AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION

Submission to the Inquiry by the

Senate Employment, Workplace Relations, Small Business and Education Legislation Committee

Into the

Workplace Relations Amendment (Fair Dismissal) Bill 2002
Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002
Workplace Relations Amendment (Compulsory Union Fees) Bill 2002
Workplace Relations Amendment (Genuine Bargaining) Bill 2002

April, 2002

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PART A – OVERVIEW

1. The Senate Committee has before it four Bills to amend the Workplace Relations Act 1996.

2. One of the Bills is to amend the unfair dismissal provisions in the Act, whilst the other three Bills amend the enterprise bargaining provisions in the Act.

3. In general terms:

   - The **Workplace Relations Amendment (Fair Dismissal) Bill 2002** removes the current legal entitlement of employees of employers employing less than 20 employees from pursuing a claim in the Industrial Relations Commission for unfair dismissal.

   - The **Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002** makes it mandatory for those seeking to engage in protected industrial action to hold a secret ballot to approve the taking of that protected action.

   - The **Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002** proscribes the inclusion of bargaining services fees in certified agreements.

   - The **Workplace Relations Amendment (Genuine Bargaining) Bill 2002** proscribes pattern bargaining, allows the Commission to put conditions on bargaining periods where they replace an earlier terminated bargaining period, and allows the Commission to order a "cooling off" period in circumstances where protected action is occurring.

4. A common theme running through each of the Bills is that their title is a misrepresentation of the content and practical application of the Bills. In a number of respects the Bills are the antitheses of their title.

5. A second common theme is that the Bills enhance the power and prerogative of employers at the expense of workers and unions. They represent a zero sum game – the employers are the true beneficiaries of these Bills, workers and unions on the other hand incur a significant cost, either in being denied the right to pursue unfair dismissal or incurring substantial fetters on the capacity to negotiate an enterprise agreement.

   In this regard it is noted that the provisions relating to individual Australian Workplace Agreements (AWA's) remain untouched.

6. A third common theme is the absence of any evidence that the Bills are either necessary or desirable and the existence of evidence that they are neither necessary nor desirable and are indeed contrary to all notions of a fair and reasonable industrial relations system.

7. A fourth common theme is that each of the Bills contravene Australia's obligations to already ratified Conventions of the International Labour Organisation (ILO).

8. A fifth common theme is the stark contrast between the content of these Bills and the government's much heralded claims about allowing the parties to freely negotiate in the workplace.

   These Bills represent a further incremental addition to the manipulation of the industrial relations system by the government. Through these Bills the Government is endeavouring to both set the agenda for enterprise bargaining and distort the rules of the game in favour of a particular outcome.

   That particular outcome is two fold; to provide outcomes that favour the employers' position and at every step along the way to undermine the capacity of unions to properly and effectively represent and pursue an effective strategy to meet the wishes of their members.

9. This submission addresses each of the Bills in turn and in doing so elaborates on the specific contents of each of them. The submission also discusses the reasons why the RTBU says these Bills contain the vices stated in this overview, amongst other things.

10. The RTBU urges the Senate to reject each of these Bills in their entirety.

PART B

WORKPLACE RELATIONS AMENDMENT (FAIR DISMISSAL) BILL 2002

1. The Effect of the Bill

1.1 The Bill adds another category to the type or class of employees that have no entitlement to pursue a claim for unfair dismissal in the Australian Industrial Relations Commission (the "Commission") and in doing so to seek an order for reinstatement and/or compensation.

1.1.1 The category or class of employees are employees who work for an employer who employs less than 20 employees.

1.2 The Bill enables the Commission to determine whether or not an employee is (was) employed by an employer of less than 20 employees by a process of written submissions and therefore in the absence of the holding of a formal hearing.

1.2.1 When determining whether or not to convene a formal hearing, the Commission is obliged to consider the cost to the employer of attending a hearing.

1.3 The Bill specifically excludes any right of appeal against a decision of the Commission about whether an employee falls into the category in point 1.1.1 above and therefore can or cannot pursue an unfair dismissal claim.

2. The Government's Grounds for the Bill

2.1 The Minister's Second Reading Speech contains a number of statements in support of the Bill.

2.1.1 The Unfair Dismissal laws, "need to be made fairer for both employers and employees".

2.1.2 The Unfair Dismissal laws, "should be improved where they still prevent jobs being created".

2.1.3 The, "current unfair dismissal provisions …….. continue to deter many small businesses from employing more staff". In this regard it is claimed that if, "one in twenty small business employers in Australia took on an additional employee because of a changed legislative framework for unfair dismissal, then an extra 53,000 jobs would result".

2.1.4 The Bill fulfils an election policy, which will in turn "address the views of many small businesses who, when surveyed, have indicated that they will be more likely to recruit new employees if they were exempted from current unfair dismissal laws".

2.1.5 The Bill will "free small business employers from the unnecessary and often costly burden of having to attend or secure representation at Commission hearings…… which can clearly be determined, on the

basis of documents provided to the Commission, to be outside its jurisdiction because of the small business exemption".

3. A Critique of the Bill

By way of introduction it is observed that whilst the rail, tram and bus industry has historically been characterised by a small number of large employers, structural change in the last 15 years has radically altered that characteristic.

An indication of the extent of that change through the entry of new players into the industry can be discerned from the fact that in recent years the RTBU has served logs of claims on some 70 employers.

Most of these employers would employ more than 20 employees but there are a number who don't. For example, companies such as Austrac Ltd, 3801 Ltd, Hotham Valley Railway, Northern Rivers Railway and the Pemberton Tramway Co employ less than 20 employees.

The RTBU recently had reason to pursue an unfair dismissal claim following the termination of a member employed by Austrac a Junee based rail operator; a claim that would not have been possible if this Bill was legislation. In this matter the employee was the RTBU Delegate and the claim was resolved to the satisfaction of the RTBU.

The RTBU expects the number of small operators in the industry to increase over time. This will be brought about by small companies contracting to the larger operators and an increasing number of traditionally small "tourist" rail operators moving from a weekend pursuit by rail enthusiasts to a commercially based operation.

3.1 The Government's Abuse of Language

3.1.1 The title of the Bill, referring as it does to "Fair Dismissal" represents a perverse irony in that if enacted its effect will be to introduce the precise opposite to the title of the Bill.

3.1.2 The notion of fairness is a relative one and one that involves a balancing act between competing interests.

The impact of the Bill is to deny absolutely and to remove totally the current right of a particular class of employees to pursue an unfair dismissal claim. This denial is based purely and simply on the basis that an employee is employed by an employer who employs less than 20 employees.

On the other hand, the employer is given total freedom to terminate an employee whenever, however and for whatever reason the employer so chooses. The concept of natural justice can be ignored. The employer is protected from applying standards of common decency or understanding and applying appropriate human resource policies.

On any measurement of “fairness”, this Bill fails the test miserably.

3.1.3 The Bill sets up a zero sum game – the employer is given absolute rights, the employee is denied any rights whatsoever.

3.1.4 In this regard, the title of the Bill is grossly misleading. And, as will be seen this is a consistent theme in each of the Bills being considered by the Committee.

It is the view of the RTBU that the title was deliberately chosen to hide its true effect, and to create a perception that is the opposite of reality. This has been done for political reasons; to make the Bill more palatable; to give the impression that it is fair and reasonable; and to counter opposition. However, no amount of crude word smithing can hide its real impact. As the saying goes – “if it looks like a duck and quacks like a duck then it is safe to say it is a duck”.

3.2 The Fallacy of the “53,000 Jobs”

3.2.1 The Government clearly regards the impact on “job creation” that it asserts this Bill will have, as its major attraction and selling point.

However, on this point, even the Government acknowledges it is contingent. The Second Reading Speech notes that the 53,000 jobs will be created only in the event that one in twenty employers employed an “additional” employee. Logically this means that not only does the employer ‘replace’ the employee whose employment was terminated but employs an additional employee. In other words, for each employee terminated, one employer in twenty will employ two new employees.

The government provides absolutely no evidence in support of this contention other than an employer inspired survey about what small business employers might do if given carte blanche on termination of employees. Nowhere does the Government address the substantive issue of how this Bill, if enacted, would lead to creation of additional jobs.

3.2.2 The absence of support for the Government’s contention on job creation is significant.

3.2.2(a) A study released by CPA Australia on 13 March 2002 found that:

- Only 5% of small businesses nominated unfair dismissals as the main impediment to hiring new staff
- Only 3% of small businesses nominated changes to unfair dismissal laws as something that would encourage them to employ more staff. (1)

3.2.2(b) A survey of 100 small businesses conducted in Treasurer Costello’s electorate showed that only one in seven rated the

unfair dismissal provisions highly. (2)

3.2.2(c) The Business Review Weekly, a pro-business magazine has commented that, “There is no evidence that 50,000 jobs will be created, an ACCI survey on the issue notwithstanding”. (3).

3.2.2(d) In the same article, the Business Review Weekly quotes Monash University Senior Lecturer in Management, Rowena Barrett as stating. “It’s not the [unfair dismissal] legislation that inhibits small business employment; it is not knowing how to get and keep the right person”.(4).

3.2.2(e) The Centre for Professional Development has stated, ”There appears to be little evidence that 53,000 people would find jobs if the unfair dismissal laws were changed or that small business was holding back from hiring people because of the legislation”.(5).

3.2.2(f) The 1995 Australian Workplace Industrial Relations Survey showed that less than 1% of small business gave unfair dismissal laws as a reason for not employing people. (6).

3.2.2(g) When for a period of time in Queensland, similar legislation was enacted, it had no positive effect on employment.(7).

3.2.2(h) In Hamzy v Tricon International Restaurants trading as KFC, a full court of the Federal Court concluded, “In the absence of any evidence about the matter, it seems to us that the suggestion of a relationship between unfair dismissal laws and unemployment is unproven”.(8).

3.2.2(i) A survey conducted for the ACTU in Minister Abbott’s electorate found that no business referred to unfair dismissal legislation as a reason for not employing people. (9).

3.2.3 It isn’t that the Government hasn’t had the time or the opportunity to find any evidence. The Government has been pursuing the exemption of small business from unfair dismissal provisions since at least 1999. The Government has all the resources of the Minister’s Department (and others) to perform the necessary work. And it’s not that the Government has been unaware of the challenge regarding evidence and the wide ranging sources of that challenge on the point of evidence.

Despite this position and despite the fact that its contention on a relationship between unemployment and unfair dismissal legislation on small business has been challenged, it has not been able to produce an iota of evidence to prove the relationship.

This reason for this is that no evidence exists.

3.3 Exaggerating the Application of the Current Unfair Dismissal Legislation to Small Business

3.3.1 In presenting this Bill, the Government gives the impression that small business is somehow inundated by unfair dismissal claims in the Australian Industrial Relations Commission.

3.3.2 This is far from the reality. As the Centre for Professional Development points out; “According to ABS and DEWRSB figures less than 0.3% of small business are faced with unfair dismissal claims annually, and of the 2800 Australian small businesses that have claims lodged against the, 90% are settled by conciliation”.(10).

3.3.3 The figures in point 3.3.2 say nothing about the validity of the claims that are filed in the Commission.

The Workplace Relations Act 1996 provides that where claims are pursued vexatiously or without reasonable course, a claim for costs can be pursued (Section 170CJ). In 2000-01 of the 8,109 unfair dismissal applications filed in the Commission only 68 led to Section 170CJ claims representing 0.8 of 1% of all claims. (11). This figure does not show how many of those claims were successful. Clearly such claims are negligible. In this regard given that the Government contends that the cost of unfair dismissal claims on small business is high, surely in the event of a vexatious or without reasonable cause claim, an employer would be anxious to recoup its costs through an order of the Commission.

3.4 Allowing Small Business to Avoid its Ethical, Moral and Business Responsibilities

3.4.1 In the ACCI Survey, “What Small Business Wants Survey November 2001 it cites financial vulnerability, no specialist HR departments, and a lack of “legislative savvy” as valid reasons for exemption from unfair dismissal legislation. (12).

3.4.2 The Australian Industry Group (AIG) Chief Executive Mr. Bob Herbert has been quoted as saying: “Small business are not geared up like big business with a personnel department and that means the steps for procedural fairness for dismissing someone are a disincentive to employ someone full time”. (13).

3.4.3 In this context the employers appear to be saying that small business should be exempt because it is not reasonable to expect them to understand the details of relevant laws or they somehow lack the resources required to follow relevant legislation. It also suggests that their size is sufficient justification for being excused from legal obligations incumbent on everybody else. In other words, in these circumstances it is fair to be unfair.

This contention ignores the issue of why an employer should be excluded from applying common decency and ordinary common sense

that people are expected to apply in their everyday dealings with other people.

Further, extending this line of reasoning does it mean that a small business without an established finance and administration department should be exempt from taxation law, occupational health and safety laws, corporations law, administrative law and other relevant laws on that account.

3.5 What about the Employees of Small Business

3.5.1 In this Bill and leading up to its introduction into Parliament, the Government has focused solely on employers in small business.

3.5.2 The Government has ignored the position of employees of employers in small business.

3.5.3 As already noted, an employee of an employer in a small business faces the prospect of being terminated at the whim of the employer and with no right of redress.

In those circumstances the employee is forced to look for a new job with the spectre of being "sacked" hanging over his/her head and in cases where the sacking could have been vindictive or capricious or in any event, unfair, unreasonable and unjust and in the absence of any notion of "a fair go all round".

It should be noted here that employees in small business are already amongst the most vulnerable, with low wages and occupying precarious jobs.

3.5.4 The Government's position on the current unfair dismissal legislation implies that the cost of pursuing an unfair dismissal claim is borne disproportionately by the employer.

The employee however is probably less likely to know the legislative requirements than the employer. If the employee is not a member of a union there is a need to pay for legal advice. This cost is being borne at a time when, unlike the employer, the employee is not earning an income (which in itself brings other pressures). The employee will at the same time be faced with the requirement to find an alternative source of income.

The Government has chosen to ignore this situation and indeed to make it worse for the employee by denying him/her the right to be treated in a just manner.

3.6 Circumventing the Bill

3.6.1 The Bill, if it becomes legislation provides a means for its circumvention.

3.6.2 This has been recognised by the Centre for Professional Development where it says, “Small business can circumvent the IR legislation by managing their human capital inventories through casual employment”.(14).

3.6.3 Once an employer reaches the magical number of 19 employees, the use of “casuals” can become the operative type of employment. Sufficient care can be taken to ensure these “casuals” do not fall into the category of “regular and systematic”.

In the event an unfair dismissal claim follows in those circumstances the employer is at an advantage. The Commission is not required to convene a hearing (the employer will claim its too costly and unnecessary), the employer has access to all the relevant information, the employee is unlikely to keep information on who was employed and when and how, and ultimately the employee is denied a right of appeal if he/she feels aggrieved by and decision.

3.7 The Bill and ILO Standards

3.7.1 The Bill clearly and unequivocally breaches Australias commitment and obligations to the ILO Convention 158 – Convention concerning termination of employment at the initiative of the Employer.

3.7.2 The Bill, in this regard, is inconsistent with the exclusions contained in the Convention (article 2), the justification for termination (article 4) and the process of appeal against termination (division B) amongst others.

4. Summary and Conclusion

4.1 This Bill, if it becomes legislation will have the precise opposite effect to that stated in the title of the Bill.

It will mean that an employee in a small business could be terminated for whatever reason the employer so determines and in a manner determined by the employer and in circumstances where the employee is denied any right of redress.

4.2 The Bill removes and existing legal entitlement to a particular class of employee and denies them a legal entitlement that is available to other classes of employee.

The Bill creates a second class category of employee in this regard and it is the very employees who are already generally low paid and in precarious forms of employment. It is divisive and denies them a, “fair go”.

4.3 The basis of the Bill is deeply flawed. There is no logic or evidence whatsoever to support a contention that this Bill will assist in the creation of jobs.

4.4 The Bill removes any employer obligation to moral and ethical considerations when dealing with a termination of employment.

4.5 The Bill breaches Australias obligations to ILO Convention 158.

5. The RTBU urges the Senate to reject the Bill in its entirety.

Endnotes:

(1) McClelland R., Small Business Survey Shows Up Abbott's Failings., **MEDIA RELEASE** 13 March 2002.

(2) Murphy K., Coalition Targets Dismissal Laws., **AUSTRALIAN FINANCIAL REVIEW**, 20 February 2002, p.6.

(3) Way N., Another Dismissal Issue Haunts Labor**., BUSINESS REVIEW WEEEKLY** 24 January 2002, p. 37.

(4) Loc. Cit.

(5) Centre for Professional Development., Unfair Dismissal Laws Boomerang Back, **WORKPLACE INTELLIGENCE**, Centre for Professional Development, March 2002, p.7.

(6) Loc. Cit. See also **ACTU Unfair Dismissal Fact Sheet**

(7) Murray A., The Motives For Unfair Sacking Law., **AUSTRALIAN FINANCIAL REVIEW** 13 March 2002, p.55.

(8) [2002] FCA 1589, dated 16 November 2001.

(9) Murphy K. and Davis M., IR War Resumes In Parliament., **AUSTRALIAN FINANCIAL REVIEW**, 14 February 2002, p.5.

(10) Centre for Professional Development, op. cit. p.6

(11) Australian Industrial Relations Commission., **ANNUAL REPORT 2000-01**., Commonwealth of Australia, 2001, p.7,table 1.

(12) Centre for Professional Development, op.cit., p.6.

(13) Quoted in Switzer P., Easing of Law "Would Create Jobs", **THE AUSTRALIAN,** 14 February 2002, p.23.

(14) Centre for Professional Development, op.cit.p.6.

PART C

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

1. The Effect of the Bill

1.1 The Bill provides for the mandatory conduct of a secret ballot to determine whether protected industrial action can be taken during a bargaining period established to negotiate a certified agreement.

1.2 The Bill establishes a process for the approval by the Australian Industrial Relations Commission of the conduct of a ballot.

1.3 The Bill contains provisions going to the conduct of the ballot including any complaints about the outcome of a ballot and the cost of a ballot.

2. The Government's Grounds for the Bill

2.1 The Minister's Second Reading Speech contains a number of statements of support for the Bill.

2.1.1 That the Bill will "enhance freedom of choice for workers".
2.1.2 That the Bill will "strengthen the accountability of unions to their members".
2.1.3 That a secret ballot is "a fair, effective and simple process".
2.1.4 That secret ballots apply in other countries.
2.1.5 That ILO officials have "indicated" that measures in the Bill "would be consistent with ILO standards".

3. A Critique of the Government's Bill

3.1 If At First You Do Not Succeed……

3.1.1 This is the third occasion that the Government has attempted to enact this type of legislation. The last two occasions were in 1999 and 2000.

On both occasions the legislation was rejected by the Senate.

3.1.2 On this occasion the Government contends in the second Reading Speech that it "has addressed the reasonable concerns raised about previous Bills".

The irony here is that at no point during the debate on the previous Bills did the Government give any view other than stating that what it was attempting to do was eminently reasonable.

This belated concession should be seen for what it is and treated accordingly.

3.1.3 The Bill merely tinkers at the edges of the previous Bills whilst leaving them essentially unchanged.

The grounds for rejection by the Senate on those previous occasions are equally as valid on this occasion.

3.2 The Current Workplace Relations Act 1996

3.2.1 The current Workplace Relations Act 1996 already provides for the holding of secret ballots – see Sections 135 and 136.

3.2.2 The Australian Industrial Relations Commission has also held that pursuant to its powers under Sections 111(1), 111(2) and 170NA it can direct that a ballot be held to ascertain the views of the employees on, whether the employees prefer a collective certified agreement or individual Australian Workplace Agreements(1).

3.2.3 The current Act thus already contains scope for secret ballots. In doing so, it vests the Commission with a discretion to so order depending upon the circumstances. This the Commission is best placed to do as it will be aware of the relevant circumstances and dynamics in any particular situation and can weigh up the merits or otherwise of holding such a ballot. That the Commission has chosen to do so on few occasions is hardly ground for criticism or for the changes proposed by the Government. It simply shows that the Commission has not been satisfied that a ballot would add anything to the resolution of the particular matter. That in turn shows that the Commission was confident that the Union was properly reflecting the position of its members.

3.2.4 This Bill effectively emasculates Sections 135 and 136 of the Workplace Relations Act 1996. In doing so it diminishes the capacity of the Commission to act appropriately in a dispute situation where it concludes a ballot would be reasonable. To that end, the bill is a further attempt to undermine the ability of the Commission to prevent and settle industrial disputes.

3.3 The Bill and "Freedom of Choice"

3.3.1 In the Second Reading Speech the Government contends that the Bill will "enhance freedom of choice for workers".

3.3.2 However, when it comes to workers exercising freedom of choice in determining the appropriate process to decide on whether to take protected industrial action, the Government's Bill provides no choice at all.

Historically, and under the current legislative regime, workers have utilised a variety of decision making processes that have evolved to suit the nature and idiosyncrasies of the workplace and the democratic decision making processes of the union. Those include the mass meeting, meetings at shiftbreaks, meetings outside of working hours – all of which allow an open forum for the debating and resolution of relevant issues. These meetings conclude with a vote which can be conducted by use of the voices, a show of hands or a ballot. An inherent part of the decision is the process of collective deliberation

prior to the actual decision. This process also encourages worker participation in the making of decisions and maximises that participation to a level far higher than the 40% vote required by the Bill.

The Bill destroys this traditional and most effective means of democratic decision making by separating the decision from the deliberative process, by removing the workers' control over how the decision is made, and by introducing a bureaucratic, time consuming and complex system to determine what they need to do and how they will do it.

Choice is no longer the prerogative of the workers who will make the decision. The Government by legislative fiat will remove that choice and compel them to do it the Government's way and only that way.

This Bill should also be seen in a context where the Act is based on a decentralised approach where bargaining occurs at periodic intervals, usually each 3 years, and the potential for a protected action is limited. Yet despite these restrictions the Government wants to add even more.

3.3.3 The democratic structure and operation of trade unions in Australia is manifest. The process of registration of Unions under the Workplace Relations Act 1996 sets high standards for unions to meet. Division 1 of Part IX of the Act sets criteria for registration and Division 2 of Part sets democratic requirements on the nature and content of union rules. Rule changes are subject to scrutiny by the industrial Registrar and explicit provisions regulate the election of union officers.

The capacity of workers to respond to unreasonable demands or actions of employers is already heavily circumscribed by the Workplace Relations Act. The operation of Section 127, the limitation on award matters in Section 89A and the limitations on the Commissions powers and discretion are testimony to that point.

Further, in addition to Sections 135 and 136 of the Act, if an employer believes that a Union is not genuinely trying to reach an agreement it can make application to have the bargaining period suspended or terminated (Section 170MW).

In these circumstances there is no basis for legislation that seeks to further frustrate the ability of workers to negotiate an enterprise agreement.

3.3.4 The RTBU is not aware nor has the Government or employers made us aware of any evidence of complaint from workers about the credibility of Union decision making processes.

The reality is that for the Government and employers it is not the decision making process that is the "problem" but rather the decision itself. This is so where the decision is to engage in protected industrial action.

This is based on their incapacity to believe or understand or accept that

workers could legitimately vote to take industrial action, that they must have been conned by "outside activists", namely union officials; being precisely the people, workers have democratically elected to represent them.

As Rawson shows in a historical context:

"In 1928 the Bruce-Page (non-Labor) government introduced a wide-ranging provision under which any ten members by petition could require that a vote on any matter, including the election of officials, be taken by secret ballot. However, it does not seem ever to have been used for this purpose. More attention at the time was given to the possible use of this provision to conduct ballots on whether strikes should be called or should continue, though even this section proved to be inoperative. Spokesmen for the government did not conceal that their principal motive was not to establish a fairer or a more democratic system of union government as an end in itself but to secure the defeat of more militant and more radical union leaders. They believed, like many who followed them, that radical union administrations were supported by active minorities and acquiesced in by apathetic majorities. If the latter could be encouraged to vote and protected from the scorn or hostility of the radical minority, then perhaps unions would become less militant". (2)

This attitude or belief is complemented by the views of the Business Council of Australia to the Senate Committee on the 2000 Bill:

"The Business Council submission also points out that strikes are seen as votes of confidence in union leadership. There is an understandable reluctance to stay out of a strike regardless of how an employee may feel about an issue. The BCA believes that the secret ballot clause is likely to encourage employees to consider the merits of the cause of action rather than consider the more extraneous issue of whether to support the union out of feelings of "solidarity". (3)

Attitudes or beliefs based on the wearing of ideological blinkers which shun objective reality are not a basis of good legislation.

3.3.5 There is evidence that compulsory secret ballots do not prevent strikes.

3.3.5(a) The British Royal Commission on Trades Unions and Employers' Associations 1965-1968 concluded:

> "There is little justification in available evidence for the view that workers are less likely to vote for strike action than their leaders; and findings from our workshop relations survey…confirm this. Experience in the USA has been that strike ballots are overwhelmingly likely to go in favour of strike action. This is also the experience of Canada, where strike ballots are compulsory in the provinces of Alberta and British Columbia….".(4)

3.3.5(b) Industrial lawyer and academic, Professor Ron McCallum has written:

> "From Australian and overseas experience it can be concluded that strike ballots have not by themselves prevented disruptions; and further they have not shown that the active rank and file are being manipulated by the leadership. It is suggested that on such evidence, the introduction of compulsory strike ballots would not lead to a lessening of industrial stoppages…" (5).

3.3.5(c) A survey conducted by the British Trades Union Congress shows that of 1926 ballots held between June 2000 and May 2001, 91% voted in favour of industrial action in circumstances where the ballot was for action short of a strike and 81% in favour where strike action was proposed. (6)

3.3.6 In summary, the Bill, contrary to enhancing freedom of choice for workers does the exact opposite and it does so in circumstances where the freedom of workers to act in their interests is already heavily circumscribed. The true basis of this legislation is to further deny workers their democratic rights.

3.4 Frustration of Due Process

3.4.1 In addition to denying workers their right to determine their own decision making process, the Bill creates a scheme for determining the ballot which is bureaucratic, complex whilst correspondingly vague, and a recipe for delay and obfuscation.

It is clear that the scheme is designed to undermine the ability of workers to make decisions in an efficient and timely manner and is another attempt to place hurdles for workers to confront on the path of enterprise bargaining.

When combined with the fact that no corresponding hurdles are faced by the employers, it is clear that the real objective of the Bill is to further skew the bargaining structure established by the Act in favour of the employers.

3.4.2 The Bill creates an unworkable scheme as part of the enterprise bargaining structure.

3.4.2(a) There is some 17 separate clauses regulating the determination and holding of a ballot.

3.4.2(b) Even though there are some 17 separate clauses that is not the end of the matter. The Bill provides that the President of the Commission may make rules specifying matters to be included in a ballot application (Section 170 NBBA). The President may develop guidelines in relation to an appropriate timetable (Section 170NBCJ). The procedure to be followed by the

Commission is left to the Commission (Section 170NBC).

3.4.2(c) There is no timetable for the determination of a ballot. Whilst the Bill sets an objective of 10 days (Section 170NBCC), it also contains the discretionary notions of "as quickly as practicable" and "as far as is reasonably possible". (Section 170NBCA).

3.4.2(d) The Bill permits the employer to appear and make submissions (Section 170NBCB). As the employer would not see that it is in the employer's interests to be faced with industrial action, it is likely to use the proceedings to pursue that objective or to place it in a tactically superior position. There is plenty of scope in the Bill for argument that an application or the process is inconsistent with the Bill's provisions.

3.4.3 The Bill puts workers in a straightjacket in respect of the negotiating process. The capacity to adapt to the changing position of the employer is heavily circumscribed and their capacity to use their own bargaining advantages is diminished. They cannot act or react quickly and appropriately.

Once the decision has been made they are locked in to an "all or nothing" situation. If they do not proceed within 30 days and in doing so act in a manner consistent with what was determined some weeks before (regardless of any change in circumstances) they have to commence the ballot process all over again (Section 170NBCP).

In these circumstances workers would feel compelled to proceed with their original decision given the alternatives available and the unfettered capacity of the employer to manipulate its bargaining position.

3.4.4 The Bill prescribes that a least 40% of employees eligible to vote must vote in order for the ballot to be legitimate (Section 170NBDD).

This provision is simply an attempt to "raise the bar" on the attainment of a legitimate vote in favour of industrial action.

It is not a parameter that applies in any other ballot procedures in this country and if applied in other countries whose general elections are not covered by compulsory voting eg UK, USA, you could not get a government of President.

The generally recognised situation in ballots is that the outcome is based on a simple majority of the persons who voted.

The last time a floor was put under the proportion of employees who must vote was in the 1970's when the Coalition Government legislated for the "50-50 rule" in union amalgamations. This meant that at least 50% of members of the amalgamating unions had to vote as a prerequisite to the ballot result being recognised as valid. It was clear at the time that the reason for this prerequisite was to act as a barrier to amalgamations. (7).

It is obvious that the same approach is being used here.

3.5 The Overseas Situation on Ballots

3.5.1 In the Second Reading Speech the Government refers to secret ballots being held in other countries.

3.5.2 The Government in particular makes great play of the UK situation – no doubt because the UK has a Labour Government. – even though the UK legislation was introduced by a Conservative Government.

3.5.3 This is not a new point raised by the Government. It was used in the last Bill and was seen then for what it is – a furphy.

3.5.4 A couple of points can be made, or reiterated in this regard.

3.5.4(a) It was recognised by employers that there is a vast difference between industrial relations laws in the UK and Australia. (8).

3.5.4(b) The DEWRSB acknowledged significant differences between the British secret ballot model and the model proposed by the Government (9). In this regard it should be noted that the changes in this Bill are minimal.

3.5.5 On the issue of the UK ballot system, the ACTU had the following to say in its submission on the 2000 Bill:

"The question on the ballot paper proposed in the Bill must 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. This limits the scope of the authorisation provided by a ballot in a totally unacceptable way, with the effect of restraining the ability to take protected action in practice.

The content of the ballot paper should be contrasted with the equivalent provisions of UK law. 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.

It should be noted that there is no requirement for the ballot question to provide any more detail about the type of action, nor must it include a

commencement date for the action or its proposed duration. 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 current requirement is for the first call for industrial action to be made not less than four weeks from the date of the ballot; the Blair Government has introduced legislation to increase this to eight weeks with the consent of the employer.

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 in intended to commence.

While the UK system is unacceptably complex and technical, and does lead to a great deal of litigation, it is not as rigid or restrictive as that proposed in the Bill.

In particular, unions are not tied to a type and duration 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".(10).

This quote whilst not a detailed comparison between the UK situation and the Governments proposal, shows that the differences are real and significant. Whilst there are some differences between this Bill and the Bill being referred to in the quote, in essence, nothing has changed.

3.6 The Cost of the Ballots

3.6.1 The Bill provides that the applicant for a ballot must pay 20% of the cost of the ballot (Section 170NBFA).

3.6.2 A union and its members are to incur a cost for something they did not request, did not want and is inimical to their interests. Workers have absolutely nothing to gain and plenty to lose from this Bill and to add insult to injury they're expected to incur part of the cost.

3.6.3 No where else in Government mandated ballots are the participants expected to pay for the administrative cost of the ballot.

3.6.4 There can be no other justification for this impost on workers and their Unions other than to add to the cost of pursuing an enterprise agreement.

3.7 Double Standards

3.7.1 Based on past Bills, it is clear that the employers will support this Bill.

3.7.2 The employers of course are not faced with the prospect of a secret ballot in the event that they wish to take protected industrial action.

There is no basis to conclude that they would support a ballot applying

to them but they support it in circumstances where it is only to apply to workers.

3.7.3 In proceedings before the Commission regarding the negotiation of a certified agreement between the RTBU and Serco Australia Ltd., the RTBU sought a ballot of employees to determine their attitude to the type of industrial instrument that should provide their wages and conditions. Serco Australia Ltd strongly opposed the ballot. The Commission in the end, based on the circumstances of the case ordered a ballot.(11).

The ballot was conducted by the Industrial Registry. In a ballot with a return of 57.45%, the vote in favour of a collective certified agreement was 100% - not one employee voted in favour of an AWA.

Despite the force of the ballot, Serco Australia Ltd ignored the outcome and has continued to insist that its employees sign AWA's.

This is indicative of the position of employers on the merits of secret ballots when they are the real focus of the ballot.

3.7.4 In the recent leadership ballot for parliamentary leader of the NSW Liberal Party, a high level of ambivalence on secret ballots was demonstrated. The then Deputy Leader of the parliamentary Liberal Party opposed a secret ballot on the basis that the public and colleagues had a right to know how people are going to vote.(12).

This ambivalence appears to reflect a view in the Liberal Party that the voting method should depend upon what you are trying to achieve, regardless of its merit or democratic content.

This Bill adds to that position in the Liberal Party – the sole basis of the Bill is to make life more difficult for workers and their Unions.

3.8 I.L.O. Conventions

3.8.1 The Second Reading Speech states that the ILO has "indicated" that the Bill would be consistent with its standards. The Minister does not elaborate on the form and substance of this "indication". Further the use of the term "indication" is ambiguous and hardly inspires confidence about the actual position of the ILO.

3.8.2 The Bill can in no way be regarded as conforming to ILO Conventions

3.8.2(a) ILO Convention 87 – Freedom of Association and Protection of the Right to Organise states (article 2) that workers' organisations shall have the right inter alia to organise their activities and formulate their programs free of interference from public authorities.

3.8.2(b) ILO Convention 98 – Right to Organise and Collective Bargaining states (article 1) that workers shall enjoy adequate

protections against anti-union discrimination

4. Summary and Conclusion

4.1 This Bill, by proposing the mandatory conduct of a secret ballot where protected industrial action is proposed represents a further attempt by the Government to dictate the bargaining process as it applies to unions and workers.

4.2 In addition to dictating the process to unions and workers, the Government proposes a scheme that is convoluted and complex with a high propensity for litigation. Simultaneously, it is designed to frustrate the capacity of unions and workers to advance their cause in negotiating an enterprise agreement. It diminishes worker democracy in the workplace.

4.3 As a corollary to the effect on unions and workers, it enhances the position of employers in negotiating an enterprise agreement.

4.4 Evidence from a variety of sources, together with the ballot provisions in the current Act shows conclusively that the Bill is neither necessary nor desirable.

4.5 The Bill and its contents reveal that its aim is both ideological and political on the part of the Government.

4.6 The Bill also specifically aims to increase the cost to unions and workers of engaging in enterprise bargaining.

4.7 The RTBU urges the Senate to reject the Bill in its entirety.

Endnotes:

(1) See the decision of Harrison SDP in Print PR908235, dated 28 August 2001.

(2) Rawson D., State-Controlled Union Ballots, in Ford. B. & Plowman. D., (eds) **AUSTRALIAN UNIONS : An Industrial Relations Perspective**. Macmillan, Melbourne, 1983, p.222

(3) Senate Employment, Workplace Relations, Small Business and Education Legislation Committee., **CONSIDERATION OF PROVISIONS, WORKPLACE RELATIONS AMENDMENT (SECRET BALLOTS FOR PROTECTED ACTION) BILL S000,** Commonwealth of Australia, September 2000, p.11.

(4) Royal Commission on Trade Unions and Employer Associations, 1965-68, Report., H.M.S.W., para. 428, quoted from Boulton A., Government Regulation of Trade Unions in Cole K., **POWER, CONFLICT AND CONTROL IN AUSTRALIAN TRADE UNIONS,** Pelican, Ringwood, 1982, pp. 225-226.

(5) McCallum R., The Mystique of Secret Ballots, **MONASH LAW REVIEW**, Vol. 2, 1975-76, p.175, quoted in Boulton A., Ibid. p.226.

(6) Trades Union Congress., **FOCUS ON BALLOTING AND INDUSTRIAL ACTION,** Trades Union Congress, London 2001, p.2.

(7) See for example, Creighton W.B., Ford W.J., and Mitchell R.J., **LABOUR LAW : Materials and Commentary**, Law Book Company, North Ryde, 1983, pp.701-702.

(8) Senate Committee Report 2000, op. Cit. P.39

(9) Loc. cit.

(10) ACTU Submission to the Senate Committee into Four Workplace Relations Bills, August 2000, p.p. 8-9.

(11) Print PR908235

(12) Totaro P., & Wainwright R., Face Reality, Chicka's got to go : Greiner., **SYDNEY MORNING HERALD**, 28 March 2002, p.1

PART D

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

1. The Impact of the Bill

1.1 The Bill proscribes the insertion of "bargaining services fee", in a certified agreement.

1.2 The Bill provides that an industrial association or an officer or member thereof must not demand the payment of a "bargaining services fee", from another person.

2. The Government's Grounds for the Bill

2.1 In the Second Reading Speech, the Government states the following:

2.1.1 That a "bargaining services fee", is contrary to the objective of freedom of association.

2.1.2 That a "bargaining services fee" amounts to a "compulsory union fee".

2.1.3 That a "bargaining services fee", does not constitute "user pays".

2.1.4 That the Bill will remove any current legal conjecture regarding the legal status of a "bargaining services fee".

3. A Critique of the Government's Bill

3.1 The Misleading use of Language

3.1.1 In the same vein as other Bills before the Senate Committee, this Bill is given a label which does not reflect its contents.

3.1.2 The only place in the Bill where the term "compulsory union fees" can be found is in the title. The remainder of the Bill refers to a "bargaining services fee".

3.1.3 In the Second Reading Speech the Minister moves between the two terms depending upon the subject matter.

3.1.4 There is no doubt that this interchange of terms has been deliberately chosen by the Government for tactical reasons.

3.1.4(a) The Government wants to create the impression that the Bill is about preventing "compulsory unionism" and in that regard a bargaining fee is a union membership fee.

3.1.4.(b)On the other hand the Government can't prohibit union membership fees as that would amount to legislatively proscribing unions

3.1.5 On any objective analysis a ‘bargaining services fee”, by definition is not a fee for joining a union.

3.1.5(a) The Government in fact recognises as much in the Bill. If it was a union membership fee then it would say so in the body of the Bill.

Indeed the Bill, in subsection 298B(1) makes it patently clear that it does not mean “membership dues”.

3.1.5(b) The bargaining services fee places an obligation on a non-union member to contribute to the negotiation of a certified agreement whilst remaining a non-union member

3.1.5(c) If a non-union member pays the fee, he/she does not become a union member.

3.2 Freedom of Association

3.2.1 The Government’s resort to the use of freedom of association is based on the premise that a bargaining services fee means compulsory unionism.

3.2.2 If the premise on compulsory unionism falls down then the whole foundation on which the Bill is constructed and the Bill itself falls down with it.

3.2.3 As observed in point 3.1, a bargaining services fee by definition is not and cannot be a union membership fee.

3.2.4 The Government is already aware of the operation of bargaining fees in other countries. The Senate Committee Report on the 2001 Bill made the following observation.

“1.11 In its submission, the ACTU notes that agency or bargaining fees are permitted in collective agreements by the International Labour Organisation (ILO) conventions and in other developed and democratic countries, and cited the difference between other countries and Australia on this issue”.

“1.12 It should be clearly noted that in countries such as the United States of America and Canada the legal systems have consistently upheld that bargaining fees are not inconsistent with the concept of freedom of association. Additionally, it should be remembered that in the early 1970’s a Conservative Government in the United Kingdom introduced the concept of bargaining fees into legislation an alternative to the closed shop”.

“1.13 Drawing attention to developments overseas, the ACTU notes that the ILO has ruled that bargaining fee issues do not impinge upon the principle of freedom of association. The ILO considers that it is not

mandatory to have bargaining fees, but says that it is an acceptable provision in collective agreements that are negotiated between employers and unions". (1)

As the Government has elsewhere been eager to use the UK Blair Labour Government as a support for its industrial legislation, it should be even more eager to rely on its soul mates in the UK Conservative Party. But, alas not on this occasion.

3.2.5 In the Senate Committee Report on the 2001 Bill, the Australian Democrats had the following to say:

"1.7 We see a clear distinction between the notion of compulsory unionism (which we oppose) and a contribution to the costs of bargaining, where the person paying is a direct beneficiary of that bargaining. Such payees are not joining a union, but clearly the fee should not be a substitute for a normal union fee. They are paying for a service. They are not contributing to other activities of the union, or electing to play any role in the activities, policies or other conduct of the organisation, or getting any of the other benefits of a union. They are not union members". (2)

This comment is a succinct summary of the notion of a bargaining services fee.

3.2.6 The reliance by the Government on compulsory unionism and freedom of association has no basis. It is in fact a smokescreen to make the untenable tenable and to promote a system that discourages employees from joining unions. It is sending out the message that an employee can enjoy the advantages of a union without the obligations, that they can have it both ways; that the obligations concomitant with achieving just wages and conditions can be borne by others.

3.3 The User Pays Principle

3.3.1 As the Government is an enthusiast of the user pays principle witnessed in a host of its policies – tax, education, health, social welfare etc. – it is obliged here to argue that the bargaining fee is no such thing.

3.3.2 In the Second Reading the Minister states that "User pays involves an exchange that is freely entered into by willing and property informed parties".

It is suggested here that the Government go out and put that line to the clients of the Australian banking and financial system who have had banking and financial fees forced upon them with gay abandon in recent years. There was (is) nothing free and willing about these fees. Further the fact is that people have no choice but to deal with at least one bank or financial institution and whilst some fees may vary, they exist across the board nevertheless.

On the other hand, a certified agreement is approved by the persons

bound by it. Unlike the banks and financial institutions there is an approval process and the agreement can be certified if approved by a majority of the persons to be bound by it. This includes an agreement with a bargaining fee.

The Government has also introduced user pay fees and concepts and in doing so would rely on the fact that it was elected by the people. However, unlike unions, the Government doesn't hold a separate vote on any legislation that includes such a fee.

3.3.3 In the Senate Committee Report on the 2001 Bill, The Australian Democrats had the following to say:

"1.9 To allow a fee-for-service is not at all unusual under industrial relations and bargaining regimes in other countries. In some countries it is imposed. In the United States of America, those who are part of workplaces where a majority vote to join a union, and who then benefit from rounds of bargaining to reach workplace agreements, must generally pay a fee to the union that wins the certification ballot and negotiates the agreement. Allowing workplaces to take a vote on agreements which include provision to charge such a fee, and then where the majority vote in its support, permit its collection, is not out of step with practice in other places. To repeat, it seems fair and reasonable that those who benefit also pay". (3)

Again, this is a succinct summary of the situation.

3.4 A Further Erosion of Enterprise Bargaining

3.4.1 The Bill represents a further attack by the Government of the rights of the parties in enterprise bargaining to determine the issues over which they should negotiate and the manner in which those negotiations are conducted.

3.4.2 More specifically, the Bill is an attack on what Unions can determine should be on the negotiating table. No such barriers exist for employers or non union members.

3.4.3 Once again the Australian Democrats put into a proper context the notion of a bargaining fee:

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

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

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' forgone earnings through taking protected action." (4)

3.5 A Further Attack on Union Resources

3.5.1 Negotiating an certified agreement takes time and resources. The capacity to dedicate that time and resources can influence the ability of workers to achieve a decent outcome within a reasonable time frame.

3.5.2 The Government's Bill is a further attack on the capacity of Unions to properly and effectively represent members by trying to undermine their resource base or potential resource base.

When combined with the cost proposed by the Government by compelling secret ballots for protected industrial action, it can be seen that the Government is attempting to use a financial weapon to undermine unions, in addition to encouraging "freeloading".

3.5.3 Whilst not all Unions will pursue bargaining fees – and to date it has been minimal to say the least – that is no ground to deny a Union a legitimate and potential source of revenue to the cover significant time and resources put into the negotiation and formal conclusion of enterprise agreement.

4. Summary and Conclusion

4.1 This Bill is another attempt by the Government to dictate the terms and conditions of enterprise bargaining through the imposition of limits on what a union can put on the bargaining agenda.

It makes a mockery of the Government's "great scheme" for the Workplace Relations Act that wages and conditions should be determined by agreement between employers and employees and that employee organisations are able to operate effectively. (5).

4.2 Consistent with the other Bills before the Senate Committee and the Workplace Relations Act 1996 in general, these limits travel a one way street; they are solely aimed at making enterprise bargaining more difficult for Unions and their members.

4.3 The Bill is based on false premises that amount to a smokescreen which hides the true intent of the Government.

Bargaining fees do not by definition mean compulsory unionism and consequently are consistent with freedom of association. Further, as is shown by overseas experience they conform with the user pays principle, a principle the government has adopted in a variety of services.

4.4 Whilst the actual application of bargaining fees has been minimal the Government's reaction through proposed legislation is indicative of the lengths it

is prepared to travel to impose its anti-union agenda.

4.5 The RTBU strongly urges the Senate to reject the Bill.

Endnotes:

(1) Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, **WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2001** Commonwealth of Australia, September 2001, p.15.

(2) Ibid. P. 21

(3) Ibid. pp 21-22

(4) Ibid. p.21

(5) See for example the Objects of the Workplace Relations Act 1996, especially subclauses 3(d)(I) (f) and (g).

PART E

WORKPLACE RELATIONS AMENDMENT (GENUINE BARGAINING) BILL 2002

1. The Impact of the Bill

1.1 The Bill extends the power of the Commission to suspend or terminate a bargaining period where the Commission is satisfied that, "pattern bargaining" is occurring.

1.2 The Bill allows the Commission to place conditions on a bargaining period where that bargaining period follows from an earlier bargaining period which was voluntarily terminated pursuant to Section 170MV(b).

1.3 The Bill allows the Commission to order a "cooling off" period by suspending a bargaining period in circumstances where protected action is occurring.

2. The Government's Grounds for the Bill

In the Second Reading Speech the Minister contended as follows:

2.1 That pattern bargaining "ignores the needs of employees and employees at the workplace level".

2.2 That there is a need to circumvent the ability of an initiating party to "deprive the Commission of jurisdiction to hear a case under section 170MW", by voluntarily terminating a bargaining period under section 170MV(b).

2.3 That a "cooling off" period will "allow negotiating parties to take a step back from industrial conflict and refocus them on reaching a resolution which works for the business in question".

3. A critique of the Government's Bill

3.1 Manipulating the Process of Enterprise Bargaining

3.1.1 This Bill is another attempt by the Government to intervene in the bargaining process by manipulating through legislation the types of claims or bargaining position a union could adopt in any given situation.

3.1.2 The Government introduces the notion of "pattern bargaining" as its reason for introducing the Bill, but nowhere in the Bill does that term appear.

3.1.3 The Bill, whilst endeavouring to manipulate the enterprise bargaining agenda, introduces another layer of confusion into the process. The Government is attempting to proscribe "pattern bargaining' which it does not define in the Bill or elsewhere, but then proceeds to say in the Second Reading Speech "This Bill would not prevent unions from making the same claims over a number of employers".

This raises the question of when making the same claims ends and

pattern bargaining begins.

The confusion which is a consequence of a lack of clarity can only be conducive of further litigation, particularly by employers who can cynically use this confusion to either enhance their own bargaining position or to circumvent the determination by its employees to engage in protected industrial action.

Further confusion flows from attempting to determine what is an industry for the purposes of "industry level bargaining".

3.1.4 The Bill is designed to undermine the bargaining position and strength of a union and its members, through introducing the capacity to "suspend" protected industrial action just at the moment it is beginning to be of influence. Protected industrial action, as per the Act, is a legitimate bargaining position.

There is no doubt that employers will attempt to obtain an order for a "cooling off" period when they see it as tactically appropriate as a means of undermining the bargaining position of its employees.

3.1.5 The Bill is designed to undermine the capacity of a union and its members to make their own decisions on the bargaining process by permitting the Commission to, in certain circumstances, dictate when a bargaining period can be initiated and the matters to be negotiated during the bargaining period.

Not only does it allow the position of the union and its members to be determined by the Commission in particular circumstances, but it also permits the employer and the Minister to have their say on what bargaining position the union and its members should be able to adopt and pursue.

3.2 The Bill is One-Sided

3.2.1 There can be no doubt that the Bill is directly aimed at unions and their members. The Second Reading Speech for example, specifically refers to unions in the context of pattern bargaining.

3.2.2 Putting to one side the merit or otherwise of pattern bargaining, the experience of unions is that employers including governments as employers engage in the practice.

Governments and employers determine their own bargaining position which they then oblige their departments or subsidiaries or separate bargaining units to adopt.

For example, in a current enterprise bargaining process between the RTBU and the State Transit Authority of NSW (a public authority of the NSW Government), it has been made clear to the RTBU that any wage increase must be consistent with wage increases in the NSW public sector generally.

Similar situations have been experienced in other public sector rail, tram and bus operations in various States.

However, the Bill is most unlikely to prevent this form of behaviour by an employer:

3.2.2(a) Employers rarely initiate a bargaining period.

3.2.2(b) Employers structure themselves in a manner that whilst exercising control of the operation, the employees performing the work are employees of a number of employers. The structure of the public sector and the use of parent, holding or subsidiary companies are examples of how this situation occurs.

3.2.2(c) Whilst an employer may have a significant presence in an industry and indeed be the pacesetter in that industry the employer does not constitute the "industry".

3.2.3 The initiation of bargaining periods and the taking of protected industrial action are, in reality, actions that are overwhelmingly taken by unions and their members.

Employers can and do simply adopt a defensive position of rejecting the claims of its employees or responding with a minimalist position. In those circumstances it is the union which is put in a position of encouraging the employer to adopt a more reasonable negotiating stance and if necessary to do so through protected industrial action.

When this occurs the employer is, through this Bill, being given further weapons of response by pursuing a "cooling off" period, or making a claim to the Commission that the union is engaging in pattern bargaining.

If nothing else, these actions divert attention from the real game – concluding an enterprise agreement – and waste time and resources on unnecessary activities.

3.2.4 As this Bill further advantages an employer in negotiating an enterprise agreement, it can only encourage employers to take a harder line and an irresponsible position on enterprise bargaining. When the deck is stacked in your favour there is little incentive to genuinely negotiate.

This is an irony that this Bill shares with the other Bills before the Senate Committee. The Bill can only encourage the opposite effect to its ostensible aim.

3.3 ILO Conventions

3.3.1 The RTBU relies on the comments made in point 3.8 of the submission regarding the Secrets Ballots Bill in stating that this Bill is in breach of Australia's obligations to ILO Conventions 87 and 98.

4. Summary and Conclusion

4.1 The effect of this Bill is to place limitations on the capacity of unions and workers to determine their own enterprise bargaining agenda and to hinder the capacity of unions and workers to take protected industrial action as they see fit in the circumstances.

4.2 The Bill is an attempt to manipulate the enterprise bargaining agenda in the favour of employers.

In doing so it creates an enterprise bargaining framework that is inherently unfair.

4.3 The Bill breaches Australia's obligations to ILO Conventions that Australia has ratified.

4.4 The RTBU urges the Senate to reject the Bill in its entirety.