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17 April 2002

John Carter
Secretary
Employment, Workplace Relations,
Small Business and Education Legislation Committee

Email: eet.sen@aph.gov.au

Dear Mr Carter,

Please find attached the Independent Education Union's submission to the Inquiry into a package of five bills to amend the Workplace Relations Act 1996.

Many thanks for your assistance.

Yours sincerely,

Lynne Rolley
Federal Secretary

INDEPENDENT EDUCATION UNION OF AUSTRALIA

SUBMISSION TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

Inquiry into a package of five bills to amend the Workplace Relations Act 1996

April 2002

INTRODUCTION

1. The Independent Education Union of Australia (lEU) has prepared this submission for the Senate Employment, Workplace Relations, Small Business and Education Committee Inquiry into the package of five Bills, to amend the Workplace Relations Act 1996. The Bills concern the following:
   - The Genuine Bargaining Bill
   - The Fair Dismissal Bill
   - The Fair Termination Bill
   - The Secret Ballots Bill
   - The Compulsory Union Fees Bill

2. The IEU has read and supports the submission made by the ACTU to this Inquiry.

3. Essentially, the effect of these Bills is to diminish the industrial rights and entitlements of workers and to advantage the industrial and legal rights of employers in their dealings with unions and their members.

4. The substance of the proposed Bills have already been part of legislative proposals put forward by the government, and have been part of rigorous public debate and the subject of Senate Inquiry reports. They failed to advance into law. **The IEU opposed them as part of the proposed amendments to the Workplace Relations Act in 1999 and 2000 and remains opposed in their recycled form in this set of Bills. The IEU urges the Senate Inquiry report to reject this proposed legislation.**

The IEU and the Non Government Education Sector

5. The IEU is a federally registered organisation pursuant to the provisions of the *Workplace Relations Act 1996* and operates in the non government education industry which comprises Catholic and other independent schools, pre schools and kindergartens, English and Business Colleges. The union's membership of approximately 50,000 consists of teachers, principals, teacher aides, education support staff, clerical and administrative staff and other ancillary staff such as cleaners and grounds and maintenance staff.

6. The IEU and its Associated Bodies are party to numerous awards and certified agreements. The awards and agreements applying to schools in Victoria, the ACT and the Northern Territory are federal awards. Other federal awards to which the union is a party cover English and Business Colleges across most states and the ACT.

7. The IEU is strongly committed to an orderly and fair approach to industrial regulation for all education workers. The union is also open and responsive to a flexible system of industrial relations which recognises the particular history, ethos, organisational and professional practices of the various educational institutions in our sector. This is evident in the substantial number of awards and certified agreements negotiated by the union under the present system of industrial relations.

8. The non government education sector is a significant and diverse one. In the schools area alone there are approximately 2,500 non government schools, of which approximately 1701 are Catholic Schools, employing some 67,000 staff. There are approximately 1350 system or individual employing authorities. Non government schools are often affiliated with groups which have a particular educational, ethnic or religious philosophies.

9. There is enormous diversity in the size of schools and educational institutions. There are approximately 700 primary schools with enrolments of between 100 and 300 students, 109 primary schools with enrolments of between 1 and 35 students and 5 primary schools with 800 to 1000 students. A significant number of schools could be characterised as small workplaces.

10. Approximately one third of schools in the non government schools sector operate in the federal jurisdiction. Colleges which provide English Language Intensive Courses for Overseas Students (ELICOS) are respondent to federal awards. There are approximately 90 of such accredited institutions operating in the non government sector. Of the vast number of child care institutions in which the IEU has coverage approximately 65 are respondent to a federal award.

Workplace Relations Amendment (Genuine Bargaining) Bill 2002

11. The purpose of this Bill is to prohibit common claims which have been long established industrial bargaining practice on the part of both unions and employers. The Bill contains 3 main provisions which go to *Pattern Bargaining, New Bargaining Periods* and *Cooling Off period.* Effectively there is little difference in terms of the outcomes and the intentions in relation to this Bill as there was in the 2000 Bill. The current Bill will have the same impact on the bargaining process as the previous Bill which has already been rejected by the Parliament.

12. The IEU believes that the Bill, if enacted, will impact negatively on proper industrial relations in the non government sector. In particular the IEU contends that

- Pattern bargaining is widespread in the non government education industry where the union ordinarily makes common claims across a number of employers

- It is in the public interest that such common claims are made and mirror agreements or multi business agreements are sought

- Employers in the non government education industry support and engage in pattern bargaining and have not expressed any concerns about common outcomes or any desire for differential outcomes across schools and educational institutions

- Even where employers in the non government education industry are in competition ie the ELICOS industry, employers seek to negotiate common outcomes in respect of wages and conditions, and

- There is no just reason for any further restrictions to be imposed on the taking of lawful industrial action.

13. While flexibility of arrangements to take account of particular education, ethnic, religious and financial arrangements can be accommodated in enterprise bargaining in the non government sector, it is in the public interest that there is a general consistency across the nation of wages and conditions for Australia's teachers and education workers.

14. Employers in the non government education sector have historically engaged in 'pattern bargaining' with the union over wages and conditions and made multi employer agreements or agreed to mirror certified agreements. It is in the interests of equity and quality in educational outcomes that common bargaining outcomes across schools and non government educational institutions are achieved. This was confirmed in the ACCER's submission to Senate Committee's Inquiry into the Workplace Relations Amendment Bill 2000 when it said:

"It may be unnecessarily time consuming and costly for similar enterprises, undertaking similar work, to establish separate enterprise agreements, especially where the organisation seeks to bargain on an industry wide level to ensure equity in its outcomes to its employees and its delivery of services. For example, this is found in parts of education, where a large number of schools may act in cooperation with each other and not in competition, as they are not equipped to bargain individually and they seek to achieve mutual outcomes."

15. It is important to note that key employers in the non government education industry have not called for reform in this area and have shown little interest to date in pursuing agreements with disparate outcomes. In fact, the ACCER submission referred to above states that *"The ACCER supports employers and employees* ***freely*** *forming any type of agreement, whether at an individual, enterprise, industry or national level"* arguing that this is consistent with the principal object of the Act, which enable *"employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for in this Act."*

16. However, it is not fair that the union must rely on the compliance of the employer on this matter. In the context of vigorous industrial campaigns, various employers in our industry have demonstrated to the union that they will use every means at their disposal to 'defend' their position and frustrate the union's claim in an attempt to undermine the bargaining power of its members. This was demonstrated in the 1997 bargaining round in the Victorian Catholic sector when Catholic school employers stopped payroll deductions in response to members taking protected industrial action.

17. Further, there are some employers in the non government education industry who take advantage of the religious sensibilities of employees or who have threatened redundancies when claims are made to avoid making agreements. These employers operate their 'businesses' in the same economic climate as other employers or are in receipt of the same levels of government funding. Currently, in the absence of any compulsory arbitration, the union pursues industry wide claims in an attempt to bring these employers along in the process

of securing equitable outcomes in terms of wages and conditions across the industry or convenient groupings within it. The proposed legislation only serves to enhance their capacity to abrogate their industrial responsibilities.

18. The IEU disputes the claim of the Minister in his second reading speech that the current Bill *"would not prevent unions from making the same claims over a number of employers."* This Bill places the onus on the union to demonstrate to the Commission that the making and pursuit of a common claim is not evidence of *"an intention to reach agreement with persons in the industry who are, or could become, negotiating parties to another agreement with the first party, rather than to reach agreement with just the other negotiating parties"* [s170MW(2A)(a)]

19. The evidence in relation to the IEU's bargaining negotiations demonstrates an understanding by the union that the nature of the sector requires an in principle commitment to the equity and quality principles referred to above but also needs to accommodate the diversity of the sector. Consequently, across all sectors of the industry in Victoria, the IEU has been prepared to and in some cases has, negotiated with individual employers on particular enterprise level issues within the framework of an industry wide claim. Attached to this submission is the section of the Union's previous submission related to the year 2000 legislative amendments regarding the operation of pattern bargaining in the Victorian Catholic Schools Sector.

20. It is therefore the view of the union that the intention of this proposed legislation is to advance the interests of employers with no safeguards provided for employees. In the present system of industrial legislation no capacity exists for an independent umpire to determine a claim. If an individual employer does not wish to meet with or confer or make an agreement with a union which has initiated a bargaining period, there is nowhere for the union to go. The union however, is required to genuinely respond to employer proposals to bargain and try to reach agreement. The IEU believes that the Bill should address the incapacity of the Commission under the current legislation to deal with a dispute through the arbitral process.

21. The IEU believes that the Act as it now stands upholds the wide discretion and judgement which the Commission has to prevent the taking of protected action where a party is not genuinely trying to reach agreement at the enterprise level and this is strongly supported by the union. There is no need to further legislate to secure or strengthen this. The inclusion again of provisions for "cooling off" are intended only to weaken the bargaining position of employees when engaged in lawful industrial action in support of their claims.

Workplace Relations Amendment (Fair Dismissal Bill) 2002

22. The IEU supports the arguments advanced by the ACTU which reject the view that exempting small business from the unfair dismissal laws will strengthen employment or other economic benefits. In particular, the union refers to the decision of the Full Court of the Federal Court in the Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589 (16 November 2001)

quoted in the ACTU submission which concluded that no link could be shown to exist between unfair dismissal laws and employment.

23. The substance of this Bill which proposes an exemption for small business of less than a certain number of employees (in this case less than 20) has been before the parliament on three prior occasions and has been rejected by the parliament. This Bill represents a further attack on the industrial rights of workers and in relation to the non government education industry, employers have not, to the union's knowledge, called for changes consistent with the proposed amendments. Further, a number of amendments dealing with process issues were made to the Act with the passage of the Workplace Relations Amendment (Termination of Employment) Bill 2000. The IEU believes that these reduced the industrial rights of employees and no further diminishing of employment protection should occur.

24. Many employers in the non government education sector can be defined as small businesses. A very substantial number of Catholic primary schools in Victoria, the ACT and the NT would have fewer than 20 permanent employees and this is similarly the case with the ELICOS industry across Australia and these institutions would therefore be exempt from requirements to exercise reasonable standards of fairness. The IEU is opposed to any provisions by which small undertakings are exempt from these requirements or singled out for special treatment. The union believes the principles of procedural fairness should apply to all organisations irrespective of the size of the employer.

25. Of particular concern to the union are the provisions in the Bill which govern which employees are counted for the purposes of determining if a workplace constitutes a small business. Casuals are not counted except those engaged on a regular and systematic basis for a sequence of periods of employment of at least 12 months. The sector of non government education that will be particularly affected by this provision is the ELICOS sector.

26. The ELICOS sector is relatively volatile and the history of employment practices in this industry has been vexed with colleges coming into existence and then becoming insolvent and closing, only to be re-established under another name. In the process of this occurring, staff have lost their employment and in many cases, their entitlements. The industry is highly competitive with similar institutions in other countries and within Australia and staffing levels are driven by the uncertainty of student numbers from term to term. The practice of employing a small core of permanent teachers supplemented by casual or sessional teachers, either short term or extended on a regular or irregular basis, is common. The capacity to then manipulate staffing policies to gain advantage from the proposed legislation and to maintain the status as a small business and thereby avoid the obligations under unfair dismissal laws, is evident.

27. The IEU is opposed to the Bill and urges the Committee to recommend that it not be supported in the Senate.

Workplace Relations Amendment (Fair Termination) Bill 2002

28. This Bill restores the exemption for employers from the unfair dismissal laws in relation to casual employees with less than 12 months service - that is, employers can terminate the employment of casual employees without their having to meet the principles and obligations of procedural fairness under unfair dismissal laws. Given the increasing number of people employed in the workforce as casuals and the continuing structural changes to the workforce, the union believes that legislation should be drafted which strengthens the protections for these workers, not diminishes them. Many of the arguments made by the government in support of the Bill are similar to those for the small business exemption outlined above and the operation of the two Bills in tandem significantly skew the Workplace Relations Act in the favour of employers. The precarious employment status for the staff in the institutions described above will be made worse with the introduction of these Bills and for the same reasons already advanced, the union rejects the legislation.

29. The IEU supports the ACTU's recommendation that the Fair Termination Bill should be amended to provide that casuals are able to make applications in relation to unfair dismissal after three months regular and systematic employment, as for all other employees.

Workplace Relations Amendment (Secret Ballots For Protected Action) Bill 2002

30. The Union rejected the Bill of the same name in the raft of Bills presented to the parliament in 2000 and does not believe that the current Bill, with its various amendments, enhances and strengthens industrial democracy but would continue to hinder and prevent the fundamental right of union members to take industrial action.

31. The IEU supports the right of union members to vote on industrial action, including the right to strike, work to rule, work bans etc. In all cases, when a branch of the IEU has taken industrial action, members have been asked to vote in support (or not) of the action.

32. At present, section 136 of the Act provides for the right of employees to participate in a secret ballot with regard to proposed strike action.

33. The Act (Section 135) also provides for the Commission to order the conduct of a secret ballot on the basis that it may assist in resolution of a dispute or to ascertain whether an agreement has been genuinely made. As well, it is open to the parties to make submissions to the Commission that such a ballot should be conducted.

34. It is the view of the Union that the Bill retains a complicated and protracted process set out in the Bill for the taking of protected industrial action. This includes the content of the ballot paper, the nature and form and conduct of the action and its place and duration. Its complexity and costs are such that compliance with the provisions would make pointless the right to take protected action. This is an attack on industrial democracy and the union urges the Committee to recommend that the Senate rejects the Bill.

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

35. The IEU made a submission to the Committee on the mater of the prohibition of compulsory union fees and opposed the Bill. This Bill seeks to do the same, although it also goes to prohibiting associations from demanding a fee and discrimination based on non payment of a fee and coercion of a person to pay a fee. The union remains strongly opposed to its passage through the parliament.

36. There is no evidence in the non government education sector of any coercion or discrimination resulting from the non payment of a bargaining fee, or for that matter, the decision by an employee not to pay the fee to join the union.

37. This matter of bargaining fee clauses has been the subject of consideration and decision in the Commission and appeal before the Full Bench of the Commission and is currently on appeal before the Full Court of the Federal Court arising from a decision of Merkel J in the Electrolux Home Products Pty Ltd v Australian Workers' Union [2001] FCA 1600 (14 November 2001). This matter should await the Court's decision.

37. The stripping back of the award system has resulted in a reliance on the union movement's capacity in the federal system to negotiate a certified agreement in nearly every workplace. In the non-government education sector, this has resulted in an enormous shift in resources from negotiating, for example, award improvements to cover hundreds of independent schools to having to try and establish a certified agreement in every school. For systems of education such as Lutherans, Catholics, Anglicans – there are in place certified agreements or awards in state jurisdictions that still cover all workplaces, but for the majority of independent schools in the federal award jurisdiction, union members have to struggle every bargaining round to achieve a workplace agreement – in many workplaces this struggle has been lost and workers are only covered by minimum conditions.

38. Yet this is the system we have to live with – the rhetoric at the time of moving to enterprise bargaining was that it would actually allow workers and their employer to customise conditions to suit their particular circumstances. The making of enterprise agreements was supposed to allow true workplace democracy – ie. through negotiations, workers and employers alike would have the chance to settle on conditions that were properly representative of their particular identity.

39. The purpose of this submission is to not analyse how far short of achieving this aim was accomplished by stripping back awards and making workers reliant on their bargaining capacity. The intent of the Bill is to now seek to prohibit what can and can not be collectively agreed to in a certified agreement – a piece of logic that sits askew with the government's own ideology about collective agreements.

40. A misnomer in the title of the Bill is the ban on "compulsory union fees". How can fees be compulsory if they have been agreed to by the majority of employees? Every aspect of a certified agreement must be approved by the majority of employees at a given workplace – regardless of whether they are

union members or not. Once the vote is taken, the will of the majority presides. It seems nonsensical to argue that a clause that was agreed to by the majority of employees must now not be able to be implemented.

41. In the non-government school sector, union membership can vary significantly from school to school. Regardless of whether union density is high or low in a school, a significant amount of union resources are expended in achieving a certified agreement. Regardless of the number of union members at a workplace, the IEU is committed to assisting its members. As many as 20 workplace (often more) meetings may be necessary just in one school to move from meetings with interested members and developing a draft claim, to the establishment of an enterprise bargaining delegation, the timing of formal negotiations, and the final certification of an agreement. In many cases, the union provides relevant industrial advice to all staff and to employers so that the overall objective of improving wages and conditions can be accomplished.

42. There are strong grounds for arguing that non-members, who receive all of the benefits of a certified agreement, should contribute something towards the cost of such an achievement. No union is arguing that they must join the union – that would be a breach of Freedom of Association principles, simply that a bargaining fee, **if agreed to by the majority of employees,** should be able to be collected. The agreement of employees makes no delineation between union and non-union members.

43. The ACTU submission mentions examples of many other countries that provide for a bargaining or agency fee – including the United States, Canada, Switzerland, Israel, and South Africa. None of these countries have found that the provision of such a fee is inconsistent with principles of freedom of association. In Australia, the notion of a service-based fee is generally understood to be a reasonable one – you pay for the services you received. In this context, the only point of difference seems to be that it is about the notion of a union collecting a fee for a service rendered as opposed to any other professional body or organisation.

44. In summary, the IEU is opposed to the passage of the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 for the reasons outlined in this submission, namely:

- The proposed Bill is not consistent with the underlying principles of collective agreements
- The collection of a bargaining fee is not compulsory – it relies on the vote of a majority of employees eligible to be covered by the agreement
- There is no evidence of coercion or discrimination resulting from the non payment of fees and the matter is now before the Federal Court and should wait for decision from that process.
- A user-pays principle certainly supports the notion that non-union members should contribute towards the cost of having bargaining conducted that benefits them
- There is strong international precedent for a bargaining fee

45. The IEU strongly supports the ACTU submission, and recommends that the Bill be not proceeded with.

ATTACHMENT A

PATTERN BARGAINING IN THE VICTORIAN CATHOLIC SCHOOLS SECTOR (from the IEU submission to the Senate Inquiry into the Workplace Relations Amendment Bill 2000)

Pattern Bargaining in the Victorian Catholic Schools Sector

1. There are 396 Catholic primary schools and 99 Catholic secondary schools in Victoria. The number of employers is not significantly less than the number of schools. While some secondary schools are operated by a particular religious order (eg the Sisters of Mercy operate 7 secondary schools and 2 special schools) more than 80% of employers are parish priests who act as employer in respect of a single parish primary school. All significant pay, payroll, human resources and industrial relations matters in respect of these primary schools are coordinated centrally through the Victorian Catholic Schools Association (VCSA) and Catholic Education Offices (CEO's).

2. All employers operate as a system under the auspices of the Catholic Education Commission of Victoria. The Commission has the responsibility for the distribution of government funding to all systemically funded schools in the state of Victoria. Under this arrangement schools operate in cooperation with each other and not in competition.

3. The history of industrial regulation in this sector of the education industry is that a single award and/or certified agreement has regulated the terms and conditions of employment of employees in all Catholic schools except Xavier College. The award is the Victorian Catholic Schools and Catholic Education Offices Award [1998] and the current agreement is the Victorian Catholic Schools and Catholic Education Offices Certified Agreement (1999 - 2000).

4. Four separate successive agreements each replacing its predecessor have been reached since the making of the first federal award for Catholic schools in Victoria. These agreements and their period of operation were and are as follows:

   - The Victorian Catholic Schools and Catholic Education Offices Certified Agreement (1995) (C. 39716 of 1995) 12.10.95 - 1.6.96

   - The Victorian Catholic Schools and Catholic Education Offices Certified Agreement (1996) (C. 34151 of 1996) 1.7.96 - 20.3.97

   - The Victorian Catholic Schools and Catholic Education Offices Certified Agreement (1998) (C. 38662 of 1997) 12.12.97 - 24.1.99

   - The Victorian Catholic Schools and Catholic Education Offices Certified Agreement (1999 - 2000) (C. 30611 of 1999) 25.1.99 - 29.1.2001

5. These agreements have also covered employees in all Catholic Education Offices throughout Victoria. In all, more than 15,000 employees' terms and conditions of employment are regulated by the current certified agreement.

6. In negotiating these agreements, in all cases a single common claim has been made in respect of all schools. In each round of bargaining each school and every employer has been represented by the VCSA. Any and all attempts to bargain with individual employers have proven entirely unsuccessful. In 1997, in response to a refusal on the part of employers collectively through the VCSA to reach an agreement acceptable to members, the IEU's Victorian Branch initiated a bargaining period with each employer and approached more than 100 employers seeking to reach agreement at the single enterprise level. All employers approached refused to bargain at the single enterprise level.

7. Notwithstanding this attempt, all parties to the current agreement including the IEU recognise the desirability of central regulation. Section 170LC (4) of the Workplace Relations Act currently provides that the parties are required, in the process of making application for the certification of a multi-employer agreement, to satisfy a Full Bench of the Commission that certification is in the public interest. The IEU and the VCSA on behalf of all respondent employers included the following statements in statutory declarations supporting the certification of the two most recent certified agreements:

"Maintaining the status quo in respect of industrial regulation is essential in ensuring that employees within Catholic education are able to maintain portability of conditions and entitlements and assists in encouraging mobility within Catholic education. Similarly employers are assisted in recruitment and retention of employees."

Other 'Pattern Bargaining' in the Non Government Education Sector

8. Employers in the ELICOS industry are respondent to one of two federal awards. It is a highly competitive area. A common claim is served on employers, usually operating in the same state, and bargaining proceeds. The employers are often represented at negotiations by the various employer organisations such as VECCI or the NSW Employers' Federation. In NSW approximately 30 colleges negotiate with the union under the auspices of a 'federation' of employers known as the Education Providers Industrial Association (EPIA). Following the serving of an industry wide claim, an EPIA representative negotiates with the union and coordinates consultation with individual employers. On reaching agreement individual mirror agreements are certified in the Commission. Currently there are 30 federal certified agreements across the ELICOS industry in NSW providing the 'EPIA agreement' outcomes. Only 3 colleges in NSW are party to agreements with different wages and conditions.

9. In the ACT there are six 'independent schools' who are represented by the Association of Independent Schools. The union makes a common claim on these schools for wages and conditions and ultimately reaches common outcomes certifying identical agreements. Most recently these schools reached agreement with the LHMU over wages and conditions for grounds and maintenance staff and certified a multi business agreement.

10. Also in the ACT are around 65 Long Day Care Centres that employ qualified teachers. A new award has recently been covering this work. It would be the intention of the union when seeking improvements in wages and conditions for teachers in these childcare centres to make a common claim on these employers and bargain on an industry wide basis

11. There are few employers in the Northern Territory in the non government education sector. There is one Catholic Employer operating 16 schools and 15 other independent schools. The IEU makes a common claim on these schools and attempts to bargain across the industry. The wages outcomes where agreements are made are common.