15 April 2002

The Secretary
Senate Employment, Workplace
Relations, Small Business and
Education Legislation Committee
S1.61 Parliament House
Canberra ACT 2600

Dear Secretary

WORKPLACE RELATIONS AMENDMENT BILLS

We refer to the above matters and make the following submissions.

Workplace Relations Amendment (Genuine Bargaining) Bill 2002.

It is alleged in the minister's second reading speech that unions use pattern bargaining to conduct their negotiations across a range of employers or an industry and do not genuinely negotiate at a enterprise level.

This Bill goes far beyond the alleged ill it serves to remedy. The nature of interests of unions and employees clearly extends beyond the terms and conditions of any one company. For example a casual employee performing the same job at two separate companies has a significant interest in ensuring the terms at each site are maintained as closely as possible otherwise they suffer financial disadvantage. Likewise a union has a significant interest in the pursuit of claims on a common basis.

The issue simply put is not whether bargaining occurs on an industry (or workplace for that matter) level. It is whether the participants, employees, their representatives and employers freely choose at what level they bargain. For Government to impose on employees, unions, which are in any case democratically elected organisations, or employers for that matter, the level at which bargaining takes place results in government imposing unwanted third party intervention on the parties to the industrial relationship.

In any case the provisions in the Act already provide a negotiating party with the capacity to seek that a bargaining period be terminated on the grounds that the party is not genuinely attempting to reach an agreement with the other negotiating party.

The intention of this Bill is to stop industry outcomes. The fact that a claim is being pursued at an industry is frankly irrelevant as to whether genuine bargaining is occurring at the workplace or enterprise level. In our view proposed Section 170MW(2A)(a) is deeply flawed as a matter for the

Commission to be considering. Every union within Australia seeks consistent outcomes. It would be irrational policy making on the part of a union to seek inconsistent outcomes. However the issue is whether the union (and its members) is prepared to examine the circumstances of the individual workplace and enterprise when determining outcomes. The proposed section just does not adequately capture the issue.

Likewise sub paragraph (b) of s170MW(2A) is also misconceived. All sub-paragraph (b) would serve to do would be to misconstrue an industry claim in the context of individual company negotiations. It misses the point that unions may serve the same claim across all employers in an industry, or be seeking common outcomes.

Further the issues associated sub-paragraphs (d) and (e) we say are appropriately considered, not by a mish-mash of reform addressed to end "pattern bargaining" but should be dealt with by a proper "bargaining in good faith" jurisdiction. The elimination of the protection of a bargaining period only is frankly insufficient and misconceived in the context of the matters considered by the Bill. These matters would be better dealt with by means of a comprehensive bargaining in good faith jurisdiction where the Commission could have a greater capacity to intervene, and where appropriate make orders directing the parties to act.

Workplace Relations (Fair Dismissal) Bill

We believe that this Bill is also misconceived. We say this for two reasons:

1. It is grossly discriminatory;

2. It is based on more anecdotal evidence and no meaningful statistics whatsoever.

As to the first issue it is unquestionably the case that the Bill operates on a policy based not on whether a company has acted lawfully, but solely upon the size of the employer. It seems to us a very strange outcome that the size of the employer can be used to alter what would be clearly in other circumstances harsh, unfair or unjust treatment of its employees.

Further the amendments recently made to the "Unfair Dismissal" provisions by way of limiting their capacity of law firms to bring claims on a "no win, no fee" basis and the increasing risk of unmeritorious applicants facing adverse costs orders has introduced a significant disincentive in the system. To then allow employers to act capriciously and willfully merely because they are a "small business" can only be said to be ideology only. It is not and can never be rational policy making. It reflects a wrong-headed view that policy should only benefit one group to the exclusion of others.

Secondly there is virtually no statistical evidence of unfair dismissal laws being a burden on the hiring of staff. The hiring of staff is a demand driven issue for the Australian small business sector.

Termination costs play virtually no part in the hiring decisions of firms. In the AWIRS Small Business survey conducted in 1995 which was reported at table 13.3 of the AWIRS 1995 book *Changes at Work* the responses to the open ended question why haven't you recruited more employees were listed. The overwhelming response was demand driven factors and not cost factors. The lack of any meaningful statistical data has meant that the Minister in his second reading speech was again forced to rely on individual anecdotes. The individual case is great for telling stories but is not useful for the purposes of policy making or legislative reform.

Secret Ballots for Protected Action Bill

The basis for this Bill also relies on a misconception as to the nature of industrial relations and the manner in which trade unions operate.

The Transport Workers' Union of Australia is an inherently democratic organisation with elected officers and officials as required by the Act. All members are represented by elected workplace delegates, who are the principle liaison between members and officials. This structure provides a highly organised mechanism for communication between the union and its members, and no decisions are made without the approval of members.

It is clear that the process set out in the Bill is intended to be cumbersome, awkward and inhibiting of the freedom to take protected industrial action. The issues raised are in some respects similar to those considered by the Federal Court in David's Distribution v National Union of Workers, (1999) FCA1108. In discussing the requirements for the provision of notice in relation to the intention to take industrial action by trade unions, the Court made the following observations (para 84):

Industrial disputes are dynamic affairs. Decisions as to future steps often that need to be made at short notice, sometimes in response to actions of the opposing party or other people, including governments, and changing circumstances…

If there is a genuine concern about whether or not union members support proposed industrial action, the answer is evident. Members will not take the action if they do not believe in it. If the government is concerned about coercion in relation to industrial action, these concerns are dealt with through other provisions of this Act and common law.

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

In particular, the TWU believes that the passage of this Bill represents both a failure to abide by the decision of the umpire in relation to the subject matter of the Bill and an attempt to intimidate the Australian Industrial Relations Commission ("the AIRC") in relation to the appeal which is presently before a Full Bench of the AIRC.

The TWU does not believe that there is any pressing need for this Bill and that the appropriate response from the Government should be to await the decision of the AIRC and if it is then considered to be unfavourable to engage in appropriate consultation in relation to whether the Bill is necessary.

The TWU further believes that the Bill runs counter to the very comments of the then Minister for Workplace Relations Mr Reith when he introduced the Workplace Relations and Other Legislation Amendment Act. Mr Reith in the Second Reading Speech stated

> "Our legislation puts the emphasis on direct workplace relationships, and on the mutual interest of employer and employee in the success and prosperity of the enterprise. The bill promotes a legislative framework, without unnecessary complexity or unwanted third party

> intervention. Above all, the legislation is designed to empower employers and employees to make decisions about relationships at work, including over wages and conditions, based on their appreciation of their own interests."

The Bill seeks to overturn agreements made at the workplace by imposing unwanted third party intervention onto the relationships of employer and employee at the workplace. It seeks to deny the right of employers and employees to make decisions about their relationships at work and operates on the premise that employers and employees are unable to appreciate the nature of their own interests.

The TWU notes that in the circumstances where a valid majority of employees have voted upon and agreed as to the terms of an agreement, the interference of the Commonwealth Government as provided for by the Bill would operate to overturn the very nature of majority voting.

Yours faithfully

JOHN ALLAN
FEDERAL SECRETARY