Australian Education Union

Submission

to the

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the provisions of the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004

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Contents of this Submission:

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1. About the Australian Education Union

The Australian Education Union ("the AEU") is a federally registered organisation with in excess of 160,000 members employed throughout Australia. The majority of our members are teachers, including principals and assistant principals, employed in government primary schools, secondary schools, pre-schools and TAFE Colleges. The AEU's membership of teachers in schools is in excess of 80 per cent of eligible employees, and in some States the figure is in excess of 90 per cent. We also have significant membership in support staff classifications in schools, including teacher aides, assistant teachers, integration aides, library technicians and assistants, laboratory technicians and assistants, Aboriginal and Torres Strait Islander Workers (AIEWs) and clerical and administrative workers.

The AEU achieved federal registration in 1987 following the expanded definition of "industry" that arose from the High Court decision in the *Social Welfare Union case* in 1983. Up until this point the terms and conditions of government school teachers in the six States had been regulated through a combination of State legislation (including determinations and regulations) and awards or similar instruments of State industrial tribunals. In 1991 the A.C.T. Teachers Federation and the Northern Territory Teachers Federation amalgamated with the AEU. These organisations were parties to federal awards covering teachers, and the AEU became a party to these awards on amalgamation.

Developments in public education and industrial relations in the 1990s inevitably prompted the AEU to look at alternative ways to protect and

improve the wages and conditions of our members. The dismantling of some State conciliation and arbitration systems contributed to the view that many of our members would be better protected in the federal system, and a log of claims was duly served on all public sector education employers throughout Australia. In addition to the federal awards already covering our members in the A.C.T. and the Northern Territory, federal awards have been gradually obtained to cover teachers in Victoria (kindergartens and early childhood education institutions, schools, TAFE, Adult Multicultural Education Services and Disability Services), Tasmania (schools and TAFE) and Western Australia (TAFE and Community Colleges). In addition, federal certified agreements have been achieved for AEU members in government schools and TAFE in the ACT, Northern Territory, South Australia, Tasmania and Western Australia, and in all sectors where we have members in Victoria.

Therefore, although public education employees are predominantly *employed* by state and territory governments, the federal industrial relations system directly regulates the terms and conditions of employment of a significant proportion of the AEU's members.

2. The *Workplace Relations Amendment (Protecting Small Business Employment) Bill* 2004

2.1 AEU members are employed by Small Businesses

The overwhelming majority of the AEU's members are employed by large public sector employers – state and territory departments of education and colleges of Technical and Further Education. However the Union also represents workers in many small enterprises which would fall within the scope of the proposed legislation.

These include workers in early childhood education institutions, including childcare centres and kindergartens, workers in some disability services workplaces, workers in adult and community education providers, and workers in companies and small businesses associated with TAFE colleges.

From time to time, we have also faced state government policy decisions to devolve the employment responsibility for teachers and allied staff in schools

to the school level, making the School Council the employer. Although the Union has always opposed these proposals, there are now varying levels of school-based employment around the country, particularly for principals, casual relief teachers and allied staff. In many cases, it could therefore be argued that government schools are actually small businesses in terms of the draft legislation.

A further concern about the potential impact of the proposed legislation is that enterprises may move in and out of the scope of the exemption over time. For example, an adult and community education centre might gain funding for an additional program, enabling it to lift its employment profile from fourteen to sixteen people. In so doing, it would suddenly take on responsibility to provide for severance pay for all sixteen employees in the case of redundancy. Similarly, by losing funding for that same program, and dropping from sixteen to fourteen employees, *all* employees would suddenly lose their entitlement to payment in the case of redundancy. Indeed, the temptation of not needing to budget for redundancy pay might serve as an incentive for a funding authority, such as a department of education, to chop up central employment arrangements into piecemeal localised arrangements, to artificially create "small business employer" status.

Thus the AEU's submission is not merely informed by a general view of the issues of principle raised by the legislation, but also directly reflects a practical concern about the industrial interests of our members.

2.2 An onus on employers to provide for redundancy

The AEU believes that there should be an onus on all businesses to set aside funds to cover employee entitlements in the case of redundancy. Any other outcome simply shifts the personal consequences of business failure from the entrepreneur and shareholders to their employees, who are left bearing the cost. However the question of proper planning for redundancies is not just about business failure. It also applies to fluctuations in the workforce size of an ongoing concern.

Education enterprises such as kindergartens, which are susceptible to the ebb and flow of enrolments, are significantly affected by changes in state and federal government policies for the funding of pre-school education, and subsidies for childcare costs. Thus external factors which are in no way affected by the quality of management or by the performance of employees, can result in the need for staff to be laid off. These workplaces, which inevitably stretch their limited resources as far as possible, and keep fees as low as possible, out of a commitment by staff and management alike to provide the best possible educational opportunity to the children, simply will not plan for worker redundancy unless they are required to by an award or industrial agreement. As there are thousands of workplaces in early childhood education alone, most of which are separate employers, the only effective way to ensure that the dedicated workers in this industry receive any redundancy pay at all, is to mandate it through a safety net award.

2.3. The Role of the AIRC

The economic, social and industrial arguments for and against the requirement for small businesses to provide for redundancy payments were extensively canvassed in the test case proceedings before a Full Bench of the Australian Industrial Relations Commission. The Commission, after careful consideration of all the evidence, determined that the award requirement should be extended to small businesses, although at a lower rate than larger enterprises, and capped at eight weeks pay.

The AEU submits that it is appropriate for the determination of the AIRC on this question to be accepted by all parties, including the Government. The Commission does not pursue an activist role in relation to such matters, and took 20 years to extend the minimalist position established in the first Termination, Change and Redundancy Test Case decision.

The AEU does not propose that it is never appropriate for the Government to substitute its judgement on an issue of public interest for that of a court or tribunal. However extreme caution should be exercised in doing so. When an expert tribunal is appointed and charged with determining an issue, it

undermines the very role of that tribunal, and the confidence which all parties have in it, for its decisions to be lightly overturned by legislation simply because the Government of the day would have preferred a different decision.

The AIRC decision to extend the test case standard on redundancy, in limited form, to small businesses should be respected because:

a) it was carefully made after lengthy argument, consideration of all parties' views, and on the basis of extensive evidence as to the impact such a decision might have on the economy and on small businesses themselves.

b) the decisions of the AIRC should not be lightly overturned by legislation. The credibility of the system of conciliation and arbitration depends on respect for the authority of the tribunal by the Government as well as other industrial players.

3. Conclusion and Recommendation

The AEU is concerned that the proposed legislation will further reduce the rights and entitlements of our members currently employed by small employers, and poses a threat to the entitlements of members whose employment might be reorganised into small business units.

The AEU submits that the test case standard was only established after careful – indeed cautious – examination of all relevant interests by a Full Bench of the Australian Industrial Relations Commission, and that it is not appropriate to use legislation to overturn that decision.

It is a fair and reasonable community standard that employers – of whatever size enterprise – should bear an onus to provide some small protection for their employees against the risk of redundancy.

Recommendation:

The AEU recommends that the Senate should reject the proposed legislation in its entirety.