A SUBMISSION BY THE

# AUSTRALIAN EDUCATION UNION

AND THE

# NATIONAL TERTIARY EDUCATION INDUSTRY UNION

TO THE

# SENATE EMPLOYMENT, WORKPLACE RELATIONS, AND EDUCATION LEGISLATION COMMITTEE

# INQUIRY INTO THE WORKPLACE RELATIONS BILLS 2002

BEING THE

**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**

The Australian Education Union and National Tertiary Education Industry Union have examined the Workplace Relations Act Amendment Bills and provide the following comments on their likely operation if they were passed by the Senate. Our comments focus in particular on the potential impact of the Amendment Bills on workers in the education industry.

In these comments, we have focussed primarily on the "Genuine Bargaining" and "Secret Ballots for Protected Action" Bills. The remaining Amendment Bills would also be bad for the education industry. For example, many kindergartens and Adult Education providers employ fewer than 20 people, especially when casuals are excluded, and workers in those workplaces would lose any avenue of redress against unfair termination if the Orwellianly-named "Fair Dismissal" Bill were passed. However in relation to those Bills we believe that the analysis already provided by the ACTU and other unions has adequately aired the key points of concern.

Key points raised in our submission include:

- The Genuine Bargaining Bill impugns actions by unions but not by employers. It is biased against employees (see page 6);

- The Genuine Bargaining Bill impugns a union bargaining with more than one employer at the same time, even where it is pursuing an entirely different bargaining agenda (see page 7);

- A union which seeks to reach agreements with all employers in an industry runs foul of the Genuine Bargaining Bill even though, in doing so, it is pursuing the objects of the Act (see page 9);

- The Explanatory Memorandum to the Genuine Bargaining Bill is highly misleading and is inconsistent with the plain words of the Bill itself (see page 11);

- There are good public policy reasons why an education union might seek to establish standards across an industry through bargaining (see pages 11-13);

- The provisions of the Secret Ballots for Protected Action Bill, as they relate to the compilation of a Voting Roll, would delay the holding of a ballot by 6-8 weeks at large education employers (see pages 14-16);

- The rights given to employers to contest the holding of a ballot for industrial action will ensure that employers will easily be able to delay ballots (see pages 16-17);

- The Secret Ballots for Protected Action Bill will in some cases lead to more serious industrial action and will make industrial action harder to lift (see pages 19-20).

**In summary,** we urge the Committee to recommend the rejection of *all* the Amendment Bills in their entirety. They would further disadvantage workers, add confusion instead of clarity to tribunal and court proceedings, impact hardest on the least organised and most vulnerable sections of the workforce, and place cumbersome and expensive barriers in the path of workers and their organisations participating as equals in genuine enterprise bargaining.

## INTRODUCTION

The **National Tertiary Education Industry Union** ("the NTEU") represents approximately 25,000 staff in tertiary education institutions around the country. Approximately 17,000 of our members are academic staff employed in universities, and around 8,000 are "general staff", (mainly professional, administrative and technical staff involved in areas such as libraries, research and administration) employed in TAFE, Universities and Adult Education.

The NTEU represents the professional and industrial interests of its members through:

- improving and protecting conditions of employment through industrial negotiations at local, state and federal levels

- promoting the work of universities and colleges and, in particular, their independence and integrity

- defending the rights of academic staff to teach, research and disseminate knowledge without fear or reprisal, and to defend the professional standing of general staff members

- working with other stakeholders to lobby for a strong, publicly funded tertiary education sector, and participating in relevant policy debates.

The **Australian Education Union** ("the AEU") is a federally registered organisation with over 155,000 members employed throughout Australia. The majority of our members are teachers, including principals and assistant principals, employed in government primary schools, secondary schools, pre-schools and TAFE Colleges. The AEU's membership of teachers in schools is in excess of 80 per cent of eligible employees, and in some States the figure is in excess of 90 per cent. We also have significant membership in non-teaching classifications in schools, including teacher aides, library technicians and assistants, laboratory technicians and assistants, and Aboriginal and Torres Strait Islander Workers (AIEWs).

The AEU represents the industrial and professional interests of its members and campaigns in support of a strong public education system.

The AEU and NTEU appreciate the opportunity to make a submission to the Committee on the five Workplace Relations Amendment Bills 2002, and would appreciate an opportunity to address the Committee at a public hearing.

The making of this submission was authorised by the Federal Executive of the Australian Education Union and the National Officers of the National Tertiary Education Industry Union.

## CRITIQUE OF THE "GENUINE BARGAINING" BILL

### Item 1 – Amendments to 170MW(2)

**General Comments:**

It is important to read the stem in the existing 170MW(2). This requires that industrial action has been taken or is being taken before the proposed additional section (2A) has any effect. Ninety nine percent of industrial action is taken by employees. Therefore, in practice, these provisions are only directed against unions. There would be no point in invoking these provisions against an employer who "refused to meet or confer" (s.(2A)(d)), or refused "to consider or respond to proposals" (s.(2A)(e)), or who intended not to reach agreement with a particular union (s.(2A)(a)). Employers could continue these practices with impunity, because they suffer no loss from the termination of a bargaining period.

Also, in the proposed new Section 170MW(2A) the word "conduct" is not defined. "Conduct" which indicates an "intention" to do something clearly is very broad. There need be no evidence of actual deeds by the union or its members constituting the impugned action – a state of mind is sufficient, hence the use of the word "intention".

"Intention" goes well beyond the actual implementation of a particular strategy or tactic, and would probably include even the verbal promotion of such a strategy or tactic.

Even if such a broad view of the meaning of "conduct" is not adopted, the provision would clearly include circumstances where a union or its members reject a proposed agreement in part because of the precedent it might set for other workplaces in the same industry.

For example, a statement to a meeting of members at one University that they should not agree to the deletion of protections of academic freedom (so important in the recent Ted Steele dismissal case at the University of Wollongong) because such a deletion would set a bad precedent for bargaining to protect these rights at other universities, could constitute grounds for termination of the bargaining period under the proposed 2(A).

**Sub-Section (2A)(a):**

The drafting of this is deceptive. A casual reader might think that it is aimed at the following scenario:

> *"A Union is seeking an agreement with Monash University and is also seeking an agreement with its subsidiary Monash International Ltd. It calls industrial action at both employers but the union's "real" intention in taking action against Monash International Ltd. is simply to put additional bargaining pressure on Monash University."*

This, of course, is already covered by existing legislation against secondary boycotts.

However, a careful reading of Section (2A)(a) shows that it would have a much broader application than that. Any union which concurrently has the "intention" to reach an agreement with another employer in the same industry is caught by the provision. **There is no requirement that there be any similarity between the bargaining agendas being pursued by the union, simply that they be bargaining concurrently with more than one employer.**

For example, both the AEU and NTEU are seeking an agreement with the Kangan Batman Institute of TAFE, but the AEU's (the first party's) conduct shows an intention to reach agreement (albeit a separate, unrelated agreement) with the Victorian Department of Education, (a person in the same industry - education) which could become a negotiating party to another agreement with the AEU, rather than to reach agreement with just the other negotiating parties (the NTEU and the TAFE Institute).

At the same time, the NTEU (the first party) is also bargaining (for a separate, unrelated agreement) with Swinburne University, (a person in the same industry - education) which could become a negotiating party to another agreement with the NTEU, and thus is also guilty of not intending "to reach agreement with just the other negotiating parties" (the AEU and Kangan Batman Institute).

On its clear wording, Section (2A)(a) implies that a union should not be seeking an agreement with more than one employer in the same industry at the same time. It is important to note that the conduct referred to in the Section encompasses much more than industrial action (see comments about "conduct" in General Comments above). It could be as little as a statement in the union journal that the AEU is seeking to achieve the introduction of blood donor leave in several of the agreements it is currently bargaining for in Victoria. Even if a narrower view of "conduct" is adopted, a resolution of a rally of Victorian NTEU members supporting the reaching of

agreements “for not less than 12% over three years” would leave the union open to the conclusion that it was “not genuinely trying to reach agreement” with the employer.

It might be said in defence of the proposed Section that this is a discretionary provision and that the Commission would not terminate a bargaining period in these circumstances. However, the last paragraph of the proposed Section (2A) clearly creates an onus which the union would then have to disprove by bringing evidence that they were genuinely trying to seek an agreement.

**Sub-Section (2A)(b):**

This provision is very strange. One can speculate that the intention of the draft is to impugn union action where the union adopts a policy of “sign with everyone or sign with no-one but not sign with some”.

However, it is plain on its face that this is not what this provision says. Instead, it would operate to make either of the following intentions evidence that the union was not genuinely trying to reach agreement:

- An intention to reach agreement will all parties in an industry who could become negotiating parties to another agreement with the union, rather than solely to reach agreement with the current negotiating party (sub-section (i));

or

- An intention to reach agreement with none of the other parties in the industry who could become negotiating parties to another agreement with the union, rather than solely to reach agreement with the current negotiating party (sub-section (ii)).

The second of these is, on the face of it, nonsensical, since an intention to reach agreement with none of the *other* employers in the industry would support rather than disprove the conclusion that the union intended to negotiate solely with the current negotiating party.

The first sub-section, on the other hand, *is* capable of sensible interpretation. However any honest reading of Section (2A)(b) leads to the conclusion that it applies to any circumstances in which a union has the intention to reach agreement with all employers in an industry. Of course, the "agreement" referred to in s.(2A)(b) need not be the same agreement with all employers, the reference is merely to an intention "to reach agreement" at all.

The NTEU has a standing policy of reaching agreements with all employers in the higher education industry. This would seem to be in pursuit of the objects of Part VI of the Act (170L) "to facilitate the making…….of agreements…". Nevertheless, under Section (2A)(b), such a policy would be evidence of not genuinely trying to seek agreement.

Of course, given the broad definition of an industry:

> *""industry" includes:*
> *(a) any business, trade, manufacture, undertaking or calling of employers;*
> *(b) any calling, service, employment, handicraft, industrial occupation or vocation of employees; and*
> *(c) a branch of an industry and a group of industries;"*

it is hard to imagine how the Commission would meaningfully construct what the relevant "industry" was. However, it could include a "branch" of an "industry", for example, two TAFE Institutes in Victoria, or a "group of industries", for example pre-school, primary, secondary and tertiary education providers across the country.

It is hard to know what the Commission would make of this – probably not much. However, it would create a *prima facie* onus which the unions would then have to disprove by extensive evidence about the "genuineness" of its efforts to bargain with each and every employer.

Again in this sense, as with Section (2A)(a), the Explanatory Memorandum is highly misleading. Although the Explanatory Memorandum refers to "standardised" outcomes, the proposed legislative provision unambiguously does not. It does not address the content of bargaining, but only the fact of it.

**Sub-Section 2(A)(c):**

Again, the party's conduct and intention is not limited to industrial action, but would encompass its priorities, policies and allocation of resources.

For example, if the NTEU were seeking an Agreement with Monash University (5000 employees) and Monash International (a co-located subsidiary with 100 employees), at the same time, it is highly likely that its conduct (the allocation of resources and priority) would show that primarily its intention was to reach agreement with Monash University. Should this give rise to a presumption that it is not genuinely seeking an agreement with Monash International?

**Sub-Section 2(A)(d) & (e):**

A refusal to meet and confer at all or a refusal to "consider or respond to" the other side's proposals at all might well be taken as evidence of a party's not being genuine in trying to reach an agreement.

However, the following example from the last round of higher education bargaining illustrates that the proposed clause would have unforseen consequences.

At one University, negotiations for an agreement went on for over a year before any industrial action was taken. The University (which, of course, had not taken industrial action) was refusing to consider or respond to union proposals for a pay increase. Eventually, the union members resolved to take industrial action and to not meet with management further until they made a pay offer. In their considered opinion, there was no point meeting about other matters until an offer was forthcoming.

In this scenario, it is only the unions' actions which could be impugned under proposed section (2A)(d) because only the unions were taking industrial action. Yet in these circumstances, the unions' actions were in fact evidence that it was the unions which were serious about reaching an agreement.

In relation to section (2A)(e), the union's refusal to "consider" a management proposal for a pay freeze from a highly profitable company, and instead to take industrial action, would, under these proposals, be taken as prima facie evidence that it wasn't genuinely trying to reach an agreement, when these facts would indicate precisely that the employer wasn't and the union was seeking to reach an agreement.

As a matter of **fact**, the taking of industrial action should, of itself, be taken as evidence that a union is genuinely trying to reach agreement.

## Onus and Discretion

Although these provisions retain ultimate discretion in the Commission, they are nevertheless a further fetter on the Commission's discretion, and create further rich pickings for lawyers. The creation of statutory onuses, such as that in s.(2A) should only be used for compelling public policy reasons. These provisions would mean that the Commission would have to proceed as follows:

- First, the employer would seek to establish the grounds in ss.(a), (b), (c), (d) or (e). In many cases, if the foregoing analysis is correct, this would be uncontestable. This would then shift the onus onto the union.

- The union would then have to run a comprehensive case (in most cases having to comprehensively disclose its strategy and tactics, negotiating bottom lines, etc, to the Commission and the other party) to displace the onus against it, and to prove that it was "genuinely" trying to reach agreement.

There is no clear case established for limiting the Commission's current discretion-at-large to terminate a bargaining period on the grounds that a party is not genuinely trying to reach an agreement.

## The Explanatory Memorandum and "Standardised" Outcomes

The Explanatory Memorandum says that these provisions are about "standardised" outcomes and "pattern bargaining". Of course, in this respect the Explanatory Memorandum bears little relation to the actual words of the Bill, which simply refers to, for example, an intention to "reach agreement" with all employers in an industry. There is no requirement for the intention to be to reach the <u>same</u> or even a <u>similar</u> agreement.

However, there can be good public policy reasons in any case why a union should seek at least some "standard" outcomes:

- There is a widely-recognised shortage of teachers. The AEU may adopt a "benchmark salary" for new teaching graduates, and have a policy of not signing agreements which do not meet this benchmark. This is part of a larger public policy campaign aimed at encouraging more new graduates and older professional workers to consider taking up teaching as a career.

- The NTEU is seeking, as a "standard" provision in all its higher education agreements to retain former award standards which protect academic staff from arbitrary dismissal. This is the industrial expression of academic freedom. The NTEU believes that there are sound public policy reasons, going to the maintenance of the integrity and reputation of Australian higher education, why such provisions should be retained at all institutions. This view has been recently endorsed by a Federal Court decision in the Steele case, expressing deep concern at the possibility that academic freedom provisions might be abandoned or ignored.

- The AEU bargains in several sectors where, although there are separate employers (such as the Victorian and Western Australian TAFE systems, and pre-school education in Victoria), there is a single funding model applied to all the employers, and government policy closely constrains the offers which can be made and the agreements which can be reached by individual employers. In these circumstances, it suits both the employers and the union to bargain concurrently across a whole system. This does not preclude (and has not precluded under existing legislation) the development of workplace-specific provisions in each individual agreement, but nor does it evidence a lack of genuine bargaining when the union pursues similar wage outcomes across a system which has a single funding formula to support wage increases.

- The NTEU is likely to adopt a "pattern-bargaining" approach to Indigenous employment in the next round of enterprise bargaining, building on its more limited achievements in the last round of bargaining. It is probable NTEU will insist on all agreements including strategies to increase Indigenous employment levels. This should be grounds for praise, not the basis for terminating bargaining periods.

- The AEU has an agreement with the Tasmanian Government which provides for an increase in teachers' wages equal to the average increase achieved by teachers in all other states and territories. This does not reflect a lack of genuine bargaining by either side. Rather it reflects an overriding policy consideration for both the union and the government to keep Tasmanian teacher salaries at competitive levels in a national skill market facing a significant teacher shortage. Yet the agreement expressly relies on the outcomes in other agreements in determining appropriate wage outcomes.

In all these cases, pursuing a standard outcome (or similar outcomes) on a particular issue (such as Indigenous employment levels or beginning teacher salaries, does not mean pursuing a carbon copy agreement on all matters. In all sectors of the education industry there is a clearly established track record of negotiating agreements appropriate to the circumstances of particular workplaces. At the

insistence of our members, these agreements have also included some national or state-wide standards on specific issues of concern.

Existing provisions of the *Workplace Relations Act* provide sufficient protections to any employer who believes they are being subjected to "pattern bargaining" without arbitrarily preventing unions and their members from pursuing reasonable bargaining claims at more than one workplace at a time.

## CRITIQUE OF THE "SECRET BALLOTS FOR PROTECTED ACTION" BILL

### General Comments

What follows is not a comprehensive analysis of this very complex legislation. The AEU and the NTEU support the general philosophical objections to the Bill which are being made by the ACTU, including the following obvious questions:

1. What evidence is there of any widespread taking of industrial action by unions without employee support?

2. Surely, the test of whether employees support industrial action is whether they actually take it. This is an individual choice, and that individual choice is already protected by law (WRA Section 298L(1)(d).

3. Why should the decision not to take industrial action be an individual choice, but a decision to take industrial action require complex collective decision-making?

In addition to these general points, the NTEU and the AEU make the following points about specific provisions in the proposed legislation which would have disastrous consequences, at least in the education industry.

### Notice of Industrial Action

In effect, the proposed legislation would require a union to give very lengthy notice of industrial action to the employer, by contrast with the current requirement for 3 working days' notice. No good reason seems to have been advanced why the employer should have to be given notice of a proposed ballot. If it were genuinely a decision for the employees, it is none of the employer's business. The proposed legislation gives the employer the right to intervene in all the Commission's proceedings over the ballot. This is indicative of the bias of the legislation.

### Compilation of the Voting Roll

Section 170NBCM describes who is to be on the voting roll for the ballot. In the case of a ballot initiated by a union, the roll must consist of each person who:

(i) Is a member of the union, and

(ii) was employed on the day the ballot order was made, and

(iii) Will be subject to the agreement.

In highly casualised large and decentralised employers such as many of those in education, it may well take weeks for an employer to compile a list of all employees who were employed "on the day" of the ballot order.

For example in higher education, there is no centralised system of recording which of (say) 3000 casuals were employed "on the day" the ballot was ordered. Although eventually time sheets or claim forms arrive at the central administration and are processed for payment, (sometimes 4 – 6 weeks after the work is performed), there is little prospect that a large university could provide the Commission with a list of persons who were employed "on the day" inside four weeks.

Similarly, were protected action proposed in, for example, the State School system in Victoria advice would have to be sought from 2000 schools about which Casual Relief Teachers (CRTs) were employed "on the day". Since relief teachers are engaged at the school level, this would take about 4 weeks, assuming the employer was actively co-operating in assisting the union to take industrial action.

Moreover, it is not clear *who* makes the decision about whether a person is a person who "will be covered by the agreement".

The central administration of a TAFE System or University would have to ascertain, in respect of each (say) 3000 casual employees whether they "will be covered by the agreement" or whether their employment will cease before any agreement could be made. If this is to be done bona fide by the employer, it would require a report from each local manager.

In addition to the excessive administrative burden this will impose on such employers, an employee's non-inclusion on the roll may be the first they discover that their employment is soon to be terminated!

In addition to this, it seems the union will not even know, or be entitled to be told, which of its members are included on the roll of a ballot it has initiated. The union provides a list of members and the employer provides a list of its opinion as to who was both employed on the day and will be covered by the agreement. These two

lists are used to compile a roll. The Commission is prohibited from allowing the union scrutiny of that roll (s.170NBGA(1)).

The question of fairness is also central to these ludicrous procedures.

> At any Australian university or TAFE Institute, if the ballot order were made on the last Friday of a mid-year non-teaching period, (say) 2000 employees would be entitled to vote in the ballot. However, if the ballot order were made on the following working day, the first day of the Second Semester, when 1000 casual staff return to work (say) 3000 employees would be entitled to vote. The same number would be eligible if the order were issued on the following day but perhaps 400 names on the roll would be different, because a different contingent of casual employees work on Tuesdays than on Mondays.

**Timelines and Natural Justice**

The proposed legislation appears at first blush to include quite clear timelines – an order is to be issued within 2 working days of the application (s.170NBCA) and the ballot to be declared within 10 days of the order being issued (s.170NBCC(3)). However these time references are not enforceable limits. The first is only required to be met "so far as is reasonably practical" while the 10 day turnaround for results is simply a desirable objective to be kept in mind if and when the Commission decides to establish timeline guidelines.

In fact, other provisions in the proposed amendment mean that a ballot is rarely likely to occur within a 10 day timeframe. The discussion of compiling a voting role, above, demonstrates that in the education industry there would be unavoidable delays involved before ballot papers could even be issued.

However, the problems in meeting a 10 day timeline are by no means limited to those associated with the holding of the ballot itself.

The proposed Bill gives the employer at least seven separate grounds which can be used to put arguments to the Commission about why the ballot should not occur or about how the ballot should be conducted.

The basic requirements of natural justice will require that the employer has to be heard in relation to each of these and would have the right to bring evidence if they choose to.

In addition to raising any alleged procedural defects in the union's application, the following sections can be exploited by competent legal counsel given instructions for delay:

1. Submissions about the appropriateness of the questions to go into the ballot, as proposed by the union. Employees would be called to give evidence about whether they would understand the meaning of the questions to be put. This, it would be argued, would be relevant to whether the objects of Division 8A would be advanced by the holding of a ballot – a relevant consideration under s.1709NBCF(2).

2. Submissions about whether the "types of employees" as described in the ballot application (s.170NVBA(1)(b)) are the same employees required to be balloted in 170NBCM. This will readily arise because the union's bargaining notice may say that it is seeking an agreement covering "all employees" whereas the "types of employees" to be balloted might be limited by its eligibility rule, and constitute a complex or ambiguous matrix of occupations. Hearings about who is eligible for membership of a union at a particular workplace typically last for days if not weeks, especially where the Commission is being "assisted" by senior counsel.

3. Submissions about whether or not the applicant union has tried and is trying to genuinely reach agreement.

   The onus rests on the union to demonstrate that it is genuinely bargaining (Section 170NBCF). Cases about whether a union is "genuinely" seeking an agreement typically last for days or weeks and require the extensive hearing of evidence where there is any contest.

4. Submissions that the employees should be denied *ab initio* the right to vote for protected action because their union (or, indeed, any individual employee!) has <u>at any time</u>, contravened a provision of "this Division".

5. Submissions that the granting of the ballot application would be inconsistent with the object of the Division (s.170NBCF(2)), namely:-

> *"to establish a transparent process which allows employees directly concerned to choose, by means of a fair and democratic secret ballot, whether to authorise industrial action supporting or advancing claims by organisations of employers, or employees".*

This, of course, would be a lawyer's banquet.

Two of many possible examples that employer's counsel could argue might be:

- the holding of a ballot to authorise industrial action limited to schools (as proposed by the union) would not be consistent with the object of the Division because, although school staff are the ones "directly concerned" with the proposed industrial action over an employer proposal to extend school teaching hours to evenings and weekends, <u>all</u> union members including those in TAFE will be subject to the eventual agreement, and therefore will get a vote;

- the holding of a ballot in a student union where only four people were employed would be inconsistent with the object of providing a <u>secret</u> ballot, because of the high chance of a unanimous vote, in which case it would be possible to determine how each individual employee voted.

A host of other arguments could be put, and while they may or may not be upheld, there would be ample opportunity to ensure that:

- the union would be put to enormous expense;
- the ballot order could usually be delayed by weeks.

Once the ballot order *is* issued, if the conduct of the ballot itself is sufficiently delayed (for example by difficulties in compiling an accurate roll of voters) then it is possible that the ballot order will expire (s.170NBCP(1)) before any vote can be taken or declared.

The constraint placed on unions by the existing requirement for three days notice of industrial action is well demonstrated in the recent Federal Court decision in <u>David's Distribution v. NUW</u> [1999] FCA 1108, in which the Full Court stated:

> *"Industrial disputes are dynamic affairs. Decisions as to future steps often need to be made at short notice, sometimes in response to actions of the opposing party or other people, including governments, and changing circumstances. It would be a major, and unrealistic, constraint on industrial action to require a party to specify, three clear working days in advance, exactly what steps it would take."*

If this is a difficult task in this short time frame, imagine how difficult it would become where these details are required two or three *months* in advance, which is a reasonable estimate given the steps to be carried out under the secret ballot process.

It is reasonable to conclude that the real purpose of the *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002* in fact has nothing to do with questions of democracy, and everything to do with undermining the lawful right of workers and their unions to take industrial action during bargaining.

**Nature of Industrial Action**

In the education industry industrial action which is put to members' meetings is ordinarily fairly limited in scope and duration. For example, our members usually vote for "a strike on April 5th" or "a ban on playground supervision duty". However, given the delay, expense and complexity involved in conducting a protected industrial action ballot, education unions would not bother holding a ballot merely for a one-day strike or a low-level ban.

It would probably be the case that ballots would be held (and carried) for "indefinite strike action". The threat of such action might create consternation among students and parents. However, if in response to representations from students or parents, following the ballot for an indefinite strike being carried, the union were to be persuaded to reduce its action to (say) a three-day strike, *that* strike would *not* be protected action, as it would be different in "nature" from that which had been the subject of the ballot (See David's Distribution v. NUW [1999] FCA 1108, para 88).

**Lifting Industrial Action would become much more difficult**

In addition to the potential legal minefield of limiting industrial action to a lesser period or more low-key level than that balloted for, there would also be a significant question

of democratic process for unions to consider in relation to lifting industrial action. Obviously if an agreement is reached, the action could be lifted without difficulty. However there are often circumstances where a significant breakthrough in bargaining is achieved as a result of industrial action, which is nevertheless short of final agreement. For example, a sticking point over span of teaching hours may be resolved, while wages and blood donor leave claims have not yet been finalised. This breakthough may be sufficient to prompt the union to recommend lifting of industrial action.

Currently, a union will normally lift action using a broadly consultative process, such as workplace meetings. However if the industrial action has been imposed by secret ballot, there is a good argument that it should only be lifted by the same means. This will leave both the union and the employer in the unfortunate situation that, although sufficient progress has been made to lift the action, all the delays associated with a secret ballot process must be endured before the decision to lift the action can be taken.

**Size doesn't matter**

The provisions in the proposed amendment would apply to bargaining in an enterprise with a single employee (or in the case of a union ballot, a single union member). If that worker seeks to place a ban on some duties in support of their bargaining, under existing legislation they must already have a bargaining period notified, and provide three working days notice of their intent. Now they will also have to go through the farce (and additional delays, and cost) of conducting a secret ballot *of one person*, before they can even give notice of intent. This is self-evidently absurd.

**Employer action is unconstrained, but worker reaction is slow and expensive**

Industrial action taken by workers in response to a lockout is exempted from the requirement for a ballot (s.170MQ(e)). However this exemption does not extend to action taken in response to any *other* action taken by the employer to advance their position in bargaining. Employer action (whether is constitutes "industrial action" or is simply a change which disadvantages workers without being "industrial action" per se – such as a change to rosters) is not delayed by the need for secret ballots.

Employers can initiate such changes at any time in support of their bargaining position. However, under the proposed legislation, any union response would be delayed by the potentially lengthy ballot process.

For example, during bargaining over the amount of non-teaching work required of teachers, an education department could issue an instruction to all schools requiring additional playground supervision and the preparation of an extra written report to parents for every student. While this might be aimed at increasing the "starting point" from which movements in teacher workloads might be measured, and thus clearly a strategy in bargaining, it would not necessarily be held to be "industrial action". Teachers would be unable to place a ban on such additional duties (in defence of their own bargaining position) until a ballot process had been completed – at least weeks, and perhaps months later.

This clearly illustrates the manner in which the secret ballot legislation tips the power balance in enterprise bargaining even further in favour of employers.

Signatories:

Rob Durbridge
**AEU Federal Secretary**
11 April 2002

Ground Floor, 120 Clarendon Street,
Southbank, Vic, 3006
aeu@aeufederal.org.au
Ph: 03 9693 1800

Ted Murphy
**NTEU Assistant National Secretary**
11 April 2002

First Floor, 120 Clarendon Street
Southbank, Vic, 3006
nteunat@nteu.org.au
Ph: 03 9254 1910