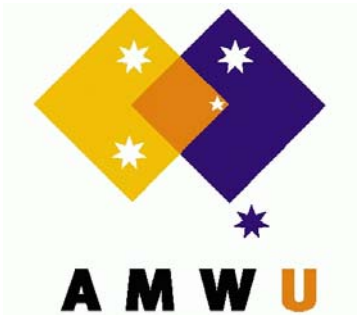
AUSTRALIAN MANUFACTURING WORKERS' UNION



SUBMISSION TO INQUIRY INTO WORKPLACE AGREEMENTS

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE

AUGUST 2005

A chilling effect on collective bargaining ….

To expose an industrial organisation of employees to grave, even crippling, civil liability for industrial action, determined years later to have been "unprotected", is to introduce a serious chilling effect into the negotiations that such organisations can undertake on behalf of their members. It would be a chilling effect inimical to the process of collective bargaining, including by such organisations on behalf of their members, as contemplated by the Act.

Justice Kirby (dissenting) on the capacity
of unions to negotiate on behalf of their members
in *Electrolux Home Products Pty Ltd v
Australian Workers' Union [2004] HCA 40*

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A. Introduction: Workers Deserve Better Than A Right To Collectively Beg

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make submissions to the inquiry of the Senate Employment, Workplace Relations and Education References Committee (the Committee) into workplace agreements.

2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU represents approximately 140,000 workers in a broad range of sectors and occupations within Australia's manufacturing industry. In representing the union's members, the AMWU is party to thousands of current workplace agreements.

3. The AMWU supports the submissions to this inquiry of the Australian Council of Trade Unions (ACTU). In addition, the AMWU seeks to make additional submissions regarding a number of aspects of the terms of reference.

4. The AMWU's submissions will focus in particular upon the capacity for employers and employees to choose the form of agreement-making which best suits their needs. In this regard it is the AMWU's experience that employee's needs are best met through union negotiated collective agreements. However, the existing agreement-making provisions of the *Workplace Relations Act 1996* (the Act) do not guarantee the right to such an agreement. Rather, the framework provided for by the Act actively undermines the capacity of employees to choose a union negotiated collective agreement by:

   - Imposing a highly artificial and restrictive limitation on the issues that can be included in agreements as a result of the High Court's decision in *Electrolux*[1].
   - Unduly restricting the capacity of employees to take protected industrial action in support of agreements.

[1] *Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40*

- Allowing employers to pursue a number unfair practices in relation to agreement-making including:

    - employers refusing to enter agreements with their employees' union(s) or refusing to include their employees' union representatives in bargaining negotiations;
    - employers offering Australian Workplace Agreements (AWAs) after being notified that employees wish to enter a collective agreement;
    - new employees being forced onto AWAs;
    - the use of corporate restructuring to avoid agreement obligations;
    - the inappropriate use of labour hire firms to break legitimate industrial action and to avoid agreement obligations; and
    - other behaviour that is not consistent with "good faith" bargaining.

5. Regrettably, from the details that have been released so far, it appears that the changes to the Act outlined by the Howard Government in May of this year will only further frustrate and deny the legitimate wishes of employees who wish to have a union negotiate an agreement on their behalf. As the academic Ron McCallum recently observed in an article examining the proposed changes:

> ***With a lessened capacity to back their demands with economic sanctions, trade unions and their members will find that collective bargaining may become more in the nature of collective begging.***[2]

6. The AMWU submits that Australian workers deserve better than a right to "collectively beg".

7. The AMWU urges the Committee to address the issues raised in this submission by making the recommendations found on pages 8 and 9. The recommendations are necessary to ensure that the industrial laws contain a framework that

[2] McCallum, R, "The Howard Government's Refashioning of Australian Labour Law: The Neo-Liberal Labour Law Agenda", Dissent, Number 18 Spring 2005 at page 20.

supports effective agreement making and which *guarantees* the rights of employees to have a union negotiated collective agreement.

B. Recommendations

8. The AMWU urges the Committee to make the following recommendations:

Recommendation 1

Agreements certified before the *Electrolux* decision should be validated unconditionally to the full extent of their existing terms.

Recommendation 2

Where agreements have been certified by the Commission after the *Electrolux* decision, those agreements should not be subject to later challenge as to the validity of the agreement or any part of the agreement.

Recommendation 3

The primary responsibility for determining matters pertaining to the relationships between employers, employees and their union should rest at the workplace level. Where parties have genuinely negotiated an agreement in good faith such an agreement should be able to be certified and enforced.

Recommendation 4

Protected industrial action should be available to support any agreement that is pursued in good faith.

Recommendation 5

Where employees want a union collective agreement, their employer should be obliged to bargain in good faith for such an agreement.

Recommendation 6

AWAs should be abolished.

Recommendation 7

Employers should be prohibited from using labour hire firms or contractors to undertake work that would otherwise have been done by employees who are taking protected industrial action in support of a collective agreement.

Recommendation 8

The Senate should oppose any legislation that seeks to further reduce the number of allowable matters in awards.

Recommendation 9

The Senate should not pass the Workplace Relations Amendment (Better Bargaining) Bill 2005 and the Senate should similarly oppose any further legislative initiative to introduce secret ballots designed to minimise access to protected industrial action or otherwise constrain protected industrial action.

Recommendation 10

The Senate should oppose any legislative initiative aimed at reducing the capacity of parties to engage in pattern or industry level bargaining.

Recommendation 11

Urgent steps be taken to amend the industrial laws to ensure that Australia is in compliance with its international obligations.

C. The Scope and Coverage of Agreements, Including the Extent To Which Employees Are Covered by Non-Comprehensive Agreements

9. In the industries in which the AMWU has members, the vast majority of employees are covered by non-comprehensive agreements that use as their foundation, and are expressed to include, the terms of a federal or state award.

10. The May 2005 proposals of the Howard Government to reduce the number of matters that can be dealt with in awards to either 16 or 5 matters will mean that long recognised minimum standards of employment will now have to be re-negotiated and re-won through the bargaining provisions of the Act. This will inevitably lead to longer, more complicated and more disruptive bargaining rounds.

11. Moreover, for employees lacking sufficient industrial strength it will mean an inevitable loss of wages and conditions.

12. The AMWU urges the Commission to recommend that the Senate oppose any legislation that seeks to further reduce the number of allowable matters in awards.

D. The Capacity of Employers and Employees To Choose The Form of Agreement-Making Which Best Suits Their Needs

D.1 Agreement Making And The Electrolux Decision

13. The objects of the Act include enabling employers and employees to choose the most appropriate form of agreement that suits their particular circumstances, whether or not that form of agreement is provided for by the Act.[3] However, the capacity for employers and employees to choose a collective union negotiated agreement is currently being hindered by the construction the High Court has given to the agreement making provisions of the Act. Specifically, the High Court's decision in *Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40* (*Electrolux*) has placed serious and unnecessary constraints not only on the capacity of parties to choose the content of agreements certifiable under the Act, but also for the taking of industrial action in support of such agreements.

14. Under the Act all certified agreements (and Australian Workplace Agreements) must be about matters pertaining to the relationship between employers and employees.

15. For example, for agreements to be made pursuant to Division 2 of Part VIB, s.170LI provides that there must be "an agreement, in writing, **about matters pertaining to the relationship between**:

    (a) **an employer** who is a constitutional corporation or the Commonwealth; and

[3] Subsection 3(c) of the Act.

(b) **all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business**, of the employer and whose employment is subject to the agreement" [emphasis added]

16. Similarly, agreements made pursuant to Division 3 of Part VIB must be made:

"(a) to settle, further settle or maintain the settlement of, or to prevent, **industrial disputes**; or

(b) to prevent industrial situations from giving rise to **industrial disputes**.

17. Pursuant to section 4 of the Act, an "industrial dispute" must be "about matters pertaining to the relationship between employers and employees".

18. Until recently the requirement that agreements be about matters pertaining to the relationship between employers and employees appeared to do relatively little to constrain parties coming to agreements in good faith and having them made enforceable under the Act through the certification process. In this respect, the view of the Australian Industrial Relations Commission (AIRC or the Commission) was generally that:

> ***[167]*** *Overall, there is nothing that leads us to perceive any other parliamentary intention in section 170LI than that expressed in Object 3(b) of the Act which we paraphrase:* ***let the primary responsibility for determining matters affecting the relationships between employers and employees at the workplace level rest with them****.*
>
> ***[168] We construe section 170LI consistent with that expression of the legislative intention and with the literal and ordinary meaning of the words set out. The requirement it imposes is that the agreement, assessed objectively and as a whole, be about matters pertaining to the reference relationship.*** *The framing of that requirement in the language of section 170LI leaves considerable room for the effective relators in that*

relationship to agree on terms that, subjectively, they accept to be part of the bargain to be applied over the life of the agreement as affecting that employment. For that purpose, the relators include the negotiating parties, who are placed by the Act in the position of proxy for the employee relators.[emphasis added][4]

19. However, the High Court in *Electrolux* eschewed such a construction. Instead the High Court favoured a highly technical approach to the agreement-making provisions in the Act. In short, the decision in *Electrolux* established:

- Firstly, that for an agreement to be certifiable under the Act it must be about matters pertaining to the relationship between employers and employees *in their capacity as such*. In so finding the High Court held that earlier cases dealing with the construction of the term "*pertaining to the relationship of employers and employees*" should be applied to the construction of the agreement making provisions under the Act (notwithstanding that those earlier authorities do not deal with legislative provisions concerned with agreement making). By rejecting the "literal or ordinary" meaning of the words in the agreement making provisions of the Act, the High Court effectively imposed a considerably narrower and more difficult to apply test in relation to which matters could be characterised as pertaining to the relationship between employers and employee.

- Secondly, that an agreement must be considered not "as a whole" but rather clause by clause. In this way, an agreement which contains any matter which does not pertain to the relationship of employers and employees "in their capacity as such", apparently subject to some minor qualifications, cannot be the subject of a valid application for certification.

20. Because the High Court's interpretation of the agreement making provisions of the Act differed markedly from the interpretation given to the Act by the vast

[4] *Re Unilever North Rocks Enterprise Agreement 2003* (PR940027**)**

majority of employers, employees, unions and members of the Commission, the most immediate effect of the decision was to raise serious questions about the validity of not only thousands of clauses in existing certified agreements (which may not have met the narrower test) but also to the validity of those agreements in which the clauses were contained.

21. The Parliament responded quickly by passing the *Workplace Relations Amendment (Agreement Validation) Act 2004* (Agreement Validation Act). The Agreement Validation Act does not validate individual clauses, however, it does ensure that the thousands of agreements certified prior to the decision in *Electrolux*, and which have clauses that may not meet the new technical interpretation of the requisite employment relationship, are not rendered invalid. While this has brought some stability to the industrial landscape, it does not assist in answering the question as to which clauses in pre-*Electrolux* agreements are, or are not, valid.

22. In addition, by failing to validate individual clauses that were certified in good faith, the Agreement Validation Act has the highly undesirable consequence of leaving parties bound to only certain parts of their current agreement - those parts which pertain to the relationship between employers and employees *in their capacity as such.* This means that agreements to which many parties are now bound are not the agreements that the parties agreed to, nor are they the agreement which the employees voted to approve. Effectively imposing agreements (or partial agreements) on parties and employees in this way is both unnecessary and unfair.

23. The AMWU submits that the Committee should seek to remedy this inherent flaw of the current regime by recommending that legislation be brought to validate agreements certified before the *Electrolux* decision *unconditionally to the full extent of their existing terms*.

24. This recommendation is consistent with the recommendations of the Opposition Senators in the Senate Inquiry into the *Workplace Relations Amendment (Agreement Validation) Bill 2005*.

25. Another flaw in the existing bargaining regime is that the Agreement Validation Act has done nothing to resolve the great uncertainties that remain in relation to agreements that have been, or are being, negotiated post-*Electrolux*.

26. In this respect, the present state of the law was usefully summarised by the first Full Bench of the AIRC to consider the question of matters pertaining following the *Electrolux* decision in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and others Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004 and others*[5] (*Schefenacker*). After summarising the current law, the Full Bench went on to highlight one of the ongoing difficulty for parties attempting to make agreements under it:

> ***[47]*** *When dealing with applications to certify agreements pursuant to Division 2 of Part VIB of the Act, the following considerations are relevant:*
>
> > *(a) The Commission has no jurisdiction to certify an agreement made pursuant to ss.170LJ, 170LK or 170LL unless the agreement answers the description in s.170LI(1).*
> >
> > *(b) To answer that description each discrete, substantive and significant provision must be about a matter that pertains to the relationship between the particular employer, in its capacity as employer, and its employees, in their capacity as employees.*
> >
> > *(c) For a matter to pertain to the requisite relationship it must be connected with the relationship between the employer in its capacity as an employer, and its employees, in their capacity as employees, in a way which is direct and not merely consequential.*
> >
> > *(d) The agreement may also contain:*

[5] PR956575

(i) machinery provisions - indexes, tables of contents and the like;

(ii) provisions that are incidental or ancillary to a matter that pertains to the relationship;

(iii) provisions that do not pertain to the relationship but they are so trivial they can be disregarded - some aspirational provisions which do not impose any enforceable legal obligations on a party to the agreement might fall into this category.

(e) When examining a provision to see whether it pertains in the relevant sense, regard must be had to the words of the clause in the context of the agreement as a whole and to any relevant evidence.

(f) The mere fact that a clause confers some rights on a union does not, of itself, lead to the conclusion that the clause does not pertain.

[48] *When dealing with applications to certify agreements pursuant to Division 3 of Part VIB the same considerations apply, with one exception. Whether a provision pertains to the relevant relationship is to be decided in the context of the relations between employers and employees generally, rather than the relations between a particular employer and its employees covered by the agreement. Whether this distinction has any significant practical implications remains to be seen.*

[49] *In having regard to these considerations reference will often be necessary to cases dealing with the same or similar issues. It is worth noting that the fact that a given matter has been held to be capable of giving rise to an industrial dispute or a matter the Commission could make an award about is not necessarily the end of the inquiry. Some older decisions may be incompatible with subsequent authority. In the same way, the fact that a clause about a particular matter can be found in an award*

is not necessarily a reliable guide to whether a provision about that matter may properly be included in an agreement.

[50] *It is clear that the Commission's decisions on these issues are very important ones. It follows from Electrolux that if an agreement contains a provision which does not pertain to the relationship the application for certification is invalid. It would seem to follow that if the Commission purports to certify an agreement containing a provision of that kind the agreement will have no legal effect under the Act.* ***Given the difficulties in characterisation which have arisen, and the likelihood that similar difficulties will arise in the future, the Parliament may think it appropriate to give consideration to a legislative amendment which might give a greater degree of certainty to the legal operation of an agreement once it has been certified.*** [emphasis added]

27. These difficulties in characterisation referred to by the Full Bench should not be underestimated. Indeed, the Full Bench itself when attempting to characterise a clause dealing with labour hire employees observed:

78 We admit to some ***difficulty in characterising this provision****, comprised as it is of a series of sub-clauses with a number of legal effects. On the one hand, it may be accepted that Schefenacker's employees have a legitimate interest in the engagement of labour hire employees because of the effect of such engagement on their own employment. For that reason it may be that the engagement of labour hire employees is a matter pertaining to the relationship between Schefenacker and its own employees. On the other hand, the extent to which the agreement can regulate the contractual relationship between Schefenacker and labour hire agencies, yet still pertain to the relevant relationship, is* ***obviously a question of degree***. [emphasis added]

28. In the same case, the Minister, intervening specifically to address whether certain clauses in the agreements subject to appeal pertained to the relevant relationship was unable to come to a concluded view on how the test should be applied in relation to the characterisation of two clauses concerning salary packaging:

> *Whether clause 19 – Salary Packaging – of the Latrobe University Agreement and clause 23 – Salary Sacrifice Arrangements – of the Murray Bridge Agreement are permissible* ***depends upon the construction of their terms. This is a matter upon which different views could be taken.*** *If they are intended to impose an obligation to make payments to persons beyond the employment relationship, then they cannot be included in a certified agreement in their present form.*[6] [emphasis added]

29. Unfortunately the difficulties experienced by the Full Bench and the Minister in the *Schefenacker* case are also being experienced more broadly throughout the industrial relations system. Parties now regularly bring agreements negotiated in good faith to the Commission for certification by consent, only to be forced into formal hearings into the Commission's jurisdiction, usually followed by a wait as the Commission considers the relevant wording and evidence against almost 100 years of case law. If the agreement is found not to pertain to the necessary relationship, the agreement then has to be re-negotiated, re-drafted, re-voted on and finally re-submitted to the Commission, with no guarantee that it will be in a form that is certifiable under the Act the second time around. The AMWU submits that no public interest can possibly be being served by putting the negotiation parties to this additional cost and delay.

30. In a recent case that highlights the absurd difficulties which parties must sometimes overcome to have their agreements certified, one Commission member went so far as to suggest that even where parties adopt the *exact words*

[6] Page 6 of the Minister's written submissions in *Schefenacker*.

of a clause that has recently been found to pertain to the necessary employment relationship, this cannot be taken to be enough. Commissioner Richards in refusing to certify an agreement recently suggested:

> *[38] These issues highlight the necessity for the Commission to examine the facts and circumstances relating to this agreement which,* ***whilst using similar or even identical terminology*** *to the agreement before the Full Bench,* ***may have quite different meanings and relationships*** *to those in Re: Schefenacker*. [where a similar clause was found to pertain][7]

31. Therefore according to the Commission in this and other post-*Electrolux* decisions, the parties can obtain little or no useful guidance when drafting their agreements from:

- clauses in agreements between the same parties that were certified prior to *Electrolux*;
- clauses that have been held to meet the relevant test following *Electrolux*;[8]
- clauses or claims which have been held to be matters over which the parties can have an industrial dispute but which may not be consistent with later decisions dealing with similar matters;[9] or
- clauses contained in the Commission's own awards.[10]

32. Instead parties now often have to negotiate a large volume of dated and conflicting case law in order to establish if they are entitled to have an otherwise perfectly legal agreement certified.

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[7] See *Re Otis Elevator Company Pty Ltd - Northern Territory Construction And Service Employees Certified Agreement 2004* PR957876 at paragraph 38.
[8] *Re Otis Elevator Company Pty Ltd - Northern Territory Construction And Service Employees Certified Agreement 2004* PR957876 at paragraph 38
[9] *Schefenacker* at paragraph 49.
[10] Ibid

33. It should be uncontroversial that there is a public interest in parties being able to draft their own workplace agreements without stumbling over arcane and technical jurisdictional grounds. Indeed it would appear that the objects of the Act envisage exactly that situation, variously providing that the Act is to:

- "[ensure] that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees and the workplace or enterprise level"[11];

- "[enable] employers and employees to chose the most appropriate form of agreement for their particular circumstances"[12];

- provide the means "for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level"[13]; and

- "[provide] a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them"[14].

34. However, after the High Court's decision in *Electrolux*, the agreement making provisions of the Act are all too often substantially unable to meet such objectives. Instead, the provisions have become a make work scheme for lawyers. This is undesirable and unnecessary. Employers, employees and unions should generally have the capacity to enter into an agreement under the Act without recourse to expensive legal advice concerning the jurisdiction of the Commission.

[11] Subsection 3(b) of the Act.
[12] Subsection 3(c) of the Act
[13] Paragraph 3(d)(i) of the Act.
[14] Paragraph 3(d)(ii) of the Act.

35. The AMWU notes that other jurisdictions do not place such onerous jurisdictional or narrow limitations over what matters parties are able to bargain. In particular the AMWU notes that in Canada for example, parties are able to agree on a wide variety of matters including those aimed at broader socio-economic objectives (an outline of relevant bargaining provisions in Canadian industrial law is provided in Appendix A). There is no reason why Australian negotiating parties should not also have this right.

36. The AMWU submits that the Committee should recommend that where parties have genuinely negotiated an agreement in good faith, such an agreement should be able to be certified and enforced.

D.2 The Taking Of Protected Industrial Action And The *Electrolux* Decision

37. The decision in *Electrolux* also has had important consequences for those parties who choose to take industrial action in support of the making of a proposed agreement. Under the general law the taking of industrial action exposes those taking it, and in particular employees and unions, to a myriad of legal sanctions including: damages in contract and in tort, disciplinary action, dismissal as well as various statutory penalties.

38. However, section170ML of the Act allows parties to take "protected" industrial action for the purpose of supporting or advancing claims made in respect of a proposed agreement. Under section 170MT parties taking "protected industrial action" are given a qualified immunity from legal action arsing under any state or federal law as a result of the taking of the industrial action. In addition, section 170MU provides that an employer is not to dismiss an employee for engaging in protected industrial action.

39. For industrial action to be "protected action" it needs to be in support of a proposed agreement that is capable of being certified under the Act. Unfortunately this then raises difficult problems of characterisation in so far as the proposed agreement cannot contain any matters that takes it outside of the relevant "employer-employee" relationship. As French J observed in the recent decision of *Wesfarmers Premier Coal Limited v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No. 2)*[15] (*Wesfarmers*):

> *[T]he construction of s 170ML(2) adopted by the High Court in Electrolux indicates that the character of the 'proposed agreement', whether it be settled or inchoate, is critical to the question whether the relevant action is protected …*
>
> *71 The practical implication of the preceding approach to the construction of s 170ML(2) may be that parties contemplating industrial action will need to consider carefully whether all the elements of their proposed agreement identified to that point, whether by a log of claims, draft agreement or otherwise, are compatible with the requirements for certification, that is to say that they pertain to the employer-employee relationship.*

40. The difficult test of what "pertains" to the employee – employer relationship must therefore be applied to every aspect of the proposed agreement whether it is in the form of a claim, draft agreement or proposal and whether it arose from the employer, employees or union. For example in the case extracted above, the industrial action taken by the union and employees was rendered unprotected by a matter that was otherwise earlier agreed between the parties:

> *126 The claims which the union sought to support and advance in the October strike were matters relating to the employer-employee relationship. They concerned rostering arrangements which had been a bone of contention between the parties for some time. The protection*

[15] [2004] FCA 1737

which the union and its officers no doubt thought they enjoyed pursuant to the provisions of s.170ML *was unavailable because of provisions in the proposed draft agreement to which it seems both they and Premier Coal had agreed. The effect of the Electrolux decision is to make clear that certain of those provisions would render a proposed agreement containing them incapable of certification and therefore not a 'proposed agreement' for the purposes of* s.170ML*(2)(e). Provisionally I am of the view that in the circumstances it would be difficult to justify a punitive response to the respondents' conduct. However, it is a matter upon which the parties may make submissions in due course.*

41. In other words, even though industrial action was taken over a matter that clearly pertained to the relationship between an employer and its employees in their capacity as such, because an earlier *agreed* draft contained a matter that did not pertain – the union and employees were potentially exposed to hundreds of thousands of dollars in damages.

42. This is simply not a sensible or effective framework in which to bargain. As the Full Court of the Federal Court (who were subsequently overturned by the majority in the High Court) said in the *Electrolux* case:

> *If parties are to make rational and confident decisions about their courses of conduct, they need to know where they stand. It would be inimical to the intended operation of Pt VIB to interpret s 170ML(2)(e) in such a way as to make the question whether particular industrial action is 'protected action', and therefore immune from legal liability, depend upon a conclusion concerning a technical matter of law: whether a particular claim, if conceded, would cause any resultant agreement to fall outside s 170LI(1). As this case demonstrates, that may be a matter about which well-informed people have different views.*[16]

[16] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Electrolux Home Products Pty Ltd* (2002) 118 FCR 177 at 195 [93].

43. Or as Kirby J observed in his dissenting judgment in *Electrolux*:

> *To expose an industrial organisation of employees to grave, even crippling, civil liability for industrial action, determined years later to have been "unprotected", is to introduce a serious chilling effect into the negotiations that such organisations can undertake on behalf of their members. It would be a chilling effect inimical to the process of collective bargaining, including by such organisations on behalf of their members, as contemplated by the Act.*[17]

44. In conclusion, it is the AMWU's submission that the capacity for employers and employees to choose the form of agreement-making which best suits their needs and to take action to support such an agreement is being unnecessarily frustrated by the interpretation the High Court has given to the agreement-making provisions under the Act.

45. The AMWU urges the Committee to make the following recommendations to help facilitate parties to choose the form and the content of their own workplace agreements:

- Agreements certified before the Electrolux decision should be validated unconditionally to the full extent of their existing terms.

- Where agreements have been certified by the Commission after the Electrolux decision, those agreements should not be subject to later challenge as to the validity of the agreement or any part of the agreement.

- The primary responsibility for determining matters pertaining to the relationships between employers, employees and their union should rest at the workplace level. Where parties have genuinely negotiated an

[17] The decision of Kirby J in *Electrolux*, paragraph 193.

agreement in good faith such an agreement should be able to be certified and enforced.

- Protected industrial action should be available to support any agreement that is pursued in good faith.

D.3 Unfair Bargaining Practices Reducing The Capacity To Pursue A Union Collective Agreement – Case Studies

46. It is the AMWU's experience that the capacity for employees to pursue a collective union negotiated agreement is being compromised not only by the High Court's *Electrolux* decision, but also more generally by the current schema of bargaining and agreement-making contained in the Act. Specifically, it is the AMWU's concern that the Act effectively allows employers to deny employees the right to choose a union collective agreement.

47. In the following pages, the AMWU provides a number of case studies where employers have engaged in unfair bargaining practices in order to deny, or attempt to deny, employees a union collective agreement. The case studies show employers:

- Flatly refusing to enter into an agreement with their employees' union.
- Refusing to include union representatives in agreement negotiations.
- Misinforming employees about the effect of a union collective agreement.
- Using labour hire workers or contractors to undermine employee attempts to take action in support of a collective union agreement.
- Offering AWAs during a bargaining round in an attempt to undermine employees' seeking a collective agreement.
- Forcing new employees onto AWAs.
- Attempting to use corporate structures to avoid obligations arising under collective agreements.

CASE STUDY #1: MORRIS, MCMAHON & CO PTY LTD

48. The following case study demonstrates the current difficulty in resolving a dispute between employees and an employer when the employees wish to enter into a collective agreement through their union, but the employer refuses to negotiate with the union. The industrial dispute was not primarily concerned with the substantive matters to be dealt with in an agreement. Rather, the sixteen-week strike was needed to convince the employer to accept that the form of agreement its employees wanted was a union agreement.

49. Morris, McMahon & Co Pty Ltd (Morris McMahon) employs around 100 workers and manufactures cans at a site at Arncliffe in southern Sydney. The majority of employees are from non-English speaking backgrounds.

50. Since 1994 Morris McMahon's workforce had operated under uncertified agreements. Under these agreements, employees worked 9.5 hours a day to make up a 4 day week.

51. Following the expiry of an unregistered agreement in August 2002, the employer sought to enter a new unregistered agreement with its employees. The proposed new unregistered agreement provided for a changed roster which included an 8 hour day and a 5 day week.

52. The proposed new roster was opposed by the majority of employees, many of whom had been employed on the basis of a 4 day week and who had other work and family responsibilities that could not be adjusted to fit in with what was proposed.

53. In December 2002, following consultation with our members at Morris McMahon, the AMWU gave notice that the union wished to negotiate a collective agreement for employees at Morris McMahon pursuant to Division 2 of the Act.

54. Morris McMahon indicated that it was not willing to enter negotiations for a collective certified agreement.

55. On 14 January 2003 Morris McMahon unilaterally issued a notice that the new 5-day week arrangement would commence from 7 April 2003.

56. On 14 March 2003, union members at Morris McMahon commenced protected industrial action in support of a proposed collective agreement under the Act. This strike action lasted 16 weeks. Almost for the entire duration of the dispute, Morris McMahon continued to refuse to enter negotiations with the employees' union for a certified collective agreement. Furthermore, during the period of strike action Morris McMahon attempted to undermine the employees demands for a collective agreement by:

- engaging a labour hire firm to have the work done that would otherwise have been undertaken by the direct employees of Morris McMahon;

- offering employees Australian Workplace Agreements (with a $1000 sign on bonus); and

- bringing a section 166A application to the Commission with a view to commencing action in tort against the union in relation to alleged action taken in support of the striking workers.

57. On 8 May 2003 the Commission issued a section 166A certificate allowing Morris McMahon to commence tort action against the AMWU (after 72 hours the Commission must issue the certificate if the conduct complained of is not brought to an end). However, at the time of doing so the Commission went out of its way to express frustration and disapproval with the approach taken by Morris McMahon, including the extent to which Morris McMahon had failed to engage in fair bargaining practices. The Commission remarked:

It became apparent that the Company was not willing to have discussions conducted on a basis that involved an acceptance that an agreement, formal or informal with the AMWU…may be an outcome… in the circumstances, I took the view that attempts to bring the conduct entirely to an end would be futile and frustrated by the Company's unwillingness to accept negotiation with the union about agreement.[18]

…

…an employer's refusal to effectively recognise a lawful and substantially supported representative of employees collectively as the appropriate negotiating party for purposes of attempting to arrive at an agreement is not a fair bargaining practice. The Company's conduct in this instance falls short of fair bargaining practice,…[19]

…

… Where a refusal to bargain collectively with representatives of employees is associated with a tactic involving a high degree of avoidance of genuine negotiation by the selection of other possible negotiators more acceptable to the employer negotiator, in my view the employer's conduct is not consistent with bargaining in good faith with the organisation of employees which is the negotiating party under the statute for purposes of the bargaining period validly constituted.[20]

…

There is no substantial injustice arising from the currently existing uncondensable [sic] conduct of the AMWU in circumstances that include the Company's own indelible conduct.[21]

[18] PR931192, *Morris McMahon & Co Pty Ltd and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*, Sydney, 8 May 2003, per Munro J at paragraph [25].
[19] Ibid at [27].
[20] Ibid at [30].
[21] id.

58. Issuing the s.166A certificate did nothing to resolve the dispute.

59. Two weeks after the s.166A certificate was issued, the then Minster for Workplace Relations visited the protesting workers outside Morris McMahon. Whilst speaking with the workers, the Minister was reported as saying:

> *TONY ABBOTT: Yeah, and you have every right to go to the union and seek the union's help. You have every right to do that and you have every right to ask for a collective agreement. Every right in the world.*
>
> …
>
> *TONY ABBOTT: I am prepared to talk to this company and make sure that they are serious about the things they said they were doing. Let's hope that pretty soon everyone can be back at work, and that people who want a collective agreement can have one. People who want an AWA can have it, people who want to be part of the union can be in it, people who would rather do their own thing can do that as well. And if we have that, that's what we call freedom, and that's what I think all Australians want.*[22]

60. Notwithstanding the Minister's visit to the site, Morris McMahon continued to refuse to consider entering a union negotiated collective agreement and the employees remained on strike. Subsequent calls to amend the Act so that employees who wished to enter a collective registered agreement had more than just "the right to ask for a collective agreement" fell on deaf ears.

61. After almost sixteen weeks of strike action Morris McMahon eventually agreed to negotiate a certified agreement with the AMWU under the Act. As part of the settlement Morris McMahon agreed to drop its legal action for damages against the AMWU.

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[22] ABC Radio, PM - Friday, 23 May , 2003 18:34:00, reporter Paula Kruger at http://www.abc.net.au/pm/content/2003/s862727.htm

62. Until the final days of the strike, the employer either refused to negotiate at all with the union or would discuss nothing except the introduction of individual contracts.

63. The 2003 Morris McMahon dispute demonstrates the glaring failure of the current bargaining regime to provide for a framework where employees can make a genuine choice to have a collective agreement under the Act.

64. If it were not for the capacity of the employees at Morris McMahon to maintain personally costly and lengthy industrial action, the employees' desire for a collective agreement under the Act would not have been fulfilled. This dog eat dog approach to industrial relations is not the sort of framework capable of meeting Australia's social and economic needs in the 21st century. It should not be controversial in a civilised society that a right to a collective agreement should not be contingent on an employees ability to sustain the hardship of forgoing 4 months wages.

CASE STUDIES #2 & # 3: INCAT AUSTRALIA / INTERCAST AND FORGE

65. The following two cases studies show other instances where employers have either simply refused to allow employees to have a collective union agreement or misinformed employees of their rights in the process of pushing a non-union agreement. In both case studies the employees desire for a collective union agreement was not fulfilled.

Incat Australia

66. Incat is a shipbuilding company in Hobart. Incat constructs ferries for a world wide market and undertakes significant manufacturing contracts for the US Navy.

67. Late in 2004 the AMWU initiated a bargaining period with Incat with a view to obtaining a pay rise and union collective agreement. At the time, no Incat employee had received a real wage increase for the previous six years.

68. Despite approaches from the union and its members, Incat flatly refused to recognise the union as a negotiating party for an enterprise bargaining agreement. Instead, Incat set up its own enterprise bargaining agreement negotiation committee, comprising Incat staff, but specifically excluding the involvement of AMWU officials.

69. It took AMWU members two and a half days strike action even before Incat was convinced it was worth meeting with officials representing the employees' union. However, notwithstanding that meeting, the employer remained totally opposed to any union being a party to the forthcoming agreement.

70. Faced with a blanket refusal by their employer to negotiate a union agreement, employees eventually agreed to accept a non-union agreement. Lacking sufficient industrial muscle, the employees were denied the option to choose a union collective agreement.

Intercast & Forge Pty Ltd - Adelaide

71. Intercast & Forge Pty Ltd (Intercast) is the largest independent iron casting and forging operation in Australia. Intercast has a foundry in Adelaide where AMWU members are employed.

72. In March 2004, AMWU members at Intercast in Adelaide wished to negotiate an agreement through their union. However, the employer refused to let the union have representatives on the enterprise bargaining committee. Eventually, a dispute was notified to the AIRC. In April 2004, the AIRC recommended that union officials be allowed to attend every third meeting of the enterprise bargaining committee.

73. On 21 July 2004, the employer ceased any semblance of bargaining with the union and issued a notice to employees that it wished to enter an agreement with the employees directly pursuant to s.170LK of the Act. This notice stated that employees could consult their union about the agreement for "clarification" of matters in the agreement.

74. On 5 August 2004, employees were variously given between ten minutes and half an hour's notice that there would be a meeting in the lunch room. At this meeting an employee asked the general manager whether a s.170LJ union agreement allowed employee input into negotiating that agreement - and employee representation in that agreement - or whether it was simply between the union and the employer. The employee was advised that a s.170LJ agreement was only between a union and the employer, with no employee representation. Following this misleading characterisation of a s.170LJ union agreement, a ballot was held to vote for the s.170LK non-union agreement the employer had proposed. After hearing that a s.170LJ agreement would not allow employee representation, a majority of employees voted for the non-union agreement.

75. Despite the AMWU bringing the questionable circumstances surrounding the ballot to the attention of the AIRC, the AIRC nevertheless certified the s.170LK agreement.

CASE STUDY #4: TOWNSVILLE ENGINEERING INDUSTRIES PTY LTD

76. The following case study illustrates the ability of an employer to simply refuse to enter a collective agreement and to use AWAs to undermine the capacity of employees to bargain collectively through their union in a State jurisdiction.

77. Townsville Engineering Industries Pty Ltd (Townsville Engineering) is an engineering and construction company which services clients in the sugar, mining, marine and mineral processing industries. In addition to engineering

and construction, Townsville Engineering also undertakes mechanical and fabrication work.

78. On 22 July 2004, the AMWU sent a notice to Townsville Engineering proposing that an agreement be made between the AMWU and Townsville Engineering under the Queensland *Industrial Relations Act 1999.* When the AMWU sought negotiations with Townsville Engineering, the company advised that notwithstanding the wishes of those of its employees who were AMWU members, it was not willing to enter into an agreement with the union.

79. In August 2004 the AMWU sought the assistance of the Queensland Industrial Relations Commission (the Queensland Commission) for conciliation with respect to an agreement with Townsville Engineering. At the conciliation proceedings Townsville Engineering continued to argue that it did not wish to make a certified agreement.

80. On 5 October 2004, a lack of progress in negotiations again led the AMWU to seek the assistance of the Queensland Commission in conciliating an agreement. Townsville Engineering again indicated that it was not interested in making an agreement with the union.

81. On 18 October 2004, the Queensland Commission agreed to arbitrate a settlement of the dispute. The matter was heard in December 2004 however no determination in relation to the wages and conditions of employees occurred as Townsville Engineering successfully argued before the Queensland Commission that the Commission lacked jurisdiction to arbitrate. The decision of the Queensland Commission in relation to jurisdiction was successfully appealed by the AMWU to the Industrial Court of Queensland.

82. In April 2005 the Industrial Court of Queensland remitted to the Queensland Commission. The Queensland Commission subsequently arbitrated a settlement of the dispute.

83. Meanwhile however, between December 2004 and April 2005 while continuing to block all attempts by the union to come to a collective agreement – or have the matter otherwise dealt with by the Queensland Commission - Townsville Engineering was also offering AWAs to its workforce.

84. Unfortunately by the time the superior arbitrated outcome was reached in the Queensland Commission, 65% of Townsville Engineering's employees had been worn down by the company and had signed an AWA. These employees were then neither entitled to the higher wages and better conditions contained in the Queensland Commission's determination, nor to the union collective agreement that they had originally sought to achieve.

CASE STUDY #5: INCHCAPE MOTORS AUSTRALIA LIMITED / AUTONEXUS PTY LTD / AUTONEXUS (SERVICES) PTY LTD

85. The following case study provides an example of the way in which corporate structuring and restructuring can and does undermine the capacity of employees to bargain with their employer and to maintain the conditions for which they have previously bargained.

86. Inchcape Motors Australia Limited (Inchcape) is in the business of vehicle and parts sales and distribution.

87. In 2003, the AMWU entered into a certified agreement with Inchcape, covering that business's supply chain operations throughout New South Wales. It was understood by the parties that during the life of the certified agreement, part of the business of Inchcape would transfer to AutoNexus Pty Ltd, a subsidiary of Inchcape, and it was expressly stated in the certified agreement that the agreement would continue to apply to AutoNexus Pty Ltd upon such a transfer.

88. The Inchcape agreement also read:

" In the event that an employee agrees to transfer to another supply chain operation of the Company, it is agreed that the terms and conditions of employment of that employee existing at the time of the transfer shall continue to apply to that employee notwithstanding what other arrangements may apply to another employee at such other site or sites, unless the terms and conditions of employment at such other site are more advantageous in which case such terms and conditions shall apply to such transferred employee."

89. Around the end of 2004 or beginning of January 2005 four employees who had been transferred to AutoNexus Pty Ltd were requested to work at a new parts distribution centre in Homebush, NSW. The employees were initially told that the Inchcape agreement would continued to apply to their employment at the Homebush site. At the time there were approximately 20 labour hire employees working at the new centre.

90. After commencing work at Homebush the four employees became aware that the labour hire employees were in the process of being offered AWAs. Further investigations revealed that the entity offering the labour hire employees AWAs was a newly registered company, called "AutoNexus (Services) Pty Ltd". The employees were subsequently advised that this was the new employing entity at the site and further that this new entity was offering AWAs as it did not consider itself bound by the Inchcape agreement.

91. In February 2005, the four AutoNexus Pty Ltd employees were informed that they would have to transfer their employment to the new employing entity AutoNexus (Services) Pty Ltd *and* accept an AWA if they wanted to continue to work full-time at the Homebush site. The AWAs offered contained terms that were substantially less favourable than those in the Inchcape agreement under which the employees were working, including in relation to: redundancy; hours of work; overtime; public holidays; leave loading; notice of termination; and rostered days off.

92. The employees were told that if they would not transfer their employment to the new subsidiary of Inchcape and accept an AWA with that subsidiary, they would have to be transferred to a third site.

CONCLUSIONS REGARDING CASE STUDIES

93. As the case studies illustrate, the capacity of employees to choose a union negotiated collective agreement is substantially compromised under the Act. This may be contrasted with the unfettered right of an employer to simply refuse to negotiate with its employees' union or unions for a collective agreement. The employer can simply choose to continually ignore the option of a s.170LJ union agreement and persist with proposals for a s.170LK non-union agreement, ignoring the employees' union(s). Alternatively, the employer can attempt to break down the employees' campaign for a collective agreement through stalling negotiations, offering AWAs or a variety of other means.

94. As the case studies show, often the only effective means of asserting an employee's right to choose a collective union-negotiated agreement is through costly and disruptive industrial action. It is worth noting in this context that in the examples given, the protected industrial action taken was generally just as much about the form of the agreement, as about the substance of what it contained.

95. The AMWU submits that employees' rights to collectively bargain through their union representatives should not be subject entirely to the whim of an employer, nor dependent solely on the level of industrial pain that employees are able either to bear or inflict.

96. In order to improve the capacity of employees to have a union collective agreement where they wish to have one, the AMWU urges the Committee to make the following recommendations:

- Where employees want a union collective agreement, their employer should be obliged to bargain in good faith for such an agreement.

- AWAs should be abolished.

- Employers should be prohibited from using labour hire firms or contractors to undertake work that would otherwise have been done by employees who are taking protected industrial action in support of a collective agreement.

97. These recommendations are both consistent with Australia's obligations under various International Labour Organisation Conventions (see the ACTU's submission in this regard) and similar to provision contained in other bargaining jurisdictions. In this context the Committee is again referred to Appendix A of this submission which provides a brief outline of the some of the relevant bargaining provisions in the Canadian industrial jurisdiction.[23]

D.4 Proposed Restrictions On The Taking Of Protected Industrial Action Which Will Restrict The Capacity Of Employees To Obtain A Union Collective Agreement

98. Unfortunately, the Howard Government's proposed changes to the Act suggest that the "serious chilling effect" on the negotiations that union's can enter for their members described by Justice Kirby in the *Electrolux* decision is likely to get worse before it gets better. Already the Workplace Relations Amendment (Better Bargaining) Bill 2005, which the Howard Government apparently intends to pass in the Spring session of Parliament, will place new and unjustifiably harsh restrictions on the right to take protected industrial action in support of a union collective agreement. These new restrictions will amongst other things:

[23] The outline is based in part from a discussion paper provided to the union by Cath Bowtell, ACTU industrial officer.

- allow clients and suppliers of businesses to apply to suspend employees' right to take protection action;
- allow businesses to adopt a corporate structure that makes the taking of protected action in support of an agreement covering employees in the business very difficult if not impossible;
- prevent employees working together in a co-ordinated fashion across an industry (or within a corporate group) to take protected industrial action in support of a union collective agreement.

99. In addition, the Howard Government has foreshadowed a range of other measures, including a system of complicated secret ballots procedures which will make protected action harder to take and less effective. As Ron McCallum has observed:

> *When bargaining with single employing enterprises for collective agreements, our current federal labour laws give trade unions a narrow window of opportunity to take lawful strike action to press their demands. Under the proposed changes it will be far more difficult for unions to take lawful industrial action. In order to strike legally, trade unions will have to conduct pre-strike secret ballots of the affected employees. While giving employees the right to vote on whether they should go on strike is reasonable, it is the very nature of the balloting mechanism which makes lawful strike activity very difficult indeed. While we are still awaiting the details about these changes, if previous Howard Government bills are any guide, unions and their members will be tied up in knots by these complex secret ballot procedures, where the date and nature of the proposed industrial action must be stated on the ballot for all and sundry to see and for employers to anticipate. I have no doubt that these secret ballot requirements, coupled with other changes like compulsory cooling off periods, will diminish the potency of the economic weapon of lawful employee industrial action.* ***With a lessened capacity to back their demands with economic sanctions, trade unions and their members will***

find that collective bargaining may become more in the nature of collective begging.[24]

100. The AMWU urges the Committee to recommend that the Senate not pass the Workplace Relations Amendment (Better Bargaining) Bill 2005 and that the Senate similarly oppose any further legislative initiative to introduce secret ballots or otherwise constrain protected industrial action.

[24] McCallum, R, "The Howard Government's Refashioning of Australian Labour Law: The Neo-Liberal Labour Law Agenda", Dissent, Number 18 Spring 2005 at pages 20-21.

E. The Parties' Ability To Genuinely Bargain, Focusing On Groups Such As Women, Youth and Casual Employees

101. The features of the agreement-making provisions under the Act that limit or undermine the ability of employees to choose a union collective agreement which were identified earlier in this submission also undermine the ability of employees to genuinely bargain.

102. By allowing the use of AWAs, labour hire firms and other employer practices aimed at breaking down collective bargaining, the Act particularly disadvantages those employees who have less bargaining power in their employment relationship, to the point where at some workplaces no genuine bargaining takes place. In our experience, such workplaces often include a disproportionately high number women, youth and casual employees.

103. The only protection for employees who are unable to engage in any form of genuine bargaining is the existing award structure. Further reductions in the ability of employees to bargain, combined with the simultaneous removal of award conditions is therefore likely to result in greater hardship for those groups of employees who are already most disadvantaged.

F. Achieving Social Objectives, Including Addressing The Gender Pay Gap and Enabling Employees to Better Balance Their Work and Family Responsibilities

104. In Australia, the majority of recent advances in relation to the gender pay gap and the improvement in employees' capacity to balance their work and family responsibilities have resulted from decisions and principles developed and applied by the AIRC. As such, the attacks on that body by the Howard Government are likely to lead to worsening outcomes in relation to the gender pay gap and the balance of work and family responsibilities.

105. Where important gains have been made through bargaining, they have been made through pattern or industry level bargaining. As Justice Munro observed in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (Print T1982) where the Commission was called on to consider to what extent the Act allowed for parties to engaged in pattern bargaining at an industry level:

> *[55] Nor do I accept the AiG's formulation to the effect that the only permissible agreement is one confined to benefits about matters that are narrowly " the needs of the employees in the enterprise ". That formulation imposes restrictions not expressed in the Act. If adopted it would unduly restrict the legitimate use of bargaining periods.* ***Many significant employee benefits, for instance maternity leave, accrued rights protection, and severance pay are evolutions of national policies pursued by unions at all available negotiation levels****.*[25]

[25] Print T1982

106. The Howard Government's legislative initiatives to prohibit pattern and industry bargaining while diminishing the role of the Commission and the award system are therefore likely to have a negative impact on the gender pay gap and the balance of work and family responsibilities.

107. The AMWU urges the Committee to recommend that the Senate oppose any legislative initiative aimed at reducing the capacity of parties to engage in pattern or industry level bargaining.

G. The Capacity Of Agreements To Contribute To Productivity Improvements, Efficiency, Competitiveness, Flexibility, Fairness and Growing Living Standards

Impact upon Productivity

108. One of the Howard Government's central justifications for the proposed changes to the industrial relations system, and in particular Australian Workplace Agreements, is that Australia needs a productivity boost and that increased emphasis on AWAs will result in this productivity burst thereby increasing our international competitiveness and our living standards.

109. The AMWU submits that nothing could be further than the truth.

110. Productivity is key to our international competitiveness, our long term growth rates and hence our future standards of living, however AWAs will not increase productivity. In fact the overwhelming body of evidence points towards the opposite. AWAs reduce productivity, thereby reducing our potential future standards of living.

111. Professor Richard K Lester, founding Director of the Massachusetts Institute of Technology Industrial Performance Center and one of the world's foremost experts on productive performance, has stated:

> *In the long run, an economy cannot grow any faster than the rate at which its underlying productive capacity grows. And if the existing supply of labor and capital is already being fully utilized, there are only two possible ways for productive capacity to grow. One is to add new inputs of labor and capital. The other is to increase the productivity of the existing*

inputs. Of the two, only the productivity-driven growth has the potential to make everyone truly better off.[26]

…

As the MIT economist Paul Krugman has observed , "productivity isn't everything, but in the long run it is almost everything' Or as his fellow economist William Baumol and colleagues put it, 'for real economic miracles you have to look to productivity growth … In terms of human welfare, there is nothing that matters as much in the long run'.[27]

112. Productivity is key, but the available evidence is that AWAs do not increase productivity. In fact they have the capacity to reduce productivity, thereby reducing the long term growth rate of the Australian economy.

113. Professor David Peetz, Professor of Industrial Relations at Griffith University and Visiting Professor at the University of Bergen, Norway comprehensively demolishes the claims and the very sketchy evidence supporting claims that individual contracting is more productive than collective agreements.

114. Most claims regarding the supposed superior productivity effects of individual contracts are usually based on the New Zealand experience or recent experience in the Australian mining sector.

115. Peetz cites numerous academic studies analysing the performance of the New Zealand economy and comes to a single conclusion:

…for the period when Australia had a collectivist national government and New Zealand an individualistic one, productivity growth was substantially higher in Australia and… this was after the two countries had had similar rates of productivity for the previous 14 years…The New Zealand experience suggests that further moves to reduce the safety net under

[26] Lester, R., "The Productive Edge", W.W. Norton, New York, p.33
[27] Ibid., p.34

individual contracts are likely to lead to reductions in the rate of growth of productivity.[28]

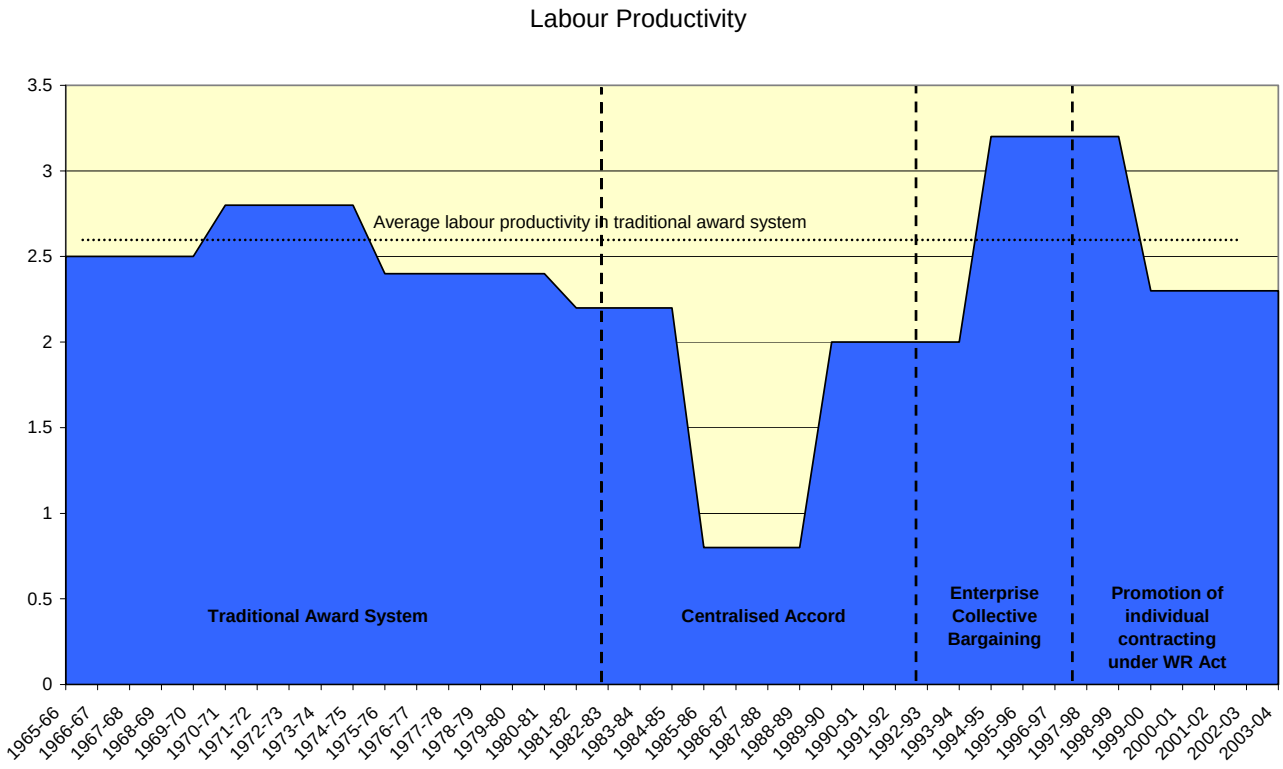
116. This is strongly supported by Dr. Paul Dalziel of the University of Canterbury's analysis of the New Zealand experience. Dr. Dalziel concluded that the introduction of the Employment Contracts Act of 1991, which strongly emphasised individual contracts, "…appears to have marked the end of a long period of strong comparability between New Zealand and Australian labour productivity growth, to New Zealand's great disadvantage. Recognition of this fact was one of the considerations leading to a new Labour led coalition government (elected in late 1999) to replace the Act with a more corporatist Employment Relations Act of 2000."[29]

117. According to Peetz to prove or disprove the impact of individual contracting on productivity you must examine the average productivity growth over the various productivity cycles since 1964-65 and compare the institutional arrangements that applied at the time. The results are as follows for labour productivity:

- Traditional Award System (1964-1982) 2.6% per annum.
- Centralised Accord (1983-1993) 0.8% per annum.
- Collective Bargaining (1993-1998) 3.2% per annum.
- Individualism Bias (1999-) 2.3% per annum.

118. Thus the current period with its legislative bias towards individual contracts has resulted in lower productivity growth than the traditional award period[30]. This is was an era where union density was also over twice the density applying to the current cycle (53% to 23%).

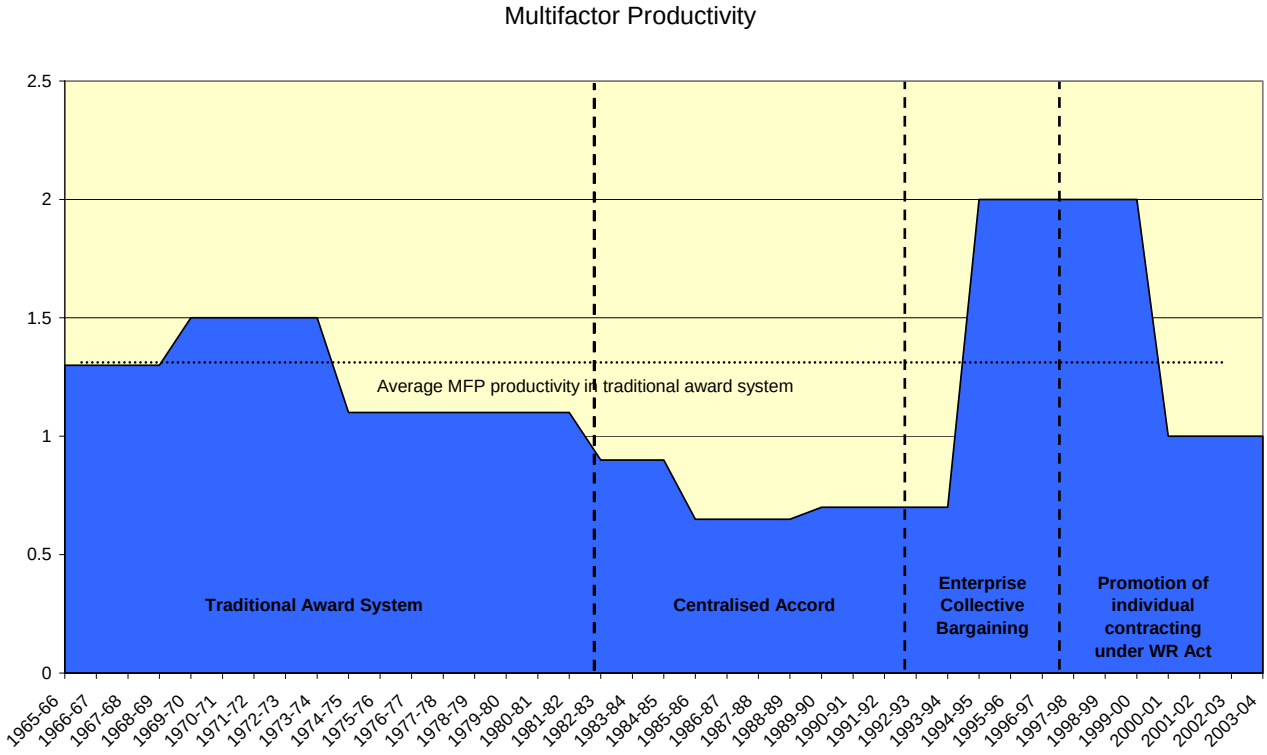
[28] Peetz, D., "Is Individual Contracting More Productive", Sydney University Industrial Relations Report Card, 2005, p.3
[29] Dalziel, P., "New Zealand's Economic Reforms: an assessment", Review of Political Economy, Volume 14, Number 1, 2002
[30] Peetz, op.cit, p.5



119. While the current productivity cycle is not finished, there is no evidence that productivity figures will trend up. In fact the latest quarterly national account figures show that for the period of 2004, labour productivity actually fell by 0.4%.

120. The story in multifactor productivity (MFP) is not much different:

- Traditional Award System (1964-1982) 1.3% per annum.
- Centralised Accord (1983-1993) 0.65% per annum.
- Collective Bargaining (1993-1998) 2% per annum.
- Individualism Bias (1999-) 1% per annum.



121. Besides the macro levels, another way of testing for systemic productivity effects is to look at the micro level, using surveys of workplaces organisations. A detailed study of New Zealand employers was conducted and concluded that:

> *…we cannot find a single statistically significant or reliable relationship between organizations pursuing individual contracts and our exhaustive measures of firm performance.*[31]

122. A 2001 study of Australian workplaces (Tsang and Wooden) looking at enterprise bargaining and productivity levels found that the combined positive effects of high union membership and collective agreement coverage on productivity were higher than the combined effects of individual contracting and non-unionism.[32]

[31] Ibid, p.8
[32] Ibid

123. The Business Council of Australia has co-funded three large academic studies of Australia workplaces and one would expect them to strongly support the BCA's agenda of individual contracts. What did they find?

- "The Transformation of Australian Industrial Relations" (Wooden) did not test the relationship between individual contracts and productivity in its analysis of the data from the Australian Workplace Industrial Relations Survey (AWIRS), but he did find a positive relationship between unionism and productivity in certain circumstances: *"unions apparently are good for productivity, but only at workplaces where unions are active"*.

- "The Impact of Enterprise and Workplace Focused Industrial Relations on Employee Attitudes and Enterprise Performance" (Wooden). This study found no negative relationship between unions and productivity, finding instead that collective bargaining coverage was associated with higher levels of self claimed productivity.

- "Simply the Best: Workplaces in Australia" (Hull and Read). The study identified 15 key drivers for excellence, but working arrangements (collective or individual) was not among them.[33]

124. So where is the evidence that the BCA relied on for its *Workplace Relations Action Plan*?

> *There has been no smoking gun in the data proving that individual contracts did lead to higher productivity, particularly by comparison with collective bargaining. What evidence did it instead rely on?*[34]

125. The only evidence the BCA cited to support its proposals was a series of observations on the mining industry, basically observing that labour productivity growth from 1994 to 2002 was higher than in other industries. However, the following should be noted:

[33] Ibid., p.9
[34] Ibid., p.10

- It is not unusual for the mining sector to experience high labour productivity growth. For example in the highly unionised coal industry labour productivity grew at the same rate as mining as a whole. So there is little link between individual contracting and labour productivity gains in mining.

- The story is incomplete because as the Productivity Commission has pointed out, the mining industry's period of strong multifactor productivity growth was from 1982-83 to 1992-93. MFP between 1992 and 2002 was low. The strong growth in labour productivity was just capital deepening, that is replacing jobs with machines. This is not a productivity gain because firms are just using another input to get the same level of output.

- The BCA was very selective in its data choice, ignoring much more recent data that showed that mining, far from having the highest rate of labour productivity growth of all industries, now had the lowest rate of productivity growth over the most recent eight years, one that was only a quarter of the national average growth are over the period.[35]

126. The BCA then sought to give an authoritative basis for its latest claims by co-releasing a report it paid Access Economics to produce. This report sought through generalizations to show a relationship between labour productivity and 'flexibility'. But the group of agreements deemed flexible was dominated by union collective agreements. So in substance, labour productivity growth was, on average, higher in industries with more union collective agreements.

127. What was the exact pattern for AWAs? If you look at the Access report and divide the thirteen industries measured into two groups according to their AWA penetration you would find that labour productivity growth in the seven industries with the most AWAs was, on average, 0.2 % less than in the six industries with the fewest AWAs for the years in which the consultants depicted productivity.

[35] Ibid., p.11

128. Using the more accurate ABS data, there is no correlation between registered individual agreements and productivity growth over the eight years to 2003-04.[36]

Impact upon Efficiency and Competitiveness

129. To compete in the world economy, the AMWU submits that we must take the high road of high skills, knowledge intensive manufacturing and service focused economy.

130. Richard Lester in his ground breaking book, *The Productive Edge*, found that companies that implemented high performance systems were leading the revival of US manufacturing.

131. These performance systems depended upon:

> *Well-trained, well-motivated workers, broadly responsible and cooperating with each other and with management, will produce better outcomes for both their firms and themselves than an unskilled workforce, operating within narrow, strictly enforce job categories, and subject to military-style command and control management, with little scope for creativity and initiative.*[37]

132. High performance systems are characterised by the following specific practices:

- Multi-attribute incentive pay
- Very extensive screening
- Job assignment flexibility
- High worker participation in teams
- Some teamwork practice
- Employment security pledge
- Regular off-site skills training

[36] Ibid., p.12
[37] Lester, Op,cit, p.216

- Information sharing and/or regular meetings with workers[38].

133. This system results in production facilities operating for 7% longer, higher productivity, improved quality.

134. Ultimately this system of production is dependant upon a high level of trust in relations between management and employees[39].

135. How would an increased emphasis on AWAs affect Australian businesses' capacity to implement this system, thereby increasing our competitiveness. Professor Peetz found that after the introduction of individual contracts in New Zealand there was a massive reduction trust in management[40], something in the order of 20-30 percent.

136. Van Barneveld's analysis of AWAs supports the hypothesis that growth in individual contracting leads to a reduction in trust of management[41]. This again is supported by other analysis of AWAs that concluded that they are dominated by a big stick approach to employee relations, rather than a carrot approach[42].

137. Thus the AMWU submits that AWAs reduce Australian companies ability to implement the most advanced production systems.

138. This problem is simply symptomatic of the wider failure of Australian business to focus on implementing performance systems that concentrate on innovation, productivity and creativity rather than simple cost cutting to maintain competitiveness.

139. As Roger Boland, previously a senior officer of the AIG and now a Deputy President of the NSW IRC recognised:

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[38] Ibid., p.221
[39] Ibid., p.223
[40] Peetz, D, Quinn, D, Edwards, L, & Riedel, P 'Workplace Bargaining in New Zealand: Radical Change at Work, in D Peetz, A Preston and J Docherty (eds) *Workplace Bargaining in the International Context*, Workplace Bargaining Research Project, Department of Industrial Relations and Australian Government Publishing Service, Canberra, p.290-291
[41] Van Barneveld, K., "Equity and Efficiency: The Case of Australian Workplace Agreements", doctorial thesis, Faculty of Business and Law, University of Newcastle, Newcastle, August 2004, p. 452
[42] Roan, A, Bramble, T, & Lafferty, G, "Australian Workplace Agreements in practice: The 'hard' and 'soft' dimensions", Journal of Industrial Relations 43, p.387-401

Where employers have adopted a bargaining strategy, in many instances it is driven by an exclusive desire to cut costs rather than pursue innovation. Now that is completely understandable in today's competitive environment. But it is a blinkered approach to achieving competitiveness through workplace change and is creating a backlash amongst workers manifested in intense feelings of job insecurity, disillusionment, lack of trust, "reform fatigue" and a shift to greater militancy.[43]

140. This myopic obsession with cost cutting reaches its zenith in the wide spread introduction of AWAs and will only become more of a problem with the foreshadowed industrial relations changes.

Impact upon Fairness

141. Income Inequality has increased under the Howard Government. The margin between the top quintile's share of income and the bottom quintile has increased from 29.2 to 30.6[44]. The income gap is widening significantly.

142. One of the weapons of choice in this inequality growth has been the *Workplace Relations Act 1996*. The Act was designed to restrict the abilities of unions to organise and privileged AWAs.

143. Richard Lester has argued that "Unions standardize pay rates among their members, and also induce non-union firms to increase wages and benefits to avoid unionization."[45] Therefore, with the increasing legislative bias towards individual contracts and consequential attack on unionism, we can expect wage rates to diverge and as a result inequality to increase.

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[43] Roger Boland, Speech to AIG members, "A critical assessment of progress in enterprise bargaining", 23 September 1999". See also Bowden B. "A Collective Catastrophe: Productivity Maximisation and Workplace Bargaining in the Australian Coal Industry", The Journal of Industrial Relations, Vol 42, 364-382

[44] Harding, A, "Recent Trends in Income Inequality in Australia", Presentation to the Conference on 'Sustaining Prosperity: New Reform Opportunities for Australia', Melbourne, 31 March 2005, p.3

[45] Lester, Op.cit, p.44

Impact upon Living Standards

144. AWAs reduce our ability to improve living standards. Living standards for the average worker may be increased by one of two means: increasing productivity to increase our long term economic growth rate or by increasing equality.

145. As the previous sections have demonstrated, AWAs do not assist either means. In fact AWAs reduce our long term productivity potential and increase inequality.

146. The AMWU submits that any government that is committed to increasing living standards for Australians, especially average workers, is compelled to restrict individual contracts, not encourage them; to encourage unionisation, not attack unions; to commit to the high road of economic development, not succumb to the easy, myopic, cruel low road of cost cutting.

147. Unfortunately, from its actions in the last 9 years, the AMWU must conclude that the current Federal Government is not committed to increasing living standards for Australians.

H. Meeting International Obligations

148. On many occasions the International Labour Organisation (ILO) has found that Australia's industrial laws do not meet Australia's obligations under ILO Conventions and in particular ILO Conventions 87 and 98.

149. Over the past decade Australia's breaches have been found to include:[46]

- A failure to promote collective bargaining.
- A favouring of individual bargaining over collective bargaining.
- A favouring of workplace level bargaining over other forms of bargaining.
- Employers being allowed to select with whom they bargain.
- Restrictions being placed on the subject matter of agreements.
- Restrictions being placed on the right to strike including where industrial action is taken over:
    - matters that cannot be contained in a certified agreement;
    - strike pay;
    - demarcation disputes; and
    - sympathy strikes.

150. Many of these failures persistent and ongoing failures are also present in the case studies that the AMWU has provided for the Committee's consideration in these submissions.

151. It is about time Australia took its international obligations in relation to labour rights seriously.

152. The AMWU urges the Committee to recommend that urgent steps be taken to amend the industrial laws to ensure that Australia is in compliance with its international obligations.

[46] These matters are expanded in an excellent discussion in the ACTU submissions to this inquiry.

I. Conclusion

153. The AMWU wishes to thank the Committee for the opportunity to make submissions to the inquiry regarding workplace agreements.

154. The issues being dealt with by the Committee are fundamental to the social and economic rights of Australian workers and their families. To paraphrase part of the International Labour Organisation's Declaration on Fundamental Principles and Rights at work, a person's right to collectively bargain is necessary to enable that person to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate. It is the AMWU's experience that too often this fundamental right is being denied to Australian workers.

155. In the context of the changes to Australian labour law foreshadowed by the Howard Government, the AMWU asks that the Committee support the proposition that the already compromised rights of Australian workers should not be further reduced.

156. Australian workers need a right to collectively bargain – not a right to collectively beg.

157. The AMWU commends the union's recommendations for the consideration of the Committee.

158. The AMWU would value the opportunity to make further submissions to the inquiry.

APPENDIX A

CANADIAN INDUSTRIAL LAW

A Brief Outline Of The Bargaining Provisions Of The Canadian Labour Code

Union recognition in collective bargaining is achieved for a "unit" of employees if more than 50% of the employees want to be represented by the union in negotiating a collective agreement – this need not occur via a vote: s.28.

A vote of the employees can be ordered by the Canadian Industrial Relations Board (CIRB) if it is unsure as to whether a majority of employees support a collective agreement: s.29(1).

If between 35% and 50% of the employees are union members there must be a vote of the employees: s.29(2).

When a vote occurs union recognition in collective bargaining is achieved if the majority of those who vote, vote in favour or recognition and at least 35% of the employees vote in favour: s.31(2).

The CIRB determines what is the composition of the "unit" of employees: ss.16(p), 27(1), (2).

Recognition gives the union exclusive rights to bargaining on behalf of all the employees thus giving protection against individual agreements: s.36(1)(a).

A recognised union can initiate a bargaining notice: s.48.

When bargaining there is an obligation to bargain in good faith: s.50.

Collective agreements are closed and enforceable: ss.56, 57.

Employees may take protected industrial action in support of an agreement: Division V1.

There is a designated process of conciliation: Division V.

First agreements can be arbitrated: s.80.

Parties have the right to seek a re-opening of an agreement to bargain questions relating to the impact of the introduction of technological change.

The code provides for a range of unfair labour practices and prohibitions relating to both employers and unions, prohibiting among other things employer interference with the formation or administration of a trade union.

Bargaining and The “Rand Formula”

A key foundation of bargaining rights within Canada is the so called "Rand Formula”.

The Rand formula is named after the Hon Mr. Justice Ivan Cleveland Rand, a judge of the Supreme Court of Canada. In 1947 Justice Rand acted as an arbitrator in a 100 days strike of 17,000 workers against Ford in Windsor, Ontario, Canada. The formula requires an employer to collect union dues from all employees covered by a collective agreement, without necessarily requiring an employee to join the union. Justice Rand's reasoning was that all workers in a bargaining unit benefited from a union negotiated contract and that, as a result, they are obliged to pay union dues even though they need not join the union. This is commonly termed the "freeloader" argument.

Justice Rand's formula for peaceful labour relations quickly spread throughout Canada and became part of collective agreements. In 1997 Québec, like other provinces, entrenched the formula in law.

The Rand Formula has survived a number of challenges by employers to the Supreme Court of Canada and continues to be an integral part of Canadian industrial law.