

**AUSTRALIAN EDUCATION UNION**

**SUBMISSION**

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

**Inquiry into the Workplace Relations Legislation  
Amendment (More Jobs, Better Pay) Bill 1999**

**September 1999**

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120 Clarendon Street  
Southbank VIC 3006**

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**Introduction**

This submission should be read in conjunction with the submissions of the AEU Victorian Branch, the AEU Tasmanian Branch and the State School Teachers' Union of Western Australia.

The Australian Education Union ("the AEU") is a federally registered organisation with in excess of 150,000 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 non-teaching classifications in schools, including teacher aides, library technicians and assistants, laboratory technicians and assistants, and Aboriginal and Torres Strait Islander Workers (AIEWs).

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.

## **Public Education and Industrial Relations in the 1990s**

The early 1990s saw the election of a number of conservative governments in the States, resulting in an unprecedented attack on the systems of conciliation and arbitration that operated in those States. The most extreme attacks occurred in Victoria, where compulsory arbitration was abolished and awards were legislated out of existence, in favour of individual employment agreements. Agreements negotiated with the AEU and certified by the Industrial Relations Commission of Victoria were unilaterally scrapped by the incoming government. In other States, access to arbitration was limited and a separate stream of non-union agreements was promoted in an attempt to remove unions from the bargaining processes.

Running alongside these legislative developments were the attacks by State and Territory governments on their own employees, including teachers and education workers, created partly by a fierce desire to drastically reduce funding for public education. Schools were closed and teacher numbers were cut. Recurrent funding did not keep pace with increased responsibilities being placed on schools, and this placed an enormous strain on those teachers who remained in the system. They were expected to teach larger classes and for more hours. Resort by governments to the use of non-permanent forms of employment increased dramatically, driven by a desire for “flexibility”, which was in reality a euphemism for the ability to reduce the workforce at short notice at minimum expense. Since 1993, all new teachers in Victoria have been engaged on fixed-term contracts, and have suffered from the insecurity and disadvantage that attends this mode of employment. These difficulties have not been helped by the increasing tendency of governments, both State and Federal, to criticise teachers and their work in public forums including and the media

This negative environment has been exacerbated by trends in educational policy development that became apparent in the 1990s, particularly the move to devolve a number of formerly central functions to the school level. These policies are masqueraded under different names in different States and Territories, such as Schools of the Future, Schools of the Third Millennium, Leading Schools, Partnerships 21 and Directions for Education to name a few. Despite the varying terminology, the

central themes of these policies are the same, albeit that some are further advanced down the track than others. They involve the shifting of a number of responsibilities to the school level, and a concomitant reduction in the size of the central and regional authorities and services. The rhetoric accompanying these policies is that they are designed to allow schools to have more autonomy over their own operations. In some cases, there has been some theoretical merit in the proposals. The AEU has supported increased autonomy at the school level in some key respects, but always on the basis that the initiatives are properly funded and resourced. Unfortunately, in the hands of government, the goal of school autonomy has been distorted, and the reality has not matched the rhetoric. Adequate funding has not accompanied the increased workload, and in many cases the autonomy sought by schools has been a pipe dream as the (smaller) central authorities have grabbed the reins even more tightly. The evidence is that devolution has not contributed to improved learning outcomes for students. In practice, devolution has been about shifting the blame for inadequate funding of public education from government to individual schools. Some of the devolved responsibilities are significant, such as the employment function and the tailoring of curriculum. Others are less so, involving a simple shift of an administrative function from a central or regional office onto school staff. Regardless of their significance, most of the responsibilities and tasks are time-consuming. Whatever view is taken of the merit of the proposals, one fact is incontrovertible. Devolution policies in all States and Territories have resulted in a significantly increased workload for all staff employed in schools.

Other educational policy developments have contributed to the increased workload of schools and their employees. Incoming governments have invariably sought to make their mark by introducing a new priority area for the school curriculum, without removing other curriculum areas to make way. Schools have been required to take responsibility for social issues that were formerly handled in conjunction with parents and the community. The merits of integrating students with disabilities into mainstream classes have been undercut by a familiar lack of adequate funding. Recent national initiatives in relation to literacy and vocational education in schools have had to be accommodated in the work of schools.

A further problem related to the pace and extent of educational policy reform has been the reluctance, and in some cases, outright refusal, of the government employers to properly consult teachers and their

union about changes that they are proposing to implement. Governments have therefore not had the benefit of expert input from those actually delivering the curriculum, and the quality of the reform has suffered accordingly. In addition, teachers have developed a natural distrust of reforms introduced without adequate, or any, consultation.

Evidence of the above matters has been presented in detail to the Senate Employment, Education and Training References Committee, in its Inquiry into the Status of the Teaching Profession. The Committee released its report, “A Class Act”, in March 1998 in which it made a number of findings consistent with the points set out above. The Committee received submissions from a wide range of individuals and organisations, including parents, students, school and community organisations, unions, universities, teachers and professional organisations, and stated that the message from these groups was “consistent and clear”:

*“Teaching in the 1990s is a highly complex and demanding activity. Despite shrinking budgets, alarmist media reports, unsupportive ministers, a crowded curriculum, and the disappearance of support services, teachers have continued to dedicate themselves to their students. The Committee has been encouraged by the evidence of the deep commitment of teachers, by their passionate concern for young people, and by the many examples of innovative and cooperative teaching practice brought to its attention.”<sup>1</sup>*

In Chapter 2 of the report, the Committee notes significantly that it was:

*“...struck by the extraordinary unanimity of views about the key issues, revealed in over 300 submissions and in the oral evidence presented at public hearings across all States and Territories. The complexities of contemporary schooling, whether in curriculum, technology, school based management or student welfare, mean that demands on*

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<sup>1</sup> “A Class Act - Inquiry into the Status of the Teaching Profession”, Senate Employment, Education and Training References Committee, March 1998, p.1

*teachers' skills, time and energy are at an all time high. Teachers continue to respond to those demands, but in an environment where they are constantly asked to do more with less, where their efforts are frequently undermined by ill-informed or gratuitous criticism, where opportunities for professional development have been severely eroded, and where career progression is largely non-existent.*

*Teachers are alarmed by what they perceive as governments' retreat from education, which combined with the unseemly brawls between Commonwealth and State Ministers over funding, does nothing to persuade teachers that they are valued or that they are engaged in one of society's most important tasks. The result is a serious crisis of morale amongst teachers. The Committee recognises that education is not the only area to be adversely affected by budgetary constraints and withdrawal of government involvement, and that similar trends are evident overseas. But it regards the impact on education as little short of desperate, and one which demands a concerted effort by governments to fund schools at a level more commensurate with the demands placed upon them, and to place quality teaching at the heart of a quality education provision.”<sup>2</sup>*

### **Federal Awards for Teachers**

The 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 the State conciliation and arbitration systems contributed to the view that our members in some, if not all, States would be better protected in the federal system, and steps were taken to serve a log of claims on all public sector employers throughout Australia. In addition to the federal awards and agreements already covering our members in the A.C.T. and the Northern Territory, federal awards have been gradually obtained to cover teachers in Victoria (schools, TAFE, Adult Multicultural Education Services and Disability Services), Tasmania (schools and TAFE) and Western Australia

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<sup>2</sup> “A Class Act”, p.5

(TAFE and Community Colleges). In addition, federal certified agreements have been achieved for teachers in government schools in South Australia and Western Australia.

All of the awards were obtained under the Industrial Relations Act prior to the introduction of the 1996 amendments. Even under this system, they were not obtained without the expenditure of a great deal of time and money. The State Governments, particularly in Victoria, Western Australia and South Australia, sought to frustrate the process at every turn, investing huge amounts of public money in engaging solicitors and barristers to devise and implement legal strategies to prevent the AEU from achieving federal award protection for its members. Almost all of the challenges and appeals proved unsuccessful, yet the governments were still able to slow the process down significantly and forced the AEU to expend time, energy and funds of its own.

In the AEU's Submission to the 1996 Senate Inquiry, we provided details of two award applications in Victoria, one dealing with redundancy and the other with teacher workload. Those case studies demonstrated the importance of speedy access to an independent tribunal to resolve important and intractable disputes. They are also a good example of the difficulties that existed even under the former system in achieving vital award protection for education employees. The capacity for the government employers, with their seemingly limitless resources (when it comes to legal expenses), to delay the provision of improvements in terms and conditions for our members is readily apparent from these examples. It is a strategy that is even more effective under the current enterprise bargaining system, and this theme will be returned to below.

### **Enterprise Bargaining**

Coinciding with the developments in public education set out above has been the expansion from the beginning of the 1990s of enterprise bargaining as the principal avenue for securing improved terms and conditions of employment. The Australian Industrial Relations Commission ("AIRC") introduced the enterprise bargaining principle in the October 1991 National Wage Case (Print K0300), and changes to the Industrial Relations Act followed to elevate the status of agreement-making. These changes

culminated in the 1994 amendments which included new objects promoting the making of agreements, the introduction of non-union enterprise flexibility agreements, the creation of a Bargaining Division in the AIRC, and the inclusion for the first time of provisions allowing employees and unions to take protected industrial action.

Enterprise bargaining has not been kind to education workers in the government sector, particularly in the climate of cost-cutting and devolution of responsibilities referred to above. Productivity improvements are not easy to measure in education, and governments have not been prepared to embrace student learning outcomes as the “product” at least in the context of enterprise bargaining. Rather the strong tendency has been for governments to measure productivity in dollar terms, requiring trade-offs measurable in monetary amounts for any improvements in wages and conditions. Often these trade-offs involve increased workload for teachers and non-teaching staff, and just as often they are detrimental to the education of students. In the main, teachers have resisted the worst of these trade-offs, and their salary levels have fallen in real terms. Given the lack of realistic alternatives, some unpalatable trade-offs have been acceded to, and inevitably these have contributed to the growing workload of our members.

It is important to stress that these comments apply to the system of enterprise bargaining that existed under the Industrial Relations Act prior to the commencement of the first wave of changes at the beginning of 1997. As the comments below will indicate, the 1996 Act has only made matters worse, and the proposals in the 1999 Bill if implemented will make effective enterprise bargaining virtually impossible

### **Workplace Relations Act 1996**

The AEU does not intend to respond to each and every term of reference in detail. Some are clearly of more relevance to our members than others, and no doubt the less relevant terms will be taken up by others. The approach in relation to the current Act is to consider its operation measured against some of the key objects in section 3, as envisaged by the terms of reference.

This item in the terms of reference begs the question of the appropriateness of the objects in the first place. The objects were substantially amended by the 1996 Act, removing a number of the elements of the previous objects, and introducing new elements. The AEU opposed a number of the amendments to the objects, and while some changes were made, there remain in our view some inappropriate provisions in section 3. The comments which follow in relation to the objects should be read with those qualifying remarks in mind.

Object (a) refers to the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market. These are obviously macroeconomic goals, and the way in which governments at the State and Federal level have pursued them has had an extremely adverse impact on the public sector. These governments view the achievement of high employment and international competitiveness as being achieved primarily through the private sector, and the result has been a significant reduction in expenditure and employment levels in the public sector, including the education sector. The Federal Government's clear agenda to transfer education funding from the public to the private sector is one example of this approach.

Objects (b) and (c) refer to the responsibility of employers and employees to determine matters affecting them and to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided by the Act. The AEU was particularly opposed to the inclusion of the words "whether or not that form is provided for by this Act" in object (c), involving as they do the implication that the parties can avoid or opt out of the federal system of industrial relations. While this is couched in terms of a choice by the parties, the reality is that where the employer unilaterally decides to avoid bargaining under the Act, there is little if anything that either the union, the employees or the AIRC can do to compel the employer to engage in bargaining over a certified agreement. This has been the experience of the AEU in a number of States, and is well demonstrated in the submission of our Victorian Branch which is before the Committee. The Victorian government has "chosen" to offer sporadic and moderate pay increases by way of letters addressed to individual teachers, ignoring their clear and expressed preference for the government to enter into a certified agreement with the

AEU. The 1996 Act, in removing the powers of the AIRC to facilitate bargaining and severely limiting access to arbitration, has reduced the capacity for education sector employees to have a say in matters affecting them and prevented them from determining their preferred form of agreement. These matters are increasingly the preserve of the employer, in which case it is clear that objects (b) and (c) have not been fulfilled insofar as the public education sector is concerned.

Object (d) refers to the maintenance of a fair and effective award safety net of fair and enforceable minimum wages and conditions of employment. The introduction of the award stripping provisions in 1996 has greatly reduced the effectiveness and fairness of the award safety net for all employees including teachers and allied staff. The full impact of award stripping is yet to be known as the process has not been completed in relation to AEU awards. It is clear however that a number of important award protections have been lost through the award stripping processes and a number of other provisions are under threat. One of the case studies in our 1996 submission related to teacher workload in Victoria. The AEU was able to obtain award clauses which firstly provided that no teacher could be subjected to an unreasonable or excessive workload, and secondly that set down maximum face-to-face teaching hours for teachers. The important protection provided by the first clause has been lost as a result of the award stripping process. While the provision setting face-to-face teaching limits has survived so far, the decision on this point has been appealed by the State government.

Another condition that has been lost in Victoria is the right to be notified about changes to educational programs, curriculum, class sizes, courses, school organisation, school classification structure or technology that are likely to have a significant effect on employees. This clause was particularly valued by the AEU in the context of the rapid changes being introduced by the Victorian government from 1993 and onwards. It was as a result of this clause being arbitrated that the AEU was for the first time able to enter into some meaningful dialogue with the government over changes that it was proposing.

The Disability Services Award in Victoria contained a clause which restricted the use of temporary fixed-term employment to situations involving the replacement of an employee taking leave, or where a specific project of limited duration arose. The AEU was able to curtail the inappropriate use of short

periods of fixed-term employment and the resultant insecurity that this created. This clause was removed in the award stripping process, and employers are now free to use this form of employment regardless of the circumstances.

The prospect that the Commission has limited powers to prevent the spread of insecure forms of employment, such as fixed-term, casual and employment through labour agencies is particularly worrying for the AEU. As noted earlier, the use of fixed-term employment is reaching epidemic proportions in some States and Territories, and is a major concern for our membership as a whole. An award safety net that cannot provide some security of employment for employees is of little value to our members.

There is no question that the award provisions described above formed part of a “fair” and “effective” safety net of conditions. The clauses relating to workload and notification of change were obtained after lengthy and hard-fought proceedings in the AIRC. The Commission was ultimately convinced on the merits of the case that these clauses were fair and appropriate, and necessary for the protection of the teachers concerned. These clauses are addressed here by way of illustration. Other provisions have been lost, and no doubt more will follow once the award stripping process is complete. The 1996 Act has clearly not achieved its objective of maintaining an effective safety net of fair and enforceable conditions of employment.

Object (e) relates to the provision of a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making. The comments above in relation to objects (b) and (c) are relevant to this object. The removal of the good faith bargaining provisions has limited the Commission’s ability to play a meaningful role in the process, particularly where one party simply refuses to negotiate. While these provisions were narrowly interpreted by the Commission, they at least provided an avenue for the parties or the Commission to progress negotiations. The AEU considers that this is a major weakness of the current Act, and recommends that the Committee look at ways of amending the Act to facilitate the effective negotiation of certified agreements.

Object (g) relates to ensuring that registered organisations are representative and accountable to their members, and are able to operate effectively. Most of the relevant changes made to the Act in 1996 were directed to the first part of this objective. It is difficult to find any that were directed towards ensuring that registered organisations be able to operate effectively. The changes to the provisions relating to the registration of new unions, including enterprise-based unions, and the provisions relating to eligibility rule alterations, have involved, and will involve registered unions in costly and time-consuming demarcation disputes, distracting them from the main game of protecting terms and conditions of employment. Right of entry has been made more difficult under the 1996 Act, despite the fact that there was little evidence of any problems with the system that existed prior to 1997. The promotion of AWAs and non-union agreements has restricted the ability of registered unions to bargain effectively. For example, collective bargaining is undermined if a proposed agreement is voted down by a majority of employees and the employer then offers the same terms to individual employees in the form of AWAs or a non-union certified agreement. The AEU has been faced with this threat on more than one occasion, and it is a real impediment to effective bargaining.

The award simplification process has been a barrier to effective operations in the last two years. Union officials and employees have invested substantial time and resources in drafting and redrafting awards, and negotiating with employers. In most cases, the union has had to drive the process as the employers have shown a reluctance to carry out the detailed preparation required. It has been obvious that some employers do not have their hearts in the process, and are merely responding to pressure from the Federal government to kick the process along.

A less direct, but no less relevant, effect of the 1996 Act has been its capacity to generate lengthy and expensive litigation in the Commission and the Courts, and this clearly impacts on the ability of registered organisations to function effectively. The AEU's experience is that some State and Territory governments would rather spend money on legal fees than provide funds for reasonable salary increases to teachers and adequate resources for schools. No doubt this approach is partly based on calculations that show that despite the substantial legal fees often involved, it is cheaper to pay the lawyers in the long run. The excessively complex nature of the Act is by no means a new phenomenon, but as each

new raft of amendments is introduced, the problem becomes worse. The 1999 Bill will almost certainly continue this trend if implemented in its current form, and employees and their unions will suffer far more than employers. Larger employers including State and Territory governments are more readily able to engage in expensive and prolonged litigation than are unions with limited resources.

Object (h) deals with the Commission's power to settle industrial disputes by conciliation and arbitration. If the narrow definition of "industrial disputes" in section 89A is accepted as the measuring stick for this object, it might be said that the Commission has been allowed to settle some disputes over items contained in the list of allowable award matters. However, based on the definition in section 4 which has stood the test of time for the best part of this century, it is fair to say that the Commission has been greatly restricted in its ability to settle disputes. The Commission has no jurisdiction to deal with any matters not contained in the list of allowable award matters. In addition, under section 170N it cannot arbitrate over matters that are at issue in an existing bargaining period, even where negotiations have reached a standstill and there is no prospect of an agreement being reached. Under the Act prior to the 1996 amendments, the Commission did have the power to arbitrate in this situation. One notable example of them doing so was at the behest of the employer in the Novacoal case (Print N1140). There can be little doubt that, in comparison with the former Act, the 1996 Act has significantly diminished the Commission's power to settle industrial disputes, whichever definition of the term is relied upon.

One compensating factor for the general loss of arbitral powers should be referred to here. The agreement that the Democrats managed to secure with the Coalition on the 1996 Bill resulted in provisions allowing for arbitration to occur in bargaining disputes involving paid rates award employees where there is no reasonable prospect of an agreement being reached. (ss.170MW(7) and 170MX) These provisions have been invoked in respect of teachers in Tasmania and South Australia. In Tasmania, the government and the AEU agreed that after two years of fruitless negotiations the dispute between them should proceed to arbitration. In South Australia, the government initiated the processes to move towards arbitration. The AEU was of the view that an agreement was still possible, but the Commission acceded to the government's request to terminate the bargaining period and move to

arbitration. The case will commence in the last week of October. These developments indicate that it is not only employees and unions that wish to retain the option of arbitral rights in enterprise bargaining or other disputes. Employers are often just as keen to resort to the independent umpire where disputes become intractable. The wisdom of abolishing these provisions, as the Coalition is proposing in the 1999 Bill, is difficult to fathom in these circumstances. The provisions in the view of the AEU should be extended to all bargaining disputes, regardless of the status of the awards covering the particular employees.

Object (i) focusses on the balancing of work and family responsibilities. This is an area in which the 1996 Act has clearly failed, and will continue to fail if appropriate amendments are not made. The award stripping process has resulted in clauses being removed from awards which provide some certainty of hours for part-time workers. In the schools sector in Victoria, provisions which limited the number of days that a part-time employee could be required to work each week have been diluted. The clauses prevented employees from having to spread a part-time load over four or five days, and are highly valued by our part-time members, particularly those who have family responsibilities. As noted above, clauses preventing teachers from being subjected to an unreasonable and excessive workload have been ruled non-allowable, and other clauses regulating face-to-face teaching hours remain under attack. These provisions are vital in assisting teachers to balance their work and family life. The AEU is currently engaged in a national campaign to reduce the excessive workloads of our members. Recent surveys have demonstrated that employees in the education sector are working more and more unpaid hours and that this workload is having a damaging effect on their health and social lives. Enterprise bargaining has not improved this situation and award stripping and other limitations on the Commission's arbitral powers is only making matters worse. Attachment 1 to the submission contains some tables from the recent ACTU commissioned survey on workload carried out by Yann Campbell Hoare Wheeler which demonstrates the workload problems of employees in the education sector.

Object (k) refers to compliance with Australia's international obligations. As the ACTU's Submission demonstrates, the 1996 Act has fallen a long way short of achieving this objective. The ILO's Committee of Experts has concluded that the current Act does not meet the requirements of Convention

No. 98 on the Rights to Organise and to Bargain Collectively. The primacy accorded to AWAs over awards and, in some cases, certified agreements is a particular area of concern for the Committee, as it is for the AEU. Concern has also been expressed on the lower status accorded to multi-employer agreements in the context of Convention 98 and the Convention on the Freedom of Association and Protection of the Right to Organise (Convention No. 87). In relation to the latter Convention, the ILO Committee of Experts has concluded that the Act is contrary to the Convention in restricting protected industrial action to negotiations over single business enterprises.

### **The Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999**

The comments above in relation to the operation and impact of the 1996 Act raise a preliminary issue about the 1999 Bill. The 1996 Act introduced the most sweeping changes to the federal system of industrial relations since its inception in 1904. The reduction of the Commission's arbitral powers, the introduction of individual contracts with the capacity to override awards and agreements, new weapons for employers to prevent industrial action, significant restrictions on the right of unions to enter the workplace, numerous changes to the enterprise bargaining provisions and the introduction of complicated "freedom of association" provisions were always going to have an enormous impact on industrial relations in Australia. Yet, the amendments had been in operation for less than two years when the Coalition government began drawing up a new Bill with a second raft of fundamental changes, many of which relate to areas introduced in the 1996 Act.

The award stripping process has not even reached the half-way stage, meaning that no realistic assessment can be made of its impact at this stage. Despite this, the Coalition wishes to embark on a second round of award reductions, and prevent those on the award rates from accessing safety net adjustments until the award has been through the second round. The Bill seeks to place further restrictions on right of entry in the absence of any evidence that the 1996 provisions have caused problems for employers. Provisions aimed at further reducing the ability of employees to engage in industrial action are introduced with statistics recording days lost due to industrial action apparently at

an all-time low.

The question must be asked before embarking on a detailed consideration of separate parts of the Bill: Why are these changes necessary? The truth is that employers generally are not calling for the amendments that are set out in the Bill, and have been only lukewarm in their support for the 1996 changes. By way of example, so concerned was the Minister with the slow take-up of the “opportunities” presented by award stripping that he felt compelled to write to them specifically to prod them into action. The Minister is clearly of the view that in this and other respects employers need to be led by the nose into his brave new world. In this regard, he is guilty of the same paternalistic approach that he accuses the unions of adopting towards their members. Almost all of the amendments are unfair to employees and will only add to the imbalance of the current legislation. For this reason they should be rejected. Even in the absence of this factor, it is incumbent on the Coalition to justify the necessity for this divisive and disruptive Bill.

The AEU Federal Executive considered the proposals in the Bill at its recent meeting in July. Its view of the proposed changes is encapsulated in the resolution which it passed:

*The AEU condemns Reith’s legislative proposals as a further, unwarranted attack on the rights of Australian workers. The AEU calls on the opposition parties to reject the Bill in total, as the vast majority of the amendments are unnecessary and unfair to employees. The AEU particularly deplores:*

- a) *the further downgrading of the Australian Industrial Relations Commission in its role as the independent umpire;*
- b) *the removal of further employee entitlements through a second round of award stripping;*
- c) *the removal of arbitration to resolve intractable disputes involving paid rates employees including teachers and education workers;*
- d) *the provisions enabling AWAs to undermine collective certified*

*agreements;*

- e) *the severe restrictions on the ability of unions to bargain effectively through the introduction of an extremely onerous and cumbersome secret ballots procedure and provisions requiring the Commission to suspend bargaining periods in inappropriate circumstances;*
- f) *the unfair extension of sanctions against industrial action;*
- g) *the absurd provisions in relation to “closed shops”, involving as they do an implication that membership in excess of 60% at a particular workplace may have been achieved through “improper” means.*

*The AEU calls on the Coalition to scrap this unfair and oppressive legislation and fulfill its commitment to “govern for all of us”.*

## **1. Awards and Award Stripping**

### *Award Stripping*

The second significant attack on awards comes in three parts:

- (a) the removal of matters from the list of allowable award matters;
- (b) the introduction of a list of matters that *cannot* be included in awards;
- (c) the introduction of a requirement to restrict award matters to “basic minimum entitlements

The removal of “skill-based career paths” from the list of allowable award matters is of particular concern to the AEU. It is surely a basic award right that an employee is able to advance through a career path on the demonstration of additional skills and responsibilities. Unions and employers invested a great deal of time and energy in the late 1980s and early 1990s in restructuring awards to include appropriate skill-based classification structures. No justification exists for removing these

important elements from awards.

The removal of such items as long service leave, public holidays and notice of termination on the basis that they are covered by legislation offers little comfort. In the first place, the legislative entitlements are often the lowest common denominator, and the result of removing these items from awards will be a reduction in existing entitlements for many workers. Secondly, the AEU's experience is that legislative entitlements, particularly at the State and Territory level, are prone to frequent unilateral variation, particularly where the government of the day holds a majority in both Houses (or where there's only one House!). This is an additional concern for the AEU and other public sector unions as the legislators are also the employers of our members. This was a significant factor in the AEU seeking to protect conditions of employment through awards.

No explanation is offered by the Coalition for the removal of items like jury service and accident make-up pay. No reason is offered as to why such entitlements do not form part of a basic safety net of conditions.

The inclusion in the list of matters that cannot be included in awards of "transfers between locations" is another significant concern for the AEU. Transfer provisions are arguably under threat from the 1996 Act, but the proposal in the Bill will put the matter beyond doubt. The AEU has been successful in obtaining protections in awards for members who face transfer from one school or TAFE college to another. These provisions are highly valued by members who work in State or Territory-wide systems of education and for whom transfer can often be a traumatic and costly experience. **Attachment 2** to this submission is a copy of Schedule 5 of the Teaching Service (Tasmanian Public Sector) Award 1995. These provisions were obtained after lengthy negotiations between the AEU and the Tasmanian Education Department.

Under the Bill, awards will not be able to include provisions which include "prohibitions (directly or indirectly) on an employer employing employees in a particular type of employment or in a particular classification". This limitation is in addition to the limitations contained in existing subsection 89A(4) and

presumably is intended to have a wider operation. The wording of the limitation is capable of an interpretation that would see many award provisions come under threat. The National Tertiary Education Industry Union (NTEU) recently obtained award provisions restricting the use of fixed term employment to certain situations. The use of short-term employment had reached epidemic proportions in the higher education industry, and the NTEU devoted extensive resources to running a case in the AIRC to stem the tide. The application was fiercely resisted by the employers, but ultimately the union won some important gains for members which have helped to increase the level of on-going permanent employment in universities and tertiary institutions. The excessive use of fixed-term employment has also presented an enormous problem to the AEU's members, particularly in Victoria where the government continues to employ all new teachers on rolling fixed-term contracts. This form of employment creates great insecurity and often prevents teachers from obtaining loans and other benefits. The AEU hopes to obtain similar protections to those achieved by the NTEU. If this particular provision of the Bill is enacted, our chances of doing this will be greatly diminished.

The impact of the amendments to the "incidental" provision in subsection 89A(6) will not be clear until the current round of award stripping is completed. No doubt many award provisions that have survived will come under renewed attack, and the Commission's resources will continue to be tied up in these processes. Should the AEU defeat the appeal against the Commission's decision to preserve face-to-face teaching, it is possible that the amended incidental provision could be used in a further attempt to remove these provisions.

The proposed amendment to subsection 89A(3) requiring awards to be limited to "basic minimum entitlements" (Schedule 6, Item 12) appears to envisage a further attack on the few remaining allowable award matters to reduce the level of the entitlement to some perceived basic standard. It could be used for instance to reduce any annual leave entitlements above four weeks down to that level. If this is the intention of the provision, it represents a further unwarranted attack on the ever-diminishing safety net. It should be remembered that the Full Bench in the Award Simplification Decision (Print P7500) set down a principle that:

*“Award simplification does not involve a general review of the level of award entitlements.”* (p.33)

It might be concluded that the amendment to s.89A(3) was aimed at reversing the effect of this principle. If it is not aimed at reducing entitlements, it must be asked what it is aimed at. The Explanatory Memorandum offers little assistance in answering this question.

### Dispute Findings

Item 21 of Schedule 6 proposes to add a new provision which will prevent the Commission from making a dispute finding where a log of claims contains particular types of demands. This provision may look innocuous on the surface, but the AEU’s experience with dispute findings leads us to believe that this section will be used by some employers to slow the process of award making down even further. The current practice of the Commission is to draw a line through any matters that cannot form part of a dispute and make a dispute finding in respect of the remaining matters. This is a sensible approach to the issue, and has not to our knowledge created any difficulties. The proposed section would require the Commission to refrain from making a dispute finding where it included a matter that “does not pertain to the relationship between employers and employees”. This very issue has occupied the High Court for almost a hundred years, and the matters that have been found to pertain to the relationship of employers and employees has evolved over this period. It is easy to envisage the Commission being bogged down in arguments over numerous clauses in a log of claims. Even without this provision, State governments have tended to run lengthy arguments at the dispute finding stage which have been particularly successful in slowing progress to award protection. The CPSU’s experience in Victoria is a prime example of this problem.

### Section 111AAA

The proposed amendments to section 111AAA (Schedule 6, Items 22-25) make a mockery of the

Victorian government's decision to refer its industrial relations powers to the Commonwealth. Their apparent effect is to prevent any employees in Victoria, Western Australia and South Australia who are not currently covered by federal awards from moving into the federal system, even where those employees do not have the benefit of a State award or agreement. In Victoria this would leave employees without any recourse to an industrial relations system, and is against all concepts of industrial fairness. In the other mentioned States, employees would be effectively marooned in the sub-standard State systems, no matter how limited those systems became. Those States could for instance abolish awards and registered agreements, and limit their Acts to a set of basic minimum conditions (as occurred in Victoria), and yet employees would still be prevented from seeking federal award protection.

#### *Safety Net adjustments and award stripping*

Much will no doubt be said about this provision, particularly by unions whose members rely heavily on the award to set rates of pay. The proposal (Schedule 6, Item 26) is that no safety net adjustments be inserted into an award until that award has undergone the second round of award stripping proposed elsewhere in the Bill. The AEU has some members who rely on the award rates, and who will be disadvantaged by any delays in receiving safety net increases. The provision is manifestly unfair, particularly when consideration is given to the length of time that the first round of award stripping has taken so far.

#### *State agreements overriding federal awards*

The 1996 Act allowed some State employment agreements to displace the operation of federal awards, but only where those agreements met certain tests set out in subsection 152(5). Even with this qualification, the AEU was strenuously opposed to the inclusion of section 152 at the time. The 1999 Bill proposes to remove the qualification in subsection 152(5) so that any State employment agreement will displace the operation of a relevant federal award. This may have the effect of reviving the old Victorian agreements which came about from the abolition of awards in that State. There is no

transitional provision which would limit the effect of this amendment to State employment agreements made after the commencement of this legislation, creating the potential for great uncertainty.

The current section 152 excludes awards made under section 170MX from the operation of the section where a State employment agreement is made *after* the s.170MX award is made, but not where the State agreement comes first. This is an anomalous situation in the view of the AEU and has created some practical problems in the s.170MX proceedings in South Australia. The Act should be amended to make it clear that State employment agreements cannot override section 170MX awards regardless of when they are made.

## **2. Paid Rates Arbitration**

As mentioned earlier in the submission, the Bill proposes to abolish the provisions which enable the Commission to arbitrate in enterprise bargaining disputes involving employees covered by paid rates awards including teachers and allied staff. These provisions arose out of the negotiations between the Democrats and the Coalition, and while they did not fully deal with the concerns of the AEU, they represent a sensible compromise between immediate access to arbitration on the one hand and the law of the jungle on the other. They are a recognition of the fact that the public interest requires disputes in the education sector to be brought to an end at some point to avoid harmful consequences to all stakeholders including students, parents, teachers and governments. The fact that in the short period of their operation, two State governments (of the same political persuasion as the Coalition) have enthusiastically embraced the opportunity to have the Commission resolve protracted bargaining disputes with the AEU is a clear indication that there remains bipartisan support for a significant retention of the Commission's arbitral powers. On the other hand, the provisions also provide an incentive for parties who would wish to avoid arbitration to enter into meaningful bargaining.

The AEU strongly urges the Committee to recommend the retention of existing subsection 170MW(7), section 170MX and related provisions. The AEU also urges the Committee to recommend the extension of the arbitration option to all enterprise bargaining disputes where it becomes apparent that

an agreement is no longer reasonably possible.

### **3. Restrictions on effective bargaining**

The continued attack on awards and the AIRC's arbitral powers reinforces the need for a fair and effective bargaining system if unions and employees are to achieve reasonable improvements to their terms and conditions of employment. The 1996 Act weakened the bargaining position of employees in a number of respects, including the promotion of AWAs and non-union agreements and the removal of good faith bargaining provisions. The 1999 Bill goes much further and it is not an exaggeration to state that effective bargaining would become impossible for employees if the proposals were implemented in full.

#### *Secret ballots*

The Minister has cloaked his argument in support of the need for compulsory ballots in rhetoric about the need for democracy and accountability. Any validity that these arguments may have had were swept away when the Coalition's secret ballot proposals were unveiled. The scheme is clearly designed to severely weaken the bargaining position of employees by making it almost impossible for them to wield their only effective weapon, industrial action.

The AEU's experience is that organising effective industrial action is pointless unless it has the overwhelming support of the members, and to this end steps are always taken to ascertain the views of the membership. Often this will involve a ballot of some description. Members who are unhappy about the decision-making processes of the union have rights under the union's rules to challenge these decisions, and are regularly given an opportunity to record their displeasure with the union leadership at the ballot box. Given the Minister's clear views on the place of unions in his utopian industrial relations system, it is difficult to take his professed concerns about the need for democratic processes within unions seriously. One would have thought that increasing dissatisfaction among union members leading to increased levels of resignations would not cause the Minister to lose too much sleep. The

reality is that arguments about democratic processes are only trotted out as a means to the end of further weakening the bargaining position of unions. The secret ballot “debate” is a classic example of this approach.

The best way to demonstrate the real agenda behind the proposals is to list the various stages and hurdles for unions seeking to engage in protected action:

- the union must apply to the Commission for permission to hold a ballot - it cannot simply go ahead and conduct the ballot once a decision to take action has been made.
- the application must be accompanied by details in relation to a number of matters, including the precise nature and form of the proposed action, the day or days on which it is proposed the action will take place and the duration of the proposed action. The difficulty of complying with this requirement is well demonstrated in the recent Federal Court decision in Dauids Distribution Pty Ltd v NUW (13 August 1999) in which the Full Court stated:

*“Industrial disputes are dynamic affairs. Decisions as to future steps often need to be made at short notice, sometimes in response to actions of the opposing party or other people, including governments, and changing circumstances. It would be a major, and unrealistic, constraint on industrial action to require a party to specify, three clear working days in advance, exactly what steps it would take.”*

If this is a difficult task in this short time frame, imagine how difficult it would become where these details are required two or three *months* in advance, which is a reasonable estimate given the steps to be carried out under the secret ballot process.

- the application must be authorised by the union’s committee of management.
- employers will be able to make submissions to the Commission about whether or not a ballot should be ordered, and about any directions that are made in relation to a

ballot. This could include submissions that the bargaining period has not been properly initiated, that the union is not genuinely seeking an agreement, that the union is pattern bargaining, that the union has contravened another provision of the Division at some other time, that the ballot timetable should be extended, and so on. The submissions that the employer could make appear to be limitless and the potential for delay and increased litigation are obvious.

- any allegations that the union is engaging in pattern bargaining must be referred to the President. Apart from the further delay this will cause, at least two issues are raised by this requirement. Firstly, it is not clear why this allegation cannot be handled by the Commission member dealing with the application. The second issue is the relevance of arguments about pattern bargaining (and, indeed, whether the union is genuinely seeking an agreement) to the question of whether a secret ballot should be ordered. There are other remedies available in the current Act and the Bill where the employer believes that the union is not genuinely seeking agreement or is pattern bargaining, including the suspension and termination of bargaining periods.
- the Commission must be satisfied of a number of matters set out in proposed section 170NBCF before a ballot can be ordered. That list could be expanded by regulations.
- the Commission may refuse a ballot if the union has *at any time* contravened a provision of this Division or an order made under the Division.
- the ballot order expires if the ballot has not been held within the period specified.
- the ballot paper must include the statement set out in proposed Schedule 5. This statement is clearly designed to discourage the employee from voting in favour of, or from taking, industrial action. The statement for example does not advise employees that they cannot be sued for taking action, and nor can their employer dismiss, injure or prejudice them for doing so.
- a minimum of 50% of eligible voters must vote in the ballot before industrial action can be taken to have been approved.
- the union will only be reimbursed 80% of the reasonable costs of the ballot.

There are no doubt other hurdles and pitfalls in the proposals. The above list simply serves to illustrate the extraordinary complexity and time-consuming nature of the scheme. Industrial action loses its potency if it cannot be implemented in a reasonably short time frame. The Coalition is well aware of this, and the provisions have clearly been designed to further limit the bargaining rights of employees.

As with other parts of the Bill, it must be asked who is leading the call for provisions of this sort. Where are the hordes of employees claiming that they have been excluded from having a say in relation to decisions about industrial action? It is incumbent on the Coalition to justify the necessity of these provisions.

#### *Suspension and termination of bargaining periods*

The rewriting of the section of the Act dealing with the suspension and termination of bargaining periods is the second major plank in the attack on employee bargaining rights. The provisions will make it easier for employers to have bargaining periods suspended or terminated, thus removing the only bargaining power that employees have to pressure employers into making reasonable agreements.

The amendments in effect propose a two stage process, encouraging the suspension of bargaining periods before a decision is taken to terminate them. Suspension is the worst of both worlds for employees because they are prevented from taking industrial action, and are also denied access to arbitration in the AIRC. At least where a bargaining period is terminated on the grounds of industrial action causing harm to the population or the economy, the matter proceeds to arbitration. Suspension merely places the matter in a legal limbo, and has no rational tendency to resolve the dispute at all.

In addition to instituting suspension as the first step in the process, the Bill introduces new grounds on which a bargaining period must be suspended or terminated:

- where 14 days have passed since protected action was first taken (proposed section

170MW);

- where the union or an employee has engaged in industrial action that was not protected action (proposed section 170MWA);
- where the union is engaging in pattern bargaining (proposed section 170MWG(5)).

This circumstance requires termination. Suspension is not an option.

Perhaps the worst of the amendments under in this area is proposed section 170MW which will require the Commission to suspend a bargaining period 14 days after industrial action was first taken, regardless of whether the action is continuing and regardless of the length or seriousness of the action. This will enable employers to simply sit on their hands for two weeks in the knowledge that the employees' rights to take action will be removed automatically at the end of that time. The AEU's experience with enterprise bargaining is that State and Territory governments will be only too happy to take up this opportunity. The period of suspension is to be determined by the Commission and should be "sufficient to resolve the matters at issue" (S.170MWC(3)), whatever this means. If the union ever managed to have the bargaining period reinstated, presumably it would be suspended again two weeks after the next instance of industrial action. The whole process is absolutely contrary to the object of promoting bargaining, and is therefore contrary to the objects of the Act even if those objects are amended in accordance with the Bill.

The other two new grounds set out above significantly increase the ability of employers to restrict the capacity of employees to bargain effectively. "Pattern bargaining" is defined in the negative which will inevitably lead to significant litigation in the Commission and the Courts. It is notable that no adverse consequences arise if an *employer* seeks to engage in pattern bargaining, despite the fact that in the AEU's experience this is a regular occurrence. The taking of unprotected action exposes employees and unions to a number of potential sanctions under the Act (and even more under the Bill). It is unnecessary to add suspension of bargaining periods to this armoury, particularly where the unprotected action may not have been authorised by the union, and may have only involved a handful of employees covered by the bargaining period.

The proposal to require interim suspension orders to be made if applications for suspension or termination cannot be determined within 48 hours will further strengthen the hand of employers (see proposed sections 170MWC (1) and 170MWI(1)). The provisions could also be open to abuse. Employers faced with imminent industrial action could file an application for suspension or termination that had little prospects of success. Given the kinds of arguments involved, it will be rare for an application to be decided within 48 hours. The Commission would be compelled to suspend the bargaining period, unless to do so would be contrary to the public interest. This would prevent the employees from engaging in protected action, even though they would have authorised the action through a secret ballot.

The only access to arbitration from the bargaining processes under the proposals will be where the bargaining period is terminated on the grounds that industrial action is threatening to endanger the life, safety, health or welfare of the population or a part of it, or to cause significant damage to the Australian economy or an important part of it. This provision exists in the current Act and has been activated on a number of occasions since 1994. There are two significant changes to the provision in the Bill. The first is that the bargaining period can only be terminated after it has been suspended at least once. It is possible that a number of suspensions could occur before the Commission was convinced to exercise its powers of termination. The second change is that the initiator of the bargaining period is not permitted to apply to have the bargaining period terminated on this ground. Given that the initiator is almost always the union, this amendment will allow employers to effectively decide whether a particular bargaining dispute should proceed to arbitration, unless the Commission is prepared to act on its own initiative. There is no fair rationale for this proposal, and it should be deleted.

As mentioned earlier, the proposed rewriting of this part of the Act also removes access to arbitration for employees and employers subject to paid rates awards who are unable to reach agreement. For the reasons set out above these provisions should be retained.

*Allowing AWAs to override certified agreements and section 170MX awards*

The proposal to allow certified agreements to be displaced by AWAs that are made after the certified agreement will result in a further significant weakening of the bargaining strength of employees. It is bad enough that existing AWAs can currently operate to displace a newly made certified agreement, and the ILO has already concluded that this aspect of the current Act is contrary to Convention No. 98. The new proposal will make some certified agreements meaningless, as employers will be able to pick off vulnerable employees by pressuring them to enter into AWAs. These AWAs may well contain conditions that are substantially inferior to the certified agreement, and could be a requirement for new employees or employees seeking a promotion or transfer. The proposal is contrary to the notion that once a deal is done it should be set in stone, which in the case of a certified of agreement means until its nominal expiry date. The Committee should recommend the deletion of this amendment and its replacement with an amendment bringing the Act into line with Convention No. 98.

The same amendment is proposed with respect to AWAs and s.170MX awards, and this is of equal concern to the AEU. It would seem pointless to embark on a lengthy arbitration if the resolution of the matter could be later undermined through the use of individual contracts. This amendment is strongly opposed, and as with the recommendation above in relation to certified agreements, the Act should be amended to ensure that section 170MX awards that are made after AWAs should over-ride those AWAs to the extent of any inconsistency.

#### *Part of a single business*

The Bill seeks to repeal existing subsection 170LU(8) which currently requires the Commission to refuse to certify an agreement which applies to part of a single business which is neither geographically distinct or a distinct operational or organisational unit within the business, where unfairness would result to employees not covered by the agreement.

In the Holmesglen TAFE case (Print Q3673) Commissioner Smith refused to certify six non-union agreements purportedly made to cover non-teaching staff in Holmesglen TAFE College late in 1997. He did so on the basis that the agreements did not apply to a distinct geographical part or operational

or organisational unit within the College, and that it was unfair for the agreement not to apply to other non-teaching staff within the College. His decision involved an interpretation of subsection 170LU(8), and was subsequently upheld by the Full Bench.

In deciding whether it was fair or not for the agreement not to apply to all non-teaching staff, Commissioner Smith was influenced by the fact that the employer had originally tried to enter into one agreement covering all non-teaching staff. The staff voted against the agreement, and the employer therefore entered into six separate agreements in the same terms as the original agreement with groups of non-teaching staff within some of the departments of the College. Smith C was of the view that this approach appeared to be a device to prevent staff who were opposed to the terms of the agreement from having a say. He was also influenced by the fact that the terms of the agreements would clearly have an impact on staff not party to them, or would effectively prevent the employer from negotiating other terms with employees outside the agreements. He described the process as "an artificial segmentation of the enterprise". A Full Bench of the Commission upheld Commissioner Smith's decision.

The amendment proposed in the Bill will enable employers to "artificially segment" their enterprises, even where to do so will result in unfairness to employees excluded from the agreement or agreements. If an agreement covering a wider group of employees is voted down, the employer will be able to reintroduce the agreement for a smaller group, who may well be more vulnerable in bargaining terms when separated off from the wider group. The amendment would clearly reduce the bargaining power of employees. In the view of the AEU, despite the decision in the Holmesglen case, existing subsection 170LU(8) should be strengthened to avoid the potential for workplaces to be inappropriately segmented in the bargaining processes.

#### *Payment during periods of industrial action*

The Bill proposes to amend section 187AA to prohibit employers from paying employees on any day on which they take action, however minor or short-lived that action. The existing section 187AA is

capable of operating in this way in some circumstances, as has been demonstrated recently with respect to a group of school bursars in the A.C.T. In a recent dispute with the Department of Education, the bursars were pushed to the unusual point of taking industrial action, albeit of a limited nature. They decided to refuse to submit a quarterly financial report to the Department until their demands for a reclassification were met. These employees are particularly vulnerable, in that they are the only employee in their classification in a school. They are all women, mostly middle-aged and would regard taking industrial action of any sort as an absolute last resort. The bursars themselves estimated that the ban they implemented amounted to less than 1 per cent of their overall duties, and they continued to carry out all other duties required of them. Despite this, the Department refused to pay them at all arguing that s.187AA prevented them from doing so. The bursars worked for about a week without pay before deciding that it was pointless to continue working and went on strike for the best part of the month. At the same time, Department employees in other areas with more industrial muscle had implemented much more significant bans, yet were suffering no loss of pay.

This case study illustrates the absurd consequences of the current section, which will only be heightened by the proposed amendment. If a conservative group of employees such as school bursars are driven to take full strike action as a consequence of section 187AA, it is not hard to envisage the level of industrial disruption likely to occur in other more militant industries. It is hardly surprising that a number of employers are opposed to the current section, let alone the amendment.

#### Notice of industrial action

The Bill proposes to extend the period of notice of intention to take industrial action from three days to five. The union will also be required to state the precise nature and form of the intended action, the day or days on which it is intended the action take place and the duration of the intended action. The problems that this will present are aptly described by the Federal Court in the Dauids Distribution case referred to above in the context of the secret ballot requirements.

#### **4. Industrial action**

In addition to placing hurdles in the way of employees engaging in protected industrial action during bargaining periods, the Bill seeks to outlaw all forms of unprotected action. The Commission will have no discretion to make an order. Once it is established that the action is unprotected, the Commission must make an order prohibiting the action. In addition, where an application cannot be determined within 48 hours, the Commission will be obliged to make an interim order prohibiting the action, unless it would be contrary to the public interest to do so. It would appear possible for an interim order to be obtained even where the action was protected in some circumstances. For instance, an employer could apply for an order to prevent action on the basis that a bargaining period was not properly initiated. Regardless of the merits of such an application, if the Commission could not determine the matter within 48 hours, the employer would have excellent prospects of obtaining an interim order.

The amendments will also allow orders to be made where unprotected action has occurred within the previous three months and further unprotected action is “reasonably possible”. A new provision will free the Commission from the requirement to specify the particular industrial action that is the subject of the s.127 order.

A clear example of the one-sided nature of the Bill is that, at the same time as increasing the circumstances in which s.127 orders can be made against employees and unions, the proposals seek to limit the availability of orders against employers. The proposal is to only allow orders against employers in relation to lockouts. Under the current Act, unions have had some limited success in obtaining orders to prevent employers from taking industrial action which falls short of a lockout.

The amendments draw attention to the “false equality” in the current Act with regard to industrial action. Supporters of the current regime in s.127 and the protected action provisions would argue that the provisions are fair because they apply to employees and employers alike. They would point to the fact that an employer can be prevented from instituting an unprotected lockout, and must go through the same steps as the unions to give the lockout protected status. The problem with this analysis is that employers rarely resort to lockouts in disputes with employees as they often do more harm to the employer than they do to the employees. The AEU’s experience is that the employer’s main weapons

in a bargaining dispute are (1) delay and/or inaction, (2) the ability to introduce unilateral changes to work practices and the like, and (3) the use of individual agreements or non-union agreements to splinter bargaining. The way to reduce the impact of the first weapon is to introduce provisions which require the parties to come to the bargaining table and negotiate in good faith. This should include an enhanced role for the Commission, and arbitration should be available as a last resort. The way to deal with the second weapon is to expand the definition of “industrial action” to enable unions to seek orders against employers in a wider range of circumstances. Remedies for the third weapon are set out earlier in the submission.

## **5. Closed Shops**

The vast majority of the workplaces in which our members work have AEU membership of in excess of 60 per cent. As the ACTU points out in its submission, the accepted definition until now of a closed shop has been a workplace with 100 per cent membership. Perhaps the provisions in proposed Division 5A of Part XA are headed “Closed Shops” for want of a better title. The title “Provisions Aimed at Lowering Unacceptably High Rates of Union Membership” was presumably rejected as being too wordy. Whatever the proposals are called, their intent is clear. The AEU has worked hard to secure its relatively high rates of unionism, often in the face of hostile employers and publicity designed to encourage teachers and allied staff to leave the union. These provisions are a stark example of the ideology-driven nature of the Bill, and have the rare distinction of being preceded by a nationwide advertising campaign. They are designed to tie up unions in ludicrous proceedings and prevent them from devoting their resources to the main game of protecting and enhancing workers entitlements. They should be rejected out of hand.

## **6. Right of Entry**

The right of entry provisions are similar to those proposed in the original Bill in 1996, and ultimately scrapped in the negotiations with the Democrats. Given the absence of evidence of difficulties experienced by employers in this area, the justification for the changes is unclear. They will allow for

intimidation of employees by making it easy for employers to identify the employee or employees who called in the union.

## **7. Women workers**

The proposals in the Bill will be to the detriment of all women workers, including the AEU's members. Over 60 per cent of our members are women. The great majority of them are also the primary care-givers in their households. They are struggling in the current climate to balance work and family responsibilities, and enterprise bargaining has done little to alleviate these problems. The proposals relating to award stripping will only exacerbate the plight of women, particularly those who are labouring under excessive workloads and those who are working part-time.

## **8. Conclusion**

The AEU urges the Committee to recommend that this Bill be rejected in total, apart from Schedule 15 which offers some limited improvements for some categories of Victorian workers. There are a number of improvements which should be made to the current Act to provide all employees with a fair safety net of wages and conditions. For AEU members this safety net should include provisions which place restrictions on the abuse of fixed-term and casual employment, and which ensure that teachers and allied staff are not subjected to unreasonable or excessive workloads. The Act should also provide an enterprise bargaining system which recognises the particular circumstances of public education, and compels employers to abandon the narrow, cost-cutting mind-set to negotiations that has typified their approach to date.

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