have observed, a particular feature of the Australian labour market is the growth in casual employment. Figure 4 illustrates this point by mapping the proportion of total employment that is casual (data in this series was not collected by the ABS in 1996).



Source: 1982 - 1996: Campbell (1996a), 1997: ABS, *Weekly Earnings of Employees (Distribution) Australia*, Cat No.6310.0, 1998: ABS, *Employee, Earnings, Benefits and Trade Union Membership, Australia*, Cat. No. 6310.0

Figure 4 shows us that the proportion of total employment that is casual is increasing and within that, part-time casual employment is decreasing. What is distinctive here is the growth in full-time casual employment. This point is outlined by Figure 5, which shows relative rates of growth by employment type. Overall, the growth of casual employment

(full and part-time) is more than three times the rate of growth of permanent employment (8.3% compared to 2.4%).



Source: ABS, *Labour Force Australia,* Cat. No. 6203.0 (August)

The emergence of 'permanent' casualisation is taken by the Government to be part of its record of achievement. On 15 August, Minister Reith remarked in response to the concerns of Victorian church leaders that:

> *The facts of reform in Australia in recent years do undermine the claims being made by certain members of the clergy today, for example, the percentage of casual employees working less than one year has between the period of 1996 to 1998 has actually fallen from 47% to 41% according to the Bureau of Australian Statistics. Those casuals with more than five years employment, namely being in the one job for more than five years, has actually increased from 18% in 1996 to 21% in 1998. And overall casual employment of part-timers has in fact fallen under the Coalition which completely denies the claims that we are furthering and entrenching the so called concerns that people have in regards to casual employment.* (Reith 1999a)

What Mr Reith wears as a badge of virtue only confirms the findings of researchers like Campbell (1996b), namely that the category of 'casual' is simply a legal device to evade the industrial entitlements that accrue to permanent employees (such as annual leave, long service leave, sick leave and the like). By what definition of 'casual' is an employee not a permanent worker having held the one job for 5 years?

The growth of casualisation has occurred not because the award system has been too *rigid*, but because it has been too *flexible* and non-prescriptive with respect to the

industrial entitlements of casual workers. These gaps in the award system arise, as Campbell (1996b) argues, from the focus of the regulatory framework on full-time permanent work. Employers have exploited this gap by simply re-labeling work as 'casual', when in point of fact their requirement for labour is in many cases on-going.

Some commentators have argued that casual employment is 'preferred' by these job-holders (eg Wooden and Hawke 1998). No doubt many workers do indeed prefer genuinely casual employment (eg students), but this proposition cannot be validated by reference to official data.

- ***The Australian Bureau of Statistics does <u>not</u> collect data on whether casual workers prefer this type of employment relative to other types of jobs.***

Other data sources on the preference of casuals do exist, and the AWIRS 1995 provides some insight into this issue. However, the same qualifications about the bias toward larger workplaces (more than 20 employees) in AWIRS that we referred to earlier have to be made with respect to the outlook of casuals to their work. The AWIRS survey also excluded agency workers, one of the primary mechanisms used by employers to organise casual work. With these qualifications in mind, ACIRRT found using AWIRS data that:

> *...on most of the objective measures of workplace conditions, casuals fare badly, but in terms of subjective assessments, they seem to be more content than the non-casuals. It's possible that casuals have set their job expectations at a lower level than that set by non-casual workers* (ACIRRT 1999 p.141)

Some limited qualitative data on the attitude of workers does exist. The Evatt Foundation (forthcoming: p. vi) interviewed female casual workers in three industries (retail trade, community services and nursing) and found that:

> *The evidence from this project...suggests that where workers express a degree of satisfaction with their casual work, this satisfaction derives from the regularity of their employment and the consistency of the work they received, employment features that are hardly consistent with common law notions of casual employment.*

On balance, the study of casual and part-time employment growth is limited because of strategic gaps in the collection of relevant data by ABS. In that light, the effects of the WRA 1996, particularly the weakening of the AIRC's capacity to regulate casual and part-time work, remain largely unknown.

Hours of work

To succeed in today's market, you have to be prepared to put in that extra effort and do so with a smile on your face. The market is such that there is always someone waiting to take your place and willing to put in the extra hours to get ahead. Sean Winder, Morgan and Banks, (1999).

While work has become precarious for large numbers of people, for those in full-time employment the intensity of work has increased in recent years, resulting in an increase in working hours. The problem here from a policy perspective is that the distribution of work is flawed, as professional and managerial full-time workers perform more and more hours while a growing pool of precarious workers are left with fewer hours than they would prefer. ACIRRT notes that:

The new industrial relations climate has made this easier for employers (lengthening working hours) for a number of reasons. To begin with, the regulatory framework covering hours of work has always been weak. It has not been part of statutory law, but has been embedded in industrial awards or been part of 'custom and practice'. Consequently, once Australian workplaces began to move towards decentralised bargaining, the industrial instruments which had traditionally regulated hours of work began to be dismantled. For example, in nearly all enterprise agreements, wages and hours of work are the most commonly negotiated items. What's more, most variations in hours of work favour employer flexibility. ACIRRT (1999: p.114)

Earnings

Now those who wish to attack our reforms would like to demonstrate with official figures rather than rhetoric where their concerns lie, well, we are obviously happy to sit down and talk with them. But every piece of economic evidence shows that what we have been doing by way of labour market reforms has actually helped people who need a bit of help and need a system which looks after their interests. (Reith: 1999a)

As with employment data, Minister Reith claims for his wage fixing system benefits for low income earners, a credit more properly due to others.

The institution that actually delivers for low income earners, and workers generally, is trade unionism, the very industrial party Peter Reith wishes to marginalise if not eliminate. This claim is verified by official statistics, and in particular the earnings differentials between unionists and non-unionists as measured by the Australian Bureau of Statistics in its catalogue *Earnings, Benefits and Union Members*, Cat. no. 6310.0.

Data from this catalogue is reproduced in Figures 6 and 7, material that graphically illustrates the earnings gap between unionists and non-unionists. Except for well paid men at the top of the occupational hierarchy, in every occupational category, for men and women, total earnings are higher among trade unionists than for their non-union counterparts.

The implications of this data are inescapable: if the Government were truly interested in 'better pay', its legislative framework would facilitate union organising and recruitment.

Instead of course, the Government's agenda is to cripple trade unionism while hiding behind a rhetoric of freedom of association. However the international umpire, the International Labour Organisation (ILO), broke through that mask in its March 1999 observation that the WRA 1996 compromised Australia's obligations as a signatory to the 1973 International Labour Convention. The ILO observed that the WRA 1996 breached the convention with respect to freedom of association and the right of workers to organise collectively. The ILO also criticised the Act's prohibition on industry wide strikes in support of social and economic issues, and the power given under the Act to the AIRC to terminate bargaining periods when industrial action was economically damaging (Ruskin 1999: p.2).

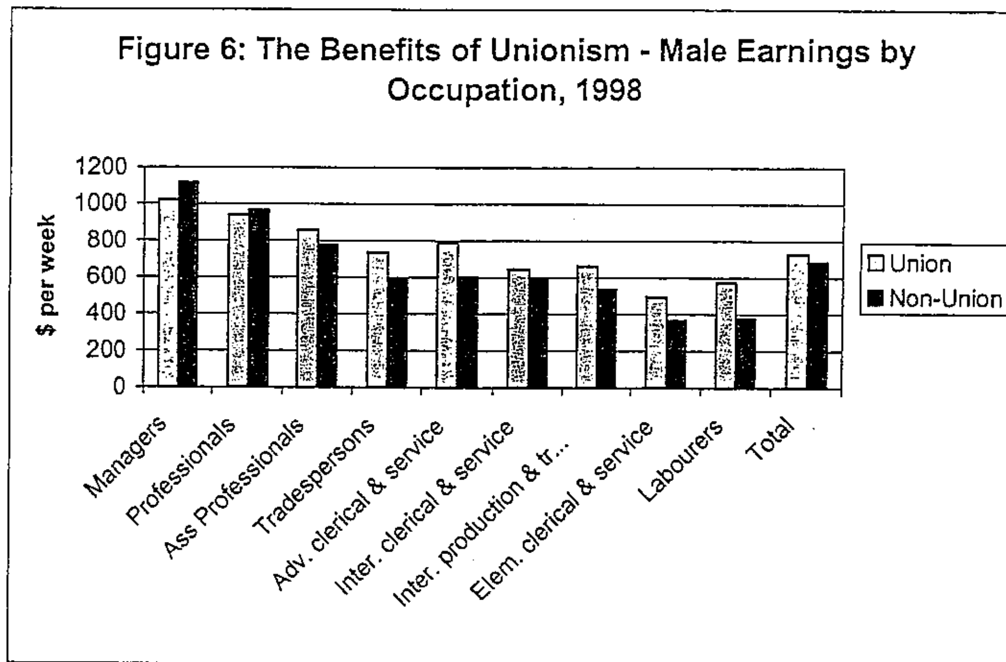


Figure 6: The Benefits of Unionism - Male Earnings by Occupation, 1998

Source for Figures 6 and 7: ABS, *Earnings, Benefits and Union Members*, Cat. no. 6310.0

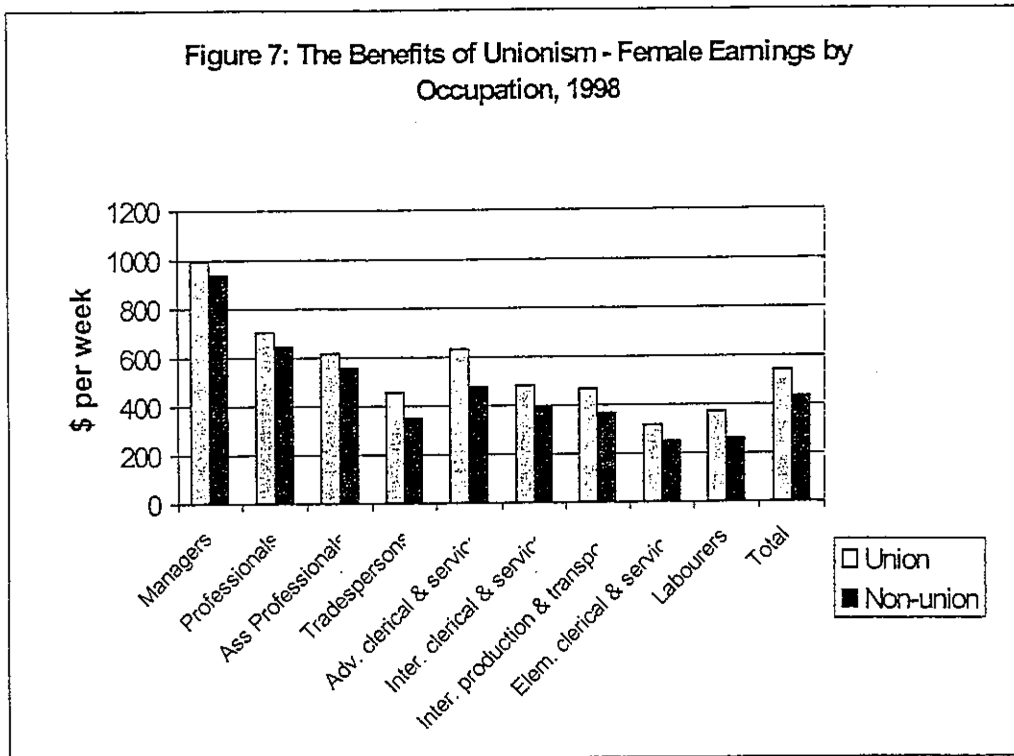


Figure 7: The Benefits of Unionism - Female Earnings by Occupation, 1998

Skill formation

One of the neglected areas of debate regarding the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* is the proposal to remove various award provisions that support skill formation in the Australian labour market. The Government's legislation would eliminate these provisions by making skill-based career paths and training and education leave 'non-allowable' matters in awards (amendments proposed to Subsection 89A(2) and Subsection 89A(3)).

These amendments conform to the Government's conception of the award system as a 'safety net', and are accordingly rationalised by the assumption that training and career path matters will be incorporated in agreements. Their practical effect however will be to polarise the Australian labour market still further, by denying workers reliant on awards entitlements to training.

Skill formation has long been recognised as a weak link in the performance of the Australian labour market (ACTU-TDC 1987), as Australian employers have traditionally relied on either 'poaching' skilled labour on the external labour market, or on the migration of skilled workers from overseas. More recently, the downsizing and 'reform' of public instrumentalities (the railways, utilities and other government business

enterprises) has dramatically contracted one of the traditional sites of skill formation in the Australian labour market (Toner 1998).

Table 1 displays the official statistics on the training effort of Australian business between 1989 and 1996, that latest data of collection for the relevant catalogue (Cat No 6353.0 *Employer Training Expenditure Australia).* This data suggests that the focus of public policy on improving the training performance of Australian industry in the later 1980s had some success, but that performance was falling away by the mid 1990s.

Table 1: Measures of Training Expenditure, Australia 1989 - 1996

	1989	1993	1996
Total training expenditure (% of gross wages and salaries)	2.2	2.9	2.5
Training hours per employee	5.7	5.6	4.9

Source: ABS Cat No 6353.0 *Employer Training Expenditure Australia*

For the purposes of the current debate, it is significant that the ABS has not undertaken further work in Catalogue 6353.0 since 1996. Accordingly, it is not possible to establish from official statistics what the impact of the 1996 legislation has been on the training effort of Australian employers. Despite this lack of reliable data, the Government, which ordinarily defends its legislative program on the basis of official statistics, intends to proceed to dismantle the award-based infrastructure that supports workplace training.

Official statistics and the legislative issues

The data presented here confirms the extent to which the Government is proceeding with *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, in the absence of reliable data on which to assess the impact of the WRA 1996. From the official data we know that:

- the highest rates of job growth are among full-time casuals. Public concerns about the impact of the WRA 1996 on casualisation therefore have merit;
- the preferences of casuals are little understood, and require much more extensive data collection;
- the growth in part-time workers who are 'underemployed', and the growth of multiple job holding, are likewise little understood;
- the best pay rates for almost all workers are delivered by trade unions, yet the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* will place further obstacles in the way of successful union organisation; and
- the current training performance of Australian industry is not captured by official data, and a further round of award stripping with respect to provisions governing training issues in awards is therefore unwise given the poor record of employers in this area.

Studies in the operation of the Workplace Relations Act 1996

This Section presents for the consideration of the Committee five case studies of the practical consequences of the WRA 1996.

Case 1: Written common law contract

ɔegan his employment with Labour LinQ, a casual labour hire agency, on 20th of May this year after returning from overseas. During his induction to the agency, was presented with a contract of employment that he was to sign *before* proceeding to a formal interview (copy attached as Appendix 1). As well as highlighting the temporary nature of the work, the Employment Contract included clauses which, among other things, allowed the agency to alter the remuneration offered to the employee without notice or consultation and denied the employee any financial redress from the agency upon termination. Despite no explanation being offered by the interviewers, enthusiasm to return to the workforce lead him to sign the contract with only a cursory review of its contents:

> *... [the] contract was sat down in front of us... before we went and seen the person in the interview itself, so we all had to sign all of these papers and do all of this and then we went an seen him for an interview...[the interviewer] said 'go through it yourself and check it out and if you have any queries, ask me'. We were not told anything specifically... I was keen and interested to get into the work force mate and that's why I signed [the contract]*

After working with the agency on two separate jobs, paid at two separate rates, was called by Labour LinQ the evening Monday the 9th of August and asked to work at Linpac the following morning. He was told it was processing work, that the rate of pay would be $12 per hour and that during the week the hourly rate would be increasing. He was also told at this point that the work would be lasting for a week or two and that Linpac would be advising him when the work was to finish, not Labour LinQ. The first day was on the job, he was asked to do some over time the next day.

> *... I thought over time, time and a half, I need money. I've spent money to come back into the country, it's cost me a fortune mate and to pay off loans and everything else, it's just a tad hard and that's why people do a lot of over time, because they need money...*

The next day at work, inquired as to the rate of pay for over time hours. He was told to ring the agency. waited until his lunch break, called the agency and asked about his over time rate.

> *...I asked him what the over time rate was at Linpac... He told me that the over time rate was $14... I asked him... 'Why is it only two dollars more than the hourly rate?'. He turned around and said 'The hourly rate is $11 something' and*

I says 'Well, hold on for a minute there. Before I even came out onto this site I was told that it was $12 and the pay rate was going up and now you're telling me it's $11?... I mightn't have taken the job in the first place... You're giving me wrong information... The over time rate, that's only three dollars more than the hourly rate. Some people wouldn't work for that over time rate mate. It's not worth their time.

then told his employer that he would be coming down to see him.

...I wanted to sort it out. I'm the one doing the work, I'm the one that's wanting to know what I'm entitled to be paid and I thought the best way to deal with the situation, you can't discuss it on the phone, is to do it in person.

While still on his lunch break, . went to the office of his agency and asked the receptionist if he can speak to either of the two men he had dealt with in the past, . . or

...she says 'May I ask who's here, who wants them?'. I says ' . . She goes off into the back room and comes back with a person I've never seen before, don't know him from a bar of soap mate. I says 'Who are you?', he says 'I'm Rob... Can I help you?', I says, 'Yeah I'm here to discuss my pay rate'. He says 'Are you ?', I says 'Yes", he says 'You're no longer on the books'

was given no reason for the termination. He sought advice from solicitors as well as organisations such as Job Watch, however found that because of his status as a casual worker, there was nothing else he could do.

[I] tried to phone up a few people like Unfair Dismissals, I wanted to see what I could do because I was definitely harshly done by. I've been kicked in the guts... I phoned Channel Seven mate, I phoned Today Tonight, I phoned the radio, I phoned everybody mate... Basically [I was told] 'you're a casual, you haven't been working with them for a year and it's pretty hard', they're getting away with it. It's not right... The consistent advice I've been given is that because I'm casual, I've been employed for under twelve months, I haven't got a legal leg to stand on. They can sack anybody when they want, whenever they want. And they don't have to give you a reason mate.

Aside from the fact that his pay rates varied from job to job and information differed between who was giving it, it appears that was also being under-paid. The Workplace Studies Centre at Victoria University of Technology was commissioned by VTHC for the purposes of this submission to compare rates of pay (as evidenced by his payslip). Depending on whether his pay rate is compared to the minimum industry rates as per Schedule 1a, or those of the Metal Industry Award (an award applicable to plastics moulding) was under-paid between 7 and 19%. These calculations, and the relevant payslip, are attached as Appendix 2.

The significance of case to the legislative issues

What redress could . expect under the WRA 1996, first for his termination and second for possible underpayment, and how does this experience relate to the provisions of the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*?

On the question of the termination, no matter how apparently unfair were the circumstances regarding his dismissal, . has no remedy available to him. As a short-term casual is one of the exemptions from the unfair dismissal provisions of the legislation. None of the amendments to unfair dismissal rights in Schedule 7 of the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* will improve this situation.

On the score of possible underpayment, Schedule 15 (Matters referred by Victoria) of the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* will provide that a breach of the Schedule 1A minima can be prosecuted under sections 178 and 179. However, here we come to the gap between notional rights and remedies, and the practical challenges of the low-paid who seek redress. The problems facing those seeking recovery of wages in Victoria are considerable, and have been fully documented by Willems (1998) of Job Watch Inc, a community legal centre in Melbourne specialising in employment matters. Section 179 provides a nominal mechanism for the recovery of underpaid wages; in practice such action 'can be very expensive, and the prohibition on costs orders contained in section 347 may rule out the making of a claim under this section' (Willems 1998: p.14)

> This study of employment by Labour LinQ highlights the vulnerability of labour agency employees to unfair or harsh employment practices, against which he has little address under the current regulatory framework. The Committee's attention is directed to:
>
> 1. Lack of redress for casual employees against dismissal, despite their on-going engagement by (in this case) a labour hire company;
> 2. The lack of effective enforcement of Schedule 1A provisions; and
> 3. The lack of an effective small claims recovery mechanism.
>
> The last two of these points will theoretically be addressed by the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, which will provide Departmental inspectors with powers to investigate Schedule 1A breaches and provide for Schedule 1A employees with options for redress under Sections 178 and 179. However these will remain theoretical rights without the departmental resources to strengthen the inspection function. Section 347 must also be replaced with a provision that allows for the awarding of costs to workers taking action under section 179 of the WRA 1996.

Case 2: Schedule 1A

had been unemployed for about a month after undergoing intensive chemotherapy for cancer. Employment National sent her resume to Data Connection, the organisation which had the contract to provide a call centre for the registration and purchase of E-tags to be used on the new City Link. was told on the Tuesday that she would have an interview the next day, and she was called the evening of the interview and told that her training would start on the following Monday. She was given one day of training during which she was presented with an agreement, which she was told was a confidentiality agreement that also outlined the rate of pay. (Her rates of pay were set by the minimum industry standards of Schedule 1A).

> *... we signed... the same sheet that told us what rate we would be paid and that we would be technically casual employees. And, then there was a box to tick if you were interested in becoming permanent. Naturally everyone's going to tick that. And that was the last you saw of it... Those that didn't sign it were called back and they said 'Oh, maybe you didn't get it, maybe you didn't read it' and the training officer was there with a list of people who didn't sign it and you had to sign it in front of her. She co-signed it.*

It was not long into the employment that realised how disorganised her new employers were. The server for the computer system used was insufficient to cope with the demand put upon it from the callers, as well as being too slow to process the amount of information required to fulfil the organisation's contract with City Link. This disorganisation was compounded by the complaints from the public at the constant delays in the opening of City Link and the amount of work generated by the advertising campaign occurring at the same time.

> *... [We were] Flat out like lizards drinking. It was lunatic. Then they'd switch everybody off, say 'Nobody's taking calls' and they'd wait for the advertisement and then there was no way you could process the information onto these computer screens we had to do it sheets of paper... you could do it quicker on a piece of paper than... a computer would let you do it...*

The result of processing this information onto pieces of paper was an increase in workload as well as the staff being asked to give false information.

> *... I've accessed their credit card. They've said it's O.K. for me to take $50 out of their credit card and I've got to give them a receipt for this, but there is no such thing as a legitimate receipt. I had to give them a receipt starting with my birth date... I was told to pick a receipt number. Make it up... I thought, this is the most ramshackle organisation I've ever worked for in my life! I'm doing something that's illegal, never mind that I'm selling my soul to the devil here. I'm lying through my teeth!... One night I stayed 'till four [entering all the information]. You get paid for it...[at a] flat rate. You're a casual, come on, they don't have to pay you penalties...*

had never hidden the fact that she was recovering from cancer, in fact she used to make a joke about her nearly bald head. For the time that she was employed at Data Connection, monitored her health carefully as she was under constant threat of the return of her cancer. Under these conditions, was working an average of 60 hours per week. Two months into her employment, who had never altered the hours she worked, was told that her roster was disorganised and some of her hours needed to be cut.

> *They said look, your hours are all over the place', and my hours aren't all over the place, I told you what time I'll be here and I'm here... For some reason or other all of a sudden working two 'till twelve was... inconvenient, so the genius says to me 'You've got to do this' and I said 'You can't cut my hours, I worked on a budget, I'm paying off these bills I incurred because I've been sick'. So anyway, I had a teary day... I didn't have time to be sick, I was too sick to be sick, too poor to be sick.*

The next day, was called into the office of a manager.

> *...[He said] 'What seems to be the problem?' and I said well my blood tests have come back and it's not great and I've got to go to the clinic and we might have to start the chemo again'. I was just relating to him what the oncologist had said to me and I'm getting tired that's all. [He] says to me 'Obviously your disease is affecting your fellow workers, I'd like you to go home'... he said that my disease was putting a lot of stress on my fellow workers. I said 'What do you mean stress on my fellow workers, what do you think cancer's catching?', and he said 'Well, I want you to take the week off and I'll talk to you in another week's time'... in that week I'd been to the clinic and they had done another lot of blood tests and they were like 'What do you mean you're working 60 hours a week, are you insane?'. I didn't have to have any more chemotherapy, I just had to give myself a rest, slow down.*

At the end of the week, went into the office to speak with her manager about coming back to work and also to let him know what the doctors had said regarding her hours of work.

> *He said 'but I need you to work... Are you telling me you can only work part-time?'. I said 'Robert, I've been working 60 hours a week, they are suggesting that I shouldn't work any more than 40 hours a week'... I said 'When are you going to call me?' and he said 'Friday week'. And I said 'So you mean I'm going to have another week off?'. He said 'Yes'.*

The manager didn't call until 12 days later, after she had called and left messages for him up to 10 times.

I said 'Robert, I have a doctor's certificate, I have a certificate from the oncologist and I have a certificate from my G.P. telling me I'm fine, I can do the work. No, the cancer hasn't come back. But, I'm tired... it's going to kill me if I work 60 hours a week. I can work for you 40 hours a week'. 'No, I won't be offering you any more hours. I won't be offering you any more hours in the future'. I said 'So you're telling me you're firing me?'. And he said 'No, I'm not firing you'. I said 'If you don't let me work it means I don't have a job and it means I don't have an income which means you've fired me'. 'No, no, no, I'm not firing you. But if you could get yourself another job it might be... in your interests'... And I just said 'You lying son of a bitch' and I hung up...

gained advice to seek redress for her treatment but found that any avenue open to her would cost too much to make it practical.

I can't take it further. I've got to go to the solicitor and the solicitor says to me 'Yes, we can make an issue of it'. But it's going to cost me to make an issue of it. I don't have the money in the bank in the first place...

Because work was technically casual, despite the fact that she had worked an average of 60 hours a week, she was left without any way of dealing with the situation apart from finding a new job, which she has done. However, the stress of the situation has left her feeling disempowered.

It's honest to God one of the few times, and I can count them on one hand, where I have felt completely powerless.

The relevance of s case to the legislative issues.

case involves many of the same gaps in the existing regulatory framework that were discussed in the previous study. Her case however is even more illustrative for the poor employment and management practices evident in her workplace. These include instructions from managers to fabricate customer transaction details and the effective dismissal without formal notice or explanation. These poor management practices are significant in the context of the philosophical underpinnings of the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, which presume that the efficiency and rational calculation of employers will come to the fore if 'over-regulation' is removed. It is arguable that Data Connection would be a better managed organisation if the regulatory framework were stronger, and gave employees like more rights within the workplace.

Case 3: Australian Workplace Agreement: Airline Reservation Call Centre*.

In 1998, Lufthansa began negotiations with a number of State Governments to open a reservations call centre. The Victorian government was successful in attracting the international airline to the Melbourne by offering them, amongst other things, rent free office space in a government building in the city and concessions on pay-roll tax.

In June of 1998, Lufthansa placed an advertisement in *The Age* seeking customer service representatives to work in their new reservations call centre due to open in Melbourne. Successful applicants went through three interviews; two with the recruitment agency The Asia Partnership, one over the phone and one in person and then the final interview with Lufthansa itself. After being offered the position, the employees were sent a copy of their Australian Workplace Agreement along with instructions to keep it for fourteen days and then sign and return it. During this process, the employees were eventually informed that the employer would not actually be Lufthansa, but Global Tele Sales (GTS), a wholly-owned subsidiary of Lufthansa. They were told that their employment conditions would be the same as if they were working for Lufthansa, but they would merely work for a company with a different name. Appendix 3 reproduces correspondence from The Asia Partnership which implies that applicants would in fact be employees of Lufthansa.

This was, in fact, not the case. Prior to any employment, GTS had applied to the Employment Advocate to approve the AWA, nominating the Commercial Sales Award (Victoria) 1994 as the comparative award. For the purposes of the No Disadvantage Test (NDT) that AWAs must pass under the WRA 1996, the use of the Commercial Sales Award, rather than the genuine industry award, the Overseas Airline Award 1994, was of fundamental importance. By using the Commercial Sales Award, the employer was able to find pay rates many thousands of dollars lower than those applying in the standard industry award. The pay differences arising from this manipulation of the No Disadvantage Test are very large. The Workplace Studies Centre, Victoria University estimates the employees are between $105 and $338 worse off as a result of the AWA in comparison to the relevant industry award. This calculation is reproduced as Appendix 4 of this submission.

In response to the AWAs offered by GTS, the Australian Services Union (ASU) lodged a dispute to be heard before the Australian Industrial Relations Commission (AIRC) in September 1998, initiated a bargaining period between themselves and GTS and commenced to inform the staff of the situation:

> *E1: ...this was like my first job, at the time I didn't know the difference between an AWA and an award. I had no idea that they were actually different systems. So I was like, "Well, O.K. this is a job and I have it"...I was on the dole, and I just*

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* Two employees were interviewed to assist with this case study. As they are current employees of the Company, their anonymity is provided by labelling them E1 and E2.

wanted to get off the dole... and then once we started, then it was like, the nightmare begins.

The staff commenced their 6 week training period, which included a two week period training at various Lufthansa call centres around the world. During the staff's time in Melbourne, the ASU stood outside the offices of Global Tele Sales and handed out fliers informing the staff of their rights and of the employment situation. This information, compounded with the employee's disappointment at not working for Lufthansa, led to many staff supporting the actions taken by the union:

E2: The union asked the staff if they were willing to take it a bit further because obviously they weren't happy with us working under the sales award. They wanted to get us, or for us to have the Overseas Airline Award because basically we are working 100% airline industry, taking reservations for an airline just under a different name... right from the beginning there wasn't much trust there because of the, I wont say confusion, but more of a stuff up really. Because of the disappointment as well, not to be able to be saying "I'm working for Lufthansa" but for another company, and the trust was basically never there.

E1: Ever since [the beginning] we've had a real identity crisis about who we are. Whether we're Global Tele Sales, who are an 100% subsidiary of Lufthansa, or are we Lufthansa itself...So once we got more information from the union about what was an Overseas Airline Award and what we were on then we started going, "Well, why aren't we on the other one?".

Immediately prior to the hearings in the AIRC concerning the union application, the employers developed a new AWA, removing the limit on the amount of weekends the employees were obliged to work. The lack of employee trust in the management was magnified by the head of GTS in Germany coming to Melbourne and addressing the staff, pressuring them to sign the new agreement:

E1...because they had a limit on how many weekends and nightshifts that could be done, they claimed that they cannot get any other business...and then they were really pressuring us to sign it... basically what the big boss was saying was "sign this variation agreement or I'm closing down this office'. That's basically what he said.

Very few of the staff signed the agreement. During this period, the ASU continued to put its case to the Employment Advocate regarding the use of the Commercial Sales Award as an appropriate comparison to the GTS workplace agreements. Despite the union's contentions, the Employment Advocate chose to use the Commercial Sales Award and on 16th of October the GTS AWA was approved. At the request of the employer, a representative of the Employment Advocate went into the workplace and spoke to the staff, outlining the legalities of the AWA and explaining the reasoning behind it, but this presentation simply created more animosity:

E1: ... I just remember thinking that I don't even know why I bothered going into that meeting because I knew [what] she would say... I remember reading the ads for the Employment Advocate and it's like "Be flexible for your employees". And I thought "Yeah right, it's flexible for the employer to basically do whatever they want to us". But she said "They wanted to use the AWA because we can work out exactly what can be done for this company and for you guys". And it's like yeah right!!

The ASU was finally successful in the AIRC and had an interim award created, however the decision was over-turned on appeal due to a technicality in the early bargaining process. The lengthy legal proceedings began to create negative publicity. The State Minister for Business, Mark Birrell, then stepped in and assisted in a deal between the unions and the employer, the result of this being the development of a new award to cover the employees of GTS. The new award includes a small pay rise, but it remains unsatisfactory to many of the employees. The handling of the dispute, the employers attitude to the union and their treatment of the employees has resulted in a high staff turn over and a culture of mistrust in the workplace:

E1: I understand that unions and companies are not always happy happy, but they're here and they're not going to go away and I've seen people go out to the lobby and say "Go down stairs, you're not welcome here, to stand here and give out fliers". So they had to get pushed down the stairs to actually hand things out. There was a real fear at that stage about being seen as a union member... from the start they screwed us over and it wouldn't surprise me if they just came up with any excuse to get rid of people they feel are going to be a threat to the organisation. That's the good thing about having the ASU come in, we can have people talk to them and get things done a bit more. I don't think the award's really great because it's not an Overseas Airline Award, but it even got to the stage... the Commissioner came in to say "Look, you pretty much don't have a choice... you're not going to get any better"

The significance of the GTS case to the legislative issues

The GTS study raises several issues of concern about both the design of the WRA 1996, the implementation of the existing No Disadvantage Test and indeed the behaviour of the Office of the Employment Advocate.

This case suggests the Office of the Employment Advocate has promoted rather than vetted AWAs, by obliging an employer request to apply the No Disadvantage Test in a manner detrimental to employees. The use of the Commercial Sales Award in this matter was purely a tactical device to lower wages without the employees concerned being aware of the manner in which the AWA was compared to the award system. That the employees and the union could only achieve some measure of satisfaction by generating sufficient political embarrassment to warrant the intervention of a Minister of the Crown indicates just how debased the industrial relations system has become.

The VTHC contends that the operation of the existing NDT has been unsatisfactory. The VTHC is therefore alarmed that the NDT will be weakened further by the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999.* In particular the VTHC notes that Section 170VCB (6) which requires the Employment Advocate to approve an AWA *even if it fails the NDT*, provided that it is 'not contrary to the public interest' to approve it. This extraordinary provision will effectively remove an employee's rights to protection against unfair AWAs. It also makes a mockery of Section 3(b) of the WRA 1996 which affirms that 'the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level'. If employers and employees are free to choose to arrangements acceptable to themselves, why does the NDT lapse in the face of the 'public interest'?

The case of GTS demonstrates that:

1. The Office of the Employment Advocate is not an impartial regulator of AWAs, but services essentially to legitimise the practices of employers;
2. Information provided to employees facing AWAs is inadequate, particularly with respect to their understanding of the No Disadvantage Test and the relevance or otherwise of the designated award;
3. Union rights of entry to the workplace are an important source of support and information for workers.

Accordingly, VTHC reiterates its opposition to AWAs. Common law contracts have always been an option in Australian industrial relations, and AWAs serve only to allow employers to opt out of award provisions. At a bare minimum however, AWAs should be vetted by the independent umpire in the shape of the Australian Industrial Relations Commission, they should not take precedence over awards and adequate resources should be provided for rigorous public inspection of the operation of AWAs.

Case 4: Union intervention in a certified agreement – Melbourne Cricket Club Event Employees

In May 1996, the Media Entertainment and Arts Alliance (MEAA) approached the Melbourne Cricket Club (MCC) to initiate discussions for an enterprise agreement to cover the casual workers employed at the Melbourne Cricket Ground. The work performed by these workers includes that of general ground and turnstile attendants, ticket sellers, supervisors and office staff. The union has approximately 800 members among the workers concerned.

Notice to the employer and the Australian Industrial Relations Commission (AIRC) initiating a bargaining period then followed in August 1996. The MCC prepared a counter-claim with the assistance of the Victorian Employers Chamber of Commerce and Industry (VECCI), seeking variations from the Award standard in four areas – night penalties, spread of hours, arrangements for postponement/cancellation of events and payment of wages.

Following negotiations facilitated by Commissioner Deegan of the AIRC, beginning in January 1997 and concluding in May, the MCC proposed an agreement incorporating an 8% increase in pay rates over two years and variations to conditions. This proposed agreement was endorsed by meetings of the union.

In July 1997 however, the MCC withdrew their offer, following a change of management personnel and pressure from the Australian Football League regarding costs of staging matches on Sundays and Public Holidays. The MCC then tabled an 'equalisation' proposal that abolished Sunday and Public Holiday loadings and compensated for these by lifting hourly rates.

The dispute between the MCC and the union turned over whether the 'equalisation' proposal provided sufficient compensation to employees for the abolition of the penalty loadings. The resources devoted to this contest illustrate the difficulties facing an individual worker attempting to assess 'no disadvantage'. For its part the MCC engaged the accounting firm Coopers and Lybrand, whose analysis purported to show that employees would be 24 cents an hour better off. In reply, the union sought advice from the Australian Council of Trade Unions, and later the Workplace Studies Centre of the Victoria University of Technology. Contrary to the Coopers and Lybrand study, the VUT report found that over a 26 week period employees would be between $367.25 and $788.12 worse off. Extracts from the Coopers and Lybrand study, the covering letter from the MCC to its employees, the VUT report commissioned by the union and the correspondence from the union to its members are attached as Appendix 5. These provide ample evidence of the complexities an individual worker is confronted by when choosing 'the most appropriate form of agreement for their particular circumstances' (Workplace Relations Act, Section 3 (c)).

The MCC elected to put its proposal to the employees, contained in a Section 170LK agreement (ie a non-union certified agreement). In the course of putting this proposal to the employees in November 1997, the employer engaged in some extraordinary record-keeping, in which the names and addresses of supporters and opponents of the agreement were identified, details logged as to who had returned the agreement, and duplicate copies of the agreement posted to employees who had not signed and returned the agreement. Details of these practices will be tabled before the Committee in the oral evidence provided by the VTHC. The employer later contended that 538 votes were recorded as valid, of which 386 were in support of the agreement and 151 were against.

The union for its part conducted a ballot of members at the same time, to test the support of members for the agreement. A copy of the correspondence despatched by the union to its members is attached in Appendix 5; 411 members returned ballots, of which 311 opposed the certification of the agreement and 100 supported it.

These conflicting accounts of the consent of the support of employees for the agreement were put to the AIRC when the employer sought certification of the agreement. Following protracted proceedings before the Commission, the employer eventually withdrew its equalisation proposal, and renegotiated the agreement with the union. This renegotiation saw the parties agree to the abolition of penalties, in return for hourly rates higher than those proposed by the MCC, together with 11% wage increases paid in three instalments. This outcome was certified via a Section 170LK agreement, to which the union is bound.

The relevance of Melbourne Cricket Club case to the legislative issues.

The MCC study indicates several problems with the operation of the WRA 1996, and suggests several measures proposed by the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* that are an unnecessary intrusion on management-union relations.

With respect to the certification procedures under the WRA 1996, although the parties eventually reached a satisfactory agreement, the means by which employers may seek the consent of employees to an agreement are highly dubious. In this case, were it not for the intervention of the union, employees would have been asked to consent to an agreement apparently vetted by a reputable accounting firm, as part of a 'balloting' procedure that no independent electoral officer would vouch for.

Yet instead of tightening certification procedures to strengthen the independent oversight of the AIRC, the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* moves in precisely the opposite direction. The Bill represents a further attack on the organising capacity of unions, and as such will provide further scope for employers to gain the consent of employees to agreements without the countervailing support and information from a trade union.

As with all casual workplaces, the Right of Entry provisions of Sections 285C and 285D of the WR Act create a difficult environment for holders of the relevant permit to hold discussions with any of those employees who wish to participate in those discussions.

On average the MCC would employ between 300 and 400 staff for an AFL Football match gameday. The majority of those staff would be entitled to one twenty minute break during their shift. These meals breaks are taken at varying times across the workforce, if at all. The Melbourne Cricket Ground has three designated staff tea rooms, one in the MCC Members area, one on the ground level of the Olympic Stand and one three levels directly above this. As those familiar with the Melbourne Cricket Ground would be aware, to negotiate internal gates and security and to move from one side of the ground to the other on a gameday may take up to 30 minutes. It is because of this that some staff positioned away from the tea room prefer to remain close to their workstation during their break.

During the negotiations for the current agreement, the topics for discussion with employees who wished to participate in those discussions altered on an almost daily basis. The ability to hold these discussions before or after work was made difficult due the vastly varying starting and finishing times of staff. The MEAA representatives had no option but to approach staff to ascertain their willingness to participate in discussions, as staff are encountered at the various positions they occupy within the Ground.

On 15 April, 1998, a period almost two years after the MEAA commenced discussions with the MCC, the Club wrote to the MEAA and advised that from this time the MEAA would be required to comply with the provisions of the WR Act in respect to Right of Entry. The MEAA viewed this letter as an attempt by the Club to limit the ability of the MEAA to fully inform its members of developments in the Australian Industrial Relations Commission hearings into the Club's application for the certification of the s170LK agreement which was subsequently renegotiated. Following this letter the Club forwarded to all casual staff a letter dated 13 May, 1999 in which employees were requested to indicate their authorisation of the Club deducting the Union dues directly from their wages. This was despite the continued offers of the MEAA to supply copies of pay roll deductions authorisations which were signed by members at the time of joining the MEAA. A copy of these authorisations were also forwarded to the employers at this time, for their future records. This was also viewed by the MEAA as a device to limit the access to its members and to confuse members who had previously signed such authorisations.

The attack on trade union organising will be intensified by the Government's legislative proposals. This can be seen with respect to the so-called 'freedom of association' provisions, a term that provides a rhetorical flourish to the Bill's anti-union intent. The *Melbourne Cricket Club Event Employees Certified Agreement 1998* contains the following provision:

> *24 Union Membership*
> *24.1 Union membership is matter of choice for each employee.*

24.2 The Club has agreed to continue to make authorised payroll deductions for Union membership fees, subject to the Club and the Union entering an agreement in relation to the cost of this arrangement to the Club.
24.3 Any person holding a permit under Division 11A of Part IX of the Workplace Relations Act 1996 shall have the rights set out in section 285C of the Act as if this Agreement was an Award of the Australian Industrial Relations Commission.

Despite the effectiveness of the Union in representing employees in this case, and despite the ultimate willingness of the employer to agree to this Clause 24 (without protracted industrial action), this provision in the agreement would fall foul of Schedule 14 – Freedom of Association of the amending legislation. Sections 298SA and 298SB place further punitive restrictions on the so-called closed shop; since MEAA membership at the MCC exceeds 60%, the union would likely face investigation under these sections. Moreover, the proposed subsection 298Z(5), will remove from certified agreements and awards provisions that encourage union membership.

The VTHC submits that Sections 298SA and 298SB are essentially union busting clauses, and that there is little empirical evidence to support the proposition that the 'closed shop' is coercing unwilling conscripts to join trade unions. The case of the MCC illustrates the effectiveness of unions in providing employees with support and information, without which they will be disadvantaged in their dealings with well-resourced employer proposals for employment contracts.

Case 5: Independent contractors

became an independent contractor with the Metropolitan Fire and Emergency Services Board (MFESB) in 1994, after the MFESB contracted out the provision, maintenance and testing of fire alarms, fire extinguishers and other fire prevention equipment. While legally a contractor, the tender process was essentially a job selection:

> *It was almost like a job interview type scenario, it wasn't like a price tender but it was written up in the tender section of the paper. That's the way I view it. You had to submit like a resume. You had to nominate the area that you would work in, like the geographical area... And basically you end up being interviewed and from those interviews they decided who they wanted to take on.*

first contract was for a period of three years, and his background in property management proved useful in evaluating its contents:

> *In the first contract, no I didn't actually have it checked by a solicitor at that stage. Because my role, that I had experienced in the bank, and I had done a little bit of commercial law with study that I have done, at that stage, it looked quite reasonable and the remuneration looked quite reasonable. I couldn't see too many problems with the contract. I've read a few, bought and sold property, so I have a bit of knowledge in that area, I'm not saying I'm an expert, but it looked reasonable and I though O.K. well I'll go for it.*

Six months before the first contract expired the contractors received a revised contract for signature. . describes the key changes sought by the MFESB and their consequences for the contractors:

> *We had a list of customers in the original contract we lost that, that wasn't in it. The dismissal clauses, as in getting rid of the contract...again were fairly onerous on us. Being able to decide what customers we did and didn't do and they had the right to change rates on customers, as in financial rates without any consultation. ... you know none of us are silly to say "O.K. that customer's got to stay at that rate" when we full well know we are going to get under cut by somebody else. It's like any business, price determines quite a lot. So there were those issues.*

The absence of the customer list in the proffered second contract was important because without it the contractors would have greater difficulty valuing their businesses if they were to sell them. On the one hand, the MFESB draft contract devalued the 'franchise' held by the contractors through the absence of this customer list, but on the other the contract relationship limited the extent to which the contractors could exercise the traditional remedy of the direct employee – the withdrawal of labour:

> *It's very hard for a contractor to take industrial action. In our industry, if we stop servicing customers, they'll go somewhere else. Because we get paid for what we*

do, we're not on a wage, we're not on a salary. So not many of them, I don't think any body was that committed to stop work, it would have been very hard. It caused a lot of, this from a personal point of view, it caused a lot of tension between a lot of the contractors ... At that stage, I didn't mind, it didn't worry me personally, but it intimidated a lot of the fellows because a lot of these guys had never been in business before, they'd always been employees so they'd sort of been in that cocooned environment of being an employee all of the time and not prepared to have someone like (Manager X) who they felt would intimidate them.

The only effective remedy available to the contractors was collective legal action, which they organised through the United Firefighters Union, Victoria Branch. In this instance, the existing organisational infrastructure of the union avoided for the contractors the need and expense of establishing their own association to prosecute the matter:

We tried many times, even before this came up we tried to form an association of all of the contractors and we could never get everybody to agree on what form, what structure it would take. All these sort of things cost money any time, a lot of people weren't prepared to put up the money, a lot of people weren't prepared to put in the time so therefore it falls over. By using the union it was an easy way of having somebody organised to do it for us.

The remedy adopted by the union was to engage labour lawyers Maurice Blackburn to lodge an application in the Federal Court under Section 127A of the WRA 1996, which confers powers on the Court to set aside unfair contracts:

I think there was an application made in the court, the Federal Court in regards to having the contract examined under that section, whatever the number of that section was. And the next stage after that I think was when the MFB tried to say they weren't a trading corporation so therefore they were exempt from that piece of legislation. That was thrown out of the court, that's when they started becoming a bit more serious about the negotiations, they never went any further, it sort of died. I think hearing dates came and went but because the negotiations were moving along more rapidly, getting towards more of a final conclusion, it wasn't taken up because A) it was going to cost us a lot more money and B) we were sort of getting towards where we wanted to go. Quite a few people are still not happy with the end result, but you're never going to please everybody.

It is significant that the availability of Section 127A, rather than the conclusion of the case, prompted the resolution of the dispute by encouraging the resumption of negotiations. What the union achieved for the independent contractors were three key improvements:

We got the customer list back. It just makes it a bit more, when we want to sell our contracts it just makes it a bit more... if you were going to come and buy and spend quite a bit of money, you'd want to see what you were going to get for your money. The dismissal clauses are a lot harder on FES. There's more consultation

now for changing rates, even though the final decision's theirs. I suppose from their point of view the customer is theirs not mine, my customer is the MFESB. There are some other changes in regards to quality assurance matters. In the original contract, basically the quality assurance manager said "Jump", we had to say how high and do it whereas no we've got an avenue of putting it right...

The relevance of the MFESB contractors case to the legislative issues.

A Coalition Government will: legislate to ensure that the distinction between employees and independent contractors is clearly defined and that independent contractors, many of whom are small businesses, are not regulated as employees by the workplace relations system. Reproduced in Reith (1999b: p.39)

Through the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, the Government intends to repeal Section 127A and thereby remove the power of the Federal Court to deal with unfair contracts facing individual contractors. The propaganda used to rationalise this amendment is the rhetoric of the small business operator facing a bureaucratic monolith:

To maximise the opportunities for small business growth, the workplace relations system must meet the needs of small business operators. The previous centralised system was developed without regard to the particular requirements of small business. (Reith 1999b p.39)

It is unclear here whether the Government is merely using a polemic of small business flexibility for tactical purposes, or whether it really does not understand that independent contracting can often involve an imbalance in the relative bargaining power between of large businesses in their dealing with smaller suppliers. Contracts therefore may not only be 'made' by independent contractors, they may be *imposed* upon them in circumstances where contractors may lack the bargaining power to resist. The only remedy available to deal with this imbalance is Section 127A, and its repeal will disadvantage many independent contractors.

Regardless of legal categories that define 'employees' and 'non-employees', all workers are entitled to minimum standards and legal remedies. Accordingly, the VTHC recommends that, to advance the Government's concern for the rights of small business, the access of independent contractors to the Federal Court facing unfair contracts be preserved. To that end, the VTHC calls on the Committee to recommend that Schedule 16 of *the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* be deleted.

Issues arising from the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999

This Section discusses a number of aspects of the proposed amendments.

Award stripping and AWAs

The Government's proposals to further limit the allowable matters that an award may contain, has particular consequences for Victorian workers. Arising from the movement of Victorian workers into the federal award system after the December 1992 amendments to the *Industrial Relations Act 1988,* Victoria has a high proportion of its workforce covered by federal awards. Based on Fox and Teicher (1994) and McCallum (1994), VTHC estimates that between 55-60% of the Victorian workforce are covered by federal awards, leaving the balance reliant on the 5 conditions nominated by Schedule 1A of the Workplace Relations Act. In the absence of a State industrial relations system, Victorian workers have 'nowhere else to go' to protect their industrial entitlements.

The Government's proposals to extend the list of non-allowable matters are nothing more than punitive and vindictive. The Government justifies its approach in terms of stripping the award system to a minimum safety net, on the assumption that this will encourage bargaining between the parties. However, as we have seen through the case studies discussed here, the safety net has so many holes it is already threadbare. The practical effect of these gaps is that it *discourages* meaningful bargaining because there is little regulatory support for workers, and this allows employers to offer work on a 'take it or leave it' basis.

The matters the Government now wishes to deem non-allowable which will contribute to this imbalance in bargaining power include:

- Transfers between locations
- Transfer from one type of employment to another
- Recording of hours of work
- The number or proportion of employees that can be employed in a particular type of employment or classification, and direct or indirect prohibitions on the type of employment provided;
- The number or proportion of hours that employees may work
- The maximum or minimum hours a part-time worker may work
- Accident make-up pay
- Tallies

The Government contends that these matters will be taken up in enterprise agreements and AWAs. Yet Drago, Hawke and Wooden (1998) found that the practice of enterprise

bargaining contributed little to organisational performance, and estimated that only 16% of collective agreements after 1994 totally replaced awards. On the efficiency question, they found that 'very little evidence was uncovered which demonstrates a clear link between the introduction of enterprise agreements and subsequent improvements in workplace performance' (Drago Hawke and Wooden 1998: pp.24-5).

We saw earlier in this submission, that full-time, permanent work is unravelling into a diaspora of casual and part-time jobs, a labour market trend that has particular consequences for women and young workers. The Government's proposals will accelerate those trends. We also saw that the training effort of Australian industry is deteriorating, and the removal of skill-based career paths and training leave as allowable matters will accelerate that trend.

Finally, the removal of accident make-up pay as an allowable matter will encourage employers to treat workers as disposable. In Victoria injured workers are entitled to 95% of their Pre Injury Average Weekly Earnings for 13 weeks and then 80% or 60% thereafter depending on the circumstances of the case. If these entitlements are disallowed as an award matter, many injured workers will suffer substantial cuts to income.

The extension of the non-allowable matters needs to be read in conjunction with the Government's proposals for AWAs. With the extension of the non-allowable matters, the hurdle for the No Disadvantage Test facing AWAs has been effectively lowered. Moreover, even if an AWA does *not* pass this weakened test, the Employment Advocate must approve it if it is not contrary to the public interest to do so.

To all intents and purposes, this means the abolition of the No Disadvantage Test, and ensures in practice that the 'minimum safety net' is a *maximum* set of entitlements outside of unionised certified agreements. This outcome will guaranteed by the provisions in the Bill to allow AWAs to prevail over awards.

> The VTHC calls on the Committee to defend and restore the bargaining rights of workers by repairing the damage to the award system. The restoration of an enforceable and comprehensive award system will equalise the bargaining power between workers and employers, and thereby facilitate fair and reasonable workplace bargaining.

Union rights to organise

Right of entry

A number of the case studies presented earlier in this report highlighted the importance of union right of entry to informed decision-making on the part of workers. With an under-resourced inspection function in the Department of Workplace Relations, and an Office

of Employment Advocate that sees its role as rubber-stamping employer applications for AWAs, the trade union movement is the key source of information for workers attempting to calculate their interests.

The WRA 1996 attempted to complicate the right of unions to enter a workplace by establishing a 24 hour notice period before a union official might enter premises (Section 285D (3)). This has meant in practice that potential breaches of awards and agreements can go uninvestigated during this notice period. The notice period can not be taken to be a safeguard against the operational needs of a business, because section 285C(2)) requires that officials may in any event only discuss issues with employees during the latter's meal or other rest breaks.

The bureaucratic proceduralism that the Government is using to complicate union organising will become still more intricate under the amendment proposals. Under them, union officials must have a 'current invitation' from an employee, *in writing*. The union official must then ask the employee concerned whether they want confidentiality. If the employee does want confidentiality, but the employer questions the legitimacy of the invitation, the union official must then go back to the Registrar to have a certificate issued to validate the invitation. This bureaucratic farce is then completed by the Government's proposed subsection 285DA(2) which would allow an employer to direct a union official to hold interviews with an employee in a designated room or area. In practice, the effect of this provision would eliminate an employee's rights to confidentiality, as an employer would only have to stand outside the door of the designated room and observe who entered for discussions with the union.

VTHC invites the Committee to compare this bureaucracy and its accountability requirements with the freedom and lack of accountability the amendments will provide to the operations of the Office of Employment Advocate

VTHC further invites the Committee to consider how workers with literacy difficulties, or those from a Non-English Speaking Background, are going to exercise their 'right' to issue a 'current invitation' in writing to their union official

The 'closed' shop

In making these changes, we invite registered organisations into the world of competition and improved service delivery for their members, legislated privilege and monopoly rights have a dwindling relevance to modernity. (Reith 1996).

The Australian legal profession is heavily over-regulated and in urgent need of comprehensive reform. It is highly regulated compared to other sectors of the economy and those regulations combine to impose substantial restrictions on the

commercial conduct of lawyers and on the extent to which lawyers are free to compete with each other for business. As a result, the current regulatory regime has adverse effects on the cost and efficiency of legal services and their prices to business and final consumers. (Trade Practices Commission 1994: p.3).

One of the curiosities of the Government's approach to industrial relations is the vast gap between the personal practices of Cabinet members and the legislative system the Government seems determined to inflict on Australian workers.

While the Cabinet preaches the virtues of individual contracts, and loudly denounces the perfidies of union closed shops, its members actually enjoy as parliamentarians the benefits of legislation that defines their entitlements collectively, with their wage rates monitored by an independent tribunal (the Remuneration Tribunal). Moreover in the majority of cases, Cabinet members came to professional prominence courtesy of a legislated closed shop – otherwise known as the legal profession.

Table 2 identifies Cabinet ministers from a legal background.

Table 2: Career Backgrounds of Federal Cabinet

Former Lawyers	*Non Lawyers*
John Howard: Prime Minister	John Anderson: Deputy Prime Minister, Minister for Transport & Regional Services.
Peter Costello: Treasurer	Alexander Downer: Minister for Foreign Affairs
Robert Hill: Minister for the Environment and Heritage	Mark Vaile: Minister for Trade
Richard Alston: Minister for Communications, Information Technology & the Arts, Deputy Leader of the Government in Senate	John Moore: Minister for Defence.
Peter Reith: Minister for Employment, Workplace Relations and Small Business	Michael Wooldridge: Minister for Health and Aged Care.
Jocelyn Newman: Minister for Family and Community Services, responsible for assisting the Prime Minister on the Status of Women	David Kemp: Minister for Education, Training and Youth Affairs, responsible for assisting the Prime Minister on Public Service, Vice President of the Executive Council
John Fahey: Minister for Finance and Administration	Warrick Truss: Minister for Agriculture, Fisheries and Forestry
Nick Minchin: Minister for Industry	
Phillip Ruddock: Minister for Immigration and Multi Cultural Affairs, responsible for assisting the Prime Minister on Reconciliation	
Darryl Williams: Attorney General	

Sections 298SA and 298SB of the proposed legislation prohibit closed shops and define them in terms of workplaces where 'at least 60% of the persons of the same kind of work at that workplace or business', belong to the same industrial association and it is an 'express or implied condition of employment' that they become members of an industrial association.

In a Cabinet dominated by professional monopolists, this is legislation drafted on the principle of 'do as I say, not as I do'. Peter Reith for example, has since the mid 1970s worked only as a solicitor and as a parliamentarian, thereby benefiting from legislated privilege and collective entitlements he condemns for others.

If we take the legislated monopoly rights conferred on him as lawyer in Victoria, (similar legislation applies in the other States) the *Legal Practice Act 1996* regulates the legal profession. This Act supersedes the 1917 statute which conferred monopoly rights on the Law Institute of Victoria to certificate legal practitioners. The 1996 Act pays lip service to national competition policy by providing scope for the registration of other professional bodies to issue practising certificates, but only if a rival body can gain membership from 200 practitioners *from 20 different law firms*. (In contrast, the WRA 1996 allows for the registration of a single company union with 50 members). The legal community has thus far not registered a rival organisation, which leaves the Law Institute of Victoria's parent company, the Victorian Lawyers RPA Limited as the sole issuer of practising certificates in the State. Even if a rival organisation to the RPA were established, the 'competitive' effect would be minuscule because the monopoly rights rest on the practising certificates enshrined in legislation. Section 314 of the *Legal Practices Act 1996* expressly prohibits unqualified legal practice, on pain of a two-year gaol term.

The benefits of monopoly rights of qualified legal practitioners are considerable. Surveys of legal incomes have revealed growth rates in earnings of up to 50% in the last year (Burrell 1999).

That the Workplace Relations Act 1996 and the proposed 1999 amendments are legislation by lawyers, for the benefit of lawyers, is one of the little known features of the industrial relations debate. Nick Ruskin, Principal of the prestigious law firm Phillips Fox, acknowledges that the WRA 1996 generated work for the legal community:

> *Whilst acknowledging that the courts have always had a significant role in industrial relations it is apparent that as the role and power of the Federal Commission has diminished as a result of the Workplace Relations Act 1996, the legislation has directed sparring parties to the Courts.*
>
> *This would appear to be a natural consequence of an approach which locates the responsibility for the resolution of industrial disputes with the dissenting parties. Should any of the disputing parties wish to invoke their legal rights, in the absence of the traditional role of the Commission, the evidence is that they will increasingly do so.* (Ruskin 1999: p.15)

VTHC invites the Committee to compare the market privileges conferred on professional associations by relevant State and Federal legislation, and the intrusive requirements on trade unions to justify high levels of union membership proposed by the amending legislation. In particular, VTHC invites the Committee to consider the consequences for social justice of preserving legislated privileges for male-dominated professional elites, while effective organisation among low-paid workers is subject to ever-increasing bureaucratic and legal investigation and constraint.

International obligations

> *It is the Workplace Relations Act that will allow businesses such as yours to grow and remain competitive – particularly in a globalised economy.* (Reith 1999c)

> *The latest observations by an International Labour Organisation committee on our labour laws are not relevant to the Australian workplace.* (Reith 1999d)

As a political discourse, globalisation is a strangely schizophrenic phenomenon – for workers, it is an irresistible tide to which they must become accustomed, but for legislators it is an optional extra.

Thus, Peter Reith can within the space of a fortnight deny the relevance of a finding from the global labour relations umpire, and then proclaim the WRA 1996 to be a necessary legislative adjustment to the realities of the global economy.

With respect to the principal object of the WRA 1996, the VTHC notes that Section 3(k) requires the Act assist 'in giving effect to Australia's international obligations in relation to labour standards'.

The VTHC noted earlier in this submission that the International Labour Organisation (ILO) has in its observations found the WRA 1996 to be in breach of Australia's obligations as a signatory to ILO Convention 87 (Freedom of Association and Protection of the Right to Organise).

Accordingly the VTHC recommends to the Committee that Section 3(k) of the WRA 1996 be amended to refer specifically to Australia's obligations under ILO Conventions. To the extent of any inconsistency between those Conventions and other sections of the WRA 1996, application of the relevant Conventions should prevail.

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Appendices

Appendix One: Copy of Labour LinQ employment contract signed by

Appendix Two: Copy of . pay slip and the relevant comparison conducted by the Workplace Studies Centre at Victoria University between rate of pay and the minimum industry rates as per Schedule 1a as well as the Metal Industry Award.

Appendix Three: Copy of letter supplied to those people invited by the employment agency The Asia Partnership to interview for a customer service position at Lufthansa.

Appendix Four: Comparison conducted by the Workplace Studies Centre at Victoria University between the pay rates for employees under the Commercial Sales Award (Victoria) 1996 and the Overseas Airline Award 1994.

Appendix Five: Extracts from the Coopers and Lybrand report commissioned by the MCC, the covering letter from the MCC, the Victoria University Report, commissioned by the MEAA, detailing analysis' of the 'equalisation' proposal tabled by the MCC and covering MEAA correspondence.