CEPU Submission
to the
Senate Employment, Workplace Relations, Small Business and Education Legislation Committee
Inquiry into Four Workplace Relations Bills

1. Introduction

1.1 The CEPU welcomes this opportunity to present to the Senate our view of the Bills seeking to amend the *Workplace Relations Act* 1996. We are disappointed that more time was not made available to prepare a submission. Consequently this submission is relatively brief as the union has not had the opportunity to make more substantial comments on the Bills.

1.2 This submission is made on behalf of the three Divisions of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the CEPU), that is, the Communications, Plumbing and Electrical Divisions.

1.3 The CEPU Electrical Division (formerly the Electrical Trades Union or 'ETU') represents the interests of skilled electrical workers in a wide range of industries including electrical contracting, manufacturing and power generation and distribution. Electrical tradespeople form the largest membership group.

1.4 The Plumbing Division (formerly the Plumbers and Gasfitters Union) represents the interests of skilled workers in the plumbing industry including general plumbing, roofing, mechanical services, and fire protection. Plumbing tradespeople form the largest group within the membership.

1.5 The Communications Division (formerly the Communications Workers Union) represents the interests of skilled workers in the communications industry (including Telstra) and persons employed by Australia Post.

1.6 The CEPU notes that:

- the *Secret Ballots for Protected Action Bill 2000* is a repackaging of Schedule 12 of the *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999* and

- the *Termination of Employment Bill 2000* is an amended version of Schedule 7 of the *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, and

- the *Australian Workplace Agreements Procedures Bill 2000* is a repackaging of Schedule 9 of the *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, and

- the provisions of the *Tallies and Picnic Days Bill 2000* were included in the *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*.

They were (albeit in a modified form in some cases) all the subject of the Senate Inquiry in 1999 in relation to the *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*.

1.7 As the current proposals were thoroughly investigated by the Senate in 1999, it is not necessary to traverse all of the issues and difficulties that arise in consideration of the current Bills.

1.8 The 1999 Senate Inquiry completed a detailed analysis of the likely impact of the (then) Bill on industrial relations and reported its detailed findings.

1.9 The Senate rejected the proposals less than one year ago and in the absence of any material change in circumstances to warrant a review of that rejection, the CEPU urges the Senate to again refuse to support the current Bills.

2. Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000

2.1 Balance Tipped in Favour of Employers

2.1.1 The Secret Ballot Bill disturbs the balance of the rights of employees vis a vis the rights of employers. The Bill has the effect of bolstering the advantage of employers in the bargaining process.

2.1.2 The Labor Senators Report on the 1999 Bill noted the substantial evidence supporting the view that the 1996 amendments changed the balance and bargaining position in favour of employers and to the detriment of employees[1].

[1] Labor Senators Report at para 6.1

2.1.3 The Australian Democrat minority report on the 1999 Bill also referred to the need to provide a fair balance between the rights of unions and employers[2]

2.1.4 The CEPU agrees with the observation of the Labor and Democrat Senators and is concerned the Secret Ballot Bill, if it becomes law, would tip the balance firmly in the employers' favour by imposing onerous and prescriptive obligations upon employees and unions during the bargaining process. The obligations are not imposed upon employers.

2.1.5 We note and endorse the view of the Democrat Senators where, having considered the merits of the 1999 Bill, found secret ballots *"pose great dangers of actually escalating conflict, lengthening disputes and making for more litigation…" "…and add greatly to impediments to unions to undertake legitimate industrial action"*[3]

2.2 The Secret Ballot Prescriptions are Unworkable and Unnecessary

2.2.1 The current Bill sets out detailed requirements that would need to be complied with before industrial action by employees and/or unions is protected.

2.2.2 The proposed requirements are:

- unions or employees must apply to the AIRC for a secret ballot order prior to industrial action being taken;
- a secret ballot of employees requires that at least 50% of employees must have voted, and at least 50% of those who vote must approve industrial action for it to be protected;
- the application for a secret ballot order must include detailed information including the precise nature, timing and duration of the proposed industrial action;
- the applicant (normally the union) must bear the cost of the ballot with 80% reimbursed at a later date.

2.2.3 The secret ballot regime proposed are unworkable for various reasons including:

[2] Democrat Minority Report, Section 1, p389
[3] Democrat Minority Report, Section 15, p398

- The requirement that at least 50% of employees must vote in a ballot. This is an extraordinary requirement when it is apparent to industrial observers that many employees do not wish to participate in formal voting processes for a host of reasons including apathy and language difficulties.

- It is interesting to note that to accept a proposed agreement the Act currently requires a majority of those employees who voted (s170LE). There is no logical reason for the requirement that a majority of employees must vote, and a majority of those who voted must vote in support of industrial action before industrial action is taken for the action to be protected, when a simple majority of those who vote suffices to approve a proposed agreement.

- The present system does not require a formal ballot of employees prior to industrial action but the CEPU always gains the support of a majority of affected employees prior to industrial action taking place. The CEPU conducts meetings of members during the bargaining process and obtains majority support for industrial action to ensure effective action is taken. If a majority of members do not support industrial action then it is unlikely to be successful. If a minority of employees take action with out the support of the majority, the resultant action is unlikely to be effective.

- It has been the experience of the CEPU that employees do not take industrial action lightly. Partly because industrial action often results in a reduction of income for the duration of the action while expenditure commitments continue.

- Moreover, employees normally only take industrial action as a last resort when the bargaining process fails to provide results. There is no evidence to suggest that employees are directed or coerced by a union into taking industrial action against their will.

2.4 Ballot Already Available

There is already substantial evidence that unions (including the CEPU), conducts their affairs democratically and act to implement decisions of members to take industrial action.

As a safeguard to ensure that the decision of employees to take industrial action is democratically determined, the AIRC has the power to order a secret ballot (ss.135 and 136). These provisions have been rarely used, which according to the Democrat Minority Report suggests "*that there may be little real demand from employers or employees for further access to secret ballots"*.[4] In the absence of evidence that the current provisions in relation to secret ballots are unsatisfactory, the current Bill should be rejected.

2.5 Resources for Conducting Ballots

The CEPU would find it difficult to provide the requisite resources to conduct formal ballots at each workplace where the union has members. We note that 80% of the costs are to be reimbursed. If the Government decides to impose the ballots proposed by the current Bill, despite the lack of need or demand for such provisions, the Government should provide all the necessary resources to conduct such ballots. The Government via the Australian Electoral Commission currently provides the resources to conduct elections for office holders of unions. The Government also reimburses unions for "reasonable costs" in conducting a secret ballot pursuant to s.138 of the current Act.

[4] Democrats Minority Report, Section, 15 p.398

3. Workplace Relations Amendment (Australian Workplace Agreements Procedure) Bill 2000

3.1 Streamlining agreement making

If enacted, the proposed changes will result in a reduced level of scrutiny of Australian Workplace Agreements (AWAs). In particular the changes will remove the Australian Industrial Relations Commission's scrutiny of AWAs which may fail the no disadvantage test.

3.2 The CEPU and other union submissions to the Senate enquiry on the 1999 Bill listed numerous failures by the Office of Employment Advocate to equitably apply their *existing* powers of scrutiny. The proposed changes will create further inequities by removing the limited power of the AIRC to oversee such agreements.

3.3 Of great concern to the CEPU are the problems which arise with respect to the no disadvantage test and the designation by the Employment Advocate of the designated award. See for instance, the problems which arose with the sale of Australian National Rail and the designation by the Advocate of a South Australian State Motel award rather than the more relevant Australian National Rail Award[5].

3.4 The CEPU has numerous experiences with the problems which arise with designating awards. The problems were spelled out in some detail in the previous enquiry[6]. A further example is that of CEPU members who were employed by Henry Walker Elton Pty Ltd at the Savage River mine in Tasmania. In this instance the Advocate, on the application of the employer, had designated the State Electrical Engineering Award rather than the State Metalliferous Mining Award,. which pursuant to the Tasmanian legislation was the award which applied.

The rates and conditions in the Metalliferous mining award are superior to those in the Engineering award and on the calculation of the employees, the AWAs would not pass the no-disadvantage test if the Metalliferous Award was designated. The employees then appointed an official of the CEPU as bargaining agent who contacted the Advocate and pointed out the Metalliferous Award

[5] Australian Rail Tram and Bus Union Submission No. 291, vol. 7, pp.1348-9.
[6] CEPU Submission No. 500 and 500A, for example the Julia Ross Personnel case.

and decisions of the State Industrial Commission which quite clearly indicated that this is the award which applies in the State.

The Advocate then wrote to the employees indicating that the Metalliferous award was now the designated award correcting its previous determination. However it does not appear that the no disadvantage test was then applied to the revised designation and as there is no right of appeal the AWAs continued to apply not withstanding their deficiency.

Other cases were detailed in submissions to the previous inquiry.

As outlined in these cases there is no right of appeal in the event that the designated award is not the most appropriate, let alone any right under the existing legislation for an opportunity for the employee to have their views taken on board regarding the designation.

3.5 Relationship between AWAs and other instruments

The main thrust of this change is to ensure that AWAs are not excluded by awards made pursuant to section 170MX. These awards are made when agreement can't be reached between the parties to a proposed agreement, and therefore are in reality an arbitrated agreement. In these type of awards which the CEPU have been involved in, the ability to offer AWAs has been one of the issues between the parties and ended up as a clause in the 170MX award[7]. There is no need for the proposed amendment as it is already allowed for under the existing legislation.

3.6 Industrial action and AWAs

The CEPU submits that there is no rational basis for this amendment. It is inherent in the scheme of the Act that this right (subject to the processes outlined) is open to all, no matter what the final form of the agreement is going to take and is not justified by a claim that this right has not been availed of thus far.

3.7 Conclusion

As stated by Senator Murray:
"..the major changes proposed are regressive in that they seek to reduce the level of scrutiny of AWAs by the Employment Advocate

[7] .Curragh Coal Mine (Print P7386)

and the Commission, and water down the protections for employees.[8]

This summation still holds true, as this Bill is no different to that proposed in the previous Bill. For the reasons outlined in the previous inquiry and the reasons outlined above, the CEPU urges that the Bill not be passed.

[8] Supplementary Report on the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, Senator Andrew Murray: Australian Democrats, November 1999, paragraph12.

4. Workplace Relations Amendment (Termination of Employment) Bill 2000

4.1 The CEPU adopts the ACTU submission

The CEPU adopts the ACTU submission regarding this Bill but makes the following additional comments.

4.2 Applications lodged out of time

Whilst the accepted position seems to be that *prima facie*, that there should be time limits, the CEPU is of the view that a greater degree of discretion ought to be given to the Australian Industrial Relations Commission (AIRC), particularly where an acceptable explanation for the delay makes it more equitable to extend the time

The current s.170CE(8) of the Workplace Relations Act, allows for out of time lodgement.

The proposed Bill seeks to limit the scope of the Commission's discretion. The CEPU is totally opposed to this change and in fact we submit that the current discretion should be loosened to give the Commission greater not less discretion.

4.3 Costs

4.3.1 The CEPU objects to the proposal to amend s170CJ to provide that costs may be awarded against an applicant who did not have a reasonable prospect of success. The Commission already has power to award costs parties who lodge claims unreasonably. There is no good reason to impose a further cost on parties.

4.3.2 It will operate to ensure that employees are not inclined to pursue their claims irrespective of merit, which presumably is the intention of the proposed change given the Commission's current power to award costs for vexatious claims.

4.3.3 It will ensure that employees are not inclined to pursue their claims because it effectively provides that an applicant has no right to pursue a claim unless there is a substantial prospect of success. Success is a slippery concept. Success is usually determined by the Commission after hearing the merits of the case not by the parties at the outset. The parties can make a judgement as to the

prospect of success but as to determining degrees of success, that is 'substantial' or not, the CEPU submits that this is a judgement for the Commission not the applicant. By imposing such a value judgement on the outcome, the Government is saying in effect that the claim is prima facie not legitimate and will ensure most employees fail to act out of fear of the result.

4.3.4 Lodgement of security in anticipation of order for costs

The proposal to require applicants to lodge security for costs is a further and powerful disincentive for employees to pursue legitimate cases. *In no other legal arena is an applicant so required to put up their house, car or other assets in pursuit of a legitimate grievance*. It totally ignores the social and economic distress and hardship already caused by the termination.

5. Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000

5.1 Part of this proposal seeks to remove picnic days from awards as an allowable matter.

Picnic days were introduced in the 1920's and now form part of our industrial relations history and tradition in the same way that Melbourne Cup day forms part of the tradition of racing.

5.2 Inconsistent and isolated attack on picnic days as opposed to days set aside for other industries or events

In the Second Reading Speech the Government argues: *"There is no basis on which it could be sensibly said that the observance of union picnic day is a necessary and relevant feature of a modern award safety net."*

The issue of relevance could be raised in relation to a host of days off which are not similarly under attack by the Government. The attack on union picnic days is an isolated and inconsistent attack on days off designated for particular events, for instance, The Melbourne Cup, days off to observe sectional religious rituals, for instance, Christmas Day, days off for particular industries, for instance bank holiday and so on.

5.3 Inappropriate to confine picnic days to a workplace level

Again in the Second Reading Speech the Government argues: *"Union picnic day if it is to be observed, should be the subject of local agreement at the workplace level."*

Union picnic days are subsidised family picnics. They promote family and community values. Picnic days seek to compensate families for the time parents spend away from their families at work. If they are left to agreement at a workplace level, they will not happen and another valuable community interaction will be lost. At the very least they should be observed on an industry basis.

5.4 Picnic days promote community and family values

They are a cost effective day out and entertainment for families. Historically, they were free days out but today there are nominal fees. For instance, at last year's building industry picnic in Melbourne, the ticket price was $20. Where else can you take your family for a full day of entertainment and food for only $20? For some families it is conceivable that due to the prohibitive cost of

alternative private venues, this is their only major day out as a family all year. Removing picnic days as an allowable award matter may mean some families lose the only gathering they can affordably attend as a family.

5.5 Picnic days more widespread than direct award provisions indicate

In its second reading speech on the *Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000*, the Government claims that picnic days have no relevance as part of the award safety net. In support of this claim it states that two thirds of federal awards contain no picnic day provisions, including 60 of the top 100 awards.

This gives an inaccurate picture of the incidence of picnic day provisions. For instance in the Metal Industry Award 1998 – Part 1 (one of the top 60 awards) clause 7.5.1 provides for one additional public holiday in addition to the prescribed public holidays in each State.

In New South Wales there has been a history of using this additional day for the union picnic day. So the custom and practice has been that the incidence of days designated or used as union picnic days is more widespread than indicated by the Government and as such should remain part of the public holidays award safety net for public holidays where so provided.

5.6 AIRC recognises picnic days as part of award safety net

That picnic days should remain part of the award safety net was recognised by the AIRC in the Public Holidays safety net case[9] where it specifically named 10 days (including Easter Saturday) and provided that one other day be specified according to the State, Territory or locality or on some other basis such as an award picnic day.

5.7 CEPU adopts ACTU submission

In relation to this additional day, the Commission has stated that it will not form the basis of double counting. For example, in Victoria the additional day will normally be Melbourne Cup day or the local equivalent. If the additional day is the union picnic day, this will be in lieu of Cup day.[10]

[9] Full Bench of the AIRC Print L4534; 4 August 1994
[10] Full Bench of the AIRC Print L4534; 4 August 1994 at p20

Where awards provide a union picnic day over and above the standard number of holidays, the result of enacting this Bill will be a reduction in the total entitlement to holidays. In this regard the CEPU agrees with the submission of the ACTU that this would be particularly unfair to those employees covered by those awards.

In general the effect for most award employees is that a substitute day would need to be determined if the Bill is enacted. In this regard we also adopt the submission of the ACTU that this involve varying over 750 awards to give effect to this change.

We also adopt the ACTU submission concerning the effect that such a change would have on enterprises employing persons under both State and Federal awards, given that a large proportion of state awards contain provision for picnic days which is also a legislated holiday in the ACT.

5.8 Conclusion

There is no evidence that picnic days are of concern to employers or employees. In fact it may well be in the employer's interest for his employees to participate in a day out with their family. The social benefits accruing can only flow on to benefit their work environment. In a society which is increasingly on the run, paid family time out once a year is a small price to pay for the improved mental health of our workers and their families.

6. Conclusion

The CEPU urges the Senate Committee to recommend that the Bills not be passed by the Senate.