Submission no: 7

Australian Education Union and National Tertiary Education Industry Union Joint Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the provisions of the Workplace Relations Amendment (Award Simplification) Bill 2002, Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 and Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004

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The Australian Education Union (AEU)

The Australian Education Union is a federally registered trade union with over 160,000 members employed in public education in all states and territories of the Commonwealth. The AEU represents the professional and industrial interests of public education workers in pre-school, school and TAFE systems, and in Disability Services in Victoria. The AEU is a strong advocate for increased resourcing of public education by state, territory and federal governments of all political persuasions.

The working conditions of AEU members are regulated through federal awards and/or agreements in all states and territories except Queensland and New South Wales, where they are regulated through awards and agreements in the respective state industrial systems.

The National Tertiary Education Industry Union (NTEU)

The National Tertiary Education Industry Union (NTEU) represents approximately 27,000 staff in tertiary education institutions around the country. Approximately 17,000 of our members are academic staff employed in universities, and around 10,000 are "general staff" employed in TAFE, universities and Adult Education.

The NTEU represents the professional and industrial interests of its members through:

- improving and protecting conditions of employment through industrial negotiations at local, state and federal levels;
- promoting the work of universities and colleges and, in particular, their independence and integrity;
- defending the rights of academic staff to teach, research and disseminate knowledge without fear or reprisal, and to defend the professional standing of general staff members;
- working with other stakeholders to lobby for a strong, publicly funded tertiary education sector, and participating in relevant policy debates.

The working conditions of NTEU members are regulated overwhelmingly through federal awards and agreements.

Introduction and General Attitude to the Bills

The NTEU and AEU (the Unions) have examined the Bills and call upon the Senate to reject all of them. The Unions submit that each of them is designed to reduce the entitlements of employees, either directly (for example, by further depriving employees of Award entitlements), or indirectly by further weakening the collective bargaining power of employees.

This submission is not comprehensive, in the sense that it does not deal with all aspects of the proposed legislation. Rather it focusses on those matters of which the AEU and NTEU have already had direct experience of where we perceive specific disadvantage for our members or those working in education. In respect of those matters which are not specifically addressed in our submission, the Unions endorse the thrust of the ACTU's position in relation to the Bills.

Workplace Relations Amendment (Better Bargaining) Bill 2003

This proposal could most generously be described as ill-conceived and not supported by any empirical evidence demonstrating that it is necessary. A more realistic assessment is that it is another partisan legislative intervention designed to weaken the bargaining power of employees and their unions.

The Unions specifically wish to comment on Schedules 1 and 2, and briefly on Schedule 3.

Schedule 1

These provisions are purportedly to "solve" the "Emwest problem", being the limited capacity some employees still have, to take industrial action after the certification of an Agreement which applies to them, because of the terms of subsections 170 MN (1) and (4) of the *Workplace Relations Act* ("the Act").

The right to take industrial action is an important human right protected by Conventions of the International Labour Organisation ("ILO") to which Australia is a signatory. It is recognised, of course, that the right to strike under ILO Conventions is not unlimited. However, the proposed changes to 170 MN (1) would have a number of consequences:

1. The right to strike recognised by the ILO Conventions does not differentiate between industrial action in support of political demands and industrial demands. To apply a penalty provision to all types of industrial action by persons covered by an Agreement is an unwarranted intrusion into democratic rights. There is already an armoury of discretionary remedies available in respect of most political strikes. A blanket prohibition on them is not justified.

2. The second problem with the proposed alteration to 170 MN (1) is best indicated by the following, entirely possible, scenario:

   "Twenty employees are covered by a State minimum-rates award and all receive the minimum rate. The employer proposes a single-item certified agreement which provides only for the granting of an

extra day's leave at Christmas. The Agreement is to operate for three years. The employer advises the employees that all other conditions remain unchanged. Understandably, a valid majority votes 'Yes'."

By this means, the employees are effectively denied the right to take industrial action on *any* issue for the full three years of the Agreement. Clearly, this would be an unfair contrivance by the employer, but one that would be encouraged by the Act.

3. However, the most absurd consequence of the proposed alteration is that it would remove the requirement in the current provision that industrial action (as defined Section 4 of the Act) is not only occurring, but also that the action is for the purpose of advancing claims against the employer. The removal of the latter requirement of course means that *all* industrial action by employees attracts the liability to an individual penalty of up to $2,000. Given the very broad definition of industrial action in Section 4, including relevantly;

   "the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or delay in the performance of the work where (a certified agreement applies)."

   The government's proposal would therefore make employees liable to a maximum $2,000 fine for any of the following:

   - Being deliberately late for work;
   - Refusing to use a new email system which was more efficient;
   - Making an unauthorised private phone call during working time.

   Using the Courts to apply fines to "bad workers", who need not even be involved in a dispute, smacks of a return to nineteenth century concepts of servility, and would bring the law, and the courts enforcing it, into disrepute.

Whether this is the intended consequences of drafting by an incompetent government, or really represents the considered intentions of the Minister is not known to the Unions.

However, this provision alone should lead to the Senate's rejection of the Bill.

Schedule 2

The introduction of provisions requiring the Commission to exercise broad discretion about suspending bargaining periods is very bad policy and will put the Commission into an invidious position.

Employers almost never need to take protected industrial action. Employees' pay and conditions are eroded by inflation and other changes in the workplace, and it is overwhelmingly employees who need to take protected industrial action to secure their legitimate industrial interests.

The only reason for opening a bargaining period under the Act is to allow for protected action, and the only real effect of suspending a bargaining period is that it denies the parties the right to take protected action.

Therefore, in the context of bargaining, the suspension of a bargaining period is virtually always a highly partisan act in its objective effect, as well as how it will be perceived. It denies the party taking protected action the right to pursue its interests. It gives a huge "free kick" to the other party.

The AEU and the NTEU do not support the existing provisions about *terminating* a bargaining period. However, there is at least a certain logic to those provisions. If, for example, industrial action is causing serious harm to the economy, the Commission may terminate the bargaining period. However, the employer seeking to have the bargaining period terminated at least knows that the bargaining dispute will then be arbitrated and that it will therefore run the risk of losing in arbitration what it has been resisting in bargaining.

However, the Senate should oppose any further extension of "suspension" which is, in fact, likely to lead to prolonging and delay in bargaining.

The AEU and NTEU place a high priority on democratic and participatory decision-making, including in relation to decisions to take industrial action. As responsible professional and paraprofessional workers, NTEU and AEU members are always cognisant of the potential impact of industrial action on students and their families, and as a result are slow to escalate industrial action from minor work bans or stopwork meetings through to the complete withdrawal of labour in the form of strikes, or bans on transmission of results.

It is the experience of the Unions and their branches that the current system of enterprise bargaining as provided for by the *Workplace Relations Act* allow workers no effective means of advancing bargaining in the face of employer intransigence other than the taking of industrial action.

The proposed Schedule 2 would empower the AIRC to suspend bargaining periods where any individual person can demonstrate they are likely to suffer significant harm as a result of actual or proposed industrial action.

It is not expressly aimed at education and health workers in the terms of the Bill, but the Minister's second reading speech makes it explicit that we are the target of the proposed legislation. In the second reading speech, Minister Kevin Andrews said:

> *"This Bill also seeks to address the harm that some industrial action causes third parties. Industrial action by negotiating parties can impact upon, or aim to harm, third parties who are not directly involved in the dispute – **for example the clients of health, community services and education systems** and other businesses."*

The proposed new Section 170MWC if adopted would empower the AIRC to suspend bargaining periods, thus making industrial action unprotected, if an application for suspension is lodged by or on behalf of a third party, being an organisation, person or body directly affected by the action (other than a negotiating party), or by the Minister, and the Commission considers that the action is threatening to cause significant harm to any person (other than a negotiating party). The terms "directly affected" and "significant harm" are not defined.

The third party can be a non-member employee, another business, or a contractor or client or consumer of services who will be affected by the industrial action. It might even include another union.

In deciding whether to suspend a bargaining period, the Commission must have regard to "the extent to which the person is particularly vulnerable to the effects of the action". While the draft legislation makes no explicit mention of education and health industries, doubtless it would not take much to establish that some students and patients are particularly vulnerable to the effects of industrial action.

The terms of the bill invest the AIRC with discretion, in that it does not automatically require the suspension of a bargaining period, but the discretion is constrained by an absolute requirement to have regard to the interests of affected third parties, and particularly to those who are particularly "vulnerable". The application for suspension of a bargaining period can be initiated with respect to threatened as well as actual industrial action.

The standard of public interest in relation to the suspension of bargaining periods is changed drastically from the current legislation. The existing s. 170MW provides that a bargaining period can be suspended if the industrial action "endangers the life, health or welfare of the population or part of it, or if it would cause significant damage to the economy". This has been applied in a manner which has disadvantaged education unions in the past, with the Commission holding that school students and their families (in one case) and university students (in another) could be considered a relevant "part of the population", and that strike action threatened by teachers was a sufficient danger to their "welfare" to trigger a suspension of the bargaining period. Under the terms of the Bill, however, all that is required is significant harm to a single person! So for example, under the current legislation it would be unlikely to be found to endanger the welfare of a part of the population if one or two students in every thousand had to miss or re-schedule an assessment, or if one parent missed a job interview because they could not find alternative child care arrangements on a strike day. But under the proposed changes, the impact on each individual student or parent could be considered in isolation, without regard to the overall impact on the population of students and parents, or on the economy as a whole.

Just as the Howard Government has consistently striven to eliminate the collective from workers rights, focussing only on the individual, this Bill shifts the focus from a public interest vested in the community and towards an individual level.

The Bill provides that a suspension of a bargaining period can be extended for a further period of suspension, but only once. There is no limit on the duration of each period of suspension.

The Government claims, on the basis of no presented evidence, that the suspension of a bargaining period would constitute a "cooling-off" period which would encourage productive negotiations or mediation.

No evidence is presented to support this from any other jurisdiction. The NTEU and the AEU submit that industrial action almost invariably *follows* lengthy negotiation. Union members do not take industrial action unless *they* are convinced there is no alternative and all other attempts to reach agreement have been exhausted.

In this context, the Government's claim that "cooling-off" periods will allow the parties to explore other options is nothing more than patronising cant.

Workplace Relations Amendment (Choice of Award Coverage) Bill 2004

It is clear from the name of the Bill whose interests the Government serves. The "choice" referred to is not a choice for anyone except employers. The clear implication underlying the legislation is that workers who are not union members would or do choose to remain award-free. In his Second Reading Speech the Minister puts forward no evidence in support of this proposition, which, on the face of it, seems an unlikely conclusion to draw. This Bill is not in any sense about giving workers choice. It is about employers being able to avoid the operation of what the current Act describes as *"a safety net of fair minimum wages and conditions….in the context of living standards prevailing in the Australian economy"* (*Workplace Relations Act* Section 88 B (2)), which is supposed to be one of the *objects* of Part IV of the Act.

So far from putting impediments to the finding of disputes (the jurisdictional pre-requisite for establishing such a safety net) or making Awards, the procedures in the Act should be consistent with the encouragement of the spread of the Award safety net.

The drafters of the legislation fail to grasp (or have ignored) long-standing principles applicable to the finding of disputes and the making of awards, and have imported into these areas concepts which, if they have any validity at all, are only applicable to enterprise-level bargaining.

The first of these is a misunderstanding of the nature of the log of claims. A "log of claims" has never been a statutory instrument. It is, in fact, merely an exhibit in proceedings. The "log of claims" is merely *evidence* of a dispute. The proposed amendments do not define a "log of claims".

The complexity of the proposal is shown by the following hypothetical, but entirely possible, scenario;

> *A union writes a letter to a university with operations extending beyond one State suggesting:*

1. *That the Science curriculum changes are educationally unsound and should not proceed.*
2. *That the cut in Science courses should not proceed.*
3. *That the consequent proposed redundancies should not proceed.*
4. *That no union member should be made retrenched, or alternatively that union members should be given not less than two years' notice.*

The University writes back saying it rejects all the union claims. The union then notifies a dispute about the proposed redundancies.

In this example, has the union served a "log of claims"?

If so, is the Commission denied jurisdiction because the letter deals with "non-industrial" questions? (Proposed 101A(d)(iii)).

Is the Commission precluded from finding the dispute because of the reference to "union members" offending the provisions of proposed Section101A(d)(ii)?

The NTEU and the AEU urge the Senate to understand that it is for the *union* to serve whatever claims or demands it wants – it is a democratic organisation operating in a free society.

If it wants to demand the resignation of the State Minister for Education in a letter which also makes industrial demands, this is its right.

The proper function of the Commission is *then,* to see whether, on the basis of all the factual material before it, an industrial dispute exists within the meaning of the Act. This is why unions are not *applicants* for a dispute finding, but are *notifiers* of the existence of a dispute.

It is therefore hard to see how the proposed Section 101A sits with Section 99 of the Act. A union, as part of its obligations as a registered organisation, is *required to notify* a dispute when it becomes aware of its existence. Such a dispute is not deemed not to be a dispute by the proposed alterations. Yet, while the union is required to notify, the Commission is precluded from finding the existence of such a dispute.

The combination of this proposal with Section 127 is also interesting, as is indicated by the following example:

> *An award-free company announces 200 retrenchments and gives four weeks notice of them. The union immediately serves a log of claims which includes claims for redundancy pay. The union only gives the employer seven days to agree, and notifies a dispute on the eighth day, also seeking an interim award of basic redundancy pay. In this circumstance, the union wants conciliation before the Commission but the dispute cannot be found because of proposed Section 101A (6). On the tenth day, the union members take industrial action and the employer makes application under Section 127 for the action to cease. The employer is then in a position of needing to establish the existence of the same substantive dispute in order to give the Commission jurisdiction to deal with the employer's application under Section 127.*

This example again shows the absurdity of the proposed legislation. The service of a log of claims is quite often an urgent response to an employer's actions. It is not fair that there is an absolute statutory bar on the AIRC finding a dispute for a lengthy period, when there is not accompanying statutory bar on the employer's actions.

The second fundamental misconception is in the proposed Section 101B. The nature of industry-wide disputes and the interests of employees as a class of persons are well-explained in several High Court Decisions. For example, *R v Dunlop; Ex parte Federated Miscellaneous Workers Union* (1957) 97 CLR 71 at 81:

> *"a demand by an organisation upon employers who employ at the time none of its members may put those employers in dispute with the organisation as to the wages and conditions of its members if and when they are employed. It [i.e., the doctrine] is the basis, too, of the further decision that a like dispute may be raised as to the wages and conditions which such employers pay to non-members (*Metal Trades Employers' Association v Amalgamated Engineering Union*). That basis is that not only need no present relation of employer and employee exist but that the organisation making the demand does not act merely as an agent for its*

members. It acts in an independent capacity and it does so because it represents not definite or then ascertainable individuals but a group or class the actual membership of which is subject to constant change, a group or class formed by reference to an industrial relationship, usually depending on an industry or calling."

This reflects the view summarised by Dixon, J, in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Kirsch* (1938) 60 CLR 507 at 540:

"the interest of an organisation in, so to speak, securing and maintaining standards or terms and conditions of employment for all so that they should not be lost to the members present and future whom it represents . . . [T]he interest which an organisation of employees possess in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms. As a result an industrial dispute may be raised by it with employers employing none of its members and an award may be made binding such employers and regulating the terms and conditions upon which they may employ unionists or non-unionists."

The High Court has recognised that, in relation to the establishment of an Award across an industry, all employees of all employers have a legitimate interest in the minimum rates of pay and conditions of employees across the industry. This, in fact, is what historically gave rise to the Award system – that below a certain minimum, employers should not be able to gain a competitive advantage by avoiding minimum of fair pay and conditions. A fair safety net cannot be sustainable if employers can avoid that minimum, for example, by ensuring that there are no union members employed in their workplace, or by other legal gymnastics.

It is also clear from the proposed 101B(6), that an employer who set up a new business with 500 casual staff could not even be found to be a party to a dispute (or have a basic minimum award apply) until twelve months after the business was established.

The Bill is a further incentive to the use of casual employment. The Bill would not even allow the Commission to find a dispute with a so-called small employer where there are no union members employed, even where that circumstance is only the case because the employer has dismissed all the unionists contrary to Section 298 K (1) and (2).

The Government says that many small businesses are not members of employer associations and find the process of dispute-finding confusing. This may be true in some cases.

However, the decision not to join an employer association is a business decision by the employer, the cost of which the Government now seeks to pass on to employees.

If the Government were genuinely concerned about such confusion it could, at least in relation to constitutional corporations, introduce federal common-rule awards.

Workplace Relations Amendment (Simplifying Agreement-making) Bill 2002

The NTEU and the AEU are opposed to Australian Workplace Agreements and to any legislative changes which further facilitate them. We support the specific criticisms of Schedule 1 by the ACTU and of other unions in this respect.

The Unions also oppose Schedule 2, but would wish to draw specific attention only to the following:

The proposed addition of Section 170 LT, Sub-section (II) might at first glance seem innocuous. However, it is probable that the words "suffered detriment as a result of that failure" would be the subject of much litigation.

For example, the employer could list a particular union as being bound by a proposed Agreement, then later delete the union from the Agreement, after the ballot of employees, but prior to certification. It is not clear that in these circumstances any employee has "suffered detriment". However, as a question of industrial reality, there are many circumstances where the impression among workers that the union had endorsed the proposed Agreement (an impression created by the unauthorised listing of the union as being bound by the Agreement) will be the determining factor in the employer obtaining a valid majority. It would seem that the "must certify" provisions of Sub-section 170LT(I) would *require* the certification of an Agreement notwithstanding the fact that the employer falsely claimed a union was bound by the Agreement, subsequently deleted reference to the union from the Agreement, and never advised the employees of this.

The proposed Section 170LVA is outrageous. Under the current arrangements a union has the right to be heard in relation to a "170 LK" Agreement if a member has requested the union to represent him or her under Sub-Section 170 LK (4) (See Section 43(2)). Moreover, a union which opposes the certification of an "170 LJ" Agreement can represent its members. These rights are to be removed. The "real problem" that this Section seeks to address is that many employers, and even sometimes unions, seek to have agreements certified that do not, in fact, meet the requirements of the Act. Sometimes, the material put forward accompanying an application is found to be false or misleading. Often, it is not until a party

opposing an Agreement draws the Commission's attention to substantive or procedural flaws that the Commission refuses to certify the Agreement.

The Act seeks to remove public scrutiny but in any case may be self-defeating. Unions may still be able to challenge the Agreement by means of an appeal under Section 45, to a Full Bench, on the grounds of jurisdiction, or in the courts. However, as public policy, it is far better to have invalid agreements found to be so at first instance, rather than through lengthy and expensive court or Full bench proceedings.

Workplace Relations Amendment (Award Simplification) Bill 2002

This Bill proposes the further reduction of allowable award matters, and a further round of award stripping reviews in order to implement these reductions.

Australian unions and employers are only now emerging from seven years of award stripping following the introduction of the present s.89A. The cost to all sides, in staff time, legal fees and appearances, as well as the cost impost on the Commission itself, has been immense.

The Award Simplification Bill would require a further review of all awards in order to ensure they comply with the new and narrower set of allowable award matters. This would in turn impose a similar level of cost and inconvenience on all parties and the Commission.

The Senate should consider the fact that in many cases workers' conditions of employment are now covered by comprehensive certified agreements. For those workers, the exercise of award stripping, although important for the no-disadvantage test, is a technical one which does not in fact alter the prevailing regulation of employee entitlements in practice. In these cases this legislation would impose a huge burden on employers and unions alike, for no practical outcome at all for the foreseeable future.

Nevertheless, while the immediate impact on working conditions for workers with comprehensive agreements is nil, the award safety net underpins the bargaining process, and to provides minimum conditions of employment for those workers who are not covered by certified agreements. As a result, the importance of the award safety net is such that all parties will have no choice but to invest considerable resources in participating in any further simplification process.

Whether such disruption and financial burden on employers and unions in order to achieve little practical result can be justified, is a question the Senate should give careful consideration to.

In general terms, the Unions oppose any restrictions on allowable award matters, and submit that a preferable approach would be to restore the broad powers of the Commission to exercise its discretion in the making of awards on any matters appropriate to the prevention and settlement of industrial disputes.

In particular, we make the following observations in relation to the provisions of Schedule 1 of the Award Simplification Bill:

Part 1 – Amendments

1. Omit "skill based career paths"

This is a direct attack on the whole basis of an award safety net. Through the processes of the Structural Efficiency Principle and Minimum Rates Adjustment, together with the recent reviews of relativities between award rates inherent in Item 51 reviews, the range of classifications and rates of pay throughout federal awards have been structured to reflect skill-based career paths. This provides something approaching a coherent and integrated safety net, against which new proposed awards and classifications can be measured. It is this comparability between awards, which is based on skills and work value, rather than on an arbitrary comparison of dollar amounts, which enables the safety net to be "fair" as well as "enforceable".

Particularly when read together with the proposed 89A(3A)(b) which would operate to prohibit award provisions relating to education, and with the reference to classifications in the proposed 89A(3A)(g) and (h), which could operate to prevent references to skill or qualification requirements in classification structures, the removal of skill-based career paths from award structures would enable awards to be effectively stripped back to a single rate of pay, without a classification structure at all. Without an elaboration of the skill base for classifications, on the one hand, or some arbitrary provision about the proportion of employees at each classification level, on the other, how are classifications to be given any meaning as enforceable standards?

This reading is supported by the proposed amendment to s.89A(3), which is commented on below.

2. Omit "and bonuses".

A prohibition of award regulation of bonus payments will move another area of income into the unregulated "over-award" sector. Research in relation to the gender pay equity gap in Australia indicates that it is in areas of such unregulated payments that the pay equity gap is widest.

3. Omit "long service leave"

We support the submissions of the ACTU in relation to this clause. This is a straightforward cut in entitlements.

Long service leave provisions are a common and long-standing feature of awards in our industries. In many cases this will affect not merely prospective entitlements, but will remove existing accrued entitlements worth tens of thousands of dollars. Some older employees who may have been employed for twenty years and be facing retirement would lose many thousands of dollars. They will not thank the Senate for what they will justifiably see as confiscation by fiat of this money.

4. Omit "cultural leave and other like forms of leave"

The question of cultural leave is addressed in relation to item 5 below.

In relation to "other like forms of leave" this deletion will throw doubt on the allowability of a range of existing leave provisions which have been retained in simplified awards on the basis that they deal with leave to deal with personal circumstances similar in nature to the range of circumstances encompassed by the named categories of leave. These include pressing necessity leave and personal emergency leave.

5. New ceremonial and cultural leave provision

This narrows cultural leave to apply only to Aboriginal and Torres Strait Islander workers. It prevents award provisions for cultural leave from encompassing the cultural and ceremonial responsibilities of workers of other cultures.

6. Narrows public holiday clause

There are two significant problems with the proposed new wording in relation to public holidays.

First, it confines any award provision to those holidays declared to be public holidays by a state or territory government. This means that where a state fails to declare a public holiday observance of which is traditionally and widely understood to be a condition of employment for workers in that state, there is no avenue under the award system to have this situation expeditiously resolved. It means that where an enterprise operates across state borders, it is prevented from having an award provision for standardised public holidays across the enterprise, which might vary from the declared holidays in one or more states and territories. And it means that the award safety net can become uncertain as the number of declared holidays may vary from year to year and from state to state.

Second, the proposed clause would confine award provisions to "observance of days declared" and "entitlements to employees to payment in respect of those days". This would be too narrow to allow for current provisions for matters such as substitution of other days for declared public holidays, and time in lieu arrangements as an alternative to payment for public holidays worked. The substitution of public holidays is a widespread practice in tertiary education, with many Universities working on week-day public holidays during the academic year, and providing for substitute days to be taken by employees at a different time. This is provided for in existing awards, operates substantially to the benefit of the employer, and was inserted for that purpose.

7. Narrows allowances clause

We support the position of the ACTU in relation to this clause. This is a straightforward cut in entitlements.

8 Narrows redundancy pay clause

Current redundancy pay provisions in awards include provisions for periods of salary maintenance where an employee who has been declared redundant in their current position is redeployed or demoted to a position with lower salary, and, under the *Higher Education Contract of Employment Award 1998* (the HECE Award), some workers employed on fixed-term contracts are entitled to redundancy payment in circumstances where they are not offered a further contract of employment, despite the fact that their termination technically arises as a result of the expiry of a contract rather than at the initiative of the employer. Neither of these provisions would be sustainable under the proposed new wording.

9. Omit "notice of termination"

We support the position of the ACTU in relation to this clause. This is a straightforward cut in entitlements.

10. Omit "jury service"

We support the position of the ACTU in relation to this clause. This is a straightforward cut in entitlements.

11. Insert "bonuses for outworkers"; and

12. Insert "(other than bonuses)" from outworkers provision.

This seems to be an unnecessary change, designed to introduce confusion into any existing award provisions which deal with outworker pay and conditions including bonuses. It sits strangely with the proposed exclusion of bonuses for workers other than outworkers at s.89A(2)(d).

13. Narrow scope of Minimum Rates Awards

This proposal revisits old ground that the Senate has rejected in the past. It is an attempt to move the parameters of award-making towards a single, minimalist set of conditions that apply across all industries, rather than a safety net of fair and enforceable conditions set in light of the circumstances of each industry.

It is either a mischievous attempt to revive this failed agenda through a back door, or it reveals a fundamental ignorance of the concept of a "minimum rates award" as applied in the federal industrial system.

This attempt to drag awards down to "basic minimum entitlements" sits strangely with the provisions designed to prevent roping-in which are found in the *Choice in Award Coverage Bill*.

14. An expanded list of express exclusions from award allowability

We oppose this provision in its entirety. It would result in crude and arbitrary reductions in award entitlements for workers in all industries.

Of particular concern to workers and unions in the education industry are:

(a) transfers between locations

The question of relocation of teachers, principals and other education workers between metropolitan and regional schools is a complex and important one. It is an issue that has often led to arbitration, and the development of award provisions which regulate the terms and conditions which apply to such transfers, including access to appeals and review processes. The public interest requires the staffing of rural and remote schools, and indeed some more difficult to staff metropolitan schools, with a full quota of qualified teaching and support staff. The public interest also requires education departments to be able to transfer staff between schools as student numbers shift. These employer requirements often conflict with employee expectations of a stable family and home life. Disputes have arisen which have been appropriately dealt with through arbitration of these competing interests, and the making of awards to regulate the terms of transfers. It would be contrary to the public interest to remove these award provisions and open up new disputation in these areas.

(b) training and education

Not surprisingly, the education industry employs many thousands of professional and paraprofessional workers for whom relevant educational qualifications are a prerequisite to employment and promotion. The industry places a strong emphasis on the need for all employees (and not just trainees and apprentices) to refresh

and upgrade their skills through formal education. As a result, our awards include many provisions relating to education and training.

These include a combination of leave, allowances, incentive payments, skill-based classification descriptors, provisions for professional development programs, time release from other duties to enable people to undertake study, and barriers to promotion in the absence of identified educational qualifications (or equivalent).

Each of these provisions is currently allowable, under one or more heads of allowability of s.89A. They are clearly appropriate to the needs of the education industry, and form part of an appropriate award safety net for professional and paraprofessional education workers.

There is no good reason why such provisions should not be allowable.

(c) recording of the hours employees work, or the times of their arrival or departure from work; and
(d) payments of accident make up pay by employers;
We support the submissions of the ACTU in relation to these subclauses. These are straightforward reductions in entitlements.

(e) rights of an organisation of employers or employees to participate in, or represent, the employer or employee in the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;
This proposal misconceives the nature of workplace disputes as being always individual rather than collective in nature. In our experience, most workplace disputes involve more than one employee, and affect the interests of more than one employee. It is unclear whether this provision is intended to prevent an award from containing a provision allowing a union to initiate a dispute-settling process at the workplace level as a party principal to the dispute. The absurd consequence of this is that a union as party to the Award will be required (and able) to take disputes directly to the Commission without first having to use the workplace-based dispute-settling procedures.

(f) transfers from one type of employment to another type of employment;

This provision appears designed specifically to prevent the inclusion of provisions facilitating long-term regular casual employees moving to more secure forms of employment. It is a crude piece of ideological warfare to propose to ban such provisions, which are generally very moderate. The philosophical commitment of this Government to increasing the use of insecure, marginalised types of employment, at the expense of ordinary working Australians, is clearly evident here.

(g) the number or proportion of employees that an employer may employ in a particular type of employment or in a particular classification; and
(h) prohibitions (directly or indirectly) on an employer employing employees in a particular type of employment or in a particular classification;
These two subclauses together expand the existing provision in s.89A(4), by including a reference to classifications, as well as types of employment, and by the addition of direct or indirect prohibitions on the use of types of employment.

The effect is very broad and uncertain in its scope. Areas in our existing awards which would probably be affected include:

1. The HECE Award, which addresses an identified poor employment practice which was widespread in the university sector, of employing people on fixed term contracts even when there was clearly an ongoing need for the work to be done. After extensive and detailed arbitration of this issue, the AIRC made an award which directly limits the circumstances in which universities may make fixed term contract employment.

   (This award is a good example of why an award safety net is necessary and appropriate. The union had raised proposals for addressing the misuse of this type of employment through a variety of consent forums, including through enterprise bargaining, but the employers and their employer organisation flatly refused to enter into meaningful negotiations. The only avenues open to the union to progress the issue were through an award arbitration in the AIRC, or through a massive campaign of industrial disruption in the context of bargaining, since the employers had made it clear that nothing less would shift their stance. The ability to have the matter arbitrated resulted in a fair and reasonable set of constraints being

placed on a group of employers who had deliberately and consciously embarked on an employment practice which was to their monetary advantage but which was harsh and exploitative on employees. The provisions imposed by the AIRC through the HECE Award do not prevent the use of fixed-term contract employment, but they prevent its use in some circumstances. The Commission took this unusual step because it was clear that the employers had no intention of engaging in any self-restraint – some staff were engaged on their 29th annual contract. Thus, the safety net award was and is appropriate to the particular circumstances of its industry, and necessary to provide a fair safety net of employment entitlements to workers in that industry.)

2. Provisions in several education industry awards provide for appointment to a minimum classification level if the employee holds a particular qualification relevant to their work. For example in the *Northern Territory Public Sector Teachers and Assistant Teachers Award 2002* [AW811318] subclause 10.2.2(e) provides that the minimum classification for a teacher with five years of tertiary training is the T5 classification. Arguably, this prevents the employer from employing such an employee in a particular (ie any lower) classification.

By this logic, the operation of the proposed subclauses (g) and (h) would make any classification structure at all entirely meaningless, since it would not be allowable for an award to, either directly through proscription, or even indirectly through any description of the skill base, prevent an employer from appointing any employee to any classification level, regardless of skills or duties.

Take the following example:

A painting contractor employs painters and labourers. An award prescribes that "An employee with a trade qualification in painting who is required to paint shall be employed and paid in the classification of painter ($500 p.w.). Other employees shall be employed and paid at not less than the classification of General Hands ($400 p.w.)".

This provision restricts the use of the "General Hand" classification by requiring that some employees (the painters) be classified at a higher level. Therefore the whole classification structure based on skill would be non-allowable.

Taken together with the proposed removal of "skill-based career paths" from s.89A(2), and the amendment proposed to s.89A(3), it is clear that the intention of the government through these provisions is to achieve what they failed to achieve through express legislation – to strip awards back to a single minimum wage point.

(i) the maximum or minimum hours of work for regular part-time employees.
This prohibition, while objectionable, merely replicates an existing provision.

General remark about the proposed 89A(3A)
As a prohibition which overrides any express inclusion of allowabiltiy which might otherwise arise under subsection (2) of section 89A, the precise operation in relation to otherwise allowable matters will be a ripe field for litigation. For example, would a monetary allowance which reimbursed employees for the cost of relocating to a teaching post at a remote location be prohibited if that teacher was transferring from another teaching post (transferring between locations) but not if they were a new employee taking up their first location? Would an allowance paid to employees who obtain a First Aid Certificate be allowable as a monetary allowance for a skill not taken into account in the rate of pay, or prohibited as a provision dealing with training?

Remaining provisions in Award Simplification Bill

The remaining provisions in Part 1 and the provisions of Part 2 are objectionable in that they impose additional workload on all parties and on the Commission itself. This not only results in a cost burden, but distracts energy and resources from the constructive work of practical industrial relations, and the negotiation of real, contemporary and relevant conditions of employment.

The award stripping process necessitated by the original s.89A is not yet complete. The AEU and NTEU have directed substantial human resources to this process over the past six years, as have the employers we deal with. Generally this has not

been due to ill will or fundamental disagreement between the parties, who have cooperated in the drafting and review process. Rather, it has been necessitated by the complexity and uncertainty of the legislation itself, and the understandable concern of all parties to ensure that the simplification process was conducted rigorously, without any accidental deletion of allowable provisions.

This bill includes, once again, a twelve-month transition period during which the review of all awards is expected to be completed. In our submission this is a farcical timeline, which the legislature could not seriously intend to be implemented. Although there are now fewer awards, and they are generally more up-to-date that some that came before the Commission for review in the past few years, it is nevertheless the case that the substantial body of award provisions remains, and every provision of every award would need to be considered afresh to determine whether it fell foul of the new legislation. It is not a simple matter of looking for clauses headed "long service leave" and deleting them. Often such clauses contain provisions which should properly be retained even when the parent clause is deleted (for example a provision which specifies which forms of leave count for service, or relating to recognition of prior service with related employers for the purpose of calculating leave entitlements). Also, other clauses will contain provisions which cross-refer to long-service-leave (such as a clause in a maternity leave provision which deals which access to accrued long-service-leave entitlements while on unpaid maternity leave). These are relatively easy exercises. However compliance with prohibitions such as those in the proposed 89A(3A) and 89A(6) will require the close examination of every clause on every subject, to identify offending words, and remove them. Sometimes this will also require rewording of surrounding phrases, which may involve negotiation between the parties as to the best way to express the reduced provision. And many of the proposed provisions are sufficiently vague and uncertain in their scope as to require parties to await Full Bench or even court guidance as to their application before they can be implemented across awards.

Therefore the timeline and workload involved in another round of award stripping which would result if this legislation were passed would be substantial, and would fall across both unions and employers.