SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO:

- **WORKPLACE RELATIONS AMENDMENT (GENUINE BARGAINING) BILL 2002**
- **WORKPLACE RELATIONS AMENDMENT (FAIR DISMISSAL) BILL 2002**
- **WORKPLACE RELATIONS AMENDMENT (FAIR TERMINATION) BILL 2002**
- **WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTED ACTION) BILL 2002**
- **WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2002**

SUBMISSION BY CPSU, THE COMMUNITY AND PUBLIC SECTOR UNION – STATE PUBLIC SERVICES FEDERATION GROUP

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

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

This submission comments on the Genuine Bargaining, Secret Ballots for Protected Action and Prohibition of Compulsory Union Fees Bills. With respect to the Fair Dismissal and Fair Termination Bills, we endorse and support the submissions of the Australian Council of Trade Unions (ACTU) and other unions. We also make it clear that we endorse and support the submissions of the ACTU on the three Bills on which we do comment and that our submissions are intended to complement and not in any way contradict or detract from the ACTU's submissions.

With respect to the Genuine Bargaining Bill, we believe, in summary, that it would:

- be inequitable in seeking to prohibit unions from engaging in pattern bargaining while leaving employers free to do so; and

- make it extremely difficult for unions to effectively represent the industrial interests of their members, thereby exposing those employees in the weakest market position to greater exploitation; and

- contravene relevant International Labour Organisation Conventions and place Australia further in breach of its international obligations.

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

- introduce a complicated and over-formalised regime of balloting as a precondition for employees or their unions being able to take protected action; and

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

With respect to the Prohibition of Compulsory Union Fees Bill, we believe, in summary, that it:

- is misleadingly and deceptively titled, as it is not about prohibiting compulsory unionism at all. It is really about prohibiting bargaining agents' fees for negotiating certified agreements; and

- is premature, as cases at present before the Federal Court will determine whether a bargaining agent's fee is a matter that can be included in agreements certified under the Act; and

- if it is a matter that can be included in certified agreements, would in fact only prohibit something that is fair and equitable, namely, that employees who benefit from the efforts of a union in negotiating an agreement should make some contribution to the costs of obtaining that outcome.

Genuine Bargaining Bill

This Bill seeks to do two things:

1. insert into the *Workplace Relations Act* 1996 ("the Act") a new subsection 170MW(2A). This would specify five circumstances in which the conduct of a party engaging in industrial action would tend to indicate that it is not genuinely trying to reach agreement with other negotiating parties. This would be to provide guidance to the Australian Industrial Relations Commission ("the Commission") in determining whether to terminate a bargaining period on that ground. Ancillary to this, a new subsection 170MWA would enable the Commission to order that a specified former negotiating party to a suspended bargaining period cannot initiate a new bargaining period within a specified period or can only do so on terms; and

2. insert a new subsection 170MWB to give the Commission the power to order cooling-off periods where it is satisfied that to do so would beneficial to the negotiating process and not otherwise contrary to the public interest or objects of the Act.

When one looks carefully at the proposed subsection 170MW(2A), the first three circumstances set out are clearly an attempt to describe behaviour amounting to "pattern bargaining". There is a significant difference, however, to the *Workplace Relations Bill* 2000, which sought to prohibit pattern bargaining by unions.

This is that it would not expressly prohibit pattern bargaining but rather make pattern bargaining prima facie not genuine bargaining. That is, once it is established that a party is engaging in pattern bargaining, the Commission would need positive evidence that, despite this, it is in fact bargaining genuinely.

Nevertheless, though not as likely as the previous Bill to promote legalistic and confrontational, rather than conciliatory, approaches to the resolution of industrial

disputes, this Bill still seeks to bring about the same inequitable outcome. That is, it would make pattern bargaining by unions prima facie not genuine bargaining but would leave employers free to engage in pattern bargaining without any sanction.

This is because the proposed subsection (2A) refers back to paragraph (2)(b) of section 170MW, which empowers the Commission to suspend a bargaining period if a party who has organised or taken, or is organising or taking, industrial action for the purpose of supporting or advancing claims did not genuinely try to reach an agreement with the other negotiating parties before doing so. That is, a negotiating party can only be engaging in the conduct set out in the paragraphs of subsection (2A) if it has organised or taken, or is organising or taking, industrial action.

The definition of "industrial action" in subsection 4(1) of the Act makes it clear that it is conduct of a kind that only unions or employees can engage in. A lockout or some other form of action by an employer does not come within the definition of "industrial action".

Paragraphs (a) and (b) are also worryingly broad in their potential reach. The circumstance paragraph (a) describes is that a "party's conduct shows an intention to reach agreement with persons in an industry who are, or who could become, negotiating parties to another agreement with the first party, rather than to reach agreement with just the other negotiating parties".

This could mean, and perhaps is intended to mean, that simply by serving a standard log of claims on a number of employers in an industry and negotiating simultaneously with them around that log of claims, they show an intention to reach agreement with more parties in the industry than the parties involved in any single negotiation. This would be so, even if the union did not seek to reach an identical or substantially similar agreement with each of those employers. The "matter mentioned" in paragraph (a) would then be established as existing and "would tend to indicate" that the union is not genuinely trying to reach agreement with the other parties to any particular negotiation.

Similarly, one of the circumstances described by paragraph (b) is that a "party's conduct shows an intention…to reach agreement with all persons in an industry who are, or who could become, negotiating parties to another agreement with the first party…rather than to reach agreement with just the other negotiating parties". Again, this could be shown to exist simply because a union has served a standard log of claims on all employers in an industry and is negotiating separately with each of them. This would clearly show an intention "to reach agreement with all persons in an industry", even if the union was not seeking to reach an identical or substantially similar agreement with each of those employers.

The proposed subsection 170MW(2A) is also poorly drafted. It links the various paragraphs by the conjunction "and", suggesting that they are cumulative and all five have to exist for the Commission to draw the necessary conclusion. But then the final sentence makes it clear that they are intended to be alternatives, the existence of any one of which would be sufficient.

Also, the final sentence of the proposed subsection says that the existence of any of those circumstances "would tend to indicate that the first party is not genuinely trying to reach an agreement". This union strongly supports the trend to expressing statutes in plain English. However, language like "would tend to indicate", in a statute, is not plain English, it is just plain sloppy.

The principal objection, however, to the proposed subsection 170MW(2A) is that, like the 2000 Bill, It targets pattern bargaining by unions, but not by employers.

In this Union's experience, Governments as employers are prime practitioners of pattern bargaining. Two recent examples within this Union's area of coverage are:

- the requirement by the Federal Government that universities achieve certain specified outcomes in enterprise agreements in order to qualify for supplementary salary funding; and

- the strict centralised control over enterprise bargaining exercised over Victorian Government departments and agencies by the former (Kennet) Government of that State.

By loose and broad wording rather than be explicit prescription, this Bill, if enacted, would seem to be calculated to achieve the same effect as the 2000 Bill, that is, to facilitate employer applications to have conduct labelled as pattern bargaining and so to deprive any industrial action which might be seen to form part of a campaign, whether or not it really was, of being protected action. The potentially wide scope of paragraphs (a) and (b) could have the effect of making almost all industrial action by unions unprotected, by enabling employers so easily establishing the basis for persuading the Commission that it must suspend bargaining periods.

This will have the greatest impact on those members of the workforce who have the least bargaining power. This includes public sector employees because most work for employers who are not subject to commercial imperatives but are subject to pressures to limit expenditure.

As to the proposed section 170MWB, the "Regulation Impact Statement", which is part of the Explanatory Memorandum, acknowledges that it would insert yet another "regulatory mechanism" and that, even if it was not intended for this purpose, section 170MW is already used to institute informal cooling-off periods.

This union strongly believes that the Act is already overloaded with legal technicalities and has promoted a legalistic rather than conciliation-focussed approach to dispute resolution. To add another seems unjustified at this stage. In addition, the proposed subsection really seems to be an add-on to dress up the real agenda of the Bill, which is to try once again to clamp down on pattern bargaining when unions engage in it.

A further consideration of significance is that the Act, as it stands now and without these proposed amendments, has been condemned for breaches of Conventions 87 and 98 of the International Labour Organisation by the Committee of Experts because of excessive restrictions it places on industrial action in pursuit of multi-employer or industry wide bargaining. The right to strike and the right to bargain collectively, and to engage in and take industrial action at any level, be it national, industry or workplace, are now considered basic human rights and core labour standards. We submit that the Bill's proposals would further restrict these rights and further contravene the Conventions.

To prohibit strikes, if they are concerned with the issue of whether a collective employment contract will bind more than one employer, is clearly contrary to the principles of freedom of association and the right to strike.

We submit that the Senate should give serious consideration to Australia's international obligations when considering these amendments.

The essence of this Bill, in this union's view, is that it is a rejigging of the 2000 Bill in what the Government hopes is a more palatable form. It still is fundamentally inequitable and seeks to tip the balance in enterprise bargaining negotiations in favour of employers against employees and their representative organisations. It is our submission that the Senate should reject this Bill.

Secret Ballots for Protected Action Bill

This Bill is also another try at something that has failed to find favour with the Senate before. The Minister, in his Second Reading speech, indicated that this Bill takes account of some of the concerns raised about the previous forms of this proposal in the Senate Inquiry and in regard to its conformity with ILO standards.

Nevertheless, we say that it should still, in this form, be rejected because, like the Genuine Bargaining Bill, it is inequitable by tipping the balance too far in favour of employers. One of the objects of the Act is to "ensure 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": s3(b). It does not serve to promote this object if

the legislation loads the dice in favour of one party to a negotiation, in this case the employer.

Like its predecessors, this Bill proposes a complicated and highly formalised regime of secret ballots before protected action could take place. While it would not operate in as rigid and inflexible a manner as its predecessors, it would still impose considerable burdens on unions before they could take protected industrial action.

No such burden is placed on employers before they can engage in a lockout of their employees from their place of work.

For example, there would be no requirement that, if an employer is a public company, it must have a lockout proposal endorsed by a general meeting of members before it engages in such action.

We submit that "sauce for the goose is sauce for the gander". If it is necessary or appropriate to ensure by legislation that a decision by employees in a workplace to take protected industrial action has been taken in a democratic manner, surely it is equally necessary or appropriate to ensure that a decision of an employer lockout its workforce is taken in a manner which ensures that the members of the company have had an adequate opportunity to have an input. After all, a lockout has the same ramifications for the economy and the public as a strike and, as it can equally affect a business's profitability, it has the same ramifications for the shareholders' dividends. It also, of course, has the same ramifications as a strike for the incomes of the employees locked out.

The clear evidence is that the general level of industrial action in Australia is low compared with the position, say, fifteen or twenty years ago. Against that background, it is hard to imagine what necessity there is to introduce such an onerous regime on unions if they want to take protected industrial action. The only possible explanations are either that this is a knee-jerk reaction to perceived problems in the building and/or metals industries in Victoria or that it reflects an ideological obsession of some of the Government's members and advisors.

If the first, then even if the perceived problems are real, which we do not concede, it is an over-reaction to impose this regime on all unions in all circumstances throughout the country. If the second, that indicates that this proposal is part of a pre-set agenda and is not a measure to address a real problem.

In any event, this is an inequitable measure, which should be rejected by the Senate.

Prohibition of Compulsory Union Fees Bill

This Bill is misleadingly and deceptively titled. It is not a Bill to prohibit compulsory union fees at all. There is already adequate provision in the Act to prevent anyone from attempting to impose compulsory unionism in a workplace. This Bill in fact seeks to prohibit bargaining agents' fees in cases where a union has negotiated an enterprise agreement, the benefits of which flow to all employees in a workplace, whether members of the union or not.

Existing provision is in the interaction between sections 298K and 298P. Section 298K makes it a breach of the Act for an employer to take detrimental action against an employee for a "prohibited reason". Subsection 298L(1) sets out the "prohibited reasons", one of which is that a person is not, or does not propose to become, a member of a union. Subsection 298P(3) makes it a breach of the Act for an "industrial association", which includes a union, to advise, encourage or incite an employer to contravene s298K or to organise or threaten to organise industrial action to coerce an employer to contravene s298K. Section 298U empowers the Federal Court, amongst other things, to fine either an employer who contravenes s298K or an industrial association which contravenes s298P.

It is curious that the Government has decided to press this Bill at a time when there has been debate both within the Federal Court and the Commission as to whether a bargaining agent's fee is a matter pertaining to the relationship between employer and employee and, if it is not, whether it can be a term of a certified agreement under the Act and whether protected industrial action can be taken if the claims advanced include a claim for payment of a bargaining agent's fee.

While there are conflicting Judgments and Decisions on this issue, the conflict of opinion between Judges and Members of the Commission will be resolved by the Full Court of the Federal Court or perhaps ultimately by the High Court. At this stage, it is hard to predict what the final outcome will be. One possibility, however, is that this Bill will end up being of no practical effect.

But the most important reasons for rejecting this Bill are those advanced by Senator Murray in his Minority Report on the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill* 2001:

> 1.4 It is hard to see how provisions for bargaining fees should be against the spirit of the WRA and its object of facilitating agreement making. Agreement making is desirable, and if fee-for-service contributes to that, it is to the good. There is also the issue of 'free-riders', by employers on the backs of employer organisations, and employees on the backs of unions.

1.5 We consider it fair that those who benefit from agreement making should make a contribution towards its costs, whether employers or employees. This strikes us as a fair principle.

1.6 The bargaining fee may represent only a small portion of the real cost of completing an agreement, for instance where that agreement involves union members' foregone earnings through taking protected action.

1.7 We see a clear distinction between the notion of compulsory unionism (which we oppose) and a contribution to the costs of bargaining, where the person paying is a direct beneficiary of that bargaining. Such payees are not joining a union, but clearly the fee should not be a substitute for a normal union fee. They are paying for a service. They are not contributing to other activities of the union, or electing to play any role in the activities, policies or other conduct of the organisation, or getting any of the other benefits of a union. They are not union members.

1.8 Coercive attempts to force union membership are clearly illegal under the WRA and should remain so.

1.9 To allow a fee-for-service is not all unusual under industrial relations and bargaining regimes in other countries. In some countries it is imposed. In the United States of America, those who are part of workplaces where a majority vote to join a union, and who then benefit from rounds of bargaining to reach workplace agreements, must generally pay a fee to the union that wins the certification ballot and negotiates the agreement. Allowing workplaces to take a vote on agreements which include provision to charge such a fee, and then where the majority vote in its support, permit its collection, is not out of step with practice in other places. To repeat, it seems fair and reasonable that those who benefit also pay.

We submit that Senator Murray's analysis in that Minority Report remains valid and this Bill should be rejected.