Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into Workplace Agreements

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Executive Summary

1. The Australian Services Union is one of Australia's largest Unions. It has fully participated in enterprise bargaining having bargained for literally thousands of agreements for members.

2. While the Union has achieved excellent results for members through union bargaining, it does not believe that the system, as it currently operates, represents a 'fair fight' even in the union bargaining stream and that it clearly disadvantages employees forced to accept non union collective agreements and individual agreements [AWAs].

3. The current system is based on American 'principles' and the exercise of "raw economic power" which are foreign to Australia's notions of the public interest and social safety nets.

4. Among the key failures of the system is the lack of

    - any requirement on employers to bargain in good faith (in any stream)

    - any real ability for the Commission to resolve bargaining disputes

    - an equity principle as a test for agreements

5. Choice in agreement making is largely employer, not employee, choice.

6. The Union believes that, to date, bargaining has worsened wage disparity in Australia. Union workers do best in the system with non union and AWA agreement workers worst off.

7. Even when they are in agreement, employers and employees are not free to reach the form of agreement they prefer due to limitations on what may be included in agreements.

8. Current bargaining provision do not meet international standards and freedom of association tests, especially as a result of

   - the application of 'no AWA – no job' principles
   - the ability of employers to lock workers out
   - so called 'sweetheart' employer-union agreements

9. Bargaining has not assisted workers to balance work and family considerations of gender equity.

10. This situation is likely to worsen under the Government's proposed 2005 amendments and policy.

11. The current system should be overhauled and improved for employees, not further weakened as proposed by the Government, in accordance with recommendations made in the final section of this Submission.

Terms of Reference

12. The Committee has been requested to inquire into:

Whether the objectives of various forms of industrial agreement-making, including Australian Workplace Agreements, are being met and whether the agreement-making system, including proposed federal government changes, meet the social and economic needs of all Australians, with particular reference to:

a. the scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements;

b. the capacity for employers and employees to choose the form of agreement-making which best suits their needs;

c. the parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees;

d. the social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities;

e. the capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards; and

f. Australia's international obligations.

13. The submission of the ASU deals with all of the Committee’s particular terms of Reference, except number 6, and some broader issues.

14. The submission is authorised by the National Executive of the Union.

Introduction

15. The Australian Services Union [ASU] is one of Australia's largest Unions, representing approximately 120,000 employees.

16. The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

17. Today, the ASU's members work in a wide variety of industries and occupations and especially in the following industries and occupations:

    - Local government (both blue and white collar employment)
    - Social and community services
    - Transport, including passenger air and rail transport, road, rail and air freight transport
    - Clerical and administrative employees in commerce and industry generally
    - Call centres
    - Electricity generation, transmission and distribution
    - Water industry
    - Higher education (Queensland and SA)

18. The ASU has members in every State and Territory of Australia, as well as in most regional centres as well. As the principal local government union, amongst other sector and industry coverage, the Union has members in all local government authorities throughout the country.

19. The Union has approximately equal numbers of males and females as members, although proportions vary in particular industries.

20. The union has 11 Branches:

- NSW/ACT (Services) Branch
- NSW - United Services Union
- Queensland Services Branch
- Central and Southern Queensland Clerical and Administrative Branch
- North Queensland Clerical and Administrative Branch
- Victorian Authorities and Services Branch
- Victorian Private Sector Branch
- Tasmanian Branch
- South Australia/Northern Territory Branch
- West Australia Branch
- Taxation Officers Branch

21. The Union has offices in Australia's eight capital cities as well as in 15 regional centres including Townsville, Rockhampton, Dubbo, Hay, Newcastle, Wollongong and Morwell.

22. The ASU has had considerable experience with regard to the issues being considered by the Committee. Since the introduction of enterprise bargaining the ASU has been involved in

- bargaining for literally thousands of union collective agreements under Division 2 and 3 of the Act in key industries and with key employers

- assisting members faced with employer proposals for non union agreements under s170LK
- assisting and negotiating on behalf of members offered Australian Workplace Agreements [AWAs] by their employer.

23. The ASU's array of Agreements is underpinned by a network of safety net awards in both State and Federal Jurisdictions. In the Federal system, the ASU maintains about 200 underpinning awards. Some of these Awards are enterprise-based, eg Airline Officers (Qantas Airways Ltd) Award and others have industry wide coverage, eg the Social and Community Services (Queensland) Award.

Agreement making objectives

24. As currently defined by the Workplace Relations Act, the objectives of the Federal industrial relations system are:

- High employment; improved living standards; low inflation and international competitiveness through higher productivity and a flexible and fair labour market
- Protecting the competitive position of young people
- Enabling employers and workers to choose the most appropriate form of agreement for them
- Providing the means for wages and conditions of employment to be determined by agreement at the workplace or enterprise level
- Ensuring an effective award safety net
- Providing a framework or rights supporting fair and effective agreement-making and ensuring that they abide by agreements
- Ensuring freedom of association
- Balance of work and family responsibilities
- Respecting and valuing diversity in the workforce
- Giving effect to Australia's international obligations re labour standards

25. Of these, the most important for workers, as employees, are

- Improved living standards for all workers
- Opportunities for genuine bargaining with employers about wages and working conditions
- A fair labour market
- A genuine choice of form of workplace agreement
- Fair processes for making of collective agreements
- Maintenance of an effective and comprehensive safety net (both for employees on agreements and those without)

- Freedom of association – and especially the protection of the right to organize and bargain collectively
- Work and family balance – genuine flexibility for employees in these matters;
- Non discrimination, recognition of diversity
- Recognition and implementation of International labour standards as the basis for fair international trade and in their own right.

26. In addition, the ASU has the following additional objectives as a participant in the Agreement making system and processes:

- Recognition of employee 'voice' in matters affecting employees in the workplace
- Right to genuine consultation and involvement in the agreement making process
- A firm relationship between agreements and the underpinning award and industry standards with regard to wages and conditions
- The highest level of occupational health and safety protection
- Equity in terms of outcomes for all workers, including women, young people, part-time and casual employees and members of disadvantaged groups
- No conditions trade offs for wage increases which reflect only safety net type outcomes
- A genuine productivity/bargaining link properly establishing a capacity to pay and profitability/productivity relationship
- An ability to set and improve social standards above legislated minimums, e.g. re parental leave, carers' leave, etc through bargaining

27. Are these general and specific objectives generally being met now in the agreement making processes established under the Workplace Relations Act? This question can only be answered generally in the context of the different forms of agreement making.

28. The objectives are best being met in the Agreements being make under s170LJ and Division 3 Agreements. Clearly, this is because of

- The ability of union members to bargaining collectively which maximises their bargaining power in the face of generally superior employer bargaining strength, and

- the involvement of representative organisations of employees which are able to assist employees in the bargaining process and to some extent match the employers resources in terms of knowledge, research and technical, legal and industrial expertise.

29. However, even with regard to s170LJ and Division 3 bargaining, outcomes are not satisfactory. Bargaining is still not a 'fair fight' in many ways for a range of reasons, including:

- There is no obligation on employers to bargain in good faith whereas a guaranteed fair outcome depends on either a willingness of employer to bargain in good faith or a legally enforceable requirement to do so
- The bargaining process itself is not a fair fight – employers still have upper hand, can avoid the consequences of protected industrial action more readily and have generally superior financial resources
- Employers have all the choices in bargaining, e.g. to turn the agreement into an LK Agreement or an AWAs if the process and or outcome of the union bargaining does not suit
- Bargaining outcomes depend on perception and use of bargaining power to force outcomes – unfair and unequal outcomes remain possible and are frequently the case
- There is no 'capacity to pay' or gender equity principles built into the bargaining requirements
- So called 'sweetheart deals' are available to the employer and a favored union at the expense of other employees and their unions of choice.

30. Moreover, the Government's proposed 2005 amendments to the Act will make it even more difficult for unions to engage in a struggle with employers on fair terms.

31. These issues are more acute in the non union collective bargaining stream [s170LK agreements] and even more difficult with regard to AWAs. This is because:

- There is no obligation on employers to bargain or even consult genuinely with employees about proposed agreements – notification to employees in the correct form and a vote is all that is sufficient
- There is usually no relationship between proposed agreement/s and industry standards or employer capacity to pay
- Living standards do not need to be improved: frequently employers seek conditions trade offs through non union bargaining for only SNA level wage increases in return, although the current no disadvantage test does limit but does not eliminate the ability to trade off conditions below a certain level
- Of the static nature of no disadvantage test (it does not take into account likely future award wage movements) and the fact that conditions can be traded for apparent wage increases
- Unequal outcomes for workers in different sectors of an company depending on bargaining strength and the willingness of the employer to recognise certain groups of employees.
- The labour market is less fair in non unionized companies
- Employers have the ability to cut out the choice of employees to have their union bargain for them – 'meet and confer' rights are not adequate
- The choice of agreement is employer choice not employee choice
- The employer can exert pressure for AWAs – including through lockouts and at the point of engagement – which offends FOA and the objective of agreement making by choice
- Work and family balance interests are not being served
- Collective bargaining rights are always capable of being undermined by AWAs

- There is a need for an improved ‘no disadvantage’ test
- The Industrial Relations Commission is greatly limited in its ability to intervene in agreement making disputes – which is not in the national interest

32. Unfortunately, the Government’s current proposals for workplace law reform only make it more likely that these outcomes will be even worse in future. This is because they:

    - Worsen choice options for employees
    - Radically reduce the level of safety net and thus the standard required to be met by all agreements to just four conditions of employment and a wage rate
    - Greatly enhance the motivation for employers to seek non union or individual contracts which can eliminate nearly all conditions of employment
    - Reduce independent scrutiny of all agreements, which will be especially significant for non union agreements
    - Increase secrecy – inability to reflect community/industry standards
    - Are likely to increase downward pressure on wages and conditions by a ‘race to the bottom’ competition in the absence of any realistic safety net

33. The ability of parties to bargain freely is to be even more restricted both by the new Act and the proposed Independent Contractors Act

34. There are a number of general issues with the concepts underpinning the Government’s 1996 Workplace Relations legislation with regard to bargaining.

35. The 1996 Act introduced for the first time the US labour law ‘principle’ of no external intervention in so-called ‘interests’ bargaining. This means that the parties are left to battle it out on the ground and are forced to acquire and utilise the ‘cruel and unscientific’ means of strikes and lockouts as the ‘normal’ way to resolve disputes. This is contrary to a century old Australian

tradition, not only of the rule of law in industrial relations but also of a role for an independent arbiter to resolve disputes

36. It is also contrary to the public interest in speedy dispute resolution and social justice as to the minimum terms and conditions of employment applying to all workers.

37. The reason the Australian Government chose to remove the independent umpire from the bargaining process has never been satisfactorily explained. It is odd, to say the least, that the publicly funded mediator and arbitrator is forced to sit on its hands while the parties war with each other to the detriment of each other and, sometimes, the wider community.

38. The processes of bargaining under the 1996 are largely designed to reflect the process and outcomes that can be achieved by the application of "raw economic power" as Justice Kirby noted in the High Court's Electrolux decision. This may well suit some parties in the industrial relations system but clearly does not suit all, particularly those incapable of or unwilling to exercise such power and produces unequal outcomes for workers and their families. Why this should be a basis of industrial law in 21st Century Australia is inexplicable.

39. It is equally poorly explained as to why there is no obligation to bargain in good faith given that the Act is designed to encourage workplace bargaining which is supposed to meet the needs of both employers and employees.

40. The West Australian Industrial Relations jurisdiction, for example, has a provision for good faith bargaining (s 42 of the WAIR Act 1979). What is a noticeable difference between this jurisdiction and the Federal system, is how negotiations which are deadlocked are effectively resolved with the assistance of the Commission. In the absence of good faith bargaining it is the Union's experience that employers have the resources to stonewall negotiations to reach a conclusion that suits the employer.

41. In a recent negotiation in the WAIR Commission, the employer refused to allow any ground in a dispute for a rostered day off. The offer made by the

employees was accompanied by significant flexibilities that would enable the offer to work effectively. The employer refused to concede any ground. The ASU was able to submit an application to the Commission to have the matter conciliated, and then finally arbitrated. The end result was an agreement reached in a much shorter time frame.

42. The ASU therefore proposes that the provision of a form of an effective 'good faith bargaining' provision in the Federal jurisdiction would ensure a more efficient and fairer resolution of disputes.

Term of Reference 1:

Do agreements currently meet the social and economic needs of all Australians with regard to:

(a) the scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements;

43. The ASU has negotiated a wide variety of enterprise agreements ranging from very limited agreements to many comprehensive agreements, that is, agreements covering all or nearly all terms and conditions of employment. To date, the type of agreement negotiated has been determined on a case by case basis appropriate to each workplace and to meet the needs of the bargaining parties.

44. According to the Federal Department's most recent Report on Agreement making, approximately 29 per cent of all employees were covered by comprehensive agreements. [1]

45. In the Union's submission it will be more and more important for employees to be able to negotiate comprehensive agreements in the future. However, the ability of the parties to negotiate comprehensive agreements is being increasingly limited by Government legislative restrictions on what matters can be included in agreements and by the decision of the High Court in Electrolux.

46. The underpinning award to any agreement is also limited by the operation of s89A of the Act by which the Government arbitrarily limited the ability of the Commission to resolve disputes by arbitration above and beyond any limitation otherwise existing in industrial law.

[1] DEWR, Agreement making in Australia, 2002-03

47. Parties were supposedly free to freely negotiate agreements above and beyond the award safety net via enterprise bargaining. This has been limited into two ways:

- The High Court's definition of the meaning of 'matters pertaining' to the employer-employee relationship, and

- Existing and planned legislative limitations on the matters about which the parties can bargain, for example, with regard to bargaining agents fees (existing) and limitations on bargaining re contractors and labour hire (planned) despite such latter clauses being approved by the Commission as meeting the employment relationship test.

48. In the submission of the ASU such restrictions are contrary to the objectives and stated intent of the Act to allow the parties to bargain freely and reach agreements in a form suitable to themselves "whether or not that form is provided for by this Act"[2].

49. In other words, Australia now has a system of State-regulated bargaining not one designed to suit the freely expressed will of the parties. Increasingly, workers and employees will be forced to rely on non enforceable 'side agreements' as part of their relationship. In some cases, these additional agreements are reflected in enterprise's HR policies which are changeable at the employer's discretion and generally unenforceable. This is unlikely to be satisfactory to any of the parties involved.

50. The ASU proposes that the Workplace Relation Act be amended to allow unrestricted bargaining on matters of interest to employees and employers, in accordance with the Objects of the current Act.

[2] Workplace Relations Act, section 3 (c)

Term of Reference 2

Do agreements currently meet the social and economic needs of all Australians with regard to:

(b) the capacity for employers and employees to choose the form of agreement-making which best suits their needs;

51. As noted above, Australia's system of agreement making allows the parties to make agreements only within the confines of Government sanctioned bargaining parameters and those imposed by relatively narrow legal interpretation.

52. Moreover, although one of the key objectives of the system is agreements that meet the needs of both employers and employees, in reality the employer has all the options. Employees are forced to bargain, in effect, for the form of agreement chosen by the employer.

53. If both sides agree, an agreement may be negotiated under s170LJ (in respect to constitutional corporations) or Division 3 (based on a dispute finding), however if the employer does not agree, employees cannot force an employer to bargain for a union agreement except by the use of protected industrial action. However, if an employer proposes either a non union collective agreement or an individual agreement, employees have virtually no choice but to negotiate on these terms.

Union agreements

54. With regard to workplaces where LJ or Division 3 agreements should be negotiated, the ASU has experience of situations where employers refuse to bargain collectively despite the workplace being an organized environment.

55. In this situation, because of the provisions of the Act, employee options are extremely limited. On behalf of employees, their union may request that the matter be conciliated by the AIRC, but there is no power in the Commission to arbitrate any outcome while bargaining periods in force. If the employer refuses to bargaining collectively, there is nothing the Commission can do to resolve the matter.

56. In these circumstances, the Act contemplates industrial action as the only means by which a 'recalcitrant' party can be 'encouraged' to bargain collectively with the employees through their Union. Such action is not always possible or desirable and frequently not in the interests of either workers or management nor in the public interest. Why then is protected industrial action contemplated as the only means of resolving such impasses over bargaining? Such disputes can last days, weeks or months (and some have) while the AIRC is powerless to act. Bargaining periods may be terminated, but only in particular situations.

57. The ASU has had considerable experience of situations where staff have voted down agreements put out for a vote by employers and, despite this rejection of the proposed agreement, employees and the ASU has experienced significant resistance from their employers to negotiating further for an improved offer. This has occurred repeatedly in the Overseas Airlines industry, where staff of Singapore Airlines, Malaysia Airlines and United Airlines all voted against agreements proposed by their employer.

58. In response, United Airlines began proceedings to set aside both the pre-existing EBA and the Award. After the Malaysia experience the ASU sought the assistance of the AIRC but was advised that the Commission had no power to require the employer to talk to the Union or staff. Four months on after the Singapore vote went down, the Union finally reached an agreement with the Company but only after employees mobilized for industrial action.

59. Section 170LJ also contemplates and indeed encourages so-called 'sweetheart deals' between employers and a union of their choosing. A union only needs to be able to represent the industrial interests of one

employee for it to make a deal with a willing employer for an agreement to cover all employees in a particular workplace.

60. The Act denies members of another union the right to even appear through their and be heard on the certification of such an agreement by the provisions of s 43(2) of the Act. This allows an employer and a union to collude in the making of an agreement and places the onus on the Commission to unearth any process or merits issues relating to that agreement. This puts the Commission in a difficult position since it largely relies on the submissions and statements of the parties to satisfy itself that the provisions of the Act in regard to the making of an agreement have been fully complied with.

61. The ASU submits that these provisions of the Act contravene fundamental principles of the right of employees to freedom of association and the right to collectively bargain through the union of their choice. The employer, in concert with another union, can take these rights away.

Non union collective agreements

62. Ironically, employees and their Union have more rights to intervene in regard to the certification of an agreement proposed to be made under s170LK – non-union agreements. Under s170LK, if certain conditions are fulfilled, the employer must 'meet and confer' with the employees' union about the Agreement if so requested. If this has occurred, the employees' Union has full rights to intervene when the proposed agreement goes to the Commission for certification and full rights to put submissions on issues going to process and the satisfaction or otherwise of the 'no disadvantage' test and other requirements for certification.

63. However, the Act only provides that the employer must 'meet and confer' with the representatives of the employees. It does not provide that the employer must actually negotiate with the union. It does not have to accept any position put by the employees' representatives at such a meeting.

There is no requirement to bargain with the employees' representative. The ASU is aware of many situations where this has occurred.

64. Most recently, the ASU exercised its meet and confer rights with EDS Pty Ltd and, as expected, there was no genuine attempt to take on the concerns or issues of the staff represented by the ASU.

65. Of course, this is not entirely surprising, since the Act does not require the employer to bargain with its employees either. Nor is there even a requirement to consult with employees or any representative group of employees in the proposing and making of an agreement. Some employers do adopt a consultative approach, many, if not most, do not.

66. In fact and in law, all an employer is required to do under s170LK is to notify employees in writing that the employer proposes to make an agreement with them. The notice must also state that, if employees are members of a union, then they may ask their union to meet and confer with the employer about the terms of the proposed agreement, as noted above.

67. However, after granting those meet and confer rights, the employer can, with no change to the proposed agreement, put the agreement to employees for a vote. The employees' only options at this stage are to vote in favour or against the proposed agreement.

68. If the employees vote down the agreement, the employer is not required to make an improved offer or negotiate in any way. The employer may propose the same agreement again, or propose no further agreement. The employees can do nothing.

69. Eventually, employees are faced with a choice of no agreement or accepting an agreement they do not want. The only other option, if they can exercise it without assistance (in a non union environment), is to terminate any expired agreement and fall back on the Award. In these circumstances, employees often decide than any agreement with some pay rise is better than no agreement at all and eventually may vote for an agreement that they do not really want.

70. In one recent example, a large corporation, after protracted negotiations, orchestrated a series of agreements votes which ensured that the agreement was narrowly supported by a majority of employees. In some areas, where union density was highest, employees were effectively marginalised and out-voted by non union members. Once the non union agreement was certified, the company moved to set aside another agreement that applied to another area of employment in the Company. Given the provisions of the Act, the agreement had to be set aside. Employees working in that area were left with the choice of either moving to the LK agreement – which they had had no say in – or accepting AWAs. Employees felt that they had had no say in the bargaining process.

71. In addition, in the experience of the ASU, many employers propose comprehensive non union agreements which eliminate award terms and conditions in return for wage increases which are set only at the level of wage rises that might have been expected from safety net movements in awards. In this way the employer gains flexibilities as compared to the underpinning awards while the employees are in reality not compensated. This is possible despite the operation of the existing 'no disadvantage' test because the test does not take into account likely future award wage increases. Over a period of time and a number of agreements, significant conditions can be stripped from agreements in this way in return for only award levels of pay increase.

72. In short, under s170LK, not only is there no requirement to negotiate in good faith, there is no requirement to consult or take into account the views of employees at all. This is not parties making agreements of their choosing. This is employers seeking to make agreements of their choice. By use of non union agreements, employers can strike hard 'bargains' with their employees, who can do little or nothing in response.

Individual agreements

73. The same is also true, but is even worse, with regard to AWAs, where the employer has maximum flexibility to divide and conquer, but with additional difficulties for employees.

74. Firstly, employers may link acceptance of an AWA in particular terms that suit the employer to the offer of a job to a new employee. That is to say: refusal to accept the terms of the AWA may and can lead to the employer legally refusing the prospective employee a job, for this reason and this reason alone.[3] This is clearly contrary to the objective of free agreement making of the parties' choosing and should be made unlawful.

75. Secondly, while employers cannot force existing employees to accept an AWA in particular terms, they can in fact legally lock out an employee in a effort to 'encourage' that employee to reach agreement on the terms of an AWA. That this is legal in Australia is unconscionable but employers have exercised these rights. There is little difference to an employee between getting sacked for refusing to sign an AWA [which is unlawful] and being locked out for any period of time [which is lawful]. In these circumstances, many employees 'choose' to sign an AWA. This is not the making of an agreement of the choice of the parties. It is coercion.

76. The use of lockouts against individuals as well as against unorganised workers is shameful and puts Australia in an almost unique situation in the industrialised world. Lockouts are offensive in any situation but as a response to protected industrial action by organised workers is recognised in a number of jurisdictions around the world. But to allow employers to use 'offensive' lockouts to pressure workers who as individuals or as unorganised workers have absolutely no defence is indefensible. It is not agreement making by the choice of the parties.

[3] Burnie Port Corporation Pty Ltd v Maritime Union of Australia [2000] FCA 1768 (6 December 2000)

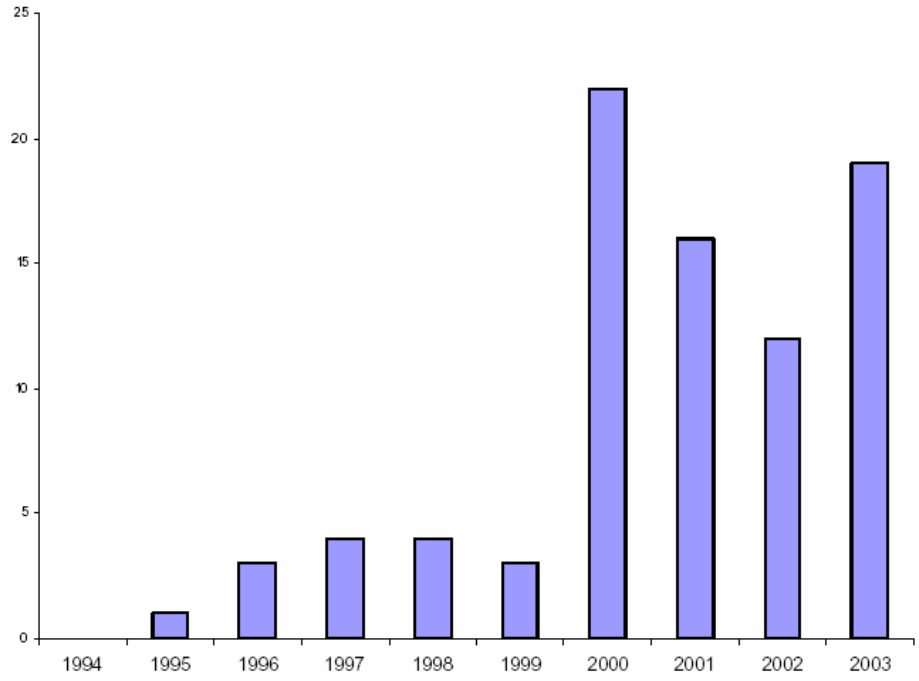
77. It has been argued that:

> "Solicitors and employer representatives deny any need for change or argue that any changes to the Workplace Relations Act should be applied equally to strikes and lockouts. The notion that strikes and lockouts should be treated equally is intuitively appealing but ultimately misguided. Other nations have rejected equal treatment of lockouts and strikes because an equal right to lockout is inconsistent with other legal principles such as freedom of association, the right to collective bargaining and strike. If employers through lockouts have such effective defences against individual preferences for union representation and strikes, the formal legal rights of employees are meaningless in practice"[4].

78. ACIRRT has noted the unusual situation Australia is now in with regard to employer lockouts of workers in comparison to similar countries. In fact, according to ACIRRT's research, through their increasing use of lockouts, Australian employers are now responsible for a majority of long running disputes in Australia, not unions.[5] The use of lockouts has increased significantly in recent years, as the table below shows[6]:

[4] Briggs, C, Lockout Law in Australia: Into the Mainstream?, ACIRRT, working paper 95
[5] Ibid.
[6] Ibid

Figure 1: Number of Lockouts, 1994-2003



Source: Lockouts in Australia Database (LAD).[1]

79. In summary, Australia's agreement making processes are not the free exercise of parties desire to make agreements about matters that concern them, but about the use of "raw economic power" to force each other to agree. This is not consistent with the objectives of the Act nor is it in the short or long term interests of Australian industry or the public interest. Employees do not have the choice to make the form of agreement that suits them. These choices all reside with the employer. Moreover, the ability of unions to exert power is being reduced, while the power of the employers is being left virtually unregulated.

80. The ASU submits that the use of 'offensive' employer lockouts against workers, and particularly against unorganised workers and individual employees should be prohibited.

Term of Reference 3

Do agreements currently meet the social and economic needs of all Australians with regard to:

(c) the parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees;

81. In general, the ASU submits that since there is no requirement to genuinely bargain under the Act there is and can be no overall achievement of this objective. Moreover, the ability of particular groups to bargain effectively is worse than the overall experience.

82. It is clear from all the published data that union collective agreements provide the best bargaining outcomes for workers. Non union agreements come second, and as far as there is data available, individual agreements come last when properly analysed and compared.[7]

83. The less organised workers are, the poorer their bargaining outcomes will tend to be. There is some data on wage outcomes for workers on AWAs, which shows that only for full-time males are the outcomes for workers on collective agreements comparable. All other sub-groups of employees fare much worse on individual contracts:

> "For men, the difference between earnings under the two systems was not significant, but women on AWAs had hourly earnings some 11 per cent less than women on registered collective agreements. This is a noteworthy figure, considering Minister Andrews' earlier claim that women earned nearly a third more on AWAs than on collective agreements. The gender pay gap was worse on AWAs: whereas women on registered collective agreements received 90 per cent of the hourly pay of men on such agreements, women on AWAs received only 80 per cent of the hourly pay of men on AWAs.

[7] Peetz, D, *The Impact on workers of Australian Workplace Agreements and the abolition of the No Disadvantage Test*, unpublished manuscript

"For casual workers, AWAs paid 15 per cent less than registered collective agreements. For permanent part-time workers AWAs paid 25 per cent less. Indeed, amongst permanent part-time employees, even "award only" workers (those who received exactly the award rate) were earning an average of 8 per cent more than AWA workers.

"For female permanent full-time workers, AWAs paid 7 per cent less than collective agreements…". [8]

84. To the extent that women, young workers, casual and part-time employees are less organised than other workers, their wage outcomes may be expected to suffer. Casual TAB employees represented by the ASU are relatively well organised and have made gains through enterprise bargaining, but other unorganised casuals have not.

85. However, the available data tends to show that the distribution of agreement coverage as between union and non union collective agreements among different groups of workers is generally similar[9]:

Table 2.1.14 Distribution of designated group employees covered by CAs in s.170LJ and s.170LK agreements, 2002-2003

Section of WR Act	% of female employees	% of part-time employees	% of NESB employees	% of young employees	% of all CA employees
170LJ	89	91	92	93	90
170LK	11	9	8	7	10

86. With regard to wage outcomes for men and women, DEWR's Enterprise Bargaining Report for 2002-03 showed no significant difference in wage outcomes for men as compared with women, particularly in 2003. While there had been some greater volatility in outcomes for women workers, the outcomes were tending to converge by the end of the reporting period.[10]:

[8] Ibid, p 11-12
[9] DEWR, *Federal Agreement making under the WR Act, 2002-03*
[10] Ibid, p 43

Table 2.3.1 AAWIs in CAs by gender and by proportion of female employees, 2002 and 2003

	AAWI per employee (%)	
	2002	2003
Overall		
Women	3.7	4.1
Men	3.8	4.1
Share of employees in CA		
<40% women	4.0	4.1
40-60% women	3.5	4.0
>60% women	3.9	4.1

Figures are based on CAs for which employee data on designated groups is known.
Source: DEWR, Workplace Agreements Database.

87. The same picture was more or less evident for part-time and full time workers and also for workers from non English speaking backgrounds.[11]

88. However, there is evidence that the wage outcomes for agreements covering young workers were significantly less than achieved for agreements covering largely older workers. According to DEWR:

> "Since 1996, young employees have consistently had lower AAWIs than those aged 21 years and over. The wage gap was highest in 2001 and 2002, and has closed slightly during 2003".[12]

Chart 2.3.4 AAWIs for CAs certified in the quarter by age, 1996 to 2003

Figures are based on CAs for which employee data on designated groups is known.
Source: DEWR, Workplace Agreements Database.

[11] Ibid, pp44 ff.
[12] Ibid, p 47

89. In some cases, particular occupational groups, e.g. clerical/administrative or other white collar employees who comprise a minority of the workforce in a particular workplace and who are dominated by other occupational groups – some of which may have considerable bargaining strength - may be ignored by employers in bargaining or if in an SBU may have their claims treated less favorably by the employer than those of the majority group or groups. In the same way, trade offs or concessions may be made by majority groups which affect only the conditions of minority groups within the workforce.

90. Overall, the ASU submits that since the current system is based on the perception of or use of industrial power, that groups within workplaces who do not have or are not seen to have this power are at a bargaining disadvantage and their outcomes are demonstrably worse. The squeaky wheel gets the oil in enterprise bargaining.

91. In the submission of the ASU, while most workers under union bargaining agreements have relatively equitable outcomes, workers on AWAs, other than adult males, do worse.

Term of Reference 4

Do agreements currently meet the social and economic needs of all Australians with regard to:

(d) the social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities;

92. The ASU submits that since there is no principle or mechanism by which enterprise bargaining is required or encouraged to address social objectives, and in particular gender pay equity and work and family issues, it is highly unlikely that bargaining will have achieved any such objectives other than by accident or by design in a relatively few instances.

93. There is no gender equity principle in the bargaining sections of the Workplace Relations Act. This contrasts, for example, with the Queensland Industrial Relations Act 1999 which does provide such a principle [at section 156 (1) (l) and (m)]:

> The commission must certify the agreement if, and must not certify the agreement unless, it is satisfied—
> …….
> (l) for an agreement other than a multi-employer agreement or project agreement, the employer—
>
> > (i) remunerates all men and women employees of the employer equally for work of equal or comparable value; or
> > (ii) will, because of the agreement if it is certified, remunerate all men and women employees of the employer equally for work of equal or comparable value; or
> > (iii) is implementing equal remuneration for work of equal or comparable value for all men and women employees of the employer; and
>
> (m) for a multi-employer agreement or project agreement--the agreement provides for equal remuneration for all men and women employees covered by the agreement for work of equal or comparable value.

94. Nor does federal bargaining have any other aims set down by law, for example work and family considerations, despite some early focus on this issue as a possible beneficial outcome from bargaining.

95. To be certified, an agreement must simply:

- Have been approved by the correct processes
- Pass the no disadvantage test against the underpinning award
- Contain a disputes settling mechanism and an expiry date
- Not contain proscribed clauses or offend FOA principles
- Otherwise be in accordance with law, eg Electrolux

96. Outside of these parameters [which can be extremely limiting] parties are free to make any agreement they choose and are not required to include socially beneficial provisions. In the experience of the ASU, socially progressive issues are frequently considered to be fringe issues in enterprise bargaining and are frequently taken off the bargaining table at an early stage in negotiations or when the going gets tough and the parties are concentrating on core issues of wages and basic conditions.

97. In the ASU's submission, enterprise bargaining has generally failed any test of social progressiveness in relation to conditions of employment. Individual bargaining has certainly failed the test with regard to gender equity in terms of wage outcomes. What data is available suggests that women workers do best in union negotiated agreements and worst in individual bargaining.

98. The ASU is aware of some agreements which can be said to discriminate against women workers, for example the Queensland Ergon Energy Agreement, the certification of which is currently on appeal in the Queensland Court of Appeal.[13]

[13] Ergon Energy Corporation Ltd and another and the Electrical Trades Union of Employees of Australia. Queensland Branch and Others (No. CA 140 of 2005).

99. The basis in this appeal with regard to this Agreement is the beneficial treatment of pre-dominantly male blue collar workers as a result of skill shortages in certain trade areas. On this basis, higher wages were offered to all blue collar employees, whether the occupations they worked in were in short supply or not. White collar employees, pre-dominantly female, were not offered equivalent increases.

100. The Union's Central and Southern Queensland Branch is now aware of other differential claims being sought via enterprise bargaining which would be detrimental to female employees without justification. The Ergon matter, whatever the outcome of the appeal, illustrates the fact that enterprise bargaining outcomes may be skewed in a way which rewards some workers more favourably than other comparable workers.

101. Most employers are reluctant to be trail blazers with regard to socially progressive conditions, for fear of becoming uncompetitive. In the strong submission of the ASU, it is preferable for the social dimensions of work to addressed by standards setting through award test cases such as those conducted regularly by the ACTU. These conditions should then flow to all workers, including those under agreements through the operation of the no disadvantage test. It is more likely that employers will accept such social norms if they apply to all workers as part of a social safety net.

102. With regard to work and family considerations, bargaining fails to address these issues for fundamental and probably inescapable reasons. These are that bargaining encourages employers to pursue so called productivity gains through increased 'flexibility' of working hours. Most agreements and in particular non union and individual agreements have sought and frequently achieved more flexible working arrangements, such as extended ordinary hours and days of work.

103. Almost by definition, such 'flexibilities' run contrary to the needs of women [and men] seeking to balance family responsibilities since the work required to be performed outside standard hours conflicts with the times such workers are most needed by their families.

104. DEWR's Enterprise Bargaining Report, provides some details on the number of Agreements with 'family friendly' provisions, but is heavily qualified in its analysis. In the most recent Report, the claim is made that:

> "Forty-four per cent of CAs, covering 87 per cent of employees, contained at least one family-friendly provision. [14]

105. The type and frequency of 'family friendly' provisions is shown in the table[15] below:

Table 2.4.6 Family-friendly provisions in CAs, 2000-2001 and 2002-2003

Provision	% of CAs	
	2000-2001	2002-2003
Flexible annual leave	6	9
Access to single days annual leave	13	11
48/52 career break	3	3
Unlimited sick leave	1	1
All purpose paid leave	3	3
Family/carer's leave	27	25
Access to other leave for caring purposes	19	18
Paid family leave	3	4
Unpaid family leave	9	8
Extended unpaid parental leave	2	3
Paid adoption leave	2	4
Paid maternity/primary carer's leave	7	10
Paid paternity/secondary carer's leave	4	7
Part-time work	25	26
Regular part-time work	7	8
Home based work	1	2
Family responsibilities	3	4
Childcare provisions	1	2
Job sharing	3	3

Source: DEWR, Workplace Agreements Database and Agreement making in Australia under the Workplace Relations Act: 2000-2001.

106. However, it will be readily apparent from even a cursory glance at this table that the most common 'family friendly' provisions – family/carers' leave, part-time work and annual leave flexibilities – are provisions that are commonly found in Awards and, in most cases, the introduction of these provisions was pioneered through the Award safety net system, not through enterprise bargaining.

107. Relatively few enterprise agreements have multiple 'family friendly' provisions: according to DEWR only 8% of agreements had two or more such provisions.[16] It would appear, on the available evidence, that enterprise bargaining as such has done little to assist workers balance their work and family responsibilities. Coupled with increased spans of hours and other 'employer friendly' flexibilities, workers have most likely would have suffered a deterioration of their work/life balance had it not been for improvements in family friendly **award** conditions which have been flowed to agreements. This is not to say that some particular agreements have introduced clauses of benefit to women and other workers with family responsibilities, but that such agreements are relatively rare.

108. An Employee Attitude Survey conducted by the Office of the Employment Advocate in 2001 found that twice as many workers thought that balancing work and family had become harder than those who thought that it had become easier. The OEA and DEWR drew some comfort that marginally fewer AWA employees thought that the balance was harder to attain but in both cases the ratio between the two groups was roughly the same. By this measure, the stated objective of assisting workers in the work/life balance is failing twice as many workers as it helps.[17]

109. Women workers generally are still less organised than male workers and even when organised tend to have less industrial power than their male counterparts. Given that agreement bargaining is, to a significant extent, based on the perception and exercise of industrial and economic power, women workers are less likely to be able to win concessions relating to gender equity and work and family considerations.

110. Bargaining outcomes thus depend on factors which do not encourage socially progressive outcomes.

[14] DEWR, Report on Enterprise Bargaining, 2002-03, p 59
[15] Ibid, p 57
[16] Ibid, p 59
[17] DEWR, Bargaining Report, 2002-03, p 86.

Term of Reference 5

Do agreements currently meet the social and economic needs of all Australians with regard to:

(e) the capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards; and

111. In the submission of the ASU, employers frequently fail to bargain on the real issues facing their business which are often known only to them at the time agreements are made. They then later act outside of the terms of any agreement made.

112. For example, Qantas and Unions representing its employees negotiated in good faith for Qantas EBA IV only to find that a few months later the Company had decided to competitively tender customer service at major airports. This was clearly known to the Company at the time of finalisation of the EBA but not revealed to negotiators who may have been able to deal with the issues through agreement provisions.

113. Similarly, at Eastern Australian Airlines, ASU members were made redundant when the Company failed to get the Jetstar contract. Members were re-instated but the Company then approached the Union wanting to change classifications of employees and re-order their work. At the time of the EBA negotiations, the Company knew it was facing competition for the Jetstar contract from lower cost competitors but said nothing at the negotiating table. Now the Company wants to re-negotiate some of the terms of the EBA in side agreements.

114. On the other hand, limits are, however, placed on employees through the operation of ‘no extra claims’ provisions in agreements. While such clauses are perhaps necessary to the effective operation of agreements, they operate unevenly with regard to employers and employees. What is seen as

an extra claim by employees is not so viewed when employers seek to restructure workplaces without agreement during the life of agreements.

115. Productivity, competitiveness, and flexibility are central objectives of the agreement making processes in Australia. However, these are almost never measured or quantified as part of the agreement making process. There have been rare examples of key performance indicators being agreed and applied by agreements and workers paid bonuses for productivity savings achieved.

116. However, in the view of the ASU such agreements are rare. While intelligent employers would clearly have an appreciation of the costs and productivity benefits of any agreement made, this information is generally not shared by employers with unions, employees or individuals as part of the bargaining process. Employees are this required to gamble on this key matter – that the wage increases obtained are not too modest in return for any concessions made.

117. Unions have some prospects of measuring the benefits of savings made by employers and benefits gained by employees. Non union workers and especially those negotiating individual agreements have no such prospects.

118. Australian unions – and employers – have little tradition of actual productivity bargaining and the measurement of enterprise level productivity is rarely known publicly.

119. The ASU submits that as part of genuine bargaining, employers should be required to provide productivity cost/benefit analyses to employee bargainers on a confidential basis.

120. The ASU submits that fairness is worsening as a result of productivity bargaining, not improving. The strong are getting better agreements than the weak, for the reasons outlined above. Those employees on individual agreements appear to do worst of all.

Unfair wage outcomes

121. Generally, living standards are growing more uneven as a result of enterprise bargaining. Again, those workers on individual agreements do worst, as far as can be determined. Data on wage outcomes for workers under AWAs compared to those on other forms of agreements is not readily available.

122. DEWR data shows that workers on union agreements consistently obtain better wage increases than those on non union collective agreements.[18] ACIRRT ADAM Report data shows the same result. Comparable data for workers on AWAs is not published by the Australian Government. As noted in the research paper by Associate Professor David Peetz, until December 2001, the Office of the Employment Advocate provided to ACIRRT a sample of AWA data in order that comparative statistics for AWA workers could be published.[19]

123. For that quarter, the comparative results were:

Union agreements:	4.0 % increase
Non union agreements:	3.1 % increase
AWAs	2.2 % increase

124. From that date onwards, the OEA refused to supply ACIRRT with the data on which comparative statistics could be published, this preventing the research community and the public from learning the truth about comparative wage outcomes. The Government should immediately reverse this censorship decision so that public policy can be properly informed.

125. The Government has consistently claimed that workers on AWAs do better than other workers. Associate Professor Peetz has also analysed this claim and finds it to be inaccurate using alternative data sources.[20] When

[18] DEWR, *Trends in Federal Enterprise Bargaining*.: http://www.workplace.gov.au/workplace/Category/Publications/AgreementMaking/TrendsinFederalEnterpriseBargaining.htm
[19] Peetz, D, op cit
[20] Ibid.

managerial employees are excluded from the data and hourly rates are used, workers on collective agreements do better than workers on AWAs.

126. Amongst various sub-groups only the earnings of full-time male employees were comparable as between collective and individual agreements. All other sub groups did significantly worse on AWAs as compared to those on collective agreements.

127. Also instructive is the data published on the experience of workers on West Australian Workplace Agreements during the 1990s. Proper statistical data and these agreements was published twice in 1994 and 1998. According to these studies, by the time of the second survey, a quarter of all workers under AWAs in WA were working for a wage rate less than that provided for in their underpinning award and a majority were also working for reduced penalty rates. [21]

128. In WA, at any rate, WAWAs had resulted in less pay and less fairness for workers, compared to those under awards. This was possible because the WA legislation did not have a 'no disadvantage test' at the time.

129. Another way of looking at the issue of fairness and enterprise bargaining is to examine the distribution of earning of wage and salary earners in Australia. According to four researchers associated with ACIRRT, "At an industry level, earnings inequality (earning dispersion) increased strongly during the 1990s, an outcome associated with enterprise bargaining. [emphasis added][22] .

130. Wage inequality grew for both men and women during this period, although the trend for women was less pronounced.[23]

131. There is considerable debate about the overall experience for low paid workers and the likely impact of changes on relative and absolute changes in levels of poverty and disadvantage in this country. It is clear that

[21] Ibid
[22] Watson. I, Buchanan, J, Campbell, I and Briggs, C, *Fragmented Futures: New Challenges in Working Life*, The Federation Press, Sydney, 2003, p 113.
[23] Ibid, p 115

enterprise bargaining has allowed the gulf between the low paid and the well paid to widen. Watson, et al, note:

> "Historicially, the answer to low wages lay in the award system, which provided an adequate floor at the bottom of the labour market. Once the nexus between high wage workers (the overaward sector) and low wage workers was broken, the award system became vulnerable to residualism. Only the commitment of the Australian Industrial Relations Commission to improving award rates over the last few years (through Living Wage adjustments) has kept the award system as a viable floor in the wages system". [24]

132. In the submission of the ASU, the Government's proposed changes to the system of wage fixation, and especially, minimum wage fixation will only serve to worsen wage inequality in Australia and reduce the real value of minimum wages. The AIRC has played an important role in keeping the floor in wage fixation at a reasonable standard, without adverse economic effects. It is unlikely the mooted Fair pay Commission will do the same, since the Government is clearly unhappy with the performance of the AIRC on this issue.

[24] Ibid, p 130

Term of Reference 6

Do agreements currently meet the social and economic needs of all Australians with regard to:

(f) Australia's international obligations.

133. The Australian Government's Workplace Relations Act has already had difficulty in meeting international labour standards re bargaining and the right to collectively organise.

134. This situation will only get worse under the Government's 2005 proposals, particularly with regard to unfair dismissal but also with regard to bargaining.

135. These issues will be dealt with in the ACTU's submission to the Committee.

Other issues

136. In the submission of the ASU, there are a number of other matters relevant to the Committee's inquiry which are not covered by the specific terms of reference.

137. Firstly, while the sections of the Act dealing with rights during bargaining periods appear at present to be even handed as between employers and employees, in practice this is far from the truth.

138. Employees can take protected industrial action in the form of strikes, bans and limitations and employers can lockout workers. Both are required to notify each other of their intention and give three clear days warning.

139. The notice provisions are clearly intended to allow employers sufficient time to take action to minimise the effects of the employee protected action. Employers have a significant capacity to do so.

140. Employees have virtually no capacity to protect themselves against the effects of lockouts.

141. Moreover, employers can take action which can almost completely minimise the impact of protected action by employees. The ASU is aware of one situation, for example, involving protected action at a warehouse in support of a new agreement. After a short time, the employer simply moved their warehouse operations to a warehouse operated by a third party. While this undoubtedly involved extra expense and inconvenience, the protected action was defeated. The Unions were prevented from taking any on-going action against the third party's warehouse since this was considered to constitute a secondary boycott under the Trade Practices Act.

142. Employees have no similar ability to defeat employer lockouts as thy simply do not have the resources to be able to withstand the economic effects of a lockout.

143. Increasingly, the ability of employees to take protected industrial action is being whittled away by this Government and the new Act is expected to further limit their scope of action and its impact on employers. At the same time employers are not being so limited and the potential for third parties to defeat protected action is being strengthened.

144. Under the Government's Workplace Relations Amendment (Better Bargaining) Bill 2005 access to protected action by employees will be further limited. In particular, the Bill requires Unions to undertake a secret membership ballot before undertaking industrial action. In fact, in order to take protected action, a group of workers will first have to apply to the AIRC for permission to hold a secret ballot which will only be approved if certain conditions are met.

145. If the AIRC approves the ballot, industrial action can only proceed if 40 per cent of employees on the role vote and 50 per cent of those vote yes. These procedures could take weeks or even months to carry out.

146. By contrast, despite the growing use of lockouts by employers, no legislative action is being taken. Australia already has the most liberal lockout laws in the OECD.[25] Under the new amendments, unions will have to undertake an extensive process before protected industrial action can be taken, "whilst employers will be free to lockout their employees on three days notice, no questions asked". [26] This in inequitable, to say the least, and is clearly designed to hamper the ability of unions to take effective protected action while not hindering the employer's ability to pressure employees.

[25] Briggs, C and Buchanan, J, *Work Commerce and the Law, A new Australian Model?,* The Australian Economic Review, vol 38, No. 2 pp 182-91 at 187.
[26] Ibid.

147. Strike breakers remain an option for Australian employers and are threatened or utilised in a variety of ways and situations.

148. The early notion that “all’s fair in love and war” when it comes to enterprise bargaining is quickly being replaced by the notion that the only action employees can take is action that has little or no effect on employers.

149. As noted above, protected industrial action was predicated on the warring parties being left alone to wear each other down. The absence of third party intervention and assistance is regrettable and anachronistic.

150. The bargaining provisions of the Federal Act are complex and are becoming increasingly so. Commentators have already observed hat the current Workplace Relations Act is complicated, especially in comparison with many state Acts. Professor Andrew Stewart has noted that the Federal Act in its current form is ‘bloated, convoluted and, in parts, unintelligible’.[27] This situation is only likely to worsen with the new Act, although the extent of the problem is not going to be known for some time.

151. If the Government really intended parties to be free to bargain with each other as they please, it should allow this without hindrance. If not, third party intervention and disputes settlement should be allowed in bargaining, in the public interest.

[27] Stuart, A., CCH Industrial law News, July 2005.

Conclusions

152. In conclusion, the ASU believes that the current system:

- Is based on an unrealistic assumption of equal bargaining power between employers and employees, which is not the case even in union bargaining and not at all the case in non union and individual bargaining
- Is not based on any requirement that employers bargain in good faith with their employees and that it is not achieving its stated objective of allowing employers and employees to choose the form of agreement which meets the needs of both parties.
- Is in effect a system of state regulated bargaining not one of the free choice of parties, even if they are in agreement
- Contravenes stated objectives relating to freedom of association and the right to organize and collectively bargain.
- Needs an overhaul and modification, but not the radical surgery proposed by government which will only serve to strengthen the power of employers at the expense of employees and further exacerbate the inequality of outcomes already inherent in the system.
- Is based on the willingness of bargaining parties to use industrial and economic power – and that this is not necessarily good for employers, workers or the economy as a whole.
- Means that workers have to be prepared to take action/fight for everything without social intervention
- Is leading to “bargaining fatigue” and may be losing any real and genuine benefits that it may have offered at the beginning.
- Has not achieved wage equity and work and family balance goals and is unlikely to do so without modification

- Is leading to greater unfairness in terms of wage outcomes for Australian workers, with workers on individual contracts doing worst of all.
- Is likely to become worse in the future as a result of the Governments planned and foreshadowed amendments to wage setting and agreement making.

Recommendations

153. The ASU recommends to the Committee that any new system of bargaining should include as objectives and specific provisions:

- An obligation on employers to bargain in good faith with respect to all three types of agreement
- The provision of a 'circuit breaker' with power to ensure that bargaining in good faith occurs and to broker an agreement without the necessity for recourse to industrial action
- A maintained and improved award safety net underpinning agreements
- A strengthened no disadvantage test against all award terms and conditions together with likely award wage increases
- An equity principle for bargaining and agreement certification
- Proper achievement of productivity bargaining through exchange of appropriate data on which such bargaining would be possible.

154. The ASU further recommends that:

- Limitations on the matters that employers and employees can bargain about be removed, by appropriate changes to the Act
- Sweetheart deals between employers and unions that exclude other unions present in the workplace should be prohibited and that s 43 of the Act be amended accordingly
- The Act be amended to prevent employers offering AWAs as a condition of employment
- That the 'offensive' use of lockouts by employers be prohibited in all situations as well as all use of lockouts against non union employees and individuals in the pursuit of an AWA.
- That data on AWA wage and other outcomes be published by the Government

- That no further restrictions be placed on the ability of employees to take protected industrial action.