John Carter
Secretary
Australian Senate
Senate Employment, Workplace Relations
and Education Committee
Parliament House
Canberra ACT 2600
fax: 02 6277 5706

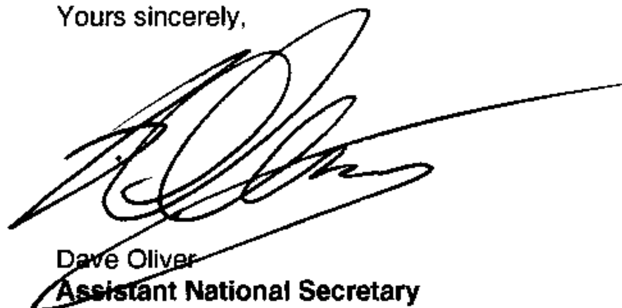
23 April, 2002

Dear Mr Carter,

Please find attached the Australian Manufacturing Workers Union detailed submissions to the Workplace Relations Bills 2002 inquiry which supplement the outline of submissions sent to the Committee on 12 April, 2002.

We apologise for the delay and any inconvenience it may have caused and thank you for your co-operation.

Yours sincerely,



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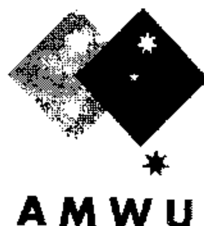
AUSTRALIAN MANUFACTURING WORKERS UNION SUBMISSIONS TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE INTO THE:

- Workplace Relations Amendment (Genuine Bargaining) Bill 2002 (pages 1-13);
- Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 (pages 14-18);
- Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 (pages 20-22);
- Workplace Relations Amendment (Fair Termination) Bill 2002 (pages 22-24).

APRIL 2002



AMWU

AMWU SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE ON THE WORKPLACE RELATIONS (GENUINE BARGAINING) BILL 2002

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ATTACHMENTS:

A. **Ai Group Model "no extra claims claims" clause published on Workplace Express (19 March 2002).**

B. **Affidavit of Mike Nicolaides re Department of Defence negotiations 2001- (10 April 2002).**

C. **Department of Employment and Workplace Relations - Advice no 2002/3 "Agreement Making- Provision of Guarantees Regarding Employee Entitlements.**

1. EXECUTIVE SUMMARY

The Workplace Relations (Genuine Bargaining) Bill 2002 has been dealt with previously by the Senate on two occasions - in 1999 and 2000. On both occasions the bill has been considered on its merits and rejected. The current bill has been re-named and amendments have been made in the drafting process but essentially the bill has the same impact - that is to outlaw so called "pattern bargaining".

The AMWU supports and adopts the submissions made by the ACTU to this Senate Inquiry. In addition, we contend that this bill represents an ideological attempt to interfere in the bargaining process in favour of employers and is out of touch with industrial reality where "pattern bargaining" is in many instances a preferred strategy adopted by employers, union members and the federal government itself.

Pattern bargaining has a legitimate role to play in an industrial system in which enterprise bargaining can take place. An isolated enterprise bargaining model should not be imposed to the exclusion of pattern bargaining which is what this bill attempts to do. The interests of employers, employees and unions are best served by an industrial relations system which enables both pattern bargaining and enterprise bargaining to be utilised.

The adoption by employers, union members and the federal Government of pattern bargaining as a preferred strategy in the current system demonstrates the need for a balanced industrial relations system in which the parties are able to choose the most appropriate form of bargaining which best serves their needs.

Since the bill was last rejected by the Senate in 2000 there has been no new compelling evidence that would justify the passing of the bill in 2002:

- The Ai Group argued that Campaign 2000 in Victoria would result in massive industrial disputation bringing Victorian industry to its knees - an Armageddon. The Australian Democrats concluded that although the 2000 bill was unnecessary they would monitor events to ensure there was no great necessity for further amendments. Armageddon didn't happen. In fact bargaining was conducted in a less time consuming more efficient manner with hundreds of agreements being reached.

- There is no evidence that the union did not "genuinely bargain" in Campaign 2001, where approximately 1000 agreements were negotiated as part of an industry campaign. In fact the outcomes which differed site by site, demonstrates that bargaining at the workplace level did take place. There is also no evidence that as a result of the campaign the levels of industrial action escalated beyond normal levels.

- The adoption by employers and federal government of "pattern bargaining" as a preferred strategy continues. The examples that will be referred to include:

- Ai Group advice and instructions to members;
- BHP steel products;
- Qantas;
- Electrolux;
- Department of Defence bargaining negotiations;
- DEWRSB advice to Government agencies on bargaining;
- Office of Employment Advocate template AWA's.

The bill, representing a slightly amended version of the 2000 bill, is still aimed at limiting union bargaining strategies as evidenced in the second reading speech of the Minister for Employment, Workplace Relations and Education, Tony Abbott where he refers to the main aim of the bill being to thwart the bargaining strategies of "militant unions". It continues, like previous bills, to ignore the legitimate role that "pattern bargaining" has in the bargaining system overall.

When rejecting the 2000 bill dealing with so called "pattern bargaining", Democrat Senator, Andrew Murray pointed out the fact that the bill was "unbalanced" and didn't deal with the concerns that unions' had about how employers were using the Act. These concerns are yet to be addressed and the focus on the bill is still only directed towards unions and does not address the trends of employer and federal government bargaining strategies aimed at disadvantaging workers.

The real question that needs to be addressed overall is "is enterprise bargaining really working in Australia in a balanced and fair way ?".

The rationale behind the bill is apparently based on the decision of Justice Munro of the AIRC in *Australian Industry Group v.Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors* handed down in the early stages of Campaign 2000 in Victoria. The bill, by further fettering the discretion of the Commission fails to address the issues raised in his Honours decision. The AMWU supports the submissions of the ACTU in outlining the reasons why the bill goes further than Justice Munro's decision.

In his report to the Senate Committee in 2000, Senator Andrew Murray concluded that the Commission's powers to deal with industrial disputes were "substantial" but questioned whether the powers of the Commission were "sufficient" to deal with the industrial disputation predicted at the time by the Ai Group. Experience has shown that the Commission has been able to intervene as appropriate and that the forebodings of the Ai Group were baseless. No new evidence has been produced *by* the Howard Government produced to justify further fettering the discretion of the Commission to prevent and settle industrial disputes.

The AMWU therefore re-emphasises its position that the powers currently available to employers under the Act are sufficient and that there is no current need to tip the balance further away from workers.

The bill also creates problems in that it ignores Australia's international obligations under international conventions to respect basic collective bargaining rights. The Howard government in seeking to re-introduce the bill is again showing total disregard for its obligations under international law. The ILO Committee of Experts on the last occasion condemned the attack on collective bargaining rights. This international condemnation continues to be ignored by the Howard Government.

....

2. HISTORICAL OVERVIEW OF THE "PATTERN BARGAINING" BILLS

(a).Workplace Relations Legislation Amendment (More Jobs Better Pay) bill 1999 -Schedule 11

In 1999 the Government introduced the Workplace Relations Legislation Amendment (More Jobs Better Pay) bill 1999. The bill attempted to outlaw pattern bargaining and industrial action taken in pursuit of "pattern bargaining". A definition of pattern bargaining was outlined in proposed section 170LG. The definition was broad and expressed in the negative i.e. it defined what was not "pattern bargaining". If the Commission was satisfied that "pattern bargaining" was occurring, then it was required to terminate the bargaining period (proposed section 170MWG).

In rejecting the provisions of the 1999 bill covering pattern bargaining Senator Andrew Murray stated:

> *"This schedule is about seeking to restrict access to penalties in respect of such action. As such it seeks to respond to what, in an objective sense, is a non-existent problem. Section 127 does not need to be changed.* ***The existing section 127 provides a strong deterrent to disruptive industrial action*** *and the government has failed to make out a case that the provisions are not working and need these reforms".*[1]

The AMWU submits that these observations are, given the absence of any new evidence that existing provisions are not adequate to deal with industrial disputes, still valid. The federal government has in 2002 failed to make out a case justifying the reforms contained in the 2002 bill.

(b). Workplace Relations Amendment bill 2000:

In 2000 the government reproduced the provisions of Schedule 11 of the above Bill, with amendments, in its' attempt to outlaw pattern bargaining in a separate bill titled the *Workplace Relations Amendment Bill 2000.* The bill again attempted to define "pattern bargaining" but as pointed out in the submission of the AMWU to the Senate Committee considering the 2000 bill, the definition was too wide, biased in favour of employers and overall unfair and unworkable. The bill attempted to limit the discretion of the Commission in hearing section 127 applications to stop or prevent industrial action i.e. if the Commission was satisfied that pattern bargaining was occurring. The bill also imposed a

[1] Consideration of the provisions of the Workplace Relations Amendment (More Jobs Better Pay) Bill 1999 by the Senate Employment Workplace Relations, Small Business and Education Legislation Committee November 1999 - Democrats Minority Report - Senator Andrew Murray

requirement on the Commissions' discretion to terminate a bargaining period if the employees were engaged in "pattern bargaining" as defined (proposed section 170MWB)

The main rationale behind the above provisions of the bill were explained by the then Workplace relations Minister, Peter Reith, in his second reading speech as:

> *"" Pattern bargaining does not leave any room for employers and unions to negotiate at the workplace".*

In rejecting the proposed amendments and having considered the provisions of this bill, Senator Murray observed:

> *"The provisions are **unbalanced** in that they principally deal with the concerns that employers have with union performance on enterprise bargaining, and **do not deal with the real concerns that unions have with employer abuses of the current law**. These include for instance:*
>
> *- The insistence by the Federal Government on universities and public service departments pursuing a certain pattern of bargaining that, if pursued by the unions, would have breached these provisions;*
>
> *- The creation of standard AWAs by the Office of the Employment Advocate and the pursuit of these as standard bargaining mechanisms across industry;*
>
> *- Failure to address concerns from the ILO about restrictions on collective bargaining.*
>
> *These are serious criticisms in terms of the balance of this bill."*

These objections apply equally to the 2000 bill.

(c) Workplace relations Amendment (Genuine Bargaining) bill 2002:

This bill represents an amended versions of the 1999 and 2000 proposed amendments to outlaw pattern bargaining as outlined above. The essential purpose of the bill remains the same - that is to restrict the bargaining power of unions and their members.

The proposed "reforms" in the 2002 bill are again ideologically driven. The provisions are unbalanced in that they are directed at weakening the bargaining capacity of workers. The capacity of employers under current laws to abuse their bargaining powers are once again totally ignored.

The bill, as did previous bills, offered ILO conventions in dealing with collective bargaining rights.

Moreover, the bill fails to acknowledge that pattern bargaining provides an efficient means for bargaining and is a form of bargaining presently utilised by employers and government agencies.

The effect of the bill will be to remove the ability of the parties to choose their preferred form of bargaining.

3. AMWU VIEW OF PROPOSED SECTION 170MW(2)

The effect of proposed section 170MW(2) is no different to the proposed amendments outlined in the Workplace Relations Amendment bill 2000 in that it:

- outlines the various situations where "pattern bargaining" occurs and classify them as not "genuine bargaining";
- fetters the disretion of the Commission to deal with industrial disputes and in particular section 170MW of the Act;
- allows recourse to employers to thwart the effective bargaining strategies of unions and their members in improving living standards of workers;
- tips the balance further in favour of employers in industrial disputes;
- further restricts access to industrial action for workers.

As outlined above the proposed amendments to Section 170MW have been previously rejected by the Senate for sound reasons. There is no compelling evidence justifying their reintroduction.

The reference in the explanatory memoranda of the decision of Justice Munro in *Australian Industry Group v AFMEPKIU and Ors* is misleading. The limits on the discretion of the Commission in circumstances of "pattern bargaining" will restrict the capacity of the Commission to appropriately consider and deal with other facts and circumstances of each dispute. The ability of the Commission to prevent and settle industrial disputes will be hampered, not enhanced.

The conclusion that the Senate Committee should reach is that the powers currently in the Act go far enough.

This is reinforced by the true situation in relation to the AMWU's Campaigns 2000 and 2001 in that:

- Armageddon did not happen;
- efficient bargaining took place;
- the Campaigns achieved different outcomes across sites.

The AMWU submits that overall the proposed amendments to section 170MW will prevent the union and its members from pursuing important industry standards ie standards regulating casual employment. There mere conduct of presenting a claim on an industry association will be sufficient to prove that so called "genuine bargaining" is not occurring. A **mere intention** to pursue the standard will be enough evidence for an employer to apply to take away the collective bargaining rights of workers.

Under the proposed section, it will be the strategy of the union in formulating and serving common claims at an industry level that will be treated as evidence of not "genuine bargaining". The reality of bargaining is therefore being ignored because it is common practice for the two to go together ie pattern claims across an industry and workplace bargaining in pursuit of those claims.

The provision will only work to water down the bargaining strength of workers by ensuring that any action taken is only legitimate if isolated and limited to a particular workplace only. Any social issues or standard setting exercises will be deemed to be not genuine bargaining. Industry standards will be eroded. Historically, important industry standards aimed at protecting the overall financial and social situation of workers has been achieved through unions bargaining across an industry. Examples that can be cited include:

- superannuation
- occupational health and safety
- union delegate rights
- equal pay
- parental leave
- 38 hour week

The above conditions were all achieved through bargaining site by site in co-ordinated industry campaigns. They wouldn't exist without the ability of unions having the capacity to create an industry standard from the site level upwards.

4. AMWU CAMPAIGNS

(a) AMWU's Campaigns 2000 and 2001

As stated above Campaign 2000 did not result in Armageddon in Victoria nor did it happen in Campaign 2001 nationally. Very little industrial action occurred and the manufacturing industry did not fall to its knees as was suggested by the Australian Industry Group on many occasions.

It is not uncommon, as occurred in Campaign 2001, for unions to serve a common claim across enterprises and also seek to achieve an understanding at the industry level with the employer associations eg, better rights and protections for casual workers.

(b) Campaign outcomes

Although campaign 2000 and 2001 involved common claims for improved conditions of employment at the industry level, different outcomes in the campaign were achieved due to the focus on the workplace and enterprise bargaining. The union has conducted an analysis of the outcomes in Campaign 2001. The average wage increase across the agreements varied between 3% to 5.7% with a national average of 4.7%. Improvements in conditions of employment varied across divisions and the states. Paid trade union training leave clauses and clauses regulating the incidence of casuals and contractors achieved high inclusion rates but varied in content depending on the workplace. In relation to the protection of employee entitlements claims, the outcomes varied, for example, a bank guarantee at Tristar, and trust fund arrangements in place at Maintrain (Sydney) and Walkers/Munro's (Adelaide). Even these arrangements differ in terms of the level of contributions paid into the fund by the employer.

The following examples can be referred to where negotiations took place at the "workplace level" in Campaign 2001.

At Tristar, workers took industrial action in pursuit of an industry trust fund. An agreement was reached which provided for improved wages and conditions and the securing of entitlements with a bank guarantee.

Electrolux: In the last submission to the Senate Committee dealing with the Workplace Relations Amendment bill 2000, the AMWU referred to the example of Email Ltd to support its' argument that the national framework agreement that had been negotiated between the company and the unions, was an efficient bargaining strategy in that it only took 10 meetings and only one 24 hour stoppage to reach a settlement. Since that time Email Ltd has been bought out by Electrolux. Electrolux's bargaining strategy has been to conduct negotiations on a site by site basis across all sites in Australia. The national agreement

has been replaced by site agreements and in some case section agreements. For example, at the Beverly site in S.A three separate agreements were negotiated to cover the one enterprise. Despite the site by site approach, standard outcomes were achieved across all sites.

These agreements were achieved after nine months in total, with a high level of industrial action. The resolution of the dispute was hampered by Federal Court action initiated by the company. It is the AMWU's view that had the company adopted a co-ordinated national negotiating strategy, the same outcomes would have been achieved over a lesser time period and efficiently for both sides. In addition it is important to point out that the site outcomes did not include the protection of employee entitlements because both the company and the union agreed that the issue should be dealt with and agreed at the industry level.

5. EMPLOYER AND FEDERAL GOVERNMENT "PATTERN BARGAINING" STRATEGIES:

(a) Australian Industry Group and employers

Whilst employer groups and the federal government have continually supported a statutory regime that would effectively prohibit workers from seeking to pursue certain claims (pattern bargaining) they themselves have continued to utilise "pattern bargaining" in negotiations with workers and their unions.

As stated in previous submissions by the AMWU in relation to the 1999 and 2000 Bills, the Ai Group has adopted a coordinated industry bargaining approach in its advice to individual employers engaging in enterprise bargaining. More recently, the Ai Group has actively campaigned across the industry to resist the AMWU's claim for the establishment of mechanisms to secure the protection of employee entitlements. The Ai Group has recently developed a model "no extra claims" clause for manufacturing employers to counter the effect of a Federal court decision in the matter of *Emwest v. AMWU.* **Attachment A** is a copy of the model clause.

Employers have on many occasions adopted in their bargaining rounds a "pattern bargaining" strategy.

The case of **BHP bargaining in the steel industry (building products and services)** is a good example where an employer has bargained to impose a pattern standard on the union and its members. In the past BHP workers in the steel industry have been covered by a national certified agreement. However in this bargaining round, which began in June 2001, BHP's strategy changed in that they desired site by site negotiations across Australia. However ,despite this, BHP at national negotiations has insisted that the

settlement reached with workers at a company called Winfield in Adelaide be the standard to be applied at the other sites.

Qantas has adopted a very hard line with its' maintenance workforce insisting on a pattern outcome across all operations i.e, a "wage freeze". It has refused to bargain with the union unless it accepts the wage freeze. During the long running Qantas dispute, Qantas management have made it clear that they were unable to settle the bargaining dispute by agreeing to anything that would fall outside of the pattern arrangement they had with the other airline unions. This clearly highlights the fact that employers pattern bargain and often do it very publicly..

(b) Federal Government:

In the AMWU's submission to the Senate inquiry last in 2000, we outlined the examples of where the Government was found to be "pattern bargaining" through model pro forma Australian Workplace Agreements and the implementation of the Government's own "Policy Parameters for Enterprise Bargaining". Since that submission there is nothing to indicate that this has stopped.

In the "reasonable hours" test case currently being heard in the AIRC, Helen Lu, General Manager of the Corporate management branch of the Australia Competition and Consumer Commission, on examination in chief had this to say about the policy parameters:

> *"Ms Lu, are you aware of the policy parameters for bargaining in the Australian public service ? I'm aware of their existence, yes.*
>
> *Could you explain what they are ? I'm not quite sure what you mean. They are guidelines set by the government that we must have regard to when making agreements within our agencies.*
>
> *Sorry say that last bit again ? For agreement making with agencies, they are policies and guidelines set by the government for us to observe in out agreement making practices.*
>
> *I see. Do they stipulate at all what can and can't be the subject of agreements ? Yes, to some extent."*[2]

Attachment B is an Affidavit of Mike Nicolaides, National secretary of the AMWU's Technical and Supervisory Division outlining his experience in negotiations with the

[2] Transcript, AIRC reasonable hours test case - Paras PN13373-77.

Department of Defence and how negotiations were thwarted due to the strict application of the policy paramaters being applied.

In addition, the Department of Workplace Relations and Employment recently issued a memo to all agencies stating that they must not agree to any model to protect employee entitlements. (see **Attachment C**)

(c) Office of the Employment Advocate (OEA)

From a recent viewing of the OEA's website the OEA is continuing the practice of AWA templates for employers to use.

6. COOLING OFF PERIODS

Nothing substantial has changed since the last time these provisions were considered by the Senate Committee. The essential purpose remains the same. The provision is designed to render ineffective any impact that industrial action may have on an employer. The clear message that is being sent to workers is that - 'you can take industrial action but only up to a point were the action starts to become effective'.

Attachment A

Australian Industry Group's draft new no extra claims clause to respond to the Emwest decision:

"It is agreed by the parties that up to the nominal expiry date of this agreement:

- The employees will not pursue any extra wage claims, whether award or overaward;
- The employees will not seek any changes to conditions of employment;
- The agreement will cover all matters or claims regarding the employment of the employees, which could otherwise be the subject of protected actions pursuant to s170ML of the Workplace Relations Act 1996; and
- Neither the employees, nor any party to this agreement, will engage in protected action pursuant to s170ML of the *Workplace Relations Act 1996*, in relation to the performance of any work covered by the agreement."

Attachment B

AFFIDAVIT OF MIKE NICOLAIDES

I, Mike Nicolaides, AMWU National Secretary, Technical and Supervisory Division, do solemnly and sincerely declare that:

1. The AMWU's Technical and Supervisory Division has regularly claimed an improvement in the redundancy payments offered by agencies of the Australian Public Service (APS), currently two weeks per year of service to a maximum of 48 weeks. This claim is of significance to the members concerned, given the steady decline of technical, trade and related employment within the Service over the last decade or so, through privatisation, corporatisation, competitive tendering and the like.

2. The Commonwealth Government has issued policy parameters to govern the bargaining positions adopted by APS agencies, including in response to claims lodged by unions on behalf of their members. The fourth of the policy parameters currently provides that:

   "Certified agreements and AWAs **are to:**

   * provide for access to compulsory redeployment, reduction and retrenchment and **ensure that:**

     - **any revision to redundancy provisions ..... is not an enhancement of the existing redundancy obligations applying to an agency;"**

3. Compliance with the policy parameters is overseen by the Department of Employment and Workplace Relations (DEWR) and by the Public Service and Merit Protection Commission (PSMPC).

4. In late 2001, negotiations were concluded between the Department of Defence (DoD) and unions on a proposed new agreement to cover the Department's employees. Paragraph 424 of that agreement addresses the entitlements of certain employees upon redundancy and protection of their entitlements. It was the subject of extensive scrutiny, consequent upon advice DoD apparently received from DEWR and the PSMPC. From the AMWU's observations, the stages in such scrutiny appear to have been as follows:

⇒ negotiations were concluded in mid-December, and the results were referred to DEWR by DoD, consistent with the policy parameters;

⇒ on 20th December, the AMWU was contacted a number of times by DoD, which was seeking to accommodate concerns apparently expressed by DEWR over the wording of paragraph 424;

⇒ on 11th January, the AMWU was again contacted by DoD, which advised of a further concern held by DEWR over the wording of paragraph 424;

⇒ DoD and the AMWU met on 29th January and agreed on a fresh formulation of paragraph 424, which the AMWU understands was cleared by DEWR, after some further re-wording;

⇒ the paragraph was then required to be amended still further, this time apparently on the advice of the PSMPC.

5. It is emphasised that both DEWR and the PSMPC were exercising their responsibilities under the policy parameters, i.e. they were seeking to ensure a close fit between DoD's proposed agreement and the **government-imposed "pattern"**.

Date 23.4.02

Signed M. Nicolaides

Attachment C

ADVICE NO. 2002/3

AGREEMENT MAKING - PROVISION OF GUARANTEES REGARDING EMPLOYEE ENTITLEMENTS WITH POTENTIAL FUTURE EMPLOYERS

14 March 2002

HEADS OF CORPORATE MANAGEMENT
ALL AGENCIES STAFFED UNDER THE *PUBLIC SERVICE ACT 1999*

1. The purpose of this Advice is to bring to the attention of agencies recent concerns regarding the issue of union claims, in an APS agreement making context, seeking scope to pursue guarantees in respect of future employee entitlements should current agency activities be contractedout.

2. The issue arose earlier this year as part of the department's assessment of a draft agency agreement against the Policy Parameters for Agreement Making in the APS. Specifically, a draft agreement included a provision relating to a potential contracting out of work which provided scope for affected employees and their representatives to seek guarantees, should the work be contracted out, from the agency regarding future employee entitlements with any successful tenderer.

3. The proposed outsourcing clause raised two significant policy concerns from DEWR's perspective:

- first, the proposed clause was inconsistent with the Government's approach, adopted in the context of proposed asset sales as opposed to contracting out, not to provide guarantees regarding employee entitlements post-sale. Although, it should be noted that in those instances the Government did indicate that it would require the purchaser(s) to demonstrate that it had the required financial resources and strength to undertake the purchase and the ongoing operation of the business, including the ability to meet ongoing obligations with respect to employee entitlements; and

- second, that the Government has established the General Employee Entitlements and Redundancy Scheme (GEERS), which is a safety-net scheme designed to protect employees who have lost their job and employee entitlements due to their employer becoming insolvent or bankrupt. Under GEERS, the Government may make payments equivalent to the defined outstanding entitlements to eligible employees who lose their jobs due to the insolvency of their employer, where all other sources of available funds have not been sufficient to meet the employer's obligation in respect of outstanding employee entitlements and to the limits prescribed under the Scheme.

4. The primary source of funding for employee entitlements is, and must remain, the responsibility of the relevant employer. Accordingly, given the establishment and operation of GEERS, any undertakings by agencies in their agreement to provide or explore the provision of guarantees regarding employee entitlements with potential future employers is unnecessary and inconsistent with Government policy in this area.

5. In addition to the abovementioned policy concerns, the particular provision raised a number of legal issues related to the decision of Merkel J of the Federal Court in Electrolux Home Products Pty Ltd v Australian Workers Union [2001] FCA 1600.

6. This case involved the Federal Court considering whether protected industrial action could be taken in support of various claims, some of which dealt with matters that did not pertain to the employment relationship. This in turn involved consideration of whether an agreement could be certified if it included such a matter given that s170LI of the Workplace Relations Act 1996 (the WR Act) requires that agreements deal with matters pertaining to the relationship between an employer and employees of the employer.

7. The Federal Court held that if a clause was a "substantive, discrete and significant matter that does not pertain to the employment relationship", the agreement could not be certified. However, the Federal Court made it clear that the decision was not meant to be understood as preventing an agreement from being certified if it includes a non-pertaining matter, where that matter is not "discrete, substantial and significant" (eg machinery provision necessary for the effective operation of an agreement).

8. The unions involved in the Electrolux case have appealed the decision.

9. In light of the above decision and the uncertainty surrounding its implications (particularly pending the appeal), agencies are encouraged to be cautious about including in their agreements provisions which could be characterised as not directly pertaining to theemployment relationship.

10. If further information or assistance is needed on this matter, please contact your DEWR Client Contact Team. In particular, it is suggested that agencies contact DEWR where they are approached by public sector unions seeking the inclusion of guarantees for future employee entitlements, in the context of possible contracting out or outsourcing in their agreements.

John Kovacic
Assistant Secretary
Workplace Relations Implementation Group

SUBMISSION ON THE WORKPLACE RELATIONS AMENDMENT (SECRET BALLOT PROTECTED ACTION) BILL

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1. EXECUTIVE SUMMARY

The Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 brings to the Parliament the third attempt in recent times to legislate to require that a secret ballot of employees precede lawful industrial action carried on in pursuit of an industrial agreement. The bill follows up on similar provisions contained in the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999 and Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000 (2000 Bill). The AMWU further relies on the submissions of the ACTU.

At the outset, the debate over the essential features of the bill remains the same. Submissions on the earlier bills dealt with the concepts that are embodied in this bill. The bill does what its predecessors sought, namely, extinguish the concept of "protected" industrial action under the Workplace Relations Act 1996, except where the desire by employees to take the action has been verified in a secret ballot. It also fails to remove the cumbersome and onerous requirements that were present in the 2000 bill.

Once again the Howard government is out of touch with industrial reality. In introducing this bill it is choosing to deliberately ignore the democratic decision making processes which involve union members deciding on whether they will take industrial action or not. The bill patronises workers. It suggests that they cannot think for themselves over and above the prospect of the mythical "union boss" dictating to them what to do. There is no compelling evidence to justify why a formal ballot process, is required in every case.

The theme that supports the bill runs contrary to logic and evidence; its only apparent purpose is that it acts as a measure to frustrate workers and their unions in negotiating agreements by placing an administrative and costly burden on unions straining their resources. It will merely work to impose unnecessary delays in the bargaining process.

The bill also places a new cost burden on the taxpayer.

To lay down onerous and cumbersome procedures for one side to follow in the bargaining processes prior to taking industrial action, but to leave a relatively free rein to the other side is unfair and unbalanced. When an employer takes industrial action by locking out its' workers in a bargaining dispute they will not be required to conduct a secret ballot both of shareholders or the Board of Directors.

The bill also attempts to alter the current notice requirements for protected action. There is no compelling evidence why these changes are required. This again is merely an attempt to frustrate the ability of workers to effectively have recourse to protected industrial action in the exercise of their collective bargaining rights.

2. A COMPARISON OF THE 2000 AND 2002 BILLS

The provisions of Workplace Relations (Secret Ballot for Protection Action)) Bill 2002 has been in effect considered and rejected by the Senate previously. The current bill contains cosmetic changes and has been given a new name, but in substance the provisions remain the same.

The provisions of the 2000 bill which remain are:

- the notice period for taking of protected industrial action is being extended;
- workers will be required to vote in a formal process on whether to take industrial action or not thus stifling the normal decision making processes currently in place;
- a cost burden is imposed on taxpayers and employees for the conduct of the ballot.

The impact of that bill, as in the 2000 bill, will be to delay and frustrate the ability of workers to take effective industrial action.

3. LEGAL AND PRACTICAL JUSTIFICATION

Part of the Coalition's rhetoric is that union bosses dictate to workers what to do. In his second reading of the 2002 bill by the Minister Tony Abbott stated:

> "*it will ensure that the right to take protected industrial action is not abused by union officials pushing agendas unrelated to the workers at the workplace concerned.*"

The Coalition are peddling this Bill in the name of democracy, it is incorrect to suggest that "union bosses" can compel workers to strike. Workers have the democratic right to decide to participate in protected action or refrain from taking protected action--they are free to choose and their rights are given the protection of law.

Also, to the extent that a secret ballot may be the best and fairest method of determining the will and desire of workers to embark on a course of protected action, the *Workplace Relations Act 1996,* Part VI, Division 4, already provides for such a course where it is requested by a prescribed number of employees (see s136(10)) and not deemed unnecessary by the AIRC according to various criteria (see s136(3)).

The AMWU's experience is that protracted industrial action occurs infrequently in negotiations. Usually, the only industrial action that precedes an agreement is one or a few

stop-work meetings to discuss issues that arise in the course of bargaining (a democratic process in itself). Generally there are a number of stop-work meetings taking place to discuss bargaining issues. The AMWU's practice is to cover such meetings with the required notices to ensure that they attract "protected action" status. Under the proposed bill, even the convening of report back meetings etc will require a secret ballot--this is clearly designed to frustrate and delay the process of resolution and agreement making.

The Bill does not distinguish between a half-hour stop-work meeting at the end of the lunch break and an indefinite strike that may go on for months; both such actions would require the same cumbersome voting process. Moreover, with the Bill requiring that the AIRC process ballot applications generally within two days (see s 170NBCA), the AIRC's resources will be stretched.

4. COST BURDEN

The bill proposes that the taxpayer will pay up to 80% of the cost of the ballot and the employees the remaining 20%. Therefore a cost will be imposed on employees who decide to take action. A cost that does not currently exist. This bill is a deliberate attempt to impose additional burdens on union resources which will adversely impact on the ability of unions to effectively bargain. To add such an additional cost burden in addition to the overall administrative burden would be unfair and unjust and against the interests of union members.

5. IMPACT ON DEMOCRATIC DECISION MAKING PROCESSES

The democratic decision making processes relating to industrial action involve union members at mass meetings debating and discussing the merits of the proposed resolution to take industrial action. This bill, if introduced, will stifle these processes and may see this open democratic process sidelined and replaced by a behind closed doors, secret ballot.

6. EXISTING LEGISLATIVE PROVISIONS

In the submission of the Ai Group to the 2000 bill, commented in its' submissions:

> *" AiGroup's concerns with compulsory secret ballots has been that they tend to polarise the position of the parties and may make disputes more difficult to resolve".*[3]

In arguing that the Bill is unnecessary and unwarranted, one can start by putting the onus on supporters of the Bill to bring forward evidence. So far the AMWU is yet to see any

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[3] Ai Group and Engineering Employers' Association, South Australia, Workplace Relations Amendment bills: A submission to the Senate, Employment, Workplace Relations, Small Business and Education Committee Inquiry, 5 September 2000, p.14

such evidence, in a review of various materials put before the parliament for the earlier versions of the Bill and in academic literature, the AMWU finds nothing that brings merit on the Bill nor has the AMWU had a single case cited to it where so called "union bosses" forced workers to go on strike against their will.

As stated above (para 5), the *Workplace Relations Act 1996*, Part VI, Division 4, contains provisions for secret ballots where requested. One would expect that if there was an extensive pattern of coercion by "union bosses", forcing workers into strikes against their desire, the incidence of such ballots would be high. However, in the AIRC's *Annual Report 2000-2001* at Appendix C, the AIRC gives figures for matters lodged over recent years. In the years 1998-99, 1999-2000 and 2000-01 over 30 000 matters were lodged in each year. However, for the years here referred to the number of applications for secret ballots were, respectively, 1, 2 and 1.

It is also worthwhile to note the experience in Western Australia. An overview of what happened in WA where laws similar to those proposed in the Bill operate was discussed by the Shadow Minister, Arch Bevis, in debates over the *Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*:

> *There is also an interesting observation from people in Western Australia where they have legislation not dissimilar to the sort of draconian laws which this minister failed to get through last year and will fail to get through again this year. The practice in Western Australia is that the law is an ass and the law is ignored. The minister knows that. There has not been enforcement of these provisions in Western Australia. The unions ignore it because the provisions are unworkable. Employers ignore it because they know it is unworkable and the government in Western Australia, with the same political motivation as this minister, having got the law through, know that they cannot enforce it--it is unworkable.*[4]

Clearly from the W.A experience, the process proposed under the bill is impractical, unnecessary and overall unworkable.

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[4] An extract from a speech by Mr Bevis, House of Representatives, *Hansard*, 30 August 2000, pp 19611 *et seqq*.

AMWU SUBMISSION TO THE SENATE INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (PROHIBITION OF COMPULSORY UNION FEES) BILL 2002

The AMWU supports and adopts the ACTU submission to this Committee in relation to the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) bill 2002. In addition, the AMWU makes the following submissions outlined below.

Once again this Bill reflects the Howard government's selective application of its own policies. The concept of bargaining agents fees is consistent with the Howard governments philosophy of user pays and "mutual obligation". More importantly, as discussed in the ACTU submission, the law with respect to the legality of including bargaining services fees in certified agreements **is presently unresolved**. At the time of writing the matter is yet to be heard by the Full Federal Court in the appeal of Merkel J's decision in *Electrolux Home Products Pty Ltd v Australian Workers' Union*. [2001] FCA 1600 (14 November 2001). This bill is an attempt to interfere in this legal process and override the court.

As was noted by the Australian Labor Party and Australian Democrat Senators when rejecting the previous bill before the Senate : **bargaining services fees cannot be equated with compulsory unionism**. Bargaining services fees are simply one solution to the problem of some workers taking the benefits of union negotiated outcomes without contributing to the costs of those negotiations.

The bill represents an attempt by the government to further restrict what can and can't be included in a certified agreement. Australian workers are in no need of any further restrictions on what can be the subject of negotiated (or arbitrated) industrial instruments.

The main objections of the AMWU to this bill are:

1. The Bargaining Services Fee Bill is substantially similar in effect to the lapsed Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001. That bill was opposed by both the ALP and Democrat Senators in the report by the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee which examined the provisions of the 2001 bill.[5]

[5]Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee - Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001 - September 2001.

2. If passed, the Bargaining Services Fee Bill would amend the Workplace Relations Act 1996 in a number of ways including:

   - preventing the Australian Industrial Relations Commission (AIRC) from certifying or varying an agreement that contains a provisions requiring the payment of a bargaining services fee;

   - voiding clauses in current certified agreements to the extent the clauses require payment of a bargaining services fee;

   - enabling the AIRC to remove clauses from current certified agreements that require the payment of a bargaining services fee on application by the Office of the Employment Advocate or a party;

   - prohibiting an industrial association from demanding a bargaining services fee from another person; and

   - prohibiting industrial action or the threat of industrial action in support of a bargaining services fee.

3. By listing the bargaining services fee as a prohibited reason under Part XA of the Act the bill goes beyond federal certified agreements but will also prohibit bargaining services fees in state industrial jurisdictions and unregistered agreements.

   By prohibiting all forms of bargaining services fees, the Bargaining Services Fee Bill would have the effect of mandating that union members pay for the costs of bargaining for improved wages and conditions for non-union members and restricting the ability of union members to recover such costs.

   Under the *Workplace Relations Act 1996*, in particular section 298K and 170MDA, non-union members cannot be excluded from the application of enterprise agreements that are negotiated by union members and their unions. As such there is a "free loader" problem for union members negotiating agreements under the Act. This bill seeks to give legislative force to the unfairness occasioned by the "free loader" problem.

   As the ACTU submission notes the costs to union members of reaching an agreement with their employer are not inconsiderable and may involve numerous meetings and at times industrial action. The AMWU is a party to over 1800 registered certified agreements.

Enterprise bargaining is a resource intensive process and provides benefits to both members and non-members but it is the union members that pay for this valuable service.

4. The proposed amendments will only work to restrict the right of workers to decide what they want to negotiate for an agreement. A majority of employees who will be affected by an agreement in a single business or in part of a single business may agree on terms that bind *all employees* expressed to be subject to that agreement. Both union members and non-union members vote on the terms of the agreement.

   The inclusion or otherwise of a bargaining agents fee should be a matter determined by employees covered by an enterprise bargaining agreement. It should not be prohibited by legislative fiat.

AMWU SUBMISSION TO THE SENATE INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (FAIR TERMINATION) BILL 2002

The AMWU opposes the introduction of the Workplace Relations Amendment (Fair Termination) Bill 2002. The AMWU supports and accepts the ACTU's submission in relation to this Bill, and makes the following submission.

This Bill provides the Senate Employment, Workplace Relations and Education Legislation Committee with evidence of how out of touch with community standards the Howard Government is.

Major players within the industrial relations arena, i.e. unions, employers and industrial tribunals alike, have appreciated for some time now that casual employees are in many ways disadvantaged. As a result there has been a general acceptance within the industrial relations arena for the need to align the rights and entitlements of casual employees more closely with those currently available to permanent employees. The Courts and Industrial Tribunals have therefore been re-regulating casual employment acknowledging the hardship and lack of protections that the majority of casual workers in Australia suffer. The *Hamzy decision*, which this Bill seeks to override, is an illustration of this. This Bill goes against these trends and ignores the need for basic protections for casual workers. There currently exists no compelling evidence to prove that there exists a nexus between casual employment and employment levels in Australia. Indeed the judge in the *Hamzy* decision noted this.

The AMWU has been committed to improving the protections available for casual workers--workers who are among the most disadvantaged employees in the labour market. It has run several cases in industrial tribunals and has succeeded in increasing the casual wage loading from 20% to 25% and introducing provisions to prevent casual workers from being employed on extended periods (usually over 6 months).

In 2000 the AMWU established to the Australian Industrial Relations Commission's satisfaction the need to establish improved standards for the regulation of casual employees engaged under the Metal, Engineering and Associated Industries Award (the decision is reported at 110 IR 247). In presenting the case, extensive aggregate and statistical evidence was adduced, but what was equally compelling--in the AMWU's view--were the individual tales of hardship faced by the ranks of casuals.

In all, about 20 worker witnesses gave evidence, and some of their complaints were telling, for example:

- Ms Goring, was employed as a casual process worker at Sylvania Lighting in NSW. During that time she could not take time off work to visit her three children who lived in another part of the state with their father, she had no paid sick leave when she needed to have an operation, and she found credit difficult to obtain.

- Ms Maloney was employed by ADECCO, a labour hire firm, and worked at the GUD factory at Sunshine in Victoria. In evidence she gave an account of being dismissed for giving a fellow worker a T-shirt (she was accused of selling T-shirts at work, but the accusation was false and union representations on her behalf won her job back). When asked how she felt about the incident, Ms Maloney said, "[i]*t's not fair but being a casual that's how you're treated, you get used to it*" (*transcript of proceedings*, p 595).

- Ms Drigicieic was employed as a casual process worker at Southcorp Packaging in Granville NSW. She had been employed as a casual for 7 years despite repeated requests for conversion to permanent status.

- Mr Hoai, a casual process worker for Metro Products in Revesby NSW stated that his casual employment worked against him being able to sponsor his wife to allow her to immigrate to Australia from Vietnam.

The bulk of worker witnesses who testified said that being employed as casual left one with no sense of job security; one can be sacked without reason or cause on an hour's notice; credit is difficult to obtain; planning family holidays is impossible; falling ill means loss of pay if one can't make it into work (and possible dismissal); and generally, one feels as though one is a second class citizen in the workforce.

All employees whether casual or permanent should have the right to be treated fairly irrespective of their status. Likewise all employers should have an obligation to treat employees fairly and without discrimination. Responsible employers small or large should therefore have nothing to fear from providing casuals with access to unfair dismissal provisions. However if this Bill is introduced it will simply give employers a green light to treat an already marginalised but growing section of the workforce, unfairly and in a discriminatory manner.

It will increase the growing gulf between conditions and rights for permanent and casual employees.

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