ACTU Submission to the 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

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OVERVIEW AND SUMMARY

The ACTU is opposed to the passage of all five Bills currently being considered by the Committee.

The subject matter of each of the Bills has been before the Parliament and/or the Committee on at least one occasion, reflecting the lack of any positive thinking by the Government, and its reliance on pursuing the same discredited line of attack on unions and its political opponents.

The ACTU Submission incorporates some relevant material put to previous inquiries.

Each Bill is directed towards the Government's two key objectives in industrial relations law "reform":

First, to reduce the rights and entitlements of employees, particularly those who occupy the most vulnerable positions in the labour market; and

Second, to strengthen the bargaining position of employers in disputes with unions and their members.

The ACTU supports real industrial relations reform, and urges the Committee to recommend legislation to:

- ensure all employees receive fair and relevant wages and conditions;
- strengthen the role of the Industrial Relations Commission; and
- bring Australian law on freedom of association and collective bargaining into conformity with international standards.

The Genuine Bargaining Bill

- There are no industrial circumstances to justify the Bill.
- Common claims and similar outcomes are a normal component of bargaining, engaged in by employers as well as unions.
- The Bill would have the effect of prohibiting common claims.
- The Bill would create a presumption which would operate to fetter the Commission's discretion.
- The ability to bargain on a multi-employer or industry-wide level is available in every developed nation internationally and is integral to the ILO's core labour standards.

- Industry-wide bargaining is not a barrier to employment or productivity.

The Fair Dismissal Bill

- The Parliament has already rejected a small business exemption from the unfair dismissal laws.
- There is no evidence for a link between small business employment and unfair dismissal legislation.
- There is no economic justification for special treatment for small business, particularly where this affects the rights of employees.
- Small business operators do not identify unfair dismissal laws as a major problem.

The Fair Termination Bill

- The 12 month employment requirement for casual coverage is outside the "short period" permitted by the ILO Convention.
- There is no evidence that casual employment is linked to unfair dismissal legislation.
- Encouragement of casual employment is, in any event, undesirable.
- The filing fee operates as a barrier to access to justice for low paid employees.

The Secret Ballots Bill

- There is no evidence of a demand from employers or employees for mandatory pre-strike secret ballots, not is this justified by the level of industrial disputes.
- Pre-strike ballot legislation in Western Australia was an abysmal failure.
- The changes in the 2002 Bill from earlier versions do not make the system significantly less cumbersome or restrictive.
- The proposed system is very substantially more restrictive than the UK model, particularly with the requirement to obtain an order from a tribunal prior to the ballot and in the form of the question to be asked.

The Compulsory Union Fees Bill

- The issue of bargaining fees and related questions are currently before the Commission and the Court, which should be allowed to make their determinations without pre-emptive legislation.

- Parties to a collectively bargaining agreement should be entitled to include provision for bargaining fees.

- Coercive conduct is already unlawful, as is compulsory unionism.

- Bargaining fees are permitted in other countries with a strong commitment to freedom of association.

- The ILO does not see as bargaining fees as inconsistent with freedom of association.

- It is only fair that non-union members contribute towards the cost of union-negotiated collective agreements when they benefit from such agreements.

WORKPLACE RELATIONS AMENDMENT (GENUINE BARGAINING) BILL 2002

INTRODUCTION

1. The *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* ("the 2002 Bill") is no more than a re-run of the *Workplace Relations Amendment Bill 2000* ("the 2000 Bill") which proposed a prohibition on "pattern bargaining" and other restrictions on the taking of lawful industrial action.

2. The 2000 Bill was not dealt with in the Senate, following decisions by the ALP and the Australian Democrats to oppose it.

3. The 2002 Bill contains three main provisions:

(i) *Pattern bargaining*

This provision requires the Commission to consider, when determining whether a union (or an employer, although this is less relevant, given the rarity of employers taking industrial action) is not genuinely trying to reach an agreement, whether its conduct shows:

a. an intention to reach agreement with other employers in the industry rather than just with the employer who is party to the particular bargaining period;

b. an intention to reach agreement with all employers in the industry or none;

c. an intention primarily to reach agreement with a person other than the employer party to the bargaining period;

d. a refusal to meet or confer with the employer;

e. a refusal to consider or respond to proposals made by the employer.

(ii) *New bargaining periods*

This provides that if a bargaining period ends because a negotiating party has given notice that it no longer wishes to negotiate an agreement, the Commission may order that a new bargaining period cannot be initiated in relation to those same matters for a specified period of time.

(iii) *Cooling off period*

This provides that the Commission may suspend a bargaining period for a specified period if protected action is being taken and the Commission believes suspension is appropriate having regard to whether it would be beneficial to the parties by assisting in resolving the matters in dispute.

4. The ACTU submits that the 2002 Bill is intended to have, and would have substantively the same effect on the bargaining process as the 2000 Bill and, for the same reasons, should not be proceeded with.

PATTERN BARGAINING

Campaign 2000

5. The 2000 Bill was introduced as the Government's response to what it claimed would be industrial Armageddon in Victoria resulting from enterprise bargaining claims being pursued against a large number of manufacturing companies.

6. The reality was quite different. There was no significant industry-wide industrial action, in spite of agitated predictions to the contrary, and agreements were concluded on an enterprise-by-enterprise basis, with most industrial action occurring at the enterprise level.

7. To the extent that it was alleged that unions had failed to genuinely try to reach agreement, this was found to be capable of being dealt with by the Australian Industrial Relations Commission ("the Commission").

8. In *Australian Industry Group - and - Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (Print T1982, 16 October 2000, Munro J) ("the *Metals Case")* the Commission terminated a number of bargaining periods, as permitted by subsection 170MW(1) of the *Workplace Relations Act 1996* ("the Act"), on the grounds that the union did not genuinely try to reach an agreement with the other negotiating parties before organising or taking industrial action and was not genuinely trying to reach an agreement at the time of taking the action, as provided for in paragraphs 170MW(2)(a) and (b).

9. In coming to that decision, the Commission made a number of findings.

(i) The Commission has the authority to terminate a bargaining period, even where that bargaining period had been terminated by the union, and another period initiated (para 32).

(ii) The test for whether a party is genuinely trying to reach agreement is whether its conduct evidences a genuine trying to reach an agreement with *the* opposing negotiating party to whom the industrial action or bargaining period is specific (para 43).

(iii) A party which is trying to secure agreement with all, or an entire class of negotiating parties in an industry - *all or none* - is not genuinely trying to reach agreement with any individual negotiating party (para 44).

(iv) A common set of demands for conditions of employment or for timing of negotiating rounds and outcomes is not sufficient in itself to establish that a negotiating party is not genuinely trying to reach agreement with the counterpart party (para 46).

(v) However, advancement of such claims in a way that denies individual negotiating parties the opportunity to concede, or to modify by agreement, does not meet the test of genuinely trying to reach agreement (para 49).

(vi) Industrial action taken in relation to separate bargaining periods but at a common time in support of common claims is an issue for subsection 170MW(3) of the Act, and is not required to be dealt with in relation to whether or not the parties are genuinely trying to reach an agreement (para 56).

(vii) Orders can be made under section 170MW in relation to protected or unprotected industrial action (para 58).

10. Munro J also made it clear that common claims and outcomes have a place in the industrial relations system, are not outside the scheme of the Act, and may be pursued by employers as well as unions:

"Industrial negotiation is usually directed to achieving benefits and rights through some form of agreement about a provision to which the parties are bound. It is not unusual for major corporate employers to attempt to achieve a consistency and sometimes a relative uniformity of outcomes in negotiations affecting workers. For that purpose, benchmark common outcomes, wage increase levels, flexibilities, and freedom from award restrictions may be energetically pursued against union and employee negotiating parties. There is no good reason to doubt that such bargaining agendas will often form part of a corporate plan or strategy pursued across all the corporation's manifestations, or selectively at key sites. Those familiar with the industrial profiles of employer groups would recognise another group of employers who have negotiation objectives more or less imposed upon them. For that group negotiation objectives are effectively controlled by ostensibly external corporations to whom product or services are supplied, or by a parent company, often off-shore. A uniform cost price reduction for goods supplied under contract is one example of a practice in vogue in the vehicle components industry some years ago. It had some characteristics of a direct enforcement effect on enterprise level negotiation objectives. Another set of employer negotiating parties are suppliers of labour as a product or resource. For that group, labour is product in relation to which work can be converted from an employment into a series of contractual propositions about providing a resource, divorced more or less from collective bargaining or even some

statutory standards. And finally in this profile, there are government agencies as employers. Such entities are able to assume configurations not relevantly distinguishable from any, or all of the types of private sector employer negotiating parties outlined.

"*It would be industrially naive to equate all such employer entities with the stereotypical small business entity which most people would identify with the notion of single business. Under the definition given by the Act to a single business or part of a single business, relatively arbitrary arrangements of workforces may be identified by an initiating negotiating party as the field for a bargaining period. That flexibility may give employers a capacity to select the field of employees to be engaged in collective bargaining. Moreover, for the reasons I have discussed in an earlier decision Re Joy Manufacturing section 170MH Application, some employers may also select their preferred employee negotiating party. <u>It appears that some of the more loudly voiced and caustic criticisms of " pattern bargaining", as practised by unions, are muted or tolerant of corporate practices intended to achieve similar uniformities of negotiating outcome across different workplaces.</u>*

" *Industry-wide demands are often made by unions and sometimes pursued at national level. It is not that character of the demand that may cause offence to the policy embodied in section 170MP and paragraphs 170MW (2)(a) and (b). I see no reason why such claims may not be advanced in a way that involves a genuine effort to have each employer concede the benefit sought. In such cases, the "pattern" character of the benefit demanded, its source, and even the uniform content of it, may be a cogent demonstration that the negotiation conduct is genuinely directed to securing agreement from the other party."* (paras 47-49) (emphasis added)

11. Munro J concluded his decision by stating:

" *I explain the order and declaration in that way because no part of my reasoning should be taken to mean or imply that it is not lawful or industrially proper for the unions to pursue the core conditions objectives of Campaign 2000. However, the Act operates to inhibit the ways in which common conditions can lawfully be collectively bargained for. If the relevant unions are to continue to pursue the core conditions now associated with Campaign 2000, the necessity of doing so in a manner that complies with the single business bargaining focus of the Act must be adequately heeded."* (para 84)

12. The clear conclusion to be drawn from this decision in that the Commission has the power to exercise its discretion in relation to whether or not a particular set of facts and circumstances in a particular case meet the test of genuine trying to negotiate an agreement. The 2002 Bill, rather than confirming that discretion, would have the effect of fettering it. As Munro J put it:

"...The meaning of the words of paragraphs 170MW(2)(a) and (b) is clear for the reasons I have stated. It is the application of that meaning to the facts of particular cases that may be complex. For reasons that relate to the character

of different sets of employer negotiating parties, it is undesirable in my view to elevate construction of these provisions into a policy dogma that compels a lopsided application of the associated powers. The overall object of the Act to providing a framework for co-operative workplace relations which supports fair and effective agreement making should not be taken out of play." (para 51)

13. There is no need to "reinforce" or "draw on" that decision in legislation, a claim made for the 2002 Bill by the Minister in his Second Reading Speech. The decision dealt with particular circumstances, and it is simply inappropriate to steer the Commission "into a political dogma" which may or may not meet the requirements of another set of circumstances, when there is no question of a lack of jurisdiction or discretion.

Pattern bargaining and common claims

14. The 2000 Bill required the Commission to terminate a bargaining period if the initiating party had engaged in pattern bargaining and/or industry-wide campaigns involving the pursuit of common claims.

15. In determining to reject the 2002 Bill, the then Leader of the Australian Democrats stated:

*"....the pattern bargaining bill proposed by the Government went too far by denying legal protection for industrial action for regular enterprise bargaining that commenced with common claims". (*Senator Meg Lees Media Release 00/34, 6 June 2000)

16. Further, Senator Lees drew attention to the existing powers of the Commission under the Act to prevent the taking of protected industrial action where a union was not genuinely trying to reach agreement at the enterprise level, and, in light of concerns raised about the potential problems arising from Campaign 2000 (which had not yet commenced) said:

"We will monitor Campaign 2000 very closely. If the Commission's powers prove to be inadequate, we will revisit the issue."

17. As was demonstrated by Munro J in the *Metals Case*, the Commission's discretion to determine whether or not a party is genuinely trying to reach an agreement is available to be used in a wide range of circumstances.

18. Contrary to the Minister's claim in his Second Reading Speech that "*The bill would not prevent unions from making the same claims over a number of employers,"* the 2002 Bill would have the effect of placing an onus on unions to demonstrate to the Commission that the making and pursuit of such claims did not evidence *"an intention to reach agreement with persons in an industry who are, or could become, negotiating parties to another agreement with the first party, rather than to reach agreement with just the other negotiating parties."* [s170MW(2A)(a)]

19. It is simply false to say, as the Minister did in the Second Reading Speech, that this is drawn from the *Metals Case* decision. In fact, Munro J found the opposite, holding that pursuing an industry-wide campaign was not evidence of a failure to try to reach agreement at the enterprise level, so long as the union was prepared to negotiate with individual employers.

20. The criterion in proposed paragraph 170MW(2A)(b) to the effect that negotiating on an "all or nothing" basis applying to all employers in an industry is consistent with Munro J's finding that this would not constitute genuinely trying to reach an agreement. This leads to two conclusions. First, given the decision shows the Commission can and did consider this factor in exercising its discretion, it is unnecessary to legislate for it. Second, in referring to this "all or none" factor, Munro J made it clear that it needs to be considered in light of particular cases.

"Does it follow that, if in truth, the respondent negotiator is trying to secure agreement with all, or an entire class of negotiating parties in an industry - all or none - the respondent negotiating party is not genuinely trying to reach agreement with any individual negotiating party in the industry or class? In my view, it does. But in a particular case, a finding to that effect is dependent upon matters of fact and degree." (para 44)

21. The situation envisaged by proposed paragraph 170MW(2A)(c), where a party's conduct shows an intention primarily to reach agreement with a person other than the other negotiating parties, was not a circumstance dealt with in the *Metals Case*.

Negotiating in good faith

22. On their face, proposed paragraphs 170MW(2A)(d) and (e) do no more than state the obvious, being criteria generally found in illustrations of the meaning of an obligation to negotiate in good faith. However, on further examination, the criteria of conduct showing a refusal to meet, confer, etc is likely to have a meaning going well beyond a simple refusal to do these things.

23. First, it needs to be understood that in the most usual situation, where it is the union which initiates a bargaining period, there is no obligation on the employer to meet and confer with the union, or to consider or respond to proposals made by the union, although the union must be able to demonstrate that it has genuinely tried to reach agreement. As the *BHP Case* [*Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3 (10 January 2001)]showed, an employer is quite free to refuse to negotiate a certified agreement with a union which has initiated a bargaining period.

24. In these circumstances, the union might take protected industrial action against the employer, in which case it is still obliged to genuinely try to reach agreement. It should also be noted that industrial action is overwhelmingly taken by unions against employers, not *vice versa.* Two potential difficulties then arise in relation to the proposed paragraphs, both of which show how the

2002 Bill is slanted against unions and their members.

25. First, although the union would be required to meet with the employer and to consider and respond to any of the employer's proposals, there is still no obligation on the employer to consider any proposals from the union.

26. Second, questions arise about the meaning of "conduct (which) shows an intention". Does this mean that unions which do meet with the employer, and consider, but reject the employer's proposals, could be alleged to be constructively refusing by their conduct? Could a union which had repeatedly met with an employer, but received no response to its claims, take industrial action on the basis that it would not meet with the employer unless it was prepared to consider and respond to the union's proposals?

27. Proposed subsection 170MW(2A) ignores the reality that the taking of industrial action, in itself, is evidence of a union and its members genuinely trying to reach an agreement. Workers do not lightly take action by which they forfeit their wages. In many cases, such as with BHP, it is the union which wants an agreement and the employer which does not.

Onus

28. The 2002 Bill is not about giving the Commission a discretion. The Commission already has an unfettered discretion in relation to determining whether or not a party taking industrial action is genuinely trying to reach an agreement.

29. The effect of proposed subsection 170MW(2A) is to direct the Commission to consider a number of matters, and, where it is established that one or more of the circumstances set out exists, to find that this tends to indicate that the first party is not genuinely trying to reach an agreement with the other negotiating parties.

30. The meaning of "tends to indicate" will no doubt be the subject of considerable litigation, should the 2002 Bill become law. The ACTU submits that the provision creates an onus or presumption, which it would then be up to the union to displace with countervailing circumstances.

31. For this reason, the provision cannot be seen as other than a limitation of the Commission's current uncircumscribed discretion, and as directing a presumption against unions seeking to continue take industrial action.

Why pattern bargaining is part of the process

32. Neither unions nor employers approach enterprise bargaining with blank minds and empty pieces of paper. Neither group have the resources to do this. The enterprise bargaining process is based on sharing of collective knowledge and experience, and using this in a cumulative way, rather than re-inventing the wheel on each occasion.

33. Unions are not merely a collection of groups of workers who relate only to their own workplace. Workers come together in unions because of concerns which they have in common as employees in particular industries, and as participants in the workforce as a whole.

34. Unions are also democratic organisations. Their job is to reflect their members' concerns and aspirations and to assist them to achieve these. As a result, unions will normally approach the bargaining process by calling meetings of delegates to draw up lists of issues which they wish to pursue in enterprise bargaining. The unions' job is then to assist members in bargaining by providing information about the issues through kits, seminars, etc. In order to assist delegates to negotiate agreements, many unions provide model agreements; while these will generally be varied as a result of negotiations at the enterprise, the model or template provides a useful basis for a starting point for the union and for the employer.

35. Employer organisations, of course, use similar measures to assist their members. Meetings to plan and adopt enterprise bargaining strategies are common, as is production of model agreements and draft clauses.

36. Employers also adopt and campaign around common issues of concern and attempt to pursue these through bargaining; for example, the introduction of performance pay in the mining industry, the abolition of penalty rates in the finance industry or reductions of pay in the meat industry.

37. Australian Workplace Agreements (AWAs) are another example of pattern bargaining, encouraged by the Employment Advocate with his promotion of an AWA "template" . The general practice of employers offering identical AWAs on a "take it or leave it" basis has been well-established, with genuine negotiation in the AWA context virtually unknown.

38. Some unions hold meetings with employers collectively, or with their organisations, to explain the claims and to explore industry views on the issues.

39. Such assistance is particularly valued by employers and employees in industries characterised by a large number of employers with a small number of employees, such as transport, live entertainment or building and construction. These employers and employees are simply not in a position to approach enterprise bargaining with a clean slate. Most of these employers

have neither the skills nor the time, and want nothing more than agreements which put the industry on more or less an equal footing in respect to labour costs.

40. In many industries, the core issues will be determined in agreements concluded with one or more employers, with other employers and their employees satisfied to then adopt these conditions. Employers are as quick to say, "you agreed to that with him, I want the same conditions" as employees are to say "we won't accept less than what she is paying her employees", and will sometimes back these claims with industrial action.

41. This approach is not inconsistent with enterprise bargaining; the reality is that agreements with each enterprise may or may not contain some or all of the common claims, invariably with other issues relevant to the particular enterprise. Even where common claims are accepted, they will frequently be implemented differently in relation to timing, "offsets" and so on. This was the case, for example, with some of the 36 hour week agreements in the building industry.

42. It is simply impossible for unions to campaign for improved conditions unless such campaigning can occur throughout an industry, the wider workforce and even the community. This does not mean that unwanted conditions can be imposed on employers and their employees against their wishes. Finally, the employer must agree and the employees must vote; if the union refuses to agree under those circumstances, an agreement can be concluded without union consent.

43. Paid maternity leave, for example, has been a goal of the women's movement for many years. The ACTU and a number of unions have campaigned around this issue, which has been included in many claims for enterprise agreements in a wide range of industries. It is this campaigning which assisted the Finance Sector Union and the vehicle industry unions to achieve paid leave in many of their enterprise agreements. At the end of the day, each agreement was negotiated with each employer, and with some variations, including in the length of the paid leave, but the campaigning was crucial in order for employers to understand the importance of the issue to their employees. The current campaign by the SDA for an extension of unpaid parental leave is another example of the need for unions to be able to pursue common claims in a co-ordinated manner.

44. All the major workplace gains of the last 20 years, including parental leave, superannuation, redundancy pay, training and skill recognition and family leave, were initiated by industry campaigns which resulted in a number of enterprise-based agreements which later were adopted by the Commission for the award system, in whole or in part.

45. Occupational health and safety is another issue which is frequently not adequately addressed at the enterprise level. In its submission to the Inquiry into the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* ("the 1999 Bill"), the ACTU pointed to the adverse effects on

occupational health and safety which have stemmed from the flexible enterprise focus. Adequate health and safety standards should not be available to be bargained away at the enterprise level, but should be based on proper industry-level agreements, as well as legislation.

46. Campaigning around common issues is integral to union functioning; to remove that ability would be to make it unacceptably difficult for unions to carry out their most basic role. Although industrial action does not always, or even usually accompany bargaining, without the *ability* to take action the process is unacceptably weighted towards the employer.

Industry-wide bargaining internationally

47. Prohibiting pattern bargaining has not been an issue internationally simply because no other comparable country imposes the types of restrictions on industry-wide and multi-employer bargaining and agreement-making as apply in Australia.

48. These restrictions have been the subject of ILO criticism on a number of occasions.

49. On 6 August 1997 the ACTU wrote to the ILO, setting out a number of concerns about the conformity of the Act with Convention No. 98 on the Right to Organise and to Bargain Collectively.

50. Australia is a signatory to the Convention, which requires the encouragement and promotion of collective bargaining between employers or their organisations and workers' organisations. The reference to bargaining with employer organisations clearly reflects a presumption that collective bargaining may be on a multi-employer basis, and that this mode of bargaining should also be encouraged and promoted.

51. The ILO's Committee of Experts, a group of internationally eminent independent jurists, found that the Act was inconsistent, in a number of respects, with the requirements of the Convention.

52. The ACTU submitted that the Act gives clear preference to single-enterprise bargaining, as evidenced by the restrictions on multi-business agreements, and the fact that protected industrial action cannot be taken in relation to these agreements. The Committee was concerned at the level of discretion afforded to the Commission by section 170LC to determine the appropriate level of bargaining and concluded:

"The Committee is of the view that conferring such broad powers on the authorities in the context of collective agreements is contrary to the principle of voluntary bargaining."

The Committee continued:

".....the choice of bargaining level should normally be made by the parties themselves, and the parties 'are in the best position to decide the most appropriate bargaining level' (see General Survey on freedom of association and collective bargaining, 1994, paragraph 249). The Committee requests the Government to review and amend these provisions to ensure conformity with the Convention."

53. ILO jurisprudence has conclusively established that the right to strike, although not explicitly referred to in the ILO Constitution, or in Conventions 87 or 98, is implicit in these instruments.

54. In March 1999 the ILO Committee of Experts published an observation in response to an ACTU complaint about Australia's breaches of Convention No. 87 regarding Freedom of Association and Protection of the Right to Organise. The Committee found, in relation to multi-employer agreements:

"The Committee notes that by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests."

55. In considering the Government's response to its 1999 observation, the Committee of Experts stated in its 2000 observation:

"With respect to the right to strike in support of a multi-employer, industry-wide or national-level agreement, the Government states that the Act does not expressly limit or restrict the scope of the subject matter pertaining to the relationship between an employer and employee, but does provide immunities in respect of a proposed single-business agreement. The Committee recalls that where strike action is 'unprotected' and therefore potentially subject to a wide range of sanctions, as in the case of action in support of multi-employer, industry-wide and national-level agreements, it is for all practical purposes prohibited."

The Committee concluded by once again requesting the Government to amend the provisions of the Act to bring the legislation into conformity with the Convention.

56. Although the Government has repeatedly told this Senate Committee that it is in "dialogue" with the Committee of Experts, it would appear that its representations have not succeeded in altering the ILO's consistent finding that Australia is in breach of its obligations under the Convention.

57. Nowhere else in the developed, industrialised world are there restrictions on industry-wide agreement-making as exist in Australia.

58. Industry-wide bargaining is the general model in most European countries. In the UK and the US bargaining is more often at an enterprise level (although in

the UK it may cover groups of employees from the same craft or occupation). However, in neither of these countries is there a prohibition on multi-employer bargaining or on industrial action associated with it.

59. In the UK multi-employer industrial action has occurred in a number of industries. The Blair Government has legislated to make it easier to organise pre-strike ballots for multi-workplace action.

60. In the US construction industry, bargaining occurs at the local and regional as well as the industry level. Enterprise bargaining coverage is greatest where there is industry-wide bargaining. [G Bamber *et al* "Collective Bargaining" in R Blanpain & C Engels *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* Kluwer Law International 1998]

61. In New Zealand legislation allows multi-employer bargaining, if union members employed by each employer agree to go into the multi-employer negotiations. The New Zealand Department of Labour reports that seven per cent of employees in its contract data base are covered by multi-employer contracts. [*ERA Info* Vol 5, October 2001] The same issue of *ERA Info* also reports the first determination of the Employment Relations Authority defining the duties of good faith bargaining and ordering the parties to resume bargaining. In *Independent Newspapers Ltd (INL) v Amalgamated Engineering Printing & Manufacturing Union*, INL, a newspaper group, had refused to bargain for a multi-employer agreement, other than for the purpose of defining the scope of bargaining. The Authority held that the fact that INL refused to bargain on any issue until the matter of coverage was settled, made it clear that it intended to bargain in a very limited way only. INL was ordered to meet with the union for the purpose of bargaining for a multi-employer agreement and properly consider the union's claim for this type of agreement.

62. A 2000 dispute in the US involving 100,000 cleaners, members of the Service Employees International Union (SEIU), demonstrates that the ability to campaign on an industry level can be crucial for workers in precarious and fragmented employment.

63. Prior to the dispute, Los Angeles cleaners, mainly Hispanic immigrants, had been employed for around half the rate of unionised workers since they replaced union members sacked in the 1980s. Growing concentration of contractors has led to a relatively small number of companies employing most of the cleaners.

64. As a result of a union strategy for common expiry dates of contracts, not only in Los Angeles, but in many other cities, it was possible for lawful industrial action to be taken by cleaners across the state.

65. In Los Angeles, a three week strike led to the cleaners increasing their wages by 26 per cent, the biggest rise ever. The campaign was supported by political and civic leaders, and marchers were joined by Cardinal Mahoney, the head of the Roman Catholic archdiocese.

66. The nationally co-ordinated campaign resulted in gains such as family health insurance and home computers and training, as well as significant wage increases for precarious workers recognised as amongst the most exploited in the US.

67. In addition to Australia and New Zealand (discussed above) a small number of countries were cited in the International Confederation of Free Trade Union's 2000 *Annual Survey of Violations of Trade Union Rights* in relation to industry-wide bargaining.

68. In Swaziland, industry level bargaining can take place only if the Commissioner of Labour considers this to be "desirable or practicable". The parliament has passed a new labour bill, drafted with ILO assistance, but the King has not yet assented to it.

69. In Zimbabwe, 1992 amendments to labour law gave joint management-worker committees the right to override industry-wide agreements negotiated by unions.

70. In Argentina a number of legislative changes were introduced by decree, including limiting the scope of collective bargaining to the company or enterprise level. The changes were a response to IMF demands for restructuring as part of a loan package. The decrees were then declared unconstitutional by the courts and suspended. A new reform bill was negotiated with trade unions, but opposed by employers and the IMF. The law was finally passed in September 1998 and confirmed the priority of industry-wide collective bargaining, although news laws introduced in 1999 provide that the Ministry of Labour must approve collective agreements which extend beyond enterprise level.

71. In Chile, where most labour law dates from the Pinochet era, the ICFTU reports:

> *"...the majority of workers are covered by individual employment contracts. Collective bargaining usually takes place at enterprise level. Industry-wide bargaining is rare and is at the discretion of the employer."*

A bill which would have made bargaining at industry level the norm was voted down by the Senate in December 1999.

72. Turkey has a ban on industry-wide bargaining.

The economic implications of pattern bargaining

Labour market competition

73. It is a universally recognised principle that the labour market should not be open to free competition in the manner of other markets for goods and services, and that the reason for this is the unfairness which would result from the exercise of the greater bargaining power of the employer over the employee.

74. This principle is reflected in paragraph 51(2)(a) of the *Trade Practices Act 1974* ("the TPA"), which has the effect of excluding from the reach of the TPA agreements and arrangements between employers and employees that relate to employment conditions.

75. In 1998 the National Competition Council reviewed the exemption provisions of the TPA, including paragraph 51(2)(a). In recommending that the exemption be retained, the Council rejected a Government submission to the effect that the exemption be revocable where the anti-competitive detriment to the community of the particular arrangements in question outweigh labour law policy objectives. The revocation would only be applicable for agreements or arrangements outside the formal industrial relations system.

76. The reasons given by the Council for recommending retention of the exemption were:

- maintaining the primacy of the industrial relations framework in labour market relations;
- compliance with Australia's ILO treaty obligations;
- the certainty provided by the exemption in relation to the application of the TPA to employment agreements and arrangements.

77. The effect of prohibiting the pursuit of common claims, as provided for in the Bill, would be to reduce enterprise bargaining to a series of completely isolated negotiations, where workers would be unable to use the collectively-gained knowledge and experience which comes from participation in their union. Employers would, of course, not be so inhibited, and would be free to pursue approaches in common with other employers in the industry.

78. In his submission to the Inquiry into the 1999 Bill, Professor Joe Isaac submitted that multi-employer bargaining was not only fairer and more efficient, but did not necessarily result in higher outcomes:

"It is difficult to understand the in-principle objection to multi-employer agreements. There may be situations where a number of employers in the same industry prefer to deal collectively with the union and to have, as far as possible, uniform wages and conditions within the industry, while allowing certain variations to meet the circumstances of particular firms. Competition

and profitability would then be based on managerial performance.

"There is much to be said for such a situation, both on equity and economic grounds. It is an accepted labour market convention of fairness that similar work (particularly in the same industry) should be remunerated in similar terms. Perception of fairness encourages better workplace relations. On economic grounds, uniformity in pay and conditions ensures greater efficiency in the allocation of resources. Under free market rules, the less efficient firms would be expected to earn lower profits, which should spur them to greater efficiency; or fall by the wayside and release resources for more productive uses. There is no sound reason, except where substantial unemployment and hardship could fall on employees, why employees should subsidise the less efficient firms. In a competitive market, the efficient and less efficient firms pay the same price for their raw materials, fuel, power, transport, etc. Apart from the special circumstances noted, is there a case why the price of labour should be treated differently?

"Further, many would see multi-employer bargaining as avoiding a situation in which the least resistant firm gives way to a standard of settlement that others would be opposed to. It is arguable that the bargaining power of a union facing a single employer may be greater than if it faced many employers at the same time in an industry bargaining situation. Picking on one employer at a time may be strategically a more effective way for the union to exact the best terms from all." [Submission 377, Vol 12, pp2692-3]

79. Professor Isaac's view is widely shared throughout the industrialised world. In criticising the lack of explicit encouragement of industry-wide bargaining in the US, one legal commentator has written:

"Another fundamental issue for a labour relations system is the structure of bargaining. In most countries, industry-wide (sectoral) bargaining is preferred for it is believed it produces greater stability, a virtue both governments and employees recognize. From unions' viewpoint, industry-wide bargaining means that the cost of labor is taken out of competition within the industry." [JR Bellace "Breaking the New Deal Model in the USA" in JR Bellace & MG Rood *Labour Law at the Crossroads: Changing Employment Relationships* Kluwer Law International 1997)

80. In Australia, although multi-employer agreements are rare, and sectoral agreements non-existent, a number of industries are characterised by similar bargaining outcomes. Building and construction and transport, for example, are characterised by a large number of employers in a very competitive environment.

81. If employers are forced to compete on labour costs, the effect is simply to keep driving these down until they reach a floor below which people will not work. The effect of labour cost competition is also to put stress on safety, of key importance in both building and transport. Recent cases of accidents involving long-distance drivers working for excessive hours demonstrates a

result of downwards pressure on labour costs.

82. With little individual market power themselves, employers in this kind of industry are finding themselves forced to attempt to compete by driving down wages and conditions if they can. Employers of unionised labour find themselves at a disadvantage over those operators who are not bound by collective agreements or industry standards. This is a serious concern to many employers and their organisations, as well as to unions and their members.

83. The disparity is exacerbated by the growing gap between award rates of pay and the market in industries such as building, manufacturing and transport. This means that there is no relevant or effective floor for bargaining, leaving employees open to exploitation and to growing disparity between the wages of unionists and non-unionists.

84. The award system operates as a form of industry-wide wage setting for small employers in industries such as hospitality and retail, where there is a very low incidence of certified agreements. These employers do not want to compete on wages; they want to know that they have a level playing field in relation to wages, taxes and other costs, and can compete on the quality of the goods and services they offer, and their entrepreneurial skills.

85. In industries such as these the award system remains as the most appropriate means of regulation. However, in the context of the current Act, with its limitations on the Commission's jurisdiction, and its emphasis on minimum wages and conditions, awards are rapidly falling behind community standards of fairness.

Productivity and employment

86. Productivity growth is a measure of the extent to which more output can be produced with the same inputs. Labour productivity specifically relates output to hours worked.

87. Productivity growth is highly cyclical, typically accelerating sharply in the early stages of economic recovery (when output picks up ahead of employment) and slowing as the recovery matures (when employment catches up and output growth slows).

88. By any measure, Australian productivity growth has been strong and sustained over the past decade. (*Australia's Strong Productivity Growth: Will it be Sustained?* D. Gruen, Head of Economic Research, Reserve Bank of Australia, 2 February 2001)

89. Labour productivity growth dipped (in line with output growth) in early 1995 and late 2000; nonetheless, the average annual growth rate of 2.3 per cent for 1995-2001 is the highest for any comparable period in history. Similarly, the growth rate over the year to December 2001 is the highest since quarterly National Accounts have been taken. (Treasurer Paul Costello, Press

Conference – National Accounts, 7 March 2002)

90. Australia's productivity growth over the past decade has exceeded most other industrial countries including the USA and UK. Our rapid productivity growth performance over the past decade is widely attributed to technological change (lately, the "new economy") and microeconomic reform, including the lowering of tariffs and increasing exposure of local industry to the international economy. (Gruen, *op cit*)

91. It has been asserted that Australia's improved productivity growth reflects the introduction of enterprise bargaining. The ACTU has consistently argued that award restructuring from the late 1980s provided the essential platform for collective bargaining to build upon, and that that reform process explains much of the nation's sound economic performance over the past decade.

92. The ACTU has always rejected the view that enterprise bargaining *simpliciter* is a magic elixer for boosting productivity growth. Recent academic assessments provide support for that view (M Wooden, J Loundes, and Y-P Tseng, *Industrial Relations Reform and Business Performance* Melbourne Institute Working Paper No 2/02)

93. Over the past decade, the making and pursuing of common claims, by unions and employers, including wage claims, has been a general feature of enterprise bargaining in Australia – as it has long been in most industrial economies. The argument that pattern bargaining is a threat to productivity growth is unsustainable.

94. Moreover, in seeking to identify the causes of the pick-up in Australian productivity growth in the nineties relative to the eighties, Gruen finds that:

"*The sectors which made the largest contribution to this pick-up were the non-traded sectors of wholesale trade, retail trade and construction. Together these sectors accounted for more than 100 per cent of the pick-up in market sector productivity growth between the two decades, despite contributing only 40 per cent of the hours worked in the market sector.*"

95. Pursuit of common claims, by employers and unions, in the construction sector is widespread and appropriate to the nature of the industry. In the retail sector, agreement coverage reflects the industry structure; the few major employers are party to collective bargains but the vast numbers of small retail employers rely on award provisions. In wholesale trade, individual agreements (overwhelmingly traditional overaward pay arrangements) account for three quarters of total employment. (Commonwealth Submission to the Safety Net Review – Wages 2001-02, Appendix A)

96. Gruen points to increased use of computers and related technology in these sectors as one powerful potential explanation of their faster productivity growth in the nineties, and suggests that this beneficial influence will continue for some years yet.

97. Wooden *et al* also document the faster productivity growth in the nineties, and note the sectoral concentration of the pick-up identified by Gruen. Wooden *et al* acknowledge that work intensification in these sectors may account for some of the apparent rise in labour productivity; that is, the higher output may be attributable to higher unmeasured labour input, thus falsely inflating apparent productivity growth.

98. Wooden *et al* review the available evidence regarding the alleged impact of bargaining ("industrial relations reform") on economic performance generally and productivity in particular, and present some new econometric evidence of their own. They conclude:

"But what has enterprise bargaining actually achieved? As demonstrated in this paper, the case for enterprise-based bargaining systems hinges in large part on its potential to enhance the productive capacity of business. Nevertheless, the available evidence is far from supportive. While it is true that Australia experienced a marked resurgence in productivity growth during the 1990s, the available evidence from workplace- and enterprise-level studies does not enable any strong conclusions to be reached about possible links between enterprise bargaining and productivity."

99. The latest data show Australia's labour productivity growth rate (five year moving average growth from previous year) exceeds all industrialised OECD countries except Finland and Ireland. (OECD *Main Economic Indicators* February 2002, Basic Structural Statistics, pp268-271)

100. In terms of unemployment, at end 2001 Australia's unemployment rate was broadly in line with the OECD average. Several European countries including Sweden, Switzerland, Norway, The Netherlands, Ireland, Denmark, and Austria had lower unemployment rates than Australia, as did the UK, USA, and Japan. Canada, France, Germany, Italy, Finland and Spain continue to struggle with unemployment rates in the order of 8-9 per cent or more.

101. There is no evidence to suggest any concordance between the presence of pattern bargaining and the level of unemployment or the productivity growth rate across OECD countries.

NEW BARGAINING PERIODS

102. In the *Metals Case,* Munro J dealt with a situation where unions terminated bargaining periods with a number of employers under section 170MV, informing them that the unions no longer wished to reach an agreement with them. This was apparently done by the unions for the purpose of instituting a "cooling-off" period. Bargaining periods relating to similar claims were then reinstated with the same employers a short time later.

103. Munro J held that "*there is an adequate basis upon which to find that relevant bargaining periods may not have ended"* in light of continuing actions by employees, including taking of industrial action, which indicated that an agreement was still being sought, in spite of the advice forwarded by the

unions.

104. Following on this, Munro J determined:

> *"Having regard to all the circumstances, I am satisfied that it is appropriate to exercise the power to order the termination of respective bargaining periods. I am satisfied also that I should associate with that order a declaration under sub section 170MW (10). The effect of that order and declaration is to attempt to force an end to the current phase of Campaign 2000 activity against the 33 employer applicants. Thereby, the order will allow an effective and unequivocal cooling-off period, free of bargaining periods until the end of November. That will not preclude negotiation or agreement. It should preclude continuance of industrial action during the period."* (para 84)

105. The orders made in the *Metals Case* demonstrate that the proposed section is 170MWA is unnecessary. There is simply no evidence of any widespread difficulty caused by termination and reinstatement of bargaining periods justifying the proposed amendment to the Act.

COOLING-OFF PERIODS

106. The 2002 Bill proposal for cooling-off periods is recycled for the third time - from the 2000 Bill and from the 1999 Bill.

107. Although the 2002 version purports to do no more than give a discretion to the Commission, the reality is that it can have no other effect than to restrict further the taking of industrial action in the context of a legislative regime which already falls short of international standards.

108. The Government's obsession with industrial action is completely unwarranted. The necessity for such a provision, given that most strikes in Australia are of short duration, should also be questioned. In 2001 there were 665 industrial disputes involving 225,700 employees. Of these, 512 disputes involving 86 per cent of employees were for two days or less. Only 72 disputes, involving 12,100 or 5.5 per cent of the employees, lasted for five or more days. The decline in working days lost from industrial disputes has continued, with 16 per cent fewer days lost in 2001 compared to the previous year. [Industrial Disputes ABS Cat 6321.0]

109. The effect of the proposed amendment would be for bargaining periods to be suspended even when the party taking the action has behaved within the law. It should be noted that the Commission already has the power to suspend the bargaining period where a party has not tried or is not genuinely trying to reach an agreement.

110. To the extent that there is an issue of protracted industrial disputes, it reflects the lack of power in the Commission to deal with the underlying causes. Restoration of the arbitral power of the Commission would provide a means of

dealing with such disputes, as submitted by the AiG to the Inquiry into the 1999 Bill:

"There have been a number of disputes where the option of arbitration might have had an advantage for the parties." (Transcript, 1/10/99, p45)

111. In the *Metals Case,* the cooling-off period was initiated by the unions in terminating the bargaining periods. It should be noted that this is not necessary; if a party taking industrial action wants a cooling-off period it can suspend its action and recommence, if it wishes, at a subsequent time.

CONCLUSION

112. For the reasons stated, the ACTU urges the Committee to recommend that the Bill not be proceeded with in the Senate.

WORKPLACE RELATIONS AMENDMENT (FAIR DISMISSAL) BILL 2002

INTRODUCTION

113. The Government has introduced this Bill for blatantly political reasons, knowing the position of the Senate in relation to an exclusion for small business from the provisions of the Act permitting applications to be made to the Commission by employees alleging that their termination of employment has been harsh, unjust or unreasonable ("unfair").

114. This has been done in spite of the lack of evidence that such an exclusion, removing major rights from 47 per cent of the private sector workforce, would be of benefit to small business employment growth, a view seemingly shared by the overwhelming majority of small business operators.

115. The ACTU submits that the Committee recommend that the Bill not be passed by the Senate.

DO UNFAIR DISMISSAL LAWS STOP SMALL BUSINESS JOBS GROWTH

116. The claim that excluding small business employees from making unfair dismissal applications would lead to the creation of more than 50,000 new jobs has been comprehensively discredited.

117. Senator Murray's minority report in the inquiry into the *Workplace Relations Amendment (Unfair Dismissals) Bill 1998* ("the 1998 Bill"), which proposed an exemption for employers with fewer than 15 employees, persuasively sets out the evidence for the following conclusions.

(i) Business opposition to unfair dismissal laws is based on a view that managerial prerogative should include the right to hire and fire at will.

(ii) Survey evidence either shows little small business concern with the issue, or is so loaded as to lack credibility.

(iii) Examples of problems are frequently drawn from cases under state legislation, which deals with the majority of claims in all states but Victoria, and which would be unaffected by amendments to the Act.

(iv) Employees of small business are less likely to make unfair dismissal applications than those of big business.

(v) The claim that exempting small business would lead to the creation of 50,000 jobs "rests on no empirical research, no case studies, no international and domestic studies," and lacks credibility, particularly given that in 1998 there were 304 federal small business unfair

dismissal applications in NSW, 79 in WA, 56 in Tasmania and 20 in SA.

118. The 50,000 jobs claim was considered by the Full Court of the Federal Court in the recent case of *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 (16 November 2001), which concerned the validity of the Regulation exempting some casual employees from the unfair dismissal laws. In the course of the proceedings, the Court considered evidence on behalf of the Commonwealth provided by Mark Wooden from the Melbourne Institute of Applied Economic and Social Research in support of the proposition that there is a link between unfair dismissal laws and employment. The Court concluded that no such link could be shown to exist.

'During the course of cross-examination, Mr Rogers suggested to Professor Wooden that, if his assumption about the effect of unfair dismissal laws on casual employment opportunities was correct, it would also apply to full-time permanent employment. Professor Wooden agreed. His evidence went on:

"Do I take it then that you accept that the consequence for employment is not dependent upon the designation of the employee, that is as between full time, part-time and casual, correct? --- Yes

It is dependent upon the fact that the given employee or the given class of employees have access to unfair dismissal laws? --- Correct."

Professor Wooden's attention was drawn to the ABS figures on employment growth. It was pointed out to him that, in the period of approximately three years, from March 1994 to December 1996, during which the more comprehensive unfair dismissal protections of the 1993 Act were in place, employment growth was stronger than in the following three years, during which less comprehensive protections applied. Employment growth under the 1993 Act was also stronger than in the three years immediately before the commencement of that Act, when there was no comprehensive unfair dismissal protection. (The ABS statistics show casual employment as being 1,271,800 in August 1990 and 1,435,000 in August 1993 - an increase of 163,200; 1,841,200 in August 1996 - an increase of 406,200 on the August 1993 figure; and 1,931,700 in August 1999 - only 90,500 more than three years earlier).

Professor Wooden agreed "the peak in increased employment happens to coincide with the most protective provisions, from the employees' point of view". He also agreed that the pattern in relation to permanent employment was similar. It was suggested this "rather demonstrates that the existence or non-existence of unlawful dismissal legislation has got very little to do with the growth of employment and that it is dictated by economic factors". Professor Wooden agreed "the driving force behind employment is clearly the state of the economy" and mentioned the recovery from recession after 1993.

It seems unfortunate that nobody has investigated whether there is any relationship between unfair dismissal legislation and employment growth. There has been much assertion on this topic during recent years, but apparently no effort to ascertain the factual situation.

Professor Wooden thought research would be difficult because of the absence of an appropriate control group. However, unfair dismissal provisions were introduced gradually during the 1980's, on an industry-by-industry basis, by awards of industrial commissions. It may have been possible, and may still be possible, for a researcher to have compared, or to compare, the pattern of employment in an industry newly affected by such a provision with the pattern, over the same years, in industries to which no unfair dismissal provisions applied. The results of any comparison might need to be treated with caution; however, any empirical material would be an improvement on mere assertion.

Professor Wooden's conclusions about the relationship between unfair dismissal laws and employment generation were disputed by Dr Richard Hall, a Senior Research Fellow with the Australian Centre for Industrial Relations Research and Training at the University of Sydney. Dr Hall noted that Professor Wooden's claim is not based on "directly relevant evidence, statistical or otherwise" but on Professor Wooden's "theorisation of the decision making processes followed by hirers". Dr Hall said:

"Professor Wooden appears to base his view on the assertion that employers faced with an extension of the unfair dismissal laws to a greater number of casuals will become more risk averse with respect to hiring because they will perceive that new substitute hires (for example permanent part-timers) will be more difficult to dismiss in the short term should they prove to be unsuitable ... That argument would be valid if it were not for the widespread practice of using probationary employment terms. Probationary employment arrangements are designed precisely to ensure that employers can exercise the flexibility to quickly and easily dispense with a new employee should they regard them as unsuitable.

"If the extension of unfair dismissal laws to include a greater proportion of casuals occurred there is little logical reason to expect that it would automatically lead to fewer jobs. First, many casuals are employed by employers with the intention of retaining them for relatively long periods anyway. Second, employers who chose not to engage casual employees would be likely to meet their labour needs through other strategies that facilitate a high degree of flexibility, for example, though the use of flexible hours, part-time contracts and/or the use of probationary periods. There is no evidence that greater reliance on these strategies would lead to any adverse consequences for job creation at the aggregate level."

Conclusions on the evidence

In the absence of any evidence about the matter, it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven. It may be accepted, as a matter of economic theory, that each burden that is placed on employers, in that capacity, has a tendency to inhibit, rather than encourage, their recruitment of additional employees. However, employers are used to bearing many obligations in relation to employees (wage and superannuation payments, leave entitlements, the provision of appropriate working places, safe systems of work, even payroll tax). Whether the possibility of encountering an unlawful dismissal claim makes any

practical difference to employers' decisions about expanding their labour force is entirely a matter of speculation. We cannot exclude such a possibility; but, likewise, there is no basis for us to conclude that unfair dismissal laws make any difference to employers' decisions about recruiting labour.' (paras 64-70)

119. The Government's Financial Impact Statement in the Explanatory Memorandum to the Fair Dismissal Bill is:

"The Bill has no financial impact on the Commonwealth Budget."

It might have been thought that if substantial job creation was expected from the Bill, that the effects on tax receipts and social security outlays would have been considered.

120. A 1997 research paper published by the then Industry Commission (Revesz J & Lattimore R. *Small Business Employment*, August 1997) comprehensively examines the role of small business in employment creation and in the job market generally.

121. Revesz and Lattimore argue that although the small business employment share is growing at the expense of large business, it cannot be inferred that this is due to job creation by small business.

122. The report sets out a number of factors which have contributed to the growing employment share of small business:

(i) employment reductions in larger firms, resulting in them employing less than 19 employees;

(ii) a decline in public sector employment;

(iii) a trend to outsourcing services;

(iv) increases in the importance of the service sector, particularly finance and insurance, property and business services, and health and community services, which traditionally has a high proportion of small employers;

(v) structural change affecting large-scale manufacturing.

123. The report says that although a large proportion of new jobs occur in small businesses (61.7 per cent of private non-farm wage and salary earners), this "does not necessarily imply that they have been autonomously generated by the small business sector" (p.30). Under the heading "Confusion of medium and cause", Revesz and Lattimore conclude that the smallness of the firm does not create the jobs.

"Small businesses appear to be a major source of new jobs in the economy. But this is open to misinterpretation. While small firms

may be where *many of the new jobs have been created, this does not necessarily mean they are* responsible *for their creation. In fact, the sectoral data (chapter 4) imply that the smallness of frms is, to a large degree, incidental to the process of job creation. Many of the new jobs were created in small business, not because that size of firm is particularly able to generate new jobs, but because the products for which demand has increased are mainly supplied by small business. In a sense, the customers of these firms created the jobs, not the firms."*

124. Revesz and Lattimore use this conclusion to argue against the provision of special incentives and/or concessions to small business as an aid to job creation. Their reasons, set out at pages 97-100, can be summarised as:

(i) Selective support ignores the optimal size distribution of firms, encouraging a shift to small firms of operations which would be more efficiently performed by a larger enterprise. As small firms are less likely to survive than larger businesses, this could create more dislocation.

(ii) It is no more logical to support small firms to "create" a job than to support a large firm or the public sector so that it does not "destroy" a job. " .... once there is a mechanistic focus on <u>where</u> jobs are 'created' or 'destroyed', there is nothing which gives the arguments of small business advocates any more coherence than those of big business or private sector advocates".

(iii) The effectiveness of subsidies in creating net employment is unknown.

(iv) Subsidies have to be financed through taxation, while selective measures applicable to small business "can actually reduce the incentive for the growth of businesses which are about to exceed the small firm threshold".

125. The report concludes that industry and other policies should be geared to the needs of all business, while not being indifferent to the small business sector. While the conclusions are in the context of a discussion about the employment generating effects of government subsidies to small business, the same principles apply to an exception from unfair dismissal provisions, which is, in effect, a subsidy by employees.

126. The ACTU submits that the evidence shows that no credibility can be given to the claim that employment or other economic benefits can be gained by exempting small business from the unfair dismissal laws.

THE "PROBLEM" OF UNFAIR DISMISSAL LAWS

127. Given a choice, small business (or large business for that matter) would no doubt choose not to be covered by unfair dismissal laws, just as they would like to be free of other regulations and laws which limit their ability to operate as they choose. Such laws generally exist to protect the public in general, or individuals in specific relationships, such as employees.

128. It is not, therefore, remarkable, that many small business people, if asked whether unfair dismissal laws are a concern, or prevent them employing more staff, answer in the affirmative. However, when small businesses are asked to rank barriers to greater employment, unfair dismissal invariably rates a weak response.

129. AWIRS '95 found that only six per cent of small businesses gave "high employment costs" as a reason for not recruiting any more employees, with another six per cent citing other reasons. The most common reason was "don't need any more employees" (68.7 per cent) followed by "insufficient work" (20 per cent)**.** (Table 13.3)

130. When small businesses were asked about significant efficiency changes that they would have liked to make but were unable to, only six per cent cited "unfair dismissal laws". (Table 13.11).

131. Little seems to have changed since 1995, given the findings of a survey of 600 small businesses and 105 chartered public accountants conducted in February 2002 by CPA Australia. The survey found small business identifying the main impediments to hiring of new staff as lack of skilled applicants (25%), slowing economy and lack of work (24%), difficulties finding motivated and reliable staff (20%), wage costs (17%), training requirements (7%) and unfair dismissal (5%).

132. While the survey found that an insignificant minority of small business owners saw unfair dismissal laws as a main reason not to hire staff, it also found that there was a high degree of ignorance and confusion about the operation of the laws, leading CPA Australia to issue the following statement:

"*Spurred on by anecdotal stories rather than fact, more than half of small business believe they cannot terminate the services of an employee, even if found guilty of theft or if the business was failing.*

CPA Australia's Business Policy Adviser Judy Hartcher says the perceptions of small business are as much a barrier to generating long-term employment as the operation of the law itself.

'While there is much debate over reforms to improve the law and whether small business should or should not be exempt, little has been done to address the confusion that has reigned for a decade,' Ms Hartcher says.

'The survey findings clearly show there is an urgent need to simplify the compliance processes and introduce educational initiatives to support the understanding of the rights and obligations of small business.

'The procedural requirements of unfair dismissal legislation are complex and ill defined. Lack of clear guidelines make it difficult for small business with few in-house resources to access up-to-date, useful information.

'Any strategies to assist small business in relation to unfair dismissals should therefore first address misinformation, and improve understanding, of the complexities of the law.

'We are confident these educational initiatives will lead to better outcomes for small business, removing a major barrier to the growth of Australian small business,' she says." ("Small business still in the dark on unfair dismissals" Media Statement, 13 March 2002)

133. The CPA survey question concerning barriers to employment was open-ended; that is, respondents were required to volunteer answers, rather than choosing from a pre-determined list. Interestingly, when a list of alternatives was provided for answers to a question about the employment of casuals, a much larger proportion nominated unfair dismissal as a reason.

134. It is not surprising, in view of the type of publicity that surrounds the issue, that employers will, when prompted, give the "politically correct" response. No doubt this influenced respondents to the ACCI survey, which found more than half of its small business respondents answered in the affirmative to the question: "Has unfair dismissal legislation had any effect on employment decisions in your business during the past 12 months?" (Mark Patterson, CEO ACCI "Unfair dismissal laws are hurting jobs" *Australian Financial Review* 7 December 2001 p71)

135. The real issue is not whether or not the unfair dismissal laws inhibit employment growth, but the lack of management expertise of many small business operators. As Senator Murray put it in his minority report on the 1998 Bill:

"Many of the employee relationship problems small business have continue to be those related to owner/manager skills, training and experience in managing people."

136. British research conducted for the UK Department of Trade and Industry found that the informality of small business management and workplace practices made unfair dismissal claims more likely, according to Rowena Barrett, who teaches small business management at Monash University. In many cases, small businesses adopt a formal termination procedure only after a claim has been made against them. The British researchers found that the existence of a disciplinary procedure reduces the likely success of a claim. Barrett concludes:

"The problem lies in the employer's recruitment and retention strategies. That's where the disease is. Unfair dismissal is just a symptom.

"It's not the legislation that inhibits small business employment; it's not knowing how to get and keep the right person.

"Even the Australian Chamber of Commerce and Industry would agree that small-business people are almost as likely to point to the problem of finding the 'right' person as they are to blame unfair dismissal laws as a factor stopping them from recruiting.

"Recourse to unfair dismissal provisions is an outcome of the larger problem of ineffective recruitment, selection and retention strategies in small and large firms." A*ustralian Financial Review* 11 December 2001, pp40-41)

PROCESS ISSUES ADDRESSED LAST YEAR

137. The CPA Australia survey shows that while there is no significant link between small business employment and unfair dismissal legislation, there is a perception that the laws are complex and that the process is cumbersome and open to exploitation by lawyers and other agents.

138. While there is no evidence to support these perceptions, a number of amendments were made to the Act with the passage of the *Workplace Relations Amendment (Termination of Employment) Bill 2000.* The key changes effected by the passage of the Bill are:

(i) where, at the conciliation stage, it has been indicated by the Commission that the applicant has no reasonable prospect of success at arbitration, the application must be dismissed;

(ii) an application can be dismissed if the applicant fails to appear after being given reasonable notice and an opportunity to be heard;

(iii) costs are able to be awarded against an applicant who commences a proceeding when it should have been reasonably apparent that it had no reasonable prospect of success or where proceedings were continued unreasonably;

(iv) a prohibition on advisers encouraging applicants to make or pursue claims where they were, or should have been, aware that there was no reasonable prospect of success, with fines for breach of up to $10,000 for a body corporate and $2000 for an individual;

(v) lawyers and other representatives must disclose whether or not they have a costs arrangement or contingency fee agreement ("no win, no pay") with the applicant;

(vi) in determining whether a termination was unfair, the Commission must consider the degree to which the size of the employer's business would be likely to impact on the procedures followed;

(vii) a three month qualifying period of employment before an employee is eligible to make an application for unfair dismissal, with provision for the period to be amended or removed by written notice or extended, provided the extended period is reasonable.

139. These amendments add up to quite substantial change to the Act, affecting the eligibility of employees to make applications, the ability of the Commission to dismiss applications, the practices of legal representatives and, most significantly, a requirement that the Commission take into account the size of the employer's business.

140. The amendments took effect in August 2001. Insufficient time has elapsed to allow for a proper evaluation of their effect, particularly for small business.

141. The ACTU submits that it is completely inappropriate to be considering this Bill before any review of the effect of the 2001 amendments has been carried out.

UNCERTAINTY AND BIAS

142. The ACTU is totally opposed to the 2002 Bill and urges the Committee that it recommend that it not be supported in the Senate.

143. Although the 2002 Bill is opposed in its entirety, the ACTU is specifically concerned about the unfairness of the proposed process.

144. Proposed subsection 170CE(5C) provides that, when determining whether or not an employer employs less than 20 people, casuals are not counted, with the exception of casuals who had been engaged on a regular and systematic basis for a sequence of periods of employment of at least 12 months.

145. Whether or not casuals meet that definition will sometimes be contentious, with employers having a real interest in minimising the number of employees to be counted for the purpose of determining whether the application is valid.

146. Large contracting companies, such as function caterers, could be exempt in relation to dismissal of their permanent core staff, even though they might employ hundreds of casual staff on an irregular and short-term basis.

147. In spite of the significance of the issue, proposed subsection 170CEB(2) provides for the Commission to have the ability to make an order that the application is not valid without holding a hearing. In deciding whether or not to hold a hearing, the only factor which the Commission is required to take into account is the cost that would be caused to the employer's business by requiring him or her to attend a hearing.

148. To further demonstrate the degree of the bias against employees, proposed subsection 170JD(3A) removes the right to apply for amendment or revocation of an order about termination of employment by an employer in small business because of a change in circumstances, while proposed subsection 170JF(2) removes the right of an appeal against such an order to a Full Bench of the Commission.

149. Apart from the issues related to litigation, it might also be expected that employers would deliberately structure their employment arrangements to ensure that they had fewer than 20 employees in the categories counted for the purpose of the unfair dismissal legislation, with the rest deliberately employed on a casual basis and in a manner which would ensure that they would not be counted.

WORKPLACE RELATIONS AMENDMENT (FAIR TERMINATION) BILL 2002

BACKGROUND

150. The Fair Termination Bill proposes to restore the exemption from the unfair dismissal laws of casuals employed for a short period in the same terms as was provided for in Regulations 30B(1)(d) and (3); that is, a casual was excluded from making an exemption unless he or she had been engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months and had, or but for the decision of the employer to terminate the employee's employment, would have had a reasonable expectation of continuing employment by the employer.

151. The Fair Termination Bill has been introduced in response to the Federal Court decision in *Hamzy* that the relevant regulations were invalid because they were not authorised by section 170CC of the Act, which authorises the exclusion, *inter alia,* of "employees engaged on a casual basis for a short period". [s170CC(1)(c)]

152. The Court found the regulations to be invalid because the definition of "short period" went well beyond the meaning of the term.

"The effect of reg 30B may be illustrated by reference to two hypothetical cases. First, suppose a person has worked on a casual basis for a particular employer for ten years; frequently, but on an irregular employment pattern. Despite the ten year period of service, reg 30B(3) would take that employee to be 'a casual employee engaged for a short period'. Second, assume a casual employee has worked, even regularly and systematically, for a particular employer for many years but learned, shortly before the termination of his or her employment, that the employer's financial position had so deteriorated that it was doubtful the employer would long continue in business. That employee would be unable to fulfil the criterion in para (b) and would therefore be deemed to be engaged for a short period.

"These examples demonstrate that reg 30B(1), as drafted, goes beyond the regulation-making power conferred on the Governor-General by reason of s170CC(1)(c) of the Act. The problem is that the Governor-General, being empowered to make regulations concerned with the length of the period of employment, has made regulations that impose criteria that have nothing to do with length of employment." (paras 50-51)

AUSTALIA'S INTERNATIONAL OBLIGATIONS

153. The exclusion provided for in paragraph 170CC(1)(c) of the Act is derived from Article 2, paragraph 2(c) of ILO Convention No. 158 on Termination of Employment, which provides for the exclusion of workers engaged on a casual basis for a short period.

154. While the Convention does not define "short period", the Committee of Experts on the Application of Conventions and Recommendations has considered relevant issues in its 1995 General Survey, which states:

"Workers engaged on a casual basis for a short period may also be excluded. Such workers are sometimes treated in the same way as those engaged under a contract for a specified period or a specified task. In some cases, these contracts are concluded to meet the temporary needs of the enterprise; sometimes legislation specifies that these must be activities other than normal activities and sets an upper limit on their duration. In Peru, for example, a casual contract, which is one of the types of temporary contracts, is defined as a contract concluded to meet temporary needs that are distinct from the normal activity of the workplace." (para 44)

155. It is clear from this paragraph that the Committee of Experts sees short-term casual work as primarily temporary and short term.

156. The ACTU submits that 12 months is far too long a period to be reasonably characterised as "short-term" and notes that the Federal Court in *Hamzy* held:

"We do not find it necessary to determine whether a period of 12 months may reasonably be regarded as a 'short period' of casual employment, either generally or in relation to any particular type of employment." (para 45)

CASUALS, EMPLOYMENT AND UNFAIR DISMISSAL

157. In his Second Reading Speech, the Minister claimed that without an exemption, employers might be reluctant to hire casuals, and continued:

"This could have affected their ability to do business and could have left those seeking casual work, such as working parents, without a job."

158. As with the debate about the proposed small business exemption, the Government is making assertions about the links between employment and unfair dismissal laws which are not backed by evidence.

159. This issue was considered in *Hamzy,* where the Court rejected evidence from Professor Wooden about the effect of removing the casual exclusion on casual employment.

'In para 69 of his affidavit, Professor Wooden stated what he understood (accurately) to be the effect of the current regulations. In para 70 he said:

"In my view, the application of the unfair dismissal provisions of the Federal Workplace Relations Act 1996 to the types of casual employees excluded by regulations would be likely to have an adverse effect on job creation in Australia. In particular, I consider that it would be considerably more difficult for more vulnerable classes of potential employees, such as early school leavers, to find work and to gain the ability to progress to other positions within the workforce."

Professor Wooden did not offer any empirical evidence to support his view. He was unable to do so. In cross-examination Professor Wooden said "there certainly hasn't been any direct research on the effects of introducing unfair dismissal laws".

Professor Wooden's view was an entirely theoretical construct. He said in his affidavit:

"The question may well be asked as to what would happen if the unfair dismissal laws were to apply to the types of casual employees excluded by the regulations. The answer essentially is that there would be fewer jobs, especially for early school leavers, unemployed people and persons seeking to re-enter the workforce after a period of absence. Firms value the flexibility afforded by casual employment. In particular, they value the ability to vary working hours quickly and sever employment relationships at short notice. Extending the reach of unfair dismissal laws to casual employees would effectively remove one of these flexibilities. That is, employers would no longer have the same flexibility to vary employment numbers in line with variations in demand for their product. Further, employers would have to spend more time, money and effort in deciding who they hire. If they hire someone who is a poor fit with their business, it will now be much more difficult and costly to remove that person."

Professor Wooden conceded "many employers do not use this flexibility", "as is reflected in the large proportion of casuals working regular hours in apparently long-term jobs". However, he argued that "just because a firm does not use the flexibility that casual employment potentially affords does not mean it does not value it".

Professor Wooden suggested flexibility was especially important to small business enterprises, which had relatively higher casual densities. However, he did not offer any evidence, either statistical or anecdotal, to support his belief about the importance of flexibility to small business. This is particularly disappointing in the light of a table set out in Professor Wooden's affidavit in reply, in which he set out the current job duration, expressed in mean years, of employees aged 15 to 69 years as at April-June 2000. The table showed the position in respect of permanent and casual employees in each of 17 industries. The mean figure for casual employees ranges from 1.6 years (in the construction and the accommodation, cafes and restaurant industries) to 4.9 years (in education).' (paras 59-63)

160. The CPA Australia survey found that 30 per cent of small businesses chose unfair dismissal from a list of reasons for employing casuals. It should be noted that respondents were able to choose more than one alternative, and that reducing costs was chosen by 51 per cent, compliance by 31 per cent, variable work patterns, etc by 60 per cent, and employee preference by 31 per cent.

161. The policy issue which this raises is the desirability of encouraging casual employment by removing from this mode the benefits which accrue to full-time and part-time workers.

162. The composition of the casual workforce has changed dramatically in recent years, with the male proportion increasing from 26 per cent to 45 per cent from 1984 to 1998. Male casuals averaged 29.1 hours of work per week, compared to 18.4 hours for women. (ABS *Labour Force, Australia* Cat. No. 6203.0) Employers are using casual employment as a means of avoiding the obligations which would otherwise apply, an approach which would be further encouraged should the Fair Termination Bill become law.

163. This has been increasingly recognised by governments and the Commission. Unpaid parental leave has been extended to casuals in two states and by the Commission to federal award employees. (*Parental Leave for Eligible Casual Employees Test Case* Print PR904631, 31 May 2001) Both the South Australian and the Federal Commissions have varied awards to provide a right for regular casuals employed over a set period of time to elect to become full-time or part-time. [*Clerks (South Australia) Award Casual Provisions Appeal Case* File No. 263 of 2000, 5 March 2001; *Re Metal, Engineering and Associated Industries Award 1998 - Part 1* Print PR901028, 29 December 2000]

164. If the Government's policy is to encourage the growth of casual employment it should say so, but the ACTU does not expect that this would win a great deal of community support.

12 MONTHS EXCLUSION AND FAIRNESS

165. The exclusion of casuals with less than 12 months service means the exclusion of most casuals. In November 1998, 58.5 per cent of casuals had more than 12 months service with their current employer, with 20.8 per cent having more than five years and 9.8 per cent more than ten years. (ABS *Career Experience* Cat. No. 6254.0) Adding the requirements for regular and systematic employment, together with a reasonable expectation of this continuing, means that an even greater proportion of casuals would be excluded by the Fair Termination Bill.

166. Most state parliaments have not been convinced to exclude casuals with less than 12 months service from unfair dismissal laws. In NSW and South Australia, the exclusion period is six months, while no exclusion operates in Tasmania or Western Australia.

FILING FEE

167. The ACTU is opposed to the proposed indexing of the filing fee, as well as to legislating for it as a permanent provision. In practice, fees such as this operate as a barrier to access to justice for employees, particularly those who are in a weak financial position.

168. The ACTU cannot see any fairness in legislation excluding employees from making applications simply on the basis of ability to pay.

CONCLUSION

169. The ACTU submits that the Fair Termination Bill should be amended to provide that casuals are able to make applications in relation to unfair dismissal after three months regular and systematic employment, in line with the provision that applies to all other employees.

WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTED ACTION) BILL 2002

BACKGROUND

170. The Secret Ballots 2002 Bill contains a number of changes from its 2000 predecessor of the same name. However, the ACTU submits that the changes do not, in practice, make the proposed requirements materially less cumbersome or restrictive.

171. The process for obtaining and implementing an order for a secret ballot set out in the Bill adds additional time-consuming complexity to the taking of protected industrial action, reflected in the approximately 35 pages which would be added to the Act if the Bill was to be passed. The ACTU submits that the process would be of such complexity that it would nullify any practical right to take protected action.

172. Following the failure of the 2000 Bill to receive sufficient support to ensure passage through the Senate, the Government submitted an outline of new proposals, largely reflected in the 2002 Bill, to the ILO's Freedom of Association Branch. In a letter to the Department dated 9 October 2000, the Chief of the Branch wrote:

"As requested, I am able to confirm that the 'elements underpinning possible Australian legislation on pre-industrial action secret ballots', which you submitted to us on 29 September 2000, do not, standing alone, appear to contravene existing ILO principles and standards on freedom of association. The supervisory bodies have accepted secret ballots as a pre-requisite to taking strike action, on the condition that the procedures, the quorum and the majority required are not such that in practice the exercise of the right to strike becomes very difficult.

"As we discussed during your visit, any legislation that is finally adopted on compulsory strike ballots will need to be considered in the context of the industrial relations legislation as a whole, in particular all the legislative requirements in order to call a lawful strike, to ensure that the cumulative effect of such legislation, by virtue of its complexity and extent, is not such as to make it very difficult from a practical point of view to declare a legal strike, or to declare a strike in a timely manner. Our opinion concerning the pre-strike ballots must also be viewed in the light of the comments of the Committee of Experts concerning the legislation regulating strikes in Australia, in particular the concerns expressed regarding the restrictions on the subject-manner of strikes, the prohibition of sympathy action, and the restrictions extending beyond essential services."

173. If the Government were to claim ILO endorsement of its scheme it would be a level of hypocrisy which would be unbelievable if it was not consistent with its general pattern of behaviour. The Government will not ask the ILO to examine the 2002 Secret Ballots Bill "in the context of the industrial relations legislation as a whole", while it continues to ignore its previous findings and observations on the right to strike. Showing complete contempt for these findings, the Government has introduced the Genuine Bargaining Bill, which further restricts the right to strike.

THE RATIONALE FOR SECRET BALLOTS

174. The ACTU supports the right of union members to vote on whether or not to take industrial action, and believes such votes are generally taken. It should be noted that a number of unions routinely use secret ballots prior to taking industrial action. No evidence has been adduced showing that unionists are being forced or required to take industrial action against their will, or without their consent. The fact that in many disputes not all union members participate, is evidence of the lack of coercion, which would, in any event, be unlawful.

175. The ACTU notes that secret pre-strike ballots are available when requested by employees under section 136 of the Act.

176. It is also possible under section 135 for the Commission to order that a secret ballot be conducted if it considers that this would be helpful in resolving a dispute, if industrial action is pending, or to ascertain whether an agreement has been genuinely made.

177. Although there is no specific provision for an application for a secret ballot to be made by an employer party to the dispute, another affected party or the Minister, there is no bar on any of these persons making submissions to the Commission that a ballot should be ordered.

178. In the Ministerial Discussion Paper *Pre-industrial action secret ballots* published in August 1998, the authors found that very few secret ballots had been ordered by the Commission, and that where these had occurred they had generally been to ascertain employees' attitudes to particular issues, rather than their views in relation to industrial action. The report concludes:

"*The Commission appears to be using ballots strategically to progress dispute resolution, particularly where the parties have reached a stand-off in negotiations."* (p3)

179. There is no evidence in the Discussion Paper of the Commission refusing applications by employers, or anybody else, for ballots to be conducted in relation to the question of taking industrial action.

180. Western Australia has legislation for compulsory secret pre-strike ballots, although its repeal is currently before the WA Parliament. There had not been one application for a ballot from 1 January 1998, when the legislation came

into effect. This is in spite of applications being able to be made by an employer or employer organisation, as well as by a union or union member. The Minister also has the power to issue a certificate that a ballot would be in the public interest, whereupon the Commission was required to order it to be held. The Ministerial Discussion Paper notes, in relation to WA:

"There have already been a number of apparent breaches of the Act." (p15)

181. The ACTU submits that existing provisions are generally unutilised, not because they are difficult to access, but because in the face of an actual dispute, parties and other affected persons have not taken the view that a ballot would be effective in preventing industrial action or resolving the dispute.

182. It is interesting to note that the Bill proposes to remove the Commission's discretion under section 135(2B) to order a secret ballot in the case of unprotected action; this is part of a general thrust by the Government to create a legislative framework in which legal action is the only possible response by employers to unprotected industrial action, rather than encouraging the use of Commission processes to resolve the dispute which has given rise to the industrial action.

183. In this context, the Government's proposals for a system of compulsory secret ballots cannot be seen as anything other than an attempt to further restrict the ability of Australian unionists to take protected industrial action, bearing in mind that this right is already more restricted than in most other developed countries. The incidence of industrial action in falling in Australia, demonstrating that there is no industrial crisis that requires action.

184. The Government's refusal to consider secret ballot requirements to call off a strike is conclusive evidence that this proposal has nothing to do with democratic functioning, and everything to do with restricting the right to strike. Further evidence is provided by the lack of any support for proposals such as compulsory secret postal shareholder votes on issues such as takeovers, or whether or not a company should lock-out its employees.

THE 2002 CHANGES

185. While the 2002 Bill contains some improvements over its predecessors, these are relatively minor, and do not change the essentially restrictive and intrusive nature of the scheme.

Ballot applications

186. Proposed subsection 170NBB(1A) provides that an application for a ballot may be made up to 30 days before the expiry of an existing agreement. Under the 2000 Bill the only requirement was that an application be made during a bargaining period.

187. This change, if anything, imposes an additional restriction, as the 2000 Bill allowed applications to be made at any time after a bargaining period had commenced. It reflects the new provision in proposed subsection 170NBDD that industrial action authorised by a ballot must commence within 30 days of the declaration of the ballot results.

Applications to be dealt with quickly

188. Proposed section 170NBCA provides that the Commission must act as quickly as is practicable and must, as far as is reasonably practicable, deal with a ballot application in two days. This has been changed from four days in the 2000 Bill.

189. The ACTU submits that as the provision is merely aspirational, the reduction in time is of no material significance. The Commission's ability to deal with applications quickly can be quite outside its control.

190. Employers and others wishing to delay the action will be able to argue a number of issues before the Commission, such as the validity of the bargaining period and whether or not the union has genuinely tried to reach agreement. In addition, procedural issues, such as who should conduct the ballot, the roll and the timetable are all issues for debate which can be used for delay.

191. The new proposal allowing the Commission to decline to consider a submission if satisfied that it is vexatious, frivolous, misconceived or lacking in substance [s170NBCB(2)] is unlikely to prevent delays, given that the Commission is bound by the rules of natural justice, and would need to listen to a submission before being able to make the relevant determination.

192. Similarly, the proposed privative clause [s170NBGBA], while limiting appeals against ballot orders, will not affect the length of the initial proceedings.

193. The Commission is also limited by its own resources and by the need to deal with competing priorities created by applications under other provisions of the Act which are seen by parties as requiring urgent attention.

194. To an uncertain period for the hearing and determination of an application for a ballot order must be added a period of around three weeks for the Electoral Commission or private ballot agent (which may include the union) to conduct a postal ballot, which is the favoured method in the Bill. This is followed by three days notice to the employer before the action can take place, with the Commission able to extend the period to a maximum of seven days if there are "exceptional circumstances". [s170NBCI(5)]

195. It should be noted that the UK pre-strike ballot provisions do not require an application to a tribunal for approval of the proposed ballot. In the UK, if a union believes that a ballot is appropriate, it simply organises one in accordance with a Department of Trade and Industry Code of Practice.

The ballot question

196. Proposed subsection 170NBDA requires the question or questions to be put to the relevant employees to include the nature of the proposed industrial action. Under the 2000 Bill the ballot question was required to include the precise nature and form of the proposed action, the day or days on which it is proposed to take place and its duration.

197. "The nature of the intended action" is the term used in subsection 170MO(5) of the Act in relation to notifying the employer of the intended taking of protected action. It is a principle of statutory interpretation that words and phrases used on more than one occasion in a statutory instrument have the same meaning.

198. In considering the meaning of the notification requirement in subsection 170MO(5), a Full Court of the Federal Court has held that a certain degree of specificity is required.

"*Parliament did not indicate what degree of specificity it intended by the term "nature of the intended action". To interpret this term, on the one extreme, as requiring no more than an indication of industrial action, as argued by NUW, would be significantly to devalue s170MO(5); the notice would provide little information. To interpret it, on the other extreme, as requiring precise details of every future act or omission would be to impose on the giver of a notice an obligation almost impossible to fulfil. 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. An unduly demanding interpretation of s170MO(5) would seriously compromise the scheme of Division 8 of Part VIB of the Act; it would be difficult for a party to an industrial dispute to obtain the protection contemplated by the Division…….*

"*We think s170MO(5) was designed to ensure that industrial disputants who are to become affected by protected action, in relation to which their usual legal rights are significantly diminished, are at least able to take appropriate defensive action. For example, an employer may operate a sophisticated item of equipment that will be damaged if precipitately shut down. If warned in advance of a ban that might affect the continued operation of that plant, the employer might choose a controlled shut down during the period of the notice. More commonly, perhaps, an employer might use the notice time to communicate with suppliers and customers, and thereby reduce the consequences for them of the notified industrial action. Very often, the recipient of the notice will respond in a way that has a legal dimension. For example, a union might react to a notice by an employer of intent to lockout some employees by giving notice that all employees will strike indefinitely as from the commencement of the lockout. Similarly, an employer might respond*

to an employees' notice of bans by giving notice of a lockout of some or all employees.

"It will be apparent we think it necessary, and sufficient, for parties to describe the intended action in ordinary industrial English; for example, 'an indefinite strike of all employees', 'a lockout of all employees employed in the AB fabrication plant', 'a ban on overtime', 'a ban on the use of the MN equipment', 'rolling stoppages throughout the mine', 'a ban on the servicing of delivery vehicles'." Davids Distribution Pty Ltd v National Union of Workers [1999] FCA 1108 paras 84, 87-88

199. In light of this, the ACTU believes that a new ballot would be required should the union and its members wish to change the type of action being taken.

200. The proposed requirement that the ballot question specify the nature of the action should be contrasted with the equivalent provisions of UK law, to which the Minister referred approvingly in his Second Reading Speech.

201. The requirements of the system are set out in a Code of Practice *Industrial Action Ballots and Notice to Employers* issued by the Secretary of State for Trade and Industry pursuant to section 203 of the *Trade Union and Labour Relations (Consolidation) Act* 1992, with the authority of Parliament. Under the UK system of pre-strike ballots, the ballot paper must include one of these two questions:

Are you prepared to take part in a strike?

Are you prepared to take part in industrial action short of a strike?

Both questions can be asked and, if both are carried, this allows for a later decision to be made about the form of action to be taken.

202. It should be noted that there is no requirement for the ballot question to provide any more detail about the type of action. The ballot operates as a general authority to one or more persons, who may be union officials or workplace delegates, to make a call for industrial action at some time after the ballot. The first call for industrial action must be made not less than four weeks from the date of the ballot, and this can be increased to eight weeks with the consent of the employer.

203. Once a ballot agreeing to industrial action has been carried, the union may decide to authorise or endorse industrial action, which may be continuous or discontinuous. Employers must be given seven days notice of the date or dates on which action is intended to commence.

204. While the UK system is unacceptably complex and technical (and is not, incidentally, supported by UK unions, as alleged by the Minister) and does lead to a great deal of litigation, it is not as rigid or restrictive as that proposed in the Bill.

205. In particular, unions are not tied to a type of action specified in the ballot paper, but are able to make decisions about action subsequent to a ballot, on an ongoing basis, so long as notice is given to the employer.

Quorum

206. Proposed section 170NBDD sets the quorum for the vote as 40 per cent of voters on the roll, although this can be reduced further by the Commission in "exceptional circumstances". [s170NBCI(4)] The quorum under the 2000 Bill was 50 per cent, with no ability for reduction.

207. The ACTU submits that it is inequitable to require a quorum, and asks the Committee to note that no quorum for voters is required under the UK legislation. (*Pre-industrial action secret ballots* Ministerial Discussion Paper, August 1998, p17)

208. The ILO Freedom of Association Committee has held that while:

> *"the obligation to observe a certain quorum.....may be acceptable.....The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises".* [Freedom of Association Digest, 4th (revised) edition, paras 507&510]

209. The June 1999 report of the non-Government members of the Public Administration Committee of the Western Australian Legislative Council into the *Labour Relations Legislation Amendment Act* 1997, which, until its expected repeal, provides for compulsory secret ballots, says in relation to quorum requirements in a voluntary system of voting:

> "*....each failure to exercise the capacity to vote has the effect of an arbitrary determination of that failure to vote as a 'no' vote.*
>
> *"The right to abstain from a voluntary vote is a democratic right which is widely practiced in Australian society.....*
>
> *"The broad purpose of section 97C of the Act is to provide a mechanism to determine whether union members wish to engage in a form of industrial action or not. It is inevitable that in most cases some members will want to strike, others will not, and others will not want to make a decision either way. A ballot should be able to reflect that range of opinions, and our administrative processes should facilitate a fair expression of those views."* (p47)

210. Although the Western Australian legislation to which these comments are addressed required a higher quorum than the Bill, the principles are the same. There is simply no justification to require more than a simple majority of valid votes cast, the system which applies, not only in the UK system of pre-strike ballots, but in the election of UK politicians, and the President of the United States. If the quorum requirements in the Bill were to operate in the US, there

would not have been a validly elected President.

211. Two examples should be considered, both involving workplaces of 100 employees. In the first, 39 employees in the ballot vote, all in favour of strike action. In the second, 40 employees vote, 21 of them in favour of strike action. In the first example, strike action would not be authorised, while in the second it would, even though it would appear that there was substantially greater active support for the strike in the first example.

Conduct of the ballot

212. The 2002 Bill provides for a union to be permitted to run the ballot if it has an "independent adviser", subject to Commission approval and authorisation of the adviser. The Commission must not name a person as the authorised independent adviser for the ballot unless satisfied that the person is sufficiently independent of the union and is capable of giving the union advice and recommendations directed towards ensuring that the ballot will be fair and democratic. [s170NBEA(2)] Under the 2000 Bill, the ballot was required to be run by the Australian Electoral Commission or a person approved by the Registrar and entered on a register of ballot agents.

213. While this change is a minor improvement, it does not deal with the inevitable delays which will result from the process required under the proposed legislation.

214. The 2002 Bill allows the Commission to agree to an attendance vote rather than a postal ballot, if the former is more "efficient and expeditious", although the presumption in favour of the latter is retained. [ss170NBCI(2)-(3)]

215. It is difficult to see how the aspiration expressed in subsection 170NBCC(3) for ballot results being available to the parties within 10 days after the ballot order is made could possibly be adhered to if a postal ballot is required by the Commission.

Cost of the ballot

216. The 2000 Bill provided for the Commonwealth to reimburse the union for 80 per cent of costs "reasonably and genuinely incurred" in the holding of the ballot. The 2002 Bill provides for the 80 per cent to be paid directly to the ballot agent by the Commonwealth.

217. The ACTU submits that this difference is not significant. The long-standing principle in Australia is that where the Government determines who shall run a ballot, it pays the costs, as is the case with union elections. It is completely unfair to impose requirements on private organisations to have ballots run by a government body, and then require the organisation to pay the costs. In this case, although the Commission may approve a ballot agent other than the Australian Electoral Commission, this is clearly the exception. Even if the AEC is not used, the alternative must be approved by the Commission

pursuant to legislation.

218. The Western Australian regulations provide that costs associated with the ballot are reimbursed by the Registrar to the entity conducting the ballot.

219. The 2002 Bill, on the other hand, proposes that unions would be reimbursed only 80 per cent of costs, which the ACTU believes is totally unacceptable.

CONCLUSION

220. The ACTU submits that the 2002 Secret Ballots Bill is intended to, and will have the effect of restricting the right to take industrial action even further than is currently the case.

221. The ACTU urges the Committee to recommend that the Senate not pass the Bill.

WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2002

INTRODUCTION

222. The ACTU is strongly opposed to the passage of the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 ("the 2002 Bill"). Although the 2002 Bill is expressed somewhat more simply than its 2001 predecessor, its effect would be the same.

223. The 2002 Bill's title is misleading, presumably intentionally so. Prohibition of bargaining or service fees has nothing to do with compulsory union fees, which are, and will remain, unlawful. In addition, although it purports to further freedom of association, this is not the case.

224. The 2002 Bill represents a further initiative by the Coalition Government to inhibit the operation of the collective bargaining system. By enacting section 89A of the Act the Government substantially restricted the scope of matters which the Commission could include in awards.

225. The 2002 Bill continues on the same track, in that it operates to prevent employers and unions and/or employees reaching agreement about a matter which is clearly related to the bargaining process.

226. In his minority report resulting from the Committee's inquiry into the 2001 Bill, Senator Murray stated:

"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 back of employer organisations, and employees on the backs of unions.

"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.

"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.

"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.

"Coercive attempts to force union membership are clearly illegal under the WRA and should remain so." (p21)

227. The ACTU submits that there is no difference between the 2002 Bill and the earlier Bill, in relation to which these comments of Senator Murray were addressed, to make them any less relevant or persuasive.

THE PROVISIONS OF THE 2002 BILL

228. The 2002 Bill has two key elements:

(i) it voids bargaining fees provisions in agreements and requires them to be removed; and

(ii) it prohibits associations from demanding a fee, as well as discrimination based on non-payment of a fee and coercion of a person to pay a fee.

229. The ACTU submits that the issue of the validity of bargaining fee provisions in agreements should be left to the Court to decide at this point in time.

230. In the event that the Court finds that such provisions are not found to be capable of being validly included in agreements, the ACTU submits that legislation should be introduced permitting the inclusion of bargaining fee clauses in agreements, and providing for their enforcement.

231. The provisions of the 2002 Bill dealing with discrimination and coercion are completely unnecessary.

232. No evidence has been produced of any coercion or discrimination resulting from non-payment of a bargaining fee. The ideological nature of the Bill can be seen in this focus on a non-existent problem.

233. As Senator Murray has pointed out, if the 2002 Bill is intended to deal with compulsory unionism, this is already comprehensively prohibited under the Act.

BACKGROUND TO THE BILL

234. The impetus for the original version of the 2001 Bill was the decision by McIntyre VP in relation to an application by the Employment Advocate to remove bargaining fee clauses from a number of certified agreements in the electrical contracting industry on the grounds that they breach the freedom of association provisions in Part XA of the Act. (Print PR900919, 9 February 2001)

235. The clause in question requires the employer to advise all employees prior to commencing work for the company that a "Bargaining Agent's Fee" of 1% of gross income or $500 per annum, whichever is the greater, is payable to the ETU each year. The clause then requires the employee to pay the fee to the union.

236. The Commission found that the clause did not breach Part XA because it would not lead to conduct by the employer which would discriminate against employees because they are not, or do not propose to become, a member of an industrial association, the relevant "prohibited reason" in subsection 298L(1)(b).

237. At the time when the 2001 Bill was considered by this Committee, an appeal had been lodged against the decision of McIntyre VP, but had not yet been determined.

238. The decision of the Full Bench of the Commission, dismissing the appeal, was handed down on 12 October 2001. (Print PR910205) In that decision, the Commission held that the clause in the agreement did not discriminate between unionists and non-unionists in its terms, as the fee applied to all employees. The Commission concluded by distinguishing the clause from any discriminatory conduct which might arise in its enforcement, and which would be unlawful

"It is true that if the CEPU were to enforce the bargaining agent's fee only against persons who did not join the union, such conduct would, if carried out by an employer, be in breach of Part XA. But to conclude therefore that clause 14.3 requires or permits etc such conduct by an employer would we think be an error. The position is analogous to one that might arise if an employer terminated the employment of a union delegate, pursuant to a general provision for termination of employment in a certified agreement, because of the delegate's union affiliation. Although in such a case the adverse activity would be permitted by the provision in the agreement, it could not be said that the provision required or permitted, etc. conduct in breach of Part XA." (para 36)

239. The Commission did not deal with the issue of whether or not the bargaining fee clause was a matter which pertains to the relations between an employer and its employees, although the Full Bench had raised this as a threshold issue in earlier proceedings, in which it had asked parties to make submissions on the issue. (Print PR905312) In the event, all parties submitted that the clause

should be treated as valid for the purposes of the appeal.

240. Subsequent to that decision, the issue of a similar bargaining fee clause was considered by the Federal Court in *Electrolux Home Products Pty Ltd v Australian Workers' Union.* [2001] FCA 1600 (14 November 2001) In that case, Merkel J considered whether or not industrial action taken in support of a claim for a certified agreement containing, *inter alia,* a bargaining fee, was protected.

241. Merkel J held that the bargaining fee claim did not pertain to the employer-employee relationship on the basis that it required the employer to act as the union's agent in requiring non-union members to employ the union as their bargaining agent, and concluded:

> *"The agency so created is for the benefit of the union, rather than for the benefit of the employee upon whom the contractual liability is to be involuntarily imposed. The resulting involuntary 'bargaining' agency is, as a matter of substance, if not form, a 'no free ride for non-unionists' claim, rather than one by which the union is undertaking its traditional role of representing the interests of union members in respect of the terms of employment of employees.*(para 41)

242. The Court also ruled against the validity of the part of the claim requiring the employer to provide a direct debit facility to employees for payment of the fee, following the principles established by the High Court in relation to payroll deduction of union dues.

243. Although unnecessary to the question the Court was required to determine, Merkel J also held that an agreement containing a "substantive, discrete and significant matter that does not pertain to the employment relationship" cannot be certified and, if certified, means that the certified agreement in its entirety is invalid.

244. In addition to this determination, Merkel J expressed some doubt as to whether the bargaining fee was lawful under the freedom of association provisions of the Act.

245. An appeal has been lodged against the decision in *Electrolux* to the Full Court of the Federal Court. Meanwhile, a number of decisions in the Commission have raised relevant issues in relation to whether provisions which do not pertain to the employment relationship can be included in agreements.

246. In *Re Atlas Steels Metals Distribution Certified Agreement 2001-2003*, Ives DP held that he was bound by *Electrolux* not to certify an agreement which contained a provision for the deduction of union dues. (Print PR914084, 7 February 2002) That decision is under appeal to a Full Bench.

247. In *Re Knox City Council Enterprise Agreement (No. 4), 2001*, Kaufman SDP held that he was not bound by *Electrolux* in relation to whether or not an agreement could be certified if it contained a provision that did not pertain to

the employment relationship, as Merkel J's findings on that issue did not form part of the *ratio* of the decision. Kaufman SDP held that an agreement could be certified in those circumstances.

248. These two decisions are relevant, because their final determination will resolve whether or not, under the current law, an agreement containing a bargaining fee clause (assuming it does not pertain to the employment relationship) can be certified.

249. However, the issue of whether or not the bargaining fee does pertain to the employment relationship is also not finally determined, both as a result of the appeal in *Electrolux,* and a decision of Munro J in *Webforge - and - Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*, (Print PR914378, 18 February 2002) in which he held that a clause of a proposed agreement providing for payroll deductions, including of union fees, did pertain to the employment relationship. This decision is also relevant to the question of the validity of bargaining fee provisions in agreements.

250. The ACTU submits that there are a number of very important legal issues before the Commission and the Court. While these are relevant to the validity and enforceability of bargaining fee provisions, they are not confined to that issue. For example, should it be finally determined that provision for payroll deduction of union fees can be validly included in a certified agreement, will the Government introduce legislation to overturn that decision? For this reason, the 2002 Bill should be not proceeded with, at least until the final results of the litigation is known.

BARGAINING FEES IN AN INTERNATIONAL CONTEXT

251. Bargaining fees paid by employees covered by collective agreements who are not union members are provided for in the law of a number of countries, including the United States, Canada, Switzerland, Israel and South Africa.

252. The principle in these countries is that where a union is recognised by the employer for the purposes of collective bargaining and negotiates an agreement covering all employees, fairness demands that non-members, or "free riders", be required to pay a fee to the union, either at the same level as union dues or at a lower rate set to approximate the real costs to the union for representing the employees as part of the collective.

253. In the US, Canada and South Africa, a union must have majority membership amongst employees in order to gain employer recognition for the purposes of collective bargaining.

254. In each of these countries, freedom of association, including the right to join or not to join a union, is strongly valued. Bargaining fees are not seen as contrary to that principle, but as serving to maintain another principle, that of "fair share" or avoiding of free-loading.

255. In the US, for instance, the standard clause adopted by the Federal Court of Appeals states:

No employee shall be required to become or remain a member of the union as a condition of employment.

Each employee shall have the right to freely join or decline to join the union.

Each union member shall have the right to freely retain or discontinue his membership.

Employees who decline to join the union may be required to pay a reduced service fee equivalent to his or her proportionate share of union expenditures that are necessary to support solely representational activities in dealing with the employer on labor-management issues. [G Orr *Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders* (2001) 14 AJLL 1, 15]

256. In South Africa, unions can charge an agency fee which must be no more than normal union dues and must be paid into a special account and not used for political purposes or any purpose that "does not advance or protect the socio-economic interests of employees". (Orr, p8)

257. In Switzerland, collective agreements are permitted to require the payment of "solidarity contributions" by non-union employees. (*Freedom of Association and Collective Bargaining: General Survey of the reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949* ILO, Geneva, 1994 , p46, n103)

258. In Israel, the fee charged is less than that paid by union members. [AV Jose (ed) *Organised Labour in the 21st Century* International Institute for Labour Studies, Geneva, 2002. p183]

259. In Canada, the "Rand formula" (named after Justice Rand who developed it in a 1946 decision for the Canadian public service) provides that the compulsory bargaining fee is presumptively that of the usual union dues. (*General Survey* p7)

COLLECTIVE BARGAINING PRINCIPLES

260. The ILO views bargaining fees as a valid issue for collective bargaining, with its Freedom of Association Committee holding:

"When legislation admits trade union security clauses such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements." [*Freedom of Association*: *Digest of decisions*

and principles of the Freedom of Association Committee of the Governing Body of the ILO Fourth (revised) edition, Geneva 1996, para 325]

261. The ILO's *General Survey* explicitly states that bargaining fee provisions, when negotiated between unions and employers, are consistent with freedom of association principles:

"(Clauses in collective agreements) *may also require all workers, whether or not they are members of trade unions, to pay union dues, or contributions, without making union membership a condition of employment (agency shop) or oblige the employer, in accordance with the principle of preferential treatment, to give preference to unionized workers in respect of recruitment and other matters. These clauses are compatible with the Convention provided, however, that they are the result of free negotiation between workers' organizations and employers."*

262. The ILO has held that:

"In keeping with the principles of freedom of association, it should be possible for collective agreements to provide for a system for the collection of union dues, without interference by the authorities." (*Digest* para 808)

263. The Canadian Supreme Court has held, in a case concerning a non-union member's challenge to an agency fee requirement in his collective agreement, that the "Rand formula" does not breach the Canadian Charter of Rights and Freedoms, which guarantees freedom of association. While the Court differed on whether this right included a right not to associate, the principle of payment of agency fees was upheld unanimously. La Forest J accepted the existence of a right not to associate, but held that this cannot be absolute:

"Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation state will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common good." [*Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4^{th}) 545, 626]

264. In distinguishing between payment for bargaining services received and financing the general "political" activities of the union, La Forest J held:

"To bring the discussion down to earth somewhat, I would suggest that a worker like Lavigne, would have no chance of succeeding if his objection to his association with the union was the extent to which it addresses itself to the matters, the terms and conditions of employment for members of his bargaining unit, with respect to which he is 'naturally' associated with his fellow employees. Few would think he should not be required to pay for the services the union renders him in this context. Significantly, he does not object to these matters. With respect to these, the union is simply viewed as a reasonable vehicle by which the necessary interconnectedness of Livigne and his fellow workers is expressed.

"When, however, the union purports to express itself in respect to matters reflecting aspects of Livigne's identity and membership in the community that go beyond his bargaining unit, and its immediate concerns, his claim to the protection of the Charter cannot as easily be dismissed."

265. The US Supreme Court adopted similar reasoning in a case concerning a claim by teachers subject to an agency shop agreement that it violated their constitutional right to freedom of expression. [*Abood v Detroit Board of Education* 431 US 209 (1977)]

266. A Conservative Government, in the context of attempting to abolish closed shops or compulsory unionism, introduced a provision for agency shops in UK legislation in 1971 which could apply where members of a registered union voted for this to apply. Subsection 6(1) of the *Industrial Relations Act* provided:

When an agency shop agreement is for the time being in force, a worker to whom the agreement applies shall not have the right, as between himself and the employer to whom the agreement applies, to refuse to be a member of the trade union with which the agreement was made unless he agrees to pay appropriate contributions to the trade union in lieu of membership of it.

267. The provision was used very little, as it applied only to registered unions, and the Trades Union Congress opposed the attempt by the legislation to make registration compulsory. The agency shop provision was repealed by the incoming Labour Government in 1974, which legislated to, once again, permit closed shops. [C Hanson et al *The Closed Shop: A Comparative Study in Public Policy and Trade Union Security in Britain, the USA and West Germany* Gower, Aldershot, 1982 pp32-33]

268. The current requirement in the Act that certified agreements include only matters "pertaining to the relationship between employers and employees" is inconsistent with the principle of free collective bargaining. It should be noted that the High Court has held that deduction of union dues is not a matter pertaining to the employment relationship, and so cannot be validly included in an award or an agreement. The Court also expressed the view that such deductions could be considered "industrial" for the purposes of the constitutional conciliation and arbitration power; the jurisdictional restriction results from the limitation imposed by the Act, not the Constitution. [*Re Alcan; ex parte FIMEE* (1994) 181 CLR 96]

269. Internationally, it is accepted that bargaining fee provisions in collective agreements are not inconsistent with principles of freedom of association.

A FAIR SHARE

270. The Minister argues that employees should not be liable to pay a fee that they have not, individually, agreed to prior to the service being provided.

271. This might carry some weight if employees were in a position to reject the service, with the consequence of being excluded from the benefits of a collective agreement negotiated by a union. However, this is not the case.

272. It should be noted that around 90% of agreements certified under the Act are made with unions. [*Agreement making in Australia under the Workplace Relations Act* DEWRSB, 2000, p25]

273. The link between unions and working conditions is made clearly by the Australian Taxation Office which, in its ruling on the deductibility of union dues, states:

> ***"****Therefore, where the principal activities of the association are negotiating and administering employment agreements, and/or providing professional development services, the subscription is an allowable deduction, provided that the member is earning assessable income from the relevant trade, business or profession."* [*Income tax: subscriptions, joining fees, levies and contributions paid to associations by individuals* [Taxation Ruling TR 2000/7 para 6]
>
> *"Most trade unions and associations of employees have as their principal objective the gaining of higher salaries and improved working conditions for members. As such, there is the required connection with the derivation of assessable income where the subscription is relevant to the member's current employment, unless the employment results in the receipt of exempt income."* (para 29)

274. The Act prohibits employers from, *inter alia,* injuring an employee in his or her employment or altering the position of an employee to the employee's prejudice for reasons including that the employee is not, or does not propose to become, a member of an industrial association. [ss298K(1)(b), 298K(1)(c), 298L(1)(b)]

275. In addition, section 170MDA of the Act provides that one or more employees whose employment is not subject to a certified agreement may request their employer to vary the agreement so that their employment is subject to the agreement and to seek Commission approval for the variation. The employer must agree to the request if their employment would have been subject to the agreement if they were or were not members of a particular organisation of employees.

276. Apart from the specific prohibitions in section 298K, and the penalties attached to a breach, the effect of section 170MDA is that it is not possible in practice for a union to make an agreement with an employer only on behalf of its own members, as non-members would be able to obtain an extension of the

agreement to cover their employment.

277. In the US, unions have a duty of "fair representation" to non-members in workplaces where it is recognised for the purpose of collective bargaining. The concept of agency shops as an answer to the problem of "free-riders" was adopted in the US as a result of the duty to non-members, an analogous situation to Australia where unions must also represent all workers in collective bargaining where they are involved as a party. [Hanson, p116]

278. This issue is one which has attracted comment from academics:

"An argument very frequently used to support the closed shop is the 'free-rider' argument; that is, that non-unionists should not be allowed to benefit from union activities without contributing to the financial and organizational burden. McCarthy referred to this as the 'common obligation argument', and Kahn-Freund explained it in biblical terms as meaning that 'he who does not sow, neither shall he reap'. The significance of this argument is perhaps underlined by some research findings which suggest that persons who would normally combine in association to pursue common goals will not necessarily do so if non-members are allowed to share the fruits of the association's efforts without the burden of subscription. A solution to this might be to allow workers to 'buy' their non-membership, or to put it another way, to pay for the union services from which they benefit without actually making them join." [F Prondzynski *Freedom of Association and Industrial Relations* Mansell, London, 1987 p121]

279. The Minister has made it clear that he expects unions to represent non-members, as in his criticism of unions for failing to insert a redundancy pay provision into the award covering One.Tel employees.

280. Enterprise bargaining is very resource intensive for unions. The Australian Manufacturing Workers' Union, for example, is party to 1600 certified agreements expiring between 1 April 2000 and 31 August 2001 and which required re-negotiation. The Construction, Forestry, Mining and Energy Union estimates that in the 15 months to March 2001 approximately 3800 agreements had been concluded.

281. In each case, the union must provide personnel to attend the workplace, often on many occasions, in order to assist employees in negotiations, as well as in the drawing up of the agreement and its processing through the certification process in the Commission.

282. The obligation which unions have to provide these services to members means that non-members employed in workplaces alongside members also benefit. Stresses can be caused at workplaces because of the perceived injustice of non-union members benefiting from the contributions and endeavours of unions and their members.

283. Unions have been genuinely surprised at the strength of members' positive reaction to the decision of McIntyre VP in relation to the electrical contracting

agreements, and the enthusiasm at which the concept of bargaining fees has been embraced at the workplace as an issue for collective bargaining.

284. With a Government strongly wedded to the principle of user-pays and individual responsibility, union members can see no reason why they should be forced to subsidise benefits for non-unionists.

285. Fairness requires that employees who benefit from a service which cannot be denied to them by a union should pay their fair share, rather than be subsidised by fellow employees who are members of the union.

INTERFERENCE IN COLLECTIVE BARGAINING

286. The Government has repeatedly committed itself to the principle that employment issues should be negotiated and agreed between employers, their employees and the latter's representatives at the enterprise level.

287. This principle is reflected in paragraph (b) of the principal Object of the Act:

ensuring 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;

288. In each case where a collective agreement requires payment of a bargaining fee, this is subject to a vote of a valid majority of all employees, union members and non-members, whose employment will be subject to the agreement. This means that it is impossible for a bargaining fee provision to be included in an agreement unless a majority of employees, whether union members or not, support it, making the process not dissimilar to that in North America where unions require majority support in order to negotiate a collective agreement.

289. The fact that a majority of employees support the certification of an agreement does not mean, necessarily, that all relevant employees support the agreement. Provisions for increased workplace flexibility, particularly in relation to extended or increased hours of work, can be very controversial and attract significant opposition. However, the Act provides that if a majority of the employees accept the agreement, subject to the no-disadvantage test and the other requirements, it must be certified.

290. There is no justification for the Government to interfere in the content of agreements which are negotiated and agreed by the employer and a majority of the employees concerned.

CONCLUSION

291. For the reasons stated above, the ACTU submits that the Committee should recommend that the Bill not be passed by the Senate.

292. In his minority report on the 2001 Bill, Senator Murray concluded by saying:

"The Democrats will consider the Bill further, if it is resurrected following the forthcoming Federal election. We remain open to the possibility that bargaining fees or fee-for-service provisions become part of workplace law, within the principles of freedom of association." (p22)

293. The ACTU supports this position, and would welcome discussion of legislation specifically providing for the inclusion of bargaining fee provisions in collective agreements; that is, subject to the agreement of the employer and a majority if the employees (including non-unionists) whose employment would be covered by the agreement.