31 August 2000

The Secretary
Senate Employment, Workplace
Relations, Small Business and
Education Legislation Committee
S1.61 Parliament House
Canberra ACT 2600

Dear Secretary

WORKPLACE RELATIONS AMENDMENT BILLS

We refer to the above matters and make the following submissions in that regard:

Termination of Employment Bill

This Bill is predicated on a number of misconceptions about the manner in which the current termination of employment system operates.

It is suggested that the Bill will have the effect of establishing that persons engaged pursuant to a contract for services are not entitled to apply for a remedy in respect of termination of employment. The explanatory memorandum fails to mention that this is in fact the case currently. The difficulty lies in determining whether a person is engaged pursuant to a contract for services or as an employee. A number of tests have been developed to determine this issue, and only close scrutiny of the facts in each case will provide the answer. This is not a matter which will be ancliorated by the proposed amendment.

Cases where employees have been demoted so as to constitute termination of the employment contract require close consideration on a case by case basis. It is simplistic to suggest that demotion should not be the basis for an application in relation to termination of employment unless remuneration is substantially affected. The issue is whether the demotion has fundamentally altered the position of the employee. This is the case irrespective of the level of remuneration, which will not necessarily be the key determinant of whether a claim is appropriate.

The development of case law in this area is sufficient to deal fairly with demotion cases, on the merits of each case.

The Bill also misconceives the nature of termination of employment law when it seeks to have regard to the degree to which the size of the employer's undertaking would be likely to impact on the procedures followed in affecting a termination. The requirements for a fair, reasonable and appropriate termination of an employee are best summed up by the expression "fair go all 'round". This maxim is not difficult to understand or follow, and indeed many small businesses are in a better position to extend to employees a fair go due to better lines of communication and less bureaucratic management structures. If the government has a genuine concern about this issue, it would do well to educate employers about their obligations in a simple and straightforward way, rather than further restricting the rights of workers.

In relation to the disclosure requirements for a contingency fee agreement, we are at a loss as to how this is a matter relevant to the treatment of an unfair dismissal claim. Relations between employees and their legal representatives are properly dealt with on a confidential basis, and we see this proposal as little more than an attempt to undermine the security of the relationship between these parties.

In relation to the issue of costs, it is well known that the *Workplace Relations Act 1996* provides a no-cost jurisdiction, except in extraordinary circumstances. The suggestion that in some situations an order for security for costs against an applicant is appropriate is difficult to comprehend in this context. Costs are only awarded in this jurisdiction after a case has been fully tested as to its level of substance or the manner in which it is conducted. This jurisdiction is not analogous to other civil jurisdictions where costs flow automatically if a claim is unsuccessful. This distinction is crucial, because unlike other jurisdictions where there is a substantial chance of costs ultimately being ordered against an applicant, an order for security for costs in this jurisdiction could only be based on little more than speculation at the early part of a proceeding as to the foundation for the case.

It should also be noted that a relevant consideration in other jurisdictions in the making of such an order is the financial standing of the applicant. It goes without saying that many award employees have few financial resources and will always be in a position where the capacity to pay costs could be questionable. This plan exposes workers to the possibility that valid claims will not be able to be pursued due to an inability to make a payment into court, and no doubt such a provision will be utilised strategically by employer representatives to stall applications.

Tallies and Picnic Days Bill

We find it extraordinary that the government proposes a bill which is directed specifically at the abolition of union picnic days.

Where union picnic days exist as award entitlements, they are entitlements which have been awarded as part settlement of industrial disputes with employers. Where the entitlement takes the form of wages or allowances, generally it will be uncontroversial. There is no reason why an entitlement in the form of a picnic day should be treated any differently. It is an entitlement which is simply part of the safety net of conditions of employment.

Secret Ballots for Protected Action Bill

The basis for this Bill also relies on a misconception as to the nature of industrial relations and the manner in which trade unions operate.

The Transport Workers' Union of Australia is an inherently democratic organisation with elected officers and officials as required by the Act. All members are represented by elected workplace delegates, who are the principle liaison between members and officials. This structure provides a highly organised mechanism for communication between the union and its members, and no decisions are made without the approval of members.

It is clear that the process set out in the Bill is intended to be cumbersome, awkward and inhibiting of the freedom to take protected industrial action. The issues raised are in some respects similar to those considered by the Federal Court in David's Distribution v National Union of Workers, (1999) FCA1108. In discussing the requirements for the provision of notice in relation to the intention to take industrial action by trade unions, the Court made the following observations (para 84):

Industrial disputes are dynamic affairs. Decisions as to future steps often that need to be made at short notice, sometimes in response to actions of the opposing party or other people, including governments, and changing circumstances…

If there is a genuine concern about whether or not union members support proposed industrial action, the answer is evident. Members will not take the action if they do not believe in it. If the government is concerned about coercion in relation to industrial action, these concerns are dealt with through other provisions of this Act and common law.

Australian Workplace Agreements Procedures Bill

The significance of AWAs in the industrial relations landscape remains marginal. It is our understanding that the reason for this relates less to the approval process and more to the preference of industrial parties for collective arrangements, either award or agreement based.

Having said that, it is important that considerable rigour is applied in the review and approval of these agreements. A greater level of rigour is required due to the fact that an individual agreement is not subjected to the same level of scrutiny as a collective agreement. This applies both at a workplace level and at the approval level, where the content of AWAs remain off limits to public scrutiny.

Against this background, it is important that the effective date of an AWA is not prior to approval. Apart from the fact that the introduction of such a provision would diverge from the procedure adopted in relation to all collective agreements which are certified by the Commission, the assumption that an AWA will meet the statutory requirements is misguided. It is far safer to maintain the status quo pending approval. It is to be noted that an application for approval does not have to be lodged for some sixty days, meaning that as many as three months may have elapsed since the agreement was entered before the agreement is approved. This is an unreasonable delay. It also again diverges from the procedure in relation to collective agreements, whereby applications for certification must be made within twenty-one days.

In relation to the provision concerning high salary earners, it is simplistic to suggest that workers whose remuneration exceeds $68,000 do not require the protection of the no disadvantage test as a matter of course. Various sectors of the transport industry may approach these levels of income when all shift penalties and entitlements are rolled into one. The flip side of this is that extremely long hours of work will be required, and often OH&S considerations will be relevant. The reference point for such matters will often be the award, which is of course the basis for the no disadvantage test.

The logical response to concerns about the inability of the Employment Advocate to certify AWAs where the Employment Advocate has concerns about the no disadvantage test, is to refer all AWAs to the Commission for approval, and abolish the Office of the Employment Advocate, which is little more than an extension of the Department and a total waste of government resources.

Please contact this office in the event that further information is required.

Yours faithfully

JOHN ALLAN
FEDERAL SECRETARY