

**AUSTRALIAN EDUCATION UNION**

**SUBMISSION**

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

**Inquiry into the Workplace Relations  
Amendment Bill 2000**

**May 2000**

Australian Education Union  
Federal Office  
120 Clarendon Street  
Southbank VIC 3006

*Copyright © Australian Education Union*



**SUBMISSION OF THE AUSTRALIAN EDUCATION UNION  
TO THE SENATE EMPLOYMENT, WORKPLACE RELATIONS,  
SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE**

**Inquiry into the Workplace Relations  
Amendment Bill 2000**

**THE AEU AND THE FEDERAL INDUSTRIAL RELATIONS SYSTEM**

**Introduction**

1. 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).
  
  2. 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**

3. 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.
  
  4. 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. From 1993 until the start of this year, all new teachers in Victoria were 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

5. 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.

### **Federal Awards for Teachers**

6. 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 (TAFE and Community Colleges). In addition, federal certified agreements have been achieved for teachers in government schools in South Australia and Western Australia.
  
  7. 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.

### **Enterprise Bargaining**

8. 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.
  
  9. 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.
-

10. 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. The introduction of the Coalition's Workplace Relations Act has made matters worse, and the proposals in the 2000 Bill if enacted will tighten the stranglehold on unions in the enterprise bargaining process.

## **THE WORKPLACE RELATIONS AMENDMENT BILL 2000**

### **Indecent haste**

11. The AEU is deeply concerned at the processes that have been put in place for consideration of this important piece of legislation. The Bill contains a number of significant proposals which if enacted in their current form will result in a further weakening of the bargaining position of unions and employees. While it is true that some of the proposals originate from the failed 1999 Bill, they have been the subject of extensive redrafting and therefore require more measured consideration. Statements emanating from the Coalition have made it clear that the short timelines are associated with a desire to have the legislation in place so that it can be used against the AMWU in its current industry-wide campaign. The proposed legislation has consequently been dubbed the "pattern bargaining" Bill, and much of the public attention has been focussed on this aspect. There are however a number of other significant proposals which are not part of the pattern bargaining provisions, and they should not be allowed to be swept up in the process without proper consideration of their content and likely impact.
  12. The pattern bargaining provisions themselves constitute a fundamental alteration to the enterprise bargaining regime that has existed in this country since the 1994 amendments to the Act. Whether they are targetted at a particular campaign or not, they should be subject to proper Parliamentary
-

consideration and debate. The current timetable will not able this to occur. The AEU supports the call of the ACTU and the AMWU for revisions to the timetable to enable the Bill to receive the attention that its significance merits.

### **Cooling off or boiling over**

13. The Bill proposes the introduction of a new section 170MWA which will make it mandatory for the Commission to suspend a bargaining period where it considers that to do so would assist the parties to resolve the matters at issue, and where it does not consider that the suspension would be contrary to the public interest. The period of suspension could be extended by the Commission, presumably on more than one occasion.
  14. This provision is similar to a proposal that was rejected in the 1999 Bill. That proposal was however contingent on the passing of 14 days after the taking of industrial action (however brief). The heading to the new provision contains a reference to “cooling-off” but there is no apparent requirement in the section itself for the existence of industrial action before the Commission can act. It is in this respect therefore wider in application than the rejected provision, which itself was fundamentally flawed.
  15. As we pointed out in our submission on the 1999 Bill, suspension is the worst of both worlds for a union and its members. It removes the only bargaining power that employees have at their disposal (the right to take industrial action), but does not result in the matter proceeding to resolution by arbitration unlike some other provisions in the current Act which provide for termination of bargaining periods.
  16. The AEU’s experience of enterprise bargaining in the education sector convinces us that this
-

provision will be used by employers to frustrate the bargaining process. The amendment draws attention to the “false equality” in the current Act with regard to industrial action. Supporters of the current regime and this amendment would argue that the provisions are fair because they apply to employees and employers alike. They would point to the fact that an employer must go through the same steps as the unions to give the lockout protected status, and could have this protected status removed if the bargaining period is suspended under this proposal. 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.

17. 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. We also find ourselves in the unfortunate position that any industrial action taken by teachers is invariably seen to be “contrary to the public interest”, in which case this qualification in proposed section 170MWA is unlikely to be of any assistance. The Commission could conclude that suspension of a bargaining period covering teachers would be likely to put pressure on those teachers to accept the offer being advanced by the employer, in which case the first limb of paragraph (1)(b) of the proposed section would be satisfied. As indicated, the second limb, relating as it does to the “public interest” is unlikely to favour the position of teachers, particularly where industrial action is proposed. Once the two limbs are satisfied, the Commission has no discretion. It must suspend the bargaining period. As long as the two limbs continue to be satisfied, it would appear a relatively straightforward exercise for the employer to obtain one or more extensions of the suspension. The employer could continue to sit on its hands and wait for the employees to succumb, without fear of retaliation.
  18. There are already provisions in the Act enabling the Commission to suspend or terminate bargaining
-

provisions in a number of situations, including where industrial action is threatening to endanger the life, personal safety or health, or welfare of the population, or part of it, or to cause significant damage to the Australian economy or part of it. Bargaining periods covering employees under paid rates awards (ie. a large percentage of the AEU's membership) can be suspended or terminated where there is no reasonable prospect of an agreement being concluded. These provisions reflect a policy position that there are some bargaining disputes that should be brought to an end in the public interest, and invariably the successful invocation of these provisions by one or both parties has resulted in the matter proceeding to arbitration.

19. The same cannot be said for proposed section 170MWA. It is not designed to protect the public or a section of it from harmful industrial disputation. It is clearly designed to shield an employer from the consequences of industrial action. The shift away from arbitration to enterprise bargaining as the chief determinant of wages and conditions of employment contemplated that employees would be able to take industrial action in support of their position. Inherent in this recognition was that the action would be designed to put pressure on employers, and would therefore be detrimental to their interests. The effect of proposed section 170MWA would be to drastically shift the balance of power further in favour of employers.
20. In this context, it is worth noting that the Democrats Senators' Report on the 1999 Bill reached the following conclusion:

*“Industrial disputation is an essential part of the bargaining and market process, and parties to disputation must be given the opportunity to work matters through. The system we now have seems, by and large, to serve Australia well.” (p.397)*

### **Pattern bargaining**

---

21. The proposed provisions will require the Commission to terminate (not suspend) a bargaining period if the union is engaging in pattern bargaining in respect of the proposed agreement. If the Commission terminates a bargaining period it may also specify a period in which the union may not initiate a new bargaining period, or declare that the union may only initiate a new bargaining period on certain conditions. “Pattern bargaining” is defined broadly to mean “a course of conduct or bargaining, or the making of claims, involving seeking common wages and/or other common employee entitlements” that forms part of a campaign extending beyond the single business and “is contrary to the objective of encouraging agreements to be genuinely negotiated between parties at the workplace or enterprise level”. The meaning of this latter phrase is expanded upon in subsection (2) which itself is followed by three “notes” providing some examples of conduct that would *not* constitute pattern bargaining. Subsection (4) will require the Commission to have particular regard to the views of the employer in assessing whether the relevant claims are capable of being pursued at the single business level.
  22. These provisions are an unacceptable fetter on the ability of parties to determine the content of their claims. They are also drafted far too broadly, in that they could apply to comprehensive claims that contain only one or two common claims among many. Unlike the cooling-off provisions, they do not even contain the *appearance* of equality in that there are no penalties for employers who engage in pattern bargaining. As is pointed out in the submissions of the ACTU and the International Centre for Trade Union Rights (“ICTUR”), the proposals are unprecedented in their scope when reference is had to collective bargaining systems in other countries.
  23. The provisions are also very poorly drafted, and would create great uncertainty and confusion if enacted in their current form. The examples contained in the three notes of conduct that does not constitute pattern bargaining are virtually meaningless, and the explanatory memorandum to the Bill offers little assistance. The AEU has not been able to come up with any examples of claims that
-

are not capable of being pursued at the single business level within the meaning of the provisions.

### **Section 127**

24. There are two major amendments proposed to section 127. The first is to remove the Commission's discretion over whether to restrain industrial action that is not, or would not be, protected. The second is to require the Commission to issue interim orders to restrain the relevant action if an application cannot be finalised within 48 hours.
  
  25. The Coalition have not established a case for the first amendment, as is amply demonstrated by the ACTU's submission. In very few cases in relation to unprotected action does the Commission refuse to grant orders or make strong recommendations which have the desired effect. The benefits of according the Commission some discretion over the issue are apparent when regard is had to the cases on the record. Commission members have extensive expertise in resolving tricky and explosive industrial disputes. Making orders mandatory may often have the effect of inflaming a conflict which could have been avoided through more subtle approaches.
  
  26. As was pointed out in our submission on the 1999 Bill, the amendment requiring the Commission to issue interim orders after 48 hours is open to abuse by employers. 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. It would be a relatively simple task for the employer to indicate that it wishes to call evidence and seek documentation in relation to the issue of whether proper authorisation for the bargaining period was given, and that this cannot be achieved within
-

48 hours. If the interim order is granted, and it subsequently transpires that the action would have been protected, there is no redress for the employees who would have been deprived of their right to take legitimate industrial action. In most cases, the granting of an interim order will deliver a comprehensive victory to the employer without any proper consideration of the merits of the claim.

27. The Democrat Senators stated unequivocally in their report on the 1999 Bill that section 127 did not need to be changed. They were of the view that the existing section provides a strong deterrent to disruptive industrial action, and that the Coalition had failed to make out a case that the existing provisions were not working and needed reforms. It is submitted that nothing has happened since that time which would alter that forthright conclusion.

#### **Federal Court's power to restrain unlawful coercion**

28. The judgment of Justice Merkel in *AWU v Yallourn Energy* [2000] FCA 65 demonstrates the importance of preserving the right of the Federal Court to prevent parties from using legal proceedings to influence the outcome of collective bargaining negotiations. The immunity provided by section 170MT loses its impact if parties are able to threaten or issue legal proceedings in other Courts. The AEU strongly supports the submissions made by the ACTU and ICTUR on this issue.

#### **Role of the Commission**

29. The Bill attempts to continue the trend initiated by the 1996 amendments to remove the Commission from the industrial relations equation. In a number of places it pointedly provides no discretion to the Commission in relation to various applications. The Commission *must* make orders to restrain industrial action that is unprotected, it *must* terminate a bargaining period if a union is engaging in pattern bargaining and it *must* suspend a bargaining period if the conditions for
-

a “cooling off” period are established. The AEU is of the view that the industrial system has worked well when the Commission has been accorded the flexibility to make common-sense decisions based on the circumstances of the case before it. These proposals will remove an important component of that flexibility.

30. More fundamentally however, it is arguable that this Bill is a result of the Coalition having painted itself into a corner in relation to the enterprise bargaining system. When the current system was introduced in 1994 it included provisions which accorded the Commission a role in the bargaining process. It was empowered to make orders requiring the parties to bargain in good faith, and generally was given a role in assisting the parties to reach agreement. While these provisions may not have operated to the extent that was initially envisaged by their drafters, they at least provided a model that could have been developed further over the ensuing years. The Coalition however decided to abolish the good faith bargaining provisions in 1996 and embarked on a campaign to remove the Commission from the bargaining process altogether, which was particularly evident in the failed 1999 Bill. The philosophy was that the parties should be left to slug it out with little or no involvement from the independent umpire.
  31. Whatever the motives of the Coalition in introducing the pattern bargaining and cooling-off provisions, they is clearly a less extreme alternative which warrants serious consideration. The AEU submits that there is scope for considering provisions which will enable the Commission to play a role in the bargaining process, particularly where positions become entrenched. The solution may not be to resuscitate the old good faith bargaining provisions, but they can at least provide a starting point for discussion. The Coalition has typically reached for the sledgehammer instead of the nutcracker, despite the long history of industrial relations in this country which clearly indicates that the latter is a much more effective tool.
-

**Conclusion**

32. The AEU calls on the Senate Committee members to allow this Bill to receive due consideration and to reject any proposal to hurry it through Parliament. In its current form, it is completely unacceptable to our members and constitutes a further shift of the balance of power towards employers. While the pattern bargaining provisions are abhorrent and excessive, the Committee should not lose sight of the other proposals which will have a significant and detrimental impact on Australian workers if they are allowed to become law.

**AUSTRALIAN EDUCATION UNION**

**120 Clarendon Street**

**SOUTH MELBOURNE VIC 3205**

**ph. (03) 9254 1800**

**Contact: Matt O'Connor**

---