

AUSTRALIAN EDUCATION UNION

SUBMISSION

TO

SENATE EMPLOYMENT, WORKPLACE

RELATIONS, SMALL BUSINESS AND

EDUCATION LEGISLATION COMMITTEE

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

**Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill
2000**

Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000

Workplace Relations Amendment (Termination of Employment) Bill 2000

Workplace Relations Amendment (Tallies and Picnic Days) Bill 2000

SUBMISSION OF THE AUSTRALIAN EDUCATION UNION

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.

3. 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.
4. 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.
5. Bargaining periods under the Workplace Relations Act are currently in place in Victoria and Western Australia covering AEU members. In South Australia, the AEU is awaiting a decision of a Full Bench of the AIRC following a lengthy arbitration under section 170MX of the Act. The arbitration followed a successful application by the South Australian government to terminate a bargaining period under subsection 170MW(7).

Secret Ballots Bill

6. The provisions of this Bill essentially replicate the provisions in Schedule 12 of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (“the 1999 Bill”). Two provisions from Schedule 11 of the 1999 Bill are also reintroduced, including the amendment to section 170MO which will require more detailed and precise notice of industrial action to be provided.
7. The Minister 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 in the 1999 Bill. 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.
8. 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.
9. 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 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.
- 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.
10. 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.
11. 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 was incumbent on the Coalition to justify the necessity of these provisions in 1999 and they clearly failed to do so.
12. It was said of these provisions as contained in the 1999 Bill that:

“In short, the provisions of this Schedule add little to industrial democracy and add greatly to impediments to unions to undertake legitimate industrial action, while opening up the prospect of longer disputes and litigation.”

These words are not taken from a union submission to the 1999 Senate Committee, nor any

other submission for that matter. They are drawn directly from the Supplementary Report of the Australian Democrats, and are unqualified. The Report concludes that Schedule 12 should be “opposed outright” as “it does not add to industrial democracy”. (See page 398 of the Senate Report on the 1999 Bill)

13. The Democrats’ Report rightly makes reference to the existing access to ballots under section 135 of the Act. They note that the fact that this option has been rarely used may suggest that there is little demand from employers and employees for further access to secret ballots. The AEU agrees with this conclusion. Nothing has occurred since the 1999 Report to alter this position. The Minister in his Second Reading Speech notes that the Government is prepared to consider amendments to refine the detail of the secret ballots scheme and invites further Senate scrutiny in order to achieve a workable scheme. These concessions however fail to deal with the central problem identified by the Democrats on the last occasion, namely, the absence of any community, employee or employer call for the proposed regime.
14. The Minister appears to be suggesting in his Second Reading Speech that the 1999 Senate Committee was merely a “platform for union opposition to fundamental democratic principles”, insofar as the secret ballot provisions were concerned. Putting aside the Minister’s well-known penchant for hyperbole, the comments conveniently ignore the many submissions made by parties and individuals outside the union movement, including highly persuasive submissions from a number of respected academics. The Democrats drew from these submissions as well as those from unions in reaching their rather damning conclusions.
15. The AEU submits that for the same reasons that these provisions were rejected on the last occasion, they should be opposed outright again.

Termination of Employment Bill

16. Many of the provisions in this Bill replicate provisions contained in the 1999 Bill. Provisions allowing the Commission to, in effect, terminate applications at the conciliation stage are

reintroduced. The AEU considers that these provisions involve a removal of fundamental rights of employees in circumstances where evidence has not been properly tested or examined. The provisions will in all likelihood result in employees adopting an intransigent position at the conciliation stage for fear that anything less could result in their application being dismissed. The amendments are also unfair in that the Commission is not empowered to *grant* an application where it considers that the applicant is likely to succeed.

17. The size of an employer's undertaking is to be given specific attention when determining whether proper procedures were followed in effecting a termination. The AEU submits that this is already one of many factors that are weighed up by the Commission in the process of assessing whether there has been a "fair go all round". By making specific reference to this issue, the legislation would be according it undue weight, and inappropriately relegating other factors.
18. The Bill proposes a prohibition on unfair dismissal applications that relate to terminations based on the "operational requirements of the employer's undertaking, establishment or service", unless the circumstances are exceptional. The scope of the quoted words is in the AEU's submission far from precise, and it is therefore unfair and inappropriate to prevent an applicant from testing the unfairness of a dismissal in these circumstances. The current Act states that the operational requirements of an employer's undertaking is a matter to be considered in assessing whether there is a valid reason for termination. This is a much fairer way for the issue to be dealt with.
19. The Bill proposes to prevent the Commission from compensating unfairly dismissed employees for shock, distress or humiliation caused by the manner of the terminations. No explanation is provided in the Second Reading Speech for the basis of this amendment. It is another example of the rights of vulnerable workers being removed, and is in our view patently unfair and unwarranted.
20. The Bill requires representatives of parties to disclose to the Commission whether they are

acting on the basis of a contingency fee agreement. No particular consequences appear to flow from such a disclosure, in which case the rationale for the proposal is unclear. It is not clear for example whether the Commission is required to take a contingency fee agreement into account in assessing compensation. If this is the case, the legislation should say so in unequivocal terms. If not, the amendment would appear to serve no useful purpose and should be opposed.

AWA Procedures Bill

21. 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.
22. 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.
23. In relation to the other provisions of the Bill, the AEU endorses and supports the conclusion

reached by the Democrats in relation to the 1999 Bill that “the major changes proposed are regressive in that they seek to reduce the level of scrutiny of AWAs by the Employment Advocate and the Commission, and water down the protections for employees”. The AEU submits that the Senate should oppose these provisions based on this assessment.

Tallies and picnic days

24. The AEU submitted in relation to the 1999 Bill that the award simplification process was only half-completed, and that it was inappropriate to engage in a further round until a proper assessment could be made of the process. The Democrats essentially agreed with this proposition and concluded that there was “little point proposing further rationalisation, simplification or amendment until that process is bedded down, and its consequences fully understood”.
25. The decision to seek the removal of union picnic days and tallies from awards as contained in the Minister’s Second Reading Speech appears to be based on the view that such conditions are no longer justified on the merits. It is pointed out that two-thirds of awards no longer contain union picnic day, and that the Commission removed tallies from the major meat-industry award after lengthy hearings last year.
26. This justification recognises the fact that it has always been open for parties to make applications to vary awards if conditions are no longer supported by merit considerations. If it is true that union picnic day has become an anachronism in some industries, then it is open to employers to apply to have the clause deleted. It will be incumbent on those employers to support the application with persuasive evidence. The AEU submits that if it is true that these provisions have become anachronistic, then the Commission will remove them based on proper merit grounds. If no grounds exist however for their removal, then it is inappropriate to remove them from the list of allowable award matters.

Conclusion

27. For the reasons set out, the AEU calls on the Senate to oppose the passage of each of these Bills. It is submitted that no compelling reasons have been advanced by the Government or any other entity to alter the status quo that emerged from the rejection of the 1999 Bill.

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